

*Income Tax Determinations*  
BUREAU OF LAW

MEMORANDUM

*A-2*  
*Maney, Elizabeth*  
*and*  
*Richard*

TO: State Tax Commission

FROM: Francis V. Dow, Hearing Officer

SUBJECT: RICHARD AND ELIZABETH MANEY  
Petition for Redetermination of a  
Deficiency or for Refund of Personal  
Income Taxes under Article 22 of the  
Tax Law for the Year 1964

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, New York on January 24, 1968. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The taxpayers filed a nonresident income tax return for the year 1964 in which they reported total New York income of \$15,000 earned by the taxpayer, Richard Maney, as a press agent. They claimed medical expenses in the amount of \$1,132.48, contributions in the amount of \$350 and other deductions in the amount of \$5,217.04, a percentage of which amount they deducted in computing their New York adjusted gross income.

Two notices of deficiency and statements of audit changes (File No. 13098324) were issued for 1964 on January 16, 1967. One notice of deficiency was issued against both taxpayers and determined that additional personal income tax was due in the amount of \$77.04 on the basis that contributions in the amount of \$197, medical expenses in the amount of \$111.07 and other deductions in the sum of \$1,268.20 were disallowed as unsubstantiated. The other notice of deficiency was issued against the taxpayer, Richard Maney, and determined that unincorporated business tax, penalty and interest was due in the sum of \$141.91 on the basis that he is deemed subject to the unincorporated business tax because he works for two or more employees at the same time.

The taxpayers did not submit any documentary or other sufficient evidence to substantiate the disallowed amounts claimed for medical expenses, contributions and other deductions.

The taxpayer, Richard Maney, is a press agent engaged to obtain publicity for various theatrical attractions. He is a member of the Association of Theatrical Press Agents and Managers, Union No. 18032, AFL-CIO. The Union entered into a "minimum basic agreement" with the League of New York Theatres, Inc. for the year 1964 which provided for wage scales, working conditions and fringe benefits.

Neither the agreement nor standard individual contracts of employment provided for in the "minimum basic agreement" entered into by the taxpayer with producers of theatrical attractions have provisions that the taxpayer is entitled to reimbursement of all his expenses. The taxpayer claimed that he was entitled to reimbursement of every expense incurred in his occupation, but did not ask reimbursement for some of them because he was paid considerably over scale and did not think it right to ask reimbursement. He claimed that he was not reimbursed for the following expenses incurred during the year: office rent--\$1,200; postage--\$353.82; office supplies--\$83.74; water--\$75.61; newspapers and periodicals--\$304.90; telephone and telegraph--\$1,070.24; accountant--\$75; taxis and car fares--\$780; entertaining newsmen--\$370; reference books--\$21.35; press clippings--\$41.02; hotel expense--\$42.06; depreciation--\$50; gratuities--\$78.20.

The taxpayer's individual contracts of employment refer to the taxpayer as an employee. Deductions were withheld from his compensation for disability benefits insurance, union dues, social security and income taxes. He was covered by workmen's compensation insurance and unemployment insurance. The taxpayer had no employees. In the event that the taxpayer required an assistant while acting as a press agent for an attraction, an assistant would be engaged by a producer of the attraction. The taxpayer was not furnished an office by any of the producers who engaged him.

The union's constitution and by-laws permitted the taxpayer to act as a press agent for no more than six theatrical attractions at one time. During the year 1964, the taxpayer was engaged by four producers. From January 1, 1964 until June 5, 1964, he was never engaged by more than two producers simultaneously and from June 6, 1964 to September 18, 1964, he was engaged by only one producer. After September 18, 1964, he was not employed for the balance of the year.

The taxpayer was subject to the supervision of the producers with regard to the means sought by him to obtain publicity for the theatrical attractions.

The issue in the matter was considered by the Tax Commission on similar facts in which an assessment issued against Benjamin Kornswieg was sustained and assessments issued against James B. Proctor were cancelled. Benjamin Kornswieg and James B. Proctor were also press agents for theatrical attractions. Benjamin Kornswieg acted as a free lance press agent, whereas James B. Proctor and the taxpayer herein did not. A copy of the memoranda in these matters is attached hereto.

It is my opinion that the evidence presented at the hearing shows that taxpayer's activities, as a press agent, were performed by him as an employee and not as an independent contractor and, accordingly, the income from such activities was not subject to the unincorporated business tax within the intent and meaning of Section 703 of the Tax Law. It is noted that assessments were issued against the taxpayer assessing unincorporated business tax on his activities for the years 1939, 1955, 1956 and 1957. These assessments were subsequently cancelled by the Income Tax Bureau.

For the reasons stated above, I recommend that the decision of the State Tax Commission in the above matter cancelling the tax deficiency issued for unincorporated business tax, penalty and interest in the sum of \$141.91 and otherwise denying the taxpayers' application be substantially in the form submitted herewith.

/s/

FRANCIS V. DOW

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Hearing Officer

FVD:rlp  
Enc.  
April 1, 1968

4-4-68

## BUREAU OF LAW

## MEMORANDUM

TO: Commissioners Murphy, Palestin and MacDuff

FROM: Mr. Kelliher

SUBJECT: BENJAMIN KORNZWEIG

1956 Assessment  
Article 16 and Article 16-A of the Tax Law

JAMES D. PROCTOR

1955 and 1956 Assessments  
Article 16-A of the Tax Law

The issue involved in both cases is whether or not the income of either of the taxpayers, as press agents, reported as salaries is subject to the unincorporated business tax. Both taxpayers are members of the Association of Theatrical Press Agents and Managers, which has a "minimum basic agreement" with the League of New York Theaters which represents 85 per cent of the producers and theater operators in the United States.

This agreement specifies the minimum terms under which theatrical press agents and others may be employed. Each producer executes such an agreement when a play comes into being. In addition, the producer and the press agent enter into an individual printed standard contract prepared by the union, based on the terms of the aforementioned agreement wherein the producer is designated as employer and the press agent is designated as employee at an agreed weekly salary for an indefinite period, usually for the run of the play. The "minimum basic agreement" permits multiple employment of press agents in New York City. Whenever a press agent is required to be employed and represents two attractions, whether for the same producers or for a second producer, an associate press agent is required to be employed by the producer. Deductions are made by the producer for withholding and social security taxes, and unemployment and workmen's compensation insurance on behalf of the press agent who is also entitled to vacation pay in accordance with the "minimum basic agreement." The union does not secure employment for its members and there is no restriction as to outside or independent work that a member may secure.

The taxpayer Benjamin Kornzweig, on his 1956 income tax return, sets forth the sum of \$1,800 as fees from freelance activities as a press agent in the theatrical field, and also the sum of \$13,503.75 as salaries received from six producers as a press agent or associate press agent. Included in this latter mentioned amount, the sum of \$2,505 was received

from Newton Productions under a nonunion contract; the balance from five other producers were all under union contracts.

The taxpayer Benjamin Kornzweig testified that during the year 1956 he maintained an office in the City of New York which he shared with others at his own expense; that he also shared secretarial services whenever necessary for which he was not reimbursed; that whenever he could prevail upon the producer to furnish an assistant, the producer would pay for the services of such assistant; that there were, however, occasions when he was required to pay for the services of an assistant without receiving any reimbursement therefor; and that he was required to have a telephone answering service for which he was not reimbursed. The taxpayer further testified that there was no difference in the type of work that he was required to perform in his independent press agent work from that which he was required to perform under union contracts with producers. The activities of the taxpayer in connection with his union contracts required that he create the proper publicity stories for the opening date set for the particular production; that he was to provide newspapers and periodicals with enough material, information and photographs relating to the production, which also involved advertising, getting up play bills, programs, window cards and printing; that such activities were performed from his office and by contact with the producer and also in the theater and working with actors, getting their biographies, etc.; that he received requests from producers as to the preferred media to place the publicity; and that although he received some instructions from the producer as to the type of publicity desired, he was not required to devote his entire working day to any particular producer, nor was he under the complete supervision and control of the producer who engaged his services.

The taxpayer James D. Proctor on his income tax returns for the years 1955 and 1956, on Schedule A, reported net income from business as "press agent and author at 545 Fifth Avenue, New York, New York" as \$8,196.24 and \$6,829.26, respectively. The taxpayer filled out IT-202's for each of the years involved and paid unincorporated business taxes for said years based on the net income previously mentioned.

In addition to the foregoing, the taxpayer, on his income tax returns for the years 1955 and 1956 listed wages received as a press agent from the following stage productions:

|                        | <u>1955</u>       | <u>1956</u>        |
|------------------------|-------------------|--------------------|
| Wedding Breakfast      | \$1,680.00        | 0                  |
| A View from the Bridge | 5,007.50          | \$ 1,250.00        |
| Diary of Anne Frank    | 1,857.50          | 12,500.00          |
| Johnny Johnson Company | 0                 | 250.00             |
|                        | <u>\$8,545.00</u> | <u>\$14,000.00</u> |

During the years 1955 and 1956 and prior thereto, the taxpayer was a member of the Association of Theatrical Press Agents and Managers which has a "minimum basic agreement" with the League of New York Theaters. This agreement specifies the minimum terms under which theatrical press agents and others may be employed. Each producer executes such an agreement when a play comes into being. In addition, the producer and the press agent enter into an individual printed standard contract prepared by the union, based on the terms of the aforementioned agreement wherein the producer is designated as employer and the press agent is designated as employee at an agreed weekly salary for an indefinite period, usually for the run of the play. The "minimum basic agreement" permits multiple employment of press agents in New York City. Whenever a press agent is required to be employed and represents two attractions, whether for the same producer or for a second producer, an associate press agent is required to be employed by the producer. Deductions are made by the producer for withholding and social security taxes, unemployment and workmen's compensation insurance on behalf of the press agent. The union does not secure employment for its members and there is no restriction as to outside or independent work that a member may secure.

The taxpayer testified that during the years 1955 and 1956, he was press agent for three shows, two of which were running concurrently, all produced by Kermit Bloomgarden; that in connection with his theatrical press agent work he had to be available to the producer either by phone or in person whenever the producer felt it necessary; that he had to follow a routine of advertising on a production which was determined by the producer and along the lines indicated to him by the producer in terms of what he wanted to sell or how he wanted to promote a particular play; that beyond that, there was a fixed, almost automatic routine for all press agents, which involved getting on TV and radio, and getting into newspapers with pictures and stories, etc., interviewing actors, rating the programs, getting copy on articles to whatever city they opened in, publicizing the return to New York and publicizing it in advance of the New York opening, following the opening and continuing on a day-to-day

basis and following through on promotional advertising; that he did not engage nor did he pay for the services of any employees in connection with his theatrical press agent work; that the producer in accordance with the union agreement would employ an associate press agent or have the union send over an apprentice to assist him; and that in such event, the taxpayer supervised the associate press agent or apprentice who worked with him on the particular play. The taxpayer further testified that "in all cases, producers have their own offices which are opened to all press agents" (Minutes of Hearing, Page 18); that the overhead of such an office and such facilities were available to him without charge by the producer (Minutes of Hearing, Page 19); that the press agent is only permitted or allowed six productions in the course of a year; that the taxpayer had no relations with outside or independent producers not affiliated with the Association of Theatrical Press Agents and Managers; that the taxpayer used his own stationery in connection with his independent public relations consultant business but, in relation to the theatrical productions, the releases always indicated that they were for the producer of the play; and that the taxpayer's activities did not interfere with his independent public relations business which he was able to perform at his convenience.

The hearing officer is of the opinion, with which I concur, that the income received as a press agent by Benjamin Kornzweig should be subject to unincorporated business taxes while that of James D. Proctor should be exempt. The difference results from the fact that whereas Benjamin Kornzweig maintained an office at his own expense, was hired as a press agent by six different producers and had engaged during the years involved in free-lance activities, the income from his free-lance activities was interconnected and interdependent with his free-lance activities as a press agent for the principal.

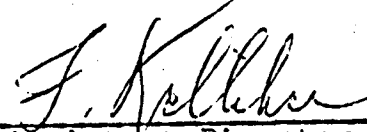
Moreover, the taxpayer employed one or more assistants without reimbursement and was not under any supervision and control by the numerous principals as to the method or means of accomplishing the desired results.

The taxpayer, James D. Proctor, on the other hand, expended his press agent efforts on behalf of one producer and was subject to such producer's supervision and control.

In addition, the income from the taxpayers independent business activity as a public relations consultant was in no way interconnected with his activity as a press agent and could not be considered as part of that business.

I am, therefore, approving the proposed determinations holding that the assessment issued against Benjamin Kornzweig for the year 1956 be sustained and the assessments issued against James D. Proctor for the years 1955 and 1956 be canceled.

If you agree, kindly sign the determinations in both matters and return the files to this Bureau for further disposition.



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Assistant Director

MS:pad/rlp  
Enclosures  
September 9, 1964



**STATE OF NEW YORK  
STATE TAX COMMISSION**

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**IN THE MATTER OF THE PETITION**

**OF**

**RICHARD AND ELIZABETH HANEY**

**FOR A DETERMINATION OF A DEFICIENCY  
OR FOR REFUND OF PERSONAL INCOME TAXES  
UNDER ARTICLE 22 OF THE TAX LAW FOR THE  
YEAR 1964**  
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The taxpayers herein, having filed a petition for re-determination of a deficiency or for refund of personal income taxes under Article 22 and unincorporated business taxes under Article 23 of the Tax Law for the year 1964, and a hearing having been held in connection therewith at the office of the State Tax Commission, 50 Centre Street, New York, New York on January 24, 1966 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer, Richard Haney, appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed a nonresident income tax return for the year 1964 in which they reported total New York income of \$15,000 earned as a press agent; that the taxpayers deducted medical expenses in the amount of \$1,132.48, contributions in the amount of \$350.00 and other deductions in the amount of \$5,217.04, on their Federal income tax return for 1964 and deducted a percentage of such deductions in computing their New York taxable income.

(2) That two notices of deficiency and statements of audit changes were issued for the year 1964 on January 16, 1967 (File No. 13098324); that one of the notices of deficiency and statement of audit changes was issued against the taxpayers, Richard and Elizabeth Haney, which determined additional personal income tax and

interest due in the amount of \$55.04 on the basis that contributions in the amount of \$177.00, medical expenses in the amount of \$111.07 and other deductions in the amount of \$1,288.20 were disallowed as unsubstantiated; that the other notice of deficiency and statement of audit changes was issued against the taxpayer, Richard Nancy, which determined unincorporated business tax, penalty and interest due in the sum of \$141.91 on the basis that the taxpayer is deemed subject to unincorporated business tax because he works for two or more employers at the same time and does not have a principal employer.

(3) That the taxpayers did not submit any documentary or other sufficient evidence to substantiate the disallowed amounts of the deductions claimed for medical expenses, contributions and other deductions.

(4) That the taxpayer, Richard Nancy, is a press agent engaged to obtain publicity for various theatrical attractions; that he is a member of the Association of Theatrical Press Agents and Managers, Union No. 18032, AFL-CIO; that the union has a "minimum basic agreement" with the League of New York Theatres, Inc. which was in effect during 1964; that the agreement provides for wage scales, working conditions and fringe benefits of members of the union; that the agreement provided that, "The employer if called upon by the Union shall provide satisfactory sureties for the payment and discharge of all obligations assumed to their employees in the form of salaries and authorized expenses, pursuant to the terms of the individual and respective standard individual contract of employment"; that the contract further provided that, "All expense statement of monies expended on the Employer's behalf shall be paid by 6:00 p.m. on Saturday, provided such statements are rendered to the Employer sufficiently in advance for such payment to be made."; that the

standard individual contracts of employment entered into by the taxpayer and producers of theatrical attractions contained no provision for the payment of expenses.

(5) That the taxpayer was reimbursed for expenses incurred on his duties as a press agent by producers who engaged his services; that the taxpayer claimed unreimbursed business expenses on his 1944 income tax returns as follows: office rent--\$1,200.00; postage--\$353.82; office supplies--\$83.74; water--\$75.61; newspapers and periodicals--\$304.90; telephone and telegraph--\$1,070.24; accountant--\$75.00; taxis and car fares--\$780.00; entertaining newsmen--\$370.00; reference books--\$21.35; press clippings--\$41.02; hotel expense--\$42.04; depreciation--\$50.00; gratuities--\$78.20; that the taxpayer claimed that he was entitled to be reimbursed for all of his expenses from producers who engaged his services, but was not reimbursed for some of them because he was paid considerably above scale and did not think that it was right to ask for reimbursement of the above expenses.

(6) That the individual contracts of employment entered into by the taxpayer with producers refer to the taxpayer as an employee; that social security and income taxes and deductions for disability benefits insurance and union dues were withheld from the compensation received by the taxpayer; that the taxpayer was covered by workmen's compensation insurance and unemployment insurance.

(7) That the taxpayer had no employees; that in the event that the taxpayer needed an assistant while acting as a press agent for a theatrical attraction, such assistant would not be an employee of the taxpayer but would be engaged by the producer of such attraction; that the taxpayer was not furnished an office by anyone for whom he performed services; that the taxpayer did not act as a free lance press agent.

(8) That the union's constitution and by-laws permitted the taxpayer to act as a press agent for no more than six theatrical attractions at one time; that during the year, the taxpayer was engaged by four producers; that, however, from January 1, 1964 until June 5, 1964, the taxpayer was never engaged by more than two producers simultaneously; that from June 6, 1964 to September 18, 1964, he was engaged by one producer and was not engaged by any producer during the balance of the year.

(9) That the taxpayer was subject to the supervision of producers with regard to the means sought to obtain publicity for theatrical attractions.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

**DECIDES:**

(A) That the taxpayers, Richard and Elisabeth Nancy, failed to substantiate their deductions in the amounts of \$197.00 claimed for contributions, \$111.07 claimed for medical expenses and \$1,288.20 claimed for other deductions since they did not submit documentary or other satisfactory evidence to support their claim, and, accordingly, they were properly disallowed.

(B) That, accordingly, the notice of deficiency and statement of audit changes for the year 1964 determining additional personal income tax and interest due in the amount of \$55.04 are correct and do not include any tax or other charge which could not have been lawfully demanded; that the taxpayers' petition for redetermination to the extent that it relates to the deficiency or refund of additional personal income taxes determined for the year 1964 be and the same is hereby denied.

(C) That the taxpayer, Richard Nancy's, activities as a press agent were conducted by him as an employee and not as an

independent contractor and did not constitute the carrying on of an unincorporated business, and accordingly, were not subject to the unincorporated business tax.

(D) That the notice of deficiency and statement of audit changes for the year 1964 which determined unincorporated business tax, penalty and interest were improper and should be cancelled and the same are hereby cancelled in full.

DATED: Albany, New York on this 19th day of April, 1968.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**PRESIDENT**

/s/

A. BRUCE MANLEY

**COMMISSIONER**

/s/

SAMUEL E. LEPLER

**COMMISSIONER**