

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

Philip Gush  
and Sandra Gush

: 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 1975 & 1976.

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State of New York  
County of Albany

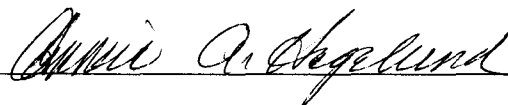
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon Philip Gush and Sandra Gush the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Philip Gush  
and Sandra Gush  
1132 Lackawanna Ave.  
Elmira, NY 14901

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  
8th day of July, 1983.

  
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AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

July 8, 1983

Philip Gush  
and Sandra Gush  
1132 Lackawanna Ave.  
Elmira, NY 14901

Dear Mr. & Mrs. Gush:

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

,  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PHILIP GUSH AND SANDRA GUSH	:	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.	:	

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Petitioners, Philip Gush and Sandra Gush, 1132 Lackawanna Avenue, Elmira, New York 14901, 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 No. 26106).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on September 13, 1982 at 1:15 P.M. Petitioners appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether this matter was resolved at a pre-hearing Tax Appeals Bureau conference.

II. Whether petitioners substantiated certain loans during the years at issue which the Audit Division should have taken into consideration in performing its income reconstruction audits.

FINDINGS OF FACT

1. Petitioners, Philip Gush and Sandra Gush,<sup>1</sup> jointly filed a Form IT-201,

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<sup>1</sup> On certain documents in the record, herein, Sandra Gush is referred to as Sandra Reese or as Sandra Reese Gush. She is a petitioner in this proceeding for the sole reason that she is the wife of petitioner Philip Gush.

New York State Income Tax Resident Return, for the 1975 taxable year on which they reported New York taxable income of \$2,377.57. Petitioner Philip Gush also filed an IT-202, New York State Unincorporated Business Tax Return, for the 1975 taxable year on which he reported net income of \$4,001.29 from his unincorporated licensed tavern, Gush's Thirsty Bear and from the rental of property.<sup>2</sup>

2. Petitioners, Philip Gush and Sandra Gush, jointly filed a Form IT-201/208, New York State Income Tax Resident Return, for the 1976 taxable year on which they reported New York taxable income of \$10,782.73. Petitioner Philip Gush also filed an IT-202, New York State Unincorporated Business Tax Return, for the 1976 taxable year on which he reported net income from his unincorporated business, Gush's Thirsty Bear, of \$7,198.41.

3. On March 21, 1978, the Audit Division issued a Statement of Audit Changes against petitioners alleging that they owed additional personal income tax of \$3,635.59, plus interest and \$1,432.33, plus interest, for the 1975 and 1976 taxable years, respectively. The Audit Division increased petitioners' income for 1975 and 1976 by \$33,444.00 and \$13,590.00, respectively. The basis for such increases was the reconstruction of petitioners' income for each year by a source and application of funds audit as follows:

1975

Source of Funds:

Net profit Schedule C	\$ 3,457.00
Depreciation Schedule C	1,013.00
Rent Income Schedule E	1,545.00
Depreciation Schedule E	559.00
Received on Land Contract	1,800.00
	<u>\$ 8,374.00</u>

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<sup>2</sup> The record is unclear why petitioner Philip Gush reported income from rental property on his unincorporated business tax return.

Application of Funds:

Increase in Assets - Schedule C	\$ 1,582.00
Increase in Assets - Schedule E	12,989.00
Cash Draw	8,500.00
New Car - By Check	2,100.00
Bank Payments - Principal	1,538.00
Nonbusiness Checks	12,868.00
Deposits to Savings - Cash	700.00
Increase in Checking Account	1,541.00
	<u>\$41,818.00</u>

Excess of Applications over Sources \$33,444.00

1976

Source of Funds:

Net Profit Schedule C	\$ 7,198.00
Depreciation Schedule C	1,228.00
Rental Income - Schedule E	6,960.00
Depreciation - Schedule E	1,158.00
Received on Land Contract	1,800.00
	<u>\$18,344.00</u>

Application of Funds:

Increase - Checking Account	\$ 1,065.00
Increase in Assets - Schedule C	5,312.00
Increase in Assets - Schedule E	12,657.00
Cash Draw	5,200.00
Nonbusiness Checks - Cycle	2,000.00
Savings	2,000.00
Savings	2,000.00
Bank payments - Principal	1,700.00
	<u>\$31,934.00</u>

Excess of Applications over Sources \$13,590.00

4. On March 21, 1978, the Audit Division also issued a Statement of Audit Changes against petitioner Philip Gush alleging additional unincorporated business tax due of \$1,479.53 and \$626.05 for the 1975 and 1976 taxable years, respectively. His unincorporated business income for 1975 and 1976 was increased by \$33,444.00 and \$13,590.00, respectively, the excess amounts of applications over sources noted in Finding of Fact "3", supra. Petitioner Sandra Gush was not involved in the unincorporated business.

5. On November 13, 1978, the Audit Division issued a Notice of Deficiency against petitioners alleging personal and unincorporated business income tax deficiencies of \$7,173.50, plus interest, for the 1975 and 1976 taxable years combined.

6. As the result of a pre-hearing Tax Appeals Bureau conference held on August 28, 1980, a revised Statement of Personal Income Tax Audit Changes dated November, 1980 was issued against petitioners. The Audit Division revised its increases of petitioner's income downward from \$33,444.00 to \$14,387.00 and from \$13,590.00 to \$6,590.00 for the 1975 and 1976 taxable years, respectively, and it alleged additional personal income tax due of \$948.27 and \$542.41 and additional unincorporated business tax due of \$578.10 and \$362.45 for the 1975 and 1976 taxable years, respectively, which are considerably less than the tax deficiencies initially alleged to be due.

7. Petitioners contended in their reply to the Audit Division's answer the following:

"Petitioner submitted proof of loans in the amount of \$9,000.00 for 1975 year, as requested to do so, and promptly to the Binghamton office, to establish that the total income adjustment for 1975 would be additional \$4,476.00. And that the additional income for 1976 would then be \$2,200.00 as agreed at pre-conference (sic) in Binghamton."

However, such proof was not deemed adequate, and the Audit Division revised its audit of petitioners only to the extent noted in Finding of Fact "6", supra.

8. Petitioner Philip Gush contended that his brother Martin A. Gush repaid a loan of \$2,000.00 to him during the 1975 taxable year. In addition, he alleged that his brother, Charles Gush, loaned him \$2,000.00 during the 1975 taxable year and his Uncle Carl Gush loaned him \$5,000.00 during the 1975 taxable year. None of these individuals appeared at the hearing, herein, to testify under oath and be subject to cross-examination by the Audit Division.

Rather, petitioners introduced into evidence a statement of Martin Gush, not in the form of an affidavit, although signed before a notary public, that he "paid to Philip P. (sic) Gush in 1975 two thousand dollars (\$2,000.00) or more for debts or personal loans incurred prior to that time." Petitioners also entered into evidence a statement of Charles B. Gush dated September 8, 1980, not in the form of an affidavit, although signed before a notary public, that he "did during 1975 loan approximately (\$2,000) two thousand dollars to my brother Phillip (sic) R. (sic) Gush." Petitioners also submitted into evidence a statement of Carl F. Gush dated September 3, 1980, not in the form of an affidavit, although signed before a notary public, that he "gave Phillip (sic) Gush \$5,000 in May 1975 to assist him in his business dealings. The agreement was made at 5% interest."

In addition, petitioners introduced into evidence a promissory note dated May 18, 1975 signed by petitioner Philip Gush in which he promised "to pay to the order of Carl Gush five thousand dollars at 5% annual." Petitioners also submitted photocopies of various checks drawn on the checking account of "Gush's Thirsty Bear, Philip R. Gush" with the Finger Lakes National Bank. Petitioner alleged that these checks were used to pay the loans described above. However, it appears that only two of the checks are made out to Carl Gush; the rest are made out to petitioner Philip Gush.

9. Petitioners remitted payment on or about January 5, 1981 of \$210.08 and of \$497.01 on the alleged deficiencies for the 1975 and 1976 taxable years, respectively. Although petitioners alleged that such payments were in full satisfaction of the deficiencies for such years as agreed at the pre-hearing conference, there is no evidence in the record that a complete resolution of the controversy herein was reached at such conference and such payments were not in full satisfaction of the deficiencies herein.

CONCLUSIONS OF LAW

A. That this matter was only partially resolved at the pre-hearing Tax Appeals Bureau conference. There is no evidence in the record that the conferee proposed a complete resolution of the controversy pursuant to 20 NYCRR §601.4.

B. That pursuant to Tax Law §689(e) and §722, which incorporates §689(e) into Article 23, the Unincorporated Business Tax Article of the Tax Law, petitioners have the burden of proving that the alleged tax deficiencies, herein, were improperly imposed by the Audit Division. Petitioners did not shoulder this burden. They did not maintain adequate records to substantiate the loans described in Findings of Fact "7" and "8", supra. Nor did any of the alleged lenders appear and offer testimony at the hearing, herein. However, the Notice of Deficiency must be amended to conform to the revised Statement of Personal Income Tax Audit Changes noted in Finding of Fact "6", supra. In addition, the Audit Division is directed to credit petitioners with the payments noted in Finding of Fact "9", supra.

C. That since petitioner Sandra Gush was not engaged in the unincorporated business, she is not liable for that part of the deficiency which pertains to Unincorporated Business Tax.

D. That the petition of Philip Gush and Sandra Gush is granted to the extent noted in Conclusions of Law "B" and "C", supra; and that, in all other respects, it is denied.

DATED: Albany, New York

JUL 08 1983

STATE TAX COMMISSION

Rodrich W. Cline  
PRESIDENT  
Francis R. Koernig  
COMMISSIONER  
John J. [Signature]  
COMMISSIONER