

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CAROLYN COMPTON

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1976
through 1978.

Petitioner, Carolyn Compton, 25 Central Park West, New York, New York
10023, 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
through 1978 (File No. 35251).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on July 8, 1985 at 1:15 P.M. Petitioner appeared by J. Arthur Robbins,
Esq. and Leon Lebensbaum, Esq. The Audit Division appeared by John P. Dugan,
Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner filed a petition for a hearing with the State Tax
Commission within 90 days of the issuance of the Notice of Deficiency.

II. Whether the Audit Division properly determined that petitioner was
subject to unincorporated business tax.

III. Whether penalties and interest in excess of the statutory minimum
should be waived.

FINDINGS OF FACT

1. On July 23, 1981, the Audit Division issued a Notice of Deficiency against petitioner, Carolyn Compton, for unincorporated business tax due in the amount of \$15,731.00 plus penalty of \$8,416.46 and interest of \$2,653.71 for a total due of \$26,801.17 for the years 1976 through 1978.

2. By a letter from her representative, dated August 26, 1981, petitioner protested the Notice of Deficiency. The Audit Division apparently lost the envelope in which the letter was sent and also failed to stamp the letter with a date of arrival. The Audit Division now maintains that the protest was untimely filed because there is no proof that the date on the letter was the date of mailing. Testimony from petitioner's representative's staff indicated, however, that it was office practice to mail letters in a mailbox outside the office at 5:00 P.M. on the day they were written. Additionally, a response to petitioner's letter from the Tax Appeals Bureau dated December 17, 1981 requested a proper power of attorney and completion of petition forms. No mention was made that the protest was untimely which would have been the standard procedure had the letter been received beyond the 90 day filing period.

3. Petitioner left high school at age 17 to begin an acting career. She worked in the theater until she married at age 21. The marriage was terminated by divorce three years later. In 1968 petitioner met a man, hereinafter referred to as Frank G., who operated a theatrical public relations firm ("the Firm"). Petitioner was placed on the payroll at the Firm in 1969; however, she did not work for the Firm and, in fact, was Frank G.'s mistress. Frank G. was married with two daughters at the time and his family lived in an apartment on Central Park West in New York City. Frank G. leased a two-bedroom apartment in his name, also on Central Park West, for petitioner. In 1972, a daughter was born to Frank G. and petitioner.

Frank G. Petitioner thought of herself as Frank G's wife and would use his surname on certain occasions and on documents such as her driver's license and passport. She would often help Frank G. in his business because, as petitioner testified, "you would do that with your husband".

4. The Firm was involved in promotional work as part of its business. Such work involved utilization of mailing companies to handle the large volume of mailings needed for promotions. In 1973, a sole proprietorship, Graphic Letters ("Graphic"), was formed to handle some of the mailings for the Firm. Initially all work for Graphic was performed at the Firm's offices; however, as the amount of business increased, the office became too crowded and the operation was moved to petitioner's apartment. The business address on the Graphic letterhead was petitioner's apartment. At the hearing, petitioner requested that the Tax Commission take judicial notice of Matter of Carolyn C. v. Frank G., 106 Misc.2d 510 (Family Ct., New York County) in which the court found certain facts concerning the formation and operation of Graphic. The court found as follows:

"Then, in 1973, after a successful joint endeavor to meet an emergency mailing deadline, petitioner and [Frank G.] decided to transfer some mailing accounts from the independent mailing houses then utilized to a mailing house to be operated by petitioner. [Frank G.] had encountered difficulties with the mailing houses he had engaged by virtue of the demanding time constraints endemic to media productions. Those problems were resolved when the petitioner's business assumed responsibility for the mailings. As is customary, petitioner's fees were billed to [Frank G.'s] clients through [Frank G.]. Financially, the undertaking proved highly rewarding. The profits provided income to support petitioner and the child. Supplementary generous contributions were made by [Frank G.], but the large part of petitioner's and the child's expenses were paid by the mailing house's profits." 106 Misc.2d at 511-512.

5. Frank G.'s accountant kept the books for both the Firm and Graphic and prepared tax returns for petitioner and Frank G. For each year in

petitioner filed New York State income tax resident returns with an attached Federal Schedule C (Profit or (Loss) From Business or Profession) listing petitioner as the proprietor of Graphic. Petitioner had also set up a Keogh pension plan for self-employed persons for which she took a deduction in each year at issue. Petitioner did not report or pay unincorporated business tax on the income from Graphic during the years in issue. In 1979, petitioner did file and pay unincorporated business tax on the Graphic income. Petitioner signed all Federal and State tax returns prepared by the accountant.

6. The only customer of Graphic was the Firm. Frank G. hired the help employed by Graphic and he directed the operation or had an assistant in charge. Petitioner occasionally helped stuff envelopes during rush periods. The accountant or Frank G. prepared any checks required for Graphic and petitioner would sign them at their direction. The accountant also signed Graphic checks on occasion. Checks to Graphic were sometimes made out to Frank G. who would deposit them in the Graphic checking account. Frank G. would occasionally take money from the Graphic account and deposit it in the personal checking account he held jointly with petitioner. This account was used to pay petitioner's personal living expenses. If she needed additional money, petitioner would write checks on the Graphic account to pay for her personal expenses.

7. By 1973 the stress of the relationship with Frank G. was causing petitioner to be depressed. She became an alcoholic and, at times, was near psychotic according to her psychologist whom she was seeing for therapy five or six times a week. On several occasions between 1973 and 1981 she attempted suicide. On many days during the years at issue, she was incapable of getting out of bed. Petitioner's psychologist testified that, in his opinion,

petitioner's mental condition during the years in issue would have precluded her from competently running a business.

8. In late 1979, petitioner terminated her relationship with Frank G. He immediately formed a new mailing service business in partnership with his wife. All of the Firm's business which was previously channeled to Graphic was then sent to the new business. Since the Firm was the only customer of Graphic, Graphic ceased doing business. Petitioner, who **is** no longer suicidal or an active alcoholic, eventually went to work as a receptionist at an art gallery.

9. Upon audit, the Audit Division determined that petitioner, as the sole proprietor of Graphic, was liable for unincorporated business tax.

Petitioner's tax due was based strictly **on** the information reported on her Federal Schedule C for each year. Petitioner maintains that her mental and physical condition prevented her from actually running the business and that Frank G. was the person in charge of Graphic and he was thus liable for the unincorporated business tax.

CONCLUSIONS OF LAW

A. That, inasmuch as the Audit Division failed to stamp the letter with a receipt date, the date on the letter will be considered the date of filing. This is especially true in light of the fact that the Audit Division actually received the letter and no response was ever made **to** petitioner indicating that the letter was received beyond the filing date. Therefore, since the date on the letter was within 90 days of the issuance of the Notice of Deficiency, it will be deemed to have been timely filed.

B. That section 701(a) of the Tax Law imposes a tax on the unincorporated business income of every unincorporated business wholly or partly carried on

within New York State. **An** unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity. Tax Law § 703(a).

C. That the question in this matter is not whether petitioner was competent to operate a business or whether she, personally, ran the business but, rather, whether a business existed, the income from which was subject to unincorporated business tax and whether petitioner was the sole proprietor of that business. Although petitioner may not have been competent to effectively operate a business during the years in issue, the fact remains that she derived all of the economic benefits flowing from ownership **of** Graphic. Virtually all of her income for those years came from Graphic and she could write checks on the Graphic account any time she had personal expenses to meet. Petitioner reported all the income received from Graphic as business income on her Federal Schedule C for each year in issue and, moreover, she derived the benefit of a deduction for contributions to a Keogh retirement plan which plan, during the years in issue, was available to persons who derived earned income from **a** business or profession which they owned or conducted, or who had earned income from a partnership in which they were partners. **I.R.C.** § 401(c).

The fact that Frank G. started petitioner in the business, hired her employees, provided his firm as Graphic's only customer, shared his accountant with her and directed the operation does not make petitioner any less a sole proprietor of Graphic. **If** an individual hired a manager and staff to completely run a business, that individual would still be subject to unincorporated business tax on the income derived from the business. Therefore, petitioner, as the sole proprietor of Graphic, was the owner of a business from which she derived income and was subject to unincorporated business tax on such income.


D. That sections 685(a)(1) and 685(a)(2) of the Tax Law provide for penalties for failure to file a tax return and failure to pay the tax shown on the return, respectively, unless it **is** shown that such failure is due to reasonable cause and not due to willful neglect. In view of petitioner's mental and physical condition during the years in issue, her complete dependence on Frank G. and his accountant to properly complete and file her tax returns and the fact that: she only considered herself to be helping Frank G. with his business rather than operating her own, there was reasonable cause for failure to file a return and, clearly, there existed no gross negligence or willful intent on petitioner's part to disobey the taxing statutes. 20 NYCRR 102.7 (b) (10). Therefore, penalties imposed under sections 685(a)(1) and 685(a)(2) are cancelled.


E. That the petition of Carolyn Compton is granted to the extent indicated in Conclusions of Law "A" and "D"; that the Audit Division is directed to modify the Notice of Deficiency issued **July** 23, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 1982


PRESIDENT


COMMISSIONER


COMMISSIONER