

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Howard Mosbacher : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
UBT under Article 22 & 23 of the Tax Law for the :
Years 1978 & 1979. :

State of New York }

ss.:

County of Albany }

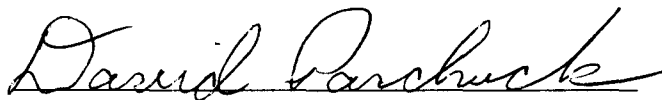
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of January, 1984, he served the within notice of Decision by certified mail upon Howard Mosbacher, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

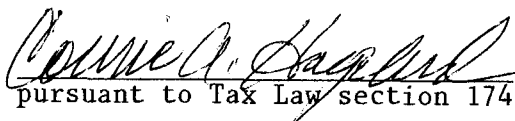
Howard Mosbacher
P.O. Box 3 - Penat Station
Bayshore, NY 11706

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
20th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Howard Mosbacher : AFFIDAVIT OF MAILING
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UBT under Article 22 & 23 of the Tax Law for the :
Years 1978 & 1979. :

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 20th day of January, 1984, he served the within notice of Decision by certified mail upon Steward L. Yanover, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steward L. Yanover
18 East Sunrise Hwy.
Freeport, NY 11520

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
20th day of January, 1984.

David Parchuck

Connie A. Haglund
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 20, 1984

Howard Mosbacher
P.O. Box 3 - Penat Station
Bayshore, NY 11706

Dear Mr. Mosbacher:

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
Steward L. Yanover
18 East Sunrise Hwy.
Freeport, NY 11520
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HOWARD MOSBACHER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax and Unincorporated	:	
Business Tax under Articles 22 and 23 of the Tax	:	
Law for the Years 1978 and 1979.	:	

Petitioner, Howard Mosbacher, P.O. Box 3 - Penat Station, Bayshore, New York 11706, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1978 and 1979 (File No. 35939).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 11, 1983 at 1:25 P.M. Petitioner appeared by Steward L. Yanover, P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether, for personal income tax and unincorporated business tax purposes, the Audit Division properly disallowed a portion of the auto depreciation and expenses claimed by petitioner.

II. Whether, for personal income tax and unincorporated business tax purposes, the Audit Division properly treated as additional, unreported income \$10,000.00 in the "cash on hand" account of the business as of January 1, 1978, and a credit balance of \$18,192.05 in the "accounts receivable" account of the business as of June 30, 1978.

FINDINGS OF FACT

1. For the years 1978 and 1979, petitioner, Howard Mosbacher, timely filed personal income tax and unincorporated business tax returns.

2. On November 6, 1981, following a field audit, the Audit Division issued to petitioner a Notice of Deficiency, asserting additional personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law, plus interest and penalty, for the years at issue, scheduled as follows:

	<u>1978</u>	<u>1979</u>
Additional personal income tax	\$3,351.58	\$340.14
Additional unincorporated business tax	1,480.07	180.32
Total taxes		\$5,352.11
Section 685(b) penalty		267.59
Interest		<u>1,150.55</u>
		<u>\$6,770.25</u>

3. Petitioner is the sole proprietor of Duck Pond Inn, a restaurant situated at 240 West Main Street, Bayshore, New York. The restaurant is open for luncheon and dinner six days per week.

4. Petitioner maintained one checking account, for personal and business use, in the name "Duck Pond Inn".

5. Petitioner used his auto, registered in his name, in connection with his business and also for personal purposes. He commuted in the auto from his home to the restaurant, a round trip of approximately one mile. Each business day, he travelled via the auto to the bank to deposit the previous day's receipts and to grocers and beverage distributors to purchase supplies (e.g., bread or ice) as needed; once a week he drove to farm stands on eastern Long Island to purchase fresh produce. (The bulk of foods and beverages sold were delivered by truck to Duck Pond Inn.) Petitioner did not use the car during business days for other than business reasons, except, as stated, for commuting.

On his days off, petitioner took day trips in the car; during his vacations, he visited relatives in Switzerland and Germany.

6. Petitioner paid all auto expenses by check. At year's end, his accountant cumulated the expenses by reference to the bank statements and cancelled checks; he then subtracted \$520.00 (\$10.00 per week) to take cognizance of petitioner's personal use of the car. On federal Schedule C, Profit or (Loss) from Business or Profession, attached to and submitted with petitioner's unincorporated business tax returns, he deducted car and truck expenses for 1978 and 1979 in the respective amounts of \$615.00 and \$1,656.00, and depreciation on the auto for 1978 and 1979 in the respective amounts of \$1,125.00 and \$2,078.75.

7. Because petitioner failed upon request to produce logs or any other documentation reflecting auto business mileage and personal mileage, the auditor disallowed 50 percent of the auto expenses incurred and depreciation claimed.

	<u>1978</u>	<u>1979</u>
Total auto expenses incurred	\$1,135	\$2,176
Expenses claimed	615	1,656
Expenses allowed	<u>568</u>	<u>1,088</u>
Difference (expenses disallowed)	\$ 47	\$ 568
Depreciation disallowed	\$ 562	\$1,040

8. (a) As part of his business recordkeeping system, petitioner maintained a "cash on hand" account. Petitioner computed the daily balance therein as follows: food and beverage sales (both cash and charge sales) plus sales tax collected, less: cash expenses, gratuities transferred to employees, payments received from credit card companies, and deposits made to petitioner's account.

(b) In preparing the year's end worksheet for 1977, petitioner's accountant determined that the cash on hand balance was unrealistically high.

He estimated that sales made by charge cards but not yet paid by the respective charge account companies totalled \$10,000.00. He accordingly reduced the balance in the cash on hand account to that amount, treated the remainder in the account of approximately \$13,000.00 as additional income, and opened the cash on hand account for 1978 at \$10,000.00. (Adjustments were made over the subsequent three years to ultimately correct this account.)

(c) During the course of the field audit, the examiner pointed to the 1978 opening balance in the cash on hand account as an incorrect accounting entry. He considered the accountant's explanation therefor to be unsatisfactory, and treated the \$10,000.00 as additional, unreported income for the year 1978.

9. (a) Also as part of his recordkeeping system for the restaurant, petitioner maintained an "accounts receivable" account. (Petitioner utilizes the accrual method of accounting.) At year's end, the accountant reconciled this account with petitioner's "true" receivables by reference to the remittance statements submitted by petitioner to the various credit card companies.

(b) Petitioner's wife kept the restaurant daybook, wherein she entered (among other things) charge sales; these figures were subsequently used to develop the accounts receivable. In early 1978, when she fell seriously ill and was no longer able to fulfill this responsibility, petitioner and other restaurant employees made the entries in the daybook.

(c) By June 30, 1978, the accounts receivable account reflected a credit balance of \$18,192.05. Petitioner's accountant ceased use of this account on July 1 because the balance was a meaningless figure. At year's end, he debited accounts receivable of \$18,192.05 and credited that amount to the cash on hand account. Further, he determined petitioner's true receivables

were \$4,583.65 and reflected this sum in accounts receivable as of December 31, 1978.

(d) The examiner differed with petitioner's treatment of the accounts receivable credit and was of the opinion that the correcting entry should have been made to sales, rather than cash on hand. He therefore treated the \$18,192.05 as additional, unreported income for 1978.

10. Petitioner's gross receipts as reported on federal Schedule C for the years 1978 through 1982 are set forth below.

<u>YEAR</u>	<u>GROSS RECEIPTS</u>
1978	\$252,379
1979	264,668
1980	272,241
1981	299,080
1982	287,977

Petitioner alleges that increasing the gross receipts for 1978 by \$28,192.00 to \$280,571.00 (as the Audit Division proposes) leads to an unrealistic result, in view of the growth of the business as shown above.

11. (a) The following figures were taken from petitioner's records for 1978:

Total sales, cash and charge account	\$248,196
Total deposits	\$260,731
Sales tax collected	12,760
Difference	<u>\$247,971</u>

Petitioner alleges that taking into consideration true receivables of \$4,583.65 (December 31, 1978), the above figures support the amount of gross receipts as reported and thus, the additions to income were unwarranted.

(b) However, employing petitioner's method of calculating the cash on hand account (see Finding of Fact "8(a)") with 1978 reported gross receipts of \$252,379, sales tax collected of \$12,760 and deposits made of \$260,731, it can

only be concluded that cash expenses, gratuities transferred to employees and payments received from credit card companies totalled somewhat less than \$4,408 (allowing for "true" cash on hand to make change).

Gross receipts reported	\$252,379
Sales tax collected	12,760
Deposits made	(260,731)
Balance	\$ 4,408

CONCLUSIONS OF LAW

A. That in view of petitioner's total failure to document the business use of his auto, by logging mileage or otherwise, the Audit Division's disallowance of 50 percent of auto expenses incurred and 50 percent of depreciation claimed is sustained. See generally Internal Revenue Code section 274(d).

B. That petitioner has failed to establish that the \$10,000.00 balance which existed in the restaurant's cash on hand account on January 1, 1978 (brought forward from December 31, 1977) was other than additional income of the restaurant; in point of fact, petitioner treated \$13,000.00 of the total of \$23,000.00 in said account on December 31, 1977 as income. However, if this sum of \$10,000.00 was income, as we believe it was, it was earned prior to 1978 and was properly subject to tax in such year. The portion of the deficiency asserted for 1978 and founded on this amount is accordingly cancelled.

C. That petitioner has failed to establish that the \$18,192.05 credit balance which existed in the restaurant's 1978 accounts receivable account was other than additional income. It is impossible to know whether this amount represents payments remitted by credit card companies, and if so, whether such payments were properly reflected elsewhere in petitioner's books. Furthermore, the computation set forth in Finding of Fact "11(b)" indicates an unreasonably low figure for cash expenses, gratuities, payments by credit card companies and "true" cash on hand as of December 31, 1978.

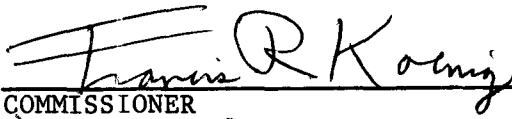
D. That the petition of Howard Mosbacher is granted to the extent indicated in Conclusion of Law "B"; the Notice of Deficiency issued on November 6, 1981 is to be modified accordingly; and except as so modified, the deficiency is in all other respects sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 20 1984


PRESIDENT


COMMISSIONER


COMMISSIONER