

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MOHAMMAD & ROOSHA JAVED** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 825127  
York State and City Personal Income Taxes under Article :  
22 of the Tax Law and the Administrative Code of the City :  
of New York for the Years 2005 through 2007. :  
\_\_\_\_\_ :

Petitioners, Mohammad and Roosha Javed, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2005 through 2007.

A hearing was commenced before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on October 30, 2013 at 11:00 A.M., with all briefs to be submitted by March 13, 2014, which date commenced the six-month period for issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel). After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly determined that petitioners are liable for additional personal income tax for the years 2005 through 2007 due to constructive dividends

attributed to petitioners based upon increased income from 492 Fast Food, Inc., by using the results of a prior sales tax audit.

***FINDINGS OF FACT***

1. On August 7, 2008, following an audit of 492 Fast Food, Inc., the Division of Taxation (Division) issued a Notice of Determination, assessment ID #L-030504128, to petitioner Mohammad Javed as a responsible officer of that corporation. The notice asserted \$43,308.61 in additional sales and use taxes due, plus penalty and interest for the period June 1, 2005 through February 28, 2007.

2. By letter dated September 22, 2008, the Division informed petitioners that their personal income tax returns for the tax years 2004 through 2007 were selected for audit. Petitioners were referred for a personal income tax audit following the sales tax audit of 492 Fast Food, Inc. The audit adjustment that increased sales in the sales tax audit of the corporation flowed through as an audit adjustment for the corporation, which in turn, increased the entire net income of the corporation during the related Article 9-A corporation franchise tax audit.

3. The increased entire net income of the corporation was then determined to be a constructive dividend to the shareholders of the corporation. Petitioner Mohammad Javed was initially determined to be a 50% shareholder of the corporation based upon the information available to the Division at the time of the audit, for each of the years 2005 through 2007. The Division issued a Notice of Deficiency, assessment #L-033404382, dated March 8, 2010, asserting that petitioners owed an additional \$20,011.00 in tax plus interest and penalty for the tax years 2005 through 2007.

4. On August 16, 2010, Mr. Javed and the Division, by their representatives, executed a Stipulation for Discontinuance of Proceeding by which the parties agreed on a disposition of the sales tax matter for 492 Fast Food, Inc. Pursuant to the stipulation, tax was recomputed to \$27,000.00 plus statutory interest and the penalty was cancelled.

5. On August 26, 2010, the Administrative Law Judge assigned to the matter issued an Order of Discontinuance, finally determining the sales tax matter, with prejudice, in the Division of Tax Appeals in accordance with the terms of the Stipulation for Discontinuance of Proceeding.

6. On September 22, 2010, Mr. Javed filed papers requesting a review of the Order of Discontinuance. By Order dated January 27, 2011, the Administrative Law Judge denied his motion.

7. Mr. Javed then filed an exception to the order of the Administrative Law Judge issued January 27, 2011. By decision dated October 6, 2011, the Tax Appeals Tribunal denied the exception and affirmed the order of the Administrative Law Judge denying his motion.

8. With respect to the Notice of Deficiency, L-033404382, for the personal income taxes, petitioners requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS), which was conducted on December 8, 2010.

9. Two adjustments were made to the Notice of Deficiency at BCMS. First, Mr. Javed established that he was not a 50% shareholder of the corporation, but rather, a 25% shareholder. Thus, the amount of the deemed dividends was decreased in order to properly reflect his ownership interest.

The second adjustment was made due to the sales tax case. At audit, the sales tax period for the corporation was the period September 1, 2004 through February 28, 2007. However, the period for which Mr. Javed was assessed as a responsible officer began on June 1, 2005 due to a statute of limitations issue. Furthermore, the sales tax proceeding was settled pursuant to a stipulation of discontinuance for the amount of \$27,000.00 in sales tax due, which resulted in a further decrease in the amount of tax asserted pursuant to the Notice of Deficiency.

10. By conciliation order dated May 11, 2012, statutory notice L-033404382 was recomputed to the amount of \$7,155.00 in tax plus interest and penalty for the years 2005, 2006 and 2007.

11. Petitioners filed their petition with the Division of Tax Appeals on July 12, 2012 to contest the recomputed statutory notice. Subsequently, the notice was further reduced to tax of \$3,122.00 plus interest. The penalties were cancelled and are no longer at issue.

#### ***CONCLUSIONS OF LAW***

A. The Notice of Deficiency issued herein is a direct result of a sales tax audit of 492 Fast Food, Inc. Petitioner Mr. Javed is a 25% shareholder of the corporation. As outlined in the facts above, he voluntarily entered into a Stipulation for Discontinuance of Proceeding that provided that the determination of sales tax due was recomputed to be \$27,000.00 in tax, plus penalty and interest (*see Matter of Javed*, Tax Appeals Tribunal, October 6, 2011). The Division asserted an income tax deficiency based upon the additional corporate income and deemed this income as constructive dividends in proportion to petitioner's interest in the corporation (i.e., 25%) (*see Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997; *Matter of Petito*, Tax Appeals Tribunal, October 17, 1991).

The sales tax determination provided a factual basis for the Division to conclude that the income reported by petitioners on their personal income tax returns for the years at issue was not accurate, and therefore, the Division properly used the sales tax audit findings to calculate petitioners' personal income tax liability. Thus, the income tax determination made by the Division was valid and proper.

B. Once the Notice of Deficiency is deemed to be valid and proper, the taxpayer then bears the burden of establishing by clear and convincing evidence that the deficiency is erroneous (Tax Law § 689[c]; *Matter of Leogrande v. Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704).

C. Petitioners continue to assert their claim that they should be granted the opportunity to argue the sales tax methodology that was used in the sales tax audit. However, the sales tax matter was closed by petitioners' execution of a Stipulation for Discontinuance of Proceeding. As detailed in Finding of Fact 11, the Division has modified the Notice of Deficiency to the tax amount of \$3,122.00 and has abated the penalty in full. Without any proof by petitioners to show that the tax amount asserted is incorrect, the notice as modified is deemed to be proper.

D. In their reply brief, petitioners present facts that Mr. Javed claims he was unable to address at the hearing due to his "sensing the time limitation" (Petitioners' reply brief letter, ¶ 1). This statement is without merit. The formal hearing in this matter was allocated for one day. The hearing was called to order at 11:20 A.M. Both parties made their presentations. After a briefing schedule was agreed upon, the following exchange occurred:

JUDGE GARDINER: I also wanted to say that this is the final opportunity to present any further documents or proof in support of your case. Ms. Milavec, do you have anything else to introduce?

MS. MILAVEC: Nothing further.

JUDGE GARDINER: Mr. Javed?

MR. JAVED: No.

JUDGE GARDINER: This hearing is now closed. Thank you very much  
(Time noted: 11:44 a.m.) (Hearing Tr., pp. 18 [lines 18-25] - 19).

Therefore, petitioners' argument that there was insufficient time to present their case due to a time limitation is rejected.

E. The petition of Mohammad and Roosha Javed is denied and the Notice of Deficiency, L-033404382, dated March 8, 2010, as modified by the conciliation order and further modified in accordance with Finding of Fact 11, is sustained.

DATED: Albany, New York  
September 11, 2014

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE