

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Pedro & Vivian Alvarez

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for  
Refund of New York State and New York City  
Income Tax under Article 22 of the Tax Law  
and Chapter 46, Title T of the Administrative  
Code of the City of New York for the Years  
1980 and 1981.

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State of New York :

ss.:

County of Albany :

Connie A. Ward, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 14th day of August, 1987, she served the within notice of decision by certified mail upon Pedro & Vivian Alvarez the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

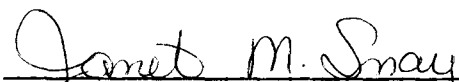
Pedro & Vivian Alvarez  
41 St. Andrew's Place  
Yonkers, NY 10705

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  
14th day of August, 1987.



  
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  
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Pedro & Vivian Alvarez

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1980 and 1981.

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State of New York :

ss.:

County of Albany :

Connie A. Ward, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 14th day of August, 1987, he served the within notice of decision by certified mail upon Gustavo DeVelasco, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gustavo DeVelasco  
DeVelasco Income Tax Service  
136-55 37th Ave.  
Flushing, NY 11354

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  
14th day of August, 1987.

Connie A. Ward

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

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

August 14, 1987

Pedro & Vivian Alvarez  
41 St. Andrew's Place  
Yonkers, NY 10705

Dear Mr. & Mrs. Alvarez:

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 & 1312 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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Gustavo DeVelasco  
DeVelasco Income Tax Service  
136-55 37th Ave.  
Flushing, NY 11354

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
PEDRO ALVAREZ AND VIVIAN ALVAREZ	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Tax under Article 22 of the Tax Law	:	
and Chapter 46, Title T of the Administrative	:	
Code of the City of New York for the Years 1980	:	
and 1981.	:	

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Petitioners, Pedro and Vivian Alvarez, 41 St. Andrew's Place, Yonkers, New York 10705, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1980 and 1981 (File No. 53193).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 28, 1987 at 10:00 A.M., with all briefs submitted by May 7, 1987. Petitioners appeared by Gustavo DeVelasco, Ph.D. The Audit Division appeared by John P. Dugan, Esq. (Michael I. Infantino, Esq., of counsel).

ISSUE

Whether the Audit Division's reconstruction of petitioners' income for the years 1980 and 1981, using a cash availability auditing method, properly determined that petitioners had unreported income.

FINDINGS OF FACT

1. On March 26, 1984, the Audit Division issued to petitioners a Notice of Deficiency which stated additional tax due of \$2,524.00 and interest of \$664.29 for a total amount due of \$3,188.29 for the tax years 1980 and 1981.

Previously, on January 11, 1984, the Audit Division issued to petitioners a Statement of Personal Income Tax Audit Changes which set forth additional tax due of \$2,524.00 and interest of \$604.00 for a total amount due of \$3,128.00 for the tax years 1980 and 1981. Said Statement of Personal Income Tax Audit Changes set forth the following explanation:

"As the result of field audit the following adjustments are being made:

Unexplained deposits are deem [sic] to be unreported income. 1980 - \$6,597.00, 1981 - \$19,663.00"

2. Petitioners timely filed New York State income tax resident returns for the years 1980 and 1981. On both returns Pedro Alvarez listed his occupation as unemployed and Vivian Alvarez listed her occupation as clerk. For both years petitioners elected the standard deduction, claimed five exemptions and claimed entitlement to a refund.

3. The Audit Division performed a cash availability income audit of petitioners for the tax years 1980 and 1981. The cash availability income audit is an audit which compares the taxpayers' sources of income with expenditures of money or revenue. If the audit reveals a higher amount of expenditures than income, the difference is assessed as unreported income.

4. For the tax year 1980 the Audit Division determined the following:

1980  
CASH OUT

Deposit to the Seamen's Bank for Savings	\$ 1,450.00
Deposit to the Seamen's Bank for Savings	10,848.00
Deposit to the Seamen's Bank for Savings	325.00
Deposit to the Seamen's Bank for Savings	861.00
Cash for Living Expenses	<u>17,582.00</u>
Total Cash Out	\$31,066.00

CASH IN

Federal Refund	\$ 1,000.00
Wife's Salary - Net	10,940.00
Tax Refund (New York State)	154.00
Withdrawal from Seamen's Savings Account	375.00
Withdrawal from Seamen's Savings Bank	500.00
Withdrawal from Seamen's Savings Bank	7,000.00
Rental Income Gross	3,300.00
Money Received from Aunt for Aluminum Siding	1,200.00
Total Cash In	<u>\$24,469.00</u>
 Total Cash Out	 <u>31,066.00</u>
DIFFERENCE	<u>\$ 6,597.00</u>

5. The auditor's workpapers indicated under subtitle "Cash In" for the year 1980 a withdrawal from the Seamen's Savings Bank in the sum of \$375.00. In fact, the withdrawal, as indicated in the transcript of activity in the account, was \$3,375.00. Therefore, the total "Cash In" figure should have read \$27,469.00, or a difference between "Cash In" and "Cash Out" of \$3,597.00.

6. With regard to cash living expenses listed under subtitle "Cash Out" for the year 1980, the auditor included food, mortgage expense, aluminum siding, transportation and heating expense which totaled \$17,582.00. These figures are substantiated by taxpayers' Federal tax returns for the years in issue, the Federal Department of Labor Guidelines for food expense, and other records and documentation produced by the taxpayer. The heating expense was calculated by doubling the heating expense claimed for the rental property, which was one half of the taxpayers' residence.

7. For the tax year 1981, the Audit Division determined the following cash availability of petitioners:

1981  
CASH OUT

Deposit to the Seamen's Savings Bank	\$ 1,881.00
Deposit to the Seamen's Savings Bank	600.00
Deposit to the Seamen's Savings Bank	13,733.00
Cash Living Expenses	<u>16,604.00</u>
Total Cash Out	<u>\$32,818.00</u>

CASH IN

Check from Father	\$ 2,605.00
Federal Tax Refund	648.00
State Tax Refund	267.00
Wife's Salary - Net	3,408.00
Rental Income - Gross	3,300.00
Withdrawal from Seamen's Savings Bank	1,627.00
Withdrawal from Seamen's Savings Bank	1,300.00
Total Cash In	<u>\$13,155.00</u>
 Total Cash Out	 <u>32,818.00</u>
DIFFERENCE	<u><u>\$19,663.00</u></u>

Cash living expenses for the year 1981 were calculated by the Audit Division using the total cost of living from 1980, \$28,210.00, and subtracting checks written of \$11,606.00 to arrive at cash living expenses of \$16,604.00. However, the Audit Division included in this figure an expenditure for aluminum siding in the sum of \$2,400.00 which was not incurred in the year 1981. Therefore, the cash living expenses for the year 1981 should have been listed as \$14,204.00 and the total "Cash Out" figure should have been \$30,418.00. Hence, the differential and the amount ultimately underreported should have been \$17,263.00.

8. Petitioners' representative contends that changes made by the Audit Division prior to the issuance of the Statement of Personal Income Tax Audit Changes issued on January 11, 1984 and the issuance of the Notice of Deficiency dated March 26, 1984 were without justification.

CONCLUSIONS OF LAW

A. That section 689(e) of Article 22 of the Tax Law and section T46-189.0(e) of Title T of the Administrative Code of the City of New York both place the burden of proof upon petitioner, except in three specifically enumerated instances, none of which is applicable in this matter.

B. That petitioners have not sustained their burden of proof to show that during the years in question their cash living expenses did not equal those


determined by the Audit Division through taxpayer's own books and records. However, pursuant to Finding of Fact "5", the Audit Division erred in transcribing the withdrawals from Seamen's Savings Account #1-1622769. Said error failed to credit the taxpayer with \$3,000.00 in withdrawals. Pursuant to Finding of Fact "7", for tax year 1981, the Audit Division is directed to modify the cash living expenses by \$2,400.00, the value of the aluminum siding which was erroneously included in the cash living expenses for 1981 even though it was incurred in 1980.

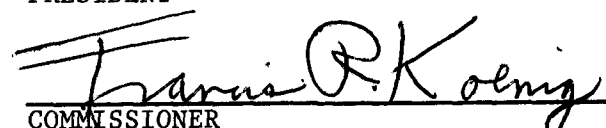
C. That the petition of Pedro and Vivian Alvarez is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to recompute the amount shown due on the Notice of Deficiency consistent with the conclusions reached herein; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER