

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Louis A. & Susan Garisto

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for the :
Years 1968 - 1970

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Louis A. & Susan Garisto, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis A. & Susan Garisto
c/o Mason & Co.
75 Rockefeller Plaza
New York, NY 10019

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
5th day of June, 1981.

Ann A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Louis A. & Susan Garisto :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for :
the Years 1968 - 1970

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon James W. Mosher 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 W. Mosher
Zissu, Stein, Couture, Mosher
270 Madison Ave.
New York, NY 10016

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
5th day of June, 1981.

Arnie A. Haglund

J. Vredenburg

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

June 5, 1981

Louis A. & Susan Garisto
c/o Mason & Co.
75 Rockefeller Plaza
New York, NY 10019

Dear Mr. & Mrs. Garisto:

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:

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 W. Mosher
Zissu, Stein, Couture, Mosher
270 Madison Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LOUIS A. and SUSAN GARISTO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the Years 1968, 1969 and 1970.	:	

Petitioners, Louis A. and Susan Garisto, 400 East 56th Street, New York, New York 10022, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1968, 1969 and 1970 (File No. 16617).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on August 24, 1978 at 1:15 P.M. Petitioners appeared by Zissu, Stein, Bergman, Couture & Mosher (James W. Mosher, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the activities of petitioner Louis A. Garisto as a composer, arranger and conductor of music, constituted the practice of a profession and are therefore deemed not to be the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioners, Louis A. and Susan Garisto, filed New York State Resident Income Tax Returns for the years 1968, 1969 and 1970. The 1968 return was a combined return, while the 1969 and 1970 returns were joint returns. On each return, Mr. Garisto's occupation was indicated as "Musician, Arranger-Composer".

2. On his Federal Schedule "C" for 1968, petitioner Louis Garisto referred to his business activity as "Musician, Composer & Arranger"; on his Federal Schedule "C" for 1969, said petitioner referred to his business activity as "Musician, Composer & Arranger & Producer-Radio & TV Commercials". On both schedules the business name was listed as "Lou Garisto Productions".

3. On February 6, 1974, a Statement of Audit Changes was sent to petitioners asserting a proposed deficiency in income tax for 1969 of \$1,151.00, based on unreported federal audit changes and also asserting proposed deficiencies in unincorporated business tax for 1968, 1969 and 1970 of \$2,597.56, \$2,983.29 and \$3,067.67, respectively, on the grounds that the income derived from activities as a musician, arranger and composer were deemed to be subject to unincorporated business tax. On April 26, 1974, the Audit Division received payment of \$1,151.00, the amount of the income tax deficiency. On June 28, 1976, the Audit Division issued a Notice of Deficiency against petitioners for the aforementioned deficiencies and applied the remittance of \$1,151.00 against the total of the deficiencies.

4. Petitioner Louis Garisto received extensive formal training in music starting at the age of 6. He has written classical music and has had works performed by the National Symphony Orchestra and other orchestras. He completed his first authentic symphony before he was 13 years old.

5. During the years at issue, Mr. Garisto was primarily a composer, scorer and orchestrator of music for television films. Seventy (70) percent of his activities during this period were related to music for commercial messages. Some of the music originally written for commercial messages was later used in other areas or for other purposes such as phonograph records or background music.

6. Mr. Garisto is known in the industry for his ability to score television films of any length, whether it be a 30 second commercial or a 2 hour feature. The films are usually post-scored, rather than pre-scored (i.e. the music is written after the film has been completed). Mr. Garisto typically performs his activities in this manner:

He first views the film on a "Movieola", a device which allows him to look at the film and start and stop it as he wishes, in order to measure the length of the scenes in the film. The film lengths are shown on a counter by feet and frames. Mr. Garisto decides what moods are necessary for the various scenes and transforms the feet and frames of the scenes mathematically into minutes or seconds and composes a piece of music appropriate for the moods required for the various scenes. Mr. Garisto does not merely write a melody or tune; he establishes a theme which is developed by any number of variations throughout the film. Mr. Garisto writes the music to be played by an orchestra of from 12 to 50 musicians. In order to do this he must be conversant with every instrument in the orchestra. Mr. Garisto always conducts the orchestra when the music is being recorded. This recorded version may or may not be the finished product which is finally used with the film. Once it leaves Mr. Garisto's hands he has no further control over it.

CONCLUSIONS OF LAW

A. That section 703(c) of the Tax Law provides as follows:

"(c) Professions. - The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

B. That 20 NYCRR 203.11(b)(1)(iv), added February 1, 1974 (after the years at issue) provides as follows:

"(iv) Musicians and artists are also recognized as professions (sic) by the Tax Commission. However, an activity which, for example, consists of executing drawings or illustrations for commercial advertising purposes, or the production of musical or dramatic shows, or the creation of advertising set to music is not a professional activity since it deals with the conduct of business itself."

C. That the activities of petitioner Louis Garisto as a composer, arranger and conductor of music for commercial messages dealt with the conduct of business itself and were not professional activities and the income therefrom is subject to unincorporated business tax. Mr. Garisto's activities as a composer, arranger and conductor of music other than music for commercial messages, however, constituted the practice of a profession and the income therefrom is not subject to unincorporated business tax.

D. That 70 percent of Mr. Garisto's income from composing, arranging and conducting music was income attributable to music for commercial messages and thus subject to unincorporated business tax. The balance of his income from composing, arranging and conducting (30 percent) is deemed not to be subject to unincorporated business tax.

E. That since petitioner Susan Garisto was not a principal in the unincorporated business conducted by her husband, the Notice of Deficiency is to be cancelled against her insofar as it applies to unincorporated business tax.

F. That except as set forth in Conclusions of Law "D" and "E", the petition of Louis A. and Susan Garisto is denied and the Notice of Deficiency is sustained.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION

Harvey W. Tuley
PRESIDENT

Thomas H. [unclear]
COMMISSIONER

Francis R. Koenig
COMMISSIONER