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STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

RANDOLPH G. PHILLIPS & LILY PHILLIPS

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or  
a Refund of Personal Income & Unincorporated  
Taxes under Article(s) 16-16A-<sup>23</sup>22-of the Business  
Tax Law for the Year(s) 1954, 1956 & 1957 and  
1960

State of New York  
County of Albany

Martha Funaro , 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 14th day of March , 19 74, she served the within  
Notice of Decision (or Determination) by (certified) mail upon Randolph G. &  
Lily Phillips (representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Mr. & Mrs. Randolph G. Phillips  
30 East 72nd Street  
New York, New York

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) 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 , 1974.

*George A. Van Patten*

*Martha Funaro*

**Dated: Albany, New York**

**March 14, 1974**

**Mr. & Mrs. Randolph G. Phillips  
30 East 72nd Street  
New York, New York**

**Dear Mr. & Mrs. Phillips:**

**Please take notice of the Determination of the  
State Tax Commission enclosed herewith.**

**Please take further notice that pursuant to  
sections 375 and 386j of the Tax Law any proceeding  
in court to review an adverse decision under Articles  
16 and 16A of the Tax Law must be commenced within  
90 days after the date of this notice.**

**Please take further notice that pursuant to  
sections 690 and 722 of the Tax Law any proceeding in  
court to review an adverse decision under Articles 22  
and 23 of the Tax Law must be commenced within 4 months  
after the date of this notice.**

**Any inquiries concerning the computation of tax  
due or refund allowed in accordance with this decision  
or concerning any other matter relating hereto may be  
addressed to the undersigned. These will be referred  
to the proper party for reply.**

**Very truly yours,**

**Paul B. Coburn  
Hearing Officer**

**cc: Law Bureau  
PBC/maf**

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Applications	:	
of	:	
RANDOLPH G. PHILLIPS and	:	
LILY PHILLIPS	:	
for Revision or Refund of Personal	:	
Income Taxes under Article 16 and	:	DETERMINATION
Unincorporated Business Taxes under	:	
Article 16-A of the Tax Law for the	:	
Years 1954, 1956 and 1957 and for	:	
Revision or Refund of Personal Income	:	
Taxes under Article 22 and Unincor-	:	
porated Business Taxes under Article	:	
23 of the Tax Law for the Year 1960.	:	

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The taxpayers herein, having filed applications for revision or refund of personal income taxes under Article 16 and unincorporated business taxes under Article 16-A of the Tax Law for the years 1954, 1956, 1957 and for revision or refund of personal income taxes under Article 22 and unincorporated business taxes under Article 23 of the Tax Law for the year 1960, and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York, on the 22nd day of January, 1965 before Solomon Sies, Hearing Officer, of the Department of Taxation and Finance, at which hearing the taxpayer, Randolph G. Phillips, appeared personally, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

1. That the taxpayers, Randolph G. Phillips and Lily R. Phillips, his wife, filed joint resident New York State income

tax returns for the years 1954 and 1956; that on Schedule "A" of said returns, the taxpayer, Randolph G. Phillips, reported receipts from business conducted as "financial consultant" at 128 West 70th Street, New York, New York; that said taxpayer deducted business expenses consisting of rent, repairs, labor, materials and supplies, telephone, electricity, entertainment and miscellaneous expenses; that said taxpayer deducted business expenses for 1954 in the sum of \$2,148.00 and for 1956 in the sum of \$3,814.00; that the taxpayer, Randolph G. Phillips, did not file any unincorporated business tax returns for said years on the ground that he claimed that none was due because he was engaged in the practice of a profession in which more than 80% of the gross income was derived from his personal services and in which capital was not a material income-producing factor; that on December 29, 1958, the Department of Taxation and Finance made an additional assessment against the taxpayers for the year 1954 (Assessment #B-519199) holding the net reported business income in the sum of \$16,130.00 subject to unincorporated business tax and imposing unincorporated business tax together with penalty and interest in the sum of \$354.10 on the ground that the business activities in which the aforementioned taxpayer was engaged constituted the carrying on of an unincorporated business so as to subject the income derived therefrom to unincorporated business tax under Article 16-A of the Tax Law; that on May 18, 1959, the Department of Taxation and Finance made an additional assessment against the taxpayer, Randolph G. Phillips, for the

year 1956 (Assessment #B-605837) holding the net business income reported by him subject to unincorporated business taxes on the ground that the activities in which he was engaged constituted the carrying on of an unincorporated business and imposed unincorporated business tax with penalty and interest in the sum of \$181.64.

2. That the taxpayers, Randolph G. Phillips and Lily R. Phillips, his wife, filed a joint personal income tax return for the year 1957 in which the taxpayer, Randolph G. Phillips, reported compensation received from the United Corporation in the sum of \$50,000.00; that attached to said return was a statement indicating that by order of the U.S. District Court for the District of Delaware the United Corporation was directed to pay to the taxpayer, Randolph Phillips, for personal services rendered by him for the period from 1943 to September 15, 1954, compensation in the sum of \$50,000.00 and disbursements in the sum of \$26,925.00; that the taxpayer had incurred other expenses which were not reimbursed in the sum of \$23,415.00 so that the amount taxable for the year 1957 based upon the amount received by the taxpayer amounted to \$26,485.00; that in addition thereto the taxpayers deducted upon said return the sum of \$1,000.00 for loss as a result of theft and further deducted the sum of \$1,084.00 for medical expenses and the sum of \$100.00 for taxes; that on April 10, 1962; the Department of Taxation and Finance made an additional assessment against the taxpayers (Assessment #FA-93724) disallowing the following items; unreimbursed business expenses in the sum of \$26,925.00, deduction for theft loss as

unsubstantiated in the sum of \$1,000.00; deduction for medical expenses as unsubstantiated in the sum of \$1,080.00 and disallowance of \$100.00 as an error in computation and imposed additional normal tax against the taxpayers in the sum of \$2,037.63; that in addition, the aforementioned assessment imposed unincorporated business tax on the aforementioned sum of \$50,000.00 as received from United Corporation and imposed additional unincorporated business tax in the sum of \$1,400.36 with penalty and interest of \$406.11 so that the total amount of both normal and unincorporated business tax assessed for the year 1957 amounted to \$3,844.10.

3. That Randolph G. Phillips and Lily R. Phillips, his wife, filed a joint personal income tax return for the year 1960 in which the taxpayer, Randolph G. Phillips, reported wages received as compensation from Investors Diversified Services, Inc. in the sum of \$12,500.00; that in addition thereto the taxpayer, Randolph G. Phillips, reported on Schedule "C" (details of Federal adjusted gross income or loss from Federal return) the sum of \$15,622.00 as net profit from business as "financial consultant"; that in addition, the aforementioned taxpayer deducted net operating loss, 1959 (carry forward) in the sum of \$2,612.00; that the taxpayer, Randolph G. Phillips, did not file any unincorporated business tax return for the year 1960; that on June 20, 1962, the Department of Taxation and Finance made an additional assessment against the taxpayers for the year 1960 (Assessment #AB-001902) correcting the errors in the

reporting by the taxpayers of the total income and total deductions for said year, disallowing the net operating loss for failure to furnish information requested; that as a result thereof personal income taxes including penalty and interest was computed to be due in the sum of \$983.70; that in addition thereto, the sum of \$26,450.00 was held to be subject to unincorporated business tax and additional unincorporated business tax including penalty and interest was assessed in the sum of \$740.25; that the total assessment for the year 1960 amounted to \$1,723.95.

4. That during the years in issue and prior thereto the taxpayer, Randolph G. Phillips, was engaged on behalf of himself as a participating stockholder and other stockholders in proxy-soliciting campaigns in connection with the election of directors at the annual meetings of the stockholders of certain corporations with a view towards seeking the ouster of an officer or officers and the election of new officers and/or new directors, to the board of directors of such corporations for the purpose of gaining control of such corporations and voting for or against certain proposals or resolutions of the board of directors and/or stockholders in connection with the affairs of such corporations and the re-organization of such corporations including public utility holding and investment companies; that the aforementioned taxpayer as a participating stockholder and as attorney-in-fact for other stockholders or bondholders appeared before the Securities Exchange Commission in corporate re-organization proceedings of public utility holding companies and investment



companies; that the taxpayer, Randolph G. Phillips, also appeared before the Federal Courts, as attorney pro se, in connection with such corporate re-organization proceedings; that the said taxpayer is not and never has been an attorney-at-law admitted to practice law in any State of the United States or in the Federal Courts; that in addition, the taxpayer, Randolph G. Phillips, instituted minority stockholder suits and/or for an accounting of funds against the officers and directors of certain corporations and appeared as attorney pro se in such court actions; that the taxpayer was retained by certain individuals and corporations as a consultant on a fee basis in connection with proxy contests and corporate re-organizations and related matters as more fully set forth above; that in connection with the aforementioned activities, the taxpayer maintained an office at 128 East 70th Street, New York City.

5. That United Corporation, a Delaware Corporation, was organized in 1929 and had been, since its organization, exclusively a holding company; that in 1938, it registered with the Commission as a public utility holding company under the act; that at that time, its capitalization consisted of preference stock, common stock and option warrants; that in 1941 United filed a plan with the Commission pursuant to Section 11(e) of the Act designed to comply with Section II of the Act and ultimately to change United from a holding company to an investment company; that at that time, the only litigating parties to the proceedings were the staff of the Commission and United; that in February, 1943, Phillips, then owner, directly and indirectly,

of 1100 shares of United stock, entered into the picture by beginning a proxy soliciting campaign in connection with the election of directors at the 1943 annual meeting of United's stockholders; that in his proxy letter to stockholders, Phillips proposed the ouster of George Howard, president of United for some fourteen years, the election of four new directors, including himself, to the seven-member board of directors, and that United "cooperate with the S.E.C. in working out United's problems under the Holding Company Act."; that on August 14, 1943, the Commission issued its Findings, Opinion and Order directing United to change its capitalization to one class of stock, namely common stock, and to take such action as would cause it to cease to be a holding company; that the taxpayer subsequently appeared before the S.E.C. and filed objections to the proposed plan and suggested various changes; that various plans and modifications were subsequently submitted which were opposed by Phillips; that having retired all its preference stock, United, on October 16, 1949, filed its Investment Company Plan; that hearings on the Plan began in January, 1950; that it was amended in June, 1950 and again in June, 1951, pursuant to suggestions by the Commission; that on June 26, 1951, the Commission approved the amended plan; that various appeals by Phillips culminated in final approval of the Commission's action; that during the pendency of the litigation relating to the Commission's approval of the amended Investment Company Plan, hearings were held by a Commission Hearing Examiner, in January, 1955, on applications for allowance of fees and reimbursement of expenses for services in

connection with the Exchange Plan and the Investment Company Plan; that Phillips requested fees as attorney pro se in the amount \$249,120.00 and reimbursement of expenses in the amount of \$50,340.00 in connection with his activities in the re-organization of United; that the hearing officer at the S.E.C. recommended allowances to the taxpayer of fees in the sum of \$50,000.00 and disbursements in the sum of \$26,925.00 and concluded that the 1943 proxy contest and the 1944 solicitation of the taxpayer did not warrant charging United for these proceedings with the cost of these solicitations since it was clear that both the 1943 and 1944 proxy contests were conducted by the taxpayer for the purpose of securing for himself and his nominees places on United's board of directors and were not related to the retirement plan in these proceedings; that the Commission rejected its Hearing Officer's recommendation to allow taxpayer fees and disbursements; that he then commenced an action in Federal Court objecting to allowance of fees by S.E.C. to counsel for United and for review of disallowance of his fees and disbursements; that after review by Appellate Courts, United was directed to and did pay to the taxpayer in 1957 the sum of \$50,000.00 as compensation for his services related to the Investment Company Plan and the 1947 proxy contest and reimbursement for expenses in connection therewith the sum of \$26,925.00 but did not allow him any further compensation or expenses.

6. That the taxpayer contends that his activities as more fully set forth in Finding (4) above constituted the practice of a profession in which more than 80% of the income was derived

from the personal services of the taxpayer and that capital was not an income-producing factor and that such income was therefore exempt from unincorporated business tax; that in addition, the taxpayer further contends that \$15,000.00 of reported business income for the year 1954 was earned by him as an employee of Alleghany Corporation; that the taxpayer further contends that his gross income of \$15,000.00 reported as total receipts from business during the year 1956 was paid to him for personal services rendered to one George Brussel, Jr., as attorney for Thermoid Corporation and that the same represents income as an "employee"; that the taxpayer further contends that the additional assessment for the year 1954 has been barred by the Statute of Limitations; that with respect to the income reported by the taxpayer for the years 1954 and 1956, the principals whom he represented and from whom he received compensation did not consider the taxpayer as an employee for payroll tax purposes since they failed to deduct withholding taxes on the compensation paid to the taxpayer nor did they consider him an employee for any other purpose; that the taxpayer has failed to establish that the principals whom he represented during the years 1954 and 1956 exercised sufficient direction and control over his activities so as to constitute an employer-employee relationship rather than that of an independent contractor; that the taxpayer was retained by said principals as an independent contractor in connection with his activities on behalf of said principals as more fully set forth in Finding (4) above.

7. That the services rendered by the taxpayer and reported

by him as an employee for Investors Diversified Services, Inc. for the year 1960 were directly related to and integrated with his business activities so as to constitute a part of such business activities being carried on by him as more fully described in Finding (4) above; that such compensation received by the taxpayer was subject to unincorporated business tax.

8. That with respect to the additional assessment for the year 1957 the taxpayer submitted proof of his medical expenses at the hearing and was also entitled to a deduction of theft which was disallowed; that the income reported by the taxpayer for the year 1957 in the sum of \$50,000.00 awarded to him as attorney pro se in certain proceedings involving the United Corporation before the S.E.C. as more fully set forth in Finding (5) above constituted income from an unincorporated business and was subject to unincorporated business tax; that the taxpayer is not entitled to deduct unreimbursed expenses in the sum of \$23,415.00 expended by him in connection with the proxy contests during the years 1943 and 1944 for which he did not receive any compensation from United Corporation or award by the Securities Exchange Commission; that such expenses were not a proper deduction by the taxpayer for the year 1957.

9. That although the taxpayer was entitled on his Federal Income Tax Return for the year 1960 to carry forward net operating loss sustained by him during the year 1959, there were no similar provisions contained in Article 16 of the New York State Tax Law, then in effect; that accordingly, the net operating loss of the taxpayer in 1959 was not a proper deduction on his New York State Income Tax Return for the year 1960.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

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A. That the activities of the taxpayer during the years 1954, 1956 and 1960 as more fully set forth in Findings (5), (7) and (8) above did not constitute the practice of a recognized profession exempt from unincorporated business taxes in accordance with the provisions of Sections 386 and 703 of the Tax Law; that the activities of the taxpayer during the years 1954, 1956 constituted that of an independent contractor and not that of an employee; that said activities constituted the carrying on of an unincorporated business in accordance with the provisions of Sections 386 and 703 of the Tax Law.

B. That the salary income reported by the taxpayer for the year 1960 was directly related to and integrated with his business activities as more fully described in Findings (4) and (7) above and in furtherance thereof and constituted additional receipts of an unincorporated business in accordance with the provisions of Section 703 of the Tax Law; that the net operating loss of the taxpayer sustained by him in 1959 was not a proper deduction on his New York State Income Tax Return for the year 1960 in accordance with the provisions of Article 16 of the Tax Law in effect during the year 1959.

C. That since the taxpayer did not file any unincorporated business tax returns for the years in issue, additional notices of assessments could be made at any time and such additional assessments of unincorporated business taxes for the years 1954 and 1956 were therefore timely made in accordance with subdivision 1, Section 373 of the Tax Law.

D. That in accordance with Finding (8) above, the assessment of unincorporated business tax for the year 1957 was lawfully due and owing; that the assessment of normal tax for the year 1957 made against the taxpayer is hereby recomputed as follows:

Normal Tax

Unreimbursed expenses disallowed	\$23,415.00
Error in computation of item 31d corrected	<u>100.00</u>
Total increase	\$23,515.00

Additional normal tax due thereon at 7% \$ 1,656.05


E. That the assessment for the year 1957 is hereby modified in accordance with Determination (D) above; that the assessment of normal tax for the year 1957 (Assessment #FA-93724), as so modified, does not include any tax or other charges which could not have been lawfully demanded and that the taxpayer's applications for revision or refund, except as so modified, be and the same is hereby denied.

DATED: Albany, New York  
March 14, 1974

STATE TAX COMMISSION

  
COMMISSIONER

  
COMMISSIONER

  
COMMISSIONER