

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas Spinosa and Anthony DiPrima :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Year 1973. :

In the Matter of the Petition :
of :
Thomas Spinosa and Carmella Spinosa : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the :
Tax Law for the Year 1973. :

In the Matter of the Petition :
of :
Anthony DiPrima and Judith DiPrima :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1973. :

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 6th day of January, 1983, he served the within notice of Decision by certified mail upon Max T. Stoner, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Max T. Stoner
Gullace, Stoner, DeLuca & Weld
510 Crossroads Bldg.
Rochester, NY 14614

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.

Page 2
Affidavit of Mailing

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
6th day of January, 1984.

David Porchuck

Annex A Hagelrud
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

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Thomas Spinosa
and Anthony DiPrima
c/o 3289 East River Rd.
Rochester, NY 14623

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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
6th day of January, 1984.

David Paruch

Conrad A. Hagedorn
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 6, 1984

Thomas Spinoso
and Anthony Diprima
c/o 3289 East River Rd.
Rochester, NY 14623

Gentlemen:

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
Max T. Stoner
Gullace, Stoner, DeLuca & Weld
510 Crossroads Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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State of New York }

ss.:

County of Albany }

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Anthony & Judith DiPrima
c/o 3289 E. River Rd.
Rochester, NY 14623

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.

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Sworn to before me this
6th day of January, 1984.

David Paruch

Ann A. Stangor
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 6, 1984

Anthony & Judith DiPrima
c/o 3289 E. River Rd.
Rochester, NY 14623

Dear Mr. & Mrs. DiPrima:

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.

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Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Max T. Stoner
Gullace, Stoner, DeLuca & Weld
510 Crossroads Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

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for Redetermination of a Deficiency or for Refund :
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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 6th day of January, 1983, he served the within notice of Decision by certified mail upon Thomas & Carmella Spinosa, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas & Carmella Spinosa
c/o 3289 E. River Rd.
Rochester, NY 14623

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.

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Sworn to before me this
6th day of January, 1984.

David Paruch

Ernie A. Hapner
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 6, 1984

Thomas & Carmella Spinosa
c/o 3289 E. River Rd.
Rochester, NY 14623

Dear Mr. & Mrs. Spinosa:

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.

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Max T. Stoner
Gullace, Stoner, DeLuca & Weld
510 Crossroads Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THOMAS SPINOSA and ANTHONY DiPRIMA	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1973.	:	

In the Matter of the Petition	:	
of	:	
THOMAS SPINOSA and CARMELLA SPINOSA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

In the Matter of the Petition	:	
of	:	
ANTHONY DiPRIMA and JUDITH DiPRIMA	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioners, Thomas Spinosa and Anthony DiPrima, c/o 3289 East River Road, Rochester, New York 14623, Thomas Spinosa and Carmella Spinosa, 58 Holly Ridge Circle, Rochester, New York, and Anthony DiPrima and Judith DiPrima, c/o 3289 East River Road, Rochester, New York 14623, filed petitions for redetermination of deficiencies or for refunds of personal income taxes and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1973 (File Nos. 24081, 31064 and 31065).

A consolidated formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, Room 1300, One Marine Midland Plaza, Rochester, New York, on December 7, 1982 at 9:30 A.M., with all briefs to be submitted by March 20, 1983. Petitioners, Thomas Spinosa and Anthony DiPrima, Thomas Spinosa and Carmella Spinosa, and Anthony DiPrima and Judith DiPrima appeared by Gullace, Stoner, DeLuca & Weld, Esqs. (Max T. Stoner, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether the use of the Statement of Net Worth was proper in determining the correct tax liability of petitioners for personal income and unincorporated business taxes.

II. Whether the Audit Division correctly stated the amount of ending inventory for net worth purposes.

III. Whether the Audit Division used due diligence in determining the correct address to which the notices of deficiency for Thomas Spinosa and Carmella Spinosa and Anthony DiPrima and Judith DiPrima were mailed.

IV. Whether the notices of deficiency were barred by the statute of limitations.

FINDINGS OF FACT

1. Petitioner Thomas Spinosa and Anthony DiPrima, a New York partnership (hereinafter "the Partnership"), timely filed a New York State Partnership Return for 1973 on which it showed a net loss derived from its grocery business of \$2,221.74. A copy of the U.S. Partnership Return of Income (1065) for 1973 showed the following items of income and deduction in arriving at said loss:

Gross receipts or sales	\$1,586,020.48
Less: Cost of Goods Sold	<u>1,331,621.11</u>
Gross Profit	\$ 254,399.37
Add: Interest Income	<u>232.00</u>
	\$ 254,631.37
Less: Total Deductions	<u>256,853.11</u>
Ordinary Loss	<u>(\$ 2,221.74)</u>

2. Petitioners Thomas Spinosa and Carmella Spinosa timely filed a New York State Income Tax Resident Return for 1973 on which they indicated their total New York income as \$1,935.40 and their taxable income as none.

3. Petitioners Anthony DiPrima and Judith DiPrima timely filed a New York State Income Tax Resident Return for 1973 on which they indicated their total New York income as \$1,935.40 and their taxable income as none.

4. On August 12, 1977, the Audit Division issued a Statement of Audit Changes against the Partnership for 1973 proposing unincorporated business tax of \$4,646.96, plus penalty, pursuant to section 685(b) of the Tax Law, and interest. Said Statement was issued on the ground that additional income was disclosed by a field audit through the use of a "Statement of Net Worth". This method, which was used because of the poor records maintained by the Partnership, determined additional partnership income of \$101,712.00 as follows:

	<u>1973</u>
Total Assets	\$582,861.00
Total Liabilities	<u>438,083.00</u>
Net Worth	\$144,778.00
Net Worth prior year	<u>81,485.00</u>
Increase in Net Worth	\$ 63,293.00
Add: Personal draws	\$31,277.00
Piccaro payments	<u>4,920.00</u>
	36,197.00
Income per audit	\$ 99,490.00
Income/(loss) per return	<u>(2,222.00)</u>
Additional income per audit	<u>\$101,712.00</u>

Accordingly, on April 4, 1978, a Notice of Deficiency was issued showing unincorporated business tax, penalty and interest due of \$6,261.92.

5. On August 12, 1977, the Audit Division issued a Statement of Audit Changes to Thomas Spinosa and Carmella Spinosa for 1973 showing additional partnership income of \$50,856.00, which amount represented petitioner Thomas Spinosa's share of the partnership adjustments of \$101,712.00 (Finding of Fact "4" supra). Said Statement proposed personal income tax of \$5,343.71, plus penalty, pursuant to section 685(b) of the Tax Law, and interest. Accordingly, a Notice of Deficiency was issued on April 4, 1978.

6. On August 12, 1977, the Audit Division issued a Statement of Audit Changes to Anthony DiPrima and Judith DiPrima for 1973 showing additional partnership income of \$50,856.00, which amount represented petitioner Anthony DiPrima's share of the partnership adjustment of \$101,712.00. Said Statement proposed personal income tax of \$5,343.71, plus penalty, pursuant to section 685(b) of the Tax Law, and interest. Accordingly, a Notice of Deficiency was issued on April 4, 1978.

7. In March of 1977, Thomas Spinosa and Carmella Spinosa and Anthony DiPrima and Judith DiPrima signed a consent fixing the period of limitation upon assessment of personal income and unincorporated business taxes for the taxable year 1973 until December 31, 1977.

8. On September 6, 1977, Thomas Spinosa and Carmella Spinosa and Anthony DiPrima and Judith DiPrima, submitted a written protest of the audit adjustments made by the Audit Division, taking exception to the application of the net worth approach and to adjustments made to inventory, accounts payable and property purchased. They also asserted that the Audit Division's computations did not provide for itemized deductions, as the standard deduction was allowed. On August 19, 1980, a conference was held with petitioners' representative at which time the following partnership adjustments were made: the Partnership's

checking account balance at December 31, 1972 was increased by \$1,400.00; ending inventory was decreased by \$5,000.00; allowance was made of \$5,000.00 for deposit on purchase of asset. On September 10, 1980, additional adjustments were made to allow for a note payable of \$5,000.00 and for the allowance of partners' personal itemized deductions in lieu of the standard deduction. As a result of the above adjustments (exclusive of itemized deductions), additional income of the Partnership was decreased to \$85,312.00, resulting in a revised distributive share to each partner of \$42,656.00. The partnership adjustment was computed as follows:

	<u>1973</u>
Total Assets	\$577,861.00
Total Liabilities	<u>443,083.00</u>
Net Worth	\$134,778.00
Net Worth prior year	<u>87,885.00</u>
Increase in Net Worth	\$ 46,893.00
Add: Personal draws	\$31,277.00
Piccaro payments	<u>4,920.00</u>
	36,197.00
Income per audit	\$ 83,090.00
Income/(loss) per return	<u>(2,222.00)</u>
Additional income per audit (revised)	<u>\$ 85,312.00</u>

9. Petitioners asserted that since the notices of deficiency were issued after December 31, 1977, the extended assessment date, the statute of limitations had expired.

10. Petitioners Thomas Spinosa and Carmella Spinosa and Anthony DiPrima and Judith DiPrima asserted that the notices of deficiency issued against them were not timely since they were sent to their old addresses. They claimed that the State Tax Commission was notified of a change of address in their powers of attorney dated October 12, 1976, which were attached to their protests to the statements of audit changes. Said protests were dated September 6, 1977. Although the powers of attorney did show a different address, the protests, which were dated subsequent to the powers of attorney, included the same

addresses as shown on petitioners' New York State income tax returns. The notices of deficiency were not returned to the Audit Division by the U.S. Postal Service.

11. The Partnership asserted that the ending inventory for 1973 should be further reduced from \$72,256.00¹ to \$61,414.91 to reflect the markup between cost and retail. Mr. Spinosa testified that the average markup of goods was around twenty (20) percent since "[t]hat is what has been our usual markup, grocery markup.". No records or other documentary evidence was submitted to support the percentage of markup claimed.

CONCLUSIONS OF LAW

A. That use of the net worth method of reconstructing taxable income is justified whenever books and records are inadequate so as not to disclose the correct amount of taxable income (see Holland v. United States, 348 U.S. 121 (1954)). Where books and records do not clearly reflect taxable income, the Audit Division's reconstruction of income will be presumed to be correct with the burden of proof upon the petitioner to disprove the Division's computation. Tax Law §689(e).

B. That petitioners have failed to sustain their burden of proof to show that the adjustments as set forth in Finding of Fact "8" are incorrect or that they are entitled to an ending inventory amount different than that allowed by the Audit Division.

C. That section 691(b) of the Tax Law provides that:

"For purposes of this article, a taxpayer's last known address shall be the address given in the last return filed by him, unless subsequent to the filing of such return the taxpayer shall have notified the tax commission of a change of address."

¹ The ending inventory of \$77,256.00, as shown on the field examiner's Statement of Net Worth, was reduced at the conference level by \$5,000.00 (Finding of Fact "8"), resulting in a revised ending inventory of \$72,256.00.

That the addresses shown on the powers of attorney for Thomas Spinosa and Carmella Spinosa and Anthony DiPrima and Judith DiPrima did not constitute proper notification of a change in address and the "mailing of the notice to an address where the Commissioner reasonably believes the taxpayers wished to be reached complies with the statute" (see Paul A. Butler et al. v. District Director of Internal Revenue, 76-1 USTC ¶9143). Therefore, petitioners failed to sustain their burden of proof imposed by section 689(e) of the Tax Law to show that the Audit Division did not exercise due diligence in mailing the notices of deficiency.

D. That section 683(d)(1) of the Tax Law provides that:

"The tax may be assessed at any time within six years after the return was filed if --

(1) an individual omits from his New York adjusted gross income...an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income...in the return."

Thomas Spinosa's and Anthony DiPrima's distributive shares of additional income, as disclosed by the Audit Division audit, equal an amount in excess of 25 percent of income reported on their respective returns. Therefore, the notices of deficiency issued on April 4, 1978 to petitioners Thomas Spinosa and Carmella Spinosa and to Anthony DiPrima and Judith DiPrima were issued within the period provided for by section 683(d)(1).

E. That for unincorporated business tax purposes, the six year period for assessment of tax provided for in section 683(d)(1) supra, refers to gross income (emphasis added) prior to reduction by the cost of goods sold (Tax Law §722; see also Treas. Reg. §301.6501(e)-1). Therefore, since 25 percent of the gross income reported (Finding of Fact "1") is greater than that determined by the Audit Division in Finding of Fact "8", the six year period is not applicable

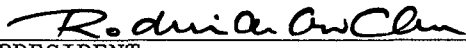
and the statutory period for limitation on assessment has expired. The Notice of Deficiency showing unincorporated business tax due of \$4,646.96 is to be cancelled.


F. That the Audit Division is directed to cancel the Notice of Deficiency showing unincorporated business tax due of \$4,646.96 on the basis of Conclusion of Law "E", supra; the Audit Division is directed to recompute the notices of deficiency issued to Thomas Spinosa and Carmella Spinosa and Anthony DiPrima and Judith DiPrima on the basis of adjustments made at the conference (see Finding of Fact "8", supra); and that, except as herein stated, the notices of deficiency for Thomas Spinosa and Carmella Spinosa and Anthony DiPrima and Judith DiPrima are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 06 1984


PRESIDENT


COMMISSIONER


COMMISSIONER