

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
M. Budd Mittleman :

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 1977 - 1979. :

State of New York  
County of Albany

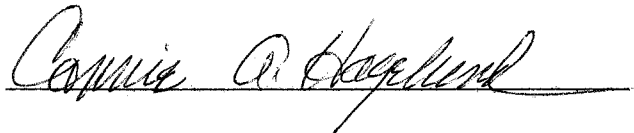
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of September, 1983, she served the within notice of Decision by certified mail upon M. Budd Mittleman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

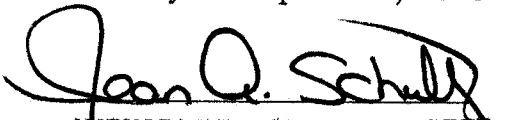
M. Budd Mittleman  
35 Sutton Place  
New York, NY 10022

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  
16th 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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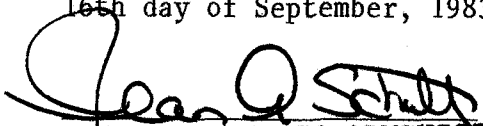
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of September, 1983, she served the within notice of Decision by certified mail upon E. Gayle McGuigan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

E. Gayle McGuigan  
555 Madison Ave.  
New York, NY 10022

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  
16th 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 16, 1983

M. Budd Mittleman  
35 Sutton Place  
New York, NY 10022

Dear Mr. Mittleman:

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 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  
E. Gayle McGuigan  
555 Madison Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
M. BUDD MITTLEMAN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1977,	:	
1978 and 1979.	:	

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Petitioner, M. Budd Mittleman, 35 Sutton Place, New York, New York 10022, 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 1977, 1978 and 1979 (File No. 34859).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1982 at 2:45 P.M. Petitioner appeared with E. Gayle McGuigan, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner's activities engaged in during the years 1977, 1978 and 1979 constituted the practice of a profession of which the income derived therefrom is exempt from the imposition of unincorporated business tax.

FINDINGS OF FACT

1. M. Budd Mittleman (hereinafter petitioner) filed combined New York State income tax resident returns with his wife for the years 1977, 1978 and

1979 whereon he reported business income of \$32,219.00, \$34,578.00 and \$34,274.00 respectively. He also filed New York State unincorporated business tax returns for said years whereon he allocated the majority of his income to sources without New York State. He described his "occupation" on his personal income tax returns and his "kind of business" on his unincorporated business tax returns as "consultant" (1977), "consultant" (1978) and "statistician" (1979). No unincorporated business tax liability was computed by petitioner for 1977 and 1979. For 1978 his unincorporated business tax liability was computed on his return to be \$53.18.

2. On May 1, 1981 the Audit Division issued a Statement of Audit Changes wherein petitioner's entire net profit from business for each year at issue herein was held subject to the unincorporated business tax. The Audit Division's explanation for such action was as follows:

"We have received and reviewed your reply to our letter requesting further information regarding your possible liability for the unincorporated business tax.

The unincorporated business tax exclusion applies only to the practice of certain professions. Specifically, the practice of law, medicine, dentistry or architecture are exempt. Also, the practice of any other profession is exempt if capital is not a material income producing factor, and more than 80% of the unincorporated business gross income is derived from personal services actually rendered by the individual.

Although the services as a consultant in pharmaceutical research and development involves the application of specialized knowledge, the nature of the services does not constitute a profession within the meaning and intent of section 703(c) of the Tax Law.

Also, since your only regular place of business is at 527 Madison Avenue in New York City, all your income is subject to the unincorporated business tax even though you may travel outside the state for the purpose of performing any duties connected with your profession."

Accordingly, a Notice of Deficiency was issued against petitioner on June 8, 1981 asserting unincorporated business tax of \$3,543.28, penalty of \$327.17,<sup>1</sup> plus interest of \$325.00, for a total due of \$4,195.45.

3. During the hearing held herein petitioner conceded that he is not properly entitled to allocate a portion of his business income to sources without New York State.

4. During the hearing petitioner argued that his business income derived during the years at issue is exempt from the imposition of unincorporated business tax since he was engaged in the practice of the profession of biometrics, a specialized form of statistics dealing with biological observations and phenomena.

5. During the years at issue petitioner performed services for approximately three (3) major pharmaceutical companies. He was compensated on a yearly retainer basis.

6. Petitioners activities consisted of providing information on new, potentially useful pharmaceutical compounds through the statistical analysis of various data compiled from the testing of such compounds. Specifically, petitioner described his activities engaged in for his client pharmaceutical companies as follows:

(a) With respect to the pre-clinical determination of which of several promising compounds to develop and subject to the costly and time-consuming clinical procedures of testing and evaluating, he studied the data relative to protency, toxicity, and specifications that were available with respect to the competing compounds and then advised his clients which of those compounds he believed merited further development, testing and evaluation.

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<sup>1</sup> The nature of this penalty is not disclosed in the hearing record. However, the interest figure reported on the Statement of Audit Changes appears to incorporate both interest and penalty as broken down in the Notice of Deficiency.

(b) With respect to the clinical testing and evaluation of the selected compound, he advised his clients of the testing pattern and protocol to be followed in the testing and evaluation procedure, studied the data resulting from the clinical tests, and prepared statistical analysis of those data. Based on such studies and analysis he advised his clients whether, and if so, what changes in the protocol should be considered and what modifications of the compounds or their dosages or dosage forms should be considered to meet problems suggested by the data resulting from the testing program.

(c) With respect to the applications for governmental approval, his advice concerning the protocols was geared toward satisfying the concerned governmental agencies. His data had to clearly demonstrate whether the new drug was safe and effective. He advised his clients with respect to the compilation and preparation of the documentation by which the testing procedures were set out, their integrity was verified, and the resultant data was presented.

7. The development and evaluation of data to demonstrate the safety and effectiveness of a new drug requires the collective efforts of a team including, but not limited to, chemists, pharmacists, pharmacologists, physiologists, pathologists, toxicologists, specialist - physicians and statisticians.

8. The actual clinical testing of new promising compounds was performed by participating physicians. The data which they compiled was then forwarded to petitioner for analysis.

9. Petitioner received a Bachelor of Science degree in biological sciences from Ohio University in 1941. He then attended Harvard University for one year, taking graduate courses in the biological sciences.

10. Petitioner's employment history is as follows:

- (a) Employed at Roche Laboratories in its clinical testing department from 1942 to 1948.
- (b) Employed as Director of the Statistical Research Division of the Burton Bigelow Organization (management consultants) from 1948 to 1953.
- (c) Employed as Executive Vice President of Medimetric Institute from 1953 to 1958.

- (d) Employed as Vice President and General Manager of Schenley Laboratories from 1958 to 1966.
- (e) Employed as Vice President for Research and Development Coordination at Armour Pharmaceutical Laboratories from 1966 to 1970.

Since 1970, petitioner has been engaged in business independently.

11. Petitioner contended that biometrics is a science which is treated as a separate discipline at the graduate school level in such institutions as Harvard, Iowa State, University of California and the University of Michigan and that graduate degrees are awarded to candidates concentrating in the field. He further contended that "a great deal of knowledge of pharmacology and clinical medicine" is necessary to be a biometrician.

12. There are no licensing requirements for practicing biometrics.

13. During the hearing petitioner testified that he is a "pharmaceutical consultant" and that this is the designation which he used on his business letterhead. He further testified that his "consultative work is evaluation of data" and that he "does not make recommendations".

14. Capital is not a material income producing factor in petitioner's business.

15. All of petitioner's business gross income was derived from personal services rendered solely by him.

#### CONCLUSIONS OF LAW

A. That the term "other profession" as defined in 20 NYCRR 203.11(b)(1)(i) 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 to be entitled to a professional exemption, the services performed must encompass some of the essential characteristics of the professions of law, medicine, dentistry or architecture. Matter of Koner v. Procaccino (45 A.D.2d 551, 553, affd. 39 N.Y.2d 258).

C. That since petitioner held himself out to be a "pharmaceutical consultant", and his activities, as described herein, constituted services dealing with the conduct of business itself, said activities did not constitute the practice of a profession. Furthermore, although petitioner's activities required special knowledge and skills, the application and nature of these attributes did not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law.

D. That the activities of petitioner during the years 1977, 1978 and 1979 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax Law.

E. That the petition of M. Budd Mittleman is denied and the Notice of Deficiency dated June 8, 1981 is sustained together with such additional penalty and interest as may be lawfully owing.


DATED: Albany, New York

SEP 16 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER