

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Melvin Evans :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income Tax :  
under Article 22 of the Tax Law for the Years 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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Melvin Evans, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin Evans  
101 Gedney St.  
Nyack, NY 10960

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 A. Heyland  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

November 9, 1984

Melvin Evans  
101 Gedney St.  
Nyack, NY 10960

Dear Mr. Evans:

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 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  
Ira Akselrad  
Brach, Eichler, Rosenberg, Silver, Bernstein & Hammer  
101 Eisenhower Pkwy.  
Roseland, NJ 07068  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|------------------------------------------------|---|----------|
| In the Matter of the Petition                  | : |          |
|                                                | : |          |
| of                                             | : |          |
|                                                | : |          |
| MELVIN EVANS                                   | : | DECISION |
|                                                | : |          |
| for Redetermination of a Deficiency or for     | : |          |
| Refund of Personal Income Tax under Article 22 | : |          |
| of the Tax Law for the Years 1978 and 1979.    | : |          |

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Petitioner, Melvin Evans, 101 Gedney Street, Nyack, New York 10960, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 and 1979 (File No. 38942).

A small claims hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 14, 1984 at 9:15 A.M., with all briefs to be submitted by May 11, 1984. Petitioner appeared by Brach, Eichler, Rosenberg, Silver, Bernstein & Hammer, P.A. (Ira Akselrad, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

#### ISSUE

Whether the income reconstruction audit properly reflected petitioner's income for 1978 and 1979.

#### FINDINGS OF FACT

1. Petitioner, Melvin Evans, and his wife, Marilyn Evans, filed New York State personal income tax returns for 1978 and 1979. For each year, they filed separately on the same tax return. For 1978, they reported total income of \$24,990.00 which was allocated \$19,300.00 to Melvin Evans and \$7,190.00 to

Marilyn Evans. For 1979, they reported total income of \$25,985.00 which was allocated \$19,300.00 to Melvin Evans and \$8,185.00 to Marilyn Evans.

2. On December 7, 1981, the Audit Division issued a Statement of Personal Income Tax Audit Changes against petitioner alleging additional income tax due of \$1,113.60 plus interest for 1978 and \$1,535.02 plus interest for 1979 on the basis of a field audit.

3. On July 29, 1982, the Audit Division timely<sup>1</sup> issued a Notice of Deficiency against petitioner for the 1978 and 1979 tax years alleging income tax due of \$2,648.62 plus interest.

4. Petitioner was an officer and shareholder<sup>2</sup> of A. F. Rockland Plumbing Supply Corp., a wholesaler of plumbing supplies. It is the Audit Division's position that, based upon a reconstruction of petitioner's income, petitioner received unreported income from the business in the form of constructive dividends.

5. An audit of A. F. Rockland Plumbing Supply Corp. was performed wherein the corporation's sales and expenses were tested. The corporation's records seemed in order. However, as an additional verification that the corporation was reporting all of its sales and income, audits of the corporation's principals, David Mazen and petitioner, were performed. As a result, the Audit Division reconstructed petitioner's income by a cash availability audit using a source and application of funds analysis.

6. The source and application of funds analysis found the following:

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<sup>1</sup> Petitioner consented to the extension of the period of limitation for assessment of 1978 personal income tax until April 15, 1983.

<sup>2</sup> Petitioner was responsible for outside sales, design and engineering. Petitioner categorized David Mazen, his fellow officer and co-shareholder, as the "inside man". Petitioner had only limited check-signing authority.

| <u>SOURCES</u>                                           | <u>1978</u> | <u>1979</u> |
|----------------------------------------------------------|-------------|-------------|
| Melvin Evans' net salary                                 | \$15,931.95 | \$15,571.96 |
| Marilyn Evans' net salary                                | 5,824.24    | 6,472.65    |
| State tax refund                                         | 113.50      | 116.60      |
| Contributions by sons to household expenses <sup>3</sup> | 1,800.00    | 1,800.00    |
| Total Sources                                            | \$23,669.69 | \$23,961.21 |
| <u>APPLICATIONS</u>                                      | <u>1978</u> | <u>1979</u> |
| Deposits to checking <sup>4</sup> account                | \$27,602.43 | \$30,933.48 |
| Cash living expenses                                     |             |             |
| (i) Food                                                 | 3,120.00    | 3,120.00    |
| (ii) Out of pocket                                       | 1,300.00    | 1,300.00    |
| (iii) Auto                                               | 923.00      | 923.00      |
| Total Applications                                       | \$32,945.43 | \$36,276.48 |
| Overapplication of Funds                                 | \$ 9,275.74 | \$12,315.27 |

7. The amounts determined by the Audit Division to represent overapplication of funds were deemed to be constructive dividends from A. F. Rockland Plumbing Supply Corp. and petitioner's taxable income for 1978 and 1979 was adjusted upward by \$9,275.74 and \$12,315.27, respectively, which resulted in the alleged deficiencies in income tax noted in Findings of Fact "2" and "3", supra.

8. The auditor analyzed, in detail, petitioner's deposits to his checking account. He made seventeen deposits of \$301.90 and twenty-two deposits of \$303.10 in 1978 which appear to represent deposits of net paychecks at regular

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<sup>3</sup> In a letter dated November 12, 1981, petitioner noted that his two sons, Glenn and Dean, "contributed between \$100.00 and \$200.00 per month toward our living expenses." The audit, relying on this information, credited petitioner with an income source of \$1,800.00 per year which represented such contributions from his sons. At the hearing, petitioner sought to increase this amount by introducing two signed statements by his sons that they contributed \$2,400.00 during 1978 and \$3,000.00 during 1979 to the living expenses of petitioner's household.

<sup>4</sup> The auditor was very conservative in estimating petitioner's cash living expenses. Her figures are much lower than the field audit guidelines which became effective in 1980 for the determination of personal living expenses. In addition, she estimated expenses as if petitioner's household consisted of three persons. In fact, it consisted of four persons.

intervals over the course of 1978. He made twenty deposits of \$302.28, fifteen of \$296.58 and nine of \$296.38 in 1979 which also appear to represent deposits of net paychecks at regular intervals over the course of 1979. In addition, during 1978, he made many deposits in variable amounts at irregular intervals including the following:

| <u>Date</u> | <u>Amount</u> |
|-------------|---------------|
| January 16  | \$1,480.00    |
| April 24    | 900.00        |
| May 8       | 550.00        |
| June 12     | 1,060.00      |
| July 5      | 600.00        |
| October 18  | 500.00        |
| November 8  | 200.00        |
| December 6  | 200.00        |
| December 7  | 1,660.00      |
| December 15 | 1,079.10      |

In 1979, he also made many deposits in variable amounts at irregular intervals including the following:

| <u>Date</u>  | <u>Amount</u> |
|--------------|---------------|
| January 9    | \$ 900.00     |
| February 27  | 140.00        |
| March 12     | 500.00        |
| April 10     | 260.00        |
| April 17     | 200.00        |
| May 16       | 400.00        |
| June 5       | 2,100.00      |
| June 29      | 2,000.00      |
| July 2       | 2,196.00      |
| July 12      | 400.00        |
| August 13    | 721.00        |
| September 12 | 590.00        |
| September 25 | 200.00        |
| November 13  | 550.00        |
| December 11  | 996.58        |

9. Petitioner did not maintain any savings accounts. Except for his stock ownership in A. F. Rockland Plumbing Supply Corp., he owned no stock and had no other business investments or financial interests.

10. In 1975, petitioner sold his personal residence in Orangeburg, New York, for \$52,000.00 (deposit, \$100.00; check, \$29,900.00; buyer's assumption of a mortgage of approximately \$22,000.00).<sup>5</sup> At that time, he was in the process of closing down an air conditioning supply business, Evans and Fuhrman, Ltd., and it seemed that petitioner's bankruptcy was a possibility. As a result, petitioner brought the cash proceeds from the sale of his house to his sister in California who placed the money in a safe deposit box. From time to time, petitioner's sister would send him money from such proceeds as he required. Petitioner did not specify which deposits to his checking account (which were analyzed in detail by the auditor as noted in Finding of Fact "8", supra) represented moneys sent to him by his sister from the proceeds of the sale of the house.

#### CONCLUSIONS OF LAW

A. That pursuant to Tax Law section 689(e), the burden of proof is imposed upon petitioner to show that the audit method used by the Audit Division in reconstructing his income for 1978 and 1979 was inaccurate and/or incorrect. Matter of Robert Damiecki and Patricia Damiecki, State Tax Commission, September 28, 1983.

B. That based upon Finding of Fact "10", supra, it is reasonable to conclude that for each of the years at issue, 1978 and 1979, petitioner used \$5,000.00 of the cash proceeds of approximately \$30,000.00 from the sale of his house in 1975. Therefore, the Audit Division is directed to credit petitioner with an additional source of income of \$5,000.00 for each of the years at issue.

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<sup>5</sup> The sale of his residence was not reported by petitioner on his 1975 income tax return. He testified that he did not report the sale because he did not realize a gain from the sale.




C. That, in all other respects, petitioner has failed to sustain his burden of proof to show other sources of income which would counteract the understatement of taxable income determined by the cash availability audit. It is noted that the auditor's reliance on petitioner's initial estimate of his sons' contributions to household expenses was reasonable. The signed statements of petitioner's sons, introduced at the hearing herein, are an insufficient basis to increase petitioner's initial estimate which was made at a time much closer to the years at issue.

D. That the Audit Division is directed to modify the Notice of Deficiency in accordance with Conclusion of Law "B", supra, and that, in all other respects, the petition of Melvin Evans is denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER