

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

JOHN DEGENSHEIN

:

DECISION

for Redetermination of a Deficiency or for  
Refund **of** Personal Income Tax under Article  
22 of the Tax Law for the Year 1982.

---

Petitioner, John Degenshein, 250 East 73rd Street, New York, New York 10021, 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 1982 (File No. 57756) ■

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 October 30, 1986 at 9:15 A.M. Petitioner appeared by Randy Blaustein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

#### ISSUE

Whether petitioner is properly entitled to an investment credit with respect to the lease of a master recording.

#### FINDINGS OF FACT

1. John Degenshein (hereinafter "petitioner") timely filed a New York State income tax resident return for 1982. As part **of** said return petitioner filed an Investment Credit Schedule whereon he claimed a total investment credit of \$33,038.00, comprised of an individual investment credit of \$28,500.00 and his share of a partnership investment credit of \$4,538.00. **On** his return he claimed an investment credit of only \$15,224.00, which

represented that portion of the total investment credit equal to his New York State personal income tax liability computed thereon.

2. On May 17, 1983, petitioner filed an amended resident income tax return for 1982 whereon he claimed an additional investment credit of \$17,814.00. Said amount represents that portion of the total investment credit of \$33,038.00 not previously claimed on his original 1982 return.

3. On June 22, 1984, the Audit Division issued a Statement of Audit Changes to petitioner wherein the major portion of his claimed investment credit was disallowed based on the following explanation:

"The investment credit is generally not allowed for New York State purposes with respect to leased property. The leasing of otherwise qualified property eliminates any potential credit to the lessor or lessee. Exception: A lessee may be allowed the credit where it retains beneficial ownership only (as in a lease purchase agreement). Therefore, the investment credit claimed of \$28,500.00 is disallowed..."

According to said statement, the investment credit of \$4,538.00, which was claimed with respect to a cattle breeding partnership, was allowed.

4. Based on the aforesaid statement, the Audit Division issued a Notice of Deficiency against petitioner on December 14, 1984 asserting personal income tax due of \$10,686.00, plus interest of \$1,830.36, for a total due of \$12,516.36.

5. On December 28, 1982, petitioner entered into an agreement of lease with Ashley Recording Corporation, a New York corporation with offices at 122 East 42nd Street, New York, New York 10168. According to said agreement petitioner leased a master recording from said corporation for a term of six years. The master contained songs by Chuck Berry, Ray Charles and the Drifters. With respect to payments, said agreement provided that:

"The minimum lease payments for the Master which the Lessee [petitioner] is obligated to pay the Lessor shall be the total sum of Thirty Thousand Dollars (\$30,000.). Fifteen Thousand (\$15,000.) Dollars constitutes the minimum lease payment and is payable upon

execution of the Lease. Fifteen Thousand (\$15,000.) Dollars constitutes the minimum lease payments for years 2 through 6, and is payable on February 15, 1983 and is evidenced by a promissory note...."

Said agreement also provided for additional lease payments based on percentages of gross proceeds or gross revenues received from the sale of, records and/or cassettes.

6. Said agreement further provided, ~~inter alia~~, that:

a. "The Lessee shall have the right to engage in the manufacture, production and distribution of all manner of reproduction of sound recordings during the Lease term...."

b. "The Lessee agrees to promote and commercially exploit the Master, and agrees to use his best efforts to expend all sums reasonably required for the promotion and distribution of the Master, and the records, tapes and cassettes produced therefrom."

c. "The Lessee shall have no right, title or interest in the Master (which is, and shall at all times be and remain, the sole and exclusive property of the Lessor)."

d. "There is no option on the part of Lessee to purchase the Master."

7. On December 28, 1982, the lessor elected to pass the investment tax credit to the lessee. The basis of the master recording was \$475,000.00 and petitioner's claimed investment credit of \$28,500.00 was computed using said basis.

8. Petitioner's representative claimed that for all practical purposes petitioner became the beneficial owner of the master recording since the master would be valueless at the end of the lease period. He contended that petitioner utilized the master to manufacture records which were distributed to various retail stores such as Seven Eleven Stores and Union Oil Convenience Centers. No evidence was submitted to support such contention.

9. Petitioner's representative alleged that the investment credit disallowance was based on corporation franchise tax regulations which are inapplicable

to an individual. However, the record gives **no** indication that said disallowance was based on anything other than the statutes properly applicable for personal income tax purposes.

10. Petitioner's main occupation was that of a sales executive for Accessories By Pearl Inc., 330 5th Avenue, New York, New York 10001. In 1982 he derived salary income from said company of \$218,945.96.

11. **No** evidence, other than the aforesaid agreement of lease, was submitted to show that petitioner is properly entitled to an investment credit with respect to his lease of the master recording at issue.

#### CONCLUSIONS OF LAW

A. That section 606(a)(2) **of** the Tax Law provides in pertinent part that:

"A credit shall be allowed under this subsection with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code or recovery property with respect to which a deduction is allowable under section one hundred sixty-eight of the internal revenue code, have a useful life **of** four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) .of the internal revenue code, have a situs in this state and are principally used by the taxpayer in the production **of** goods by manufacturing, processing, assembling...."

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) **of** the Tax Law, to show that his property (the lease) has met the requirements provided in section 606(a)(2) **of** the Tax Law for allowance of the investment credit. Accordingly, **no** such credit is allowed with respect to petitioner's lease of the master recording at issue.

C. That the petition of John Degenshein is denied and the Notice of Deficiency issued December 14, 1984 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

*Roderick W. Allen*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*[Signature]*  
COMMISSIONER