

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Alexander Di Lorenzo, Jr. :
and Jean Di Lorenzo, Individually :
& as Administratrix : 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 :
1968. :
_____:

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 December, 1982, he served the within notice of Decision by certified mail upon Estate of Alexander Di Lorenzo, Jr. and Jean Di Lorenzo, Individually & as Administratrix, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

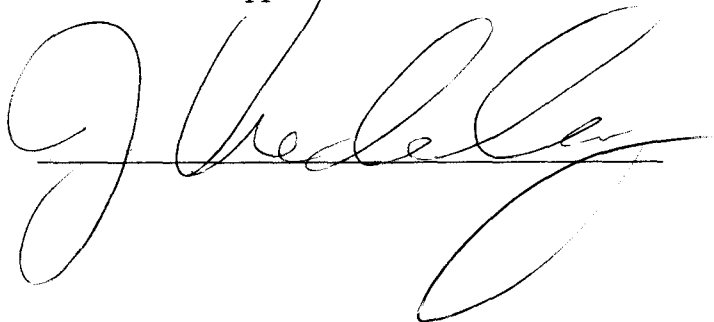
Estate of Alexander Di Lorenzo, Jr.
and Jean Di Lorenzo, Individually
& as Administratrix
121 Kings Point Rd.
Great Neck, NY 11024

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 December, 1982.

Kath. Rappaport
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Estate of Alexander Di Lorenzo, Jr. :
and Jean Di Lorenzo, Individually :
& as Administratrix : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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State of New York
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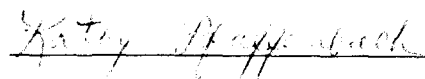
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Leo Kuperschmid the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leo Kuperschmid
Manes, Lawrence, Marks & Kuperschmid
250 Park Ave.
New York, NY 10017

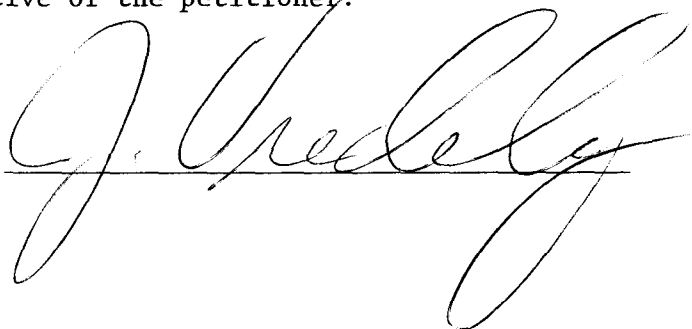
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 29, 1982

Estate of Alexander Di Lorenzo, Jr.
and Jean Di Lorenzo, Individually & as Administratrix
121 Kings Point Rd.
Great Neck, NY 11024

Dear Mrs. Di Lorenzo:

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
Leo Kuperschmid
Manes, Lawrence, Marks & Kuperschmid
250 Park Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ESTATE OF ALEXANDER DI LORENZO, JR.	:	
and JEAN DI LORENZO,	:	DECISION
Individually and as Administratrix	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1968.	:	

Petitioners, Estate of Alexander DiLorenzo, Jr. and Jean DiLorenzo, 121 Kings Point Road, Great Neck, New York 11024, 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 1968 (File No. 20932).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 26, 1981 at 1:35 P.M. Petitioners appeared by Manes, Lawrence, Marks & Kuperschmid (Leo Kuperschmid, Esq. of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioners may challenge the results of a federal audit which was incorporated in a notice of additional tax due when they filed a report of a federal change or correction accompanied by a statement showing wherein the federal audit and notice of additional tax due was erroneous within thirty days of the mailing of the notice of additional tax due.

FINDINGS OF FACT

1. Alexander DiLorenzo, Jr. (now deceased) and Jean DiLorenzo filed a joint New York State Income Tax Resident Return and a joint U.S. Individual

Income Tax Return for the calendar year 1968. Petitioners reported a loss on these returns of \$790,300.00.

2. The Internal Revenue Service conducted an audit of petitioners' Federal return and determined that there was a deficiency in petitioners' reported income. On January 20, 1976 petitioners consented to the Internal Revenue Service's assertion of a deficiency of income tax for the 1968 calendar year.

3. On January 3, 1977 the Audit Division issued a Notice of Additional Tax Due asserting income tax liability of \$316,994.00 for the year 1968 plus interest of \$734,031.31, for a total due of \$1,051,025.31. This income tax liability was premised upon a Federal audit of petitioners' Federal income tax return.

4. In a letter dated February 1, 1977 the law firm of Rubin Baum Levin Constant & Friedman, Steven M. Stuchiner, Esq., of counsel, on behalf of petitioners, submitted as an enclosure a completed Notice of Change in Taxable Income, Items of Tax Preference and Claim for Credit or Refund by U.S. Treasury Department Pursuant to Section 659 of the New York State Tax Law (Form IT-115). The form's instructions directed petitioners to cross out the sentence above their signature if they did not concede the accuracy of the Federal change or correction. Petitioners did not cross out this sentence. However, the cover letter asserted, among other things: that petitioners properly determined their Federal taxable income for 1968 as originally filed and reported and, as a result, no additional New York State income tax was due; that petitioners did not concede the accuracy of the Federal changes referred to on Form IT-115; and that because of a change in counsel, a ninety-day extension was needed to

review the Federal proceeding and to file a statement showing where the Federal determination was erroneous.

5. In a letter dated March 9, 1977 petitioners' representative was informed by the Audit Division, inter alia, that it would serve no useful purpose to grant a ninety-day extension to show where the Federal determination was erroneous since the Federal tax audit was concluded and accepted. Petitioners' representative was also advised that on the basis of the information provided on Form IT-115 the Notice of Additional Tax Due was withdrawn and was superseded by a Notice of Deficiency. This Notice of Deficiency, which was issued September 26, 1977, asserted personal income tax liability of \$253,036.00, plus interest of \$128,238.64, for a total of \$381,274.64.

6. In a letter dated April 5, 1977 petitioners' representative argued that "[w]hile the consent to an assessment of Federal taxable income on Form 870-AD constitutes a final determination within the meaning of Reg. §153.5(d), the Taxpayers may still contest the validity of such a determination for purposes of determining New York State taxable income." Petitioners' representative then renewed petitioners' request for an extension of time to show why the Federal determination was erroneous.

7. At the hearing the parties stipulated that if petitioners prevailed on their argument that they could challenge the propriety of the Federal correction or adjustment, then the matter would be remanded for an audit.

CONCLUSIONS OF LAW

A. That during the period in issue Tax Law §659 provided, in part:

"If the amount of a taxpayer's federal taxable income reported on his federal income tax return for any taxable year is changed or corrected by the United States internal revenue service or other competent authority...the taxpayer shall report such change or correction in federal taxable income within ninety days after the final determination of such change, correction,...,or as otherwise

required by the tax commission, and shall concede the accuracy of such determination or state wherein it is erroneous."

B. That petitioners have not challenged the conclusion that the Federal assessment of a deficiency constituted a final determination within the meaning of 20 NYCRR 153.5(d).

C. That a report of a change or correction in Federal taxable income is to be made on Form IT-115 (20 NYCRR 153.2).

D. That petitioners did not comply with Tax Law §659 in that they did not file Form IT-115 with the requisite statement within ninety days of the final federal determination.

E. That during the period in issue Tax Law §681(e)(1) provided, in part:

"If the taxpayer fails to comply with section six hundred fifty-nine in not reporting a change or correction increasing his federal taxable income as reported on his federal income tax return or in not reporting a change or correction which is treated in the same manner as if it were a deficiency for federal income tax purposes or in not filing an amended return, instead of the mode and time of assessment provided for in subsection (b) of this section, the tax commission may assess a deficiency based upon such changed or corrected federal taxable income by mailing to the taxpayer a notice of additional tax due specifying the amount of the deficiency, and such deficiency, together with the interest, additions to tax and penalties stated in such notice, shall be deemed assessed on the date such notice is mailed unless within thirty days after the mailing of such notice a report of the federal change or correction or an amended return, where such return was required by section six hundred fifty-nine, is filed accompanied by a statement showing wherein such federal determination and such notice of additional tax due are erroneous." (Emphasis added)

F. That although the envelope utilized to submit the form IT-115 and petitioners' letter of February 1, 1977 challenging the Notice of Additional Tax Due were not offered into evidence in order to reveal the filing date [see Tax Law §691(a)], it is clear from the conduct of the Audit Division in withdrawing the Notice of Additional Tax Due and in issuing a superseding Statement of Audit Changes that the form IT-115 and letter stating that petitioners did

not concede the accuracy of the Federal changes were filed within the thirty day period required by the Tax Law §681(e)(1). The filing of the form IT-115 and letter constitutes substantial compliance with Tax Law §681(e)(1). Therefore petitioners may challenge the propriety of the Federal change or correction.

G. That the New York State Tax Commission is not required to conduct an independent audit or investigation of a change or correction in a taxpayer's Federal taxable income by the United States Internal Revenue Service, but it may do so when it deems such an audit or investigation is warranted (see 20 NYCRR 153.4). However, since the parties have entered into the stipulation noted in Finding of Fact "7", this matter is remanded to the Audit Division for an audit of petitioners' New York State taxable income for the 1968 calendar year.

H. That the petition of the Estate of Alexander DiLorenzo, Jr. and Jean DiLorenzo is granted only to the extent noted in Conclusion of Law "G".

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

Robert A. Richard
ACTING PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER