

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

October 9, 1979

Merle B. Debuskey
300 West 55th St.
New York, NY 10019

Dear Mr. Debuskey:

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) 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 Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Sincerely,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph I. Rotenburg
Cohn, Glickstein, Lurie, Ostrin & Lubell
1370 Ave. of the Americas
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Merle B. Debuskey :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Years 1967 - 1969. :

State of New York

County of Albany

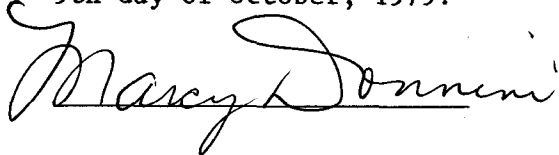
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Decision by certified mail upon Merle B. Debuskey, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

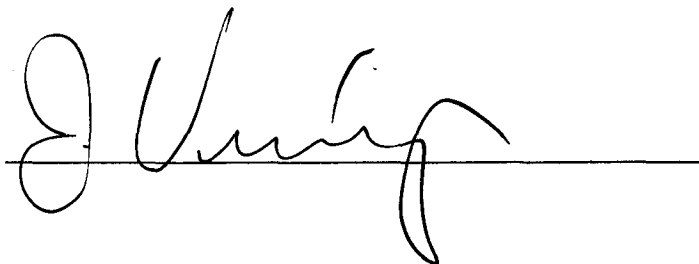
Merle B. Debuskey
300 West 55th St.
New York, NY 10019

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
9th day of October, 1979.


Nancy Donnini


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Merle B. Debuskey :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Unincorporated Business Tax :

under Article 23 of the Tax Law

for the Years 1967 - 1969. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Decision by certified mail upon Joseph I. Rotenburg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Joseph I. Rotenburg
Cohn, Glickstein, Lurie, Ostrin & Lubell
1370 Ave. of the Americas
New York, NY 10019

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
9th day of October, 1979.

Marcy Domini

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
B. MERLE DEBUSKEY : DECISION
for Redetermination of a Deficiency or :
for Refund of unincorporated Business :
Tax under Article 23 of the Tax Law for :
the Years 1967, 1968 and 1969. :
:

Petitioner, B. Merle Debuskey, 300 West 55th Street, New York, New York 10019, 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 1967, 1968 and 1969 (File No. 13865).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 21, 1978 at 9:15 A.M. Petitioner appeared by Joseph I. Rotenberg, Esq. and Audrey J. Isaacs, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioner's activities as a press agent during 1967, 1968 and 1969 constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, B. Merle Debuskey, timely filed New York State personal income tax resident returns for 1967, 1968 and 1969. Petitioner did not file unincorporated business tax returns for said years.

2. On October 28, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioner for 1967, 1968 and 1969, on which it contended that petitioner's activities as a press agent constituted the carrying on of an unincorporated business. Said Notice asserted \$3,482.88 in unincorporated business tax, plus \$1,177.21 in penalty and \$1,141.82 in interest, for a total of \$5,801.91.

3. Petitioner contended that he performed services similar to those of an employee and, therefore, was exempt from unincorporated business tax.

4. Petitioner performed services as a theatrical press agent during the years at issue. He was responsible for preparing and providing publicity and advertising for theatrical productions, and would be retained by the producer of a show. He received income from approximately twelve principals in 1967, ten principals in 1968, and thirteen principals in 1969.

5. Petitioner was a member of a union, the Association of Theatrical Press Agents and Managers. The union had an industry-type "Minimum Basic Agreement" in effect during the years at issue with the League of New York Theatres, Inc., which represented management. Said agreement referred to press agents as "employees" and set forth the minimum conditions of employment such as wage scales, working conditions, fringe benefits, obligations of employers and other clauses which benefited and protected the employees.

6. When petitioner was retained by a producer, a "Standard Individual Contract of Employment" (a union form) was executed which referred to petitioner and producer as employee and employer, respectively. The contract named the union as agent on behalf of the "employee" and stated that the provisions of the Minimum Basic Agreement

were in effect. It stipulated that social security and other taxes were to be withheld from petitioner's weekly salary and that the producer was to contribute to fringe benefits, unemployment insurance, disability and vacation pay, and also post a bond ensuring payment of the above. In addition to stating the payable weekly salary, the producer had the option of including an additional, fixed weekly amount for expenses. Petitioner's compensation from his principals was reported on wage and tax statements with the exception of one major principal in 1968 and two major principals in 1969, who issued petitioner Federal forms 1099 with no withholding or deductions from his compensation. In 1967, petitioner received \$8,664.50 which he reported as "other fees." He did not offer a satisfactory explanation regarding the nature of this income.

7. Petitioner was free to perform services for more than one producer simultaneously (up to six), and did so during the years at issue. There was no agreement between principals as to the division of petitioner's time. He did not have to work stated hours and no vacation time was scheduled for him. His principals did not provide him with a place to work. He maintained an office at his own expense and filed Federal Schedule "C" in order to deduct office expenses and other unreimbursed expenses, which were incurred on behalf of his principals. The amounts which he deducted included expenses for a telephone answering service, professional fees, stationery, depreciation, travel and office cleaning, as well as relatively large deductions for a publicity service and for promotion expenses. Petitioner offered no satisfactory explanation as to the nature of the last two items.

8. Petitioner was retained by producers because of his expertise in his field. He performed services within the guidelines established

by his principals, and within the restriction of a budget. The producer had the right to reject the plans and decisions which petitioner made.

9. When petitioner was retained by more than one producer at a time, the producer or producers were required by contract to retain and pay an associate press agent. Section III of the union's By-Laws provided, in part, the following:

1. Associate press agents are to be engaged by the senior press agents with the advise and consent of the producer or producers and must work on all of the productions handled by the senior press agent.

...

Upon receipt of written notification of employment of the associate by the senior press agent, the producer shall place the associate upon his own payroll. The respective compensation of the senior press agent and the associate press agent shall thereupon be paid on a pro-rata basis and the associate shall, upon receipt of written notice as foresaid, be deemed an employee of the producer.

10. The associate press agents who were retained in conjunction with petitioner's activities on behalf of multi-principals, frequently worked out of petitioner's office. Petitioner exercised his own judgment as to which tasks should be assigned to the associates.

CONCLUSIONS OF LAW

A. That petitioner's activities as a press agent during 1967, 1968 and 1969 constituted the carrying on of an unincorporated business, in accordance with the meaning and intent of section 703(a) of the Tax Law. Said activities did not constitute the performance of services as an employee, in accordance with section 703(b) of the Tax Law.

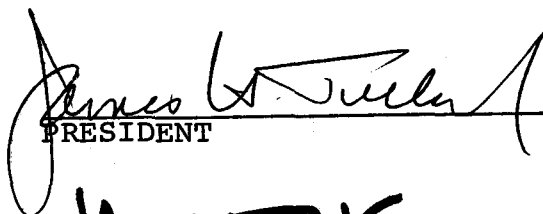
B. That the income derived from petitioner's activities as a press agent during 1967, 1968 and 1969 is subject to unincorporated business tax under section 701(a) of the Tax Law.


C. That the petition of B. Merle Debuskey is denied and the Notice of Deficiency issued October 28, 1974 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

OCT 9 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER