

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

PEDRO ALVAREZ AND VIVIAN ALVAREZ

DECISION

for Redetermination of a Deficiency or for Refund of New York State and New York City Income Tax 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.

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Petitioners, Pedro and Vivian Alvarez, 41 St. Andrew's Place, Yonkers, New York 10705, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income tax 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. 53193).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 28, 1987 at 10:00 A.M., with all briefs submitted by May 7, 1987. Petitioners appeared by Gustavo DeVelasco, Ph.D. The Audit Division appeared by John P. Dugan, Esq. (Michael I. Infantino, Esq., of counsel).

#### ISSUE

Whether the Audit Division's reconstruction of petitioners' income for the years 1980 and 1981, using a cash availability auditing method, properly determined that petitioners had unreported income.

#### FINDINGS OF FACT

1. On March 26, 1984, the Audit Division issued to petitioners a Notice of Deficiency which stated additional tax due of \$2,524.00 and interest of \$664.29 for a total amount due of \$3,188.29 for the tax years 1980 and 1981.

Previously, on January 11, 1984, the Audit Division issued to petitioners a Statement of Personal Income Tax Audit Changes which set forth additional tax due of \$2,524.00 and interest of \$604.00 for a total amount due of \$3,128.00 for the tax years 1980 and 1981. Said Statement of Personal Income Tax Audit Changes set forth the following explanation:

"As the result of field audit the following adjustments are being made:

Unexplained deposits are deem [sic] to be unreported income. 1980 - \$6,597.00, 1981 - \$19,663.00"

2. Petitioners timely filed New York State income tax resident returns for the years 1980 and 1981. **On** both returns Pedro Alvarez listed his occupation as unemployed and Vivian Alvarez listed her occupation as clerk. For both years petitioners elected the standard deduction, claimed five exemptions and claimed entitlement to a refund.

3. The Audit Division performed a cash availability income audit of petitioners for the tax years 1980 and 1981. The cash availability income audit is an audit which compares the taxpayers' sources of income with expenditures of money or revenue. If the audit reveals a higher amount of expenditures than income, the difference is assessed as unreported income.

4. For the tax year 1980 the Audit Division determined the following:

| 1980                                     |                  |
|--|------------------|
| <u>CASH OUT</u>                          |                  |
| Deposit to the Seamen's Bank for Savings | \$ 1,450.00      |
| Deposit to the Seamen's Bank for Savings | 10,848.00        |
| Deposit to the Seamen's Bank for Savings | 325.00           |
| Deposit to the Seamen's Bank for Savings | 861.00           |
| Cash for Living Expenses                 | <u>17,582.00</u> |
| Total Cash Out                           | \$31,066.00      |

CASH IN

|  |                    |
|--|--------------------|
| Federal Refund                               | \$ 1,000.00        |
| Wife's Salary Net                            | 10,940.00          |
| Tax Refund (New York State)                  | 154.00             |
| Withdrawal from Seamen's Savings Account     | 375.00             |
| Withdrawal from Seamen's Savings Bank        | 500.00             |
| Withdrawal from Seamen's Savings Bank        | 7,000.00           |
| Rental Income Gross                          | 3,300.00           |
| Money Received from Aunt for Aluminum Siding | 1,200.00           |
| Total Cash In                                | <u>\$24,469.00</u> |
| Total Cash Out                               | 31,066.00          |
| DIFFERENCE                                   | <u>\$ 6,597.00</u> |

5. The auditor's workpapers indicated under subtitle "Cash In" for the year 1980 a withdrawal from the Seamen's Savings Bank in the sum of \$375.00. In fact, the withdrawal, as indicated in the transcript of activity in the account, was \$3,375.00. Therefore, the total "Cash In" figure should have read \$27,469.00, or a difference between "Cash In" and "Cash Out" of \$3,597.00.

6. With regard to cash living expenses listed under subtitle "Cash Out" for the year 1980, the auditor included food, mortgage expense, aluminum siding, transportation and heating expense which totaled \$17,582.00. These figures are substantiated by taxpayers' Federal tax returns for the years in issue, the Federal Department of Labor Guidelines for food expense, and other records and documentation produced by the taxpayer. The heating expense was calculated by doubling the heating expense claimed for the rental property, which was one half of the taxpayers' residence.

7. For the tax year 1981, the Audit Division determined the following cash availability of petitioners:

1981  
CASH OUT

|                                      |                    |
|--------------------------------------|--------------------|
| Deposit to the Seamen's Savings Bank | \$ 1,881.00        |
| Deposit to the Seamen's Savings Bank | 600.00             |
| Deposit to the Seamen's Savings Bank | 13,733.00          |
| Cash Living Expenses                 | <u>16,604.00</u>   |
| Total Cash Out                       | <u>\$32,818.00</u> |

CASH IN

|                                       |                           |
|---------------------------------------|---------------------------|
| Check from Father                     | \$ 2,605.00               |
| Federal Tax Refund                    | 648.00                    |
| State Tax Refund                      | 267.00                    |
| Wife's Salary - Net                   | 3,408.00                  |
| Rental Income - Gross                 | 3,300.00                  |
| Withdrawal from Seamen's Savings Bank | 1,627.00                  |
| Withdrawal from Seamen's Savings Bank | 1,300.00                  |
| Total Cash In                         | <u>\$13,155.00</u>        |
| <br>Total Cash Out                    | <br><u>32,818.00</u>      |
| DIFFERENCE                            | <u><u>\$19,663.00</u></u> |

Cash living expenses for the year 1981 were calculated by the Audit Division using the total cost of living from 1980, \$28,210.00, and subtracting checks written of \$11,606.00 to arrive at cash living expenses of \$16,604.00. However, the Audit Division included in this figure an expenditure for aluminum siding in the sum of \$2,400.00 which was not incurred in the year 1981. Therefore, the cash living expenses for the year 1981 should have been listed as \$14,204.00 and the total "Cash Out" figure should have been \$30,418.00. Hence, the differential and the amount ultimately underreported should have been \$17,263.00.

8. Petitioners' representative contends that changes made by the Audit Division prior to the issuance of the Statement of Personal Income Tax Audit Changes issued on January 11, 1984 and the issuance of the Notice of Deficiency dated March 26, 1984 were without justification.

CONCLUSIONS OF LAW

A. That section 689(e) of Article 22 of the Tax Law and section T46-189.0(e) of Title T of the Administrative Code of the City of New York both place the burden of proof upon petitioner, except in three specifically enumerated instances, none of which is applicable in this matter.

B. That petitioners have not sustained their burden of proof to show that during the years in question their cash living expenses did not equal those


determined by the Audit Division through taxpayer's own books and records. However, pursuant to Finding of Fact "5", the Audit Division erred in transcribing the withdrawals from Seamen's Savings Account #1-1622769. Said error failed to credit the taxpayer with \$3,000.00 in withdrawals. Pursuant to Finding of Fact "7", for tax year 1981, the Audit Division is directed to modify the cash living expenses by \$2,400.00, the value of the aluminum siding which was erroneously included in the cash living expenses for 1981 even though it was incurred in 1980.

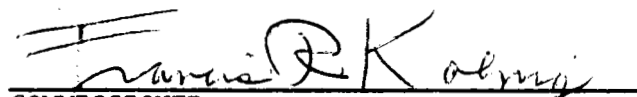
C. That the petition of Pedro and Vivian Alvarez is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to recompute the amount shown due on the Notice of Deficiency consistent with the conclusions reached herein; and that, except as so granted, the petition is in all other respects denied.

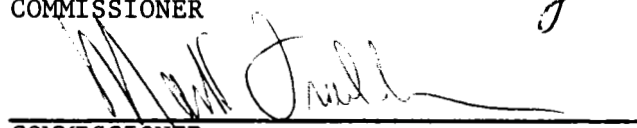
DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 '1987

  
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COMMISSIONER

  
COMMISSIONER