

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Arthur & Joan Bimonte :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC Income :
Tax under Article 22 & 30 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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Arthur & Joan Bimonte, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur & Joan Bimonte
141 Reville St.
Bronx, NY 10464

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
15th day of February, 1985.

David Parchuck

Bonnie A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Arthur & Joan Bimonte :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC
Income Tax under Article 22 & 30 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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Anthony J. Mirabito, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony J. Mirabito
William J. Oliverio & Co., P.C.
1443 East Gun Hill Rd.
Bronx, NY 10469

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
15th day of February, 1985.

David Parchuck

William J. Oliverio
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 15, 1985

Arthur & Joan Bimonte
141 Reville St.
Bronx, NY 10464

Dear Mr. & Mrs. Bimonte:

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 & 1312 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
Anthony J. Mirabito
William J. Oliverio & Co., P.C.
1443 East Gun Hill Rd.
Bronx, NY 10469
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ARTHUR BIMONTE AND JOAN BIMONTE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Years 1978 and 1979.	:	

Petitioners, Arthur Bimonte and Joan Bimonte, 141 Reville Street, Bronx, New York 10464, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1978 and 1979 (File No, 37092).

A formal hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 30, 1984 at 9:30 A.M. Petitioners appeared by Anthony J. Mirabito, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly attributed additional personal income to petitioner in the form of a constructive dividend based on a markup audit of a corporation in which petitioner was the sole shareholder.

FINDINGS OF FACT

1. Petitioners, Arthur Bimonte and Joan Bimonte, filed a joint New York State Income Tax Resident Return (with City of New York Personal Income Tax)

for each of the years 1978 and 1979 whereon Arthur Bimonte (hereinafter "petitioner") reported his occupation as "cook". On each of said returns, the only income reported was petitioner's wages of \$10,920.00 (1978) and \$13,000.00 (1979) derived from Arjo Restaurant, Inc., 394 City Island Avenue, Bronx, New York 10464.

2. On December 1, 1981, the Audit Division issued a Statement of Personal Income Tax Audit Changes wherein adjustments were made for constructive dividends of \$11,635.73 (1978) and \$35,434.22 (1979) as the result of a markup audit of Arjo Restaurant, Inc. (hereinafter "Arjo") by the sales tax unit of the Audit Division. Accordingly, a Notice of Deficiency was issued against Arthur Bimonte and Joan Bimonte on February 11, 1982 asserting additional New York State and New York City personal income tax of \$7,044.53, penalties of \$352.23 and interest of \$1,379.28, for a total due of \$8,776.04. Said penalties were asserted for negligence pursuant to sections 685(b) of the Tax Law and T46-185.0(b) of the Administrative Code of the City of New York.

3. An audit was conducted on Arjo for the period June 1, 1976 through August 31, 1979. Since the records of Arjo were deemed inadequate, the audit was conducted using a markup test of purchases. Based on such method, a sales tax deficiency of \$15,688.00 was determined. Said deficiency was agreed to by Arjo.

4. The income tax deficiency at issue herein was determined by breaking down Arjo's purchases, as reported on its U.S. Corporation Income Tax Return filed for each of the years 1978 and 1979, into separate categories of food, wine, liquor and beer. Said breakdown was computed using the allocation of purchase percentages determined in the markup audit. Each category of purchases was then multiplied by the markup percentages determined in the markup audit to

yield sales per purchase category. The sales for each category were totaled and reduced by gross receipts as reported on the U.S. Corporation Income Tax Return to yield additional gross receipts, which were considered as personally attributable to petitioner in the form of constructive dividends.

5. Arjo did not file New York State corporation franchise tax returns for the years 1978 and 1979.

6. Arjo was a medium sized Italian-American restaurant located on City Island. It catered mostly to a transient summer trade.

7. During the years at issue petitioner was the sole stockholder and corporate officer of Arjo.

8. Petitioner argued that he would not have agreed to the sales tax deficiency had he known that the markup audit would be used as a basis for asserting personal income taxes.

9. Petitioner argued that the markup audit should not be used as a basis for asserting the income tax deficiency at issue since the sales tax assessment "was due primarily to the lower amount of sales reported on the sales tax returns, in relation to the total amount of sales shown on the annual 'Corporate Returns'", and "not due because of any mark-up procedures".

10. Petitioner alleged that he is properly entitled to have an audit conducted incorporating a cost of living analysis, which he contended would show that he did not receive additional income from Arjo.

11. Petitioner alleged that any unreported gross receipts of Arjo were used in the business to acquire capital assets or make capital improvements. However, Arjo's balance sheets, as shown on Schedule L of the U.S. Corporation Income Tax Return filed for each year at issue, does not reflect increases in fixed assets to the extent alleged by petitioner.

12. Petitioner submitted a group of receipts and bills which are purported to show a portion of the expenses incurred by Arjo for capital improvements during 1978 and 1979 which were not reported on the corporation's returns. However, petitioner was unable to establish that such bills and receipts did not represent a duplication of amounts originally reported.

CONCLUSIONS OF LAW

A. That established audit procedures were used in conducting the audit of Arjo Restaurant Inc. Accordingly, it was proper for the Audit Division to use such audit as a basis for determining the personal income tax deficiency at issue herein.

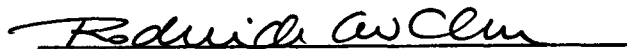
B. That petitioner Arthur Bimonte has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law and section T46-189.0(e) of the Administrative Code of the City of New York, to show that the additional unreported gross receipts attributable to Arjo, as the result of the markup audit, were not received personally by petitioner.


C. That the petition of Arthur Bimonte and Joan Bimonte is denied and the Notice of Deficiency issued February 11, 1982 is sustained together with such additional penalties and interest as may be lawfully owing.

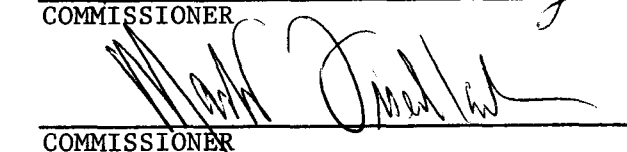
DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER