

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Thomas F. Walsh : 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 1974. :

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 Thomas F. Walsh, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

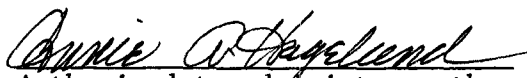
Thomas F. Walsh
463 74th St.
Brooklyn, NY 11209

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.




Annie 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

Thomas F. Walsh
463 74th St.
Brooklyn, NY 11209

Dear Mr. Walsh:

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

THOMAS F. WALSH

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1974.

Petitioner, Thomas F. Walsh, 463 74th Street, Brooklyn, New York 11209, 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 1974 (File No. 38456).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 26, 1984 at 1:15 P.M. Petitioner, Thomas F. Walsh, appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioner's activities as a marine cost consultant constituted the practice of a profession exempt from unincorporated business tax by virtue of section 703(c) of the Tax Law.

FINDINGS OF FACT

1. Petitioner herein, Thomas F. Walsh, filed a New York State unincorporated business tax return for 1974, reporting thereon a net profit of \$19,983.00 generated from his activities as a marine cost consultant. Unincorporated business tax due as shown on said return amounted to \$604.00.

2. On July 27, 1978, the Audit Division issued a Notice of Additional Tax Due to petitioner wherein the net profit from his consultant activities was increased, based on the results of a Federal audit, from \$19,983.00 to \$43,946.67. Unincorporated business tax due increased from \$604.00 to \$1,867.07.

3. Petitioner filed a claim for refund for 1974 in the amount of \$2,483.20. Said amount consisted of the following items:

Unincorporated business tax	\$1,867.07
Interest	522.78
5% negligence penalty	93.35
Total refund claimed	<u>\$2,483.20</u>

4. On July 28, 1980, the Audit Division gave notice to petitioner that his claim for refund in the amount of \$2,483.20 was disallowed in full. Grounds for disallowance were stated in the following manner:

"Activities as a Marine Cost Consultant and Surveyor does (sic) not constitute professional services and the income derived therefrom is subject to the Unincorporated Business Tax."

Petitioner thereafter filed a petition for refund.

5. During the year at issue petitioner was engaged in business as a marine cost consultant. All of petitioner's consultant activities during 1974 were performed for the United States Salvage Association (hereinafter "the Association"). Prior to 1974 petitioner had been a full time employee of the Association.

6. Petitioner's consultant activities for the Association consisted of conducting a survey or study as to the difference in operating costs incurred by American shipowners as compared to government subsidized foreign shipowners. Said consultant activities were conducted out of petitioner's residence located in Brooklyn, New York and also out of an office provided by the Association located in New York City.

7. Petitioner's educational background consisted of graduation from Brooklyn Technical High School and also attendance at a drafting school. Petitioner did not attend college; however, his knowledge of the maritime industry was gained through 50 years of practical on-the-job experience. No license was required by petitioner to conduct business as a marine cost consultant.

8. Petitioner utilized his own techniques and methods in the performance of his consultant activities. During the year 1974 petitioner held himself out to the general public as a marine cost consultant. Compensation received by petitioner in 1974 from the Association was paid on a flat fee basis from which no taxes were withheld.

9. Petitioner maintains that his consulting activities in 1974 constituted the practice of a profession exempt from unincorporated business tax by virtue of section 703(c) of the Tax Law. No evidence was adduced or argument made at the hearing held herein with respect to the 5 percent negligence penalty asserted pursuant to sections 722 and 685(b) of the Tax Law.

CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides, inter alia, that income received from the practice of law, medicine, dentistry or architecture or from the practice of any other profession is exempt from unincorporated business tax. Regulation section 203.11(b)(1)(i) defines other profession as follows:

"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."

B. That petitioner's activities as a marine cost consultant during the year at issue, although requiring special skill and knowledge, 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).

In Rosenbloom v. State Tax Commission, 44 A.D.2d 69, mot. for lv. to app. den. 34 N.Y.2d 518, the court listed four factors to consider when determining if an activity constituted the practice of a profession. These factors are:

1. long-term educational background generally associated with a degree in an advanced field of science or learning;
2. the requirement of a license;
3. control of the occupation by standards of conduct, ethics and malpractice liability; and
4. a barrier to carrying on the occupation as a corporation.

In the instant matter there were no licensing requirements for a marine cost consultant nor were petitioner's activities governed by any Federal or New York State regulatory bodies. Additionally, there were no strict educational requirements for marine cost consultants. Finally, the record is devoid of any evidence regarding the control of petitioner's occupation by standards of conduct, ethics and malpractice liability and whether petitioner is barred from carrying on his occupation as a corporation. See Costa et al. v. State Tax Commission, 67 A.D.2d 1074 and cases cited therein.

C. That the petition of Thomas F. Walsh for a refund is denied in its entirety; and that the notice of disallowance dated July 28, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

Richard W. Allen
PRESIDENT

Frank R. King
COMMISSIONER

Mark J. [Signature]
COMMISSIONER