

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Angelo Mamone : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for the :
Years 1967, 1970 - 1975. :

State of New York
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Angelo Mamone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Angelo Mamone
1289 Hobart Ave.
Bronx, NY 10461

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
24th day of January, 1983.

Kathy Pfaffenbach

Annunzio A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Angelo Mamone : AFFIDAVIT OF MAILING
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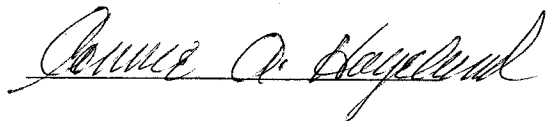
Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Robert L. Ellis the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert L. Ellis
310 Madison Avenue
New York, NY 10017

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
24th day of January, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Angelo Mamone
1289 Hobart Ave.
Bronx, NY 10461

Dear Mr. Mamone:

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, 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
Robert L. Ellis
310 Madison Avenue
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANGELO MAMONE

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1967 and the Years
1973 through 1975 and Unincorporated Business
Tax under Article 23 of the Tax Law for the
Years 1970 through 1975.

Petitioner, Angelo Mamone, 1289 Hobart Avenue, Bronx, New York 10461, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1967 and the years 1973 through 1975 and Unincorporated Business Tax under Article 23 of the Tax Law for the years 1970 through 1975 (File Nos. 19873 and 20837).

A formal hearing was held before Gasper S. Fasullo, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 24, 1981 at 11:00 A.M. Petitioner appeared by Robert L. Ellis, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner was a New York resident for personal income tax purposes during the years 1967 and 1973.

II. Whether petitioner is liable for income tax deficiencies for the years 1967 and 1973 through 1975.

III. Whether petitioner's activities as a gambler constituted the carrying on of an unincorporated business and therefore the income derived therefrom was subject to unincorporated business tax for the years 1970 through 1975.

IV. Whether the penalties asserted for the years at issue are correct.

FINDINGS OF FACT

1. On May 23, 1977, the Audit Division issued a Notice of Deficiency and Statement of Audit Changes against petitioner, Angelo Mamone, asserting personal income tax due for the year 1967, and unincorporated business tax due for the years 1970, 1971 and 1972 in the following amounts:

<u>Personal Income Tax</u>	<u>Year</u>	<u>Deficiency</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
	1967	\$ 283.00	\$ 70.75	\$ 154.61	\$ 508.36
<u>Unincorporated Business Tax</u>	1970	385.00	182.88	141.03	708.91
	1971	605.00	287.38	185.32	1,077.70
	1972	2,310.00	1,097.25	711.04	4,118.29
	TOTALS	\$3,583.00	\$1,638.26	\$1,192.00	\$6,413.26

The following explanation was provided:

"Since you did not file a 1967 return, your tax liability¹ has been computed from information on file in our office.

As you failed to submit information requested in our letters of September 20, 1974 and December 13, 1974 and have not established that miscellaneous income for 1970, 1971 and 1972 is not from an unincorporated business, income is held reportable for unincorporated business tax purposes.

Delinquency penalty is herein imposed under section 685(a) of the New York Tax Law for tax year 1967.

Delinquency penalties are herein imposed under section 685(a)(1) and (2) of the New York Tax law for tax years 1970, 1971 and 1972."

¹ The information on file included petitioner's 1967 United States income tax return.

2. On September 26, 1977, the Audit Division issued a Notice of Deficiency and Statement of Audit Changes against petitioner, asserting income taxes due for the years 1973, 1974 and 1975 and unincorporated business taxes due for the same three years, in the following amounts:

<u>Year</u>	<u>Personal Income Tax</u>	<u>Uninc. Bus. Tax</u>	<u>Total Deficiency</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1973	\$2,960.00	\$1,408.00	\$ 4,368.00	\$1,900.08	\$1,130.00	\$ 7,398.08
1974	47.40	1,408.00	1,455.40	124.78	803.00	1,883.18
1975	4,460.00	1,958.00	6,418.00	2,021.67	790.63	9,230.30
TOTALS	\$7,467.40	\$4,774.00	\$12,241.40	\$4,046.53	\$2,223.63	\$18,511.56

The following explanation was provided:

"Failure to submit information requested September 2, 1976 in connection with the filing of New York State income tax returns for the years 1973 and 1975 and details of your business activities for the years 1973 through 1975 inclusive results in ... holding the income from your business activities subject to the unincorporation (sic) business tax."

3. At the hearing, the Audit Division conceded that there was no personal income tax deficiency for the year 1974. However, no concession was made with reference to the penalty which was imposed for failing to file a declaration of estimated tax for 1974.

4. At the hearing, petitioner admitted that he was a resident of New York during the years 1967, 1970, 1971, 1972, 1974 and 1975. However, he claimed that he was a domiciliary and resident of Florida during the year 1973.

5. Petitioner did not file a New York State personal income tax return for the year 1967 but did file a United States income tax return for that year on which he stated that his home address was 1289 Hobart Avenue, Bronx, New York 10461.

6. Petitioner filed New York State personal income tax returns and United States income tax returns for the years 1970 and 1974.

7. Petitioner filed New York State personal income tax returns for the years 1971 and 1972.

8. Petitioner did not file New York State personal income tax returns for the years 1973 and 1975.

9. Petitioner did not file unincorporated business tax returns for the years 1970 through 1975.

10. In the New York State personal income tax returns filed by petitioner for the years 1970, 1971, 1972 and 1974, and in the United States income tax returns filed by petitioner for the years 1967, 1970 and 1974, petitioner listed his earnings on the line designated "Miscellaneous Income".

11. The Internal Revenue Service assessed a self-employment tax against petitioner for the year 1974 and petitioner paid said tax.

12. Petitioner was a gambler by occupation and played cards, dice, baccarat and other games of chance in clubs in New York and Las Vegas, and he testified that he had no other source of income during the years in issue.

13. There is nothing in the record to show that petitioner received income in exchange for rendering any services to others including "taking book" or serving as "the house" in gambling activities.

14. Petitioner kept no books or records as to his gambling activities and the income derived therefrom, and at the hearing did not offer any documentary proof with respect thereto.

15. Petitioner denies any income tax is due for the year 1973 since he asserts that he was a resident and domiciliary of the State of Florida during that year.

16. Petitioner testified that he and his wife and two children moved to Florida in January, 1973 (he was uncertain of the specific date) with the intent

to remain there permanently, but then returned to his former home in the Bronx, New York in or about the month of February, 1974 "on a full-time basis" to prepare his defense to a criminal action pending against him.

17. Prior to moving to Florida, petitioner owned a home in the Bronx which he did not sell but kept vacant until his return to New York in February, 1974.

18. When he moved to Florida petitioner took with him all of the furniture situated in his Bronx home; he rented an apartment in Ft. Lauderdale, Florida for the first three months of his stay in Florida and he then purchased a home there; and during 1973 he returned to New York "four or five times" and on each occasion he remained in New York "for a day or two".

19. Petitioner offered no proof at the hearing that during his stay in Florida in 1973 he registered his automobile in that State, changed his voter registration, changed his driver's license, etc.

20. Petitioner was incarcerated in prison from May 1975 through March 1979.

CONCLUSIONS OF LAW

A. That Tax Law section 681(a) provides in part as follows:

"If a taxpayer fails to file an income tax return required under this Article, the tax commission is authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of deficiency to the taxpayer."

Therefore, it was proper for the Audit Division to estimate petitioner's New York taxable income and tax thereon for the year 1967 based on the information in the Audit Division's possession, including petitioner's United States income tax return for 1967, since petitioner failed to file a New York State personal income tax return for such year. Petitioner conceded that he

was domiciled in and a resident of New York during the year 1967 and therefore was liable for New York State personal income tax for the 1967 taxable year.

B. That since the Audit Division conceded that there was no personal income tax deficiency for the year 1974, the personal income tax for said year is cancelled. However, the penalty imposed pursuant to section 685(c) of the Tax Law is sustained, since petitioner has failed to show he qualified for one of the exceptions enumerated under section 685(d) of the Tax Law.

C. That a domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. Petitioner has not met his burden of proof under Tax Law section 689(e) to show that he became a Florida domiciliary when he moved to Florida in January, 1973. Petitioner offered no proof at the hearing that during his stay in Florida in 1973 he registered his automobile in Florida, changed his voter registration, or obtained a Florida driver's license. In addition, he did not sell his home in the Bronx prior to moving to Florida and, in fact, he later returned to it in February, 1974.

D. That pursuant to 20 NYCRR §102.2(b) any person domiciled in New York is a resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the following requirements: (1) he maintains no permanent place of abode in New York during such year, (2) he maintains a permanent place of abode elsewhere during such entire year, and (3) he spends in the aggregate not more than 30 days of the taxable year in this State. Since petitioner has failed to sustain his burden of proof under Tax Law section 689(e) to show that he has satisfied all three of the aforementioned requirements, he is deemed to have been a resident of New York during the entire year 1973. Therefore, he is liable for New York personal income tax for the 1973 taxable year.

E. That under Tax Law section 681(a), it was proper for the Audit Division to estimate petitioner's New York taxable income and to calculate his personal income tax liability thereon for the years 1973 and 1975 since petitioner failed to file income tax returns for such years. It is noted that petitioner has not offered any documentary or other evidence to contradict the estimated figures used by the Audit Division. However, since petitioner was incarcerated in prison for approximately 8 months during the 1975 taxable year, it is reasonable to estimate petitioner's income for the 1975 taxable year by using one-third of petitioner's 1974 income. Therefore, the Audit Division is directed to recalculate petitioner's personal income tax deficiency for 1975.

F. That 20 NYCRR §203.1(a)² provides in part as follows:

"(A)n unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual ... In general, the trades, businesses or occupations which constitute an unincorporated business when conducted or engaged in ... by an individual ... included, without limitation, all phases of such activities as mining, farming, manufacturing and processing, merchandising, banking and financing, trucking and other transportation services, brokerage services of all types and any other activity which involves the leasing of or trading or dealing in real or personal property or the performing of services of any kind. Where a doubt as to the status of an activity exists, all the relevant facts and circumstances must be considered in determining whether the activity or the transactions involved constitute a trade, business or occupation for the purposes of this section..."

G. That the unincorporated business tax "was intended as a corollary to the previously existing franchise tax on corporate business and their cumulative effect is to subject to taxation all income derived from carrying on business

² This regulation became effective February 1, 1974. We note that some of the years at issue in this proceeding are prior to this effective date. However, the regulation reflects prior policy of the State Tax Commission.

within the State as distinguished from income from other sources." Moffett v. Bates, 276 A.D.38, aff'd. 301 N.Y. 597.

Playing cards, dice, baccarat and other games of chance does not constitute an unincorporated business within the meaning and intent of the aforesaid regulation or of Tax Law section 703. Therefore, petitioner's income from such gambling activities was not subject to unincorporated business tax.

H. That since petitioner had reasonable cause for failing to file a personal income tax return for the 1973 taxable year, penalties imposed on the personal income tax deficiency for such year are cancelled. However, petitioner did not establish that his failure to file personal income tax returns for the 1967 and 1975 taxable years was due to reasonable cause and not willful neglect.

I. That the petition of Angelo Mamone is granted to the extent noted in Conclusions of Law "B", "E", "G", and "H"; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER