

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Dani Jacobson :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
& UBT under Article(s) 22 & 23 of the Tax Law :
for the Years 1977 - 1979.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 21st day of April, 1986, he/she served the within notice of decision by certified mail upon Dani Jacobson the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dani Jacobson
1333 Lancaster Avenue
Syracuse, NY 13210

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
21st day of April, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Dani Jacobson :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
& UBT under Article(s) 22 & 23 of the Tax Law :
for the Years 1977 - 1979.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 21st day of April, 1986, he served the within notice of decision by certified mail upon Harold I. Silverman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold I. Silverman
Supnik and Silverman
812 University Blvd.
Syracuse, NY 13202

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
21st day of April, 1986.

David Parchuck

Janet M. Snay

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 21, 1986

Dani Jacobson
1333 Lancaster Avenue
Syracuse, NY 13210

Dear Mr. Jacobson:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Harold I. Silverman
Supnik and Silverman
812 University Blvd.
Syracuse, NY 13202

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DANI JACOBSON

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax and Unincorporated :
Business Tax under Articles 22 and 23 of the
Tax Law for the Years 1977 through 1979. :

Petitioner, Dani Jacobson, 1333 Lancaster Avenue, Syracuse, New York 13210, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1977 through 1979 (File No. 35684).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on July 9, 1985 at 9:15 A.M., with all briefs and documents to be submitted by October 23, 1985. Petitioner appeared by Supnik and Silverman (Harold I. Silverman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division's source and application of funds audit properly resulted in a finding of additional income subject to personal income tax and unincorporated business tax.

II. Whether the Audit Division has sustained its burden of proof of establishing that petitioner is liable for fraud for the year 1979.

FINDINGS OF FACT

1. On March 25, 1981, the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of personal income tax and unincorporated business tax for the years 1977 through 1979 in the amount of \$16,329.71, plus penalty and interest in the amount of \$9,768.29, for a total amount due of \$26,098.00. For the years 1977 and 1978, the Audit Division asserted a penalty for negligence with respect to the asserted deficiencies of personal income tax and unincorporated business tax. For the year 1979, the Audit Division asserted a penalty for fraud with respect to both the asserted deficiencies of personal income tax and unincorporated business tax.

2. After the Notice of Deficiency was issued, the Audit Division reduced the amount of the original deficiency by \$492.49 based upon the Audit Division's allowance of sums paid for employee insurance expenses in the amount of \$933.73 for 1977, \$1,163.88 for 1978 and \$1,314.76 for 1979.

3. During the periods in issue, petitioner owned and operated a gas station known as Dani's Arco Service which was located in Syracuse, New York.

4. Petitioner filed a New York State Income Tax Resident Return and a New York State Unincorporated Business Tax Return for the year 1977. On the unincorporated business tax return, petitioner reported a net profit from the operation of the service station of \$5,296.05. Petitioner reported a total income on the New York State Income Tax Resident Return of \$5,313.90 consisting of business income of \$5,296.05 and interest income of \$17.85.

5. Petitioner filed a New York State Income Tax Resident Return and a New York State Unincorporated Business Tax Return for 1978. On the unincorporated business tax return, petitioner reported net profit from the operation of the service station of \$7,854.46. He reported a total income on the New York State

Income Tax Resident Return of \$7,894.46 consisting of business income of \$7,854.46 and interest income of \$40.00.

6. Petitioner filed a New York State Income Tax Resident Return and a New York State Unincorporated Business Tax Return for the year 1979. He reported a net profit of \$1,112.28 from the operation of the service station on the New York State Unincorporated Business Tax Return. On the New York State Income Tax Resident Return, petitioner reported a total income of \$5,161.49 consisting of business income of \$1,112.28, dividends of \$695.41 and interest income of \$3,373.80.

7. At the commencement of the audit, the Audit Division concluded that using a source and application of funds methodology of conducting an audit was warranted. The Audit Division reached this conclusion because of the substantial interest income reported in one year, the low reported net profit and the maintenance of single entry records.

8. In order to determine the appropriate amounts for the source and application of funds audit, the Audit Division utilized information reported on petitioner's tax return and information obtained from the banks in which petitioner maintained an account.

9. The field audit disclosed that petitioner had applications of funds in excess of sources of funds as follows¹:

1977	\$ 9,943.00
1978	1,731.00
1979	91,398.00

1 The Statement of Source and Application of Funds is set forth in the appendix.

10. Petitioner began operating the service station in Syracuse, New York in June, 1972. He continued to operate the service station during the years in issue.

11. At the commencement of the audit, petitioner stated, upon inquiry, that he did not have a cash hoard. However, after the audit was concluded, petitioner stated for the first time that he brought some money back from Israel in 1966 and again brought money back from Israel in 1973.

12. In 1966, when he was twenty-two years old, petitioner immigrated to the United States from Israel. At the hearing, petitioner testified that at the age of thirteen, he began working part-time during school vacations for his brother-in-law building scaffolding at construction sites. Petitioner stated that during this period he earned from \$50.00 to \$70.00 a day after taxes. He continued to work part-time earning this sum until he was seventeen years old. When petitioner became eighteen years old, he entered military service for a period of two and one-half years. From the time he left military service until the time he emigrated to the United States in 1966, he worked full-time in the construction industry. Petitioner testified that as a full-time employee his take-home pay was \$100.00 a day and that he worked six days a week.

13. Petitioner explained that he lived at home during the period he lived in Israel and that his mother paid for his room and board and consequently, by the time he was twenty-two years old, he was able to save a little over \$40,000.00.

14. Petitioner further testified that he brought this amount of approximately \$40,000.00 with him when he came to the United States. Since there was a restriction on the amount of Israeli currency which could be converted to American currency, petitioner explained that he divided the money up among friends and relatives and had them convert the funds into American currency for him.

15. Petitioner also explained that in 1973 he returned to Israel and at that time received an additional \$35,000.00 representing his share of an inheritance from his father. These funds were also purportedly brought back to the United States.

16. Petitioner testified that he was afraid to let it be known that he had withdrawn approximately \$75,000.00 since it was illegal to remove this amount of money from Israel. Consequently, until in or about 1975 or 1976 he, at various times, either kept the money with his personal belongings or hid it in a relative's basement. Thereafter, he put the money in a safe deposit box.

17. In 1976, petitioner told his attorney that he had \$75,000.00 which was in a safety deposit box and inquired whether the funds could be invested. At that time, petitioner's attorney recommended that he should not continue to hide the money because he was losing the value of the money due to inflation.

18. In 1979, petitioner became an American citizen. At this time, he placed the money in a savings account and thereafter purchased securities.

19. Petitioner did not declare the money on either trip to the United States ostensibly because he was not aware that he was required to do so.

20. A comparison of petitioner's cash register tapes with petitioner's bank deposits reveals that petitioner was making bank deposits which did not appear to have a business source throughout the years in issue. Petitioner asserts that this proves that he had a cash hoard.

21. On March 19, 1982, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1978 through November 30, 1979. The assessment was subsequently cancelled. The record does not disclose why the assessment was cancelled.

22. At the hearing, the Audit Division requested that the negligence penalty be applied against petitioner for the year 1979 if the Tax Commission concludes that the fraud penalty will not be imposed.

CONCLUSIONS OF LAW

A. That, with certain specified exceptions such as fraud, section 689(e) of the Tax Law provides that the burden of proof in any case before the State Tax Commission is upon the petitioner.

B. That petitioner has failed to sustain his burden of proving that the additional funds asserted by the Audit Division as having been received by petitioner in the years 1977, 1978 and 1979 were funds received from non-taxable sources. Petitioner's explanation of the amount of money he was able to save by the age of twenty-two while working in Israel, in the absence of any documentation, is not found plausible. The balance of petitioner's testimony must be viewed in the same light and similarly rejected. It is noted that petitioner's evidence that there were deposits in his checking account which did not appear to be from a business source is also consistent with the theory that petitioner did not maintain adequate records.

C. That in the Matter of Walter Shutt and Gertrude Shutt (State Tax Commission, June 4, 1982) it was held:

"That where a taxpayer against whom a New York State tax fraud penalty is asserted files a timely petition for redetermination, the State is put to its proof. The standard of proof necessary to support a finding of fraud by the Tax Commission requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing."

D. That an understatement of income alone does not establish each and every element of fraud (see Rose v. Commissioner, 33 T.C.M. 458 [1974]). Accordingly, the Audit Division has failed to sustain its burden of proof of


fraud under Tax Law §689(e)(1). However, petitioner has failed to show that the understatement of income for the year 1979 was not due to negligence and penalties under Tax Law §685(b) may be imposed pursuant to Tax Law §689(d)(1) (Matter of Henry Jarvis and Delores Jarvis, State Tax Commission, April 27, 1983).

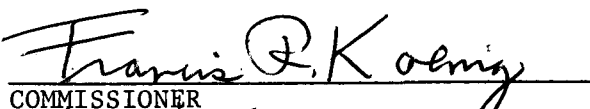
E. That the petition of Dani Jacobson is granted to the extent of cancelling the fraud penalty under Tax Law §685(e); that a negligence penalty is imposed against petitioner as described in Conclusion of Law "D" herein; that, except as so granted, the petition is denied and the Audit Division is directed to modify the Notice of Deficiency, dated March 25, 1981, to be consistent with the decision rendered herein; as modified, the Notice of Deficiency is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 21 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

APPENDIX

DANI JACOBSON
Statement of Source and Application of Funds

<u>Source of Funds</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
Net profit as reported	\$ 5,296.00	\$ 7,854.00	\$ 1,112.00
Depreciation as reported	1,434.00	2,580.00	
Decrease in inventory		500.00	
Decrease in checking account balance	1,215.00		
Withdrawal from savings (11/8/79)			31,458.00
Withdrawal from savings (11/9/79)			31,458.00
Withdrawal from savings (11/9/79)			41,894.00
Total source of funds	<u>\$ 7,945.00</u>	<u>\$10,934.00</u>	<u>\$105,922.00</u>

Application of Funds

Personal checks on business checking account	\$13,588.00	\$11,672.00	\$ 13,750.00
Increase in checking account balance		993.00	59.00
Increase in inventory	4,300.00		1,700.00
Savings account deposits			
5/10/79			30,000.00
11/8/79			31,458.00
Checking account deposit (5/10/79)			40,000.00
Stock purchases (see detail below)			80,353.00
Total application of funds	<u>\$17,888.00</u>	<u>\$12,665.00</u>	<u>\$197,320.00</u>
Excess application of funds	<u>\$ 9,943.00</u>	<u>\$ 1,731.00</u>	<u>\$91,398.00</u>

DANI JACOBSON
Stock Purchases

<u>Date</u>	<u>Amount</u>
10/3/79	\$ 5,300.00
11/9/79	31,458.58
11/9/79	41,894.79
11/14/79	1,700.00
	<u>\$80,353.37</u>