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## BUREAU OF LAW

## MEMORANDUM

*Income Tax Determination*  
*A-2*  
*Marro, Anthony*

TO: Commissioners Murphy, Stanley and Lepler

FROM: Francis X. Boylan

SUBJECT: Hearing Determination, Anthony Marro  
Income Taxes, Articles 22  
1960, 1961 and 1962

A hearing was held before me on this matter June 1, 1963. The taxpayer appeared by his attorney, Thomas McCabe, Esq. of Albany, New York. There was no testimony. There were a number of exhibits, including an extract, undated but received March 17, 1963, of a memorandum which recorded oral admissions reportedly made by the taxpayer at the time of his arrest, which took place at a date not stated, but some time earlier than January 6, 1964; this paper is exhibit C.

On January 6, 1964, the Department issued a jeopardy assessment against the taxpayer charging him with additional unreported taxes in the amounts of \$172.12 for 1960, \$168.00 for 1961 and \$168.02 for 1962. As appears from a statement of audit changes, dated February 24, 1964, these amounts were arrived at by charging the taxpayer with \$5,000 additional unreported income in these three years.

The statement, exhibit C, was not in the Department's possession until March 17, 1963, but personnel of the district tax office evidently knew of the alleged admissions made by the taxpayer at the time of his arrest.

At an informal conference, the taxpayer denied that he had been engaged in any bookmaking, admitting only to a very limited amount of gambling in his own name.

The proposed determination holds that the available evidence at the time of the jeopardy assessment, and that presently before the Tax Commission, is not adequate to support the proposition that the taxpayer can be charged with \$5,000 annual unreported annual income in the years under consideration or in any of these years.

Tax Law, section 681 authorizes the Tax Commission to determine a deficiency with such notification of deficiency not becoming an assessment of taxes until the expiration of the time for filing a petition, or if a petition is filed (as was the case here), until the Tax Commission issues a decision. Pursuant to

section 694 however, an assessment may be made immediately by process under that section. In such a case, where the jeopardy assessment is followed by a notice of deficiency, and the taxpayer duly files a petition, the question for decision is not different from what it would be if only the notice of deficiency had been served. This is to say, that while the jeopardy assessment serves to insure collection, it does not in itself affect the question on review, whether the assessment was or was not arbitrary.

The extract, exhibit 6, is in the nature of a police blotter report and although it is hearsay, it is nonetheless admissible evidence in an administrative hearing. The reported statement seemingly means to state that the taxpayer had \$150.00 on him when arrested, and that he admitted that he handled that much daily on his working days in bets taken. His reported admissions indicated that he had been so engaged for nine or ten months. The date he was arrested does not clearly appear, but does not appear to be earlier than 1963; and the admission does not support an assessment for other than the year related to this period. There is no indication, either, by what formula it is concluded from the taxpayer's reported admission (that he handled \$150.00 daily) that he would earn about \$3,000 annually. It further would seem that even if there is a known ratio between a runner's daily handle and his earnings, it is not clear that this usual ratio would be applicable in the circumstances here, where the accounts on which he was making collections reportedly were not his own but those of his brother and another brother.

At least at the time of the hearing held pursuant to the petition for review, the evidence before the State Tax Commission must be enough to support the conclusion that the estimated deficiency was reasonably arrived at, or that it can be modified so as to have such a reasonable basis. Compare *Flora v. New York State Tax Commission*, (U. L. § 373; Article 16) (1961) 28 Misc. 2d 35. Here the available data leaves the conclusion of his estimated earnings little more than a guess.

Accordingly, it is recommended that the assessments under consideration here be cancelled.

/s/

FRANCIS X. BOYLAN

HEARING OFFICER

FEB:dc

November 30, 1967

3-18-68

STATE OF NEW YORK  
STATE TAX COMMISSION

----- T  
IN THE MATTER OF THE PETITION  
OF  
ANTHONY MARRO  
FOR A REDETERMINATION OF A DEFICIENCY  
OR FOR A REFUND OF PERSONAL INCOME TAXES  
UNDER ARTICLE 22 OF THE TAX LAW FOR THE  
YEARS 1960, 1961 AND 1962  
----- DECISION

The taxpayer, Anthony Marro, having filed a petition for a redetermination of deficiency or for refund of personal income taxes for the years 1960, 1961 and 1962, following a notice of demand for payment of additional income taxes for those years issued under section 694 of the Tax Law, and after findings of deficiencies issued under section 681, and a hearing having been held thereon at the offices of the State Tax Commission at Albany, New York, before Francis X. Boylan, Esq., Hearing Officer, and the taxpayer having appeared by Thomas C. McCabe, Esq. of Albany, New York and the record having been duly examined and considered, the State Tax Commission hereby finds that:

(1) By a notice and demand dated January 6, 1964 pursuant to section 694 of the Tax Law (which provides for jeopardy assessments), the State Tax Commission set forth deficiencies of personal income tax on the returns made by the taxpayer in the amounts of \$172.12 for the year 1960, \$168.00 for the year 1961, and \$168.02 for the year 1962. Thereafter a statement of audit charges, dated February 24, 1964, was sent to the taxpayer. This statement indicated that these deficiencies were arrived at by charging the taxpayer with the amount of

\$5,000 annually in each of the said years in addition to the income reported by him for those years.

The taxpayer thereafter filed a petition for redetermination of deficiency, in effect asking for a review of such additional jeopardy assessment and statement of deficiencies, on the grounds that the findings of such additional income in the said years was arbitrary.

(2) At a time not precisely indicated in the evidence submitted at the hearing, but earlier than January 6, 1963, as it is found, the taxpayer was arrested by the New York State Police, and at that time reportedly he admitted that he had been a bookmaker, operating out of his home for nine or ten months. He reportedly stated that he "averaged \$150.00 a day in bookmaking." A statement reported made orally by the taxpayer was recorded by the Police at the time, according to a paper described as an "extract from unsigned written statement"; this extract was transmitted to this Department on or about March 17, 1963, and was in evidence at the hearing.

At the time of the jeopardy assessment in 1963 and the notice of deficiency which followed, the Department was advised, orally or otherwise, of the substance of these reported admissions, it is found.

(3) At a conference held on February 13, 1964 at the Albany District Office, the taxpayer denied that he had ever engaged in bookmaking; reportedly he admitted only to a very limited amount of gambling with his own funds.

There was no testimony by anyone at the hearing.

Upon the foregoing facts and findings and all the evidence, the State Tax Commission hereby

**DECIDES:**

(A) That the information which the State Tax Commission and the Department had at the time of the jeopardy assessment, dated January 6, 1968, and of the statement of deficiency, dated February 24, 1968, and the information presently available to the State Tax Commission on the record, does not adequately support the additional assessments made, which in effect charge the taxpayer with unreported annual income in the years under consideration in the amount of \$5,000 annually. The available information does not fairly give rise to a factual inference, or otherwise adequately establish, that the taxpayer had additional annual income in the approximate amount stated for each of the years under consideration, or for any of such years.

Accordingly, on review, the aforesaid additional assessments set forth in paragraph (1) hereof, for the years 1960, 1961 and 1962 are cancelled in full.

**And IT IS SO ORDERED.**

**Dated: Albany, New York**

March 25 , 1968.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**COMMISSIONER**

/s/

A. BRUCE MANLEY

**COMMISSIONER**

/s/

SAMUEL E. LEPLER

**COMMISSIONER**