

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
John W. & Ruth L. Howard : 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 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 John W. & Ruth L. Howard, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John W. & Ruth L. Howard
10 Leitch Ave.
Skaneateles, NY 13152

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

Annice O'Hageland

Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

John W. & Ruth L. Howard
10 Leitch Ave.
Skaneateles, NY 13152

Dear Mr. & Mrs. Howard:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN W. HOWARD AND RUTH L. HOWARD	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1977.	:	

Petitioners, John W. Howard and Ruth L. Howard, 10 Leitch Avenue, Skaneateles, New York 13152, 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 1977 (File No. 33406).

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 August 21, 1984 at 2:45 P.M. Petitioner John W. Howard appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether petitioner's activities as a sales representative and consultant constituted the practice of a profession for unincorporated business tax purposes.

FINDINGS OF FACT

1. John W. Howard and Ruth L. Howard filed a joint New York State Income Tax Resident Return for the year 1977 whereon John W. Howard (hereinafter "petitioner") reported business income of \$6,354.00 and wages of \$44,982.00. His "occupation" was described on said return as "Broker, Consultant". Petitioner did not file a New York State unincorporated business tax return for 1977.

2. In response to an Audit Division inquiry letter of December 28, 1979, petitioner submitted a breakdown of his reported "wages" as follows:

"Can Am Sales Corporation	\$ 5,000.00 (W-2)
Fibers & Fillers, Inc.	15,250.00 (W-2)
American Recovery Co., Inc.	19,374.73 (1099)
American Recovery Co., Inc.	3,600.00 (1099)
Indiana Recycling, Inc.	1,722.28 (1099)
Fibers & Fillers, Inc. (Ruth Howard)	35.00
	<u>\$44,982.00"</u>

3. On March 20, 1980, the Audit Division issued a Statement of Audit Changes to petitioner wherein it held his "consulting income reported" of \$31,051.01 subject to the unincorporated business tax. Said consulting income was determined as follows:

<u>Source</u>	<u>Income</u>
Standard Milling Co. (reported on return as business income)	\$ 6,354.00
American Recovery Co., Inc.	19,374.73
American Recovery Co., Inc.	3,600.00
Indiana Recycling, Inc.	1,722.28
Total	<u>\$31,051.01</u>

4. On January 22, 1981, the Audit Division issued a Notice of Deficiency against petitioner and his wife asserting unincorporated business tax for 1977 of \$1,157.81, plus interest of \$270.49, for a total due of \$1,428.30.

5. During 1977 Standard Milling Co. was a charcoal manufacturing company situated in Kansas City, Missouri. Petitioner's reported 1977 business income of \$6,354.00 was derived from Standard Milling Co. in his capacity as a "sales representative". He was compensated by said company on a five percent commission basis. He also "consulted for them in establishing industrial charcoal accounts in New York and New England".

6. During 1977 petitioner was "a consultant to American Recovery Company, Inc." He was compensated on a \$600.00 per month retainer basis, plus commissions

based on the earnings of two plants. Petitioner's activities for this company dealt with marketing recycle oil, sales, and the purchase of raw materials.

7. During 1977 petitioner was a "marketing consultant" for Indiana Recycling, Inc. He specialized in marketing recycle oil and was compensated on a commission basis for "new sales" he established.

8. Petitioner argued that the income derived from his sales representative and consulting activities is exempt from the imposition of unincorporated business tax since "all of my services are in the same category as other professionals that are exempt, such as doctors and lawyers."

9. Petitioner received both a Bachelor's degree and a Master's degree in Chemistry from Dartmouth College.

10. Prior to becoming self-employed in 1969, petitioner was employed for twenty-one years by "DuPont". His services for DuPont were in the research, manufacturing and sales areas.

11. Petitioner was a member of the American Chemical Society during 1977. Said society did not provide rules, standards of ethics, or a code of conduct for its members.

12. There were no governmental licensing requirements to be met in order to engage in the type of activities petitioner was engaged in during 1977.

13. Petitioner was not barred from incorporating his self-employed activities during 1977.

14. Petitioner's activities did not involve the performance of chemical analyses. With respect to such analyses he testified that "everybody in our organizations are fully aware of what the problems are without my being involved."

15. Capital was not a material income producing factor in the performance of petitioner's activities.

16. The income held subject to unincorporated business tax was derived from services actually rendered by petitioner.

17. Petitioner's wife, Ruth L. Howard, did not carry on an unincorporated business during 1977.

CONCLUSIONS OF LAW

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

"An unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity, including a partnership or fiduciary or a corporation in liquidation, but not including any entity subject to tax under articles nine, nine-a, nine-b, nine-c, thirty-two or thirty-three of the tax law. If an individual or an unincorporated entity carries on two or more unincorporated businesses, all such businesses shall be treated as one unincorporated business for purposes of this article."

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" 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. [20 NYCRR 203.11(b)(1)(i)].

D. That petitioner's sales representative and consulting activities during the year 1977 did not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law and 20 NYCRR 203.11(b)(1)(i).

E. That petitioner's sales representative and consulting activities during the year 1977 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 from said activities is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.


F. That the name Ruth L. Howard is to be removed from the Notice of Deficiency since she did not carry on an unincorporated business during the year 1977.

G. That the petition of John W. Howard and Ruth L. Howard is denied and except for removal of the name Ruth L. Howard, the Notice of Deficiency dated January 22, 1981 is sustained together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER