

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Jack & Claire Scalici :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Years 1967 - 1969. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York  
County of Albany

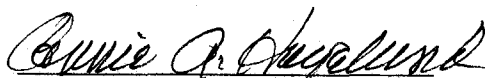
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Jack & Claire Scalici, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack & Claire Scalici  
136 Casewell Ave.  
Staten Island, NY 10314

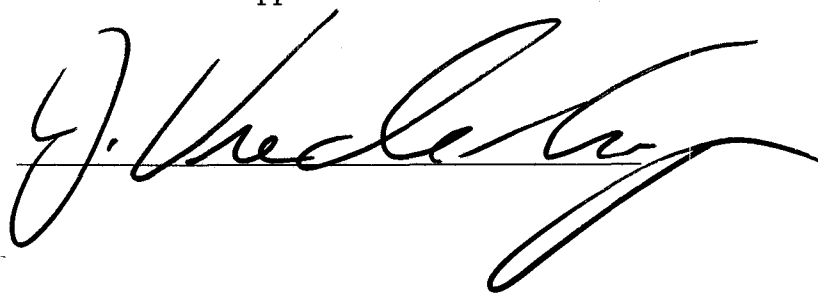
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
6th day of October, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Jack & Claire Scalici

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Years 1967 - 1969. :

State of New York  
County of Albany

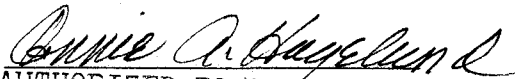
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Murray Selman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

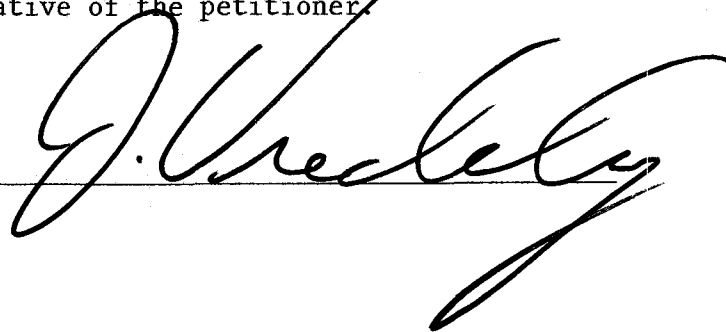
Murray Selman  
181 City Blvd.  
Staten Island, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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  
6th day of October, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

October 6, 1982

Jack & Claire Scalici  
136 Casewell Ave.  
Staten Island, NY 10314

Dear Mr. & Mrs. Scalici:

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) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Murray Selman  
181 City Blvd.  
Staten Island, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JACK SCALICI AND CLAIRE SCALICI	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1967,	:	
1968 and 1969.	:	

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Petitioners, Jack Scalici and Claire Scalici, 136 Casewell Avenue, Staten Island, New York 10314, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967, 1968 and 1969 (File No. 23775).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 10, 1981 at 2:45 P.M. Petitioners appeared with Murray Selman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether a Federal audit adjustment characterized as an "increase in gross receipts" is applicable to petitioners' business, thereby rendering such adjustment proper for unincorporated business tax purposes.

FINDINGS OF FACT

1. During the years 1967, 1968 and 1969, Jack Scalici and Claire Scalici (hereinafter petitioners) operated an unincorporated retail garden supplies business under the name of Natures Garden Center.

2. On July 27, 1977, the Audit Division issued a Statement of Audit Changes to petitioners for the years 1967, 1968 and 1969, wherein adjustments were made consistent with those final adjustments made by the Internal Revenue Service pursuant to a Federal audit. Such adjustments, which affected both petitioners' personal and unincorporated business tax liabilities, were made to items variously characterized by the Internal Revenue Service as gross receipts, rental income, purchases, truck repairs, insurance and medical.

3. On August 24, 1977, petitioners paid the additional personal income tax computed, but protested the proposed deficiency relating to certain adjustments affecting unincorporated business tax on the basis that the Federal adjustments were the result of a compromise settlement and were not actually related to the conduct of their business.

4. On April 20, 1978, a revised Statement of Audit Changes was issued to petitioners, wherein credit was given for the aforestated payment of personal income tax. Accordingly, a Notice of Deficiency was issued against petitioners on July 10, 1978 asserting unincorporated business tax of \$1,114.41, penalty of \$265.91 pursuant to section 685(e) of the Tax Law based on the determination that the deficiency for the year 1967 was due to fraud, penalty of \$140.44 pursuant to section 685(b) of the Tax Law based on the determination that the deficiency for the year 1969 was due to negligence, plus interest of \$1,550.93, for a total due of \$3,071.69. Said penalties were asserted to conform to penalties of an identical nature imposed by the Internal Revenue Code.

5. During the hearing held herein, petitioners contested the adjustment made to gross receipts. They argued that this adjustment was the total of an arbitrary adjustment computed based on a cost of living analysis and an adjustment for unexplained bank deposits, which they contended represented loans

received from family members. No documentary evidence was offered in support of said contention.

6. The only evidence contained in the record in support of the penalty asserted under section 685(e) of the Tax Law was a copy of the Federal audit report showing imposition of a similar penalty.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law provides that:

"In any case before the tax commission under this Article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

(1) Whether the petitioner has been guilty of fraud with intent to evade tax."

B. That petitioners have failed to sustain their burden of proof required pursuant to section 689(e) of the Tax Law to show that the Federal audit adjustment characterized as an "increase in gross receipts" was not applicable to petitioners' unincorporated business. Accordingly, said adjustment is hereby sustained.

C. That the Audit Division has failed to sustain its burden of proof required pursuant to section 689(e)(1) of the Tax Law to show that the deficiency for the year 1967 was due to fraud. Accordingly, said penalty is hereby cancelled.

D. That the petition of Jack Scalici and Claire Scalici is granted to the extent provided in Conclusion of Law "C", supra, and, except as so granted, said petition is in all other respects denied.

E. That the Audit Division is hereby directed to modify the Notice of Deficiency dated July 10, 1978 to be consistent with the decision rendered herein.

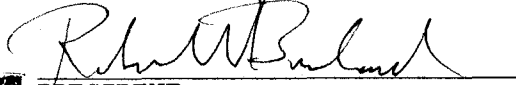
DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

**ACTING**

PRESIDENT

  
COMMISSIONER  
COMMISSIONER