

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Fred & Mary Weber :

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 1979.

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 15th day of April, 1986, he/she served the within notice of Decision by certified mail upon Fred & Mary Weber the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred & Mary Weber
5 Aspen Road
Scarsdale, New York 10583

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
15th 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

In the Matter of the Petition :
of

Fred & Mary Weber :

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 1979.

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 15th day of April, 1986, he served the within notice of Decision by certified mail upon Milton H. Hertzberg, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton H. Hertzberg
254-11 58 Avenue
Little Neck, NY 11362

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
15th day of April, 1986.

Daniel 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 15, 1986

Fred & Mary Weber
5 Aspen Road
Scarsdale, New York 10583

Dear Mr. & Mrs. Weber:

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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Milton H. Hertzberg
254-11 58 Avenue
Little Neck, NY 11362

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRED WEBER AND MARY WEBER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1979.	:	

Petitioners, Fred Weber and Mary Weber, 5 Aspen Road, Scarsdale, New York 10583, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1979 (File No. 51247).

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 18, 1985 at 9:15 A.M. Petitioners appeared by Milton H. Hertzberg. 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 petitioner Fred Weber in the form of a constructive dividend based on a sales tax audit of a corporation of which said petitioner was the sole shareholder.

II. Whether the Audit Division's adjustment to petitioners' claimed capital gains and losses was proper.

FINDINGS OF FACT

1. Petitioners, Fred Weber and Mary Weber, filed a New York State Income Tax Resident Return for the year 1979 under filing status "Married filing

separately on one return." On such return, Mr. Weber reported capital gain income of \$69,683.00 and Mrs. Weber reported capital gain income of \$46,456.00. No minimum income tax was paid with respect to the aforestated capital gain income.

2. On November 2, 1983, the Audit Division issued two (2) statements of personal income tax audit changes for the year 1979 to petitioners as follows:

a - to petitioner Fred Weber incorporating the following adjustments:

<u>Adjustment</u>	<u>Amount</u>
Constructive Dividend from F. R. Weber, Inc.	\$ 19,282.00
Net Long Term Capital Gain (to remove)	(69,683.00)
New York State Modification (to remove)	(17,301.00)
Net Long Term Capital Gain Corrected	
Taxable @ 50% by New York State	154,780.00
NET ADJUSTMENT	<u>\$ 87,078.00</u>

b - to petitioner Mary Weber incorporating the following adjustments:

<u>Adjustment</u>	<u>Amount</u>
Capital Gain Reported	(\$46,456.00)
Capital Gain Modification	(11,534.00)
NET ADJUSTMENT	<u>(\$57,990.00)</u>

3. On August 25, 1982, petitioners executed a consent form extending the period of limitation upon assessment of personal income tax for the taxable year ended December 31, 1979 to any time on or before April 15, 1984.

4. On December 30, 1983, the Audit Division issued a Notice of Deficiency to petitioners asserting additional personal income tax of \$12,426.42, penalty of \$980.32 and interest of \$5,122.79, for a total due of \$18,529.53. Said penalty was asserted for negligence pursuant to section 685(b) of the Tax Law.

5. A sales tax audit of F. R. Weber, Inc. for the periods June 1, 1976 through May 31, 1979 resulted in additional unreported sales of \$32,345.23.

Petitioner Fred Weber, who was president and sole stockholder of said corporation, consented to the sales tax audit results.

6. Subsequently, the portion of the additional sales determined to be applicable to F. R. Weber, Inc. during its fiscal year ended January 31, 1979, i.e., \$19,282.47, was deemed to be personally attributable to petitioner during taxable year 1979 in the form of a constructive dividend.

7. The balance of the adjustments appearing on the two aforesaid statements of personal income tax audit changes were made with respect to capital gains and losses reported.

8. Petitioners failed to substantiate a claimed long-term capital loss of \$19,212.00 which was purportedly sustained on the sale of one hundred (100) shares of "Weber West." Accordingly, the Audit Division disallowed such loss. Furthermore, since petitioners failed to establish that Mrs. Weber owned any of the stock sold during 1979, all of the allowable gains and losses reported were deemed attributable solely to Mr. Weber. The tax asserted on the Notice of Deficiency of \$12,426.42 was comprised of additional tax due from Mr. Weber of \$19,606.32, less the credit determined for Mrs. Weber of \$7,179.90 based on the adjustments transferring her reported capital gains to Mr. Weber.

9. The deficiency asserted was comprised in part of minimum income tax asserted against Mr. Weber on his items of tax preference (capital gains).

10. Petitioners did not personally attend the hearing. According to their petition, their sole grounds for relief in this matter were as follows:

"The figure of \$12,426.42 for additional personal income tax due was not derived from an audit, but was arbitrarily arrived at. This occurred because we refused permission for an audit for the following reasons.

We learned that the personal income tax audit was recommended by the sales tax auditor after a sales tax audit of our corporation. During the course of this sales tax audit we found that the auditor had detailed information of our personal affairs. This information was obtained from a close relative (sister-in-law) who worked in the same N.Y.S. office as the sales tax auditor.

This involves both a conflict of interest and a violation of oath. The auditor should have disqualified herself from performing the original audit. We consider the original sales tax audit and any referrals derived therefrom illegal and void."

11. During the hearing, petitioners' representative's arguments were substantially similar to those as stated in the petition. No evidence was submitted to show wherein the adjustments were erroneous.

12. The sales tax auditor did not discuss details of the audit or petitioners' lifestyles and affairs with Mr. Weber's sister-in-law, who happened to be employed as an auditor by the Audit Division.

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 additional unreported sales of \$32,345.23. Such determination provided a factual basis for deciding that the income reported by petitioners on their 1979 income tax return was not accurate and, thus, the Audit Division properly used the sales tax audit findings to calculate 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 since the auditor did not engage in any improper communications with Mr. Weber's sister-in-law, no basis exists for deeming the deficiency invalid or illegal.

C. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that the adjustments made by the Audit Division, or its manner and method of determining such adjustments, were erroneous or improper.

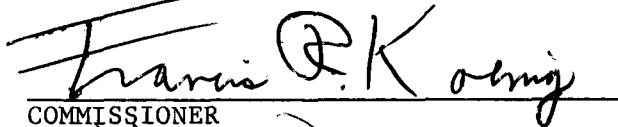
D. That the petition of Fred Weber and Mary Weber is denied and the Notice of Deficiency issued against them on December 30, 1983 is sustained, together with such additional penalty and interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER