STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM MERKLEN	:	DETERMINATION DTA NO. 819371
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1998 and 1999.	:	

Petitioner, William Merklen, 104 Meadowpark N. Avenue, Stamford, Connecticut 06905, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1998 and 1999.

On November 26, 2003 and December 2, 2003, respectively, petitioner, appearing by William Seplowitz, P.C. (William Seplowitz, Esq., of counsel) and the Division of Taxation by Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel) consented to have this controversy determined upon documents and briefs to be submitted by June 1, 2004, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioner was a salaried employee and not an independent contractor for New York State and New York City personal income tax purposes for the years at issue.

FINDINGS OF FACT

1. William Merklen ("petitioner") is an appointed Administrative Law Judge ("ALJ") in the Parking Violations Bureau ("PVB") of the Department of Transportation of the City of New York.

2. During each of the years at issue, 1998 and 1999, petitioner filed a form IT-203, Nonresident and Part-Year Resident Income Tax Return, attached to which was a Schedule C, Profit or Loss from Business. On each Schedule C, petitioner listed his principal business or profession as "ATTORNEY AND ADMINISTRATIVE JUDGE - NYC" and indicated that he was not subject to self-employment tax as "FICA/MEDICARE WITHHELD AT SOURCE."

Attached to his return for 1998 was a form W-2, Wage and Tax Statement, on which it was indicated that petitioner earned wages in the amount of $50,928.20 from the City of New York. Attached to petitioner's 1999 return was a form W-2 which indicated that petitioner had earned wages of $48,501.64 from the City of New York for the year.

For the year 1998, the Schedule C gross income was equal to the amount of wages reported by the City of New York on the wage and tax statement (Form W-2). For 1999, petitioner's Schedule C gross income equaled the amount of wages reported on the wage and tax statement by the City of New York plus an additional $4,166.00.

3. On November 23, 2001, the Division of Taxation ("Division") issued a Statement of Proposed Audit Changes to petitioner for each of the years 1998 and 1999. On each statement,

petitioner was advised that as a salaried employee, he was not considered a business entity and, therefore, not entitled to claim Schedule C deductions. In addition, he was informed by the Division that his Federal adjustments to income had been changed to reflect the maximum allowable individual retirement account ("IRA") deduction of $2,000.00. Accordingly, the Statement of Proposed Audit Changes for 1998 adjusted petitioner's adjusted gross income by $16,306.00 ($10,858.00 in disallowed Schedule C expenses, plus $5,448.00 in disallowed Keogh and simplified employee pension deductions) which resulted in additional tax due of $1,034.24 plus interest for the 1998 tax year. The Statement of Proposed Audit Changes for 1999 adjusted petitioner's adjusted gross income by $15,725.00 ($13,394.00 in disallowed Schedule C expenses plus $6,497.00 in disallowed Keogh and simplified employee pension deductions, less $4,166.00 which was the amount by which petitioner's gross receipts for the year exceeded his wages from the City of New York) thereby resulting in additional tax due of $1,119.74 consisting of $1,006.74 in New York State personal income tax and $113.00 in New York City nonresident earnings tax.[1]

4. On January 17, 2002, the Division issued a Notice of Deficiency to petitioner in the amount of $1,034.24, plus interest, for a total amount due of $1,260.19 for the year 1998. Also, on January 17, 2002, the Division issued a Notice of Deficiency to petitioner in the amount of $1,119.74 ($1,006.74 in State tax and $113.00 in City tax), plus interest, for a total amount due of $1,271.61 for the year 1999.

5. On each of the forms W-2 which were attached to petitioner's returns for the years at issue, it was indicated that Federal income tax, Social Security/Federal Insurance Contributions

[1] For 1998, as a result of overwithholding, no additional New York City nonresident earnings tax was asserted to be due.

Act ("FICA") tax, Medicare tax, New York State and New York City income tax and section 414(h) New York State Retirement System payroll contributions were withheld from the sums paid to petitioner by The City of New York.

6. While the forms W-2 for each of the years at issue list petitioner's address as "80-15 Grenfell St., Kew Gardens, New York 11415," his income tax returns for these years list his address as "104 Meadow Park Avenue North, Stamford, CT 06905."

7. Petitioner is required by the PVB to comply with instructions about when, where and how his work as an ALJ for the PVB is to be performed.

8. The PVB requires petitioner to be trained by working with an experienced employee, to work with others, to attend meetings or to use specified work methods.

9. Petitioner's work services as an ALJ are integrated into the business operation of the PVB.

10. Petitioner's services as an ALJ for the PVB must be rendered personally.

11. The PVB hires, supervises and pays assistants as part of its business operation.

12. Petitioner maintains a continuing relationship with the PVB with services performed at frequently recurring, though irregular, intervals.

13. The PVB maintains an established set of hours of work concerning the performance of petitioner's ALJ services.

14. Petitioner must devote substantially full time to the performance of his services as an ALJ.

15. Petitioner performs services on PVB premises.

16. The PVB maintains an established order or sequence concerning the performance of petitioner's ALJ services.

17. Petitioner is required to submit regular oral or written reports.

18. The PVB maintains an established payment at regular intervals, by the hour, week or month for ALJ services performed by petitioner.

19. The PVB pays for petitioner's business and/or traveling expenses.

20. The PVB furnishes tools, materials and other equipment to petitioner in the performance of his ALJ services.

21. Petitioner does not make investments in significant facilities used in the performance of his ALJ services which are not typically maintained by ALJs of the PVB.

22. Petitioner cannot realize a profit or suffer a loss as a result of the performance of his ALJ services for the PVB.

23. Petitioner does not perform more than de minimis services for a number of unrelated firms or persons at the same time.

24. Petitioner does not make his services as an ALJ for the PVB available to the general public on a regular basis.

25. The PVB retains the right to discharge petitioner as a worker.

26. Petitioner retains the right to end his worker relationship as an ALJ for the PVB at any time he wishes without incurring liability.[2]

27. Petitioner was appointed to his position as an ALJ with the PVB pursuant to a letter from the New York City Department of Transportation dated December 16, 1988. The letter

[2] On October 8, 2003, the Division served a Notice to Admit pursuant to 20 NYCRR 3000.6(b)(1) upon petitioner's representative. No response to the Notice to Admit was served upon the Division. Accordingly, pursuant to 20 NYCRR 3000.6(b)(2), each of the matters as to which an admission was requested are deemed admitted. Findings of Fact "7" through "26" are reflective of such matters to which an admission was requested but no response was received.

indicated that the appointment was on a per diem basis and that the dates and places of his hearing assignments would be arranged by the PVB.

28. On September 24, 2003, the Internal Revenue Service ("IRS") served a Notice of Deficiency upon petitioner which asserted a deficiency of Federal income tax in the amount of $4,950.00 for the tax year ended December 31, 2001. The deficiency arose from a determination by the IRS that petitioner failed to pay self-employment tax with the filing of his return.

29. Petitioner filed a petition dated December 19, 2003 seeking a redetermination of the aforesaid deficiency. In the petition, petitioner alleged that by reason of the fact that FICA and Medicare taxes were paid at the source by the payer of the income included on petitioner's Schedule C, that he is not subject to the remittance of any self-employment tax.

SUMMARY OF PETITIONER'S POSITION

30. In support of his position that he was an independent contractor and not an employee of the City of New York, petitioner submitted the following:

a. A letter dated March 27, 2002 from Salvatore Russo, Manager, Payroll Section of the City of New York's Department of Finance which stated that hearing officers are not recognized as employees of the City of New York but are considered to be independent contractors. The letter also states that hearing officers do not have union representation and, therefore, do not receive union pay raises. It further states that hearing officers are not authorized to receive health benefits as do all recognized employees of the City of New York, nor can they become members of the New York City Employees' Retirement System;

b. A letter dated March 7, 1991 from the New York City Employees' Retirement System which indicates that in the opinion of the Corporation Counsel of the City of New

York, ALJs should not be considered City employees. The letter further stated that petitioner's membership in the retirement system will, therefore, be terminated; and

c. A letter dated September 25, 2003 from the New York City Employees' Retirement System which states that the New York City Corporation Counsel has established that ALJs employed by either the Department of Transportation or the Department of Finance are not deemed to be City employees and are thus ineligible to become members of the retirement system. The letter further states that petitioner was erroneously certified as a member of the retirement system as of October 23, 1990, but the membership has since been withdrawn. Although payroll deductions toward this withdrawn membership continued for the length of petitioner's employment, such amounts would be refunded in full with an additional 5% in interest. In 2003, the amount of $27,007.67 was refunded to petitioner from the New York City Employees' Retirement System.

31. In his brief submitted on April 5, 2004, petitioner asked that a determination of this matter be deferred until a matter "involving the same issues" for the year 2001 was concluded by the United States Tax Court. Although petitioner's request was not granted, he nonetheless submitted, on August 6, 2004, a letter dated July 26, 2004 from the IRS, Office of Division Counsel, and accompanying documents purporting to show that the IRS accepted petitioner's status as a self-employed person. The letter and documents were the result of a settlement reached by petitioner with the IRS wherein the amount of self-employment tax was revised.

At the same time, i.e., August 6, 2004, petitioner also submitted a letter dated June 30, 2004 from an attorney who represented petitioner in a matter before the United States Equal Employment Opportunity Commission along with a Dismissal and Notice of Rights. These documents apparently related to an action against the New York City Department of Finance and

the Dismissal and Notice of Rights indicates thereon that the Equal Employment Opportunity Commission was closing its file for the following reason: "no employee/employer."

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 631(a), the starting point for determining the New York source income of a nonresident individual is the net amount of items of income, gain, loss and deduction entering into his Federal adjusted gross income, as defined in the Internal Revenue Code ("IRC"), which are derived from or connected with New York sources.

B. IRC § 162(a) provides for a deduction for all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Business expenses of an individual engaged in his own trade or business are deductible on Schedule C of such individual's Federal return (Form 1040). An individual who is an employee may deduct ordinary and necessary business expenses as adjustments to income on Form 2106 (Employee Business Expenses) or as miscellaneous itemized deductions on Form 1040.

C. In the present matter, petitioner filed a Schedule C for each of the years at issue indicating that his principal business or profession was "ATTORNEY AND ADMINISTRATIVE JUDGE - NYC." Upon audit by the Division, it was determined that petitioner was a salaried employee, not a business entity, and that he was, therefore, not entitled to claim Schedule C deductions. Accordingly, it must be determined whether petitioner, as an ALJ for the PVB of the Department of Transportation of the City of New York, was an employee or an independent contractor during the years at issue.

D. Since petitioner was receiving compensation from the City of New York pursuant to his work as an ALJ for the PVB, it is appropriate to examine the regulations of the City of New York in this matter. While in his brief submitted on April 5, 2004, petitioner cited to section 236

of the Vehicle and Traffic Law (the statute which created the PVB) which, in subdivision (2)(d) thereof, states that "[s]uch hearing examiners shall not be considered employees of the city in which the administrative tribunal has been established," it is well established that "[t]he designation and description of the relationship by the parties, whether by contract or otherwise, is not necessarily determinative of the status of the individual for . . . tax purposes." (19 RCNY 28-02[e][3].) This principle also applies to designation and description of the relationship for purposes of union representation and benefits and membership in a retirement system. Therefore, the evidence presented by petitioner relating to petitioner's status in the union and in the New York City Employees' Retirement System cannot be found to be determinative of the issue of whether, for income tax purposes, petitioner was an independent contractor or an employee.

E. As noted by the Tax Appeals Tribunal in ***Matter of Manhattan Fire Extinguisher, Inc.*** (Tax Appeals Tribunal, September 18, 1997), the existence of an employer-employee relationship depends upon the facts of a particular case. The Tribunal went on to list 20 factors which were developed by the IRS in Revenue Ruling 87-41 which were as follows:

> 1. Instructions. If the individual is required to comply with instructions about when, where and how the work is to be performed, it indicates that he or she is an employee.
>
> 2. Training. If a worker is trained by being required to work with an experienced employee, to work with others, to attend meetings or to use specified work methods, this indicates an employment relationship.
>
> 3. Integration. Integration of the worker's services into the business operation generally shows that the worker is subject to direction and control.
>
> 4. Rendering Services Personally. If the services must be rendered personally, it indicates the existence of an employment relationship.

5. Hiring, Supervising and Paying Assistants. If the person for whom the service is performed hires, supervises and pays assistants, such action shows control over the workers on the job.

6. A Continuing Relationship. A continuing relationship performed at frequently recurring though irregular intervals is indicative of an employment relationship.

7. Set Hours of Work. The establishment of set hours of work by the person(s) for whom the services are performed is a factor indicating control.

8. Full Time Required. If the worker must devote substantially full time to the business, control exists over the amount of time the worker spends working and is indicative of an employment relationship.

9. Doing Work on Employer's Premises. The fact that the work is performed on the premises of the person(s) for whom the services are performed suggests control over the worker, especially if the work could be done elsewhere.

10. Setting Order or Sequence. If the services must be performed in an order or sequence set by the person(s) for whom the services are being performed, it shows that the worker is not free to follow his or her own pattern of work.

11. Oral or Written Reports. The requirement that the worker submit regular oral or written reports indicates control by the person(s) for whom the services are being performed.

12. Payment at Regular Intervals. Payment by the hour, week or month indicates an employment relationship, provided that it is not simply a way to pay a lump sum set forth in an agreement.

13. Payment of Business and/or Travel Expenses. Payment of the worker's business and/or traveling expenses by the person(s) for whom the services are being performed indicates an employment relationship.

14. Furnishing Tools and Material. The fact that the person(s) for whom the services are being performed furnishes tools, materials and other equipment tends to show the existence of an employer-employee relationship.

15. Significant Investment. Investment by the worker in significant facilities used in performing services and not typically maintained by employees tends to indicate that the worker is an independent contractor.

16. Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of services provided (in addition to the profit or loss ordinarily realized by an employee) is generally an independent contractor.

17. Working for More Than One Firm at a Time. If a worker performs more than de minimis services for a number of unrelated firms or persons at the same time, it generally indicates that the worker is an independent contractor.

18. Making Service Available to the General Public. The fact that a worker makes his or her services available to the general public on a regular basis indicates an independent contractor relationship.

19. Right to Discharge. The right to discharge a worker indicates that the worker is an employee.

20. Right to Terminate. An employer-employee relationship is indicated if a worker has the right to end the relationship at any time he or she wishes without incurring liability.

F. As previously noted in the footnote to Finding of Fact "26", Findings of Fact "7" through "26" reflect matters to which an admission was requested but no response was received. A review of these matters which were contained in the Notice to Admit served upon petitioner pursuant to 20 NYCRR 3000.6(b)(1) reveals that each was derived from the factors as set forth in Conclusion of Law "E". Since petitioner failed to respond to the Division's Notice to Admit, each of the matters to which as admission was requested is deemed admitted pursuant to 20 NYCRR 3000.6(b)(2). Accordingly, since petitioner's services as an ALJ for the PVB met each and every factor for an employer-employee relationship as set forth in Revenue Ruling 87-41, it is hereby determined that the Division properly determined that petitioner was a salaried employee and not an independent contractor for the years at issue and that the adjustments to petitioner's income were, therefore, proper.

It must also be noted that while petitioner submitted evidence relating to a matter before the United States Tax Court purporting to involve the same issues for a subsequent tax year

(2001), it is unclear from the settlement reached between petitioner and the IRS why some adjustments were made to the self-employment tax deficiency originally asserted. Even if petitioner was correct that the same issues were involved (and from the documentary evidence presented, that assertion cannot be confirmed), the Division, in its brief submitted on May 4, 2004, correctly noted that it is not bound by a Federal determination of a taxpayer's income, but may conduct its own independent audit or investigation and reach its own determination (***see***, 20 NYCRR 159.4; ***Matter of Dufton***, Tax Appeals Tribunal, April 6, 1995).

G. The petition of William Merklin is denied and the notices of deficiency issued by the Division of Taxation to petitioner on January 17, 2002 are hereby sustained.

DATED: Troy, New York
November 18, 2004

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE