

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. Beres & Sons Dairy :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Years 1970, 1971 & 1972. :

In the Matter of the Petition :
of :
Estate of Andrew Beres :
and Jane Beres, Individually and as :
Administratrix :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1970, 1971 and 1972. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Michael Beres (Deceased) and Emily Beres :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1970, 1971 and 1972. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon J. Beres & Sons Dairy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

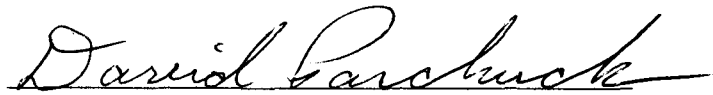
J. Beres & Sons Dairy
1280 Electric Ave.
Lackawanna, NY 14218


Page 2
Affidavit of Mailing

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
21st day of March, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. Beres & Sons Dairy :
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and Jane Beres, Individually and as :
Administratrix :
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Law for the Years 1970, 1971 and 1972. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Michael Beres (Deceased) and Emily Beres :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1970, 1971 and 1972. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon Estate of Andrew Beres & Jane Beres, Indiv. & as Administratrix, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Andrew Beres
& Jane Beres, Indiv. & as Administratrix
2185 Abbott Rd.
Lackawanna, NY 14218

Page 2
Affidavit of Mailing

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Sworn to before me this
21st day of March, 1984.

David Paruchuck

Annie R. O'Connell
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
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In the Matter of the Petition :
of :
Estate of Andrew Beres :
and Jane Beres, Individually and as :
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AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Michael Beres (Deceased) and Emily Beres :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1970, 1971 and 1972. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon Michael Beres (Deceased) and Emily Beres, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Beres (Deceased)
and Emily Beres
1720 Abbott Rd.
Lackawanna, NY 14218

Page 2
Affidavit of Mailing

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
21st day of March, 1984.

David Parchuck

Gina P. Hymel

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. Beres & Sons Dairy :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
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In the Matter of the Petition :
of :
Estate of Andrew Beres :
and Jane Beres, Individually and as :
Administratrix :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1970, 1971 and 1972. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Michael Beres (Deceased) and Emily Beres :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1970, 1971 and 1972. :

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

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon J. Grant Zajas, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. Grant Zajas
Zajas, Bennett & Zajas
8193 Erie Rd.
Evans, NY 14006

Page 2
Affidavit of Mailing

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
21st day of March, 1984.

David Parckhals

Conni A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

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

March 21, 1984

J. Beres & Sons Dairy
1280 Electric Ave.
Lackawanna, NY 14218

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) 690 & 722 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
J. Grant Zajas
Zajas, Bennett & Zajas
8193 Erie Rd.
Evans, NY 14006
Taxing Bureau's Representative

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

March 21, 1984

Michael Beres (Deceased)
and Emily Beres
1720 Abbott Rd.
Lackawanna, NY 14218

Dear Mrs. Beres:

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, 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
J. Grant Zajas
Zajas, Bennett & Zajas
8193 Erie Rd.
Evans, NY 14006
Taxing Bureau's Representative

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

March 21, 1984

Estate of Andrew Beres
& Jane Beres, Indiv. & as Administratrix
2185 Abbott Rd.
Lackawanna, NY 14218

Dear Mrs. Beres:

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, 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.

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Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
J. Grant Zajas
Zajas, Bennett & Zajas
8193 Erie Rd.
Evans, NY 14006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
J. BERES & SONS DAIRY
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1970,
1971 and 1972.

In the Matter of the Petition
of
ESTATE OF ANDREW BERES
AND JANE BERES, INDIVIDUALLY AND AS
ADMINISTRATRIX
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1970, 1971 and
1972.

In the Matter of the Petition
of
MICHAEL BERES (DECEASED) and EMILY BERES
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1970, 1971 and
1972.

DECISION

Petitioners, J. Beres & Sons Dairy, 1280 Electric Avenue, Lackawanna, New York 14218, Estate of Andrew Beres and Jane Beres, Individually and as Administratrix, 2185 Abbott Road, Lackawanna, New York 14218, and Michael Beres (Deceased) and Emily Beres, 1720 Abbott Road, Lackawanna, New York 14218, filed petitions 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 1970, 1971 and 1972 (File Nos. 10574, 10575 and 10576).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on December 15, 1981 at 1:15 P.M. Petitioners appeared by E. G. Bautz, P.A. and J. Grant Zajas, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Anna D. Colello, Esq., of counsel).

ISSUES

I. Whether the Audit Division can conduct an audit using indirect audit methods where there are books and records.

II. Whether the notices of deficiency issued to the petitioners should be dismissed on the ground of laches since all the partners became deceased prior to the hearing being held.

FINDINGS OF FACT

1. The partnership of J. Beres & Sons Dairy timely filed New York State partnership returns for 1970, 1971 and 1972. The members of the partnership were Michael Beres, Albert Beres and Andrew Beres, who devoted all their time to business.

2. Petitioners Andrew Beres and Jane Beres timely filed joint New York State income tax resident returns for 1970, 1971 and 1972.

3. Petitioners Michael Beres and Emily Beres timely filed joint New York State income tax resident returns for 1970, 1971 and 1972.

4. Signed consents for the tax year 1970 fixing the period of limitation upon which personal income and/or unincorporated business taxes may be assessed, extending such period to any time on or before April 15, 1975, were previously executed for all three petitioners by their representative, E. G. Bautz.

5. On September 30, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioner J. Beres & Sons Dairy for 1970, 1971 and 1972 asserting additional unincorporated business tax of \$5,914.00, plus penalty and interest of \$1,332.61.

On September 30, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioners Andrew Beres and Jane Beres for 1970, 1971 and 1972, asserting additional personal income tax of \$5,486.63, plus penalty and interest of \$1,201.10.

On September 30, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioners Michael Beres and Emily Beres for 1970, 1971 and 1972, asserting additional personal income tax of \$5,569.90, plus penalty and interest of \$1,221.66.

All three notices of deficiency were issued pursuant to a "source and application of funds" audit of the partnership, along with the following adjustments:

- (1) The business exemption for unincorporated business tax is limited to \$5,000.00.
- (2) A modification of the unincorporated business tax must be made on Line 13 of Schedule U-A.
- (3) Additional first year depreciation must be deducted from total cost to determine the depreciation expenses allowed for that year.

A summary of the audit showed additional taxable income from J. Beres & Sons Dairy of \$40,655.54, \$34,729.46 and \$8,485.80 for 1970, 1971 and 1972, respectively. This additional income was then allocated between all partners

including Albert Beres (a partner who did not file a petition) for 1970. For 1971 and 1972 the allocation excluded Albert Beres.

6. Petitioners contended that the Income Tax Bureau should not be able to use an indirect audit method (source and application of funds) since all the books and records were available. The petitioners further contended that the Income Tax Bureau should be restricted to the books and records unless they can show absence of complete books and records.

7. Testimony adduced at the hearing provided the following information. Petitioners used a single entry bookkeeping system, maintained in a rather loose, informal manner. There was a ledger of income but no cash receipts journal. Initial audit action revealed inaccuracies in petitioners' books and records, most notably a discrepancy between totals per the records versus amounts reported per returns. In view of this discrepancy, the Audit Division conducted their audit using the method of a source and application of funds analysis. No documentary evidence was provided to substantiate petitioners' assertion of the adequacy of their books and records.

8. Petitioners argued that because of the State's delay in bringing these cases to hearing all of the partners were now deceased and it was impossible for petitioners to prove the partners had other sources of income not used in the audit.

9. At the hearing, the Audit Division stated that the penalties on all three notices of deficiency should be cancelled.

CONCLUSIONS OF LAW

A. That the books and records appear superficially adequate does not preclude use of an indirect audit method. Use of an indirect audit method is not limited to cases in which the taxpayer has no books and records or where

his books and records are patently inadequate. The Income Tax Bureau need not prove specific inaccuracies in the taxpayers' books and records in order to resort to an indirect audit method. Once a discrepancy is established and the facts are such to give rise to an inference that the discrepancy stemmed from unreported income, use of an indirect audit method is appropriate.

B. That the State Tax Commission is not estopped from making a claim against petitioner. A state agency or body cannot be estopped from asserting its governmental power regarding acts within its governmental capacity. That the record in the instant case shows no undue delay by the State Tax Commission in instituting action, therefore, the remedy of laches claimed by petitioner is unfounded.


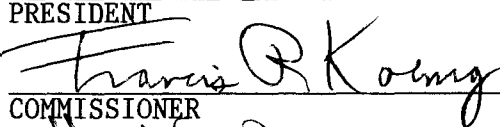

C. That the Audit Division is hereby directed to reduce the notices of deficiency issued on September 30, 1974 against J. Beres & Sons Dairy, Estate of Andrew Beres and Jane Beres, individually and as administratrix, and Michael Beres (Deceased) and Emily Beres by the amounts of the penalties.

D. That the petitions of J. Beres & Sons Dairy, Estate of Andrew Beres and Jane Beres, individually and as administratrix, and Michael Beres (Deceased) and Emily Beres are granted to the extent shown in Conclusion of Law "C", supra, and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

MAR 21 1984

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER