

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Peter D. Lembo :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 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 November, 1980, he served the within notice of Decision by certified mail upon Peter D. Lembo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter D. Lembo

407 David Dr.

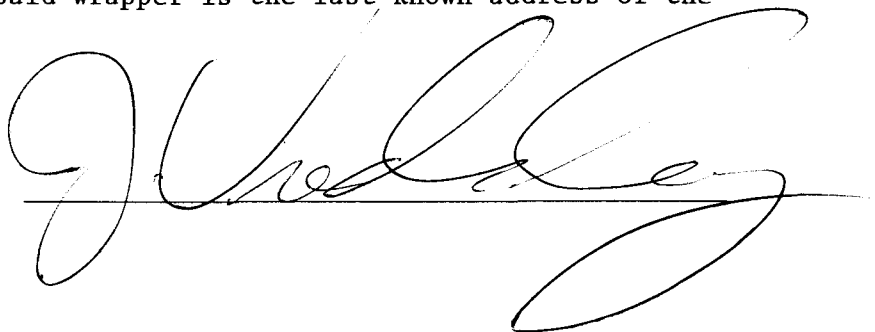
N. Syracuse, NY 13212

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 November, 1980.

Deborah A Bank



STATE OF NEW YORK
STATE TAX COMMISSION

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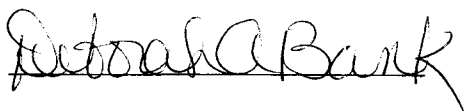
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon John A. Gaines the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

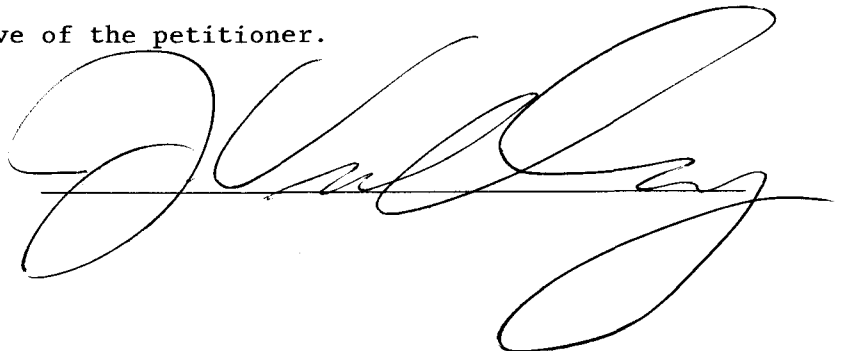
Mr. John A. Gaines
5100 W. Genesee St.
Camillus, NY 13031

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
28th day of November, 1980.





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

November 28, 1980

Peter D. Lembo
407 David Dr.
N. Syracuse, NY 13212

Dear Mr. Lembo:

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) 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
John A. Gaines
5100 W. Genesee St.
Camillus, NY 13031
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PETER D. LEMBO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971	:	
and 1972.	:	

Petitioner, Peter D. Lembo, 407 David Drive, North Syracuse, New York 13212, 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 1971 and 1972 (File No. 15398).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on June 10, 1980 at 9:15 A.M. Petitioner, Peter D. Lembo, appeared with John A. Gains, PA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner's sales activities during 1971 and 1972 constituted the carrying on of an unincorporated business.

II. Whether the Income Tax Bureau properly imposed penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law against petitioner, for his failure to file unincorporated business tax returns for 1971 and 1972.

FINDINGS OF FACT

1. Petitioner, Peter D. Lembo, and his wife timely filed New York State resident income tax returns for the years 1971 and 1972. He did not file unincorporated business tax returns for the years.

2. On March 29, 1976, the Audit Division issued a Notice of Deficiency for 1971 and 1972 against petitioner, asserting unincorporated business tax of \$1,296.46, plus penalties (pursuant to sections 685(a)(1) and (2) of the Tax Law) of \$556.97 and interest of \$295.56, for a sum of \$2,148.99. The Notice was issued on the grounds that since petitioner failed to submit the information requested in the Audit Divisions' letters of January 31, 1975 and April 16, 1973, it held that petitioner's activities as a manufacturer's representative constituted the carrying on of an unincorporated business and the net income derived from that source was subject to the unincorporated business tax as imposed under Article 23 of the New York State Tax Law.

3. Petitioner, Peter D. Lembo, was a furniture sales representative of Bassett Upholstery Division of Newton, North Carolina during the years 1971 and 1972. He did not represent any other firm during the aforesaid years.

4. Petitioner was paid on a commission basis. Bassett Upholstery Division did not deduct Federal and State withholding taxes or social security taxes from his commission income. He was not reimbursed for expenses incurred in connection with his selling activities.

5. Petitioner was required to devote his full time and effort to selling merchandise for Bassett Upholstery Division. He was required to attend periodic trade shows, to submit periodic reports and to restrict his sales efforts to a specific territory. He was further restricted to the size of stores to whom he could sell and size of orders he could fulfill. In addition, he was given sales quotas and the firm for whom he sold retained the authority to approve all customers.

6. The firm that the petitioner represented during the years 1971 and 1972 determined all policies of sales regarding prices, credit terms and shipping dates. All billing and collection for the merchandise which petitioner

sold was handled by Bassett Upholstery Division.

7. Petitioner was required to receive permission from the firm when he took time off or went on vacation. He was also required to tell the firm where he could be reached during his vacation.

8. Petitioner, Peter D. Lembo, relied on the advice of his accountant that he was not required to file unincorporated business tax returns.

CONCLUSIONS OF LAW

A. That Bassett Upholstery Division exercised sufficient direction and control over petitioner's selling activities during the years 1971 and 1972 to create an employer-employee relationship, within the meaning and intent of section 703(b) of the Tax Law. (Petition of Benjamin Dickert, Decision of State Tax Commission, February 17, 1978.)

B. That the issue as to whether the Income Tax Bureau properly imposed penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law is moot by reason of Conclusion of Law "A", supra.

C. That the petition of Peter D. Lembo is granted and the Notice of Deficiency issued March 29, 1976 in the sum of \$2,148.99 is cancelled.

DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER