

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
DAVID MERRICK

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~(s)~~ 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1963 through 1967

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 21st day of June, 1977, she served the within
Notice of Decision by (certified) mail upon David Merrick
~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. David Merrick
246 West 44th Street
New York, New York
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

21st day of June, 1977.

Janet Mack

Marsina Donnini

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
DAVID MERRICK

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~(8)~~ 23 of the :
Tax Law for the Year(s) ~~XXXXXXX~~ :
1963 through 1967

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 21st day of June, 1977, she served the within
Notice of Decision by (certified) mail upon Murray Frank, Esq.

(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
Murray Frank, Esq.
as follows: 1501 Broadway
New York, New York 10036

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

21st day of June, 1977.

Marsina Donnini

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

June 21, 1977

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

TELEPHONE: (518) 457-1723

Mr. David Merrick
246 West 44th Street
New York, New York

Dear Sir:

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

Please take further notice that pursuant to
Section ~~21~~ **722** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,

PAUL B. COBURN
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DAVID MERRICK	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1963 through 1967.	:	

Petitioner, David Merrick, of 246 West 44th Street, New York, New York, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1963 through 1967. (File No. 01632).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1974 at 1:30 P.M. The petitioner appeared by Murray Frank, Esq. (Eugene Chester, Esq., of Everett, Johnson & Breckinridge, Esqs., of counsel). The Income Tax Bureau appeared by Saul Heckelman, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the activities of the petitioner, David Merrick, during the years in issue constituted the carrying on of an unincorporated business subject to unincorporated business tax.

II. Whether fees received by the petitioner for guest appearances on radio and television talk shows were subject to unincorporated business tax.

III. Whether "sub-chapter S" income received by the petitioner was subject to unincorporated business tax.

IV. Whether income received by petitioner as a limited partner from partnerships in which he was not a general partner was subject to unincorporated business tax.

V. Whether royalty income received by the petitioner was subject to unincorporated business tax.

VI. Whether the income received by the petitioner for management, supervision and direction of various limited partnerships in which he was the sole general partner constituted income subject to unincorporated business tax.

VII. Whether the petitioner was entitled to an allocation of income both within and without the State of New York.

VIII. Whether salary income received from David Merrick, Inc. constituted part of his business income subject to unincorporated business tax.

IX. Whether the gains realized on the liquidation of corporations, and the gains on installment sale of petitioner's partnership interest constituted income subject to unincorporated business tax.

FINDINGS OF FACT

1. The petitioner, David Merrick, filed New York State unincorporated business tax returns for the years 1963 through 1967, reflecting income from the business of renting electrical equipment to production entities for the purpose of staging plays. He also included on the returns for the years 1963 through 1967, except 1966, under "other business income", income earned as a general partner of various limited partnerships which presented stage plays in New York State and elsewhere. For 1966 the petitioner's unincorporated business tax return excluded partnership income earned outside the State of New York.

2. The petitioner filed Federal and New York State resident returns for the years 1963 through 1967. The I.R.S. audited his Federal personal income tax returns for said years. The petitioner filed notices of Federal changes (IT-115's) for the years in issue with respect to his personal income tax returns, but did not file any notices of Federal changes with respect to his unincorporated business tax returns.

3. On March 16, 1970, the Income Tax Bureau issued a Statement of Audit Changes against the petitioner for the years 1963 through 1967, imposing additional unincorporated business tax in the amounts of \$5,886.71, \$5,552.63, \$20,642.54, \$28,474.72 and \$47,318.00 for a total of \$107,874.60, less his 1967 personal income tax refund as claimed on Form IT-115 (Notice of Federal Changes) in the amount of \$3,901.00, for a net tax due of \$103,973.60. Additional interest leaves a balance due of \$122,545.06. Accordingly, a Notice of Deficiency was issued therefor. The petitioner timely filed a petition for redetermination of the aforesaid deficiency. The petitioner amended his petition at the time of the hearing, and claims he is not subject to unincorporated business tax.

4. The additional unincorporated business income included in the aforementioned Notice of Deficiency consisted of the following:

(a) Compensation designated as "salaries" received from corporations in which the petitioner is the sole stockholder and whose business activities include the production of plays.

(b) Income designated as "salaries" by the Income Tax Bureau, but which represent fees for guest appearances on radio and television talk shows.

(c) Gain on liquidation of corporations solely owned by petitioner engaged in the leasing of theatrical lighting equipment, which constitutes part of a business regularly carried on by petitioner.

(d) Royalty income.

(e) Installment gain on sale of interest in Dolly Co.

(f) Sub-chapter S income of David Merrick, Inc., in 1967.

(g) Distribution of profits received as a limited partner in limited partnerships.

(h) Recovery of loss 1965 - \$2,508.04 (conceded to be due and owing).

(i) 1966 miscellaneous income, \$1,710.16 and Dolly Co., London royalties, \$17,975.18 (conceded to be due and owing).

(j) 1967 rent and royalty income, \$1,209.00 (conceded to be due and owing).

5. The petitioner, David Merrick, is a well-known producer of theatrical shows that appear on Broadway and on road tours. He maintains an office and an organization. Mr. Merrick searches for scripts for plays to be produced on Broadway. He enters into agreements with playwrights and authors for the acquisition of the scripts. If he decides to produce a play, he enters into negotiations with actors, directors, craft unions and theatre owners. He also arranges for lighting equipment, sets, publicity

and financial backing. Once he has decided to produce a play and has received financial support, he will enter into an agreement of limited partnership, whereby he will be the sole general partner and the contributors will be limited partners, without authority to participate in any phase of the production of the play. A limited partnership with Mr. Merrick as sole general partner was formed for each play produced during the years in issue. Mr. Merrick, as a general partner, had complete control of the activities of the limited partnership. He decided whether a play should close or remain open, and whether another road company should be formed or not. He arranged for the hiring of actors, the leasing or purchase of electrical equipment, sets, etc. He also entered into contracts with various craft unions for the staging of the plays.

6. Pursuant to the terms of the limited partnership agreement, Mr. Merrick assigned the first-class production rights of the play to the partnership, retaining royalty rights for himself. The agreement also provided that the limited partners should receive only 50% of the net profits. Mr. Merrick was to receive 50% of the net profits as compensation for his services in the management and production of the play. The contributions of the limited partners were to be returned to them under certain conditions, and thereafter they were to share in 50% of the net profits.

The term "net profits", as provided in the agreement, is defined as meaning the excess of gross receipts over all "production expenses", "running expenses" and "other expenses". The term "production expenses" includes fees of director, designers, cost of sets, curtains, drapes, costumes, properties, furnishings, electrical equipment, cash deposits with Actors' Equity Association, advances to authors, rehearsal charges and expenses, transportation charges, cash office charge and reasonable legal and auditing expenses. Advance publicity, theatre costs and expenses, and all other expenses and losses incurred in connection with the production, preliminary to the opening of the play in New York City, including any summer stock and out-of-town losses were to be considered production expenses.

7. Mr. Merrick received a "cash office charge" from each limited partnership (in the case of World Company, \$350 for each company commencing two weeks before rehearsal and ending each week after close of each company performance) which is included both as a "production expense" and "running expense" of the partnership. In addition, the agreement provided that the general partner was to receive payment for rights or property as a producer's management fee, that is, 1% of the weekly gross box office receipts.

8. In 1966 and 1967, the petitioner received salaries of \$100,000 and \$200,000 respectively, from David Merrick, Inc. Petitioner is the chief executive officer and sole stockholder of said corporation which is engaged in the business of producing plays, leasing theatres and furnishing office facilities to entities engaged in the production of plays.

9. Mr. Merrick was the sole stockholder of corporations that owned and leased electrical equipment for stage productions.

10. The services rendered by the corporations controlled by Mr. Merrick were rendered to the limited partnerships, in which Mr. Merrick was the sole general partner.

11. The limited partnerships in which Mr. Merrick was the sole general partner did not maintain any regular place of business outside the State of New York. Mr. Merrick did not maintain any regular place of business outside the State of New York.

12. During the years in issue, Mr. Merrick was also a limited partner in limited partnerships which produced plays. As such, he received a distributive share of the profits from said limited partnerships in the following amounts:

1963 -	\$14,172.24
1964 -	8,947.25
1965 -	7,210.28
1966 -	2,975.67
1967 -	7,842.19

13. From 1963 to 1967, Mr. Merrick received income from limited partnerships in which he was sole general partner, with respect to from three to seven shows running simultaneously, either in New York or elsewhere. The most prominent of these were Hello Dolly (Dolly Co.), Stop the World-I Want to Get Off (World Co.), Oliver (Oliver Co.) and Cactus Flower (Cactus Co.). In addition, he also received royalties from shows that had been closed.

14. During the years in issue, Mr. Merrick liquidated some of the corporations of which he was the sole stockholder. Said corporations were engaged in the rental of lighting equipment to the limited partnerships in which he was the general partner.

15. During the years 1965, 1966 and 1967, Mr. Merrick received installment gains on the sale of a substantial interest in Dolly Company.

16. During the years in issue, Mr. Merrick received fees for guest appearances on radio and television talk shows. He received W-2's in connection with said fees from the sponsor or broadcasting company. The Income Tax Bureau considered said fees to be "salaries".

CONCLUSIONS OF LAW

A. That the sub-chapter S income received by the petitioner in 1967 from David Merrick, Inc. does not constitute income subject to unincorporated business tax.

B. That the income received by the petitioner more fully set forth in Finding of Fact "12", supra, does not constitute income subject to unincorporated business tax.

C. That the income received by the petitioner as more fully set forth in Finding of Fact "16", supra, does not constitute income subject to unincorporated business tax.

D. That the activities of the petitioner, David Merrick, in the management supervision and control of theatrical productions constitutes the carrying on of a business subject to unincorporated business tax within the intent and meaning of section 703(a) of the Tax Law.

E. That the income received by the petitioner from the various limited partnerships represented unincorporated business income rather than distributive shares of profits as a co-partner.

F. That the salary income received by petitioner was an integral part of the same business conducted by him as it related to the theatrical production of shows and the sale and rental of theatrical and lighting equipment.

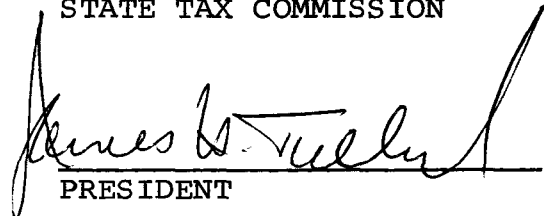
G. That the gains on the liquidation of the various corporations in which the petitioner was sole stockholder, and the sale of his partnership interest constituted unincorporated business income subject to unincorporated business tax within the intent and meaning of section 703 of the Tax Law.

H. That the Income Tax Bureau be and is hereby directed to recompute the unincorporated business tax in accordance with Conclusions of Law "A", "B" and "C".

I. That the petition of David Merrick is granted to the extent indicated in Conclusions of Law "A", "B" and "C", and is in all other respects denied.

DATED: Albany, New York
June 21, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER