

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
IMAGING ARTS BILLING SERVICES, INC. : DECISION
for Redetermination of Deficiencies or for Refund of : DTA NO. 816538
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the Years :
1993 through 1995. :

Petitioner Imaging Arts Billing Services, Inc., 37-61 87th Street, Jackson Heights, New York 11372-7534, filed an exception to the determination of the Administrative Law Judge issued on August 31, 2000. Petitioner appeared by Richard Diamond, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was scheduled for January 17, 2002. Petitioner failed to appear at the oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation correctly determined that Imaging Arts Billing Services, Inc. failed to deduct and remit withholding taxes to New York State and New York City on the compensation paid to certain individuals during the years at issue.

II. Whether the Division of Taxation correctly determined the amount of tax due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Imaging Arts Billing Services, Inc. (“Imaging Arts”), is a firm which performed magnetic resonance imaging. The Division of Taxation (“Division”) conducted an audit of Imaging Arts for the years 1993 through 1995.

The Division found that in 1993, petitioner paid wages to an employee named Ramon Becce in the amount of \$75,000.00 and withheld New York State and New York City personal income taxes in the amounts of \$5,506.00 and \$2,909.00, respectively. However, the taxes were not remitted. A Form 1099 was also issued to Mr. Becce showing a payment in the amount of \$18,055.00 without any tax withholding. Since petitioner did not provide the Division with copies of forms W-4 or IT-2104, the Division used a filing status of single with one exemption to compute the taxes due.

The Division also found that in 1993 Imaging Arts issued a Form 1099 in the amount of \$54,300.00 to Eric Hagerbrant who was an administrator and employee. The Division determined that New York State and New York City tax was due in the amounts of \$3,524.00 and \$244.00, respectively, on the basis of a filing status of single with no exemptions.

In 1994, petitioner withheld but did not remit taxes from the wages paid to Ramon Becce and David Perez. According to wage and tax statements, the amounts withheld for New York State and New York City taxes for each of these individuals were \$4,167.00 and \$2,227.00, respectively. A wage and tax statement also showed that no taxes were withheld from the wages

of \$26,168.00 which were paid to Richard Zito. A Form 1099 was also issued to each of the employees mentioned above showing that they received the following payments:

Ramon Becce	\$11,106.00
David Perez	2,000.00
Richard Zito	2,500.00

In 1994 petitioner also issued a Form 1099 to Norman Robles, a marketing employee, in the amount of \$62,462.00 but did not withhold taxes from these payments. Since petitioner did not provide Forms W-4 or IT-2104, the Division computed the tax due using a filing status of single with no exemptions.

In 1995, wage and tax statements and Forms 1099 were issued to David Perez and Richard Zito. Petitioner withheld \$5,304.00 from the wages paid to Mr. Perez and \$3,716.00 from the wages paid to Mr. Zito and remitted these amounts to New York State. Petitioner also withheld \$3,080.00 from the wages paid to Mr. Perez and \$2,107.00 from the wages paid to Mr. Zito and remitted these amounts to New York City. However, the Division found that taxes were not withheld on the Form 1099 amounts.

In order to calculate the amount of tax due, the Division determined the amount of tax which was underpaid each year for the separate New York State and New York City jurisdictions. The Division's workpapers contain columns for the name of the employee, social security number, marital status, exemptions, salary according to the wage and tax statement, the amount of withholding shown on the wage and tax statement, the amount of tax due, the amount of the credits, the amount of tax due after subtracting the credits and the amount of tax underpaid. According to the workpapers, the amount of the tax due after subtracting the credits

was equal to the amount of tax underpaid for the years 1993 and 1994. The same amounts were also set forth on the Division's Statement of Proposed Audit Adjustment for the years 1993 and 1994.

The New York City withholding tax workpapers also explain that in 1995 wage and tax statements were issued to D. Perez and R. Zito which reflected salaries in the combined amount of \$187,400.00 and that taxes in the amount of \$5,187.00 were withheld and remitted. The Division determined that tax in the amount of \$7,608.00 was due on the income resulting in an underpayment of New York City taxes in the amount of \$2,421.00. The Division's Statement of Proposed Audit Adjustments shows that the Division is asserting that the additional tax due to New York City for the year 1995 is the same amount as the Division calculated as the underpayment of tax, that is, \$2,421.12.¹

The New York State withholding tax workpaper for 1995 shows the same combined salary of \$187,400.00 and that taxes in the amount of \$9,020.00 were withheld and remitted. The Division determined that tax in the amount of \$13,063.00 was due on the income resulting in an underpayment of New York State taxes in the amount of \$4,043.00. As was the case with the New York City taxes, the Division's Statement of Proposed Audit Adjustment shows that the Division is asserting that the additional tax due to New York State for the year 1995 is the same amount as the Division calculated as the underpayment of tax, that is, \$4,043.00.

The Division's field audit record shows that on February 7, 1997, the Division revised the Statement of Proposed Audit Adjustments so that a Dr. Rabiner would not be treated as an employee.

¹ The difference of 12 cents apparently arises from allocating the underpayment of tax to the 52 weeks of a year.

On the basis of the foregoing, the Division issued a series of notices of deficiency, dated March 24, 1997, which asserted a deficiency of New York State withholding tax as follows:

<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance Due</u>
01/08/93-06/25/93	\$4,817.75	\$1,878.14	\$3,680.03	\$10,375.92
07/02/93-12/31/93	5,203.17	1,780.44	3,850.53	10,834.14
01/08/94-06/25/94	4,701.50	1,392.26	3,431.13	9,524.89
07/02/94-12/31/94	5,077.62	1,256.75	3,582.18	9,916.55
01/08/95-06/25/95	1,943.75	374.47	2,228.23	4,546.45
07/02/95-12/31/95	2,099.25	290.23	2,349.39	4,738.87

The Division also issued a series of notices of deficiency, dated March 24, 1997, which asserted a deficiency of New York City withholding tax as follows:

<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance Due</u>
01/08/93-06/25/93	\$1,909.00	\$744.22	\$2,376.65	\$5,029.87
07/02/93-12/31/93	2,061.72	705.47	2,517.57	5,284.76
01/08/94-6/25/94	2,619.75	775.80	3,018.86	6,414.41
07/02/94-12/31/94	2,829.33	700.25	3,191.60	6,721.18
01/08/95-06/25/95	1,164.00	224.26	1,334.37	2,722.63
07/02/95-12/31/95	1,257.12	173.85	1,406.95	2,837.92

Petitioner's certificate of incorporation from the New York State Department of State was filed on June 23, 1992. Petitioner is a subsisting corporation.

A Certified Copy of Corporate Banking Resolutions, dated July 9, 1992, authorized Eric Hagerbrant to sign checks drawn on petitioner's bank account.

A form CT-6, entitled Election by a Federal S Corporation to be Treated as a New York S Corporation, listed only Mr. Hagerbrant's name as shareholder.

Petitioner's representative offered a letter which stated as follows:

As a follow up to the submission of our documentation, this letter will serve as an explanation as to why we think that Dr. Rabiner and Richard Zito should be characterized as separate situations when it involves remuneration. Dr. Herbert R. Rabiner is the principal participant in Metropolitan Radiological Imaging, P.C. and as such his remuneration comes from Imaging Arts Billing Services in the form of a distribution and not as salary.

Mr. Zito owns a billing company (Invoice enclosed) which does the billing and collections for our medical centers.

Imaging Arts Billing Services has an agreement with Mr. Zito as to remuneration. Mr. Zito not only has billing stationary, but he also advertises us [in] various publications.

Petitioner also submitted an invoice form bearing the letterhead of Medical Claims Consulting. A statement appears under the description column of the invoice which provides that its services commenced on January 1, 1993 and have continued until the present. Medical Claims Consulting states that it is not affiliated with Imaging Arts Billing Services other than providing services in connection with collection procedures. The name "R. Zito" is listed on the invoice as the sales representative.

In response, the Division asserts that petitioner has not satisfied its burden of showing by clear and convincing evidence that the notices of deficiency were incorrect or insufficient.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge stated that pursuant to Tax Law § 671(a)(1), every employer maintaining an office or transacting business in New York State which pays taxable wages to a resident or nonresident must deduct and withhold tax from such wages. The New York City Administrative Code contains similar provisions with respect to the withholding of New York City personal income tax and nonresident earnings tax. The

Administrative Law Judge also observed that pursuant to Tax Law § 675, every employer required to deduct and withhold tax under Article 22 is liable for such tax and if an employer fails to deduct and withhold tax as required, and the tax required to be deducted is paid, the employer is liable for any penalties, interest or additions to the tax otherwise applicable for such failure to deduct and withhold.

The Administrative Law Judge considered petitioner's argument that Dr. Rabiner should not have been treated as an employee. As the Division's revised Statement of Proposed Audit Adjustments demonstrated, the Division did not treat Dr. Rabiner as an employee. Therefore, the Administrative Law Judge considered this argument moot.

As to petitioner's argument that Mr. Zito should not be treated as an employee, the Administrative Law Judge found that petitioner offered very little information about the nature of Mr. Zito's employment. Although petitioner's evidence supported the proposition that Mr. Zito was an employee of a different firm (Medical Claims Consulting), the record also showed that petitioner issued wage and tax statements to Richard Zito for 1994 and 1995. Therefore, regardless of what Mr. Zito's relationship was with Medical Claims Consulting, the Administrative Law Judge concluded that it was obvious that petitioner had treated Mr. Zito as an employee. Accordingly, the Administrative Law Judge concluded that petitioner did not sustain its burden of proof to establish that the Division erred by treating Mr. Zito as an employee of petitioner.

The Administrative Law Judge rejected petitioner's argument that the Division incorrectly calculated the amount of tax due because it used the wrong column in its workpapers by taking the amount of additional tax due from the column entitled "Calculated Tax Less Credits" instead

of the column entitled "Tax Under Paid." The Administrative Law Judge found that the Division had prepared a series of withholding tax workpapers which separately calculated the amount of tax which was underpaid for each year with regard to New York State and New York City. The workpapers contain columns for, among other items, the amount of tax due after subtracting the credits and the amount of tax underpaid. According to the workpapers, the amount of the tax due after subtracting the credits was equal to the amount of tax underpaid for the years 1993 and 1994 and petitioner's objection had no bearing on these years.

As for taxes for the year 1995, the Administrative Law Judge analyzed the Division's workpapers concerning the underpayment of New York State tax in the amount of \$4,043.00 and New York City tax in the amount of \$2,421.00. The Administrative Law Judge found that the Division's Statement of Proposed Audit Adjustment explained that the Division was asserting that the additional taxes due to New York State and to New York City for the year 1995 were the same amounts as the Division calculated as the underpayment of tax. Thus, the Administrative Law Judge concluded that petitioner's argument that the Division calculated the tax due from the wrong column of its workpapers was without merit.

ARGUMENTS ON EXCEPTION

On exception, petitioner presents arguments concerning the deductibility of reasonable compensation for personal services pursuant to Internal Revenue Code § 162(a)(1).

The Division asserts that although petitioner argues on exception that the compensation it paid was reasonable and should be deductible, that was not an issue considered by the Administrative Law Judge in his determination. The issue of deductibility of compensation has no bearing on this case. Rather the issue before the Administrative Law Judge was the failure of

petitioner to deduct and remit withholding tax on compensation. As a result, the Division argues that the determination should be affirmed.

OPINION

Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Imaging Arts Billing Services, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Imaging Arts Billing Services, Inc. is denied; and
4. The notices of deficiency dated March 24, 1997 are sustained together with such

penalties and interest as may be lawfully due.

DATED: Troy, New York
March 7, 2002

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner