

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Peter E. Simonian :  
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 1972-1973. :  
\_\_\_\_\_ :

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Peter E. Simonian, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter E. Simonian  
c/o Walquist, Renodin, Crudin & Miller  
11 Pearl Street  
Albany, NY 12207

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  
27th day of May, 1983.

David Parchuck

Barrie A. Delaney

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 :  
Peter E. Simonian :  
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 1972-1973. :  
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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 27th day of May, 1983, he served the within notice of Decision by certified mail upon John G. Miller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John G. Miller  
Walquist, Renodin, Cruden & Miller  
11 N. Pearl St.  
Albany, NY 12207

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  
27th day of May, 1983.

David Parchuck

Ernest A. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 27, 1983

Peter E. Simonian  
c/o Walquist, Renodin, Crudin & Miller  
11 Pearl Street  
Albany, NY 12207

Dear Mr. Simonian:

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  
John G. Miller  
Walquist, Renodin, Cruden & Miller  
11 N. Pearl St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
PETER E. SIMONIAN	:	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 1972 and 1973.	:	

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Petitioner, Peter E. Simonian, c/o Walquist, Renodin, Crudin & Miller, 11 North Pearl Street, Albany, New York 12207 (Attn: John G. Miller, C.P.A.), 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 1972 and 1973 (File No. 19553).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York on October 4, 1982 at 9:15 A.M., and was continued to conclusion before the same Hearing Officer at the same location on November 8, 1982 at 9:15 A.M., with all briefs to be submitted by February 20, 1983. Petitioner appeared by Walquist, Renodin, Crudin and Miller, C.P.A.'s (John G. Miller, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

Whether the Audit Division correctly determined that petitioner had additional income subject to tax during the years 1972 and 1973.

FINDINGS OF FACT

1. On April 14, 1977, the Audit Division issued a Notice of Deficiency to petitioner, Peter E. Simonian, asserting additional tax due in the amounts of

\$6,538.89 for 1972 and \$2,295.73 for 1973, respectively, plus penalty for 1972 and interest for both years. On April 9, 1976, petitioner, together with Mary F. Simonian, who is not a party to this proceeding, executed a consent allowing the assessment of personal income and unincorporated business taxes for the year ended December 31, 1972, to be made at any time on or before April 15, 1977.

2. A Statement of Audit Changes dated April 14, 1977, explained that the above asserted deficiency was issued as the result of a field audit, wherein certain adjustments were made with respect to two businesses operated by petitioner. The adjustments for the year 1972 included the assertion of additional business income (\$27,756.00; per cash audit), an estimated withdrawal of merchandise for personal use (\$2,000.00), and the disallowance of certain expenses claimed as business promotional expenses (\$2,500.00). The adjustment for the year 1973 was based on an asserted error made in the computation of gain realized on the sale, in 1973, of one of petitioner's businesses (\$10,000.00). The Statement of Audit Changes further specified the additional tax asserted as due for each year as follows:

	<u>1972</u>	<u>1973</u>
Additional Personal Income Tax	\$4,792.36	\$ 821.38
Additional Unincorporated Business Tax	\$1,746.53	\$1,474.35

Finally, penalties were asserted for 1972 (only) pursuant to section 685(b) and 685(c) of the Tax Law.

3. Petitioner operated two businesses, the Club Morocco located in Troy, New York and The Downunder located in Latham, New York, each of which was operated as a "nightclub" during 1972. The Downunder was opened on March 21, 1972, and the Club Morocco was closed on October 13, 1972. Land and buildings

of The Downunder were owned by PCM Realty Corporation ("PCM"), of which petitioner was the sole stockholder.

4. In conducting its field audit, the Audit Division examined the books and records of the two businesses as well as petitioner's Federal and New York State income tax returns. This examination revealed that no allowance was made to reflect withdrawals of any food and/or beverages or other merchandise from either business for petitioner's personal use. The Audit Division estimated such withdrawals for 1972 in the total amount of \$2,000.00.

5. Petitioner asserts the above \$2,000.00 amount is an arbitrary and unreasonable estimate. Petitioner asserts further that the two businesses did not serve food other than snacks, that it is unrealistic to state that petitioner personally withdrew \$2,000.00 worth of beverages and, (in spite of testimony to the contrary by the Audit Division's auditor) that the \$2,000.00 amount was not an estimate arrived at mutually as the result of discussions between the auditor and the petitioner's representative. Finally, petitioner has given no indication that any amount of merchandise was withdrawn for personal use, and alleges no additional amount should be included on this basis.

6. The Audit Division's audit further resulted in the disallowance of deductions taken for business promotional expenses in the amount of \$2,500.00, on the assertion that such expenses were personal in nature and unsubstantiated as business expenses.

7. Petitioner asserts the above \$2,500.00 amount consisted of two parts, as follows:

- a) a book charge (bookkeeping entries) to income (sales) and expense (promotional expense) in the amount of \$1,250.00. This figure is a year-end estimated total based on weekly estimates, allegedly made by petitioner, of the amount of beverages given away to customers "on the house". No explanation was offered as to why this method of accounting

was used or why the sales account (an income account) rather than an inventory account (liquor inventory) was credited when no sale, in fact, occurred.

b) Expenses allegedly incurred as business promotion expenses in connection with the operation of the Downunder. Several cancelled checks drawn by petitioner on the account of the Downunder were presented at the hearing in substantiation of the claimed business promotional expenses. None of the checks bore any legend or notation of a particular purpose on their face, and were drawn to named payees, as follows:

<u>Check Number</u>	<u>Check Date</u>	<u>Payee</u>	<u>Amount</u>
1018	3/26/72	Deratzian Studio	\$ 19.26
1083	5/1/72	Capital Cigar	42.13
1131	5/20/72	Cash *	180.00
1215	6/24/72	Universal Match	601.98
1351	8/14/72	Committee to Re-Elect Fred Fields	200.00
1386	8/28/72	Renssalaer County Democratic Steak Roast	30.00
1387	8/28/72	Tony Mullins Testimonial	100.00
1518	10/31/72	Fish and Chips **	52.10
J-5	12/31/72	Petty Cash ***	24.00

8. At the hearing, petitioner's representative conceded that the checks numbered 1351 (\$200.00; Committee to Re-Elect Fred Fields) and 1386 (\$30.00 Renssalaer County Democratic Steak Roast) were political contributions and thus were not properly deductible as business promotional expenses. No testimony or other evidence was presented at the hearing with respect to either the book charges to promotional expense or the remaining various items shown by the cancelled checks (see Finding of Fact "7(a) and (b)").

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\* Alleged to be for tickets to a clam steam.

\*\* Alleged to be for hors d'oeuvres.

\*\*\* No explanation of this item was given, nor was any check introduced in evidence; it is presumably either a disbursement from The Downunder's petty cash, or an addition to the petty cash fund in the form of a deposit thereto.

9. The Audit Division also asserted that additional unreported business income was received by petitioner in 1972 in the amount of \$27,756.00. This amount was determined on the basis of deposits by petitioner to certain bank accounts, estimated withdrawals of cash by petitioner from The Downunder, and the results of an audit of both the Club Morocco and The Downunder.

10. The audit of the Club Morocco revealed no understatement of income, while the audit of The Downunder revealed a discrepancy (deposits to gross sales differential) of \$6,356.00. Petitioner asserts an initial deposit of \$1,000.00 (from personal cash) was made to The Downunder, and that withdrawals from (petitioner's) savings accounts in 1972 were in an amount greater than those deposits in excess of receipts to the Downunder's checking account (\$6,356.00), in order to meet business cash demands. Petitioner's representative noted that these additional deposits in excess of receipts were recorded on the books and records as loans from petitioner, Peter Simonian, to The Downunder, with the actual cash coming from petitioner's savings accounts.

11. The Audit Division also noted unexplained deposits to petitioner's savings accounts as constituting a portion of the asserted additional business income. These deposits were in an amount of \$6,000.00 to the Fidelity Savings Bank and \$4,000.00 to the Troy Savings Bank.

12. Petitioner asserts the above-noted \$6,000.00 deposit was the result of a loan repayment (in that amount) to petitioner by PCM Realty Corporation. A cancelled check for \$6,000.00 drawn by petitioner on the account of PCM and payable to petitioner was introduced in evidence at the hearing. This check, dated October 18, 1972, bore no legend or other designation of its purpose. In addition, petitioner's representative introduced a copy of PCM Realty Corporation's Federal income tax return (Form 1120) for the fiscal year ended September 30,



1973. Page 4 of this return contained a schedule showing, at line 18, loans owed to officers at the beginning of the (fiscal) year (\$79,008.83), and loans owed to officers at the end of the (fiscal) year (\$-0-). Petitioner's representative asserted that the \$6,000.00 deposit was a part of the loans repaid to Peter Simonian as the sole officer and stockholder of PCM Realty Corporation, and that such repayment occurred in 1972 (PCM Realty Corporation's fiscal year 1973 ended on September 30, 1973, and thus would also encompass the months of October, November and December of 1972). The amount of the alleged loan repayment (\$6,000.00) was not in any way separately stated on PCM's tax return.

13. The \$4,000.00 deposit to the Troy Savings Bank is alleged by petitioner to be the proceeds from the sale of a boat used as both a business and a personal asset, which proceeds (when received) were allegedly deposited directly to petitioner's personal savings account and not run through the records of the business. Copies of certain checks made payable to or indorsed over to petitioner by one Doris E. Irving, the alleged purchaser of the boat, together with a deposit slip to the Troy Savings Bank were introduced in evidence at the hearing. The checks were for a combined total of \$3,900.00 and the deposit slip was for \$3,900.00 in checks and \$100.00 in cash. Petitioner asserts the boat was sold to Mrs. Irving for \$4,500.00, with payment being received as \$100.00 in cash, \$3,900.00 balance by check, and \$500.00 having been received earlier as a deposit. Finally, an affidavit from Doris E. Irving stated that she purchased a 28 foot Chris Craft cabin cruiser on or about August 22, 1972 from Peter E. Simonian for \$4,500.00.

14. The Audit Division further asserts that petitioner took \$200.00 per week from the businesses for his personal living expenses. This amount is an estimate by the Audit Division based on its allegation that petitioner showed

no withdrawals or other sources of income from the business for such expenses. This estimated amount, totalling \$10,400.00 for the year (1972), was allegedly withdrawn in cash ("from the till") and was asserted as additional income to the petitioner by the Audit Division.

The auditor testified that he reviewed entries for a withdrawal account, and that these entries appeared to be in the nature of a "catch-all" account to collect items of a non-business nature. He further testified that these entries were the only evidence of any withdrawal account furnished by petitioner's representative during the course of the audit. The estimated amount for withdrawals of cash by petitioner (\$10,400.00) was thus included by the Audit Division to reflect a source of money for petitioner's ordinary living expenses such as food, clothing, apartment rent, etc.

15. Petitioner maintains that no such cash withdrawals were made from the businesses, but rather that all withdrawals by petitioner were handled by check and accounted for through a drawing account properly reflected on the books and records of the business. Petitioner asserts that such withdrawals, together with substantial cash withdrawals from savings were sufficient without further (cash) withdrawals from the businesses to cover petitioner's expenses during the year. Petitioner's representative submitted copies of a workpaper dated December 31, 1972 containing journal entries (presumably adjusting journal entries), an "analysis" of a drawing account for Club Morocco and for The Downunder and two ledger sheets entitled "P.E. Simonian - Drawing" which were alleged to represent petitioner's drawing account. The "analysis" sheets contained columns labelled "Cash & M.J. Simonian", "Personal Taxes", "Trust Fund", "Mutual Fund" and "Sundry", and showed figures apparantly representing monthly total disbursements made for these items on behalf of petitioner. The

disbursements reflected for 1972 under the column entitled "Cash & M.J. Simonian" totalled \$8,250.00 on the Club Morocco sheet and \$-0- on The Downunder sheet. The quarterly amounts for each of the various columns, as totalled together, appear as one sum on the ledger sheets under the posting reference "CD": (presumably cash disbursements).

16. For the year 1973, the Audit Division asserted additional income to petitioner on the basis of an alleged computational error of \$10,000.00 in reporting gain on the sale of The Downunder. The Audit Division asserts a sale price (for the business) of \$140,000.00, with \$90,000.00 being allocated to PCM Realty Corporation to cover an outstanding mortgage owed, and \$40,000.00 (\$13,000.00 inventory and equipment, \$27,000.00 goodwill) being allocated to petitioner, thus leaving a \$10,000.00 difference which was allocated to petitioner as income.

17. Petitioner asserts the transaction was properly reported, and that \$100,000.00 rather than \$90,000.00 was allocated to PCM Realty Corporation. Petitioner's representative submitted copies of the contract of sale of The Downunder as well as worksheets containing conditional sales figures pertaining to the sale of the business. Both the sale contracts and the worksheets provide evidence of a sale price of \$140,000.00, with \$40,000.00 allocated to Peter E. Simonian as owner of the business of The Downunder, and \$100,000.00 allocated to PCM as owner of the premises conveyed. Finally petitioner concedes and does not contest that unincorporated business tax was not paid and is properly due and owing by petitioner in connection with the sale of The Downunder. However, petitioner does not concede the assertion of \$10,000.00 of additional income on the sale.

18. Petitioner submitted an affidavit stating that he withdrew no merchandise for personal use from either business and only withdrew from the business such amounts as were charged to him through the books and records. Petitioner was not present to offer testimony at the hearings.

CONCLUSIONS OF LAW

A. That the petitioner has failed to provide such sufficient credible evidence as would refute the assertion of withdrawal of merchandise in the amount of \$2,000.00. Petitioner's bare assertion, by affidavit, that he withdrew no merchandise for personal consumption fails to meet the burden of proof or even of persuasion on this issue and hence the Audit Division's position is sustained.

B. That claimed business promotional expenses in the total amount of \$2,500.00 are disallowed and the assertion of additional business income to petitioner in this amount is sustained. A portion of these expenses were conceded to be not properly deductible by petitioner (see Finding of Fact "8"). Furthermore, although some items at issue were evidenced by cancelled checks, no evidence was submitted concerning the purpose of the check payments and thus petitioner has failed to sustain his burden of proving the entitlement to a deduction for these expenses. The portion of the claimed expense created by book charges for beverages given away to customers is an estimate by petitioner's accountants and is not substantiated by testimony or any other evidence. Accordingly, no basis has been established by petitioner to prove the amount of or entitlement to a deduction for this item.

C. That no evidence of withdrawals from petitioner's savings accounts to meet petitioner's business cash demands (subsequent deposits to The Downunder in excess of receipts) was provided at the hearing. Furthermore, with respect

to the Audit Division's assertion of cash withdrawals from the businesses for petitioner's personal living expenses, the petitioner alleged that personal expenses were paid by check through petitioner's business and charged to a drawing account. Work papers pertaining to a drawing account showed a total amount of \$8,250.00 disbursed to "Cash & M.J. Simonian". No testimony or other evidence was presented as to the identity of M.J. Simonian or as to whether this amount was disbursed for petitioner's personal living expenses.<sup>1</sup> Furthermore, no evidence was presented concerning petitioner's alleged "substantial withdrawals from savings" to meet such expenses. Accordingly petitioner has failed to refute by sufficient credible evidence the asserted additional income, and thus the Audit Division's position is sustained.

D. That the deposit to Fidelity Savings Bank in the amount of \$6,000.00 (see Finding of Fact "12") is alleged by petitioner to have been the repayment of a loan owed to petitioner by PCM Realty, Inc. PCM's Corporate Franchise Tax Report showed all outstanding loans to officers paid off during fiscal year 1973, and petitioner offered a cancelled check for \$6,000.00 from PCM payable to petitioner and dated October 18, 1972 (within PCM's fiscal year ended September 30, 1973). No testimony was provided on this item nor did the check indicate on its face or elsewhere that it was in repayment of a loan. No documents evidencing any repayment schedule (dates and amounts) was provided. It is equally believable that this \$6,000.00 amount could have been a dividend to petitioner rather than a loan repayment. Accordingly, the petitioner has failed to sustain his burden of proving the non-taxability of this deposit to his savings account and the Audit Division's position is sustained.

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<sup>1</sup> Amounts shown as disbursed under the other columnar headings (Personal Taxes, Trust Fund and Mutual Fund) would not be construed as disbursed for personal living expenses. No testimony or other explanation was presented on this, nor was any explanation given concerning the column entitled "Sundry".

E. That the deposit of \$4,000.00 to the Troy Savings Bank (see Finding of Fact "13") is alleged to have been received as payment on the sale of a boat. Cancelled checks indorsed to or payable to petitioner, as well as an affidavit from the purchaser, together with entries on petitioner's tax return are sufficient to prove the source of this deposit of \$4,000.00. Accordingly, petitioner has met his burden of proof and the Notice of Deficiency is to be recomputed to reflect removal of this amount (\$4,000.00) from items of additional asserted income for 1972.

F. That the documentary evidence submitted by petitioner with respect to the sale of The Downunder establishes that \$100,000.00 and not \$90,000.00 of the proceeds of the sale was allocated to PCM, and that the gain on the sale allocated to petitioner was properly reflected on petitioner's tax return. Accordingly, the Notice of Deficiency is to be recomputed to reflect removal of the excess income (\$10,000.00) asserted against petitioner for 1973. Finally, petitioner concedes that imposition of unincorporated business tax in connection with this sale is proper and remains due and owing.

G. That the petition of Peter E. Simonian is hereby granted to the extent indicated in Conclusions of Law "E" and "F", but is in all other respects denied, and the Notice of Deficiency dated April 14, 1977, as modified in accordance with this decision, is sustained.

DATED: Albany, New York

**MAY 27 1983**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER