

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

B. Joseph Checho

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income & :
UBT under Article 22 & 23 of the Tax Law for the :
Years 1972, 1973 & 1974. :

State of New York
County of Albany

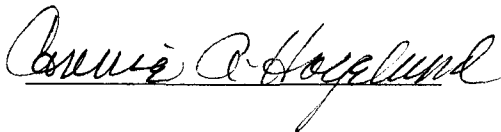
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon B. Joseph Checho, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

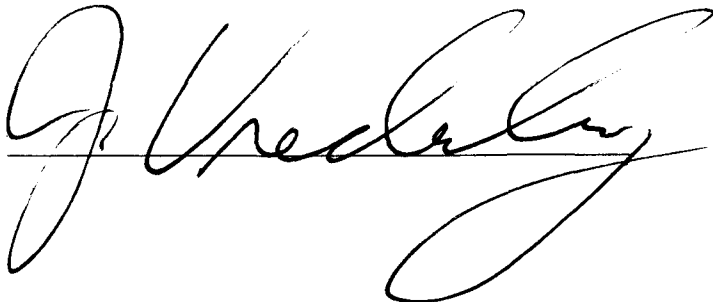
B. Joseph Checho
1200 Fairport Rd.
Fairport, NY 14450

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
4th day of August, 1982.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

B. Joseph Checho

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
and UBT under Article 22 & 23 of the Tax Law for :
the Years 1972, 1973 & 1974.

State of New York
County of Albany

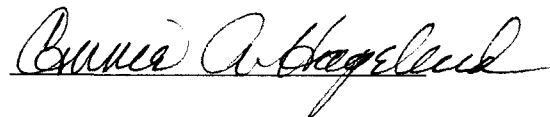
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon William E. Easton the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

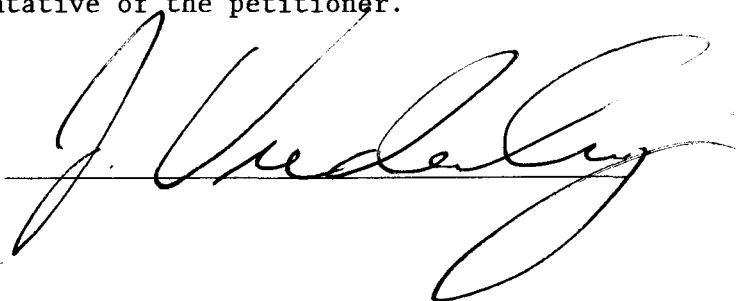
William E. Easton
875 Midtown Tower
Rochester, NY 14604

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
4th day of August, 1982.





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

August 4, 1982

B. Joseph Checho
1200 Fairport Rd.
Fairport, NY 14450

Dear Mr. Checho:

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 & 722 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:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William E. Easton
875 Midtown Tower
Rochester, NY 14604
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
B. JOSEPH CHECHO
for Redetermination of a Deficiency or for
Refund of Personal Income and Unincorporated
Business Taxes under Articles 22 and 23 of
the Tax Law for the Years 1972, 1973 and 1974.

:
:
:
:
:
DECISION

Petitioner, B. Joseph Checho, 1200 Fairport Road, Fairport, New York 14450, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1972, 1973 and 1974 (File No. 19371).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on July 15, 1980 at 9:15 A.M. Petitioner appeared by William E. Easton, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (J. Ellen Purcell, Esq., of counsel).

ISSUES

- I. Whether the State of New York is bound by a Federal determination of income.
- II. Whether the burden of proof is on the Audit Division.
- III. Whether the income reconstruction audit properly reflected petitioner's income.

FINDINGS OF FACT

1. On September 9, 1976, the Audit Division issued a Statement of Audit Changes against petitioner finding additional personal income taxes and unincor-

porated business taxes due for the years 1972, 1973 and 1974. Fraud penalties pursuant to section 685(e) of the Tax Law were imposed. A Notice of Deficiency for said years was issued in the amount of \$47,237.26 on March 28, 1977.

2. A consent fixing period of limitation upon assessment of personal income and unincorporated business taxes was signed on February 27, 1976 by B. Joseph Checho and Virginia Checho for the taxable year which ended December 31, 1972. The consent extended the period for assessment to April 15, 1977.

3. Petitioner operated a nine hole golf course, a banquet or party house, was a stockholder in Midville Research, Inc., and was in a business partnership with his brother. His rental properties included a Kentucky Fried Chicken franchise. Petitioner's method of accounting was on the accrual basis.

4. An income reconstruction audit by the net worth and cash availability methods was conducted upon petitioner in January 1976 for the period in issue. His disbursements and receipts journals, cancelled checks, bank statements, savings accounts, personal checking accounts, and loan records were used. Data concerning real estate purchases and mortgage data were checked at the County Clerk's office. Savings accounts were in the Rochester Savings Bank, First Federal Savings and Loan of Orlando, Lincoln First and Marine Midland banks. Federal and State tax returns were checked. Using established audit procedures and techniques, it was calculated that petitioner had additional income of \$37,613.42 in 1972, \$51,825.39 in 1973 and \$54,787.14 in 1974.

5. The Internal Revenue Service conducted an audit of petitioner for the years 1973, 1974, 1975 and 1976. It was determined that petitioner had additional income for said years. A net worth analysis was made by the Service for the years 1975 and 1976 because of the absence of adequate records. It was noted that all income for said years was not reported. For years within the period

in issue herein, namely 1973 and 1974, adjustments were made for medical expenses, certain income from a capital sale was not reported, interest income was not reported, certain reimbursements for real estate taxes in 1974 were not reported, commission expenses in 1973 and 1974 were improperly claimed, and wages paid to taxpayer's wife were disallowed.

6. The Audit Division conceded that certain adjustments be made with respect to the years in issue, namely that for 1972 the income per audit which was \$50,664.68 be reduced by \$19,600.00 to \$31,054.68, resulting in an understatement for said year of \$18,013.42; that for 1973 the income per audit of \$61,663.52 be reduced by \$16,545.00 to \$45,118.52 resulting in an understatement for said year of \$35,280.39; and that for 1974 the income per audit of \$68,295.00 be reduced by \$11,300.00 to \$56,995.00 resulting in an understatement for said year of \$43,487.14. The Audit Division also conceded that petitioner was not guilty of fraud. The audit by the Internal Revenue Service for said years was understated by \$14,312.00 for 1973 and \$19,402.00 in 1974. Petitioner conceded that the Federal audit was accurate.

7. Petitioner offered no documentary or other substantial evidence that the net worth audit performed by the Audit Division was incorrect.

CONCLUSIONS OF LAW

A. That the State of New York is not bound by a Federal determination of petitioner's income, but may conduct its own examination and reach its own determination.

B. That since the Audit Division conceded its claim for a fraud penalty, (Finding of Fact "6") there is no issue as to whether the petitioner has been guilty of fraud with intent to evade tax. Accordingly, the burden of proof as to the deficiency in tax is upon petitioner.

C. That the Audit Division's reconstruction of income will be presumed to be correct with the burden of proof upon the petitioner to disprove the Division's computation, where the books do not clearly reflect income.

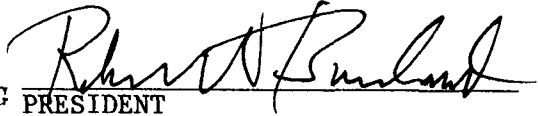
D. That the petitioner did not sustain the burden of proof imposed by sections 689(e) and 722 of the Tax Law to show that the audit method used by the Audit Division was inaccurate and/or incorrect for 1972, 1973 and 1974.

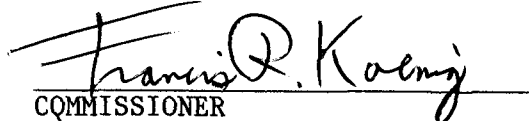
E. That the Audit Division is hereby directed to modify the Notice of Deficiency in accordance with Finding of Fact "6". The petition of B. Joseph Checho is granted to the extent of such modification. The adjusted tax shall be due together with such additional interest as may be lawfully owing; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

ACTING 
PRESIDENT


COMMISSIONER


COMMISSIONER