

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ROCCO COMMISSO AND CATHEKINE COMMISSO

DECISION

for Redetermination of a Deficiency or for  
Refund of New York State Personal Income Tax  
under Article 22 of the Tax Law for the Years :  
1979 and 1980.

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Petitioners, Rocco Commisso and Catherine Commisso, 229 Winding Brook Road, New Rochelle, New York 10804, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1979 and 1980 (File No. 58605).

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 October 20, 1986 at 1:15 P.M., with additional documentary evidence to be submitted by December 1, 1986. Petitioners appeared by Raymond Zutell, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division issued a Notice of Deficiency for the 1979 tax year prior to the expiration of the statute of limitations for assessment.

II. Whether the Audit Division's reconstruction of petitioners' income for the years 1979 and 1980, through utilization of cash availability analyses, properly determined that petitioners had additional unreported income.

FINDINGS OF FACT

1. Petitioners herein, Rocco Commisso and Catherine Commisso<sup>1</sup>, timely filed joint New York State income tax resident returns for 1979 and 1980. On said returns, petitioner reported total New York income of \$35,658.00 for 1979 and \$56,187.00 for 1980.

2. On March 15, 1984, petitioner executed a consent extending the period of limitation for assessment for the year 1980 to any time on or before April 15, 1985. The record herein does not contain a consent extending the period of limitation for assessment for the 1979 tax year.

3. On June 14, 1984, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioner increasing reported taxable income by \$23,674.00 for 1979 and by \$13,773.00 for 1980. The aforementioned increases to reported taxable income were based on the Audit Division's assertion that petitioner received unreported constructive dividends during the years at issue from a wholly-owned corporation.

4. Based on the aforementioned Statement of Personal Income Tax Audit Changes, the Audit Division, on November 23, 1984, issued a Notice of Deficiency to petitioner for 1979 and 1980 asserting additional tax due of \$5,206.00, plus a 5% negligence penalty of \$261.00 and interest of \$2,644.78, for a total allegedly due of \$8,111.78.

5. During the years at issue, petitioner was employed on a full-time basis by Chase Manhattan Bank, N.A. as a second vice president. Mr. Commisso was also president and sole stockholder of a discotheque known as Nereid Restaurant, Inc. (hereinafter "Nereid") located in Bronx, New York. Petitioner

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1 Catherine Commisso is involved in this proceeding solely as the result of having filed joint returns with her spouse. Accordingly, the use of the term petitioner shall hereinafter refer solely to Rocco Commisso.

was active in the day-to-day management of Nereid and received wages from Nereid **of** \$9,750.00 in 1979 and \$20,800.00 in 1980.

6. Sometime after August 31, 1980, the Audit Division conducted a field audit of Nereid's books and records to determine if any additional sales and use taxes were due and owing. The final results **of** the sales tax audit determined that Nereid had underreported its sales by \$105,932.00 for the period June 1, 1976 through August 31, 1980.

7. After the sales tax audit of Nereid was concluded, the results **of** said audit were forwarded to the Audit Division's income tax section and an income tax field audit **was** commenced. The Audit Division reconstructed petitioner's income for each year at issue through the use of cash availability analyses. The following chart represents a synopsis of said analyses:

<u>1979</u>		
Cash In		
Salary		\$24,933.00
Cash Out		
Deposits to checking	\$20,916.00	
Deposits to savings	24,706.00	
Meals from salary	300.00	
Estimate cash living expenses	<u>5,200.00</u>	
Total Cash Out		<u>51,122.00</u>
Excess Cash Out		<u>\$26,189.00</u>
<u>1980</u>		
Cash In		
Salary	\$15,641.00	
Bonus	15,000.00	
Profit sharing	12,657.00	
Money orders from Canada	10,150.00	
Withdrawals from savings	<u>25,206.00</u>	
Total Cash In		\$78,654.00
Cash out		
Deposits to checking	\$55,141.00	
Meals from salary	150.00	
Cash living expenses	12,288.00	
Funds to purchase house	51,389.00	
Less paid by check	<u>(25,901.00)</u>	
Total Cash Out		<u>92,527.00</u>
Excess Cash Out		<u>\$13,873.00</u>

8. Although the cash availability analysis for 1979 revealed additional income of \$26,189.00, the Audit Division, in its computation of additional tax due, determined a constructive dividend of only \$23,774.00. The \$23,774.00 figure represents additional sales attributed to Nereid for the 1979 calendar year as determined by the sales tax audit. The additional sales as determined by the sales tax audit was utilized for the assessment of additional income tax since the Audit Division in its cash availability analysis for 1979 had used an estimated figure for cash living expenses.

9. In 1979 petitioner borrowed approximately \$13,700.00 from an uncle located in Toronto, Canada. Said funds were to be utilized by petitioner as a down payment on the purchase of a personal residence. Petitioner received the \$13,700.00 from his uncle in cash on several dates in 1979 and said total sum was deposited by Mr. Commisso in either his checking account or one of several savings accounts.

10. Petitioner's first child, a daughter, was born in 1979. Said child was baptized on December 2, 1979 and a party, attended by some 150 of Mr. Commisso's friends and relatives, followed the baptismal ceremony. Petitioner's daughter received gifts, in the form of both cash and checks, totalling \$9,529.00 and said sum was deposited by petitioner into a savings account.

11. In its cash availability analysis for 1979, the Audit Division did not take into consideration the \$13,700.00 of cash funds received by petitioner from his uncle or the \$9,529.00 in gifts received from his daughter's baptismal party.

12. For the 1980 tax year, petitioner introduced evidence establishing that the additional income disclosed pursuant to the cash availability analysis should be reduced by the following:

- (a) the sum of \$1,605.46 for a check received by petitioner and deposited into his checking account which represents the return of the deposit on his apartment;
- (b) the sum of \$1,672.84 for funds received by petitioner from Chase Manhattan Bank, N.A. for reimbursement of employee business expenses;
- (c) the sum ~~of~~ \$272.00 which represents a deposit which the Audit Division erroneously included twice in its analysis;
- (d) the sum of \$455.00 which represents a rental payment for the month of June which the Audit Division erroneously included in its analysis. Petitioner vacated his apartment on or about May 31, 1980;
- (e) the sum of \$321.23 which represents real estate taxes which the Audit Division incorrectly considered twice in its analysis;
- (f) the sum of \$4,858.50 which represents loan payments made by petitioner to North Side Savings Bank. The Audit Division, in its analysis, determined loan payments of \$5,924.00, when in fact the proper amount should have been \$1,065.50;
- (g) the sum of \$477.00 for car payments made by petitioner in 1980. The Audit Division determined car payments of \$954.00, when in fact the proper amount should have been \$477.00.

13. Petitioner also asserts that for 1980 he is entitled to credit of \$454.00 for reimbursement received from his employer for educational expenses and \$600.00 for medical expense reimbursements. The evidence presented by petitioner in support of these allegations was insufficient to establish that he actually received the sums ~~of~~ \$454.00 and \$600.00 from his employer.

14. Petitioner further asserts that the Audit Division's analysis for 1980 overstated the amounts expended for food, clothing, miscellaneous and auto expense. No credible evidence was adduced to support said contentions.

CONCLUSIONS OF LAW

A. That any tax due under Article 22 must generally be assessed within three years after the return was filed (Tax Law § 683[a]). Tax Law § 683(d)(1) provides for a **six** year statute of limitations on assessment where a taxpayer omits from New York adjusted gross income an amount properly includable therein which is in excess of 25% of reported income. In the instant matter, the Notice of Deficiency dated November 23, 1984 was not, for 1979, timely issued within the time constraints of Tax Law § 683(a). However, said notice was timely issued within the six year statute inasmuch as the Audit Division determined that petitioner had excluded the sum of \$23,674.00 from 1979 income, an amount which is well in excess of 25% of reported income.

B. That petitioner has sustained his burden of proof (Tax Law § 689[e]) to show that he had additional funds from loans of \$13,700.00 and from gifts of \$9,529.00. Accordingly, the constructive dividend for 1979 is to be reduced by \$23,229.00 (\$13,700.00 + \$9,529.00). After taking into consideration the \$23,229.00 reduction, the remaining balance of the constructive dividend is insufficient to produce a 25% omission of income. Accordingly, the assessment of tax due for 1979 is barred by the statute of limitations on assessment.

C. That with respect to the 1980 tax year, petitioner has sustained his burden of proof to show that additional income disclosed pursuant to the cash mailability analysis is to be reduced by \$9,662.03 (~~see~~ Finding of Fact "12", supra). Petitioner has failed to sustain his burden of proof to show he had sources of funds from medical expense and educational expense reimbursement or that the Audit Division overstated the amounts expended for food, clothing, miscellaneous and auto expense.

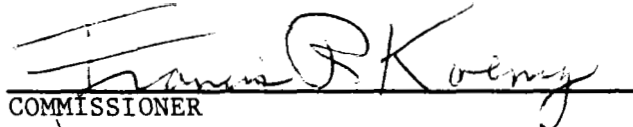
D. That the petition of Rocco Commisso and Catherine Commisso is granted to the extent indicated in Conclusions of Law "B" and "C", supra; that the Audit Division is directed to recompute the Notice of Deficiency dated November 23, 1984 **consistent with** the conclusions reached herein; and that, except as so granted, the petition is in all other respects denied.

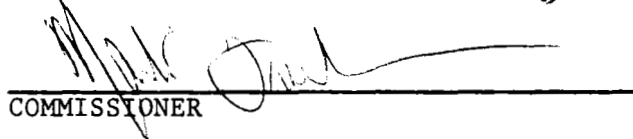
DATED : Albany, New **York**

STATE TAX COMMISSION

AUG 12 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER