

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thailand Food Corp. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Tax :
under Article(s) 9A of the Tax Law :
for the Years 1977, 1978, 1980 & 1981.

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 5th day of December, 1986, he/she served the within notice of Decision by certified mail upon Thailand Food Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thailand Food Corp.
2445 Broadway
New York, New York 10024

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
5th day of December, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thailand Food Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Tax :
under Article(s) 9A of the Tax Law :
for the Years 1977, 1978, 1980 & 1981.

State of New York :
 ss. :
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 5th day of December, 1986, he served the within notice of Decision by certified mail upon Morris A. Gloskin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris A. Gloskin
2449 Broadway
New York, NY 10024

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
5th day of December, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 5, 1986

Thailand Food Corp.
2445 Broadway
New York, New York 10024

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Morris A. Gloskin
2449 Broadway
New York, NY 10024

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 and thus could not apply to any of the years in question.

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 officers' compensation had no Federal consequence since the

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.

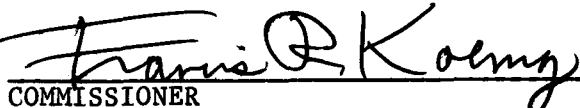
B. That the petition of Thailand Food Corp. is hereby granted and the notices of deficiency dated March 20, 1984 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986


PRESIDENT


COMMISSIONER


COMMISSIONER