

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Kim H. & Wai C. Pon :

: AFFIDAVIT OF MAILING

for Redetermination of Deficiencies or for Refund :  
of Personal Income and Unincorporated Business :  
Taxes under Articles 22, 23 and 30 of the Tax Law :  
for the Years 1975 and 1976 and New York State :  
Personal Income and Unincorporated Business Taxes :  
under Articles 22 and 23 of the Tax Law and :  
Chapter 46, Title T of the Administrative Code of :  
the City of New York for the Year 1977.

State of New York  
County of Albany

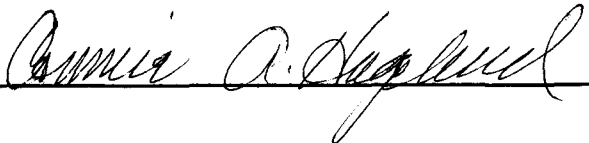
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Kim H. Pon and Wai C. Pon, the petitioner in the within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

Kim H. & Wai C.  
41-69 53rd Street  
Woodside, NY 11377

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

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In the Matter of the Petition :  
of  
KIM H. PON and WAI C. PON :

AFFIDAVIT OF MAILING

for Redetermination of Deficiencies or for Refund :  
of Personal Income and Unincorporated Business :  
Taxes under Articles 22, 23 and 30 of the Tax Law :  
for the Years 1975 and 1976 and New York State :  
Personal Income and Unincorporated Business Taxes :  
under Articles 22 and 23 of the Tax Law and :  
Chapter 46, Title T of the Administrative Code of :  
the City of New York for the Year 1977.

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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 15th day of July, 1983, she served the within notice of Decision by certified mail upon Michael J. Steinhorn, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael J. Steinhorn  
Clover Lane  
Rumson, NJ 07760

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

Kim H. and Wai C. Pon  
41-69 53rd Street  
Woodside, NY 11377

Dear Mr. & Mrs. Pon:

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 & 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 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  
Michael J. Steinhorn  
Clover Lane  
Rumson, NY 07760

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
KIM H. PON and WAI C. PON	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22, 23 and 30 of	:	
the Tax Law for the Years 1975 and 1976 and	:	
New York State Personal Income and Unincor-	:	
porated Business Taxes under Articles 22 and	:	
23 of the Tax Law and Chapter 46, Title T of	:	
the Administrative Code of the City of New	:	
York for the Year 1977.	:	

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Petitioners, Kim H. Pon and Wai C. Pon, 41-69 53rd Street, Woodside, New York 11377, filed a petition for redetermination of deficiencies or for refund of New York State personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law and New York City personal income tax under Article 30 of the Tax Law for the years 1975 and 1976 and New York State personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File Nos. 31044, 31381, 31382 and 31383).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 9, 1982 at 10:45 A.M. Petitioners appeared by Michael J. Steinhorn, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the results of a field audit which disclosed unreported income was proper.

II. Whether petitioners' payment by check in an amount less than the asserted deficiencies for the years at issue, which check was cashed by the Audit Division, constituted an accord and satisfaction with respect to said asserted deficiencies.

FINDINGS OF FACT

1. Petitioners herein, Kim H. Pon and Wai C. Pon<sup>1</sup>, timely filed a New York State income tax resident return for the year 1975 and New York State and New York City resident income tax returns for the years 1976 and 1977. Petitioner Kim H. Pon filed New York State unincorporated business tax returns for the years 1975, 1976 and 1977, wherein he reported the income generated from his operation of a laundry.

2. On March 3, 1980, the Audit Division issued to petitioners four (4) separate notices of deficiency. The following chart represents a summary of the aforementioned notices of deficiency:

<u>Notice Issued To</u>	<u>Years</u>	<u>Type of Tax</u>	<u>Amount</u>
Kim & Wai Pon	1975 & 1976	New York State Personal Income	\$1,334.60
Kim Pon	1975 & 1976	New York State Unincorporated Business	\$ 907.12
Kim & Wai Pon	1976 & 1977	New York State and New York City Personal Income	\$2,393.80
Kim Pon	1977	New York State Unincorporated Business	\$ 872.86

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<sup>1</sup> Wai C. Pon is involved in this proceeding due solely to the filing of joint income tax returns with her husband. Accordingly, the use of the term petitioner hereinafter shall pertain solely to Kim H. Pon.

In addition to the tax asserted due in each of the four (4) notices of deficiency, the Audit Division also assessed penalties pursuant to sections 685(b) and 685(c) of the Tax Law plus interest.

3. The four (4) notices of deficiency were based upon a field audit of petitioner's personal and business books and records. Using a cash availability analysis to reconstruct income, the Audit Division determined that petitioner had underreported his income by \$7,162.00 for 1975, \$9,689.00 for 1976 and \$18,307.00 for 1977. In addition to the assertion that petitioner had underreported his income, the Audit Division also made some minor adjustments of a technical nature which petitioner does not protest and, accordingly, same will not be addressed hereinafter.

4. In its cash availability analysis, the Audit Division estimated that petitioner expended \$10,000.00 in cash per year for personal living expenses. Items included in cash living expenses were such things as food, clothing, recreation, entertainment, personal care, transportation, gifts and vacations. The \$10,000.00 figure for personal living expenses paid by cash was estimated by the Audit Division without discussion or consultation with petitioner as to the approximate amounts expended. The cash availability analysis performed by the Audit Division revealed that few personal living expenses were paid by check.

5. At the hearing held herein, an auditor from the Audit Division testified as to the average cost per family household for the year 1975, as determined from a survey conducted by the Community Council of Greater New York. The following chart represents a summary of the average yearly amounts which would have been expended in 1975 by petitioner, his wife and three children in accordance with the aforementioned survey:

	<u>Husband</u>	<u>Wife</u>	<u>3 Children</u>
Food and grocery	\$1,058.20	\$ 902.20	\$2,184.00
Clothing	304.20	304.20	741.00
Recreation, entertainment, etc.	592.80	296.40	226.20
Personal care items	107.12	106.08	124.80
Total	<u>\$2,062.32</u>	<u>\$1,608.88</u>	<u>\$3,276.00</u>
Grand Total	<u>\$6,947.20</u>		

6. Petitioner argued that the personal living expenses paid by cash as estimated by the Audit Division of \$10,000.00 or the amount determined pursuant to the aforementioned survey of \$6,947.20 were both excessive given his family's life style. Petitioner testified that he spent \$20.00 per week, or a total of \$1,040.00 per year, on food for his entire family. It was also petitioner's testimony that his mother, a seamstress, made all the clothes used by his family and that only a negligible amount was spent on recreation and entertainment. No credible documentary or other evidence was adduced at the hearing to support the actual amount of petitioner's personal living expenses paid by cash during the years at issue.

7. Petitioner's mother lived with him and his family during the years at issue and his father also resided in the same household until his death sometime in 1976. It is petitioner's contention that his parents gave him money to help support the family and meet everyday living expenses. No credible documentary or other evidence was presented to support the amount of income earned by petitioner's parents during the years 1975 and 1976 or the amount which petitioner allegedly received from said parents during these two years. For the year 1977, petitioner's mother earned wage income of \$5,710.00. Both petitioner and his mother testified that the wages she earned were given to petitioner to help support the household. Net wages (gross wages less Federal, State, City and Social Security tax withheld) received by petitioner's mother in 1977 amounted to \$4,780.96.

8. On his 1975 and 1976 New York State unincorporated business tax returns petitioner included in total income from business \$892.00 and \$140.33 of rental income, respectively. These amounts represent rental income generated from petitioner's three-family house located at 41-69 53rd Street, Woodside, New York. Petitioner, his family and his mother and father resided in one-third of the house, while the remaining two-thirds of the house was leased to others. Petitioner's rental property at 41-69 53rd Street, Woodside, New York was not used in or otherwise connected with the operation of his laundry.

9. On April 17, 1981 petitioner submitted a check to the Audit Division in the amount of \$4,500.00. Typed on the back of said check was the following statement:

"Without admitting liability in full payment for all outstanding tax liabilities in settlement for all years up to and including 1977."

The check dated April 17, 1981 was deposited by the Audit Division. Petitioner argued that the \$4,500.00 payment was tendered as the result of a compromise settlement reached between his representative and an Audit Division employee in the collection section of the Queens, New York District Office. Petitioner contends that a valid accord and satisfaction of the Audit Division's larger claim resulted when the \$4,500.00 check was cashed by the Audit Division. No evidence was adduced at the hearing to support either the existence or execution of a compromise agreement.

10. Petitioner did not argue nor was any evidence presented with respect to the penalties asserted due pursuant to section 685(b) of the Tax Law for negligence and section 685(c) of the Tax Law for failure to file and pay estimated tax.



CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law and Chapter 46, Title T of the New York City Administrative Code is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30 and Chapter 46, Title T.

B. That sections 722 and 689(e) of the Tax Law places the burden of proof on petitioner and he has failed to produce any credible evidence to show that his personal living expenses paid by cash were less than \$6,947.20 per year. That additional unreported income is to be reduced by \$3,052.80 (\$10,000.00 - \$6,947.20) for each year at issue to reflect the reduction in personal living expenses paid by cash.

C. That for the year 1977 additional unreported income is to be further reduced by the sum of \$3,172.08, said sum representing funds given to petitioner by his mother. The sum of \$3,172.08 is computed in the following manner:

Gross wages	\$5,700.00
Less: withholding and social security taxes	(919.04)
Less: mother's cash personal living expenses (deemed identical to expenses of petitioner's wife -- see Finding of Fact "5")	(1,608.88)
Balance	<u>\$3,172.08</u>

That no adjustment can be made for the years 1975 and 1976 for funds petitioner may have received from his parents, as the record does not disclose the amount of income his parents earned during these years or the amounts, if any, which were given to petitioner [Tax Law section 689(e)].

D. That rental income of \$892.00 and \$140.33 reported on petitioner's 1975 and 1976 unincorporated business tax returns, respectively, constitutes income generated from the holding, leasing or managing of real property. Since the rental property was not used in or otherwise connected with petitioner's unincorporated business, said rental income is to be deleted from unincorporated business gross income (Tax Law section 703(e) and 20 NYCRR 203.13).

E. That Article 8, section 171, paragraph fifteenth of the Tax Law provides the State Tax Commission with:

"...authority to compromise any taxes or any warrant or judgement for taxes imposed by this chapter, and the penalties and interest in connection therewith, if the tax debtor has been discharged in bankruptcy, or is shown by proofs submitted to be insolvent..."

That Article 8, section 171, paragraph eighteenth of the Tax Law, as amended by Chapter 123 of the Laws of 1977 (effective May 13, 1977), provides the State Tax Commission with:

"...authority to enter into a written agreement with any person, relating to the liability of such person...in respect of any tax or fee imposed by the tax law..."

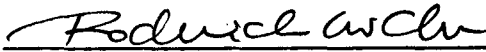
F. That paragraphs fifteenth and eighteenth of section 171 of Article 8 of the Tax Law provides for the exclusive method in which tax cases can be compromised. That petitioner has not shown that he was discharged in bankruptcy, nor has he submitted proofs as to his insolvency. It has not been shown that petitioner entered into a written agreement relating to his liability for the years at issue. That no compromise was reached in this matter within the meaning and intent of section 171 of Article 8 of the Tax Law. That the principle of accord and satisfaction is not applicable in the instant matter. (See: Botany Worsted Mills v. U.S., 278 U.S. 282; Ray Howard, 15 TCM 1152; Colebank v. Comm., 36 TCM 200; Glauber Valve Co. Inc. v. U.S., 536 F. Supp. 68.)

G. That the petition of Kim H. Pon and Wai C. Pon is granted to the extent indicated in Conclusions of Law "B", "C" and "D", supra; that the Audit Division is directed to recompute the notices of deficiency consistent with the decision rendered herein and the resultant tax due is to be reduced by the \$4,500.00 payment made by petitioner on April 17, 1981; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER