

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

JAMES MONGITORE and LUCIO GEMOLA
c/o/a MONGITORE ASSOCIATES

FOR REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW
FOR THE FISCAL YEARS ENDING APRIL 30,
1961 AND APRIL 30, 1964

(2 determinations
here)

See also:

Unincorp. Bus. Tax
A-Z

Weisenbocher, Karl W.,
& Associates

(memo dated 3/12/69)

The taxpayers herein having filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes imposed under Article 23 of the Tax Law for the fiscal years ending April 30, 1961 and April 30, 1964 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on November 9, 1967, January 30, 1968 and February 20, 1968 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, and the taxpayer, James Mongitore having appeared on January 30, 1968 and the taxpayer, Lucio Gemola having appeared on February 20, 1968 and the taxpayers having been represented by Victor DeGurtis, Esq., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed a partnership return for the fiscal year ending April 30, 1961 in which they reported gross income in the amount of \$218,173.64 from fees as consulting engineers; that the taxpayers did not file any unincorporated business tax return for the fiscal year ending April 30, 1961 on the alleged ground that unincorporated business tax was not applicable; that on May 22, 1963 a statement of audit charges was filed against the taxpayer herein imposing additional unincorporated business tax in

the amount of \$3,271.46 with interest of \$447.01 for a total of \$3,718.47; that the taxpayers paid said unincorporated business taxes for fiscal year ending April 30, 1961 under protest and filed a claim for refund thereof.

(2) That the taxpayers filed partnership and unincorporated business tax return for the fiscal year ending April 30, 1964 reporting income from fees as consulting engineers, computed the unincorporated business tax due thereon in the amount of \$2,502.34; that they paid the same under protest and filed a claim for refund; that the claims for refund for the fiscal years ending April 30, 1961 and April 30, 1964 were denied and the taxpayers filed a petition for redetermination of a deficiency or for refund of unincorporated taxes with respect thereto.

(3) That in 1956, James Mongitore and Lucio Gencola formed the partnership of James Mongitore Associates maintaining an office at 101 Park Avenue, New York, New York; that each partner had a 50% interest in the partnership and profits and losses were shared equally; that the partnership performed engineering work on commercial buildings, school buildings, hospitals, churches and office buildings in connection with plumbing, heating, ventilation and air-conditioning; that the partnership had approximately 10 employees who were licensed professional engineers, unlicensed graduate engineers and mechanical designers and draftsmen.

(4) That in 1952, the New York State Education Department granted James Mongitore a license to practice professional engineering; that during the years in issue, James Mongitore was and still is licensed to practice professional engineering in the State of New York; that Lucio Gencola is not and never has been licensed as a professional engineer by the New York State Education Department.

(5) That the duties of Lucio Gemola, in connection with the partnership consisted of supervising personnel in the office; that he consulted with the licensed partner on plans and designs; that he checked the plans and initialled some of the floor plans (Minutes of Hearing, page 45; Taxpayer's Exhibit No. 1); that plans were approved by the licensed partner James Mongitore with his seal affixed thereto.

(6) That Lucio Gemola, the unlicensed partner, held himself out to the public as engaged in the practice of professional engineering.

(7) That on or about August 5, 1965 the New York State Education Department directed that the partnership of James Mongitore Associates be discontinued since one of the partners was unlicensed; that the partnership was discontinued and James Mongitore continued the practice of professional engineering in his own name with Lucio Gemola as an employee.

(8) That during the tax periods in issue, the partnership failed to comply with section 7209 of the Education Law requiring all the members of a partnership engaged in professional engineering to be licensed.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DECIDES:

(A) That during the tax periods in issue, the taxpayer partnership was not engaged in the practice of professional engineering since it failed to meet the requirements of section 7209 of the Education Law.

(B) That the taxpayer partnership accordingly was not engaged in the practice of a profession within the intent and meaning of section 703(c) of the Tax Law; that the taxpayer partnership was accordingly during the tax periods in issue not entitled to a professional exemption and was during the fiscal years ending April 30, 1961 and April 30, 1964, therefore, subject

to the unincorporated business tax.

(C) That the unincorporated business taxes paid by the taxpayers for the fiscal years ending April 30, 1961 and April 30, 1964 were properly due; that the taxpayers are not entitled to a refund thereof; that said unincorporated business taxes so paid for said tax periods in issue do not include any tax or other charge which would not have been lawfully demanded and that the petition of the taxpayers for redetermination of a deficiency or for refund of unincorporated business taxes filed with respect thereto be and the same is hereby denied.

DATED: Albany, New York this 8th day of April, 1969.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

PRESIDENT

/s/

A. BRUCE MANLEY

COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

: **IN THE MATTER OF THE APPLICATION** :
: **OF** :
: **JAMES MONSITORE and LUCIO GENOLA** :
: **d/b/a MONSITORE ASSOCIATES** :
: **FOR REVISION OR REFUND OF UNINCORPORATED** :
: **BUSINESS TAXES UNDER ARTICLE 16-A OF THE** :
: **TAX LAW FOR THE FISCAL YEARS ENDING** :
: **APRIL 30, 1959 AND APRIL 30, 1960** :
: -----

The taxpayers herein having filed applications for revision or refund of unincorporated business taxes imposed under Article 16-A of the Tax Law for the fiscal years ending April 30, 1959 and April 30, 1960 and hearings having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on November 9, 1967, January 30, 1968 and February 20, 1968 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, and the taxpayer, James Monsitore, having appeared on January 30, 1968, and the taxpayer, Lucio Genola, having appeared on February 20, 1968 and the taxpayers having been represented by Victor DeCurtis, Esq., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed partnership returns for the fiscal years ending April 30, 1959 and April 30, 1960 in which they reported gross income in the amounts of \$220,422.63 and \$198,792.12 for said respective years from fees as consulting engineers; that the taxpayers did not file any unincorporated business tax returns for said years on the alleged ground that

unincorporated business tax was not applicable; that on March 18, 1953 the Department of Taxation and Finance issued notices of additional unincorporated business tax assessments against the partnership for the fiscal years ending April 30, 1953 and April 30, 1954 (Assessments Nos. AB 048338 and AB 048339, respectively) in the amounts of \$2,557.99 and \$2,707.45 upon the ground that the activities of the taxpayers as reported on their returns constituted the carrying on of an unincorporated business, the income of which was subject to unincorporated business tax.

(2) That in 1954, James Mongitore and Lucio Genola formed the partnership of James Mongitore Associates maintaining an office at 101 Park Avenue, New York, New York; that each partner had a 50% interest in the partnership and profits and losses were shared equally; that the partnership performed engineering work on commercial buildings, school buildings, hospitals, churches and office buildings in connection with plumbing, heating, ventilation and air-conditioning; that the partnership had approximately 10 employees who were licensed professional engineers, unlicensed graduate engineers and mechanical designers and draftsmen.

(3) That in 1952, the New York State Education Department granted James Mongitore a license to practice professional engineering; that during the years in issue, James Mongitore was and still is licensed to practice professional engineering in the State of New York; that Lucio Genola is not and never has been licensed as a professional engineer by the New York State Education Department.

(4) That the duties of Lucio Genola, in connection with the partnership consisted of supervising personnel in the office; that he consulted with the licensed partner on plans and

designs; that he checked the plans and initialled some of the floor plans (Minutes of Hearing, page 45, Taxpayer's Exhibit No. 1); that plans were approved by the licensed partner James Mungitore with his seal affixed thereto.

(5) That Lucio Genola, the unlicensed partner, held himself out to the public as engaged in the practice of professional engineering; that on or about August 5, 1955 the New York State Education Department directed that the partnership of James Mungitore Associates be discontinued since one of the partners was unlicensed; that the partnership was discontinued and James Mungitore continued the practice of professional engineering in his own name with Lucio Genola as an employee.

(6) That during the tax periods in issue, the partnership failed to comply with section 7209 of the Education Law requiring all the members of a partnership engaged in professional engineering to be licensed.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DETERMINES:

(A) That during the tax periods in issue, the taxpayer partnership was not engaged in the practice of professional engineering since it failed to meet the requirements of section 7209 of the Education Law.

(B) That the taxpayer partnership accordingly was not engaged in the practice of a profession within the intent and meaning of Section 386 of the Tax Law; that the taxpayer partnership was accordingly, during the tax periods in issue, not entitled to a professional exemption and was, during the fiscal years ending April 30, 1959 and April 30, 1960, therefore, subject to the unincorporated business tax.

(C) That the unincorporated business taxes assessed against the taxpayers for the fiscal years ending April 30, 1959 and April 30, 1960 (Assessment Nos. AB 048358 and AB 048359, respectively) are correct; that said assessments do not include any tax or any charge which could not have been lawfully demanded; that the applications of the taxpayers for revision or refund filed with respect thereto be and the same are hereby denied.

Dated: Albany, New York this day of , 1969.

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

Milton Korn

COMMISSIONER