

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Robert & Joanne Scarpulla : 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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Robert & Joanne Scarpulla the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Joanne Scarpulla  
411 Sannita Dr.  
Rochester, NY 14626

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 P. Hays  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of

Robert & Joanne Scarpulla : 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 }  
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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Carl A. Nanni, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl A. Nanni  
273 Lake Ave.  
Rochester, NY 14608

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  
5th day of October, 1984.

David Parchuck

James A. Hadden  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

October 5, 1984

Robert & Joanne Scarpulla  
411 Sannita Dr.  
Rochester, NY 14626

Dear Mr. & Mrs. Scarpulla:

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  
Carl A. Nanni  
273 Lake Ave.  
Rochester, NY 14608  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBERT AND JOANNE SCARPULLA	:	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 Years 1978 and 1979.	:	

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Petitioners, Robert and Joanne Scarpulla, 411 Sannita Drive, Rochester, New York 14626, 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 years 1978 and 1979 (File No. 36792).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, 1 Marine Midland Plaza, Rochester, New York, on March 15, 1984 at 1:15 P.M., and continued to conclusion on May 31, 1984 at 1:30 P.M. Petitioners appeared by Carl A. Nanni, P.A. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the source and application of funds method of income reconstruction used by the Audit Division accurately reflected petitioners' tax liability for 1978 and 1979.

FINDINGS OF FACT

1. Petitioners, Robert and Joanne Scarpulla, filed a New York State Income Tax Resident Return and a New York State Unincorporated Business Tax Return for 1978. Petitioners filed a New York State Income Tax Resident Return for 1979; they did not file an Unincorporated Business Tax Return for 1979.

2. On March 30, 1982, as the result of a field audit, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$17,961.81 plus penalty of \$1,688.89 and interest of \$4,501.42 for a total due of \$24,152.12 for the years 1978 and 1979. The deficiency included both personal income tax and unincorporated business tax.

3. During the period in issue, petitioner Robert Scarpulla owned and operated State Fuel Co., ("the company"), a residential and commercial fuel oil business in Rochester, New York. The company had been formed in the 1930's by Robert Scarpulla's father, Angelo Scarpulla, Sr. and Louis Di Ponzio. The latter two individuals turned over the company to petitioner at some undisclosed time; however, both individuals did light sales work for 10 to 20 hours per week during the years in issue.

4. On audit, the auditors performed a source and application of funds analysis relying primarily on petitioners' bank account statements and cancelled checks as well as loan accounts and securities accounts. The auditors determined total funds applied for 1978 to be \$123,011.00 and total sources of funds to be \$68,867.00, resulting in additional unreported income of \$54,144.00 for 1978. The auditor determined total funds applied for 1979 to be \$199,424.00 and total sources of funds to be \$161,813.00 resulting in additional unreported income of \$37,611.00 for 1979. Prior to the hearing, the Audit Division conceded that certain adjustments should be made reducing the unreported income computed for 1978 to \$51,675.28 and for 1979 to \$32,749.10.

5. In determining funds applied, the auditors analyzed State Fuel Co. checks which appeared to be issued in payment of petitioners' personal expenses. Among such checks were many made to the order of Angelo Scarpulla, Sr. and

Louis Di Ponzio. Some of the checks were marked "sales commission", some were marked "payment on business", some were marked "repayment on loan", and some were unmarked. State Fuel Co. issued Federal forms 1099, (Statement for Recipients of Miscellaneous Income), to both Angelo Scarpulla Sr. and Louis Di Ponzio for each of the years in issue. The forms 1099 characterized the funds as "commissions and fees to nonemployees". The amounts reported on the forms were identical to the total of the checks issued to Angelo Scarpulla Sr. and Louis Di Ponzio and were reported as follows:

<u>Recipient</u>	<u>Year</u>	<u>Amount</u>
Louis Di Ponzio	1978	\$5,274.00
Angelo Scarpulla, Sr.	1978	\$1,391.00
Louis Di Ponzio	1979	\$4,800.00
Angelo Scarpulla, Sr.	1979	\$7,750.00

Both Mr. Scarpulla, Sr. and Mr. Di Ponzio explained that the checks from the company were commission payments for their sales efforts. Both individuals spent 10 to 20 hours per week visiting potential customers. They would usually work for two or three hours during the afternoon and occasionally during the evening. The company paid them a commission based on gallons of fuel sold per account obtained. They were paid in consistent monthly amounts with occasional adjustment checks issued to balance their account based on gallons sold. Mr. Scarpulla, Sr. and Mr. Di Ponzio were both over 65 years old during the years in issue and neither filed tax returns since the commission payments were their only taxable source of income.

6. One of the auditors had a meeting with petitioner Robert Scarpulla in 1981 and he could not specifically remember what transpired at the meeting although he had written a note stating that petitioner explained that the payments to Mr. Di Ponzio represented repayments of amounts owed him by the

company for periodic contributions made by him in prior years. For this reason the auditor classified all the checks to Mr. Di Ponzio and Mr. Scarpulla, Sr. as applications of funds.

7. In determining total funds applied, the auditor also included estimated cash living expenses. One of the expense categories was vacation and travel to which the auditor allocated \$1,500.00 per year. The evidence adduced at the hearing indicated that petitioner Robert Scarpulla had a severe heart attack in 1978 and was unable to travel during 1979. The auditor knew that petitioner had suffered a heart attack and acknowledged that possibly an adjustment should be made.

8. In 1979, the company purchased a truck from Anthony Ulgiati for \$38,000.00. The down payment on the purchase price was paid in the form of a promissory note dated February 7, 1979 in the amount of \$8,000.00 payable to Mr. Ulgiati one year after date. The auditor included the entire \$38,000.00 as an application of funds for 1979, although, as of October 31, 1981, the remaining \$8,000.00 had yet to be paid to Mr. Ulgiati.

9. In 1978, Robert Scarpulla loaned his brother Angelo Scarpulla, Jr. \$10,000.00 to enable him to settle the property distribution in a divorce matter. The \$10,000.00 loan was included as an application of funds for 1978. In 1979 Angelo Scarpulla, Jr. paid his brother \$5,500.00 on the loan by a check dated June 5, 1979. The \$5,500.00 was not included as a source of funds for 1979. The remainder of the loan was paid back in cash over a two and one half year period. However, any other amounts, if any, paid back in 1979 were unsubstantiated.

10. During 1978, the company would, at times, be unable to pay its oil suppliers within the 10 day payment period. When this occurred petitioner's

father, Angelo Scarpulla, Sr. would lend his son the money to pay the suppliers. Mr. Scarpulla, Sr. lent his son \$3,000.00 to \$5,000.00 at a time and by the end of the year the total amount lent was \$14,056.00. The loans were in the form of cash which Mr. Scarpulla, Sr. kept stored in his fruit cellar under some shelving. He explained that he did not believe in banks and that he kept over \$14,000.00 in his cellar during the period in issue and that he continues to keep \$4,000.00 or \$5,000.00 hidden in his cellar. Robert Scarpulla had not paid back the loans from his father as of the date of the hearing. The \$14,056.00 in loans was not included as a source of funds for 1978.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law provides that, with certain exceptions not herein applicable, the burden of proof is upon the petitioners to overcome the deficiency.

B. That with respect to the payments made to Angelo Scarpulla, Sr. and Louis Di Ponzio, it is clear that, regardless of the notations on the cancelled checks, the two individuals provided a service to the company and they were reimbursed for this service and the amounts paid were reported on Federal form 1099 for both years in issue. Therefore, such payments were business expenses previously reported and not unreported personal expenses of petitioners and the total funds applied for 1978 is to be reduced by \$6,665.00 and for 1979 by \$12,550.00.

C. That with respect to the \$1,500.00 estimated as cash travel expenses for 1979, since petitioner Robert Scarpulla had a severe heart attack, his travel during 1979 would have been negligible. Therefore, the total funds applied for 1979 is to be further reduced by \$1,500.00. Petitioners have not



shown that any other estimated cash living expenses as determined by the auditors were incorrect and the remainder are, therefore, sustained.

D. That with respect to the purchase of the truck from Anthony Ulgiati, since \$8,000.00 in the form of a promissory note has yet to be paid, the total funds applied for 1979 is to be reduced by \$8,000.00.

E. That with respect to the loan of \$10,000.00 made by Robert Scarpulla to his brother Angelo Scarpulla, Jr., petitioners have shown that \$5,500.00 of said loan was repaid to Robert Scarpulla in 1979; they have not, however, adequately demonstrated that any other portions of the loan were repaid during the years in issue. Therefore, the total sources of funds for 1979 is to be increased by \$5,500.00.

F. That petitioners have shown that during 1978, Angelo Scarpulla, Sr. lent his son Robert \$14,056.00 to help him pay the company's oil suppliers and, therefore, the total sources of funds for 1978 is to be increased by \$14,056.00.

G. That the adjustments allowed by the Audit Division together with the additional adjustments discussed herein result in a recomputation of unreported funds as follows:

	<u>1978</u>	<u>1979</u>
Unreported funds determined by auditor	\$54,144.00	\$37,611.00
Audit Division adjustments	<u>2,468.72</u>	<u>4,861.90</u>
	\$51,675.28	\$32,749.10
Hearing adjustments	<u>20,721.00</u>	<u>27,550.00</u>
Final unreported funds	<u>\$30,954.28</u>	<u>\$ 5,199.10</u>

Additional income tax and unincorporated business tax due is to be recomputed using the aforesaid final determination of unreported funds.

H. That the petition of Robert and Joanne Scarpulla is granted to the extent indicated in Conclusion of Law "G"; that the Audit Division is directed

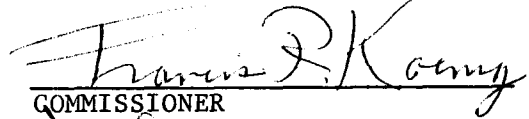
to modify the Notice of Deficiency issued March 30, 1982 accordingly; and that, except as so modified, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER