

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Martin Gitlitz and Randi Gitlitz

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of NYS & NYC Income :  
Tax under Article 22 & 30 of the Tax Law for the :  
Years 1975, 1976 & 1977.

\_\_\_\_\_  
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 Martin & Randi Gitlitz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin & Randi Gitlitz  
2301 S.W. 70th Street  
Davie, FL 33317

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

James R. 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  
Martin Gitlitz and Randi Gitlitz :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of NYS & NYC  
Income Tax under Article 22 & 30 of the Tax Law :  
for the Years 1975, 1976 & 1977.

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 Stuart H. Gitlitz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stuart H. Gitlitz  
Gitlitz & Keegan  
Suite 807, Biscayne Bldg., 19 W. Flagler St.  
Miami, FL 33130

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

Constance R. Hegelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 6, 1983

Martin & Randi Gitlitz  
2301 S.W. 70th Street  
Davie, FL 33317

Dear Mr. & Mrs. Gitlitz:

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 & 1312 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  
Stuart H. Gitlitz  
Gitlitz & Keegan  
Suite 807, Biscayne Bldg., 19 W. Flagler St.  
Miami, FL 33130  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
MARTIN GITLITZ AND RANDI GITLITZ	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975, Article 22 of	:	
the Tax Law and Chapter 46, Title U of the	:	
Administrative Code of the City of New York for	:	
the Years 1976 and 1977.	:	

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Petitioners Martin Gitlitz and Randi Gitlitz, 2301 S.W. 70th Street, Davie, Florida 33317 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1975, Article 22 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York for the years 1976 and 1977 (File Nos. 31295, 31296 and 31297).

On August 10, 1982, petitioners waived a hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether the Audit Division properly determined petitioners' tax liability using a bank deposit analysis.

II. Whether petitioners were allowed an opportunity to appear and refute such determination.

FINDINGS OF FACT

1. Petitioners Martin Gitlitz and Randi Gitlitz filed New York State income tax resident returns for the years 1975 through 1977.

2. On April 4, 1980, as the result of a field audit, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$1,879.52 plus penalty and interest of \$756.59 for a total due of \$2,636.11 for the year 1975. On the same date a second Notice of Deficiency was issued against petitioners in the amount of \$747.93 plus penalty and interest of \$237.49 for a total due of \$985.42 for the year 1976. A third Notice of Deficiency was issued against petitioners on the same date in the amount of \$465.63 plus penalty and interest of \$108.28 for a total due of \$573.91 for the year 1977.

3. On February 2, 1979 petitioners executed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes for the taxable year 1975 allowing tax to be assessed at any time on or before April 15, 1980.

4. Pursuant to a news article concerning the Federal indictment of petitioner Martin Gitlitz on charges of food stamp fraud, the Special Investigations Bureau conducted a field audit of petitioners' books and records. Petitioners' accountant produced bank statements, cancelled checks and bank books. Mr. Gitlitz would not appear and refused to answer any questions alleging his fifth amendment right against self-incrimination.

5. Because of the lack of adequate records and information, the auditors conducted a bank deposit analysis of petitioners' records. Petitioners' net deposits for each of the three years in issue were determined. Since the deposits only reflected bank transactions, estimated cash personal expenses of \$5,592.00 were added to the net deposits for each year to determine total income. The auditor arrived at the personal expense figure by using the "Family Budget Standard" for 1974 which lists average weekly personal expenses for various types of individuals (ie: employed woman, age 20-34, child under

1, etc.). The schedule used for the entire audit herein was the standard in effect for 1974 and did not take into consideration the higher costs in effect for 1975 through 1977 due to inflation.

6. Petitioners conceded that they could not refute the net deposit figures but protested that the \$5,592.00 figure for personal expenses paid by cash was arbitrary and capricious. Petitioners, however, did not produce any evidence showing that the personal expense figures were erroneous nor did they produce any evidence indicating that any of the personal expenses were already included in the bank transactions by way of check payments for the items in question.

7. Petitioners also maintained that neither they nor their representatives were given the opportunity to review the findings of the auditors in order to corroborate or refute them and that the applicable records are no longer in existence. However, there is no indication in the file, as submitted, that petitioners were ever denied their rights to review the findings or voice their protests in person. In fact, petitioners voluntarily waived a personal appearance at a pre-hearing conference choosing instead to conduct the conference by correspondence.

8. Petitioners' books and records were returned by the Special Investigations Bureau by certified mail and a return receipt was signed.

#### CONCLUSIONS OF LAW

A. That where there is some factual basis for deciding that the tax return as filed does not accurately reflect the true income received by a taxpayer the Audit Division may reconstruct income using indirect methods (See Holland v United States, 348 U.S. 121, 131-132). Petitioner Martin Gitlitz's indictment on charges of food stamp fraud was a sufficient basis in fact for

determining that a bank deposit analysis was appropriate for substantiating the income as reported on petitioners' tax returns.

B. That section 689(e) of the Tax Law provides that, with certain exceptions not applicable herein, the burden of proof is upon the petitioner to show that the notices of deficiency were in error. Petitioners did not offer any evidence in any form whatsoever to substantiate their contention that the personal expense figure used by the auditor was arbitrary and capricious, nor did they submit any evidence showing that they paid any of their personal expenses by check thereby demonstrating that such expenses were not properly included as personal expenses paid by cash. Petitioners have, therefore, failed to meet their burden of proving that the deficiencies were erroneous.

C. That petitioners voluntarily waived personal appearances at both a conference and a hearing where they would have been given the opportunity to explain or refute any of the audit findings on which the notices of deficiency were based. Petitioners cannot, therefore, maintain that they were deprived of an adequate opportunity to be heard.

D. That the Special Investigations Bureau returned petitioners' books and records by certified mail, return receipt requested. It then became petitioners' responsibility to adequately protect their books and records. Petitioners produced no evidence which would indicate that the Department of Taxation and Finance was responsible for the destruction or loss of any of petitioners' books and records.

E. That the petition of Martin Gitlitz and Randi Gitlitz is denied and the notices of deficiency issued April 4, 1980 are sustained.

DATED: Albany, New York

**MAY 06 1983**

STATE TAX COMMISSION

*Roderick W. Clun*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*[Signature]*  
COMMISSIONER