

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John P. & Mary Z. Martin :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax & Unincorporated Business Tax under Articles :  
22 & 23 of the Tax Law for the Years 1978 - 1980. :  
:

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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 4th day of April, 1985, he served the within notice of Decision by certified mail upon John P. & Mary Z. Martin, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John P. & Mary Z. Martin  
58 Rosemont St.  
Albany, NY 12203

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  
4th day of April, 1985.

David Parchuck

James A. Healy  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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22 & 23 of the Tax Law for the Years 1978 - 1980. :  
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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 4th day of April, 1985, he served the within notice of Decision by certified mail upon Richard D. Weller, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard D. Weller  
Weller, Leonard & Casey  
1138 Troy-Schenectady Rd.  
Latham, NY 12110

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  
4th day of April, 1985.

David Parchuck

Germie A. Dayland  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 4, 1985

John P. & Mary Z. Martin  
58 Rosemont St.  
Albany, NY 12203

Dear Mr. & Mrs. Martin:

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  
Richard D. Weller  
Weller, Leonard & Casey  
1138 Troy-Schenectady Rd.  
Latham, NY 12110  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JOHN P. and MARY Z. MARTIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the years 1978, 1979 and 1980.	:	

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Petitioners John P. and Mary Z. Martin, 58 Rosemont Street, Albany, New York 12203, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1978, 1979 and 1980 (File No. 36959).

On August 31, 1984, petitioners, by their representative, Richard D. Weller, C.P.A. filed a waiver of small claims hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record with all briefs to be submitted by November 27, 1984. After due consideration the Tax Commission renders the following decision.

ISSUES

I. Whether management fees paid to petitioner John P. Martin were subject to unincorporated business tax.

II. Whether wages paid to petitioner John P. Martin were subject to unincorporated business tax.

III. Whether the Audit Division properly disallowed vehicle expenses of petitioner John P. Martin's plumbing supply company.

IV. Whether the Audit Division properly calculated the depreciation on an automobile used for business 50 percent of the time.

FINDINGS OF FACT

1. Petitioners, John P. and Mary Z. Martin, filed New York State income tax resident returns and unincorporated business tax returns for the taxable years 1978, 1979 and 1980.

2. On January 22, 1982, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$4,678.79 plus penalty of \$28.24 and interest of \$860.62 for a total due of \$5,567.65 for the years 1978, 1979 and 1980.

3. Petitioner<sup>1</sup>, during the years in issue, was President and Chairman of the Board of Directors of John P. Martin Plumbing and Heating Corp. ("the corporation") and sole proprietor of Martin Supply Co. ("the company"). The corporation operated a plumbing repair and maintenance business. The company was engaged in sales of plumbing supplies. Both businesses were located in a large building containing garage, shop and office space at 552-556 Yates Street, Albany, New York. Petitioner owned the property used by the business.

4. Up to and including fiscal year ended June 30, 1976, petitioner was paid an annual salary by the corporation of approximately \$30,000.00 to \$40,000.00. Following said year, petitioner began operating under a management contract with the corporation. The alleged purpose of this change was to facilitate the ultimate transfer of ownership of the corporation to petitioner's sons. There was, however, no indication that any transfer actually took place during the years in issue nor was there any explanation as to why the management contract was required for three or more years prior to any transfer of control. The contract provided that petitioner would perform the following services:

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1 All references to petitioner refer to petitioner John P. Martin only.

- "1. Supervise and conduct the day-to-day operation of the Corporation, including but not limited to ordering materials and supplies, scheduling jobs, assigning, hiring and terminating all employees, collecting amounts owed to the Corporation and depositing receipts in the Corporate bank account.
2. Supervise and approve all bids and job proposals and conduct other business development activity on behalf of the Corporation.
3. Maintain contact on a regular basis with all existing customers and resolve any problems related to services rendered by the Corporation.
4. Coordinate the services of subcontractors.
5. Supervise the preparation and filing of all corporate income and payroll tax returns.
6. Arrange for legal, accounting, collection and any other outside services required by the Corporation.
7. Obtain all insurance coverage required for the Corporation.
8. Handle all matters related to the Albany Local of the Plumbers Union.

To facilitate the performance of these duties, John P. Martin is authorized to sign corporate checks, negotiated [sic] bank loans, sign any and all contracts required in the conduct of corporate business, transfer funds between corporate accounts and represent the Corporation at all Contractor's Association, job progress and other meetings."

As compensation for these services petitioner was paid a monthly fee of \$3,200.00.

5. During the years in issue, the corporation billed its customers at standard hourly rates based on labor hours expended on specific projects by the employees. Petitioner was a licensed master plumber who worked on such projects and was paid an hourly wage of \$16.25 to \$16.75. The corporation withheld income taxes and social security taxes from petitioner's wages and issued federal forms W-2 for the years in issue. Petitioner was covered by all

corporate employee benefit plans and unemployment insurance taxes were paid by the corporation on his wages.

6. The company was formed in 1977 to purchase plumbing materials at wholesale prices for the corporation. During the years in issue, the company received virtually all of its income from the corporation. The company billed the corporation for petitioner's management fee on company invoices. In 1978 and 1979 the fee was billed, along with plumbing supply purchases, on the same invoices. In 1980 separate company invoices were used to bill the management fee and supply purchases.

7. On audit, the Audit Division determined that the management fee was subject to the unincorporated business tax of the company since the Audit Division deemed the fee to be income of the company. In similar fashion the Audit Division deemed the wages paid petitioner by the corporation to be income of the company and thus subject to unincorporated business tax.

8. Petitioner owned a Chrysler station wagon which was used by the company for business purposes as well as by petitioner for personal use. The depreciation basis of the automobile was \$6,600.00. Petitioner reduced this amount by 20 percent for personal use and took a deduction for depreciation for each year in issue as follows:

<u>1978</u>	<u>1979</u>	<u>1980</u>
\$1,741.00	\$1,741.00	\$726.00

The auditor determined that the business use percentage of the station wagon was 50 percent and reduced the depreciation deduction by one-half to \$871.00 for 1978 and 1979 and \$363.00 for 1980. Petitioner does not contest the 50 percent business usage determination; however, he maintains that the deductible amount was computed incorrectly. The auditor took 50 percent of the amount previously deducted by petitioner and allowed that much as a deduction.

Petitioner had already reduced the depreciation basis by 20 percent for personal use and had claimed 80 percent as a deduction. The auditor had, therefore, allowed only 40 percent business usage. Petitioner argues that the deficiency should be modified as follows:

Full cost of Chrysler Wagon	\$8,801
Less salvage value - 25%	<u>2,201</u>
Depreciation Basis - total	<u><u>\$6,600</u></u>

	<u>1978</u>	<u>1979</u>	<u>1980</u>
Total Depreciation based on 3 year life	\$2,200	\$2,200	\$911
Depreciation at 50%	<u>(1,100)</u>	<u>(1,100)</u>	<u>(456)</u>
Deductible at 50% per auditor	1,100	1,100	455
Actual amount deducted on return	<u>1,741</u>	<u>1,741</u>	<u>725</u>
Actual adjustment to 50%	641	641	270
Adjustment per auditor	<u>871</u>	<u>871</u>	<u>363</u>
Overstatement of audit adjustment	<u><u>\$ 230</u></u>	<u><u>\$ 230</u></u>	<u><u>\$ 93</u></u>

9. The company also took a deduction for the expenses incurred in operating two vehicles during the years in issue. The auditor reduced the expense deduction by 50 percent to allow for personal use of the vehicles. Petitioner argues that the amount deducted represented the reasonable cost for the business use of the vehicles. Petitioner was, however, unable to locate any additional documentation or evidence related to the vehicle expenses disallowed by the auditor.

#### CONCLUSIONS OF LAW

A. That section 703(b) of the Tax Law provides:

"The performance of services by an individual as an employee or as an officer or director of a corporation, society, association, or political entity, or as a fiduciary, shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

B. That "[t]he clear purpose of the proviso in subdivision (b) is to prevent an individual entrepreneur from sheltering from the unincorporated business tax income which derives from the conduct of his unincorporated

business in the form of salaries for services as an employee or officer of the corporate entities, in a situation where the corporate entities exist primarily to advance the business purposes of the unincorporated entity and do not have an independent and unrelated business purpose." (Naroff v. Tully, 55 A.D.2d 755, 756).

C. That, although the corporation and the company were closely related due to common ownership, the corporate entity did not exist primarily to advance the business purposes of the unincorporated entity; rather, the reverse was true. With respect to the management fee, although the services provided by petitioner to the corporation under the management agreement were those normally required of a corporate officer, petitioner recharacterized the salary payments from the corporation to himself as management fees paid to the company and, in so doing, the company and the corporation chose not to follow procedures which would have excluded the transaction from unincorporated business tax. Petitioner purposely set up the arrangement between the corporation and the company and the tax consequences thereof cannot be avoided. (Cf. Prospect Dairy, Inc. v. Tully, 53 A.D.2d 755).

D. That the hourly wages received by petitioner for his work as a licensed plumber were for the performance of services for the corporation, not for the company. The corporation provided plumbing services to the public and the company provided plumbing supplies. The services provided by petitioner as a plumber were connected with his employment by the corporation; there was no connection with his ownership of the plumbing supply company. Petitioner was clearly employed by the corporation as evidenced by the withholding of taxes by the corporation, the payment of unemployment insurance on his behalf by the corporation and petitioner's coverage by all corporate employee benefit plans.

The wages, received by petitioner were, therefore, not subject to the unincorporated business tax in accordance with section 703(b) of the Tax Law.

E. That the adjusted depreciation deduction was calculated in error and the deficiency is to be modified by \$230.00 for 1978, \$230.00 for 1979 and \$93.00 for 1980 as calculated in Finding of Fact "8" supra.


F. That petitioner has not met his burden of proof under section 689(e) of the Tax Law to show that there should not have been a 50 percent adjustment to the vehicle expense deduction to allow for personal use and the adjustment made by the Audit Division is sustained.

G. That the petition of John P. and Mary Z. Martin is granted to the extent indicated in Conclusions of Law "D" and "E"; that the Audit Division is directed to modify the Notice of Deficiency issued January 22, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER