

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Helga Schmidt-Westerkamp : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS Income, UBT :
& NYC Income Tax under Article 22, 23 & 30 of the :
Tax Law for the Years 1974, 1975 and 1976.

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 690, 722 & 1312 by certified mail upon Helga Schmidt-Westerkamp, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

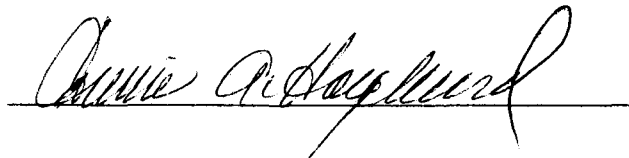
Helga Schmidt-Westerkamp
315 E. 68th St.
New York, NY 10021

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

In the Matter of the Petition :
of :
Helga Schmidt-Westerkamp : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS Income, UBT :
& NYC Income Tax under Article 22, 23 & 30 of the :
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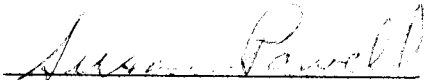
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of 690, 722 & 1312 by certified mail upon Peter Schliesser the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

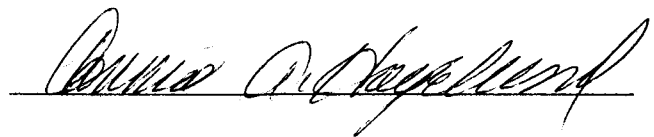
Peter Schliesser
15 Gramercy Park
New York, NY 10003

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

Helga Schmidt-Westerkamp
315 E. 68th St.
New York, NY 10021

Dear Ms. Schmidt-Westerkam:

Please take notice of the 690, 722 & 1312 of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 4 months of the Tax Law, 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 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
Peter Schliesser
15 Gramercy Park
New York, NY 10003
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HELGA SCHMIDT-WESTERKAMP	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22, 23 and 30 of	:	
the Tax Law for the Years 1974, 1975 and 1976.	:	

Petitioner, Helga Schmidt-Westerkamp, 315 East 68th Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22, 23 and 30 of the Tax Law for the years 1974, 1975 and 1976 (File No. 25370).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 17, 1981 at 1:15 P.M. Petitioner appeared with Peter Schliesser, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner's activities constituted the practice of a profession, thereby exempting the income earned from said activity from unincorporated business tax.

FINDINGS OF FACT

1. Petitioner herein, Helga Schmidt-Westerkamp, timely filed New York State personal income tax resident returns for the years 1974, 1975 and 1976. The 1976 return also reported a New York City personal income tax liability of \$304.56. The 1974, 1975 and 1976 returns reported business income of \$17,434.09,

\$17,647.46 and \$16,790.30, respectively. On the 1974 and 1975 returns petitioner indicated the type of business conducted as physical therapist, while the 1976 return did not identify the nature of the business activity.

2. On December 22, 1978, the Audit Division issued a Notice of Deficiency to petitioner for the years 1974, 1975 and 1976 asserting that \$1,406.77 of tax was due together with interest. The additional tax due was broken down in a Statement of Audit Changes as follows:

	<u>1974</u>	<u>1975</u>	<u>1976</u>
Unincorporated Business Tax	\$477.63	\$489.36	\$395.55
NYS Personal Income Tax			33.65
NYC Personal Income Tax			10.58

Petitioner did not present any argument or evidence with respect to the additional New York State and New York City personal income tax asserted due.

3. The aforementioned Statement of Audit Changes contained the following explanation with respect to the assessment of unincorporated business tax:

"Since you do not possess a physical therapist license, and have not obtained the education necessary to obtain a license, the earnings received from your exercise and massage business is subject to the New York State unincorporated business tax."

4. During the tax years in question petitioner was licensed as a masseuse pursuant to New York State Education Law, Article 155. Petitioner did not maintain a formal office or place of business since all her services were performed in her clients' personal residences. Petitioner operated her business on an appointment basis only.

5. As a masseuse, petitioner would provide her clients with therapeutic massages and she would also lead them through special exercise programs. More than half of petitioner's clients were referred to her by physicians. For those new clients who came to petitioner unreferred by a physician, petitioner

would first contact their physician to obtain the diagnosis and information relevant to their general health (i.e. heart condition, diabetes, etc.).

6. On April 27, 1954, petitioner was licensed as a physio-therapist by the City of Hamburg, West Germany. Said license was issued as the result of petitioner's graduation from the School of Physical Therapists at the University Clinic of Hamburg-Eppendorf, West Germany and her subsequent passing of the physio-therapist examination before a public examining board.

7. Petitioner's education and training as a physio-therapist in West Germany began on November 1, 1951 and ended on December 31, 1955. From November 1, 1951 to January 31, 1952, petitioner participated in a three (3) month program in general hospital training at Hamburg Children's Hospital. Petitioner completed her basic university training in physiotherapy at the University Clinic from May 1, 1952 to April 20, 1954 and from May 1, 1954 to December 31, 1955 she had nineteen (19) months of practical post-graduate training (at least twelve [12] months were required as a pre-requisite for admission to practice).

8. Petitioner was a practicing physio-therapist until 1963 when she entered New York State. Pursuant to New York State Education Law (Article 131-A, Section 6534), in order to qualify for a license as a physical therapist, an applicant must have, inter alia, completed a four (4) year college program in physical therapy. Although petitioner did not make a formal application to the Education Department for a physical therapist's license, she was informed that any such application would be denied as her West German education and training would not be recognized as the equivalent of a four (4) year college program in physical therapy.

9. Since petitioner was unable to obtain a license as a physical therapist, she acquired, in lieu thereof, a license as a masseuse. In order to qualify as

a licensed masseuse, an applicant must have, inter alia, a high school diploma, graduate from a school or institute of massage or its substantial equivalent and pass a written examination. Petitioner's education and training in West Germany was accepted as the equivalent of graduation from a school or institute of massage and, upon passing the written examination, she was issued a license as a masseuse.

10. All physical therapists are trained to treat ailments via the use of electrotherapy, thermotherapy, actinotherapy and hydrotherapy, as well as therapeutic massage. Petitioner did not use any mechanical devices while attending to her clients. The services provided by petitioner to her clients consisted solely of therapeutic massage and exercise. Many of petitioner's clients were either partially or entirely bedridden. Petitioner was involved in treating her clients for conditions after hip surgery, stroke, fractures and due to back ailments.

11. Petitioner did not carry malpractice insurance and the services which she provided her clients were not subject to reimbursement pursuant to medical insurance plans.

CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides, inter alia, that income received from the practice of law, medicine, dentistry or architecture or from the practice of any other profession is exempt from unincorporated business tax. That 20 NYCRR 203.11(b)(1)(i) defines other profession as:

"For purposes of this subdivision, the term 'other profession' includes any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The word profession implies attainments in professional knowledge as distinguished from

mere skill and the application of knowledge to uses for others as a vocation. The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such business and consulting services, does not constitute the practice of a profession even though the services involve the application of a specialized knowledge."

B. That petitioner did not meet the educational requirements to practice physiotherapy in New York State during the years in issue. Therefore, she limited the services provided her client to that of massage and exercise programs. While such services require special knowledge and skills, the application and nature of these services did not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law.

C. That the activities of petitioner, Helga Schmidt-Westerkamp, during the years 1974, 1975 and 1976 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. Thus, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax Law.


D. That petitioner has failed to sustain the burden of proof pursuant to section 689(e) of Article 22 and section 1312(a) of Article 30 to show that the additional New York State and New York City personal income tax asserted due in the Notice of Deficiency dated December 22, 1978 is erroneous or incorrect.

E. That the petition of Helga Schmidt-Westerkamp is denied and the Notice of Deficiency dated December 22, 1978 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER