

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip & Lois Gioio :
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 1975 & 1976. :

AFFIDAVIT OF MAILING

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 11th day of May, 1983, he served the within notice of Decision by certified mail upon Philip & Lois Gioio, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip & Lois Gioio
26 Stormytown Rd.
Ossining, NY 10562

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
11th day of May, 1983.

David Parchuck

Conrad P. 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 :
Philip & Lois Gioio :
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& UBT under Article 22 & 23 of the Tax Law for :
the Years 1975 & 1976. :
:

AFFIDAVIT OF MAILING

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 11th day of May, 1983, he served the within notice of Decision by certified mail upon Thomas R. Langan the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas R. Langan
Mishkin, Dempsey, Gibbs & Langan
1045 Park St., Suite C
Peekskill, NY 10566

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
11th day of May, 1983.

David Parchuck

James Hegbert

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 11, 1983

Philip & Lois Gioio
26 Stormytown Rd.
Ossining, NY 10562

Dear Mr. & Mrs. Gioio:

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
Thomas R. Langan
Mishkin, Dempsey, Gibbs & Langan
1045 Park St., Suite C
Peekskill, NY 10566
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PHILIP GIOIO AND LOIS GIOIO	:	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 1975 and 1976.	:	

Petitioners, Philip Gioio and Lois Gioio, 26 Stormytown Road, Ossining, New York 10562, 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 1975 and 1976 (File Nos. 27225 and 27495).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1981 at 2:45 P.M. Petitioners appeared by Mishkin, Dempsey, Gibbs & Langan (Thomas R. Langan, Esq.). The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioner Philip Gioio's income from self-employment was understated for unincorporated business tax and personal income tax purposes for subject years.

II. Whether petitioner Philip Gioio's claimed deduction for business expenses were ordinary and necessary and properly substantiated.

III. Whether petitioner Philip Gioio, if found to have understated his income, is subject to a negligence penalty pursuant to section 685(b) of the Tax Law.

FINDINGS OF FACT

1. Petitioners, Philip Gioio and Lois Gioio, his wife filed New York State income tax resident returns for 1975 and 1976. Petitioner Philip Gioio filed unincorporated business tax returns for subject years.

2. On March 8, 1979, the Audit Division issued a Notice of Deficiency against the petitioners, asserting personal income tax of \$1,150.00, plus penalty and interest of \$248.00, for a total of \$1,398.00 for 1975 and 1976. The notice for personal income tax was based on a disallowance of claimed deductions taken on petitioners' personal income tax return for 1975. For 1976, the notice for personal income tax was based on changes made to petitioner Philip Gioio's unincorporated business income. On March 8, 1979, the Audit Division issued a separate Notice of Deficiency against petitioner Philip Gioio asserting unincorporated business tax of \$676.18, plus penalty and interest of \$142.62, for a total of \$818.80 for 1976. The notice for unincorporated business tax was issued on the basis that petitioner Philip Gioio understated his unincorporated business income for 1976.

3. At the hearing, the petitioners agreed to the audit adjustments made to their personal income tax for 1975.

4. At the hearing, the petitioners further agreed to the amendment of the Department of Taxation and Finance's answer, specifically to paragraph 10, wherein it was stated that negligence penalty is asserted under section 685(g) of the Tax Law, and that it be corrected to read penalty asserted pursuant to section 685(b) of the Tax Law.

5. Petitioner Philip Gioio for subject years was employed by the New York State Department of Corrections as a stationary engineer. In addition, he

also conducted an unincorporated business engaged in the renovation and contracting business.

6. The Audit Division increased Philip Gioio's unincorporated business income, based in part, on an analysis of petitioners' estimated personal living expenses. The estimated cost of living expenses had been determined by the Audit Division on the basis of the family composition of ten children and two adults. The bureau estimated that petitioners required \$10.00 a week per person for food; \$100.00 per month for family clothing and an amount for out of pocket expenditures.

7. On September 11, 1976, petitioner Philip Gioio received a check in the amount of \$1,549.65 from the Maryland Casualty Company as a result of a collision loss. Petitioners used the funds for various household expenditures. The Audit Division refused to reduce petitioners cash needs by this amount.

8. Petitioners maintained a charge account at Sears Roebuck and Company which is used principally for purchasing clothing for various members of the family. In addition, petitioners also made occasional purchases of clothes from other retail establishments. All purchases made at Sears Roebuck and Company and other retail stores totalling \$1,250.94, were paid for by check. The Audit Division previously allowed petitioners a \$750.00 credit for clothing purchased by check against the \$1,200.00 cash requirement for clothing expense. The Audit Division refused to reduce petitioners' cash requirements by more than the \$750.00.

9. Moneys required for miscellaneous cash purposes were obtained by cashing checks made payable to either cash or petitioners. Copies of cancelled checks made payable to cash or petitioners in the amount of \$1,066.00 were submitted in evidence. The Audit Division refused to reduce petitioners' cash requirements by these check payments.

10. Petitioner Philip Gioio submitted into evidence copies of cancelled checks totalling \$151.75 incurred for truck repairs. The Audit Division, in its examination of his books and records had determined that this amount had been paid for by cash, and, accordingly, increased petitioner's cash requirements.

11. Petitioner Philip Gioio contends that he incurred expenses for entertaining various vendors, from whom he purchased material, when they visited him at his summer home. He argued that these expenditures were made because during the year these vendors entertained him and it was his belief that it was good business practice to reciprocate.

CONCLUSIONS OF LAW

A. That petitioner Philip Gioio has established that certain of his cash living requirements as determined by the Audit Division were paid by check and that he received a payment from an insurance company which was not considered by the Audit Division. Accordingly, petitioner's income from self-employment as determined by the Audit Division is reduced in the following amounts:

- a) By the amount of \$450.00 which represents an additional reduction of cash clothing expense for amounts paid by personal checks of petitioner.
- b) By the amount of \$1,549.65 which represents an insurance settlement received by petitioners and used for various household expenditures.
- c) By the amount of \$1,066.00 which represents personal checks of petitioners made payable to cash or themselves and used for living expenses.
- d) By the amount of \$151.75 which represents truck repairs paid by personal check of petitioner.

B. That petitioner Philip Gioio has not sustained the burden of proof to show that the balance of the increase to his business income is erroneous or improper. Accordingly said adjustment, as modified, is sustained.

C. That petitioner Philip Gioio failed to show that the disallowed entertainment expenses were ordinary and necessary or that he maintained proper records in support thereof [Treas. Reg. 1.274-5]. That petitioner Philip Gioio failed to sustain the burden of proof within the meaning and intent of section 689(e) of the Tax Law in establishing that he was entitled to any deduction for said business expenses.

D. That petitioner Philip Gioio has failed to establish that any part of the deficiency asserted by the Audit Division was not due to negligence or intentional disregard of the Tax Law. Accordingly, the penalty asserted, pursuant to section 685(b) of the Tax Law, is sustained.

E. That the Audit Division is hereby directed to modify the notices of deficiency dated March 8, 1979, to be consistent with the Conclusion of Law "A"; and that, except as so granted, the petition is in all other respects denied.

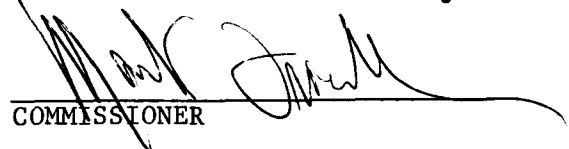
DATED: Albany, New York

STATE TAX COMMISSION

MAY 11 1983


PRESIDENT


COMMISSIONER


COMMISSIONER