

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

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 8th day of March, 1985, 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
120 Fairport Rd.
Fairport, NY 14450

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
8th day of March, 1985.

David Parchuck

James R. Hurlbut
Authorized to administer oaths
pursuant to Tax Law section 174

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

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 8th day of March, 1985, he served the within notice of Decision by certified mail upon William 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 Easton
Easton & Bittker
875 Midtown Tower
Rochester, NY 14604

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
8th day of March, 1985.

David Parchuck

Connie A. Haggard

Authorized to administer oaths
pursuant to Tax Law section 174

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

March 8, 1985

B. Joseph Checho
120 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, 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
William Easton
Easton & Bittker
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	:	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 1972, 1973 and 1974.	:	

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).

Petitioner commenced an Article 78 proceeding in the Appellate Division, Third Department, to review the determination of the State Tax Commission issued August 4, 1982. On March 1, 1984, the Appellate Division withheld decision and remitted the matter to the State Tax Commission for further development of the record.

On remand, a formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on November 15, 1984 at 11:00 A.M., with all briefs to be submitted

by February 4, 1985. Petitioner appeared by William E. Easton. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, 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 unincorporated 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 which was not reported, unreported interest income, certain reimbursements for real estate taxes in 1974 which were not reported, commission expenses in 1973 and 1974 which were improperly claimed, and wages paid to taxpayer's wife which were disallowed.

6. The Audit Division conceded that certain adjustments should be made with respect to the years in issue, specifically, 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 resulted in adjustments of \$14,312.88 for 1973 and \$19,402.00 in 1974. Petitioner conceded that the Federal audit was accurate.

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

8. On appeal to the Appellate Division, Third Department, part of the Audit Division's Exhibit "J" in evidence was inadvertently left out of the record. This part of the exhibit explained the concessions discussed in Finding of Fact "6", supra. The court was unable to determine what, if any, errors asserted by petitioner in the Article 78 proceeding were conceded by the Audit Division and included in the adjustments made. Accordingly, the Appellate Division remitted the matter for further development of the record.

9. The concessions and adjustments made by the Audit Division were itemized on page four of the Field Audit Summary made part of Exhibit "J" as follows:

	<u>1972</u>	<u>1973</u>	<u>1974</u>
Loan repayment from Menihan	\$ 2,200.00		
Loan obtained-Fulmer (father-in-law)		\$ 5,350.00	
Loan obtained-Balas Checho	\$ 6,200.00		
Loan obtained-William Friel	\$1,300.00		
Loan obtained-Nadine Malanga			\$ 3,000.00
Aetna Ins. payment (golf carts)		\$ 2,995.00	
Sale of property & fill dirt from Steffan Land-reduced basis by ½ amount claimed	\$ 4,900.00	\$ 3,200.00	\$ 3,300.00
Personal cash living reduced	\$ 5,000.00	\$ 5,000.00	\$ 5,000.00
Total Adjustments	<u>\$19,600.00</u>	<u>\$16,545.00</u>	<u>\$11,300.00</u>

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, where petitioner's books do not clearly reflect income, 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.

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.

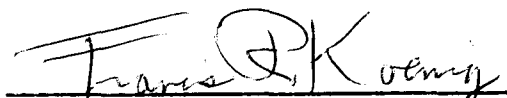
E. That the petition of B. Joseph Checho is granted to the extent indicated in Findings of Fact "6" and "9"; that the Audit Division is directed to modify the Notice of Deficiency issued March 28, 1977 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 08 1985


PRESIDENT


COMMISSIONER


COMMISSIONER