

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Eduardo & Rosa Estrada :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax and :
Unincorporated Business Tax under Articles 22 and :
23 of the Tax Law and New York City Personal :
Income Tax under Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1977, 1978 & 1979. :

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Eduardo & Rosa Estrada, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eduardo & Rosa Estrada
58-09 College Point Blvd.
Flushing, NY 11355

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
5th day of October, 1984.

David Parchuck

William A. H. H. H.
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Eduardo & Rosa Estrada
58-09 College Point Blvd.
Flushing, NY 11355

Dear Mr. & Mrs. Estrada:

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 and Chapter 46, Title T of the Administrative Code of the City of New York, 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDUARDO ESTRADA AND ROSA ESTRADA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
and Unincorporated Business Tax under Articles	:	
22 and 23 of the Tax Law and New York City	:	
Personal Income Tax under Chapter 46, Title T	:	
of the Administrative Code of the City of New	:	
York for the Years 1977, 1978 and 1979.	:	

Petitioners, Eduardo Estrada and Rosa Estrada, 58-09 College Point Boulevard, Flushing, New York 11355, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1977, 1978 and 1979 (File Nos. 35351, 35352, 35353 and 35354).

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 November 3, 1983 at 9:15 A.M., with all briefs to be submitted by February 11, 1984. Petitioner Eduardo Estrada appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq. of counsel).

ISSUES

I. Whether a field audit adjustment attributing additional unreported business income to petitioner Eduardo Estrada was proper.

II. Whether the Audit Division properly asserted a greater deficiency against petitioner Eduardo Estrada for the years 1977 and 1978.

III. Whether petitioners filed a timely petition for the year 1979.

IV. Whether the Audit Division's imposition of negligence penalties was proper.

FINDINGS OF FACT

1. Petitioners, Eduardo Estrada and Rosa Estrada, filed a New York State Income Tax Resident Return (with New York City Personal Income Tax) under filing status "married filing separately on one return" for each of the years 1977, 1978 and 1979. On each of said returns petitioner Eduardo Estrada reported net income derived from his activities engaged in as a taxicab owner and operator as follows: 1977 - \$3,612.00, 1978 - \$5,097.00, 1979 - \$5,286.00. Petitioner Eduardo Estrada did not file an unincorporated business tax return for any of the years at issue herein.

2. On April 30, 1981 the Audit Division issued three (3) statements of audit changes to petitioners as follows:

- a. - to Eduardo Estrada wherein as the result of a field audit, an adjustment was made for "additional receipts" of \$9,000.00 for each year at issue. Also, credit adjustments were made reallocating exemptions and deductions claimed by Mrs. Estrada to him in order to arrive at the smallest combined tax liability.
- b. - to Eduardo Estrada wherein unincorporated business tax was computed on his reported taxicab income plus the "additional receipts" of \$9,000.00 determined for each year at issue.
- c. - to Rosa Estrada wherein the corresponding reallocation of deductions and exemptions was made shifting such deductions and exemptions to Eduardo Estrada's return for each year at issue.

3. Based on the above, six (6) notices of deficiency were issued against petitioners as follows:

<u>Petitioner</u>	<u>Date of Issuance</u>	<u>Year</u>	<u>Taxes Asserted</u>	<u>Total Tax Deficiency</u>
a. Eduardo Estrada	July 23, 1981	1977	NYS Personal Income Tax, NYC Personal Income Tax and Unincorporated Business Tax	\$557.36
b. Eduardo Estrada	July 23, 1981	1977	NYS Personal Income Tax and NYC Personal Income Tax	\$140.93
c. Eduardo Estrada	July 23, 1981	1978	NYS Personal Income Tax, NYC Personal Income Tax and Unincorporated Business Tax	\$752.86 ¹
d. Eduardo Estrada	July 23, 1981	1978	NYS Personal Income Tax and NYC Personal Income Tax	\$ 32.26 ¹
e. Eduardo Estrada	September 10, 1981	1979	NYS Personal Income Tax, NYC Personal Income Tax and Unincorporated Business Tax	\$517.61
f. Rosa Estrada	September 10, 1981	1979	NYS Personal Income Tax and NYC Personal Income Tax	\$220.53

4. Negligence penalties were asserted on each of the aforesaid notices of deficiency pursuant to sections 685(b) and 722(a) of the Tax Law and section T46-185.0(b) of Chapter 46, Title T of the Administrative Code of the City of New York. Interest was also asserted on each of said notices.

5. Notices of deficiency "b" and "d", supra, were inadvertently issued to Eduardo Estrada although the deficiencies asserted therein were with respect to the tax liabilities determined to be due from Rosa Estrada.

6. On March 9, 1981 petitioners executed a consent form extending the period of limitations for assessment with respect to their 1977 return to April 15, 1982. Said consent was validated by the Audit Division March 11, 1981.

¹ It appears that in transposing the 1978 deficiencies from the statements of audit changes to the corresponding notices of deficiency, Notice of Deficiency "c" was overstated by \$71.15 while Notice of Deficiency "d" was understated by \$71.15.

7. On September 4, 1981 petitioner Eduardo Estrada submitted a letter to the Tax Appeals Bureau wherein he protested the deficiencies asserted for 1977 and 1978. Subsequently, on April 22, 1982 he filed petitions with respect to the four (4) notices of deficiency issued July 23, 1981 for the years 1977 and 1978. There is no record of petitioners' having filed a petition for the year 1979. On March 3, 1983 petitioners filed a perfected petition for all three years at issue herein.

8. In order to cure the defect created by the erroneous issuance of notices of deficiency "b" and "d", supra, to Eduardo Estrada rather than to Rosa Estrada, the Audit Division proposed at the hearing held herein that said notices be cancelled and that the deductions and exemptions originally claimed by Rosa Estrada on her 1977 and 1978 returns be shifted back to her returns, thus creating greater deficiencies for Eduardo Estrada for said years than those shown on notices of deficiency "a" and "c", supra.

9. The shift in deductions and exemptions from Rosa Estrada's returns to Eduardo Estrada's returns was made at the discretion of the Audit Division in computing the revised liabilities on the statements of audit changes. Said changes were not made at the request, nor with the consent, of petitioners.

10. The field audit adjustments for "additional receipts" of \$9,000.00 for each year at issue were determined through use of an indirect method of income reconstruction. The method used herein was the cash availability analysis method. Since Eduardo Estrada alleged at the time of the audit that all his records had been stolen, the audit was conducted utilizing information contained in the tax returns at issue and subpoenaed checking account records. Based on such records said adjustments were computed as follows:

	<u>1977</u>	<u>1978</u>	<u>1979</u>
"Cash In:			
Gross Receipts	\$ 7,404.00	\$ 9,623.00	\$11,432.00
Net Wages (wife)	4,217.00	4,400.00	5,228.00
From C. Lopez	2,284.00	2,925.00	1,471.00 ²
	<u>\$13,905.00</u>	<u>\$16,948.00</u>	<u>\$18,331.00</u>
Cash Out:			
Deposits to Checking Account	\$12,214.00	\$12,153.00	\$12,725.00
Business Expenses Paid in Cash	2,262.00	1,942.00	2,348.00
Total Cash Out	<u>\$14,476.00</u>	<u>\$14,095.00</u>	<u>\$15,073.00</u>
Cash Available	\$ (571.00)	\$ 2,853.00	\$ 3,258.00
Cost of Living	8,429.00	11,853.00	12,258.00
Shortage	<u>(\$ 9,000.00)</u>	<u>(\$ 9,000.00)</u>	<u>(\$ 9,000.00)"</u>

11. Mr. Estrada alleged that he was unable to drive his cab full time during the years at issue since he was experiencing medical problems which affected his eyes. Although he established that he was indeed experiencing problems with his eyes, he failed to establish that as the result of such problems his working time was diminished.

12. Mr. Estrada alleged that he received money from his mother in Peru during each year at issue. The money, he contended, was comprised of gifts as well as his share of rental income from property he owned jointly with his mother in Peru. Petitioner did not keep a record of the money he received which originated from Peru. He claimed that the money was delivered to him by individuals traveling from Peru to the United States since Peru was under a dictatorship at the time and strict governmental restrictions were placed on money leaving the country.

13. Subsequent to the hearing Mr. Estrada submitted a translated sworn affidavit by his mother in Peru wherein she stated that:

- a. Mr. Estrada owns a piece of land in Peru that covers two thousand square meters and on which is situated

² Cash in for 1979 totals \$18,131.00 not \$18,331.00 as stated in the cash availability analysis.

three stores used as mechanic workshops, a retail store and a house with living quarters from which he receives rental income.

- b. Mr. Estrada receives a pension or monthly income as a retired employee of the Health Ministry in Peru.
- c. Through a third party she sent him \$7,000.00 in 1977.
- d. She delivered \$11,000.00 to him in 1978, such funds being the proceeds from the sale of a "Microbus Dodge" he owned in Peru.
- e. Through a third party she sent him \$6,600.00 in 1979.

14. The amount of rental and pension income petitioner received from Peru was stated in said affidavit in terms of "soles" rather than United States dollars. No conversion rate was supplied. Additionally, said affidavit does not show whether the amounts delivered to petitioner constituted gifts from his mother, his rental and pension income, or a combination thereof.

15. Mr. Estrada did not establish that the proceeds from the sale of the Microbus Dodge represented anything other than taxable income.

16. Although the assertion of negligence penalties was raised as an issue by the Audit Division, petitioners failed to address the same during the hearing. The Audit Division's position was that such penalties were proper based on the large omissions of income as determined.

17. Since the \$11,000.00 proceeds from the sale of the Microbus Dodge exceed the \$9,000.00 shortage determined by the auditor for 1978, the Audit Division asserts a greater deficiency for 1978 on this basis, in addition to the basis for asserting a greater deficiency as outlined in Finding of Fact "8", supra.

CONCLUSIONS OF LAW

A. That section 689(b) of the Tax Law provides in pertinent part that:

"Within ninety days... after the mailing of the notice of deficiency authorized by section six hundred eighty-one, the taxpayer may file a petition with the tax commission for a redetermination of the deficiency."

Section 722(a) of the Tax Law incorporates section 689(b) into Article 23 for unincorporated business tax purposes. For New York City personal income tax purposes, section T46-189.0(b) of the Administrative Code of the City of New York is, for all intents and purposes, identical to section 689(b) of the Tax Law.

B. That for taxable year 1979, petitioners have failed to show that they filed a petition. Accordingly, the issues as stated for said year are moot and will not be decided by the State Tax Commission.

C. That since petitioner Eduardo Estrada was a resident of New York State and New York City during the years at issue herein, his pension and rental income from Peru, which is properly taxable for Federal purposes, is likewise taxable for purposes of said jurisdictions, regardless of the fact that such income was derived from foreign sources.

D. That the \$7,000.00 petitioner Eduardo Estrada received from his mother in Peru during 1977 is deemed to be taxable income since there was no evidence submitted to establish that such money was tax exempt.

E. That for 1977, \$2,000.00 (\$9,000.00 "additional receipts" less \$7,000.00 from foreign sources) is deemed to be unreported income derived from Mr. Estrada's activities as a taxicab owner/operator. Accordingly, said amount, rather than the full \$9,000.00, is the proper adjustment for "additional receipts" for unincorporated business tax purposes for 1977.

F. That the unincorporated business tax of \$212.44 asserted for the year 1977 is hereby cancelled since the redetermined net income is too nominal to produce a tax liability.

G. That the \$11,000.00 petitioner Eduardo Estrada received as proceeds on the sale of his Microbus Dodge in Peru during 1978 is deemed taxable income since there was no showing to the contrary.

H. That for New York State and New York City personal income tax purposes the adjustment for "additional receipts" of \$9,000.00 for 1978 is hereby raised to \$11,000.00.

I. That for unincorporated business tax purposes, the 1978 adjustment for "additional receipts" of \$9,000.00 is cancelled, since the source of the additional receipts was not from Mr. Estrada's taxicab business. Accordingly, the unincorporated business tax of \$254.88 asserted for 1978 is also cancelled since the net income derived from Mr. Estrada's business activities as reported is too nominal to yield a tax liability.

J. That the deductions and exemptions shifted by the Audit Division to Eduardo Estrada's 1977 and 1978 returns are to be shifted back to Rosa Estrada's returns since they were originally claimed by her and the shift to Eduardo Estrada's returns was made at the discretion of the Audit Division rather than at petitioners' request.

K. That Notice of Deficiency "c" (see Finding of Fact "3", supra) is to be reduced by the erroneous overstatement of \$71.15.

L. That based on the large omissions of income for 1977 and 1978, the negligence penalties asserted are hereby sustained.

M. That the Audit Division's claim asserting a greater deficiency against petitioner Eduardo Estrada for the year 1977 is granted based on Findings of Fact "8" and "9", supra.

N. That the Audit Division's claims asserting a greater deficiency against petitioner Eduardo Estrada for the year 1978 are granted based on Findings of Fact "8", "9", "13" and "15", supra.

O. That the petition filed for the years 1977 and 1978 is granted to the extent provided in Conclusions of Law "F", "I" and "K", supra.

The Notice of Deficiency (notice "a") issued July 23, 1981 is to be adjusted to be consistent with the decision rendered herein.

The Notice of Deficiency (notice "b") inadvertently issued to Eduardo Estrada on July 23, 1981 is hereby cancelled.

The Notice of Deficiency (notice "c") issued July 23, 1981 is to be adjusted to be consistent with the decision rendered herein.

The Notice of Deficiency (notice "d") inadvertently issued to Eduardo Estrada on July 23, 1981 is hereby cancelled.


The two notices of deficiency (notices "e" and "f") issued September 10, 1981 with respect to taxable year 1979 are sustained in full together with such additional penalties and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER