

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Elizabeth H. Todd, as Executrix :
of the Estate of Gordon B. Todd (dec'd) : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax & UBT :
under Article 16 - 16A of the Tax Law :
for the Years 1955 thru 1959. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of March, 1981, he served the within notice of Determination by mail upon Elizabeth H. Todd, as Executrix, of the Estate of Gordon B. Todd (dec'd), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Elizabeth H. Todd, as Executrix
of the Estate of Gordon B. Todd (dec'd)
c/o Hawkins, Delafield & Wood
67 Wall St.
New York, NY 10005

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 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
2nd day of March, 1981.

Cornie A. Hageland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Elizabeth H. Todd, as Executrix :
of the Estate of Gordon B. Todd (dec'd) : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Personal Income Tax & UBT :
under Article 16 - 16A of the Tax Law
for the Years 1955 thru 1959. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of March, 1981, he served the within notice of Determination by mail upon James R. Eustis the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. James R. Eustis
Hawkins, Delafield & Wood
67 Wall St.
New York, NY 10005

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 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
2nd day of March, 1981.

Ernie A. Haglund

J. Vredenburg

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

March 2, 1981

Elizabeth H. Todd, as Executrix
of the Estate of Gordon B. Todd (dec'd)
c/o Hawkins, Delafield & Wood
67 Wall St.
New York, NY 10005

Dear Ms. Todd:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 386J & 375 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 90 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James R. Eustis
Hawkins, Delafield & Wood
67 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
ELIZABETH H. TODD, as Executrix of	:	DETERMINATION
the Estate of GORDON B. TODD, Deceased	:	
for Revision or Refund of Personal Income Taxes	:	
or Unincorporated Business Taxes under Articles	:	
16 and 16-A of the Tax Law for the Years 1955	:	
through 1959.	:	

Elizabeth H. Todd, as executrix of the estate of Gordon B. Todd, c/o Hawkins, Delafield & Wood, Esqs., 67 Wall Street, New York, New York 10005, filed an application for revision or refund of personal income taxes or unincorporated business taxes under Articles 16 and 16-A of the Tax Law for the years 1955 through 1959 (File No. 20309).

On February 4, 1980, applicant, by Hawkins, Delafield & Wood, Esqs. (James R. Eustis, Jr., Esq., of counsel) and the Audit Division, by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel) executed a Consent to Submission without Hearing, the matter to be determined on the basis of facts set forth in the Stipulation of Facts entered into by the parties on the same date.

ISSUE

Whether the activities of the Gordon B. Todd in writing puts and calls, taken together with his transactions in securities, constituted engagement in an unincorporated business so as to subject his income from said activities to taxation pursuant to Article 16-A of the Tax Law.

FINDINGS OF FACT

1. Gordon B. and Elizabeth H. Todd did not file any unincorporated business tax returns for the years 1955 through 1959.

2. On October 12, 1976, the Audit Division issued a Notice of Additional Assessment, which assessed against the estate of Gordon B. Todd deficiencies in normal, capital gains and unincorporated business taxes in the total amount of \$35,251.00, scheduled as follows:

<u>TAXABLE YEAR</u>	<u>NORMAL TAX</u>	<u>CAPITAL GAINS TAX</u>	<u>UBT</u>	<u>TOTALS</u>
1955	\$365.00	\$ -	\$ 6,066.00	\$ 6,431.00
1956	19.00	-	10,445.00	10,464.00
1957	51.00	-	6,936.00	6,987.00
1958	-	643.00	911.00	1,554.00
1959	-	703.00	9,112.00	9,815.00
	<u>\$435.00</u>	<u>\$1,346.00</u>	<u>\$33,470.00</u>	<u>\$35,251.00</u>

Interest was computed to October 15, 1976, pursuant to section 376 of the Tax Law, in the amount of \$39,257.13.

3. Each year until 1975, decedent and/or applicant had executed consents extending the period of limitation for assessment of personal income and unincorporated business taxes up to and including April 15, 1977.

4. On May 27, 1977, applicant filed Applications for Revision or Refund of Personal Income Taxes or Unincorporated Business Taxes for each of the years at issue, contesting the assessment of unincorporated business taxes, and, in effect, conceding the normal and capital gains tax liabilities. Applicant subsequently filed a Demand for Hearing on September 30, 1977. As heretofore stated, applicant's counsel and counsel for the Audit Division thereafter consented to submission of this matter to the State Tax Commission without formal hearing.

5. The following facts are found in accordance with the Stipulation of Facts executed by the parties and in accordance with other materials in the file, as presently constituted.

6. Gordon B. Todd (the "decedent") died on March 10, 1975, leaving his wife Elizabeth H. Todd who was named executrix of his estate.

7. During the taxable years at issue, decedent derived his income primarily from ownership of and transactions in securities, and during said period decedent had occasion to write put and call options, both negotiable and non-negotiable.

8. A stock option is a negotiable contract paid for in advance pursuant to which the holder thereof has the right to buy (a "call") or sell (a "put") a specified number of shares of stock for a fixed price within the period allowed by the contract. In the brief filed on behalf of the Estate of Gordon B. Todd, it was argued that applicant was not a dealer in options and accordingly he was not engaged in a business subject to unincorporated business tax.

9. An option writer is one who agrees to sell stock on or before a specified date at a specified price if he issues a call, or to buy stock on or before a fixed date at a fixed price if he issues a put.

10. The option writer receives a premium. In the case of a call option, if the stock price remains the same or increases, the writer's profit equals the difference between the contract price and his adjusted basis in the shares, plus the amount of the premium; if the stock price declines, any loss incurred upon subsequent disposition of the shares is lessened by the amount of the premium. In the case of a put option, the writer profits from an unexercised option if the market price of the shares remains the same or rises; if the price of the shares declines, the writer exercises the option and offsets the loss incurred with the premium received.

11. In all instances in which he wrote negotiable options, either decedent was solicited by a member of the Put and Call Brokers and Dealers Association, or he telephoned a member broker or dealer and offered to write an option. (Decedent was not a member of said Association). Decedent then utilized the

standard forms prepared by the Association. After endorsement by a member firm of the New York Stock Exchange with which decedent had an account, the options, then freely negotiable, were surrendered to the member of the Association involved in the particular transaction. The broker or dealer paid decedent a premium and thereafter retailed the option to a customer at a price which included the broker's commission.

12. Decedent's practice was never to write a call option against stock he did not own nor against stock which if called away would result in a capital loss. Nor did decedent write put options in respect of stock he had no interest in acquiring.

13. From time to time decedent also wrote non-negotiable options for a "select group," comprised of approximately twenty relatives and long-time acquaintances. Under rather informal arrangements, decedent agreed to purchase from (a put) or sell to (a call) the individual on or before a specified date a specified number of shares at the contract price, with the tacit understanding between the parties that should the market price rise (in the case of a call) or fall (in the case of a put) in an amount sufficient to justify exercise of the option, decedent would deliver the equity in the contract (i.e., the difference between the then prevailing market price and the contract price) rather than the underlying shares. These options were not written on the standard forms of the Put and Call Brokers and Dealers Association.

14. For the years 1950 through 1961, and for the period January 1, 1962 through August 15, 1962, decedent was registered with the Securities and Exchange Commission as a broker-dealer. On or about May 28, 1962, Gordon B. Todd filed an application for registration as a broker and dealer, pursuant to

the Securities Exchange Act of 1934, under the name of Gordon B. Todd & Co. (a partnership). Prior to said date he operated as a sole proprietor under the name of Gordon B. Todd (a sole proprietorship). On July 6, 1962, the Securities and Exchange Commission granted the application of Gordon B. Todd & Co., a partnership, succeeding to the assets of Gordon B. Todd, a sole proprietorship. On August 15, 1962, he withdrew the registration with the approval of the commission.

15. The accounting firm of Haskins and Sells submitted to decedent on or about April 11, 1972, a review of his option activity for the years 1950 through 1968 which, among other things, showed the percentages of gross premiums on negotiable and non-negotiable options. The percentages for the years 1956 through 1961 were as follows:

<u>YEAR</u>	<u>GROSS PREMIUMS</u>	<u>PREMIUMS ON NON- NEGOTIABLE OPTIONS WRITTEN FOR OUTSIDE INDIVIDUALS</u>	<u>PERCENTAGE OF GROSS PREMIUMS ON NON- NEGOTIABLE OPTIONS</u>	<u>PERCENTAGE OF GROSS PREMIUMS ON NEGOTIABLE OPTIONS</u>
1956	\$159,778.00	\$19,107.00	11.9	88.1
1957	55,953.00	8,044.00	14.3	85.7
1958	111,787.00	12,710.00	11.4	88.6
1959	367,220.00	14,406.00	4.0	96.0
1960	201,012.00	8,767.00	4.4	95.6
1961	570,829.00	4,149.00	0.72	99.28

During 1962, decedent wrote one non-negotiable option; during 1963, he wrote two such options. Thereafter, he wrote no non-negotiable options.

16. Reports made by decedent to the Securities and Exchange Commission on his financial condition reflected the market value of shares on or against which he wrote negotiable options ("share values"), compared with the market

value of all securities held by decedent ("portfolio values"). The comparative values were as follows:

<u>YEAR</u>	<u>SHARE VALUES</u>	<u>PORTFOLIO VALUES</u>	<u>SHARE VALUES AS A PERCENTAGE OF PORTFOLIO VALUES</u>
1955	\$ 725,147.50	\$3,357,708.61	21.6
1956	956,888.85	3,662,626.81	26.1
1957	247,712.50	3,341,239.03	7.4
1958	660,287.50	4,478,211.49	14.7
1959	1,629,137.50	5,191,745.28	31.4
1960	862,713.75	4,680,986.74	18.4
1961	2,348,500.50	6,595,109.82	35.6
1962	2,227,500.00	5,726,177.00	38.8

17. On December 16, 1964, the State Tax Commission conducted a formal hearing to adduce evidence on several issues, among them, whether decedent was a "dealer" in securities in his own unincorporated business and thus subject to unincorporated business taxes for the taxable years 1945 through 1954. On July 7, 1971, the Commission issued its determination which stated in relevant part:

"The business activities of the taxpayer in buying and holding stocks are inseparable from his activities of using such stocks in his dealings as a writer of puts and calls and conversions.

"The business activities of the taxpayer constituted the carrying on of an unincorporated business within the meaning and intent of Article 16-A of the Tax Law."

On or about October 1, 1971, an Article 78 proceeding was initiated in the Supreme Court, County of Albany, on behalf of Gordon B. and Elizabeth H. Todd to review the aforesaid determination. The proceeding was transferred to the Appellate Division, Third Department, pursuant to a stipulation by the attorneys for the parties. Subsequent correspondence and meetings among representatives of the office of the Attorney General, representatives of the Department of Taxation and Finance and the attorneys for the applicants resulted in a settlement and a stipulation of discontinuance of the court proceeding. Under

the terms of the settlement, decedent was deemed to be subject to taxation under Article 16-A for the years 1945 through 1954, for the reason that by writing options, he was engaged in an unincorporated business.

CONCLUSIONS OF LAW

A. That the activities of decedent Gordon B. Todd as an option writer together with his transactions in securities during the years 1955 through 1959 constituted the carrying on of an unincorporated business within the meaning and intent of section 386 of the Tax Law and State Tax Commission Regulation 20 NYCRR 281.2.

B. That the Application for Revision or Refund of Unincorporated Business Tax of Elizabeth H. Todd, as executrix of the Estate of Gordon B. Todd, is denied and the Notice of Additional Assessment issued October 12, 1976 is sustained.


DATED: Albany, New York

MAR - 2 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER