

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Joseph Bada : 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 Years :  
1976 & 1977. :

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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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Joseph Bada, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Bada  
117 Wilmore Pl.  
Syracuse, NY 13208

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  
29th day of January, 1982.

*Annie A. Hageland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
of

Joseph Bada

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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Tax under Article 22 of the Tax Law for the Years :  
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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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Alfred C. DeRosa the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred C. DeRosa  
Alfred C. DeRosa, Public Acct.  
526 Oak St.  
Syracuse, NY 13202

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  
29th day of January, 1982.

*Annice P. Hagedorn*

*J. Vredenburg*

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

January 29, 1982

Joseph Bada  
117 Wilmore Pl.  
Syracuse, NY 13208

Dear Mr. Bada:

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  
Alfred C. DeRosa  
Alfred C. DeRosa, Public Acct.  
526 Oak St.  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
John J. Polito : 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 Years :  
1976 & 1977.

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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 29th day of January, 1982, he served the within notice of Decision by certified mail upon John J. Polito, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Polito  
205 Hood Ave.  
Syracuse, NY 13208

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  
29th day of January, 1982.

*Annice R. Hapland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

John J. Polito

:

:

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 Years :  
1976 & 1977.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Alfred C. DeRosa the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred C. DeRosa  
Alfred C. DeRosa, Public Acct.  
526 Oak St.  
Syracuse, NY 13203

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  
29th day of January, 1982.

*Annie R. Hagelund*

*J. Vredenburg*

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

January 29, 1982

John J. Polito  
205 Hood Ave.  
Syracuse, NY 13208

Dear Mr. Polito:

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  
Alfred C. DeRosa  
Alfred C. DeRosa, Public Acct.  
526 Oak St.  
Syracuse, NY 13203  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Family Food Market : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Years 1976 & 1977. :

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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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Family Food Market, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Family Food Market  
814 Butternut St.  
Syracuse, NY 13203

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  
29th day of January, 1982.

*Conrad A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
Family Food Market

:  
:  
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Unincorporated  
Business Tax under Article 23 of the Tax Law for :  
the Years 1976 & 1977.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Alfred C. DeRosa the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred C. DeRosa  
Alfred C. DeRosa, Public Accountant  
526 Oak St.  
Syracuse, NY 13203

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  
29th day of January, 1982.

*James A. Hagelund*

*J. Vredenburg*



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

January 29, 1982

Family Food Market  
814 Butternut St.  
Syracuse, NY 13203

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) 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  
Alfred C. DeRosa  
Alfred C. DeRosa, Public Accountant  
526 Oak St.  
Syracuse, NY 13203  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
JOSEPH BADA  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1976 and 1977.

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DECISION

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In the Matter of the Petition  
of  
JOHN J. POLITO  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1976 and 1977.

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DECISION

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In the Matter of the Petition  
of  
FAMILY FOOD MARKET  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1976  
and 1977.

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DECISION

Petitioners, Joseph Bada, 117 Wilmore Place; John J. Polito, 205 Hood Avenue; Family Food Market, 814 Butternut Street, Syracuse New York, filed petitions for redetermination of deficiencies or for refunds of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1976 and 1977 (File Nos. 28460, 27142 and 28461).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse,

New York, on June 16, 1981 at 10:45 A.M. Petitioners appeared by Alfred C. DeRosa, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division can conduct an audit using indirect audit methods where there are books and records.

II. Whether the two savings accounts of the partnership should be included in the Audit Division's source and application of funds computation.

III. Whether the amount used as miscellaneous expenses for the personal living expense analysis of petitioner John J. Polito was arbitrary.

IV. Whether Blue Cross/Blue Shield payments are a source of funds within the indirect audit method used.

#### FINDINGS OF FACT

1. Petitioner, Joseph Bada, timely filed New York State income tax resident returns for 1976 and 1977.

2. Petitioner, John J. Polito, timely filed New York State income tax resident returns for 1976 and 1977.

3. Petitioner, Family Food Market, timely filed New York State partnership returns for 1976 and 1977. Petitioners Joseph Bada and John J. Polito are equal partners in the retail grocery business dealing in food, beverages and meat products.

4. On March 30, 1979, the Audit Division issued a Notice of Deficiency against petitioner, Joseph Bada, for 1976 and 1977, imposing additional personal income tax of \$508.35, plus penalty and interest.

On March 30, 1979, the Audit Division issued a Notice of Deficiency against petitioner, John J. Polito, for 1976 and 1977, imposing additional

personal income tax of \$858.00, plus penalty and interest of \$132.69. However, the schedule of audit adjustments reported additional personal income tax of \$583.76 plus penalty and interest which should have been the amounts shown on the Notice of Deficiency. The \$858.00 is in fact additional unincorporated business taxes due from the petitioner, Family Food Market.

On March 30, 1979, the Audit Division issued a Notice of Deficiency against petitioner, Family Food Market, for 1976 and 1977 imposing additional unincorporated business tax of \$858.00, plus penalty and interest of \$132.69.

All three notices of deficiency were issued pursuant to a "source and application of funds" audit on each of the petitioners, along with an analysis of petitioners Joseph Bada's and John J. Polito's personal living expenses. A summary of the audits found unreported income from Family Food Market of \$4,874.00 and \$12,986.00 for 1976 and 1977 respectively. This unreported income was then equally divided between each of the partners.

5. Petitioners contended that the Audit Division should not be able to use an indirect audit method (source and application of funds) since the Audit Division did not go through all the books and records available and indicate the incompleteness of said records. The petitioners further contended that the Audit Division should be restricted to the books and records unless they can show absence of complete books and records. They based their argument on Chartair, Inc. v. State Tax Commission, 69 A.D. 2d 44 which states in part "The honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability". The petitioners argue there was no adequate examination of the books and records, therefore the assessments can only be construed as arbitrary and without basis of fact.

6. The partnership had two savings accounts in which monies were deposited to cover the store mortgage payments and medical insurance for the partners.

The balances are as follows:

	<u>ACCOUNT 026256</u>	<u>ACCOUNT 024822</u>
January 1976	\$ 21.00	\$374.46
December 1976	1,108.68	707.10
January 1977	1,108.68	707.10
December 1977	931.61	345.91

The Audit Division took the position that all of the daily receipts went through the partnership checking account, therefore the savings accounts should not be considered. The petitioners contended that not all receipts went through the checking account, but some went to the savings accounts and therefore they should be included in the "source and application of funds" audit.

7. The Audit Division estimated the miscellaneous expenses (i.e. entertainment, vacations and tangible personal property other than food and clothing) at \$1,300.00 each year for the personal living expense analysis of petitioner John J. Polito. The petitioners contended that this expense was arbitrary because the Audit Division had not shown what the petitioner, John J. Polito, used this expense for. However, the petitioners presented no evidence as to the true cost of petitioner, John J. Polito's, miscellaneous expenses.

8. The Audit Division used the Blue Cross/Blue Shield payments as an application of funds within the audit. However, the petitioners contended that the Blue Cross/Blue Shield payments are a non-deductible expense which reduce the partners capital and therefore are a source of funds.

#### CONCLUSIONS OF LAW

A. That the books appear superficially adequate does not preclude use of an indirect audit method. Use of an indirect audit method is not limited to cases in which the taxpayer has no books or where his books are patently

inadequate. The Audit Division need not prove specific inaccuracies in the taxpayer's book in order to resort to an indirect audit method. Once a discrepancy is established and the facts are such to give rise to an inference that the discrepancy stemmed from unreported income, use of an indirect audit method is appropriate. That petitioners' reliance on Chartair, Inc. v. State Tax Commission, 69 A.D. 2d 44 is misplaced. Said determination confines itself to the use of taxpayers records as they relate to a test period and not to established indirect audit methods.

B. That petitioners have not presented adequate or supporting evidence sufficient to establish that the miscellaneous expenses for petitioner, John J. Polito, and the exclusion of the savings accounts from the source and application of funds audit were erroneous, arbitrary or capricious. That in fact inclusion of said savings accounts would generate an overall larger discrepancy. However, since claim for an increased deficiency in personal and unincorporated business taxes was not made at or before the hearing, as required by section 689(d) of the Tax Law, the inclusion of the savings accounts can not even be considered at this time.

C. That the payments of Blue Cross/Blue Shield is an application of funds and not a source of funds as contended by petitioner.

D. That the Audit Division is hereby directed to reduce the Notice of Deficiency issued on March 30, 1979 against John J. Polito from \$858.00, plus penalty and interest to \$583.76, plus penalty and interest in accordance with Finding of Fact "4".

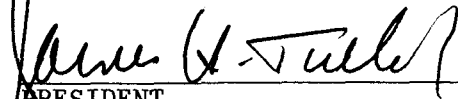
E. That the petitions of Joseph Bada and Family Food Market are denied and the notices of deficiency issued March 30, 1979, are sustained, together with such additional interest as may be lawfully owing.


F. That the petition of John J. Polito is granted to the extent shown in Conclusion of Law "D", supra; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER