

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Nate & Joyce Kapus

:

:

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 - 1974.

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 Nate & Joyce Kapus, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nate & Joyce Kapus
5035 Ledge Lane
Williamsville, NY 14221

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.

Connie Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

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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 Joseph E. Supples the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph E. Supples
Flaherty & Shea
1000 Western Building
Buffalo, NY 14202

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

Nate & Joyce Kapus
5035 Ledge Lane
Williamsville, NY 14221

Dear Mr. & Mrs. Kapus:

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
Joseph E. Supples
Flaherty & Shea
1000 Western Building
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
NATE KAPUS and JOYCE KAPUS	:	DECISION
	:	
for Redetermination of a Deficiency or for Refund	:	
of Personal Income Tax and Unincorporated	:	
Business Tax under Articles 22 and 23 of the Tax	:	
Law for the Years 1972 through 1974.	:	

Petitioners, Nate Kapus and Joyce Kapus, 5035 Ledge Lane, Williamsville, New York 14211, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1972 through 1974 (File Nos. 27389 and 27603).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on July 15, 1982 at 10:45 A.M. Petitioners appeared by Flaherty & Shea, Esqs. (Joseph E. Supples, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether amounts of money applied by petitioners during the years 1972, 1973 and 1974, which were in excess of funds available to petitioners from known sources during those years, were amounts which should have been included by petitioners in their income subject to tax during the years 1972, 1973 and 1974.

FINDINGS OF FACT

1. Petitioners, Nate Kapus and Joyce Kapus, husband and wife, timely filed New York State income tax resident returns (Form IT-201) for the years 1972, 1973 and 1974.

2. On March 30, 1979, the Audit Division issued to petitioners a Notice of Deficiency asserting additional tax due in the aggregate amount of \$39,624.47¹ for the years 1972 through 1974, plus penalty and interest. On the same date the Audit Division also issued to petitioners two additional notices of deficiency asserting tax due in the amounts of \$5,455.68 and \$6,963.55 for the years 1973 and 1974, respectively, plus penalty and interest.

3. A Statement of Audit Changes dated January 20, 1978, explained that the above asserted deficiencies were based on an audit of petitioners' 1972, 1973 and 1974 tax returns and an audit of Kapus Brothers (a plumbing business operated by petitioner Nate Kapus), and that "[a]dditional taxable income was derived from the attached source and application of funds." This Statement also specified that the notices of deficiency for 1973 and 1974 pertained to unincorporated business tax asserted for those years, and the Notice of Deficiency for 1972 through 1974 pertained to personal income tax.

4. At two pre-hearing conferences concerning the above asserted deficiencies, petitioners submitted certain documents and information such that the above-noted source and application of funds analysis was recomputed and revised. This recomputation reflected funds applied by petitioners in excess of funds available to petitioners from known sources, in amounts of \$35,549.53, \$107,000.40

¹ This amount was incorrectly stated on the Notice of Deficiency. The correct amount is \$39,260.47.

and \$129,871.74 for the years 1972, 1973 and 1974, respectively. This recomputation and revision resulted in a reduction of the asserted deficiencies for certain of the years. In accordance with this recomputation, tax was asserted as due for each year at issue, as follows:

<u>Year</u>	<u>Tax Article</u>	<u>Amount Asserted as Due</u>
1972	22	\$ 4,601.07
1973	22	15,484.68
1973	23	5,455.68
1974	22	18,016.01
1974	23	<u>6,538.69</u>

Total = \$50,096.13 (plus penalty and interest)

5. Petitioners do not contest the use of the source and application of funds method of analysis by the Audit Division. The only issue raised at the hearing was petitioners' claim that excess funds applied by them in 1972, 1973 and 1974, as above, were funds received by petitioners in those years from a non-taxable source.

6. Petitioner Nate Kapus is, by trade, a plumber, and has been in the plumbing business in the Buffalo, New York area since 1957. During the years at issue herein, he operated a small plumbing business with only one business vehicle (a truck). He worked "in partnership", first with his son, Marvin (then about 12 years old), and subsequently with his brother, Morris Kapus. Various business names were used, including Kapus Plumbing, Kapus and Son, and Kapus Brothers.

7. Petitioner Joyce Kapus was not involved in the conduct of an unincorporated business with petitioner Nate Kapus during the years at issue herein.

8. Petitioner Joyce Kapus is the only child of Charles Rubin (deceased) and Rose Rubin. Petitioners' five children are the Rubins' only grandchildren.

9. Mr. and Mrs. Rubin lived in Toronto, Ontario (Canada), until the time of Mr. Rubin's death. Mr. Rubin owned and operated a taxicab business in Toronto which consisted of approximately 4 cabs. Mr. Rubin died at the age of approximately eighty, and had owned and operated the cab company since he was a young man. Mrs. Kapus testified that her father (Charles Rubin) had owned and operated his taxicab business "...for as long as I could remember.". Petitioners have been married for 32 years and Mrs. Kapus is 52 years old.

10. Testimony by petitioners and by Roger M. Murphy (a long-time friend of petitioners and of the Rubins), as well as affidavits from Marvin Kapus (petitioners' son), Morris Kapus (petitioner Nate Kapus' brother) and Rose Rubin, were offered at the hearing in support of petitioners' assertion that excess funds applied during the years 1972, 1973 and 1974 were from a non-taxable source. The above-noted evidence provides information as to the single alleged source of excess funds, as follows:

- a) At intervals of approximately once a month, although on occasion as often as twice a month, Charles Rubin and Rose Rubin would visit petitioners at petitioners' home in Williamsville, New York.
- b) At the time of these visits, Charles Rubin would give to petitioner Nate Kapus large sums of money. The form of transfer was that Mr. Rubin would bring the money to petitioners' home, in American currency, in a large paper bag. The cash was generally in bundles bound by rubber bands and was in various denominations (10, 20, 50 and 100 dollar bills). Mr. Rubin would, often in the presence of others, empty the contents of the bag on petitioners' table.

- c) Petitioner Nate Kapus would accept this money and deposit it in one or more Buffalo area bank accounts maintained by petitioners (including accounts at Niagara Frontier Bank, Buffalo Savings Bank, and Marine Trust).
- d) Generally, the amount of money allegedly transferred to petitioners in the manner described above was many thousand dollars on each occasion. However, only once did petitioners count the money at the time of transfer. On the final occasion before Mr. Rubin's death, petitioner Nate Kapus insisted the transfer be by bank check, rather than by cash. No copy of the check was introduced at the hearing.
- e) These transfers occurred before, as well as during, the years at issue. Petitioners testified the amount of money transferred during the years at issue in all probability exceeded the amount of excess funds applied as reflected per the revised source and application of funds analysis performed by the Audit Division. Petitioners also noted that Rose Rubin continues to "help them out financially" and makes her home with petitioners during part of the year.

11. According to petitioners' testimony, the money was held for use as needed in Nate Kapus' plumbing business and, more specifically (in accordance with the alleged stated desire of Charles Rubin), for use in the event one of petitioners' children decided to enter into a business venture.

12. Petitioners' eldest son, Marvin Kapus, did use some of the money allegedly transferred as described to open a marina and restaurant on Grand Island, New York. In addition, some of the money was used by petitioner Nate Kapus in his plumbing business. Finally, Nate Kapus loaned approximately \$60,000.00 to a Mr. Michael Miletello for use in connection with an establishment

called Mulligan's. This money was repaid during the period at issue. Petitioner Nate Kapus testified no formal loan arrangements, note or other documents existed with respect to this loan, but (with respect to Mr. Miletello),..."I know the man. He is honest and good and he paid me.". No date was given as to when petitioners acquired the funds loaned to Mr. Miletello. Presumably, these funds were acquired during the period at issue.

13. Petitioners assert the above-described gifts from the Rubins were petitioners' only source of income during 1972, 1973 and 1974, in excess of income earned from petitioner Nate Kapus' work as a plumber, and that no records of the alleged transfers from the Rubins to petitioners exist or, in fact, were kept due to the nature and circumstances of the transfers.

14. Petitioner Nate Kapus did not work for the Rubins during the years at issue.

15. Petitioners did not offer bank deposit slips, cancelled (or active) passbooks, or any other records evidencing deposits of large sums of money on a regular or recurrent basis to their bank accounts during the years at issue.

16. The affidavit of Marvin Kapus (petitioners' son), submitted at the hearing, in part provides:

"...in the year 1973 my father, Nathan Kapus, advanced to me the sum of \$75,224.08, and in the year 1974 he also advanced to me the sum of \$137,765.32.

* * *

I personally observed my grandfather giving these monies to my father."

It is unclear whether the affiant observed these sums being transferred by his grandfather to his father in various amounts over a period of time or as a lump sum on two individual occasions.

17. The affidavit of Rose Rubin, submitted at the hearing, in part provides:

"...my husband Charles (Chas.) Rubin...and myself, Rose Rubin, were in the habit of giving large gifts to Nate & Joyce Kapus...

That since the death of my husband, they have given me a home and that I still help them out financially.

<u>1972</u>	<u>1973</u>	<u>1974</u>
\$50,000	\$65,000	\$135,000"

Rose Rubin was not a witness at the hearing.

CONCLUSIONS OF LAW

A. That with certain specified exceptions, none of which are applicable in this matter, section 689(e) of the Tax Law provides that the burden of proof in any case before the State Tax Commission is upon the petitioner.

B. That the petitioners have failed to sustain their burden of proving that the additional funds in excess of known sources, asserted by the Audit Division as having been received by petitioners in the years 1972, 1973 and 1974, were funds received from non-taxable sources. Petitioners have not substantiated with any degree of specificity the number of occasions or the dates upon which the alleged transfers took place, nor have they submitted any documentary evidence establishing regular bank deposits of large sums, despite testimony that the alleged transfers took place on a regular (in general, monthly) basis, and that the monies were thereafter deposited in the bank(s).


It is unclear whether affiant Marvin Kapus observed the alleged transfer to his father of \$75,224.08 in 1973 and \$137,765.32 in 1974 over a period of time in each year or rather on a single occasion in each year. Finally, the affidavit of Rose Rubin, one of the alleged donors, cites transfer of \$65,000.00 in 1973, whereas the Audit Division alleges excess funds totalling \$107,000.40 for 1973.

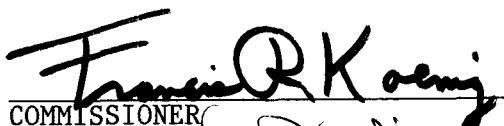
C. That the petition of Nate Kapus and Joyce Kapus is hereby denied and the notices of deficiency dated March 30, 1979, as recomputed and reduced by the Audit Division prior to the hearing (see Finding of Fact "4"), together with such penalty and interest as may be lawfully owing, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 23 1983


PRESIDENT


COMMISSIONER


COMMISSIONER