

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Frank & Mary Marotta : 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 :  
Years 1978 & 1979.

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

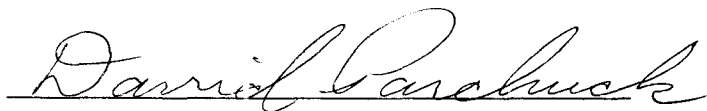
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of August, 1984, he served the within notice of Decision by certified mail upon Frank & Mary Marotta, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

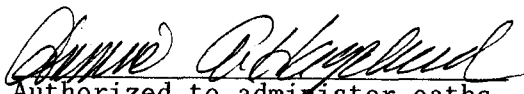
Frank & Mary Marotta  
23 Bobolink Lane  
Lockport, NY 14094

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 August, 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

Frank & Mary Marotta

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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 :  
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 August, 1984, he served the within notice of Decision by certified mail upon Thomas A. Morris, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas A. Morris  
Seligman, Sunshine & Co.  
3912 Maple Road  
Amherst, NY 14226

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 August, 1984.

*David Parchuck*

*Ann P. [Signature]*

Authorized to administer oaths  
pursuant to Tax Law section 174

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

August 9, 1984

Frank & Mary Marotta  
23 Bobolink Lane  
Lockport, NY 14094

Dear Mr. & Mrs. Marotta:

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  
Thomas A. Morris  
Seligman, Sunshine & Co.  
3912 Maple Road  
Amherst, NY 14226  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
FRANK MAROTTA AND MARY MAROTTA : 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 Years 1978 and 1979. :

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Petitioners, Frank Marotta and Mary Marotta, 23 Bobolink Lane, Lockport, New York 14094, 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 years 1978 and 1979 (File Nos. 36667 and 39033).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Part VI, Buffalo, New York, on March 20, 1984 at 1:15 P.M. Petitioners appeared by Joseph M. Nasca, Esq. and Thomas A. Morris, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division's reconstruction of petitioners' income for the years 1978 and 1979, using source and application of funds analyses, properly determined that petitioner Frank Marotta had additional unreported income from his horse racing activities.

FINDINGS OF FACT

1. Petitioners herein, Frank Marotta and Mary Marotta<sup>1</sup>, timely filed New York State resident income tax returns for the years 1978 and 1979. Petitioner

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<sup>1</sup> Mary Marotta is involved in this proceeding due solely to the fact that she filed joint tax returns with her spouse. Accordingly, the term "petitioner" shall hereinafter refer solely to Frank Marotta.

also filed unincorporated business tax returns for each of the years at issue, reporting thereon the income generated from his horse racing activities.

2. On February 11, 1982, the Audit Division issued two notices of deficiency to petitioner for the years 1978 and 1979. The first Notice asserted that additional personal income tax of \$2,754.55 was due, together with interest of \$727.06, for an alleged total due of \$3,481.61. The second Notice proposed a deficiency in unincorporated business tax of \$992.31, plus interest of \$274.46, for an alleged total due of \$1,266.77.

3. The aforementioned notices of deficiency were premised on the results of a field audit of petitioner's personal and business books and records. Using the source and application of funds method to reconstruct income, the Audit Division determined that petitioner had understated his business income by \$24,492.63 for 1978 and by \$5,017.90 for 1979. Other adjustments were also proposed which petitioner does not contest or which were statutory adjustments based solely on proposed increases to adjusted gross income. Accordingly, said other adjustments will not be addressed hereinafter.

4. During the years at issue petitioner owned and operated the Mamipa Stables. Business activities consisted of the purchase, sale and racing of thoroughbred horses. Petitioner did not maintain a formal set of books which detailed the income earned and expenses incurred as the result of his horse racing activities. Business records consisted primarily of handwritten receipts. Petitioner maintained two checking accounts, one for personal use and one which combined both personal and business activities. No accurate records were kept by petitioner segregating personal funds from business funds.

5. At the hearing held herein petitioner submitted into evidence reconstruction analyses prepared by his accountant which reflected understatements

of income of \$1,140.00 and \$1,127.00 for 1978 and 1979, respectively. For the year 1978, petitioner's accountant used a "cash out analysis" to reconstruct income. Petitioner's accountant testified that he did not reconcile his "cash out analysis" to the Audit Division's source and application of funds analysis and that, therefore, he could not point to any specific area or areas where the two analyses may differ.

For the year 1979, petitioner's accountant used a source and application of funds analysis to reconstruct income. The primary difference between the Audit Division's analysis for 1979 and the accountant's analysis for 1979 was in the computation of personal living expenses. The Audit Division computed total personal living expenses to be \$28,853.49, while petitioner's accountant computed said expenses to total \$24,748.84. Petitioner's computation of personal living expenses was identical to the Audit Division's, except for the exclusion of the following items:

- a) a \$450.00 expense for clothing;
- b) a \$213.06 reduction of expenses for charge accounts; and
- c) a \$3,441.59 expense for miscellaneous cash items.

No credible documentary or other evidence was adduced at the hearing held herein to support the reduction in 1979 personal living expenses as claimed by petitioner. Petitioner Frank Marotta, although present at the hearing, did not offer his testimony.

6. Petitioner also maintains that he was the recipient of a \$6,000.00 cash gift from his parents in each of the years 1977<sup>2</sup>, 1978 and 1979. Petitioner's father, Mr. Anthony Marotta, testified at the hearing to the effect that:

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<sup>2</sup> The year 1977 was included by petitioner as he maintains that the \$6,000 cash gift for 1977 was received at the very end of said year and that therefore this amount is properly considered as a source of funds for 1978.

a) he gave gifts of \$6,000.00 to both petitioner and his brother in each of the years 1977, 1978 and 1979;

b) said gifts were made in cash from funds which were accumulated from his truck farming operation and which were kept in his house;

c) he regularly kept anywhere from \$4,000.00 to \$12,000.00 in cash in his house and he usually made the cash gifts to his sons either in the spring or fall of the year;

d) he kept no written record of the cash gifts to his sons;

e) no gift tax returns were filed due to the fact that his accountant advised him of the maximum amount which could be given to his sons before gift tax returns would be required; and

f) his total income during the years in which the gifts were made exceeded \$20,000.00 per year.

7. Anthony Marotta's tax returns for the years 1977, 1978 and 1979 were not submitted into evidence to show what his reported total income was for said years. Furthermore, there is no credible evidence in the record to show what petitioner did with the alleged gifts (e.g., deposited into bank accounts, purchased race horses, etc.).

#### CONCLUSIONS OF LAW

A. That the notices of deficiency issued by the Audit Division are presumed to be correct and it is petitioner who bears the burden of proof to show wherein the Audit Division's computations are erroneous, incorrect or unreasonable [Tax Law sections 722 and 689(e)].

B. That regardless of the method used to reconstruct income (i.e. source and application of funds analysis or cash out analysis), said methods, if properly performed, should produce nearly identical results. In the instant matter, petitioner's cash out analysis for 1978 produced an understatement of \$1,140.00, while the Audit Division's source and application of funds analysis

for 1978 determined a substantially larger understatement of \$24,492.63. The bare submission by petitioner of the cash out analysis for 1978, without a reconciliation of said analysis to the Audit Division's source and application of funds analysis and without specific references to where and why the two analyses differ, leads to the conclusion that the cash out analysis can be given little or no weight. See also Conclusion of Law "A", supra.

C. That the source and application of funds analysis submitted by petitioner for 1979 is likewise accorded no weight since he has failed to sustain the burden of proof to show that his total personal living expenses were \$24,748.84, and not \$28,853.49 as determined by the Audit Division.

D. That petitioner has also failed to sustain the burden of proof to show that he was the recipient of cash gifts from his parents during the years 1977, 1978 and 1979. Petitioner offered no documentary evidence, either from his records or from his parents' records, substantiating the existence of said cash gifts. Petitioner Frank Marotta, although present at the hearing, did not testify. Mr. Anthony Marotta's testimony would have us believe that he took the precaution of checking with his accountant as to the maximum amount which could be given before incurring a gift tax liability, but that he kept absolutely no record of the gifts made to his sons from large sums of cash kept in his house. Furthermore, Mr. Anthony Marotta's testimony that he gave a total of \$12,000.00 to his sons in each of the years 1977, 1978 and 1979 out of a total income slightly in excess of \$20,000.00 a year strains credibility.



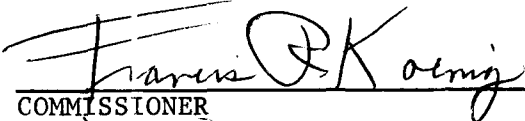
E. That the petition of Frank Marotta and Mary Marotta is denied and the two notices of deficiency dated February 11, 1982 are sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

**AUG 09 1984**

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
  
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COMMISSIONER