

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

HARRY FRANK-SHIRLEE BARON ORCHESTRA

For a Redetermination of a Deficiency or
a Refund of Unincorporated Business
Taxes under Article(s) 23 of the
Tax Law for the (Year(s) 1967

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

MARTHA FUNARO, 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 15th day of February, 1973, she served the within Notice of Decision (or Determination) by (certified) mail upon HARRY FRANK-SHIRLEE BARON ORCHESTRA (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Harry Frank-Shirlee Baron Orchestra
393 Sunrise Highway
Lynbrook, New York 11563
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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

15th day of February, 1973.

Lynn Wilson

Martha Funaro

STATE OF NEW YORK
STATE TAX COMMISSION

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HARRY FRANK-SHIRLEE BARON ORCHESTRA

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MARTHA FUNARO, 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 15th day of February, 1973, she served the within
Notice of Decision (or Determination) by (certified) mail upon ALLAN J.

ARCHER, C.P.A. (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows:

Allan J. Archer, C.P.A.
3366 Park Avenue
Wantagh, New York 11793

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

15th day of February, 1973.

Lynn Wilson

Martha Funaro



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

BUILDING 9, ROOM 214A
STATE CAMPUS
ALBANY, N. Y. 12227

AREA CODE 518
457-2655, 6, 7

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York
February 15, 1973

Harry Frank-Shirlee Baron Orchestra
393 Sunrise Highway
Lynbrook, New York 11563

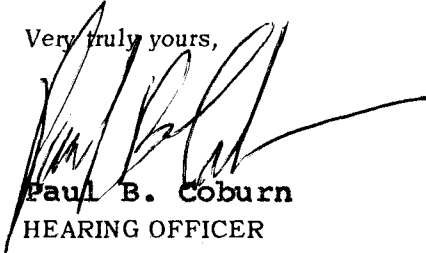
Gentlemen:

Please take notice of the **DECISION** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to **section 722** of
the Tax Law any proceeding in court to review an adverse decision
must be commenced within **4 months** after
the date of this notice.

Any inquiries concerning the computation of tax due or refund allowed
in accordance with this decision or concerning any other matter relat-
ing hereto may be addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,


Paul B. Coburn
HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE TAX COMMISSION

Petitioner, Harry Frank-Shirlee Baron Orchestra, has filed a petition for redetermination of deficiency or for refund of personal income tax under Article 23 of the Tax Law for the year 1967. (File No. 1545). A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York on November 13, 1972 at 1:30 P.M. Petitioner appeared by Allan J. Archer, C.P.A. The Income Tax Bureau appeared by Saul Heckelman, Esq. (Francis X. Boylan, Esq., of Counsel).

Did the business activities of petitioner, Harry Frank-Shirlee Baron Orchestra, during the year 1967 constitute the practice of a profession?

2. On March 30, 1970, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Harry Frank-Shirlee Baron

Orchestra, imposing unincorporated business tax upon its ordinary income for the year 1967 and accordingly issued a Notice of Deficiency in the sum of \$552.86.

3. Harry Frank and Shirley Larkin carried on an orchestra business as partners during the year 1967. The partnership was known as Harry Frank-Shirlee Baron Orchestra. They shared equally in the profits of the partnership. There was no written partnership agreement. The partnership maintained an office in Hempstead, New York.

4. During the year 1967, petitioner, Harry Frank-Shirlee Baron Orchestra, provided orchestras consisting of three to seven musicians to play dance music for private parties such as weddings and Bar Mitzvahs. It booked approximately 200 separate engagements during the year. Generally Harry Frank would act as a leader and saxophone player for one band and Shirley Larkin would act as leader, singer and marracas player for a second band. The partnership did not have any full time musicians. It booked musicians as it needed them for engagements. In said year it used a total of 102 different musicians.

5. The following procedure was used by petitioner, Harry Frank-Shirlee Baron Orchestra, in booking engagements during the year 1967. The person requiring the band entered into a written agreement with the partnership. A standard single engagement contract provided by Local 802, American Federation of Musicians was used. He was designated as the employer and the partnership was designated as the leader or booking agent. The contract set forth the terms of the engagement as to date and hours. It also set forth a flat

fee to be charged. The contract did not itemize the amount to be paid to each musician or the amount to be paid to the partner for his services as a musician. The fee for the musical services rendered was paid to the partnership. It in turn paid the musicians, withholding and social security taxes, union welfare fund charges, commissions for bookings and other miscellaneous expenses. The remaining profit was divided between the two partners.

6. Petitioner, Harry Frank-Shirlee Baron Orchestra, was not considered an employer of the musicians who played in its bands for purposes of unemployment insurance during the year 1967 by the New York State Department of Labor.

7. Petitioner, Harry Frank-Shirlee Baron Orchestra's gross receipts for the year 1967 were \$117,879.25. Its cost of operations representing basically payments made to musicians was \$69,571.55, resulting in a gross profit of \$48,307.70. In addition, it had income from loans made by the partnership of \$6,537.18. Therefore the total income of the partnership before deductions was \$54,844.88. Total deductions were \$36,612.43 resulting in ordinary income for the year of \$18,232.45. There was no breakdown as to what percentage of its gross income was derived from its activities as a booking agent and what percentage was derived from the services of the partners as musicians.

CONCLUSIONS OF LAW


A. That petitioner, Harry Frank-Shirlee Baron Orchestra, failed to establish that more than 80% of the gross income of the partnership for the year 1967 was derived from personal services of the partners as professional musicians since they failed to submit any proof as to what percentage of its gross income was derived from services as

a booking agent, which is not a professional activity, and what percentage was derived from services of the partners as musicians. The partnership therefore cannot be held to have been engaged in the practice of a profession during said year in accordance with the meaning and intent of section 703(c) of the Tax Law.

B. That the petition of Harry Frank-Shirlee Baron Orchestra is denied and the Notice of Deficiency issued March 30, 1970, is sustained.

DATED: Albany, New York
February 15, 1973

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER