

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

THAILAND FOOD CORP.,

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Years 1977,
1978, 1980 and 1981.

Petitioner, Thailand Food Corp., 2445 Broadway, New York, New York 10024,
filed a petition for redetermination of a deficiency **or** for refund of corporation
franchise tax under Article 9-A of the Tax Law for the years 1977, 1978, 1980
and 1981 (File **No.** 52301).

A hearing was held before Dennis **M.** Galliher, Hearing Officer, at the
offices **of** the State Tax Commission, Two World Trade Center, New York, New
York, on April 30, 1986 at 9:15 A.M., with all documents to be submitted by
September **30,** 1986. Petitioner appeared by Morris A. Gloskin, P.A. **The** Audit
Division appeared by John P. Dugan, **Esq.** (Joseph W. Pinto, **Esq.,** of counsel).

ISSUE

Whether the Audit Division's recomputation of petitioner's corporation
franchise tax liability upon the basis **of** entire net income was proper.

FINDINGS OF FACT

1. On March 20, 1984, the Audit Division issued to petitioner, Thailand
Food Corp., four notices **of** deficiency asserting additional corporation franchise
tax due as follows:

<u>Assessment No.</u>	<u>Year Ended</u>	<u>Tax</u>
C840320156N	12/31/77	\$ 612.00
C840320157N	12/31/78	1,187.00
C840320158N	12/31/80	1,802.00
C840320159N	12/31/81	1,582.00

2. Statements of audit adjustment also issued on March 20, 1984 provided, in relevant part with respect to the above-asserted deficiencies, as follows:

"Every domestic corporation (except 1120S corporations making a timely election to be taxable under Article 22 for periods beginning after 1/1/81) must pay franchise tax on the highest of the four taxable bases - entire net income, capital, alternative base or minimum. Refer to Sections 209.1 and 210.1 of the Tax Law.

Tax for the periods ended 12/31/77, 12/31/78, 12/31/80 and 12/31/81 has been assessed on entire net income - determined by the amounts of taxable income shown on your 1120S returns filed for the respective periods.

Your claim for credit for 12/31/81, based on an amended report, has been disallowed as you did not send the information requested in our letter of August 9, 1983. We did not receive substantiation that the amounts claimed as officer's compensation on your amended 1120S return would be deductible [sic] from federal taxable income if the corporation did not file 1120S return.

The deficiencies for the periods ended 12/31/77 and 12/31/78 have been assessed under Section 1083(d) which allows assessments to be issued within 6 years from the time the report was filed when a taxpayer omits from gross income required to be reported on the return an amount properly includable which is in excess of 25% of gross income stated on the return. Since no income was shown on the reports, tax may be assessed under this section."

3. Petitioner operates a small food market located at 2445 Broadway, New York, New York. Prasert and Srinum Varana, husband and wife, who hold nine shares and one share, respectively, of petitioner's issued and outstanding shares of stock, are petitioner's sole owners and officers. Mr. and Mrs. Varana, refugees from Thailand, incorporated petitioner in 1975, have always physically worked at the market and have always been its sole owners, operators and officers, holding the offices of president and treasurer, respectively.

4. For each of the years in question, petitioner filed Form 1120S (U.S. Small Business Corporation Income Tax Return) with the Internal Revenue Service, as allowed pursuant to petitioner's previously accepted election to be treated as a small business corporation under the Internal Revenue Code. Petitioner reported taxable income, on these Forms 1120S (line 28), of \$8,616.00 for 1977, \$14,366.00 for 1978, \$20,520.00 for 1980 and \$18,320.00 for 1981, respectively. On each of these Forms 1120S, there was no entry or amount shown as compensation of officers (line 12).

5. For each **of** the years at issue, petitioner also filed Forms CT-4 (State of New York Corporation Franchise Tax Report) with the Audit Division, including an amended Form CT-4 for 1981.¹ For each of the years in question, petitioner reported and remitted the minimum statutory franchise tax amount of \$250.00, with such amount being the highest amount due as calculated by petitioner under the four alternative computational methods available. On each Form CT-4, petitioner reported officers' compensation equal to the amounts of taxable income reported per its Forms 1120S (~~see~~ Finding of Fact "4"), with such compensation reported as paid to Mr. Varana, only, for 1977, and split equally between Mr. and Mrs. Varana for **the** other years.

6. For each year in question, petitioner's Forms 1120S included Schedule K (Computation of Undistributed Taxable Income and Summary of Distributions **and**

1 Petitioner's amended Form CT-4 indicated tax due of \$250.00 and reflected compensation of officers **of** \$18,320.00, whereas the original Form CT-4 for 1981 indicated zero for both of these items. In addition, while both Forms **CT-4** for 1981 stated an election had been made, via Form CT-6, to be treated as a small business (essentially a subchapter S election for New York State tax purposes), such election was not made effective until the period November 30, 1982 through December 31, 1983.

Other Items), which schedule reflected only the entry of petitioner's amount: of taxable income for each year, and Schedules E (Compensation of Officers) which reflected the names, social security numbers, officer status, ownership interests and amounts of compensation (~~see~~ Finding of Fact "5") flowing to Mr. and Mrs. Varana.

7. Petitioner's tax preparer and accountant did not issue either Forms W-2 or 1099 to Mr. and Mrs. Varana on behalf of petitioner during any of the years at issue.

8. At the hearing, copies of Mr. and Mrs. Varana's Forms 1040 and IT-201 (Federal and New York State income tax returns) for the subject years were introduced. On each of these copies, the amounts listed as taxable income on petitioner's Forms 1120S for each year (~~see~~ Finding of Fact "4") were reported as and included in taxable income received by Mr. and Mrs. Varana, and copies of cancelled checks (and bank statements for 1980 and 1981) substantiating the payment of tax for each year were provided. In addition, Mr. and Mrs. Varana's Federal tax liability included for each year social security self-employment tax due as computed on Schedules SE attached to each of their Forms 1040.

9. Petitioner asserts that the amounts shown as taxable income on its Forms 1120S were, in fact, compensation paid to Mr. and Mrs. Varana, with such amounts properly deductible in reducing petitioner's taxable income to zero and thus leaving only the minimum statutory corporation franchise tax due for each of the subject years. Petitioner notes that Mr. and Mrs. Varana included such amounts in income in each year and paid Federal and New York State taxes (including social security self-employment tax) thereon. Further, petitioner maintains its method of filling out its Forms 1120S such that no amount was shown and deducted as official tax.

amounts were to be taxed as income to Mr. and Mrs. Varana in any event, and that its Forms CT-4 (as well as the Varanas' personal income tax returns) did reflect and disclose such amounts as compensation of officers. Finally, petitioner maintains that pro-forma amended Forms 1120S reflecting the amounts in question as compensation of officers were filed with the Internal Revenue Service, and that the amounts in question were Mr. and Mrs. Varana's income and cannot reasonably be construed as excessive compensation treated as constructive dividends.

CONCLUSIONS OF LAW

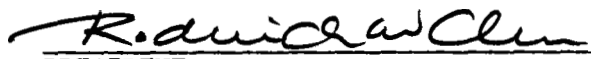
A. That based upon the evidence presented, petitioner has met the burden of proving that the amounts reflected as taxable income on its Forms 1120S, as originally filed, were, in fact, compensation to petitioner's sole owners and officers, the Varanas. Accordingly, notwithstanding its error in completing the Forms 1120S, upon which the asserted deficiencies arose, petitioner's franchise tax liability should have been the statutory minimum amount as reflected on its Forms CT-4.

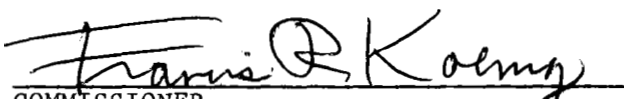
B. That the petition of Thailand Food Corp. is hereby granted and the notices of deficiency dated March 20, 1984 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986


PRESIDENT


COMMISSIONER


COMMISSIONER