

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alfred & Anne Arees : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1976 & 1977. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon Alfred & Anne Arees, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred & Anne Arees
1670 W. 2nd St.
Brooklyn, NY 11223

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
6th day of February, 1985.

David Parchuck

Anna O'Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 6, 1985

Alfred & Anne Arees
1670 W. 2nd St.
Brooklyn, NY 11223

Dear Mr. & Mrs. Arees:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALFRED AREES AND ANNE AREES	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976	:	
and 1977.	:	

Petitioners, Alfred Arees and Anne Arees, 1670 West 2nd Street, Brooklyn, New York 11223, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1976 and 1977 (File No. 38657).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 12, 1984 at 9:15 A.M. Petitioner Alfred Arees appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the income derived from petitioner Alfred Arees' activities as an international book salesman and marketing consultant during the years 1976 and 1977 was exempt from the imposition of unincorporated business tax.

II. Whether the penalties asserted should be abated.

FINDINGS OF FACT

1. Petitioners, Alfred Arees and Anne Arees, timely filed a New York State Income Tax Resident Return for each of the years 1976 and 1977 whereon Alfred Arees (hereinafter "petitioner") reported business income of \$19,788.56

and \$21,339.05 respectively, derived from his activities as an international book salesman and marketing consultant. Additionally, petitioner reported wage income of \$2,490.39 for 1976 from Schocken Books, Inc., 200 Madison Avenue, New York City, and \$2,823.05 for 1977 from Grosset & Dunlap Inc., 51 Madison Avenue, New York City. Petitioner did not file an unincorporated business tax return for either year at issue herein.

2. On December 14, 1981, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes wherein petitioner's business income and wage income reported for each year at issue was held subject to unincorporated business tax. Accordingly, a Notice of Deficiency was issued against Alfred Arees and Anne Arees on April 14, 1982 asserting unincorporated business tax of \$1,493.40, penalties of \$785.94, plus interest of \$617.68, for a total due of \$2,897.02. Said penalties were asserted pursuant to sections 685(a)(1), 685(a)(2) and 685(b) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722 of the Tax Law, for failure to file 1976 and 1977 unincorporated business tax returns, failure to pay the tax determined to be due and negligence, respectively.

3. During the years at issue petitioner's activities dealt with the sale and marketing of United States book products in the overseas "Third World" market.

4. Petitioner's grounds for claiming that his income for 1976 and 1977 was exempt from the imposition of unincorporated business tax were vague. In his petition he claimed that:

"In reference to paragraph 203.14 of the regulations, an individual other than one who maintains an office or employs assistants or otherwise carries on a business shall not be deemed engaged in an unincorporated business solely by reason of selling goods, or merchandise for more than one enterprise. My position for not being engaged in an unincorporated business is based on this premise."

However, during the hearing held herein petitioner argued that he is properly entitled to an exemption from said tax on the basis that he was engaged in the practice of a profession. He claimed that "I would like to be given an exception on the ground that I function just the same as an accountant or lawyer... and that's the basis on which I make my appeal."

5. Petitioner rendered services for thirteen (13) principals during 1976 and fourteen (14) principals during 1977. The income derived from such principals was comprised, inter alia, of commissions, consulting fees, representation fees, finders fees and procurement fees.

6. Three of petitioner's major principals during the years at issue were as follows:

a. Levant Distributors - Said company was located in Beirut, Lebanon. Petitioner acted in the capacity of a purchasing agent. He was compensated on a commission basis based on the net volume of purchases shipped.

b. Ao Livro Tecnico - Said company was located in Rio de Janeiro, Brazil. Petitioner acted in the capacity of a purchasing agent and was compensated on a commission basis.

c. Grosset and Dunlap Inc. - Said company was located in New York City. From October 1976 to September 19, 1977 petitioner was retained as an International Sales and Marketing Consultant. He was compensated on an hourly consulting fee basis.

7. On September 19, 1977, petitioner was put on the payroll of Grosset and Dunlap Inc. This action was taken solely for the purpose of affording petitioner the opportunity to join Grosset and Dunlap Inc.'s health insurance plan. His activities and relationship with said company did not change. Petitioner's "wage" income derived from Grosset and Dunlap Inc. during 1977 was held subject to unincorporated business tax.

8. The record is devoid of information with respect to the nature of services rendered for Schocken Books, Inc. during 1976. Petitioner's "wage"

income derived from Schocken Books, Inc. during 1976 was held subject to unincorporated business tax.

9. Petitioner's principals exercised little control over his activities other than to direct him as to which books to purchase, what price to pay and how to handle billing and shipping. With respect to direction and control, petitioner testified that "certainly I am under my own control and supervision, except to the extent that I am governed and guided by the clients who have arranged for my services".

10. Petitioner readily admitted that he was a self-employed individual. He testified that he "became self-employed on November 5, 1975" and that "the fact that I was self-employed is something I am proud of. I don't deny it. I assert it".

11. Petitioner's sole office was maintained in his personal residence. He argued that "as a self-employed person I am entitled to have my office in my home".

12. Petitioner's activities did not require licensing from any governmental body or authority. There were no educational requirements for engaging in such activities.

13. Petitioner requested that the penalties asserted be waived. However, no cause, reasonable or otherwise, was shown as to why the violations for which the penalties were asserted occurred.

14. Anne Arees was a housewife during the years at issue herein. The hearing record gives no indication that she was carrying on an unincorporated business.

CONCLUSIONS OF LAW

A. That petitioner's reliance on 20 NYCRR 203.14(a) is ill placed (See Finding of Fact "4", supra). Since he regularly carried on a business and readily admitted to being a self-employed individual during the years at issue herein, said regulation is not applicable.

B. That section 703(c) of the Tax Law provides that:

"The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

C. That the term "other profession" within the meaning of section 703(c) of the Tax Law requires a showing that "the service rendered... requires knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study". (Matter of Koner v. Procaccino, 39 N.Y. 2d 258, 262, citing People ex rel. Tower v. State Tax Comm., 282 N.Y. 407, 412).

D. That petitioner's activities during 1976 and 1977 did not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law.

E. That petitioner's activities as an international book salesman and marketing consultant constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, his income derived therefrom is subject to the unincorporated business tax pursuant to section 701(a) of the Tax Law.

F. That the penalties asserted may not be abated since petitioner has failed to establish that the violations for which the penalties were asserted were due to reasonable cause rather than to willful neglect.

G. That the name Anne Arees is to be removed from the Notice of Deficiency since she did not carry on an unincorporated business during the years at issue.

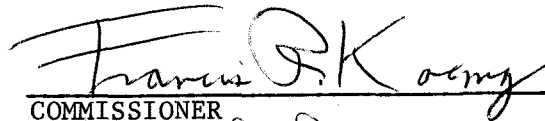
H. That the petition of Alfred Arees and Anne Arees is denied and except for the removal of Mrs. Arees' name, the Notice of Deficiency dated April 14, 1982 is sustained together with such additional penalties and interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER