

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Anthony Barnell

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:

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 :  
1970 - 1972.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon Anthony Barnell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony Barnell  
292 Ashdale Ave.  
Syracuse, NY 13206

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  
24th day of June, 1983.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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Anthony Barnell : AFFIDAVIT OF MAILING

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of a Determination or a Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Years :  
1970 - 1972.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon Richard E. Silverman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard E. Silverman  
Gubman, Lowstein & Silverman  
4309 E. Genesee St.  
Dewitt, NY 13214

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  
24th day of June, 1983.

Connie O. Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

June 24, 1983

Anthony Barnell  
292 Ashdale Ave.  
Syracuse, NY 13206

Dear Mr. Barnell:

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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Richard E. Silverman  
Gubman, Lowstein & Silverman  
4309 E. Genesee St.  
Dewitt, NY 13214  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ANTHONY BARNELL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1970, 1971 and	:	
1972.	:	

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Petitioner, Anthony Barnell, 292 Ashdale Avenue, Syracuse, New York 13206, 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 1970, 1971 and 1972 (File No. 17426).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Syracuse, New York, on April 30, 1981 at 1:45 P.M., with all briefs to be submitted by June 2, 1982. Petitioner appeared by Richard E. Silverman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly determined the amount of personal income tax liability of petitioner for the years in issue.

II. Whether petitioner is liable for the fraud penalty pursuant to section 689(e) of the Tax Law for the years in issue.

#### FINDINGS OF FACT

1. On November 22, 1976, as the result of a field audit, the Audit Division issued a Notice of Deficiency against petitioner, Anthony Barnell, in

the amount of \$5,495.87, plus fraud penalty of \$2,747.95 and interest of \$1,606.71, for a total due of \$9,850.53 for the years 1970 through 1972.

2. On February 26, 1976 petitioner pleaded guilty in the Albany City Police Court to two counts of filing false and fraudulent New York State Combined Income Tax Returns with the intent to evade the payment of tax for the years 1971 and 1972. Petitioner and Louis Cacciola were partners in Taft Grove Partnership ("the Partnership"). Petitioner admitted to the fraudulent actions in 1971 and 1972 but protested the amounts asserted to be due by the Audit Division.

3. The Partnership operated two bar and grills, The Taft Grove on Taft Road, East Syracuse, New York and the New Wolf Inn at 1130 Wolf Street, Syracuse, New York. The Partnership filed two Federal partnership returns for the businesses. Petitioner and Louis Cacciola kept their business books and records in an informal manner. Business transactions were recorded on pieces of tablet paper which were subsequently given to the Partnership's accountant. The accountant did not have access to the Partnership's bank deposit records and there were inconsistencies in sales figures as recorded.

4. The auditor deemed petitioner's records to be inadequate to conduct a proper audit and he performed an income reconstruction audit by the source and application of funds method. The auditor then turned over his findings to the Special Investigations Bureau which reconstructed income by the bank deposit method of audit. The auditors subpoenaed bank records of petitioner's business and personal accounts. The auditors examined the bank records to determine the amount of income received by petitioner during the period in issue. As a result of the audit, the auditors found a difference of approximately \$118,000 between actual income and income as reported on the Partnership returns for the

years at issue. Petitioner could offer no explanation for this discrepancy. One account, designated "the Sunshine Fund" by the Partnership, contained income from the gross receipts of the business which was allegedly to be set aside for petitioner's and Louis Cacciola's retirement. The receipts deposited in the aforesaid account were never shown to the Partnership's accountant when he prepared the Partnership's tax returns. Therefore, the income in the "Sunshine Fund" was not reported on the partnership returns.

5. Petitioner claimed that all of the Partnership's business and personal taxes due had been paid with the exception of the receipts found in the "Sunshine Fund" and that tax was due only on those receipts.

#### CONCLUSIONS OF LAW

A. That section 658(a) of the Tax Law and 20 NYCRR 152.1 require that taxpayers keep sufficient records to show whether such persons are liable for tax. "In a situation where adequate records do not exist or access to them is not available, the government, in attempting to establish a violation of the income tax laws, may reconstruct a taxpayer's taxable base by any reasonable method" (United States v. Morse, 491 F.2d, 149, 151). The poor condition of the Partnership's records was clearly a case for using an indirect method of reconstructing income.

B. That the source and application of funds and bank deposit methods of auditing are generally accepted indirect audit methods and were properly performed according to established accounting principles. The audit findings were uncontroverted by any documentary or other evidence submitted by petitioner.

C. That since petitioner pleaded guilty to evasion of personal income taxes for 1971 and 1972, there is no reason to cancel the fraud penalty imposed pursuant to section 685(e) of the Tax Law. No proof of fraud or willful


understatement was offered by the Audit Division for the year 1970 (fraud penalty for 1970 was computed to be \$831.05), therefore, fraud penalty for 1970 is cancelled.


D. That the petition of Anthony Barnell is granted to the extent indicated in Conclusion of Law "C"; that the Notice of Deficiency issued on November 22, 1976 is to be modified accordingly; and that, except as so modified the Notice is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 24 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER