

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Estate of Richard E. Mynatt  
and Carol E. Mynatt :

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 1975 & 1976.

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State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Estate of Richard E. Mynatt, and Carol E. Mynatt the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Richard E. Mynatt  
and Carol E. Mynatt  
22 Suellen Rd.  
Islip, NY 11751

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  
6th day of May, 1983.

David Parchuck

Quinn R. Hegelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Business Tax under Article 23 of the Tax Law :  
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State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Paul C. Ludwig the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul C. Ludwig  
Ludwig & Scourby  
170 Old Country Rd.  
Mineola, NY 11501

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  
6th day of May, 1983.

David Parchuck

Connie A. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 6, 1983

Estate of Richard E. Mynatt  
and Carol E. Mynatt  
22 Suellen Rd.  
Islip, NY 11751

Dear Mrs. Mynatt:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Paul C. Ludwig  
Ludwig & Scourby  
170 Old Country Rd.  
Mineola, NY 11501  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RICHARD E. MYNATT AND CAROL E. MYNATT	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1975	:	
and 1976.	:	

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Petitioners, Richard E. Mynatt and Carol E. Mynatt, 22 Suellen Road, Islip, New York 11751, 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 1975 and 1976 (File No. 26551).

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 July 13, 1982 at 1:15 P.M. Petitioner Carol E. Mynatt appeared with Paul C. Ludwig, Jr., Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irving Atkins, Esq., of counsel).

ISSUES

I. Whether petitioner Richard E. Mynatt's construction consultant activities constituted the carrying on of an unincorporated business of which the income derived therefrom is subject to the imposition of unincorporated business tax.

II. Whether petitioner Richard E. Mynatt's construction consultant income may properly be reduced by losses purportedly sustained from petitioners' dog breeding activities.

FINDINGS OF FACT

1. Petitioners, Richard E. Mynatt and Carol E. Mynatt, timely filed a joint New York State Income Tax Resident Return for each of the years 1975 and 1976. On their 1975 return Richard E. Mynatt (hereinafter petitioner) reported his occupation as "Construction Consultant" while Mrs. Mynatt reported her occupation as "Actress/dog breeder". Mrs. Mynatt's acting income was reported as wages. The income and/or expenses derived from the dog breeding activities was combined with petitioner's construction consulting income and reported as "business income" of \$31,232.22. On their 1976 return petitioner reported his occupation as "Consultant". Mrs. Mynatt's reported occupation was identical to that designated on their 1975 return. "Business Income" of \$33,017.26 reported on their 1976 return was derived, pursuant to a copy of their Federal Schedule C annexed thereto, from activities of "consultant" and "dog breeder". Gross receipts of \$37,316.00 reported on said Schedule C was derived exclusively from petitioner's construction consulting activities as evidenced by a Federal form 1099-Misc., which reports said amount paid to petitioner during 1976 as "Commissions and fees to non-employees". The payor of said amount was Raymond International Inc., P.O. Box 22718, Houston, Texas. Petitioners did not file unincorporated business tax returns for either year at issue herein.

2. On November 29, 1978 the Audit Division issued a Statement of Audit Changes to petitioners wherein it was stated that "The types of business income which you report are both subject to unincorporated business tax. In the following computation the business income from consultant and dog breeding are combined". Accordingly, a Notice of Deficiency was issued against petitioners on March 5, 1979 asserting unincorporated business tax of \$2,433.72, plus penalties and interest of \$1,386.72, for a total of \$3,820.44. Said

penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file unincorporated business tax returns and failure to pay the tax determined to be due respectively.

3. During the years at issue petitioner rendered services for Raymond International Inc. (Raymond Int'l). He contended that such services constituted the practice of the profession of "Construction engineer", thereby rendering the income derived therefrom as exempt from the imposition of unincorporated business tax. In the alternative, petitioner argued that his activities also constituted services rendered as an employee of Raymond Int'l, and as such, the income derived therefrom would be exempt from the imposition of said tax.

4. Petitioner had been working in the construction field for approximately fifty years and has been the recipient of many awards and citations within the industry. Petitioner commenced employment with Raymond Int'l in or about 1968. He remained so employed until 1972, at which time he reached the mandatory retirement age of sixty-five (65). Since company policy required his retirement he entered into a consulting agreement with Raymond Int'l. Such consulting agreement was renewed on a yearly basis and petitioner remained a consultant for Raymond Int'l until the time of his death at age seventy-three (73) on July 2, 1981. Prior to his retirement petitioner held the title of "Assistant Vice President".

5. Petitioner's consulting agreement dated April 18, 1974, and effective for the period May 1, 1974 through April 30, 1975 provided, inter alia that:

(a) Petitioner "would be placed on a consulting basis rather than being on the salaried payroll as is now the case."

(b) Petitioner "will be paid a rate of \$100.00 a day for each day you actually work" payable on a monthly basis. Additionally, he will receive, "At the satisfactory conclusion of the assignment --- \$10.00/day for the days worked subsequent to May 1, 1974."

(c) "No tax or other deductions will be made from the payments made" to petitioner

(d) Petitioner's services "will be required on a full time basis".

(e) Petitioner "will be reimbursed for your reasonable travel and living expenses when working outside your normal work location at 2 Penn Plaza, New York City".

Subsequent consulting agreements extending through the balance of the period at issue herein contained essentially the same provisions.

6. During the years at issue petitioner spent much time away from home on assignments. When not in the field on specific assignments he reported to his 2 Penn Plaza office on a daily basis.

7. Petitioner's assignments dealt with heavy construction in the nature of ports, dams, bridges and tunnels, etc. One assignment during the years at issue was with respect to work on the Chesapeake Bay Bridge. Petitioner purportedly rendered services in an executive capacity. His duties were supervisory and related in part to engineering.

8. Although petitioner took courses at several universities he never received a degree. The nature of the courses he participated in dealt with construction, management and accounting.

9. Petitioner held no certification or license in engineering.

10. Petitioner rendered services solely for Raymond Int'l during the years at issue.

11. Petitioner's consulting agreements, as well as his own correspondence and that from Raymond Int'l, all referred to petitioner as being a "consultant" during the years at issue herein.

12. Although additional time was allowed for submission of documentation detailing the exact nature of petitioner's activities during the years at issue, no such documentation was forthcoming.

13. During the hearing it was alleged that Raymond Int'l supervised and controlled petitioner's activities; however, no evidence was submitted to support such allegation.

14. Pursuant to a letter submitted by petitioner dated September 3, 1978 and the testimony adduced by Carol E. Mynatt during the hearing held herein, it was alleged that:

(a) The aforementioned dog breeding activities were engaged in by both petitioner and Mrs. Mynatt.

(b) Partial ownership in one champion grade "Afghan" dog was purchased by petitioners. The remaining interest was held by the owner of Grandeur Kennels.

(c) Said dog was to be used for breeding and show purposes and such purchase was made with the intention of producing a profit.

(d) Said dog, which was boarded in petitioners' home, developed an infirmity of the hip which destroyed its value for the purposes intended.

15. No documentary evidence was submitted in support of any of the above such allegations.

16. Although a breakdown of income and expenses attributable to the "Construction Consultant" activities and the "dog breeding" activities was requested at the hearing, no such breakdown was submitted; however, it was determined that no income was derived during the years at issue from the dog breeding activities.

17. The expenses purportedly incurred with respect to the dog breeding activities were deducted on petitioners' returns in computing their reported business income.



CONCLUSIONS OF LAW

A. That 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. (20 NYCRR 203.11(b)(1)(i)).

B. That petitioner's services for Raymond Int'l during the years at issue dealt with the conduct of business itself. Accordingly, even though petitioner's services involved the application of a specialized knowledge, they do not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law and 20 NYCRR 203.11(b)(1)(i).

C. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the unique facts and circumstances of each case.

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.' (Matter of Morton, 284 N.Y. 167, 172). It is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee. (E.g., Matter of Greene v. Gallman, 39 A.D.2d 270, 272, aff'd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of Sullivan Co., 289 N.Y. 110, 112)." Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

D. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e), as incorporated into section 722 of the Tax Law, to show that the degree of direction and control exercised by Raymond Int'l over his activities was sufficient for the existence of a bona fide employer-employee

relationship. Accordingly, petitioner's activities did not constitute services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law.

E. That petitioner's construction consultant activities constituted the carrying on of an unincorporated business pursuant to 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(a) of the Tax Law.

F. That although petitioners have failed to sustain their burden of proof required pursuant to section 689(e), as incorporated into section 722 of the Tax Law, to show that their dog breeding activities were engaged in for profit, the expenses attributable to such activities are not herein disallowed since no action was taken by the Audit Division to raise the deficiency.


G. That the petition of Richard E. Mynatt and Carol E. Mynatt is denied and the Notice of Deficiency dated March 5, 1979 is hereby sustained together with such additional penalty and interest as may be lawfully owing.

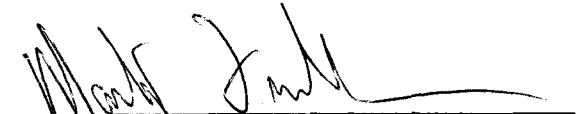
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER