



STATE OF NEW YORK
DEPARTMENT OF
TAXATION AND FINANCE
ALBANY, N.Y. 12227

MICHAEL ALEXANDER
SECRETARY TO THE
STATE TAX COMMISSION

December 21, 1982

Mr. Robert Clark
Bob Clark Agency, Inc.
217 Olmstead Avenue
Depew, NY 14043

Dear Mr. Clark:

I am in receipt of your letter of December 16, 1982 in which you request that I dismiss the December 14, 1982 decision of the State Tax Commission which denied your petition and sustained the Notices of Deficiency issued to you on June 29, 1982.

As indicated in the cover letter forwarding the Commission's decision to you, review at the administrative level is no longer available. The exclusive remedy for review as prescribed in Section 690 of the Tax Law is the commencement of an Article 78 proceeding within 4 months from the date of the decision. Such proceeding must be commenced in Supreme Court, Albany County. Article 78 of the Civil Practice Laws and Rules does not require that you retain an attorney, though most people prefer to be represented by counsel in a court proceeding.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Michael Alexander".

MICHAEL ALEXANDER
Secretary to the State Tax
Commission

MA/lvj

Bob Clark Agency, Inc.

SPECIALIST IN COMMERCIAL INSURANCE

217 OLMSTEAD AVENUE

DEPEW, NEW YORK 14043

TELEPHONE: 683-0022

December 16, 1982

State of New York
State Tax Commission Secretary
Albany, New York 12227



Gentlemen:

Referring to your letter of December 14, 1982, I would appreciate your reviewing this decision. Now, I am a Korean Veteran, with three battle stars and a good conduct medal. I was willing to give my life to defend this nation. Yet, am I to understand that to appeal the decision, it is necessary for me to retain an attorney???

Initially, when the audit was performed by Mr. Costello, no mention was made that a funds analysis was being done. Now, were we asked if there were any disability checks from Social Security of the Veterans Administration.

You have been given copies of checks, showing \$180.90 paid by the Veterans Administration and \$251.40 plus \$343.80 paid by Social Security each month. These checks totalled \$9,313 per year. This meant that our family received \$27,939 during the three years, which was deposited into our checking account. The aggregate "Over Applied" for 1972, 1973, and 1974 is \$29,027, which means for the three years in question, we are not accounting for \$1,088.06, or \$362.68/year.

These checks were always deposited in the bank each month, into our checking account, and then checks were written from this checking account. At no time were these Social Security or Veterans Administration checks cashed.

At the advice of Carl Wright, I wrote Jack Kemp on December 18, 1981. Social Security Administration sent me a letter on February 16, 1982, which was incomplete. Therefore, I wrote Jack Kemp again and asked him for additional information. To date, my letter has not been answered. Many letters and phone calls have been made to the Social Security Administration; however, they fail to respond also.

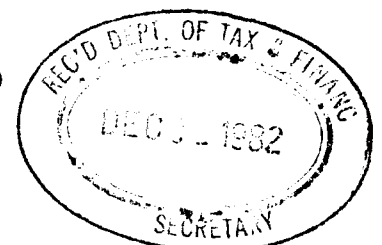
Therefore, I am asking you to dismiss this case on the strength of the copies of the checks you actually have, showing \$9,313/year income plus the letter verifying my children's portion of this income.

Thank you for your consideration...

Sincerely yours,

Robert R. Clark

Robert R. Clark (110-22-6572)



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Robert R. Clark	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Years	:	
1972 - 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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Robert R. Clark, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert R. Clark
34 Arlington Pl.
Depew, NY 14043

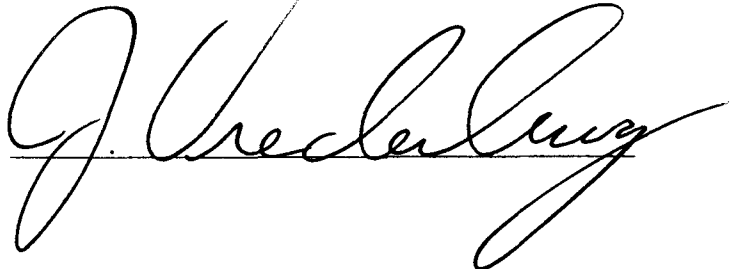
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 14, 1982

Robert R. Clark
34 Arlington Pl.
Depew, NY 14043

Dear Mr. Clark:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT R. CLARK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the years 1972, 1973 and	:	
1974.	:	

Petitioner, Robert R. Clark, 34 Arlington Place, Depew, New York 14043, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972, 1973 and 1974 (File No. 26388).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on December 17, 1981 at 9:15 A.M. Petitioner Robert R. Clark appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether the results of a field audit performed by the Audit Division properly reflected petitioner's income for 1972 through 1974.

FINDINGS OF FACT

1. Petitioner Robert R. Clark and his wife filed a joint New York State Income Tax Resident Return for 1972. On said return petitioner reported total income of \$4,288.00 which was his wife's wages.

Petitioner Robert R. Clark and his wife filed a joint New York State Income Tax Resident Return for 1973. On said return petitioner reported total income of \$5,297.00 of which \$4,565.07 was his wife's wages.

Petitioner Robert R. Clark and his wife filed a joint New York State Income Tax Resident Return for 1974 on short form, IT-200. On said return petitioner reported total income of \$1,554.00 of which \$1,234.03 was his wife's wages.

For tax years 1972 and 1973 the petitioner reported six exemptions. For tax year 1974 he reported five exemptions.

2. The Audit Division conducted a cash analysis and a source and application of funds indirect audit, wherein it found the following:

<u>SOURCES</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>
Net Wages	\$ 3,880.16	\$ 4,050.12	\$ 1,071.98
Interest	-0-	731.93	320.00
Tax Refunds - State	-0-	41.00	53.56
Tax Refunds - Federal	-0-	143.73	194.36
Savings Account Balances 1/1			
1. Western Savings Bank 521-22362	-0-	1,041.95	1,107.08
2. Western Savings Bank 521-22434	-0-	1,038.02	1,102.90
3. Western Savings Bank 521-22450	-0-	1,555.23	1,652.43
4. Western Savings Bank 521-22467	-0-	3,104.85	-0-
5. Western Savings Bank 521-22492	-0-	1,549.63	-0-
6. Western Savings Bank 521-26620	-0-	2,057.01	2,185.88
7. Western Savings Bank 521-26645	-0-	1,026.65	1,090.82
8. Western Savings Bank 521-26688	-0-	1,023.79	1,087.78
9. Manufacturers & Traders 36-028730-4	\$10,761.61	16,496.54	-0-
Empire Card - Loans	-0-	100.00	-0-
Checking Account Balances 1/1			
1. Bank of Buffalo 694-36548-3	756.00	2,754.17	4,236.02
2. Bank of Buffalo 694-37546-2	-0-	-0-	-0-
Sale of Stock	1,795.09	-0-	-0-
Unemployment Insurance - Wife	-0-	-0-	1,836.00
TOTAL SOURCES	<u>\$17,192.86</u>	<u>\$36,714.62</u>	<u>\$15,938.81</u>

<u>APPLICATIONS</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>
Savings Account Balances 12/31			
1. Western Savings Bank 521-22362	\$ 1,041.95	\$ 1,107.08	\$ -0-
2. Western Savings Bank 521-22434	1,038.02	1,102.90	-0-
3. Western Savings Bank 521-22450	1,555.23	1,652.43	-0-
4. Western Savings Bank 521-22467	3,104.85	-0-	-0-
5. Western Savings Bank 521-22492	1,549.63	-0-	-0-
6. Western Savings Bank 521-26620	2,057.01	2,185.58	-0-

7. Western Savings Bank 521-26643	1,026.65	1,090.82	-0-
8. Western Savings Bank 521-26688	1,023.79	1,087.78	-0-
9. Manufacturers & Traders 36-028730-4	16,496.54	-0-	-0-
Checking Account Balances 12/31			
1. Bank of Buffalo 694-36548-3	2,754.17	4,236.02	-0-
2. Bank of Buffalo 694-27546-2	-0-	-0-	3,383.49
Empire Card Cash Payments	-0-	607.41	230.85
Corporate Checks for Personal Use	1,886.77	1,000.00	-0-
Downpayment on Car-Check from Personal Acct.	1,035.00	-0-	-0-
Transfer to Insurance Savings Account	-0-	-0-	8,388.25
Personal Living Expense Paid by Check	7,950.16	12,522.23	13,280.36
Transfer from M & T Savings - Personal Use	-0-	4,478.48	-0-
TOTAL APPLICATIONS	<u>\$42,519.77</u>	<u>\$31,070.73</u>	<u>\$25,282.95</u>
OVER APPLIED	<u>\$25,326.81</u>	<u>\$ (5,643.89)</u>	<u>\$ 9,344.14</u>

Using the above information the Audit Division made the following adjustments:

Total over applied of \$29,027.16 was then divided by three years equalling \$9,675.72 for each year.

PERSONAL INCOME TAX	1972		1973		1974	
	Husband	Wife	Husband	Wife	Husband	Wife
Omission of income per source and application of funds analysis	\$9,675.72	\$ -0-	\$9,675.72	\$ -0-	\$9,675.72	\$ -0-
Wife's wages	-0-	4,288.34	-0-	4,565.07	-0-	1,234.00
Interest	-0-	-0-	365.96	365.97	160.00	160.00
Standard deduction	(1,954.97)	-0-	(2,000.00)	-0-	(1,684.46)	-0-
Exemption	(3,250.00)	(650.00)	(3,250.00)	(650.00)	(2,600.00)	(650.00)
Corrected Taxable Income	<u>\$4,470.75</u>	<u>\$3,638.34</u>	<u>\$4,791.68</u>	<u>\$4,281.04</u>	<u>\$5,551.26</u>	<u>\$ 744.00</u>
Tax on Above	\$ 138.83	105.53	\$ 151.67	\$ 131.24	\$ 187.51	\$ 14.88
Tax Previously Computed	-0-	-0-	-0-	-0-	-0-	-0-
Deficiency	<u>\$ 138.83</u>	<u>\$ 105.53</u>	<u>\$ 151.67</u>	<u>\$ 131.24</u>	<u>\$ 187.51</u>	<u>\$ 14.88</u>

3. On November 18, 1977, the Audit Division issued a Statement of Audit Changes against petitioner for additional personal income tax due for 1972 through 1974 based on the above cash analysis and source and application of funds audit. The tax for 1972 was assessed based on section 683(d) of the Tax Law. (Omission of income in excess of twenty-five percent of New York adjusted gross income.) Section 685(b) of the Tax Law, negligence penalty, was also imposed. Accordingly, the Audit Division issued a Notice of Deficiency against

Robert R. Clark on June 29, 1978 in the amount of \$478.01 in personal income tax, plus penalty and interest of \$176.90, for a total due of \$654.91.

Also on November 18, 1977, the Audit Division issued a Statement of Audit Changes against the petitioner's wife, Esther E. Clark, for additional personal income tax due for 1972 through 1974 based on the above cash analysis and source and application of funds audit. The tax for 1972 was assessed based on section 683(d) of the Tax Law. (Omission of income in excess of twenty-five percent of New York adjusted gross income.) Section 685(b) of the Tax Law, negligence penalty, was also imposed. Accordingly, the Audit Division issued a Notice of Deficiency against Robert R. Clark on June 29, 1978 in the amount of \$251.65 in personal income tax, plus penalty and interest of \$99.17, for a total due of \$350.82. The record does not indicate why the Notice was issued against Robert R. Clark and not Esther E. Clark.

4. Petitioner Robert R. Clark is an insurance broker. In 1965, petitioner had a coronary infarction and thrombosis. During 1972 through 1974 the petitioner contended he was not working and lived with his parents and not his family. He contended that he was only a student during this time because of his heart attack and poor vision.

During the years at issue, the petitioner had a corporation which sold insurance and prepared tax returns. Though the corporation tax return showed no compensation paid to petitioner, the audit was commenced by a letter stating that the petitioner was improperly using insurance monies from clients. The petitioner did use corporation checks for personal use during this period.

5. Petitioner contended that the monies in the saving accounts were the corporation's funds. Petitioner further contended that the corporation could receive a higher rate of earning from the banks if the accounts were in the

name of a person and not that of the corporation. The Audit Division took the position that though the corporation's records did reflect that funds were turned over to petitioner for deposit into the savings accounts, when some of the accounts were closed, there was no evidence that the monies were then transferred back to the corporation. The petitioner did use the funds for his personal use.

6. Petitioner received Social Security disability benefits of \$2,233.60, \$2,512.80 and \$2,718.60 for 1972, 1973 and 1974 respectively. Petitioner received Veterans Administration Benefits of \$1,762.56 for each of the years at issue. The petitioner argued that the Audit Division failed to consider these sources of income in the Audit Division's analysis. The Audit Division took the position that these funds were in reality offset because the Audit Division's analysis had no cash estimate for personal living expenses and there is no evidence that these funds went into the bank accounts of the petitioner. The Audit Division contended that these monthly checks were cashed and used by petitioner.

7. Prior to the years at issue, the petitioner had been an Internal Revenue Service field agent (July, 1970 through a portion of 1971).

8. Petitioner further contended he received monies from his father.

9. The averaging of the unreported income and change of election of filing were done by the Audit Division so as to benefit the petitioner and his wife.

CONCLUSIONS OF LAW

A. That the petitioner has not presented evidence to show that the notices of deficiency dated June 29, 1978 were incorrect, and thereby has failed to sustain the burden of proof imposed by section 689(e) of the Tax Law.

B. That the unilateral averaging of the unreported income over 1972, 1973 and 1974 and the change of election in filing status reflected in the Audit Division's computations were done for the benefit of the petitioner and his wife as this computation resulted in the lowest possible tax. That the filing of joint returns for tax years 1972, 1973 and 1974 committed the petitioner and his wife to a joint and several liability and therefore, the combined tax, penalties and interest reflected on the two notices of deficiency issued against the petitioner (both dated June 29, 1978), does not result in an over-assertion of liability against the petitioner.

C. That the petition of Robert R. Clark is denied and the notices of deficiency issued June 29, 1978 are sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER