

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Fred R. Bates :

: 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 Year 1980.

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 10th day of July, 1985, he served the within notice of decision by certified mail upon Fred R. Bates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred R. Bates
27 Ridge Road
Cold Spring Harbor, NY 11724

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
10th day of July, 1985.

David Parchuck

Stephen J. Magallon

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Fred R. Bates	:	
	:	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 Year 1980.	:	

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 10th day of July, 1985, he served the within notice of decision by certified mail upon Louis Kanter, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis Kanter
Kanter & Levenberg, P.C.
52 Broadway
Greenlawn, NY 11740

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
10th day of July, 1985.

David Parchuck

Samuel A. Chagel
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 10, 1985

Fred R. Bates
27 Ridge Road
Cold Spring Harbor, NY 11724

Dear Mr. Bates:

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 4 months 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: Petitioner's Representative
Louis Kanter
Kanter & Levenberg, P.C.
52 Broadway
Greenlawn, NY 11740
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRED R. BATES	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the year 1980.	:	

Petitioner, Fred R. Bates, 27 Ridge Road, Cold Spring Harbor, New York 11724, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1980 (File No. 45705).

A 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 March 19, 1985 at 10:45 A.M. Petitioner appeared by Louis Kanter, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a marketing consultant constituted the practice of a profession, the income of which is exempt from the imposition of unincorporated business tax.

II. Whether, if petitioner's income is subject to unincorporated business tax, he may properly allocate a portion of such income to sources without the State of New York.

FINDINGS OF FACT

1. Fred R. Bates (hereinafter "petitioner") failed to file an unincorporated business tax return for the year 1980.

2. On March 25, 1983, the Audit Division issued a Statement of Audit Changes to petitioner wherein it held his business net profit of \$32,627.00 subject to the imposition of unincorporated business tax on the basis that his activities as a marketing consultant "constitute the carrying on of an unincorporated business". Accordingly, a Notice of Deficiency was issued against petitioner on June 29, 1983 asserting unincorporated business tax of \$905.00, penalty of \$41.03, plus interest of \$242.40, for a total due of \$1,188.43. Said penalty was asserted for failure to file a declaration of estimated unincorporated business tax pursuant to section 685(c) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722(a).

3. Petitioner claimed exemption from the imposition of unincorporated business tax on the ground that his activities constituted the practice of a profession. Specifically, he argued that since capital was not a material income producing factor in his business, and more than 80% of his business gross income was derived from personal services which he actually rendered, his income is therefore exempt from the imposition of said tax.

4. During 1980 petitioner was engaged in business as a marketing consultant. His activities consisted of "advising various commercial and industrial establishments on marketing programs, company reorganizations (and) long-range planning, studies and research".

5. Petitioner received a B.A. degree from Middlebury College and a M.B.A. degree from Harvard and Harvard Business School.

6. Prior to becoming self-employed, petitioner held several high level managerial positions with various large corporations.

7. Although it was not formally raised as an issue, petitioner vaguely indicated that he may possibly be entitled to allocate a portion of his 1980 business income to sources without New York State.

8. Petitioner alleged that during the year at issue his business income was derived solely from Information Science Incorporated ("ISI") which was headquartered in Montvale, New Jersey. He was assigned as an independent consultant to various consulting projects that ISI was engaged in on behalf of its clients. ISI provided petitioner with a cubicle on its business premises which contained a desk, chair and telephone. It also provided petitioner with secretarial services. ISI compensated petitioner on a fee basis at a daily rate of \$250.00.

9. During 1980, petitioner's business activities were carried on at the office (cubicle) provided by ISI, his business office situated in his personal residence and at the business locations of various clients of ISI.

10. Petitioner's business activities as a marketing consultant were not subject to any governmental licensing requirements.

11. Petitioner failed to submit any documentation with respect to his business activities engaged in during 1980. He also failed to submit any documentation to establish that he maintained a bona fide business office without the State of New York.

CONCLUSIONS OF LAW

A. 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 members of the partnership or other entity, shall not be deemed an unincorporated business." (emphasis supplied).

B. That 20 NYCRR 203.11(b)(1)(i) defines the term "other profession" as:

"[a]ny occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The word profession implies attainments in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation. The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such business and consulting services, does not constitute the practice of a profession even though the services involve the application of a specialized knowledge." (emphasis supplied).

C. That petitioner's consulting services during the year 1980 dealt with the conduct of business itself. Accordingly, such services did not constitute the practice of a profession pursuant to section 703(c) of the Tax Law and 20 NYCRR 203.11(b)(1)(i).

D. That petitioner's consulting services during the year 1980 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to unincorporated business tax.

E. That section 707(a) of the Tax Law provides that:

"...if an unincorporated business is carried on both within and without this state as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

F. That, in general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. A regular place of business is any bona fide office, factory, warehouse or other place which is systematically and

regularly used by the unincorporated business entity in carrying on its business.
(20 NYCRR 207.2(a))


G. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of Article 22 of the Tax Law, as incorporated into Article 23 by section 722(a), to show that he had a regular place of business without New York State during the year 1980. Accordingly, petitioner's entire net business income is allocated to New York State.


H. That the petition of Fred R. Bates is denied and the Notice of Deficiency issued June 29, 1983 is sustained together with such additional penalty and interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 10 1985


PRESIDENT


COMMISSIONER


COMMISSIONER