

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(s) 23 of the Tax Law :
for the Years 1978-1980.

State of New York :

ss.:

County of Albany :


David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 26th day of September, 1986, he/she 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:

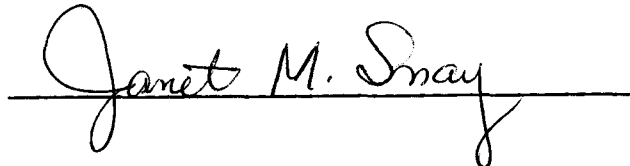
Alfred & Anne Arees
1670 W. 2nd St.
Brooklyn, NY 11223

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
26th day of September, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

September 26, 1986

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 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

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 1978	:	
through 1980.	:	

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 1978 through 1980 (File No. 60990).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1986 at 1:15 P.M. Petitioner Alfred Arees appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether a petition to contest a deficiency asserted by the Audit Division was timely filed by Alfred Arees and Anne Arees.

II. Whether, in the event a timely petition was filed, the income derived from petitioner Alfred Arees' activities as an international book salesman and marketing consultant during the years 1978 through 1980 was exempt from the imposition of unincorporated business tax.

III. Whether the penalties asserted by the Audit Division should be abated.

FINDINGS OF FACT

1. Petitioners, Alfred Arees and Anne Arees, timely filed New York State income tax resident returns with City of New York personal income tax for the years 1978, 1979 and 1980. Alfred Arees (hereinafter "petitioner") reported business income in the amount of \$17,334.96 for 1978, \$20,518.43 for 1979 and \$32,148.16 for 1980 from his activities as an international book salesman and marketing consultant. In addition thereto, petitioner reported wage income of \$12,958.41 for 1978 and \$15,836.46 for 1979 from Grosset & Dunlap, Inc. Petitioner did not file unincorporated business tax returns for any of the years at issue.

2. On December 14, 1981, the Audit Division issued a Statement of Unincorporated Business Tax Audit Changes for the years 1978 and 1979 and, on January 15, 1982, issued an additional Statement of Unincorporated Business Tax Audit Changes for the year 1980 wherein petitioner's business income and wage income reported for each said year were held subject to the imposition of unincorporated business tax. Accordingly, on January 9, 1985, a Notice of Deficiency was issued to Alfred Arees and Anne Arees which asserted unincorporated business tax due in the amount of \$3,086.56, plus interest of \$1,753.19 and penalties of \$1,587.26, for a total amount due of \$6,427.01 for the years 1978, 1979 and 1980. Said penalties were asserted pursuant to sections 685(a)(1), 685(a)(2) and 685(b) of the Tax Law, as incorporated into Article 23 by section 722(a) of the Tax Law, for failure to file unincorporated business tax returns, failure to pay the tax shown on the return and for negligence, respectively.

3. On March 20, 1985, petitioner sent, via certified mail, a letter addressed to the Tax Compliance Bureau of the Department of Taxation and Finance which was received on March 22, 1985. Said letter stated that petitioner

did not agree with the determination and had attached thereto a copy of the Notice of Deficiency issued January 9, 1985. Petitioner subsequently filed Form TA-11, Petition, bearing the date of April 29, 1985, with the Tax Appeals Bureau, said Petition having been received on May 1, 1985. The Audit Division contends that since the Petition was not filed within ninety days of the issuance of the Notice of Deficiency on January 9, 1985, the State Tax Commission is without jurisdiction in the present proceeding.

4. For the years at issue, petitioner was an international book salesman and marketing consultant whose principal activities consisted of working with publishers, educators and middlemen to get American books and educational materials distributed into various countries, particularly the Arab world. Petitioner rendered services for several principals during the years 1978, 1979 and 1980, but approximately 75 to 80 percent of his income was derived from his work for three principals, Grosset & Dunlap, Inc., Levant Distributors and Ao Livro Tecnico. With the exception of his income from Grosset & Dunlap, Inc., the income which petitioner derived from his services for said principals consisted of commissions and fees. No Federal, State or local income taxes or Social Security taxes were withheld from said fees and commissions. Petitioner received no pension or insurance benefits from these principals. Prior to the years at issue, petitioner was put on the payroll of Grosset & Dunlap, Inc. for the purpose of enabling him to join Grosset & Dunlap, Inc.'s health insurance plan. However, the duties which petitioner performed for the company were substantially similar to those duties performed for other principals and were, therefore, held by the Audit Division to be subject to the unincorporated business tax. Federal, State and local income taxes and F.I.C.A. taxes were

withheld from said wages received from Grosset & Dunlap, Inc. for 1978 and 1979.

5. For the years in which petitioner was receiving wages from Grosset & Dunlap, Inc., petitioner was not given an office by the company. Petitioner performed most of the work for the company at an office maintained in his home. Although he was to perform thirty hours of work per week in return for his wages, he was permitted to perform such work on whatever days and during such hours as he chose.

6. None of the other principals for whom petitioner performed his activities provided him with an office. Most of his work was performed at the office which he maintained in his home. Said principals exerted little supervision or control over his activities. Petitioner had no contract with any of his principals which prohibited him from acting on behalf of other principals.

7. For the years at issue, petitioner filed a Federal Schedule C, Profit or (Loss) From Business or Profession, on which he claimed business deductions for such items as car and truck expenses, office supplies, postage, telephone, travel and entertainment and rent on business property. While on the payroll of Grosset & Dunlap, Inc., petitioner was not reimbursed for his expenses. Petitioner had no employees.

8. Petitioner received a Bachelor of Arts Degree from Columbia University. He entered the book business as an internationalist in April of 1955. He did not take specialized courses to enable him to work as an internationalist. No licensing or specific educational requirements were necessary for petitioner to perform his activities.

9. Petitioner contends that he should be exempted from the imposition of the unincorporated business tax on the basis that the activities which he

performs are so unique and specialized in nature as to constitute the practice of a profession.

10. Petitioner did not file unincorporated business tax returns for the years at issue because he felt that he was not operating an unincorporated business and, as such, was unaware that he was required to file said returns.

CONCLUSIONS OF LAW

A. That section 689(b) of the Tax Law provides, in pertinent part, as follows:

"Within ninety days...after the mailing of the notice of deficiency authorized by section six hundred eighty-one, the taxpayer may file a petition with the tax commission for a redetermination of the deficiency."

B. That 20 NYCRR 601.1(c) provides as follows:

"The term petition shall include an 'application,' 'petition,' 'demand for hearing' or variation of such terms as used in the applicable statutory sections of the Tax Law. The petition, for purposes of the time limitations, may be in any form, so long as it is in writing, identifies the action, or actions, which are protested and indicates that revision of the action, or actions, is desired."
(Emphasis in original.)

C. That the letter of petitioner Alfred Arees mailed, by certified mail, on March 20, 1985 and received on March 22, 1985 (see Finding of Fact "3") contained sufficient information to identify the action being protested and to indicate the desired revision of the action. Since the letter was received within ninety days after the mailing of the Notice of Deficiency, such letter shall, therefore, be deemed a timely filed petition within the meaning and intent of section 689(b) of the Tax Law and the regulations promulgated thereunder.

D. 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."

E. 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.)

F. That petitioner's activities during 1978 through 1980 did not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law.

G. 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.

H. That 20 NYCRR 102.7(b)(10) provides that ignorance of the law will not be considered reasonable cause for the cancellation of penalties asserted to be due. Petitioner's unawareness of the requirement to file unincorporated business tax returns is not, therefore, reasonable cause for abatement of the penalties which were asserted herein.

I. That the petition of Alfred Arees and Anne Arees is denied and the Notice of Deficiency dated January 9, 1985 is sustained, together with such additional penalties and interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986

Roderick W. Allen
PRESIDENT
Francis R. Koening
COMMISSIONER
Mark J. Smith
COMMISSIONER