

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ELI VIGLIANO</b>	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 809303
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1984.	:	

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Petitioner Eli Vigliano, 283 Soundview Avenue, P.O. Box 70, White Plains, New York 10605, filed an exception to the determination of the Administrative Law Judge issued on January 28, 1993. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner submitted a brief in support of his exception. The Division of Taxation submitted a letter in response. Petitioner filed a reply brief on July 2, 1993, the original date that began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied. On July 28, 1993, one month from the receipt of petitioner's reply brief, the Tax Appeals Tribunal received a written objection from petitioner to the denial of oral argument. Petitioner was allowed until September 9, 1993 to file any further written arguments in lieu of oral argument. On September 10, 1993, the Tax Appeals Tribunal received a letter in which petitioner declined to submit additional written argument, in lieu of oral argument. The period for the issuance of this decision was five months from receipt of this letter.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether New York State may subject to tax some or all of the net income reported on Federal Schedule C by petitioner, a nonresident attorney licensed to practice law only in New York State.

II. Whether, if so, petitioner has nonetheless advanced sufficient grounds to warrant cancellation of penalties.

III. Whether petitioner was denied due process of law because the Division of Taxation changed the theory supporting the notice of deficiency issued to petitioner shortly before the hearing.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

During the year at issue herein petitioner, Eli Vigliano, was a resident and domiciliary of Connecticut. He was, however, licensed and admitted to practice law in New York State, and was not so licensed or admitted to practice law in Connecticut or anywhere else.

For 1984, petitioner filed a U.S. Individual Income Tax Return (Form 1040), listing thereon his address as 32F Putnam Green, Greenwich, Connecticut and his occupation as "lawyer". Attached to and filed as a part of such return was Schedule C ("Profit [or Loss] From Business or Profession"), on which petitioner listed his business address as 1 Waters Street, White Plains, New York and his business activity as "attorney". Petitioner did not file either a resident or nonresident New York State return, nor did petitioner report or pay tax to New York State on any of his income.

On February 3, 1989, the Division of Taxation ("Division") issued to petitioner a Notice of Deficiency asserting additional personal income tax due for the year 1984 in the amount of \$6,463.84, plus penalty and interest. A Statement of Audit Changes previously issued to petitioner on May 23, 1988 reveals the above-asserted deficiency was calculated as the tax due on petitioner's total Federal adjusted gross income as reported, less allowance for the New York standard deduction and one exemption. This statement also reveals the penalties at issue were imposed based on petitioner's late filing (here non-filing) and late payment of tax due.

Petitioner was licensed by and admitted to practice law in New York State in December 1950. Petitioner initially became associated with a law firm in New York City, where he was primarily involved in real estate work. Petitioner continued this employment until approximately September 1968, when petitioner took employment in the general counsel's office of Ciro Buildings Corporation (also in New York City). Thereafter, in December 1973, petitioner became "counsel" to one Albert P. Phelps, Jr.

Albert P. Phelps, Jr. was a suburban/commercial developer principally involved in the building of strip shopping centers, motels, restaurants and office buildings. Mr. Phelps developed various projects in Long Island, New York, Westchester County, New York and Fairfield County, Connecticut. Mr. Phelps maintained his offices in Bronx, New York until approximately 1982, at which time his offices were relocated to Norwalk, Connecticut (specifically to office space he was then involved in developing, constructing and leasing). Mr. Phelps had personally moved to Connecticut in or about 1973. Petitioner, by contrast, had lived in New York State until approximately 1980 or 1981 at which time he moved to Greenwich, Connecticut.

Petitioner described his title within Mr. Phelps' organization as akin to executive vice-president to Mr. Phelps -- serving essentially as Mr. Phelps' "right hand man" and "alter ego". Petitioner, however, held no equity participation or ownership interests in any of the projects developed by Mr. Phelps.

Petitioner's initial compensation package with Mr. Phelps' organization consisted of wage compensation to the extent of the then-maximum allowable social security wage limit, with the balance of his earnings paid as "fee income". At some time prior to the year in question this arrangement changed such that, by 1984, petitioner's compensation was paid as fees billed (see below) with no wage compensation involved.

Petitioner's job duties for Mr. Phelps, as described at hearing, included negotiating financing for development projects, negotiating leases, resolving various problems between

Mr. Phelps (as landlord) and his various tenants, review of documents including legal documents prepared for Mr. Phelps' corporations, summarizing the same and offering his opinion thereon to Mr. Phelps. Petitioner was also frequently involved in dealing with outside counsel, architects, general contractors, engineers, etc. on behalf of Mr. Phelps. Petitioner described his position as one of substantial authority to make business decisions on Mr. Phelps' behalf. He described himself as an "expeditor" in bringing the pieces of a project together. Petitioner also described his role as providing Mr. Phelps with the comfort of having a "lawyer in the office", and also likened his role to doing "double duty, both a lawyer and an executive."

Mr. Phelps' method of operation was to create separate corporations for separate projects (or parts of projects) so as to secure, inter alia, the benefit of limited personal liability. Review of the evidence offered, including specifically petitioner's Schedule C and attached Forms 1099 ("Statement for Recipients of Miscellaneous Income"), reveals that petitioner earned some \$168,868.00 of gross business income, paid through some ten different corporations.<sup>1</sup> All of the Forms 1099 issued to petitioner list his address as 1 Waters Street, White Plains, New York. Eight of the ten Forms 1099 reflect amounts paid to petitioner from corporations owned by Albert Phelps, and each bears the same Norwalk, Connecticut address. These eight Forms 1099 represent all but \$2,230.63 of the total amount of business income reported on petitioner's Schedule C, with the balance of such income reflected on the two remaining Forms 1099. These latter two Forms 1099 were issued to petitioner by Burkie Photo, Inc. (in the amount of \$600.00), and Doris Sassower, P.C. (in the amount of \$1,630.63), and each such issuer lists for itself a New York address. At hearing, petitioner conceded that such income apparently was derived from or connected with New York sources. In fact, petitioner described his best recollection of such income as having been earned in connection with landlord and tenant matters undertaken on behalf of the two named payors in New York. Petitioner admitted that such income should properly be allocated to and is taxable by New York State. Petitioner,

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<sup>1</sup>Included in evidence were 11 Forms 1099. However, one of such forms is a duplicate apparently included in error.

however, disputes that the balance of his Schedule C income, received from the corporations owned by Mr. Phelps, is properly subject to tax by New York State.

Petitioner listed net income of \$39,766.00 on his Schedule C,<sup>2</sup> after deduction of expenses itemized as follows:

Schedule C Deductions

Car and truck expenses	\$ 1,625.00
Depreciation	253.00
Insurance	5,369.00
Interest on business indebtedness	63.00
Legal and professional services	72,180.00
Office expense	5,927.00
Rent on business property	15,832.00
Taxes	1,546.00
Travel and entertainment	10,621.00
Utilities and telephone	1,745.00
Wages	12,760.00
Other expenses	4,781.00
Total	<u>\$132,702.00</u>

Petitioner's method of receiving payment from Mr. Phelps was based upon billings for the number of hours spent on each project or corporate entity involved. Petitioner explained that he kept hourly records and billed at the appropriate hourly rate, allocating appropriately to each corporate entity on the basis of the time spent thereon. Petitioner testified that the majority of his services for Mr. Phelps from which the income in question was derived occurred in Connecticut, including negotiations, visiting local attorneys and government officials, meeting with tenants and working with Mr. Phelps. Petitioner did negotiate on Mr. Phelps' behalf in New York City, apparently on a limited number of occasions, with respect to certain financing arrangements with regard to the Norwalk (Fairfield County), Connecticut office building project under development in 1984.

Petitioner's tax returns were prepared by petitioner's accountant, to whom petitioner gave check stubs and billings. Petitioner was unable to offer specificity with respect to several items of expense reflected on his Schedule C, including the amount of "rent on business property",

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<sup>2</sup>In addition to the \$168,868.00 paid via Forms 1099, petitioner also listed some \$3,600.00 of "other income" on his Schedule C. The source and nature of this other income was not described or disclosed in the record. In any event, total Schedule C income of \$172,468.00 less Schedule C deductions of \$132,702.00 results in net business income of \$39,766.00.

although petitioner indicated that he "may have paid rent to Mr. Phelps as part of his compensation package and deducted the same." Similarly, petitioner described the deduction for "wages" on Schedule C as representing his purchase of secretarial services in Connecticut, noting that he received no secretarial service per se from Mr. Phelps or at his New York office address at 1 Waters Street (see below). The largest single item of expense on Schedule C pertained to "legal and professional services". Petitioner described this expense as representing attorney billings to petitioner, apparently from outside local counsel in Connecticut employed or consulted by petitioner on Mr. Phelps' behalf, with petitioner paying such charges out of amounts he billed (for himself) to the various corporations owned by Mr. Phelps. Petitioner described this manner of operation as one suggested to him by his accountants.

Petitioner remained with Mr. Phelps until approximately the end of 1985, at which time petitioner ceased working with Mr. Phelps and returned to New York State. Petitioner's reason for leaving centered upon his inability to convince Mr. Phelps to allow petitioner some equity ownership in any of the projects being developed.

Petitioner described the use of outside counsel or local counsel with respect to the Connecticut developments as a common occurrence and one in which petitioner might best be described as the liaison between counsel and Mr. Phelps.

Petitioner described his office at 1 Waters Street in White Plains, New York as representing a "shell" office wherein, for a monthly rental amount, petitioner received telephone service, receptionist service, mail service and the availability of a conference room (by prior reserved appointment). Petitioner indicated that he was rarely present at this office, and described the same to consist of an approximately 15 by 14-foot room with a desk, a desk chair, two other chairs and a file cabinet. Petitioner explained that the majority of his work and his files in connection therewith were kept in Connecticut apparently at or near Mr. Phelps' offices. More specifically, petitioner described his work for Mr. Phelps as being performed either at Mr. Phelps' property in Connecticut or in various local attorneys' offices (local counsel for Mr. Phelps) in Connecticut.

Petitioner attended various real estate law conventions as a means of maintaining current status with respect to the latest relevant cases. Petitioner reviewed legal documents prepared by general contractors or by Mr. Phelps' Connecticut attorneys and explained the documents to Mr. Phelps and recommended changes to Mr. Phelps' Connecticut attorneys. In addition, petitioner provided various documents and forms to local counsel, which documents and forms petitioner had developed and used in his real estate practice in New York in prior years.

The bulk of petitioner's work in 1984 on behalf of Mr. Phelps involved the negotiation of a joint venture agreement with Equitable Life Assurance Company with respect to building part of Mr. Phelps' Merit Seven Office Park Plaza in Norwalk, Connecticut, and the negotiation of a mortgage with respect to Building One at such office park.

In addition to the facts found by the Administrative Law Judge, we find as follows:

Approximately one week before the hearing on this matter, the Division's attorney spoke with petitioner by telephone. As a result of this conversation, the Division's attorney agreed to stipulate to the fact that petitioner was a nonresident of New York in 1984 and switched the theory underlying the deficiency to one of allocation rather than domicile. At the hearing, petitioner acknowledged the change in theory, claimed surprise but agreed to go ahead with the hearing to develop the facts concerning the receipt of the income in question. Petitioner was granted time after the hearing to submit affidavits to supplement his testimony but did not submit any affidavits.

#### ***OPINION***

The Administrative Law Judge determined that many of the activities petitioner performed for Mr. Phelps fell within the ambit of providing legal services. The Administrative Law Judge also found it significant that petitioner was not compensated as an employee but rather on an hours billed, fee-income basis, that petitioner reported these fees as an attorney on his Federal income tax return and that he claimed significant deductions against the fee income which would not have been available to him as an employee of Mr. Phelps. The Administrative Law Judge noted that these deductions were an important benefit petitioner derived from maintaining an office and the appearance of practicing law in New York State. Against this background, the Administrative Law Judge concluded:

"it is clear that petitioner chose to gain the advantage of treating his activities as related to his license to practice law in New York State. It follows, then, that the income in question was connected to such license, and since petitioner was licensed only to practice in New York, it therefore follows that the income in question is properly subject to tax by New York (see, Carpenter v. Chapman, 276 App Div 634, 97 NYS2d 311)" (Determination, conclusion of law "E").

The Administrative Law Judge also found that petitioner had not advanced sufficient grounds to abate penalty.

We affirm the determination of the Administrative Law Judge.

On exception, petitioner first asserts that there is no evidence in the record to support the Administrative Law Judge's finding that petitioner was not licensed to practice law in any state other than New York. Our review of the record reveals that petitioner stipulated, on the record, to the fact that he was "licensed to practice law in New York and nowhere else during 1984" (Tr., p. 8).

Petitioner also contends that the Administrative Law Judge erred in finding that petitioner served in a dual role of attorney and executive. Petitioner states that the Administrative Law Judge confused petitioner's original role in 1973 with his role in 1984 and that "by 1984, his role had evolved to serving as an executive and acting in a business capacity; rather than as a lawyer" (Petitioner's exception). The record does not support the distinction petitioner seeks to make about his role in 1984 versus that in 1973. Instead, petitioner testified that he was counsel to Mr. Phelps from 1973 through the end of 1985 (Tr., p. 68). This testimony also belies petitioner's assertion that the services he performed for Mr. Phelps were not in the nature of legal services, as does his specific testimony that in 1984 he negotiated a lease, a joint venture agreement, a mortgage and a lease surrender (Tr., pp. 82-85). Petitioner also testified that before Mr. Phelps would sign almost any legal document, petitioner would review it and would render an opinion on the import of the document (Tr., p. 90). In addition, as noted by the Administrative Law Judge, petitioner himself characterized his business activity as that of an attorney on the Federal Schedule C when reporting the income at issue (Exhibit "I"). Thus, the record provides overwhelming support for the conclusion that petitioner earned the income at



issue by providing legal services. As petitioner agreed that he was only licensed to practice law in New York State, it follows that the Administrative Law Judge correctly determined, relying on Carpenter v. Chapman (supra), that the income in question was attributable to a profession carried on in this State and subject to tax under former section 632(b)(1)(B) of the Tax Law.

Next, petitioner argues that penalties should not be imposed because petitioner had no legal obligation to file a tax return in New York in 1984. As we find no basis for petitioner's assertion that he did not have to file a New York tax return in 1984, we affirm the Administrative Law Judge's decision not to abate the penalties imposed.

Lastly, petitioner argues for the first time in his reply brief that he was denied due process of the law because the Division abandoned its theory that petitioner was domiciled in New York and proceeded at the hearing on the new theory that the income at issue was properly allocated to New York even though petitioner was a nonresident of New York. The record does indicate that at some point shortly before the hearing the Division agreed that petitioner was a nonresident of New York and changed its basis for the assessment to one of allocation (Tr., pp. 12-13). In response to this change in theory, petitioner stated:

"[n]ow, I really, as I said, if I were what I consider to be a fancy dancing litigator, I would make a big issue about the fact that I am now not prepared; this is a surprise. I don't know--or, I don't believe in cat and mouse. Basically I have my documents; I am prepared to proceed subject to what I had understood; I would be permitted to apply for relief, and also Judge Ranalli had said in his letter to submit some affidavits or documents within a reasonable period of time to support whatever I testify to" (Tr., pp. 13-14).

Subsequently, petitioner repeated his desire to get the facts on the record, notwithstanding his ignorance about the applicable law (Tr., pp. 14-15). The Administrative Law Judge gave petitioner until April 30, 1992 to submit affidavits to supplement his testimony (Tr., p. 104). Petitioner did not submit any affidavits. In view of petitioner's agreement to proceed with the hearing and his failure to avail himself of the opportunity to submit additional evidence after the hearing, we find no basis to petitioner's claim that he was denied due process of the law.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eli Vigliano is denied;

2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Eli Vigliano is denied; and
4. The Division of Taxation is directed to modify the Notice of Deficiency dated February 3, 1989 in accordance with conclusion of law "G" of the Administrative Law Judge's determination, but such Notice is in all other respects sustained.

DATED: Troy, New York  
January 20, 1994

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner