

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-81 (5) I
Income Tax
July 15, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I810316A

On March 16, 1981, a Petition for Advisory Opinion was received from Barry Dayboch, 11 Plant Lane, Westbury, New York 11590.

The issue raised is whether the activities of Petitioner as a self-employed computer programmer/analyst constitute the practice of a profession exempt from the Unincorporated Business Income Tax imposed under Article 23 of the Tax Law.

Petitioner is a self-employed computer programmer/analyst. Petitioner designs computer systems, creates and codes new computer programs, amends and modifies existing computer programs, and instructs clients in the use of the software he installs. More than 80 percent of Petitioner's income is derived from personal services. Capital is not a material income producing factor.

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."

The Unincorporated Business Income Tax Regulations defines the term "other profession" to include "...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).

It has been held that to be entitled to a "professional" exemption, the services performed must "encompass some of the essential characteristics" of the professions of law, medicine, dentistry or architecture. Matter of Koner v. Procaccino, 45 A.D. 2d 551, aff'd. 39 NY 2d 258. In the Matter of Robert Shmaruk v. State Tax Commission, 79 A.D. 2d 832, taxpayer was a "self-employed computer specialist who developed, designed, and implemented electronic data processing systems for various business concerns". The Court held that the activities of advising, designing and programming computer systems do not encompass the essential characteristics of the enumerated professions but seem to involve the type of services generally performed by those in a "trade, business, or occupation." Thus, the Court held that the taxpayer was not eligible for the exemption provided by §703(c) of the Tax Law.

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Accordingly, Petitioner's activities do not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law, and the income derived therefrom is subject to the unincorporated business income tax.

DATED: June 15, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau