

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

FRED WEBER AND MARY WEBER

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1979.

---

Petitioners, Fred Weber and Mary Weber, 5 Aspen Road, Scarsdale, New York 10583, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1979 (File No. 51247).

A 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 December 18, 1985 at 9:15 A.M. Petitioners appeared by Milton H. Hertzberg. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly attributed additional personal income to petitioner Fred Weber in the form of a constructive dividend based on a sales tax audit of a corporation of which said petitioner was the sole shareholder.

II. Whether the Audit Division's adjustment to petitioners' claimed capital gains and losses was proper.

#### FINDINGS OF FACT

1. Petitioners, Fred Weber and Mary Weber, filed a New York State Income

separately on ~~one~~ return." On such return, Mr. Weber reported capital gain income of \$69,683.00 and Mrs. Weber reported capital gain income of \$46,456.00. No minimum income tax was paid with respect to the aforestated capital gain income.

2. On November 2, 1983, the Audit Division issued two (2) statements of personal income tax audit changes for the year 1979 to petitioners as follows:

a - to petitioner Fred Weber incorporating the following adjustments:

<u>Adjustment</u>	<u>Amount</u>
Constructive Dividend from F. R. Weber, Inc.	\$ 19,282.00
Net Long Term Capital Gain (to remove)	(69,683.00)
New York State Modification (to remove)	(17,301.00)
Net Long Term Capital Gain Corrected	
Taxable @ 50% by New York State	<u>154,780.00</u>
NET ADJUSTMENT	<u>\$ 87,078.00</u>

b - to petitioner Mary Weber incorporating the following adjustments:

<u>Adjustment</u>	<u>Amount</u>
Capital Gain Reported	(\$46,456.00)
Capital Gain Modification	<u>( 11,534.00)</u>
NET ADJUSTMENT	<u>(\$57,990.00)</u>

3. On August 25, 1982, petitioners executed a consent form extending the period of limitation upon assessment of personal income tax for the taxable year ended December 31, 1979 to any time on or before April 15, 1984.

4. On December 30, 1983, the Audit Division issued a Notice of Deficiency to petitioners asserting additional personal income tax of \$12,426.42, penalty of \$980.32 and interest of \$5,122.79, for a total due of \$18,529.53. Said penalty was asserted for negligence pursuant to section 685(b) of the Tax Law.

5. A sales tax audit of F. R. Weber, Inc. for the periods June 1, 1976 through May 31, 1979 resulted in additional unreported sales of \$32,345.23.

Petitioner Fred Weber, who was president and sole stockholder of said corporation, consented to the sales tax audit results.

6. Subsequently, the portion of the additional sales determined to be applicable to F. R. Weber, Inc. during its fiscal year ended January 31, 1979, i.e., \$19,282.47, was deemed to be personally attributable to petitioner during taxable year 1979 in the form of a constructive dividend.

7. The balance of the adjustments appearing on the two aforesaid statements of personal income tax audit changes were made with respect to capital gains and losses reported.

8. Petitioners failed to substantiate a claimed long-term capital loss of \$19,212.00 which was purportedly sustained on the sale of one hundred (100) shares of "Weber West." Accordingly, the Audit Division disallowed such loss. Furthermore, since petitioners failed to establish that Mrs. Weber owned any of the stock sold during 1979, all of the allowable gains and losses reported were deemed attributable solely to Mr. Weber. The tax asserted on the Notice of Deficiency of \$12,426.42 was comprised of additional tax due from Mr. Weber of \$19,606.32, less the credit determined for Mrs. Weber of \$7,179.90 based on the adjustments transferring her reported capital gains to Mr. Weber.

9. The deficiency asserted was comprised in part of minimum income tax asserted against Mr. Weber on his items of tax preference (capital gains).

10. Petitioners did not personally attend the hearing. According to their petition, their sole grounds for relief in this matter were as follows:

"The figure of \$12,426.42 for additional personal income tax due was not derived from an audit, but was arbitrarily arrived at. This occurred because we refused permission for an audit for the following reasons.

We learned that the personal income tax audit was recommended by the sales tax auditor after a sales tax audit of our corporation. During the course of this sales tax audit we found that the auditor had detailed information of our personal affairs. This information was obtained from a close relative (sister-in-law) who worked in the same N.Y.S. office as the sales tax auditor.

This involves both a conflict of interest and a violation of oath. The auditor should have disqualified herself from performing the original audit. We consider the original sales tax audit and any referrals derived therefrom illegal and void."

11. During the hearing, petitioners' representative's arguments were substantially similar to those as stated in the petition. No evidence was submitted to show wherein the adjustments were erroneous.

12. The sales tax auditor did not discuss details of the audit or petitioners' lifestyles and affairs with Mr. Weber's sister-in-law, who happened to be employed as an auditor by the Audit Division.

#### CONCLUSIONS OF LAW

A. That where there **is** some factual basis for deciding that the tax return as filed does 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 unreported sales of \$32,345.23. Such determination provided a factual basis for deciding that the income reported by petitioners on their 1979 income tax return was not accurate and, thus, the Audit Division properly used the sales tax audit findings to calculate income tax. Nowhere in the Tax Law or regulations **is** the Audit Division precluded from utilizing the results of an audit conducted under one article of the Tax Law in an audit conducted under another article.

B. That since the auditor did not engage in any improper communications with Mr. Weber's sister-in-law, **no** basis exists for deeming the deficiency invalid or illegal.

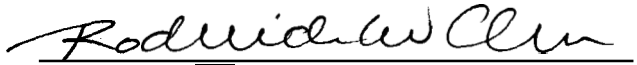
C. That petitioners have failed to sustain their burden **of** proof, imposed pursuant to section 689(e) of the Tax Law, **to** show that the adjustments made by the Audit Division, or its manner and method **of** determining such adjustments, were erroneous or improper.

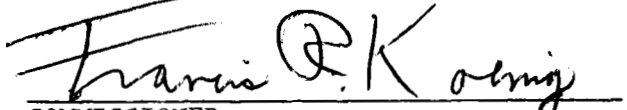
D. That the petition of Fred Weber and Mary Weber is denied and the Notice **of** Deficiency issued against them on December 30, 1983 **is** sustained, together with such additional penalty and interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

**APR 15 1986**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER