

STATE OF NEW YORK  
STATE TAX COMMISSION

*U. B. T. Determination*  
*Gordon, Robert A-2*

In the Matter of the Petition

of  
ROBERT GORDON

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

For a Redetermination of a Deficiency or  
a Refund of UNINCORPORATED BUSINESS  
Taxes under Article(s) 23 of the  
Tax Law for the (Year(s) 1961 & 1962 :

State of New York  
County of Albany

Patricia Conley, 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 27th day of October, 1969, she served the within  
Notice of Decision (~~or Determination~~) by (certified) mail upon Mr. Robert Gordon,  
(~~representative of~~) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Mr. Robert Gordon, 50 Wilton Road,  
Huntington, N.Y.

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

28th day of October, 1969.

*Grace E. Pritchard*

*Patricia Conley*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
ROBERT GORDON"

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

For a Redetermination of a Deficiency or  
a Refund of UNINCORPORATED BUSINESS :  
Taxes under Article(s) 23 of the :  
Tax Law for the (Year(s) 1961 & 1962 :

State of New York  
County of Albany

Patricia Conley , 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 27th day of October , 1969 , she served the within  
Notice of Decision (or ~~Determination~~) by (certified) mail upon Harold Ross, CPA,  
(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Harold Ross, CPA, c/o Ross, Friedman & Co.,  
300 Madison Avenue, New York 17, NY  
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

28 day of October , 1969.

Grace E. Pritchard

Patricia Conley

To Mr. Rook

To be submitted to Commission, for  
signature upon your approval.

October 2, 1969

NGW:pw

(Robert Gordon)

*Handwritten:* (HIS) NEW 10/21/69  
*Signature:* [Handwritten signature]  
From Nigel G. Wright

PATCH T (FILE A)



STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :

of :

ROBERT GORDON :

DECISION

For a Redetermination of a  
Deficiency or for Refund of  
Unincorporated Business Tax  
under Article 23 of the Tax Law :  
for the Years 1961 and 1962 :

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The taxpayer having filed a petition pursuant to § 722 and 689 of the Tax Law for a redetermination of a deficiency dated April 11, 1966 of unincorporated business taxes imposed by Article 23 of the Tax Law for the years 1961 and 1962 and a hearing having been held before Nigel G. Wright, Hearing Officer, an appearance being made by a representative on behalf of the taxpayer but with the taxpayer not present and the record having been duly examined and considered,

The State Tax Commission hereby

FINDS:

(1) The sole questions in this case are whether the taxpayer is exempt from the unincorporated business tax by reason of being engaged in a profession (Tax Law §703(c) ) or by reason of being an employee (Tax Law §703(b) ). The amount of the deficiency, which would otherwise be due, showing a tax due of \$394.70 for 1961 and \$457.82 for 1962 is not otherwise contested.

(2) The taxpayer's business consists entirely of the service of selling the services of two commercial photographers. The taxpayer has described himself on his personal income tax return as an "artists representative."

(3) The taxpayer's entire income consists of amounts received from two individuals each doing business separately as a commercial photographer. These amounts were received as commissions and were computed as a percentage of the income received by the photographer from advertising agencies for photography work.

(4) The taxpayer maintains an office in a residential apartment building at 136 East 55 Street, Manhattan. He had a telephone and a telephone listing for that address. He had his own business stationery. He employed an accountant from time to time to write up his books. He pays his own expenses for the office. At the office he has a desk, filing cabinet and typewriter. He receives an extra 5% commission if he has to travel out of town to contact a client.

(5) No amounts were deducted or withheld for taxes from the amounts due to the taxpayer from either of the commercial photographers. An amount was withheld by one of the photographers for Blue Cross Insurance in which the taxpayer participated but the terms of the contract of insurance are not available.

(6) Taxpayer shared some of his fees with "free lancers" who found business for the commercial photographer and submitted such business through him. Such was in the nature of a finders fee and not salary or wages. The taxpayer claimed one such "free lancer" as an employee for purposes of social security.

(7) All orders received by taxpayer for the services of his principals must be acceptable to the principals and the taxpayer has no power to finally accept such orders.

(8) The taxpayer has full discretion in locating suitable clients for his principals.

(9) The reputation, good will and sales ability of the taxpayer is an important element in his ability to locate clients for his principals.

(10) Capital is not a material income producing factor of taxpayers business.

(11) The taxpayers ability in his business is derived from

experience and not from formal academic training. No academic training is available for the type of business activities performed by the taxpayer.

Upon the foregoing findings and all the evidence presented herein, the State Tax Commission hereby

DECIDES:

A. The taxpayer is engaged in a business activity in which ability is acquired through past experience rather than through academic training and is not therefore engaged in a profession. (Tower v. S.T.C. 1940, 282 N.Y. 407; Moffett v. Bates, 1949, 276 App. Div. 38, aff'd 301 N.Y. 597).

B. Any evidence that the principals of the taxpayer exercised sufficient control over him so as to constitute him an employee rather than an independent contractor will be construed most strongly against the taxpayer where, as here, neither the taxpayer nor the principal was present to testify as to such issue and only they have direct knowledge of the facts relating to that issue. (Fisch on New York Evidence Sec. 1125; Richardson on Evidence Sec. 92).

C. The testimony of taxpayer's representative which is hearsay and conclusory in nature is insufficient to carry the burden of proof as to the degree of control exercised over the taxpayer by his principal.

D. The taxpayer has not carried the burden of proof that he is an employee rather than an independent contractor (Petition of Sam Miller, 1966-4 N.Y.S. Tax Bull. page 29).

E. The taxpayer is engaged in an unincorporated business for the taxable years 1961 and 1962.

F. The petition for redetermination of the deficiency is denied and the notice of deficiency under date of April 11, 1966 showing a tax due of \$394.70 for 1961 and \$457.82 for 1962 is affirmed together with such interest, if any, as may be lawfully due under §684 of the Tax Law.

DATED: Albany, New York this 20th day of October, 1969.

STATE TAX COMMISSION

*Norman L. Galbraith*  
PRESIDENT

*Bruce Mawley*  
COMMISSIONER

*Milton Koerner*  
COMMISSIONER