

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

THOMAS J. BRETSCHER AND DOLORES M. BRETSCHER

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1981 and 1982.

Petitioners, Thomas J. Bretscher and Dolores M. Bretscher, Pine Hill Road, Pleasant Valley, New York 12569, 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 1981 and 1982 (File No. 50095).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Campus, Albany, New York, on May 20, 1986 at 1:15 P.M., with all documents to be submitted by June 18, 1986. Petitioners appeared by George DeWitt, Jr. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division correctly determined that petitioners had additional taxable income as the result of a markup audit on purchases of an automotive service station.

FINDINGS OF FACT

1. During the years in issue, petitioner Thomas J. Bretscher was the president and sole shareholder of an automotive service station known as Tom Bretscher's Auto Clinic, Inc. ("Auto Clinic").

2. Petitioners, Thomas and Dolores Bretscher, filed a joint New York State Resident Income Tax Return for the year 1981. Petitioners filed separately, on one return, a New York State Resident Income Tax Return for the year 1982.

3. The Auto Clinic filed a State of New York Corporation Franchise Tax Report for the fiscal years ended March 31, 1981 and March 31, 1982.

4. On October 21, 1983, as the result of a field audit, the Audit Division issued two notices of deficiency to petitioners asserting a deficiency of personal income tax. The first Notice of Deficiency asserted tax due for the years 1981 and 1982 of \$1,648.02, plus interest of \$118.03, for a total amount due of \$1,766.05. The second Notice of Deficiency asserted tax due for the year 1982 of \$20.00, plus interest of \$.87, for a total amount due of \$20.87. The Statement of Audit Adjustment, which was issued September 7, 1983, explained that the asserted deficiencies were premised upon a determination that the Auto Clinic had additional taxable sales which gave rise to additional taxable income, in the form of constructive dividends, to Thomas Bretscher in 1981 of \$5,072.02 and in 1982 of \$13,611.12. In addition, the household credit claimed by petitioners in 1982 was disallowed because petitioners' total income, as adjusted, exceeded the maximum household income allowable.

5. In the course of the audit, it was learned that the Auto Clinic maintained neither a complete sales journal nor a complete set of purchase invoices for the audit period. In addition, the Auto Clinic did not retain sales invoices for the years in issue. As a result, it was determined that a markup audit on purchases was warranted in order to determine petitioners' income.

6. At the hearing, the only aspect of the markup audit which was challenged pertained to the Audit Division's computation of the markup on the Auto Clinic's purchases of parts.

7. At the time the audit was being conducted, the Auto Clinic was only able to provide the Audit Division with seventeen purchase invoices representing parts purchases of \$325.93. Utilizing these invoices, the Audit Division determined that the Auto Clinic had a markup on purchases of 49 percent.

8. At the hearing, petitioner's representative presented purchase invoices from two of the Auto Clinic's main suppliers. One group of purchase invoices, from Jack Haverty's Auto Parts, represented purchases of parts in the amount of \$1,692.47. Petitioner's representative also presented purchase invoices from Jack Nussbaum Auto Parts representing purchases of parts in the amount of \$1,560.28. Lastly, petitioner's representative presented a group of the Auto Clinic's sales invoices. A comparison of the purchase invoices with the sales invoices establishes that the Auto Clinic's markup on parts sales was approximately 36 percent.

CONCLUSIONS OF LAW

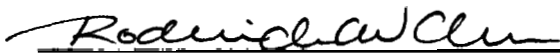
A. That the Audit Division's use of a purchase markup analysis was an appropriate means of reconstructing the Auto Clinic's gross receipts (see, e.g., Matter of Arthur Bimonte and Joan Bimonte, State Tax Commission, February 15, 1985). Moreover, it was proper to consider the additional gross receipts to be taxable income, in the form of constructive dividends, to Thomas Bretscher (see Matter of Arthur Bimonte and Joan Bimonte, supra). However, in view of the additional information regarding the markup on parts purchases presented at the hearing, the Audit Division is directed to recompute the amount of tax to be due on the premise that the markup on parts sales was 36 percent.


B. That the petition of Thomas J. Bretscher and Dolores M. Bretscher is granted to the extent of Conclusion of Law "A" and the Audit Division is directed to modify the Notice of Deficiency which was premised upon the markup audit accordingly; except as so modified, the notices of deficiency are sustained


DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT


COMMISSIONER


COMMISSIONER