

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Maurice & Barbara Deane :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Years 1976 - 1978. :  
:

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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 22nd day of April, 1985, he served the within notice of Decision by certified mail upon Maurice & Barbara Deane, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Maurice & Barbara Deane  
35 Pheasant Run  
Great Neck, NY 11024

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
22nd day of April, 1985.

David Parchuck

James A. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Maurice & Barbara Deane	:	
		AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Years 1976 - 1978.	:	
	:	

State of New York :  
County of Albany : ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 22nd day of April, 1985, he served the within notice of Decision by certified mail upon Lawrence J. Podell, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence J. Podell  
The Tram Bldg.  
Corner of Applegarth & Prospect Plains Rd.  
Cranbury, NJ 08512

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
22nd day of April, 1985.

David Parbuck

Barbara A. Kappel  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 22, 1985

Maurice & Barbara Deane  
35 Pheasant Run  
Great Neck, NY 11024

Dear Mr. & Mrs. Deane:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Lawrence J. Podell  
The Tram Bldg.  
Corner of Applegarth & Prospect Plains Rd.  
Cranbury, NJ 08512  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MAURICE DEANE AND BARBARA DEANE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1976,	:	
1977 and 1978.	:	

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Petitioners, Maurice Deane and Barbara Deane, 35 Pheasant Run, Great Neck, New York 11024, 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 1976, 1977 and 1978 (File No. 39044).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 25, 1984 at 10:45 A.M. Petitioners appeared by Lawrence J. Podell, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly imposed unincorporated business tax on the income of petitioner Maurice Deane which he reported on a Federal Schedule C for each of the years 1976, 1977 and 1978 on the basis that such income was from activities constituting an unincorporated business.

#### FINDINGS OF FACT

1. Petitioners, Maurice Deane and Barbara Deane<sup>1</sup>, filed timely New York State income tax resident returns for 1977 and 1978 wherein petitioner Maurice

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<sup>1</sup> Barbara Deane is a party hereto solely because she is the wife of petitioner Maurice Deane and filed joint New York income tax returns with her husband for the tax years at issue.

Deane reported business income of \$91,111.00 for 1977 and \$86,056.00 for 1978. Attached to each return was a Federal Schedule C, Profit or (Loss) From Business or Profession, filed for petitioner Maurice Deane, on which the business income noted above was computed. His business activity was listed as "management consultant." The tax return for 1976 was not introduced into evidence.

2. On June 8, 1981, the Audit Division issued a Statement of Audit Changes against petitioners alleging unincorporated business tax due of \$127.18, \$4,461.10 and \$3,802.80 for 1976, 1977 and 1978, respectively.<sup>2</sup> The following explanation was provided: "Your activities as a management consultant is (sic) subject to the Unincorporated Business Tax under Article 23 of the New York Tax Law." On April 14, 1982, the Audit Division issued a Notice of Deficiency against petitioner Maurice Deane for 1976 and 1978 asserting unincorporated business tax due of \$1,929.94 plus interest.<sup>3</sup>

3. Petitioner Maurice Deane was employed by Endo Laboratories, Inc. ("Endo") from April of 1951 to February of 1977. Endo, an ethical pharmaceutical firm,<sup>4</sup> was a family-owned business founded by Mr. Deane's father-in-law and another family member. Mr. Deane also had an ownership interest in Endo. In 1969, Endo was sold to and became a subsidiary of E. I. du Pont de Nemours & Co. ("Du Pont"). Petitioner Maurice Deane and the other owners of Endo received approximately one percent of the common stock of Du Pont in exchange for their ownership interest in Endo.

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<sup>2</sup> The Statement also showed a personal income tax overpayment due petitioners of \$6,461.14 for 1977 which was applied against the alleged unincorporated business tax deficiency resulting in net tax due of \$1,929.94.

<sup>3</sup> Although the Notice identified the years at issue as 1976 and 1978, the tax alleged due was for the years 1976, 1977 and 1978.

<sup>4</sup> An ethical pharmaceutical company is an industry term used to describe companies which deal primarily in drug products prescribed by physicians.

4. Beginning in 1970, Du Pont began replacing the management of Endo with Du Pont's own staff. However, petitioner Maurice Deane, who had been Endo's executive vice president and chairman of its executive committee prior to the takeover by Du Pont [and in the words of Mr. Deane "was essentially making all the (management) decisions..."], was retained by Du Pont primarily because Du Pont, according to Mr. Deane, had "no experience in the pharmaceutical business at all...." In fact, petitioner Maurice Deane became president of Endo at the end of 1970 and was involved in the operation of Endo up until 1977 when Du Pont decided to replace Mr. Deane with one of their own people, Norbert F. Reinert. Mr. Deane, who was "surprised" by this development, entered into a "Consultantship Agreement", which provided, in part, as follows:

"1) For the three (3) year period March 1, 1977, through February 29, 1980, you shall make yourself available to consult with and for us (Endo) and/or the Biochemicals Department of E. I. du Pont de Nemours and Company (Du Pont) promptly after you are notified that such consultation is requested.

2) The area of consultation shall be any matter within the scope of the ethical pharmaceutical business.

\* \* \*

4) Your position shall be that of an independent contractor and not an employee of Endo or Du Pont.

\* \* \*

8) During the three (3) year period specified in paragraph 1 hereof, you shall not consult for or enter into or carry on, either directly or indirectly, whether as owner, employee or otherwise, in any area or possession of the United States or in Canada, a business or businesses involving the manufacture and/or sale of ethical pharmaceutical drug products (including over-the-counter drugs) except as a director, officer or employee of Endo...

9) In consideration of the foregoing, we shall pay to you the sums of \$105,012.00 for the year ending February 28, 1978; \$75,000.00 for the year ending February 28, 1979; and \$50,000.00 for the year ending February 29, 1980; thus an amount totaling \$230,012.00 over the three (3) year period specified in paragraph 1 of this

agreement. During each of those three (3) years, payments shall be made to you in twelve (12) equal monthly installments. In addition, we shall reimburse you for all reasonable expenses you incur when traveling at Endo's or Du Pont's request pursuant to this agreement. Payment of such expenses shall be made promptly after your submittal to us of the appropriate invoice."

5. Petitioner Maurice Deane, during the years at issue, never provided consulting services to Du Pont, although he was under an obligation to do so. Petitioner's base salary from Endo in his last year of employment was \$100,000.00. Petitioner and Du Pont reached an agreement that he would receive \$100,000.00 for the period March 1, 1977 through February 28, 1978, \$75,000.00 for the period ending February 28, 1979 and \$50,000.00 for the period ending February 28, 1980. [The \$105,012.00 noted in the agreement described in Finding of Fact "4", supra, as the amount to be paid to petitioner in the first year following his termination of employment with Endo also includes "five thousand some odd dollars owed to me (petitioner Maurice Deane) from the previous year, and they just lumped it in...."]

6. Endo's two best selling drugs are "coumadin" and "percordan."<sup>5</sup> They were first introduced in the 1950's and petitioner's knowledge concerning the research and development of these drugs, as well as his familiarity with the new drug applications filed by Endo with the Federal Drug Administration, was knowledge valued by Du Pont in light of the potential for product liability or negligence lawsuits concerning these drugs. Mr. Deane testified as follows:

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<sup>5</sup> According to the Physicians' Desk Reference published by Medical Economics Company, Inc., "coumadin" is an anticoagulant and "percordan" is a narcotic analgesic.

"Unfortunately pharmaceutical manufacturers are often parties in lawsuits brought by individuals against physicians and or hospitals and manufacturers, because of medications which were taken or prescribed by the doctor, even if the primary suit is against the doctor, the pharmaceutical manufacturer is often named, as well."

7. Petitioner reported the payments received from Du Pont pursuant to the consultantship agreement as gross receipts on a Federal Schedule C for both 1977 and 1978. In addition, the gross receipts apparently included payments that petitioner Maurice Deane received from Posner Laboratories, Inc. ("Posner") of approximately \$18,000.00 during each of the years 1977 and 1978. Petitioner Maurice Dean reported gross receipts of \$98,010.00 and \$96,502.00 for 1977 and 1978, respectively, on a Schedule C for each year. Business expenses were reported on the schedules as follows:

	<u>1977</u>	<u>1978</u>
Rent on business property	\$3,625.00	\$ 5,372.00
Telephone expense	702.00	1,733.00
Office supplies	675.00	279.00
Secretarial	-0-	340.00
Travel, Auto & Sundry	<u>1,897.00</u>	<u>2,722.00</u>
Total Schedule C deductions	<u>\$6,899.00</u>	<u>\$10,446.00</u>

The rental expense was for a one-room office Mr. Deane rented at 98 Cutter Mill Road, Great Neck, New York. The Cutter Mill Road office was used by Mr. Deane primarily as a place to work on the petitioners' substantial personal investment activities. Petitioners were, in the words of Mr. Deane, "the largest single shareholders" in the Saint Francis Hotel Towers in San Francisco. Their dividend income for 1977 and 1978 was \$602,410.00 and \$757,500.00, respectively. On their Schedules B for 1977 and 1978, they reported miscellaneous itemized deductions (which would include expenses of producing income) of only \$18,118.00 and \$24,171.00, respectively. A large portion of the expenses which they reported on the Schedules C appear to be expenses of producing income and should have been reported on Schedules B. For example, travel expenses deducted



on the Schedules C include the expense of attending shareholder meetings in San Francisco, which should have been deducted on Schedules B. Petitioner Maurice Deane also performed some activities for Posner at the Cutter Mill Road office.

8. Posner was a manufacturer of cosmetic products that was owned by Endo prior to Du Pont's acquisition of Endo. Posner, however, was not acquired by Du Pont. Its ownership was restructured with Mr. Deane and his brothers-in-law remaining in control. During the years at issue, Posner retained Mr. Deane to locate a suitable individual to serve as its president and to see that the company was operated properly. The payments from Posner noted in Finding of Fact "7", supra, were for such services.

9. Mr. Deane was not an employee of Posner, but was a member of its Board of Directors during the years at issue.

10. Petitioner Maurice Deane received a Wage and Tax Statement from Endo for each of the years, 1977 and 1978, on which total compensation was reported of \$43,124.63 and \$46,852.50, respectively. Mr. Deane reported such compensation on his 1977 and 1978 New York State income tax returns as wages and other employee compensation. The compensation was comprised of the following items:

	<u>1977</u>
Salary earned	\$17,502.00
In lieu of vacation at termination	6,058.38
1975 Incentive Compensation installment	10,500.00
1976 Incentive Compensation installment:	
17 shares Du Pont Common Stock @ \$128.75	2,188.75
Cash	6,576.50
Dividend equivalents 52 shares @ \$5.75	299.00
Total	<u>\$43,124.63</u>

	<u>1978</u>
1975 & 1976 Incentive Compensation installment	\$21,000.00
1976 Incentive Compensation 52 shares Du Pont Common Stock @ \$117.75	6,123.00
1976 Incentive Compensation installment	<u>19,729.50</u>
Total	<u>\$46,852.50</u>

11. There is some confusion in the record concerning the years at issue. The petition states that 1976, 1977 and 1978 are at issue. Furthermore, petitioner's representative stated at the commencement of the hearing (see page 7 of the transcript) that petitioners are seeking to cancel an alleged unincorporated business tax deficiency of \$8,391.08. This amount consists of tax alleged due of \$127.18 for 1976, \$4,461.10 for 1977, and \$3,802.80 for 1978. However, counsel for the Audit Division stated (see page 5 of the transcript), "I might add that 1978 is not in issue at this point. It's been resolved between the parties." Later in the proceeding when he was asked to state the issue(s) for the State Tax Commission to resolve, he compounded the confusion stating, "The issue is whether the petitioner's activity as a management consultant is and (sic) subject to the Unincorporated Business Tax for the 1977-1978 tax years." When asked to restate the issue, the petitioner's representative did not note that 1976 was also at issue. Because of this confusion, for purposes of this decision, the State Tax Commission will address all three years, 1976, 1977 and 1978.

#### CONCLUSIONS OF LAW

A. That 20 NYCRR 203.1(a) defines an unincorporated business as follows:

"(A)n unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual... In general, the trades, businesses or occupations which constitute an unincorporated business when conducted or engaged in (or when they are being liquidated) by an individual or an unincorporated entity include, without limitation, all phases of such acti-

vities as mining, farming, manufacturing and processing, merchandising, banking and financing, trucking and other transportation services, brokerage services of all types and any other activity which involves the leasing of or trading or dealing in real or personal property or the performing of services of any kind. Where a doubt as to the status of an activity exists, all the relevant facts and circumstances must be considered in determining whether the activity or the transactions involved constitute a trade, business or occupation for the purposes of this section. Generally, the continuity, frequency and regularity of activities, as distinguished from casual or isolated transactions, and the amount of time, thought and energy devoted to the activities or transactions are the factors which are to be taken into consideration."

B. That petitioners did not produce any documentary or substantial evidence to sustain their burden of proof under Tax Law §722, which incorporates §689 into Article 23 of the Tax Law, to show that the receipts from the "Consultantship Agreement" were really in the nature of severance pay and were not compensation for consulting services provided on a frequent and regular basis by Maurice Deane to Du Pont. The petitioner was required under a binding legal contract to be available for a term of three years upon the demand of Du Pont to provide consultantship services and therefore the income derived therefrom was subject to the unincorporated business tax. It is irrelevant that the consultantship services were not actually rendered on a frequent and regular basis, because the contract provided the potential for those services to be rendered on such a basis over a term of years.

C. That petitioners did not sustain their burden of proof to show that Mr. Deane's income of approximately \$18,000.00 per year from Posner was not properly subject to the unincorporated business tax. As noted in Finding of Fact "8", supra, petitioner Maurice Deane was retained by Posner "to see that the company was operated properly." It is reasonable to assume that in performing such a broad task, he performed services on a frequent and regular basis on behalf of Posner. Therefore, the Audit Division is directed to recalculate the

deficiencies for 1977 and 1978. The deficiency for 1976 is also sustained because petitioner failed to produce any evidence in support of the cancellation of such deficiency.


D. That the petition of Maurice Deane and Barbara Deane is denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 22 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER