

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Robert & Patricia Damiecki :  
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 1974 & 1975. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Robert & Patricia Damiecki, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Patricia Damiecki  
Box 637  
Bridgehampton, NY 11932

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  
28th day of September, 1983.

Connie Hagelund

James P. [Signature]

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

September 28, 1983

Robert & Patricia Damiecki  
Box 637  
Bridgehampton, NY 11932

Dear Mr. & Mrs. Damiecki:

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  
Eli A. Flax  
33 Gillette Ave.  
Patchogue, NY 11772  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ROBERT DAMIECKI and PATRICIA DAMIECKI : DECISION  
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 Years 1974 and 1975.

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Petitioners, Robert Damiecki and Patricia Damiecki, Box 637, Bridgehampton, New York 11932, 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 years 1974 and 1975 (File Nos. 29713, 29714 and 29715).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 26, 1982 at 2:00 P.M. Petitioners appeared by Eli A. Flax, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether the income reconstruction audit properly reflected petitioners' income.

FINDINGS OF FACT

1. Petitioners, Robert Damiecki and Patricia Damiecki, timely filed a New York State combined personal income tax resident return for tax year 1974. They filed separately on the same tax return and reported total income of \$14,845.95 which was allocated \$11,669.57 to Robert Damiecki and \$3,176.38 to Patricia Damiecki.

Petitioners timely filed a New York State personal income tax resident return for tax year 1975. They filed jointly for such year and reported total income of \$9,108.04.

2. Petitioner Robert Damiecki timely filed New York State unincorporated business tax returns for tax years 1974 and 1975 reporting net income from his business of \$9,335.66 and \$8,630.68 for 1974 and 1975, respectively.

3. On December 31, 1979, the Audit Division timely issued<sup>1</sup> a Notice of Deficiency against petitioner Robert Damiecki for the 1974 taxable year showing additional tax due or tax deficiencies of \$4,980.15 plus penalty<sup>2</sup> and or interest of \$2,332.67 for a total claimed due of \$7,312.82. The additional tax due or tax deficiencies of \$4,980.15 included a personal income tax deficiency of \$3,447.80 and an unincorporated business tax deficiency of \$1,532.35.

On December 31, 1979, the Audit Division issued a Notice of Deficiency against petitioner Patricia Damiecki for the 1974 taxable year showing additional tax due or tax deficiencies of \$605.82 plus penalty and/or interest of \$274.67 for a total claimed due of \$880.49.

On December 31, 1979, the Audit Division issued a Notice of Deficiency for the 1975 taxable year against petitioners showing additional tax due or tax deficiencies of \$2,960.66 plus penalty and/or interest of \$1,137.23 for a total claimed due of \$4,097.89. The additional tax due or tax deficiencies of

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<sup>1</sup> Petitioners consented to the extension of the period of limitation for assessment of personal income and unincorporated business taxes for the 1974 and 1975 taxable years until April 15, 1980.

<sup>2</sup> The Audit Division imposed negligence penalties under Tax Law §685(b) in each of the three notices of deficiency described in Finding of Fact "3". Page 2 of the "Confidential Report", Exhibit H, incorrectly noted that the penalties were imposed under Tax Law §685(c).

\$2,960.66 included a personal income tax deficiency of \$1,862.54 and unincorporated business tax deficiency of \$1,098.12.

4. Petitioners conceded that petitioner Patricia Damiecki is liable for the additional tax due or tax deficiencies of \$605.82 plus penalties and or interest thereon which was based upon (i) an increase of \$8,066.33 in Patricia Damiecki's personal income for the 1974 taxable year for alimony not reported and a "capital gain - schedule D adjustment" and (ii) the imposition of minimum tax.

5. Petitioner Robert Damiecki operated a gas station, Monument Shell, on Route 27 in Bridgehampton, New York during the years at issue, as an unincorporated business.

6. The Audit Division reconstructed petitioners' income by (i) a bank deposit analysis and (ii) a cash availability audit using a source and application of funds analysis because the single entry records of the unincorporated business did not agree with the tax returns.

7. Daniel Misnick, the auditor in charge of the audit herein, testified that by using the bank deposit analysis he determined "that there was additional income on the business just based on the business checking account..." of \$5,584.00 for the 1974 taxable year and \$7,660.00 for the 1975 taxable year.

8. In addition, the source and application of funds analysis found the following:

<u>SOURCES</u>	<u>1974</u>	<u>1975</u>
Cash Draw by Check	\$ 7,075.00	\$ 1,375.00
Cash From Sales Tax A/C	1,100.00	904.00
Gross Rental Receipts	-0-	4,550.00
Wages Net of Taxes	155.00	-0-
Alimony	2,080.00	-0-
Child Support	1,820.00	1,820.00
Cash Draw From Business	-0-	-0-
Bank Loan "CM"	1,200.00	-0-

Proceeds of Sale of Home	24,319.00	-0-
Personal Loan (Mr. X)	-0-	15,000.00
Savings Acct. Withdrawals:		
1. A/C #13250	400.00	-0-
2. A/C #48490	4,000.00	1,175.00
3. A/C #14603	-0-	500.00
4. A/C #45441	13,950.00	16,450.00
5. A/C #48489	15,125.00	1,345.00
6. A/C #13780	-0-	1,325.00
Transfers From Personal Checking	15,000.00	14,000.00
Transfers From Personal Checking	5,000.00	-0-
Custodial A/C (Rec'd From Brother)	1,040.00	320.00
TOTAL SOURCES	\$92,264.00	\$58,764.00

<u>APPLICATIONS</u>	<u>1974</u>	<u>1975</u>
Paid on Contract for Personal Residence	\$ 4,750.00	\$ -0-
Paid on Contract for Rental Property	5,750.00	-0-
Deposits into Bank Accounts:		
1. Checking Account #01031665	35,132.00	19,958.00
2. Savings Account #13250	600.00	-0-
3. Savings Account #48490	5,100.00	328.00
4. Savings Account #14603	-0-	-0-
5. Savings Account #45441	12,750.00	14,720.00
6. Savings Account #48489	15,418.00	14,518.00
7. Savings Account #13780	1,040.00	320.00
Purchased Home	9,750.00	-0-
Purchased Rental	-0-	12,500.00
Loaned (Mr. X)	1,500.00	-0-
Loaned (Mr. X)	13,500.00	-0-
Vacation - Taxes	-0-	800.00
Auto Purchased	-0-	3,150.00
Custodial Account Paid to Brother	-0-	1,325.00
Unknown Use-Not For Sales Tax	4,000.00	-0-
Cash Living	6,500.00	3,500.00
TOTAL APPLICATIONS	<u>\$115,790.00</u>	<u>\$71,119.00</u>
Overapplication of Funds	\$ 23,526.00	\$12,355.00

9. The Audit Division increased Robert Damiecki's personal income for the 1974 taxable year by \$29,962.64 which includes overapplication of funds of \$23,526.00 described above in Finding of Fact "8", the additional income of \$5,584.00 described above in Finding of Fact "7", an adjustment of \$607.98 for "statutory medical deduction", and a modification for allocable expenses attributable to items of tax preference of \$244.66. This increase in Robert

Damiecki's personal income resulted in a determination of a personal income tax deficiency of \$3,447.80 for 1974. The Audit Division also determined that the unincorporated business income should be increased by \$26,443.91 which is the difference between \$29,110.00 (the additional business receipts determined by the reconstruction of income described in Findings of Fact "7" and "8") and an additional allowance for personal services of \$2,666.09. This increase in the unincorporated business income resulted in a determination of an unincorporated business tax deficiency of \$1,532.35 for 1974.

10. The Audit Division increased petitioners' personal income for the 1975 taxable year by \$21,856.06 which includes the overapplication of funds of \$12,355.00 described above in Finding of Fact "8", the additional income of \$7,660.00 described above in Finding of Fact "7", the disallowance of a utility expense of \$1,200.00, and an adjustment of \$641.06 for "statutory medical deduction". This increase in petitioners' personal income resulted in a determination of a personal income tax deficiency of \$1,862.54 for 1975. The Audit Division also determined that the unincorporated business income should be increased by \$18,372.67 which is the difference between (i) \$20,015.00 (the additional business receipts determined by the reconstruction of income described in Findings of Fact "7" and "8") plus \$1,200.00 resulting from the disallowance of a utility expense and (ii) an additional allowance for personal services of \$2,842.33. This increase in the unincorporated business income resulted in a determination of an unincorporated business tax deficiency of \$1,098.12 for 1975.

11. Petitioners contend that Robert Damiecki accumulated \$4,750.00 in cash "over a period of two and a half to three years (prior to the years under audit)..." However, Robert Damiecki did not testify or present any evidence at

the hearing to substantiate this accumulation of cash. According to his representative, Mr. Damiecki was absent from the hearing herein because he "runs a one-man business and he felt he couldn't leave it. There is a situation where Mrs. Damiecki had fears for his wellbeing and health should he have to endure such a hearing and she based that upon his physical reaction to (the informal conference)..."

12. Petitioners contended that the \$4,000.00 withdrawn from petitioners' savings account #48490 as noted in Finding of Fact "8" under the column heading "Sources" for the year 1974 was used as partial payment of the amount "paid on contract for rental property" of \$5,750.00 noted under the column heading, "Applications", for 1974. However, petitioners did not provide any evidence to show that the \$4,000.00 was used as part of the \$5,750.00 payment.

13. Petitioners also objected to the Audit Division's estimates of cash living expenses as noted under the "Applications" column in Finding of Fact "8", herein. However, they failed to introduce any evidence to show that such estimates were unreasonable and/or incorrect.

#### CONCLUSIONS OF LAW

A. That pursuant to Tax Law sections 689(e) and 722, the burden of proof is imposed upon petitioners to show that the audit method used by the Audit Division in reconstructing their income for 1974 and 1975 was inaccurate and/or incorrect. Matter of Robert R. Clark, State Tax Commission, December 14, 1982. Although petitioner Robert Damiecki claims that he had \$4,750.00 of cash on hand at the beginning of the audit period herein, which would partially counteract the understatement of income determined by the cash availability audit, petitioners have failed to prove such claim. Petitioner has also failed to prove that the withdrawal of \$4,000.00 from a savings account was used as part of the

\$5,750.00 payment described in Finding of Fact "12". We note, however, that the Audit Division has not shown that the \$4000.00 was not used (i) as a cash expenditure or (ii) to decrease a known liability or (iii) to increase a known asset. Therefore it was unreasonable to consider the \$4,000.00 as an unknown application of funds.

B. That the Audit Division is directed to redetermine the tax deficiency for the 1974 taxable year after decreasing the "applications" for such year by \$4,000.00.

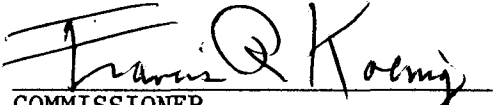
C. That the Audit Division is directed to modify the Notices of Deficiency for 1974 in accordance with Conclusion of Law "B", herein, and that, in all other respects, the petition of Robert Damiecki and Patricia Damiecki is denied.

DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER