

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
THOMAS P. BERMAN

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of ~~Personal Income and~~ Unincorporated Business :
Taxes under Article(s) 22 and 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1971 and 1972.

State of New York
County of Albany

John Huhn , 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 20 day of September, 1978, she served the within
Notice of Decision by (certified) mail upon Thomas P. Berman

~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Thomas P. Berman
320 East 53rd Street
New York, New York 10022

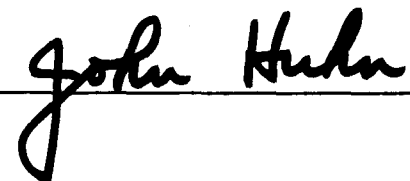
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~(representative of)~~
~~xxx~~ petitioner herein and that the address set forth on said wrapper is the
last known address of the ~~(representative of)~~ petitioner.

Sworn to before me this

20 day of September , 1978





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Notice of Decision by (certified) mail upon Harry M. Wendroff, CPA


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by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Harry M. Wendroff, CPA
43-25 Douglaston Pkwy.
Douglaston, New York

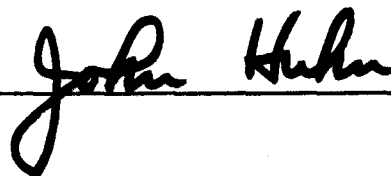
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

20 day of September , 1978







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

September 20, 1978

**Thomas P. Berman
320 East 53rd Street
New York, New York 10022**

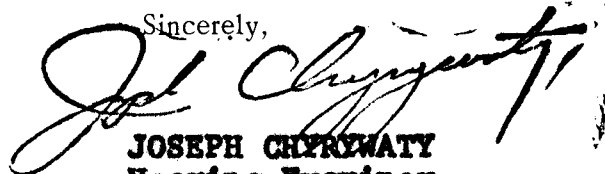
Dear Mr. Berman:

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 Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


JOSEPH CHYZYWATY
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Joseph A. Milack, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 21, 1976 at 1:15 P.M. Petitioner appeared by Harry M. Wendroff, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Paul Rosenkranz, Esq., of counsel).

I. Whether the penalty for underpayment of personal income and unincorporated business taxes for 1971 and 1972 was properly computed.

II. Whether the commission income received by petitioner as a commission salesman during 1971 and 1972 was subject to unincorporated business tax.

III. Whether petitioner had reasonable cause for failing to file New York State unincorporated business tax returns for 1971 and 1972.

FINDINGS OF FACT

1. Petitioner, Thomas P. Berman, filed New York State income tax resident returns for 1971 and 1972. He did not file New York State unincorporated business tax returns for said years.

2. During 1971 and 1972 petitioner was employed by Art Theatre Guild, Inc. His duties were primarily of an administrative nature. Additionally during 1971, he was a commission salesman representing Sherpix, Inc. (a Wholly-owned subsidiary of Art Theatre Guild, Inc.), Cinetreat Corp. and Cine Supply Corp. During 1972 he represented Sherpix, Inc. and Cine Supply Corp.

3. On April 11, 1975, the Income Tax Bureau issued a Notice of Deficiency against petitioner for 1971 and 1972 in the sum of \$1,227.06. The sum of \$1,227.06 consisted of the following:

<u>ITEM</u>	<u>AMOUNT</u>
Unincorporated business tax	\$ 758.57
Penalty for failure to file unincorporated business tax returns	274.86
Penalty for underpayment of estimated tax - 1971 and 1972	88.75
Interest	<u>104.88</u>
TOTAL	\$1,227.06

4. The penalty included in the Notice of Deficiency for underpayment of estimated tax was asserted against petitioner because he did not file declarations of estimated personal income and unincorporated business taxes on Form IT-2105 for 1971 and 1972, and because he did not make any payments with respect to his underpayment of estimated tax for said years. The penalty asserted against petitioner in the amount of \$88.75 consisted of a penalty of \$61.04 for underpayment of personal income tax for 1971, as well as penalties of \$6.14 and \$21.57 for underpayment of unincorporated business tax for 1971 and 1972, respectively.

5. Petitioner submitted a photocopy of Federal Form 2210 (Underpayment of Estimated Tax by Individuals), on which he computed an underpayment of 1972 New York State personal income tax of \$48.83. This was based on the 6 percent rate which was applicable for 1972 Federal income tax purposes. However, the applicable rate for 1972 New York State underpayment of estimated tax was 7 1/2 percent.

6. The firms from whom petitioner received commission income did not withhold Federal or New York State income taxes or social security tax from the commissions paid to him.

7. The commissions which petitioner earned from Sherpix Inc. were based on a sales participation program of distribution of motion pictures to local theatres.

8. The commissions which petitioner received from Cinetreat Corp. and Cine Supply Corp. were based on the sales of motion picture supplies and services to the same customers to whom he sold for Sherpix, Inc.

9. Petitioner was not reimbursed by the firms for whom he sold, for expenses he incurred in connection with his sales activities.

10. Although there is an indication that Sherpix, Inc. exercised some supervision and control over petitioner's selling activities, no such indication exists with respect to Cinetreat Corp. and Cine Supply Corp.

11. Petitioner was advised by his accountant that he was not required to file New York State unincorporated business tax returns for 1971 and 1972.

CONCLUSIONS OF LAW

A. That penalties asserted against petitioner for underpayment of personal income and unincorporated business taxes for 1971 and 1972 were properly determined by the Income Tax Bureau, in accordance with the meaning and intent of sections 685(c) and 722 of the Tax Law.

B. That the commission income received by petitioner during 1971 and 1972 from Cinetreat Corp. and Cine Supply Corp. constituted income from his regular business of selling motion picture supplies and services.

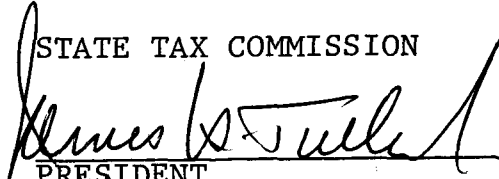
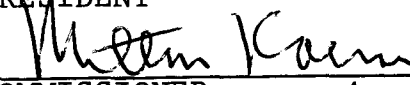
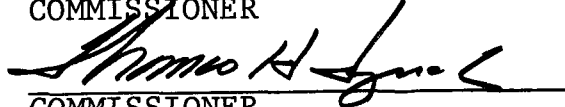
C. That petitioner's selling activities in connection with Cinetreat Corp. and Cine Supply Corp. constituted the carrying on of an unincorporated business, in accordance with the meaning and intent of section 703 of the Tax Law; thus, the income he derived therefrom was subject to unincorporated business tax.

D. That petitioner's selling activities on behalf of Sherpix, Inc. during 1971 and 1972 were so integrated and interrelated with activities in connection with his unincorporated business as to constitute part of a business regularly carried on by him; therefore, the commission income he received from said corporation is subject to unincorporated business tax.

E. That petitioner had reasonable cause for not filing New York State unincorporated business tax returns for 1971 and 1972; therefore, the penalties asserted against him pursuant to sections 722 and 685(a)(1) and 685(a)(2) of the Tax Law are cancelled. The Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency issued to petitioner on April 11, 1975.

F. That the petition of Thomas P. Berman is granted to the extent indicated in Conclusion of Law "E" above, but that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
September 20, 1978

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER