

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HAROLD PHOENIX

:

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax and Unincorpor-
ated Business Tax under Articles 22 and 23 of :
the Tax Law for the Years 1978 and 1979.

Petitioner, Harold Phoenix, 608 Valley Road, Brooktondale, New York 14817,
filed a petition for redetermination of a deficiency or for refund of personal
income tax and unincorporated business tax under Articles 22 and 23 of the Tax
Law for the years 1978 and 1979 (File No. 39834).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of
the State Tax Commission, 333 East Washington Street, Syracuse, New York, on
December 2, 1985 at 1:45 P.M., with all briefs and documents to be filed by
January 20, 1986. Petitioner appeared pro se. The Audit Division appeared by
John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that petitioner owed
additional personal income tax and unincorporated business tax based upon an
analysis of petitioner's sales and purchases.

11. Whether the Audit Division properly asserted a penalty for negligence.

FINDINGS OF FACT

1. During the periods in issue petitioner, Harold Phoenix, operated a
small grocery store in Slaterville Springs, New York. Mr. Phoenix also sold
gasoline at this location.

2. Mr. Phoenix filed separately, with his wife, New York State income tax resident returns for the years 1978 and 1979. For the same years, he also filed a New York State Unincorporated Business Tax Return.

3. On July 9, 1982, as the result of a field audit, the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of personal income tax and unincorporated business tax for the years 1978 and 1979 in the amount of \$11,636.75 plus penalty for negligence of \$589.64 and interest of \$3,201.16 for a total amount due of \$15,427.55.

4. In order to determine the amount of the business's gross sales the Audit Division started with the gross sales as shown on the business's books and added back the sales tax reflected on petitioner's books to calculate the gross receipts per books. The Audit Division then subtracted the sales tax shown on Mr. Phoenix's sales tax returns to determine corrected gross sales. Thereafter this amount was reduced by the gross sales reported on the income tax returns to determine the amount of the adjustment in gross sales for each of the years in issue. The foregoing computations resulted in an adjustment to gross sales of \$6,213.00 for the year 1978 and minus \$5,203.00 for the year 1979.

5. The Audit Division also conducted an examination of petitioner's cost of goods sold. At the outset, the Audit Division found that petitioner's accountant had made unsupported adjusting entries in petitioner's books. Specifically, petitioner did not have as much money in the bank as his records would indicate. Therefore, the accountant made the assumption that the reason petitioner had less money in the bank was because petitioner made additional purchases of merchandise. On the basis of the unsupported adjusting entries, the Audit Division concluded that a recomputation of purchases was warranted

In order to compute the business's purchases the Audit Division, utilizing petitioner's records, added the amounts spent on merchandise for sale per the disbursements journal, lottery tickets, other merchandise, gas purchases and the respective increases in accounts payable for the years in issue. The total was then reduced by errors found in petitioner's records and personal withdrawals. The remainder per year was then increased by the amount of petitioner's purchases by bank draft to calculate the corrected net purchases. The purchases reflected on petitioner's income tax return were then subtracted by the amount of the corrected net purchases to determine the reduction of purchases for the years in issue. These calculations resulted in a reduction of purchases of \$27,335.00 for the year 1978 and \$38,913.00 for the year 1979.

6. The asserted deficiencies of personal income tax and unincorporated business tax were premised upon the changes found on audit in sales and purchases. However, the Audit Division allocated all of the income from the business to Mr. Phoenix since he operated the grocery store as a sole proprietorship. Further the Audit Division reallocated the standard deduction between Mr. and Mrs. Phoenix to petitioner's advantage and, for the year 1979, calculated an additional amount as a standard deduction based upon the finding of increased income.

7. Mr. Phoenix's books and records were reviewed by a certified public accountant and his tax returns were prepared by the certified public accountant on the basis of these records.

8. At the hearing, petitioner maintained that he did not feel the business earned as much income as was attributed to it by the Audit Division. However, he was unable to identify any portion of the audit which he believed was conducted erroneously.

CONCLUSIONS OF LAW

A. That, with three exceptions which are not pertinent herein, the burden of proof is upon the petitioner to establish that the asserted deficiency is erroneous (Tax Law §§689(e); 722). Petitioner has not presented any basis warranting a cancellation or modification of the amount asserted to be due. Accordingly, the amount of tax asserted to be due is sustained.

B. That in view of petitioner's reliance upon his accountant to review his books and records and to prepare his tax returns therefrom and in view of the fact that a substantial portion of the asserted deficiency appears to have arisen from adjustments to petitioner's purchase records which petitioner did not initiate, it is found that petitioner did not act with negligence or intentional disregard of Articles 22 or 23 of the Tax Law. Accordingly, the penalty imposed pursuant to sections 685(b) and 722 of the Tax Law is cancelled.

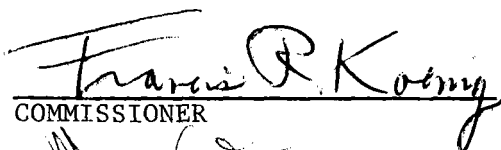
C. That the petition of Harold Phoenix is granted to the extent of Conclusion of Law "B" and the Audit Division is directed to modify the Notice of Deficiency accordingly; as modified, the Notice of Deficiency is, in all respects, sustained.

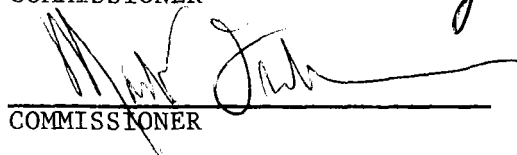
DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER