

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UGO AND LEONORA CIANCIOSI	:	
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Tax and	:	
Unincorporated Business Tax under Articles 22	:	
and 23 of the Tax Law for the Years 1980	:	
through 1982.	:	
	:	DECISION
	:	DTA No. 802791
In the Matter of the Petition	:	
of	:	
LEONORA CIANCIOSI	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1980 through 1982.	:	

Petitioners Ugo and Leonora Ciaciosci, 405 Anderson Road, Vestal, New York 13850 filed an exception to the determination of the Administrative Law Judge issued on August 23, 1990 with respect to their petition for redetermination of deficiencies or for refunds of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1980 through 1982 (File No. 802791). Petitioners appeared by Frederick A. Griffen, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Neither party submitted a brief on exception, nor was oral argument requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Administrative Law Judge erred in concluding that petitioners had not proved that certain adjustments to the audit were required.

II. Whether the Administrative Law Judge erred in concluding that Ugo Ciaciosci's criminal conviction collaterally estopped him from denying liability for the fraud penalty.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Ugo and Leonora Ciaciosci,¹ jointly filed New York State resident income tax returns for each of the years at issue as follows:

<u>Year</u>	<u>Filing Date</u>
1980	January 25, 1982
1981	December 27, 1982
1982	November 5, 1984

During the years in question, petitioner was involved in three businesses. First among these was a sole proprietorship known as Ugo J. Ciaciosci Insurance Agency, located at 156 Vestal Parkway East, Vestal, New York. Petitioner had been licensed as an insurance agent and/or broker since 1952. Petitioner became an insurance agent soon after receiving his B.A. degree in business in 1952. During the years at issue, petitioner employed a secretary to assist him in this otherwise sole business endeavor. In connection with his insurance business, petitioner sold various types of insurance, received premium payments from policy holders, and sent renewal notices to policy holders. Petitioner maintained a separate insurance broker account at the Bank of New York for his insurance business. In 1980, credit advances totalling \$7,644.00 were made to this account. This account was audited by the Division in connection

¹Leonora Ciaciosci is a petitioner herein solely by reason of her having filed joint returns with her husband. Accordingly, unless otherwise indicated, all references to petitioner herein refer to Ugo Ciaciosci.

with the audit herein and no irregularities in respect of petitioner's use of said account were found.

Also during the years in question petitioner owned and operated a sole proprietorship known as Vestal Tax Service. Petitioner operated this business out of his insurance agency's offices at 156 Vestal Parkway East, Vestal, New York. Vestal Tax Service was in the business of preparing income tax returns for individuals. It is unclear from the record precisely when petitioner became involved in the tax return preparation business, but it appears that petitioner went into the business at some point prior to the years at issue. Initially, petitioner had a partner in the tax service business, one Henry Fiacco. Petitioner, however, supervised the business from his office at 156 Vestal Parkway East, collecting fees from customers and paying the employees. Mr. Fiacco apparently worked elsewhere. At some point in 1980 or 1981, petitioner and Mr. Fiacco terminated their relationship with respect to the tax preparation business. Petitioner, however, continued his involvement in the tax service as a sole proprietor and continued to run the business as he had done previously.

Petitioner's third business enterprise during the years at issue was used car sales. Petitioner apparently became involved in selling used cars in 1981. At that time, petitioner was not licensed as a dealer by the Department of Motor Vehicles. He became involved in the car selling business by purchasing vehicles at dealer auctions. Petitioner held himself out as a dealer at these auctions. He used a friend's "dealer's card" which authorized petitioner as (an apparent) dealer, to purchase cars at these auctions. Petitioner then turned these cars over to licensed dealers for sale. During 1981, petitioner's personal checking account revealed purchases of eight cars totalling \$15,630.00 in connection with his car business. No evidence was presented herein as to car sales in 1981. In August 1982, petitioner became licensed as a dealer by the Department of Motor Vehicles, and conducted his car sales business at his 156 Vestal Parkway East offices under the name "Lee's Used Cars".

Petitioner did not file a separate Schedule C in respect of the tax preparation business for the years 1980 and 1981. Rather, on his returns for those years, he combined the receipts and expenses in respect of the tax business and the insurance business on a single Schedule C for

each year which listed only the insurance agency as the name and type of business. The business activity in respect of the car sales for 1981 was not reported at all.

Petitioner prepared his own returns for 1980 and 1981. His 1982 return was prepared by his attorney.

For 1982, petitioner reported on separate Schedule C's his insurance, tax preparation and car sales businesses.

As noted previously, petitioner maintained a bank account at Chemical Bank in connection with his insurance business. Petitioner also maintained, at various points during the period at issue, two checking accounts at Endicott Trust Company (Account Nos. 473-2010136 and 473-2001609) and an account at Key Bank (Acct No. 453-010464). In addition, petitioner maintained, at various times during the audit period, 17 savings accounts which are listed below:

<u>Schedule of Savings Accts.</u>	<u>Acct. #</u>
1. Key Bank (Bankers Trust)	453-010464
2. Binghamton S.B. (5 yr. C/D)	05-800624-9
3. Binghamton S.B. (5 yr. C/D)	05-618978-8
4. Endicott Trust Co.	473-1209869
5. Endicott Trust Co.	471-1210453
6. Endicott Trust Co.	471-5223290
7. 1st Fed. Bank (Delaware S.B.)	37-980-4364
8. 1st Fed. Bank (Delaware S.B.)	37-980-4363
9. 1st Fed. Bank (Delaware S.B.)	37-150-3563
10. 1st Fed. Bank (Delaware S.B.)	37-150-3561
11. 1st Fed. Bank (Delaware S.B.)	37-150-3564
12. 1st Fed. Bank (Delaware S.B.)	37-150-3566
13. 1st Fed. Bank (Delaware S.B.)	37-100-4349
14. 1st Fed. Bank (Delaware S.B.)	37-980-4162
15. 1st Fed. Bank (Delaware S.B.)	107-060-3333
16. 1st Fed. Bank (Delaware S.B.)	107-080-334
17. 1st Fed. Bank (Delaware S.B.)	107-080-0726

Interest income to petitioner in respect of the various savings and checking accounts during the years at issue and interest income reported by petitioner on tax returns for those years is set forth below:

	<u>1980</u>	<u>1981</u>	<u>1982</u>
Total interest income from savings and checking accts.	\$4,738.00	\$7,508.00	\$7,081.00
Total interest reported per returns	<u>557.00</u>	<u>1,137.00</u>	<u>2,046.00</u>
Difference	\$4,181.00	\$6,371.00	\$5,035.00

Petitioner also maintained numerous savings accounts jointly with his mother, Angelina Ciaciosi. In addition, he maintained other savings accounts jointly with his mother and his brother, Mario Ciaciosi. (During the period at issue, Mario Ciaciosi was a resident of Texas.) On audit, the Division determined the total deposits and total withdrawals with respect to eight joint accounts maintained by petitioner and his mother during the audit period. This analysis revealed \$9,848.00 in withdrawals and \$14,186.00 in deposits in 1980; \$11,254.00 in withdrawals and \$23,032.00 in deposits in 1981; and \$40,565.00 in withdrawals and \$26,744.00 in deposits in 1982. Petitioner and his mother jointly maintained several other savings accounts during the period at issue. These other accounts were not analyzed by the Division during its audit.

On audit, none of the accounts jointly held by Angelina Ciaciosi and petitioner were used to determine petitioner's total bank deposits and withdrawals under the Division's audit analysis herein.

Petitioner's mother was of advanced age during the period at issue. Petitioner assisted his mother in paying her bills by accompanying her to the various locations where she would make the necessary payments. Sometimes petitioner paid his mother's bills with his own funds and was later reimbursed by her. Petitioner's mother died in January 1987.

On audit, petitioner advised the auditor that, during the period at issue, he had received money from his mother.

A \$6,000.00 bank check, dated June 17, 1982 and payable to petitioner, was drawn from a savings account jointly held by petitioner and his mother (First Federal Account No. 37-100-5247). Said check was subsequently endorsed by petitioner and paid by First Federal. A \$5,000.00 bank check, dated October 22, 1982, payable to petitioner was drawn from a First Federal savings account jointly held by petitioner and his mother (First Federal Account No. 37-150-4037). Petitioner subsequently endorsed said check and deposited it in his checking account on October 22, 1982.

Petitioner's name was also on three other First Federal Savings accounts: 1) No. 1070801918 opened 7/18/78 and closed 1/13/81 for \$3,083.13; 2) No. 1070200416 opened 1/24/73 and closed 1/28/81 for \$6,674.12; and 3) No. 1070801582 opened 2/10/78 and closed 2/21/80 for \$3,028.97. The record fails to disclose whether these funds were transferred to another account or, if such transfers were made, to what account the transfers were made. The record also fails to show in whose name or names these accounts were held, e.g., petitioner alone, petitioner and his wife, or petitioner and his mother.

Petitioner and his wife had five children, Patrice, David, John, Steven and Daniel. One of petitioner's sons attended LeMoyne College in Syracuse, New York during 1980 through 1982. All five children were claimed as dependents on petitioner's 1980 and 1981 tax returns. Petitioner claimed four of his children as dependents on his 1982 return.

During the period at issue, petitioner also owned rental property located at 372 Third Avenue, Vestal, New York.

Since 1975, petitioner consistently late-filed both his Federal and New York State income tax returns. The approximate date of preparation of his Federal returns for the years 1975-1980, together with the reported adjusted gross income for each year, is set forth below:

<u>Year</u>	<u>Approx. Date Return Prepared</u>	<u>Adjusted Gross Income Reported</u>
1975	12/17/76	\$2,014.00
1976	12/27/77	2,020.00
1977	12/27/78	1,889.00
1978	12/31/79	(35.00)
1979	12/30/80	(19.00)
1980	1/29/82 (Filing Date)	1,737.00

THE INITIAL AUDIT

The audit herein was commenced by an interview of petitioner at his place of business on October 17, 1983. At that time, petitioner had not yet filed his 1982 income tax return. On audit, the Division correctly determined that petitioner maintained no books of original entry in respect of his various businesses. Additionally, petitioner maintained banking records for only a portion of the period at issue and cancelled checks for only a portion of the audit period. As a result, it was necessary for petitioner and the Division to obtain information directly from the various banks with whom petitioner did business. Petitioner was cooperative with the Division in attempting to obtain this information and was generally cooperative with the Division throughout the course of the audit.

On audit the Division attempted to reconstruct petitioner's income by means of the source and application of funds method. The auditor's initial source and application analysis, dated January 17, 1984, is summarized below:

<u>Sources of Funds</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>
1. Net Profit Per Return "Sch.C"	<1541>	<1217>	-0-
2. Depreciation	1955-	1968	-0-
3. Interest Expense Per Return	165-	413	-0-
4. Rental Income	752-	831	-0-
5. Rental Depreciation	600-	600	-0-
6. Stock Dividends (gross)	2169-	1653	-0-
7. Gambling Winnings Per Return	-0-	2366	-0-
8. Withdrawals From Savings	7691	24936	61267
9. Decrease in Ck. Acct's	7478	-0-	4450
10. Decrease in Bk. of NY	-0-	7051	1592
Total Sources of Funds	<u>19,269</u>	<u>38,601</u>	<u>67,309</u>
<u>Applications of Funds</u>			
1. Deposits in Savings	39033	23096	64361
2. Total Personal Cks. Written	27864	51164	67568 Est.
3. Increase in Ck. Acct's		510	-0-
4. Increase in Bk. of N.Y.	6690	-0-	-0-
5. E.F. Hutton Margin Acct. Increase	--	--	16878
6. Personal Living by Cash	<u>17,177</u>	<u>17,177</u>	<u>17,177</u> Est.
Total Applications of Funds	90,764	91,947	165,984
Overapplications of Funds	71,495	53,346	98,675

Sources of Funds numbered "1" through "7" above are not in dispute. In fact, "1" through "7" were taken from petitioner's filed returns. (At the time the initial source and application was prepared, the 1982 return had not been filed.) Source "8", "Withdrawals from Savings" was determined by adding withdrawals made from each of the savings accounts maintained by petitioner and listed above. Sources numbered "9" and "10" were determined by a review of the balance in these accounts at the beginning and end of each year in question. Sources "8", "9" and "10" were determined by a review of available bank records.

On the applications side, Application "1", "Deposits in Savings", was determined by adding deposits to each of the savings accounts listed above. Applications numbered "3" and "4" were determined by a review of the balance in these accounts at the beginning and end of each year in question.

Application "5" was determined by a review of petitioner's E.F. Hutton account. The amount of this application was based upon the fair market value of the account at the end of 1982, and was made up of the following:

Cash reserve	\$ 1.00
135 shares IBM	\$12,993.00
100 IBM Calls	\$ 875.00
150 shares NYS E & G	\$ 3,243.00
99 shares Safeguard Bus.	\$ 2,351.00
66 shares Safeguard Bus.	\$ 255.00
Market Value	\$19,718.00
Less: Debit owed	\$ 2,840.00
Fair Market Value	\$16,878.00

Application "2", "Personal Checks Written", was determined by calculating total deposits to petitioner's checking accounts and subtracting business expenses claimed on petitioner's Schedule C's and rental expenses claimed on petitioner's Schedule E's, with adjustments for claimed depreciation and increases or decreases in the checking accounts. This calculation is summarized below:

	<u>1980</u>	<u>1981</u>	<u>1982</u>
Total Deposits-Endicott Trust Ck. Acct. 473-2010136	23810	72787	98158
Total Deposits-Endicott Trust Ck. Acct. 473-2001609	16477	-0-	-0-
Total Deposits-Bankers Trust 96-0054-9	<u>10952</u>	<u>9110</u>	<u>2437</u>
Total Deposits	<u>51239</u>	<u>81897</u>	<u>100595</u>
Business Expenses per Sch. "C"	<u>31460</u>	<u>30622</u>	<u>48493</u>
Less: Depreciation	<u>1955</u>	<u>1968</u>	<u>4409</u>
Net Sch. "C" Expenses	29505	28654	44084
 Rental Expenses Per Return	 1948	 2169	 2914
Less: Depreciation	<u>600</u>	<u>600</u>	<u>1465</u>
Net Rental Expenses	<u>1348</u>	<u>1569</u>	<u>1449</u>
 Total of Net Sch. "C" and Rent Expenses	 <u>30853</u>	 <u>30223</u>	 <u>45533</u>
 Gross Personal Expenses By Check (Total Deposits Less Total Net Expenses)	 <u>20386</u>	 <u>51674</u>	 <u>55062</u>
 <Increase> or Decrease Ck. Acct Bal. 473-2010136	 3853	 <369>	 4450
473-2001609	2904	-0-	
96-0054-9	<u>721</u>	<u><141></u>	<u>—</u>
 Total Personal Chks. Written	 <u>27864</u>	 <u>51164</u>	 <u>59512</u>

Application "6", "Personal Living by Cash", was determined by an analysis of petitioner's personal checks written for 1980.² Based upon discussions with petitioner, the auditor estimated petitioner's total personal expenses for 1980. The personal living by cash for 1980 represents the difference between estimated total personal living expenses and personal living expenses paid by check.

PERSONAL LIVING <u>EXPENSES</u>			
	<u>Check</u>	<u>Cash</u>	<u>Total</u>
Food	155	4845	5000
Housing:			
Mtg. payments	2283		2283
Taxes	2934		2934
Utilities	2039	461	2500
Auto Expense:			
gas, oil			
repairs			
insurance	1741	1259	3000
Dept. Stores (Clothing)	1254	746	2000
Medical Expenses	1254	246	1500
Insurance	1530		1530
Education:			
College	1106	6894	8000
Porocial School	1500		1500
Contributions	374	126	500
Personal Assets:			
1976 Pacer	1649		1649
Income Tax	1276		1276
Loan Payments	2243		2243
Miscellaneous	<u>6526</u>	<u>2600</u>	<u>9126</u>
Total Personal Living Expenses	<u>27864</u>	<u>17177</u>	<u>45041</u>

Having determined that checks available for the remaining years at issue were insufficient to perform the same analysis for 1981 and 1982 as was performed with respect to 1980, the Division used the personal living by cash figure for 1980 for both 1981 and 1982.

THE CRIMINAL MATTER

Given the degree of understatement of income per the above source and application analysis, petitioner's failure to file (at that time) his 1982 New York State personal income tax return, and petitioner's omission of interest income from his returns, the Division referred the instant matter to the office of the Attorney General for criminal prosecution. Petitioner was subsequently charged in the Vestal Town Court, Vestal, New York, with felony tax evasion charges in respect of his alleged underreporting for 1980 and 1981. He was also charged, pursuant to Tax Law former § 695(a), with a misdemeanor charge of attempting to evade tax in respect of 1982. A preliminary hearing on the felony charges was held at the Vestal Town Court, Vestal, New York on June 19, 1984.

On November 8, 1984 in Vestal Town Court, petitioner pled guilty to the above-noted misdemeanor charge of attempting to evade tax in violation of Tax Law former § 695(a). The felony charges against petitioner were dismissed. The charge to which petitioner pled guilty alleged the following:

"On or about April 15, 1983, the defendant, with intent to evade personal income tax, did fail to pay such tax and did fail to make, render, sign and certify any return and declaration of estimated income and did fail to supply any information within the time required by Section 651(a)(1) of the Tax Law."

Petitioner elected to enter his plea of guilty upon advice of counsel and upon acknowledgement and waiver of his rights to a trial on the charges.

Also on November 8, 1984, petitioner was sentenced by the Vestal Town Court to a conditional discharge for a period of one year in respect of his misdemeanor conviction. Petitioner was neither fined nor incarcerated in respect of his conviction. Petitioner agreed to attend conferences with the Division to attempt to reach an agreement in respect of his New York income tax liability for the years 1980 and 1981. Petitioner and the Division retained all their rights and remedies in challenging or enforcing any deficiency assessment for 1980 and 1981.

Petitioner entered his guilty plea following extensive discussions among petitioner's representative, the Attorney General's office and the New York State Insurance Department. Petitioner's representative advised the Insurance Department of the charges pending against petitioner and of the circumstances surrounding such charges. Petitioner's representative sought to determine whether a guilty plea to the misdemeanor charge would jeopardize petitioner's insurance license. Petitioner's representative received assurances, following a satisfactory audit of petitioner's insurance broker account by the Division, that petitioner's insurance license would not be in jeopardy. Such assurances were a factor in petitioner's decision to plead guilty to the misdemeanor charge.

It should be noted that at the time petitioner was charged with the felonies for 1980 and 1981 and the misdemeanor for 1982 and continuing through his guilty plea and sentencing in respect of the misdemeanor, the Division was alleging an underreporting of taxable income for the years 1980 through 1982 based upon its initial source and applications analysis summarized above. This alleged underreporting totalled \$223,516.00 over the three years in question. It should be further noted that, during the pendency of the criminal proceedings petitioner had not filed his 1982 income tax return.

THE NOTICE OF DEFICIENCY

Following the conclusion of the criminal matters, the Division reviewed certain additional information provided by petitioner. Such additional information resulted in a revised source and application of funds analysis as follows:

<u>Sources of Funds</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>
1. Net Profit per Return Sch "C"'s	<1541>	<1217>	<1484>
2. Depreciation	1955	1968	4409
3. Interest Expense Per Return	165	413	-0-
4. Rental Income	752	831	<86>
5. Rental Depreciation	600	600	1465
6. Stock Dividends	2169	1653	3583
7. Gambling Winnings Per Return	-0-	2366	-0-
8. Withdrawals from Savings	42789	24936	61267
9. Decrease in Ck. Accts.	7478	-0-	4450
10. Decrease in Bk. of NY (Ins. Acct)	-0-	7051	1592
11. Sale of Stock	-0-	4133	20097
Total Sources of Funds	<u>54367</u>	<u>42734</u>	<u>95293</u>

Applications of Funds:

1. Deposits in Savings	39033	23096	64361
2. Total Personal Cks. written	27864	51164	59512
3. Increase in Checking Accnts.	-0-	510	-0-
4. Increase in Bk. of NY Ins. Acct.	6690	-0-	-0-
5. E.F. Hutton Margin Acct. Increase	-0-	-0-	16878
6. Personal Living by Cash	<u>13362</u>	<u>13362</u>	<u>13362</u>
Total Applications of Funds	<u>86949</u>	<u>88132</u>	<u>154113</u>
Excess Applications (Additional Income)	<u>32582</u>	<u>45398</u>	<u>58820</u>

The changes in this revised source and application analysis result from:

1) An increase in withdrawals from savings by \$35,099.00. Additional information revealed the existence of three more bank accounts in petitioner's name. These accounts, which totalled \$35,099.00 were closed in 1980, and the funds withdrawn therefrom.

2) Information regarding petitioner's sale of certain stock which resulted in additional sources of income for 1981 and 1982.

3) A downward adjustment to the estimated total personal checks written figure for 1982.

4) A downward adjustment of \$3,815.00 per year in personal living by cash based upon information that petitioner received \$1,100.00 per year in cash from his mother as reimbursement for payment of real estate taxes and also based upon information that petitioner's education costs for his son had been overestimated by \$2,715.00 per year.

5) Petitioner's filing of his 1982 return allowed for the use of amounts set forth on that return under various categories of "sources" of income.

Following the above-noted adjustments to the source and applications audit, the Division issued to petitioner a Statement of Personal Income Tax Audit Changes, dated February 28,

1985, which set forth the Division's assertion of a personal income tax deficiency against petitioner as follows:

	<u>1980</u>	<u>1981</u>	<u>1982</u>
1. Additional Income (As Determined by Source and Application Method)	32,582	45,398	58,820
2. Exemption Disallowed	750	750	800
3. Additional Interest Income (Allocated Between Husband and Wife)	1,812	2,617	1,495
	<u>1980</u>	<u>1981</u>	<u>1982</u>
Per Audit	4,738	7,508	7,081
Per Return	<u>557</u>	<u>1,137</u>	<u>2,046</u>
	4,181	6,371	5,035
4. Capital Loss Allowed	-----	-----	(3,000)
5. Itemized Deduction Allowed	(3,250)	(3,150)	1,749
	<u>1980</u>	<u>1981</u>	<u>1982</u>
Per Audit	5,150	5,150	5,150
Per Return	<u>1,900</u>	<u>2,000</u>	<u>6,899</u>
	<u>3,250</u>	<u>3,150</u>	<u>1,749</u>
Net Adjustment	31,894	45,615	59,864
Taxable Income Previously Stated	(5,313)	(2,880)	(7,840)
Corrected Taxable Income	26,581	42,735	52,024
Tax on Corrected Taxable Income (IT-250)	2,281	4,533	5,713
Corrected Tax Due	2,281	4,533	5,713
Tax Previously Computed	-0-	-0-	-0-
Total Additional Tax Due	2,281	4,533	5,713

On September 27, 1985, the Division issued to petitioners Ugo and Leonora Cianciosi a Notice of Deficiency which asserted \$12,527.00, in additional personal income tax due, plus a 50% fraud penalty and interest, for the years 1980, 1981 and 1982. Said notice was premised upon the Statement of Audit Changes dated February 28, 1985.

It should be noted that in the Statement of Audit Changes the Division allowed itemized deductions of \$5,150.00 for each of the years in question. The Division determined these amounts to be reasonable under the circumstances. These estimated deductions consisted of the following:

<u>Deduction</u>	<u>Amount</u>
Real Estate Taxes Paid	\$2,000.00
Sales Taxes Paid	500.00
Medical Expenses	150.00
Charitable Contributions	300.00
Mortgage Interest & Expense	<u>2,200.00</u>
	5,150.00

On his return, petitioner claimed the standard deduction of \$1,900 and \$2,000 for 1980 and 1981, respectively. The estimated itemized deduction thus allowed an additional \$3,250.00 and \$3,150.00 in deductions for those respective years.

For 1982, petitioner claimed itemized deductions of \$6,899.00, consisting of \$2,508 in claimed medical and dental expenses, \$1,862 in total taxes, \$2,192 in interest expenses, and \$337 in contributions. The Division, however, allowed deductions of only \$5,150.00, resulting in an increase of \$1,749 in petitioner's audited taxable income for 1982.

The additional interest income resulted from petitioner's underreporting of interest earned during the years at issue.

It should be noted that the allocation of interest between petitioner and his wife and the personal exemption disallowance resulted from the Division's recomputation of tax herein which was based upon a "married filing separately" filing status. This allocation of interest income and exemption disallowance is not in dispute herein. The capital loss allowance is likewise not in dispute.

Following the issuance of the Notice of Deficiency, the Division further adjusted petitioner's personal living expenses downward for each of the three years at issue based upon an additional reduction in education costs. This reduction, in turn, reduced the total applications of funds and excess applications for each of the years at issue. The Division also reduced the E.F. Hutton margin account increase asserted to be an application of funds for 1982. These adjustments are summarized below.

	<u>1980</u>	<u>1981</u>	<u>1982</u>
Corrected Taxable Income per Statement of Audit Changes	26,581.00	42,735.00	52,024.00
Reduction in personal living expenses (education costs)	(1,825.00)	(1,660.00)	(1,565.00)
Reduction in E.F. Hutton Margin account increase			<u>(8,439.00)</u>
Recomputed Taxable Income	24,756.00	41,075.00	42,020.00
Recomputed Tax Due	2,025.84	4,310.50	4,442.80

With respect to the reduction in the E.F. Hutton Margin account increase, the Division conceded that petitioner acquired the shares of New York State Electric and Gas and Safeguard prior to the year in question. This was the basis of the Division's adjustment with respect to this calculation. (Although why such proof resulted in a 50% adjustment and not an adjustment proportional to the value of the NYS G&E and Safeguard stock is unclear.)

Regarding the remaining items in the E.F. Hutton account, petitioner purchased the 100 IBM calls on credit. Also, petitioner purchased the 135 shares of IBM on October 15, 1979. Petitioner reported dividends in respect of these IBM shares on his 1980 and 1981 returns.

Subsequent to hearing, the Division conceded that certain automatic credit advances made to petitioner's Endicott Trust Checking account should have been considered as a source of funds. This is so since total deposits in checking accounts included such credit advances. As noted above, total checking deposits less expense per returns resulted in total personal checks written which was considered an application of funds under the method employed herein. This conceded adjustment is summarized below:

	<u>1980</u>	<u>1981</u>	<u>1982</u>
Recomputed Taxable Income	24,756.00	41,075.00	42,020.00
Conceded Reduction based on credit advances	(<u>31.00</u>)	(<u>1,012.00</u>)	(<u>3,955.00</u>)
Taxable Income as asserted by Division subsequent to hearing	24,725.00	40,063.00	38,065.00

RELATED NOTICES OF DEFICIENCY

On September 27, 1985, the Division issued to Ugo and Leonora Ciansiosi a Notice of Deficiency which asserted \$841.00 in unincorporated business tax (UBT) due, plus fraud penalty and interest, for the year 1980. This notice was premised upon the results of the personal income tax audit of petitioner discussed herein. Pursuant to the adjustments to the personal income tax deficiency made subsequent to issuance of the notice, the UBT deficiency was also adjusted downward to \$768.60, plus fraud penalty and interest. Additionally, the adjustments conceded by the Division subsequent to hearing with respect to 1980 will adjust

petitioner's taxable business income downward by an additional \$31.00 with a corresponding adjustment to the UBT deficiency.

Also on September 27, 1985, the Division issued to petitioner Leonora Ciaciosi a Notice of Deficiency which asserted \$191.00 in personal income tax due, plus minimum interest, for the years 1980, 1981 and 1982. This deficiency was based on the Division's allocation of additional interest income found on audit to petitioner Leonora Ciaciosi. Such allocation apparently resulted from the Division's recomputation of tax due herein as if petitioners had filed separate returns. Petitioner Leonora Ciaciosi conceded liability with respect to this Notice of Deficiency.

OPINION

The Administrative Law Judge sustained the use of the source and application of funds methodology employed to audit petitioner, but held that petitioner had established that certain adjustments to the audit were required. The Administrative Law Judge also concluded that certain other adjustments sought by petitioner had not been proven. Further, the Administrative Law Judge found that the Division had not sustained its burden to prove fraud for the years 1980 and 1981, but that for the year 1982, petitioner was estopped from challenging the fraud penalty by his plea of guilty to a misdemeanor charge which included the failure to pay tax with intent to evade tax. With respect to the years 1980 and 1981, the Administrative Law Judge concluded that the Division's assertion of the negligence penalty, pursuant to section 685(b) of the Tax Law, at the conclusion of the hearing, as an alternative to the fraud penalty, did not provide petitioner with adequate notice of the lesser penalty. Therefore, the Administrative Law Judge refused to impose the negligence penalty.

On exception, petitioner asserts that the Administrative Law Judge erred in not allowing petitioner two additional sources of funds: \$11,000 in checks drawn on an account that was determined to be his mother's account and \$12,779 from closed bank accounts. Petitioner also asserts that the Administrative Law Judge erred in asserting that petitioner was estopped from contesting the fraud penalty imposed for 1982.

In response, the Division relies on the brief it filed before the Administrative Law Judge and the determination rendered by the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

With respect to the two additional sources of funds requested by petitioner, the Administrative Law Judge gave specific factual reasons for not allowing the two items as sources. Petitioner has not articulated a challenge to the facts upon which the Administrative Law Judge relied, nor to the Administrative Law Judge's rationale for disallowing the items. Instead, petitioner has simply stated that the sources should have been allowed. We see no basis for modifying the Administrative Law Judge's determination.

With respect to the imposition of the fraud penalty, the Administrative Law Judge specifically found that petitioner had pled guilty to a misdemeanor charge that included the failure to pay tax with the intent to evade tax. Based on this fact, the Administrative Law Judge concluded that petitioner was collaterally estopped from challenging the fraud penalty. Petitioner does not challenge the Administrative Law Judge's legal reasoning but instead argues that "the plea was to willful failure to file a tax return and not tax evasion" (petitioner's exception). Petitioner's claim is in absolute contradiction to the record where it is indicated that petitioner was convicted of an "Attempt to Evade Tax, a class A misdemeanor, in violation of section 695(a) of the Tax Law of the State of New York" (Exhibit T, Order and Conditions of Conditional Discharge, Town Court, Town of Vestal). Accordingly, we see no basis for altering the Administrative Law Judge's determination on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Ugo and Leonora Cianciosi is denied;
2. The determination of the Administrative Law Judge is affirmed.³

3. The petition of Ugo and Leonora Ciansiosi is granted to the extent indicated in conclusions of law "E", "G", "J", "K" and "L", but is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of deficiency dated September 27, 1985 in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
January 31, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner