

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Anthony Pietrosanto :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income & :  
Unincorporated Business Tax under Articles 22 & 23 :  
of the Tax Law or the Years 1977 - 1979. :  
:

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AFFIDAVIT OF MAILING

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 May, 1985, he served the within notice of Decision by certified mail upon Anthony Pietrosanto, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony Pietrosanto  
1709 Western Ave.  
Albany, NY 12203

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 May, 1985.

David Parchuck

Bonnie 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 :  
Anthony Pietrosanto :  
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Unincorporated Business Tax under Article 22 & 23 :  
of the Tax Law for the Years 1977 - 1979. :  
:

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AFFIDAVIT OF MAILING

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 May, 1985, he served the within notice of Decision by certified mail upon Dominick A. Parisi, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dominick A. Parisi  
D.A. Parisi & Co.  
151 Barrett St.  
Schenectady, NY 12305

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 May, 1985.

David Parchuck

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

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

May 29, 1985

Anthony Pietrosanto  
1709 Western Ave.  
Albany, NY 12203

Dear Mr. Pietrosanto:

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  
Dominick A. Parisi  
D.A. Parisi & Co.  
151 Barrett St.  
Schenectady, NY 12305  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|----------|
| In the Matter of the Petition                  | : |          |
| of   | : |          |
| ANTHONY PIETROSANTO                            | : | DECISION |
| for Redetermination of a Deficiency or for     | : |          |
| Refund of Personal Income and Unincorporated   | : |          |
| Business Taxes under Articles 22 and 23 of the | : |          |
| Tax Law for the years 1977, 1978 and 1979.     | : |          |

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Petitioner, Anthony Pietrosanto, 1709 Western Avenue, Albany, New York 12203, 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 for the years 1977, 1978 and 1979 (File Nos. 35102 & 35103).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on September 20, 1984 at 1:15 P.M. and continued to a conclusion at the same location on December 3, 1984 at 9:30 A.M. Petitioner appeared by Dominick A. Parisi, P.A. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division's reconstruction of petitioner's income for the years 1977 and 1978, using the cash analysis method, properly determined that petitioner had additional unreported business income.

II. Whether the Audit Division properly disallowed and/or adjusted certain expense items claimed on petitioner's returns.

III. Whether the Audit Division properly determined that petitioner's sale of real property in 1979 constituted a sale of business property, thereby subjecting the gain realized from said sale to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner herein, Anthony Pietrosanto, timely filed New York State income tax resident returns for 1977, 1978 and 1979 and also New York State unincorporated business tax returns for the same years. Both the personal income tax return and unincorporated business tax return filed for each of the three years in question reported the income and expenses generated by petitioner from his operation of an unincorporated business known as "Tina Marie's Fruit Garden" (hereinafter "Tina Marie"). Tina Marie's main business activities consisted of the retail sale of fruit and flowers and also the operation of a motel. Petitioner reported a net profit from said activities of \$13,352.43, \$15,344.00 and \$30,231.00 for 1977, 1978 and 1979, respectively.

2. (a) As the result of a field audit of petitioner's personal and business books and records, the Audit Division, on December 29, 1980, issued a Statement of Unincorporated Business Tax Audit Changes wherein the following proposed adjustments were added to reported unincorporated business gross income:

|  | <u>1977</u>         | <u>1978</u> | <u>1979</u> |
|--|---------------------|-------------|-------------|
| Business income is increased per cash analysis | \$ 9,213.00         | \$15,810.00 | \$ -0-      |
| Depreciation is adjusted for non-business use  | 1,662.00            | 802.00      | 802.00      |
| Addition error, resulting in less purchases    | 222.00 <sup>1</sup> | -0-         | -0-         |

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1 Petitioner conceded the accuracy of these adjustments. Accordingly, same will not be addressed hereinafter.

|   |                    |                         |                    |
|---|--------------------|-------------------------|--------------------|
| Insurance expense is adjusted for personal use                                  | 414.00             | 1,047.00                | -0-                |
| Miscellaneous expense is adjusted for personal use                              | 654.00             | -0-                     | -0-                |
| Heat, light & power expense is adjusted for personal use                        | 1,589.00           | 1,545.00                | 850.00             |
| Supply expense is allowed to amount substantiated                               | 52.00 <sup>1</sup> | -0-                     | -0-                |
| Depreciation is adjusted for in-service time                                    | -0-                | 153.00 <sup>1</sup>     | 49.00              |
| Taxes are adjusted for math error   | -0-                | 81.00 <sup>1</sup>      | -0-                |
| Sub-contractor expense is disallowed as unsubstantiated                         | -0-                | 9,000.00                | -0-                |
| Gain on the sale of business property is subject to unincorporated business tax | -0-                | -0-                     | 4,687.00           |
| Modification for new job credit   | -0-                | (1,374.00) <sup>1</sup> | -0-                |
| Net Adjustment  | <u>\$13,806.00</u> | <u>\$27,064.00</u>      | <u>\$ 6,388.00</u> |

(b) On February 18, 1981, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioner, wherein the following proposed adjustments were added to reported personal taxable income:

|  |                     |                         |                       |
|--|---------------------|-------------------------|-----------------------|
| Additional business income: (Per statement of Unincorporated Business Tax Audit Changes) | \$13,806.00         | \$28,438.00             | \$ 1,701.00           |
| Itemized medical deductions are allowed to amount substantiated                          | 719.00 <sup>2</sup> | -0-                     | -0-                   |
| 3% medical adjustment  | 414.00 <sup>2</sup> | 853.00 <sup>2</sup>     | 51.00 <sup>2</sup>    |
| Allowance for new job credit   | -0-                 | (1,374.00) <sup>1</sup> | -0-                   |
| Unreported interest income per bank statements   | -0-                 | -0-                     | 1,083.00 <sup>1</sup> |
| Net Adjustment   | <u>\$14,939.00</u>  | <u>\$27,917.00</u>      | <u>\$ 2,835.00</u>    |

3. Based on the aforementioned Statement of Unincorporated Business Tax Audit Changes and Statement of Personal Income Tax Audit Changes, the Audit Division, on March 25, 1981, issued two notices of deficiency to petitioner, each for the years 1977, 1978 and 1979. One notice proposed additional New

<sup>2</sup> The 3% medical adjustment is a statutory adjustment based on the proposed increase to total income for each year at issue. Since this adjustment is statutory in nature, it will not be addressed hereinafter.

York State personal income tax due of \$4,298.23, plus penalty<sup>3</sup> and interest of \$1,123.64, for a total allegedly due of \$5,421.87. The second notice proposed additional New York State unincorporated business tax due of \$2,281.83, plus penalty<sup>3</sup> and interest of \$598.70, for a total allegedly due of \$2,880.53.

4. The Audit Division reconstructed petitioner's income for the years 1977 and 1978 using the cash analysis method. The cash analysis for 1977 produced an understatement of income in the amount of \$9,213.00 and the cash analysis for 1978 revealed an understatement of income amounting to \$15,810.00. At the hearing held herein, petitioner's representative submitted reconciliations of deposits made to the checking account to gross sales reported on petitioner's tax returns. Since only small discrepancies were disclosed by said reconciliations (\$1,622.59 for 1977 and \$136.37 for 1978), petitioner's representative maintains that the cash analyses prepared by the Audit Division were incorrect. No evidence or argument was adduced by petitioner to show that there existed specific errors in the cash analyses. The reconciliations submitted by petitioner prove only that those funds which were deposited were included in reported gross sales. Said reconciliations would not disclose cash receipts not deposited (e.g. cash withdrawn for personal expenses or cash receipts used to pay business expenses).

5. In addition to the cash analyses performed for the years 1977 and 1978, the Audit Division also examined expenses claimed on petitioner's personal income and unincorporated business tax returns. Said examination involved substantiation of the deductions and also an investigation as to the propriety of the claimed deductions. Said examination resulted in numerous adjustments

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3 Penalty was imposed at 5 percent pursuant to section 685(b) of the Tax Law for negligence.

and the following represents a synopsis of those adjustments with which petitioner takes exception:

(a) Depreciation for non-business use -

Petitioner claimed depreciation on four (4) vehicles. The Audit Division allowed a depreciation deduction based on two and one-half ( $2\frac{1}{2}$ ) vehicles and disallowed one and one-half ( $1\frac{1}{2}$ ) vehicles as being for personal use. No documentary evidence, except copies of Federal depreciation schedules, and no credible testimony were presented to support the claim that petitioner used more than two and one-half ( $2\frac{1}{2}$ ) vehicles for business purposes.

(b) Insurance expense for personal use -

This adjustment was based on the disallowance of the one and one-half ( $1\frac{1}{2}$ ) vehicles as detailed in Finding of Fact 5 (a), supra. Since one and one-half ( $1\frac{1}{2}$ ) vehicles were disallowed as personal vehicles, the insurance deduction claimed for said disallowed vehicles was also disallowed as personal.

(c) Miscellaneous expense for personal use -

A portion of this adjustment was also premised on the one and one-half ( $1\frac{1}{2}$ ) disallowed vehicles. The claimed miscellaneous expenses for the repair and/or maintenance of all four vehicles were allowed to the extent of 62% ( $2\frac{1}{2}$  divided by 4) and disallowed to the extent of 38% ( $1\frac{1}{2}$  divided by 4). Also, claimed miscellaneous expenses for a water bill (\$154.20) and for water tax (\$108.00) were allowed to the extent of two-thirds ( $2/3$ ) for business use and disallowed to the extent of one-third ( $1/3$ ) for personal use. No relevant documentary evidence and no credible testimony were adduced to show that the water bill or water tax should be apportioned between business use and non-business use on a basis other than that utilized by the Audit Division.



(d) Heat light and power expense for personal use -

This adjustment was based on the disallowance of a portion of petitioner's claimed deduction for heat, power and light. Petitioner's personal residence was located on the second floor of the building which also contained his fruit and flower shop. The Audit Division disallowed a portion of the claimed deductions on the basis of one-third (1/3) personal use and two-thirds (2/3) business use. At the hearings held herein, petitioner's representative submitted worksheets which purport to breakdown all power bills between business and personal use. Where an allocation was required because of a combined meter, petitioner's representative allocated 25 percent for personal use and 75 percent for business use. The power bills were not submitted in evidence nor was any evidence submitted to support that 25 percent, and not one-third (1/3), of combined power bills should be allocated for personal usage. The Audit Division's allocation of one-third (1/3) personal usage and two-thirds (2/3) business usage was obtained directly from petitioner's returns where other combined personal and business expenses were allocated on a one-third (1/3) / two-thirds (2/3) basis.

(e) Depreciation for in-service time -

This adjustment was premised on the Audit Division's partial disallowance of depreciation expenses for a greenhouse in 1978 and for a sign and cash register in 1979. In each instance the depreciation deduction was partially disallowed based on the date the asset was placed in service. Petitioner claims that since the greenhouse was placed in service on January 1, 1978 and since the sign and cash register were placed in service effective January 1, 1979, that he is entitled to full year depreciation deductions. Upon examination, the Audit Division determined that the greenhouse was not placed in service until

July 1, 1978 and that the sign and cash register were not placed in service until April 1, 1979 and November 1, 1979, respectively. Accordingly, the depreciation deductions were prorated based on the number of months actually in service. No relevant documentary or other evidence was presented by petitioner to show that the assets in question were placed in service at the beginning of the respective calendar years.

(f) Sub-contractors expenses disallowed -

This was a \$9,000.00 deduction claimed by petitioner for amounts allegedly paid to each of his three children (\$3,000.00 each) for work performed at the fruit and flower shop and at the motel. Petitioner produced no evidence to substantiate that \$3,000.00 was actually paid to each of his three children. The children were not carried on the business books and records as employees and, at the time the audit was conducted, the children had not filed tax returns. Sometime after the conclusion of the audit, all three children filed tax returns with the Audit Division.

(g) Gain on sale of business property -

On Federal Schedule D for 1979 petitioner reported a gain of \$4,687.00 from "Sale of Land". No amounts were shown on Schedule D for gross sales price or for cost basis. The property sold was a small piece of land located in the front section of the entire piece of property which contained the fruit and flower shop and the motel. Petitioner argued that the property sold was not business property and, in the alternative, argued that a cost should be applied to the property and that the gain should be allocated between business and personal usage. No evidence was submitted to support any of said arguments.

(h) Itemized medical deductions -

For 1977 a portion of petitioner's claimed itemized deductions for medical expenses were disallowed as unsubstantiated. No evidence was presented by petitioner to substantiate the disallowed deductions.

6. Petitioner did not appear at either of the hearings held herein to offer his testimony nor did any of his children appear and testify on his behalf. No evidence or argument was adduced with respect to the 5 percent negligence penalty asserted due in the two notices of deficiency dated March 25, 1981.

CONCLUSIONS OF LAW

A. That sections 722 and 689(e) of the Tax Law place the burden of proof on petitioner except in three specifically enumerated instances, none of which are relevant to this case. Petitioner has failed to meet his burden of proof with respect to each and every issue raised. The summary schedules submitted in evidence by petitioner's representative were supported by neither documentary evidence nor credible testimony and do not serve to form any basis warranting cancellation or reduction of the instant deficiencies.

B. That the petition of Anthony Pietrosanto is denied; and that both notices of deficiency dated March 25, 1981 are sustained in full, together with such additional penalty and interest as may be lawfully due and owing.

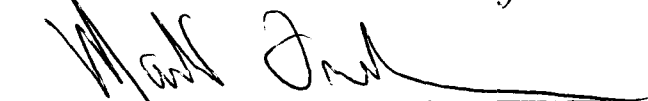
DATED: Albany, New York

STATE TAX COMMISSION

**MAY 29 1985**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER