

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

Carmen & Adelia Garzia :

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.

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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 29th day of June, 1983, she served the within notice of Decision by certified mail upon Carmen & Adelia Garzia, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carmen & Adelia Garzia  
202 King Avenue  
Solvay, NY 13209

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  
29th day of June, 1983.

  
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AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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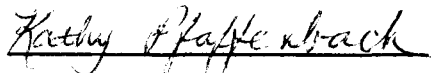
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of June, 1983, she served the within notice of Decision by certified mail upon Donald J. Aquilio the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald J. Aquilio  
Birnbaum, Manaker & Aquilio  
Suite 805 Carrier Tower  
Syracuse, NY 13202

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  
29th day of June, 1983.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

June 29, 1983

Carmen & Adelia Garzia  
202 King Avenue  
Solvay, NY 13209

Dear Mr. & Mrs. Garzia:

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  
Donald J. Aquilio  
Birnbaum, Manaker & Aguilio  
Suite 805 Carrier Tower  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
CARMEN AND ADELIA GARZIA	:	DECISION
	:	
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Tax and	:	
Unincorporated Business Tax under Articles 22	:	
and 23 of the Tax Law for the Years 1972 and	:	
1973.	:	

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Petitioners, Carmen and Adelia Garzia, 202 King Avenue, Solvay, New York 13209, filed petitions for redetermination of deficiencies or for refunds of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1972 and 1973 (File No. 24090).

A formal hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, New York, New York on June 15, 1982 and concluded at the same offices on August 9, 1982 with all briefs to be submitted by November 5, 1982. Petitioners appeared by Birnbaum, Manaker, and Aquilio (Donald J. Aquilio, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined Carmen and Adelia Garzia's liability for personal income tax and unincorporated business tax upon a field audit of Carmen's Restaurant.

FINDINGS OF FACT

1. Petitioners, Carmen and Adelia Garzia, filed joint New York State Income Tax Resident Returns for 1972 and 1973. On the income tax return for

1972, petitioners reported their total income as \$6,110.10. Petitioners reported a total income of \$9,647.38 for 1973.

2. Petitioner Carmen Garzia did not file a New York State Unincorporated Business Tax Return for 1972.

3. Petitioner Carmen Garzia filed a New York State Unincorporated Business Tax Return for 1973. On this return, Carmen Garzia reported a net profit from his business of \$9,647.38.

4. On April 4, 1978 the Audit Division issued a Notice of Deficiency to petitioners which asserted a deficiency of personal income tax, for the years 1972 through 1975, in the amount of \$11,345.37, plus penalty and interest of \$9,285.41, for a total amount due of \$20,630.78. The asserted deficiency of personal income tax was premised upon an understatement of income which was purportedly revealed during an audit by the Sales Tax Unit of the Audit Division (hereinafter "sales tax audit") of Carmen's restaurant. The penalty asserted in the Notice of Deficiency was for fraud pursuant to section 685(e) of the Tax Law.

5. Subsequent to the issuance of the Notice of Deficiency, the Audit Division revised the asserted deficiency of personal income tax. The deficiency of personal income tax currently asserted by the Audit Division is for the years 1972 and 1973 in the amount of \$5,265.12, plus a penalty pursuant to section 685(b) of the Tax Law for negligence in the amount of \$263.25, and interest of \$2,593.29, for a total amount due of \$8,121.66. The basis for this reduction was adjustments made to the sales tax audit.

6. On April 14, 1980 the Audit Division issued a Notice of Deficiency to petitioners which asserted a deficiency of unincorporated business tax for the years 1972 and 1973 in the amount of \$2,498.53, plus a penalty for negligence

of \$124.93 and interest of \$1,236.25, for a total amount due \$3,859.71. The asserted deficiency of unincorporated business tax was premised upon the sales tax audit which revealed income subject to unincorporated business tax.

7. Petitioner Carmen Garzia is the owner of a business known as Carmen's Restaurant (hereafter "restaurant"). The first floor of the restaurant has a dining room and a bar area. The dining room has seating for approximately two hundred people and is used for banquets as well as regular meals. The bar area has approximately twenty tables. Food is also served in the bar area. There is a room on the second floor of the restaurant which seats approximately 150 people and is used for banquets and meetings. The outside of the building is attractively landscaped and the building is in excellent condition. The restaurant is located in an industrial area. It is surrounded by a chemical plant, a steel firm, and a scrapyard.

8. The sales tax audit was performed through an examination of the sales and cash payments journal for the entire audit period; purchase invoices for the period March 1, 1973 through August 31, 1973; sales tax returns for the audit period; income tax returns for 1973; and bank statements and cancelled checks.

9. The auditor accepted the food sales as recorded on the restaurant's books and records. However, separate mark-ups were computed on liquor purchases and beer purchases. The mark-ups were computed by determining the difference between the restaurant's purchase price and selling price. The computation of the selling price was based upon the number of drinks per bottle after an allowance for spillage. These computations resulted in a mark-up on beer of 229% and a mark-up on liquor of 175%. These mark-ups were then applied to the restaurant's purchases of liquor and beer, less an allowance for sales tax, to

determine taxable sales. The audited taxable sales were then divided by the taxable sales reported by petitioner to determine an error rate. The rate of error was then applied to the taxable sales which petitioner reported during the entire audit period to determine the sales tax due.

10. After the audit was concluded, Carmen Garzia argued that a large portion of his food sales were made to exempt organizations. This was not taken into account in the sales tax audit since the non-taxable sales could not be substantiated.

11. The auditor found that petitioners reported more sales on their income tax returns than were reported on the restaurant's sales tax returns. However, the mark-up test resulted in greater sales than those reported on the income tax return.

12. After the sales tax assessment was issued, the Audit Division agreed to make adjustments which resulted in a lower assessment. The individual who represented Carmen Garzia at that time agreed to withdraw the petition challenging the sales tax assessment on the basis of the adjustments made by the Audit Division. Thereafter, Carmen Garzia paid the sales tax due upon being advised by his representative that he was required to do so. However, Carmen Garzia was dissatisfied with the arrangement reached by his representative and the Audit Division and promptly discharged his representative.

13. A separate audit for the purpose of determining the asserted income tax or unincorporated business tax due was not conducted by the Audit Division.

14. The restaurant's sales in the bar area were recorded on the restaurant's books in a different manner than its sales in the banquet area. In the bar area, sales of beer, liquor and food were separately recorded. All banquet

sales, however, were recorded as food sales even though they included the sale of beer and liquor.

15. After the Notices of Deficiency were issued, petitioners' current accountant performed a mark-up test on the records of the restaurant during the period in issue. The mark-up test was performed on the purchases of the restaurant's food, beer, and liquor. The cost of the liquor in petitioners' mark-up was the same as that used by the auditor. However, the selling price of beer and liquor was determined by asking other vendors what the market selling price of beer and liquor was at that time.

16. The selling price of food was based on the restaurant's guest checks. The restaurant's food purchases were obtained from petitioners' income tax returns with adjustments for beer and whisky purchases.

17. Petitioners' accountant's computations established that by accepting the food sales as reported in the restaurant's records, a portion of the restaurant's liquor sales would be counted twice. In addition, the liquor mark-up determined by the Audit Division audit was excessive since a portion of the liquor sales were made by the bottle rather than by the drink.

18. The audit performed by petitioners' accountant disclosed that petitioners underreported their sales on their personal income tax return by \$11,594.00 in 1972 and by \$4,567.00 in 1973.

19. Petitioners income tax liability and Carmen Garzia's sales tax liability were reviewed by the Audit Division for the years 1974 through 1978. An agreement for each of these years was reached. The restaurant's gross profit percentage according to the sales tax audit of 1972 and 1973 substantially exceeded the restaurant's gross profit percentage of the following years. Similarly, the auditor's determination of petitioners' income during the



period in issue far exceeded the amount of income which was agreed upon by the Audit Division and petitioner for subsequent years.

CONCLUSIONS OF LAW

A. That where a taxpayers records are inadequate, incomplete, and unreliable, the Audit Division is authorized to determine income by whatever method that will reflect the taxpayer's income (See DiLando v. Commissioner, et al, 34 T.C.M. (CCH) 1046, 1050). The use of a mark-up percentage on purchases is an acceptable method under these circumstances (DiLando v. Commissioner, supra; see generally, J. Rabkin and M. Johnson, Federal Income, Gift and Estate Taxation, Vol. 2A; § 12.03 B (4)). In view of Findings of Fact "11, "14" and "18, the books and records maintained by the restaurant were inadequate and unreliable. Therefore, the Audit Division was authorized to utilize a mark-up percentage to determine the personal and unincorporated business tax due.

B. That in view of Finding of Fact "15", petitioners have sustained their burden of proof imposed by subdivision (e) of section 689 of the Tax Law to establish that the audit method utilized did not properly reflect petitioners' personal income tax liability or petitioner Carmen Garzia's unincorporated business tax liability.

C. That the asserted deficiency of personal income tax is reduced to an amount premised upon unreported sales of \$11,594.00 in 1972 and unreported sales of \$4,567.00 in 1973 in accordance with Finding of Fact "18". The asserted deficiency of unincorporated business tax is similarly adjusted to reflect the amount of unreported sales found herein. The penalties asserted for negligence are to be recomputed in accordance with the above changes.

D. That since Carmen Garzia was the owner of the restaurant, the Audit Division is directed to remove Adelia Garzia's name from the Notice of Deficiency dated April 14, 1980, as she is not subject to the Unincorporated Business Tax.


E. That the petitions of Carmen Garzia and Adelia Garzia are granted to the extent of Conclusions of Law "C" and "D" and the Audit Division is directed to recompute the Notices of Deficiency accordingly; the petitions are in all other respects denied.

DATED: Albany, New York

JUN 29 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER