

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Harry Rigby

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. :

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 31st day of March, 1982, he served the within notice of Decision by certified mail upon Harry Rigby, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

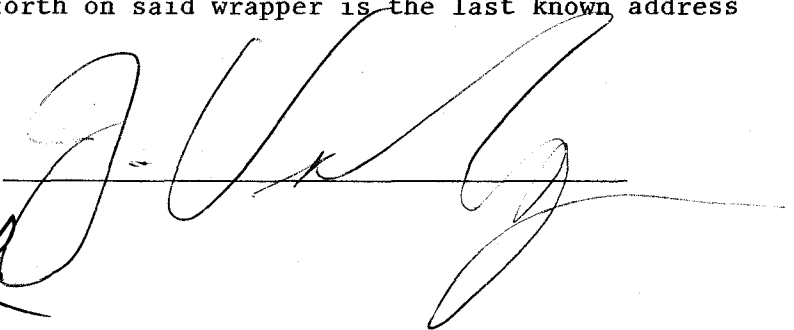
Harry Rigby  
420 W. 24th St.  
New York, NY 10023

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  
31st day of March, 1982.

*Cornelia A. Hagedorn*



STATE OF NEW YORK  
STATE TAX COMMISSION

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Harry Rigby :

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 :

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 31st day of March, 1982, he served the within notice of Decision by certified mail upon Clifford Forster the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Clifford Forster  
Fitelson, Lasky & Aslan  
1212 Avenue of the Americas  
New York, NY 10036

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  
31st day of March, 1982.

*Carrie G. Hupel*

*[Signature]*

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

March 31, 1982

Harry Rigby  
420 W. 24th St.  
New York, NY 10023

Dear Mr. Rigby:

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) 1138 & 1243 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  
Clifford Forster  
Fitelson, Lasky & Aslan  
1212 Avenue of the Americas  
New York, NY 10036  
Taxing Bureau's Representative

## STATE TAX COMMISSION

2. On May 19, 1977 the Audit Division issued a Statement of Audit Changes against petitioner for the years at issue on the grounds that his

activities as a theatrical producer constituted the carrying on of an unincorporated business, and, was subject to unincorporated business tax. Accordingly the Audit Division issued a Notice of Deficiency on December 19, 1977 for \$3,876.59 in unincorporated business tax, penalties pursuant to section 685(a)(1) and (a)(2) of the Tax Law for \$1,811.90, plus interest of \$1,316.76, for a total of \$7,005.25.

3. On or about September 21, 1970, petitioner entered into an employment agreement with Rubin & Rigby Production, Ltd. (hereinafter "R & R"). The agreement provided , inter alia, that petitioner shall propose properties for production, sale or other use by R & R or any person, firm, or company designated by the board of directors of R & R, assist in the production, sale or other use of such properties, and perform such other duties in connection therewith as may be assigned to him by the board of directors of R & R. Petitioner shall also serve in the office of vice president of R & R or in any other office if elected to do so by the board of directors of R & R.

R & R shall credit petitioner for all services to be rendered by him to R & R in an amount equal to 33 1/3 percent of the net profits of R & R.

4. On September 14, 1970, R & R and Cyma Rubin (hereinafter "Rubin") entered into a Memorandum of Agreement in connection with the musical stage production of "No, No, Nanette" (hereinafter "play"). The agreement provided, inter alia, that the parties will cause a New York limited partnership to be organized of which R & R and Rubin will be the sole general partners. The business of said limited partnership shall be solely to produce and present the "play".

5. Petitioner's principal duties were to be concerned with creating and developing theatrical and other entertainment projects, and, with Mrs. Rubin funding such projects.

6. By letter dated December 15, 1970, Mrs. Rubin unilaterally terminated the employment agreement petitioner had with R & R.

7. On December 22, 1970, petitioner commenced an arbitration proceeding against R & R, and its successor, now known as Pyxidium, Ltd. for breach of employment agreement.

8. The arbitrator found, inter alia that the compensation to be given to petitioner and the sharing of profits plainly establishes his status as co-producer and not as an ordinary servant of the corporation. Any doubt that petitioner ever, under the so-called employment agreement was to be regarded by Mrs. Rubin as other than a co-producer is removed by the substantial one third interest provided for petitioner in the net profit of R & R. The arbitrator also found that for the period of time that petitioner was connected with the production of the play under the so-called employment agreement, petitioner was billed and credited as co-producer and co-presenter of the play. The financial terms of the so-called employment agreement provided petitioner with entrepreneurial compensation.

Additionally, the arbitrator found that the continued interest of petitioner in "No, No, Nanette", whatever the reason for termination of the agreement, is wholly consistent with the basic premise of the agreement, namely that petitioner in fact is an entrepreneur- co-producer in the production of the play.

#### CONCLUSIONS OF LAW

A. That the income realized by petitioner, Harry Rigby, from R & R is subject to unincorporated business tax. The income received by petitioner was

based on the profits realized from the play "No No Nanette" which was provided by R & R. That such activities constituted part of a business regularly carried on by petitioner in accordance with the meaning and intent of section 703, subdivision (b) of the Tax Law.

In the Matter of Naroff v. Tully, 55 A.D.2d 755, the court said:

"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 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 independent and unrelated business purpose."

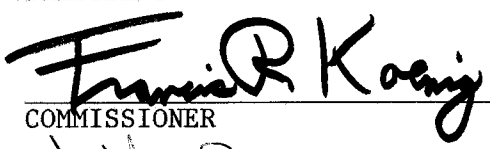
B. That the petition of Harry Rigby is denied and the Notice of Deficiency dated December 19, 1977 for the years 1971, 1972 and 1973 is sustained together with penalties and such additional interest as may be legally owing.

DATED: Albany, New York

MAR 31 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER