

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Victor Samrock :  
: 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, 1973 & 1974. :

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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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Victor Samrock, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor Samrock  
16 West 77th St.  
New York, NY 10024

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  
14th day of August, 1981.

*Gennie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Francis Neuwirth the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Francis Neuwirth  
Pinto, Winokur & Pagano  
60 E. 42nd St.  
New York, NY 10017

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  
14th day of August, 1981.

*Annice A. Hagelund*

*J. Vredenburg*

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

August 14, 1980

Victor Samrock  
16 West 77th St.  
New York, NY 10024

Dear Mr. Samrock:

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  
Francis Neuwirth  
Pinto, Winokur & Pagano  
60 E. 42nd St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
VICTOR SAMROCK	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business Tax :	:	
under Article 23 of the Tax Law for the	:	
Years 1971, 1973 and 1974.	:	

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Petitioner, Victor Samrock, 16 West 77th Street, New York, New York 10024, 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, 1973 and 1974 (File No. 17845).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1980 at 9:15 A.M. Petitioner appeared with Francis Neuwirth, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the activities engaged in by petitioner as a theatrical general manager constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Petitioner, Victor Samrock, timely filed joint New York State income tax resident returns with his wife for the years 1971, 1973 and 1974. On December 26, 1973, petitioner filed an amended return for 1971, wherein the sole amendment was the inclusion of unincorporated business tax as computed on petitioner Victor Samrock's unincorporated business tax return attached thereto. For taxable years 1973 and 1974, Victor Samrock (hereinafter petitioner), timely

filed unincorporated business tax returns in conjunction with his personal income tax returns. For all years at issue, petitioner reported his income (other than that reported as wages for which he received a Wage and Tax Statement) derived from his activities as a theatrical general manager as subject to the imposition of unincorporated business tax.

2. On November 22, 1976, the Audit Division issued a Statement of Audit Changes to petitioner for the years 1971, 1973 and 1974 (taxable year 1972 was not adjusted since the Statute of Limitations had expired for said year), wherein, in addition to petitioner's income reported for unincorporated business tax purposes, it further imposed such tax on his reported wage income on the basis that such income is considered to be part of the receipts of his business. Accordingly, a Notice of Deficiency was issued against petitioner under the same date, asserting additional unincorporated business tax of \$3,598.50, section 685(c) penalty for the year 1974 of \$278.08, and interest of \$685.64, for a total due of \$4,562.22.

3. On February 17, 1977, petitioner filed a timely petition for redetermination of a deficiency for the years at issue together with claims for credit or refund of unincorporated business tax for the years 1973 and 1974, wherein full refund was requested of the unincorporated business taxes paid with his returns for said years of \$36.06 and \$563.31 respectively. Petitioner's basis for such claim was that he filed and paid the tax erroneously since he contended he was not carrying on an unincorporated business.

4. During the years at issue, petitioner Victor Samrock consistently rendered services as a theatrical general manager for various legitimate stage productions. As such, his duties consisted of assisting the producer, booking theatres and arranging contracts with actors and production personnel, such as

scenery and costume designers. He was generally present at rehearsals and performances and was responsible for the people connected with the production.

5. During the year 1971, petitioner reported wage income from three production companies of \$11,024.00 derived from his activities as a general manager. Additionally, he reported net miscellaneous income of \$22,036.00 from such activities for which he received information returns, Federal forms 1099, rather than wage and tax statements. Petitioner filed and paid unincorporated business tax on this income which was derived from a total of twenty-one separate sources, according to a schedule attached to petitioner's return entitled "Fees and other income as Producer-Manager". During the year 1973, petitioner reported wage income from three production companies of \$38,038.00, while that gross income for which he received forms 1099 and filed an unincorporated business tax return totaled \$23,472.00, which appears to have been derived from nineteen separate sources. For taxable year 1974, petitioner reported wage income from three principals totaling \$19,872.00. Gross income reported for unincorporated business tax purposes totaled \$27,421.00 and was derived from twenty-one separate sources per a schedule submitted into evidence.

6. Petitioner contended that he was never a producer and the term "Producer-Manager" was used to describe his occupation on his 1971 return solely to characterize the type of manager he was, rather than to indicate that he was a producer as well.

7. Petitioner contended that all his income derived from his theatrical general manager activities, regardless of the source or method of reporting, was derived from services rendered as an employee of a producer.

8. Petitioner's compensation derived from services rendered as a theatrical general manager can be segregated into three distinct phases, the nature of

which varies with the progression of the producer's efforts toward final production and subsequent thereto, as follows:

(a) Pre-production - Prior to production of a play, a theatrical producer finds a play "property", and interests investors in financing same. The theatrical production is then implemented after the financing is secured through the organization of a separate entity, usually a limited partnership of which the theatrical producer is the general partner. Prior to the formation of the limited partnership, the theatrical producer would, generally, maintain no staff and would therefore have no payroll. At this time, petitioner is engaged by the producer to, among other things, assist in preparing a production budget. Since the production entity has yet to be established, petitioner's compensation during this phase is reported on form 1099 rather than a wage and tax statement.

(b) Pre-production through limited partnership and actual production -

Upon the formation of the limited partnership (of which the producer is the general partner with executive authority), petitioner's function was to represent the producer in contract negotiations with actors and other personnel, arrange for locations and terms of bookings and, in general, to carry out the plans of the producer so as to enable the producer to devote his time to the creative aspects of the production. During this period, petitioner's compensation was paid through the production entity and was reported on a Wage and Tax Statement, Federal form W-2.

(c) Post-production - After running a play for the requisite number of performances, the limited partnership which produced the play would be entitled to receive a share of the author's royalties from subsidiary rights for a period of eighteen years. Such subsidiary rights might arise from subsequent

motion picture or television production, and stock productions on tour.

Generally, petitioner was engaged by the producer during this period to maintain investor lists and arrange for periodic distributions on behalf of the producer. Since the payroll of the limited partnership was previously terminated, petitioner's compensation during this period was paid through the partnership entity, but reported on a Federal form 1099.

All duties and responsibilities as outlined above were carried out by petitioner under the direction and control of the producer, to whom he was rendering services.

9. Although it appears that petitioner's income reported as other than wages was derived from numerous sources, it was actually derived from services rendered to a nominal number of producers. For example, during 1973, although nineteen sources were listed from which petitioner received income reported on forms 1099, such income was derived basically from one producer, The Playwrights Company, which in its dissolution engaged petitioner to handle the subsidiary rights of approximately thirty-five plays which it had produced. For this service petitioner received an administrative salary which was paid through the limited partnership created for each individual production.

10. Petitioner contended that he had always believed that his entire income from general management activities was exempt from the imposition of unincorporated business tax since he was an employee of a producer, but as the result of a district office conference in 1970, he began reporting the income derived from which no taxes were withheld.

11. Due to the highly volatile nature of the theatrical business and the uncertain lifespan of any given production, petitioner had to involve himself with a number of producers and productions each year. Petitioner was not



forbidden from having more than one principal, and was not required to get permission from his present principals to take on a new principal.

12. Petitioner entered into either verbal or written employment contracts prior to rendering services to a producer.

13. Due to the difficulty of receiving employment in his field, petitioner maintained a business office during the years at issue since he considered it essential to have a permanent place where people could contact him on a regular ongoing basis.

14. Petitioner's employment may have been terminated by the producer, and in fact, his services were actually terminated during 1972 in connection with the play "No, No, Nanette".

15. Petitioner did not have the right to hire or fire actors, but merely negotiated contract terms on behalf of the producer.

16. Petitioner has neither produced a play nor had a financial interest in any play during the years at issue herein.

17. Petitioner maintained no regular working hours since the nature of the theatrical business dictated the time to be devoted to an activity. Many days petitioner spent all his waking hours rendering services in his capacity as a general manager.

18. Petitioner was a member of the Managers and Press Agents Union which maintained a pension plan for petitioner to which each production company for whom he rendered services was required to contribute to.

19. Petitioner was covered for unemployment insurance and workmen's compensation by each production company to which he rendered services.

20. Petitioner testified that he considered himself a "free lance manager" and that he divided his time by the needs of each play. There was no showing

of any agreement between principals as to the division of petitioner's time and efforts.

CONCLUSIONS OF LAW

A. That the activities of petitioner, Victor Samrock, constituted the carrying on of an unincorporated business during the years herein at issue in accordance with the meaning and intent of section 703(a) of the Tax Law, and did not constitute the performance of services as an employee, in accordance with section 703(b) of the Tax Law. (Matter of Carl Fisher, N.Y.S. Tax Commission Decision, September 20, 1978; see also Matter of B. Merle Debuskey, N.Y.S. Tax Commission Decision, October 9, 1979.)

B. That the income derived from petitioner's activities during 1971, 1973 and 1974 is subject to the unincorporated business tax within the meaning and intent of section 701 of the Tax Law.

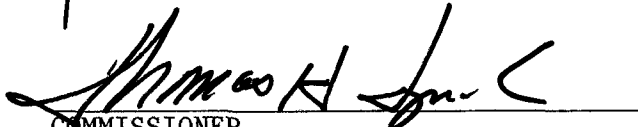
C. That the Notice of Deficiency issued November 22, 1976 is sustained as issued including penalty and such interest as lawfully due and the claims for refund dated January 14, 1977 for the years 1973 and 1974 are denied.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER