

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LAWRENCE DORAN

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1979, 1980 and 1981.

Petitioner, Lawrence Doran, 15 Capel Drive, Dix Hills, New York 11146,
filed a petition for redetermination of a deficiency or for refund of personal
income tax under Article 22 of the Tax Law for the years 1979, 1980 and 1981
(File No. 44013).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on June 5, 1985 at 1:15 P.M. Petitioner appeared by Schooler, Weinstein,
Minsky & Lester, P.C. (Michael H. Lester, C.P.A.). The Audit Division appeared
by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly recomputed petitioner's tax
liability for the years 1979, 1980 and 1981 by including as additional taxable
income the undistributed income of two Subchapter S corporations owned solely
by petitioner.

II. Whether the expiration of the federal statute of limitations prevents
New York State from assessing additional tax due.

FINDINGS OF FACT

1. On February 9, 1983, a Notice of Deficiency was issued to petitioner,

years 1979, 1980 and 1981 in the amount of \$103,454.00, plus penalty of \$5,172.00 and interest of \$23,900.91, for a total due of \$132,526.91.

2. Petitioner timely filed State of New York resident income tax returns for the taxable years 1979, 1980 and 1981 reporting taxable income of \$13,337.00, \$31,437.00 and \$26,174.00, respectively. On April 12, 1984, he filed an amended return for the year 1980 reporting a taxable income of \$18,415.00.

3. Petitioner is the 100 percent shareholder of two Subchapter S corporations Doran Service Station, Inc. and Jolan Service Center, Ltd. Audits of the two corporations disclosed unreported gross sales by each for the years 1979, 1980 and 1981. These audit results were used to adjust petitioner's reported taxable income by treating the additional corporate income from unreported sales as a constructive dividend paid, or payable, to the petitioner. An adjustment was also made for unreported interest income from savings accounts for the year 1980.

4. At a pre-hearing conference held before the Tax Appeals Bureau in the Mineola District office on December 30, 1983, the petitioner produced additional information and records not previously available to the auditor. As a result, the Audit Division conceded that the net income of the two corporations should be adjusted and the deficiency against the petitioner reduced to \$15,926.00 plus penalty and interest.

5. Petitioner agrees with the audit results, but he disputes the Audit Division's position that any additional net income from the Subchapter S corporations may be treated as a constructive dividend payable to him as the 100 percent shareholder of the corporations. Primarily, he contends that since New York State did not recognize the Subchapter S corporation for franchise tax purposes during the years in issue, it cannot recognize constructive dividend

basis of a pass-through from the corporation to the individual. He asserts that the Audit Division must perform a cost of living analysis or net worth analysis to determine whether or not he had additional unreported income for the years in issue. In addition, he argues that the expiration of the federal statute of limitations precludes the State from assessing additional income taxes predicated upon what he perceives to be an adjustment of his federal gross income.

CONCLUSIONS OF LAW

A. That under section 612 of the Tax Law, New York adjusted gross income means the federal adjusted gross income as defined in the laws of the United States for the taxable year. Pursuant to sections 1373(a) and (b) of the Internal Revenue Code, petitioner was required to include in his gross income the undistributed income of Doran Service Station, Inc. and Jolan Service Center, Ltd. During the years in issue, section 612 allowed no modification to exclude for New York State purposes the undistributed Subchapter S income which was includible for federal purposes. A resident's taxable income included such undistributed profits even though those profits were also includible in the tax base of the corporation (Matter of Marcus D. and Lois B. Grayck, State Tax Commission, November 18, 1970). There is no support for petitioner's contention that during the years in issue New York did not treat undistributed Subchapter S income as personal income to a shareholder. Moreover, petitioner has not met his burden under section 689(e) of the Tax Law of proving that the deficiency asserted was incorrect.


B. That section 683 of the Tax Law provides, inter alia, that any tax under Article 22 shall be assessed within three years after the return was filed. The Audit Division fully complied with this time limitation by issuing the notice of deficiency (section 681(b) of the Tax Law) in 1971.

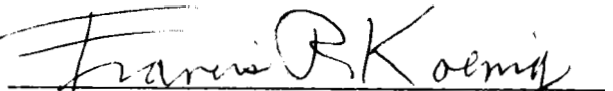
C. That the petition of Lawrence Doran is denied and the Notice of Deficiency issued February 9, 1983, as modified (see Finding of Fact "4"), is sustained.

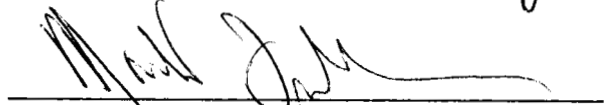
DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER