

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH DUDO **AND** BETTY DUDO

DECISION

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

Petitioners, Joseph Dudo and Betty Dudo, Terry Boulevard, Holbrook, New York 11741, 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 1980 and 1981 (File No. 56926).

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 July 17, 1986, at 1:15 **P.M.** Petitioners appeared by William Johnson. The Audit division appeared by John **P.** Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of the markup method of indirect audit was proper **for** determining a personal income tax deficiency.

II. Whether the adjustments made as the result of employing such audit method were proper.

FINDINGS OF FACT

1. Joseph Dudo and Betty Dudo filed joint New York State income tax resident returns for the years 1980 and 1981 whereon Joseph Dudo (hereinafter "petitioner") reported business income for 1980 of \$105,086.00 and a business **loss** for 1981 of \$4,456.00.

2. On September 25, 1984, the Audit Division issued a Statement of Personal Income Tax Audit Changes wherein, as the result of a field audit, the following adjustments were made:

a - In computing the 1980 maximum tax on personal service income, petitioner's personal service income was reduced from 100% of business income to 20% of business income, resulting in an additional tax due of \$2,395.50.

b - Gross receipts reported on petitioner's 1981 Federal Schedule C were increased by \$103,141.00.

3. Based on the above adjustments, a Notice of Deficiency was issued against petitioner and his wife on September 25, 1984 asserting additional New York State personal income tax for 1980 and 1981 of \$15,442.78, penalty of \$772.14 and interest of \$4,790.12, for a total due of \$21,005.04. Said penalty was asserted for negligence pursuant to section 685(b) of the Tax Law.

4. The aforestated notice was timely issued with respect to taxable year 1980 since petitioner and his wife executed a consent form which extended the period within which 1980 taxes may be assessed to any time on or before October 15, 1984.

5. During the years at issue petitioner owned and operated "Dudo's Island Service Station", a gasoline station located in Holbrook, New York.

6. A markup audit as well as a cash availability audit were performed for each year at issue. The cash availability audit resulted in cash shortages of \$3,593.00 for 1980 and \$3,121.00 for 1981. However, the markup audit was deemed more accurate and, accordingly, used for computing the deficiency asserted herein.

7. A markup audit was performed since petitioner failed to provide daily gasoline inventory worksheets, which report the gallons sold daily and the prices for each type of gasoline sold.

8. Petitioner's 1980 book markup of 7.97%, as determined from the purchases and gross sales reported on his 1980 Federal Schedule C, was accepted by the Audit Division. Accordingly, no adjustment for additional gross receipts was made for 1980.

9. Petitioner's book markup for 1981, as determined from the purchases and gross sales reported on his 1981 Federal Schedule C, was 3.47%. Since the 1981 markup was **so** much lower than the 1980 markup and petitioner's net profit as reported changed from a gain of \$105,086.00 in 1980 to a loss of \$4,456.00 in 1981, the Audit Division decided to apply the 1980 markup to petitioner's reported 1981 purchases, which resulted in additional gross receipts for 1981 of \$103,141.00. For personal income tax purposes the additional gross receipts were treated as unreported income.

10. Petitioner contended that the 1981 book markup was correct. He alleged that said markup was drastically reduced from that of 1980 due to **a** disproportionate increase in purchase price as compared to sales price, resulting from the elimination of government pricing controls in 1981, which forced him to reduce his profit margin in order to remain competitive. If a stipulated gallonage was not sold each month his lease was subject to termination, accordingly, he had to maintain competitive prices.

11. Petitioner argued that since the cash shortages, determined by the cash availability audit method, were nominal, it was improper for the Audit Division to compute the deficiency based on the markup method.

12. In his petition filed in November 1984, petitioner contested the 1980 adjustment made with respect to personal service income. However, his subsequently filed perfected petition made no mention of this adjustment.

Furthermore, during the hearing said adjustment was neither raised as an issue nor addressed by petitioner.

13. A sales tax deficiency was asserted against petitioner's business based on the markup audit results as stated. Petitioner consented to the audit results for sales tax purposes and paid the taxes determined to be due.

14. Petitioner inadvertently paid the income tax deficiency asserted herein on September 28, 1984. He mistakenly believed the deficiency was for sales taxes. The check issued in payment of the deficiency was paid to the order of the New York State Sales Tax Bureau.

CONCLUSIONS OF LAW

A. That petitioner has failed to sustain his burden of proof imposed pursuant to section 689(e) of the Tax Law, to show that the Audit Division's use of the markup audit method, or the results determined therefrom, were improper or erroneous.

B. 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 US 121, 131-132). Nowhere in the Tax Law or regulations is the Audit Division precluded from utilizing an indirect audit method commonly used in reconstructing income under one article of the Tax Law in an audit conducted under another article of the Tax Law.


C. That the adjustment made with respect to petitioner's 1980 personal service income is sustained since such adjustment was not contested at the hearing (See Finding of Fact "12", supra).

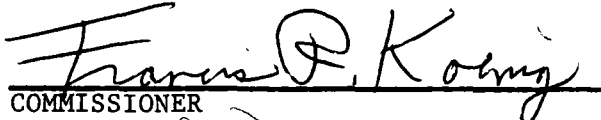
D. That the petition of Joseph Dudo and Betty Dudo is denied and the Notice of Deficiency issued September 25, 1984 and subsequently paid on September 28, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER