

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Randolph B. & Carol B. McMullen :

: 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 1978 & 1979. :

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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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Randolph B. & Carol B. McMullen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Randolph B. & Carol B. McMullen  
55 Montebello Rd.  
Suffern, NY 10901

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  
23rd day of May, 1985.

David Parchuck

Edward A. Hagelund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 23, 1985

Randolph B. & Carol B. McMullen  
55 Montebello Rd.  
Suffern, NY 10901

Dear Mr. & Mrs. McMullen:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RANDOLPH B. McMULLEN AND CAROL B. McMULLEN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1978	:	
and 1979.	:	

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Petitioners, Randolph B. McMullen and Carol B. McMullen, 55 Montebello Road, Suffern, New York 10901, 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 1978 and 1979 (File No. 36353).

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 October 2, 1984 at 2:45 P.M., with all briefs to be submitted by November 30, 1984. Petitioner Randolph B. McMullen appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUES

I. Whether petitioner Randolph B. McMullen's activities as an economic consultant constituted the practice of a profession, the income of which is exempt from the imposition of unincorporated business tax.

II. Whether, if said petitioner's income is subject to unincorporated business tax, he may properly allocate a portion of such income to sources without the State of New York.

FINDINGS OF FACT

1. Randolph B. McMullen and Carol B. McMullen timely filed a New York State Income Tax Resident Return for each of the years 1978 and 1979 under filing status "married filing separately on one return". On each of said returns, Randolph B. McMullen (hereinafter "petitioner") listed his occupation as "consultant" and reported business income of \$27,603.00 (1978) and \$34,307.00 (1979). Petitioner did not file an unincorporated business tax return for either year at issue herein. Pursuant to a copy of petitioner's 1978 Federal Schedule C, he conducted business under the name "McMullen Associates."

2. On June 2, 1981, the Audit Division issued a Statement of Audit Changes wherein petitioner's business income derived from his activities as a consultant was held subject to unincorporated business tax. Accordingly, a Notice of Deficiency was issued against petitioner and his wife on November 6, 1981 asserting unincorporated business tax for 1978 and 1979 of \$1,973.97, penalties of \$885.48, plus interest of \$353.59, for a total due of \$3,213.04. Said penalties were asserted for failure to file unincorporated business tax returns for 1978 and 1979, failure to pay the taxes determined to be due, and failure to file declarations of estimated unincorporated business tax, pursuant to sections 685(a)(1), 685(a)(2) and 685(c) of the Tax Law, respectively, as incorporated into Article 23 by section 722(a).

3. Petitioner alleged that his activities as an economic consultant constituted the practice of a profession pursuant to section 703(c) of the Tax Law. Accordingly, he argued that his income derived therefrom is properly exempt from the imposition of unincorporated business tax.

4. Prior to June, 1978, petitioner carried on his consulting activities from an office maintained in his personal residence in Suffern, New York.

5. In June, 1978, petitioner was engaged by Lincoln Telephone Company ("Lincoln") in Lincoln, Nebraska to complete a ten year economic forecast for Lincoln with respect to its customers and equipment. Petitioner's services for Lincoln were expected to last for a duration of approximately eighteen months.

6. At the time petitioner secured the assignment with Lincoln, he separated from his wife on a trial basis and moved to Lincoln, Nebraska. Lincoln provided petitioner with a residence and an office at its expense in Lincoln, Nebraska. Said office, which was leased by Lincoln, was located in a bank building at 1440 M Street, Lincoln, Nebraska and contained a desk, table, bookcase and telephone.

7. Petitioner's New York office remained basically intact on his move to Nebraska; however, he moved his computer to the Nebraska office.

8. From June, 1978 through the close of taxable year 1979, petitioner conducted no business within the State of New York. His services during said period were rendered either in the office maintained in Nebraska or on the business premises of various other clients located without New York State.

9. From June, 1978 through the close of taxable year 1979, approximately seventy-five (75) percent of petitioner's activities were with respect to his services rendered for Lincoln. Additionally, he rendered services during said period for the following principals:

a) Bowater Co. - a South Carolina paper manufacturer. Petitioner performed an evaluation of its marketing procedures for coated papers.

b) Simmons Co. - a New Jersey mattress manufacturer. Petitioner conducted a brief economic study.

c) Bigalow - a North Carolina carpet manufacturer. Petitioner conducted a profitability study of its products.

d) Echlin Manufacturing Co. - a Connecticut automobile parts manufacturer. Petitioner conducted a profitability study of its products.

e) Commonwealth Telephone Co. - located in Pennsylvania. The nature of petitioner's services rendered for this principal were not disclosed.

f) Sterling Products - located in Pennsylvania. The nature of petitioner's services rendered for this principal were not disclosed.

g) Sun Oil Co. - located in Pennsylvania. Petitioner conducted a study to develop a business line profitability system.

h) First National Bank - located in Lincoln, Nebraska. Petitioner conducted an economic analysis for this principal.

10. All of the aforestated clients were solicited by petitioner through either mail or personal contact.

11. During the years at issue, petitioner billed his clients on a flat rate basis of \$275.00 per day. His invoices were computer generated and bore no letterhead.

12. In March, 1980, petitioner vacated the Lincoln, Nebraska office and moved back to his residence and office in Suffern, New York. He claimed that the reason for this change was twofold: that he had been increasing his clientele outside of the Nebraska area and that he had reconciled with his wife.

13. Petitioner argued that should it be determined that his activities as an economic consultant constitute the carrying on of an unincorporated business, he would properly be entitled to allocate all his income derived from such activities during the period June, 1978 through December 31, 1979 to sources without the State of New York.

14. That 41 percent of petitioner's services during 1978 were rendered prior to his move to Nebraska in June, and 59 percent of his services during 1978 were rendered subsequent to said move.

15. Petitioner holds a master's degree in economics from Lehigh University, where he had also subsequently taught. Prior to his independent consulting career, he was a principal with the management consulting firm of Cooper, Behrens & McMullen, Inc. Previously, he held various management positions in private industry.

16. Prior to the years at issue, petitioner had authored a portion of the McGraw-Hill publication, "Encyclopedia of Professional Management."

17. More than 80 percent of petitioner's gross income was derived from personal services actually rendered by him.

18. Capital was not a material income producing factor in petitioner's business.

19. Carol B. McMullen was not involved in petitioner's business activities during the years at issue herein.

#### CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides that:

"The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or members of the partnership or other entity, shall not be deemed an unincorporated business."

B. That 20 NYCRR 203.11(b)(1)(i) defines the term "other profession" as:

"[a]ny 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." (emphasis supplied).

C. That petitioner's consulting services during the years 1978 and 1979 dealt with the conduct of business itself. Accordingly, such services did not constitute the practice of a profession pursuant to section 703(c) of the Tax Law and 20 NYCRR 203.11(b)(1)(i) (see Alfred E. Kahn and Mary S. Kahn, State Tax Commission, January 9, 1981).

D. That petitioner's consulting services during the years 1978 and 1979 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law.

E. That section 707(a) of the Tax Law provides that:

"...if an unincorporated business is carried on both within and without this state as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

F. That, in general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. A regular place of business is any bona fide office, factory, warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business. (20 NYCRR 207.2(a).)

G. That petitioner's Lincoln, Nebraska office constituted a regular place of business for petitioner during the period June, 1978 through December 31, 1979. Since this office was his sole regular place of business during said



period, petitioner's income derived from his consulting activities during said period is allocable to sources without New York State and accordingly nontaxable for New York State unincorporated business tax purposes.

H. That for the year 1978, 41 percent of petitioner's net business income of \$27,603.00 is allocable to New York State and 59 percent of such income is allocable to sources without New York State (see Finding of Fact "14, supra).

I. That the deficiency is cancelled insofar as it applies to petitioner Carol B. McMullen (see Finding of Fact "19, supra).

J. That the petition of Randolph B. McMullen and Carol B. McMullen is granted to the extent provided in Conclusions of Law "G", "H" and "I", supra, and except as so granted, said petition is, in all other respects, denied.


K. That the Audit Division is hereby directed to modify the Notice of Deficiency issued November 6, 1981 to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER