

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Robert & Dorothy Beagle

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
Tax under Article(s) 22 of the Tax Law for the :
Years 1979, 1980 & 1981.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 28th day of May, 1986, he/she served the within notice of decision by certified mail upon Robert & Dorothy Beagle the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Dorothy Beagle
15 Mercury Drive
Rochester, NY 14624

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
28th day of May, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Beagle's Service, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation
Franchise Tax under Article(s) 9A of the Tax Law :
for the Period 4/1/79 - 3/31/82.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 28th day of May, 1986, he/she served the within notice of decision by certified mail upon Beagle's Service, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Beagle's Service, Inc.
15 Mercury Drive
Rochester, NY 14624

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.

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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Robert & Dorothy Beagle

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
Tax under Article(s) 22 of the Tax Law for the :
Years 1979, 1980 & 1981.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 28th day of May, 1986, he served the within notice of decision by certified mail upon Carl R. Reynolds, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl R. Reynolds
430 Reynolds Arcade, 16 E. Main St.
Rochester, NY 14614

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
28th day of May, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Beagle's Service, Inc.

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation
Franchise Tax under Article(s) 9A of the Tax Law:
for the Period 4/1/79 - 3/31/82.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 28th day of May, 1986, he served the within notice of decision by certified mail upon Carl R. Reynolds, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl R. Reynolds
430 Reynolds Arcade, 16 E. Main Street
Rochester, NY 14614

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
28th day of May, 1986.

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 28, 1986

Robert & Dorothy Beagle
15 Mercury Drive
Rochester, NY 14624

Dear Mr. & Mrs. Beagle:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Carl R. Reynolds
430 Reynolds Arcade, 16 E. Main St.
Rochester, NY 14614

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

May 28, 1986

Beagle's Service, Inc.
15 Mercury Drive
Rochester, NY 14624

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) 1090 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
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Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Carl R. Reynolds
430 Reynolds Arcade, 16 E. Main Street
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:
	:
of	:
	:
ROBERT AND DOROTHY V. BEAGLE	:
	:
for Redetermination of a Deficiency or for	:
Refund of Personal Income Tax under Article 22	:
of the Tax Law for the Years 1979, 1980 and	:
1981.	:

DECISION

In the Matter of the Petition	:
	:
of	:
	:
BEAGLE'S SERVICE, INC.	:
	:
for Redetermination of a Deficiency or for	:
Refund of Corporation Franchise Tax under	:
Article 9-A of the Tax Law for the Period	:
April 1, 1979 through March 31, 1982.	:

Petitioners Robert and Dorothy V. Beagle, 15 Mercury Drive, Rochester, New York 14624, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1979, 1980 and 1981 (File No. 42823).

Petitioner Beagle's Service, Inc., 15 Mercury Drive, Rochester, New York 14624, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period April 1, 1979 through March 31, 1982 (File No. 47102).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on March 12, 1985 at 1:15 P.M., continued at the same offices on March 14, 1985 at 12:30 P.M., March 27, 1985 at 1:15 P.M., and March 28, 1985 at 1:15 P.M. and concluded on

September 23, 1985 at 1:15 P.M., with all briefs to be submitted by December 3, 1985. Petitioners appeared by Carl R. Reynolds, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the corporate petitioner's franchise tax liability for its fiscal years ended March 31, 1980, March 31, 1981 and March 31, 1982.

II. Whether the Audit Division's assertion of a fraud penalty against the corporate petitioner pursuant to section 1085(e) of the Tax Law was proper.

III. Whether the Audit Division properly determined the individual petitioners' personal income tax liability for the years 1979, 1980 and 1981.

IV. Whether the Audit Division's assertion of fraud penalties against the individual petitioners pursuant to section 685(e) of the Tax Law was proper.

FINDINGS OF FACT

1. Petitioner Beagle's Service, Inc. ("the corporation") operated a Sunoco service station located at 3095 Buffalo Road, in the Town of Gates, New York during the periods at issue.

2. The corporation was formed in 1963. Petitioner Robert Beagle was president of and a shareholder in the corporation from its inception to its termination in 1982. Mr. Beagle was the sole stockholder of the corporation from 1969 through 1982. The corporation did not have any other officers during the periods at issue. Mr. Beagle maintained the daily records of the corporation during these years.

3. The corporation's service station was located on the corner of a major intersection, Elmgrove and Buffalo Roads, and was within approximately 150 yards of an Eastman Kodak factory. The service station had 150 to 200 feet of

frontage, three service bays, and six gasoline pumps. One bank of three pumps was for full service, the other for self-service. There were also two other service stations operating within approximately 150 yards of the corporation's service station.

4. During the periods at issue, the station was in operation from 6:00 a.m. to 8:00 p.m. on Monday through Friday and 6:00 a.m. to 6:00 p.m. on Saturday, a total of 82 hours per week.

5. At various times during the period at issue, the corporation employed five individuals. These individuals were Robert Beagle, Russell Ellis, Mark Sidor, Peggy Miller and Robert Begandy. All five individuals were employed by the corporation in 1980. Mr. Begandy was also employed by the corporation in 1979, 1981 and 1982. The corporation did not file a withholding tax statement for Mr. Begandy in 1980. In addition, the corporation contracted out labor repair work in 1980, as evidenced by the corporation's franchise tax report for the year ended March 31, 1980. At the hearing, Mr. Beagle denied that the corporation had contracted out such repair work, but could not reconcile this allegation with the corporation's franchise tax report.

6. The corporation's fiscal and tax year ended on March 31. The corporation's income for financial accounting and tax purposes was reported on a cash basis. The corporation filed a franchise tax report for the year ended March 31, 1980, but did not file franchise tax reports for the years ended March 31, 1981 or March 31, 1982. The report for the fiscal year ended March 31, 1980 reported a net loss of \$2,410.00.

7. The corporation did not maintain any bank accounts during the periods at issue. Consequently, all bills were paid by Mr. Beagle in cash or by bank draft during these periods.

8. The corporation's franchise tax reports were prepared under the direction of a Mrs. LaFrance, an accountant. Mrs. LaFrance prepared these reports based upon information furnished by Mr. Beagle. Mr. Beagle provided Mrs. LaFrance with the corporation's daily summary sheets and register tapes to prepare the franchise tax reports.

9. A comparison of the gross sales figures set forth in the corporation's daily summary sheets which were submitted at the hearing and Mrs. LaFrance's monthly journals reveals a close correlation between these two sets of figures.

10. Mrs. LaFrance also prepared Federal income tax returns for the corporation for the years ended March 31, 1981 and March 31, 1982. These returns were not filed by the corporation. Under the system by which the corporation's tax returns were filed, Mrs. LaFrance returned completed returns to Mr. Beagle for his signature and his subsequent filing of said returns.

11. In June of 1982, the Audit Division commenced a field audit of the corporation for the years ended March 31, 1980, March 31, 1981 and March 31, 1982. On June 29, 1982, auditors visited the business premises of the corporation and conducted an initial audit interview with Mr. Beagle. At that time, the auditors requested access to the sales records of the business, including cash register tapes and daily sales records for the periods at issue. Mr. Beagle did not furnish any records in response to this request, but suggested that all records were in the possession of Mrs. LaFrance. The auditors made two subsequent requests for sales records and Mr. Beagle failed to furnish any records in response thereto on each occasion.

12. During the meeting of June 29, 1982, Mr. Beagle advised the auditors that the corporation's actual markup on gasoline sold was six to ten cents for 1979 and 1980 and eight to ten cents for 1980 and 1981. This markup for

gasoline was about two cents above the average for service stations in the Rochester area during the periods at issue. Mr. Beagle also advised the auditors during this meeting that the corporation's markup on tires, batteries and accessories ("TBA") was 15 to 20 percent during the audit period. Mr. Beagle further stated during this meeting that the corporation employed one full-time mechanic during the audit period, and that the corporation charged \$16.00, \$17.00 and \$18.00 an hour for labor repair services during 1979, 1980 and 1981, respectively.

13. During 1982, the Audit Division observed the station in operation several times. On each occasion, it observed approximately 25 to 30 automobiles on the premises of the station. During each observation, all three service bays were in use. Four persons, including Mr. Beagle, were observed repairing automobiles in the service bays.

14. As part of the audit, the Audit Division compared sales reported on the corporate franchise tax reports for 1978 and 1979 to the gross sales reported on the sales tax returns filed by the corporation. The amount of gross sales reported by the corporation on its franchise tax reports for the years ended March 31, 1979 and March 31, 1980 were \$399,859.00 and \$665,304.00, respectively. Gross sales reported for sales tax purposes for the respective periods were \$181,719.00 and \$214,816.00.

15. The Audit Division conducted a markup audit for the purpose of computing the corporation's gross sales for sales tax purposes for the period September 1, 1979 through February 28, 1982. In computing sales of gasoline and TBA, the Audit Division used the amount of purchases reflected on the corporation's books. The Audit Division used the markup percentages furnished by Mr. Beagle in computing gasoline sales. TBA purchases were marked up 20 percent and

miscellaneous items were marked up 50 percent. Sales of automobile repair services were computed upon the premise that the corporation billed 80 hours of repair work per week based upon two individuals working 40 hours per week. The hours of repair work per week were multiplied by the labor rates furnished by Mr. Beagle. The markup audit revealed that the corporation had underreported its taxable sales for sales tax purposes by \$1,594,585.70 for the sales tax audit period.

16. As a result of the discrepancy between sales reported on the franchise tax reports and on the sales tax returns, the Audit Division sought to determine the manner in which the sales tax returns were prepared. Mrs. LaFrance advised the auditor that Mr. Beagle phoned in the figures for the sales tax returns. Mr. Beagle, however, stated that both the sales tax returns and corporate franchise tax reports were prepared by Mrs. LaFrance in the manner set forth in Finding of Fact "8".

17. The dollar amount of the corporation's purchases of gasoline as set forth in the corporation's books were \$499,787.00, \$567,858.00, \$886,849.00 and \$728,045.00 for the years ended March 31, 1979, March 31, 1980, March 31, 1981 and March 31, 1982, respectively. The corporation reported sales for sales tax purposes for the years ended March 31, 1979 and March 31, 1980 of \$181,719.00 and \$214,816.00, respectively.

18. The corporation did not report any bad debt expense on the sales tax or franchise tax returns filed during the periods at issue. The corporation's books also did not report any bad debt expense for the periods in issue. At the hearing, Mr. Beagle alleged that the corporation had a 10 percent bad debt expense during the audit period, but presented no evidence to support his contention.

19. Based on the results of the markup audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation asserting sales tax due in the amount of \$111,621.17, plus penalty of \$25,096.58 and interest of \$27,464.53, for a total amount due of \$164,182.38 for the period September 1, 1979 through February 28, 1982. The corporation did not file a petition in response to this notice.

20. On February 1, 1983, the Audit Division issued three notices of deficiency to the corporation asserting additional corporate franchise tax due for the years ended March 31, 1980, March 31, 1981 and March 31, 1982 in amounts as follows:

<u>FYE</u>	<u>Tax Deficiency</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total Due</u>
3/31/80	\$ 8,980.00	\$3,134.65	\$ 898.00	\$13,012.65
3/31/81	\$12,812.90	\$3,383.63	\$4,676.71	\$20,873.24
3/31/82	\$11,902.20	\$1,280.56	\$3,630.17	\$16,812.93

21. The notices of deficiency were premised on the assertion that the corporation had unreported income in the amount of \$89,800.00, \$128,129.00 and \$119,022.00 during the years at issue. The additional income was based upon the results of the markup audit. Specifically, the audited sales per the markup audit were held to be income to the corporation for franchise tax purposes. In addition, the income attributed to the corporation included unremitted sales tax on the corporation's unreported taxable sales during the fiscal years at issue. The penalties asserted in the notices of deficiency were based upon the Audit Division's contention that the corporation's failure to report the additional income revealed by the audit was due to negligence or intentional disregard of Articles 9-A and 27 of the Tax Law and the rules and regulations promulgated thereunder.

22. After the conclusion of the markup audit, the Audit Division conducted a net worth audit of petitioners Robert and Dorothy Beagle's personal finances for the years 1979, 1980 and 1981. During this audit, Mrs. Beagle was requested to furnish a listing of assets and liabilities acquired during the years 1979 through 1981. In response to this request, Mrs. Beagle furnished the following list of assets:

1) A savings account with Marine Midland Bank which had a balance of \$3,266.00, \$1,636.90, \$1,636.90 and \$3,358.02 on December 31, 1978, December 31, 1979, December 31, 1980 and December 31, 1981, respectively;

2) A certificate of deposit with Marine Midland Bank which was acquired in 1980 and was worth \$42,741.66 and \$47,870.66 on December 31, 1980 and December 31, 1981, respectively;

3) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$16,475.00 on December 31, 1981;

4) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$17,057.88 on December 31, 1981;

5) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$1,000.00 on December 31, 1981.

During this audit period, Mrs. Beagle stated that she and her husband had at most \$500.00 cash on hand during the years in question. At the hearing, however, she stated that she and her husband had at one time during the audit period \$4,000.00 to \$5,000.00 cash on hand at home.

23. As part of the net worth audit, the Audit Division examined the real property records maintained by the Monroe County Clerk. This review disclosed that Mr. and Mrs. Beagle purchased, without the need of financing, a house for \$32,885.00 in August, 1981. The house was transferred to their daughter as a

gift. The Beagles also purchased with cash a new automobile in 1980 costing \$8,803.00. The net worth audit revealed that the Beagles had unexplained increases in their net worth in amounts of \$11,839.00, \$42,986.00 and \$97,229.00 for the years 1979, 1980 and 1981, respectively.

24. On February 2, 1983, the Audit Division issued three notices of deficiency to Robert E. and Dorothy V. Beagle asserting deficiencies of personal income tax for the years 1979 through 1981 in amounts as follows:

<u>Taxpayer</u>	<u>Period</u>	<u>Additional Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Balance Due</u>
Dorothy V. Beagle	1979, 1980	\$ 35.00	\$ 2.64	\$ 9.43	\$ 47.07
Robert E. & Dorothy V. Beagle	1979, 1980	\$25,566.29	\$1,758.51	\$6,625.31	\$33,950.11
Robert E. & Dorothy V. Beagle	1981	\$23,147.22	\$8,911.68	\$5,597.24	\$37,656.14

25. The additional tax asserted due by the Audit Division in the notices of deficiency was based upon the Audit Division's contention that Robert E. Beagle had received as a constructive dividend the entire amount of the corporation's unreported income. The penalties asserted in said notices were based upon the Audit Division's assertion that petitioners' failure to report receipt of the constructive dividends was due to negligence or intentional disregard of Article 22 and the rules and regulations promulgated thereunder.

26. After the issuance of the notices of deficiency regarding their personal income tax liability, Mr. and Mrs. Beagle furnished a new listing of assets acquired during the audit period. This new listing included eight certificates of deposit which were not disclosed to the Audit Division during the audit.

27. At the hearing, Mr. Beagle submitted a limited number of cash register tapes and daily worksheets. The Audit Division conducted an analysis of the tapes subsequent to their submission into evidence. There were numerous

discrepancies between the cash register tapes and daily worksheets. The cash register tapes submitted were complete for three months in 1981- February, June and August. The cash register tapes were almost complete for four other months- April, May, July and September 1981. In computing sales for days where no tapes were available, the Audit Division used sales per the daily worksheets. The cash register tapes for these seven months reported sales of \$654,338.07. Sales as reported by the corporation in its sales journal for the same months were \$573,686.01.

28. At the hearing, Mr. Beagle stated that he received wages from the corporation of \$250.00 per week, or \$13,000.00 per annum, during the tax years in question. Nevertheless, his 1979 personal income tax return reported wage income of \$9,750.00 and his 1980 personal income tax return reported wage income of \$11,107.00. The withholding tax return filed by the corporation for 1980 reported the following gross wages and taxes withheld for Mr. Beagle:

<u>Year</u>	<u>Gross</u>	<u>Taxes Withheld</u>	<u>Take Home Pay</u>
1980	\$10,400.00	\$1,801.64	\$8,598.36

29. The corporation reported for tax purposes net losses from the operation of its business for each year from 1971 through 1979, except the year ended March 31, 1974 for which no tax return was filed.

30. The corporation was delinquent in paying the minimum corporate franchise tax due for the years 1971 through 1979. The corporation received a Notice and Demand for Payment of Corporation Tax Due for each of these tax delinquencies.

31. The corporation made capital expenditures in excess of \$22,000.00 during the audit period.

32. The corporation records made available for audit or presented at the hearing do not show any evidence that additional capital was contributed to the business during any time period.

33. The Beagles received no substantial gifts or loans during the period at issue.

34. Mr. and Mrs. Beagle filed separate New York State personal income tax returns for the year 1979 and a joint New York State personal income tax return for the year 1980. Neither Mr. Beagle nor Mrs. Beagle filed a New York State personal income tax return for the year 1981.

35. With respect to the year 1981, the Beagles' accountant, Mrs. LaFrance, did prepare a Federal income tax return for them for that year. This return reported interest income of \$8,624.00. The Beagles submitted on audit or at hearing certificates of deposit and savings accounts which earned approximately \$2,000.00 during 1981.

36. Mr. Beagle was continuously engaged in the gas station business since 1951. During the audit period, the retail gasoline business was extensively regulated by the federal government. Mr. Beagle was familiar with and able to comply with these regulations.

37. Mr. and Mrs. Beagle reported their income on a cash basis for tax purposes during the years at issue.

38. At the hearing, the Audit Division asserted a penalty for fraud pursuant to Tax Law sections 685 and 1085 in lieu of the negligence penalty which had been asserted in each notice of deficiency. Petitioners protested the assertion of such penalties at hearing claiming that the Audit Division had failed to give proper notice of its intention to assert such penalties.

39. In accordance with section 307(a) of the New York State Administrative Procedure Act, the Audit Division's proposed findings of fact have generally been accepted and the substance thereof adopted herein. However, the following major changes are noted: proposed findings of fact "7", "14", "22" and "25" have been rejected in whole or in part because they are either redundant or unnecessary to the determination. Also, proposed finding of fact "9" has been rejected in part as argumentative.

CONCLUSIONS OF LAW

A. That the Audit Division's employment of a purchase markup to determine additional sales tax due from petitioner Beagle's Service, Inc. was warranted in view of said petitioner's failure to provide complete and accurate records to the Audit Division's examiners. Mr. Beagle's subsequent production of certain records at the hearing does not affect the validity of the Audit Division's method; in fact, given the incomplete and inconsistent nature of the records which were produced, the production of such records supports the Audit Division's decision to resort to the markup method of audit. Petitioners have failed to submit any evidence which would tend to refute the results of the markup audit.

B. That the Audit Division's use of the purchase markup analysis was an appropriate means of reconstructing the corporate petitioner's gross receipts for corporation franchise tax purposes and such methodology reasonably reflects the additional corporation franchise tax due from the corporate petitioner (see Holland v. United States, 348 U.S. 121; DiLando v. Commissioner, 34 T.C.M. 1046).

C. That the Audit Division properly asserted as additional income for franchise tax purposes sales tax proceeds collected by the corporation (see Estate of Kurtzhalz v. Commissioner, 34 T.C.M. 334).

D. That the Audit Division's assertion of fraud penalties at hearing for each of the notices of deficiency at issue herein was procedurally proper pursuant to sections 689(d)(1) and 1089(d)(1) of the Tax Law, each of which provides, in pertinent part:

"the tax commission shall have power...to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at...the hearing..."

Petitioners' claim that the Audit Division failed to give proper notice of their assertion of fraud herein pursuant to 20 NYCRR 601.6(c) is without merit.

E. That with respect to the imposition of the fraud penalty against the corporation, in order to prevail the Audit Division must prove by clear and convincing evidence every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation by petitioner and resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Walter Shutt, State Tax Commission, June 4, 1982). The Audit Division need not prove that the entire amount of the deficiency is due to fraud, but only that some portion of the deficiency for each tax year in issue is due to fraud (Tax Law section 1085[e]).

F. That the Audit Division has met its burden with respect to the imposition of the fraud penalty against the corporation. In reaching this conclusion, it should be noted that no single fact among those established at hearing is in itself conclusive evidence of fraud, yet upon review of the totality of facts established herein, we are of the opinion that petitioner's consistent pattern of misrepresentations and omissions evince a knowing, willful and deliberate attempt by petitioners to evade payment of taxes lawfully due.

Among the facts found at hearing which collectively establish a fraudulent intent on the part of the corporation are its failure to file

corporate franchise tax returns for the fiscal years ended March 31, 1981 and March 31, 1982; the corporation's reporting of net operating losses for a period of ten years (1971-1980); the corporation's underreporting of net income for franchise tax purposes by some \$90,000.00 based upon the markup audit for the fiscal year ended March 31, 1980; the discrepancy between the corporation's cash register tapes and daily worksheets; the fact that petitioner's purchases for the year ended March 31, 1981 were approximately three times as great as its reported gross sales for sales tax purposes for the same period; the corporation's failure to maintain any bank accounts during the period at issue and the resulting "cash only" business dealings; Mr. Beagle's failure to produce records when requested by the Audit Division; and the corporation's failure to file withholding statements for one of its employees during the audit period. Taken together, these facts establish, by clear and convincing evidence, a knowing, willful and deliberate intent by the corporation, through its agent, Mr. Beagle, to evade payment of taxes lawfully due and owing. See Ehlers v. Vinal, 382 F.2d 58 (8th Cir. 1967); Merritt v. Commissioner, 301 F.2d 484 (5th Cir. 1962); Gromacki v. Commissioner, 361 F.2d 727 (7th Cir. 1966).

Petitioner's contention that Mr. Beagle's reliance upon the professional expertise of his accountant, Mrs. LaFrance, in the preparation of all tax returns during the audit period negated any possibility of fraudulent intent on Mr. Beagle's part is untenable in view of the following: first, the franchise tax returns were prepared by Mrs. LaFrance based upon information provided by Mr. Beagle; second, Mr. and Mrs. Beagle's personal income tax returns were prepared from information provided by Mr. and Mrs. Beagle; third, Mr. Beagle was responsible to file all tax returns under the system as set up between he and Mrs. LaFrance.

G. That inasmuch as Mr. Beagle was the sole shareholder and officer of the corporation during the period at issue and controlled the corporation's finances, the Audit Division properly attributed the additional corporate income per the markup audit to Mr. Beagle through a constructive dividend. See Estate of L. F. Slater, 21 T.C.M. 1355.

H. That Mrs. Beagle was neither a stockholder of the corporation nor was she involved in the running of the corporation during the period at issue, and during the years 1979 and 1981 she did not file a joint income tax return with her husband. Her tax liability for the years 1979 and 1981 is therefore separate and distinct from that of her husband for those years. As a result, the Audit Division improperly asserted income tax liability against Mrs. Beagle for the years 1979 and 1981 based upon the constructive dividends attributed to Mr. Beagle during those years.

I. That inasmuch as Mrs. Beagle filed a joint New York State income tax return with her husband for the year 1980, her income tax liability is joint and several with that of her husband for that year, and the Audit Division properly asserted income tax liability against her based upon Mr. Beagle's receipt of a constructive dividend during that year.

J. That the Audit Division's use of a purchase markup analysis was an appropriate means of reconstructing the individual petitioners' taxable income and such methodology reasonably reflects the additional personal income tax due from the individual petitioners (see Holland v. United States, supra; DiLando v. Commissioner, supra; Matter of William T. Kelly, supra). The Audit Division was not restricted to the use of or the results of the net worth audit (see Dilando v. Commissioner, supra; Matter of William T. Kelly, supra; Matter of Carmen and Adelia Garzia, State Tax Commission, June 29, 1983).

K. That the Audit Division has met its burden of proving fraudulent intent on the part of Mr. Beagle for intentionally failing to report the amount of the constructive dividend received by him per the markup audit during the period at issue.

Similar to the rationale set forth in Conclusion of Law "F" herein, no single fact among those adduced at the hearing is conclusive evidence of fraud, yet collectively, the facts established at hearing show, by clear and convincing evidence, that Mr. Beagle did with fraudulent intent underreport his income during each of the tax years at issue.

The factors set forth in Conclusion of Law "F" are also relevant evidence of Mr. Beagle's fraudulent intent, for, given his control of the corporation, these facts are part of the same pattern of behavior evincing fraudulent intent to evade payment of taxes. In addition, the following are relevant: Mr. Beagle's failure to file a personal income tax return for 1981; his testimony which was contradicted by documentary evidence; and the reluctant manner in which he revealed personal assets to the Audit Division. Taken together, these facts clearly and convincingly establish fraudulent intent on Mr. Beagle's part to evade payment of taxes lawfully due and owing. See Ehlers v. Vinal, 382 F.2d 58 (8th Cir. 1967); Gromacki v. Commissioner, 361 F.2d 727 (7th Cir. 1966); Merritt v. Commissioner, 301 F.2d 484 (5th Cir. 1962).

L. That the Audit Division has failed to sustain its burden of proof of fraud for the year 1980 with respect to Mrs. Beagle, given her lack of involvement in both the running of the corporation and the preparation of tax returns. However, Mrs. Beagle has failed to show that the understatement of income for

the year 1980 was not due to negligence. She is therefore liable for the negligence penalty for the year 1980 pursuant to Tax Law §689(b).

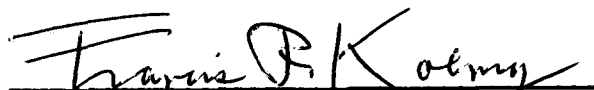
M. That the petition of Beagle's Service, Inc. is denied and the fraud penalty pursuant to Tax Law § 1085(a) is hereby imposed against said petitioner; that the petition of Robert and Dorothy V. Beagle is granted to the extent indicated in Conclusions of Law "H" and "I", limiting the liability of Dorothy V. Beagle to the year 1980; that the fraud penalty as asserted by the Audit Division is hereby imposed against Robert Beagle; that the Audit Division is hereby directed to modify the notices of deficiency at issue herein in accordance with this decision; that except as so modified, the notices of deficiency at issue herein are sustained and, except as so granted herein, the petitions of Beagle's Service, Inc. and Robert and Dorothy V. Beagle are in all respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

W. A. Harriman Campus

ALBANY, N.Y. 12227

2423

CLAIM CHECK
NO.

54353

☐ HOLD

DATE

5/30

1ST NOTICE

2ND NOTICE

6/4/86

RETURN

6/4/86

Detached from
PS Form 3946-A
Oct. 1980

Postage and fee on envelope to the right
will be returned to the sender

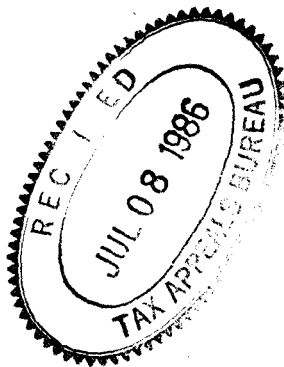
CERTIFIED

P 319 372 688

MAIL

Beagle's Service, Inc.
15 Mercury Drive
Rochester, NY 14624

HOLD TIL 6/18/86



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

May 28, 1986

Beagle's Service, Inc.
15 Mercury Drive
Rochester, NY 14624

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) 1090 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Carl R. Reynolds
430 Reynolds Arcade, 16 E. Main Street
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:
	:
of	:
	:
ROBERT AND DOROTHY V. BEAGLE	:
	:
for Redetermination of a Deficiency or for	:
Refund of Personal Income Tax under Article 22	:
of the Tax Law for the Years 1979, 1980 and	:
1981.	:

DECISION

In the Matter of the Petition	:
	:
of	:
	:
BEAGLE'S SERVICE, INC.	:
	:
for Redetermination of a Deficiency or for	:
Refund of Corporation Franchise Tax under	:
Article 9-A of the Tax Law for the Period	:
April 1, 1979 through March 31, 1982.	:

Petitioners Robert and Dorothy V. Beagle, 15 Mercury Drive, Rochester, New York 14624, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1979, 1980 and 1981 (File No. 42823).

Petitioner Beagle's Service, Inc., 15 Mercury Drive, Rochester, New York 14624, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period April 1, 1979 through March 31, 1982 (File No. 47102).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on March 12, 1985 at 1:15 P.M., continued at the same offices on March 14, 1985 at 12:30 P.M., March 27, 1985 at 1:15 P.M., and March 28, 1985 at 1:15 P.M. and concluded on

September 23, 1985 at 1:15 P.M., with all briefs to be submitted by December 3, 1985. Petitioners appeared by Carl R. Reynolds, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the corporate petitioner's franchise tax liability for its fiscal years ended March 31, 1980, March 31, 1981 and March 31, 1982.

II. Whether the Audit Division's assertion of a fraud penalty against the corporate petitioner pursuant to section 1085(e) of the Tax Law was proper.

III. Whether the Audit Division properly determined the individual petitioners' personal income tax liability for the years 1979, 1980 and 1981.

IV. Whether the Audit Division's assertion of fraud penalties against the individual petitioners pursuant to section 685(e) of the Tax Law was proper.

FINDINGS OF FACT

1. Petitioner Beagle's Service, Inc. ("the corporation") operated a Sunoco service station located at 3095 Buffalo Road, in the Town of Gates, New York during the periods at issue.

2. The corporation was formed in 1963. Petitioner Robert Beagle was president of and a shareholder in the corporation from its inception to its termination in 1982. Mr. Beagle was the sole stockholder of the corporation from 1969 through 1982. The corporation did not have any other officers during the periods at issue. Mr. Beagle maintained the daily records of the corporation during these years.

3. The corporation's service station was located on the corner of a major intersection, Elmgrove and Buffalo Roads, and was within approximately 150 yards of an Eastman Kodak factory. The service station had 150 to 200 feet of

frontage, three service bays, and six gasoline pumps. One bank of three pumps was for full service, the other for self-service. There were also two other service stations operating within approximately 150 yards of the corporation's service station.

4. During the periods at issue, the station was in operation from 6:00 a.m. to 8:00 p.m. on Monday through Friday and 6:00 a.m. to 6:00 p.m. on Saturday, a total of 82 hours per week.

5. At various times during the period at issue, the corporation employed five individuals. These individuals were Robert Beagle, Russell Ellis, Mark Sidor, Peggy Miller and Robert Begandy. All five individuals were employed by the corporation in 1980. Mr. Begandy was also employed by the corporation in 1979, 1981 and 1982. The corporation did not file a withholding tax statement for Mr. Begandy in 1980. In addition, the corporation contracted out labor repair work in 1980, as evidenced by the corporation's franchise tax report for the year ended March 31, 1980. At the hearing, Mr. Beagle denied that the corporation had contracted out such repair work, but could not reconcile this allegation with the corporation's franchise tax report.

6. The corporation's fiscal and tax year ended on March 31. The corporation's income for financial accounting and tax purposes was reported on a cash basis. The corporation filed a franchise tax report for the year ended March 31, 1980, but did not file franchise tax reports for the years ended March 31, 1981 or March 31, 1982. The report for the fiscal year ended March 31, 1980 reported a net loss of \$2,410.00.

7. The corporation did not maintain any bank accounts during the periods at issue. Consequently, all bills were paid by Mr. Beagle in cash or by bank draft during these periods.

8. The corporation's franchise tax reports were prepared under the direction of a Mrs. LaFrance, an accountant. Mrs. LaFrance prepared these reports based upon information furnished by Mr. Beagle. Mr. Beagle provided Mrs. LaFrance with the corporation's daily summary sheets and register tapes to prepare the franchise tax reports.

9. A comparison of the gross sales figures set forth in the corporation's daily summary sheets which were submitted at the hearing and Mrs. LaFrance's monthly journals reveals a close correlation between these two sets of figures.

10. Mrs. LaFrance also prepared Federal income tax returns for the corporation for the years ended March 31, 1981 and March 31, 1982. These returns were not filed by the corporation. Under the system by which the corporation's tax returns were filed, Mrs. LaFrance returned completed returns to Mr. Beagle for his signature and his subsequent filing of said returns.

11. In June of 1982, the Audit Division commenced a field audit of the corporation for the years ended March 31, 1980, March 31, 1981 and March 31, 1982. On June 29, 1982, auditors visited the business premises of the corporation and conducted an initial audit interview with Mr. Beagle. At that time, the auditors requested access to the sales records of the business, including cash register tapes and daily sales records for the periods at issue. Mr. Beagle did not furnish any records in response to this request, but suggested that all records were in the possession of Mrs. LaFrance. The auditors made two subsequent requests for sales records and Mr. Beagle failed to furnish any records in response thereto on each occasion.

12. During the meeting of June 29, 1982, Mr. Beagle advised the auditors that the corporation's actual markup on gasoline sold was six to ten cents for 1979 and 1980 and eight to ten cents for 1980 and 1981. This markup for

gasoline was about two cents above the average for service stations in the Rochester area during the periods at issue. Mr. Beagle also advised the auditors during this meeting that the corporation's markup on tires, batteries and accessories ("TBA") was 15 to 20 percent during the audit period. Mr. Beagle further stated during this meeting that the corporation employed one full-time mechanic during the audit period, and that the corporation charged \$16.00, \$17.00 and \$18.00 an hour for labor repair services during 1979, 1980 and 1981, respectively.

13. During 1982, the Audit Division observed the station in operation several times. On each occasion, it observed approximately 25 to 30 automobiles on the premises of the station. During each observation, all three service bays were in use. Four persons, including Mr. Beagle, were observed repairing automobiles in the service bays.

14. As part of the audit, the Audit Division compared sales reported on the corporate franchise tax reports for 1978 and 1979 to the gross sales reported on the sales tax returns filed by the corporation. The amount of gross sales reported by the corporation on its franchise tax reports for the years ended March 31, 1979 and March 31, 1980 were \$399,859.00 and \$665,304.00, respectively. Gross sales reported for sales tax purposes for the respective periods were \$181,719.00 and \$214,816.00.

15. The Audit Division conducted a markup audit for the purpose of computing the corporation's gross sales for sales tax purposes for the period September 1, 1979 through February 28, 1982. In computing sales of gasoline and TBA, the Audit Division used the amount of purchases reflected on the corporation's books. The Audit Division used the markup percentages furnished by Mr. Beagle in computing gasoline sales. TBA purchases were marked up 20 percent and

miscellaneous items were marked up 50 percent. Sales of automobile repair services were computed upon the premise that the corporation billed 80 hours of repair work per week based upon two individuals working 40 hours per week. The hours of repair work per week were multiplied by the labor rates furnished by Mr. Beagle. The markup audit revealed that the corporation had underreported its taxable sales for sales tax purposes by \$1,594,585.70 for the sales tax audit period.

16. As a result of the discrepancy between sales reported on the franchise tax reports and on the sales tax returns, the Audit Division sought to determine the manner in which the sales tax returns were prepared. Mrs. LaFrance advised the auditor that Mr. Beagle phoned in the figures for the sales tax returns. Mr. Beagle, however, stated that both the sales tax returns and corporate franchise tax reports were prepared by Mrs. LaFrance in the manner set forth in Finding of Fact "8".

17. The dollar amount of the corporation's purchases of gasoline as set forth in the corporation's books were \$499,787.00, \$567,858.00, \$886,849.00 and \$728,045.00 for the years ended March 31, 1979, March 31, 1980, March 31, 1981 and March 31, 1982, respectively. The corporation reported sales for sales tax purposes for the years ended March 31, 1979 and March 31, 1980 of \$181,719.00 and \$214,816.00, respectively.

18. The corporation did not report any bad debt expense on the sales tax or franchise tax returns filed during the periods at issue. The corporation's books also did not report any bad debt expense for the periods in issue. At the hearing, Mr. Beagle alleged that the corporation had a 10 percent bad debt expense during the audit period, but presented no evidence to support his contention.

19. Based on the results of the markup audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation asserting sales tax due in the amount of \$111,621.17, plus penalty of \$25,096.58 and interest of \$27,464.53, for a total amount due of \$164,182.38 for the period September 1, 1979 through February 28, 1982. The corporation did not file a petition in response to this notice.

20. On February 1, 1983, the Audit Division issued three notices of deficiency to the corporation asserting additional corporate franchise tax due for the years ended March 31, 1980, March 31, 1981 and March 31, 1982 in amounts as follows:

<u>FYE</u>	<u>Tax Deficiency</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total Due</u>
3/31/80	\$ 8,980.00	\$3,134.65	\$ 898.00	\$13,012.65
3/31/81	\$12,812.90	\$3,383.63	\$4,676.71	\$20,873.24
3/31/82	\$11,902.20	\$1,280.56	\$3,630.17	\$16,812.93

21. The notices of deficiency were premised on the assertion that the corporation had unreported income in the amount of \$89,800.00, \$128,129.00 and \$119,022.00 during the years at issue. The additional income was based upon the results of the markup audit. Specifically, the audited sales per the markup audit were held to be income to the corporation for franchise tax purposes. In addition, the income attributed to the corporation included unremitted sales tax on the corporation's unreported taxable sales during the fiscal years at issue. The penalties asserted in the notices of deficiency were based upon the Audit Division's contention that the corporation's failure to report the additional income revealed by the audit was due to negligence or intentional disregard of Articles 9-A and 27 of the Tax Law and the rules and regulations promulgated thereunder.

22. After the conclusion of the markup audit, the Audit Division conducted a net worth audit of petitioners Robert and Dorothy Beagle's personal finances for the years 1979, 1980 and 1981. During this audit, Mrs. Beagle was requested to furnish a listing of assets and liabilities acquired during the years 1979 through 1981. In response to this request, Mrs. Beagle furnished the following list of assets:

- 1) A savings account with Marine Midland Bank which had a balance of \$3,266.00, \$1,636.90, \$1,636.90 and \$3,358.02 on December 31, 1978, December 31, 1979, December 31, 1980 and December 31, 1981, respectively;

- 2) A certificate of deposit with Marine Midland Bank which was acquired in 1980 and was worth \$42,741.66 and \$47,870.66 on December 31, 1980 and December 31, 1981, respectively;

- 3) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$16,475.00 on December 31, 1981;

- 4) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$17,057.88 on December 31, 1981;

- 5) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$1,000.00 on December 31, 1981.

During this audit period, Mrs. Beagle stated that she and her husband had at most \$500.00 cash on hand during the years in question. At the hearing, however, she stated that she and her husband had at one time during the audit period \$4,000.00 to \$5,000.00 cash on hand at home.

23. As part of the net worth audit, the Audit Division examined the real property records maintained by the Monroe County Clerk. This review disclosed that Mr. and Mrs. Beagle purchased, without the need of financing, a house for \$32,885.00 in August, 1981. The house was transferred to their daughter as a

gift. The Beagles also purchased with cash a new automobile in 1980 costing \$8,803.00. The net worth audit revealed that the Beagles had unexplained increases in their net worth in amounts of \$11,839.00, \$42,986.00 and \$97,229.00 for the years 1979, 1980 and 1981, respectively.

24. On February 2, 1983, the Audit Division issued three notices of deficiency to Robert E. and Dorothy V. Beagle asserting deficiencies of personal income tax for the years 1979 through 1981 in amounts as follows:

<u>Taxpayer</u>	<u>Period</u>	<u>Additional Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Balance Due</u>
Dorothy V. Beagle	1979, 1980	\$ 35.00	\$ 2.64	\$ 9.43	\$ 47.07
Robert E. & Dorothy V. Beagle	1979, 1980	\$25,566.29	\$1,758.51	\$6,625.31	\$33,950.11
Robert E. & Dorothy V. Beagle	1981	\$23,147.22	\$8,911.68	\$5,597.24	\$37,656.14

25. The additional tax asserted due by the Audit Division in the notices of deficiency was based upon the Audit Division's contention that Robert E. Beagle had received as a constructive dividend the entire amount of the corporation's unreported income. The penalties asserted in said notices were based upon the Audit Division's assertion that petitioners' failure to report receipt of the constructive dividends was due to negligence or intentional disregard of Article 22 and the rules and regulations promulgated thereunder.

26. After the issuance of the notices of deficiency regarding their personal income tax liability, Mr. and Mrs. Beagle furnished a new listing of assets acquired during the audit period. This new listing included eight certificates of deposit which were not disclosed to the Audit Division during the audit.

27. At the hearing, Mr. Beagle submitted a limited number of cash register tapes and daily worksheets. The Audit Division conducted an analysis of the tapes subsequent to their submission into evidence. There were numerous

discrepancies between the cash register tapes and daily worksheets. The cash register tapes submitted were complete for three months in 1981- February, June and August. The cash register tapes were almost complete for four other months- April, May, July and September 1981. In computing sales for days where no tapes were available, the Audit Division used sales per the daily worksheets. The cash register tapes for these seven months reported sales of \$654,338.07. Sales as reported by the corporation in its sales journal for the same months were \$573,686.01.

28. At the hearing, Mr. Beagle stated that he received wages from the corporation of \$250.00 per week, or \$13,000.00 per annum, during the tax years in question. Nevertheless, his 1979 personal income tax return reported wage income of \$9,750.00 and his 1980 personal income tax return reported wage income of \$11,107.00. The withholding tax return filed by the corporation for 1980 reported the following gross wages and taxes withheld for Mr. Beagle:

<u>Year</u>	<u>Gross</u>	<u>Taxes Withheld</u>	<u>Take Home Pay</u>
1980	\$10,400.00	\$1,801.64	\$8,598.36

29. The corporation reported for tax purposes net losses from the operation of its business for each year from 1971 through 1979, except the year ended March 31, 1974 for which no tax return was filed.

30. The corporation was delinquent in paying the minimum corporate franchise tax due for the years 1971 through 1979. The corporation received a Notice and Demand for Payment of Corporation Tax Due for each of these tax delinquencies.

31. The corporation made capital expenditures in excess of \$22,000.00 during the audit period.

32. The corporation records made available for audit or presented at the hearing do not show any evidence that additional capital was contributed to the business during any time period.

33. The Beagles received no substantial gifts or loans during the period at issue.

34. Mr. and Mrs. Beagle filed separate New York State personal income tax returns for the year 1979 and a joint New York State personal income tax return for the year 1980. Neither Mr. Beagle nor Mrs. Beagle filed a New York State personal income tax return for the year 1981.

35. With respect to the year 1981, the Beagles' accountant, Mrs. LaFrance, did prepare a Federal income tax return for them for that year. This return reported interest income of \$8,624.00. The Beagles submitted on audit or at hearing certificates of deposit and savings accounts which earned approximately \$2,000.00 during 1981.

36. Mr. Beagle was continuously engaged in the gas station business since 1951. During the audit period, the retail gasoline business was extensively regulated by the federal government. Mr. Beagle was familiar with and able to comply with these regulations.

37. Mr. and Mrs. Beagle reported their income on a cash basis for tax purposes during the years at issue.

38. At the hearing, the Audit Division asserted a penalty for fraud pursuant to Tax Law sections 685 and 1085 in lieu of the negligence penalty which had been asserted in each notice of deficiency. Petitioners protested the assertion of such penalties at hearing claiming that the Audit Division had failed to give proper notice of its intention to assert such penalties.

39. In accordance with section 307(a) of the New York State Administrative Procedure Act, the Audit Division's proposed findings of fact have generally been accepted and the substance thereof adopted herein. However, the following major changes are noted: proposed findings of fact "7", "14", "22" and "25" have been rejected in whole or in part because they are either redundant or unnecessary to the determination. Also, proposed finding of fact "9" has been rejected in part as argumentative.

CONCLUSIONS OF LAW

A. That the Audit Division's employment of a purchase markup to determine additional sales tax due from petitioner Beagle's Service, Inc. was warranted in view of said petitioner's failure to provide complete and accurate records to the Audit Division's examiners. Mr. Beagle's subsequent production of certain records at the hearing does not affect the validity of the Audit Division's method; in fact, given the incomplete and inconsistent nature of the records which were produced, the production of such records supports the Audit Division's decision to resort to the markup method of audit. Petitioners have failed to submit any evidence which would tend to refute the results of the markup audit.

B. That the Audit Division's use of the purchase markup analysis was an appropriate means of reconstructing the corporate petitioner's gross receipts for corporation franchise tax purposes and such methodology reasonably reflects the additional corporation franchise tax due from the corporate petitioner (see Holland v. United States, 348 U.S. 121; DiLando v. Commissioner, 34 T.C.M. 1046).

C. That the Audit Division properly asserted as additional income for franchise tax purposes sales tax proceeds collected by the corporation (see Estate of Kurtzhalz v. Commissioner, 34 T.C.M. 334).

D. That the Audit Division's assertion of fraud penalties at hearing for each of the notices of deficiency at issue herein was procedurally proper pursuant to sections 689(d)(1) and 1089(d)(1) of the Tax Law, each of which provides, in pertinent part:

"the tax commission shall have power...to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at...the hearing..."

Petitioners' claim that the Audit Division failed to give proper notice of their assertion of fraud herein pursuant to 20 NYCRR 601.6(c) is without merit.

E. That with respect to the imposition of the fraud penalty against the corporation, in order to prevail the Audit Division must prove by clear and convincing evidence every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation by petitioner and resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Walter Shutt, State Tax Commission, June 4, 1982). The Audit Division need not prove that the entire amount of the deficiency is due to fraud, but only that some portion of the deficiency for each tax year in issue is due to fraud (Tax Law section 1085[e]).

F. That the Audit Division has met its burden with respect to the imposition of the fraud penalty against the corporation. In reaching this conclusion, it should be noted that no single fact among those established at hearing is in itself conclusive evidence of fraud, yet upon review of the totality of facts established herein, we are of the opinion that petitioner's consistent pattern of misrepresentations and omissions evince a knowing, willful and deliberate attempt by petitioners to evade payment of taxes lawfully due.

Among the facts found at hearing which collectively establish a fraudulent intent on the part of the corporation are its failure to file

corporate franchise tax returns for the fiscal years ended March 31, 1981 and March 31, 1982; the corporation's reporting of net operating losses for a period of ten years (1971-1980); the corporation's underreporting of net income for franchise tax purposes by some \$90,000.00 based upon the markup audit for the fiscal year ended March 31, 1980; the discrepancy between the corporation's cash register tapes and daily worksheets; the fact that petitioner's purchases for the year ended March 31, 1981 were approximately three times as great as its reported gross sales for sales tax purposes for the same period; the corporation's failure to maintain any bank accounts during the period at issue and the resulting "cash only" business dealings; Mr. Beagle's failure to produce records when requested by the Audit Division; and the corporation's failure to file withholding statements for one of its employees during the audit period. Taken together, these facts establish, by clear and convincing evidence, a knowing, willful and deliberate intent by the corporation, through its agent, Mr. Beagle, to evade payment of taxes lawfully due and owing. See Ehlers v. Vinal, 382 F.2d 58 (8th Cir. 1967); Merritt v. Commissioner, 301 F.2d 484 (5th Cir. 1962); Gromacki v. Commissioner, 361 F.2d 727 (7th Cir. 1966).

Petitioner's contention that Mr. Beagle's reliance upon the professional expertise of his accountant, Mrs. LaFrance, in the preparation of all tax returns during the audit period negated any possibility of fraudulent intent on Mr. Beagle's part is untenable in view of the following: first, the franchise tax returns were prepared by Mrs. LaFrance based upon information provided by Mr. Beagle; second, Mr. and Mrs. Beagle's personal income tax returns were prepared from information provided by Mr. and Mrs. Beagle; third, Mr. Beagle was responsible to file all tax returns under the system as set up between he and Mrs. LaFrance.

G. That inasmuch as Mr. Beagle was the sole shareholder and officer of the corporation during the period at issue and controlled the corporation's finances, the Audit Division properly attributed the additional corporate income per the markup audit to Mr. Beagle through a constructive dividend. See Estate of L. F. Slater, 21 T.C.M. 1355.

H. That Mrs. Beagle was neither a stockholder of the corporation nor was she involved in the running of the corporation during the period at issue, and during the years 1979 and 1981 she did not file a joint income tax return with her husband. Her tax liability for the years 1979 and 1981 is therefore separate and distinct from that of her husband for those years. As a result, the Audit Division improperly asserted income tax liability against Mrs. Beagle for the years 1979 and 1981 based upon the constructive dividends attributed to Mr. Beagle during those years.

I. That inasmuch as Mrs. Beagle filed a joint New York State income tax return with her husband for the year 1980, her income tax liability is joint and several with that of her husband for that year, and the Audit Division properly asserted income tax liability against her based upon Mr. Beagle's receipt of a constructive dividend during that year.

J. That the Audit Division's use of a purchase markup analysis was an appropriate means of reconstructing the individual petitioners' taxable income and such methodology reasonably reflects the additional personal income tax due from the individual petitioners (see Holland v. United States, supra; DiLando v. Commissioner, supra; Matter of William T. Kelly, supra). The Audit Division was not restricted to the use of or the results of the net worth audit (see Dilando v. Commissioner, supra; Matter of William T. Kelly, supra; Matter of Carmen and Adelia Garzia, State Tax Commission, June 29, 1983).

K. That the Audit Division has met its burden of proving fraudulent intent on the part of Mr. Beagle for intentionally failing to report the amount of the constructive dividend received by him per the markup audit during the period at issue.

Similar to the rationale set forth in Conclusion of Law "F" herein, no single fact among those adduced at the hearing is conclusive evidence of fraud, yet collectively, the facts established at hearing show, by clear and convincing evidence, that Mr. Beagle did with fraudulent intent underreport his income during each of the tax years at issue.

The factors set forth in Conclusion of Law "F" are also relevant evidence of Mr. Beagle's fraudulent intent, for, given his control of the corporation, these facts are part of the same pattern of behavior evincing fraudulent intent to evade payment of taxes. In addition, the following are relevant: Mr. Beagle's failure to file a personal income tax return for 1981; his testimony which was contradicted by documentary evidence; and the reluctant manner in which he revealed personal assets to the Audit Division. Taken together, these facts clearly and convincingly establish fraudulent intent on Mr. Beagle's part to evade payment of taxes lawfully due and owing. See Ehlers v. Vinal, 382 F.2d 58 (8th Cir. 1967); Gromacki v. Commissioner, 361 F.2d 727 (7th Cir. 1966); Merritt v. Commissioner, 301 F.2d 484 (5th Cir. 1962).

L. That the Audit Division has failed to sustain its burden of proof of fraud for the year 1980 with respect to Mrs. Beagle, given her lack of involvement in both the running of the corporation and the preparation of tax returns. However, Mrs. Beagle has failed to show that the understatement of income for

the year 1980 was not due to negligence. She is therefore liable for the negligence penalty for the year 1980 pursuant to Tax Law §689(b).

M. That the petition of Beagle's Service, Inc. is denied and the fraud penalty pursuant to Tax Law § 1085(a) is hereby imposed against said petitioner; that the petition of Robert and Dorothy V. Beagle is granted to the extent indicated in Conclusions of Law "H" and "I", limiting the liability of Dorothy V. Beagle to the year 1980; that the fraud penalty as asserted by the Audit Division is hereby imposed against Robert Beagle; that the Audit Division is hereby directed to modify the notices of deficiency at issue herein in accordance with this decision; that except as so modified, the notices of deficiency at issue herein are sustained and, except as so granted herein, the petitions of Beagle's Service, Inc. and Robert and Dorothy V. Beagle are in all respects denied.

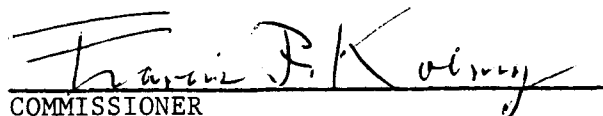
DATED: Albany, New York

STATE TAX COMMISSION


MAY 28 1986



PRESIDENT



COMMISSIONER



COMMISSIONER

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commission
TAX APPEALS BUREAU

W. A. Harriman Camp
ALBANY, N.Y. 12227

2423

CLAIM CHECK
NO.

843588

CHECK

DATE

5/30

POST NOTICE

POST NOTICE

6/4/86

RETURN

6/18/86

Detached from
PS Form 3840-A
Oct. 1985

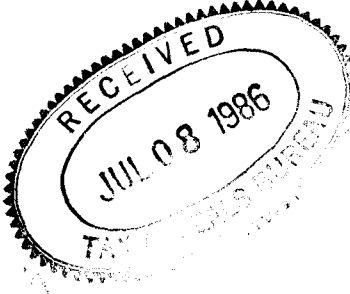
Fold along over top of envelope to the right
of the return address

CERTIFIED

P 319 372 677

MAIL

Robert & Dorothy Beagle
15 Mercury Drive
Rochester, NY 14624



HOLD FILE 6/18/86

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

May 28, 1986

Robert & Dorothy Beagle
15 Mercury Drive
Rochester, NY 14624

Dear Mr. & Mrs. Beagle:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Carl R. Reynolds
430 Reynolds Arcade, 16 E. Main St.
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ROBERT AND DOROTHY V. BEAGLE :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1979, 1980 and :
1981. :

DECISION

In the Matter of the Petition :
of :
BEAGLE'S SERVICE, INC. :
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Period :
April 1, 1979 through March 31, 1982. :

Petitioners Robert and Dorothy V. Beagle, 15 Mercury Drive, Rochester, New York 14624, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1979, 1980 and 1981 (File No. 42823).

Petitioner Beagle's Service, Inc., 15 Mercury Drive, Rochester, New York 14624, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period April 1, 1979 through March 31, 1982 (File No. 47102).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on March 12, 1985 at 1:15 P.M., continued at the same offices on March 14, 1985 at 12:30 P.M., March 27, 1985 at 1:15 P.M., and March 28, 1985 at 1:15 P.M. and concluded on

September 23, 1985 at 1:15 P.M., with all briefs to be submitted by December 3, 1985. Petitioners appeared by Carl R. Reynolds, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the corporate petitioner's franchise tax liability for its fiscal years ended March 31, 1980, March 31, 1981 and March 31, 1982.

II. Whether the Audit Division's assertion of a fraud penalty against the corporate petitioner pursuant to section 1085(e) of the Tax Law was proper.

III. Whether the Audit Division properly determined the individual petitioners' personal income tax liability for the years 1979, 1980 and 1981.

IV. Whether the Audit Division's assertion of fraud penalties against the individual petitioners pursuant to section 685(e) of the Tax Law was proper.

FINDINGS OF FACT

1. Petitioner Beagle's Service, Inc. ("the corporation") operated a Sunoco service station located at 3095 Buffalo Road, in the Town of Gates, New York during the periods at issue.

2. The corporation was formed in 1963. Petitioner Robert Beagle was president of and a shareholder in the corporation from its inception to its termination in 1982. Mr. Beagle was the sole stockholder of the corporation from 1969 through 1982. The corporation did not have any other officers during the periods at issue. Mr. Beagle maintained the daily records of the corporation during these years.

3. The corporation's service station was located on the corner of a major intersection, Elmgrove and Buffalo Roads, and was within approximately 150 yards of an Eastman Kodak factory. The service station had 150 to 200 feet of

frontage, three service bays, and six gasoline pumps. One bank of three pumps was for full service, the other for self-service. There were also two other service stations operating within approximately 150 yards of the corporation's service station.

4. During the periods at issue, the station was in operation from 6:00 a.m. to 8:00 p.m. on Monday through Friday and 6:00 a.m. to 6:00 p.m. on Saturday, a total of 82 hours per week.

5. At various times during the period at issue, the corporation employed five individuals. These individuals were Robert Beagle, Russell Ellis, Mark Sidor, Peggy Miller and Robert Begandy. All five individuals were employed by the corporation in 1980. Mr. Begandy was also employed by the corporation in 1979, 1981 and 1982. The corporation did not file a withholding tax statement for Mr. Begandy in 1980. In addition, the corporation contracted out labor repair work in 1980, as evidenced by the corporation's franchise tax report for the year ended March 31, 1980. At the hearing, Mr. Beagle denied that the corporation had contracted out such repair work, but could not reconcile this allegation with the corporation's franchise tax report.

6. The corporation's fiscal and tax year ended on March 31. The corporation's income for financial accounting and tax purposes was reported on a cash basis. The corporation filed a franchise tax report for the year ended March 31, 1980, but did not file franchise tax reports for the years ended March 31, 1981 or March 31, 1982. The report for the fiscal year ended March 31, 1980 reported a net loss of \$2,410.00.

7. The corporation did not maintain any bank accounts during the periods at issue. Consequently, all bills were paid by Mr. Beagle in cash or by bank draft during these periods.

8. The corporation's franchise tax reports were prepared under the direction of a Mrs. LaFrance, an accountant. Mrs. LaFrance prepared these reports based upon information furnished by Mr. Beagle. Mr. Beagle provided Mrs. LaFrance with the corporation's daily summary sheets and register tapes to prepare the franchise tax reports.

9. A comparison of the gross sales figures set forth in the corporation's daily summary sheets which were submitted at the hearing and Mrs. LaFrance's monthly journals reveals a close correlation between these two sets of figures.

10. Mrs. LaFrance also prepared Federal income tax returns for the corporation for the years ended March 31, 1981 and March 31, 1982. These returns were not filed by the corporation. Under the system by which the corporation's tax returns were filed, Mrs. LaFrance returned completed returns to Mr. Beagle for his signature and his subsequent filing of said returns.

11. In June of 1982, the Audit Division commenced a field audit of the corporation for the years ended March 31, 1980, March 31, 1981 and March 31, 1982. On June 29, 1982, auditors visited the business premises of the corporation and conducted an initial audit interview with Mr. Beagle. At that time, the auditors requested access to the sales records of the business, including cash register tapes and daily sales records for the periods at issue. Mr. Beagle did not furnish any records in response to this request, but suggested that all records were in the possession of Mrs. LaFrance. The auditors made two subsequent requests for sales records and Mr. Beagle failed to furnish any records in response thereto on each occasion.

12. During the meeting of June 29, 1982, Mr. Beagle advised the auditors that the corporation's actual markup on gasoline sold was six to ten cents for 1979 and 1980 and eight to ten cents for 1980 and 1981. This markup for

gasoline was about two cents above the average for service stations in the Rochester area during the periods at issue. Mr. Beagle also advised the auditors during this meeting that the corporation's markup on tires, batteries and accessories ("TBA") was 15 to 20 percent during the audit period. Mr. Beagle further stated during this meeting that the corporation employed one full-time mechanic during the audit period, and that the corporation charged \$16.00, \$17.00 and \$18.00 an hour for labor repair services during 1979, 1980 and 1981, respectively.

13. During 1982, the Audit Division observed the station in operation several times. On each occasion, it observed approximately 25 to 30 automobiles on the premises of the station. During each observation, all three service bays were in use. Four persons, including Mr. Beagle, were observed repairing automobiles in the service bays.

14. As part of the audit, the Audit Division compared sales reported on the corporate franchise tax reports for 1978 and 1979 to the gross sales reported on the sales tax returns filed by the corporation. The amount of gross sales reported by the corporation on its franchise tax reports for the years ended March 31, 1979 and March 31, 1980 were \$399,859.00 and \$665,304.00, respectively. Gross sales reported for sales tax purposes for the respective periods were \$181,719.00 and \$214,816.00.

15. The Audit Division conducted a markup audit for the purpose of computing the corporation's gross sales for sales tax purposes for the period September 1, 1979 through February 28, 1982. In computing sales of gasoline and TBA, the Audit Division used the amount of purchases reflected on the corporation's books. The Audit Division used the markup percentages furnished by Mr. Beagle in computing gasoline sales. TBA purchases were marked up 20 percent and

miscellaneous items were marked up 50 percent. Sales of automobile repair services were computed upon the premise that the corporation billed 80 hours of repair work per week based upon two individuals working 40 hours per week. The hours of repair work per week were multiplied by the labor rates furnished by Mr. Beagle. The markup audit revealed that the corporation had underreported its taxable sales for sales tax purposes by \$1,594,585.70 for the sales tax audit period.

16. As a result of the discrepancy between sales reported on the franchise tax reports and on the sales tax returns, the Audit Division sought to determine the manner in which the sales tax returns were prepared. Mrs. LaFrance advised the auditor that Mr. Beagle phoned in the figures for the sales tax returns. Mr. Beagle, however, stated that both the sales tax returns and corporate franchise tax reports were prepared by Mrs. LaFrance in the manner set forth in Finding of Fact "8".

17. The dollar amount of the corporation's purchases of gasoline as set forth in the corporation's books were \$499,787.00, \$567,858.00, \$886,849.00 and \$728,045.00 for the years ended March 31, 1979, March 31, 1980, March 31, 1981 and March 31, 1982, respectively. The corporation reported sales for sales tax purposes for the years ended March 31, 1979 and March 31, 1980 of \$181,719.00 and \$214,816.00, respectively.

18. The corporation did not report any bad debt expense on the sales tax or franchise tax returns filed during the periods at issue. The corporation's books also did not report any bad debt expense for the periods in issue. At the hearing, Mr. Beagle alleged that the corporation had a 10 percent bad debt expense during the audit period, but presented no evidence to support his contention.

19. Based on the results of the markup audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation asserting sales tax due in the amount of \$111,621.17, plus penalty of \$25,096.58 and interest of \$27,464.53, for a total amount due of \$164,182.38 for the period September 1, 1979 through February 28, 1982. The corporation did not file a petition in response to this notice.

20. On February 1, 1983, the Audit Division issued three notices of deficiency to the corporation asserting additional corporate franchise tax due for the years ended March 31, 1980, March 31, 1981 and March 31, 1982 in amounts as follows:

<u>FYE</u>	<u>Tax Deficiency</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total Due</u>
3/31/80	\$ 8,980.00	\$3,134.65	\$ 898.00	\$13,012.65
3/31/81	\$12,812.90	\$3,383.63	\$4,676.71	\$20,873.24
3/31/82	\$11,902.20	\$1,280.56	\$3,630.17	\$16,812.93

21. The notices of deficiency were premised on the assertion that the corporation had unreported income in the amount of \$89,800.00, \$128,129.00 and \$119,022.00 during the years at issue. The additional income was based upon the results of the markup audit. Specifically, the audited sales per the markup audit were held to be income to the corporation for franchise tax purposes. In addition, the income attributed to the corporation included unremitted sales tax on the corporation's unreported taxable sales during the fiscal years at issue. The penalties asserted in the notices of deficiency were based upon the Audit Division's contention that the corporation's failure to report the additional income revealed by the audit was due to negligence or intentional disregard of Articles 9-A and 27 of the Tax Law and the rules and regulations promulgated thereunder.

22. After the conclusion of the markup audit, the Audit Division conducted a net worth audit of petitioners Robert and Dorothy Beagle's personal finances for the years 1979, 1980 and 1981. During this audit, Mrs. Beagle was requested to furnish a listing of assets and liabilities acquired during the years 1979 through 1981. In response to this request, Mrs. Beagle furnished the following list of assets:

1) A savings account with Marine Midland Bank which had a balance of \$3,266.00, \$1,636.90, \$1,636.90 and \$3,358.02 on December 31, 1978, December 31, 1979, December 31, 1980 and December 31, 1981, respectively;

2) A certificate of deposit with Marine Midland Bank which was acquired in 1980 and was worth \$42,741.66 and \$47,870.66 on December 31, 1980 and December 31, 1981, respectively;

3) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$16,475.00 on December 31, 1981;

4) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$17,057.88 on December 31, 1981;

5) A certificate of deposit with Marine Midland Bank which was acquired in 1981 and was worth \$1,000.00 on December 31, 1981.

During this audit period, Mrs. Beagle stated that she and her husband had at most \$500.00 cash on hand during the years in question. At the hearing, however, she stated that she and her husband had at one time during the audit period \$4,000.00 to \$5,000.00 cash on hand at home.

23. As part of the net worth audit, the Audit Division examined the real property records maintained by the Monroe County Clerk. This review disclosed that Mr. and Mrs. Beagle purchased, without the need of financing, a house for \$32,885.00 in August, 1981. The house was transferred to their daughter as a

gift. The Beagles also purchased with cash a new automobile in 1980 costing \$8,803.00. The net worth audit revealed that the Beagles had unexplained increases in their net worth in amounts of \$11,839.00, \$42,986.00 and \$97,229.00 for the years 1979, 1980 and 1981, respectively.

24. On February 2, 1983, the Audit Division issued three notices of deficiency to Robert E. and Dorothy V. Beagle asserting deficiencies of personal income tax for the years 1979 through 1981 in amounts as follows:

<u>Taxpayer</u>	<u>Period</u>	<u>Additional Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Balance Due</u>
Dorothy V. Beagle	1979, 1980	\$ 35.00	\$ 2.64	\$ 9.43	\$ 47.07
Robert E. & Dorothy V. Beagle	1979, 1980	\$25,566.29	\$1,758.51	\$6,625.31	\$33,950.11
Robert E. & Dorothy V. Beagle	1981	\$23,147.22	\$8,911.68	\$5,597.24	\$37,656.14

25. The additional tax asserted due by the Audit Division in the notices of deficiency was based upon the Audit Division's contention that Robert E. Beagle had received as a constructive dividend the entire amount of the corporation's unreported income. The penalties asserted in said notices were based upon the Audit Division's assertion that petitioners' failure to report receipt of the constructive dividends was due to negligence or intentional disregard of Article 22 and the rules and regulations promulgated thereunder.

26. After the issuance of the notices of deficiency regarding their personal income tax liability, Mr. and Mrs. Beagle furnished a new listing of assets acquired during the audit period. This new listing included eight certificates of deposit which were not disclosed to the Audit Division during the audit.

27. At the hearing, Mr. Beagle submitted a limited number of cash register tapes and daily worksheets. The Audit Division conducted an analysis of the tapes subsequent to their submission into evidence. There were numerous

discrepancies between the cash register tapes and daily worksheets. The cash register tapes submitted were complete for three months in 1981- February, June and August. The cash register tapes were almost complete for four other months- April, May, July and September 1981. In computing sales for days where no tapes were available, the Audit Division used sales per the daily worksheets. The cash register tapes for these seven months reported sales of \$654,338.07. Sales as reported by the corporation in its sales journal for the same months were \$573,686.01.

28. At the hearing, Mr. Beagle stated that he received wages from the corporation of \$250.00 per week, or \$13,000.00 per annum, during the tax years in question. Nevertheless, his 1979 personal income tax return reported wage income of \$9,750.00 and his 1980 personal income tax return reported wage income of \$11,107.00. The withholding tax return filed by the corporation for 1980 reported the following gross wages and taxes withheld for Mr. Beagle:

<u>Year</u>	<u>Gross</u>	<u>Taxes Withheld</u>	<u>Take Home Pay</u>
1980	\$10,400.00	\$1,801.64	\$8,598.36

29. The corporation reported for tax purposes net losses from the operation of its business for each year from 1971 through 1979, except the year ended March 31, 1974 for which no tax return was filed.

30. The corporation was delinquent in paying the minimum corporate franchise tax due for the years 1971 through 1979. The corporation received a Notice and Demand for Payment of Corporation Tax Due for each of these tax delinquencies.

31. The corporation made capital expenditures in excess of \$22,000.00 during the audit period.

32. The corporation records made available for audit or presented at the hearing do not show any evidence that additional capital was contributed to the business during any time period.

33. The Beagles received no substantial gifts or loans during the period at issue.

34. Mr. and Mrs. Beagle filed separate New York State personal income tax returns for the year 1979 and a joint New York State personal income tax return for the year 1980. Neither Mr. Beagle nor Mrs. Beagle filed a New York State personal income tax return for the year 1981.

35. With respect to the year 1981, the Beagles' accountant, Mrs. LaFrance, did prepare a Federal income tax return for them for that year. This return reported interest income of \$8,624.00. The Beagles submitted on audit or at hearing certificates of deposit and savings accounts which earned approximately \$2,000.00 during 1981.

36. Mr. Beagle was continuously engaged in the gas station business since 1951. During the audit period, the retail gasoline business was extensively regulated by the federal government. Mr. Beagle was familiar with and able to comply with these regulations.

37. Mr. and Mrs. Beagle reported their income on a cash basis for tax purposes during the years at issue.

38. At the hearing, the Audit Division asserted a penalty for fraud pursuant to Tax Law sections 685 and 1085 in lieu of the negligence penalty which had been asserted in each notice of deficiency. Petitioners protested the assertion of such penalties at hearing claiming that the Audit Division had failed to give proper notice of its intention to assert such penalties.

39. In accordance with section 307(a) of the New York State Administrative Procedure Act, the Audit Division's proposed findings of fact have generally been accepted and the substance thereof adopted herein. However, the following major changes are noted: proposed findings of fact "7", "14", "22" and "25" have been rejected in whole or in part because they are either redundant or unnecessary to the determination. Also, proposed finding of fact "9" has been rejected in part as argumentative.

CONCLUSIONS OF LAW

A. That the Audit Division's employment of a purchase markup to determine additional sales tax due from petitioner Beagle's Service, Inc. was warranted in view of said petitioner's failure to provide complete and accurate records to the Audit Division's examiners. Mr. Beagle's subsequent production of certain records at the hearing does not affect the validity of the Audit Division's method; in fact, given the incomplete and inconsistent nature of the records which were produced, the production of such records supports the Audit Division's decision to resort to the markup method of audit. Petitioners have failed to submit any evidence which would tend to refute the results of the markup audit.

B. That the Audit Division's use of the purchase markup analysis was an appropriate means of reconstructing the corporate petitioner's gross receipts for corporation franchise tax purposes and such methodology reasonably reflects the additional corporation franchise tax due from the corporate petitioner (see Holland v. United States, 348 U.S. 121; DiLando v. Commissioner, 34 T.C.M. 1046).

C. That the Audit Division properly asserted as additional income for franchise tax purposes sales tax proceeds collected by the corporation (see Estate of Kurtzhalz v. Commissioner, 34 T.C.M. 334).

D. That the Audit Division's assertion of fraud penalties at hearing for each of the notices of deficiency at issue herein was procedurally proper pursuant to sections 689(d)(1) and 1089(d)(1) of the Tax Law, each of which provides, in pertinent part:

"the tax commission shall have power...to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at...the hearing..."

Petitioners' claim that the Audit Division failed to give proper notice of their assertion of fraud herein pursuant to 20 NYCRR 601.6(c) is without merit.

E. That with respect to the imposition of the fraud penalty against the corporation, in order to prevail the Audit Division must prove by clear and convincing evidence every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation by petitioner and resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Walter Shutt, State Tax Commission, June 4, 1982). The Audit Division need not prove that the entire amount of the deficiency is due to fraud, but only that some portion of the deficiency for each tax year in issue is due to fraud (Tax Law section 1085[e]).

F. That the Audit Division has met its burden with respect to the imposition of the fraud penalty against the corporation. In reaching this conclusion, it should be noted that no single fact among those established at hearing is in itself conclusive evidence of fraud, yet upon review of the totality of facts established herein, we are of the opinion that petitioner's consistent pattern of misrepresentations and omissions evince a knowing, willful and deliberate attempt by petitioners to evade payment of taxes lawfully due.

Among the facts found at hearing which collectively establish a fraudulent intent on the part of the corporation are its failure to file

corporate franchise tax returns for the fiscal years ended March 31, 1981 and March 31, 1982; the corporation's reporting of net operating losses for a period of ten years (1971-1980); the corporation's underreporting of net income for franchise tax purposes by some \$90,000.00 based upon the markup audit for the fiscal year ended March 31, 1980; the discrepancy between the corporation's cash register tapes and daily worksheets; the fact that petitioner's purchases for the year ended March 31, 1981 were approximately three times as great as its reported gross sales for sales tax purposes for the same period; the corporation's failure to maintain any bank accounts during the period at issue and the resulting "cash only" business dealings; Mr. Beagle's failure to produce records when requested by the Audit Division; and the corporation's failure to file withholding statements for one of its employees during the audit period. Taken together, these facts establish, by clear and convincing evidence, a knowing, willful and deliberate intent by the corporation, through its agent, Mr. Beagle, to evade payment of taxes lawfully due and owing. See Ehlers v. Vinal, 382 F.2d 58 (8th Cir. 1967); Merritt v. Commissioner, 301 F.2d 484 (5th Cir. 1962); Gromacki v. Commissioner, 361 F.2d 727 (7th Cir. 1966).

Petitioner's contention that Mr. Beagle's reliance upon the professional expertise of his accountant, Mrs. LaFrance, in the preparation of all tax returns during the audit period negated any possibility of fraudulent intent on Mr. Beagle's part is untenable in view of the following: first, the franchise tax returns were prepared by Mrs. LaFrance based upon information provided by Mr. Beagle; second, Mr. and Mrs. Beagle's personal income tax returns were prepared from information provided by Mr. and Mrs. Beagle; third, Mr. Beagle was responsible to file all tax returns under the system as set up between he and Mrs. LaFrance.

G. That inasmuch as Mr. Beagle was the sole shareholder and officer of the corporation during the period at issue and controlled the corporation's finances, the Audit Division properly attributed the additional corporate income per the markup audit to Mr. Beagle through a constructive dividend. See Estate of L. F. Slater, 21 T.C.M. 1355.

H. That Mrs. Beagle was neither a stockholder of the corporation nor was she involved in the running of the corporation during the period at issue, and during the years 1979 and 1981 she did not file a joint income tax return with her husband. Her tax liability for the years 1979 and 1981 is therefore separate and distinct from that of her husband for those years. As a result, the Audit Division improperly asserted income tax liability against Mrs. Beagle for the years 1979 and 1981 based upon the constructive dividends attributed to Mr. Beagle during those years.

I. That inasmuch as Mrs. Beagle filed a joint New York State income tax return with her husband for the year 1980, her income tax liability is joint and several with that of her husband for that year, and the Audit Division properly asserted income tax liability against her based upon Mr. Beagle's receipt of a constructive dividend during that year.

J. That the Audit Division's use of a purchase markup analysis was an appropriate means of reconstructing the individual petitioners' taxable income and such methodology reasonably reflects the additional personal income tax due from the individual petitioners (see Holland v. United States, supra; DiLando v. Commissioner, supra; Matter of William T. Kelly, supra). The Audit Division was not restricted to the use of or the results of the net worth audit (see Dilando v. Commissioner, supra; Matter of William T. Kelly, supra; Matter of Carmen and Adelia Garzia, State Tax Commission, June 29, 1983).

K. That the Audit Division has met its burden of proving fraudulent intent on the part of Mr. Beagle for intentionally failing to report the amount of the constructive dividend received by him per the markup audit during the period at issue.

Similar to the rationale set forth in Conclusion of Law "F" herein, no single fact among those adduced at the hearing is conclusive evidence of fraud, yet collectively, the facts established at hearing show, by clear and convincing evidence, that Mr. Beagle did with fraudulent intent underreport his income during each of the tax years at issue.

The factors set forth in Conclusion of Law "F" are also relevant evidence of Mr. Beagle's fraudulent intent, for, given his control of the corporation, these facts are part of the same pattern of behavior evincing fraudulent intent to evade payment of taxes. In addition, the following are relevant: Mr. Beagle's failure to file a personal income tax return for 1981; his testimony which was contradicted by documentary evidence; and the reluctant manner in which he revealed personal assets to the Audit Division. Taken together, these facts clearly and convincingly establish fraudulent intent on Mr. Beagle's part to evade payment of taxes lawfully due and owing. See Ehlers v. Vinal, 382 F.2d 58 (8th Cir. 1967); Gromacki v. Commissioner, 361 F.2d 727 (7th Cir. 1966); Merritt v. Commissioner, 301 F.2d 484 (5th Cir. 1962).

L. That the Audit Division has failed to sustain its burden of proof of fraud for the year 1980 with respect to Mrs. Beagle, given her lack of involvement in both the running of the corporation and the preparation of tax returns. However, Mrs. Beagle has failed to show that the understatement of income for

the year 1980 was not due to negligence. She is therefore liable for the negligence penalty for the year 1980 pursuant to Tax Law §689(b).

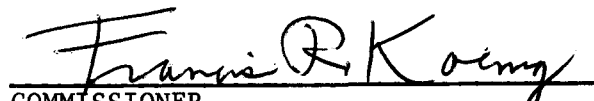
M. That the petition of Beagle's Service, Inc. is denied and the fraud penalty pursuant to Tax Law § 1085(a) is hereby imposed against said petitioner; that the petition of Robert and Dorothy V. Beagle is granted to the extent indicated in Conclusions of Law "H" and "I", limiting the liability of Dorothy V. Beagle to the year 1980; that the fraud penalty as asserted by the Audit Division is hereby imposed against Robert Beagle; that the Audit Division is hereby directed to modify the notices of deficiency at issue herein in accordance with this decision; that except as so modified, the notices of deficiency at issue herein are sustained and, except as so granted herein, the petitions of Beagle's Service, Inc. and Robert and Dorothy V. Beagle are in all respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER