

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**IMAGING MANAGEMENT** :  
**SERVICES OF AMERICA, INC.** :

DECISION  
DTA NO. 816563

for Redetermination of Deficiencies or for Refund of  
Personal Income Tax under Article 22 of the Tax Law :  
and the New York City Administrative Code for the Years :  
1993 through 1995. :

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Petitioner Imaging Management Services of America, Inc., 37-61 87<sup>th</sup> 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.

***ISSUE***

Whether the Division of Taxation correctly determined that Imaging Management Services of America, Inc. improperly failed to deduct and remit withholding taxes to New York

State and New York City with respect to compensation paid to its president during the years at issue.

***FINDINGS OF FACT***

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

The Division of Taxation (“Division”) conducted an audit of Imaging Management Services of America, Inc. (“Imaging Management”) for the years 1993 through 1995. Eric Hagerbrant owned the outstanding stock of Imaging Management and held the title of president.

In the course of the audit, the Division found that rather than issuing W-2 Forms to Mr. Hagerbrant, the corporation issued Forms 1099 without withholding income taxes. This practice prompted the Division to examine whether Mr. Hagerbrant filed and paid New York State personal income tax. The Division found that Mr. Hagerbrant filed New York State personal income tax returns and paid taxes for the years 1994 and 1995. However, he did not file a New York State personal income tax return for the year 1993.

The Forms 1099 filed by Imaging Management reported that Mr. Hagerbrant received nonemployee compensation of \$232,570.00, \$250,500.00 and \$312,500.00, respectively, in the years 1993 through 1995.

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

<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance Due</u>
01/03/93-12/03/93	\$18,605.04	\$6,879.56	\$9,021.33	\$34,505.93
01/03/94-12/03/94	0.00	1,712.28	0.00	1,712.28

<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance Due</u>
01/08/94-06/25/94	0.00	2,047.91	0.00	2,047.91

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>
01/03/93-12/03/93	\$1,047.00	\$387.14	\$1,292.88	\$2,727.02
01/03/94-12/03/94	0.00	95.96	0.00	95.96
01/03/95-12/03/95	0.00	117.00	0.00	117.00

The penalties imposed for the year 1993 were asserted pursuant to Tax Law § 685(a)(1) for failure to file a return and Tax Law § 685(b) for negligence. For the remaining years in issue, the amount of interest asserted to be due was based on the tax due on the amounts reported as “DIST FROM SUBS” which was reported on Mr. and Mrs. Hagerbrant’s New York State nonresident and part-year resident income tax returns for the years 1994 and 1995. For the latter two years in issue, Mr. Hagerbrant and his wife reported \$250,500.00 and \$312,500.00, respectively, as “DIST FROM SUBS.” These amounts corresponded with the amounts reported on Forms 1099-MISC for 1994 and 1995 as nonemployee compensation.

A banking resolution, dated July 9, 1992, gave Eric Hagerbrant the authority to act on the account of Imaging Management Services of America, Inc. The form listed Mr. Hagerbrant’s title as president.

A Certificate of Amendment of Certificate of Incorporation of RMI Associates, Inc. filed on June 23, 1992 changed petitioner’s corporate name from RMI Associates Inc. to Imaging Management Services of America, Inc. The fifth paragraph of this document stated that it was

authorized by the written consent of the sole director and shareholder. The document is signed by Eric Hagerbrant as president, secretary and sole incorporator.

The Internal Revenue Service advised petitioner on July 5, 1993, that its election to be treated as a S-corporation had been accepted.

Petitioner's Election by a Small Business Corporation, dated July 27, 1992, named only Mr. Hagerbrant as a shareholder. The form was signed by Mr. Hagerbrant as president.

The form CT-6, entitled Election by a Federal S Corporation to be Treated as a New York S Corporation, also listed only Mr. Hagerbrant's name as shareholder. Mr. Hagerbrant signed this form as president as well.

#### ***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 concluded that the record established that Mr. Hagerbrant was petitioner's president. The Administrative Law Judge rejected petitioner's argument that

Mr. Hagerbrant was an independent contractor or a consultant. The Administrative Law Judge found that the definition of “employer” and “employee” set forth in the Internal Revenue Code and its applicable regulations applied for New York State personal income tax purposes (20 NYCRR 171.1[b]). As section 3121(d)(1) of the Internal Revenue Code expressly provides that the term “employee” means “any officer of a corporation,” the Administrative Law Judge determined that Mr. Hagerbrant was an employee of petitioner and petitioner should have been deducting and withholding taxes from the wages it paid to him.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that petitioner hired Mr. Hagerbrant as a consultant and not as an employee. Petitioner further argues 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 Management Services of America, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Imaging Management Services of America, 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