

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Mario Capuano, Deceased :
and Annette Capuano : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income &
UBT under Article 22 & 23 of the Tax Law for the :
Fiscal Years Ending 1/31/77 & 1/31/78.

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Mario Capuano, Deceased, and Annette Capuano the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mario Capuano, Deceased
and Annette Capuano
314 Terry Rd.
Smithtown, NY 11787

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.





Authorized to administer oaths

pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mario Capuano, Deceased :
and Annette Capuano :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
UBT under Article 22 & 23 of the Tax Law for the :
Fiscal Years Ending 1/31/77 & 1/31/78.

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Lester Cooper, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lester Cooper
Frederick S. Todman & Co.
181 S. Franklin Ave.
Valley Stream, NY 11582

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.

David Parchuck

James A. DeAngelis
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Mario Capuano, Deceased
and Annette Capuano
314 Terry Rd.
Smithtown, NY 11787

Dear Mrs. Capuano:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Lester Cooper
Frederick S. Todman & Co.
181 S. Franklin Ave.
Valley Stream, NY 11582
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MARIO CAPUANO and ANNETTE CAPUANO	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the Fiscal Years Ending January 31,	:	
1977 and January 31, 1978.	:	

Petitioners, Mario Capuano (now deceased) and Annette Capuano, 314 Terry Road, Smithtown, New York 11787, filed a petition for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the fiscal years ending January 31, 1977 and January 31, 1978 (File Nos. 33346, 33653 and 33654).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 12, 1983 at 10:45 A.M., with all briefs to be submitted by May 26, 1983. Petitioners appeared by Lester Cooper, C.P.A., of the accounting firm of Frederick S. Todman & Co. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether for the fiscal year ending January 31, 1977 the Audit Division properly disallowed as unsubstantiated a portion of claimed itemized deductions for real estate taxes.

II. Whether a cash availability analysis audit performed by the Audit Division properly reflected additional income generated from petitioner Mario Capuano's operation of a retail liquor store.

FINDINGS OF FACT

1. Petitioners herein, Mario Capuano (now deceased) and Annette Capuano, timely filed separate New York State resident income tax returns for the fiscal years ending January 31, 1977 (hereafter F/Y/E 1-31-77) and January 31, 1978 (hereafter F/Y/E 1-31-78). Petitioner Mario Capuano also filed New York State unincorporated business tax returns for F/Y/E 1-31-77 and F/Y/E 1-31-78 wherein he reported the net profit realized from the operation of a retail liquor store known as Capri Wines and Liquor.

2. On January 22, 1981, the Audit Division issued a Notice of Deficiency to Mario Capuano for the year 1976¹, claiming that \$1,079.83 of additional New York State personal income tax was due together with interest and penalty (5% negligence) of \$437.30, for an alleged total due of \$1,517.13.

A second Notice of Deficiency was issued to Mario Capuano, also on January 22, 1981, for the years 1976 and 1977². Said notice claimed that \$1,228.51 of additional unincorporated business tax was due together with interest and penalty (5% negligence) of \$449.90, for an alleged total due of \$1,678.41.

A third Notice of Deficiency was issued to Annette Capuano, also on January 22, 1981, for the years 1976 and 1977². Said notice claimed that \$934.98 of additional New York State personal income tax was due together with interest and penalty (5% negligence) of \$303.60, for an alleged total due of \$1,238.58. Included in the Notice of Deficiency issued to Annette Capuano was

¹ The correct tax period in question is actually the fiscal year ending January 31, 1977.

² The correct tax periods in question are actually the fiscal years ending January 31, 1977 and January 31, 1978.

\$718.06 of alleged New York State personal income tax due from Mario Capuano for the F/Y/E 1-31-78. Said amount was added to the \$216.92 of alleged tax due from Annette Capuano for F/Y/E 1-31-77 and F/Y/E 1-31-78.

3. All three aforementioned notices of deficiency were premised on a Statement of Audit Changes dated October 30, 1980, wherein the following net adjustments to taxable income were proposed:

<u>Petitioner</u>	<u>F/Y/E 1-31-77</u>	<u>F/Y/E 1-31-78</u>
<u>Mario Capuano</u>		
Personal Income Tax	\$15,801.70	\$12,035.12
Unincorporated Business Tax	\$15,344.00	\$12,384.00
<u>Annette Capuano</u>		
Personal Income Tax	\$ 1,663.87	\$ 3,867.36

The above net adjustments to taxable income were proposed by the Audit Division as the result of an examination of petitioners' personal and business books and records. There were numerous adjustments which form the basis for the proposed net adjustments to taxable income. However, petitioners protest only the disallowance of a portion of claimed itemized deductions for real estate taxes in the amount of \$987.68 for F/Y/E 1-31-77 and the increasing of income for F/Y/E 1-31-77 by \$15,344.00 and for F/Y/E 1-31-78 by \$12,384.00 based on the reconstruction of income using cash availability analyses.

4. For F/Y/E 1-31-77 petitioners claimed as an itemized deduction real estate taxes in the amount of \$1,971.36. The Audit Division disallowed \$987.68 of the total claimed deduction on the ground that said amount was not substantiated. Petitioners have submitted a mortgage statement which substantiates that a total of \$2,073.03 in real estate taxes were paid during the F/Y/E 1-31-77.

5. The cash availability analyses were erroneously performed by the Audit Division on a calendar year basis for the years 1976 and 1977 instead of on a

fiscal year basis for F/Y/E 1-31-77 and F/Y/E 1-31-78. The practical effect of this error was that the cash availability analysis for F/Y/E 1-31-77 improperly included sources and applications of funds for the month of January, 1976 and improperly excluded sources and applications of funds for the month of January, 1977. For F/Y/E 1-31-78 the cash availability analysis improperly included sources and applications of funds for the month of January, 1977 and improperly excluded sources and applications of funds for the month of January, 1978.

6. Petitioners' argument and defense that the cash availability analyses were incorrectly computed on a calendar year basis instead of a fiscal year basis was raised for the first time at the hearing held herein. A witness for the Audit Division, Mr. John Scopa, Tax Auditor I, conceded that the cash availability analyses should have been performed for the fiscal years ending January 31, 1977 and January 31, 1978.

7. After the conclusion of the hearing held herein the Audit Division submitted revised cash availability analyses for F/Y/E 1-31-77 and F/Y/E 1-31-78. The revised computation for F/Y/E 1-31-77, which excluded sources and applications of funds for the month of January, 1976 and included sources and applications of funds for the month of January, 1977, resulted in a reduction of understated income by \$2,375.21, from \$15,344.00 to \$12,968.79. The revised computation for F/Y/E 1-31-78 excluded sources and applications of funds for the month of January, 1977, however, no sources and applications of funds were included for the month of January, 1978, since the auditor did not examine the records for this month and therefore no figures were available. This 11 month cash availability analysis (2-1-77 to 12-31-77) produced an understatement of income in the amount of \$12,898.42, some \$514.42 more than the original understatement of \$12,384.00. The Audit Division did not assert a claim for a greater deficiency pursuant to section 689(d) of the Tax Law at or before the hearing.

8. Petitioners assert that the revised cash availability analyses do not take into consideration cash on hand accumulated in prior years. No testimony or documentary evidence was adduced at the hearing to support any of petitioners' arguments.

9. For F/Y/E 1-31-78 the Audit Division reclassified itemized deductions of \$2,305.52 from Annette Capuano to Mario Capuano since said reallocation produced a lower deficiency in tax. Also, the Audit Division made statutory adjustments to claimed itemized deductions for medical and dental expenses for F/Y/E 1-31-77 and F/Y/E 1-31-78 based on the proposed increases in gross incomes for said fiscal years.

CONCLUSIONS OF LAW

A. That petitioners have substantiated that they paid real estate taxes of \$2,073.03 during the F/Y/E 1-31-77. Accordingly, the adjustment decreasing claimed itemized deductions for \$987.68 of unsubstantiated real estate taxes for F/Y/E 1-31-77 is to be deleted from the Notice of Deficiency imposing personal income tax against Mario Capuano and, in addition thereto, the deduction for real estate taxes is to be increased by \$101.67 (\$2,073.03 - \$1,971.36).

B. That for F/Y/E 1-31-77 unreported income disclosed pursuant to the cash availability analysis is to be reduced by \$2,375.21, from \$15,344.00 to \$12,968.79 (See: Finding of Fact 7, supra). That petitioners have not submitted any evidence to support their contention that cash on hand was the source of at least part of the unreported income disclosed by the cash availability analysis and, accordingly, they have failed to sustain the burden of proof imposed upon them pursuant to sections 689(e) and 722 of the Tax law.

C. That for the fiscal years at issue petitioners filed separate New York State personal income tax returns and in accordance with section 651(b)(2)(B) of

the Tax Law their tax liabilities shall be separate. That the Notice of Deficiency issued to Annette Capuano improperly includes \$718.06 of New York State personal income tax allegedly due from Mario Capuano and, therefore, said amount must be deleted from the Notice of deficiency issued to Annette Capuano.

D. The Audit Division's omission of sources and applications of funds for the month of January, 1978, said omission based upon the failure to recognize that petitioners were fiscal year taxpayers, could materially and substantially effect the result of the cash availability analysis. The cash availability analysis for F/Y/E 1-31-78, in its present state, indirectly computes income for the eleven (11) month period February 1, 1977 to December 31, 1977 and compares it with income reported by petitioners for the twelve (12) month period February 1, 1977 to January 31, 1978. That the omission of the month of January, 1978 from the cash availability analysis represents a significant and substantial error which renders the entire analysis incomplete and inaccurate. Accordingly, unreported income disclosed by the cash availability analysis for F/Y/E 1-31-78 is to be deleted from the computation of personal income and unincorporated business taxes due for said fiscal year.

E. That the Audit Division's reallocation of itemized deduction from Annette Capuano to Mario Capuano for F/Y/E 1-31-78 no longer produces a tax benefit in light of Conclusion of Law "D", supra. Accordingly, for F/Y/E 1-31-78 itemized deductions are to be split between petitioners in the same manner as originally claimed on their returns.

F. That the statutory adjustments to the deduction for medical and dental expenses for F/Y/E 1-31-77 and F/Y/E 1-31-78 must be recomputed due to the

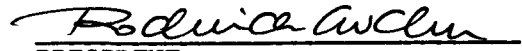
modifications to the net increases in gross incomes provided for in Conclusions of Law "B" and "D", supra.

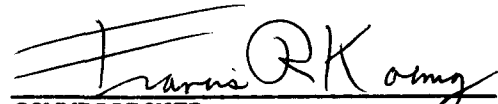
G. That the petition of Mario Capuano (now deceased) and Annette Capuano is granted to the extent indicated in Conclusions of Law "A through F", supra; that the Audit Division is directed to recompute the three notices of deficiency dated January 22, 1981 consistent with the conclusions reached herein; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 18 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

modifications to the net increases in gross incomes provided for in Conclusions of Law "B" and "D", supra.

G. That the petition of Mario Capuano (now deceased) and Annette Capuano is granted to the extent indicated in Conclusions of Law "A through F", supra; that the Audit Division is directed to recompute the three notices of deficiency dated January 22, 1981 consistent with the conclusions reached herein; and that, except as so granted, the petition is in all other respects denied.

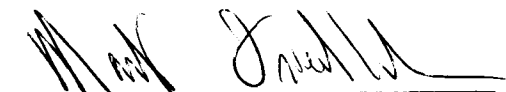
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