STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Lila Malsman :

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 1970 - 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 13th day of August, 1980, he served the within notice of Decision by certified mail upon Lila Malsman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lila Malsman
309 Atlantic Ave.
Cedarhurst, NY 11516

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
13th day of August, 1980.

Deborah A. Brink

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Lila Malsman :

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 1970 - 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 13th day of August, 1980, he served the within notice of Decision by certified mail upon David Malsman 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. David Malsman
309 Atlantic Ave.
Cedarhurst, NY 11516

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
13th day of August, 1980.

Sarah A Bank

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

August 13, 1980

Lila Malsman
309 Atlantic Ave.
Cedarhurst, NY 11516

Dear Ms. Malsman:

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
David Malsman
309 Atlantic Ave.
Cedarhurst, NY 11516
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LILA MALSMAN	:	DECISION
for Redetermination of a Deficiency or for Refund of Unincorporated Business Tax under Article 23 of the Tax Law for the Years 1970, 1971 and 1972.	:	

Petitioner, Lila Malsman, 309 Atlantic Avenue, Cedarhurst, New York 11516, 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 1970, 1971 and 1972 (File No. 13292).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 24, 1979 at 2:45 P.M. Petitioner appeared by David Malsman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether an application for a declaratory ruling requesting a default decision against the Audit Division should be granted.

II. Whether the income derived from petitioner's activities as an interior designer is subject to the unincorporated business tax.

III. Whether petitioner is subject to a penalty pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Lila Malsman, filed New York State combined income tax resident returns for the years 1970, 1971 and 1972, on which petitioner reported net business income from her activities as a "decorator". Petitioner did not file unincorporated business tax returns for the years 1970, 1971 and 1972, upon the advice of her accountant.

2. On October 28, 1974, the Audit Division issued a Notice of Deficiency in the sum of $703.50, along with an explanatory Statement of Audit Changes on which the income derived from petitioner's activities as a decorator during the years 1970, 1971 and 1972 was held subject to the unincorporated business tax. In addition, penalties under sections 685(a)(1) and 685(a)(2) of the Tax Law were imposed.

3. On May 15, 1975, without waiving her rights to a hearing, petitioner remitted the sum of $552.97 in order to arrest further interest. Petitioner's check was marked "under protest" and represented unincorporated business tax of $469.86, plus interest of $83.11. The penalties imposed were not paid in anticipation that they be waived for "reasonable cause".

4. Petitioner, Lila Malsman, graduated from the University of Pennsylvania with a baccalaureate degree in fine arts. In 1948, petitioner attended a non-credit course in "layout and design" at New York University for a period of one year. Subsequently, petitioner obtained eight years of full time practical experience in interior designing.

5. In 1960, petitioner became a member of the National Society of Interior Designers. In 1974, the aforementioned society was consolidated with the American Institute of Designers and became known as the American Society of Interior Designers (hereinafter referred to as "ASID"). ASID provided its members with information, guidelines, a code of ethics, a manual of operations

and minimum qualifications for individuals who wanted to become members. ASID considered its members as individuals practicing a profession in the field of interior designing and promulgated procedures for disciplining members who violated their code of ethics.

6. Petitioner is a self-employed interior designer with a clientele primarily in the residential area. Her services included;

(a) evaluating the needs of her clients.

(b) planning the space and structual design in accordance with the clients' needs and requirements.

(c) supervising the work of workrooms involved in manufacturing furniture, fabrics, wall and floor covering and materials to be used for her clients.

(d) Examining the finished product prior to delivery and installation to insure her standard of quality and workmanship.

(e) preparing scaled floor plans indicating size and placement of furniture and fixtures.

(f) conducting a final inspection, often bringing with her a selection of antiques and accessories which petitioner had chosen in order to personalize and complete the design of the interior.

7. The General Services Administration, a Federal agency, recognizes interior designers as "design professionals", a designation formerly limited to architects and engineers.

8. Capital was not a material income producing factor, and all of petitioner's business income was derived from personal services rendered as an interior designer.

9. Petitioner argued that she was engaged in the practice of a profession which lies between the professions of architecture, landscape architecture and industrial design. She further argued that interior designing was more of a profession than many of the occupations granted a professional exemption from the unincorporated business tax.

10. A copy of an application for a declaratory ruling, dated October 17, 1979, was submitted at the small claims hearing of October 24, 1979 which requested that a determination in favor of petitioner be made by reason of default. Petitioner contended that a default decision should be granted since;

(a) An answer to her petition and subsequent correspondence was not made.

(b) There was an unreasonable delay in the scheduling of the hearing from the time the petition was issued.

(c) There was a denial of due process.

Petitioner agreed that the merits of the aforementioned application be considered and answered through this decision.

CONCLUSIONS OF LAW

A. That the request for a default decision (against the Audit Division) submitted by petitioner, Lila Malsman, through an application for a declaratory ruling is inappropriate and contrary to the intended purpose of section 204 of the State Administrative Procedure Act. However, it is noted that the record does not indicate that the actions or inactions of the Department of Taxation and Finance have unduly prejudiced or adversely affected petitioner's position in this matter; nor is there any evidence or indication of a denial of due process.

B. That the services rendered by petitioner, Lila Malsman, during the years 1970, 1971 and 1972 as an interior designer did not constitute the practice of a profession within the meaning and intent of section 703(c) of the Tax Law. It seldom suffices, and is often immaterial, in the resolution of tax controversies to demonstrate that in application a particular statute or regulation works even a flagrant unevenness (Dissenting opinion of Staley, Jr., J., Gurney v. Tully, 67 A.D.2d 303, 307).

C. That the services rendered during the years 1970, 1971 and 1972 as an interior designer constituted the carrying on of an unincorporated business within the meaning and intent of section 703 of the Tax Law, and the income derived therefrom is subject to the unincorporated business tax in accordance with the meaning and intent of section 701 of the Tax Law.

D. That the petition of Lila Malsman is granted to the extent that the penalties imposed pursuant to section 685(a)(1) and 685(a)(2) of the Tax Law are cancelled for reasonable cause.

E. That the Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued October 28, 1974 and to reflect payment previously remitted of $552.97, which included updated interest of $83.11 (Finding of Fact "3", supra).

F. That, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 13 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER