

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Robert P. & Beatriz Engelke :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Personal Income Tax :

under Article 22 of the Tax Law

for the Years 1970 & 1971. :

State of New York

County of Albany

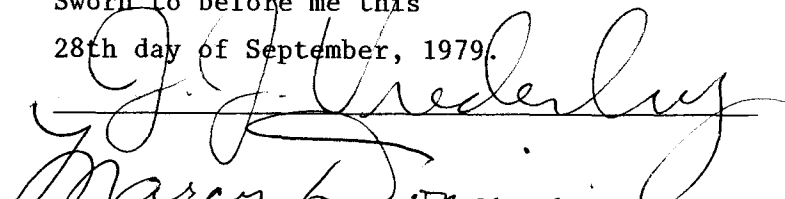
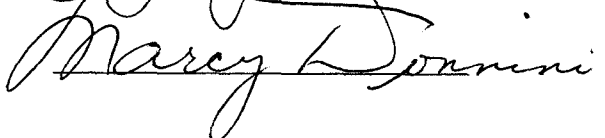
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Robert P. & Beatriz Engelke, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert P. & Beatriz Engelke  
Onteora Club  
Tannersville, NY 12485

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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  
28th day of September, 1979.

STATE OF NEW YORK  
STATE TAX COMMISSION

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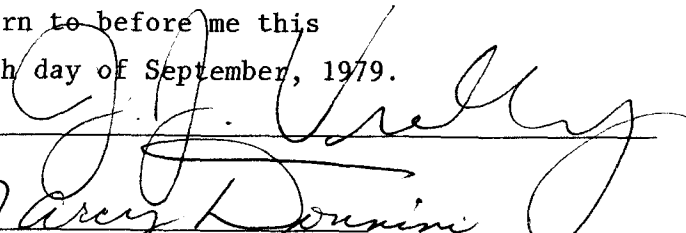
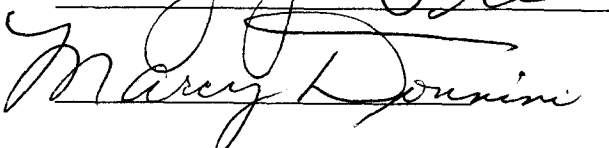
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon R. Douglas Taylor the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. R. Douglas Taylor  
P.O. Box 83, Rt. 209  
Stone Ridge, NY 12484

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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  
28th day of September, 1979.

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Robert P. & Beatriz Engelke  
Onteora Club  
Tannersville, NY 12485

Dear Mr. & Mrs. Engelke:

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) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,



cc: Petitioner's Representative  
R. Douglas Taylor  
P.O. Box 83, Rt. 209  
Stone Ridge, NY 12484  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
ROBERT P. ENGELKE and BEATRIZ ENGELKE	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the	:	
Years 1970 and 1971.	:	

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Petitioners, Robert P. and Beatriz Engelke, Onteora Club, Tannersville, New York 12485, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1970 and 1971 (File Nos. 01153 and 14248).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on August 14, 1978 at 9:15 A.M. Petitioners appeared by R. Douglas Taylor, Accountant. The Income Tax Bureau appeared by Peter Crotty, Esq. (Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether unreimbursed business expenses incurred by petitioner Robert P. Engelke were deductible by him on his personal income tax return, or whether expenses of a corporation of which he was an officer and shareholder were properly deductible by the corporation on its corporation franchise tax return.

II. Whether the adjustments for the modification for allocable expenses and for minimum income tax were properly imposed for 1971.

FINDINGS OF FACT

1. Petitioners, Robert P. and Beatriz Engelke, timely filed New York State personal income tax returns for 1970 and 1971, on which petitioner

Robert P. Engelke claimed employee business expenses as adjustments to income of \$7,076.92 for 1970 and \$4,623.39 for 1971.

2. The Income Tax Bureau issued a Statement of Audit Changes for each of the years at issue. On these the bureau contended that the employee business expenses were not deductible by petitioners on their personal income tax returns because said expenses were the business expenses of a corporation, of which petitioner Robert P. Engelke was an officer and shareholder; therefore, they were properly deductible on the franchise tax returns of the corporation. Furthermore, adjustments were made for modification for allocable expenses and minimum income tax, based on the sale or exchange of capital assets reported for 1971. Accordingly, the Income Tax Bureau issued a Notice of Deficiency against petitioners for 1970 on November 27, 1972, for \$1,025.26 in personal income tax, plus \$99.42 in interest, for a total of \$1,124.68. It also issued a Notice of Deficiency on April 11, 1975 for 1971 in the amount of \$713.25 in personal income tax, plus \$127.98 in interest, for a total of \$841.23.

3. Petitioners conceded that certain other adjustments made to their 1970 and 1971 tax returns by the Income Tax Bureau were correct, and said other adjustments are not at issue.

4. Petitioner Robert P. Engelke was president and chief executive officer of Audicom Corporation (hereafter "Audicom") which was incorporated in March of 1970. He was one of eight stockholders and held 22 of Audicom's 115 shares. Audicom was formed to manufacture and market a television commercial monitoring device. Audicom's most valuable asset was the patent on the device.

5. Petitioner Robert P. Engelke's duties for Audicom involved sales, administration, planning, and obtaining financing. He was not paid a salary, but performed services hoping for a "future high salary". He was not reimbursed for expenses incurred on behalf of Audicom.

6. Petitioners contended that pursuant to an agreement with Audicom, Mr. Engelke was to receive commissions on sales. It was expected that the commissions would cover his expenses. Petitioners' tax returns for 1970 and 1971 do not indicate any commission income received from Audicom; however, Mr. Engelke's Federal "Employee Business Expenses" (Form 2106) for 1971 indicates a \$2,000.00 subtraction from total expenses which, petitioners contend, constituted commissions earned by Mr. Engelke.

7. Petitioners' representative stated that Audicom had no profits, that it paid no dividends and that it subsequently went out of business.

8. On their 1971 New York State Income Tax Resident Return (Form IT-201), petitioners reported \$14,586.22 on Page 2, Schedule A, line 5A, as sale or exchange of capital assets for 1971; the Income Tax Bureau erroneously increased this amount to \$29,172.45.

#### CONCLUSIONS OF LAW

A. That generally, payments of the obligations of another are not deductible as ordinary and necessary business expenses (Welch v. Helvering, 290 U.S. 111, (1933)); moreover, a shareholder is not entitled to a deduction from his personal income tax for payment of the expenses of a corporation. Such amounts which constitute either a loan or a contribution to capital, are deductible, if at all, by the corporation (Ernest L. Rink 51 T.C. 746 (1969)). Petitioner Robert P. Engelke's individual trade or business as president and chief executive officer of the corporation was carried on without remuneration. There was no relationship between expenses and income. Future monetary gain was based on the speculation that the corporation would be successful. This connection with Mr. Engelke's trade or business was too speculative (Jean U. Koree, 40 T.C. 961 (1963)); therefore, such expenses were attributable to

Audicom and were not deductible by petitioners on their personal income tax return, under section 162 of the Internal Revenue Code.

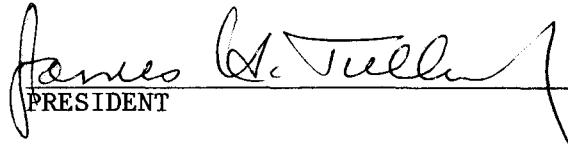
B. That since the Income Tax Bureau had no basis for increasing the gain on the sale or exchange of capital assets, the adjustments for the modification for allocable expenses and for minimum income tax were improper; therefore, the Income Tax Bureau is directed to recompute the Notice of Deficiency for 1971.

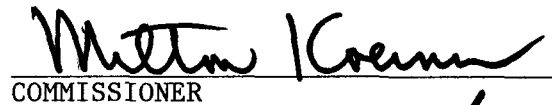
C. That the petitions of Robert P. and Beatriz Engelke are granted to the extent indicated in Conclusion of Law "B" and that, except as so granted, are in all other respects denied.

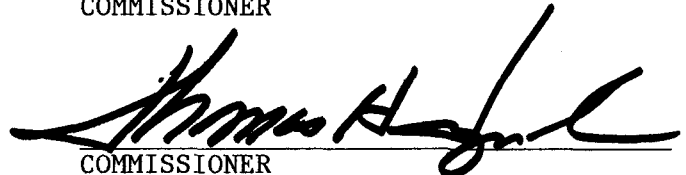
DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER