STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ELI VIGLIANO	:	DETERMINATION DTA NO. 809303
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1984.	:	

Petitioner Eli Vigliano, 283 Soundview Avenue, P.O. Box 70, White Plains, New York 10605 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1984.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 25, 1992 at 9:30 A.M., with all briefs to be submitted by July 7, 1992. The Division of Taxation, appearing by William F. Collins, Esq. (Gary Palmer, Esq., of counsel), filed a brief on June 17, 1992. Petitioner, appearing pro se, filed his brief on July 1, 1992. Petitioner had also reserved time, post-hearing, to submit two affidavits. However, no such affidavits were submitted.

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.

FINDINGS OF FACT

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 Finding of Fact "11") 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.[1] 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, 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,[2] after deduction of expenses itemized as follows:

Schedule C Deductions

Car and truck expenses	$ 1,625.00
Depreciation	253.00

[1]Included in evidence were 11 Forms 1099. However, one of such forms is a duplicate apparently included in error.

[2]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.

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	~~$132,702.00~~

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", 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 Finding of Fact "15"). 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.

SUMMARY OF THE PARTIES' POSITIONS

The Division initially believed petitioner was taxable as a resident of New York and thus calculated the asserted deficiency herein based on subjecting all of petitioner's income to taxation by New York. However, in light of the fact that petitioner was a nonresident of New York in 1984, the Division concedes that it is appropriate for New York to tax only the portion of his income reflected on his Schedule C (net income of $39,766.00). Petitioner, for his part, has conceded that the income received from Doris Sassower, P.C. and from Burkie Photo, Inc. is properly subject to New York State taxation. The Division maintains that the balance of petitioner's Schedule C income, paid by the various Connecticut corporations as described, is also properly subject to tax by New York State as derived from petitioner's legal practice carried out through his license to practice law granted by the State of New York.

Petitioner argues that the Division is exceeding its authority in attempting to tax income earned by petitioner on services performed for Connecticut resident individuals and/or corporations, and that the Division is incorrect in asserting that the services were necessarily "incidental to" and "derived from" his license to practice law in New York. Petitioner argues that he did not carry on an active law practice in New York, and that his only reason for having an office in White Plains, New York was to keep his New York law license. Petitioner maintains that Albert Phelps utilized Connecticut law firms for legal services and relied on petitioner principally for "executive-type" services.

CONCLUSIONS OF LAW

A. Tax Law §§ 601(e) and 631, in pertinent part, require inclusion within the New York adjusted gross income of a nonresident individual those items of income derived from or connected with New York sources, including income attributable to a business or profession carried on within New York State. Tax Law § 631(c) allows items of income from a profession carried on partly within and partly without New York to be apportioned and allocated.

B. In this case, it appears undisputed that most of the services from which the income in question was derived were in fact carried out in Connecticut on behalf of Connecticut corporations owned by Albert Phelps. Petitioner likens these services, described in Findings of

Fact "8", "16" and "17", to executive-type services and, in hand, would in all respects liken the income therefrom to compensation earned by an employee. However, petitioner's manner of reporting the income for Federal income tax purposes is entirely inconsistent with and belies the nature of this claim. Thus, while petitioner would cast his role as that of an employee, he held himself out, for tax purposes at least, as an independent contractor and, more specifically, as an attorney.

C. One of the basic issues presented in this case is whether petitioner's activities on behalf of Mr. Phelps and Mr. Phelps' corporations constituted the practice of law. Perhaps the best summarization of the evidence on this issue is that petitioner's position was that of "in-house counsel" and a "lawyer in the office" to Mr. Phelps. While petitioner undoubtedly made business decisions and dealt with business problems on behalf of Mr. Phelps, which activities could well be described as in the nature of executive services, the record also contains more than significant instances wherein petitioner himself described his functions as being in the nature of providing legal services, to wit, negotiating leases, representing Mr. Phelps in resolving landlord/tenant disputes, preparing, revising and interpreting legal documents including contracts, providing legal advice to Mr. Phelps, etc. It is unknown whether petitioner in fact presented himself as Mr. Phelps' attorney in meetings with tenants, government officials and others. It is, however, apparent that many of petitioner's activities fall within the ambit of providing legal services (see, People v. Alfani, 227 NY 334).

D. It is also significant that petitioner was not compensated as an employee, but rather was compensated on an hours-billed, fee-income basis, that petitioner reported these fees as an attorney, and that he claimed significant deductions against such fee income on his Schedule C. Were petitioner to have been an employee of Mr. Phelps and/or Mr. Phelps' corporations, petitioner would not have been entitled to claim such deductions and would not have been afforded their tax benefit (except perhaps to the extent that the same might in some instances have constituted unreimbursed employee business expenses). For purposes of maintaining his license to practice law in New York State, petitioner maintained what he described as a shell

office in New York State. What cannot be disregarded, however, is that one of the other main benefits petitioner derived from maintaining such office and an apparent practice of law was the ability to report (on Schedule C) fee income earned in Connecticut from Mr. Phelps' corporations and claim significant amounts of deduction as described. In fact, all of petitioner's business earnings and expenses were "run through" this office. It would appear petitioner's "compensation package" was carefully structured to realize this tax advantage. Petitioner, having taken the benefit of such an arrangement, cannot now lightly cast aside the same to avoid New York taxation.

E. It is unnecessary in resolving this case (and beyond the scope of this forum) to address the issue of whether petitioner's activities in Connecticut exceeded the limits against practicing law without a license in such jurisdiction (see, Conn Gen Stat § 51-88). Rather, it is sufficient to note that petitioner held himself out for Federal taxation purposes as being engaged in the practice of law. Such being the case, 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).

Additional support for the foregoing is found in Matter of Johnston v. New York State Tax Commn. (115 AD2d 196, 495 NYS2d 265). There, the petitioner, a Connecticut resident, was licensed to practice law in New York State (and in the District of Columbia), but was not licensed to practice by the State of Connecticut. The petitioner was, however, registered to practice patent law by the U.S. Patent Office and, as a result, was allowed to allocate to Connecticut (and out of New York) so much of his income as was derived specifically from services performed within the scope of his patent law practice. The court noted that:

> "registration with the Patent Office is a Federal right which takes precedence over the legal licensing requirements of any state. Consequently, petitioner could engage in certain activities in Connecticut which, but for his registration with the Patent Office, would be prohibited."

In sum, but for his Patent Office registration, the petitioner would have been required to report his income only to the jurisdiction(s) in which he was licensed to practice law (see also, Matter of Schrieber, State Tax Commn., May 6, 1983 [TSB-H-83(148)I]).

There being no evidence here upon which petitioner was entitled to allocate income within and without New York State (here, specifically, without running afoul of the proscription against the unauthorized practice of law in Connecticut), the entire amount of net income per petitioner's Federal Schedule C ($39,766.00) was properly subject to tax by New York State. This would be a closer case had petitioner been an employee or held himself out as a self-employed business consultant. However, reporting the income in question in the manner described, together with the nature of the services performed by petitioner as described, leaves the income in question tied to petitioner's license to practice law. To hold otherwise would blatantly ignore the evidence that petitioner in many ways held himself out as a lawyer and reaped the benefits thereof.

F. Petitioner has not advanced sufficient grounds to excuse his failure to have filed a return and remitted tax due to New York. While petitioner's position might have been arguable under other circumstances, as described, the fact remains that petitioner, whether upon advice or by personal planning, chose to structure his tax position in the manner presented. Accordingly, penalties were properly imposed (cf., Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990).

G. The petition of Eli Vigliano is hereby denied and the Notice of Deficiency dated February 3, 1989, reduced however to reflect imposition of tax only on the net amount of petitioner's Schedule C income ($39,766.00), together with penalty and interest lawfully due and owing, is sustained.

DATED: Troy, New York
January 28, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE