STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANTHONY LOMANGINO

for Redetermination of a Deficiency or for Refund of Personal Income Tax and Unincorporated Business Tax under Articles 22 and 23 of the Tax Law for the Years 1979 and 1980.

DECISION

Petitioner, Anthony Lomangino, 327 Greenlawn Road, Greenlawn, New York 11740, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1979 and 1980 (File No. 43772).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 19, 1986 at 1:30 P.M., with all briefs to be submitted by May 1, 1986. Petitioner appeared by Macri, Greenspan & Moramarco, Esqs. (Raphael P. Greenspan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly valued petitioner's inventory in computing the gain on the sale of his business.

FINDINGS OF FACT

1. Petitioner, Anthony Lomangino, filed a joint New York State Income Tax Resident Return together with his wife, Susan Lomangino, for the year 1979. For the year 1980, petitioner and his wife filed separately on one return.

2. (a) On February 25, 1983, the Audit Division issued a Notice of Deficiency to petitioner, Anthony Lomangino, for additional tax due of $12,447.64, plus interest, for the year 1979. This consisted of $3,986.63 in unincorporated business tax and $8,461.01 in personal income tax.

(b) On February 25, 1983, the Audit Division also issued a Notice of Deficiency to petitioner for additional tax due of $851.16, plus interest, for the year 1980. This was composed of $186.05 in unincorporated business tax and $896.11 in personal income tax, less a credit of $231.00 which was attributable to petitioner's wife.

3. The deficiencies were the result of a field audit of petitioner's business, Mr. Thrifty Discount Liquors. The audit disclosed that petitioner sold the business on January 9, 1979. The following adjustments were made:

a) Inventory as per petitioner's records of $215,782.00 was reduced to $107,570.52, resulting in an overstatement of cost of goods sold of $108,211.48 (stated as $108,212.00 in the audit report).

b) Petitioner was allowed additional cost of $35,000.00 for good will which he had paid when he acquired the store. Capital gain after audit was calculated at $80,405.00. (Petitioner had reported a capital gain of $7,193.00 on his return.)

c) Examination of petitioner's business checking account showed deposits made after the sale of the business. These deposits were determined to be due to accounts receivable but were not recorded on the business books by petitioner's accountant. Petitioner conceded that these deposits were income items. The amounts of the deposits are not clear from the record, however it appears that the deposits constitute the $14,077.46 in "additional sales per audit" for 1979 noted in the Statement of Audit Changes.

d) Interest income was held subject to unincorporated business tax for both 1979 and 1980, although petitioner elected the option of reporting all gains during 1979.

The only item in issue at the hearing was the value of the inventory at the time of the sale of the business, January 9, 1979.

4. Petitioner operated the liquor store, which was located at 648 North Wellwood Avenue, Lindenhurst, New York, from 1974 until he sold it on January 9, 1979. During the last year he owned the business, he worked at another job and operated the business on an absentee basis while he attempted to sell it.

5. On August 23, 1978, petitioner entered into a contract with Frank Liotta and Ralph Prisco for the sale of his business. The contract stated that the purchase price was $220,000.00, subject to adjustments, allocated as follows:

good will	$ 35,000.00
furniture and fixtures	35,000.00
inventory	100,000.00
lease	50,000.00
Total	$220,000.00

Upon execution of the agreement, $20,000.00 was tendered and $50,000.00 was to be paid in cash or certified check at the time of closing. The balance, $150,000.00, which amount was subject to the results of a physical inventory to be taken just prior to the closing, was to be paid by a secured promissory note.

6. The purchasers filed a Bulk Sale Questionnaire with the Department of Taxation and Finance on October 27, 1978 showing the selling price of inventory to be $93,562.52.

7. The closing took place on January 9, 1979 and the $150,000.00 balance noted above was increased to $157,570.52, evidently as a result of the physical inventory prior to the closing. The additional $7,570.52 was added by the auditors to the $100,000.00 inventory figure in the contract, resulting in the $107,570.52 used in computing the deficiency.

8. The purchasers of the business made the physical inventory of the business shortly before the closing. However, no details thereof are in the record. Petitioner claims that his manager had purchased too great a quantity of off-brand items which had to be heavily discounted to the purchaser of the business at the time of the inventory valuation. Petitioner also claims to have purchased $65,327.00 in inventory between December 31, 1978 and January 9, 1979, in order to replenish the stock for the new owner after the busy holiday season. However, nothing was shown to substantiate these claims.

9. Petitioner's 1978 Schedule C, to Federal Form 1040, shows opening inventory of $211,908.00, additional purchases of $704,282.00 and closing inventory on December 31, 1978, of $158,706.00.

10. Inventory as of January 9, 1979, is hereby found to be $151,422.50, which represents the December 31, 1978, closing inventory, less an estimated $7,283.50 in inventory sold during the six business days petitioner owned the store in 1979 (sales assumed at one-half weekly average due to post-holiday slack period).

CONCLUSIONS OF LAW

A. That the inventory as of January 9, 1979, was $151,422.50 and the petitioner's gain on the sale of the business is to be reduced from $80,405.00, as calculated by the Audit Division, to $36,563.52. The $7,193.00 reported gain is to be subtracted from this figure resulting in a net additional gain of $29,370.52. Petitioner has not sustained his burden of proof under section 689(e) of the Tax Law to show that he purchased inventory between January 1 and January 9, 1979.

B. That the petition of Anthony Lomangino is granted to the extent indicated in Conclusion of Law "A" and, except as so granted, it is denied and the notices of deficiency are otherwise sustained.

DATED: Albany, New York

OCT 15 1986

STATE TAX COMMISSION

Roderick G. W. Chu

PRESIDENT

Francis R. Koenig

COMMISSIONER

Maurice Jones

COMMISSIONER