

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Harry & Barbara Hurwitz :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Personal Income Tax & UBT :

under Article 22 & 23 of the Tax Law

for the Years 1971 & 1972. :

State of New York

County of Albany

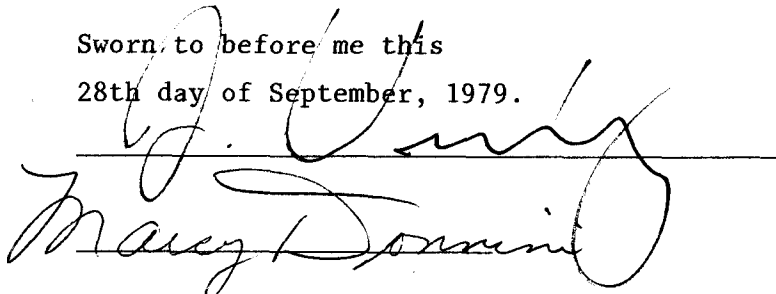
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Harry & Barbara Hurwitz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry & Barbara Hurwitz
6447 Guernsey Ave.
Malibu, CA 90265

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
28th day of September, 1979.


Mary J. Quinn

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Harry & Barbara Hurwitz
6447 Guernsey Ave.
Malibu, CA 90265

Dear Mr. & Mrs. Hurwitz:

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,

A handwritten signature in dark ink, appearing to read "John J. Sollecito", written in a cursive style.

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

of :

DECISION

for Redetermination of a Deficiency or :
for Refund of Personal Income and Unin- :
corporated Business Taxes under Articles :
22 and 23 of the Tax Law for the Years :
1971 and 1972. :

On October 28, 1978, petitioners advised the State Tax Commission, in writing, that they desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file.

Whether the activities of petitioner Harry Hurwitz in connection with the making of films constituted the carrying on of a profession which was exempt from the unincorporated business tax.

1. Petitioners, Harry and Barbara Hurwitz, filed joint New York State income tax resident returns for 1971 and 1972. Mr. Hurwitz did not file any unincorporated business tax returns for said years.

2. On February 24, 1976, the Income Tax Bureau issued a Statement of Audit Changes to petitioners, imposing unincorporated business tax on the grounds that the activities of petitioner Harry Hurwitz as a film maker were subject to unincorporated business tax. The Bureau also imposed penalties under sections 685(a)(1) and (a)(2) of the Tax Law for failure to file and pay unincorporated business tax, and under section 685(c) of the Tax Law for underestimation of personal and unincorporated business taxes for the years at issue. Accordingly, it issued a Notice of Deficiency on February 24, 1976 for \$1,967.04 in unincorporated business tax, plus penalties of \$1,001.15 and interest of \$433.83, for a total due of \$3,402.02.

3. During the years at issue, petitioner Barbara Hurwitz was a housewife and had no separate income. She was not engaged in any business activity.

4. Petitioner Harry Hurwitz is a graduate of the High School of Music and Art in New York City, where he took the art curriculum. In 1960, he received the degree of Bachelor of Science from New York University and in the same year, he received a completion certificate from the Parsons School of Design in New York City, where he studied painting and drawing. In 1962, he received a Master of Arts degree from New York University.

5. Thereafter, Harry Hurwitz intermittently taught courses in art at the New York State University at New Paltz and at Queens College in New York City. He also taught courses in film at New York University, State University at Purchase, New York Institute and Pratt Institute. In addition to teaching, he lectured on the subject of art and film at various educational institutions.

6. Before Harry Hurwitz began to teach and while teaching, he functioned as an artist. His work as a painter and graphic artist are in the permanent collections of a number of art museums, including the Metropolitan Museum of Art in New York City. He has also had a number of one-man exhibitions of his paintings and drawings.

7. In the art medium of film, he made The Penny Arcade and The Projectionist, in addition to Richard and The Eternal Tramp, the two films from which Mr. Harry Hurwitz had income in the years at issue. The Penny Arcade won an award at the San Francisco Film Festival and The Projectionist was shown on college campuses throughout the country, and at the Museum of Modern Art, which now has a print in its permanent collection.

8. The film Richard was completed in 1972 and is a satirical comedy about Richard Nixon. It was jointly written and directed by Lorees Yerby and Harry Hurwitz.

9. The film The Eternal Tramp was completed in 1967 and is an educational documentary film on Charlie Chaplin, being written and directed by Harry Hurwitz. It was shown frequently on Public Television and was included in the film rental library of Audio-Brandon Films.

10. For 1971 Mr. Hurwitz had a gross income of \$26,750.00, which consisted of \$26,000.00 on account from Josephine Productions for Richard, and \$750.00 for lecturing at places such as the University of Connecticut. In 1972 his gross income came entirely from Richard (\$19,000.00) and from The Eternal Tramp (\$22,500.00).

11. It is Mr. Hurwitz's contention that his work with films was just one facet of his overall basic work as an artist. The income derived from his films did not alter his status as an artist any more than the sale of paintings by an artist to dealers, galleries, museums and collectors transforms said artist into a businessman in the ordinary sense. Harry Hurwitz further argues that his work on Richard and The Eternal Tramp called for a high degree of professionalism; that it required artistic talent and vision, as well as knowledge and expertise gained by specialized study and training over a period of many years; and that his activities were not used by him for the purpose of conducting or promoting a business or trade, but were used to make a creative work of artistic merit.

CONCLUSIONS OF LAW

A. That petitioner Harry Hurwitz derived his income from writing and directing films. Directing films is a facet of acting; acting and writing are generally not subject to unincorporated business tax.

B. That petitioner Harry Hurwitz's activities as a writer and director of films were not used in the format of advertising copy, commercials or any material which promotes business or the sale of a product. These activities constituted the practice of a profession within the meaning and intent of section 703(c) of the Tax Law and, thus, are deemed not to be the carrying on of an unincorporated business.

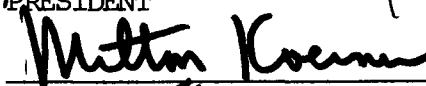
C. That the petition of Harry and Barbara Hurwitz is granted to the extent that the unincorporated business tax and the penalties pursuant to that tax are cancelled. The Income Tax Bureau is hereby directed to modify the Notice of Deficiency issued on February 26, 1976, but that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER