

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
David & Brenda Gordon : 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 Year 1974. :

---

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 9th day of August, 1984, he served the within notice of Decision by certified mail upon David & Brenda Gordon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David & Brenda Gordon  
185 West End Ave. #25-S  
New York, NY 10023

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  
9th day of August, 1984.

David Parchuck

Conrad A. Hagedorn  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

August 9, 1984

David & Brenda Gordon  
185 West End Ave. #25-S  
New York, NY 10023

Dear Mr. & Mrs. Gordon:

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

In the Matter of the Petition	:	
of	:	
DAVID GORDON AND BRENDA GORDON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1974.	:	

Petitioners, David Gordon and Brenda Gordon, 185 West End Avenue, Apt. 25-S, 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 year 1974 (File No. 28398).

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 February 9, 1984 at 9:15 A.M. Petitioner David Gordon appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUE

Whether petitioner David Gordon's activities, described on his return as "consultant", constituted the carrying on of an unincorporated business.

#### FINDINGS OF FACT

1. Petitioners, David Gordon and Brenda Gordon, timely filed a joint New York State Income Tax Resident Return for the year 1974 whereon David Gordon (hereinafter petitioner) reported business income of \$28,560.00 derived from his activities described as "consultant". On said return, Brenda Gordon reported her occupation as "H/W". Such designation is herein accepted to

represent housewife. Petitioner did not file an unincorporated business tax return for taxable year 1974.

2. On November 28, 1978, the Audit Division issued a Statement of Audit Changes to petitioner and his wife wherein petitioner's reported business income of \$28,560.00 was held subject to the unincorporated business tax "based on information submitted in your [petitioner's] reply." Accordingly, a Notice of Deficiency was issued against petitioner and his wife on September 21, 1979 asserting unincorporated business tax of \$1,020.80, plus interest of \$435.63, for a total due of \$1,456.43.

3. Petitioner's aforestated reply of May 25, 1978, on which the deficiency asserted herein was based, was sent in response to the Audit Division's inquiry letter of May 16, 1978. Such letter posed several questions relative to his business activities and relationship with his principal. In response to said questions, petitioner answered, inter alia, that:

(a) He "worked as an independent consultant for Symphonic Electronic Co., Inc. a/k/a Hartley Sales Corp. to assist in the liquidation of all assets since the company was out of business. Responsible for collecting all outstanding receivables, selling remaining inventory etc., on a percentage basis."

(b) "Little or no supervision exercised [by his principal] other than my being given the parameters (sic) in which I could sell or settle collections."

(c) He "agreed to devote approximately 15 to 20 hours per week [to his principal] and was free to seek other clients, which I did attempt to do."

(d) "All extraordinary expenses were paid by Symphonic such as air fare, hotels, etc. I did not deduct expenses of this nature. I deducted car expense, office expense for which I received no reimbursement from Symphonic."

4. The petition filed with respect to the deficiency herein was solely in the name of petitioner. The "grounds upon which relief is claimed and the facts relied upon in making this claim" were addressed in a letter annexed to

the petition. Said letter, which was dated March 17, 1980 and written by the President of Resinol, Inc., stated that:

"When Lynch Corporation engaged your services in 1973, it was with the understanding that you were to perform certain duties such as: collections of outstanding receivables, cost studies, acquisition and divestiture studies and other financial functions. Your job with Lynch was of an indefinite time period which required your full time performance (normal 40 hour week plus occasional overtime).

In 1974, the company decided to liquidate one of its subsidiaries, and you were asked to oversee the total liquidation of the assets. Since this function was of a definite time frame, as an added inducement for you to accept the position and responsibility, you were given a contract which included a base compensation of salary plus a percentage of funds collected from outstanding receivables in excess of a predetermined amount. All expenses incurred by you in performing this function were to be borne by you.

In addition to the above, you were to report to me as Vice President and Treasurer, on a daily basis for additional financial projects as they arose."

5. Petitioner alleged that he was an employee, and as such, his income was exempt from the imposition of unincorporated business tax. He contended that pursuant to an agreement with his principal, entered into on March 21, 1973, he was an employee.

6. Petitioner did not offer a copy of said agreement into evidence. However, he did submit an amendment to said agreement dated September 12, 1973. Said amendment, which listed the parties to the original agreement and to the amendment as Lynch Corporation (Lynch) and petitioner, provided, in pertinent part, for the following amendments:

(a) "Lynch will employ Gordon, and Gordon will serve Lynch, as an employee until December 31, 1973."

(b) "The 'incentive bonus' will be payable by Lynch to Gordon at the rate of 10% of all 'net collections' commencing September 1, 1973 and continuing until May 31, 1974. It is clearly understood and agreed by the parties hereto that Gordon will not be entitled to receive any payment for monies received by Lynch after May 31, 1974."

(c) "The 'incentive bonus' on the 'net collections' of Lynch in 1973 will be deferred until calendar year 1974."

7. Pursuant to said amendment, the agreement was further amended by the addition of a new Section "11" which read as follows:

"Following the termination of Gordon's employment on December 31, 1973, Gordon agrees that for a period of three months thereafter he will make himself available to Lynch to perform such consulting services as Lynch may desire in connection with the accounts receivable under the Agreement. However, it is understood and agreed that Gordon will not be required to perform any consulting services for more than sixteen (16) hours during any calendar week in the first quarter of 1974.

As Gordon's full and complete compensation for the aforesaid consulting services, he will receive the sum of \$6,250.00. Said amount shall be paid by check to Gordon in three equal monthly installments due January 31, February 28, and March 31, 1974, respectively. It is understood that Gordon will be entitled to receive the full amount of \$6,250.00 regardless of whether he is ever called upon by Lynch to perform such consulting services; provided, however, it is further understood that should Gordon be requested to perform consulting services on behalf of Lynch, he will exert his best efforts to perform such services faithfully and at all times in the best interests of Lynch. Upon submission of properly documented vouchers, Gordon will be entitled to receive on a bi-weekly basis reimbursement for all reasonable expenses incurred by him in connection with the performance of his consulting services.

For the period of Gordon's consultancy, namely January 1, 1974 to March 30, 1974, Lynch agrees to continue at its sole expense all of Gordon's current insurance benefits and any additional insurance benefits that Lynch may obtain for certain executive employees by December 31, 1973."

8. It is unclear for which corporate entity petitioner actually rendered services. During the hearing held herein, petitioner testified that "the money that I got and reported in 1974 came from Lynch or Hartley or Symphonic or whoever". The relationship between the corporations is also unclear. Accordingly, petitioner's principal will hereinafter be referred to as "the corporation".

9. Petitioner alleged that all of the income received from the corporation in 1974 was derived from services rendered solely in 1973.

10. In October or November 1973, the corporation closed its New York office and moved to Detroit, Michigan. From that time until the corporation's New York lease expired on December 31, 1973, petitioner ran the New York office independently. Thereafter, petitioner worked at his personal residence.

11. In or about April 1974, petitioner terminated his relationship with the corporation and commenced employment with Addar Products Corp. Petitioner's salary income derived from Addar Products Corp. was not held subject to the unincorporated business tax.

12. New York State personal income taxes were not withheld from petitioner's compensation derived from the corporation.

13. Petitioner contended that the corporation provided him with health insurance; however, no documentation was submitted to support such contention.

14. In contrast to petitioner's reply letter of May 25, 1978 (see Finding of Fact "3", supra), he now alleges that:

(a) he was not free to work for any other principals pursuant to the terms of his contract;

(b) the hours devoted to the corporation ("15 to 20 hours per week") were subsequent to the corporation's move to Detroit;

(c) he paid all of his business expenses incurred in rendering services to the corporation.

15. Petitioner's wife, Brenda Gordon, was not involved with the activities petitioner was engaged in for the corporation.

#### CONCLUSIONS OF LAW

A. That it is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax. Lieberman v. Gallman, 41

N.Y.2d 774. Furthermore, "[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c).

B. That petitioner may have earned a portion of the income at issue during 1973 is immaterial. As a cash basis taxpayer, the income was taxable in the year received. Whether such income is taxable for unincorporated business tax purposes is to be determined based on the activities engaged in and the relationship maintained with the corporation during the period in which the income was earned.

C. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law as incorporated into Article 23 by section 722(a) of the Tax Law, to show that sufficient direction and control was exercised by the corporation over his day-to-day activities so as to constitute a relationship of employer-employee. Accordingly, petitioner's activities did not constitute services rendered as an employee within the meaning and intent of section 703(b) of the Tax Law.

D. That petitioner's activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

E. That the name of Brenda Gordon is to be removed from the Notice of Deficiency.

F. That the petition of David Gordon and Brenda Gordon is granted to the extent provided in Conclusion of Law "E", supra, and except as so granted, said petition is, in all other respects, denied.



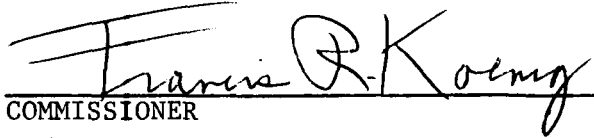
G. That the Audit Division is hereby directed to modify the Notice of Deficiency dated September 21, 1979 to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

**AUG 09 1984**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER