

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Frank W. Manker :

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

Frank W. Manker  
Marion Lane  
Fort Salonga, NY 11768

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 R. Hayes  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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Frank W. Manker :

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

John J. Zureck  
Albrecht, Viggiano, Zureck & Co.  
375 Fulton St.  
Farmingdale, NY 11735

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

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

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

May 23, 1985

Frank W. Manker  
Marion Lane  
Fort Salonga, NY 11768

Dear Mr. Manker:

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: Petitioner's Representative  
John J. Zureck  
Albrecht, Viggiano, Zureck & Co.  
375 Fulton St.  
Farmingdale, NY 11735  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
FRANK W. MANKER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 and 1978.	:	

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Petitioner, Frank W. Manker, Marion Lane, Fort Salonga, New York 11768, 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 1977 and 1978 (File No. 35071).

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 November 2, 1984 at 9:00 A.M. Petitioner appeared by Albrecht, Viggiano, Zureck & Company, P.C. (John J. Zureck, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

#### ISSUES

I. Whether the deficiency against petitioner for 1978 was asserted in a timely manner.

II. Whether in 1978 petitioner realized additional, unreported income from a Subchapter S corporation as allegedly revealed by a cash availability analysis.

III. Whether the Audit Division properly asserted a deficiency against petitioner grounded on the allegedly unreported income from a Subchapter S corporation, notwithstanding that no deficiency was asserted against the corporation.

FINDINGS OF FACT

1. On July 23, 1981, the Audit Division issued to petitioner, Frank W. Manker, a Notice of Deficiency asserting additional personal income tax due under Article 22 of the Tax Law for the years 1977 and 1978 in the combined amount of \$34,785.77, plus penalty of \$6,741.49 and interest of \$77.67. The audit adjustments upon which the asserted deficiency was premised are outlined below.

	<u>1977</u>	<u>1978</u>
Commission expenses disallowed	\$2,398	\$154,698
Additional receipts per cash availability analysis		49,830
Purchase of rose plants, expenses disallowed		23,178
Rental expense disallowed		<u>2,352</u>
	<u>\$2,398</u>	<u>\$230,058</u>

At a pre-hearing conference, petitioner substantiated the commission expenses incurred, and such expenses were consequently allowed by the Audit Division; further, petitioner consented to the disallowance of the rental expense. At the hearing, counsel for the Audit Division conceded the propriety of petitioner's expensing, rather than capitalizing, the cost of the rose plants. The only item remaining in dispute, therefore, is additional, unreported income for 1978 allegedly revealed by a cash availability analysis.

2. Petitioner engages in the business of growing roses. Prior to January 11, 1977, he operated the business as a sole proprietorship, reporting his farm income on federal schedule F, Farm Income and Expenses, and also on New York State unincorporated business tax returns. On January 11, 1977, he incorporated the business as F. W. Manker Wholesale Grower, Inc. and made an election as a small business corporation for federal corporation income tax purposes. The corporation filed a federal Small Business Corporation Income Tax Return for the short period January 11 through January 31, 1977 and thereafter filed

returns on a fiscal year schedule ending January 31. Petitioner filed his 1977 New York State income tax resident return on or about April 5, 1978 and his 1978 return on or about April 12, 1979; the farm income, income (or loss) from the Subchapter S corporation and other relevant figures reported on his returns are shown below.

	<u>1977</u>	<u>1978</u>
Wages, salaries, tips and other employee compensation	--	\$17,700
Interest income	\$ 2,969	11,692
Dividends	1,579	2,025
Sale or exchange of capital assets	408	--
Rents and royalties	--	22,509
Partnerships, estates and trusts and small business corporations	(74,351)	4,313
Farm income	84,140	--
Other income (land option income)	10,000	--
Total	\$24,745	\$58,239
Adjustments	82	(10,781)
N.Y. adjusted gross income	\$24,827	\$47,458

3. In May, 1980, the Audit Division began an examination of petitioner's business and personal records, which examination embraced a 1977 personal cash availability analysis. The analysis is outlined below.

(a) SOURCES

Draw from business	\$ 57,089
Loan repayments from corporation	44,000
Savings withdrawal	5,000
Dividends	2,811
Interest	3,025
Land option income	10,000
	<u>\$121,925*</u>

\* A mathematical error was made in arriving at total sources and has been corrected.

(b) APPLICATIONS

Funds to corporation	\$ 76,000
Funds to sole proprietorship	26,000
Savings deposits	58,258
Personal checking account	1,502
Cash living expenses, estimated	10,000
	<u>\$171,760</u>

ALLEGED SHORTAGE	\$ 49,835
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The withdrawal from savings occurred on December 31, 1976 and, according to the examiner's workpapers and a photocopy of the relevant passbook page, was actually in the amount of \$15,000.00; the alleged shortage must thus be decreased to \$39,835.00.

The shortage was considered unreported income earned by the Subchapter S corporation during the fiscal year ended January 31, 1978 and distributed to petitioner at the termination of such fiscal year; in the examiner's view, the sum of \$49,835.00 represented income distributed to but unreported by petitioner for the calendar year 1978. (The theoretical underpinnings for treating a shortage allegedly disclosed by a 1977 personal cash availability analysis as income from a Subchapter S corporation distributed to petitioner in 1978 were not presented in the examiner's report or in the Audit Division's oral argument.)

No deficiency was asserted against the Subchapter S corporation. The Audit Division's position is that the six-year period of limitations for assessment (Tax Law section 683[d][1]) is applicable to petitioner by reason of his omission of more than 25 percent of his 1978 New York adjusted gross income ( $\$39,835/\$47,458 = 83.94\%$ ).

4. On December 31, 1976, petitioner made withdrawals from four personal savings accounts in the amounts of \$6,000.00, \$15,000.00, \$24,000.00 and \$13,000.00. The withdrawals are evidenced by photocopies of the relevant pages of the passbooks. The \$58,000.00 in funds were withdrawn for the specific purpose of providing the to-be-formed Subchapter S corporation with working capital. Between January 4 and January 25, 1977, petitioner advanced the corporation a total of \$64,000.00 by depositing such amount to the corporate account.

CONCLUSIONS OF LAW

A. That insofar as petitioner submitted his 1978 personal income tax return in a timely manner, the deficiency against him for such year was asserted within the three-year period of limitations for assessment provided by Tax Law section 683(a).

B. That giving recognition to the additional withdrawals from savings by petitioner on December 31, 1976 in the amount of \$43,000.00, which withdrawals were used in 1977 to make advances to the Subchapter S corporation, petitioner must be credited with additional sources of \$43,000.00 in the cash availability analysis. The alleged shortage is thereby eliminated and in fact, an overage of \$3,165.00 results.


C. That in view of the foregoing, the third issue is rendered moot.

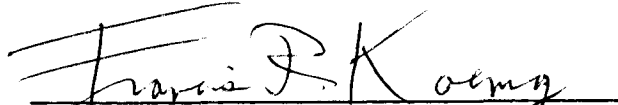
D. That the petition of Frank W. Manker is granted to the extent indicated in Conclusion of Law "B"; the Notice of Deficiency is to be modified in accordance therewith and also to take account of the concessions by the Audit Division (see Finding of Fact "1"); and except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER