

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:
of	:
<b>IMAGING ARTS BILLING SERVICES, INC.</b>	:
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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DETERMINATION  
DTA NO. 816538

Petitioner, Imaging Arts Billing Services, Inc., 37-61 87<sup>th</sup> Street, Jackson Heights, New York 11372, filed a petition 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.

On June 14, 1999 and June 23, 1999, respectively, petitioner, appearing by its controller, Stephen Sherman, and the Division of Taxation appearing by Barbara G. Billet, Esq. (Michael J. Glannon, Esq., of counsel) consented to have the matter determined on submission without a hearing. The Division of Taxation had until March 9, 2000 to comment upon the documents submitted by petitioner, which date began the six-month period for the issuance of this determination. After review of the entire record, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***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***

1. 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.

2. 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.

3. 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.

4. 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

5. 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.

6. 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.

7. 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.

8. 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.<sup>1</sup>

9. 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.

10. 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.

11. On the basis of the foregoing, the Division issued a series of notices of deficiency,

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

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

12. 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

13. 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.

14. 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.

***SUMMARY OF THE PARTIES' POSITIONS***

15. 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.

16. 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.

17. 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.

***CONCLUSIONS OF LAW***

A. Tax Law § 671(a)(1) requires every employer maintaining an office or transacting business in the State and making payment of any taxable wages to a resident or nonresident, to deduct and withhold from such wages for each payroll period a tax in an amount substantially equal to the tax reasonably estimated to be due from the employee's New York adjusted gross

income or New York source income received during the calendar year (*see also*, Administrative Code of City of NY §§ 11-1771, 11-1908). The method of determining the amount to be withheld is prescribed by regulations issued by the Commissioner (Tax Law § 674[a][1]). 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 (*see*, Administrative Code §§11-1771, 11-1775, 11-1776, 11-1908, 11-1913, 11-1914).

B. Section 675 of the Tax Law provides that every employer required to deduct and withhold tax under Article 22 is liable for such tax (*see also*, Administrative Code §§ 11-1775, 11-1913). Tax Law § 676 further provides that if an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest or additions to the tax otherwise applicable for such failure to deduct and withhold (*see also*, Administrative Code §§ 11-1776, 11-1914). Thus, the employer will be relieved of its liability for payment of the New York State personal income tax required to be deducted and withheld under sections 671 and 674 if it can meet its burden of establishing that the tax has been paid.

C. In essence, petitioner has raised three arguments. First, petitioner argues that Dr. Rabiner should not have been treated as an employee. The Division's field audit record shows that on February 2, 1997, the Division revised the Statement of Proposed Audit Adjustments so that he would not be treated as an employee. Therefore, petitioner's arguments regarding Dr. Rabiner are considered moot and will not be addressed any further.

D. The next question presented is whether Mr. Zito should be treated as an employee. The issue of whether an individual should be treated as an employee has arisen on a number of occasions (*see, e.g., Matter of Liberman v. Gallman*, 41 NY2d 774, 396 NYS2d 159; *Matter of Manhattan Fire Extinguisher, Inc.*, Tax Appeals Tribunal, September 18, 1997; *Matter of O'Keh Caterers Corp.* (Tax Appeals Tribunal, June 3, 1993) and has been dependent upon the consideration of many different factors (*see, e.g., Matter of Manhattan Fire Extinguisher, Inc., supra* [where the Tribunal considered a list of 20 factors]; *see also, Matter of Liberman v. Gallman, supra; Matter of O'Keh Caterers Corp., supra*).

In this instance petitioner has offered very little information about the nature of Mr. Zito's employment. Petitioner's evidence with respect to Mr. Zito consisted of a statement on an invoice from Medical Claims Consulting which indicates that Mr. Zito was a sales representative for a company which provided collection services for petitioner. This invoice would support the proposition that Mr. Zito was an employee of a different firm. On the other hand, the record also shows 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, it is obvious that petitioner was also treating Mr. Zito as an employee. Petitioner has not offered any explanation of why it was issuing documents to Mr. Zito as if he were an employee if petitioner did not consider him to be one. Accordingly, it is concluded that petitioner's evidence merely shows that Mr. Zito was employed by another firm in addition to petitioner and that petitioner has not sustained its burden of proof of establishing that the Division erred by treating Mr. Zito as an employee of petitioner.



E. The issue remaining is whether the Division correctly calculated the amount of tax due. Petitioner asserts that the Division assessed tax from the wrong column, i.e., that the additional tax due was determined by using the amounts listed under the column entitled “Calculated Tax Less Credits” instead of using the amounts listed in the column entitled “Tax Under Paid.”

The documents in the record do not support this argument. The Division’s Income Tax Report of Audit shows that the Division prepared a series of withholding tax workpapers which separately calculated the amount of tax which was underpaid for each year with regard to the separate New York State and New York City jurisdictions. The workpapers contain columns for the name of the employee, social security number, marital status, exemptions, wage and tax statement salary, the amount of withholding shown on the wage and tax statement, the amount of tax due, the amount of 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. Therefore, petitioner’s objection has no bearing on these years.

The withholding tax workpaper for New York State taxes for the year 1995 states that salaries were paid to a D. Perez and R. Zito in the total amount of \$187,400.00 and that taxes in the amount of \$9,020.00 were withheld and remitted from this compensation. The Division also determined that tax was due on the wage income in the amount of \$13,063.00 resulting in an underpayment of tax in the amount of \$4,043.00 ( $\$13,063.00 - \$9,020.00$ ). In turn, the Division’s Statement of Proposed Audit Adjustment explains 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 New York City withholding tax workpaper also explains that 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 Adjustment 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, \$2,421.00.

It follows from the foregoing that petitioner's argument that the Division calculated the tax due from the wrong column is without merit.

F. The petition of Imaging Arts Billing Services, Inc. is denied and the notices of deficiency dated March 24, 1997 are sustained.

DATED: Troy, New York  
August 31, 2000

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE