

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
George A. Cau, Jr. :

: 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 - 1978. :

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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon George A. Cau, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George A. Cau, Jr.
16 Suzanne Lane
Bethpage, NY 11714

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
3rd day of October, 1985.

David Parchuck

Ann M. Adgefund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
George A. Cau, Jr. :

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 - 1978.

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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon John P. McTigue, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John P. McTigue
Arthur Young & Company
227 Park Avenue
New York, NY 10172

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
3rd day of October, 1985.

David Parchuck

Annunzio A. Delgado
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 3, 1985

George A. Cau, Jr.
16 Suzanne Lane
Bethpage, NY 11714

Dear Mr. Cau:

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
John P. McTigue
Arthur Young & Company
227 Park Avenue
New York, NY 10172
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GEORGE A. CAU, JR.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976,	:	
1977 and 1978	:	

Petitioner, George A. Cau, Jr., 16 Suzanne Lane, Bethpage, New York 11714, 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, 1977 and 1978. (File No. 34655).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 12, 1983 at 3:00 P.M., with all briefs to be submitted by December 19, 1983. Petitioner appeared by Arthur Young & Company (John P. McTigue, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's activities as a nursing home administrator constitute the practice of a profession and thus are not deemed to be an unincorporated business.

FINDINGS OF FACT

1. Petitioner, George A. Cau, Jr., filed an unincorporated business tax return for 1978 listing his business name as Medical Labor Relations Services

and claiming that he was not subject to the tax.¹ On April 1, 1981, the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$7,186.39 plus penalty and interest of \$5,449.27 for a total due of \$12,635.66 for the years 1976, 1977 and 1978. In a Statement of Audit Changes issued June 19, 1980, the Audit Division explained that petitioner's "business income received as a labor relations consultant" was subject to unincorporated business tax.²

2. Petitioner is, and since November 11, 1971 has been, a licensed nursing home administrator. Petitioner has several nursing homes as clients; he acts as the sole administrator of some of these facilities and substitute or co-administrator of the others. Petitioner is primarily involved in rehabilitative medicine and long term health care. Petitioner establishes training programs for elderly patients to enable them to function normally by themselves both physically and mentally. In carrying out his duties, petitioner coordinates the activities of the physicians, physical therapists, social workers and other health care professionals. He meets with the staff regularly and discusses individual patient problems and advises them as to the best methods of care. Petitioner's duties also involve overall administration of all the activities necessary to operate the nursing homes.

3. The practice of nursing home administration requires licensure by the New York State Department of Health. The prerequisites for licensure are set forth in Article 28-D of the Public Health Law and include possession of a

¹ The Audit Division failed to offer returns for 1976 and 1977 into evidence and made no assertion that petitioner did not similarly file unincorporated business tax returns in those years; therefore, it is presumed that petitioner filed such returns for 1976 and 1977 in a similar manner.

² The deficiency included a credit of \$954.44 for overpayment of personal income tax for 1978.

bachelor's degree from an accredited institution or an equivalent combination of education and experience, completion of a nine month internship in health care facility administration, satisfactory completion of a 100-hour course of study in nursing home administration leading to a certificate, and satisfactory performance on an examination given by the Board of Examiners of Nursing Home Administrators of the Department of Health. Following licensure, the Public Health Law requires a program of continuing education which consists of a minimum of 72 hours of approved courses (100 hours during the years in issue) every two years. Petitioner has completed some 3,000 hours in coursework since receiving his license in 1971.

4. The Board of Examiners oversees the professional ethics and standards of nursing home administrators, which standards are set forth in the Public Health Law and regulations promulgated thereunder. All disciplinary proceedings against a licensed administrator are brought before the Board of Examiners which has the power to suspend or revoke licenses or censure, reprimand and otherwise discipline administrators who are found, after due hearing, to be in violation of the ethical standards set forth in the law.

5. During 1977, petitioner performed consulting services during the building of a nursing home. Petitioner worked with the architects in designing the structure in order that it might better suit the needs of the patients. Petitioner received \$2,916.00 for his consulting services and he reported the entire amount as part of his business income which he claimed was exempt from unincorporated business tax.

6. Petitioner's stationery and tax returns designate his business name as Medical Labor Relations Service. The Audit Division maintains that such labor relations services are not exempt, as the practice of a profession, from the

unincorporated business tax. Petitioner explained that, when he first started his business in 1969, he thought medical labor relations was going to be a promising field of work; however, very little labor relations work became available and since receiving his license in 1971, petitioner's business, with the exception of his consulting services, has been strictly limited to the practice of nursing home administration, although he has maintained his original business name. Petitioner now only becomes involved with labor relations as it affects his personnel function as a nursing home administrator.

7. Petitioner's position is that his activities as a nursing home administrator meet all of the criteria for the practice of a profession within the meaning and intent of 20 NYCRR 203.11 and, therefore, such activities should not be deemed to constitute an unincorporated business. Moreover, petitioner argues that, even if his consulting services are deemed to be taxable, such services are easily accountable and distinguishable from his regular activities as a nursing home administrator and tax should be imposed only on the \$2,916.00 received for the consulting services.

CONCLUSIONS OF LAW

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

"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."

B. That 20 NYCRR 203.11(b)(1)(i) provides:

"For purposes of this subdivision, the term 'other profession' includes any 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."

C. That the factors which should be considered in determining what activity constitutes the practice of a profession include whether a long-term educational background generally associated with a degree in an advanced field of science or learning is required; whether there is the requirement of a license which indicates sufficient qualifications have been met prior to engaging in the occupation; and whether there is control of the occupation by standards of conduct, ethics, and malpractice liability (Rosenbloom v. State Tax Commission, 44 A.D.2d 69, mot. for lv. to app. den. 34 N.Y.2d 518).

D. That the practice of nursing home administration requires a degree and a specialized advanced program of education and internship; the practice requires a license awarded by the state only after certain qualifications are met, including successful completion of an examination administered by a State Board of Examiners; and the Public Health Law controls the practice by standards of conduct and ethics overseen by the Board of Examiners. Petitioner, therefore, is required by law to meet all the criteria set forth in Rosenbloom, supra. Moreover, petitioner uses the specialized instruction gained from his courses of study and training by applying it to the affairs of his clients and their patients by setting up programs in long-term health facilities and advising, guiding and training the staffs of these facilities as to the optimum means of putting the programs to work for the benefit of the patients. Petitioner's occupation is not one which requires mere skill but one which requires a high level of knowledge which can be put to work only by thoughtful and careful

planning. Petitioner's activities as a nursing home administrator do, therefore, constitute a profession within the meaning and intent of section 703(c) of the Tax Law and 20 NYCRR 203.11(b)(1)(i) and the income therefrom is not subject to unincorporated business tax.


E. That petitioner's activities as a consultant to the architects of a nursing home in 1977 were consulting services dealing with the conduct of business itself and are specifically excluded by 20 NYCRR 203.11(b)(1)(i) from the term "profession" and, therefore, the sum of \$2,916.00 earned from such consulting services is subject to unincorporated business tax. However, since such earnings are less than the unincorporated business exemption of \$5,000.00 allowed under section 709(1) of the Tax Law no tax is due and petitioner is entitled to a refund of the personal income tax credited for 1978.

F. That the petition of George A. Cau, Jr. is granted to the extent indicated in Conclusions of Law "D" and "E"; that the Audit Division is directed to cancel the Notice of Deficiency issued April 1, 1981 and issue a refund in the amount of \$954.44 together with appropriate interest.


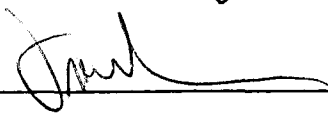
DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1985


PRESIDENT


COMMISSIONER

 
COMMISSIONER