

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Salvatore Cardinale : 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 :
1975 & 1976.

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 8th day of July, 1983, she served the within notice of Decision by certified mail upon Salvatore Cardinale, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Salvatore Cardinale
512 Vanderbilt Pkwy.
Huntington, NY 11228

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
8th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Salvatore Cardinale : AFFIDAVIT OF MAILING
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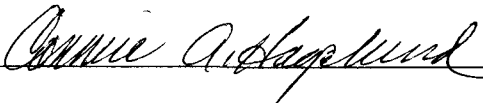
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon John R. Serpico the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


John R. Serpico
186 Joralemon St., 9th Floor
Brooklyn, NY 11201

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
8th day of July, 1983.




AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 8, 1983

Salvatore Cardinale
512 Vanderbilt Pkwy.
Huntington, NY 11228

Dear Mr. Cardinale:

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
John R. Serpico
186 Joralemon St., 9th Floor
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SALVATORE CARDINALE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1975 and 1976.	:	

Petitioner Salvatore Cardinale, 512 Vanderbilt Parkway, Huntington, New York 11228, 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 1975 and 1976 (File No. 26134).

A formal hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1981, continued at the same offices on March 15, 1982, and concluded at the same offices on May 10, 1982 with all briefs to be submitted by August 4, 1982. Petitioner appeared by John R. Serpico, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel) on November 20, 1981 and by Paul B. Coburn, Esq. (Samuel Freund, Esq., of counsel) on March 15, 1982 and May 10, 1982.

ISSUE

Whether petitioner failed to report income for the years 1975 and 1976 and, if so, whether the fraud penalty imposed for failure to report income was proper.

FINDINGS OF FACT

1. Petitioner Salvatore Cardinale is the president and sole stockholder of Cardinal Motors, Inc. ("the Corporation").

2. The Corporation is a retail distributor of Honda motorcycles. In addition to selling motorcycles, the Corporation sells motorcycle parts and performs repairs for its customers. The Corporation has been operating since approximately 1965.

3. Petitioner, Salvatore Cardinale, and his wife, filed separate 1975 New York State income tax returns on a combined form. On this return petitioner reported that he had a total income of \$24,508.22.

4. Petitioner, Salvatore Cardinale, and his wife, filed separate 1976 New York State income tax resident returns on a combined form. Petitioner reported that he had a total income of \$23,991.03 on this return.

5. On January 15, 1979 the Audit Division issued to petitioner a Notice of Deficiency asserting a deficiency of personal income tax in the amount of \$11,048.06 plus a penalty due to fraud and interest of \$7,585.08 for a total amount due of \$18,633.14. The Statement of Audit Changes, which had previously been issued, indicated that the asserted deficiency of personal income tax and the fraud penalty were premised upon an audit which disclosed additional unreported income.

6. The audit, which was conducted by an investigator of the Special Investigations Bureau, disclosed a series of checks which were drafted by petitioner and made payable to himself during the year 1975. These checks were drawn on the bank account of the Corporation and totalled \$30,500.00. One check, upon which the deficiency was based, was made payable to a third party. However, this check was endorsed back to petitioner. With one exception, all of the checks drawn in 1975 indicated on their face that they were in payment of a loan. The investigator found that during the year 1976 there were checks totaling \$27,800.00 which were drafted by petitioner and made payable to

himself. These checks were also drawn on the bank account of the Corporation. The audit also disclosed that payroll checks were issued to petitioner in an amount in excess of that shown on petitioner's wage and tax statement. In 1975 and 1976 the amount paid to petitioner in excess of that shown on petitioner's wage and tax statement was, respectively, \$3,264.00 and \$5,867.00. No evidence was presented by either party with respect to the latter adjustment.

7. Petitioner testified at the hearing that the Corporation's sales were greatest from March to October and therefore this was the period during which the Corporation generated most of its income. It was petitioner's practice that as the Corporation acquired excess funds in its checking account during the prime season, the money would be redeposited in what was characterized as the business savings account (see Finding of Fact "8", infra). The funds then accumulated in the savings account would be utilized to finance the Corporation during the winter months. In December the Corporation would commence purchasing inventory for the new season. At this time the money which had been saved in the business savings account would be redeposited in the business checking account. Petitioner stated that when the savings account was exhausted he would borrow the funds needed from friends. Petitioner also personally loaned money to the Corporation. Petitioner maintained that the loans to the Corporation from himself and his friends neither carried interest nor were represented by a note. Petitioner averred that during the period in issue he borrowed from forty to forty-five thousand dollars from friends. Petitioner then stated that during the time when sales resumed he would have checks drawn payable to himself, cash the checks, and then repay his friends in cash.

8. The savings account which purported to be the business savings account was a joint account held in the name of Salvatore Cardinale and other individuals. This account was not exhausted during the audit period.

9. Petitioner did not cooperate with the original auditor who sought to examine the Corporation's compliance with the New York State Sales and Use Tax Law. Subsequently, petitioner did cooperate with the investigator from the Special Investigations Bureau who conducted the audit at issue herein.

10. Petitioner's income tax returns were prepared by an accountant.

11. The Internal Revenue Service asserted a deficiency of personal income tax from petitioner and his wife for the year 1976. The deficiency was eventually settled in the United States Tax Court pursuant to an agreement of the parties that the Internal Revenue Service had erroneously recorded an undistributed loss of \$469.38 from the Corporation as undistributed taxable income of \$46,900.00 and that an adjustment to a medical deduction was in order. Petitioner and his wife agreed to pay additional tax of \$38.00 as a result of this agreement.

CONCLUSIONS OF LAW

A. That the party who must sustain the burden of proof in a hearing under Article 22 of the Tax Law is prescribed by section 689(e) of the Tax Law. This section of the Tax Law generally places the burden of proof on the petitioner. In view of the failure of petitioner to present any documentary or testimonial evidence from disinterested individuals that the amount drawn on the Corporate bank account was in repayment of a loan as well as the questionable explanation that non-interest bearing loans from third parties in the amount of \$40,000.00 to \$45,000.00 per year were repaid in cash, petitioner has failed to sustain his burden of proof of establishing that the Audit Division improperly included the amount of the checks payable to petitioner as income to petitioner. In

addition, since no evidence was presented with respect to the payroll checks issued to petitioner that were not reflected on petitioners, wage and tax statements, petitioner has failed to sustain his burden of proof of establishing that the Audit Division erred by including the payroll checks as income to petitioner.

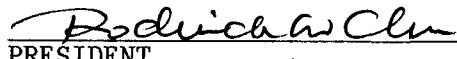
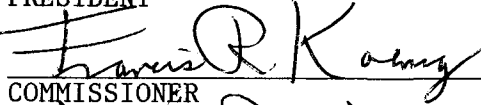
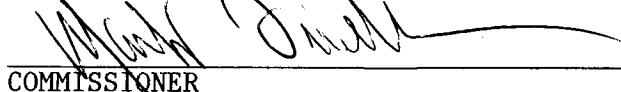
B. That the the burden of proof with respect to the issue of fraud is on the Audit Division (Tax Law §689(e)). A finding of fraud "...requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts of omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing." (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982). The production of checks payable to petitioner which were not reported as income and which petitioner has characterized as loans is, in and of itself, insufficient to establish fraud (see Welsh v. Commission, 36 TCM (CCH) 1020). Moreover, since no evidence was presented with respect to the payroll checks issued to petitioner that were not reflected on petitioners' wage and tax statements, the Audit Division has also failed to establish by clear and convincing evidence that the failure to report the additional salary income was due to fraud.

D. That the petition of Salvatore Cardinale is granted to the extent that the penalty based upon fraud is cancelled, and that, except as so modified, the asserted deficiency is in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 08 1983


PRESIDENT

COMMISSIONER

COMMISSIONER