

Petitioner, Precision Automotive, 7 Brightside Avenue, East Northport, New York 11731, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1979 and 1980 (File No. 50964).

Petitioners, Matthew Holochuck and Joseph Mauceri d/b/a Precision Automotive 7 Brightside Avenue, East Northport, New York 11731, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through November 30, 1980 (File No. 41736).

Petitioners, Matthew Holochuck and Diane Holochuck, 2 Alice Lane, Commack, New York 11725, 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 and 1980 (File No. 48167).

Petitioners, Joseph Mauceri and Diana Mauceri, 35 Rutledge Street, Brentwood, New York 11717, 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 and 1980 (File No. 48166).

A consolidated hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 12, 1985 at 1:15 P.M. Petitioners appeared by Leon A. Kweit. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether adjustments made to the returns of the aforestated petitioners as the result of cash availability audits conducted on the individuals, as well as an audit conducted on the partnership Precision Automotive, Inc.,

FINDINGS OF FACT

1. During the years 1979 and 1980, petitioners, Matthew Holochuck and Joseph Mauceri, were equal partners in Precision Automotive, an automobile service and gasoline station located on Long Island, New York.

2. The Audit Division conducted a consolidated field audit of both the partnership's and the individual partners' books and records for the years 1979 and 1980. As a result thereof, the following statements of audit changes were issued on December 28, 1982:

a) to Matthew and Diana Holochuck incorporating the following adjustments

	<u>1979</u>	<u>1980</u>
Additional partnership income from Precision Automotive	\$ 4,244.80	\$ 2,028.50
Additional income based on analysis of cash availability and total living expenses	\$30,000.00	\$24,176.00
Medical expense is adjusted due to increase in adjusted gross income	\$ 700.00	\$ 576.00
NET ADJUSTMENT	<u>\$34,944.80</u>	<u>\$26,780.50</u>

b) to Joseph and Diana Mauceri incorporating the following adjustments:

	<u>1979</u>	<u>1980</u>
Additional partnership income from Precision Automotive	\$ 4,244.80	\$ 2,028.50
Additional income based on analysis of cash availability and total living expenses	\$12,181.00	\$20,458.00
Medical expenses are adjusted due to the increase in adjusted gross income	\$ 327.00	\$ 674.60
NET ADJUSTMENT	<u>\$16,752.80</u>	<u>\$23,161.10</u>

c) to Precision Automotive incorporating the following adjustments:

	<u>1979</u>	<u>1980</u>
Additional receipts based on unexplained cash determined during audit of partners	\$42,181.00	\$44,634.00
Depreciation expense is adjusted by the amount attributable to auto, Cadillac determined not held for income producing purposes	\$ 6,316.00	\$ 3,158.00
Title insurance is not deductible		\$ 899.00
Health insurance expense		

3. The additional income of each partner determined by the cash availability analysis method of income reconstruction was deemed to have come from the partnership and, accordingly, the total for each year at issue was held taxable to the partnership for unincorporated business tax purposes. The balance of the adjustments to the partnership for each year at issue was divided equally and attributed to each partner for personal income tax purposes.

4. The three petitioners each timely executed a consent form extending the period of limitation upon assessment of personal income and unincorporated business taxes for the year ended December 31, 1979 to any time on or before October 15, 1983.

5. Based on the abovementioned statements of audit changes, the following notices of deficiency were issued by the Audit Division for 1979 and 1980 on June 22, 1983:

a) against Matthew and Diana Holochuck asserting additional personal income tax of \$6,909.29, penalty of \$345.46, plus interest of \$2,290.28, for a total due of \$9,545.03.

b) against Joseph and Diana Mauceri asserting additional personal income tax of \$4,063.60, penalty of \$203.19, plus interest of \$1,296.71, for a total due of \$5,563.50.

c) against Precision Automotive asserting additional unincorporated business tax of \$3,958.63, penalty of \$197.93, plus interest of \$1,283.86, for a total due of \$5,440.42.

6. The aforestated penalties were asserted for negligence pursuant to section 685(b) of the Tax Law. For unincorporated business tax purposes, section 722(a) of Article 23 incorporates section 685(b).

7. On December 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Matthew Holochuck and Joseph Mauceri d/b/a Precision Automotive. Said notice assessed sales tax due for the period December 1, 1979 through November 30, 1980 of \$3,112.00, plus interest of \$847.54, for a total due of \$3,959.54. The sales tax assessed resulted solely from the additional receipts attributed to the partnership based on the cash availability analysis of each partner. The reported taxable sales for each quarterly period were increased by the applicable prorated portion of the additional receipts.

8. On March 27, 1984, a Tax Appeals Bureau pre-hearing conference was held wherein the following revisions were made:

- a) to the deficiency asserted against Matthew and Diane Holochuck:
 - 1) Petitioners' cash availability shortage for 1979 was reduced by a Master Charge cash advance of \$850.00.
 - 2) Petitioners' cash availability shortage for 1980 was reduced by \$1,100.00 received from the sale of a Volkswagen.
 - 3) The adjustment for "additional partnership income" in 1979 of \$4,244.80 was reduced by 50 percent of the health insurance premium adjustment to the partnership of \$2,173.60.
 - 4) Medical expenses were adjusted due to a revised increase in adjusted gross income.
- b) to the deficiency asserted against Joseph and Diana Mauceri:
 - 1) Petitioners' cash availability shortages for 1979 and 1980 were reduced by Veterans Administration benefits received each year of \$2,148.00.

2) The adjustment for "additional partnership income" in 1979 of \$4,244.80 was reduced by 50 percent of the health insurance premium adjustment to the partnership of \$2,173.60.

3) Medical expenses were adjusted due to a revised increase in adjusted gross income.

c) to the deficiency asserted against Precision Automotive:

1) The partnership adjustments for "additional receipts" based on unexplained cash determined during audit of the partners of \$42,181.00 for 1979 and \$44,634.00 for 1980 were reduced based on revised cash availability shortages of the partners to \$39,183.00 for 1979 and \$41,386.00 for 1980.

9. No adjustments were made to the sales tax assessment at the Tax Appeals Bureau pre-hearing conference.

10. Petitioners, Matthew and Diane Holochuck, did not personally appear for the hearing. In their perfected petition, they alleged that:

"The corrected taxable income for Mr. Holochuck for 1979 includes in error rental security of \$1,475.00 and proceeds of a loan from Mr. Casbarro totalling \$20,000.00.

The corrected taxable income for 1980 includes in error master charge loans for \$2,200.00, rental security of \$2,620.00 and loans from Mr. Casbarro totalling \$15,000.00."

11. Petitioners, Joseph and Diana Mauceri, did not personally appear for the hearing. In their perfected petition, they alleged that:

"The corrected taxable income for Mr. Mauceri for 1979 includes in error master charge loans of \$1,500.00 and loans from father of \$5,000.00.

The corrected taxable income for Mr. Mauceri for 1980 includes in error living expenses paid by father of \$13,000.00."

12. Petitioners' representative contended that the alleged rental security

and, since they were not his funds, they were improperly considered in the cash availability analysis. Although a notarized, handwritten statement was submitted showing the purported dates, amounts and payors of rental security during 1979 and 1980, no documentation was submitted to show actual receipt of the payments or the transfer of such payments into Mr. Holochuck's accounts. Furthermore, his purported receipts of rental security in 1980 were for the same apartments as for 1979, which would have necessitated the return of the 1979 payments to the previous occupants.

13. Petitioners' representative submitted documentation evidencing that Mr. Holochuck received Master Charge cash advances during 1980 from the European American Bank totalling \$2,200.00. Credit was not given for this amount during the audit or the pre-hearing conference.

14. Petitioners' representative submitted a sworn affidavit from one James Casbarro wherein he deposed and said that:

"I am the Father-in-Law of MATTHEW HOLOCHUCK and I make this Affidavit concerning finances between myself and MATTHEW HOLOCHUCK.

That during the period from 1979 through 1980, I loaned MATTHEW HOLOCHUCK \$20,000.00 to help him with his financial needs and when the loan was not repaid as indicated, it was converted to a first mortgage on his home.

When MATTHEW HOLOCHUCK received an additional \$15,000.00 to aid him with his financial problems, and that there was a total of \$35,000.00 due and owing to me from MATTHEW HOLOCHUCK."

15. Mortgage documents were submitted into evidence for the original \$20,000.00 and the additional \$15,000.00; however, said mortgages were not recorded. Furthermore, no documentation was submitted to show that Mr. Holochuck had received said amounts. Receipt of such funds were **not** traceable into Mr. Holochuck's accounts.

16. No documentation was submitted to establish that Mr. Mauceri is properly entitled to Master Charge loans of \$1,500.00 for 1979 as claimed.

17. Petitioners' representative submitted an undated letter from one Anthony Mauceri wherein he stated:

"In reguard (sic) to, and to certify that a personal loan I made to my son Joseph Mauceri in the year 1979. (\$5,000.00).

In addition I lived with him and his family in the year of 1980. And over the course of that year I gave him approximately \$13,000.00 for living expenses, food, room and board.'"

A notarized statement attesting to the above was submitted by petitioner Joseph Mauceri.

18. No traceable transfer of funds was shown to substantiate the alleged loans to petitioner Joseph Mauceri from his father Anthony Mauceri during the years at issue.

19. Petitioners' representative alleged that the depreciation adjustment to the partnership was erroneous. The depreciation that was disallowed was with respect to a 1979 Cadillac purchased on March 20, 1979 and claimed 100 percent for business purposes. It was contended that the Cadillac was loaned to customers when their automobiles were left for major repairs. No evidence was submitted to support such contention.

CONCLUSIONS OF LAW

A. That petitioners Matthew and Diane Holochuck failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that they are properly due credit for rental security payments or loans from Mr. Holochuck's father-in-law. Accordingly, no such credit is allowed.

B. That petitioners Matthew and Diane Holochuck are properly entitled to credit for Master Charge cash advances of \$2,200.00 during the year 1980

C. That petitioners Joseph and Diana Mauceri have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that they are properly due credit for Master Charge loans or loans from Mr. Mauceri's father. Accordingly, no such credit is allowed.

D. That petitioner Precision Automotive has failed to sustain its burden of proof, imposed pursuant to section 689(e) of the Tax Law [as incorporated into Article 23 by section 722(a)], to show that it is properly due a depreciation deduction for the 1979 Cadillac. Accordingly, the adjustment made with respect to such depreciation deduction is sustained.

E. That petitioners are properly entitled to the credits previously allowed **as** the result of the Tax Appeals Bureau pre-hearing conference (see Finding of Fact "8", supra).

F. That the petitions of Matthew and Diane Holochuck, Joseph and Diana Mauceri and Precision Automotive are granted to the extent provided in Conclusions of Law "B" and "E", supra, and except as so granted, said petitions are, in all other respects, denied.

G. That the notices of deficiency issued against the three aforesated petitioners on June 22, 1983 are to be modified **so** as to be consistent with the decision rendered herein.

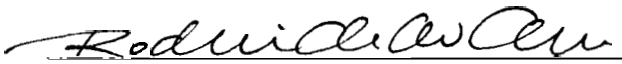
H. That the petition of Matthew Holochuck and Joseph Mauceri d/b/a Precision Automotive is granted to the extent of reducing additional receipts to the proper revised amount based on the revisions made herein to each partner's adjustment for "additional income based on analysis of cash availability and total living expenses" and except as **so** granted, said petition is, in all other respects, denied.

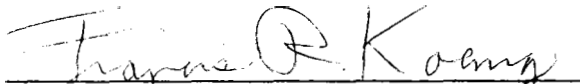
I. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1982 against petitioner Matthew Holochuck and Joseph Mauceri d/b/a Precision Automotive is to be modified so as to be consistent with the decision rendered herein.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER