

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Henry S. Lynn :  
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 Year 1973. :

State of New York  
County of Albany

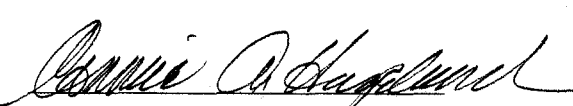
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Henry S. Lynn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

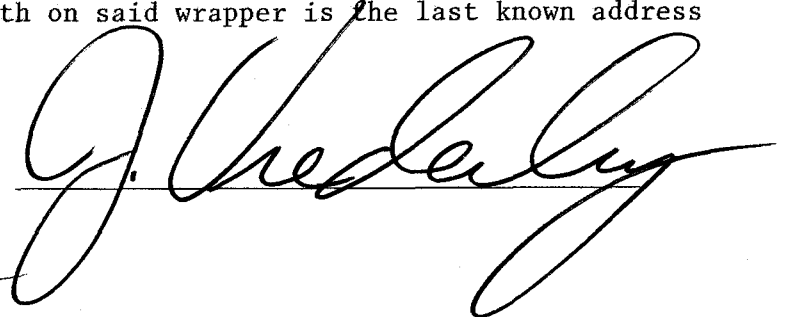
Henry S. Lynn  
110-20 71st Rd.  
Forest Hills, NY 11375

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 December, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

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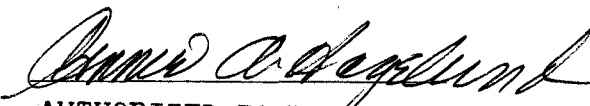
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Morton Brilliant the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

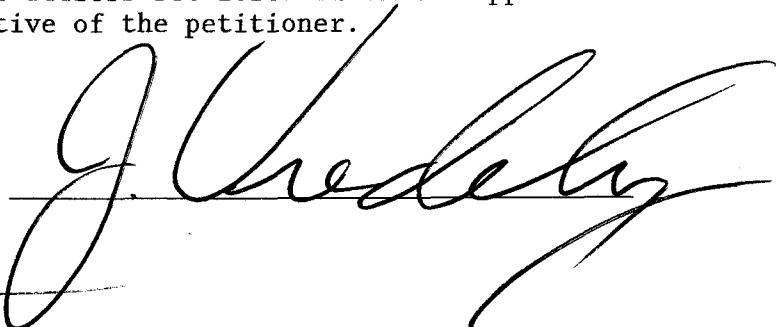
Morton Brilliant  
3 Novie Rd.  
Port Jefferson Sta., NY 11776

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 December, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

December 14, 1982

Henry S. Lynn  
110-20 71st Rd.  
Forest Hills, NY 11375

Dear Mr. Lynn:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Morton Brilliant  
3 Novie Rd.  
Port Jefferson Sta., NY 11776  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
HENRY S. LYNN  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1973.

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DECISION

Petitioner, Henry S. Lynn, 110-20 71st Road, Forest Hills, New York 11375, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 22487).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 2, 1982 at 10:45 A.M. Petitioner Henry S. Lynn appeared with Morton Brilliant, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner's sales activities during the year 1973 constituted the carrying on of an unincorporated business, thereby subjecting the income derived from said activities to unincorporated business tax.

II. Whether petitioner's failure to file an unincorporated business tax return on time and pay the tax when due was based on reasonable cause, and not willful neglect, thereby permitting said penalties to be waived.

FINDINGS OF FACT

1. Petitioner herein, Henry S. Lynn, timely filed a New York State Income Tax Resident Return for the year 1973, wherein he reported business income of

\$31,116.00. Mr. Lynn did not file an unincorporated business tax return for said year.

2. On April 10, 1978, the Audit Division issued a Notice of Deficiency against petitioner asserting that unincorporated business tax of \$1,161.38 was due together with penalties and interest. The penalties were asserted pursuant to sections 685(a)(1) and (a)(2) of the Tax Law for failure to file an unincorporated business tax return on time and failure to pay the tax when due, respectively. The aforementioned Notice of Deficiency was based on a Statement of Audit Changes dated December 1, 1976, wherein the Audit Division held petitioner's net business income of \$31,116.00 subject to unincorporated business tax.

3. During the year at issue petitioner was engaged in the business of receiving orders for metal wire products from several companies in the United States and placing these orders with foreign suppliers for direct shipment to the U.S. company. Petitioner received a commission computed on the basis of a percentage of the profit realized by the U.S. companies on the subsequent resale of the metal wire products.

4. Predominantly all of petitioner's business income in 1973 was received from the Nessor Alloy Co. (hereinafter "Nessor"), with the balance being derived from other miscellaneous customers. Petitioner testified that none of his customers exercised any supervision or control over his activities nor was there any agreement between the customers as to the division of petitioner's time and effort.

5. Nessor and the other companies from which petitioner derived commission income did not withhold any Federal or State income taxes or social security taxes. Petitioner was free to accept other clients. All expenses incurred by

petitioner in his business endeavors were paid by him without reimbursement from Nessor or the other principals. Petitioner conducted his business, a sole proprietorship, under the firm name of "Lynn Trading Co.".

6. Petitioner conducted his business from his home where he maintained a desk, typewriter and telephone. Mr. Lynn claimed \$9,535.00 in expenses against business income, the nature of said expenses being: automobile expenses, cables, phones, office-in-home, stationery, postage, samples, customs clearance, entertainment, presents, pier expenses, accounting, legal, insurance, technical publications and expenses for business trips to Europe.

7. Petitioner did not employ secretarial help nor did he utilize sales assistants. Petitioner argued that he is exempt from unincorporated business tax as a sales representative under section 703(f) of the Tax Law.

8. Mr. Lynn utilized the services of a Public Accountant to prepare his income tax returns and relied on said accountant's advice that he was not subject to unincorporated business tax. Petitioner's personal income tax returns have been prepared and filed in a timely fashion.

#### CONCLUSIONS OF LAW

A. That section 703(f) of the Tax Law states that:

"Sales representative. -- An individual, other than one who maintains an office or who employs one or more assistants or who otherwise regularly carries on a business, shall not be deemed engaged in an unincorporated business solely by reason of selling goods, wares, merchandise or insurance for more than one enterprise. For purposes of this subdivision, space utilized solely for the display of merchandise and/or for the maintenance and storage of records normally used in the course of business shall not be deemed an office, and the employment of clerical and secretarial assistance shall not be deemed the employment of assistants."

B. That section 703(f) of the Tax Law is not an exemption from unincorporated business tax. The Appellate Division in Frishman v. New York State Tax Commission, 33 A.D.2d 1071, mot. for lv. to app. den. 27 N.Y.2d 483, opined that:

"The petitioner has apparently been under the misconception that subdivision (f) of section 703 is an exemption from the unincorporated business tax when in fact this portion of article 23 merely limits the factors which may be relied upon to conclude that the individual is self-employed as opposed to being a mere employee of his principals."

C. That petitioner's sales activities during the year 1973 constituted the carrying on of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law and the income derived from said activities is deemed subject to unincorporated business tax (Frishman v. New York State Tax Commission, supra; Price v. State Tax Commission, 40 A.D.2d 930, mot. for lv. to app. den. 32 N.Y.2d 483).

D. That petitioner's failure to file an unincorporated business tax return for 1973 and pay the tax when due was based on reasonable cause and not willful neglect. Accordingly, the penalties assessed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are waived.

E. That the petition of Henry S. Lynn is granted to the extent indicated in Conclusion of Law "D", supra, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

*Robert M. Enslin*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. [Signature]*  
COMMISSIONER