

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Carl M. & Josephine Cropo : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
& Unincorporated Business Tax under Article(s) :
22 & 23 of the Tax Law for the Years 1979-1981. :

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 9th day of January, 1987, he/she served the within notice of Decision by certified mail upon Carl M. & Josephine Cropo the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl M. & Josephine Cropo
41 Bambi Lane
Rochester, NY 14624

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
9th day of January, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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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 9th day of January, 1987, he served the within notice of Decision by certified mail upon Robert F. O'Connell, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

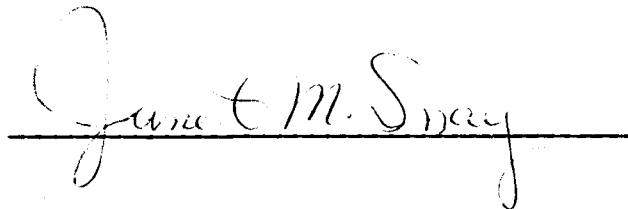
Robert F. O'Connell
Petralia, Webb & Bersani
811 First Federal Plaza
Rochester, NY 14614

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
9th day of January, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

January 9, 1987

Carl M. & Josephine Cropo
41 Bambi Lane
Rochester, NY 14624

Dear Mr. & Mrs. Cropo:

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:
Robert F. O'Connell
Petrallia, Webb & Bersani
811 First Federal Plaza
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CARL M. CROPO AND JOSEPHINE CROPO
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 1979, 1980 and 1981.

DECISION

Petitioners, Carl M. Cropo and Josephine Cropo, 41 Bambi Lane, Rochester, New York 14624, 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 1979, 1980 and 1981 (File No. 56722).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 4, 1986 at 1:15 P.M., with all briefs to be submitted by June 23, 1986. Petitioners appeared by Petralia, Webb & Bersani, P.C. (Robert F. O'Connell, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioners' liability for personal income tax and unincorporated business tax upon a sales tax audit of a service station owned and operated by Carl M. Cropo.

II. Whether the Audit Division issued the Notice of Deficiency herein to petitioners within the applicable period of limitations.

III. Whether reasonable cause exists for abatement of penalty asserted herein by the Audit Division.

FINDINGS OF FACT

1. On August 23, 1984, following an audit, the Audit Division issued to petitioners, Carl M. and Josephine Cropro, a Notice of Deficiency asserting additional New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law, respectively, in the amount of \$2,669.06, plus penalty and interest. The asserted deficiency was premised upon an understatement of income which was purportedly revealed during an audit by the Sales Tax Unit of the Audit Division (hereinafter "sales tax audit") of a service station owned and operated by petitioner Carl M. Cropro. The penalty asserted in the Notice of Deficiency was for negligence pursuant to section 685(b) of the Tax Law. The computation of the tax asserted due is summarized below.

(a) Personal Income Tax

	<u>1979</u>	<u>1980</u>	<u>1981</u>
Additional Income Per Sales Tax Audit	\$28,872.86	\$21,894.51	\$30,974.64
Net Operating Loss	--	--	20,981.00
Medical Adjustment	--	254.00	614.78
Standard Deduction	(500.00)	--	--
Net Adjustments	<u>28,372.86</u>	<u>22,148.51</u>	<u>52,570.42</u>
Taxable Income Previously Reported	<u>(8,791.00)</u>	<u>(20,226.00)</u>	<u>(39,270.00)</u>
Corrected Taxable Income	<u>\$19,581.86</u>	<u>\$ 1,922.51</u>	<u>\$13,300.42</u>
Corrected Tax Due	\$ 1,314.82	\$ 12.68	\$ 717.04

(b) Unincorporated Business Tax

Net Business Loss Reported	(\$ 5,275.00)
Additional Business Income Per Sales Tax Audit	28,872.86
Specific Exemption	(5,000.00)
Allowance for Services	(4,719.57)
Net Adjustment	<u>\$13,878.29</u>
Corrected Taxable Income	\$13,878.29
Corrected Unincorporated Business Tax Due	\$ 624.52

2. With respect to their New York adjusted gross income, petitioners' reported losses of \$5,491.00, \$13,428.00 and \$31,463.00 for the years 1979, 1980 and 1981 respectively.

3. Petitioners filed joint New York State personal income tax returns for the years 1979, 1980 and 1981 on May 27, 1980, June 17, 1981 and June 17, 1982, respectively. Petitioner Carl M. Cropo did not file an unincorporated business tax return for the year 1979.

4. During the years at issue, petitioner Carl M. Cropo¹ owned and operated a gasoline service station located at 895 East Main Street, Rochester, New York. In 1979, petitioner was affiliated with Texaco Oil Company and received his supply of gasoline, oil and tires, batteries and accessories ("TBA") from Texaco. Sometime during 1980, petitioner's relationship with Texaco was terminated and his gasoline supplier became Pal-Oil Company. At the same time, petitioner began making most of his purchases of TBA from Nu-Way Auto Parts. During the early part of the audit period, petitioner lost his contract with the Automobile Club of America ("AAA"), by which contract petitioner had provided service calls and towing services to AAA members and through which petitioner had gained a substantial portion of his repair work. The loss of the AAA contract therefore had a significant negative impact upon petitioner's gross sales of TBA and service. Petitioner was also the victim of thefts totalling approximately \$4,000.00 worth of gasoline and diesel fuel from his service station.

1 Josephine Cropo is a petitioner herein solely because she filed joint returns with her husband. She was in no way involved in the operation of the service station. Accordingly, all references to "petitioner" refer to Carl M. Cropo.

5. On audit for sales tax purposes, the Audit Division found no purchase invoices for petitioner's gasoline purchases for the year 1979. In addition, petitioner had no sales invoices for the same year. The Audit Division compared reported sales of gasoline for the period December 1, 1980 through November 30, 1981 with sales of gasoline as reported by petitioner's supplier, Pal-Oil Company. This comparison revealed a large discrepancy between sales as reported by petitioner and sales to petitioner as reported by Pal-Oil. In view of the foregoing inaccuracies in petitioner's books and records, the Audit Division determined petitioner's gasoline sales based upon purchase information furnished by petitioner's suppliers, Texaco and Pal-Oil. The gallonage information provided by the suppliers was then multiplied by selling prices as set forth in petitioner's daily sales books to arrive at gross sales.

6. With respect to petitioner's sales of service, oil and TBA, no sales invoices were available. Also, petitioner's purchases of TBA from Nu-Way Auto Parts, as reported by Nu-Way for the period October 1980 through May 1981, could not be reconciled with petitioner's reported sales of TBA during the same period. In light of the foregoing, the Audit Division estimated an additional \$6,000.00 in TBA sales per quarter throughout the sales tax audit period. The Audit Division based this estimate upon petitioner's average quarterly reporting of TBA sales from September 1978 through February 1979.

7. At a pre-hearing conference on the sales tax audit, the Audit Division reduced its estimate of additional taxable sales of TBA to \$3,000.00 per quarter in view of petitioner's loss of its AAA business. In addition, based upon the theft of \$4,000.00 worth of gasoline and diesel fuel, the Audit Division reduced petitioner's additional gross sales of gasoline by that amount. Finally, two other minor adjustments resulted in a reduction of

\$220.00 in additional sales tax due. In total, as a result of the conference, the Audit Division reduced the additional sales tax asserted due by \$2,600.00. Subsequent to this conference, petitioner withdrew his petition with respect to the sales tax assessment and consented to the fixing of tax at the adjusted amount.

8. Following the withdrawal of the petition, the Sales Tax Unit referred this matter to the Income Tax Unit of the Audit Division for audit. Utilizing the gross sales figures as adjusted at the conference and deducting petitioner's cost of goods sold, the Audit Division determined the personal income and unincorporated business tax asserted due in Finding of Fact "1".

9. Petitioner contended that his books and records were complete and accurate and that the Audit Division had therefore improperly utilized third party information on the sales tax audit. Petitioner also contended that the purchase information provided to the Audit Division by Pal-Oil was inaccurate because Pal-Oil had allegedly shorted him on its deliveries of gasoline. That is, the amount of gasoline actually delivered to petitioner was less than the amount listed on the invoice. Petitioner also contended that Pal-Oil had listed on its books sales of gasoline to petitioner which were never made. Such misrepresentations involved the purchase of thousands of gallons of gasoline. Pal-Oil was also purportedly investigated by the Monroe County District Attorney's office.

10. Petitioner further contended that certain governmental restrictions on gasoline allocations during the audit period would have precluded petitioner from purchasing gasoline in amounts as disclosed by Pal-Oil. Moreover, petitioner contended that his loss of Texaco as his supplier of gasoline resulted in fewer sales because of the loss of a national brand and credit card sales.

11. Petitioner also argued that the applicable period of limitations had expired with respect to 1979 prior to the issuance of the Notice of Deficiency, and that, therefore, such notice was untimely with respect to that year.

12. Petitioner relied on his accountant to prepare his tax returns during the years at issue. Petitioner's accountant was not in good health during this period. For these reasons, the Audit Division abated penalties asserted for petitioner's sales tax deficiency.

CONCLUSIONS OF LAW

A. That, in view of Findings of Fact "5" and "6", petitioner's records were inadequate and incomplete for purposes of verifying his gross sales. Under such circumstances, the Audit Division is authorized to determine income by whatever method will reflect the petitioner's income (see DiLando v. Commissioner, 34 T.C.M. [CCH] 1046, 1050).

B. That the audit methodology employed by the Audit Division herein was reasonable under the circumstances and the petitioner has failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to show wherein the audit results were erroneous. With respect to petitioner's contention that governmental restrictions would have precluded his purchase of amounts of gasoline as indicated by Pal-Oil, it is noted that petitioner introduced no evidence regarding the specifics of any such restrictions. Similarly, petitioner's contentions regarding an investigation of the activities of Pal-Oil by the District Attorney's office were unspecific. Finally, with respect to petitioner's claim that the purchase information provided by Pal-Oil was inaccurate, such allegations lacked specificity as to the total amount of the purported inaccuracies.

C. That, with respect to petitioner's contention regarding the period of limitations for assessment, section 683 of the Tax Law provides, in pertinent part:

"(a) General. -- Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed).

* * *

(d) Omission of income, ... -- The tax may be assessed at any time within six years after the return was filed if --

(1) an individual omits from his New York adjusted gross income ...an amount properly includible therein which is in excess of twenty-five per cent of the amount of New York adjusted gross income ...stated in the return".

D. That inasmuch as the Notice of Deficiency herein was issued more than three years after petitioner filed his 1979 and 1980 personal income tax returns, the notice will be considered timely with respect to those two years only if section 683(d) is properly applicable.

E. That section 612(a) of the Tax Law defines New York adjusted gross income as Federal adjusted gross income with certain modifications not relevant herein.

F. That sections 61 and 62 of the Internal Revenue Code define Federal adjusted gross income as all income from whatever source derived less certain deductions, none of which are relevant herein.

G. That Treasury Regulation §1.61-3(a) further defines gross income derived from business as follows:

"(a) In general. In a manufacturing, merchandising, or mining business, 'gross income' means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources".

H. That petitioner's omission of additional business income found on audit from his New York adjusted gross income stated on his personal income tax returns for each of the years 1979 and 1980 was in excess of twenty-five percent of the New York adjusted gross income stated on each such return. Specifically, for 1979, petitioner reported a loss of \$5,491.00 as his New York adjusted gross income. The Audit Division found \$28,872.86 in additional income on audit. In 1980, petitioner reported a loss of \$13,428.00 as his New York adjusted gross income. The Audit Division found \$21,894.51 in additional income on audit. In both instances, the omission clearly exceeded twenty-five percent of the reported amount. Accordingly, the relevant period of limitations for both 1979 and 1980 was six years. The Notice of Deficiency was therefore timely. Petitioner's contention that section 6501(e)(1)(A) of the Internal Revenue Code is properly applicable in this matter is rejected, for that section sets forth certain periods of limitation determined by omissions of gross income. Tax Law § 683(d) refers only to omission of New York adjusted gross income. Internal Revenue Code § 6501(e)(1)(A) is therefore inapplicable herein.


I. That, in view of Finding of Fact "12", petitioner has shown reasonable cause for the abatement of penalty herein.

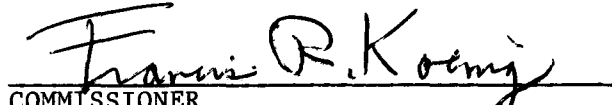
J. That the petition of Carl M. Cropro and Josephine Cropro is granted to the extent indicated in Conclusion of Law "I", and the Audit Division is directed to modify the Notice of Deficiency in accordance therewith; and except as so modified, the Notice of Deficiency, dated August 23, 1984, is in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER