

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
John Dziuba

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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 & 1973

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 John Dziuba, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Dziuba  
108 Donna Lea  
Williamsville, NY 14221

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.

*Carrie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
John Dziuba

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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 & 1973

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 Ralph J. Gregg 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. Ralph J. Gregg  
Albrecht, Maguire, Heffern & Gregg  
2110 Main Place Tower  
Buffalo, NY 14202

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.

*Cornie A. Hayeklund*

*J. Vredenburg*

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

May 15, 1981

John Dziuba  
108 Donna Lea  
Williamsville, NY 14221

Dear Mr. Dziuba:

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  
Ralph J. Gregg  
Albrecht, Maguire, Heffern & Gregg  
2110 Main Place Tower  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN DZIUBA	:	DECISION
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 1971, 1972 and 1973.	:	

Petitioner, John Dziuba, 108 Donna Lea, Williamsville, New York 14221, filed a petition 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 1971, 1972 and 1973 (File No. 16068).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on June 6, 1978 at 9:00 A.M. and was continued on June 7, 1978 at 9:00 A.M. Petitioner appeared by Albrecht, Maguire, Heffern & Gregg, Esqs. (Ralph J. Gregg, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether a "Source and Application of Funds" method of income reconstruction used by the Audit Division was a proper method for an audit of petitioner's records for the years 1971, 1972 and 1973.

II. Whether a "Source and Application of Funds" method of income reconstruction used by the Audit Division accurately reflected petitioner's tax liability for 1971, 1972 and 1973.

III. Whether petitioner possessed or obtained income in 1971, 1972 and 1973 which is subject to imposition of personal income taxes, interest, and a negligence penalty.

FINDINGS OF FACT

1. Petitioner timely filed personal income tax returns for 1971, 1972 and 1973. He later signed two consents extending the period of limitations.

2. The Audit Division issued a Notice of Deficiency and Statement of Audit Changes on June 28, 1976 covering 1971, 1972 and 1973 demanding a total payment of additional taxes, interest and penalties of \$10,132.66.

3. Petitioner signed and filed a petition for review on August 13, 1976, and said petition was directed against the examiner's use of a "source and application" method which served as the basis for the deficiency.

4. Petitioner filed an amended income tax return for 1973 on Form 1040-X on or about June 18, 1975 accounting for previously unreported income.

5. Petitioner's business, Door Equipment Co., employed a full-time bookkeeper, counter representatives, and field-servicemen/salesmen, all of whom handled and were involved with the gross receipts of the business in one way or another. Petitioner did not exercise sole control of the business books, records and receipts and, in fact, petitioner had little to do with the records or receipts. Also, the bookkeeper maintained a thorough double-entry system covering all receivables and payables.

6. The "source and application" method was used in the field audit because it was suspected that the books of Door Equipment Co. were falsified. That suspicion was based upon the entries in the books showing a discrepancy

for the years 1971, 1972 and 1973 of about \$50,000.00 in applications being more than sources.

7. Petitioner accumulated cash savings in excess of \$30,000.00 and a cash loan from his brother of \$20,000.00 during the years 1971, 1972 and 1973.

8. Petitioner did not regularly use banks for his personal use other than to keep an escrow fund of his own for payment of realty and income taxes and petitioner did maintain "cash-on-hand" in a large safe located in the basement of his home.

9. The auditor did not recognize "cash-on-hand" from any of the alleged cash savings of petitioner in computing the "source and application" method, except for the \$20,000.00 loan from petitioner's brother.

10. Petitioner acted upon the advice of his accountants and the petitioner did prove by credible testimony that the conclusions of the auditor in his "source and application" method were erroneous in regard to more than a dozen items totaling about \$36,925.00 in the application of funds, thus, reducing the \$49,274.00 of over application as computed by the auditor. By crediting the petitioner with \$36,000.00 capital contributions to the Door Equipment Co. in 1971 and 1972 derived from his accumulated savings and the \$20,000.00 loan from his brother more than wipes out the balance.

11. The Audit Division makes no claim for a fraud penalty nor did it conduct a 10 year fraud audit, but the presentation of the audit report and the posture of the Audit Division, as reflected by many of the questions put to the witnesses by the counsel for the Audit Division, clearly reflects the on-going suspicion that fraud took place in petitioner's business.

CONCLUSIONS OF LAW

A. That a deficiency of additional taxes plus interest and a five percent negligence penalty was imposed upon petitioner in accordance with section 685(b) of the Tax Law, and nothing therein shifts the burden of proof from petitioner to the Tax Commission, nor can the Tax Commission shift the burden of proof to itself because of the manner in which it computes a deficiency, e.g. use of the "Source and Application of Funds" method or because of innuendo or hypothetical questioning during a hearing. Section 689(e) of the Tax Law.

B. That the utilization of the "Source and Application of Funds" method is not an accounting method and it is proper even if petitioner used other adequate bookkeeping or accounting methods. Its purpose is to determine if petitioner's books and records are true and complete (Holland v. U.S., 348 U.S. 121).

C. That petitioner's books and records were consistent, full and complete, and accurate and adequately reflected petitioner's tax liability for the years 1971, 1972 and 1973, and the reconstruction of petitioner's income by the Audit Division through its use of the "Source and Application of Funds" method did not accurately represent petitioner's financial picture and tax liability for the years at issue.

D. That petitioner satisfied his burden of proof that the Audit Division's reconstruction of income was erroneous and any presumption of accuracy of said reconstruction was refuted by petitioner's evidence and testimony.


E. That petitioner satisfied his burden of proof that he neither possessed nor obtained additional income during the years 1971, 1972 and 1973 subject to taxes, interest, or penalties.


F. That the petition of John Dziuba is, in all respects, hereby granted,  
and the Notice of Deficiency issued on June 28, 1976 is cancelled.

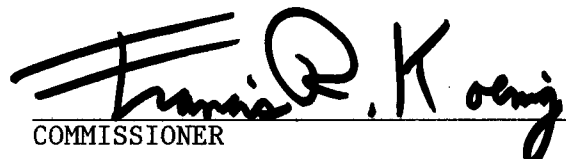
DATED: Albany, New York

STATE TAX COMMISSION

MAY 15 1981

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER