

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Buono Brothers, Anthony Buono, :
Fortunato Buono & Joseph Buono :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Personal Income &:
UBT under Article 22 & 23 of the Tax Law for the
Years 1973 - 1974. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Buono Brothers, Anthony Buono,, Fortunato Buono & Joseph Buono the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Buono Brothers, Anthony Buono,
Fortunato Buono & Joseph Buono
2329 Arthur Ave.
Bronx, NY 10457

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
30th day of October, 1981.

J. Vredenburg
J. Vredenburg

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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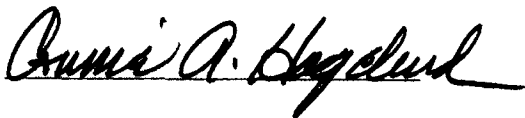
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Jack A. Addesso the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

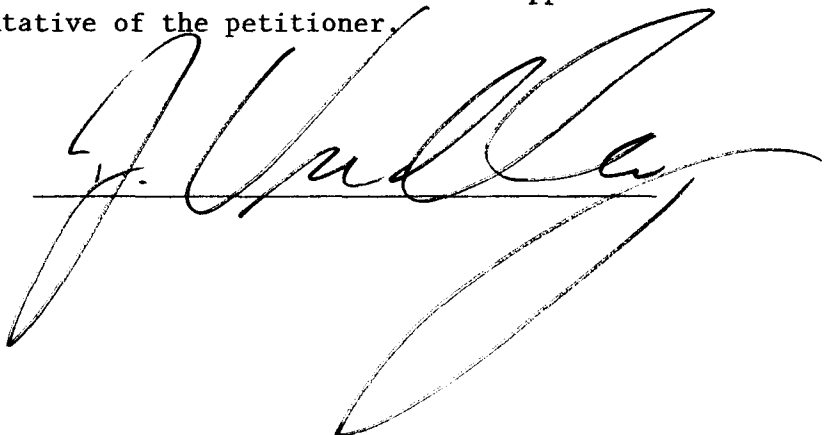
Jack A. Addesso
Addesso & Merovitch
9 West Prospect Ave.
Mount Vernon, NY 10550

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Buono Brothers, Anthony Buono,
Fortunato Buono & Joseph Buono
18 Bryn Mawr Place
Yonkers, NY 10701

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Sworn to before me this
30th day of October, 1981.

Annie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Salvator Chiarelli the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Salvator Chiarelli
Chiarelli & Chiarelli
95 Church St.
White Plains, NY 10601

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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Sworn to before me this
30th day of October, 1981.

Bernie P. Hagelund

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 30, 1981

Buono Brothers, Anthony Buono,
Fortunato Buono & Joseph Buono
18 Bryn Mawr Place
Yonkers, NY 10701

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Salvator Chiarelli
Chiarelli & Chiarelli
95 Church St.
White Plains, NY 10601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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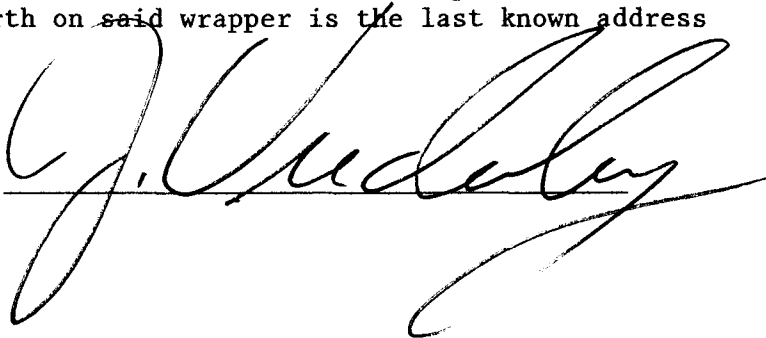
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STATE TAX COMMISSION

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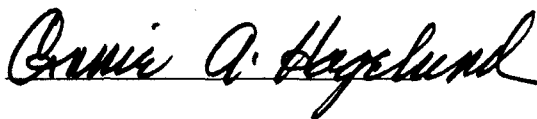
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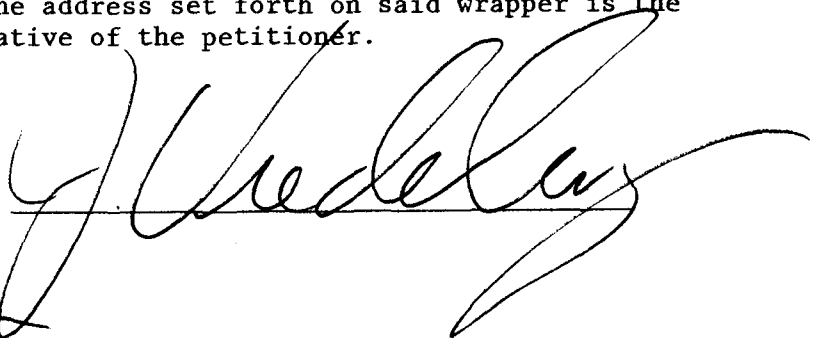
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Sworn to before me this
30th day of October, 1981.


Bonnie A. Hayward



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 30, 1981

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Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Salvator Chiarelli
Chiarelli & Chiarelli
95 Church St.
White Plains, NY 10601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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Fortunato Buono and Joseph Buono
256 Davis Ave.
Bronx, NY 10465

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Annie A. Magelund

J. Vredenburg

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STATE TAX COMMISSION
ALBANY, NEW YORK 12227

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STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

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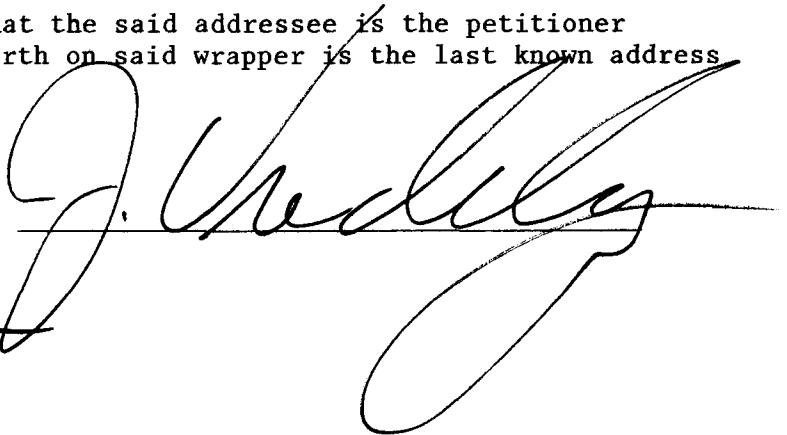
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STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 30, 1981

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Bronx, NY 10457

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jack A. Addesso
Addesso & Merovitch
9 West Prospect Ave.
Mount Vernon, NY 10550
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
BUONO BROTHERS, ANTHONY BUONO,	:	DECISION
FORTUNATO BUONO and JOSEPH BUONO	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the Years 1973 and 1974.	:	

Petitioner, Buono Brothers, 2329 Arthur Avenue, Bronx, New York, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1973 and 1974 (File No. 19044).

Petitioners, Anthony Buono, 256 Davis Avenue, Bronx, New York, Fortunato Buono, 3986 Carpenter Avenue, Bronx, New York and Joseph Buono, 8 Mohawk Road, Yonkers, New York, each filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 and 1974 (File Nos. 19045, 19046, 19047).

A formal hearing was held before Nigel Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 7, 1981. Petitioners appeared by Addesson & Meromitch (Jack A. Addesson, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the deduction by Buono Brothers of certain expenses in the year after they were actually incurred is proper under sections 446(a) and 1314 of the Internal Revenue Code, because said petitioner had allegedly followed that practice for many years.

FINDINGS OF FACT

1. (a) A Notice of Deficiency was issued on March 28, 1977 against Buono Brothers for unincorporated business tax under Article 23 of the Tax Law for the years 1973 and 1974 in the amount of \$3,198.24, plus penalty of \$159.90 under section 685(b) of the Tax Law and interest of \$610.85, for a total of \$3,968.99.

(b) On March 28, 1977, notices of deficiency were issued to Anthony Buono and Fortunato Buono. On April 14, 1977, a Notice of Deficiency was issued to Joseph Buono. Each was for personal income taxes under Article 22 of the Tax Law for the years 1973 and 1974. The deficiency against Anthony Buono is \$1,239.09, plus penalty of \$61.96 under section 685(b) of the Tax Law and interest of \$237.10, for a total of \$1,538.15. The deficiency against Fortunato Buono is \$1,513.87, plus a penalty of \$75.69 under section 685(b) of the Tax Law and interest of \$281.13, for a total of \$1,870.69. The deficiency against Joseph Buono is \$2,595.19, plus a penalty of \$129.76 under section 685(b) of the Tax Law and interest of \$495.36, for a total of \$3,220.31. Each deficiency against the individuals is entirely derived from the audit of the partnership Buono Brothers.

2. Petitioner Buono Brothers is a wholesale fruit and vegetable grocer. Because of the highly perishable nature of its goods, Buono Brothers does not record inventory on its books. Its federal and New York income tax returns show no amounts for inventory.

3. (a) Buono Brothers ceased doing business as a partnership as of December 31, 1974. The business was incorporated as of January 1, 1975.

(b) The 1973 income tax return of Buono Brothers showed:

gross receipts	\$1,042,557.00
cost of goods sold	975,949.16
gross profit	66,607.84
deductions	41,893.66
ordinary income (net profit)	24,714.18

(c) The 1974 income tax return of Buono Brothers showed:

gross receipts	\$1,018,435.00
cost of goods sold	952,290.00*
gross profit	66,144.98
deductions	42,338.93
ordinary income (net profit)	23,806.05

(d) Buono Brothers has been unable to provide any legible worksheets to support its tax returns and it admits the returns are erroneous.

4. (a) The income of Buono Brothers has been reconstructed (by its current accountant) for the years 1973 and 1974. The ordinary income (net profit) thus arrived at is \$25,906.00 for 1973 and \$9,523.10 for 1974.

(b) The reconstructed figures for income for 1973 and 1974 were arrived at by counting as sales the amounts shown as deposits to bank accounts as of the time of the deposits and by counting as expenses the amounts shown as charges shown on its bank statements as of the time when the statements were rendered and cancelled checks returned to petitioner. Buono Brothers claims that this has been its consistent accounting practice and that this practice has been continued by the corporation which is the successor to petitioner. There is no evidence in the record to support this.

5. (a) The income for 1974 (as reconstructed) is low, compared to the income for 1973, because Buono Brothers (contrary to its previous practice) deducted expenses represented by checks written in 1974 but cancelled and

* Return actually shows an inconsistency of less than \$1.00 in the two places cost of goods sold is reported.

returned to it by the bank in 1975. Buono Brothers believed this was proper because 1974 was the final year of the partnership. The amount of these expenses is not in the record.

(b) At the hearing, petitioners claimed that the 1974 income of Buono Brothers should be increased by \$13,024.25, as representing accounts receivable which were collected in 1975.

6. The income for 1974, as reconstructed by Buono Brothers, includes a deduction of \$47,253.10 as expenses incurred in December, 1973 but which are represented by checks written in 1973 and cancelled and returned to Buono Brothers by the bank in 1974.

7. The income for 1973, as reconstructed by Buono Brothers, includes a deduction of \$68,806.25 as expenses incurred in December, 1972 but which are represented by checks written in 1972 and cancelled and returned to Buono Brothers by the bank in 1973.

8. The income for the year 1972 is not in issue in this case as all deficiencies and refunds with respect thereto are barred by the statute of limitations.

9. The current accountant for Buono Brothers, Salvatore Chiarelli, CPA, testified that the computation of expenses according to the date when either a check clears the bank or when the cancelled check is returned to the writer, is a commonly accepted method of accounting and has been approved by the Internal Revenue Service. This testimony is found to be incredible and beyond belief.

10. The deficiencies in issue are based upon the disallowance for 1974 of the 1973 expenses of \$47,253.30 and allowing them instead for 1973, and the disallowance for 1973 of the 1972 expenses of \$68,806.25. (These 1972 expenses can no longer be allowed because 1972 is not an open year.)

11. Petitioners, at the hearing, contested a small part of each deficiency, which is based upon a denial of deductions for hospital and automobile insurance. Petitioners, at the hearing, requested credits for depreciation allegedly not previously allowed. Petitioners have not pursued these claims with submission of evidence or with argument in its brief.

CONCLUSIONS OF LAW

A. That section 446 of the Internal Revenue Code does not justify a particular method of computation of income and expenses merely because a taxpayer regularly computes its income and expenses in that way. In any event, there is no evidence in this case as to how in fact Buono Brothers did regularly compute its income and expenses.

B. That the computation of expenses in the case according to the date when checks are cancelled and returned by the bank is wholly inconsistent with any method which might clearly reflect income and is not a permissible method of accounting under the Internal Revenue Code and Treasury Regulations.

C. That section 1311-1314 of the Internal Revenue Code have no effect on the computation of either adjusted gross income or deductions under the Internal Revenue Code for the years herein at issue and therefore, can have no effect on the computation of the New York personal income tax.

D. That petitioners have not sustained their burden of proof with respect to the claims raised in Finding of Fact "11".

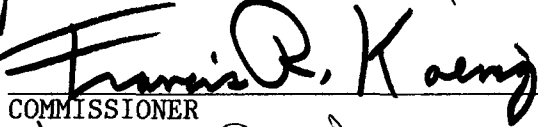
E. That the notices of deficiency are sustained and the petitions are denied.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER