

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Morton & Davida Zimmerman :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Year 1974. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

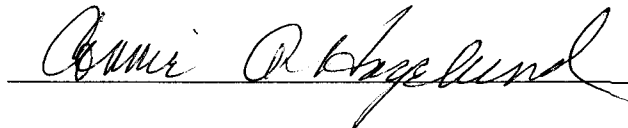
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon Morton & Davida Zimmerman, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morton & Davida Zimmerman  
65-50 Wetherole St.  
Rego Park, NY 11374

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  
8th day of July, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

July 8, 1983

Morton & Davida Zimmerman  
65-50 Wetherole St.  
Rego Park, NY 11374

Dear Mr. & Mrs. Zimmerman:

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, 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 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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
MORTON ZIMMERMAN AND DAVIDA ZIMMERMAN  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1974.

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DECISION

Petitioners, Morton Zimmerman and Davida Zimmerman, 65-50 Wetherole Street, Rego Park, New York 11374, 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 Nos. 28967 and 28968).

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 January 20, 1982 at 9:15 A.M. Petitioner Morton Zimmerman appeared pro se. the Audit Division appeared by Ralph J. Vecchio, Esq. (James F. Morris, Esq., of counsel).

ISSUE

Whether petitioner Morton Zimmerman's activities engaged in on behalf of Ted Bates & Company, Inc. constituted services rendered as an employee for unincorporated business tax purposes.

FINDINGS OF FACT

1. Morton Zimmerman (hereinafter petitioner) and Davida Zimmerman filed a joint New York State Income Tax Resident Return for the year 1974 whereon petitioner reported business income of \$20,508.00 derived from his occupation described as "sales rep". Petitioner did not file an unincorporated business tax return for said year.

2. On June 6, 1978 the Audit Division issued a Statement of Audit Changes wherein petitioner's business income was held subject to the imposition of unincorporated business tax on the basis that petitioner was "a free lance agent with no formal contracts covering your services". Additionally, said statement imposed a penalty pursuant to section 685(c) of the Tax Law for underestimation of unincorporated business tax and personal income tax. Accordingly, a Notice of Deficiency was issued against petitioner on January 25, 1980 asserting unincorporated business tax of \$627.33, section 685(c) penalty of \$28.44, plus interest of \$254.77, for a total due of \$910.54. A second Notice of Deficiency was issued under the same date against both petitioners asserting section 685(c) penalty of \$64.60 with respect to underestimation of personal income tax. This penalty was not protested pursuant to the petition filed on February 11, 1980, or addressed by petitioner during the hearing held herein.

3. On May 27, 1974 petitioner, who was experienced in the field of television programming, was retained by Ted Bates to assume the position of Director of the Colgate Programming Unit. Specifically, he was retained to replace the former director since Ted Bates' client, Colgate-Palmolive Company (Colgate), was unhappy with the performance of the unit with respect to the distribution of its show "Police Surgeon".

4. As director of said unit, petitioner's major responsibility was to see that Colgate's programs were distributed to as many television stations as possible. In connection with this responsibility, petitioner was required, pursuant to a written contract dated June 21, 1974, to:

- (a) recommend playing order of shows based on episode strengths,
- (b) screen all episodes and report to Colgate on quality,
- (c) continually improve line-up and remain in constant contact with clearing stations,

- (d) negotiate contracts with individual stations, and
- (e) supervise tape transfers of all programs.

No evidence or testimony was given with respect to the type of duties or services petitioner performed for his other accounts.

5. Said contract, between petitioner and Ted Bates was effective for a period of one year after which either party had the right to cancel on two weeks prior written notice. Petitioner remained in his position with Ted Bates for a period of time beyond the effective contract period.

6. Pursuant to said contract, petitioner received a fee for his services of \$1,041.66 payable twice each month starting on May 27, 1974. Additionally, he was fully reimbursed for business expenses incurred. Furthermore, said contract provided:

- (a) That as an independent contractor, petitioner will be permitted to work on his own television projects in the office space provided by Ted Bates without charges or fees,
- (b) that Ted Bates will have first rights on said projects, and
- (c) that petitioner was required to give "a full work week to the Colgate Television Program Unit".

7. Petitioner was required to report to Joel M. Segal, Senior Vice President of Ted Bates, on a daily basis. He was required to be available on a regular eight hour per day basis and attend client meetings pertaining to other Ted Bates television projects. He was further required to read and critique scripts and provide written reports with respect to same to Mr. Segal.

8. Petitioner was instructed to "follow the same work procedures of regularly employed Ted Bates personnel".

9. Ted Bates provided secretarial services to petitioner without charge.

10. Mr. Segal characterized petitioner's services to Ted Bates as "free lance services".

11. Ted Bates did not withhold personal income taxes or social security taxes from petitioner's compensation. Furthermore, petitioner was not provided with pension, health insurance or profit sharing benefits which were normally provided to Ted Bates' executives.

12. Petitioner was not provided with paid vacation time. However, he was paid for those days where he was out sick.

13. Petitioner reported gross business income of \$27,002.00 for 1974 on a Federal Schedule C (Profit or (Loss) From Business or Profession). Said income breaks down as follows:

<u>SOURCE</u>	<u>INCOME</u>
Ted Bates & Company, Inc.	\$18,777.00
Pacific Video	3,000.00
Victor Awards	5,000.00
Total	<u>\$26,777.00</u>

Petitioner was unable to recall the source of the unscheduled balance of \$225.00 and no explanation was given for the amount of income received from Ted Bates & Company, Inc., since petitioner was to receive a lesser amount (see Finding of Fact "6", supra).

14. Petitioner testified that the income derived by him from Pacific Video and the Victor Awards was for services rendered prior to the commencement of his affiliation with Ted Bates and Company, Inc. (hereinafter Ted Bates). He conceded that such income, together with the unscheduled balance of \$225.00, is subject to the imposition of unincorporated business tax. However, pursuant to his contract and a letter from Mr. Segal, petitioner was permitted to work on his own television projects (see Finding of Fact "6", supra) and, in particular, petitioner was concerned with two accounts, namely Pacific Video Industries and Victor Awards Television Special. Petitioner contended that the income derived

from Ted Bates is excludable from said tax since his services were rendered under a bona fide employer-employee relationship.

15. All "other business expenses" of \$5,392.00 claimed on petitioner's Federal Schedule C were incurred with respect to activities engaged in for the scheduled principals other than Ted Bates.

#### CONCLUSIONS OF LAW

A. That the penalty of \$64.60 asserted pursuant to section 685(c) of the Tax Law with respect to personal income taxes is deemed conceded by petitioner since said penalty was neither addressed in the petition nor raised as an issue herein.

B. That the income derived from Pacific Video of \$3,000.00, the Victor Awards of \$5,000.00 and the undetermined source of \$225.00 is subject to the unincorporated business tax, since petitioner conceded that this income is subject to the unincorporated business tax (see Finding of Fact "14", supra).

C. That the rendering of services by an individual as an employee is not considered an unincorporated business for purposes of Article 23 of the Tax Law.

"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." Section 703(b) of the Tax Law.

D. That the burden of proof is upon petitioner to show that his relationship with Ted Bates was that of employer-employee (sections 689(e) and 722 of the Tax Law).

E. That petitioner has failed to sustain his burden of proof to show that his activities on behalf of Ted Bates constituted services as an employee within the meaning and intent of section 703(b) of the Tax Law. Accordingly,

the income derived from such activities, together with the income noted in Conclusion of Law "B", supra, is subject to the imposition of unincorporated business tax pursuant to section 701 of the Tax Law.

F. That the petition of Morton Zimmerman and Davida Zimmerman is denied and the notices of deficiency dated January 25, 1980, are hereby sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 08 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER