

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Irving Lobell :  
: 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 1966 & 1967. :

---

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Irving Lobell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

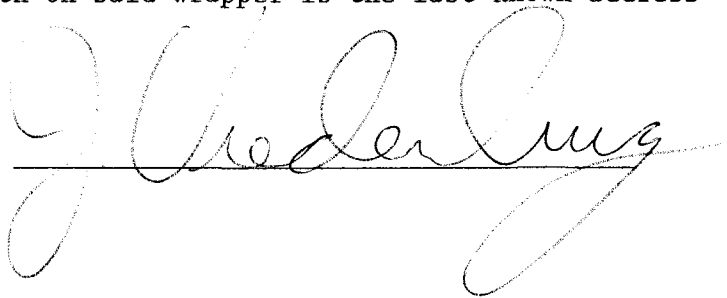
Irving Lobell  
1776 Mt. Everest Ln.  
Toms River, NJ 08753

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  
27th day of November, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Irving Lobell :  
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 1966 & 1967. :

---

State of New York  
County of Albany

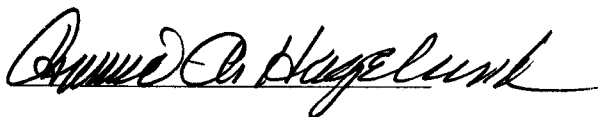
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Arthur N. Read the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

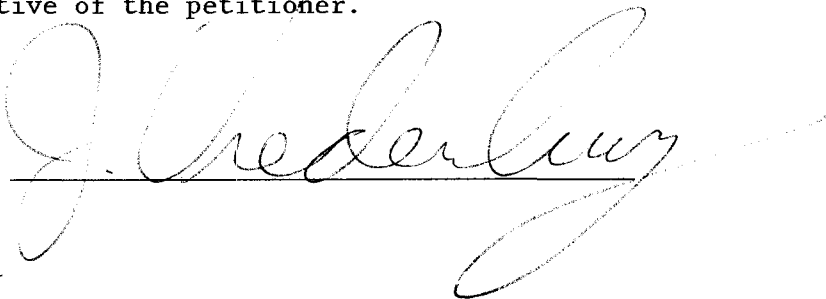
Arthur N. Read  
Eisner, Levy, Steel & Bellman  
351 Broadway  
New York, NY 10013

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  
27th day of November, 1981.





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

November 27, 1981

Irving Lobell  
1776 Mt. Everest Ln.  
Toms River, NJ 08753

Dear Mr. Lobell:

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  
Arthur N. Read  
Eisner, Levy, Steel & Bellman  
351 Broadway  
New York, NY 10013  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of  
IRVING LOBELL  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Taxes under  
Article 23 of the Tax Law for the Years 1966  
and 1967.

---

DECISION

Petitioner, Irving Lobell, 1776 Mt. Everest Lane, Tom's River, New Jersey 08753, filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1966 and 1967 (File No. 14989).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 3, 1978 at 11:45 A.M. Petitioner appeared by Eisner, Levy, Steel & Bellman, P.C. (Arthur N. Read, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner Irving Lobell's sales activities during the years 1966 and 1967 were performed as an employee within the meaning of section 703(b) and (f) of the Tax Law, or, in the alternative, as an independent contractor subject to unincorporated business tax under Article 23 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Irving Lobell, and his wife Belle Lobell, timely filed joint New York State Income Tax Resident Returns (Form IT-201) for the tax

years 1966 and 1967. Petitioner did not file an unincorporated business tax return for either year.

2. On March 26, 1973, the Audit Division issued a Notice of Deficiency and Statement of Audit Changes to petitioner showing as due unincorporated business tax in the amount of \$469.82 for 1966 and \$394.66 for 1967, plus penalty and interest for each year.

3. According to the Statement of Audit Changes issued to petitioner, imposition of unincorporated business tax liability for the tax years 1966 and 1967 was based on a decision of the State Tax Commission finding petitioner liable for unincorporated business tax for the four tax years immediately preceding the period at issue herein.

4. That decision, resolving for the tax years 1962 through 1965 the same question as is at issue herein, was not issued by the State Tax Commission until June 23, 1972, and thus the question of whether petitioner was an employee or an independent contractor subject to unincorporated business tax was not yet resolved for the period at issue herein.

5. Petitioner, Irving Lobell, was a wholesale salesman of ladies' apparel during the period herein involved. From January to March, 1966, petitioner principally represented Ira Retner, Inc. (Retner), of 498 Seventh Avenue, New York, New York.

6. Petitioner was required by Retner to act as its sales representative in a thirteen state New England territory. Petitioner spent approximately 22 weeks per year on the road covering this territory, and spent the remaining 30 weeks of the year performing various tasks in Retner's New York showroom.

7. When working in Retner's showroom, petitioner was required to report daily at 8:00 or 9:00 A.M., and generally stayed there until 5:30 or 6:00 P.M.

Petitioner would perform whatever tasks were assigned to him in the normal course of daily showroom business, which in addition to serving clients from his own and other territories occasionally included the packing and shipping of merchandise.

8. Before being sent on the road to obtain orders for Retner's newest collections, petitioner would receive general suggestions, at an informal sales meeting, as to which items and fabrics to push hardest, which buyers or potential buyers to sell to, and the most effective means to display merchandise for sale. When petitioner was travelling, he was required to make daily progress reports to his principals at Retner.

9. Retner withheld federal and state income taxes, and social security taxes from petitioner's \$150.00 weekly draw against commissions.

10. Retner went out of business on April 1, 1966. In March of that year, petitioner contacted Ilsa Engel, Ltd., (Engel), and arranged to be engaged on a full-time basis with Engel as his principal.

11. Engel produced a sportswear line with three selling seasons per year and 70 to 80 styles per selling season. Prior to each such selling season, petitioner would receive general instructions as to fabrics, prices, styles, selling points and display techniques. These instructions never took more than a full day to convey to petitioner.

12. Petitioner spent approximately 30 weeks per year, during the period herein involved, in Engel's New York showroom under an arrangement similar to that described for Retner in Finding of Fact "7" (supra). Petitioner was on the road serving his territory the remaining weeks of the year.

13. Engel withheld federal, state and city personal income taxes as well as social security taxes from petitioner's \$150.00 weekly draw against commis-

sions. Engel also deducted from petitioner's draws against commissions for unemployment, disability and health insurance.

14. In March 1966, petitioner, with the consent of Engel, agreed to represent Harmay, Inc., (Harmay), which manufactured a non-conflicting line of streetwear. Such representation was on a part-time basis only, subject to the time demands of his principal, Engel. No express time division agreement ever existed between petitioner's various principals.

15. During the 30 weeks per year he spent in New York, petitioner spent no more than two hours per week in Harmay's showroom. Such time was spent there with the permission of Engel.

16. Prior to each of its four selling seasons, Harmay gave petitioner general sales instructions similar to those described in Findings of Fact "8" and "11" (supra).

17. Harmay compensated petitioner in the same manner as described for Engel in Finding of Fact "13" (supra), withheld the same taxes, and extended the same coverage.

18. In August 1967, petitioner's physical condition required him to abandon the Harmay line. Later that year, he agreed to sell a non-conflicting line of cocktail dresses produced by Belliciano Couture, Inc. (Belliciano), under a similar arrangement as that described for Harmay in Findings of Fact "14" through "16" (supra). Petitioner was required to make progress reports to Harmay and Belliciano approximately only once a week.

19. All of petitioner's principals, during the period herein involved, retained final control over merchandise price as well as the right to refuse orders for credit and other business reasons. Commissions were paid only on orders actually shipped into petitioner's territory and paid for by his customers.

20. During the period herein involved, petitioner neither requested nor received any overtime pay for the extra hours worked when travelling on business.

21. Petitioner had no individual pension or retirement plan during the period herein involved.

22. Petitioner was required to pay all of his travelling and business expenses out of his own pocket without reimbursement. He was charged for merchandise samples provided him in the event he failed to return them at the end of each selling season.

23. Petitioner's decisions on sales techniques, time allocation between his principals, discretion as to whether or not to show a secondary principal's line of merchandise, and as to new sales initiatives were primarily his independent decisions.

24. Petitioner's principals, during the period herein involved, were concerned primarily with the results of his sales activities and not the means by which he accomplished those results. Any exercise of control by his principals as to those means was incidental to their dominant concern for results, and rose only to the level of suggestion and general instruction as to sales targets and techniques, coupled with a requirement of periodic progress reports.

25. All errors in the record noted by petitioner's counsel are deemed corrected as noted.

#### CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Lieberman v. Gallman, 41 N.Y.2d 774, 396 N.Y.S.2d 159, (1977). Regulations adopted by the State Tax



Commission after the period at issue herein, but evidencing the position of the Commission during the period at issue herein provide:

"[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c), (adopted February 1, 1974).

B. That among the facts and circumstances to be examined are whether petitioner maintained an office, engaged assistants, incurred expenses without reimbursement, and was covered by a pension plan. Also whether the principal(s) withheld State and federal taxes, social security, F.I.C.A. and other payments on behalf of petitioner, and the amount of control over petitioner's activities exercised by the principal(s). Raynor v. Tully, 60 A.D.2d 731, 401 N.Y.S.2d 329, (1977), lv. to app. den. 44 N.Y.2d 643 (1978).

C. That section 703(f) of the Tax Law provides:

"Sales representative -- an individual,..., shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise." (emphasis added).

D. That petitioner Irving Lobell's principals, during the period herein involved, neither retained nor exercised sufficient direction and immediate control over his daily activities to classify him as an employee rather than as an independent contractor. Petitioner is therefore subject to the imposition of unincorporated business tax under Article 23 of the Tax Law for the years 1966 and 1967.

E. That petitioner Irving Lobell's failure to file returns and pay unincorporated business tax for the period at issue herein was reasonable under the circumstances cited in Findings of Fact "3" and "4" (supra), and was not willful within the meaning and intent of section 685(a) of the Tax Law. Accordingly, the penalty is cancelled.

F. That the petition of Irving Lobell is granted to the extent that the penalty imposed pursuant to section 685(a) of the Tax Law is cancelled, but is in all other respects denied and the Notice of Deficiency is, as modified above, sustained.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

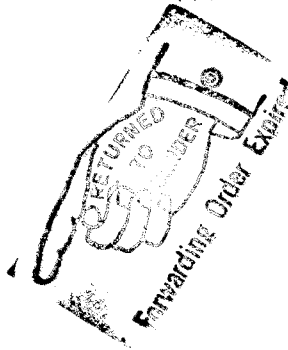
  
PRESIDENT

  
COMMISSIONER

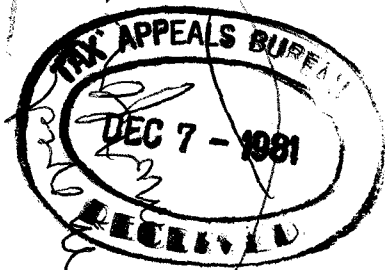
  
COMMISSIONER

TA 26 (9-79)  
STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

REP  
COPY



Arthur N. Read  
Eisner, Levy, Steel & Bellman  
351 Broadway  
New York, NY 10013



**CERTIFIED**

**P 230 841 832**

**MAIL**

174

174



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

November 27, 1981

Irving Lobell  
1776 Mt. Everest Ln.  
Toms River, NJ 08753

Dear Mr. Lobell:

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  
Arthur N. Read  
Eisner, Levy, Steel & Bellman  
351 Broadway  
New York, NY 10013  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
IRVING LOBELL	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Taxes under	:	
Article 23 of the Tax Law for the Years 1966	:	
and 1967.	:	

---

Petitioner, Irving Lobell, 1776 Mt. Everest Lane, Tom's River, New Jersey 08753, filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the years 1966 and 1967 (File No. 14989).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 3, 1978 at 11:45 A.M. Petitioner appeared by Eisner, Levy, Steel & Bellman, P.C. (Arthur N. Read, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner Irving Lobell's sales activities during the years 1966 and 1967 were performed as an employee within the meaning of section 703(b) and (f) of the Tax Law, or, in the alternative, as an independent contractor subject to unincorporated business tax under Article 23 of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Irving Lobell, and his wife Belle Lobell, timely filed joint New York State Income Tax Resident Returns (Form IT-201) for the tax

years 1966 and 1967. Petitioner did not file an unincorporated business tax return for either year.

2. On March 26, 1973, the Audit Division issued a Notice of Deficiency and Statement of Audit Changes to petitioner showing as due unincorporated business tax in the amount of \$469.82 for 1966 and \$394.66 for 1967, plus penalty and interest for each year.

3. According to the Statement of Audit Changes issued to petitioner, imposition of unincorporated business tax liability for the tax years 1966 and 1967 was based on a decision of the State Tax Commission finding petitioner liable for unincorporated business tax for the four tax years immediately preceding the period at issue herein.

4. That decision, resolving for the tax years 1962 through 1965 the same question as is at issue herein, was not issued by the State Tax Commission until June 23, 1972, and thus the question of whether petitioner was an employee or an independent contractor subject to unincorporated business tax was not yet resolved for the period at issue herein.

5. Petitioner, Irving Lobell, was a wholesale salesman of ladies' apparel during the period herein involved. From January to March, 1966, petitioner principally represented Ira Retner, Inc. (Retner), of 498 Seventh Avenue, New York, New York.

6. Petitioner was required by Retner to act as its sales representative in a thirteen state New England territory. Petitioner spent approximately 22 weeks per year on the road covering this territory, and spent the remaining 30 weeks of the year performing various tasks in Retner's New York showroom.

7. When working in Retner's showroom, petitioner was required to report daily at 8:00 or 9:00 A.M., and generally stayed there until 5:30 or 6:00 P.M.

Petitioner would perform whatever tasks were assigned to him in the normal course of daily showroom business, which in addition to serving clients from his own and other territories occasionally included the packing and shipping of merchandise.

8. Before being sent on the road to obtain orders for Retner's newest collections, petitioner would receive general suggestions, at an informal sales meeting, as to which items and fabrics to push hardest, which buyers or potential buyers to sell to, and the most effective means to display merchandise for sale. When petitioner was travelling, he was required to make daily progress reports to his principals at Retner.

9. Retner withheld federal and state income taxes, and social security taxes from petitioner's \$150.00 weekly draw against commissions.

10. Retner went out of business on April 1, 1966. In March of that year, petitioner contacted Ilsa Engel, Ltd., (Engel), and arranged to be engaged on a full-time basis with Engel as his principal.

11. Engel produced a sportswear line with three selling seasons per year and 70 to 80 styles per selling season. Prior to each such selling season, petitioner would receive general instructions as to fabrics, prices, styles, selling points and display techniques. These instructions never took more than a full day to convey to petitioner.

12. Petitioner spent approximately 30 weeks per year, during the period herein involved, in Engel's New York showroom under an arrangement similar to that described for Retner in Finding of Fact "7" (supra). Petitioner was on the road serving his territory the remaining weeks of the year.

13. Engel withheld federal, state and city personal income taxes as well as social security taxes from petitioner's \$150.00 weekly draw against commis-



sions. Engel also deducted from petitioner's draws against commissions for unemployment, disability and health insurance.

14. In March 1966, petitioner, with the consent of Engel, agreed to represent Harmay, Inc., (Harmay), which manufactured a non-conflicting line of streetwear. Such representation was on a part-time basis only, subject to the time demands of his principal, Engel. No express time division agreement ever existed between petitioner's various principals.

15. During the 30 weeks per year he spent in New York, petitioner spent no more than two hours per week in Harmay's showroom. Such time was spent there with the permission of Engel.

16. Prior to each of its four selling seasons, Harmay gave petitioner general sales instructions similar to those described in Findings of Fact "8" and "11" (supra).

17. Harmay compensated petitioner in the same manner as described for Engel in Finding of Fact "13" (supra), withheld the same taxes, and extended the same coverage.

18. In August 1967, petitioner's physical condition required him to abandon the Harmay line. Later that year, he agreed to sell a non-conflicting line of cocktail dresses produced by Belliciano Couture, Inc. (Belliciano), under a similar arrangement as that described for Harmay in Findings of Fact "14" through "16" (supra). Petitioner was required to make progress reports to Harmay and Belliciano approximately only once a week.

19. All of petitioner's principals, during the period herein involved, retained final control over merchandise price as well as the right to refuse orders for credit and other business reasons. Commissions were paid only on orders actually shipped into petitioner's territory and paid for by his customers.

20. During the period herein involved, petitioner neither requested nor received any overtime pay for the extra hours worked when travelling on business.

21. Petitioner had no individual pension or retirement plan during the period herein involved.

22. Petitioner was required to pay all of his travelling and business expenses out of his own pocket without reimbursement. He was charged for merchandise samples provided him in the event he failed to return them at the end of each selling season.

23. Petitioner's decisions on sales techniques, time allocation between his principals, discretion as to whether or not to show a secondary principal's line of merchandise, and as to new sales initiatives were primarily his independent decisions.

24. Petitioner's principals, during the period herein involved, were concerned primarily with the results of his sales activities and not the means by which he accomplished those results. Any exercise of control by his principals as to those means was incidental to their dominant concern for results, and rose only to the level of suggestion and general instruction as to sales targets and techniques, coupled with a requirement of periodic progress reports.

25. All errors in the record noted by petitioner's counsel are deemed corrected as noted.

#### CONCLUSIONS OF LAW

A. That "[i]t is the degree of control and direction exercised by the employer which determines whether the taxpayer is an employee or an independent contractor subject to the unincorporated business tax." Lieberman v. Gallman, 41 N.Y.2d 774, 396 N.Y.S.2d 159, (1977). Regulations adopted by the State Tax

Commission after the period at issue herein, but evidencing the position of the Commission during the period at issue herein provide:

"[w]hether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case." 20 NYCRR 203.10(c), (adopted February 1, 1974).

B. That among the facts and circumstances to be examined are whether petitioner maintained an office, engaged assistants, incurred expenses without reimbursement, and was covered by a pension plan. Also whether the principal(s) withheld State and federal taxes, social security, F.I.C.A. and other payments on behalf of petitioner, and the amount of control over petitioner's activities exercised by the principal(s). Raynor v. Tully, 60 A.D.2d 731, 401 N.Y.S.2d 329, (1977), lv. to app. den. 44 N.Y.2d 643 (1978).

C. That section 703(f) of the Tax Law provides:

"Sales representative -- an individual,..., shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise." (emphasis added).

D. That petitioner Irving Lobell's principals, during the period herein involved, neither retained nor exercised sufficient direction and immediate control over his daily activities to classify him as an employee rather than as an independent contractor. Petitioner is therefore subject to the imposition of unincorporated business tax under Article 23 of the Tax Law for the years 1966 and 1967.

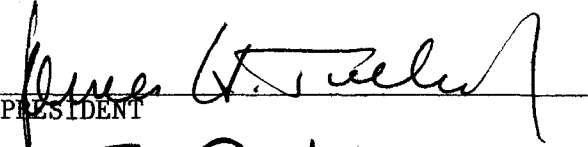
E. That petitioner Irving Lobell's failure to file returns and pay unincorporated business tax for the period at issue herein was reasonable under the circumstances cited in Findings of Fact "3" and "4" (supra), and was not willful within the meaning and intent of section 685(a) of the Tax Law. Accordingly, the penalty is cancelled.

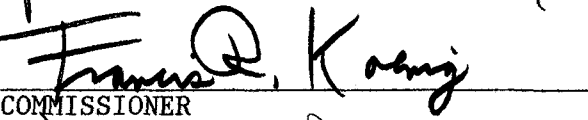
F. That the petition of Irving Lobell is granted to the extent that the penalty imposed pursuant to section 685(a) of the Tax Law is cancelled, but is in all other respects denied and the Notice of Deficiency is, as modified above, sustained.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
\_\_\_\_\_  
COMMISSIONER