

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of		
Joseph LoTempio	:	
		AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Personal Income &		
Unincorporated Business Tax under Article 22 & 23	:	
of the Tax Law for the Year 1976.		
	:	

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Joseph LoTempio, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph LoTempio  
c/o Patrick J. Brown  
181 Franklin St.  
Buffalo, NY 14202

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  
31st day of December, 1984.

David Parchuck

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

## STATE TAX COMMISSION

County of Albany :

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

December 31, 1984

Joseph LoTempio  
c/o Patrick J. Brown  
181 Franklin St.  
Buffalo, NY 14202

Dear Mr. LoTempio:

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  
Patrick J. Brown  
LoTempio & Brown, Attorneys at Law  
181 Franklin St.  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
JOSEPH LOTEMPPIO	:	DECISION
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 Year 1976.	:	

---

Petitioner, Joseph LoTempio, c/o LoTempio & Brown, Attorneys at Law, 181 Franklin Street, Buffalo, New York 14202, 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 year 1976 (File No. 38762).

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 May 22, 1984 at 10:45 A.M. Petitioner appeared by LoTempio & Brown, P.C. (Patrick J. Brown, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

#### ISSUES

I. Whether additional income, discovered as the result of a Federal audit and attributed to petitioner as arising from his acceptance of wagers, was properly included in and made subject to the imposition of personal income and unincorporated business taxes.

II. Whether the Audit Division properly imposed a fraud penalty upon petitioner, based on the results of the aforementioned Federal audit.

FINDINGS OF FACT

1. Petitioner, Joseph LoTempio, and his wife, Jean LoTempio, who is not a party to this proceeding, timely filed a New York State Income Tax Resident Return (Form IT-201/208) for the year 1976. The filing status indicated on the return was "married filing separately on (this) combined return". Petitioner did not file an unincorporated business tax return for 1976.

2. On August 11, 1982, the Audit Division issued to petitioner a Notice of Deficiency asserting additional tax due for 1976 in the amount of \$6,634.01, plus penalty and interest. A Statement of Audit Changes, previously issued to petitioner on May 12, 1982, provided computations of the asserted deficiency, together with an explanation of the basis for the deficiency, as follows:

"[o]ur notice is based on unreported Federal Audit Adjustments. Unincorporated business tax is computed on your taxable business income. The fraud penalty is asserted to conform with Federal audit adjustments. Penalty under Section 685(c) of the New York Tax Law is imposed for underestimation of tax."

3. Petitioner did not appear personally at the hearing and give testimony or other evidence in support of his petition. Petitioner's representative, Patrick J. Brown, Esq., appeared and indicated that despite repeated attempts to contact petitioner concerning the instant matter, such efforts were unsuccessful. Mr. Brown stated that he had no evidence to offer in support of the petition filed by petitioner.

4. Petitioner's position in contesting the asserted deficiency, as set forth in his perfected petition, is as follows:

"[t]he taxpayer plead (sic) guilty in New York State Supreme Court to a gambling related offense. This in no way should be construed as an admission of the taxpayer as accepting wagers. This was not in fact a failure to report. The taxpayer never earned income from accepting wagers.

The taxpayer was also assessed a penalty of 50% of the payment due to fraud. Since the taxpayer denies receiving income from wagering and therefore denies any income to himself, there can be no fraud."

5. Petitioner's total New York income for 1976, as reflected at line "1", column "A" of his New York State Income Tax Resident Return, was \$4,367.68, and New York taxable income, per line "9" of said return, was \$1,067.68.

6. The Audit Division's asserted deficiency was premised upon a federal audit, the result of which was a proposed adjustment increasing petitioner's income by \$42,055.03. This increase was allegedly due to petitioner's acceptance of wagers during the months of September 1976 (\$16,175.01), October 1976 (\$16,714.18) and November 1976 (\$9,165.84). The Federal audit results also included the assertion of a 50 percent fraud penalty.

7. The Audit Division considered the entire amount of the alleged wagers (\$42,055.03) to be business income subject to the unincorporated business tax ("U.B.T.") and calculated such tax due in the amount of \$1,763.03. In addition, a 50 percent fraud penalty was imposed, as was a penalty pursuant to section 685(c) of the Tax Law for underestimation of tax. Similarly, the Audit Division increased petitioner's New York taxable income by \$42,027.01 and calculated additional personal income tax due in the amount of \$4,870.98.<sup>1</sup> A 50 percent fraud penalty was also asserted as due.

---

<sup>1</sup> As a consequence of the Federal auditor's finding of additional income, resultant minor mathematical adjustments were made to petitioner's claimed itemized deductions for medical expenses and sales tax, decreasing the former by \$352.64 while increasing the latter by \$380.66. The \$28.02 net difference between these items served to decrease the amount of the additional income subjected to personal income tax, hence accounting for the difference between the amount of the additional income subjected to personal income tax (\$42,027.01), and the amount of said income subjected to U.B.T. (\$42,055.03).

8. By a letter dated September 23, 1981, petitioner was advised that the Audit Division was aware of the then-proposed Federal deficiency and of the requirement that petitioner notify the Audit Division (via Form IT-115) of any change to his taxable income within 90 days of the final Federal determination. This letter also requested petitioner to submit information concerning the status of the Federal audit.

9. By a letter to the Internal Revenue Service dated August 18, 1980, petitioner had formally protested the additional tax proposed by the Internal Revenue Service, in terms essentially identical to those stated in the perfected petition (see Finding of Fact "4"). Petitioner has not filed Form IT-115, nor has he supplied evidence regarding the status of the Federal audit results or his protest thereof.

10. The Audit Division's Answer to petitioner's perfected petition states, in paragraph "8", as follows:

"AFFIRMATIVELY states that the fifty percent fraud penalty assessed by New York State was based upon the report issued by the agent of the Internal Revenue Service, not upon the petitioner's criminal conviction."

11. No evidence was offered on petitioner's behalf with respect to the additional income found as the result of the Federal audit.

12. The Audit Division asserts that petitioner's failure to file Form IT-115, and failure to comply with the requirements of Article 35 of the Internal Revenue Code (Excise Tax on Wagering), specifically section 4411 which mandates that individuals engaged in wagering file certain forms pertaining thereto with the Internal Revenue Service (Forms 11-C and 730), together with "other" evidence, supports the conclusion that petitioner's non-reporting of wagering income was deliberate and constituted fraud.

CONCLUSIONS OF LAW

A. That the Audit Division has established a reasonable basis for the issuance of the Notice of Deficiency against petitioner, and thus the personal income and unincorporated business taxes asserted as due thereon by the Audit Division are presumed to be correct (Matter of Joseph F. Tavalacci v. State Tax Commission, 77 A.D.2d 759). The burden of proving such deficiency to be incorrect rests upon petitioner [sections 689(e) and 722 of the Tax Law]. Petitioner has, in turn, adduced no proof that such asserted tax deficiency, including the penalty for underestimation imposed pursuant to section 685(c), is not accurate and correct, and thus such deficiency, including the penalty portion thereof based on underestimation, must be sustained. (Matter of Tavalacci, supra; Matter of Henry Jarvis & Delores Jarvis, State Tax Comm., April 27, 1983).

B. That the burden of proof in any hearing under Articles 22 and 23 of the Tax Law regarding the issue of "whether the petitioner has been guilty of fraud with intent to evade tax..." is upon the Audit Division.  
[Tax Law sections 689(e)(1) and 722].

C. That where, as here, a taxpayer against whom a New York State tax fraud penalty is asserted files a timely petition for redetermination, the State is put to its proof. That "[t]he standard of proof necessary to support a finding of fraud by the Tax Commission requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing." (Matter of Walter Shutt and Gertrude Shutt, State Tax Comm., June 4, 1982.) Fraud must be proven by clear and convincing evidence; a mere preponderance of the

evidence is insufficient to meet the burden. Matter of Samuel Bernstein, State Tax Comm., October 2, 1981.

D. That the evidence submitted by the Audit Division does not sustain the burden of proof of fraud under Tax Law section 689(e)(1). The fraud penalty was not asserted based on petitioner's criminal conviction, and no information regarding such conviction was supplied. (see Finding of Fact "10"). Moreover, no evidence regarding any final disposition of the proposed Federal audit adjustments has been provided, notwithstanding that the fraud penalty was asserted to conform with such proposed adjustments. (see Finding of Fact "2").

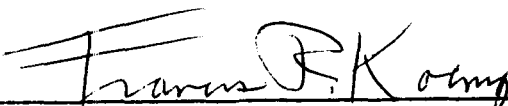
E. That the petition of Joseph L. Lotempio is granted to the extent that the fraud penalty is cancelled, but is in all other respects denied, and the Notice of Deficiency dated August 11, 1982, as modified by cancellation of the fraud penalty, is sustained.

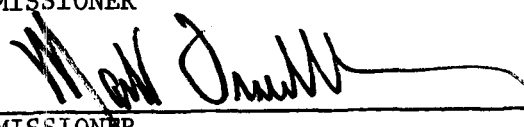
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER