

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas J. & Dolores M. Bretscher : 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 :
Year 1981 & 1982. :
_____:

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 12th day of November, 1986, he/she served the within notice of Decision by certified mail upon Thomas J. & Dolores M. Bretscher the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas J. & Dolores M. Bretscher
Pine Hill Rd.
Pleasant Valley, NY 12569

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
12th day of November, 1986.

Daniel Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas J. & Dolores M. Bretscher : AFFIDAVIT OF MAILING
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Tax under Article(s) 22 of the Tax Law for the :
Years 1981 & 1982. :
_____:

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 12th day of November, 1986, he served the within notice of Decision by certified mail upon George DeWitt, Jr., the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George DeWitt, Jr.
Pilgrim Business Management, Inc.
P.O. Box 3256
Poughkeepsie, NY 12603

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
12th day of November, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

November 12, 1986

Thomas J. & Dolores M. Bretscher
Pine Hill Rd.
Pleasant Valley, NY 12569

Dear Mr. & Mrs. Bretscher:

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:
George DeWitt, Jr.
Pilgrim Business Management, Inc.
P.O. Box 3256
Poughkeepsie, NY 12603

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
THOMAS J. BRETSCHER AND DOLORES M. BRETSCHER
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1981 and 1982.

DECISION

Petitioners, Thomas J. Bretscher and Dolores M. Bretscher, Pine Hill Road, Pleasant Valley, New York 12569, 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 1981 and 1982 (File No. 50095).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Campus, Albany, New York, on May 20, 1986 at 1:15 P.M., with all documents to be submitted by June 18, 1986. Petitioners appeared by George DeWitt, Jr. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division correctly determined that petitioners had additional taxable income as the result of a markup audit on purchases of an automotive service station.

FINDINGS OF FACT

1. During the years in issue, petitioner Thomas J. Bretscher was the president and sole shareholder of an automotive service station known as Tom Bretscher's Auto Clinic, Inc. ("Auto Clinic").

2. Petitioners, Thomas and Dolores Bretscher, filed a joint New York State Resident Income Tax Return for the year 1981. Petitioners filed separately, on one return, a New York State Resident Income Tax Return for the year 1982.

3. The Auto Clinic filed a State of New York Corporation Franchise Tax Report for the fiscal years ended March 31, 1981 and March 31, 1982.

4. On October 21, 1983, as the result of a field audit, the Audit Division issued two notices of deficiency to petitioners asserting a deficiency of personal income tax. The first Notice of Deficiency asserted tax due for the years 1981 and 1982 of \$1,648.02, plus interest of \$118.03, for a total amount due of \$1,766.05. The second Notice of Deficiency asserted tax due for the year 1982 of \$20.00, plus interest of \$.87, for a total amount due of \$20.87. The Statement of Audit Adjustment, which was issued September 7, 1983, explained that the asserted deficiencies were premised upon a determination that the Auto Clinic had additional taxable sales which gave rise to additional taxable income, in the form of constructive dividends, to Thomas Bretscher in 1981 of \$5,072.02 and in 1982 of \$13,611.12. In addition, the household credit claimed by petitioners in 1982 was disallowed because petitioners' total income, as adjusted, exceeded the maximum household income allowable.

5. In the course of the audit, it was learned that the Auto Clinic maintained neither a complete sales journal nor a complete set of purchase invoices for the audit period. In addition, the Auto Clinic did not retain sales invoices for the years in issue. As a result, it was determined that a markup audit on purchases was warranted in order to determine petitioners' income.

6. At the hearing, the only aspect of the markup audit which was challenged pertained to the Audit Division's computation of the markup on the Auto Clinic's purchases of parts.

7. At the time the audit was being conducted, the Auto Clinic was only able to provide the Audit Division with seventeen purchase invoices representing parts purchases of \$325.93. Utilizing these invoices, the Audit Division determined that the Auto Clinic had a markup on purchases of 49 percent.

8. At the hearing, petitioner's representative presented purchase invoices from two of the Auto Clinic's main suppliers. One group of purchase invoices, from Jack Haverty's Auto Parts, represented purchases of parts in the amount of \$1,692.47. Petitioner's representative also presented purchase invoices from Jack Nussbaum Auto Parts representing purchases of parts in the amount of \$1,560.28. Lastly, petitioner's representative presented a group of the Auto Clinic's sales invoices. A comparison of the purchase invoices with the sales invoices establishes that the Auto Clinic's markup on parts sales was approximately 36 percent.

CONCLUSIONS OF LAW


A. That the Audit Division's use of a purchase markup analysis was an appropriate means of reconstructing the Auto Clinic's gross receipts (see, e.g., Matter of Arthur Bimonte and Joan Bimonte, State Tax Commission, February 15, 1985). Moreover, it was proper to consider the additional gross receipts to be taxable income, in the form of constructive dividends, to Thomas Bretscher (see Matter of Arthur Bimonte and Joan Bimonte, supra). However, in view of the additional information regarding the markup on parts purchases presented at the hearing, the Audit Division is directed to recompute the amount of tax to be due on the premise that the markup on parts sales was 36 percent.

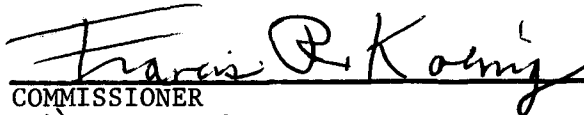
B. That the petition of Thomas J. Bretscher and Dolores M. Bretscher is granted to the extent of Conclusion of Law "A" and the Audit Division is directed to modify the Notice of Deficiency which was premised upon the markup audit accordingly; except as so modified, the notices of deficiency are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER