

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dash Auto Sales :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Year 1976. :

In the Matter of the Petition :
of :
Michael Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Tax and New York State Unincorporated :
Business Tax under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Articles 22 and 23 of :
the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1977. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Gerald Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Taxes under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Article 22 of the Tax :
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Year 1977. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Dash Auto Sales, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dash Auto Sales
3537 Boston Rd.
Bronx, NY 10469

Page 2
Affidavit of Mailing

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 September, 1983.

Susan Powell

Anna A. Haggell

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dash Auto Sales :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Year 1976. :

In the Matter of the Petition :
of :
Michael Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Tax and New York State Unincorporated :
Business Tax under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Articles 22 and 23 of :
the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1977. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Gerald Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Taxes under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Article 22 of the Tax :
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Year 1977. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Leo Ellman the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leo Ellman
Leo Ellman & Co.
82 Demarest Mill Rd.
Nanuet, NY 10954

Page 2
Affidavit of Mailing

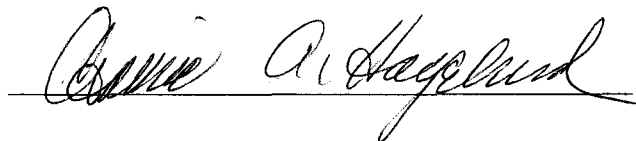
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

September 28, 1983

Dash Auto Sales
3537 Boston Rd.
Bronx, NY 10469

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) 690 & 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted 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
Leo Ellman
Leo Ellman & Co.
82 Demarest Mill Rd.
Nanuet, NY 10954
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dash Auto Sales :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Year 1976. :

In the Matter of the Petition :
of :
Michael Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Tax and New York State Unincorporated :
Business Tax under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Articles 22 and 23 of :
the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1977. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Gerald Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Taxes under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Article 22 of the Tax :
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Year 1977. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Michael Baum, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Baum
666 Pelham Rd.
New Rochelle, NY 10805

Page 2
Affidavit of Mailing

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 September, 1983.

Susan Powell

James A. Haglund

**AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174**

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

September 28, 1983

Michael Baum
666 Pelham Rd.
New Rochelle, NY 10805

Dear Mr. Baum:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted 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
Leo Ellman
Leo Ellman & Co.
82 Demarest Mill Rd.
Nanuet, NY 10954
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dash Auto Sales :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Year 1976. :

In the Matter of the Petition :
of :
Michael Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Tax and New York State Unincorporated :
Business Tax under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Articles 22 and 23 of :
the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1977. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Gerald Baum :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal :
Income Taxes under Articles 22 and 30 of the Tax :
Law for the Year 1976 and Article 22 of the Tax :
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Year 1977. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Gerald Baum, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald Baum
666 Pelham Rd.
New Rochelle, NY 10805

Page 2
Affidavit of Mailing

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 September, 1983.

Susan Powell

Amelia A. Heywood

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 28, 1983

Gerald Baum
666 Pelham Rd.
New Rochelle, NY 10805

Dear Mr. Baum:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted 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
Leo Ellman
Leo Ellman & Co.
82 Demarest Mill Rd.
Nanuet, NY 10954
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DASH AUTO SALES :
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Year 1976. :
:

In the Matter of the Petition :
of :
MICHAEL BAUM :
for Redetermination of a Deficiency or for :
Refund of New York State and New York City :
Personal Income Tax and New York State :
Unincorporated Business Tax under Articles 22 :
and 30 of the Tax Law for the Year 1976 and :
Articles 22 and 23 of the Tax Law and Chapter :
46, Title T of the Administrative Code of the :
City of New York for the Year 1977. :
:

DECISION

In the Matter of the Petition :
of :
GERALD BAUM :
for Redetermination of a Deficiency or for :
Refund of New York State and New York City :
Personal Income Taxes under Articles 22 and 30 :
of the Tax Law for the Year 1976 and Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1977. :
:

Petitioner, Dash Auto Sales, 3537 Boston Road, Bronx, New York 10469,
filed a petition for redetermination of a deficiency or for refund of unincor-
porated business tax under Article 23 of the Tax Law for the year 1976 (File
No. 33272).

Petitioner, Michael Baum, 666 Pelham Road, New Rochelle, New York 10805, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976, New York State unincorporated business tax under Article 23 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 33274).

Petitioner, Gerald Baum, 666 Pelham Road, New Rochelle, New York 10805, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976 and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 33273).

A consolidated formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 8, 1982 at 2:00 P.M., with all briefs to be submitted by March 4, 1983. Petitioners appeared by Leo Ellman & Co. (Leo Ellman, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether Dash Auto Sales and Michael Baum timely filed petitions and, if so, whether the personal income tax and unincorporated business tax field audit utilizing the source and application of funds method to reconstruct said petitioners' income resulted in a correct determination of taxes due.

II. Whether the personal income tax field audit utilizing the source and application of funds method to reconstruct Gerald Baum's income resulted in a correct determination of tax due.

FINDINGS OF FACT

1. Petitioner Dash Auto Sales ("Dash Auto") timely filed a New York State Partnership Return for 1976 and reported partnership unincorporated business gross income.

2. Petitioner Michael Baum and his wife filed a joint New York State Income Tax Resident Return and a New York City Nonresident Earnings Tax Return for 1976 and 1977. For the year 1977, Michael Baum filed a New York State Unincorporated Business Tax Return.

3. Petitioner Gerald Baum and his wife filed a joint New York State Income Tax Resident Return for 1976 and 1977. They also filed a New York City Nonresident Earnings Tax Return for 1976.

4. On March 27, 1980, the Audit Division issued a Notice of Deficiency to Dash Auto asserting a deficiency of unincorporated business tax for the year 1976 in the amount of \$4,090.34, plus penalty and interest of \$1,305.24, for a total amount due of \$5,395.58. The Statement of Unincorporated Business Tax Audit Changes explained that the Notice of Deficiency was based on an increase in income subject to unincorporated business tax of \$74,369.55. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax.

5. On March 27, 1980, the Audit Division issued two notices of deficiency to petitioner Michael Baum. One of the notices of deficiency asserted a deficiency of personal income tax in the amount of \$6,890.13, plus penalty and interest of \$1,922.57, for a total amount due of \$8,812.70. This Notice of Deficiency was based upon an adjustment for the year 1976 increasing petitioner's income subject to New York State personal income tax for the year 1976 in the

amount of \$22,429.39 and \$25,868.88 for the year 1977. The Notice of Deficiency was also based upon adjustments increasing Michael Baum's income subject to New York City personal income tax in the amount of \$22,341.40 for 1976 and \$22,486.38 for 1977. The penalties asserted in the Notice of Deficiency were pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax. The second Notice of Deficiency asserted a deficiency of unincorporated business tax for the year 1977 in the amount of \$1,190.00, plus penalty and interest of \$306.39, for a total amount due of \$1,496.39. This Notice of Deficiency was based on an adjustment increasing said petitioner's income subject to unincorporated business tax in the amount of \$21,636.38. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax.

6. On April 14, 1980, the Audit Division issued a Notice of Deficiency to petitioner Gerald Baum asserting a deficiency of New York State and New York City personal income tax for the years 1976 and 1977 in the amount of \$7,989.61, plus penalties of \$435.74 and interest of \$1,984.44, for a total amount due of \$10,409.79. The Statement of Audit Changes indicated that the asserted deficiency was based upon an adjustment increasing petitioner's income subject to New York State personal income tax by the amount of \$41,188.47 for 1976 and \$7,461.45 for 1977. The Notice of Deficiency was also based on an adjustment increasing said petitioner's income subject to New York City personal income tax for the year 1976 in the amount of \$41,468.58. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax. On June 26, 1980, the Audit Division issued a second Notice of Deficiency to Gerald Baum

which asserted the same deficiency of personal income tax, penalties and interest as that asserted on April 14, 1980.

7. Prior to April 11, 1980, Michael Baum mailed his petition, as well as the petition of Dash Auto, to the address indicated on the notices of deficiency, i.e. Tax Compliance Bureau of the Department of Taxation and Finance. The petitions were sent by certified mail return receipt requested. The receipt establishes that the petitions were received by the Tax Compliance Bureau on April 11, 1980.

8. In 1976, Michael Baum and Gerald Baum were equal partners in an business called Dash Auto Sales. In 1977, Dash Auto was operated as a sole proprietorship, as Gerald Baum was no longer a partner. Dash Auto bought and sold used cars.

9. Dash Auto used a trailer located on its lot as an office. Located adjacent to the trailer was a two-story converted gas station which could accommodate four cars on the first floor. The second floor of the gas station had an apartment which was rented to a tenant.

10. In general, the audit was conducted by examining the individual petitioners' income and expenses. If the income of the individual petitioners was not sufficient to satisfy the expenses, the auditor concluded that each petitioner must have received additional income from Dash Auto. Since Gerald Baum was not a partner of Dash Auto in 1977, the auditor concluded that the additional income needed to meet Gerald Baum's expenses for 1977 was "miscellaneous income".

11. For the year 1976, the auditor concluded that the additional income needed by each individual petitioner to satisfy his respective expenses was the result of additional sales by Dash Auto. Therefore, the auditor increased the

income of Dash Auto subject to unincorporated business tax by the amount that the auditor concluded each petitioner would need to meet his expenses.

12. The result of the audit was that Michael Baum had unexplained funds during 1976 of \$24,947.00 and unexplained funds during 1977 of \$15,794.64. The audit also revealed that Gerald Baum had unexplained funds during 1976 of \$3,586.00 and unexplained funds during 1977 of \$4,125.35. However, in reconciling the unexplained funds of Gerald Baum for 1976 with the sales of Dash Auto for 1976, the auditor utilized the same amount of unexplained funds as that found in the audit of Michael Baum, i.e. \$24,947.00.

13. With regard to Dash Auto, the auditor examined the reported business expenses and disallowed certain items on the ground that they were either unsubstantiated or of a personal nature. The adjusted income of Dash Auto was then used to recompute the income of the individual petitioners for 1976 and Michael Baum's income for 1977. The adjusted income of Dash Auto was also used to determine Dash Auto's income subject to unincorporated business tax.

14. In the course of the audit, the auditor concluded that the purported rental expense reflected on the partnership return and the corresponding rental income reflected on Michael Baum's return did not reflect Dash Auto's expenses or Michael Baum's income. That is, the auditor found that no rent expense was actually paid by Dash Auto and that only a bookkeeping entry was made. Therefore, the auditor disallowed the rent expense of Dash Auto and, in order to avoid double taxation, computed a credit to Michael Baum's income in recognition that Michael Baum did not receive said rental income.

15. The auditor deemed the used car lot and the adjacent building to be the property of Dash Auto because Michael Baum did not submit a copy of the deed. On this basis, the auditor concluded that the rental income from the

apartment located above the garage was subject to unincorporated business tax. Moreover, the auditor disallowed the real estate taxes and mortgage interest on the property which were deducted on Michael Baum's return and permitted these deductions on Dash Auto's unincorporated business tax return. However, in permitting Dash Auto a deduction for the property, the auditor concluded that the respective values of the land and building as apportioned by Michael Baum were inappropriate. That is, the auditor felt that, in the absence of an appraisal, too high a value was apportioned to the building. Therefore, the auditor reduced the value which was apportioned to the building and, as a result, reduced the depreciation expense attributable to the building.

16. The auditor disallowed the insurance expenses deducted by Dash Auto arising from payments made to two different insurers. The auditor disallowed a deduction for insurance payments to Blue Shield because they were a personal expense. The auditor also disallowed the payment by Dash Auto of \$142.00 to the insurance firm of Blumencranz-Klepper because an invoice was unavailable. Testimony was presented at the hearing that the amount of \$142.00 was spent on an "umbrella policy" on Dash Auto.

17. The auditor disallowed as either unsubstantiated or as a personal expense the amount of \$11.98 deducted by Dash Auto which Michael Baum purportedly paid to Mount Vernon Sporting Goods for a box of ammunition. Michael Baum used this ammunition to load a revolver which he would carry on the premises of Dash Auto. Prior to the time of this purchase, there were criminal incidents in the area and individuals associated with the police department suggested that the Baums obtain something to protect themselves.

18. The auditor disallowed as unsubstantiated or personal a deduction claimed by Dash Auto in the amount of \$54.04 which was paid to Porsche-Audi of

Avon, Connecticut. This expense was allegedly incurred by Dash Auto because an automobile which Dash Auto purchased broke down while being transported to Dash Auto. Consequently, the automobile was repaired.

19. The Audit Division disallowed a deduction claimed by Dash Auto of \$29.95 which was paid to the Dell Coffee Shop. Testimony was presented that this expense was incurred because Dash Auto would treat its customers to coffee or danish.

20. Michael Baum testified at the hearing that the out-of-pocket expenses attributable to him by the auditor, i.e. \$1,560.00 for 1976 and 1977, were excessive. However, an amount which would purport to reflect Michael Baum's out-of-pocket expenses was not presented for consideration.

21. For the year 1977, the Audit Division disallowed expenses for a business trip by Michael Baum and Gerald Baum to Puerto Rico. These expenses were deducted on Michael Baum's personal income tax return for 1977. The Audit Division disallowed these expenses as a personal expense because Mrs. Michael Baum's name was on the receipt. Michael Baum averred at the hearing that Mrs. Baum did not travel to Puerto Rico and that the reason Michael Baum and Gerald Baum went to Puerto Rico was to establish a partnership with an individual who owned a used car dealership in Puerto Rico.

22. On January 5, 1976, Michael Baum and his wife, Ronnie Baum, obtained approval for a loan in the amount of \$9,500.00 from the United States Small Business Administration. The loan authorization provided that monthly payments of the loan of \$98.00 were to be made starting five months from the date of the note. No evidence was presented as to the date of the note. Michael Baum received the loan in order to repair real property and to repair and replace personal property. However, Michael Baum used all of the proceeds of the loan

for personal living expenses. This loan was not taken into consideration in determining the sources of Michael Baum's funds.

23. In computing the amount of Michael Baum's expenses, the Audit Division estimated that \$250.00 per month was spent on oil and electricity for the personal residence during 1975 and 1976. Credible testimony was presented at the hearing that Michael Baum did not, in fact, spend more than \$1,500 per year on these utility expenses.

24. The auditor attributed automobile gasoline expense of \$1,040.00 per year to Michael Baum and Gerald Baum as a personal expense. Michael Baum lived six miles from Dash Auto and drove to work with his brother. Frequently, the cars which Dash Auto purchased had gasoline in them. If these cars did not have gasoline in them at the time of the purchase, Michael or Gerald Baum would purchase gasoline in order to transport them from the place of purchase to Dash Auto. Michael and Gerald Baum would use these automobiles to commute to work. On the basis of this explanation, Michael Baum argued that his personal expense for gasoline did not exceed \$365.00 a year.

25. Gerald Baum claimed his wife and minor child as exemptions during 1976 and 1977. The auditor discovered that Gerald Baum was divorced from his wife on February 2, 1976. On this basis, he disallowed an exemption for Gerald Baum's wife. The auditor also disallowed an exemption for his child since Gerald Baum did not establish that he provided over fifty percent of the support for the child.

26. After Gerald Baum separated from his wife, he resided with Michael Baum. In 1976, Gerald Baum's daughter was six years old. At the hearing, Michael Baum presented testimony that Gerald Baum provided all of his daughter's

support. During the period in issue, Gerald Baum was required by a court to pay \$100.00 a month for the support, maintenance, and education of his daughter.

27. The auditor attributed food purchases of \$4,098.00 to Michael Baum during 1976 and 1977. During these years, Michael Baum resided with his two children and his brother Gerald Baum. Michael Baum contributed \$2,500.00 a year for the household's food. Gerald Baum also contributed to the food expense.

CONCLUSIONS OF LAW

A. That, in general, a proceeding before the State Tax Commission is commenced by the filing of a petition within ninety days of the mailing of a Notice of Deficiency [Tax Law §§689(a),(b)]. In view of the credible testimony of Michael Baum and the receipt from the United States Postal Service showing that something was mailed to the address indicated on the notices of deficiency within ninety days of the mailing of the notices of deficiency to Dash Auto and Michael Baum, it is found that Dash Auto and Michael Baum filed timely petitions challenging the notices of deficiency.

B. That in addition to using the source and application of funds audit of Michael Baum, the Audit Division should have also utilized the source and application of funds audit of Gerald Baum to determine the amount of Gerald Baum's unreported income and the increase in business net profit of Dash Auto Sales. Accordingly, the Notice of Deficiency issued to Dash Auto and the Notice of Deficiency issued to Gerald Baum is to be modified to take into account Gerald Baum's unexplained funds during 1976 of \$3,586.00. As a result, the increase in business net profit of Dash Auto is to be computed by adding together the disallowed business expenses and rental income of Dash Auto, plus the unexplained funds specifically attributable to Michael Baum and the unexplained funds

specifically attributable to Gerald Baum. Similarly, the notices of deficiency issued to each individual petitioner are to be adjusted to reflect only those unexplained funds attributable to that individual plus the distribution share of Dash Auto's disallowed expenses and Dash Auto's rental income.

C. That Michael Baum is entitled to be given the benefit of the proceeds of the loan from the Small Business Administration in 1976. Accordingly, Michael Baum's asserted deficiency of income tax is to be recomputed by taking into account an additional \$9,500.00 as a source of funds. However, this source of funds is to be reduced by Michael Baum's payments to the Small Business Administration in repayment of the loan. Inasmuch as the loan was authorized on January 5, 1976, the authorization provided that repayment was to begin five months from the date of the note, and there is no evidence as to the date of the note, Michael Baum's source of funds of \$9,500.00 from the loan is to be reduced by seven installments of \$98.00 per installment.

D. That petitioner Gerald Baum is entitled to a dependency exemption for his daughter since he provided \$1,200.00 for the support of his child and since no evidence was introduced to establish that his former wife provided more support than petitioner did (I.R.C. §152(e)(2)(B); Tax Law §616; Matter of Earl L. LeMelle, State Tax Commission, September 28, 1979).

E. That petitioners have failed to sustain their burden of proof to show that they maintained the proper records to establish that the disallowed or adjusted business expenses were ordinary and necessary or that the proper amount was deducted (Treas. Reg. §§1.162-17(d); 1.274-5; Matter of Seymour Orlofsky (Deceased) and Blanche Orlofsky, State Tax Commission, February 11, 1982).

F. That since petitioner Michael Baum failed to submit the deed to the property in issue, the adjustments based upon deeming the property in issue to be the property of Dash Auto are sustained [Tax Law §689(e)].

G. That the notices of deficiency are to be adjusted by attributing personal expenses to Michael Baum as follows: utility expenses of \$1,500.00 per year and food expenses of \$2,500.00 per year. The remaining aspects of the audit pertaining to personal expenses are sustained.


H. That petitioners' argument that the Audit Division improperly determined petitioners' gasoline purchases is rejected since petitioners have not presented any evidence establishing what portion of the expense was an ordinary and necessary business expense and that portion which is attributable to a personal expense.

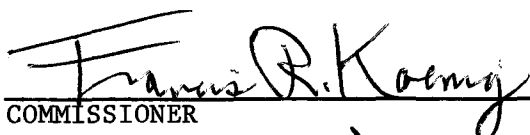
I. That the petitions of Dash Auto Sales, Michael Baum, and Gerald Baum are granted to the extent of Conclusions of Law "A", "B", "C", "D" and "G"; that the Audit Division is directed to recompute the notices of deficiency accordingly; and that, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK
NO.

446772

☐ HOLD

DATE

10-1

1ST NOTICE

2ND NOTICE

3 RETURN

Detached from
PS Form 3849-A
May 1979

Dash Auto Sales
8537 Boston Rd.
Bronx, NY 10469

BRONX, N.Y.
10469

- ☒ MOVED, LIST NO. ADDRESS
☐ INSUFFICIENT ADDRESS
☐ FORWARDING ORDER EXPIRED
☐ ADDRESS NOT KNOWN
☐ NO SUCH NUMBER
☐ REFUSED
- 6422

CERTIFIED

P 481 208 272

MAIL

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

September 28, 1983

Dash Auto Sales
3537 Boston Rd.
Bronx, NY 10469

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) 690 & 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted 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
Leo Ellman
Leo Ellman & Co.
82 Demarest Mill Rd.
Nanuet, NY 10954
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DASH AUTO SALES :
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Year 1976. :
:

In the Matter of the Petition :
of :
MICHAEL BAUM :
for Redetermination of a Deficiency or for :
Refund of New York State and New York City :
Personal Income Tax and New York State :
Unincorporated Business Tax under Articles 22 :
and 30 of the Tax Law for the Year 1976 and :
Articles 22 and 23 of the Tax Law and Chapter :
46, Title T of the Administrative Code of the :
City of New York for the Year 1977. :
:

DECISION

In the Matter of the Petition :
of :
GERALD BAUM :
for Redetermination of a Deficiency or for :
Refund of New York State and New York City :
Personal Income Taxes under Articles 22 and 30 :
of the Tax Law for the Year 1976 and Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Year 1977. :
:

Petitioner, Dash Auto Sales, 3537 Boston Road, Bronx, New York 10469,
filed a petition for redetermination of a deficiency or for refund of unincor-
porated business tax under Article 23 of the Tax Law for the year 1976 (File
No. 33272).

Petitioner, Michael Baum, 666 Pelham Road, New Rochelle, New York 10805, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976, New York State unincorporated business tax under Article 23 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 33274).

Petitioner, Gerald Baum, 666 Pelham Road, New Rochelle, New York 10805, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976 and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 33273).

A consolidated formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 8, 1982 at 2:00 P.M., with all briefs to be submitted by March 4, 1983. Petitioners appeared by Leo Ellman & Co. (Leo Ellman, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether Dash Auto Sales and Michael Baum timely filed petitions and, if so, whether the personal income tax and unincorporated business tax field audit utilizing the source and application of funds method to reconstruct said petitioners' income resulted in a correct determination of taxes due.

II. Whether the personal income tax field audit utilizing the source and application of funds method to reconstruct Gerald Baum's income resulted in a correct determination of tax due.

FINDINGS OF FACT

1. Petitioner Dash Auto Sales ("Dash Auto") timely filed a New York State Partnership Return for 1976 and reported partnership unincorporated business gross income.

2. Petitioner Michael Baum and his wife filed a joint New York State Income Tax Resident Return and a New York City Nonresident Earnings Tax Return for 1976 and 1977. For the year 1977, Michael Baum filed a New York State Unincorporated Business Tax Return.

3. Petitioner Gerald Baum and his wife filed a joint New York State Income Tax Resident Return for 1976 and 1977. They also filed a New York City Nonresident Earnings Tax Return for 1976.

4. On March 27, 1980, the Audit Division issued a Notice of Deficiency to Dash Auto asserting a deficiency of unincorporated business tax for the year 1976 in the amount of \$4,090.34, plus penalty and interest of \$1,305.24, for a total amount due of \$5,395.58. The Statement of Unincorporated Business Tax Audit Changes explained that the Notice of Deficiency was based on an increase in income subject to unincorporated business tax of \$74,369.55. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax.

5. On March 27, 1980, the Audit Division issued two notices of deficiency to petitioner Michael Baum. One of the notices of deficiency asserted a deficiency of personal income tax in the amount of \$6,890.13, plus penalty and interest of \$1,922.57, for a total amount due of \$8,812.70. This Notice of Deficiency was based upon an adjustment for the year 1976 increasing petitioner's income subject to New York State personal income tax for the year 1976 in the

amount of \$22,429.39 and \$25,868.88 for the year 1977. The Notice of Deficiency was also based upon adjustments increasing Michael Baum's income subject to New York City personal income tax in the amount of \$22,341.40 for 1976 and \$22,486.38 for 1977. The penalties asserted in the Notice of Deficiency were pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax. The second Notice of Deficiency asserted a deficiency of unincorporated business tax for the year 1977 in the amount of \$1,190.00, plus penalty and interest of \$306.39, for a total amount due of \$1,496.39. This Notice of Deficiency was based on an adjustment increasing said petitioner's income subject to unincorporated business tax in the amount of \$21,636.38. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax.

6. On April 14, 1980, the Audit Division issued a Notice of Deficiency to petitioner Gerald Baum asserting a deficiency of New York State and New York City personal income tax for the years 1976 and 1977 in the amount of \$7,989.61, plus penalties of \$435.74 and interest of \$1,984.44, for a total amount due of \$10,409.79. The Statement of Audit Changes indicated that the asserted deficiency was based upon an adjustment increasing petitioner's income subject to New York State personal income tax by the amount of \$41,188.47 for 1976 and \$7,461.45 for 1977. The Notice of Deficiency was also based on an adjustment increasing said petitioner's income subject to New York City personal income tax for the year 1976 in the amount of \$41,468.58. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax. On June 26, 1980, the Audit Division issued a second Notice of Deficiency to Gerald Baum

which asserted the same deficiency of personal income tax, penalties and interest as that asserted on April 14, 1980.

7. Prior to April 11, 1980, Michael Baum mailed his petition, as well as the petition of Dash Auto, to the address indicated on the notices of deficiency, i.e. Tax Compliance Bureau of the Department of Taxation and Finance. The petitions were sent by certified mail return receipt requested. The receipt establishes that the petitions were received by the Tax Compliance Bureau on April 11, 1980.

8. In 1976, Michael Baum and Gerald Baum were equal partners in an business called Dash Auto Sales. In 1977, Dash Auto was operated as a sole proprietorship, as Gerald Baum was no longer a partner. Dash Auto bought and sold used cars.

9. Dash Auto used a trailer located on its lot as an office. Located adjacent to the trailer was a two-story converted gas station which could accommodate four cars on the first floor. The second floor of the gas station had an apartment which was rented to a tenant.

10. In general, the audit was conducted by examining the individual petitioners' income and expenses. If the income of the individual petitioners was not sufficient to satisfy the expenses, the auditor concluded that each petitioner must have received additional income from Dash Auto. Since Gerald Baum was not a partner of Dash Auto in 1977, the auditor concluded that the additional income needed to meet Gerald Baum's expenses for 1977 was "miscellaneous income".

11. For the year 1976, the auditor concluded that the additional income needed by each individual petitioner to satisfy his respective expenses was the result of additional sales by Dash Auto. Therefore, the auditor increased the

income of Dash Auto subject to unincorporated business tax by the amount that the auditor concluded each petitioner would need to meet his expenses.

12. The result of the audit was that Michael Baum had unexplained funds during 1976 of \$24,947.00 and unexplained funds during 1977 of \$15,794.64. The audit also revealed that Gerald Baum had unexplained funds during 1976 of \$3,586.00 and unexplained funds during 1977 of \$4,125.35. However, in reconciling the unexplained funds of Gerald Baum for 1976 with the sales of Dash Auto for 1976, the auditor utilized the same amount of unexplained funds as that found in the audit of Michael Baum, i.e. \$24,947.00.

13. With regard to Dash Auto, the auditor examined the reported business expenses and disallowed certain items on the ground that they were either unsubstantiated or of a personal nature. The adjusted income of Dash Auto was then used to recompute the income of the individual petitioners for 1976 and Michael Baum's income for 1977. The adjusted income of Dash Auto was also used to determine Dash Auto's income subject to unincorporated business tax.

14. In the course of the audit, the auditor concluded that the purported rental expense reflected on the partnership return and the corresponding rental income reflected on Michael Baum's return did not reflect Dash Auto's expenses or Michael Baum's income. That is, the auditor found that no rent expense was actually paid by Dash Auto and that only a bookkeeping entry was made. Therefore, the auditor disallowed the rent expense of Dash Auto and, in order to avoid double taxation, computed a credit to Michael Baum's income in recognition that Michael Baum did not receive said rental income.

15. The auditor deemed the used car lot and the adjacent building to be the property of Dash Auto because Michael Baum did not submit a copy of the deed. On this basis, the auditor concluded that the rental income from the

apartment located above the garage was subject to unincorporated business tax. Moreover, the auditor disallowed the real estate taxes and mortgage interest on the property which were deducted on Michael Baum's return and permitted these deductions on Dash Auto's unincorporated business tax return. However, in permitting Dash Auto a deduction for the property, the auditor concluded that the respective values of the land and building as apportioned by Michael Baum were inappropriate. That is, the auditor felt that, in the absence of an appraisal, too high a value was apportioned to the building. Therefore, the auditor reduced the value which was apportioned to the building and, as a result, reduced the depreciation expense attributable to the building.

16. The auditor disallowed the insurance expenses deducted by Dash Auto arising from payments made to two different insurers. The auditor disallowed a deduction for insurance payments to Blue Shield because they were a personal expense. The auditor also disallowed the payment by Dash Auto of \$142.00 to the insurance firm of Blumencranz-Klepper because an invoice was unavailable. Testimony was presented at the hearing that the amount of \$142.00 was spent on an "umbrella policy" on Dash Auto.

17. The auditor disallowed as either unsubstantiated or as a personal expense the amount of \$11.98 deducted by Dash Auto which Michael Baum purportedly paid to Mount Vernon Sporting Goods for a box of ammunition. Michael Baum used this ammunition to load a revolver which he would carry on the premises of Dash Auto. Prior to the time of this purchase, there were criminal incidents in the area and individuals associated with the police department suggested that the Baums obtain something to protect themselves.

18. The auditor disallowed as unsubstantiated or personal a deduction claimed by Dash Auto in the amount of \$54.04 which was paid to Porsche-Audi of

Avon, Connecticut. This expense was allegedly incurred by Dash Auto because an automobile which Dash Auto purchased broke down while being transported to Dash Auto. Consequently, the automobile was repaired.

19. The Audit Division disallowed a deduction claimed by Dash Auto of \$29.95 which was paid to the Dell Coffee Shop. Testimony was presented that this expense was incurred because Dash Auto would treat its customers to coffee or danish.

20. Michael Baum testified at the hearing that the out-of-pocket expenses attributable to him by the auditor, i.e. \$1,560.00 for 1976 and 1977, were excessive. However, an amount which would purport to reflect Michael Baum's out-of-pocket expenses was not presented for consideration.

21. For the year 1977, the Audit Division disallowed expenses for a business trip by Michael Baum and Gerald Baum to Puerto Rico. These expenses were deducted on Michael Baum's personal income tax return for 1977. The Audit Division disallowed these expenses as a personal expense because Mrs. Michael Baum's name was on the receipt. Michael Baum averred at the hearing that Mrs. Baum did not travel to Puerto Rico and that the reason Michael Baum and Gerald Baum went to Puerto Rico was to establish a partnership with an individual who owned a used car dealership in Puerto Rico.

22. On January 5, 1976, Michael Baum and his wife, Ronnie Baum, obtained approval for a loan in the amount of \$9,500.00 from the United States Small Business Administration. The loan authorization provided that monthly payments of the loan of \$98.00 were to be made starting five months from the date of the note. No evidence was presented as to the date of the note. Michael Baum received the loan in order to repair real property and to repair and replace personal property. However, Michael Baum used all of the proceeds of the loan

for personal living expenses. This loan was not taken into consideration in determining the sources of Michael Baum's funds.

23. In computing the amount of Michael Baum's expenses, the Audit Division estimated that \$250.00 per month was spent on oil and electricity for the personal residence during 1975 and 1976. Credible testimony was presented at the hearing that Michael Baum did not, in fact, spend more than \$1,500 per year on these utility expenses.

24. The auditor attributed automobile gasoline expense of \$1,040.00 per year to Michael Baum and Gerald Baum as a personal expense. Michael Baum lived six miles from Dash Auto and drove to work with his brother. Frequently, the cars which Dash Auto purchased had gasoline in them. If these cars did not have gasoline in them at the time of the purchase, Michael or Gerald Baum would purchase gasoline in order to transport them from the place of purchase to Dash Auto. Michael and Gerald Baum would use these automobiles to commute to work. On the basis of this explanation, Michael Baum argued that his personal expense for gasoline did not exceed \$365.00 a year.

25. Gerald Baum claimed his wife and minor child as exemptions during 1976 and 1977. The auditor discovered that Gerald Baum was divorced from his wife on February 2, 1976. On this basis, he disallowed an exemption for Gerald Baum's wife. The auditor also disallowed an exemption for his child since Gerald Baum did not establish that he provided over fifty percent of the support for the child.

26. After Gerald Baum separated from his wife, he resided with Michael Baum. In 1976, Gerald Baum's daughter was six years old. At the hearing, Michael Baum presented testimony that Gerald Baum provided all of his daughter's

support. During the period in issue, Gerald Baum was required by a court to pay \$100.00 a month for the support, maintenance, and education of his daughter.

27. The auditor attributed food purchases of \$4,098.00 to Michael Baum during 1976 and 1977. During these years, Michael Baum resided with his two children and his brother Gerald Baum. Michael Baum contributed \$2,500.00 a year for the household's food. Gerald Baum also contributed to the food expense.

CONCLUSIONS OF LAW

A. That, in general, a proceeding before the State Tax Commission is commenced by the filing of a petition within ninety days of the mailing of a Notice of Deficiency [Tax Law §§689(a),(b)]. In view of the credible testimony of Michael Baum and the receipt from the United States Postal Service showing that something was mailed to the address indicated on the notices of deficiency within ninety days of the mailing of the notices of deficiency to Dash Auto and Michael Baum, it is found that Dash Auto and Michael Baum filed timely petitions challenging the notices of deficiency.

B. That in addition to using the source and application of funds audit of Michael Baum, the Audit Division should have also utilized the source and application of funds audit of Gerald Baum to determine the amount of Gerald Baum's unreported income and the increase in business net profit of Dash Auto Sales. Accordingly, the Notice of Deficiency issued to Dash Auto and the Notice of Deficiency issued to Gerald Baum is to be modified to take into account Gerald Baum's unexplained funds during 1976 of \$3,586.00. As a result, the increase in business net profit of Dash Auto is to be computed by adding together the disallowed business expenses and rental income of Dash Auto, plus the unexplained funds specifically attributable to Michael Baum and the unexplained funds

specifically attributable to Gerald Baum. Similarly, the notices of deficiency issued to each individual petitioner are to be adjusted to reflect only those unexplained funds attributable to that individual plus the distribution share of Dash Auto's disallowed expenses and Dash Auto's rental income.

C. That Michael Baum is entitled to be given the benefit of the proceeds of the loan from the Small Business Administration in 1976. Accordingly, Michael Baum's asserted deficiency of income tax is to be recomputed by taking into account an additional \$9,500.00 as a source of funds. However, this source of funds is to be reduced by Michael Baum's payments to the Small Business Administration in repayment of the loan. Inasmuch as the loan was authorized on January 5, 1976, the authorization provided that repayment was to begin five months from the date of the note, and there is no evidence as to the date of the note, Michael Baum's source of funds of \$9,500.00 from the loan is to be reduced by seven installments of \$98.00 per installment.

D. That petitioner Gerald Baum is entitled to a dependency exemption for his daughter since he provided \$1,200.00 for the support of his child and since no evidence was introduced to establish that his former wife provided more support than petitioner did (I.R.C. §152(e)(2)(B); Tax Law §616; Matter of Earl L. LeMelle, State Tax Commission, September 28, 1979).

E. That petitioners have failed to sustain their burden of proof to show that they maintained the proper records to establish that the disallowed or adjusted business expenses were ordinary and necessary or that the proper amount was deducted (Treas. Reg. §§1.162-17(d); 1.274-5; Matter of Seymour Orlofsky (Deceased) and Blanche Orlofsky, State Tax Commission, February 11, 1982).

F. That since petitioner Michael Baum failed to submit the deed to the property in issue, the adjustments based upon deeming the property in issue to be the property of Dash Auto are sustained [Tax Law §689(e)].

G. That the notices of deficiency are to be adjusted by attributing personal expenses to Michael Baum as follows: utility expenses of \$1,500.00 per year and food expenses of \$2,500.00 per year. The remaining aspects of the audit pertaining to personal expenses are sustained.


H. That petitioners' argument that the Audit Division improperly determined petitioners' gasoline purchases is rejected since petitioners have not presented any evidence establishing what portion of the expense was an ordinary and necessary business expense and that portion which is attributable to a personal expense.

I. That the petitions of Dash Auto Sales, Michael Baum, and Gerald Baum are granted to the extent of Conclusions of Law "A", "B", "C", "D" and "G"; that the Audit Division is directed to recompute the notices of deficiency accordingly; and that, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED

P 481 208 262

MAIL

Michael Baum
666 Pelham Rd.
New Rochelle, NY 10805

HOLD ☐

DATE 3/8/06/8
1ST NOTICE
2ND NOTICE 3/6/07
RETURN 3/2/07

0881 120
Detached from
PS Form 3848

CLAIM CHECK NO. 7552

REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 10/27/83
---	---	-----------------------------

Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition F - Dec. - 9/28/83
Name Michael Baum	
Address 666 Pelham Rd. New Rochelle, N.Y. 10805	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	Unclaimed

Searched by D.R.	Section	Date of Search 10/27/83
---------------------	---------	----------------------------

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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

September 28, 1983

Michael Baum
666 Pelham Rd.
New Rochelle, NY 10805

Dear Mr. Baum:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted 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
Leo Ellman
Leo Ellman & Co.
82 Demarest Mill Rd.
Nanuet, NY 10954
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DASH AUTO SALES

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1976.

In the Matter of the Petition

of

MICHAEL BAUM

DECISION

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Tax and New York State
Unincorporated Business Tax under Articles 22
and 30 of the Tax Law for the Year 1976 and
Articles 22 and 23 of the Tax Law and Chapter
46, Title T of the Administrative Code of the
City of New York for the Year 1977.

In the Matter of the Petition

of

GERALD BAUM

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Taxes under Articles 22 and 30
of the Tax Law for the Year 1976 and Article 22
of the Tax Law and Chapter 46, Title T of the
Administrative Code of the City of New York for
the Year 1977.

Petitioner, Dash Auto Sales, 3537 Boston Road, Bronx, New York 10469,
filed a petition for redetermination of a deficiency or for refund of unincor-
porated business tax under Article 23 of the Tax Law for the year 1976 (File
No. 33272).

Petitioner, Michael Baum, 666 Pelham Road, New Rochelle, New York 10805, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976, New York State unincorporated business tax under Article 23 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 33274).

.Petitioner, Gerald Baum, 666 Pelham Road, New Rochelle, New York 10805, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976 and Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 33273).

A consolidated formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 8, 1982 at 2:00 P.M., with all briefs to be submitted by March 4, 1983. Petitioners appeared by Leo Ellman & Co. (Leo Ellman, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether Dash Auto Sales and Michael Baum timely filed petitions and, if so, whether the personal income tax and unincorporated business tax field audit utilizing the source and application of funds method to reconstruct said petitioners' income resulted in a correct determination of taxes due.

II. Whether the personal income tax field audit utilizing the source and application of funds method to reconstruct Gerald Baum's income resulted in a correct determination of tax due.

FINDINGS OF FACT

1. Petitioner Dash Auto Sales ("Dash Auto") timely filed a New York State Partnership Return for 1976 and reported partnership unincorporated business gross income.

2. Petitioner Michael Baum and his wife filed a joint New York State Income Tax Resident Return and a New York City Nonresident Earnings Tax Return for 1976 and 1977. For the year 1977, Michael Baum filed a New York State Unincorporated Business Tax Return.

3. Petitioner Gerald Baum and his wife filed a joint New York State Income Tax Resident Return for 1976 and 1977. They also filed a New York City Nonresident Earnings Tax Return for 1976.

4. On March 27, 1980, the Audit Division issued a Notice of Deficiency to Dash Auto asserting a deficiency of unincorporated business tax for the year 1976 in the amount of \$4,090.34, plus penalty and interest of \$1,305.24, for a total amount due of \$5,395.58. The Statement of Unincorporated Business Tax Audit Changes explained that the Notice of Deficiency was based on an increase in income subject to unincorporated business tax of \$74,369.55. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax.

5. On March 27, 1980, the Audit Division issued two notices of deficiency to petitioner Michael Baum. One of the notices of deficiency asserted a deficiency of personal income tax in the amount of \$6,890.13, plus penalty and interest of \$1,922.57, for a total amount due of \$8,812.70. This Notice of Deficiency was based upon an adjustment for the year 1976 increasing petitioner's income subject to New York State personal income tax for the year 1976 in the

amount of \$22,429.39 and \$25,868.88 for the year 1977. The Notice of Deficiency was also based upon adjustments increasing Michael Baum's income subject to New York City personal income tax in the amount of \$22,341.40 for 1976 and \$22,486.38 for 1977. The penalties asserted in the Notice of Deficiency were pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax. The second Notice of Deficiency asserted a deficiency of unincorporated business tax for the year 1977 in the amount of \$1,190.00, plus penalty and interest of \$306.39, for a total amount due of \$1,496.39. This Notice of Deficiency was based on an adjustment increasing said petitioner's income subject to unincorporated business tax in the amount of \$21,636.38. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax.

6. On April 14, 1980, the Audit Division issued a Notice of Deficiency to petitioner Gerald Baum asserting a deficiency of New York State and New York City personal income tax for the years 1976 and 1977 in the amount of \$7,989.61, plus penalties of \$435.74 and interest of \$1,984.44, for a total amount due of \$10,409.79. The Statement of Audit Changes indicated that the asserted deficiency was based upon an adjustment increasing petitioner's income subject to New York State personal income tax by the amount of \$41,188.47 for 1976 and \$7,461.45 for 1977. The Notice of Deficiency was also based on an adjustment increasing said petitioner's income subject to New York City personal income tax for the year 1976 in the amount of \$41,468.58. The penalties were asserted pursuant to sections 685(b) and 685(c) of the Tax Law for, respectively, negligence and failure to file a declaration or underpayment of estimated tax. On June 26, 1980, the Audit Division issued a second Notice of Deficiency to Gerald Baum

which asserted the same deficiency of personal income tax, penalties and interest as that asserted on April 14, 1980.

7. Prior to April 11, 1980, Michael Baum mailed his petition, as well as the petition of Dash Auto, to the address indicated on the notices of deficiency, i.e. Tax Compliance Bureau of the Department of Taxation and Finance. The petitions were sent by certified mail return receipt requested. The receipt establishes that the petitions were received by the Tax Compliance Bureau on April 11, 1980.

8. In 1976, Michael Baum and Gerald Baum were equal partners in an business called Dash Auto Sales. In 1977, Dash Auto was operated as a sole proprietorship, as Gerald Baum was no longer a partner. Dash Auto bought and sold used cars.

9. Dash Auto used a trailer located on its lot as an office. Located adjacent to the trailer was a two-story converted gas station which could accommodate four cars on the first floor. The second floor of the gas station had an apartment which was rented to a tenant.

10. In general, the audit was conducted by examining the individual petitioners' income and expenses. If the income of the individual petitioners was not sufficient to satisfy the expenses, the auditor concluded that each petitioner must have received additional income from Dash Auto. Since Gerald Baum was not a partner of Dash Auto in 1977, the auditor concluded that the additional income needed to meet Gerald Baum's expenses for 1977 was "miscellaneous income".

11. For the year 1976, the auditor concluded that the additional income needed by each individual petitioner to satisfy his respective expenses was the result of additional sales by Dash Auto. Therefore, the auditor increased the

income of Dash Auto subject to unincorporated business tax by the amount that the auditor concluded each petitioner would need to meet his expenses.

12. The result of the audit was that Michael Baum had unexplained funds during 1976 of \$24,947.00 and unexplained funds during 1977 of \$15,794.64. The audit also revealed that Gerald Baum had unexplained funds during 1976 of \$3,586.00 and unexplained funds during 1977 of \$4,125.35. However, in reconciling the unexplained funds of Gerald Baum for 1976 with the sales of Dash Auto for 1976, the auditor utilized the same amount of unexplained funds as that found in the audit of Michael Baum, i.e. \$24,947.00.

13. With regard to Dash Auto, the auditor examined the reported business expenses and disallowed certain items on the ground that they were either unsubstantiated or of a personal nature. The adjusted income of Dash Auto was then used to recompute the income of the individual petitioners for 1976 and Michael Baum's income for 1977. The adjusted income of Dash Auto was also used to determine Dash Auto's income subject to unincorporated business tax.

14. In the course of the audit, the auditor concluded that the purported rental expense reflected on the partnership return and the corresponding rental income reflected on Michael Baum's return did not reflect Dash Auto's expenses or Michael Baum's income. That is, the auditor found that no rent expense was actually paid by Dash Auto and that only a bookkeeping entry was made. Therefore, the auditor disallowed the rent expense of Dash Auto and, in order to avoid double taxation, computed a credit to Michael Baum's income in recognition that Michael Baum did not receive said rental income.

15. The auditor deemed the used car lot and the adjacent building to be the property of Dash Auto because Michael Baum did not submit a copy of the deed. On this basis, the auditor concluded that the rental income from the

apartment located above the garage was subject to unincorporated business tax. Moreover, the auditor disallowed the real estate taxes and mortgage interest on the property which were deducted on Michael Baum's return and permitted these deductions on Dash Auto's unincorporated business tax return. However, in permitting Dash Auto a deduction for the property, the auditor concluded that the respective values of the land and building as apportioned by Michael Baum were inappropriate. That is, the auditor felt that, in the absence of an appraisal, too high a value was apportioned to the building. Therefore, the auditor reduced the value which was apportioned to the building and, as a result, reduced the depreciation expense attributable to the building.

16. The auditor disallowed the insurance expenses deducted by Dash Auto arising from payments made to two different insurers. The auditor disallowed a deduction for insurance payments to Blue Shield because they were a personal expense. The auditor also disallowed the payment by Dash Auto of \$142.00 to the insurance firm of Blumencranz-Klepper because an invoice was unavailable. Testimony was presented at the hearing that the amount of \$142.00 was spent on an "umbrella policy" on Dash Auto.

17. The auditor disallowed as either unsubstantiated or as a personal expense the amount of \$11.98 deducted by Dash Auto which Michael Baum purportedly paid to Mount Vernon Sporting Goods for a box of ammunition. Michael Baum used this ammunition to load a revolver which he would carry on the premises of Dash Auto. Prior to the time of this purchase, there were criminal incidents in the area and individuals associated with the police department suggested that the Baums obtain something to protect themselves.

18. The auditor disallowed as unsubstantiated or personal a deduction claimed by Dash Auto in the amount of \$54.04 which was paid to Porsche-Audi of

Avon, Connecticut. This expense was allegedly incurred by Dash Auto because an automobile which Dash Auto purchased broke down while being transported to Dash Auto. Consequently, the automobile was repaired.

19. The Audit Division disallowed a deduction claimed by Dash Auto of \$29.95 which was paid to the Dell Coffee Shop. Testimony was presented that this expense was incurred because Dash Auto would treat its customers to coffee or danish.

20. Michael Baum testified at the hearing that the out-of-pocket expenses attributable to him by the auditor, i.e. \$1,560.00 for 1976 and 1977, were excessive. However, an amount which would purport to reflect Michael Baum's out-of-pocket expenses was not presented for consideration.

21. For the year 1977, the Audit Division disallowed expenses for a business trip by Michael Baum and Gerald Baum to Puerto Rico. These expenses were deducted on Michael Baum's personal income tax return for 1977. The Audit Division disallowed these expenses as a personal expense because Mrs. Michael Baum's name was on the receipt. Michael Baum averred at the hearing that Mrs. Baum did not travel to Puerto Rico and that the reason Michael Baum and Gerald Baum went to Puerto Rico was to establish a partnership with an individual who owned a used car dealership in Puerto Rico.

22. On January 5, 1976, Michael Baum and his wife, Ronnie Baum, obtained approval for a loan in the amount of \$9,500.00 from the United States Small Business Administration. The loan authorization provided that monthly payments of the loan of \$98.00 were to be made starting five months from the date of the note. No evidence was presented as to the date of the note. Michael Baum received the loan in order to repair real property and to repair and replace personal property. However, Michael Baum used all of the proceeds of the loan

for personal living expenses. This loan was not taken into consideration in determining the sources of Michael Baum's funds.

23. In computing the amount of Michael Baum's expenses, the Audit Division estimated that \$250.00 per month was spent on oil and electricity for the personal residence during 1975 and 1976. Credible testimony was presented at the hearing that Michael Baum did not, in fact, spend more than \$1,500 per year on these utility expenses.

24. The auditor attributed automobile gasoline expense of \$1,040.00 per year to Michael Baum and Gerald Baum as a personal expense. Michael Baum lived six miles from Dash Auto and drove to work with his brother. Frequently, the cars which Dash Auto purchased had gasoline in them. If these cars did not have gasoline in them at the time of the purchase, Michael or Gerald Baum would purchase gasoline in order to transport them from the place of purchase to Dash Auto. Michael and Gerald Baum would use these automobiles to commute to work. On the basis of this explanation, Michael Baum argued that his personal expense for gasoline did not exceed \$365.00 a year.

25. Gerald Baum claimed his wife and minor child as exemptions during 1976 and 1977. The auditor discovered that Gerald Baum was divorced from his wife on February 2, 1976. On this basis, he disallowed an exemption for Gerald Baum's wife. The auditor also disallowed an exemption for his child since Gerald Baum did not establish that he provided over fifty percent of the support for the child.

26. After Gerald Baum separated from his wife, he resided with Michael Baum. In 1976, Gerald Baum's daughter was six years old. At the hearing, Michael Baum presented testimony that Gerald Baum provided all of his daughter's

support. During the period in issue, Gerald Baum was required by a court to pay \$100.00 a month for the support, maintenance, and education of his daughter.

27. The auditor attributed food purchases of \$4,098.00 to Michael Baum during 1976 and 1977. During these years, Michael Baum resided with his two children and his brother Gerald Baum. Michael Baum contributed \$2,500.00 a year for the household's food. Gerald Baum also contributed to the food expense.

CONCLUSIONS OF LAW

A. That, in general, a proceeding before the State Tax Commission is commenced by the filing of a petition within ninety days of the mailing of a Notice of Deficiency [Tax Law §§689(a),(b)]. In view of the credible testimony of Michael Baum and the receipt from the United States Postal Service showing that something was mailed to the address indicated on the notices of deficiency within ninety days of the mailing of the notices of deficiency to Dash Auto and Michael Baum, it is found that Dash Auto and Michael Baum filed timely petitions challenging the notices of deficiency.

B. That in addition to using the source and application of funds audit of Michael Baum, the Audit Division should have also utilized the source and application of funds audit of Gerald Baum to determine the amount of Gerald Baum's unreported income and the increase in business net profit of Dash Auto Sales. Accordingly, the Notice of Deficiency issued to Dash Auto and the Notice of Deficiency issued to Gerald Baum is to be modified to take into account Gerald Baum's unexplained funds during 1976 of \$3,586.00. As a result, the increase in business net profit of Dash Auto is to be computed by adding together the disallowed business expenses and rental income of Dash Auto, plus the unexplained funds specifically attributable to Michael Baum and the unexplained funds

specifically attributable to Gerald Baum. Similarly, the notices of deficiency issued to each individual petitioner are to be adjusted to reflect only those unexplained funds attributable to that individual plus the distribution share of Dash Auto's disallowed expenses and Dash Auto's rental income.

C. That Michael Baum is entitled to be given the benefit of the proceeds of the loan from the Small Business Administration in 1976. Accordingly, Michael Baum's asserted deficiency of income tax is to be recomputed by taking into account an additional \$9,500.00 as a source of funds. However, this source of funds is to be reduced by Michael Baum's payments to the Small Business Administration in repayment of the loan. Inasmuch as the loan was authorized on January 5, 1976, the authorization provided that repayment was to begin five months from the date of the note, and there is no evidence as to the date of the note, Michael Baum's source of funds of \$9,500.00 from the loan is to be reduced by seven installments of \$98.00 per installment.

D. That petitioner Gerald Baum is entitled to a dependency exemption for his daughter since he provided \$1,200.00 for the support of his child and since no evidence was introduced to establish that his former wife provided more support than petitioner did (I.R.C. §152(e)(2)(B); Tax Law §616; Matter of Earl L. LeMelle, State Tax Commission, September 28, 1979).

E. That petitioners have failed to sustain their burden of proof to show that they maintained the proper records to establish that the disallowed or adjusted business expenses were ordinary and necessary or that the proper amount was deducted (Treas. Reg. §§1.162-17(d); 1.274-5; Matter of Seymour Orlofsky (Deceased) and Blanche Orlofsky, State Tax Commission, February 11, 1982).

F. That since petitioner Michael Baum failed to submit the deed to the property in issue, the adjustments based upon deeming the property in issue to be the property of Dash Auto are sustained [Tax Law §689(e)].

G. That the notices of deficiency are to be adjusted by attributing personal expenses to Michael Baum as follows: utility expenses of \$1,500.00 per year and food expenses of \$2,500.00 per year. The remaining aspects of the audit pertaining to personal expenses are sustained.


H. That petitioners' argument that the Audit Division improperly determined petitioners' gasoline purchases is rejected since petitioners have not presented any evidence establishing what portion of the expense was an ordinary and necessary business expense and that portion which is attributable to a personal expense.

I. That the petitions of Dash Auto Sales, Michael Baum, and Gerald Baum are granted to the extent of Conclusions of Law "A", "B", "C", "D" and "G"; that the Audit Division is directed to recompute the notices of deficiency accordingly; and that, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER