

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

Peter & Greta Cristo :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax & UBT under Article 22 & 23 of the Tax Law :
for the Year 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 15th day of May, 1981, he served the within notice of Decision by certified mail upon Peter & Greta Cristo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter & Greta Cristo
9 Old Landmark Dr.
Rochester, NY 14618

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
15th day of May, 1981.

Annice A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter & Greta Cristo :

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for Redetermination of a Deficiency or a Revision :
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Tax & UBT under Article 22 & 23 of the Tax Law :
for the Year 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 15th day of May, 1981, he served the within notice of Decision by certified mail upon Jack Battaglia the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Jack Battaglia
Suite 111, First Federal Plaza
Rochester, NY 14614

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
15th day of May, 1981.

Arnie A. Hegelund

Jay Vredenburg

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

May 15, 1981

Peter & Greta Cristo
9 Old Landmark Dr.
Rochester, NY 14618

Dear Mr. & Mrs. Cristo:

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
Jack Battaglia
Suite 111, First Federal Plaza
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
PETER CRISTO and GRETA CRISTO	:	DECISION
for Redetermination of Deficiencies or	:	
for Refund of Personal Income and	:	
Unincorporated Business Taxes under	:	
Articles 22 and 23 of the Tax Law for	:	
the Year 1974.	:	

Petitioners, Peter Cristo and Greta Cristo, 9 Old Landmark Drive, Rochester, New York 14618, filed petitions for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1974 (File Nos. 22456 and 22457).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 24, 1980 at 5:00 P.M. Petitioner Peter Cristo appeared with Jack Battaglia, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' tax liability as a result of a field audit.

FINDINGS OF FACT

1. Petitioners, Peter Cristo and Greta Cristo, timely filed a New York State Income Tax Resident Return for 1974. Petitioner Peter Cristo filed a New York State Unincorporated Business Tax Return for 1974.

2. Petitioner Peter Cristo was in the auto sales business and did business under the name and style of Cris Motors at 1137 Main Street, Rochester, New York.

3. On April 14, 1978, based on a field audit, the Audit Division issued two notices of deficiency. One notice was issued against petitioners, Peter Cristo and Greta Cristo, asserting additional personal income taxes of \$1,736.89, plus interest of \$442.51, for a total of \$2,179.40. The other notice was issued against petitioner Peter Cristo asserting additional unincorporated business taxes of \$636.85, plus interest of \$162.25, for a total due of \$799.10.

4. The Audit Division examined the books and records of petitioner Peter Cristo in accordance with established audit procedures and techniques. It utilized the net worth method of reconstructing income, along with an analysis of petitioners' living expenses. The Division determined that there was additional income per audit of \$11,579.29 for 1974.

5. In preparing the statement of net worth, the Audit Division used an opening balance of \$2,067.42 for a savings account on January 1, 1974 which in fact reflected the balance of the account as of November 13, 1973. The reason the November 13, 1973 figure was used was that the bank's microfilm had gone bad and the next known balance in the account was \$6,316.38 on February 22, 1974. Neither the petitioners, the Audit Division nor the bank could accurately state what the opening balance of the account was on January 1, 1974. The Audit Division stated there was no reason the \$6,316.38 figure could not be used other than its personal preference. By using the November 13, 1973 balance, the discrepancy was increased by \$4,248.96.

6. Central Trust Company did a search of its records for two checks in the amounts of \$2,782.52 and \$1,778.77 and dated September 27, 1974 and October 30, 1974, respectively. Each check was drawn against Cris Motors, a business checking account, and payable to Central Trust Company. Central Trust Company determined that the checks were not applied to the petitioners' personal or business checking accounts, savings accounts or loans balances.

The two checks were used to pay off the balance on automobiles that were taken in trade or purchased by Cris Motors. The bank stated that it is common practice for automobile dealers to either purchase or take automobiles in trade and directly pay off creditors holding liens against the automobile. Petitioners, therefore, argue that the personal living expenses are overstated by \$4,561.29 which reflects the total of the two checks which were not used for personal living expenses.

7. In preparing the statement of net worth, the Audit Division used the total withdrawal (\$4,781.29) from one of the checking accounts as part of the personal expenses in the analysis of the petitioners' living expenses. This account's deposits and withdrawals were in connection with rental property located at 1730 North Goodman Street which is a bar with an apartment upstairs. This property was owned by the petitioner Peter Cristo and Dolores Gallucci in a partnership, however, the checking account was in the name of Peter Cristo. The Audit Division was unaware of the exact nature of this account until the hearing. The rental income and expense was filed on a partnership return and reported on the petitioners' personal return as a partnership loss. The Audit Division conceded that if the withdrawals were connected to rental property, this amount should not be included in determining the petitioners' personal living expenses.

CONCLUSIONS OF LAW

A. That while the burden of proof as to a deficiency determined by the net worth method is upon the taxpayer, the taxing authority must follow fair procedures. Accuracy in the determination of opening net worth is necessary in net worth cases. That where it is a question of what figures are to be used, then the figures construed most strongly against the taxing authority and in favor of the taxpayer must be used, otherwise the determination would

be arbitrary or capricious. Since the Audit Division presented no evidence to support its contention that the opening balance of \$2,067.42 in the savings account should be used over that of the opening balance of \$6,316.38 as contended by petitioner, the figure in favor of petitioner must be used.

B. That petitioners, Peter Cristo and Greta Cristo, have sustained the burden of proof imposed by section 689(e) of the Tax Law in showing the two checks drawn against Cris Motors and payable to Central Trust Company and the checking account used exclusively for the rental property should not be used in determining the petitioners' personal living expenses.

C. That the petitions of Peter Cristo and Greta Cristo are granted and the notices of deficiency issued against petitioners on April 14, 1978 are cancelled.

DATED: Albany, New York

MAY 15 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER