

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of :
 The Tokens :

for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Year 1971. :

In the Matter of the Petition :
 of :
 Mitchell and Sherry Margo :

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the :
Tax Law for the Year 1971. :

In the Matter of the Petition :
 of :
 Henry B. Medress :

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the :
Tax Law for the Year 1971. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
 of :
 Philip F. and Abbie Margo :

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In the Matter of the Petition :
 of :
 Jay and Judith Siegel :

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the :
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Page 2
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 10th day of November, 1983, she served the within notice of Decision by certified mail upon Jay & Judith Siegel, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jay & Judith Siegel
32 Charlotte Dr.
Spring Valley, NY 10977

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
10th day of November, 1983.

Martha L. Brunelle

Connie A. Hagelund

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

November 10, 1983

Jay & Judith Siegel
32 Charlotte Dr.
Spring Valley, NY 10977

Dear Mr. & Mrs. Siegel:

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 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 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
Murray M. Weinstein
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

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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 10th day of November, 1983, she served the within notice of Decision by certified mail upon Murray M. Weinstein the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray M. Weinstein
225 Broadway
New York, NY 10007

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
10th day of November, 1983.

Martha L. Brunelle

Connie Hagelund

STATE OF NEW YORK

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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 10th day of November, 1983, she served the within notice of Decision by certified mail upon Mitchell & Sherry Margo, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mitchell & Sherry Margo
134 S. Palm Dr.
Beverly Hills, CA 90212

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.

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10th day of November, 1983.

Maucha L. Grucelle

Connie A. Hagelund

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

November 10, 1983

Mitchell & Sherry Margo
134 S. Palm Dr.
Beverly Hills, CA 90212

Dear Mr. & Mrs. Margo:

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 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 4 months from the date of this notice.

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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
Murray M. Weinstein
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

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Henry B. Medress
c/o Murray Weinstein
225 Broadway
New York, NY 10007

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
10th day of November, 1983.

Martha L. Smalley

Connie Hagelund

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

November 10, 1983

Henry B. Medress
c/o Murray Weinstein
225 Broadway
New York, NY 10007

Dear Mr. Medress:

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 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 4 months from the date of this notice.

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Murray M. Weinstein
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

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Philip F. & Abbie Margo
c/o Murray Weinstein
225 Broadway
New York, NY 10007

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.

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10th day of November, 1983.

Martha L. Smuelle

Connie A. Hagelund

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

November 10, 1983

Philip F. & Abbie Margo
c/o Murray Weinstein
225 Broadway
New York, NY 10007

Dear Mr. & Mrs. Margo:

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 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 4 months from the date of this notice.

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The Tokens
c/o Murray M. Weinstein
225 Broadway
New York, NY 10007

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.

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Martha L. Smalley

Connie Hagelund

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

November 10, 1983

The Tokens
c/o Murray M. Weinstein
225 Broadway
New York, NY 10007

Gentlemen:

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, 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:

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of
THE TOKENS
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Refund of Unincorporated Business Tax under
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In the Matter of the Petition
of
MITCHELL AND SHERRY MARGO
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1971.

In the Matter of the Petition
of
HENRY B. MEDRESS
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1971.

In the Matter of the Petition
of
PHILIP F. AND ABBIE MARGO
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1971.

DECISION

In the Matter of the Petition :
of :
JAY AND JUDITH SIEGEL :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Year 1971. :

Petitioner, The Tokens, c/o Murray M. Weinstein, 225 Broadway, New York, New York 10007, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1971 (File No. 12711).

Petitioners Mitchell and Sherry Margo, 134 South Palm Drive, Beverly Hills, California 90212; Henry B. Medress, 480 East 86th Street, New York, New York 10028; Philip F. and Abbie Margo, 140 South Almont Drive, Beverly Hills, California 90211; and Jay and Judith Siegel, 32 Charlotte Drive, Spring Valley, New York 10977, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1971 (File Nos. 12707, 12708, 12709, and 12710).

A combined formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 7, 1982 at 10:00 A.M. with all briefs to be submitted on or before February 3, 1983. Petitioners appeared by Murray M. Weinstein, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether it was proper for the Audit Division to issue notices of deficiency without examining the taxpayers' books and records, when the accounting

firm which prepared the returns for the years in issue was uncooperative in making books and records available for examination.

II. Whether income from activities in connection with recording music is subject to unincorporated business tax.

III. Whether penalties were properly asserted against the partnership for failure to file an unincorporated business tax return and pay the tax shown due thereon.

IV. Whether the partnership, The Tokens, has substantiated certain expenses deducted on its partnership return.

FINDINGS OF FACT

1. During 1971, petitioners Jay Siegel, Philip Margo, Henry Medress, and Mitchell Margo, were equal partners in a partnership known as The Tokens.

2. The Tokens filed a U.S. Partnership Return and a New York State Partnership Return for 1971. On each return the partnership deducted record production expenses of \$128,741.13, management commissions of \$119,527.41 and entertainment expenses of \$12,082.17. The partnership reported its principal business activity as "Songwriters, Entertainers and Producers" on each return.

3. Petitioners Mitchell and Sherry Margo filed a joint New York State Income Tax Resident Return for 1971. On the return said petitioners reported Mitchell Margo's distributive share of the partnership income of The Tokens as reflected on the partnership return. Mitchell Margo reported his occupation as an entertainer.

4. Petitioner Henry B. Medress and his wife filed separate New York State Income Tax Resident Returns for 1971 on one form. Henry B. Medress reported his distributive share of the partnership income as reflected on the partnership return and reported his occupation as an entertainer.

5. Petitioners Philip F. and Abby Margo filed a joint New York State Income Tax Resident Return for 1971. On this return said petitioners reported Philip F. Margo's distributive share of the partnership income as reflected on The Tokens' partnership return. Philip F. Margo reported his occupation as an entertainer.

6. Petitioners Jay and Judith Siegel filed a joint New York State Income Tax Resident Return for 1971. On this return petitioners reported Jay Siegel's distributive share of partnership income as reflected on The Tokens' partnership return. Jay Siegel reported his occupation as an entertainer.

7. On April 11, 1975 the Audit Division issued a Notice of Deficiency to The Tokens asserting a deficiency of unincorporated business tax of \$22,207.14 plus penalties of \$8,993.90 and interest of \$3,984.63 for a total amount due of \$35,185.67. The deficiency of unincorporated business tax was premised upon the failure to substantiate certain deductions thereby resulting in additional income subject to unincorporated business tax. The deductions disallowed were record production expenses of \$128,741.13, management commissions of \$119,527.41, and entertainment expenses of \$12,082.17. The penalties were asserted pursuant to section 685(a)(1) and (a)(2) of the Tax Law for failure to file an unincorporated business tax return and failure to pay the tax shown due thereon.

8. On April 11, 1975 the Audit Division issued notices of deficiency to Jay and Judith Siegel, Philip F. and Abbie Margo, Henry B. Medress, and Mitchell and Sherry Margo. Each Notice of Deficiency asserted a deficiency of personal income tax of \$9,112.28 plus interest of \$1,634.84 for a total amount of \$10,747.12. The basis of each asserted deficiency was the additional distributive share of The Tokens' partnership income arising from the disallowance of partnership expenses noted in Finding of Fact "7".

9. The notices of deficiency were issued because the accounting firm which prepared petitioners' income tax returns was uncooperative in making the books and records of the partnership available for examination.

10. Prior to the year in issue, the partnership and its member partners were entertainers. During 1971, the partnership and its member partners would look for talented individuals and with these individuals they would write, arrange, and play music on records. They were also involved in the engineering of the recording. Each member of the partnership was a singer, a songwriter, and an arranger and each belonged to the American Society for Composers, Authors and Publishers, the Screen Actors Guild, and the American Federation of Musicians.

11. The partnership was not involved with the manufacturing of records nor was it involved in the physical production of records.

12. During the period in issue the partnership maintained an office suite and employed an individual who worked as a receptionist and typist. The office suite was equipped with drums, guitars, pianos, bass, and amplifiers for rehearsing and writing music arrangements. The Tokens would also arrange music in a studio.

13. The members of the partnership conferred among themselves before making decisions.

14. Aside from musical instruments, capital was not needed to produce records.

15. During 1971, a firm called Three Dimension Management, Inc. ("Three Dimension") acted as the partnership's business manager. All of the partnership's financial dealings, including payment of expenses, were handled by Three Dimension.

16. When Three Dimension received a voucher it would draw a check for the expense. Three Dimension would not draw a check without proper documentation.

17. The agreement between Three Dimension and the partnership entitled Three Dimensions to a thirty percent commission on the net income of the partnership. Each month Three Dimension would provide the partnership with a statement of income and expenses. At the end of the year, the accounting firm employed by Three Dimension would provide accounting worksheets to Three Dimension detailing the partnership's income and expenses. The documents provided by the accounting firm to Three Dimension and the statements of income and expenses provided by Three Dimension to the partnership establish that the partnership had commission expenses of \$119,527.41 in 1971.

18. The annual accounting worksheets provided by the accounting firm to Three Dimension as well as a statement from Bell Records showing royalties less expenses and advances establishes that the partnership had recording expenses of \$128,741.13 as follows:

Job expenses	\$110,436.11
Recording expenses	325.02
Songwriting and composing expenses	<u>17,980.00</u>
	\$128,741.13

19. The auditor responsible for the issuance of the notices of deficiency testified that, prior to the hearing, petitioners substantiated the entertainment expenses and the record production expenses which were deducted on the partnership's return.

20. After the notices of deficiency were issued, the accounting firm employed by Three Dimension refused to permit the individual petitioners to examine the partnership's original books and records.

CONCLUSIONS OF LAW

A. That a taxpayer is required to maintain books and records bearing on matters required to be included in a tax return (see Tax Law §697(b)). Since the accountant who had control of the books and records utilized to prepare the returns in issue was uncooperative in making such books and records available, the Audit Division properly issued the notices of deficiency without examining them.

B. That section 703(c) of the Tax Law provides as follows:

"(c) Professions. - The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

C. That 20 NYCRR 203.11(b)(1)(iv) added February 1, 1974 (after the year at issue), provides, in part, that "[m]usicians and artists are also recognized as professions (sic) by the Tax Commission."

D. That the activities of The Tokens during the year at issue were essentially the activities of musicians, writers and arrangers of music and did not deal with the conduct of business itself. Thus, the income of The Tokens therefrom is not subject to unincorporated business tax (see Matter of Louis A. and Susan Garisto, State Tax Commission, June 5, 1981, determination confirmed 91 A.D.2d 811).

E. That in view of Conclusion of Law "D", the issue of whether penalties were properly asserted against the partnership for failure to file an unincorporated business tax return and pay the tax shown due thereon is moot.

F. That in view of Findings of Fact "16", "17" and "18", petitioners have sustained the burden of proof imposed by section 689(e) of the Tax Law of

substantiating the disallowed deductions in issue and, therefore, the individual petitioners properly reported their distributive share of partnership income.


G. That the petitions of The Tokens, Mitchell and Sherry Margo, Henry B. Medress, Philip F. and Abbie Margo, and Jay and Judith Siegel are granted and the notices of deficiency issued April 11, 1975 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER