

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

THUEY WAH CHIN

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law and Chapter 46, Title T of the  
Administrative Code of the City of New York  
for the Years 1976 through 1980.

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In the Matter of the Petition

of

SHEW S. TOM

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law and Chapter 46, Title T of the :  
Administrative Code of the City of New York  
for the Years 1976 through 1980.

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In the Matter of the Petition

Of

YAT BUN SING, INC.

for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Articles 9-A and 27 of the Tax Law for the  
Years 1978 through 1980.

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Petitioners, Thuey Wah Chin, 46 Mulberry Street, New York, New York 10013  
and Shew S. Tom, 52-03 69th Place, Maspeth, New York 11378, filed petitions for  
redetermination of deficiencies or for refunds of personal income tax under  
Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of

the City of New York for the years 1976 through 1980 (File Nos. 43943 and 43949).

Petitioner Yat Bun Sing, Inc., c/o Thuey Wah Chin, 46 Mulberry Street, New York, New York 10013, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Articles 9-A and 27 of the Tax Law for the years 1978 through 1980 (File No. 45295).

A consolidated hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 21, 1985 at 10:00 A.M. Petitioners appeared by Bernard Halpern, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

#### ISSUES

I. Whether petitioner Yat Bun Sing, Inc. filed a petition for a hearing with the State Tax Commission within 90 days of the mailing of notices of deficiency issued pursuant to Article 9-A of the Tax Law.

11. Whether the Audit Division properly used the results of a sales tax audit to adjust petitioners' corporation franchise taxes and personal income taxes without performing an independent audit.

#### FINDINGS OF FACT

1. On October 18, 1982, the Audit Division issued three notices of deficiency pursuant to Article 9-A of the Tax Law against petitioner Yat Bun Sing, Inc. ("the corporation") as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total Due</u>
12/31/78	\$2,953.00	\$1,199.00	\$4,152.00
12/31/79	\$ 594.00	\$ 191.00	\$ 785.00
12/31/80	\$1,101.00	\$ 260.00	\$1,361.00

2. On February 2, 1983, the Audit Division issued two notices of deficiency against petitioner Shew S. Tom asserting personal income tax due in the amount of \$3,834.00, plus interest of \$1,603.83, for a total due of \$5,437.83 for the years 1976 through 1980. On the same date, the Audit Division issued two notices of deficiency against petitioner Thuey Wah Chin asserting personal income tax due in the amount of \$6,081.00, plus interest of \$5,585.29, for a total due of \$11,666.29 for the years 1976 through 1980.

3. Petitioners Shew S. Tom and Thuey Wah Chin each filed timely protests of the aforementioned notices. With respect to petitioner Yat Bun Sing, Inc., the first correspondence protesting its notices of deficiency was a note typed on a payment document originally issued by the Audit Division which the corporation sent to the Tax Appeals Bureau on or about May 27, 1983. The note stated, "Above amounts not due. Taxpayer objected to assessment." No evidence of an earlier protest with respect to the corporation was offered by petitioners.

4. The corporation operated a Chinese restaurant in New York City. Mr. Chin was the president and Mr. Tom was the secretary-treasurer. Mr. Chin worked full time at the restaurant and Mr. Tom worked part time as a waiter. Petitioners sold the business in August, 1980.

5. The Audit Division conducted a sales tax audit of the business for the period March 1, 1976 through August 31, 1980. The auditor performed markup tests on the corporation's purchases for February, 1980 comparing them to the March, 1980 selling prices. The auditor computed markups of 318 percent on wine and liquor, 201 percent on beer, 30.8 percent on cigarettes and 150 percent on soda. Based on markups computed on a prior audit, the auditor adjusted the liquor markup to 300 percent and set the markup on food sales at 80 percent. The markups were applied to purchases for the audit period to

determine total taxable sales for the period. The auditor also performed an overcollection test and found that \$314.39 in tax was overcollected during the audit period and not remitted to the Department of Taxation and Finance.

Petitioners agreed to the results of the sales tax audit and paid the assessment.

6. Subsequently, the sales tax audit results were used to adjust petitioner corporation franchise tax and personal income tax due. The additional sales found for sales tax purposes were applied as additional gross sales for corporation franchise tax purposes and the tax for the corporation was increased by an appropriate amount. It was then assumed that Mr. Chin and Mr. Tom were each 50 percent shareholders in the corporation and one-half of the additional gross sales were attributed to each of them as constructive dividends which increased their respective personal income taxes accordingly.

7. Petitioners offered no evidence to refute the sales tax audit findings but objected to their use for corporation franchise and personal income tax purposes. However, with respect to the corporation, petitioners offered no evidence that it had additional cost of goods sold or other deductions that would partially offset the additional sales found on audit.

8. With respect to Mr. Chin and Mr. Tom, evidence was produced indicating that there were other shareholders of the corporation and that Mr. Chin held 6 of 73 shares outstanding, or 8 percent, and Mr. Tom held 4 of 73 shares outstanding, or 5 percent. The additional gross sales of the corporation for the years in issue were as follows:

<u>Year</u>	<u>Additional Sales</u>
1976	\$23,963.00
1977	\$28,694.00
1978	\$29,526.00
1979	\$20,806.00
1980	\$11,004.00

Applying Mr. Chin's and Mr. Tom's respective percentage interests in the corporation to the additional sales results in additional income to each as follows:

<u>Year</u>	<u>Mr. Chin</u>	<u>Mr. Tom</u>
1976	\$1,917.04	\$1,198.15
1977	\$2,295.52	\$1,434.70
1978	\$2,362.08	\$1,476.30
1979	\$1,664.48	\$1,040.30
1980	\$ 880.32	\$ 550.20

CONCLUSIONS OF LAW

A. That section 1089(b) of the Tax Law provides, in part, that within 90 days after the mailing of a Notice of Deficiency of corporation franchise tax, a taxpayer may file a petition with the Tax Commission for a redetermination of the deficiency. With respect to the corporation, since the first communication which could be construed as a petition was not filed until May 27, 1983, over four months late, the corporation's petition for a hearing is denied.

B. That where there is some factual basis for deciding that the tax returns as filed do not accurately reflect the true income received by a taxpayer, the Audit Division may determine proper income using indirect methods. See Holland v. United States, 348 U.S. 121, 131-132. The sales tax audit conducted by the Audit Division revealed additional sales tax due from the corporation. Such a determination provided a factual basis for deciding that the income reported by petitioners on their corporation franchise tax reports and personal income tax returns was not accurate and, thus, the Audit Division properly used the sales tax audit findings to calculate corporation franchise and personal income tax. No provision of the Tax Law or regulations precludes the Audit Division from utilizing the results of an audit conducted under one

article of the tax law in an audit conducted under another article. See  
Matter of Castaldo, State Tax Commission, February 15, 1985.

C. That inasmuch as Mr. Chin and Mr. Tom owned only eight percent and five percent, respectively, of the stock of the corporation, their constructive dividends should have been determined based on those percentages. Therefore, the personal income tax liability of petitioners Thuey Wah Chin and Shew S. Tom is to be recomputed utilizing additional income amounts based on their respective interests in the corporation as discussed in Finding of Fact "8".

D. That the petition of Yat Bun Sing, Inc. is denied and the notices of deficiency issued October 18, 1982 are sustained.

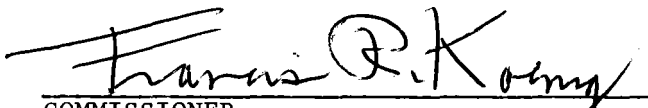
E. That the petitions of Thuey Wah Chin and Shew S. Tom are granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to modify the notices of deficiency issued February 2, 1983 accordingly; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER