

STATE TAX COMMISSION

In the Matter of the Petition
of
Perry & Jacqueline Tucker
for Redetermination of a Deficiency or Revision
of a Determination or Refund of Personal Income &
Unincorporated Business Tax under Articles 22 & 23
of the Tax Law for the Years 1979 & 1980.

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

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Perry & Jacqueline Tucker, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Perry & Jacqueline Tucker
27 Woodard St.
Glens Falls, NY 12801

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
9th day of November, 1984.

David Parbuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Perry & Jacqueline Tucker :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
Unincorporated Business Tax under Article 22 & 23 :
of the Tax Law for the Years 1979 & 1980. :
:

AFFIDAVIT OF MAILING

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Ormondo S. Leombruno, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ormondo S. Leombruno
686 Glen Street
Glens Falls, NY 12801

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
9th day of November, 1984.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

Perry & Jacqueline Tucker
27 Woodard St.
Glens Falls, NY 12801

Dear Mr. & Mrs. Tucker:

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
Ormondo S. Leombruno
686 Glen Street
Glens Falls, NY 12801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PERRY W. and JACQUELINE TUCKER	:	DECISION
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 1979 and 1980.	:	

Petitioners Perry, W. and Jacqueline Tucker, 27 Woodard Street, Glens Falls, New York 12801, 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 1979 and 1980 (File No. 42816).

A small claims hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on June 26, 1984 at 10:45 A.M. Petitioners appeared by Ormondo S. Leombruno, CPA. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the source of income of a third party should be considered by the Audit Division in its cash flow audit of petitioners.

FINDINGS OF FACT

1. Petitioners, Perry W. and Jacqueline Tucker, filed joint New York State income tax resident returns for 1979 and 1980. Petitioner Perry W. Tucker filed unincorporated business tax returns for 1979 and 1980.

2. Petitioner Perry W. Tucker operated his business, a bar and grill as a sole proprietorship under the name of Buck and Mike's. The only income

reported on the tax returns filed was derived from the business. Petitioners resided with Beulah Wells who was Jacqueline Tucker's mother.

3. On February 25, 1983 the Audit Division issued to petitioners two notices of deficiency. One notice asserted personal income tax of \$529.07 plus penalty of \$26.45 and interest of \$148.44 for a total due of \$703.96. The other notice asserted unincorporated business tax of \$183.81 plus interest of \$55.87 for a total due of \$239.68. The notices were based on a Statement of Personal Income Tax Audit Changes and a Statement of Unincorporated Business Tax Audit Changes, respectively, which stated that based on a recent audit of the business, the "cash flow" audit resulted in an increase in gross receipts for the years 1979 and 1980.

4. Petitioner Perry W. Tucker's books for the bar and grill consisted of a sheet of paper on which he accumulated expenses and a checkbook. The checkbook was used for both personal and business expenses. Since the auditor determined that the books were inadequate for audit purposes, a cash flow audit was conducted. In order to perform the audit, petitioners were asked questions as to their cost of living and they were also requested to complete a cost of living form. Petitioners refused to answer the questions or to complete the form stating that it was not the Tax Departments function to know this information.

5. Based on information available a cost of living was determined for petitioners by the Audit Division. An adjustment was computed for each year at issue as follows:

	1979	1980
Net Business Deposits	\$ 2,037.55	\$ 665.31
Net Outlays per Return	<u>15,409.67</u>	<u>15,766.01</u>
Gross Receipts without		
Cost of Living	\$17,447.22	\$16,431.32
Cost of Living	<u>10,400.00</u>	<u>10,400.00</u>
Gross Receipts per Audit	\$27,847.22	\$26,831.32
Gross Receipts per Returns	<u>21,462.87</u>	<u>19,777.76</u>
Adjustment	\$ 6,384.35	\$ 7,053.56

6. After petitioners were notified of the adjustment, they submitted to the Audit Division a statement of annual estimated personal and family living expenses for each year at issue. They also submitted a source and application of income statement for themselves and a statement for Beulah Wells.

7. At the hearing a signed notarized schedule of income and expenses was submitted for Beulah Wells which indicated the following:

<u>Source of Income</u>	
Pension \$389/month	\$4,668.00
Social Security	-0-
Rent \$100/month	1,200.00
Total Income	<u>\$5,868.00</u>
<u>Application of Income</u>	
Fuel	\$ 500.00
Lights, Electric	600.00
Telephone	120.00
Homeowners' Insurance	128.00
Mortgage	-0-
Total Expenses	<u>\$1,348.00</u>
Residual Income over Expenses	\$4,520.00

8. Petitioners also submitted a source and application of funds schedule which indicated the following:

<u>Sources:</u>	1979	1980
Schedule C Net Income (plus dep.)	\$ 6,053.00	\$ 4,011.00
IRS and State Refunds	-0-	623.00
Beulah Wells' Pension and Rentals	5,868.00	5,868.00
Total Sources	<u>\$11,921.00</u>	<u>\$10,502.00</u>
<u>Applications:</u>		
Statement of Annual Living Expenses	\$10,436.00	\$ 8,698.00
Beulah Wells' Household Expenses	1,348.00	1,348.00
Total Applications	<u>\$11,784.00</u>	<u>\$10,046.00</u>
Net Excess Sources	\$ 137.00	\$ 456.00

9. Petitioners argued that Beulah Wells' income and expenditures should be included in the cash flow audit, since they reside with her. Neither

petitioners nor Beulah Wells appeared at the hearing to give testimony and there was no documentation submitted to support the schedule of income and expenses for Beulah Wells.

10. No issue was raised with reference to the penalty asserted by the Audit Division.

11. Petitioner Jacqueline Tucker listed her occupation on the tax returns filed as housewife. She was not involved with the operation of her husband's business.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law section 689(e) and section 722(a), which incorporates section 689(e) into Article 23, the Unincorporated Business Tax Article of the Tax Law, petitioners have the burden of proving that the alleged tax deficiencies herein were improperly asserted by the Audit Division.

B. That where one party to an action, knowing the truth of a matter in controversy, and having the evidence in his possession, omits to speak, every inference warranted by the evidence will be indulged in against him. Salter v. Havivi, 215 N.Y.S.2d 913. An unfavorable inference may be drawn when a party fails to produce evidence which is within his control and which he is naturally expected to produce. (See Orange & Rockland Utilities, Inc. v. Amerada Hess Corp. 59 A.D.2d 110.)

C. That since there was no testimony or other documentary evidence to support Beulah Wells' source of income, petitioners have not sustained their burden of proof to show that the Audit Division should have considered her income in the cash flow audit.


D. That since petitioner Jacqueline Tucker was not in business with her husband, the Audit Division is directed to remove her name from the Notice of Deficiency which asserted the unincorporated business tax.

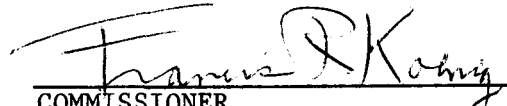
E. That the petition of Perry W. and Jacqueline Tucker is granted to the extent indicated in Conclusion of Law "D", supra and is in all other respects denied, and the notices of deficiency are sustained as indicated by this decision.

DATED: Albany, New York

NOV 09 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER