

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Solomon Estren :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income Tax under Article :  
22 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. :

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Solomon Estren, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Solomon Estren  
4405 Waldo Ave.  
Bronx, NY 10471

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  
9th day of November, 1984.

David Parchuck

James J. O'Connell  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

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the Years 1977, 1978 and 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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Marc A. Goodman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marc A. Goodman  
P.O. Box 484, Gracie Station  
New York, NY 10028

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  
9th day of November, 1984.

David Parchuck

James A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

November 9, 1984

Solomon Estren  
4405 Waldo Ave.  
Bronx, NY 10471

Dear Mr. Estren:

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 & 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: Petitioner's Representative  
Marc A. Goodman  
P.O. Box 484, Gracie Station  
New York, NY 10028  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SOLOMON ESTREN	:	DECISION
for Redetermination of a Deficiency or for	:	
refund of New York State Personal Income Tax	:	
under Article 22 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.	:	

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Petitioner, Solomon Estren, 4405 Waldo Avenue, The Bronx, New York 10471, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 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 No. 36878).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 9, 1983 at 10:45 A.M., with all briefs to be submitted by February 14, 1984. Petitioner appeared by Marc A. Goodman, CPA. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq. of counsel).

#### ISSUES

I. Whether the Audit Division properly adjusted petitioner's income by adding back certain deductions taken by a professional service corporation of which petitioner was a shareholder.

II. Whether the Audit Division properly disallowed a claim for casualty loss for the year 1979.

FINDINGS OF FACT

1. Petitioner, Solomon Estren, a physician, and his wife, Elaine Estren, filed separate New York State income tax resident returns with New York City personal income tax, on combined forms for the years 1977, 1978 and 1979.

2. The 1977, 1978 and 1979 returns were sent to the Harlem Branch Office for field audit examination in connection with an audit of petitioner's personal service corporation, Solomon Estren, M.D., P.C. The auditor concluded that petitioner had failed to add to New York income those modifications required under section 612(b)(7), (b)(8) and (b)(9) of the Tax Law. The auditor also disallowed a casualty loss on the basis that petitioner had submitted insufficient proof.

3. Statements of Audit Changes issued to petitioner on October 20, 1981 provided in part as follows:

1977 and 1978

"As the result of field audit examination for the above indicated years, your tax liability is recomputed as follows:

You failed to add to New York Income modifications under article 22, Section 612 (b) (7), (b) (8), and (b) (9).

Adjustments

Section 612 (b) (7) - Pension	\$5,508.72	\$6,129.77	
Section 612 (b) (8) - F.I.C.A.	816.75	893.85	
Section 612 (b) (9) - Insurance	754.99	1,469.45	
Travel & Entertainment	-	1,222.00	
Total Adjustments	<u>\$7,080.46</u>	<u>\$9,715.07</u>	
Additional New York State			
Personal Income Tax Due	\$1,062.07	\$1,139.11*	\$2,201.18
Additional New York City			
Personal Income Tax Due (Tax Rate 4.3%)	304.46	417.75	722.21

\*Maximum Tax Computation - IT-250"

1979

"As the result of field audit examination for the above indicated year, your tax liability is recomputed as follows:

You failed to add to New York Income modifications under article 22, Section 612 (b) (7), (b) (8) and (b) (9). The information submitted does not substantiate the casualty loss deduction claimed:

Adjustments:

Section 612 (b) (7) - Pension	\$ 7,257.36
Section 612 (b) (8) - F.I.C.A.	1,163.32
Section 612 (b) (9) - Insurance	388.57
Casualty Loss	12,982.00
Travel and Entertainment	1,332.00
Total Adjustments	<u>\$23,123.25</u>

Additional New York State Personal Income Tax Due. IT-250 Computation \$2,772.97

Additional New York City Personal Income Tax Due (\$23,123.25 X 4.3%) 994.30"

On January 22, 1982, the Audit Division issued notices of deficiency against petitioner based on the statements of audit changes. (Petitioner had executed a consent fixing the period of limitation for the year 1977 to April 15, 1982.)

4. It is not clear from the record whether form IT-2102.1-PC (New York State Professional Service Corporation Information Return) was filed by petitioner's professional service corporation for each of the years in issue. In any event, copies were not attached to petitioner's return nor produced at the hearing.<sup>1</sup>

5. Petitioner claims that the amounts added to his income as modifications under section 612 were excessive and did not take into consideration the fact that contributions were made by the corporation on behalf of its other employees. At the hearing, petitioner produced a letter dated November 28, 1983 from The Marks Pension Service, the firm which provided actuarial services to the corporation for the years at issue. The letter was addressed to petitioner's representative and stated in part as follows:

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<sup>1</sup> Form IT-2102.1-PC requires the reporting of amounts required to be added to the shareholder's Federal income under section 612(b)(7), 612(b)(8) and 612(b)(9) of the Tax Law.

"As per our telephone conversation, we have determined the portion of the annual contribution for Dr. Estren, deductible for the year ending August 31, 1977, 1978 and 1979. The figures are as follows:

<u>Taxable year ending</u>	<u>1979</u>	<u>1978</u>	<u>1977</u>
Side Fund	\$14,026.	\$7,419.	\$7,783.
Premium	2,680.	2,770.	2,895.
Cost of life insurance			
Protection P.S. 58	1,321.	1,257.	1,196."

Petitioner also claims that the amounts listed above as "Cost of life insurance Protection P.S. 58" were reported as other income for all of the years in question on the appropriate form IT-201. The items of "other income" reported on petitioner's IT-201 returns were as follows:

<u>Calendar Year</u>	<u>Other Income (Schedule A Form IT-201/208)</u>
1977	\$1,257
1978	1,321
1979	3,293

6. The casualty loss of \$12,982 claimed on petitioner's 1979 return was based on water damage to petitioner's residence located at 4405 Waldo Avenue in the Fieldston section of The Bronx.

Petitioner did not personally appear and give testimony at the hearing. Letters sent by Dr. Estren to the Fieldston Property Owners Association, Inc. in October and November 1978, however, indicate that the damage was caused by clogging of the storm sewer lines which purportedly belong to the Association.

The letter of October 12, 1978, states in part, as follows;

"As a result of repeated flooding and apparent obstruction of these sewer lines, there has been extensive erosion of the land which encompasses my property, and seepage and undermining of the concrete coving of the house and of both soil and concrete walks. Since these lines ultimately belong to and are maintained by F.P.O.A. it continues to be my understanding that F.P.O.A. is indeed responsible for the damage which has occurred. It does not seem to me reasonable that my underground system be responsible for the entire drainage of all of Fieldson (sic) which lies to our north. I have been given to understand, in addition, that the drainage from Mr. Victor's pool was directed by a sewer line into my sewer pipe system."

The letter of November 20, 1978 points out that petitioner received no reply to the first letter and states in part:

"Because of the horrendous flooding which had occurred last winter, and in order to avoid a recurrence, I have been forced to undertake extensive replacement and revision of the sewer and drainage system which underlies my property, and have already gone to considerable expense. I again call these facts to your attention, and again request your attention to the situation, specifically with regard to the liability of FPOA, Inc. as apparent owner and maintainer of these systems."

7. At the hearing, petitioner's representative produced four photographic color transparencies (slides) and a hand viewer. The transparencies showed exterior views of a building and landscaping surrounded by water. The Hearing Officer requested petitioner's representative to have prints made from the transparencies, which prints would be received in evidence after the hearing. On January 6, 1984, however, the trunk of the representative's automobile was burglarized and the representative's brief case, which contained the Estren file, was stolen. The file was not recovered and the prints were thus not received into evidence.

8. At the hearing, petitioner's representative also produced invoices showing that repairs were made to petitioner's property in 1979. The representative was asked to provide copies of the invoices after the hearing, however, these also became unavailable due to the theft.

9. No evidence was adduced at the hearing as to the travel and entertainment adjustments made in the statement of audit changes and included in the notices of deficiency and it appears that these items are no longer being challenged by petitioner.

#### CONCLUSIONS OF LAW

A. That section 612(b) of the Tax Law and section T46-112.0(b) of the Administrative Code of the City of New York provide for certain modifications



increasing Federal adjusted gross income of taxpayers who are shareholders in personal service corporations.

Subdivision (b)(7) of each section requires such a taxpayer to add back the amount deductible by such corporation under section 404(a)(1), (2) or (3) of the Internal Revenue Code (Pension Trusts, Employees' Annuities and Stock Bonus and Profit Sharing Trusts) for the personal service corporation's taxable year ending in or with such taxpayer's taxable year for contributions paid on behalf of such taxpayer minus the maximum amount which would be deductible for Federal income tax purposes by such taxpayer under section 62(7) of the Internal Revenue Code (Self Employed Retirement Plans) if such taxpayer were a self employed individual.

Subdivision (b)(8) of each section requires such a taxpayer to add back social security tax deducted by the corporation with respect to the wages of such taxpayer for the calendar year ending in or with such taxpayer's taxable year.

Subdivision (b)(9) of each section requires such a taxpayer to add back the amount deducted by the corporation for Federal income tax purposes for contributions to purchase life, accident or health or other insurance for said taxpayer for the corporation's taxable year ending in or with such taxpayer's taxable year, except for the amount included by such taxpayer in gross income for Federal income tax purposes and except for the amount attributable to contributions to purchase insurance to reimburse such taxpayer for expenses incurred by him for medical care [213(e) Internal Revenue Code] of such taxpayer, his spouse and his dependents.

B. That petitioner has not sustained his burden of proof<sup>2</sup> to show that he is entitled to redetermination of the adjustments made with respect to section 612(b)(7), (8) and (9) of the Tax Law and section T46-112.0(b)(7), (8) and (9) of the Administrative Code of the City of New York.

With respect to the pension modification [(b)(7)], the letter of The Marks Pension Service (Finding of Fact "5") is ambiguous and by itself is not sufficient to show that the modifications made by the Audit Division were excessive.

With respect to the social security modification [(b)(8)], there is nothing in the record to show that any such modifications had been made by petitioner or that the modifications made by the Audit Division were excessive.

With respect to the insurance modification [(b)(9)], although the figures reported by The Marks Pension Service (Finding of Fact "5") for insurance for 1978 (\$1,257) and 1979 (\$1,321), are identical to "other income" reported for 1977 and 1978, respectively, there is no explanation as to why insurance contributions reported as deductible for the corporation's fiscal year ending on August 31, 1978, for example, would be treated as income for petitioner's calendar year 1977.

Moreover, with respect to all modifications, it is noted that forms 2102.1-PC, the corporation information returns, or other such documents were not produced by petitioner.

C. That section 165(a) of the Internal Revenue Code provides for a deduction for any loss sustained during the taxable year and not compensated for by insurance or otherwise. Section 165(c)(3) limits losses of property not connected with an individual's trade or business to losses arising from fire,

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<sup>2</sup> Section 689(e) of the Tax Law; Section T46-189.0(e) of the Administrative Code of the City of New York.

storm, shipwreck or other casualty, or from theft and further limits the amount of the deduction to that amount exceeding \$100 for each such loss.


Petitioner did not sustain his burden of proof to show: (1) that the water damage was the result of a casualty; or, (2) the amount of the loss. (Although the photographic evidence and the invoices which were stolen may have been helpful to petitioner's case, it is doubtful that they alone would have been sufficient to sustain the burden.)

D. That the petition of Solomon Estren is denied and the notices of deficiency issued on January 22, 1982 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER