

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Richard & Theresa DeVivio :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1972. :

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 5th day of February, 1981, he served the within notice of Decision by certified mail upon Richard & Theresa DeVivio, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard & Theresa DeVivio
278 Beach 17th L St.
Far Rockaway, NY 11691

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
5th day of February, 1981.

Conrad R. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Richard & Theresa DeVivio :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1972. :

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 5th day of February, 1981, he served the within notice of Decision by certified mail upon Nicholas J. LaMonica 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. Nicholas J. LaMonica
42 Lott Place
Brooklyn, NY 11234

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
5th day of February, 1981.

Cornie G. Hagelund

J. Vredenburg

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

February 5, 1981

Richard & Theresa DeVivio
278 Beach 17th L St.
Far Rockaway, NY 11691

Dear Mr. & Mrs. DeVivio:

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 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
Nicholas J. LaMonica
42 Lott Place
Brooklyn, NY 11234
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
RICHARD DeVIVIO and THERESA DeVIVIO : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Year :
1972.

Petitioners, Richard DeVivio and Theresa DeVivio, 450 West Broadway, Long Beach, New York 11561, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 (File No. 15157).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 13, 1980 at 1:15 P.M. Petitioner Richard DeVivio appeared pro se and for his wife. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the Notice of Deficiency was mailed to petitioners "by certified or registered mail" as provided for in section 681 of the Tax Law.

II. Whether petitioner Richard DeVivio is properly entitled to a greater deduction for "Travel Reimbursement Expense" than allowed by the Audit Division.

III. Whether petitioner Richard DeVivio is properly entitled to a deduction for the cost of maintaining an office in his personal residence.

FINDINGS OF FACT

1. Petitioners Richard DeVivio and Theresa DeVivio timely filed a New York State Combined Income Tax Return for the year 1972.

2. As the result of an audit, on April 16, 1974 the Income Tax Bureau issued a Statement of Audit Changes to petitioners wherein adjustments were made to deductions claimed for "Travel Reimbursement Expense" and "Home Used for Office" of \$3,624.00 and \$360.00 respectively. Additionally, a medical expense adjustment was made of \$109.00 which was computed on the basis of three percent of the "travel reimbursement expense" adjustment, since as the result of said adjustment petitioners' adjusted gross income was effectively increased by an amount, equal to same. Petitioner conceded this adjustment to the extent of three percent of the final net adjustment if any, to the deduction claimed for "travel reimbursement expense". Accordingly, a Notice of Deficiency was issued against petitioners on November 25, 1974 asserting additional personal income tax of \$337.32, plus interest of \$40.83, for a total due of \$378.15.

3. Petitioner contended that the aforementioned Notice of Deficiency was not mailed by certified or registered mail but subsequently submitted evidence indicates a certified mailing of said notice to petitioners' last known address on November 25, 1974.

4. The adjustment to petitioner Richard DeVivio's "travel reimbursement expense" of \$3,624.00 was comprised of separate adjustments to various, catagorically distinct deductions as follows:

	<u>Claimed</u>	<u>Allowed</u>	<u>Adjustment</u>
Auto	\$ 3,336.00	\$ 960.00	\$ 2,376.00
Entertainment	2,870.00	2,270.00	600.00
Gifts	735.00	-0-	735.00
Policy Jackets	160.00	167.00	(7.00)
Postage	-0-	80.00	(80.00)
TOTAL ADJUSTMENT			\$ 3,624.00

Petitioner did not contest the above adjustments for which he received credit for an amount greater than that claimed on his return.

5. During the year at issue Richard DeVivio (hereinafter petitioner) was employed by The Prudential Insurance Company of America as a sales manager. As such, he supervised and coordinated the activities of a unit consisting of ten men. Although he earned some commissions from his own accounts, his compensation was predominantly derived from override commissions from sales made by his staff. Petitioner contended that the automobile expenses claimed were incurred in traveling to prospective clients of his subordinate salesmen for the purpose of assisting them in making sales, which was his primary job function.

6. Petitioner's claimed automobile expenses were computed using the standard mileage rate which was applied to a total of 29,014 business miles claimed. The business mileage was computed by reducing total mileage claimed of 40,620 by two sevenths of same. Additionally, \$275.00 was claimed for parking and toll expenses incurred. Although petitioner claimed that his diary, which was received in evidence, documented his automobile expenses, as well as his deductions claimed for gifts and entertainment, review of same shows it to be grossly illegible and generally lacking in required detail. As evidence of total mileage driven during the year at issue, petitioner submitted several repair bills which substantiated petitioner's total mileage as claimed. No evidence has been submitted to establish actual business mileage or amounts expended for parking and tolls.

7. The adjustment of \$600.00 made to petitioner's claimed entertainment expenses represents amounts expended for coffee and food which petitioner bought for his staff during weekly meetings held each Friday. Diary entries in support of this expenditure total \$530.00.

8. No documentary evidence was submitted to substantiate petitioner's claimed gifts expenses of \$735.00.

9. Petitioner's deduction claimed for "home used for office" of \$360.00 was with respect to one small room used by petitioner solely for business. It contained a desk, chair, typewriter, telephone and file cabinet, and was used by petitioner to plan his schedule, correspond with his staff and review paperwork. The amount claimed was estimated on the basis of \$30.00 per month. During the hearing, the Audit Division conceded that they did not question the amount claimed but took the position that petitioner does not qualify for a deduction of this nature. Petitioner testified, he was not required to maintain a home office as a condition of employment.

CONCLUSIONS OF LAW

A. That the Notice of Deficiency dated November 25, 1974 was properly mailed to petitioners by certified mail on said date in compliance with the provisions of section 681(a) of the Tax Law.

B. That petitioner has failed to comply with the recordkeeping requirements pursuant to section 274(d) of the Internal Revenue Code, and further, petitioner has failed to sustain his burden of proof pursuant to section 689(e) of the Tax Law with respect to the following adjustments:

- i. That the adjustment of \$2,376.00 to petitioner's automobile expenses is sustained.
- ii. That the adjustment of \$600.00 to petitioner's claimed entertainment expense is properly reduced to \$70.00.
- iii. That the adjustment to "gifts" of \$735.00 is sustained.

C. That the adjustment of \$360.00 to petitioner's claimed deduction for "home used for office" is sustained within the meaning and intent of section 162(a) of the Internal Revenue Code.

D. That the medical expense adjustment of \$109.00 is properly reduced to \$92.82 as the result of the net decrease of \$530.00 in the adjustment to all items comprising "travel reimbursement expenses".

E. That petitioner Theresa DeVivio's name be removed from the Notice of Deficiency since petitioners filed separate returns and all adjustments were to deductions claimed by petitioner Richard DeVivio.

F. That the petition of Richard DeVivio and Theresa DeVivio is granted to the extent provided in Conclusions of Law "B(ii), D and E" (Supra) and that said petition is, in all other respects, denied.

G. That the Audit Division is hereby directed to modify the Notice of Deficiency dated November 25, 1974 to be consistent with the decision rendered herein.

DATED: Albany, New York

FEB 05 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

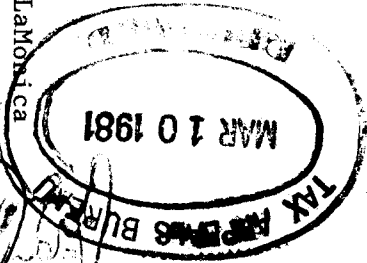

COMMISSIONER

TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

P30-8945372

Nicholas J. LaMonica
42 Lott Place
Brooklyn, NY 11234

LaMonica



Detached from
PS Form 3849-A
May 1979

DO NOT WRITE IN THIS ENVELOPE

1ST NOTICE	2ND NOTICE
<i>2/15</i>	<i>2/15</i>

DATE *2/10/81*
☐ HOLD

CLAIM CHECK
NO. 484963

Unclaimed

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

February 5, 1981

Richard & Theresa DeVivio
278 Beach 17th L St.
Far Rockaway, NY 11691

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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
Nicholas J. LaMonica
42 Lott Place
Brooklyn, NY 11234
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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RICHARD DeVIVIO and THERESA DeVIVIO : DECISION
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DATED: Albany, New York

FEB 05 1981

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