

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NUNZIO'S PIZZA, INC.

for Redetermination of a Deficiency or for
Refund of Corporate Franchise Tax under
Article 9A of the Tax Law for the Fiscal Years :
Ended June **30**, 1980 and June 30, 1981.

In the Matter of the Petition

of

VINCENT COPPOLA

DECISION

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Taxes under Article 22 of the :
Tax Law and Chapter 46, Title T of the
Administrative Code of the City of New York for :
the Years 1980 and 1981.

In the Matter of the Petition

of

ALBERT and JENNIE BRUNO

for Redetermination of a Deficiency or **for**
Refund of New York State and New York City
Personal Income Taxes under Article 22 of **the** :
Tax Law and Chapter **46**, Title **T** of the
~~Administrative~~ Code of the City of New York for :
the Years 1980 and 1981.

Petitioner, Nunzio's Pizza, Inc., 2155 Hylan Blvd., Staten Island, New
York 10306, filed a petition for redetermination of a deficiency or for refund
of corporate franchise tax under Article 9A of the Tax Law for the fiscal years
ended June 30, 1980 and June 30, 1981 (File No. 48723).

Petitioner Vincent Coppola, 2076 East 65th Street, Brooklyn, New York, 11234, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1980 and 1981 (File No. 48711).

Petitioners, Albert and Jennie Bruno, 379 Baden Place, Staten Island, New York 10306, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1980 and 1981 (File No. 49120).

A consolidated hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on September 12, 1985 at 10:45 A.M., with all documents to be submitted by November 28, 1985. Petitioners appeared by Feldman, Feldman & Co., CPA's (Marvin Todfeld, CPA). The Audit Division appeared by John P. Dugan, Esq. (Paul A. LeFebvre, Esq., of counsel).

ISSUE

Whether petitioners have shown that additional income determined upon audit (based on funds expended in excess of known funds available) was from nontaxable sources thus warranting cancellation of the asserted deficiencies.

FINDINGS OF FACT

1. On October 5, 1983, the Audit Division issued a Notice of Deficiency to petitioner Vincent Coppola asserting additional tax due for the years 1980 and 1981 in the aggregate amount of \$5,840.00, plus penalty [Tax Law §685(b)] and interest. A Statement of Audit Changes issued previously to Mr. Coppola and his wife Patricia Coppola on August 2, 1982 indicated that the

deficiency was based upon audit findings of additional unreported income in the amount of \$16,960.00 for 1980 and \$25,780.00 for 1981.

2. On December 9, 1983, **the** Audit Division issued a Notice of Deficiency to petitioners Albert and Jennie Bruno asserting additional tax due for the years 1980 and 1981 in the aggregate amount of \$3,727.00 plus penalty [Tax Law §685(b)] and interest¹. A Statement of Audit Changes issued previously to Mr. Bruno on August 2, 1983 indicated that such deficiency **was** based upon audit findings of additional unreported income in the amount of \$13,004.00 for 1980 and \$18,646.00 for 1981.

3. On September 15, 1983, the Audit Division issued a Notice of Deficiency to petitioner Nunzio's Pizza, Inc. ("Nunzio") asserting additional corporation franchise tax due in the amounts of \$2,805.00 and \$3,846.00, respectively, for the fiscal years ended June 30, 1980 and June 30, 1981, respectively, plus penalty [Tax Law §1085(b)] and interest for each of such fiscal years. A Statement of Audit Changes issued to Nunzio previously on August 2, 1983 indicated that the corporate deficiency was based on the results of the audits of Messrs. Bruno and Coppola.

4. Petitioners Coppola and Bruno are the sole shareholders of petitioner Nunzio, which during the period in question operated a pizza restaurant located in Staten Island, New York.

5. In or about October of 1982, the Audit Division commenced an audit of the three petitioners herein. The auditor reviewed petitioner Nunzio's corporate tax returns and accompanying accountant's workpapers and found no discrepancies.

1. Jennie Bruno's name appears hereafter throughout the document.

6. The auditor also performed a cash availability audit of petitioners Bruno and Coppola, the results of which give rise to the instant deficiencies. More specifically, the auditor analyzed and transcribed all bank accounts and then prepared a Statement of Cash Availability whereby total sources of cash (funds) from net wages, bank withdrawals, unemployment insurance received and (for Bruno) gambling winnings (from horse racing) were compared to total uses of cash (funds) by bank deposits, living expenses² and (for Bruno) claimed gambling losses (from horse racing) and cash payments to an I.R.A. account.

7. The above audit resulted in funds applied (expended) in excess of available funds for each year at issue as follows:

<u>Petitioner</u>	<u>1980</u>	<u>1981</u>
Bruno	\$13,004.00	\$18,646.00 ³
Coppola	\$16,960.00	\$25,780.00

8. Petitioners Bruno and Coppola were employed by Nunzio. The auditor was informed that such employment was the only source of income to Bruno and Coppola, and noted that there was no other apparent source of income. Accordingly, the auditor treated the excess funds determined upon audit (excepting the \$3,014.00 of gambling winnings for Bruno) as constructive dividends from Nunzio and included the entire amount of such excess funds plus the gambling winnings by Bruno as additional unreported taxable income. After computing and allowing the requisite increase in the standard deduction occasioned by such

2 This item included estimated amounts for food, out of pocket expenses, clothing, automobile and vacation, based on the number of people in each household.

3 For 1981, \$3,014.00 of the excess funds determined by the auditor.

excess funds, there resulted the instant deficiencies asserted against Bruno and Coppola.

9. In turn, the deficiency asserted against Nunzio was premised upon combining the amounts of excess funds determined to be constructive dividends to Bruno and Coppola (excluding the noted gambling winnings), including such combined amounts as additional income earned by Nunzio, and recomputing franchise tax due accordingly.

10. Neither Mr. Bruno nor Mr. Coppola appeared to give testimony at the hearing. In lieu thereof, each submitted an affidavit, as did Mr. Coppola's mother, which affidavits are more specifically detailed hereinafter. No explanation was offered **as** to why none of the affiants appeared to provide testimony.

11. Each petitioner's position herein is that there were additional, allegedly nontaxable, funds available as sources of cash during the years in question which were not taken into consideration in the audit analysis.

12. Petitioner Bruno -

a.) - Savings Withdrawals:

<u>DATE</u>	<u>AMOUNT</u>
1/8/80	\$ 326.00
1/29/80	2,000.00
3/20/80	800.00
3/25/80	2,200.00
10/1/80	600.00
<u>TOTAL</u>	<u>\$5,926.00</u>

b.) - Rental Receipts:

approximately \$650.00 per month during the audit period (\$650.00 x 24 = \$15,600.00)

c.) - Veteran's Disability Check:

approximately \$180.00 per month during the audit period (\$180.00 x 24 = \$4,320.00)

13. Petitioner Bruno's affidavit states that Nunzio's business was not good during the years at issue and that the noted withdrawals as well as the rental income were used to cover living expenses, partly in cash and partly by deposit into the checking account. Said affidavit also states that the rental property was "a loss" and thus Mr. Bruno did not "think it was necessary to inform my accountant of the building". Finally the affidavit states that the savings bank withdrawal of \$2,000.00 made on January 29, 1980 was in connection with a settlement of an accident claim.

14. The auditor did not allow as available sources of funds some of the withdrawals listed in Finding of Fact "12-a", specifically those on January 29, 1980 (\$2,000.00), March 25, 1980 (\$2,200.00) and October 1, 1980 (\$600.00), since there were no matching or near-matching deposits corresponding thereto and no explanation of the disposition of these funds. However, the January 8, 1980 (\$326.00) and March 20, 1980 (\$800.00) withdrawals were allowed as sources of funds, as reflected in the auditor's workpapers. Bank statements, specifically regarding deposits, were not available to the auditor upon audit (or subsequently) for the period January 1980 through April 1980, and thus an average of other months' deposits **was** used in computing the analysis.

15. Subsequent to the hearing, the following items were submitted on behalf of petitioner Bruno:

a.) Copies of bank statements showing returned checks during June, 1980 and March, 1981 in the amounts of \$100.00 and \$200.00, respectively sought by petitioner **as a** reduction of deposits and hence a reduction of applications of funds.

b.) A photocopy of a U.S. Treasury check dated October 1, 1985 in the amount of \$185.00 with the notation "Mr. A. C. Bruno" and "10/1/85".

evidence that indicated disability payments had commenced in or about 1962, and asserted that such payments continued during (and after) the years in question.

c.) Summary schedules of rental income and expenses, a closing statement, deed and loan amortization schedules pertaining to rental property located at 450 Castleton Avenue, Staten Island, New York. The summary schedule reflects gross rents of \$7,800.00 per year with total expenses of \$6,886.00 for 1980 and \$6,915.00 for 1981, thus leaving net cash gains of \$914.00 for 1980 and \$885.00 for 1981. It was asserted via Mr. Brunos's affidavit that part of the rental proceeds were deposited to his checking account, with the balance used for personal living expenses. The auditor's analysis of checking account disbursements indicates that expenses of the property were paid by check, and thus were included in deposits as applications of funds for each year.

d.) With respect to the \$2,000.00 withdrawal on January 29, 1980 (see Finding of Fact "12"), petitioner's representative made the following comment:

"[w]ith regard to the \$2,000.00 accident claim, Albert Bruno could not find the papers; however, he claims that the \$2000.00 withdrawn on 1/29/80 was paid to fix the car and the \$2,000 deposit on 8/27/81 was a reimbursement from the other driver's insurance company."

16. Petitioner Coppola -

a.) - Savings Withdrawals:

<u>DATE</u>	<u>AMOUNT</u>
3/20/80	\$ 500.00
4/11/80	1,000.00
9/30/80	500.00
3/4/82	2,000.00
1/27/81	3,000.00

1/09/82	2,500.00
11/25/80	2,500.00
<u>TOTAL</u>	<u>\$12,000.00</u>

b.) - Funds From Rubina Coppola (mother):

i) Savings Withdrawals:

<u>DATE</u>	<u>AMOUNT</u>
4/23/80	\$2,069.00
12/4/80	2,598.00
4/11/80	2,800.00
5/22/80	599.00
<u>TOTAL</u>	<u>\$8,066.00</u>

ii) Approximately \$200.00 per month in cash from
Rubina Coppola during audit period (\$200.00 x 24
= \$4,800.00)

Petitioner Coppola's affidavit, like petitioner Bruno's affidavit, states that Nunzio's business was not good during the years at issue and that the noted withdrawals and other cash from his mother were used to cover living expenses, partly in cash and partly by deposit into the checking account. Mr. Coppola's affidavit states that the withdrawals in 1982 were used to make partial repayments to his mother, Rubina Coppola. Rubina Coppola's affidavit states the same amounts and purposes regarding these funds as does Mr. Coppola's affidavit.

17. Submitted on behalf of petitioner Coppola subsequent to the hearing, were duplicate copies of the Vincent Coppola and Rubina Coppola affidavits previously offered in evidence, copies of bank books reflecting petitioner Coppola's withdrawals (without further explanation other than that noted in the affidavits) and copies of account statements for a Dreyfus Liquid Assets Fund held by petitioner Vincent Coppola. This fund reflected withdrawals of \$35.18 in 1980 and \$1,588.56 in 1981. The Dreyfus account, which was opened on December 5, 1980, reflected deposits of \$3,300.00 in 1980 and \$6,550.00 in 1981. This account was not revealed at the time of audit nor was an explanation advanced

Petitioner Coppola seeks to have the withdrawals of \$1,623.74 deemed an additional source of funds.

18. The auditor's workpapers reflect that three of the noted withdrawals in 1980 (those on March 20, 1980, April 11, 1980 and September 30, 1980) were, in fact, allowed as sources of funds, with the January 27, 1981 withdrawal of \$3,000.00, and the November 25, 1980 withdrawal of \$2,500.00 (as well as the 1982 withdrawals) not allowed as not matched to any deposit or otherwise explained as to disposition.

19. There is no evidence that the auditor was in any manner advised or made aware of funds flowing to petitioner Coppola from his mother, or to petitioner Bruno from the noted rental property, nor was the existence or asserted nontaxability of certain funds (the alleged accident settlement and the veteran's disability) alleged at the time of the audit.

20. At the hearing, the Audit Division asserted, in view of statements contained in the affidavits and upon the evidence submitted, greater deficiencies against petitioner Bruno based on the alleged unreported rental income, against petitioner Coppola based on the funds allegedly received from his mother, and against petitioner Nunzio based on such combined additional income.

21. The items submitted post-hearing were submitted pursuant to a request by petitioners' representative for a period of time, specifically until November 1, 1985, to submit additional documents providing further information regarding petitioner Bruno's accident settlement, veteran's disability, proof of check (rather than cash), I.R.A payments, a summary of rental income and expenses and account statements from the Dreyfus liquid assets fund, as well as further information regarding the funds received by petitioner Coppola from his mother.

Nothing was submitted regarding the I.R.A. account.

22. No challenge was raised concerning the estimated cost of living amounts determined by the auditor as an application of funds.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law section 689(e), petitioners herein bear the burden of proving the inaccuracy of the asserted deficiencies. However, Tax Law section 689(e)(3) places the burden of proving the propriety of any increase to such deficiencies, as asserted herein after their issuance, upon the Audit Division.

B. That based upon the items presented, there is insufficient documentary evidence, outside of the affidavits, to support certain adjustments with regard to petitioner Bruno. Such adjustments for each year at issue are as follows:

<u>ITEM</u>	<u>1980</u>	<u>1981</u>
<u>Additional Sources of Funds:</u>		
Rental Income (\$650.00 x 12)	\$7,800.00	\$7,800.00
Veteran's Pension (\$185.00 x 12)	2,220.00	2,220.00
Savings Withdrawals: (1/29/80)	2,000.00	
(3/25/80)	2,200.00	
(10/1/80)	600.00	
<u>Reductions of Applications of Funds:</u>		
Returned Checks	100.00	200.00

The Audit Division is directed to recompute and modify the deficiency for each year by adjusting its cash availability audit in light of the foregoing items. Finally in view of the evidence submitted, the assertion of a greater deficiency against petitioner Bruno is not warranted.

C. That, outside of the affidavits, there is sufficient documentary evidence to support certain adjustments with regard to petitioner Coppola. Such adjustments for each year at issue are as follows:

<u>ITEM</u>	<u>1980</u>	<u>1981</u>
<u>Additional Sources of Funds:</u>		
Savings Withdrawals: (11/25/80)	\$2,500.00	
(1/27/81)		\$3,000.00
Withdrawals from Dreyfus Fund	35.18	1,588.56

Additional Applications of Funds:

Deposits to Dreyfus Fund

3,300.00

6,550.00

The evidence submitted does not suffice to allow any additional adjustment based upon the allegation, per affidavit, of funds received from Rubina Coppola. The Audit Division is directed to recompute and modify the deficiency for each year by adjusting its cash availability audit in light of the foregoing items. Finally, any increase to the deficiency (per year) as occasioned by inclusion of deposits to the Dreyfus fund as additional applications of funds results from evidence supplied by petitioner and is clearly warranted.

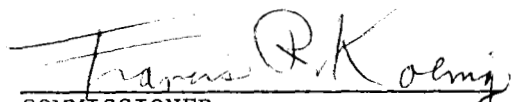
D. That the petition of Albert and Jennie Bruno is granted to the extent indicated in Conclusion of Law "B", but is otherwise denied and the deficiency asserted, as recomputed in accordance herewith, is sustained. The petition of Vincent Coppola is granted to the extent indicated in Conclusion of Law "C" but is otherwise denied and the deficiency asserted, as recomputed in accordance herewith, is sustained. Finally, the petition of Nunzio's Pizza, Inc. is granted to such extent as is consistent with recomputation of the deficiency against petitioners Bruno and Coppola, but is otherwise denied and the deficiency asserted against petitioner Nunzio's Pizza, Inc., as recomputed, is sustained.

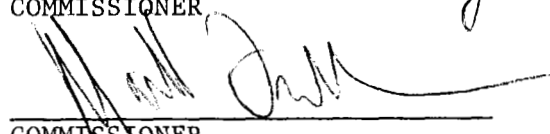
DATED: Albany, New York

STATE TAX COMMISSION

FEB 1970


PRESIDENT


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COMMISSIONER