

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael & Anne McSherry :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax and :
Unincorporated Business Tax under Articles 22 and :
23 of the Tax Law and New York City Personal Income :
Tax under Chapter 46, Title T of the Administrative :
Code of the City of New York for the Years 1978 & :
1979. :

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Michael & Anne McSherry, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael & Anne McSherry
331 E. 138th St.
Bronx, NY 10454

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
18th day of February, 1986.

Doris E. Steinhardt

John Connelley
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael & Anne McSherry :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax and :
Unincorporated Business Tax under Articles 22 and :
23 of the Tax Law and New York City Personal Income :
Tax under Chapter 46, Title T of the Administrative :
Code of the City of New York for the Years 1978 & :
1979. :

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he served the within notice of Decision by certified mail upon Thomas J. Joyce, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas J. Joyce
350 Fifth Ave., Room 2716
New York, NY 10118

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
18th day of February, 1986.

Doris E. Steinhardt

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

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

February 18, 1986

Michael & Anne McSherry
331 E. 138th St.
Bronx, NY 10454

Dear Mr. & Mrs. McSherry:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690, 722 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas J. Joyce
350 Fifth Ave., Room 2716
New York, NY 10118
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MICHAEL McSHERRY and ANNE McSHERRY	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
and Unincorporated Business Tax under Articles	:	
22 and 23 of the Tax Law and New York City	:	
Personal Income Tax under Chapter 46, Title T	:	
of the Administrative Code of the City of New	:	
York for the Years 1978 and 1979.	:	

Petitioners, Michael McSherry and Anne McSherry, 331 East 138th Street, Bronx, New York 10454, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1978 and 1979 (File No. 36268).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1985 at 1:15 P.M. Petitioners appeared by Thomas J. Joyce, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether for New York State and New York City personal income tax purposes and for unincorporated business tax purposes, petitioner Michael McSherry realized additional, unreported income in 1978 and 1979 as disclosed by a sales tax field audit.

FINDINGS OF FACT

1. Michael McSherry (hereinafter "petitioner") and his wife, Anne McSherry, filed a New York State Income Tax Resident Return (with City of New York Personal Income Tax) for each of the years 1978 and 1979 under filing status "married filing separately on one return." For each of said years, petitioner reported business income from three (3) taverns totalling \$10,883.98 (1978) and \$4,022.04 (1979).

2. On October 30, 1981, the Audit Division issued a Notice of Deficiency against petitioner and his wife asserting additional New York State personal income tax, unincorporated business tax and New York City personal income tax under Article 22 of the Tax Law, Article 23 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, respectively, for the years 1978 and 1979 in the combined amount of \$8,821.84, plus penalty of \$2,069.19 and interest of \$1,609.47, for a total due of \$12,500.50. A Statement of Personal Income Tax Audit Changes and a Statement of Unincorporated Business Tax Audit Changes, previously issued to petitioner and his wife on July 29, 1981, advised them that "additional gross receipts" of \$19,240.00 (1978) and \$19,546.00 (1979), as found upon a sales tax audit, was deemed subject to New York State and City personal income tax and unincorporated business tax. Additionally, for personal income tax purposes, an adjustment was made to a capital loss claimed for each of said years; however, this adjustment was uncontested. Although the aforestated adjustments were attributable solely to the income of petitioner, the Notice of Deficiency was issued against both petitioner and his wife.

3. During the years at issue, petitioner owned three (3) taverns located as follows:

- a) 331 East 138th Street, Bronx, New York 10454;
- b) 1327 Third Avenue, New York, New York 10021;
- c) 523 Third Avenue, New York, New York 10016.

4. All sales by the above three taverns were consolidated on one sales tax return for each sales tax reporting period.

5. The Audit Division conducted an examination of the books and records of petitioner's three taverns for the purpose of verifying taxable sales reported for the period March 1, 1976 through November 30, 1979.

6. Of the three taverns, only the one located at 523 Third Avenue sold food. Because of petitioner's lack of cash register tapes and guest checks, and considering that a prior sales tax audit yielded additional tax due of approximately \$5,000.00, the auditor decided to perform a markup test to measure taxable sales.

7. The sales tax auditor developed markups on wine, liquor and beer through a detailed analysis of purchase bills. According to petitioner's books and records, his food markup was approximately 36 percent. Based on office experience and industry guidelines, the Audit Division decided to apply an estimated markup of 125 percent to petitioner's food purchases after an allowance of 5 percent for employee meals.

8. Based on the markup audit, additional taxable sales were determined to be \$69,683.00, resulting in additional sales tax due of \$5,574.64 for the aforesaid periods audited. Petitioner consented to the sales tax deficiency and paid same together with simple interest.

9. After completion of the sales tax audit, an income tax examiner computed the New York State and City personal income tax deficiencies at issue in this proceeding by treating additional taxable sales revealed by the sales

tax audit of \$19,240.00 for 1978 and \$19,546.00 for 1979 (January 1 through November 30) as additional taxable income realized by petitioner in such years; he also treated the additional taxable sales amounts of \$19,240.00 and \$19,546.00 as additional taxable business income in 1978 and 1979, respectively, subject to unincorporated business tax. The deficiencies were thus computed solely with reference to the sales tax examination results, and not by a net worth analysis or an analysis of bank deposits.

10. Petitioner did not personally appear for the hearing. His representative argued that the estimated food markup was overstated; however, no evidence, documentary or otherwise, was presented to establish that the estimated markup was erroneous. He further argued that the markup audit did not constitute a proper basis for asserting the deficiencies at issue herein.

CONCLUSIONS OF LAW

A. That the employment by the Audit Division of a purchase markup analysis to determine additional sales tax due from petitioner was warranted and proper in view of the inadequacy of petitioner's record keeping. While such methodology is commonly used to calculate additional, unreported taxable sales for purposes of Articles 28 and 29, it is also an appropriate means of reconstructing a taxpayer's taxable income, and for purposes of Articles 22 and 23 there is no obligation on the part of the Audit Division to first attempt a net worth or bank deposits analysis. (See DiLando v. Commr., 34 T.C.M. [CCH] 1046; Matter of Carmen and Adelia Garzia, State Tax Comm., June 29, 1983; Matter of William T. Kelly, State Tax Commission, December 31, 1984.) The hearing held herein afforded petitioner a full opportunity to refute the estimated food markup, yet he failed to submit any evidence which would tend to show the audit results were in error.

B. That the Notice of Deficiency issued October 30, 1981 is cancelled insofar as it relates to Anne McSherry (see Finding of Fact "2", supra).

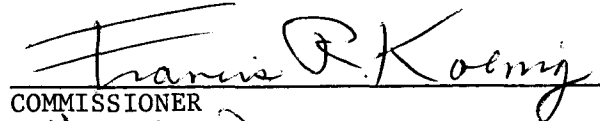
C. That the petition of Michael McSherry and Anne McSherry is denied and, except as provided in Conclusion of Law "B", supra, the Notice of Deficiency issued October 30, 1981 is sustained, together with such additional penalty and interest as may be lawfully owing.

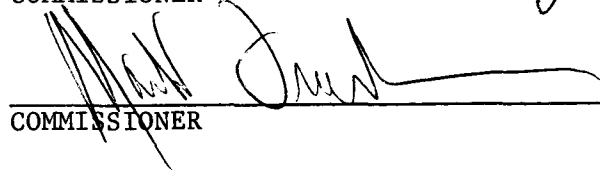
DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER