

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Guido & Johanna Hennekens :
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 :
Year 1971 - 1973. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

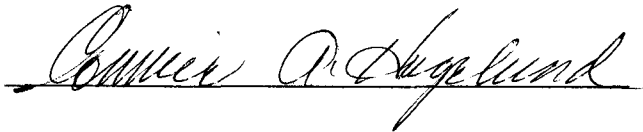
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Guido & Johanna Hennekens, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Guido & Johanna Hennekens
122 Clifton Blvd.
Binghamton, NY 13901

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Guido & Johanna Hennekens	:	
	:	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 Year 1971 - 1973.	:	

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 15th day of July, 1983, she served the within notice of Decision by certified mail upon Henry Fiacco and Joel A. Scelsi, the representatives of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Henry Fiacco
and Joel A. Scelsi, CPA's
2609 E. Main St., P.O. Box 479
Endicott, NY 13760

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

Guido & Johanna Hennekens
122 Clifton Blvd.
Binghamton, NY 13901

Dear Mr. Hennekens:

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
Henry Fiacco
and Joel A. Scelsi, CPA's
2609 E. Main St., P.O. Box 479
Endicott, NY 13760
Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building Annex, 164 Hawley Street, Binghamton, New York on September 15, 1982 at 2:45 P.M., with all briefs to be submitted by January 1, 1983. Petitioner appeared by Henry Fiacco, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Barry Bresler, Esq., of counsel).

ISSUES

I. Whether petitioners failed to report certain income during the years 1971 through 1973, as revealed by a net worth analysis audit performed by the Audit Division, and thus are liable for additional tax for those years.

II. Whether penalties pursuant to section 685(e) of the Tax Law may be imposed against petitioners.

FINDINGS OF FACT

1. Petitioners, Guido Hennekens and Johanna Hennekens, husband and wife, filed New York State Income Tax Resident Returns (Forms IT-201) for the years 1971, 1972 and 1973. Attached to and filed with these returns were New York State Unincorporated Business Tax Returns (Form IT-202), signed only by petitioner Guido Hennekens for 1971, by both petitioners for 1972 and by neither petitioner for 1973.

2. Petitioners executed a consent allowing personal income and unincorporated business taxes for the years ended December 31, 1971, 1972 and 1973 to be assessed at any time on or before April 15, 1978.

3. On April 11, 1975 and on September 26, 1977, the Audit Division issued various notices of deficiency to petitioners, asserting additional personal income and/or unincorporated business taxes due, together with penalty and interest accrued to the date of issuance of the deficiencies, as follows:

<u>YEAR AT ISSUE</u>	<u>TAX</u>	<u>DATE OF DEFICIENCY</u>	<u>AMOUNT OF DEFICIENCY</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1971	Personal Income Tax	4/11/75	\$1,222.27	\$ 611.35	\$ 219.31	\$ 2,052.93
1971	Unincorp. Bus. Tax	4/11/75	774.63	387.32	138.99	1,300.94
1972	Personal Income Tax	9/26/77	2,215.88	1,107.94	739.44	4,063.26
1972	Unincorp. Bus. Tax	9/26/77	1,121.55	560.78	374.26	2,056.59
1973	Personal Income Tax	9/26/77	7,368.71	3,684.36	1,906.29	12,959.36
1973	Unincorp. Bus. Tax	9/26/77	3,026.85	1,513.43	783.05	5,323.33

4. Each of the above notices of deficiency for personal income tax were issued jointly to the petitioners, while the deficiencies for unincorporated business tax were issued only to petitioner Guido Hennekens. Statements of audit changes issued with each of the above notices of deficiency explained that the adjustments to petitioners' tax liabilities were the result of an audit by the Audit Division utilizing a net worth analysis. It was further specified that a penalty was imposed upon each of the asserted deficiencies pursuant to section 685(e) of the Tax Law (deficiency due to fraud).

5. During the years at issue herein, petitioner Guido Hennekens operated a gasoline service station known as Hennekens Arco, located at the corner of Exchange and Susequehanna Streets in Binghamton, New York, It was noted in the field audit summary introduced in evidence that Mr. Hennekens' "speciality" is foreign car repairs. It does not appear that Mrs. Hennekens was involved in the operation of the service station business with Mr. Hennekens.

6. According to narrative contained in the field audit summary, Mr. Hennekens' business utilized a single entry, accrual basis accounting system. Books and records available for 1972 and 1973 consisted of expense vouchers, sales and disbursements journals, cancelled checks, check stubs and bank statements, with no books and records available for 1971. The field audit summary states that "[b]ecause of voluminous unidentified bank transfers between many bank accounts and the absence of business records for 1971, a net worth audit was conducted for the years 1971, 1972 and 1973. All local and Syracuse banks were surveyed."

7. The net worth analysis performed by the Audit Division resulted in the assertion of additional taxable income of \$15,511.53 for 1971, \$23,438.92 for 1972 and \$61,708.57 for 1973.

8. The Audit Division's net worth analysis indicated petitioners' net worth (assets less liabilities) as of January 1, 1971 to be \$29,111.21, and arrived at the above asserted additional income for the years at issue as follows:

	<u>1/1/71</u>	<u>12/31/71</u>	<u>12/31/72</u>	<u>12/31/73</u>
Net Worth	\$29,111.21	\$34,660.58	\$40,771.84	\$61,389.32
Increase in net worth*		5,549.37	6,111.26	20,617.48
Add draw Lincoln Nat'l Bank		4,504.11	10,275.66	11,026.07
Add draw Business Checking Acct		13,381.84	13,730.00	13,000.00
Cert. of Deposit deposited 2/15/73				20,000.00
Computed Net Profit	-	\$23,435.32	\$30,116.92	\$64,643.55
Less Net Profit per return Sch.C		8,701.00	6,953.00	3,325.24
Less Net Profit per return Sch.E		(817.21)	(275.00)	(390.26)
<u>Additional Income</u>		<u>\$15,511.53</u>	<u>\$23,438.92</u>	<u>\$61,708.57</u>

9. Petitioner's representative, Henry Fiacco, appeared at the hearing and indicated that petitioner's position with respect to the asserted deficiencies had been previously detailed in a letter dated October 8, 1975 together with certain documents submitted at that time. Mr. Fiacco stated that this letter, together with the documents submitted with it, adequately presented petitioner's position. Mr. Fiacco agreed to submit a copy of the letter and documents to the hearing officer within thirty (30) days after the hearing, with thirty (30) days reserved by the Audit Division's representative for comments in response to any material submitted by petitioners. No other evidence or presentation was offered on behalf of petitioners at the hearing, nor did petitioners appear or give testimony at the hearing.

*The net worth analysis reflected year end amounts (balances) for petitioners' various assets and liabilities for each year at issue. It is each year's-end total assets less total liabilities which represents petitioner's net worth, with the difference between this amount and the prior year's net worth constituting the increase in net worth.

10. Following the hearing, Mr. Fiacco submitted copies of several documents on behalf of petitioners including two (2) affidavits¹ made by Guido Hennekens, two (2) letters to one Murray Ginsberg (Special Investigations Bureau of the Audit Division) dated September 5, 1975 and October 8, 1975, respectively, an undated note handwritten in a foreign language (presumably Flemish) and signed by "M. Cuypers", and an undated typewritten document laden with abbreviations and apparently concerned with various purchases and/or expenditures by petitioners. Also included was a copy of a bank check dated June 2, 1973 in the amount of \$20,000.00, payable to Guido Hennekens from G. Cuypers Delsalle and stating on its face "Loan 5x ./ . 1972/77; Mrs. Cuypers Belgium". Finally, summaries of daily reports for 1973, (apparently taken from petitioners' business books and records) showing daily gross receipts, credit card sales, cash received, amount banked and amount made up from cash box, together with monthly statements for 1973 from Lincoln National Bank and copies of deposit receipts from Lincoln National Bank were submitted. No such documents were submitted for 1971 or 1972.

11. In explanation of the additional income asserted by the Audit Division, the following information and assertions on behalf of petitioners may be taken from the above-noted documents. The net worth figure for January 1, 1971 (\$29,111.21) was the result of acquisitions of assets and payments of expenses with monies earned from the service station business and from cash allegedly brought secretly into this country by petitioners between 1965 and 1971 from Belgium following the death of petitioner Guido Hennekens'

¹ Although the affidavits submitted were unsigned and unsworn, there is evidence contained in the field audit summary indicating that the original affidavits submitted to the Audit Division by petitioner Guido Hennekens had been properly executed.

mother in 1957.² The increase to net worth during 1971 (\$5,549.37) is allegedly due to a loan or gift of \$5,000.00 in cash made by one Mrs. Cuypers to Guido Hennekens in or about December 1971. No documentation of such a loan or gift, apparently alleged to be cash on hand not included in the January 1, 1971 net worth computation, has been submitted by petitioners.

12. Petitioners allege that the portion of additional income for each year asserted by the Audit Division to have been drawn from business receipts by Mr. Hennekens through Lincoln National Bank and through a business checking account was actually a product of Mr. Henneken's bookkeeping system and was not additional income to petitioners. Mr. Hennekens' bookkeeping system involved the use of a cash box from which amounts of cash were taken each day and added to the cash received each day from sales in order to equal the amount of money banked each day by Mr. Hennekens. Apparently, Mr. Hennekens banked such amounts daily as were necessary to cover "daily activities" (presumably daily expenses paid by checks). Where cash from a given day's sales would be insufficient, if deposited alone, to cover activities for that day, the additional amount needed for deposit would be added to the day's cash received by means of cash kept in the cash box. Daily credit sales slips (BankAmericard Credit sales) were deposited at Lincoln National Bank (allegedly because no discount fee on such credit slips was charged by this bank). Mr. Hennekens allegedly replenished his cash box by withdrawing from Lincoln National (presumably from credit slips previously deposited) and other banks and putting the money in his cash box.

² The cash allegedly totalling \$37,000.00 to \$40,000.00, had been put into a secret trust by Guido Hennekens' mother, was secretly brought to this country to circumvent Belgian laws on descent and distribution, and was allegedly completely spent by petitioners by the end of 1971.

13. Bank statements and deposit receipts from Lincoln National Bank were summarized and showed deposits to Lincoln National for 1973 totalling \$12,840.92. Daily reports for 1973, as summarized on worksheets, showed an amount made up from the cash box totalling \$20,342.69. No records or other evidence was presented concerning deposits or withdrawals to any banks other than Lincoln National. Furthermore, neither testimony nor any other explanation was rendered with any specificity concerning the various transfers and transactions allegedly occurring under Mr. Hennekens' bookkeeping system, other than a general description of the system and one isolated example illustrating the system.

14. Various allegations included in the documents submitted by petitioner appear to contest the net worth increases asserted for 1972 and 1973 on the basis that petitioner purchased certain assets on credit or with cash received as either loans and/or gifts from Mrs. Cuypers. Furthermore, it is alleged that a certificate of deposit dated (deposited) February 15, 1973 was included twice in the Audit Division's analysis.

15. With respect to the alleged credit purchases and cash from Mrs. Cuypers, no evidence other than the copy of the bank check for \$20,000.00 (see Finding of Fact "10") and the unverified allegations contained in the documents submitted after the hearing has been presented. Allegations were made concerning various amounts allegedly received at different times from Mrs. Cuypers but no evidence specifying dates of receipt and amounts received has been presented. Furthermore, a liability of \$18,000.00 to Mrs. G. Cuypers Delsalle is included in the net worth analysis.

16. It is alleged that only one certificate of deposit was purchased by petitioners in the amount of \$20,000.00, and that this was used to pay a portion of the \$30,000.00 purchase price on real property purchased by petitioners

on June 2, 1973. Petitioners assert that the value of this property was included as an asset in the net worth analysis and that the value of the certificate of deposit was included as an additional item of income, thus duplicating the \$20,000.00 amount. No testimony or evidence was presented with respect to this item.

17. Petitioners assert that the audit result is entirely incorrect and that their income and tax liability was correctly reported and paid during each of the years at issue.

18. No evidence was presented by the Audit Division with regard to the issue of fraud.

CONCLUSIONS OF LAW

A. That the burden of proof in any hearing under Articles 22 and 23 of the Tax Law is governed by section 689(e) of the Tax Law, which in pertinent part provides:

"(e) Burden of proof. - In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

(1) whether the petitioner has been guilty of fraud with intent to evade tax;..."³

B. That the petitioners have not presented evidence sufficient to show that the notices of deficiency issued by the Audit Division as the result of its audit were incorrect, and thus have failed to sustain their burden of proof imposed by sections 689(e) and 722(a) of the Tax Law. While the various allegations raised by petitioners together with the documents presented for 1973 support the existence of a bookkeeping system as described in Findings of Fact "12" and "13", no testimony or other evidence has been offered for any

³ Section 689(e) of the Tax Law is made applicable to Article 23 via the operation of section 722 (a) of the Tax Law.

of the years which would provide a sufficient basis to refute or adjust the additional income asserted by the Audit Division.


C. That the Audit Division has not met its burden of proof to support a finding of fraud against the petitioners as is required by section 689(e)(1) of the Tax Law and thus penalties asserted pursuant to section 685(e) of the Tax Law may not be sustained (Matter of Walter Shutt and Gertrude Shutt, State Tax Comm., June 4, 1982).


D. That the petition of Guido Hennekens and Johanna Hennekens is granted to the extent indicated in Conclusion of Law "C", but is in all other respects denied and the notices of deficiency dated April 11, 1975 and September 26, 1977, respectively, as modified in accordance with this decision are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER