

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lewis Merenstein :
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

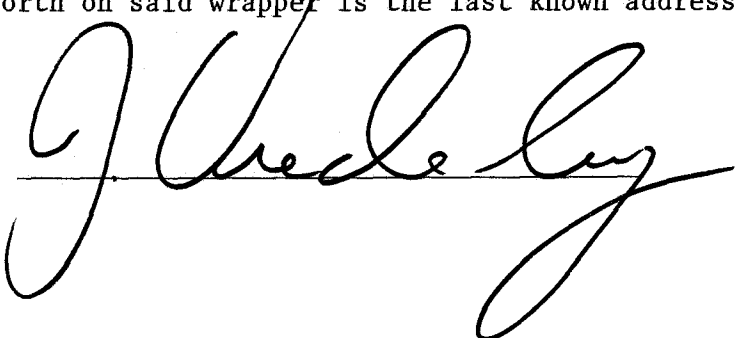
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Lewis Merenstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lewis Merenstein
c/o Satin, Tenenbaum, Eichler & Zimmerman
1776 Broadway
New York, NY 10019

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
6th day of October, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lewis Merenstein :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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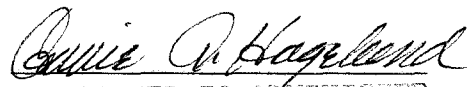
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Murray M. Weinstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

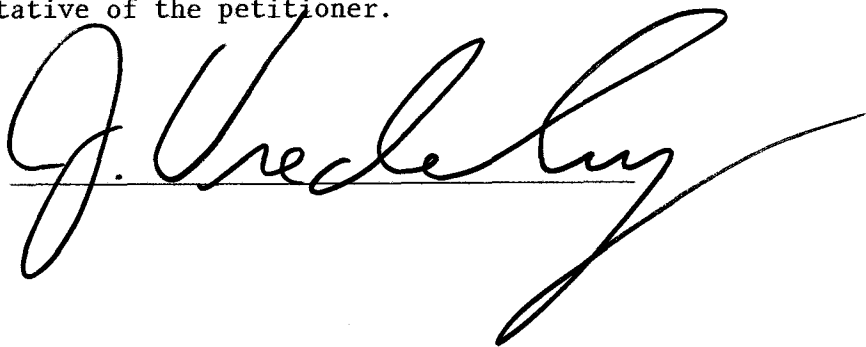
Murray M. Weinstein
217 Broadway
New York, NY 10007

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
6th day of October, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 6, 1982

Lewis Merenstein
c/o Satin, Tenenbaum, Eichler & Zimmerman
1776 Broadway
New York, NY 10019

Dear Mr. Merenstein:

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
Murray M. Weinstein
217 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
LEWIS MERENSTEIN
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.

DECISION

Petitioner Lewis Merenstein, c/o Satin, Tenenbaum, Eichler and Zimmerman, 1776 Broadway, New York, New York 10019, 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. 24811)

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 26, 1981 at 1:15 P.M. Petitioner appeared with Murray M. Weinstein, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a record and tape producer constitute the carrying on of an unincorporated business, the income from which is subject to unincorporated business tax.

II. If petitioner's activities are subject to unincorporated business tax, whether the performance of services by petitioner as an employee of Schwaid, Merenstein & Thau, Inc., and Thau-Merenstein Productions, Inc., were so inter-related and integrated with his activities as a record producer so as to subject his corporate salaries to unincorporated business tax.

III. If petitioner is subject to unincorporated business tax, whether he had reasonable cause for failure to file unincorporated business tax returns for the years in issue.

FINDINGS OF FACT

1. Petitioner, Lewis Merenstein, filed New York State income tax resident returns for 1971 and 1972. Petitioner did not file unincorporated business tax returns for said years.

2. On September 15, 1978, the Audit Division issued a Notice of Deficiency against petitioner asserting unincorporated business tax of \$1,947.13, plus penalties, pursuant to section 685 (a)(1), (a)(2) and (c) of the Tax Law, and interest, of \$1,836.69, for a total of \$3,783.82. The Notice of Deficiency was based on a Statement of Audit Changes dated December 8, 1976, which was issued on the grounds that petitioner's activities as a producer-manager were subject to unincorporated business tax.

3. Petitioner filed Federal forms 1040 and Schedules C, Profit or Loss from Business or Profession, for subject years. He included in gross receipts, in toto, his self-employment income as a record and tape producer, salaries received from various corporations, and reimbursed expenses.

4. The net profit from business on which the unincorporated business tax was computed was determined as follows:

	1971	1972
Gross Receipts	\$38,200.00	\$63,100.00
Total Expenses	19,761.00	27,449.00
Net Profit From Business	\$18,439.00	\$35,651.00

Included within the gross receipts were salary of \$30,000.00 and \$17,500.00 for 1971 and 1972 and reimbursed expenses of \$3,200.00 and \$6,250.00 for 1971 and 1972. At the hearing, the Audit Division conceded that the reimbursed

expenses are to be excluded from the computation of unincorporated business income.

5. Petitioner, during 1971 and 1972, was self-employed as a producer of master recordings for record companies. The non-exclusive agreements entered into by petitioner and the record companies provided, inter alia, that the record companies would finance its production and become the owners of the finished product. In consideration, petitioner would receive a percentage of the sales income generated by the record, after it went into mass production.

6. Petitioner contends that he was selected by the record companies because of his ability to produce a top grade product based on his background as a musician and as a sound engineer. As a musician, it was his responsibility to hire the artist, musicians, and the arranger, and to assure himself that the material was rendered in accordance to his standard. On occasion, he co-arranged the music with the arranger and determined the way it was to be played. As a sound engineer, he chose the microphones to be used and determined their placement to assure himself of the best accoustical results. The records and tapes produced by petitioner are used for commercial purposes.

7. Petitioner is neither licensed by nor a member of a society which sets professional standards and criteria for record producers. He does not possess a degree in sound engineering and/or in recording.

8. Petitioner's income as a record producer was derived from personal services, and, capital was not a material income producing factor.

9. For subject years, petitioner was an officer/shareholder of Schwaid, Merenstein & Thau, Inc. and Thau-Merenstein Productions, Inc. (hereinafter "corporations"). The corporations' principal business activity, in which petitioner actively participated, was to manage the affairs of artists under

contract to the corporations. The activities require, inter alia, introducing the artist to booking agents, determining whether artists under contract to them are properly handled, and to look after artists in their dealings with others.

10. Petitioner did not file unincorporated business tax returns for subject years in reliance on the advice of his accountant.

CONCLUSIONS OF LAW

A. That the activities of petitioner, Lewis Merenstein, as a record producer for subject years, although requiring special knowledge, experience, and artistic ability, did not constitute the practice of a profession exempt from the imposition of unincorporated business tax in accordance with the meaning and intent of section 703, subdivision (c) of the Tax Law. There is no indication in the record that the production of records and tapes is controlled by standards of conduct, ethics, malpractice liability or long-term educational background generally associated with a degree in an advanced field of learning (Matter of Rosenbloom v. State Tax Commission, 44 A.D. 2d 69).

B. That the services rendered by petitioner Lewis Merenstein for the corporations were not so interrelated or integrated with the pursuit of his unincorporated business so as to constitute part of a business regularly carried on by him but rather were independent of, and not in furtherance of, such record producing activities. That section 703 subdivision (b) of the Tax Law provides, in relevant part, that:

"The performance of services by an individual as an employee or ... officer... of a corporation... shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

In the Matter of Naroff v. Tully, 55 A.D.2d 755, relating to subdivision (b) of section 703 of the Tax Law, the court held:

"The clear purpose of the proviso in subdivision (b) is to prevent an individual entrepreneur from sheltering from the unincorporated business tax income which derives from the conduct of his unincorporated business in the form of salaries for services as an employee or officer of the corporate entities, in a situation where the corporate entities exist primarily to advance the business purposes of the unincorporated entity and do not have an independent and unrelated business purpose."

That the salary received from said corporations is not subject to the unincorporated business tax.

C. That petitioner Lewis Merenstein's failure to file New York State unincorporated business tax returns for 1971 and 1972 was due to reasonable cause and not due to wilful neglect, and, accordingly, penalties asserted pursuant to section 722 and subdivisions (a)(1) and (a)(2) of section 685 of the Tax Law are cancelled.

D. That, in general, relief from the penalty imposed pursuant to sections 722 and 685(c) of the Tax Law for failure to file declaration or underpayment of estimated unincorporated business tax is obtained through subsection (d) of section 685. Petitioner has failed to submit any information showing that he qualifies for any of the relief provisions of section 685(d) of the Tax Law.

E. That the petition of Lewis Merenstein is granted to the extent indicated in Finding of Fact "4" and Conclusions of Law "B" and "C" and that, except as so granted, the Notice of Deficiency dated September 15, 1978 is sustained, together with such additional interest as may be legally owing.

DATED: Albany, New York

OCT 16 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER