

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Oscar R. Del Giudice :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1976 & 1977.

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 Oscar R. Del Giudice, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Oscar R. Del Giudice
146 Lakeview Ave.
Rockville Centre, NY 11570

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

Oscar R. Del Giudice

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 23, 1985

Oscar R. Del Giudice
146 Lakeview Ave.
Rockville Centre, NY 11570

Dear Mr. Del Giudice:

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.

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

In the Matter of the Petition
of
OSCAR R. DEL GIUDICE
for Redetermination of Deficiency or for Refund
of Personal Income Tax under Article 22 of the
Tax Law for the Years 1976 and 1977.

DECISION

Petitioner, Oscar R. del Giudice, 146 Lakeview Avenue, Rockville Centre, New York 11570, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1976 and 1977 (File Nos. 34841 and 34842).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, 114 Old Country Road, 2nd Floor, Mineola, New York 11501, on August 29, 1984 at 10:30 A.M. Petitioner appeared pro se. The Audit division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether adjustments made to petitioner's claimed home office and casualty loss deductions were proper.

II. Whether an adjustment attributing additional taxable income of \$4,300.00 to petitioner was proper.

FINDINGS OF FACT

1. Oscar R. del Giudice (hereinafter "petitioner") timely filed separate New York State income tax resident returns with his wife, Mathilda C. del Giudice, for each of the years 1976 and 1977. On each of said returns petitioner

reported his occupation as "Attorney at Law, semi-retired". He reported business net profits for said years of \$16,602.75 and \$5,082.45 respectively.

2. As the result of an audit, the Audit Division issued an undated Statement of Personal Income Tax Audit Changes to petitioner wherein, according to schedules of audit adjustments attached thereto, his tax liability for said years was recomputed based on the following adjustments:

1976

<u>Adjustments</u>	<u>Amount</u>
"Line 2 Addition:	
20% long-term capital gain modification	\$ 131.59

Business Expenses (Sch. C):

The following expenses were adjusted to reflect the change in percentage from 1/3 to 1/6 for office expenses in the home:

Depreciation - home	192.50
Taxes on business property	670.52
Repairs & maintenance	302.16
Water expense	13.16
Heat & Fuel	159.39
Electricity	87.52

Depreciation - auto	
Adjustment of 2/7 to reflect personal usage	348.30

Itemized Deductions:

The following itemized deductions were disallowed for amounts deemed personal in nature or unsubstantiated:

Medical & dental		773.54
Taxes - additional real estate allowed	670.52	
less: item disallowed	<u>81.55</u>	(588.97)
Casualty & theft loss		300.00
Miscellaneous		543.00
Net adjustment		<u><u>\$2,932.71"</u></u>

1977

<u>Adjustment</u>	<u>Amount</u>
"Other Income:	
Income erroneously omitted	\$4,300.00

Business Expenses (Sch. C):

The following expenses were adjusted to reflect the change in percentage from 1/3 to 1/6 for office expenses in the home:

Depreciation - home	192.50
Taxes on business property	700.98
Repairs & maintenance	153.90
Water expense	13.16
Heat & fuel	244.12
Electricity	54.39

Depreciation - auto	
Adjustment of 2/7 to reflect personal usage	348.30

Itemized Deductions:

The following itemized deductions were disallowed for amounts deemed personal in nature or unsubstantiated:

Medical & dental	1,062.33
Taxes	383.57
Miscellaneous	303.00
Net Adjustment	<u>\$7,756.25"</u>

3. On December 29, 1980, petitioner and his wife executed a consent form fixing the period of limitation upon assessment of personal income tax for the years 1976 and 1977 to any time on or before April 15, 1982. Said consent was validated by Department of Taxation and Finance on December 31, 1980. The hearing record offers no indication that petitioner had executed an earlier consent form with respect to taxable year 1976.

4. On July 23, 1981, the Audit Division issued two (2) notices of deficiency against petitioner based on the aforestated Statement of Personal Income Tax Audit Changes. One such notice asserted personal income tax for the year 1976 of \$443.77, plus interest of \$159.35, for a total due of \$603.12. The other notice asserted personal income tax for the year 1977 of \$772.47, penalty of \$38.62, plus interest of \$211.73, for a total due of \$1,022.82. Said penalty was asserted for negligence pursuant to section 685(b) of the Tax Law.

5. During the hearing petitioner contested the adjustments relating to the portion of his home used for business; the 1976 casualty loss adjustment;

and the 1977 adjustment for "income erroneously omitted". All other adjustments as scheduled above were conceded by petitioner.

6. During the years 1976 and 1977 petitioner was primarily engaged in the practice of law. He also was engaged in activities as an insurance broker. Both activities were carried on at a business office maintained in petitioner's personal residence. Such office, which consisted of an office, lavatory, waiting room and foyer, was used exclusively and regularly by petitioner for business purposes.

7. On his returns, petitioner claimed one third of the expenses related to his residence (see Finding of Fact "2", supra) as being attributable to his home office. He contended that this fraction was determined by the Internal Revenue Service during an audit in 1964. The Audit Division determined, based on a personal observation, that petitioner is properly entitled to deduct only one sixth of such expenses as being attributable to his home office.

8. Petitioner's residence consisted of two stories plus a basement. The top floor contained three bedrooms and two full baths. The main floor consisted of his office as described, a living room, formal dining room, kitchen and foyer. Clients were admitted to petitioner's office through a separate entrance. Client parking, of up to four automobiles, was provided in the rear. Petitioner submitted photographs of his residence and those rooms which constituted his business office.

9. The casualty loss of \$300.00 claimed by petitioner on his 1976 return was related to his alleged loss of a spruce tree from the grounds of his personal residence. Such loss was purportedly the result of a hurricane. Petitioner contended that he paid \$100.00 for removal of the tree from his property. No substantiation was provided by petitioner to establish that said

casualty had in fact occurred or that if such casualty had occurred, it resulted in a decrease in the fair market value of his property.

10. Petitioner made a bank deposit of \$7,993.76 during 1977. On audit, it was determined that \$3,693.76 of said deposit was from a nontaxable source. The \$4,300.00 balance of such deposit was cash. Since on audit petitioner did not satisfactorily establish that the cash was from a nontaxable source, it was deemed "other income" and accordingly held taxable.

11. Petitioner contended that the \$4,300.00 cash deposit represented accumulated social security benefits which were kept on hand for use in possible emergencies.

CONCLUSIONS OF LAW

A. That with respect to taxable year 1977, petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that he is properly entitled to a greater deduction for the expenses attributable to his home office than that allowed by the Audit Division. Accordingly, the 1977 adjustments allowing one sixth of the expenses related to his residence as being attributable to his home office are hereby sustained.

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the 1977 cash deposit of \$4,300.00 was from a nontaxable source. Accordingly, the adjustment holding such deposit as "other income" is hereby sustained.

C. That section 683(a) of the Tax Law provides that:

"Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed."

D. That section 683(c)(2) of the Tax Law provides, in pertinent part, that:

"Where, before the expiration of the time prescribed in this section for the assessment of tax, both the tax commission and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon."

E. That the Notice of Deficiency issued July 23, 1981, with respect to taxable year 1976, was issued after the expiration of the period for assessment provided in section 683(a) of the Tax Law. Since the consent form extending such period for assessment was executed after such period had expired, the Notice of Deficiency issued for 1976 was untimely issued and as such, said notice is hereby cancelled.

F. That the issues with respect to petitioner's claimed casualty loss deduction and home office deduction for 1976 are moot in view of Conclusion of Law "E", supra.

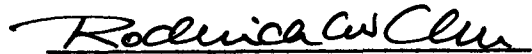
G. That the petition of Oscar R. del Giudice is granted to the extent provided in Conclusion of Law "E", supra, and except as so granted said petition is, in all other respects, denied.

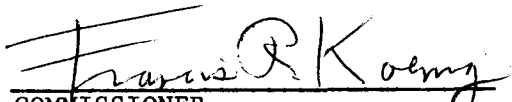
H. That the Notice of Deficiency issued July 23, 1981, with respect to taxable year 1977, is sustained together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985


PRESIDENT


COMMISSIONER


COMMISSIONER