STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **GLORIA VANDERBILT-COOPER** for Redetermination of a Deficiency or for Refund of New York State Unincorporated Business Tax under Article 23 of the Tax Law for the Years 1978, 1979 and 1980.	:	DECISION DTA NO. 801272

Petitioner, Gloria Vanderbilt-Cooper, c/o Richard W. Miske, 200 East 42nd Street, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on May 12, 1988 with respect to her petition for redetermination of a deficiency or for refund of New York State unincorporated business tax under Article 23 of the Tax Law for the years 1978, 1979 and 1980 (File No. 801272). Petitioner appeared by Ferro, Berdan & Co., C.P.A.'s (Richard W. Miske, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioner filed a notice on exception, The Division filed a letter in opposition. Oral argument was not heard.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly determined that income reported by petitioner as business income (per Schedule C, Form 1040) for each of the years in question was properly subject to unincorporated business tax.

II. Whether the gain realized by petitioner upon her sale of a registered trademark in 1980 was properly held subject to the unincorporated business tax by the Division.

III. Whether penalty imposed against petitioner pursuant to Tax Law sections 722 and 685(a)(1) should be abated in light of the facts and circumstances brought forth in this case.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts are summarized as follows.

Petitioner, Gloria Vanderbilt-Cooper, filed a New York State Income Tax Resident Return for each of the years 1978, 1979 and 1980. For each of said years petitioner listed her occupation as “artist/writer/designer”. Included with her filings for the years 1979 and 1980 was a New York State Unincorporated Business Tax Return (Form IT-202). No Unincorporated Business Tax Return was filed by petitioner for the year 1978.

On each of the above-noted personal income tax returns, petitioner reported certain income as “business income”, in the dollar amounts specified hereinafter. The same amounts were also reported by petitioner on the two unincorporated business tax returns as "net profit (or loss) from business" (at line “l”), but were treated thereafter as income not subject to the unincorporated business tax and zero liability was shown on each of said returns. Further, the same amounts of business income were reported for 1979 and 1980 on Forms IT-250

(Maximum Tax on Personal Service Income) as personal service income subject to the benefits afforded pursuant to the maximum tax calculation provisions (Tax Law former § 603-A).

In addition to the foregoing items reported as business income, petitioner's return for 1980 also reflected a (capital) gain in the total amount (for said year) of $2,171,789.00, derived from the sale of a registered trademark as described hereinafter.

On April 13, 1984 the Division issued to petitioner a Notice of Deficiency asserting additional unincorporated business tax due for the years 1978, 1979 and 1980 in the aggregate amount of $209,405.12, plus penalty and interest.

A Statement of Audit Changes previously issued to petitioner on August 16, 1983 provided an explanation and calculation of the aforementioned deficiency, including specifically an indication that penalty was being imposed pursuant to Tax Law section 685(a)(1) based upon failure to file timely returns for the years 1978 and 1979, as follows:

> "The income from your activities as artist, writer and designer is subject to the unincorporated business tax.
>
> Capital gains for unincorporated business tax purposes are taxable at 100%.
>
> Penalty for late filing has been applied at 5% per month at a maximum of 25% (Section 685(a)(1) of the New York State Tax Law).

	1978	1979	1980
Income from business	$344,722.00	$1,458,616.00	
Capital gains		2,171,789.00	
Total business income	$344,722.00	$3,630,405.00	
Allowance for taxpayer's services	(5,000.00)	(5,000.00)	(5,000.00)
Business exemption	(5,000.00)	(5,000.00)	(5,000.00)
Taxable business income	$334,722.00	$3,620,405.00	
Unincorporated Business Tax on above	47,852.82	$209,405.12	
Section 685(a)(1)	4,184.03	11,963.21	16,147.24
TOTAL TAX AND PENALTY DUE:			$225,552.36

As the facts herein bear out, petitioner's name is undeniably well known and recognized. Some years prior to those at issue herein, petitioner studied art at the Art Student's League in New York City, as well as under the tutelage of many well-known artists and, over a period of time, became well known for her own artwork. More specifically, petitioner presented over the course of her career many critically acclaimed one-woman shows of oil paintings, watercolors, and pastels.

Commencing in or about the years 1968 through 1970, and continuing thereafter, certain companies determined that petitioner's artwork might be particularly adaptable to their product lines. For example, Hallmark, a manufacturer of paper products, and Bloomcraft, a textile manufacturer, among others, determined petitioner's artwork to be particularly adaptable to their products. Accordingly, petitioner, under license, allowed certain of her original and existing paintings to be reproduced on various companies' products. In addition, petitioner created certain other paintings and artistic designs specifically for various companies for use on their

products. The types of products to which petitioner's artistic designs and paintings were adapted were linens, china, glassware, and flatware. With respect to the latter three items, petitioner would paint on the blank glass, china or flatware, and the company would thereafter reproduce petitioner's painting or design in bulk on these products for sale. As a result of these endeavors petitioner's work, as well as her name, became increasingly well-known.

During the decade of the 1970's, petitioner allowed her name to be licensed and carried on a line of fashion eyeglasses, a line of perfume, and a line of clothing bearing her name. Included in the line of clothing was a line of blouses designed and produced by a company known as Murjani Corporation ("Murjani"), bearing petitioner's name in replacement of the previously carried name 'Lucky Pierre". At hearing, petitioner claimed to have had no input as to the actual design of the clothing, eyewear or perfume, explaining that she "claimed no gift for such endeavors". Rather, petitioner indicated that she merely consented to and licensed the use of her name on such products. Certain of the aforementioned product lines were commercially successful, whereas others failed.

In or about 1979 Murjani, through one of its principals, suggested (noting the fact that it then had the largest quota of denim material in the United States) the creation of a line of designer jeans which would carry petitioner's signature. Petitioner agreed that this could be a successful endeavor, and brought in a pair of her own jeans as a model for the cut and fit of the jeans to be designed. The jeans were produced, bore petitioner's signature and the line commonly known as “Gloria Vanderbilt” designer jeans became financially very successful. In turn, petitioner notes that the success of this line of designer jeans further increased the recognizability and commercial value of her name.

With respect to the various enterprises previously described, petitioner received compensation in the form of royalties paid pursuant to the terms of various licensing agreements between petitioner and the various manufacturers producing and selling the items bearing petitioner's name. The largest single source of such income during the latter two years in question was generated from Murjani (see infra), specifically from the sale of Gloria Vanderbilt designer jeans. Petitioner's compensation from this endeavor was governed by a licensing agreement entered into on August 1, 1978 between petitioner and Murjani.[1] Under this agreement petitioner gave to Muriani, subject to certain pre-existing licensing agreements with other manufacturers, the right to use petitioner's name on certain Murjani products. Petitioner's name was denominated in said agreement as "the Mark" (as a trademark). In exchange for the use of her name pursuant to this licensing agreement, petitioner was to be compensated by Murjani in the minimum amount of $225,000.00 per year, payable in equal monthly installments, plus an additional amount based upon a (varying) percentage of the net amounts of sales of products bearing petitioner's name.

The agreement between petitioner and Murjani provided that petitioner reserved the right to the use of her name without restriction for her personal affairs, and for publishing, writing, painting, theater, television and radio appearances, recordings, etc. The agreement contained a provision such that it was to survive petitioner's death. Pursuant to the agreement, petitioner consented to submit to medical examinations as required by Murjani for the purpose of securing insurance policies on the life of petitioner. However, this particular provision of the contract

[1] No licensing agreements between petitioner and manufacturers other than Murjani were introduced into evidence.

was never exercised by Murjani. In addition, petitioner agreed to apply for and maintain trademarks in such countries where, in Murjani's judgment, it was commercially feasible for Murjani to market its products bearing petitioner's name. Petitioner also agreed to use her best efforts to promote the Murjani products carrying her name by personal appearances, advertisements, etc., within reasonable bounds in light of petitioner's personal health, as requested by Murjani. Murjani agreed to pay petitioner's reasonable first class travel and living expenses (as well as the travel and living expenses of one employee of petitioner) as such were connected with the promotional appearances. These promotional appearances were not to exceed 90 days in any one year of the agreement.

Also included in the licensing agreement was a provision whereby Murjani could purchase the Mark for $8,000,000.00 in cash. It was Murjani's installment purchase of the Mark, in the year 1980, which generated the capital gain income included as subject to unincorporated business tax by the Division.

With respect to the personal appearances and promotions called for in the agreement, petitioner acknowledged that she did make personal appearances at various stores throughout the country. She characterized these appearances as in the nature of promotional appearances benefiting all of her licensed product lines including (but not limited to) those products manufactured by Murjani and bearing petitioner's name. Murjani did reimburse petitioner for the expenses of travel and lodging in connection with such appearances. Petitioner testified that she could not recall a specific number of appearances in any one of the years in question, but acknowledged that she made many such promotional appearances. Petitioner testified that, in her mind the benefit of such appearances inured not only to the Murjani line of items but also to

whatever other items bearing petitioner's name were being sold in a given store where she appeared, including home furnishing items and artistic productions such as lithographs.

Included with petitioner's income tax returns for each of the years 1978, 1979 and 1980 were Schedules C (Profit [or Loss] from Business or Profession) on which petitioner listed the income at issue as business income, and also enumerated the expenses incurred in connection therewith.[2] The individual sources of income and expenses for 1978 and 1979 were reported as follows:

	1978
Source of Income	Amount
Talent & Residuals Inc.	$ 5,000
Rollins & Joffe Productions-W.A.S.P.	61
Zyloware	17,761
James Seaman Studios	90,945
Westpoint Pepperell	61,853
Doubleday	7,895
Bloomcraft Inc.	7,652
Glentex	3,782
McCall Magazine	66
Conde Nast-Women to Women	375
Murjani USA	93,750
Total Income	$449,140

Petitioner reduced such total income of $449,140.00 by expenditures for staff salaries, car rental, telephone, studio rent, hairdresser, make-up and facial treatments, etc., totalling $104,418.00 to arrive at net (business) income of $344,722.00. (See finding of fact “14" of the Administrative Law Judge's determination for the complete list of such expenditures.)

[2] Documents in evidence include a statement that the expenses could not be allocated to particular activities or sources of income.

1979

Source of Income	Amount
Murjani International Ltd.	$1,092,721
Murjani International Ltd.	71,330
Zyloware Corporation	140,717
James Seaman Studios Inc.	104,256
Westpoint Pepperell Inc.	4,207
National Paragon Corporation	3,000
Bloomcraft Inc.	2,225
Kimberly Clark	7,500
Gloria Vanderbilt Ltd.	166,717
Gloria Vanderbilt Ltd.-Expense Reimbursement	5,784
Pearl Bedell Lithographs	278
McCall Patterns	13
Total Income	$1,598,748

Petitioner reduced such total income of $1,598,748.00 by expenditures for items and services similar to those mentioned for 1978, totalling $525,352.00 to arrive at net (business) income of $1,073,396.00. (See finding of fact "15" of the Administrative Law Judge's determination for the complete list.)

For 1980, petitioner's return did not include a listing of the individual sources from which the reported total business income was generated. Rather petitioner's Schedule C for 1980 reflected gross receipts of $2,245,900.00, expenditures of $787,284.00 and net (business) income of $1,458,616.00.

OPINION

The Administrative Law Judge determined that pursuant to multiple licensing agreements, petitioner's activities in promoting her name and the products with which her name was associated were of such an ongoing, continuous and regular nature as to constitute the carrying on of an unincorporated business. The Administrative Law Judge further noted that the income

which arose from these activities was therefore properly subject to the unincorporated business tax. The gain realized by petitioner upon her sale of the Trademark in 1980 constituted income from the sale of an asset used in her unincorporated business, and according to the Administrative Law Judge, was also properly subject to the unincorporated business tax.

In terms of the issue of penalty, however, the Administrative Law Judge determined that pursuant to Tax Law sections 722 and 685(a)(1) the petitioner had established reasonable cause warranting the abatement of penalty. The Administrative Law Judge asserted that the issue of penalty was one of a factual nature, wherein reasonable minds could differ as to whether the activities in question rose to the level of constituting an unincorporated business properly subject to the unincorporated business tax. In its letter in opposition, however, the Division-argued against abatement of the penalty claiming inter alia that uncertainty as to the application of the unincorporated business tax was no excuse for late filing.

On exception, petitioner claimed that the income received from Murjani was royalty income generated solely from the recognizability and marketability of petitioner's name, in that petitioner's personal services in the nature of promotional appearances were not a material factor in the successful sale of the Murjani products or in the generation of income therefrom. Thus, petitioner contended that the generation of this income was due only to her passive involvement, not to her active role, and was therefore to be considered “passive income” and not income from an unincorporated business.

As support for this contention, petitioner refers to the clause in the licensing agreement which grants Murjani the right to insure petitioner's life. Petitioner reasoned that Murjani would

have exercised this right if her death would have resulted in a material loss to Murjani in terms of product marketability and Sales success.

We affirm the determination of the Administrative Law Judge with respect to the applicability of the unincorporated business tax to petitioner's business income and to petitioner's realized gain, as well as with respect to the issue of penalty.

Tax Law former section 703(a) defines an unincorporated business as follows:

> "(a) General.--An unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity, including a partnership or fiduciary or a corporation in liquidation . . . ."

Regulation 20 NYCRR 203.1(a) clearly articulates the considerations to be made when determining the taxability of activities under section 703(a), when it states, "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."

Tax Law former section 705(a) defines unincorporated gross income as the following:

> . . . the sum of the items of income and gain of the business, of whatever kind and in whatever form paid, includible in gross income for the taxable year for federal income tax purposes, including income and gain from any property employed in the business, or from liquidation of the business, of from collection of installment obligations of the business, with the modifications specified in this section."

The returns for 1978, 1979 and 1980 reflected petitioner's net business income for the years at issue. All but the 1980 return also showed a listing of individual sources from which the reported total business income was generated, While Murjani USA and Murjani International Ltd. represent the two sources which have generated the highest individual per annum income for

the petitioner, the returns also reveal ten other sources which contributed to petitioner's yearly net business income amount.

We look first to the licensing agreement. As the Administrative Law Judge properly noted, while petitioner's name is unmistakably well-recognized in its own right and is clearly recognizable, the licensing agreement did not simply require the passive allowance of the use of her name in exchange for the income generated therefrom. The very language of the agreement demanded not more than ninety (90) personal appearances from petitioner, and petitioner testified that she made these personal promotional appearances "in practically any store in which my designs were shown . . ." . Although petitioner testified that she was unclear as to exactly how many personal appearances were made throughout a one year period, it is clear from the record that Murjani intended petitioner to take a reasonably-active role in the promotion of these products.

Petitioner listed for the years at issue, respectively, $104,418.00, $525,352.00 and $787,284.00 worth of expenses incurred in connection with the generation of business income. For each of the three years, namely, 1978, 1979 and 1980, the expenses listed cannot be allocated to any particular source. It is therefore impossible to determine what percentage of the expenses were attributable to petitioner's activities with Murjani. However, in view of the fact that the expenses were incurred in order to produce the income, and for each of the three years at issue Murjani represented the largest income source so listed, it is an anomaly for petitioner to claim that the income received was in fact "passive income."

Further, for the years 1979 and 1980, petitioner's amounts of business income were reported as personal service income and therefore subject to the reduced tax rate benefits

afforded by Tax Law former section 603-A. Section (b)(1)(A) of such statute defines New York personal service income as “wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered . . . .” Because the statute specifically covers only compensation for "personal services actually rendered", petitioner's characterization of the income as personal service income is inconsistent with her claim that her role in the generation of income was passive.

Petitioner also relied upon Merrick v. Tully (68 AD2d 289) where royalty income received by petitioner David Merrick was held not to be subject to the unincorporated business tax. In that case, the royalty income was generated solely by passive investment activity, and no action in regard to those activities was either required or taken by petitioner Merrick. The Administrative Law Judge determined that Merrick v. Tully, supra, was inapposite to the present case, and we agree with this determination. We therefore cannot accept petitioner's contention that the income received from Murjani is royalty or passive income generated solely from the recognizability and marketability of petitioner's name.

The income received from Murjani as a result of these licensing agreements consisted of petitioner's licensing of the use of her name in exchange for $225,000.00 per year, plus an additional amount based upon a varying percentage of the net amount of sales of products bearing petitioner's name. According to the language of regulation 20 NYCRR 203.1(a), supra, petitioner's business relationship with Murjani constituted much more than a casual or isolated transaction. In fact, the agreement as described above would, standing alone, constitute the continuous, frequent and regular course of activities representing a taxable unincorporated business under former section 703(a) of the Tax Law.

The additional provisions of the licensing agreement serve to underscore the rationale behind such a conclusion. Petitioner agreed inter alia 1) to maintain trademarks in the countries where Murjani determined it was commercially feasible to market its products bearing petitioner's name, 2) to promote the Murjani products bearing petitioner's name through personal appearances, etc. and 3) to submit to medical examinations in order that Murjani could secure insurance policies on the life of the petitioner.

We conclude, therefore, that petitioner's activities in promoting her name and the products which bore her name were of such a continuous, ongoing and regular nature as to constitute the carrying on of an unincorporated business, the income from which was properly subject to the unincorporated business tax.

Petitioner contends that 1) the fact that Murjani did not exercise its option to insure petitioner's life and 2) that the licensing agreement survived petitioner's death somehow results in the conclusion that 3) petitioner's promotional activities were immaterial to the failure or success of the product line. We cannot accept this line of reasoning.

The mere fact that the licensee reserved the right to insure the life of petitioner is an indication that Murjani's interest in petitioner included more than the use of her name. We cannot speculate as to the reason behind Murjani's choice not to exercise such an option, but certainly the fact that the agreement survived the death of petitioner would support a conclusion that insuring petitioner's life was deemed to be unnecessary. The fact that the agreement survived petitioner's death and that Murjani failed to exercise the right to insure petitioner's life does not support petitioner's assertion of non-taxability.

The licensing agreement also contained a provision whereby petitioner agreed to sell Muriani her trademark in exchange for $8,000,000.00 and in 1980, it was this installment purchase by Murjani which resulted in the capital gain for petitioner. Being that the trademark was used in petitioner's unincorporated business, we agree with the Administrative Law Judge's determination that the capital gain generated from its sale is subject to the unincorporated business tax (Marshall v. State Tax Commn., 62 AD2d 1124).

With regard to the issue of penalty, unless an extension has been requested, the statute and the Tribunal's Rules of Practice and Procedure (Tax Law § 2006.7; 20 NYCRR 3000.11[a]) do not provide for an exception outside the thirty day time period. Therefore, because the Division failed to file an exception or a request for an extension within the thirty day time period, the Division waived its right to require the Tribunal to review the portion of the Administrative Law Judge's determination regarding penalty. Although according to Tax Law section 2006.7 and 20 NYCRR 3000.11(e), the Tribunal may review any part of the Administrative Law Judge's determination, this is a discretionary power and we find no reason for the Tribunal to exercise this power in the present case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Gloria Vanderbilt-Cooper, is in all respects denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Gloria Vanderbilt-Cooper is granted to the extent indicated in conclusions of law “G” and “H” of the Administrative Law Judge's determination but except as so granted is in all other respects denied and the Notice of Deficiency dated April 13, 1984, as modified to reflect elimination of the penalty asserted, is sustained.

Dated: Albany, New York
January 12, 1989

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner