

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

SANTO C. AND LINDA PISANI

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1981.

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Petitioners, Santo C. and Linda Pisani, 3989 Elmcrest Road, Liverpool, New York 13088, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1981 (File No. 47842).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on July 8, 1985 at 3:00 P.M., with all briefs and documents to be submitted by July 31, 1985. Petitioner appeared by Shiroki Associates (Kenneth Makowski, P.A.). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly disallowed a bad debt deduction claimed by Santo C. Pisani on the ground that the amount claimed represented a contribution of capital.

#### FINDINGS OF FACT

1. Santo C. Pisani filed a New York State Resident Income Tax Return for 1981. On this return, he reported a short-term capital loss of \$15,559.66.
2. On June 22, 1983, the Audit Division issued a Notice of Deficiency to

amount of \$1,036.30, plus interest of \$176.10, for a total amount due of \$1,212.40. The Statement of Audit Adjustment, which was issued March 11, 1983, stated that the loss of \$15,559.66 was disallowed since the amount involved was a contribution of capital to Little Gem Diner, Inc. and not a bad debt loss as claimed. At the hearing, the Audit Division requested that Linda Pisani's name be removed from the Notice of Deficiency since the tax return which led to the asserted deficiency was filed by Santo C. Pisani only.

3. Little Gem Diner, Inc. ("Little Gem") operated a diner in Syracuse, New York. In 1981, the stockholders and officers of Little Gem were Louis Adornato who was the president; Santo Pisani, who was the secretary; and Frank Winters, who was the treasurer.

4. During the period in issue, Mr. Pisani, Mr. Adornato and Mr. Winters were stockholders in a corporation which operated a truck stop and motel complex. On or about April 30, 1981, each of the foregoing individuals drew a bonus of \$15,559.00 from this corporation and deposited the funds into their personal accounts. They then withdrew these funds and deposited them into the account of Little Gem.

5. The bonus funds were provided to Little Gem in order to enable it to satisfy its creditors. The principals wanted the credit rating of Little Gem to remain sound because they planned to continue the operation of the diner as partners.

6. On or about June 30, 1981, Little Gem was dissolved as a corporate entity and the same individuals who were stockholders of Little Gem continued the operation of the diner as a partnership.

7. Little Gem and the successor partnership had the same creditors.

8. For the fiscal year ended June 30, 1979, Little Gem had taxable income, before a net operating loss, of \$11,613.00. For the fiscal years ended June 30, 1980 and June 30, 1981, Little Gem reported on its federal returns losses of \$11,830.94 and \$10,042.67, respectively. During each of the fiscal years ended June 30, 1978 through June 30, 1980, Little Gem's capital stock was valued at \$4,000.00. It reported a retained earnings deficit during the same three year period.

9. In 1981, Little Gem had total assets of \$42,298.49 and total liabilities of \$81,957.25 resulting in a retained earnings deficit of \$43,658.76.

10. No evidence was presented as to whether Little Gem executed a note promising to repay the funds that were transferred to it in 1981; whether Little Gem ever paid interest on the money that was transferred to it; or whether there were fixed repayment dates for the funds that were transferred to Little Gem.

#### CONCLUSIONS OF LAW

A. That, during the period in issue, Treas Reg. §1.166-1(c) provided, in part:

"Bona fide debt required. Only a bona fide debt qualifies for purposes of section 166. A bona fide debt is a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money. A gift or contribution to capital shall not be considered a debt for purposes of section 166."

B. That petitioner Santo C. Pisani has failed to sustain his burden of proof by establishing that there existed a bona fide debtor-creditor relationship between himself and Little Gem based upon an obligation to pay a fixed or determinable sum of money (Treas. Reg. §1.166-1[c]; Tax Law §689[e]). Indeed, in view of the poor financial situation of Little Gem, it **is** questionable whether petitioner expected a return of the funds provided. Accordingly, the Audit

Division properly determined that petitioner was not entitled to claim the bad debt deduction at issue.

C. That, in accordance with Finding of Fact "2", the Notice of Deficiency is cancelled insofar as it applies to petitioner Linda Pisani and the petition is, in all other respects, denied and the Notice of Deficiency **is** otherwise sustained,

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986

Rodriguez  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

~~Mark J. [Signature]~~  
COMMISSIONER