

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of		
Elia Caputo	:	
		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	:	
Year 1972.		
	:	

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Elia Caputo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Elia Caputo
36 Joan Court
Elmont, NY 11003

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
27th day of May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Elia Caputo :
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 Year 1972. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon John R. Serpico the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Serpico
186 Joralemon St.
Brooklyn, NY

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
27th day of May, 1983.

David Parchuck

James A. DeFeo

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Elia Caputo
36 Joan Court
Elmont, NY 11003

Dear Ms. Caputo:

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 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
John R. Serpico
186 Joralemon St.
Brooklyn, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ELIA CAPUTO
for Redeterminaiton of a Deficiency or for
Refund of Personal Income and Unincorporated
Business Taxes under Articles 22 and 23 of the
Tax Law for the Year 1972.

DECISION

Petitioner, Elia Caputo, 36 Joan Court, Elmont, New York 11003, 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 year 1972 (File No. 31992).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1982 at 1:15 P.M. Petitioner, Elia Caputo, appeared by John R. Serpico, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether unreported income found as the result of an audit conducted by the Internal Revenue Service was derived from an unincorporated business carried on by petitioner, thereby subjecting said unreported income to the unincorporated business tax.

FINDINGS OF FACT

1. Petitioner herein, Elia Caputo, filed a 1972 U.S. Individual Income Tax Return wherein he reported adjusted gross income of \$6,035.14. The aforementioned adjusted gross income figure was comprised of the following items:

Interest income	\$ 32.52
Business income	5,302.62
Pension, rents, partnership, estate, etc. income	700.00
Total	<u>\$6,035.14</u>

After deducting itemized deductions and the allowance for personal exemptions, taxable income shown on petitioner's Federal return amounted to \$2,992.08. Taxable income reported on petitioner's New York State personal income tax return was \$3,092.00.¹

2. On December 22, 1972, petitioner was arrested by the local authorities in Nassau County and charged with possession of a controlled substance and with the intent to sell a controlled substance. Said arrest was the result of petitioner's sale of one pound of marijuana to an undercover narcotics agent. Petitioner was subsequently convicted on both of the above mentioned charges.

3. The Internal Revenue Service audited petitioner's 1972 Federal income tax return and, as a result of said audit, proposed to increase petitioner's reported income by \$25,985.00. The proposed increase was explained in the following manner:

In the absence of adequate records, additional taxable income has been computed by reference to the value of drugs found in your possession at the time of your arrest on December 22, 1972 and to a down payment made by you in 1972 for the purchase of a house. Therefore, your taxable income is increased in the amount of \$25,985.00, since the source of the funds expended for the purchase of the drugs and the down payment for the purchase of a house are unidentified. Computation is as follows:

Down payment on house purchased August 1972	\$15,000.00
Drugs seized by police - 84½ pounds @ \$130.00 per pound	<u>10,985.00</u>
Total unreported income	<u>\$25,985.00</u>

¹ It is presumed that the \$100.00 difference between Federal taxable income and New York State taxable income can be attributed to the difference between the Federal exemption (\$750.00) and the New York State exemption (\$650.00).

4. Petitioner protested the results of the aforementioned Internal Revenue Service examination. As the result of said protest, a settlement was entered into between petitioner and the Internal Revenue Service, whereby proposed unreported income was reduced by \$8,600.00, from \$25,985.00 to \$17,385.00. Petitioner did not report to the Audit Division the final results of the Internal Revenue Service examination of his 1972 Federal return, as required by section 659 of the Tax Law.

5. On April 28, 1980, the Audit Division issued a Statement of Audit Changes to petitioner, indicating that his personal income and unincorporated business tax liabilities for the year 1972 were "...recomputed based upon final Federal audit of your Federal income tax return by the Internal Revenue Service." Petitioner does not contest the \$1,443.46 of additional personal income tax asserted due, nor does he contest the five percent negligence penalty. Petitioner does contest that \$768.20 of unincorporated business tax is due.² Petitioner concedes that if the unincorporated business tax is found to be due and owing, that the penalties assessed for failure to file a 1972 unincorporated business tax return, failure to pay the unincorporated business tax when due, failure to file a declaration of estimated unincorporated business tax and five percent negligence penalty were properly asserted by the Audit Division.

6. In accordance with the above mentioned Statement of Audit Changes, the Audit Division, on August 7, 1980, issued a Notice of Deficiency to petitioner for the year 1972. Said notice asserted that additional personal and unincorporated business tax of \$2,211.66 was due, together with penalties and interest of \$1,727.36, for a total due of \$3,939.02.

² The Audit Division, in computing petitioner's unincorporated business tax liability, determined business income to be \$23,709.11. Said amount represents the sum of reported Federal adjusted gross income (\$6,035.14), the final increase in unreported income per Federal audit (\$17,385.00) and a prior adjustment made by the Internal Revenue Service (\$288.97).

7. At the hearing held herein, petitioner testified to the effect that the marijuana found in his possession was for personal consumption, that the sale of one pound of marijuana to the undercover agent was an "accommodation sale" for a friend and that it was the only time he had ever sold drugs. Petitioner maintains that the sale of marijuana was an isolated transaction and that he was not involved in the sale of drugs with any degree of continuity, frequency or regularity so as to be considered carrying on an unincorporated business.

8. The business income of \$5,302.62 reported on petitioner's 1972 Federal tax return represented income generated from the repair of automobiles. Schedule C attached to petitioner's Federal return indicated the following:

Gross receipts	\$6,014.00
Less: cost of goods sold	<u>711.38</u>
Total income	\$5,302.62
Less: business expenses	<u>-0-</u>
Net profit	<u>\$5,302.62</u>

CONCLUSIONS OF LAW

A. That petitioner has failed to sustain the burden of proof pursuant to sections 722 and 689(e) of the Tax Law to show that the unreported income disclosed pursuant to the audit conducted by the Internal Revenue Service was not derived from the conduct of an unincorporated business (i.e. the sale of drugs or the repair of automobiles). That petitioner's testimony that the marijuana found in his possession was for personal consumption and that he made only one sale during 1972 is considered unbelievable given the quantity of marijuana found (84½ pounds).

B. That section 703(a) of the Tax Law provides, in part, that:

"If an individual...carries on two or more unincorporated businesses, all such businesses shall be treated as one unincorporated business for the purposes of this article."

C. That petitioner's 1972 unincorporated business gross income is computed as follows:

Unreported income per Federal audit	\$17,385.00
Add: income from auto repairs	<u>5,302.62</u>
Corrected total business income	<u>\$22,687.62</u>

D. That petitioner does not contest that portion of the Notice of Deficiency pertaining to additional personal income tax, nor does he contest the imposition of penalties pursuant to sections 685(a)(1), 685(a)(2), 685(b) and 685(c) of the Tax Law. Accordingly, same are sustained.

E. That the petition of Elia Caputo is granted to the extent indicated in Conclusion of Law "C", supra; that the Audit Division is directed to recompute petitioner's 1972 unincorporated business tax liability using an unincorporated business gross income figure of \$22,687.62; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983

Richard W. Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER