

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Attilio Castaldo :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of NYS & NYC Income :  
Tax under Article 22 & 30 of the Tax Law for the :  
Years 1979 & 1980.

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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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Attilio Castaldo, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Attilio Castaldo  
3617 White Plains Road  
Bronx, NY 10467

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  
15th day of February, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

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Tax under Article 22 & 30 of the Tax Law for the :  
Years 1979 & 1980.

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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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Daniel Graubart, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel Graubart  
34 South Broadway  
White Plains, NY 10601

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  
15th day of February, 1985.

David Parchuck

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

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

February 15, 1985

Attilio Castaldo  
3617 White Plains Road  
Bronx, NY 10467

Dear Mr. Castaldo:

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  
Daniel Graubart  
34 South Broadway  
White Plains, NY 10601  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	DECISION
	:	
ATTILIO CASTALDO	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York	:	
for the Years 1979 and 1980.	:	

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Petitioner, Attilio Castaldo, 3617 White Plains Road, Bronx, New York 10467, 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 and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 and 1980 (File No. 39801).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 18, 1984 at 1:15 P.M. Petitioner appeared by Daniel Graubart, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence Newman, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined petitioner's personal income tax and unincorporated business tax due based on the results of a sales tax field audit.

#### FINDINGS OF FACT

1. On August 26, 1982, the Audit Division issued a Notice of Deficiency against petitioner, Attilio Castaldo, in the amount of \$38,525.66 plus penalty

of \$1,926.28 and interest of \$7,982.03 for a total amount due of \$48,433.97 for the years 1979 and 1980.

2. The Audit Division conducted a sales tax audit of petitioner's service station. Following conferences held after the audit, petitioner and the Audit Division agreed upon a sales tax assessment of \$30,000.00 which was to be paid by petitioner over the course of a year. The additional sales tax due was subsequently used as a basis to determine additional income to petitioner for personal income tax and unincorporated business tax purposes. Petitioner, at the time he agreed to the sales tax assessment, was not informed that such assessment would be used to determine additional income and unincorporated business taxes.

3. At a prehearing conference, the amount of the deficiency was redetermined as follows:

<u>Year</u>	<u>Tax</u>	<u>Amount Due</u>
1979	Personal Income Tax	\$11,846.00
1980	Personal Income Tax	\$14,017.00
1979	Unincorporated Business Tax	\$ 2,911.00
1980	Unincorporated Business Tax	\$ 2,971.00
	TOTAL	<u>\$31,745.00</u>

4. Petitioner argues that he consented to the sales tax assessment merely as a compromise to close sales tax matters. It was petitioner's impression that the agreement as to the sales tax assessment would settle all tax matters with the Audit Division and he had no idea that the sales tax figures would later be used as a basis for determining other taxes to be due. Petitioner maintains that such use of figures from one type of tax audit to make a determination in another tax audit is illegal.

5. The Internal Revenue Service examined petitioner's tax return for 1980 and issued a letter indicating that his return for that year was accepted as

filed. Petitioner maintains that the Audit Division should follow the federal determination for 1980. Petitioner alleged that the federal audit was "thorough", however, no evidence was presented demonstrating the scope of the federal audit and whether it was more extensive than the sales tax audit.

CONCLUSIONS OF LAW

A. That where there is some factual basis for deciding that the tax return as filed does not accurately reflect the true income received by a taxpayer, the Audit Division may determine proper income using indirect methods (see Holland v. United States, 348 U.S. 121,131-132). The sales tax audit conducted by the Audit Division revealed \$30,000.00 in sales tax due. Such determination provided a factual basis for deciding that the income reported by petitioner on his income tax return was not accurate and, thus, the Audit Division properly used the sales tax audit findings to calculate income tax and unincorporated business tax. Nowhere in the Tax Law or regulations is the Audit Division precluded from utilizing the results of an audit conducted under one article in an audit conducted under another article.


B. That section 689(e) of the Tax Law provides that, with certain exceptions not applicable herein, the burden of proof is upon the petitioner to show that a notice of deficiency is in error. Petitioner offered no evidence, other than the Internal Revenue Service closing letter, showing that the audit findings were in error. It is impossible to determine from the record whether the federal audit was comparable to the state audit and, at any rate, the Tax Commission is not required to accept as correct any federal audit determination, but may conduct an independent audit or investigation (20 NYCRR 153.4).


C. That the petition of Attilio Castaldo is granted to the extent indicated in Finding of Fact "3"; that the Audit Division is directed to modify the Notice of Deficiency issued August 26, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

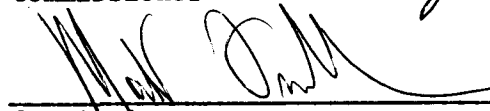
DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 1985

  
President

  
Commissioner

  
Commissioner