

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

FRANK J. PELC and JACQUELYN D. PELC

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, Frank J. Pelc and Jacquelyn D. Pelc, 477 Reserve Road, West Seneca, New York 14224, 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.47549).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York on September 16, 1986 at 9:15 A.M. Petitioners appeared by Paul E. Rudnicki, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioners substantiated their entitlement to a casualty loss deduction of \$20,684.00 for the year 1979.

FINDINGS OF FACT

1. Frank J. Pelc and Jacquelyn D. Pelc (hereinafter "petitioners") timely filed a joint New York State Income Tax Resident Return for the year 1979 on which they claimed a casualty loss in the amount of \$20,684.00.

2. On December 27, 1982, the Audit Division issued to petitioners a Statement of Personal Income Tax Audit Changes asserting tax due of \$1,174.18

plus interest of \$252.57 for the year 1979.

The Statement of Personal Income Tax Audit Changes advised petitioners that their claimed casualty **loss** had been disallowed in full due to their failure to verify the cost and the fair market value of the property lost in the casualty. Accordingly, on March 10, 1983, the Audit Division issued to petitioners a Notice of Deficiency in the amount of \$1,174.18 plus interest of \$381.81, for a total amount due of \$1,555.99.

3. On March 5, 1979, petitioners' barn/garage and the contents thereof were lost due to a fire. Petitioners were insured through a homeowners policy issued by The Aetna Casualty and Surety Company ("Aetna") of Hartford, Connecticut. Pursuant to the terms of the policy and a subsequent amendment thereto, the total policy **limit** for the barn/garage was \$10,700.00. The policy limit for unscheduled personal property was \$22,500.00

4. For the purpose of reaching a settlement with and receiving payment from Aetna, petitioners hired National Fire Adjustment Co., Inc. ("NFA"). In return for NFA's services, petitioners agreed to pay a fee equal to ten percent of the payment received from Aetna. NFA submitted an appraisal to Aetna which indicated a **loss** to petitioners in the amount of \$37,700.00. In its appraisal, NFA claimed a **loss** for the barn/garage in the amount of \$22,452.77. Aetna agreed to pay the policy **limit** of \$10,700.00 for the barn/garage and agreed to a **loss** and claim figure of \$6,215.83 for the personal property contained in the barn/garage, for a total payment of \$16,915.83. Petitioners, therefore, claimed a casualty **loss**, after insurance reimbursement and \$100.00 exclusion, of P20,684.00

5. Petitioners submitted no evidence regarding the cost or dates of purchase of any of the items of personal property claimed to have been destroyed in the barn/garage fire. By a letter dated September 18, 1983, NFA advised

petitioners' representative, Paul E. Rudnicki, Esq., that Aetna had agreed that the loss to the barn/garage was in the sum of \$13,000.00., but since this amount exceeded the total policy coverage for the building, the policy limit of \$10,700.00 was paid by Aetna for the barn/garage. Petitioners produced no evidence, at the hearing held herein, that Aetna had agreed to a loss for the barn/garage which exceeded the insurance policy limits.

CONCLUSIONS OF LAW

A. That section 165 of the Internal Revenue Code provides, in pertinent part, as follows:

"(a) General rule. -- There shall be allowed as a deduction any **loss** sustained during the taxable year and not compensated for by insurance or otherwise.

* * *

(c) Limitation on losses of individuals. -- In the case of an individual, the deduction under subdivision (a) shall be limited to --

* * *

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. A **loss** described in this paragraph shall be allowed only to the extent that the amount of **loss** to such individual arising from each casualty, or from each theft, exceeds \$100. For purposes of the \$100 limitation of the preceding sentence, a husband and wife making a joint return under section 6013 for the taxable year in which the loss is allowed as a deduction shall be treated as one individual."

B. That Treasury Regulation §1.165-7(a)(2)(i) provides that:

"In determining the amount of loss deductible under this section, the fair market value of the property immediately before and immediately after the casualty shall generally be ascertained by competent appraisal. This appraisal must recognize the effects of any general market decline affecting undamaged as well as damaged property which may occur simultaneously with the -----

C. That Treasury Regulation §1.165-7(b)(1) provides, in pertinent part, as follows:

"In the case of any casualty loss whether or not incurred in **a** trade **or** business or in any transaction entered into for profit, the amount of loss to be taken into account for purposes of section 165(a) shall be the lesser of either --

(i) The amount which is equal to the fair market value of the property immediately before the casualty reduced by the fair market value **of** the property immediately after the casualty; or

(ii) The amount of the adjusted basis prescribed in § **1.1011-1** for determining the loss from the sale or other disposition of the property involved."

D. That while it **is** undisputed that petitioners incurred a **loss** arising from fire, petitioners have not met their burden of proving the cost or fair market value **of** the personal property **lost or** damaged in the fire. In addition, petitioners have failed to meet their burden of proving that they incurred a loss which exceeded the insurance reimbursement paid for the loss and/or damage to their barn/garage.

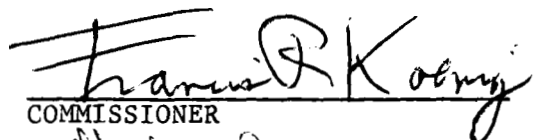
E. That the petition of Frank J. Pelc and Jacquelyn D. Pelc is denied and the Notice of Deficiency dated March 10, **1983 is** sustained.

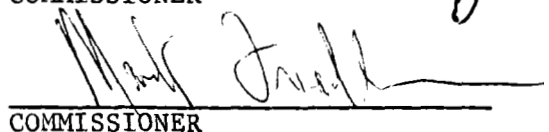
DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987

PRESIDENT


COMMISSIONER


COMMISSIONER