

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Donald Softness :  
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 - 1979. :  
:

---

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon Donald Softness, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Softness  
251 East 51st Street  
New York, NY 10022

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  
14th day of March, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Donald Softness :  
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 - 1979. :  
:

---

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 14th day of March, 1985, he served the within notice of Decision by certified mail upon Steven Glaser, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven Glaser  
Moses & Singer  
1271 Avenue of the Americas  
New York, NY 10020

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  
14th day of March, 1985.

David Parchuck

Anna A. Hageman  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

March 14, 1985

Donald Softness  
251 East 51st Street  
New York, NY 10022

Dear Mr. Softness:

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  
Steven Glaser  
Moses & Singer  
1271 Avenue of the Americas  
New York, NY 10020  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

|   |   |          |
|---|---|----------|
| In the Matter of the Petition                 | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| DONALD SOFTNESS                               | : | 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, 1978 and 1979.                          | : |          |

---

Petitioner, Donald Softness, 251 East 51st Street, 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 1976, 1977, 1978 and 1979 (File No. 39038).

A formal hearing was held before Thomas E. Drake, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1984 at 9:15 A.M. Petitioner appeared by Moses & Singer (Steven Glaser and David Rabinowitz, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

#### ISSUES

I. Whether the income received by petitioner from RDR Associates during each of the years in issue was from activities which constituted an unincorporated business and is thus subject to unincorporated business tax.

II. Whether petitioner had reasonable cause for his failure to timely file unincorporated business tax returns and remit any unincorporated business tax due.

FINDINGS OF FACT

1. Petitioner, Donald Softness ("petitioner"), filed separate New York State resident income tax returns on combined forms with his wife for the years 1976, 1977, 1978 and 1979. Said returns reported business income from his activities as a public relations consultant in the amount of \$224,115.00, \$119,385.00, \$264,105.00 and \$34,501.00, respectively. Petitioner did not file unincorporated business tax returns for the years at issue.

2. On June 10, 1982, the Audit Division issued a Notice of Deficiency to petitioner asserting unincorporated business tax due of \$14,006.54, penalty of \$8,571.27, plus interest for the years 1976 and 1977. On the same date, the Audit Division issued a Notice of Deficiency to petitioner for the years 1978 and 1979 asserting unincorporated business tax due of \$8,807.79, penalty of \$3,589.08, plus interest. The Audit Division issued two statements of audit changes to petitioner, one for the years 1976 and 1977 and the other for the years 1978 and 1979, each of which provided the following explanation for the tax and penalty asserted due:

"The income derived from your business activities as a Public Relations Consultant is deemed to be business income subject to the New York State Unincorporated Business Tax under Article 23 of the business tax law...

Penalties under Section 685(a)(1) and 685(a)(2) is (sic) being asserted for failure to file an Unincorporated Business Tax Return and pay the Unincorporated Business Tax Due."

The Statement of Audit Changes for the years 1976 and 1977 showed a reduction to the unincorporated business tax due for 1976 by an overpayment of personal income tax resulting from a net operating loss carryback. Petitioner agrees with the personal income tax overpayment. Accordingly, said overpayment is not at issue herein.

3. Prior to and during the years in issue, petitioner was employed on a full-time basis as a public relations consultant by Softness Group, Inc. ("Softness"). Softness was a public relations firm founded by petitioner several years prior to the years in issue. Its offices were located at 3 East 54th Street, New York, New York. Softness provided petitioner with an office at said address. Petitioner had a 5 percent ownership interest in Softness during the years in issue.

4. During the years in issue, Softness had approximately twenty clients who would pay Softness a set fee every month, and for these clients, Softness would gain favorable press coverage in newspapers, magazines and sometimes television and radio. Petitioner stated that, "we [Softness] persuaded them [the media] that the stories would be of interest to their readers or of service to their readers or in general being newsworthy...". Thereafter, the articles, stories and photos appeared in the press. Softness did not pay the media for such coverage.

5. One of the clients of Softness was a company named RDR Associates ("RDR"). RDR was in the advertising business, specializing in the purchase of advertising time for its respective clients. Another client was Best Foods Company ("Best Foods"), which was a major food processing company. Its products included, among others, Hellman's Mayonnaise and Skippy Peanut Butter. Petitioner handled, as an employee of Softness, the public relations accounts of both RDR and Best Foods.

6. Petitioner's contact at Best Foods was Dennis Beaumont ("Beaumont"), Best Foods' Director of Advertising and Promotion. Petitioner usually met with Beaumont two times a week concerning the public relation activities Softness performed for Best Foods. In 1975, during the course of one of such meetings,

petitioner learned that Best Foods was not satisfied with their current arrangements with its advertising agencies concerning the purchase of television advertising time and that Beaumont was interested in exploring alternate means of purchasing such time. Beaumont commented that he was attending a one-week course dealing with computerized management of the media function which he was very impressed with. The course was taught by an individual who worked for RDR.

7. During the next meeting petitioner had with RDR concerning the public relations activities performed by Softness for RDR, petitioner spoke with its president, Sam Wyman ("Wyman"). At that time, petitioner told Wyman that he knew of a major company who was "somewhat dissatisfied with their present means of buying advertising time." Wyman indicated that he would be interested in meeting with representatives of such a company and, if the meeting resulted in this company becoming a client of RDR, RDR would pay petitioner a "finder's fee" of 10 percent of the income generated over the next five years between the company and RDR.

8. Petitioner arranged a luncheon meeting between Beaumont and Wyman which took place in New York City in 1975. As a result of this meeting and many subsequent meetings between representatives of Best Foods and RDR, Best Foods used RDR to purchase substantial amounts of its television advertising time over the next five years. Petitioner was not present at any of the subsequent meetings between Best Foods and RDR, and was not involved with the development of the business relationship between Best Foods and RDR after the initial meeting.

9. Petitioner received payments from RDR pursuant to the oral agreement between himself and RDR in the amounts of \$224,990.00, \$120,000.00, \$265,000.00

and \$36,000.00 for the years 1976, 1977, 1978 and 1979, respectively.<sup>1</sup> He reported such income on Federal Schedule C, Profit or (Loss) From Business or Profession, for each of the years at issue. The income received from RDR was the sole item of business income reported on said schedules. Each of the schedules showed petitioner's principle business activity as "Public Relations" and listed his home address as his business address. Each schedule reported business expenses in the amount of \$875.00, \$615.00, \$895.00 and \$1,499.00 for the years 1976, 1977, 1978 and 1979, respectively. Although business expenses were reported on the schedules, petitioner did not prepare the returns during the years in issue and had no explanation why they were reported in that manner since he did not incur any expenses, after the initial meeting, in earning the income in question.

10. Petitioner did not conduct any business at his home or at the office provided him by Softness except for the business of Softness. He did not hold himself out to the public as being engaged in any business other than as an employee and shareholder of Softness.

11. Petitioner employed an accountant to prepare his income tax returns during the years in issue. Petitioner submitted his tax information to the accountant who would prepare the return which petitioner would then review and sign. Petitioner was not aware of the unincorporated business tax and his accountant never discussed the question of unincorporated business tax concerning the income in question.

---

<sup>1</sup> The payments were not made on a set schedule, but were apparently made when Best Foods made a payment to RDR, usually four or five times a year.



CONCLUSIONS OF LAW

A. That an unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity (section 703(a) of the Tax Law).

B. That 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 unincorporated business tax purposes. 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 (20 NYCRR 203.1[a]).

C. That the finder's fee received by petitioner during the years in issue resulted from an isolated transaction and the activity performed by petitioner in earning said fee lacked the continuity, frequency and regularity to constitute an unincorporated business. Accordingly, the finder's fee is not subject to unincorporated business tax (see Matter of Whitney I. Gerard, State Tax Commission, October 9, 1979).

D. That in light of Conclusion of Law "C", supra, it is not necessary to address the second issue herein.

E. That the petition of Donald Softness is granted and the two notices of deficiency dated June 10, 1982 are cancelled. The Audit Division is directed

to authorize a refund of the personal income tax overpayment noted in Finding of Fact "2", supra.

DATED: Albany, New York

MAR 14 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER