

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nicholas & Christina Pavlou : 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 - 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 April, 1986, he/she served the within notice of Decision by certified mail upon Nicholas & Christina Pavlou the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas & Christina Pavlou
623 Bellevue Ave. North
Yonkers, NY 10703

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 April, 1986.

David Parchuck

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

STATE OF NEW YORK

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for Redetermination of a Deficiency or Revision :
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Tax under Article(s) 22 of the Tax Law for the :
Years 1979 - 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 April, 1986, he served the within notice of Decision by certified mail upon James Kotiadis, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Kotiadis
29 Broadway
New York, NY 10006

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 April, 1986.

David Parchuck

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

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

April 28, 1986

Nicholas & Christina Pavlou
623 Bellevue Ave. North
Yonkers, NY 10703

Dear Mr. & Mrs. Pavlou:

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:
James Kotiadis
29 Broadway
New York, NY 10006

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NICHOLAS PAVLOU and CHRISTINA PAVLOU	:	DECISION
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.	:	

Petitioners Nicholas Pavlou and Christina Pavlou, 623 Bellevue Avenue North, Yonkers, New York 10703, 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 Nos. 51758 and 51759).

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 December 17, 1985 at 9:15 A.M. Petitioner appeared by James Kotiadis and Socrates Scott L. Nicholas. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly attributed additional personal income to petitioners in the form of constructive dividends based on a sales tax audit of a corporation of which petitioners were the sole shareholders.

II. Whether certain adjustments made as the result of an income tax field audit were proper.

FINDINGS OF FACT

1. Petitioners, Nicholas & Christina Pavlou, filed a New York State Income Tax Resident Return for each of the years 1979 and 1980 under filing

status "married filing separately on one return". For 1981, they filed their return under filing status "married filing joint return".

2. On October 31, 1983, the Audit Division issued a separate Statement of Personal Income Tax Audit Changes to each petitioner based, in part, on the results of a sales tax audit conducted for the periods December 1, 1978 through August 31, 1981. Said statements incorporated the following adjustments:

a - <u>To Nicholas Pavlou</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
"Constructive Dividends from Nicks Clover-Leaf Deli, Inc.	\$24,561.64	\$23,788.64	\$ 8,086.50
Taxable Capital Gain			1,740.60
Line-2 addition - Capital Gain			435.15
Forgiveness of Corporated (sic) Debt			34,184.00
Bad Debt Disallowed \$40,000.00			
Capital Loss Disallowed		1,500.00	
Capital Loss Carryover Disallowed			1,500.00
Medical Adjustment Due to Change in AGI	620.87		
Interest Income Reallocated	1,503.64		
Exemption Reallocated		750.00	
1981 Return Converted to Separate Returns			(6,514.00)
Reallocated Taxable Income			(500.00)
Standard Deduction			
Net Adjustment	<u>\$26,686.15</u>	<u>\$26,038.64</u>	<u>\$38,932.25"</u>
b - <u>To Christina Pavlou</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
"Constructive Dividends from Nicks Clover-Leaf Deli, Inc.	\$24,561.63	\$23,788.64	\$ 8,086.50
Taxable Capital Gain			1,740.60
Line 2 Addition - Capital Gain			435.15
Bad Debt Disallowed \$40,000.00			
Capital Loss Disallowed		1,500.00	
Capital Loss Carryover Disallowed			1,500.00
Medical Adjustment Due to Change in AGI	620.86		
Interest Income Reallocated	(1,503.64)		
Exemption Reallocated		(750.00)	
1981 Return Converted from Joint to Married Filing Separate			(7,922.00)
Reallocated Taxable Income			
Net Adjustment	<u>\$23,678.85</u>	<u>\$24,538.64</u>	<u>\$ 3,840.25"</u>

3. Based on the aforesaid adjustments, four (4) notices of deficiency were issued against petitioners on February 2, 1984 as follows:

- a - against Nicholas Pavlou, asserting additional personal income tax of \$5,910.95 for the years 1979 and 1980, penalty of \$295.55, plus interest of \$2,301.29, for a total due of \$8,507.79.
- b - against Nicholas Pavlou, asserting additional personal income tax of \$4,010.51 for the year 1981, penalty of \$200.52, plus interest of \$853.15, for a total due of \$5,064.18.
- c - against Christina Pavlou, asserting additional personal income tax of \$5,304.66 for the years 1979 and 1980, penalty of \$265.24, plus interest of \$2,058.30, for a total due of \$7,628.20.
- d - against Christina Pavlou, asserting additional personal income tax of \$113.61 for the year 1981, penalty of \$5.68, plus interest of \$24.16, for a total due of \$143.45.

All of the aforestated penalties were asserted for negligence pursuant to section 685(b) of the Tax Law.

4. On February 16, 1983, petitioners executed a consent form extending the period of limitation on assessment for the taxable year ended December 31, 1979 to any time on or before April 15, 1984.

5. During the years at issue petitioners were officers and the sole shareholders of Nick's Clover-Leaf Delicatessen, Inc. ("the Corporation").

6. The corporation's premises were destroyed by fire on July 24, 1981. All books and records were destroyed in the fire except the general ledger, a copy of the 1980 federal income tax return, and copies of sales tax returns, forms ST-100, which were in the custody of petitioners' accountant, Mr. Robert Hochhauser.

7. Since inadequate records were available, taxable ratio and markup tests could not be performed for the sales tax audit.

8. On July 29, 1981, petitioners' accountant submitted a schedule of the Corporation's sales figures for the months of January through June 1981 to the "Public Adjusters Department". Said schedule was submitted with respect to the

aforesaid fire. The sales figures reported thereon were specific odd amounts. Nothing in the schedule indicated that the sales figures were estimated.

9. The sales figures reported in the aforesaid schedule were 21.958% greater than those reported on the sales tax returns. Accordingly, reported sales for the entire audit period were increased by said percentage, yielding audited gross sales of \$714,850.72. Reported gross sales were \$586,145.00. Applying a taxable ratio of 37.46% yielded an amount for additional sales tax due for the audit period of \$6,902.40, which was consented to and paid by the petitioners.

10. Since inadequate records were available for the performance of an income tax audit, the additional gross sales per the sales tax audit were attributed to petitioners as additional income in the nature of constructive dividends from the Corporation, which were divided equally between petitioners for each of the years at issue.

11. Although petitioners consented to the sales tax assessed, they now contend that the sales reported on the forms ST-100 were accurate and that the sales reported in the aforesaid letter from their accountant were estimated. To support such contention, petitioners submitted an affidavit, sworn to by Mr. Hochhauser on June 25, 1985, wherein he stated that the sales figures he previously reported in his letter of July 29, 1981 "were derived from memory and intended only to be estimates".

12. The record indicates that the Corporation made loans to petitioner Nicholas Pavlou. The balance of said loans outstanding appeared on the Corporation's balance sheet as an asset of \$34,184.00 as of December 31, 1980. The balance sheet for December 31, 1981 showed no such loans. Accordingly, the

Audit Division determined that the corporation forgave the debt, thereby creating taxable income in said amount to Mr. Pavlou.

13. Although petitioners alleged that no such loans existed and the balance sheet reporting of such loans represented an accounting error, no credible evidence was submitted to support such allegation.

14. A long term capital loss attributable to a bad debt of \$40,000.00 was claimed on petitioners' 1980 tax return and disallowed for lack of substantiation. The related 1980 capital loss deduction of \$3,000.00 and 1981 loss carryover deduction of \$3,000.00 resulting from such claimed bad debt were also disallowed. Although petitioner Christina Pavlou claimed the bad debt arose from loans to her brother, whose business subsequently went bankrupt making such debt worthless, no evidence was submitted to show that a bona fide debt existed; that funds were actually transferred to her brother from petitioners' accounts; or that petitioner had the funds available to make such loan.

15. Petitioners' 1981 return was changed by the Audit Division from a joint return to separate returns. The resulting recomputation was to the benefit of petitioners and the adjustments made with respect to such change of filing status were not contested.

CONCLUSIONS OF LAW

A. That where there is some factual basis for deciding that the tax return as filed does not accurately reflect the true income received by a taxpayer, the Audit Division may determine proper income using indirect methods (see Holland v. United States, 348 U.S. 121, 131-132). The sales tax audit conducted by the Audit Division revealed \$6,902.40 in sales tax due. Such determination provided a factual basis for deciding that the income reported by petitioners on their income tax returns was not accurate and, thus, the Audit Division properly

used the sales tax audit findings in its calculation of income tax. Nowhere in the Tax Law or regulations is the Audit Division precluded from utilizing the results of an audit conducted under one article of the Tax Law in an audit conducted under another article.


B. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that they are properly entitled to a bad debt deduction or that the adjustment made with respect to the forgiveness of loans by the corporation was erroneous or improper. Accordingly, the adjustments made with respect to the bad debt deduction and the forgiveness of loans are sustained.


C. That the petition of Nicholas Pavlou and Christina Pavlou is denied and the notices of deficiency issued February 2, 1984 are sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER