

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition of Alex Latkany | : : : : : : | 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 1973 & 1974. | | |

State of New York
County of Albany

David Parchuck, 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 April, 1983, he served the within notice of Decision by certified mail upon Alex Latkany, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alex Latkany
34 77th Street
Brooklyn, NY 11209

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 April, 1983.

David Parchuck

Ann M. DeHaglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alex Latkany :

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 1973 & 1974. :

State of New York
County of Albany

David Parchuck, 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 April, 1983, he served the within notice of Decision by certified mail upon William M. Moser the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William M. Moser
425 Northern Blvd.
Great Neck, NY 11021

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 April, 1983.

David Parchuck

Annie A. Deland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 27, 1983

Alex Latkany
34 77th Street
Brooklyn, NY 11209

Dear Mr. Latkany:

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
William M. Moser
425 Northern Blvd.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE TAX COMMISSION

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 October 26, 1982 at 10:45 A.M. Petitioner appeared by William M. Moser, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a production manager constituted the carrying on of an unincorporated business or were his activities that of an employee exempt from unincorporated business tax.

II. Whether petitioner's failure to file unincorporated business tax returns on time and pay the tax when due was based on reasonable cause and not willful neglect, thereby permitting the penalties asserted pursuant to sections 685(a)(1) and (a)(2) of the Tax Law to be waived.

FINDINGS OF FACT

1. Petitioner herein, Alex Latkany, timely filed New York State resident income tax returns for the years 1973 and 1974. On his 1973 return petitioner reported "other income" of \$19,781.00, while the 1974 return reported "other income" of \$26,945.00. Petitioner did not file unincorporated business tax returns for the years 1973 or 1974.

2. On April 4, 1980 the Audit Division issued a Notice of Deficiency to petitioner for the years 1973 and 1974, asserting that unincorporated business tax of \$1,527.34 was due, together with penalties and interest of \$1,265.16, for a total due of \$2,792.50. The Notice of Deficiency was premised on a Statement of Audit Changes dated March 21, 1977, wherein the Audit Division held that the compensation earned by petitioner as a production manager, and reported on his returns as "other income", was subject to unincorporated business tax. Penalty was asserted due for the year 1974 pursuant to section 685(c) of the Tax Law for underestimation of tax. Additional penalties were asserted due for both 1973 and 1974 under sections 685(a)(1) and (a)(2) of the Tax Law for failure to file unincorporated business tax returns and pay the tax when due, respectively.

3. During the tax years in question petitioner was a production manager for Sel-More Garment Co. (hereinafter "Sel-More"). Petitioner also earned fees from four other principals for making patterns. The following chart represents a breakdown of the various principals from whom petitioner received fees and the respective amounts:

| <u>PRINCIPAL</u> | <u>1973</u> | <u>1974</u> |
|----------------------|--------------------|--------------------|
| Sel-More Garment Co. | \$15,769.66 | \$22,456.00 |
| Marcel Manufacturing | 342.00 | -0- |
| Jacey | 2,015.42 | 1,134.00 |
| G & O Corp. | 1,665.83 | 275.00 |
| Lounges, Inc. | -0- | 3,080.00 |
| | <u>\$19,792.91</u> | <u>\$26,945.00</u> |

4. Prior to the years at issue petitioner had been employed in the "garment industry" for some 50 years. After his retirement from active daily employment petitioner became associated with Sel-More. As a production manager for Sel-More petitioner was responsible for locating factories in the New York City metropolitan area interested in manufacturing Sel-More's garments. Petitioner would have the prospective factory manufacture a sample which he would then submit to Sel-More for approval. Once a particular factory was accepted by Sel-More and production started, it was petitioner's responsibility to see that the garment was made correctly, e.g. the stitching was correct, buttons were on right, the pressing was good, and that production schedules were being met.

5. Sel-More was headquartered in St. Louis, Missouri and did not maintain an office in New York City. Petitioner did not maintain his own office, did not have business cards, did not advertise and had no letterhead. Petitioner conducted his activities for Sel-More primarily from the factories which manufactured Sel-More's garments. No expenses were claimed by petitioner for the years 1973 and 1974 against the commissions received from Sel-More or the fees received from the other principals.

6. Petitioner was paid by Sel-More on a commission basis, receiving 5¢ for each garment accepted by Sel-More. No federal, state or social security taxes were withheld by Sel-More from the commissions paid to petitioner. Petitioner did not receive a paid vacation from Sel-More nor did he participate in any pension plan or medical benefit plan maintained by Sel-More.

7. Petitioner's association with Sel-More was not evidenced by a written contract. Petitioner reported to Sel-More two to three times per week by telephone concerning the progress being made by the various factories. Sel-More retained the right to reject any samples submitted by petitioner and did on occasion instruct him to find other factories. Sel-More also retained the right to reject any garments shipped to them if they found the garments unsatisfactory. Petitioner utilized his own technique and judgement in locating prospective factories and in checking the quality of the garments being manufactured.

8. Sel-More's production season ran from August to December and during this period Sel-More's business took up all of petitioner's time. The patterns which petitioner made for the other principals were made during the period that petitioner was not busy with Sel-More's business. The patterns made by petitioner for the other principals were made at the principal's place of business using their material and equipment. Petitioner did not make patterns for Sel-More.

9. Petitioner relied on his certified public accountant to prepare all tax returns which were due. Petitioner's personal income tax returns were filed in a timely fashion for the years in question and for prior tax years. Petitioner's accountant advised him that he was not subject to unincorporated business tax and that he need not file unincorporated business tax returns for 1973 and 1974.

CONCLUSIONS OF LAW

A. That petitioner's activities as a production manager and maker of patterns during the years 1973 and 1974 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 subject to the unincor-

porated business tax imposed by subdivision (a) of section 701 of the Tax Law. That petitioner's principals exercised insufficient direction and control over his activities so as to consider him an employee within the meaning and intent of section 703(b) of the Tax Law and 20 NYCRR 203.10.

B. That petitioner's failure to file unincorporated business tax returns for the years 1973 and 1974 and pay the tax when due was based on reasonable cause and not willful neglect. Accordingly, the sections 685(a)(1) and (a)(2) penalties are cancelled. That the section 685(c) penalty for underestimation of tax is sustained since petitioner did not satisfy any of the exceptions provided for in section 685(d) of the Tax Law.

C. That the petition of Alex Latkany is granted to the extent indicated in Conclusion of Law "B", supra, and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER