

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ralph Coloney, Jr. :
and Althea Coloney : 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 Years 1972, 1973 & 1974.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Ralph Coloney, Jr., and Althea Coloney the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ralph Coloney, Jr.
and Althea Coloney
RD #1
Mayfield, NY 12117

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
6th day of May, 1983.

David Parchuck

Constance M. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ralph Coloney, Jr. :
and Althea Coloney :

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 Years 1972, 1973 & 1974.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Francis T. Roach the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Francis T. Roach
Stulmaker & Roach
50 Colvin Ave.
Albany, NY 12206

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
6th day of May, 1983.

David Parchuck

Conrad J. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Ralph Coloney, Jr.
and Althea Coloney
RD #1
Mayfield, NY 12117

Dear Mr. & Mrs. Coloney:

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 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
Francis T. Roach
Stulmaker & Roach
50 Colvin Ave.
Albany, NY 12206
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
RALPH COLONEY, JR. AND ALTHEA COLONEY	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the Years 1972, 1973 and 1974.	:	

Petitioners, Ralph Coloney, Jr. and Althea Coloney, RD #1, Mayfield, New York 12117, filed petitions for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1972, 1973 and 1974 (File No. 16048).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Room 107, Albany, New York 12227, on July 19, 1982 at 9:15 A.M. Petitioners appeared with Francis T. Roach (Stulmaker & Roach), CPA and Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the "Cash-Flow" audit method used by the Audit Division properly reflected the net income from business of petitioner Ralph Coloney, Jr.

II. Whether the Audit Division is guilty of laches.

FINDINGS OF FACT

1. Petitioners, Ralph Coloney, Jr. and Althea Coloney, filed joint New York State income tax resident returns for the years 1972, 1973 and 1974.

Petitioner Ralph Coloney, Jr. filed unincorporated business tax returns for the same years at issue.

2. Petitioner, Ralph Coloney, Jr., operated his business as a sole proprietorship under the name of New Atomic Gas Station & Grocery Store which sold food, gas and small hardware items. The store operated seven days a week from 6:00 a.m. to 10:00 p.m. and employed three persons who divided their time between the store and the fuel pumps. Petitioners resided in living quarters over the store.

3. On April 15, 1976, the Audit Division issued a Statement of Audit Changes to petitioner, Ralph Coloney, Jr., which proposed an increase in unincorporated business tax based on the following adjustments:

	<u>1972</u>	<u>1973</u>	<u>1974</u>
Business receipts increased per cash flow audit	\$28,879.23	\$20,043.69	\$24,413.17
Personal utilities disallowed	679.44		
Personal telephone disallowed	150.00		
Duplication of purchases		262.55	
Personal expenses charged to purchases disallowed		750.00	
Additional Business Income	<u>\$29,708.67</u>	<u>\$21,056.24</u>	<u>\$24,413.17</u>

Petitioner, Ralph Coloney, Jr., was given credit for the additional allowance for taxpayer's services provided for in section 708 of the Tax Law up to a maximum of \$5,000.00. Accordingly, on May 24, 1976, a Notice of Deficiency was issued which asserted unincorporated business tax of \$3,795.83, penalties, pursuant to sections 685(a)(1) and 685(b) of the Tax Law, of \$681.61, plus interest.

4. On May 24, 1976, a second Notice of Deficiency was issued to petitioners asserting personal income tax of \$9,768.18, penalties, pursuant to sections 685(a)(1) and 685(b) of the Tax Law, of \$1,703.61, plus interest. The adjustments made by the Audit Division included those made in the first Notice, plus

additional adjustments for gain on sale of residential property and a twenty (20) percent capital gain modification for the year 1972.

5. Petitioner, Ralph Coloney, Jr., testified that in the late 1960's, he acquired the mortgages of certain persons who, in later years (including the years in issue) repaid him and he in turn deposited said monies once a week in both his business and savings accounts. He also testified that said monies were deposited intact and were not segregated as to business receipts and receipts from other than business. Petitioner submitted "recap sheets" for 1972, 1973 and 1974 showing the source of the mortgage and loan payments received, thus reducing the amount of additional business gross receipts proposed by the Audit Division. No records were submitted which clearly showed that petitioner deposited these monies in either personal or business accounts.

6. Petitioner, Ralph Coloney, Jr., contended that the Audit Division failed to include the following non-taxable items as sources of funds in the cash flow audit: sale of a house, sales of personal property, sale of a snowmobile, transferring monies from his savings account to his business checking account, insurance proceeds from two auto collisions, a loan from Fulton County National Bank, and sale of land. He stated that all or most of these funds went into his business. Petitioner did not segregate deposits made in his business bank account as to deposits from business and deposits from sales other than business.

7. In June of 1972, petitioners sold property which was located in the Town of Northhampton. They asserted that the cost basis assigned to said property by the Audit Division (\$1,590.00) was erroneous since sums of money accumulated over the years were spent on repairs by petitioner Althea Coloney and her first husband, who died in 1966. They stated that the value of the

property on the date of his death was \$15,000.00 and that this amount is the proper cost basis. The Audit Division conceded this amount to be the proper basis. The broker fees and other disbursements amounted to \$2,004.80. They asserted that part of the net proceeds from the sale was used to purchase land and that the balance was used in the business; however, no documentary evidence was submitted to support their contention that part of the money was deposited in the business.

8. Petitioner, Ralph Coloney, Jr., testified that the adjustments made for living expenses for the years in issue were excessive since he had deducted from business purchases the cost of items withdrawn for personal use (food and gas). Petitioners, in their perfected petition, indicated that said adjustments should be reduced by \$1,300.00 for each year because the auditor for the Audit Division did not take into consideration life styles, environment, and the allowance made for personal use already in cost of goods sold. They also requested an adjustment be made to utilities and telephone on the ground that the auditor improperly prorated these items on a basis not representative of their use. Petitioners did not submit any evidence to show that the method used by the auditor to prorate utilities and telephone was inequitable.

9. Petitioners stated that the auditor for the Audit Division did not reduce the adjustment of gross receipts by the dividends, interest and rental income included therein. No evidence, documentary or otherwise, was offered to support their contention.

10. Petitioners contended that the delay by the Audit Division in scheduling the hearing herein in an expeditious manner caused them anguish and undue hardship and made it difficult for them to obtain information essential to their case.

CONCLUSIONS OF LAW

A. That petitioners Ralph Coloney, Jr. and Althea Coloney failed to sustain their burden of proof imposed by section 689(e) of the Tax Law in establishing that non-taxable items or additional funds such as mortgage and loan repayments and the items mentioned in Findings of Fact "6", "7" and "9", supra were, in fact, deposited either in personal or business accounts. Therefore, said items are deemed not to have been included in business receipts.

B. That petitioners sustained their burden of proof imposed by section 689(e) of the Tax Law in showing that the adjustment for living expenses was excessive. Therefore, said adjustment should be reduced by \$1,300.00 for each year in issue. Petitioners did not sustain their burden of proof imposed by section 689(e) of the Tax Law in showing why the adjustments made to utilities and telephone were erroneous. Therefore, said adjustments are sustained.

C. That since the Audit Division conceded the cost basis of property referred to in Finding of Fact "7", the capital gain modification made, pursuant to section 612(b)(11) of the Tax Law, should, accordingly, be reduced.

D. That the Audit Division is not guilty of laches since the State of New York cannot be estopped from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority (Matter of McMahan v. State Tax Commission, 45 A.D.2d 624; Matter of G. H. Walker v. State Tax Commission, 62 A.D.2d 77).

E. That the petitions of Ralph Coloney, Jr. and Althea Coloney are granted to the extent indicated in Conclusions of Law "B" and "C"; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

Rodrick Gw Clin
PRESIDENT

Francis R Koenig
COMMISSIONER

Mark J. Judd
COMMISSIONER