

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Alio and Olga Constantino :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law and new York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1976, 1977, 1978 and 1979.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Alio and Olga Constantino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alio and Olga Constantino
10 Birch Rd.
Yonkers, NY 10705

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
23rd day of May, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Alio and Olga Constantino :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law and new York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1976, 1977, 1978 and 1979.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Leon H. Paisner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leon H. Paisner
1577A St. Nicholas Ave.
New York, NY 10040

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
23rd day of May, 1985.

David Parchuck

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

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

May 23, 1985

Alio and Olga Constantino
10 Birch Rd.
Yonkers, NY 10705

Dear Mr. & Mrs. Constantino:

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
Leon H. Paisner
1577A St. Nicholas Ave.
New York, NY 10040
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Albert & Eleanor Constantino

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law and New York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1976, 1977, 1978 and 1979.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Albert & Eleanor Constantino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert & Eleanor Constantino
112 The Crossways
Yonkers, NY 10701

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
23rd day of May, 1985.

David Parchuck

James A. Hagelind

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Albert & Eleanor Constantino

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law and New York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1976, 1977, 1978 and 1979.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Leon H. Paisner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leon H. Paisner
1577A St. Nicholas Ave.
New York, NY 10040

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
23rd day of May, 1985.

David Parchuck

Carmie G. Hagelund
Authorized to administer oaths

pursuant to Tax Law section 174

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

May 23, 1985

Albert & Eleanor Constantino
112 The Crossways
Yonkers, NY 10701

Mr. & Mrs. Constantino:

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
Leon H. Paisner
1577A St. Nicholas Ave.
New York, NY 10040
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Tino Italian Restaurant :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated
Business Tax under Article 23 of the Tax Law for :
the Years 1978 & 1979.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Tino Italian Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tino Italian Restaurant
6697 Broadway
Bronx, NY 10471

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
23rd day of May, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Tino Italian Restaurant :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated
Business Tax under Article 23 of the Tax Law for :
the Years 1978 & 1979.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Leon H. Paisner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leon H. Paisner
1577A St. Nicholas Ave.
New York, NY 10040

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
23rd day of May, 1985.

David Parchuck

Carrie R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 23, 1985

Tino Italian Restaurant
6697 Broadway
Bronx, NY 10471

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
Leon H. Paisner
1577A St. Nicholas Ave.
New York, NY 10040
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
TINO ITALIAN RESTAURANT
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1978
and 1979.

In the Matter of the Petition
of
ALBERT CONSTANTINO AND ELEANOR CONSTANTINO
for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Nonresident Earnings Tax under Chapter 46,
Title U of the Administrative Code of the City
of New York for the Years 1976, 1977, 1978 and
1979.

In the Matter of the Petition
of
ALIO CONSTANTINO AND OLGA CONSTANTINO
for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Nonresident Earnings Tax under Chapter 46,
Title U of the Administrative Code of the City
of New York for the Years 1976, 1977, 1978 and
1979.

DECISION

Petitioner, Tino Italian Restaurant, 6697 Broadway, Bronx, New York 10471,
filed a petition for redetermination of a deficiency or for refund of unincor-

porated business tax under Article 23 of the Tax Law for the years 1978 and 1979 (File No. 40869).

Petitioners, Albert Constantino and Eleanor Constantino, 112 The Crossways, Yonkers, New York 10701, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1976, 1977, 1978 and 1979 (File No. 40870).

Petitioners, Alio Constantino and Olga Constantino, 10 Birch Road, Yonkers, New York 10705, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1976, 1977, 1978 and 1979 (File No. 44934).

A consolidated 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 October 1, 1984 at 1:15 P.M., with all briefs to be submitted by October 9, 1984. Petitioners appeared by Leon H. Paisner, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioners realized additional unreported income in 1978 and 1979 as the result of a markup audit conducted on Tino Italian Restaurant.

II. Whether the penalties asserted should be abated.

FINDINGS OF FACT

1. For taxable year 1978, Tino Italian Restaurant (hereinafter "Tino") failed to file a New York State Partnership Return and accordingly did not pay unincorporated business tax for said year. For taxable year 1979, Tino filed a New York State Partnership Return whereon it reported net income of \$18,807.00. According to said return, Albert Constantino and Alio Constantino were equal partners in Tino. Unincorporated business tax of \$621.32 was computed and paid for said year.

2. On July 29, 1982, the Audit Division issued a Notice of Deficiency against Tino asserting additional unincorporated business tax for 1978 and 1979 of \$1,872.46, penalties of \$650.58 and interest of \$566.91, for a total due of \$3,089.95. Said penalties were asserted for failure to file a return (1978), failure to pay the tax determined to be due (1978) and negligence (1978 and 1979) pursuant to sections 685(a)(1), 685(a)(2) and 685(b) of Article 22 of the Tax Law, respectively, as incorporated into Article 23 by section 722(a).

3. The aforestated Notice of Deficiency was premised on a Statement of Unincorporated Business Tax Audit Changes issued to Tino wherein adjustments for additional unreported sales of \$14,816.00 (1978) and \$15,610.00 (1979) were made as the result of a markup audit of Tino conducted by the sales tax unit of the Audit Division for the periods August 31, 1976 through November 30, 1980. Said markup audit determined that additional sales tax of \$4,304.48 was due. Such additional sales tax was consented to and paid by Tino.

4. Petitioners, Albert Constantino and Alio Constantino, executed a consent form fixing the period of limitation upon assessment of 1978 unincorporated business tax against Tino to any time on or before April 15, 1983. Said consent form was validated by the State Tax Commission on December 14,

1981. This action appears to have been unnecessary since the assessment could have been made at any time based on Tino's failure to file a return for said year.

5. Petitioners, Albert Constantino and Eleanor Constantino, timely filed a New York State Income Tax Resident Return for each of the years 1976, 1977, 1978 and 1979 under filing status "Married filing separately on one return". They did not file a New York City nonresident earnings tax return for any of said years at issue.

6. On April 26, 1982, the Audit Division issued a Statement of Personal Income Tax Audit Changes to said petitioners for the years 1978 and 1979 wherein their New York State income tax liabilities were recomputed based on a reallocation of income between the spouses and an increase in Albert Constantino's reported partnership income by half (\$7,408.00 for 1978 and \$7,805.00 for 1979) the additional income (sales) determined for Tino based on the markup audit. According to the recomputation incorporated into said statement, the additional New York State personal income taxes due for 1978 and 1979 were determined to be as follows:

	<u>1978</u>		<u>1979</u>		<u>Total</u>
	<u>Husband</u>	<u>Wife</u>	<u>Husband</u>	<u>Wife</u>	
<u>Additional Tax Due</u>	\$521.72	(\$81.35)	\$635.21	(\$58.39)	\$1,017.19

7. Petitioners, Albert Constantino and Eleanor Constantino, timely executed a consent form fixing the period of limitation upon assessment of 1978 personal income tax to any time on or before April 15, 1983. Said consent form was validated by the State Tax Commission on December 14, 1981.

8. On July 29, 1982, the Audit Division issued a Notice of Deficiency solely against petitioner Albert Constantino with respect to the modified New York State personal income tax liability of both Albert and Eleanor Constantino

for the years 1978 and 1979 (see Finding of Fact "6", supra). Said notice asserted additional New York State personal income tax of \$1,017.19, penalty of \$57.85 plus interest of \$284.88, for a total due of \$1,359.92. Said penalty was asserted against Albert Constantino for negligence pursuant to section 685(b) of the Tax Law.

9. The Audit Division made no claim prior to or during the hearing held herein to increase the deficiency on the basis that such deficiency, which was issued solely in Albert Constantino's name, was for a lesser amount than his computed additional tax liability since it was reduced by the credits determined for Eleanor Constantino (see Finding of Fact "6", supra).

10. On July 29, 1982, the Audit Division issued a Notice of Deficiency against petitioner Albert Constantino wherein New York City nonresident earnings tax of \$375.86 was asserted for the years 1976, 1977, 1978 and 1979. The City taxes asserted for 1976 and 1977 were computed based solely on said petitioner's partnership income derived from Tino as reported on his New York State returns. The City taxes asserted for 1978 and 1979 were computed based on said petitioner's reported partnership income from Tino, plus his portion of the increase in Tino's income for said years as determined by the aforestated markup audit. Penalties of \$177.63 and interest of \$129.37 were also asserted for a total due of \$682.86. Said penalties were asserted, according to a Statement of Personal Income Tax Audit Changes dated April 26, 1982, for failure to file returns for 1976 through 1979, inclusive, failure to pay the taxes determined to be due and negligence, pursuant to sections 685(a)(1), 685(a)(2) and 685(b) of the Tax Law. Since only New York City nonresident earnings taxes were asserted in this notice, statutory authority for said penalties appears to have been misstated. Pursuant to Chapter 46, Title U of the Administrative Code of the City of New

York, the aforestated penalties imposed for failure to file the returns at issue and negligence are so imposed pursuant to sections U46-35.0(a) and U46-35.0(b) of Chapter 46, Title U, which parallel the aforestated New York State statutes. The penalties imposed for failure to pay the taxes determined to be due were erroneously imposed since Chapter 46, Title U provides no penalty for such violation.

11. Petitioners, Alio Constantino and Olga Constantino, timely filed a New York State Income Tax Resident Return for each of the years 1976, 1977, 1978 and 1979 under filing status "Married filing separately on one return". They did not file a New York City nonresident earnings tax return for the years 1976, 1977 or 1979. For taxable year 1978, only petitioner Olga Constantino filed said City return wherein her wage income for said year was reported.

12. Petitioners, Alio Constantino and Olga Constantino, timely executed a consent form fixing the period of limitation upon assessment of 1978 personal income tax to any time on or before April 15, 1983. Said consent form was validated by the State Tax Commission on December 14, 1981.

13. On June 21, 1982, the Audit Division issued a Statement of Personal Income Tax Audit Changes to said petitioners for the years 1978 and 1979 wherein their New York State income tax liabilities were recomputed based on a reallocation of income between the spouses, the increase in Alio Constantino's reported partnership income by half (\$7,408.00 for 1978 and \$7,805.00 for 1979) the additional income determined for Tino based on the markup audit, and other minor adjustments which are not at issue herein. Accordingly, two (2) notices of deficiency were issued against petitioners on August 26, 1982. One such notice, which was issued against petitioner Alio Constantino, asserted additional New York State personal income tax of \$1,399.29, penalties of \$69.97 and

interest of \$402.61, for a total due of \$1,871.87. The other notice, which was issued against petitioner Olga Constantino, asserted additional New York State personal income tax of \$175.67, penalty of \$8.79, plus interest of \$47.88, for a total due of \$232.34. The penalties asserted against both of the aforesaid petitioners were asserted for negligence pursuant to section 685(b) of the Tax Law.

14. On August 26, 1982, the Audit Division issued a Notice of Deficiency against petitioner Alio Constantino asserting New York City nonresident earnings tax for the years 1976, 1977, 1978 and 1979 of \$375.87, penalties of \$180.13, plus interest of \$133.05, for a total due of \$689.05. The Audit Division's basis for assertion, and method used for computation of such taxes and penalties, as well as the error made with respect to certain penalties being asserted under misstated statutory authority, are identical to those with respect to petitioner Albert Constantino (see Finding of Fact "10", supra).

15. To verify that the partners in Tino, Albert Constantino and Alio Constantino, had in fact received additional unreported income for 1978 and 1979, an independent cash availability analysis audit was conducted on the individuals for each of said years. In each case, the cash availability analysis resulted in "cash out" in excess of "cash in".

16. Petitioners, Albert Constantino and Alio Constantino, conceded the deficiencies asserted for New York City nonresident earnings tax for the years 1976 and 1977 since such deficiencies were asserted based solely on their failure to file New York City returns for said years.

17. Petitioners did not personally appear at the hearing held herein. Their representative contended that the markup audit was incorrect and resulted in a greater sales tax deficiency for Tino than was properly due. He argued

that petitioners "went ahead and paid the (sales tax) deficiency just to get the case over with".

18. No evidence, documentary or otherwise, was offered to show wherein the markup audit conducted on Tino was improper or erroneous.

19. Petitioners herein requested abatement of the penalties asserted; however, they failed to show that the violations for which the penalties were asserted were due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That the employment of a markup audit is commonly used to calculate additional, unreported taxable sales for purposes of Articles 28 and 29. It is, however, also an appropriate means of reconstructing a taxpayer's taxable income, and for purposes of Articles 22 and 23, there is no obligation on the part of the Audit Division to first attempt a net worth or bank deposits analysis. (See DiLando v. Commr., 34 T.C.M. [CCH] 1046; Matter of Carmen and Adelia Garzia, State Tax Comm., June 29, 1983.) Petitioners' argument that the markup audit was erroneous and resulted in an overstated sales tax liability is untenable. The hearing held herein afforded them the opportunity to refute the markup audit, yet they failed to submit any evidence which would tend to show the audit results were in error.

B. That Tino Italian Restaurant realized additional, unreported income of \$14,816.00 in 1978 and \$15,610.00 in 1979 and the partners, Albert Constantino and Alio Constantino, had each realized additional, unreported income of half of said amounts: \$7,408.00 in 1978 and \$7,805.00 in 1979.

C. That the deficiencies asserted against petitioners Albert Constantino and Alio Constantino for New York City nonresident earnings tax for the years

I. That the petition of Albert Constantino and Eleanor Constantino is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.


J. That the petition of Alio Constantino and Olga Constantino is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.


K. That all notices of deficiency issued against petitioners Albert Constantino, Eleanor Constantino, Alio Constantino and Olga Constantino, with the exception of those addressed in Conclusion of Law "F", supra, (with respect to abatement of certain specified penalties) are sustained together with such additional penalties and interest as may lawfully be owing.


DATED: Albany, New York

STATE TAX COMMISSION

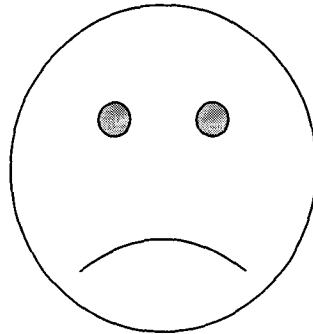
MAY 23 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

**CORRECTION
FOLLOWS**



that petitioners "went ahead and paid the (sales tax) deficiency just to get the case over with".

18. No evidence, documentary or otherwise, was offered to show wherein the markup audit conducted on Tino was improper or erroneous.

19. Petitioners herein requested abatement of the penalties asserted; however, they failed to show that the violations for which the penalties were asserted were due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That the employment of a markup audit is commonly used to calculate additional, unreported taxable sales for purposes of Articles 28 and 29. It is, however, also an appropriate means of reconstructing a taxpayer's taxable income, and for purposes of Articles 22 and 23, there is no obligation on the part of the Audit Division to first attempt a net worth or bank deposits analysis. (See DiLando v. Commr., 34 T.C.M. [CCH] 1046; Matter of Carmen and Adelia Garzia, State Tax Comm., June 29, 1983.) Petitioners' argument that the markup audit was erroneous and resulted in an overstated sales tax liability is untenable. The hearing held herein afforded them the opportunity to refute the markup audit, yet they failed to submit any evidence which would tend to show the audit results were in error.

B. That Tino Italian Restaurant realized additional, unreported income of \$14,816.00 in 1978 and \$15,610.00 in 1979 and the partners, Albert Constantino and Alio Constantino, had each realized additional, unreported income of half of said amounts: \$7,408.00 in 1978 and \$7,805.00 in 1979.

C. That the deficiencies asserted against petitioners Albert Constantino and Alio Constantino for New York City nonresident earnings tax for the years

1976 and 1977 are sustained as conceded by petitioners (see Finding of Fact "16", supra).

D. That section 689(d)(1) of the Tax Law provides that:

"-If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency...if claim therefore is asserted at or before the hearing under the rules of the tax commission."

E. That the Notice of Deficiency issued solely against petitioner Albert Constantino on July 29, 1982, with respect to the New York State personal income taxes of both Albert and Eleanor Constantino for the years 1978 and 1979, cannot be increased to reflect only the deficiencies relative to Albert Constantino's liability (by excluding the credits due Eleanor Constantino) since claim therefore was not asserted at or before the hearing held herein (see Findings of Fact "6", "8" and "9", supra).

F. That the penalties asserted pursuant to section "685(a)(2)" on the notices of deficiency issued against petitioner Albert Constantino on July 29, 1982 and Alio Constantino on August 26, 1982, with respect to New York City nonresident earnings tax, are hereby abated (see Findings of Fact "10" and "14", supra).

G. That all penalties, with the exception of those penalties addressed in Conclusion of Law "F", supra, are sustained since reasonable cause for abatement has not been established.

H. That the petition of Tino Italian Restaurant is denied and the Notice of Deficiency issued July 29, 1982 with respect to said petitioner is sustained together with such additional interest and penalties as may lawfully be owing.

I. That the petition of Albert Constantino and Eleanor Constantino is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.


J. That the petition of Alio Constantino and Olga Constantino is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.

K. That all notices of deficiency issued against petitioners Albert Constantino, Eleanor Constantino, Alio Constantino and Olga Constantino, with the exception of those addressed in Conclusion of Law "F", supra, (with respect to abatement of certain specified penalties) are sustained together with such additional penalties and interest as may lawfully be owing.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985


PRESIDENT


COMMISSIONER


COMMISSIONER