

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jean L. & Lynne A. David :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1978-1980. :
:

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 22nd day of March, 1985, he served the within notice of Decision by certified mail upon Jean L. & Lynne A. David, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jean L. & Lynne A. David
205 W. 57th Street
New York, NY 10019

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
22nd day of March, 1985.

David Parchuck

Annunzio R. Hegeland
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
Jean L. & Lynne A. David :
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Business Tax under Article 23 of the Tax Law for :
the Years 1978-1980. :
:

AFFIDAVIT OF MAILING

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 22nd day of March, 1985, he served the within notice of Decision by certified mail upon Stephen M. Brecher, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen M. Brecher
Peat, Marwick, Mitchell & Co.
345 Park Avenue
New York, NY 10154

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
22nd day of March, 1985.

David Parchuck

Lynne A. David

Authorized to administer oaths
pursuant to Tax Law section 174

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

March 22, 1985

Jean L. & Lynne A. David
205 W. 57th Street
New York, NY 10019

Dear Mr. & Mrs. David:

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
Stephen M. Brecher
Peat, Marwick, Mitchell & Co.
345 Park Avenue
New York, NY 10154
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JEAN L. AND LYNNE A. DAVID	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1978,	:	
1979 and 1980.	:	

Petitioners, Jean L. and Lynne A. David, 205 West 57th Street, New York, New York 10019, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1978, 1979 and 1980 (File No. 38589).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 25, 1984 at 10:45 A.M., with additional documentary evidence and briefs to be submitted by April 11, 1984. Petitioners appeared by Peat, Marwick, Mitchell & Co. (Stephen M. Brecher, CPA and Robert C. Benz, CPA). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether during 1978, Mr. David was engaged in an unincorporated business conducted wholly or partly within this state.

II. Whether income derived from Mr. David's activities as a hairstylist and fashion photographer was subject to unincorporated business tax.

III. Whether salaries earned by Mr. David for services rendered to Gerome Coiffure, S.A. and Hair Programming, Inc. were subject to unincorporated business tax.

IV. If so, whether the salary received from Gerome Coiffure, S.A. was allocable within and without New York.

FINDINGS OF FACT

1. For taxable year 1978, petitioner Jean L. David filed a New York State Income Tax Resident Return (with City of New York Personal Income Tax), reporting and computing tax upon business income of \$11,895.86. Federal Schedule C, Profit or (Loss) from Business or Profession, indicated that such income was derived from the "Jean Louis David Salon" located at Henri Bendel. A Wage and Tax Statement issued to Mr. David by Hair Programming, Inc., 120 East 16th Street, New York, New York, shows wages, tips and other compensation paid to him of \$10,000.00. Mr. David did not file an unincorporated business tax return for such year.

For taxable year 1979, Mr. David filed a joint New York State Income Tax Resident Return (with City of New York Personal Income Tax) with his wife, Lynne A. David, whereon he reported among other things business income in the amount of \$149,718.00 (comprised of franchise income, commissions, consulting fee and wages, and gross receipts from photography) and wages, salaries and tips of \$168.00. Two Wage and Tax Statements issued to Mr. David by Hair Programming, Inc., reflect total wages, tips and other compensation paid to him of \$40,000.00. Mr. David also filed an unincorporated business tax return for 1979, reporting taxable business income of \$46,851.00 from his business of hairstyling and consulting. At Schedule U-C of the return, Mr. David stated that such business

was commenced in November, 1979; in arriving at net income from business, he subtracted wages in the amount of \$92,867.00.

For taxable year 1980, Mr. David filed a joint New York State Income Tax Resident Return (with City of New York Personal Income Tax) with his spouse whereon he reported business income in the sum of \$145,567.00. Mr. David similarly reported such income on the unincorporated business tax return he filed; in calculating net income from business, he subtracted wages of \$76,991.00. A Wage and Tax Statement issued him by Hair Programming, Inc. shows wages, tips and other compensation paid of \$33,333.31.

2. On April 6, 1982, the Audit Division issued to petitioners a Statement of Audit Changes, proposing unincorporated business tax due for the years 1978, 1979 and 1980 in the respective amounts of \$144.79, \$4,179.31 and \$3,079.68, plus interest. The proposed increase in tax resulted from subjecting to Article 23 taxation: (a) in 1978, net profit of \$11,895.86; (b) in 1979, salaries of \$40,000.00 from Hair Programming, Inc. and \$52,867.00 from Gerome Coiffure, S.A.; and (c) for 1980, salaries of \$33,333.00 from Hair Programming, Inc. and \$43,658.00 from Gerome Coiffure, S.A. On May 5, 1982, the Audit Division issued to petitioners a Notice of Deficiency, asserting unincorporated business tax for the years 1978, 1979 and 1980 in the total amount of \$7,403.78, plus interest. At the formal hearing, counsel for the Audit Division conceded that the Statement of Audit Changes and Notice of Deficiency should properly have been issued solely to Mr. David (hereinafter, petitioner).

3. Petitioner is a hairstylist, hair designer and fashion photographer of international reputation. He began his career at the age of 15 as an apprentice at his parents' salon.

4. The income which petitioner reported for unincorporated business tax purposes was generated from the following sources: (a) his activities as a hairstylist and fashion photographer; (b) the licensing of his hairstyle techniques; (c) demonstrations at which he exhibited his styling techniques to hairdressers who paid a fee for attendance; (d) the licensing of videotapes employed to teach his techniques; (e) commissions for his promotion of certain hair care products; and (f) the franchising of hair salons.

5. Sometime during the early 1960's, petitioner formed Gerome Coiffure, S.A. ("Gerome"), a French corporation which owns and franchises salons and operates an internationally known hairstyling school. Petitioner owns approximately 81 percent of the stock of Gerome and serves as corporate president. His office is situated in Gerome's Paris salon and is used exclusively to conduct the business of Gerome. During the years under consideration, petitioner did not render any services for Gerome within the United States.

6. Gerome owns salons in France and Italy; in addition, it has entered franchising agreements for the operation of salons in France, Italy, Australia and certain South American nations. All hairstyling techniques used by the salons are subject to licensing agreements with Mr. David. The Gerome hairstyling school teaches petitioner's techniques to select pupils via live instruction and also by means of Mr. David's videotapes.

7. As president of Gerome, petitioner was responsible for the management of the various businesses it conducted. Petitioner maintains that he had an employment contract with Gerome, governed by detailed provisions of French law. It is unclear whether such agreement has been reduced to writing, but in any event, no copy was produced at the hearing. Petitioner offered in evidence a schedule prepared by Gerome, reflecting inter alia monthly gross salary (in

francs and dollars) paid to petitioner during 1980 and French social security tax (in francs and dollars) and income tax (in francs and dollars) withheld therefrom.

8. On September 1, 1978, petitioner entered into a "Shareholders' Agreement" with American Yvette Company, Inc. ("Yvette"), a Delaware corporation with its principal place of business at 120 East 16th Street, New York, New York, and Hair Programming, Inc. ("Programming"), a New York corporation with its principal place of business at 120 East 16th Street, New York, New York, for the following stated purposes:

"(a) owning and operating the Salons listed in Exhibit A attached hereto and made a part hereof and such other salons as may at any time or from time to time be owned and/or operated by the Corporation ("Salons"); and

(b) furnishing such public relations, fashion consulting, systems, management, educational know-how and techniques and other services and products for hairdressing for women and/or men and beauty schools in the Territory as David furnishes to his customers and clients in Europe..."

Petitioner and Yvette each owned 50 percent of the common stock of Programming.

Under the terms of the agreement, petitioner, as president, was to perform the services consistent with the responsibilities of that office, including direction of the artistic, technical and public relations aspects of the business conducted by Programming. Yvette made office space available to petitioner at its premises, exclusively for his conduct of the business of Programming.

The agreement further provided, in relevant part:

"David will devote a significant amount of his time and efforts to the business of the Corporation which the parties agree will require David's presence in New York for not more than two months per year (including time spent in other cities in the Territory promoting salons). David shall render services to the best of his ability and shall use his best efforts to promote the interests of the Corporation and of Yvette. During the term of this Agreement, David will not

engage in any capacity or activity which is, or may be, contrary to the welfare, interest or benefit of the business now or hereafter conducted by the Corporation. David shall be entitled to reimbursement by the Corporation for travelling, living and other reasonable expenses actually incurred by him on its behalf during his visits to the United States in the course of his employment by the corporation... The Corporation may terminate David's employment hereunder by sending notice to David of its intention to do so if David, after actual receipt of written notice from the Corporation and within thirty (30) days after such receipt, fails to cure such refusal, neglect or default, refuses or neglects to comply or defaults in complying with the Corporation's directions and/or instructions, or with any or all of the terms and/or obligations of this Agreement or with any policy or directive of any store where one of the Salons is located, as contemplated by the Corporation's lease with the store."

Petitioner's specific duties were to locate suitable salons in the United States and to improve the artistic and management techniques used at such salons in order for them to become Jean Louis David franchises. The purposes of the agreement were not accomplished, however: only one salon was established at Henri Bendel; the agreement was therefore terminated sometime in 1980 or 1981.

In addition to salary, petitioner received income from Programming (reported for unincorporated business tax purposes) under franchise arrangements and licensing arrangements with that corporation.

CONCLUSIONS OF LAW

A. That in accordance with the concession made by counsel to the Audit Division (Finding of Fact "2"), Lynne A. David's name is to be removed from the Notice of Deficiency.

B. That the record is virtually devoid of evidence regarding the nature and location of the services petitioner performed in connection with the Jean Louis David salon in New York. The net profit of \$11,895.86 he realized from said salon must thus be considered subject to the tax imposed by Article 23 of the Tax Law.

C. That petitioner's activities as a hairstylist and fashion photographer do not encompass some of the essential characteristics of the professions of law, medicine, dentistry or architecture as recently enumerated in Matter of Cissley v. N.Y.S. Tax Comm. (98 A.D.2d 899 [3d Dept. 1983]). Such activities are thus not within the scope of the exemption from unincorporated business tax created by Tax Law section 703(c) for the practice of a profession. Koner v. Procaccino, 39 N.Y.2d 258 (1976); Matter of Irwin Feldman, State Tax Comm., April 6, 1979; Matter of Ralph A. Adams, State Tax Comm., August 31, 1979.

D. That the performance of services by an individual as an employee or as an officer or director of a corporation is not considered an unincorporated business, unless such services constitute part of a business regularly conducted by the individual. Tax Law section 703(b). Petitioner's employment by Gerome and Programming was in furtherance of and for the direct benefit of his unincorporated business activities, most especially the franchising of Jean Louis David salons and the licensing of petitioner's hairstyling techniques. See Matter of Naroff v. Tully, 55 A.D.2d 755 (3d Dept. 1976); 20 NYCRR 203.10(d). In fact, the activities of the corporate entities and the unincorporated business activities of petitioner were so interrelated as to appear inseparable. Consequently, salaries petitioner received from such corporations were properly the subject of Article 23 taxation.

E. That in general, where an unincorporated business is conducted both within and without New York, "a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions" is to be allocated to this State. Tax Law section 707(a). In light of the performance by petitioner of all services for Gerome in France, and pursuant to the authority granted this Commission by Tax Law section 707(d) to determine

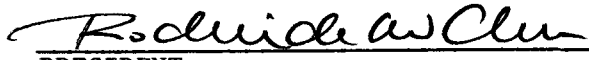
allocation methods other than those prescribed by subsections (b) and (c) of said section, petitioner's entire salary from Gerome is to be allocated without New York.

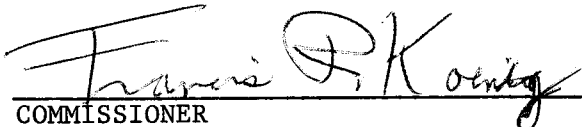
F. That the petition of Jean L. and Lynne A. David is granted to the extent indicated in Conclusions of Law "A" and "E"; the notice of deficiency issued on May 5, 1982 is to be modified accordingly; and except as so modified, the deficiency is in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 22 1985


PRESIDENT


COMMISSIONER


COMMISSIONER