

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Estate of Nick J. Dinovo  
and Lillian M. Dinovo

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:

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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 1971 & 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 28th day of August, 1981, he served the within notice of Decision by certified mail upon Estate of Nick J. Dinovo, and Lillian M. Dinovo the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Nick J. Dinovo  
and Lillian M. Dinovo  
Retreat House Rd.  
Glenmont, NY 12077

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  
28th day of August, 1981.

*Constance A. Hagelund*

*Jay Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Estate of Nick J. Dinovo :  
and Lillian M. Dinovo :

: 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 1971 & 1972

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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 28th day of August, 1981, he served the within notice of Decision by certified mail upon Stanley B. Eisenberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley B. Eisenberg  
105 Wolf Rd.  
Albany, NY 12205

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  
28th day of August, 1981.

*Constance A. Hagelund*

*Jay Vredenburg*

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

August 28, 1981

Estate of Nick J. Dinovo  
and Lillian M. Dinovo  
Retreat House Rd.  
Glenmont, NY 12077

Dear Mrs. Dinovo:

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  
Stanley B. Eisenberg  
105 Wolf Rd.  
Albany, NY 12205  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
NICK J. DiNOVO and LILLIAN M. DiNOVO	:	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 Years 1971 and 1972.	:	

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Petitioners, Nick J. DiNovo and Lillian M. DiNovo, Retreat House Road, Glenmont, New York 12077, filed a petition 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 years 1971 and 1972 (File No. 13742).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Campus, Albany, New York, on September 30, 1977 and April 24, 1978 and was concluded on May 22, 1978. Petitioners appeared by Stanley B. Eisenberg, PA. The Audit Division appeared by Peter Crotty, Esq. (Andrew S. Haber, Francis Cosgrove and Barry Bresler, Esqs., of counsel).

ISSUE

Whether petitioners are liable for additional income taxes pursuant to audit for the years 1971 and 1972.

FINDINGS OF FACT

1. On December 22, 1975, the Audit Division issued a Statement of Audit Changes against Nick J. DiNovo asserting unincorporated business tax for the years 1971 and 1972. Accordingly, on the same date, a Notice of Deficiency was issued against said petitioner in the amount of \$8,156.85, plus penalty imposed

under section 685(e) of the Tax Law of \$407.84 and interest of \$1,723.02, for a total of \$10,287.71.

2. On December 22, 1975, the Audit Division issued a Statement of Audit Changes against Nick J. DiNovo and Lillian M. DiNovo asserting additional personal income tax for the years 1971 and 1972. Accordingly, on the same date, a Notice of Deficiency was issued against petitioners in the amount of \$21,321.40, plus penalty imposed under section 685(e) of the Tax Law of \$1,066.07 and interest of \$4,492.12, for a total of \$26,879.59.

3. Petitioners timely filed New York State income tax and unincorporated business tax returns for the years in issue. They also signed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes for the year 1971, providing that the taxes for said year could be assessed at any time up to April 15, 1976.

4. Petitioners operated a grocery store on South Pearl Street, a depressed area in the City of Albany, New York. Petitioner Nick J. DiNovo died prior to the hearing.

5. An audit was performed on the income of petitioners which covered the years 1971 and 1972. Available to the auditor were a cash book, a journal, cancelled checks, bank statements, passbooks, invoices and other material normal for such business. The journal contained a listing of business checks written and a summary. Since it was found that "all checks were not in the books and that a substantial amount of the taxpayer's purchases were cash and not checks", a bank deposit audit was used for the year 1971.

6. In 1972, determination was made as to the amount of petitioners' deposits to the various checking accounts, then subtracting therefrom unrelated personal deposits, sales tax collections, and exchange accounts. The result

was net business deposits. The net business deposits, plus expenses paid in cash, plus personal cash withdrawn by petitioner, plus net savings account deposits in cash, plus net payments to a stockbroker in cash were computed to be approximately \$481,000.00; and after cash adjustments were made, an understatement of some \$75,000.00 resulted in the total gross receipts. This was a bank deposit cash flow audit.

7. Two minor mathematical errors were made in the audit and acknowledged by the Audit Division. In the 1972 audit, the cash flow was overstated by \$7,632.00. In the 1971 audit, sales tax was not deducted in arriving at total business deposits in the amount of \$3,016.92.

8. In 1971, petitioner had purchased various shares of stock totaling \$17,000.00, which were paid for with a \$5,000.00 check and a \$5,000.00 savings bank withdrawal, which left \$7,000.00, the source of which was unaccounted for. In addition, deposits of \$10,600.00 and \$17,600.00 in savings accounts were made, the sources of which could not be ascertained and a withdrawal of \$5,200.00 cash was also made and its source could not be ascertained.

9. Petitioners' journals contained and reflected all business checks. Omitted therefrom were the exchange checks (used in their money order business as agent for Travelers Express Company) and personal checks.

10. Petitioners challenged only the computation of the Audit Division. However, no documentary or other substantial evidence was presented by petitioners that earnings were not greater than reported.

#### CONCLUSIONS OF LAW

A. That section 697(b) of the Tax Law provides as follows:

"Sec. 697. General powers of Tax Commission

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(b) Examination of books and witnesses - The tax commission for the purposes of ascertaining the correctness of any return, or for the purpose of making an estimate of taxable income of any person, shall have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters to be included in the return..."

B. That such an examination was conducted in accordance with standard auditing procedures established by the Audit Division.

C. That petitioners have not presented any substantial evidence and therefore have failed to sustain the burden of proof imposed by section 689(e) of the Tax Law.

D. That the Audit Division is directed to recompute the deficiencies as per Finding of Fact "7".

E. That the petition of Nick J. DiNovo and Lillian M. DiNovo is granted to the extent that the income tax and unincorporated business tax for the years 1971 and 1972 be recomputed as per Conclusion of Law "D", together with such additional interest and penalties as may be lawfully owing; that the Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued December 22, 1975; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 28 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER