

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Angelo Mongiello, Sr. and Anna Mongiello, Deceased : 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 for the Years 1975 and 1976 and :  
New York City Personal Income Tax under Article 30  
of the Tax Law for the Year 1976. :

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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 29th day of April, 1985, he served the within notice of Decision by certified mail upon Angelo Mongiello, Sr. and Anna Mongiello, Deceased, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Angelo Mongiello, Sr.  
and Anna Mongiello, Deceased  
c/o American Pioneer  
820 62nd St.  
Brooklyn, NY 11220

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  
29th day of April, 1985.

David Parchuck

Annice A. Hagelund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Angelo Mongiello, Sr. and Anna Mongiello, Deceased : AFFIDAVIT OF MAILING  
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New York City Personal Income Tax under Article 30  
of the Tax Law for the Year 1976. :

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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 29th day of April, 1985, he served the within notice of Decision by certified mail upon Edward Eisner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Eisner  
156 Fifth Avenue  
New York, NY 10010

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  
29th day of April, 1985.

David Parchuck

Bruno A. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 29, 1985

Angelo Mongiello, Sr.  
and Anna Mongiello, Deceased  
c/o American Pioneer  
820 62nd St.  
Brooklyn, NY 11220

Dear Mr. Mongiello:

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  
Edward Eisner  
156 Fifth Avenue  
New York, NY 10010  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|----------|
| In the Matter of the Petition                      | : |          |
|  | : |          |
| of   | : |          |
| ANGELO MONGIELLO, SR. AND ANNA MONGIELLO, DECEASED | : | DECISION |
| for Redetermination of a Deficiency or for Refund  | : |          |
| of New York State Personal Income Tax under        | : |          |
| Article 22 of the Tax Law for the Years 1975 and   | : |          |
| 1976 and New York City Personal Income Tax under   | : |          |
| Article 30 of the Tax Law for the Year 1976.       | : |          |

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Petitioners, Angelo Mongiello, Sr. and Anna Mongiello, Deceased, c/o American Pioneer, 820 62nd Street, Brooklyn, New York 11220, 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 for the years 1975 and 1976 and New York City personal income tax under Article 30 of the Tax Law for the year 1976 (File No. 33502).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 25, 1984 at 1:15 P.M. Petitioners appeared by Edward Eisner, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioner Angelo Mongiello, Sr. utilized a business checking account of a corporation he controlled to pay personal, non-business expenses and whether the Audit Division properly treated payments for such personal, non-business expenses as additional income of petitioners subject to taxation.

FINDINGS OF FACT

1. On October 3, 1980, the Audit Division issued a Statement of Personal Income Tax Audit Changes against petitioners, Angelo Mongiello, Sr. and Anna Mongiello,<sup>1</sup> alleging New York State personal income tax due of \$5,882.00 plus interest and penalties under Tax Law §685(a)(1), §685(a)(2) and §685(b) and \$11,333.00 plus interest and penalty under Tax Law §685(b) for 1975 and 1976, respectively. It also alleged New York City personal income tax due for 1976 of \$3,228.00 plus interest and penalty under Tax Law §685(b) which (pursuant to Tax Law §1312) is incorporated into Article 30 of the Tax Law for 1976. The following explanation for the alleged deficiencies was provided:

"Because of a lack of proper substantiation and improperly maintained records of account, the following amounts paid through the checking account of American Pioneer Corp. are deemed to be salary income."

The Audit Division determined that petitioner paid \$54,123.00 and \$81,616.00 for personal expenses during 1975 and 1976, respectively, through a business checking account of American Pioneer Corp. and treated such amounts as salary income to petitioner from American Pioneer Corp.

2. On February 20, 1981, the Audit Division issued a Notice of Deficiency against petitioner alleging income tax due of \$20,443.00 plus penalties and interest for 1975 and 1976. Petitioner Angelo Mongiello, Sr. executed a

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1 Anna Mongiello, deceased, is a party to this matter for the sole reason that the decedent was the wife of petitioner Angelo Mongiello, Sr. and filed joint tax returns with her husband for the years at issue. Therefore, references hereinafter to "petitioner" are to Angelo Mongiello, Sr.

consent which extended the period of limitation for the assessment of 1976 personal income taxes "at any time on or before April 15, 1981."

3. Petitioners filed jointly a 1976 New York State Income Tax Resident Return on which they reported New York taxable income of \$4,900.00, New York State income tax of \$159.90 and New York City income tax of \$71.20. According to the 1976 "Wage and Tax Statement" attached to the return, petitioner Angelo Mongiello received wages of \$9,000.00 from American Pioneer Corp. during 1976. There is no evidence in the record that petitioners filed a New York State income tax return for 1975.

4. The Audit Division provided the following breakdown of the alleged payments of personal, non-business expenses of \$54,123.00 and \$81,616.00 for 1975 and 1976, respectively, which it treated as salary income of petitioner from American Pioneer Corp.

|                          |              | <u>1975</u> | <u>1976</u>  |
|--------------------------|--------------|-------------|--------------|
| Travel                   | \$ 1,819     |             |              |
| Entertainment            | 1,813        |             |              |
| American Express         | <u>4,512</u> | \$ 8,144    | \$ 9,853*    |
| Insurance                |              | 4,844       | 9,288        |
| Auto Expenses            |              | 1,996       | 5,548        |
| Telephone                | \$ 4,662     |             | \$5,683      |
| Allowed                  | <u>4,326</u> |             | <u>5,273</u> |
| Brooklyn Union Gas       |              | \$ 336      | \$ 410       |
| Bayside Fuel             |              | 505         | --           |
| Master Charge            |              | 947         | --           |
| Con Edison               | \$ 1,533     | 3,224       |              |
| Allowed                  | <u>1,161</u> |             | \$3,779      |
|                          |              |             | <u>2,862</u> |
| Officer's Loan Payable   | \$10,190     | \$ 372      | \$ 917       |
| Rent - Alfrieda Avitable | 1,620        |             |              |
| Medical and Misc.        | <u>996</u>   |             |              |
|                          |              | \$12,806    | \$10,708*    |
| Frank's Mortgage         |              | 196         | --           |
| Cash/Petty Cash          |              | 5,978       | 6,017        |

\* These amounts were not broken down by the Audit Division in the schedule it introduced into evidence.

|                               |          |                 |                 |
|-------------------------------|----------|-----------------|-----------------|
| 12 St. mortgage - Jamaica S/B | \$ 1,195 |                 |                 |
| 12 St. loan - Jamaica S/B     | 1,121    |                 |                 |
|                               |          | \$ 2,316        | \$ 2,755*       |
| 84 St. mortgage - MHT         |          | 1,121           | 1,946           |
| 2nd mortgage - Polizzotto     |          | 5,300           | 26,288          |
| Loan - Pontano                |          | 2,535           | --              |
| Loan - Republic National Bank |          | 959             | 1,436           |
| Loan - Lincoln S/B            |          | 1,002           | 6,450           |
| Catherine Terrenova           |          | 625             | --              |
| Lawrence Mongiello            |          | 917             |                 |
|                               |          | <u>\$54,123</u> | <u>\$81,616</u> |

\* This amount was not broken down by the Audit Division in the schedule it introduced into evidence.

5. The auditor, after reviewing additional information provided by petitioner Angelo Mongiello, determined that the amounts which were treated as salary income to petitioner from American Pioneer Corp., of \$54,123.00 and \$81,616.00 for 1975 and 1976, respectively, should be reduced to \$36,434.00 and \$54,694.00, respectively. The reduction for 1975 resulted from the auditor treating two-thirds of petitioner's expenses for travel, entertainment, American Express, insurance, auto expense and petty cash as business expenses and not as personal expenses which he paid through his corporation's business checking account. In addition, the auditor also treated the loan payment in 1975 of \$6,450.00 from petitioner to Lincoln Savings Bank as a business expense. The reduction for 1976 resulted from the auditor treating two-thirds of petitioner's expenses for travel, entertainment, American Express, insurance, auto expenses, Master Charge and petty cash as business expenses and not as personal expenses which he paid through his corporation's business checking account. In addition, the auditor also treated the loan payment in 1976 of \$1,002.00 from petitioner to Lincoln Savings Bank and \$560.00 paid by petitioner to Bayside Fuel as business expenses.

6. American Pioneer Corp., which appears to be a one-man operation conducted by petitioner, designs and builds equipment and machinery for food

processing, in particular, equipment for making mozzarella and ricotta cheeses. Petitioner, through his corporation, sells machines, which mold, size, shape, cool and salt cheese, to cheese manufacturers throughout the United States. To conduct such sales, petitioner makes two or three business trips per month.

7. Petitioner introduced evidence to show that he borrowed the amounts as noted below:

| <u>Lender</u>               | <u>Amount</u> | <u>Date of Loan</u> |
|-----------------------------|---------------|---------------------|
| Alfred Polizzotto           | \$35,350.00   | Undated             |
| Jamaica Savings Bank        | \$ 5,340.00   | 10/19/73            |
| Manufacturers Hanover Trust | \$ 4,904.17   | 6/28/71             |
| Kings Lafayette Bank*       | \$ 2,011.02   | 9/10/73             |

\* According to petitioner's representative, this is the predecessor name of Republic National Bank.

Petitioner offered adequate proof to show that the proceeds from the Jamaica Savings Bank loan, the Manufacturers Hanover Trust loan and the Kings Lafayette Bank loan were deposited into the business checking account of American Pioneer Corp. However, the loan from Alfred Polizzotto became due and owing in June, 1973 before the period at issue, and, in addition, petitioner failed to provide adequate evidence of a larger loan of \$29,715.00 from Kings Lafayette Bank and of a loan from an individual described, on the auditor's worksheet, as "Pontano."

8. The auditor treated certain amounts designated by petitioner as "officer's loan payable" as salary income from the corporation because such amounts were not included in the corporation's officer loan account and, according to the testimony of the auditor, if petitioner "had taken back money that they (sic) loaned the business previously, the amount should go through this account and it should show here." However, the 1975 officer loan account does show payments of \$625.00 to Catherine Terranova and of \$917.00 to Lawrence Mongiello.



CONCLUSIONS OF LAW

A. That pursuant to Finding of Fact "5", supra, the Audit Division is directed to modify the alleged deficiencies by taking into account the reductions in amounts treated as salary income made by the auditor after he reviewed additional information provided by the petitioner.

B. That, in addition, the petitioner has sustained his burden of proof to show that the following loan payments were business expenses and should not be included in additional income subject to taxation:

|                             | <u>1975</u> | <u>1976</u> |
|-----------------------------|-------------|-------------|
| Jamaica Savings Bank        | \$2,316     | \$2,755     |
| Manufacturers Hanover Trust | 1,121       | 1,946       |
| Republic National Bank      | 959         | 1,436       |

Furthermore, pursuant to Finding of Fact "8", supra, the Audit Division is directed to reduce the amount subject to taxation by the \$625.00 paid to Catherine Terranova and \$917.00 to Lawrence Mongiello.

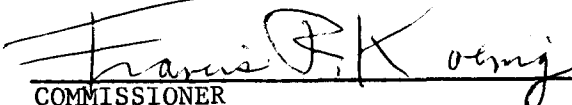
C. That the petition of Angelo Mongiello, Sr. and Anna Mongiello, Deceased, is granted to the extent provided by Conclusions of Law "A" and "B" but, in all other respects, is denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 29 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER