

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Mario E. & Evelyn M. Triolo : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of NYS & NYC Income :  
& UBT under Article 22, 23 & 30 of the Tax Law :  
for the Years 1977 & 1978. :

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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 26th day of July, 1984, he served the within notice of Decision by certified mail upon Mario E. & Evelyn M. Triolo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mario E. & Evelyn M. Triolo  
6 Windward Dr.  
Barnegat, NJ 08005

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  
26th day of July, 1984.

David Parchuck

Ann M. A. Hayward  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 26, 1984

Mario E. & Evelyn M. Triolo  
6 Windward Dr.  
Barnegat, NJ 08005

Dear Mr. & Mrs. Triolo:

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 & 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:

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MARIO E. AND EVELYN M. TRIOLO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law, Nonresident Earnings Tax under	:	
Chapter 46, Title U of the Administrative Code	:	
of the City of New York, and Unincorporated	:	
Business Tax under Article 23 of the Tax Law	:	
for the Years 1977 and 1978.	:	

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Petitioners, Mario E. and Evelyn M. Triolo, 6 Windward Drive, Barnegat, New Jersey 08005, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law, nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York, and unincorporated business tax under Article 23 of the Tax Law for the years 1977 and 1978 (File Nos. 37644 and 37645).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 24, 1984 at 1:15 P.M., with additional documentary evidence and briefs to be submitted by February 21, 1984. Petitioners appeared by Mario E. Triolo, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether for personal income, nonresident earnings and unincorporated business tax purposes, the Audit Division properly treated as additional, unreported income in 1977 and 1978 the amounts of \$5,500.00 and \$6,500.00, respectively, representing estimated cash living expenses.

II. Whether the Audit Division properly disallowed, to the extent of \$4,000.00, deductions for repairs claimed on petitioners' 1977 personal income and unincorporated business tax returns for lack of substantiation.

III. Whether income generated by Mr. Triolo's real estate appraisal activities constituted income from a business or occupation conducted in this state for personal income and unincorporated business tax purposes.

IV. If so, whether such activities constituted the practice of a profession, so that income derived therefrom was exempt from unincorporated business tax.

FINDINGS OF FACT

1.(a) On March 25, 1981, the Audit Division issued to petitioners, Mario E. and Evelyn M. Triolo, a Notice of Deficiency, asserting personal income tax under Article 22 of the Tax Law and nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York, plus interest, for the years 1977 and 1978, scheduled as follows:

	<u>1977</u>	<u>1978</u>
Personal income tax	\$3,073.42	\$1,854.06
Nonresident earnings tax	195.82	320.74
	<u>\$3,269.24</u>	<u>\$2,174.80</u>
		\$5,444.04

(b) On the same date, the Audit Division issued to petitioners a second Notice of Deficiency, asserting unincorporated business tax under Article 23 of the Tax Law for the years 1977 and 1978 in the amounts of \$1,030.75 and \$1,967.23, respectively, plus interest.

(c) Briefly stated, the asserted deficiencies resulted from the partial disallowance of deductions for repairs as unsubstantiated (serving to augment rental income and income derived from the operation of a liquor store), increases in income to take account of "additional cash for living", and consideration of

income derived from Mr. Triolo's consulting activities as New York source income.

(d) At the formal hearing in this matter, counsel for the Audit Division cancelled that portion of the 1977 personal income, nonresident earnings and unincorporated business tax deficiencies attributable to the increment to income for "additional cash for living".

2.(a) During the course of the audit, the income tax examiner performed analyses of Mr. Triolo's sources of income during 1978 and of deposits to savings and checking accounts, taking cognizance of transfers between accounts. These analyses revealed overdeposits of \$3,731.92. The examiner treated as additional, unreported income in 1978 the sum of \$6,500.00: the overdeposits of \$3,731 plus \$2,769, to yield weekly living expenses (e.g., clothing, food, transportation and entertainment) in the estimated amount of \$125.00.

SOURCES

Pension (taxable and nontaxable portions)	\$ 18,849.00
Dividends	119.40
State and local tax refunds	563.34
Gross receipts, appraiser	80,750.00
Capital gains	38,195.28
Rental income	37,000.00
	<u>\$175,477.02</u>

APPLICATIONS (deposits)

Irving Trust	\$ 58,845.64
Chemical	193,737.75
Drydock (6 accounts)	90,325.00
Prudential	17,275.55
Republic (4 accounts)	48,000.00
	<u>\$408,183.94</u>
Less transfers	<u>(228,975.00)</u>
	<u>\$179,208.94</u>

OVERDEPOSITS \$ 3,731.92

(b) Mr. Triolo alleges that a \$35,000.00 deposit made to his checking account at Irving Trust Co. on January 31, 1978 consisted of income earned and reported in the taxable year 1977.

(c) Mr. Triolo's monthly statement for the period July 20, 1978 through August 16, 1978 reflects the following deposits made to his checking account at Chemical Bank during that period:

<u>DATE</u>	<u>DEPOSIT</u>
7/28	\$1,171.75
7/31	1,544.78
8/4	2,544.83
8/10	395.30

The examiner recorded these deposits in her analysis as follows:

<u>DATE</u>	<u>DEPOSIT</u>
7/28	\$ 1,171.75
7/31	1,544.78
8/4	29,401.--

Her entry for August 4 apparently resulted from cumulating the deposits of August 4 and August 10 (\$2,940.13) and transposing the decimal point one place (\$29,401.30), thereby overstating deposits by \$26,461.17.

3.(a) Mr. Triolo owns a building situated at 1998 Second Avenue, also known as 302 East 103rd Street, New York, New York. The first floor is occupied by a liquor store which he operates as a sole proprietor under the name "Mario's Liquor Store". The remainder of the building consists of apartments leased to tenants.

(b) In the fall of 1977, a fire occurred on the floor immediately above the liquor store, causing damage to the store and to several apartments. Mr. Triolo rehabilitated the premises with the assistance of two handymen he employed.

(c) On Schedule E (Supplemental Income Schedule) appended to and submitted with petitioners' 1977 federal income tax return, petitioners claimed expenses of \$21,105.12 incurred in connection with the 1998 Second Avenue rental property, which amount included supplies and labor to repair the fire damage to the

apartments. Mr. Triolo offered in evidence at the hearing the worksheet he composed to prepare said Schedule E; the worksheet indicates total expenses of \$25,523.20, comprised in part of miscellaneous hardware supplies in the amount of \$2,135.89 and labor in the amount of \$1,800.00. In support of these two items, Mr. Triolo offered invoices and cash register tapes, which evidenced purchases in the amount of \$3,135.89 made throughout 1977 of materials for repairs (e.g., window panes, cabinets, sand and cement, sheetrock and nails); and his handwritten notes regarding services rendered by the handymen, stating that he paid them \$25.00 per day each for 44 days worked, for a total labor expense of \$2,200.00. Mr. Triolo did not explain the discrepancy between the total amount of expenses deducted on the return and the total amount of expenses shown on the worksheet, or that between the amount paid for labor as shown on the worksheet and the amount paid for labor as indicated by his notes. The discrepancy between cost for miscellaneous hardware supplies stated on the worksheet and that indicated by the invoices and tapes seems to be due to an error in addition.

4.(a) On a schedule entitled "Mario's Liquor Store" attached to petitioners' 1977 federal return, Mr. Triolo claimed expenses of \$4,224.48 for repairs and hardware, including expenditures for labor and materials in repairing the fire damage to the store. In justification of the amount claimed, Mr. Triolo offered the journal he maintained for the liquor store, reflecting monthly "cash receipts" and "cash paid outs"; a one-page summary of the journal; a worksheet reflecting expenses of the store for 1977 paid by check, with supporting purchase invoices for repair expenses; and a bundle of 46 purchase invoices totalling \$750.00 which Mr. Triolo alleges support additional cash paid out for repairs, but not entered in the journal.

(b) The journal and the journal summary sheet show expenses for hardware and repairs in the total amount of \$3,382.68, consisting of the following:

hardware	\$ 237.97
repairs	3,103.71
paint	41.00
	<u>\$3,382.68</u>

(c) Repair expenses paid by check, as indicated by the worksheet and invoices, amounted to \$91.80.

(d) With respect to the bundle of invoices totalling \$750.00, the purchases which they evidence appear to have been made in connection with the rental property as well as the liquor store. (An invoice dated May 13, 1977 shows the purchase of 6 rolls of wallpaper and 6 tubs of roof cement; an invoice dated October 11, 1977 shows the purchase of 4 tubs of roof cement, 3 rolls of wallpaper and 16 gallons of paint.) In the course of reconstructing and reconciling expenses deducted on the return after the conduct of the audit, Mr. Triolo assumed that the invoices were paid out in addition to the journal entries, but he could not recollect whether the invoices had in fact been entered.

5.(a) Until his retirement in June, 1977, Mr. Triolo was employed by the Internal Revenue Service as an appraiser, most recently as the supervisor of a real property valuation unit.

(b) Mr. Triolo possesses a bachelor of business administration degree, with a major in accounting, and a master of business administration degree, with realty as a specialty. He has also successfully completed courses offered by the Master Appraisal Institute at the University of Connecticut. He is a public accountant, enrolled to practice before the Internal Revenue Service. He is a member of the National Society of Public Accountants, the American Society of Appraisers and the Association of Government Appraisers.



(c) From June, 1977 until Mrs. Triolo's death on September 7, 1977, Mr. Triolo was occupied with caring for his wife, who was afflicted with cancer. Petitioners owned a condominium in Englishtown, New Jersey, but leased an apartment in New York City during 1976 and January through September, 1977<sup>1</sup> to enable Mrs. Triolo to more easily travel to and from Roosevelt Hospital for treatment. After her death, Mr. Triolo relinquished the apartment and returned to the condominium.

(d) In late 1977, Mr. Triolo commenced some limited appraisal and tax-related activities on a consulting basis. Matters which turned on the appraisal of real property were referred to Mr. Triolo by a law firm and by an accounting firm, both located in New York City. In almost all instances, the properties were located in New York. Mr. Triolo received and compiled the case files at the firms' offices, inspected the properties and then performed his analysis at an office in his New Jersey home. In at least two instances during the years at issue, the referrals also required Mr. Triolo to represent the client before the Internal Revenue Service, at the Service office in Brooklyn and at a Service office somewhere in Oklahoma.

(e) Mr. Triolo's office is equipped with a desk, desk lamps, several large bookcases, filing cabinets, a typewriter and adding machines. The directories issued by the various organizations to which Mr. Triolo belongs list his New Jersey address. Further, on a schedule attached to the 1977 return enumerating income and expenses attributable to his consultation and appraisal activities, Mr. Triolo deducted rental expense of \$3,800.00 for the office in his home; he testified that he also deducted such rental expense for

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<sup>1</sup> The Audit Division does not assert that Mr. Triolo was a statutory resident of the State of New York under Tax Law section 605(a)(2) for either of the years at issue.

1978, but a similar schedule is not attached to the return as admitted in evidence.

(f) The Audit Division considered the income generated by these activities, \$33,583 for 1977 and \$43,658 for 1978, as derived from New York sources, on the theory that the business was conducted at 110 East 59th Street and 475 Fifth Avenue, New York City. The 110 East 59th Street address is the location of the offices of the accounting firm which made referrals to Mr. Triolo. The 475 Fifth Avenue address is the location of the offices of another accounting firm; on two or three occasions during 1977 and 1978, Mr. Triolo used the firm's reference library.

#### CONCLUSIONS OF LAW

A. That in view of the Audit Division's concession (Finding of Fact "1(d)") and the transpositional error made by the income tax examiner in her analysis of deposits (Finding of Fact "2(c)"), those portions of the 1977 and 1978 deficiencies founded on an increase in income for estimated cash living expenses are cancelled.

B. That Mr. Triolo has established, by his credible testimony and by the introduction in evidence of purchase documents and the workpapers he utilized in preparing petitioners' 1977 returns, that deductions in the amount of \$21,105.12 for expenses incurred in connection with the 1998 Second Avenue rental property (including amounts expended for materials and labor to repair the fire damage) were properly taken.

He also established, by his credible testimony and by the introduction in evidence of the journal, the journal summary and the worksheet with supporting invoices, that deductions in the amount of \$3,474.48 for expenses incurred in

connection with the liquor store (including labor and materials to repair the fire damage) were properly taken.

C. That the adjusted gross income of a nonresident individual is defined for purposes of Article 22 of the Tax Law as the net amount of income, gain, loss and deduction entering into his federal adjusted gross income, derived from or connected with New York sources. Section 632(a). Income and deductions from New York sources is defined by subdivision (b) of the same section, as follows:

"(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

\* \* \*

(B) a business, trade, profession or occupation carried on in this state."

The Administrative Code of the City of New York, Chapter 46, Title U, section U46-2.0(a)(2) imposes tax at the rate of .0065 percent upon a nonresident individual's net earnings from self-employment, as follows:

"For each taxable year beginning on or after January first, nineteen hundred seventy-one and ending on or before December thirty-first, nineteen hundred eighty-four, a tax is hereby imposed on the wages earned, and net earnings from self-employment, within the city, of every nonresident individual...".

Mr. Triolo's appraisal and accounting activities constituted, respectively, a business and a profession conducted in New Jersey at the office in his residence. The occasional performance of activities in the State or City of New York (e.g., consulting reference works) did not occur with any "fair measure of permanency and continuity" so as to lead to the conclusion that either the business or the profession was carried on both within and without New York State or New York City. 20 NYCRR 131.4(a). Thus, the income derived

from such activities was subject to neither personal income tax nor nonresident earnings tax.

D. That in accordance with the reasoning of Conclusion of Law "C", the income from Mr. Triolo's appraisal activities was not subject to the unincorporated business tax imposed by Article 23 of the Tax Law. Section 701(a). Any income generated by his practice of accounting was, of course, exempt from the tax by virtue of section 703(c).

E. That the petition of Mario E. and Evelyn M. Triolo is granted to the extent indicated in Conclusions of Law "A", "B", "C" and "D"; the notices of deficiency issued on March 25, 1981 are to be modified accordingly; and the Audit Division is directed to refund to petitioners the amounts to which they are entitled as a result of these modifications to the deficiencies.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 26 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER