

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Edward F. & Elizabeth C. McDougal :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income and Unincorporated Business :  
Taxes under Articles 22 and 23 of the Tax Law and :  
Chapter 46, Title U of the Administrative Code of :  
the City of New York for the Years 1976 and 1977. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

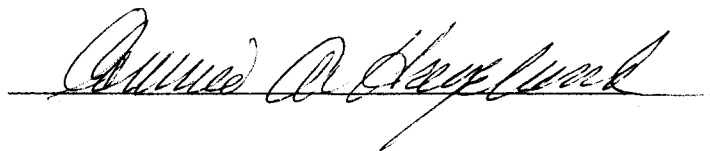
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Edward F. & Elizabeth C. McDougal, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

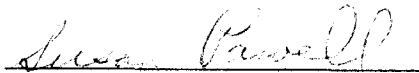
Edward F. & Elizabeth C. McDougal  
200 E. 82nd St., Apt. 5D  
New York, NY 10028

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
28th day of September, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Edward F. & Elizabeth C. McDougal :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income and Unincorporated Business :  
Taxes under Articles 22 and 23 of the Tax Law and :  
Chapter 46, Title U of the Administrative Code of :  
the City of New York for the Years 1976 and 1977. :  
AFFIDAVIT OF MAILING

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon James M. Casey the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James M. Casey  
J.M. Casey & Co.  
50 East 42nd Street  
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
28th day of September, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

September 28, 1983

Edward F. & Elizabeth C. McDougal  
200 E. 82nd St., Apt. 5D  
New York, NY 10028

Dear Mr. & Mrs. McDougal:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
James M. Casey  
J.M. Casey & Co.  
50 East 42nd Street  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
EDWARD F. AND ELIZABETH C. McDOUGAL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law and Chapter 46, Title U of the Adminis-	:	
trative Code of the City of New York for the	:	
Years 1976 and 1977.	:	

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Petitioners, Edward F. and Elizabeth C. McDougal, 200 E. 82nd Street, Apt. 5D, New York, New York 10028, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law and New York City non-resident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1976 and 1977 (File Nos. 29750, 29751, 30348 and 30349).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 29, 1982 at 1:30 P.M. Petitioners appeared by James M. Casey, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether petitioner's wage income as an employee was so integrated and interrelated with his independent business income as to subject said wage income to unincorporated business tax.

II. Whether penalties should be cancelled where petitioner, in reliance on his accountant's advice, failed to file an unincorporated business tax return

for 1976 based on the assumption that his occupation as a public relations consultant was an exempt profession.

FINDINGS OF FACT

1. Petitioners, Edward F. and Elizabeth C. McDougal, filed New York State income tax resident returns for the years 1976 and 1977 and petitioner Edward F. McDougal filed a New York State Unincorporated Business Tax return for 1977.

2. On March 3, 1980 the Audit Division issued two notices of deficiency against petitioners. One was in the amount of \$5,934.12, plus penalty and interest of \$3,776.54, for a total due of \$9,710.66 for the year 1976. The other deficiency was in the amount of \$57.72, plus penalty and interest of \$23.66, for a total due of \$81.38 for the year 1977. On the same date the Audit Division issued two notices of deficiency against petitioner Edward F. McDougal. The first was in the amount of \$4,773.34, plus penalty and interest of \$1,169.22, for a total due of \$5,942.56 for the year 1976. The other deficiency was in the amount of \$1,215.83, plus penalty and interest of \$194.48, for a total due of \$1,410.31 for the year 1977.

3. Two statements of audit changes issued December 3, 1979 explained that petitioners had failed to establish a division of working time and, as a result, wage income was considered an intricate part of business income and subject to unincorporated business tax. Additionally, total business income, as recomputed by the Audit Division, was considered subject to New York City nonresident earnings tax because petitioners' self-employment income could not be allocated based on days worked outside New York State. The statements also explained that penalties were being assessed for failure to file and pay tax when due.

4. At the hearing, petitioner (all references to petitioner will refer to Edward F. McDougal only) conceded that he owed penalty for late filing and payment of his income taxes but not for the late filing and payment of unincorporated business taxes because, based on the advice of his accountant, he had erroneously believed that his occupation of public relations consultant was exempt as a profession. Petitioner conceded at the hearing that his occupation is not an exempt profession. Petitioner also conceded that he could not allocate his income based on days worked within and without New York City. The only issues remaining to be decided were whether petitioner's salary was subject to unincorporated business tax and whether penalties should be waived.

5. During the first half of 1976 petitioner worked as a free-lance public relations consultant and writer out of an office he maintained in his home. Petitioner received assignments from various clients and advertising agencies. During this period petitioner worked on several assignments for Jack Raymond & Company, Inc. ("Jack Raymond").

6. Sometime around mid-year 1976 petitioner went to work full time for Jack Raymond. Petitioner remained full time with Jack Raymond until September, 1977. Petitioner worked on a salary basis for Jack Raymond and was paid twice a month. In 1976 Jack Raymond paid petitioner a total salary of \$39,333.26 and in 1977 paid petitioner a total salary of \$46,904.20. Petitioner received no commissions, but did receive a termination bonus in November, 1977. During petitioner's employment, Jack Raymond withheld Federal, State and FICA taxes according to 1976 and 1977 state tax returns and a 1977 wage and tax statement. Jack Raymond reimbursed petitioner for business and travel expenses and provided office space and clerical assistance. Petitioner did the same type of work for Jack Raymond as he had when he was on his own. However, when he started

working for Jack Raymond, he no longer did any free-lance work for other principals, rather he worked solely for Jack Raymond doing only those jobs assigned by his employer. Petitioner was required to be at his job at regular hours, five days a week. Petitioner was also required to travel at the direction of Jack Raymond.

7. In September, 1977 petitioner decided he wanted to work for himself on a free-lance basis again so that he would be able to pick and choose his own clients and set his own hours and amounts of travel. Petitioner, therefore, left the full-time employ of Jack Raymond on September 30, 1977. After that date petitioner remained in an office provided by Jack Raymond for which petitioner paid \$800.00 per month. Included in this fee was use of the office, as well as clerical assistance. From September 30, 1977 until the end of the taxable year in issue, petitioner worked for whatever clients he chose, paid for his own business and travel expenses, and had his name listed separately from Jack Raymond's on the building directory and office door. Petitioner was paid directly by the clients or advertising agencies which employed him. He no longer worked solely for one employer.

8. Petitioner conceded that unincorporated business tax was due for the first six months of 1976 and the last three months of 1977 when he was working for himself. Petitioner maintained, however, that no unincorporated business tax was due on the \$39,333.26 he earned as a salary in 1976 and the \$46,984.20 he earned in 1977 while working for Jack Raymond, as this was salary for personal services rendered as an employee.

9. Petitioner further argued that as to the unincorporated business tax due during his self-employment periods, no penalties should be assessed because

he relied in good faith on the advice of his accountant that public relations consultant was a profession which was exempt from the unincorporated business tax.

CONCLUSIONS OF LAW

A. That section 703(b) of the Tax Law provides that:

"(t)he performance of services by an individual as an employee...of a corporation...shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

B. That 20 NYCRR 203.10(d) provides in pertinent part that:

"(p)ersonal services rendered by an individual as an employee...will ordinarily be deemed part of a business regularly carried on by such individual if such services are performed in furtherance of or for the direct benefit of other business activities or occupational activities the conduct of which constitutes an unincorporated business... For purposes of the preceding sentence, services as an employee... performed by an individual will not be deemed to be performed in furtherance of or for the direct benefit of other business or occupational activities of the individual

(1) if the individual does not maintain an office or employ assistants in connection with such services and his services as an employee...are performed on a full-time basis for one employer or principal and constitute the primary or chief occupational activity of the individual."

C. That one of the important factors in determining whether an individual is an employee is:

"the right of the employer to direct the services which the individual performs, not only as to what should be done, but also as to the manner in which it is to be performed. Another is whether the individual is required to work stated hours and days. If the employer provides the individual with equipment and an office, then this is another indication of the individual's employee status" (Herson v. Tully, 65 A.D.2d 638).

D. That petitioner worked full time at a salary with regular hours and days for one employer who directed petitioner's activities, provided an office, clerical assistance and travel and expense reimbursement, and withheld taxes



from petitioner's wages. Petitioner did not employ assistants in connection with his work and the aforesaid employment constituted petitioner's chief occupation from the middle of 1976 through September 30, 1977. Therefore, petitioner was an employee of Jack Raymond during the aforesaid period and his services did not constitute part of a business regularly carried on by petitioner within the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10(d). Accordingly, no unincorporated business tax is due on the \$39,333.26 petitioner earned at Jack Raymond in 1976 nor on the \$46,984.20 petitioner earned in 1977.

E. That petitioner's failure to timely file personal income tax returns as well as unincorporated business tax returns for 1976 and 1977 is an indication that the unincorporated business tax returns would not have been timely filed regardless of advice from the accountant. There was, therefore, no reasonable cause for failure to file within the meaning and intent of sections 685(a)(1) and 685(a)(2) of the Tax Law and the penalties imposed are sustained.

F. That the Audit Division is hereby directed to recompute the unincorporated business tax for the periods shown in Finding of Fact "8" when petitioner was self-employed and to recompute petitioner's New York City non-resident earnings tax to be consistent with the decision rendered herein.


G. That the petition of Edward F. and Elizabeth C. McDougal is granted to the extent indicated in Conclusions of Law "D" and "F" above; that the Audit Division is hereby directed to modify the notices of deficiency issued


March 3, 1980 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER