

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sam J. & Santina Tulumello :
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 1973-1977. :
_____ :

AFFIDAVIT OF MAILING

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 Sam J. & Santina Tulumello, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sam J. & Santina Tulumello
137 Gaslight Trail
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
27th day of May, 1983.

David Parchuck

William A. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Sam J. & Santina Tulumello	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
& UBT under Article 22 & 23 of the Tax Law for	:	
the Years 1973-1977.	:	

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 Harold T. Boreanaz the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold T. Boreanaz
Boreanaz, Nemoyer and Baker
736 Brisbane Bldg.
Buffalo, NY 14203

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

Annice O. Seymour

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Sam J. & Santina Tulumello
137 Gaslight Trail
Williamsville, NY 14221

Dear Mr. & Mrs. Tulumello:

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
Harold T. Boreanaz
Boreanaz, Nemoyer and Baker
736 Brisbane Bldg.
Buffalo, NY 14203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
SAM J. TULUMELLO and SANTINA TULUMELLO
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 1973 through 1977.

:
:
:
DECISION
:
:
:

Petitioners, Sam J. Tulumello and Santina Tulumello, 137 Gaslight Trail, Williamsville, New York 14221, 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 1973 through 1977 (File No. 30653).

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 16, 1982 at 9:00 A.M. Petitioner appeared by Boreanaz, Nemoyer and Baker, Esqs. (Harold J. Boreanaz, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether funds in excess of funds available to petitioners from documented sources, as revealed by a source and application of funds audit performed by the Audit Division, constituted funds which should have been reported by petitioners as income subject to tax during the years 1973 through 1977.

FINDINGS OF FACT

1. Petitioners, Sam J. Tulumello and Santina Tulumello, husband and wife, timely filed New York State income tax resident returns on Form IT-201 for the years 1973, 1974 and 1975, and Form IT-201/208 for the years 1976 and 1977. Attached to each of petitioners' 1976 and 1977 returns, respectively, was a New York State Unincorporated Business Tax Return (Form IT-202).

2. As the result of a field audit, the Audit Division issued to petitioners a total of seven (7) notices of deficiency, each of which was dated April 11, 1980, asserting additional tax due (plus penalty and interest computed to April 11, 1980) as follows:

<u>Period</u>	<u>Notice Number</u>	<u>Additional Tax</u>	<u>Penalty/Interest</u>	<u>Total</u>
1973	A8003090711 ¹	\$ 4,786.15	\$2,314.26	\$ 7,100.41
1973, 1974	A8003090713	2,710.41	1,312.26	4,022.67
1975	A8003090721	1,780.95	690.78	2,471.73
1975	A8003090722	46.58	18.07	64.65
1976	A8003090731	4,627.58	1,401.59	6,029.17
1976	A8003090732	8.16	2.47	10.63
1977	A8003090733	4,119.96	897.65	5,017.61
	<u>Total</u>	<u>\$18,079.79</u>	<u>\$6,637.08</u>	<u>\$24,716.87</u>

3. Four (4) statements of audit changes attached to the above notices of deficiency showed the computation of the additional tax asserted as due, and indicated that the basis for such assertion was an audit performed by the Audit Division utilizing a source and application of funds analysis.

4. The additional tax asserted as due from petitioners included both personal income tax and unincorporated business tax and, as specified by the Audit Division's answer to petitioners' perfected petition, was computed on the basis of joint or separate reports for petitioners, with the computation resulting in the lower amount of tax being asserted as due, as follows:

¹ Notice Number A8003090713, incorrectly addressed to petitioner Santina Tulumello, pertains to petitioner Sam J. Tulumello.

<u>Year</u>	<u>Unincorporated Business Tax</u>	<u>Personal Income Tax</u>		
		<u>Husband</u>	<u>Wife</u>	<u>Joint</u>
1973	\$1,210.94	--	--	\$2,020.30
1974	1,499.47	--	--	2,765.85
1975	757.46	\$1,023.49	\$46.58	--
1976	1,514.95	3,112.63	8.16	--
1977	1,428.22	--	--	2,691.74
<u>Total</u>	<u>\$6,411.04</u>	<u>\$4,136.12</u>	<u>\$54.74</u>	<u>\$7,477.89</u>

5. The portions of the above deficiencies pertaining to the unincorporated business taxes at issue are asserted only against petitioner Sam J. Tulumello and not against petitioner Santina Tulumello.

6. On March 13, 1979, petitioners executed a consent allowing personal income tax and/or unincorporated business tax, for the year ended December 31, 1975, to be assessed at any time on or before April 15, 1980. On December 5, 1979, petitioners executed a second consent allowing assessment of said taxes, for the years ended December 31, 1975 and December 31, 1976, at any time on or before April 15, 1981. No issue as to the timeliness of any of the asserted deficiencies was raised at the hearing.

7. During the years at issue, petitioner Sam J. Tulumello operated a retail produce store out of rented premises located at 433 Niagara Street, Buffalo, New York. This store, known as "Farmer's Market", was operated as a sole proprietorship. Mr. Tulumello commenced operation of Farmer's Market in 1962.

8. Farmer's Market was operated as an "open-air" market offering fruit and vegetables for sale. Mr. Tulumello purchased the produce sold in his store from a market in Buffalo handling both locally-grown produce (from April through October) and out-of-town produce (year round). Purchases of locally-grown produce were made by cash or check, while out-of-town produce was purchased, in general, on credit. Farmer's Market customers were mainly individual purchasers,

although 6 or 7 restaurants bought produce there. Payments for purchases were generally made in cash or by check.

9. In general, a portion of the daily receipts from the sale of produce were kept by Mr. Tulumello for purchases the following day, while the balance of receipts were handed over to Mrs. Tulumello for deposit in petitioners' one checking account. Mr. Tulumello testified he spent an average of \$100.00 to \$150.00 per day in cash to purchase produce for sale in the market. This amount is apparently exclusive of credit purchases of produce. Mr. Tulumello further stated that he priced his produce to achieve a 12 percent to 15 percent overall profit on sales.

10. Petitioners opened their first and only checking account in or about 1972. This account was opened with a portion of approximately \$10,000.00 (cash) which, according to testimony by Mrs. Tulumello, had been accumulated at petitioner's home by Mrs. Tulumello over the course of several years from receipts from Farmer's Market. The remaining (undeposited) portion of this approximately \$10,000.00 accumulated sum was used by petitioners primarily to meet the expenses of finishing the construction and furnishing of their home.² Finally, it was alleged that some portion of the same \$10,000.00 sum was deposited in one or more savings accounts opened by petitioners sometime before 1972.

11. Petitioners testified they entered into a contract with one Michael Julian, a building contractor, to build a home for petitioners, and that they paid him \$8,000.00 on the contract. Copies of three (3) checks signed by Mrs. Tulumello and payable to Michael Julian Builders, Inc., dated in October

² Petitioners' house was finished in 1974 at an aggregate cost of approximately \$14,000.00.

1972, December 1972 and February 1973, and totalling \$8,000.00 were introduced in evidence at the hearing. Petitioners testified that Mr. Julian did not fulfill the contract, was allegedly about to file for bankruptcy, and at petitioners' demand returned the \$8,000.00 to petitioners (in cash) in 1973. No documentation of the return of this money was produced at the hearing. Petitioners testified that this money was deposited in their checking account, but it is unclear whether the money was deposited all at once or rather over a period of time.

12. Petitioners used their (only) checking account to pay gas and electric bills and other expenses incurred both by the family (personal expenses), as well as by Farmer's Market (business expenses).

13. Petitioners have six (6) children. During the latter years at issue herein, petitioners' three (3) oldest children, Charles, Mary and Leonarda, worked either full-time or part-time as follows:³

<u>Child's Name</u>	<u>Employer or Occupation</u>	<u>Year</u>	<u>Wages Earned</u>
Charles	Farmer's Market	1976	\$1,700.00
Charles	Farmer's Market	1977	4,675.00
Mary	Saleswoman	1975	1,585.75
Mary	Cashier	1976	2,378.00
Mary	Cashier	1977	3,941.00
Leonarda	Waitress	1976	494.00
Leonarda	Student	1977	1,584.00

According to a family rule or agreement, the children's entire earnings were turned over to Mrs. Tulumello for deposit in the family bank account(s) to be used for the family's expenses. Mrs. Tulumello testified that she would deposit the children's entire earnings except for small amounts which were returned to the children to have for their own personal use.

³ The information concerning the children's earnings is taken from copies of payroll records and from income tax returns (as adjusted and reduced for taxes withheld) introduced in evidence at the hearing.

14. Mrs. Tulumello also worked at the Farmer's Market, but was not paid for her work at the market.

15. Petitioners testified they did not often go out to dinner or for entertainment. They bought inexpensive clothing at discount stores, and their children attended Catholic schools where no tuition was charged. Petitioners also used food from the business (Farmer's Market) for meals at home.

16. Petitioners purchased new cars in each of the years 1974 through 1977, including two Lincoln Continentals, a Ford Granada and a Chevrolet. Each of these purchases was preceded by the trade-in of the car previously purchased.

17. Mr. Tulumello employed his nephew, one Joseph Buccoleri, at Farmer's Market during part of the period at issue. At Mr. Buccoleri's request, Mr. Tulumello retained a portion of Mr. Buccoleri's wages, accumulated the amount retained and then paid the accumulated sum of \$2,000.00 (\$1,000 in 1976 and \$1,000.00 in 1977) to Mr. Buccoleri.

18. Petitioners received inheritances from Italy in the amounts of \$4,500.00 in each of the years 1973 and 1975, and \$4,900.00 in 1977. These monies were deposited in their checking account and spent as needed.

19. In 1973, Mr. Tulumello purchased a one-half ($\frac{1}{2}$) interest in a racehorse at a cost of approximately \$2,500.00. Mr. Tulumello later sold his interest in the horse and received approximately \$2,700.00. Mr. Tulumello testified the total of his investment in the horse, together with expenses incurred in connection with the ownership of the horse up to the time he sold his ownership interest, amounted to approximately \$3,000.00. Mr. Tulumello further testified that he never placed bets on this horse nor won any money in connection with it and that the horse never won any races while owned by Mr. Tulumello.

20. Petitioners did not, according to their testimony, have a large sum or "hoard" of money at their home at the time of the audit (1979), nor were they in the practice of keeping such a hoard during the later years at issue herein. Petitioners were neither questioned about nor did they advise the Audit Division's auditor of the approximaely \$10,000.00 allegedly accumulated at their home in 1973, nor would they have disclosed this money or its "safe hiding place" to their accountant, or to persons outside of their family.

21. Petitioners went on a "junket" to Las Vegas during the period at issue herein, but testified they had no net winnings from gambling while in Las Vegas.

22. Petitioners received certain sums in 1976 and 1977 in the form of insurance payments as the result of automobile accidents. In 1976, a payment of \$709.21 was made on behalf of petitioners by their insurance company directly to the auto repair shop, while in 1977, a payment totalling \$1,234.02 was made by the insurance company directly to petitioners.

23. Petitioners testified their only source of taxable income during the years at issue was the profit earned from Farmer's Market.

24. Mr. Tulumello immigrated to the United States from Italy in 1951, and was subsequently joined by his wife who immigrated to the United States in 1955. Petitioners received no formal education in the United States, and had both attended school through the fourth grade level in Italy. Petitioners retained one Thomas Cardin as their accountant, and he prepared all of petitioners' business and personal tax returns and reports throughout the years at issue herein. Petitioners neither prepared nor kept any financial records of their own. Mr. Cardin's method of preparing returns and reports involved meeting with Mr. Tulumello and having Mr. Tulumello explain how much money he made in

the business (Farmer's Market). Mr. Cardin would then use this information, together with gas, electric and other bills turned over to him by Mr. Tulumello, as a means of reconstructing the records and filling out the required returns.

25. In conducting the source and application of funds analysis, the Audit Division's auditor examined petitioners' bank records (cancelled checks, statements and savings accounts), purchase invoices, disbursement journals and purchase journals (petitioners' checkbook).

26. Petitioners' tax returns did not reflect any gain on the sale of the racehorse, nor any interest income from savings accounts. In addition, no gain from the sale of certain vacant lots owned by petitioners was reported. However, testimony by the Audit Division's auditor who conducted the audit noted that any gain on such sales of the vacant lots would be in large measure offset by real estate taxes payable on such property, as well as by capital gains treatment of any such gain.

27. No audit adjustment was made to petitioners' sources of income with respect to either the alleged \$8,000.00 refund from Michael Julian (see Finding of Fact "11") or the \$10,000.00 alleged to have been accumulated at petitioners' home in 1973.

28. The Audit Division's audit included no adjustment for wages earned by the petitioners' children and allegedly turned over to petitioners for family use. The auditor testified he had no knowledge of the children's income or where they worked, but based, in part, on the assumption that the children worked, made a low estimate of family cash living expenses as an application of funds, thus, in effect, reducing the analysis discrepancy between sources and applications of funds. The estimated application for family cash living

expenses per audit was \$6,000.00 in 1973 and \$6,500.00 in 1974 through 1977.⁴ This estimate also took cognizance of food taken from the business and used by petitioners at home.

29. Petitioners introduced a reconstruction of the Audit Division's source and application of funds analysis, utilizing the Audit Division's figures in most instances, but alleging certain "omissions" therefrom and reconstructing the analysis to take cognizance of the alleged omissions. This reconstruction started with a total purchases figure for the business, arrived at by summing all check purchases [taken from cancelled checks, and from the petitioners' check disbursements journal (their checkbook)] and estimated cash purchases per year. This purchases figure was then reduced by an estimated amount for personal consumption of produce at home by petitioners. The reduced total purchases figure was then increased by fifteen percent (15%) to reflect a profit margin for Farmer's Market. The resultant sales figure (115 percent of reduced total purchases) was then reduced by the "net available for resale" (the reduced total purchases figure) to arrive at gross profit. Gross profit was then reduced by operating expenses to arrive at net profit which, according to petitioners' reconstruction, is "close" to the profit figures reported per petitioners' tax returns.

30. Petitioners' reconstruction then included as sources of income certain items heretofore noted (see Findings of Fact "10", "11", "13", "17" and "22"), which were not included in the Audit Division's analysis.

⁴ Family cash living expenses included cash expenses in general for items such as food, clothing, automobile operating expense, etc.

31. Petitioners assert the above reconstruction is more accurate than the Audit Division's analysis, specifically because it accounts for total sources and total disbursements of the business, whereas the Audit Division's analysis utilized receipts as deposited in various bank accounts and then analyzed disbursements to account for those receipts.

32. Petitioners contest that portion of the Audit Division's analysis regarding family cash living expense on the basis that it represents an estimate (see Finding of Fact "28") which could have been more fairly established by resort to certain indexes providing information on these items. Petitioners have not otherwise specified what changes should be made to the Audit Division's figures for this item.

CONCLUSIONS OF LAW

A. That both the Audit Division's source and application of funds analysis, as well as the petitioners' reconstruction of portions of such analysis, constitute methods of estimation involving a theoretical approach for arriving at petitioners' tax liability during the years in question. Such approach is permissible where, as in the instant case, there are inadequate records from which to determine tax liability. Furthermore, absent a showing that the Audit Division's method of analysis was in some manner arbitrary or unreasonable, there is no basis for disallowing said analysis in favor of petitioners' reconstruction.

B. That on the basis of testimonial and documentary evidence presented at the hearing, adjustments are to be allowed increasing the (nontaxable) sources of funds available (per the Audit Division's analysis) to petitioners during the various years at issue, as follows:

<u>Year</u>	<u>Amount</u>	<u>Source</u>
1973	\$ 8,000.00	Return in conjunction with Michael Julian Contractors, Inc. (<u>see</u> Finding of Fact "11")
1974	-0-	No adjustment
1975	\$ 1,585.75	Income from children
1976	\$ 5,572.00	Income from children (\$4,572.00) Money held for J. Buccoleri (\$1,000.00; <u>see</u> Finding of Fact "17")
1977	\$12,434.02	Income from children (\$10,200.00) Insurance Recovery (\$1,234.02) Money held for J. Buccoleri (\$1,000.00; <u>see</u> Finding of Fact "17")

C. That the Audit Division's estimate of cash living expenses, as reflected on its source and application of funds analysis, is accepted (see Finding of Fact "28"). Although petitioners' assert that resort to certain external indexes could have been used by the Audit Division in estimating the amounts for this item, petitioners have not produced proof from records or, in fact, from such external indexes, of any figures more accurate than those asserted by the Audit Division.

D. That the petition of Sam J. Tulumello and Santina Tulumello is granted to the extent indicated in Conclusion of Law "B", but is in all other respects denied. The Audit Division is hereby directed to modify its source and application of funds analysis in accordance with Conclusion of Law "B", and to reduce the notices of deficiency to be consistent therewith. The notices of deficiency,

as reduced, together with such penalty and interest as may be lawfully owing,
are hereby sustained.


DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER