

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Frederick & Pasqua Spinelli :  
for Redetermination of a Deficiency or for Refund :  
of New York State Personal Income Tax under Article :  
22 of the Tax Law for the Year 1975 and New York :  
State and New York City Personal Income Taxes under :  
Articles 22 and 30 of the Tax Law for the Year :  
1976. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

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 21st day of March, 1984, he served the within notice of Decision by certified mail upon Frederick & Pasqua Spinelli, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick & Pasqua Spinelli  
1146 E. 27th St.  
Brooklyn, NY 11210

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  
21st day of March, 1984.

David Parchuck

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

## STATE TAX COMMISSION

# AFFIDAVIT OF MAILING

Corinne A. Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

March 21, 1984

Frederick & Pasqua Spinelli  
1146 E. 27th St.  
Brooklyn, NY 11210

Dear Mr. & Mrs. Spinelli:

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, 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  
Melvin Ginsberg  
26 Pine Tree Lane  
Roslyn, NY 11577  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
FREDERICK SPINELLI and PASQUA SPINELLI	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Year	:	
1975 and New York State and New York City	:	
Personal Income Taxes under Articles 22 and 30	:	
of the Tax Law for the Year 1976.	:	

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Petitioners, Frederick Spinelli and Pasqua Spinelli, 1146 East 27th Street, Brooklyn, New York 11210, filed a petition for redetermination of a deficiency or for refund of New York State personal income taxes under Article 22 of the Tax Law for the year 1975 and New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976 (File No. 30385).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 10, 1983 at 9:15 A.M., and continued to a conclusion on May 9, 1983 at 9:15 A.M., with all briefs to be submitted by June 9, 1983. Petitioner Frederick Spinelli appeared with Melvin Ginsberg, CPA. The Audit Division appeared by Paul B. Coburn, Esq. and John P. Dugan, Esq. (Irving Atkins and Alfred Rubenstein, Esqs., of counsel).

ISSUES

I. Whether certain adjustments to contributions and medical expenses were proper.

II. Whether the disallowance of a claimed rental loss was proper.

III. Whether the disallowance of a claimed capital loss was proper.

IV. Whether a field audit adjustment attributing additional income to petitioners was proper.

FINDINGS OF FACT

1. Petitioners, Frederick Spinelli and Pasqua Spinelli, late filed a joint New York State Income Tax Resident Return for 1975 on February 4, 1977. For tax year 1976 they filed a joint New York State Income Tax Resident Return (with New York City Personal Income Tax). On said returns Frederick Spinelli (hereinafter petitioner) reported business income of \$1,065.00 and \$5,661.00 respectively, derived from his practice as an attorney.

2. On April 25, 1979, the Audit Division issued a Statement of Audit Changes to petitioners wherein, pursuant to a schedule of audit adjustments attached thereto, the following adjustments were made as the result of a field audit:

<u>Item</u>	<u>1975</u>	<u>Adjustments</u>
Additional funds required		\$23,380.00
Rental loss disallowed		2,142.00
Capital loss disallowed		1,000.00
Contributions		219.00
Medical insurance		398.00
Statutory medical adjustment		810.00
Modification for interest income reported on U.S. treasury bonds		<u>(2,353.00)</u>
Net Audit Adjustment		<u>\$25,596.00</u>
	<u>1976</u>	
Capital loss disallowed		\$ 1,000.00
Statutory medical adjustment		<u>40.00</u>
Net Audit Adjustment		<u>\$ 1,040.00</u>

Accordingly, a Notice of Deficiency was issued against petitioners on January 25, 1980 asserting additional New York State personal income tax for 1975 and 1976 of \$2,701.75, additional New York City personal income tax for 1976 of \$14.06, plus penalties and interest of \$1,602.69, for a total due of \$4,318.50. Said penalties were asserted under sections 685(a)(1) and 685(b) of the Tax Law for petitioners' failure to timely file their 1975 return and negligence connected with such filing respectively.

3. The aforestated 1976 adjustments were determined as the result of a Federal audit. No independent state audit was conducted for 1976. As such, petitioners conceded said 1976 adjustments. Accordingly, only the year 1975 remains at issue herein.

4. Petitioners claimed contributions of \$842.00 on their 1975 return. On audit petitioners were allowed \$623.00, yielding the adjustment at issue of \$219.00. Said adjustment was comprised of amounts spent for parochial school tuition and books which were claimed as contributions.

5. At the hearing petitioner submitted a check for \$75.00 paid to the Greater New York City Hockey League which he contended was paid as a contribution. At least one of petitioner's sons was a member of said league. Neither a receipt nor any other form of documentation was submitted to establish that said payment was in fact a contribution. Petitioner further contended that he made cash contributions to the church of approximately four dollars per week for which he was not given credit on audit.

6. Petitioner claimed a deduction for medical insurance totaling \$1,780.00. The adjustment at issue of \$398.00 represented amounts paid to the Veterans Administration for life insurance.

7. Petitioners reported a rental loss of \$2,142.00 from a house located at 1146 East 27th Street, Brooklyn, New York. Said house consisted of two apartments; one of which was occupied by petitioner and his family, the other being rented to his mother-in-law and sister-in-law. On their return petitioners claimed 50 percent of the expenses relative to this property as being attributable to the rental portion. The rental income received was \$100.00 per month, totaling \$1,200.00 for the year 1975.

8. The Audit Division disallowed said rental loss on the basis that the apartment was rented to relatives for an amount less than the fair rental value and therefore there was no profit motive attached to such rental.

9. Petitioner testified that his family occupied the lower floor of the house, which consisted of five (5) rooms, and that his relatives "used about three(3) rooms" upstairs, with one upstairs room being used by his children for storage. He further testified that "the going rent was \$50.00 to \$75.00 more per month in the area at that time."

10. Expenses attributable to said property consisted of, inter alia, real estate tax of \$1,243.00, depreciation of \$2,666.00, mortgage interest of \$704.00 and fuel of \$1,143.00. Total expenses claimed for the property was \$6,684.00, of which petitioners allocated half to the rental portion.

11. Pursuant to petitioners' Federal Schedule D, their claimed long-term capital loss of \$1,000.00 in 1975 was solely the result of a long-term capital loss carryover of \$21,441.00 attributable to years beginning after 1969.

12. The Audit Division disallowed the 1975 capital loss of \$1,000.00 based on the fact that the Internal Revenue Service had disallowed petitioners' 1976 claimed capital loss of \$1,000.00, where such loss for 1976 was also claimed based on the carryover of the post 1969 loss.

13. Petitioner alleged that the 1976 capital loss disallowance was not based on disallowance of the carryover. Rather, he argued that such loss was disallowed by the Internal Revenue Service based on its inclusion, on audit, of a previously unreported long-term capital gain of \$10,116.00 derived from the sale of real property. In support of this, petitioner submitted a copy of a 1976 Federal Schedule D marked "Amended Return", which he claimed was prepared by the Internal Revenue Service during his Federal audit. However, such "Amended Return" computed to a capital loss of \$109.00 and when questioned as to why the full 1976 capital loss of \$1,000.00 was disallowed by the Internal Revenue Service, petitioner was unable to satisfactorily respond.

14. Petitioner submitted a copy of his 1970 Federal return, inclusive of Schedule D, whereon he reported a net long-term capital loss of \$60,991.00, which he alleged was the loss giving rise to the carryover claimed during the year at issue herein.

15. The adjustment for "additional funds required" of \$23,380.00 was computed using an indirect method of income reconstruction. The method used herein was the "Cash Availability - Bank Deposit Method". The adjustment was comprised of a computed cash shortage of \$10,380.00 plus estimated cash living expenses of \$13,000.00.

16. Petitioner submitted a copy of a check dated December 22, 1975 in the amount of \$2,386.25. Said check, which was payable to his wife, Pasqua Spinelli, was received from The Prudential Insurance Co. and represented a matured endowment policy #23026923. Said check was included in petitioner's deposit to Dime Savings Bank of \$2,486.25 on December 29, 1975. Credit was not given by the Audit Division for this check as a source of funds.



17. Petitioner submitted a savings account passbook from Terrace Savings and Loan Association (Terrace), account #36866 evidencing a withdrawal of \$2,000.00 on May 9, 1975. Said withdrawal was deposited to his personal checking account on the same date. Credit was not given by the Audit Division for this withdrawal as a source of funds.

18. Petitioner submitted two bank debit memos dated January 7, 1975 and January 20, 1975 respectively. Each was for \$160.00 and established that petitioner had twice deposited a check for said amount into his personal checking account and that each time the check has been returned unpaid. Review of the record shows that these amounts were previously considered during the audit.

19. Petitioner contended that on audit he was not given credit for certain savings account withdrawals as a source of funds. Such withdrawals are as follows:

<u>DATE</u>	<u>ACCOUNT</u>	<u>WITHDRAWAL</u>
May 9, 1975	Terrace #36866	\$5,455.63
January 14, 1975	Terrace #36865	\$1,243.25
July 25, 1975	Roosevelt Savings Bank #9132892	\$2,661.25
July 25, 1975	Roosevelt Savings Bank #9132893	\$1,601.67
February 14, 1975	Terrace #36866	\$2,000.00
July 25, 1975	Terrace #100770	\$3,119.30

20. Review of the bankbooks and the audit workpapers shows that;

(a) The May 9, 1975 withdrawal of \$5,455.63 from Terrace, account #36866 was redeposited on the same date to Terrace, account #100770. Neither the withdrawal nor the deposit were included in the cash availability analysis.

(b) The January 14, 1975 withdrawal of \$1,243.25 from Terrace, account #36865 was not credited to petitioners as a source of funds. Said withdrawal closed the account.

(c) The July 25, 1975 withdrawal of \$2,661.25 from Roosevelt Savings Bank, account #9132892 was not credited to petitioners as a source of funds. Said withdrawal closed the account.

(d) The July 25, 1975 withdrawal of \$1,601.67 from Roosevelt Savings Bank, account #9132893 was not credited to petitioners as a source of funds. Said withdrawal closed the account.

(e) The February 14, 1975 withdrawal of \$2,000.00 from Terrace, account #36866 was not credited to petitioners as a source of funds.

(f) The July 25, 1975 withdrawal of \$3,119.30 from Terrace, account #100770 was credited to petitioner as a source of funds. Said withdrawal closed the account.

21. Petitioner alleged that all of the aforestated withdrawals were used to pay cash living expenses.

22. Of the aforestated withdrawals, three were made on July 25, 1975 and each resulted in the closing of an account. The total of the withdrawals on said date was \$7,382.22. The Audit Division allowed the withdrawal of \$3,119.30 as a source of funds since petitioner established that \$3,000.00 of said withdrawal was used to purchase a bank teller's check for the purpose noted in Finding of Fact "26", infra. The remaining two withdrawals were not allowed on the basis that the substantial total withdrawn on the same date indicates a large purchase or expenditure rather than for use as payment of living expenses.

23. In computing the additional funds required of \$23,380.00 the Audit Division estimated cash living expenses to be \$13,000.00, computed as follows:

Vacation		\$ 2,500.00
Food		
Husband \$4 x 5 = \$20 x 52	\$1,040.00	
At Home (4 people) \$80 x 50	<u>4,000.00</u>	5,040.00
Entertainment		2,000.00
Clothing		2,000.00
Miscellaneous - Newspapers, Barber, Transportation		<u>2,000.00</u>
ESTIMATED CASH LIVING EXPENSES		<u>\$13,540.00</u> <sup>1</sup>

24. On Audit, petitioner estimated his cash living expenses to be approximately \$11,500.00. However, at the hearing held herein, petitioner testified

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<sup>1</sup> Said amount was rounded to \$13,000.00.

that the estimate he gave at the audit was for 1979 (the year the audit was conducted) rather than for 1975, the year at issue.

25. No evidence, other than petitioner's testimony, was introduced to establish that the Audit Division's estimate of cash living expenses was improper or erroneous.

26. Petitioner owned a portion of the stock in Swordsman, Inc., a corporation which owned a vacant lot in New Jersey. Pursuant to the Audit Division, each year petitioner contributed between \$6,000.00 and \$7,000.00 to the corporation to cover his share of the real estate taxes. During the audit, petitioner established the payment of \$3,000.00 to Swordsman, Inc. in 1975 by check. The balance of \$4,000.00 was charged to petitioner as an additional cash requirement.

27. Petitioner claimed that the total yearly real estate tax for Swordsman, Inc. was approximately \$7,000.00 and that said total was paid by both him and his "partner". Petitioner submitted copies of two checks written by an individual who he purported was his "partner". Both checks, which were dated in July 1975, were paid to the order of Swordsman, Inc. and totaled \$3,500.00. Petitioner contended that these checks represented his "partner's" share of the real estate tax.

28. Subsequent to the hearing petitioner submitted a Statement from the New Jersey tax authorities which indicated that a total of \$6,195.12 had been paid on block 77, lots 4c and 5d during 1975. Although the statement was addressed to petitioner, it did not show who paid the tax, whether the amount stated was the total tax for the year or whether it in fact was relative to the property held by Swordsman, Inc.

CONCLUSIONS OF LAW

A. That the deficiency asserted for 1976 is hereby sustained, as such was conceded by petitioners.

B. That petitioners have failed to sustain their burden of proof, required pursuant to section 689(e) of the Tax Law, to show that they are properly entitled to greater deductions for contributions and medical insurance than those allowed on audit. Accordingly, the adjustments to said deductions are hereby sustained.

C. That petitioner lacked a profit motive in his rental of the apartment at 1146 East 27th Street, Brooklyn, New York to his mother-in-law and sister-in-law for an amount less than the fair rental value. Therefore, since the loss sustained on said rental was personal in nature, the adjustment disallowing such loss is sustained.

D. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e) of the Tax Law, to show that he is properly entitled to a capital loss in 1975. Accordingly, the adjustment disallowing petitioners' claimed capital loss of \$1,000.00 is hereby sustained.

E. That the check for \$2,386.25 received by Pasqua Spinelli from Prudential Insurance Co. should properly be considered as an additional source of funds in the cash availability analysis prepared by the Audit Division. Accordingly, the additional cash requirements as computed is to be reduced by said amount. (See Finding of Fact "16" supra).

F. That in computing petitioners' additional cash requirements, the following savings account withdrawals are to be properly considered as additional sources of funds:

<u>DATE</u>	<u>ACCOUNT</u>	<u>WITHDRAWAL</u>
May 9, 1975	Terrace #36866	\$2,000.00
January 14, 1975	Terrace #36865	\$1,243.25
February 14, 1975	Terrace \$36866	\$2,000.00
TOTAL		<u>\$5,243.25</u>

Accordingly, the additional cash requirements as computed is to be reduced by this amount. (See Findings of Fact "17", "19" and "20", supra).

G. That petitioner has failed to sustain his burden of proof to show wherein the cash living expenses of \$13,000.00, as estimated by the Audit Division, was improper or erroneous. Accordingly, said estimate is hereby deemed correct.

H. That the additional cash requirement of \$4,000.00 charged to petitioner for cash payments to Swordsman, Inc. is deemed correct since petitioner failed to properly show wherein such amount charged was erroneous.


I. That the petition of Frederick Spinelli and Pasqua Spinelli is granted to the extent provided in Conclusions of Law "E" and "F", supra, and except as so granted, said petition is, in all other respects, denied.

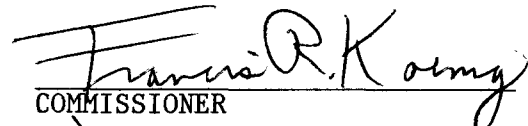
J. That the Audit Division is hereby directed to modify the Notice of Deficiency dated January 25, 1980 to be consistent with the decision rendered herein.

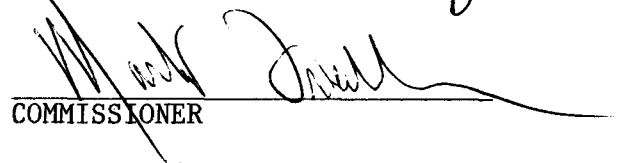
DATED: Albany, New York

STATE TAX COMMISSION

MAR 21 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER