

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
ESTATE OF PAUL D'AURIA &
ESTATE OF ANNA D'AURIA
(JAMES D'AURIA, ADMINISTRATOR)
For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Personal Income & Unincorporated Business
Taxes under Article(s) 22 and 23 of the
Tax Law for the Year(s) ~~or Period(s)~~ 1965;
1966, 1967 and 1968.

AFFIDAVIT OF MAILING

State of New York
County of Albany

John Huhn, 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 13th day of September, 1978, she served the within
Notice of Decision by (certified) mail upon Estate of Paul D'Auria
Estate of Anna D'Auria

(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Estate of Paul D'Auria
Estate of Anna D'Auria
c/o James D'Auria, Administrator
163-45 95th St.
Howard Beach, NY 11414
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~~
~~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

13th day of September, 1978

J.P. Walker
22

John Huhn

STATE OF NEW YORK
STATE TAX COMMISSION

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of
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ESTATE OF ANNA D'AURIA
(JAMES D'AURIA, ADMINISTRATOR)
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Taxes under Article(s) 22 and 23 of the
Tax Law for the ~~Year(s) or~~ Period(s)
1965, 1966, 1967 and 1968.

AFFIDAVIT OF MAILING

State of New York
County of Albany

John Huhn, 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 13th day of September, 1978, he served the within
Notice of Decision by (certified) mail upon Jesse Fishkin, Esq.

(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Jesse Fishkin, Esq.
250 Fulton Avenue
Hempstead, New York 11550

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

13th day of September, 1978.

V. P. Walker
notary

John Huhn



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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

September 13, 1978

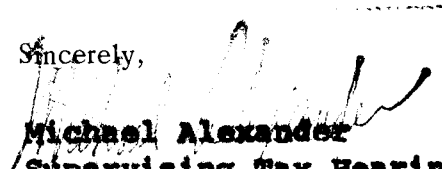
**Estate of Paul D'Auria and
Estate of Anna D'Auria
c/o James D'Auria, Administrator
163-45 95th St.
Howard Beach, NY 11414**

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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


Michael Alexander
Supervising Tax Hearing
Officer

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ESTATE OF PAUL D'AURIA :
and :
ESTATE OF ANNA D'AURIA :
(JAMES D'AURIA, ADMINISTRATOR) :
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 1965, 1966, 1967 and 1968. :
:

A formal hearing was held before Neil Fabricant, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 9, 1976 at 1:15 P.M. Petitioner appeared by Jesse Fishkin, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Louis Senft, Esq., of counsel).

I. Whether the amount of cash found in safety deposit boxes rented by Paul and Anna D'Auria was \$385,687.36 or \$283,970.00.

II. Whether the cash discovered in the safety deposit boxes constituted unreported business income of Paul D'Auria which was subject to unincorporated business tax and whether it also constituted unreported income of Paul D'Auria and Anna D'Auria which was subject to personal income tax.

III. Whether the Income Tax Bureau properly allocated the amounts found in decedents' safety deposit boxes to the taxable years 1965 through 1968 for unincorporated business tax and personal income tax purposes.

IV. Whether the notices of deficiency issued against petitioners were barred by the statute of limitations.

FINDINGS OF FACT

1. On May 20, 1974, the Income Tax Bureau issued a Notice of Deficiency against the Estates of Paul and Anna D'Auria for the years 1965 through 1968 in the amount of \$38,928.19, plus interest of \$15,140.49, for a total of \$54,068.68. This notice was issued on the grounds that currency discovered in two safety deposit boxes constituted unreported income which was subject to personal income tax. The deficiency of personal income tax was determined by apportioning \$385,687.36 (the total currency claimed by the Bureau to have been discovered in the two safety deposit boxes) in equal amounts of \$96,421.84 each, to the years 1965, 1966, 1967 and 1968.

2. On May 20, 1974, the Income Tax Bureau also issued a Notice of Deficiency against the Estate of Paul D'Auria for the years 1965 through 1968 in the amount of \$15,123.81, plus interest of \$5,869.63, for a total of \$20,993.44. This notice was issued on the grounds that currency discovered in two safety deposit boxes constituted unreported business income of Paul D'Auria from his jewelry business and was subject to unincorporated business tax for the years 1965 through 1968. The deficiency of unincorporated business tax for the years 1965 through 1968 was determined by allocating \$96,421.84 to each of said years.

3. Anna D'Auria died on September 21, 1968 at the age of 72.

4. Paul D'Auria died on November 16, 1969 at the age of 79.

5. On August 19, 1970, two safety deposit boxes maintained by Anna and Paul D'Auria were opened in the presence of bank officials, a representative of the State Tax Commission, James D'Auria, Administrator for the Estates of Paul and Anna D'Auria, and his attorney. The box maintained at Chase Manhattan Bank, Richmond Hill, New York (hereinafter the "Chase" box) contained \$79,000.00 in currency. The box maintained at the Columbia Savings and Loan Association, Woodhaven, New York (hereinafter the "Columbia" box), contained \$204,970.00 in currency. The total amount of currency found in the two boxes was \$283,970.00, rather than \$385,687.36 as contended by the Income Tax Bureau.

6. The Chase box was not visited from the date of its initial rental, September 11, 1962, until the box opening on August 19, 1970.

7. The Columbia box was visited only once from the date of its initial rental, September 6, 1962, until the box opening on August 19, 1970 and that was by Anna D'Auria and Paul D'Auria on August 20, 1968.

8. Unsigned photocopies of New York State income resident returns (purported to be joint returns) were submitted for Paul D'Auria and Anna D'Auria for the years 1965 and 1966. The 1965 New York return, listed Paul D'Auria's occupation as jeweler and reported thereon interest income of \$1,957.10 and income from pensions and annuities, rents and royalties, partnerships and estates or trusts of \$1,603.96, for a total of \$3,561.06. On the 1966 New York return, Paul D'Auria and Anna D'Auria reported total Federal income of \$11,148.13, consisting of interest income of \$9,349.21 and income from pensions and annuities, rents and royalties, partnerships and estates or trusts of \$1,798.92. The amount of total Federal income of \$11,148.13 was reduced on said return by a subtraction of \$7,623.20 (for interest income derived from United States government bonds) in arriving at the total New York income reported thereon of \$3,524.93. The 1967 and 1968 joint New York State income tax resident returns filed for Paul D'Auria and Anna D'Auria indicated that Paul D'Auria was retired in both years and that their income for said years of \$3,278.95 and \$3,014.87, respectively, was derived solely from interest income.

9. Paul D'Auria was carrying on a jewelry business as a sole proprietor from about 1927 to about 1962. In 1962 Paul D'Auria made his son, James D'Auria, a partner in the jewelry business, although no certificate of doing business as a partnership was filed in any county clerk's office. The partnership continued from 1962 until 1966 when Paul D'Auria retired. New York partnership returns were timely filed for said years. Paul D'Auria was not engaged in any business subsequent to the year 1966.

10. James D'Auria testified that he had no idea as to the profits derived from the jewelry business partnership as his father took care of the business records; that each of them drew \$125.00 a week from the partnership; that he did not otherwise share in the partnership profits, and that the checking account for the partnership was maintained in his father's name.

11. The decedents' New York State income tax returns for the years 1967 and 1968 were timely filed.

12. Petitioners offered no explanation as to the source of the currency discovered in the safety deposit boxes or the dates upon which said currency was obtained.

13. The Income Tax Bureau did not advance a claim of fraud until the closing argument at the formal hearing.

14. At the formal hearing, the attorney for the Income Tax Bureau stated that "...due to the decease of Paul D'Auria, no interest is claimed by the State."

CONCLUSIONS OF LAW

A. The Income Tax Bureau did not sustain the burden of proof under section 689(e)(1) of the Tax Law to show such fraud as would permit the assessment of tax at any time in accordance with section 683(c)(1)(B) of the Tax Law.

B. That in view of the showing that partnership returns were filed for the years 1962 through 1966, and in the absence of a showing of fraud, the Notice of Deficiency issued against Paul D'Auria for unincorporated business tax for the years 1965 and 1966 is barred by the limitation on assessment provided by section 683(a) of the Tax Law.

C. That since Paul D'Auria retired in 1966 and was not subsequently engaged in any business thereafter, none of the currency found in the safety deposit boxes constituted unreported business income of Paul D'Auria for the years 1967 and 1968. Accordingly, the Notices of Deficiency in unincorporated business tax issued for the years 1967 and 1968 should be cancelled.

D. That petitioners have not sustained the burden of proof required under section 689(e) of the Tax Law to show that the currency discovered in the two safety deposit boxes did not constitute unreported accumulated income of Paul D'Auria and Anna D'Auria. They particularly failed to show that the \$204,970.00 in cash found in the Columbia box was not placed therein when it was visited by Paul D'Auria and Anna D'Auria on August 20, 1968, that said cash represented other than unreported income, or that it was not attributable to income earned

during the years 1965 through 1968. Thus, said cash constituted unreported income of the decedents which was properly allocable to the years 1965 through 1968. However, since the Chase box was not visited by Paul D'Auria or Anna D'Auria after its initial rental on September 11, 1962, the \$79,000.00 in cash discovered therein must have been placed in the box in 1962 and presumable represented unreported accumulated income from undetermined sources for that year and perhaps the years prior thereto. Therefore, in the absence of a showing of fraud, the Notice of Deficiency in personal income tax is untimely as to such sum and must be modified accordingly.

E. That the unsigned photocopies of 1965 and 1966 New York State Income Tax Resident Returns submitted for Paul D'Auria and Anna D'Auria did not constitute returns for said years within the meaning and intent of section 653(a) of the Tax Law and 20 NYCRR 147.1. Accordingly, the Notice of Deficiency in personal income tax for the years 1965 and 1966 is not barred by any period of limitation on assessment (section 683(c)(1)(A) of the Tax Law).

F. That although petitioners are deemed to have had unreported income in excess of twenty-five percent of the New York adjusted gross income reported for 1967 and 1968, only the portion of the deficiency asserted against petitioners with respect to 1968 was timely within the 6 year period of limitation prescribed by section 683(d) of the Tax Law. The Notice of Deficiency (which was issued May 20, 1974) was not timely as to petitioners' 1967 return.

G. That the fact that an individual is deceased does not free his estate from liability for interest due on an underpayment imposed by section 684 of the Tax Law. Moreover, the State Tax Commission does not have the authority to waive such interest. Accordingly, interest is to be computed on the deficiency, as modified by this decision.

H. That the petition of the Estate of Paul D'Auria and the Estate of Anna D'Auria is granted to the extent of cancelling the Notice of Deficiency of unincorporated business tax issued against Paul D'Auria in accordance with Conclusions of Law "B" and "C" above; that the Notice of Deficiency of personal income tax is cancelled insofar as it pertains to the year 1967, in accordance with Conclusion of Law "F" above; that the Notice of Deficiency of personal income tax is modified to reduce the amounts deemed unreported income subject to personal income tax for each of the years 1965, 1966 and 1968 to be \$51,242.50, plus interest.

DATED: Albany, New York

September 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER