

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SALVATORE ZAFFOS AND MOLLIE **ZAFFOS**

DECISION

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code ~~of~~ the City of New York for the Year 1979.

Petitioners, Salvatore Zaffos and Mollie Zaffos, 120-11 Donizetti Place, Bronx, New York 10475, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1979 (File No. 48504).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 9, 1985 at 2:45 P.M. Petitioner Salvatore Zaffos appeared pro se and for his wife, Mollie Zaffos. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioners were required to make the capital gain modification provided for in section 612(b)(11) of the **Tax** Law.

11. Whether, by not issuing a Notice of Deficiency to petitioners, the Audit Division failed to follow the procedures prescribed by the Tax Law.

FINDINGS OF FACT

1. Petitioners, Salvatore Zaffos and Mollie Zaffos, filed a New York State Income Tax Resident Return (with City of New York Personal Income Tax) for the year 1979 under filing status "married filing separately on one return." On such return, petitioners reported total Federal capital gain income of \$29,259.58, of which \$13,050.38 was attributed to Mr. Zaffos and \$16,209.20 was attributed to Mrs. Zaffos.

2. On November 12, 1981, the Audit Division issued a Statement of Audit Changes to petitioners wherein an adjustment was made as follows:

<u>"Adjustment</u>	<u>Husband</u>	<u>Wife</u>
20% of long term capital gain	3221	4052"

Said adjustment was made with the explanation that "under section 612(b)(11), 20% of long term capital gain must be added to Federal adjusted gross income." On their Federal Schedule D, petitioners reported a net long-term capital gain of \$72,734.75.

3. The aforestated Statement of Audit Changes showed additional New York State and City taxes due from Mr. Zaffos of \$551.00 and from Mrs. Zaffos of \$665.00, for a total amount of tax due of \$1,216.00. On November 27, 1981, petitioners paid the taxes computed to be due of \$1,216.00 under protest "in order to stop the running of interest."

4. On December 2, 1981, the Audit Division sent a letter to petitioners wherein it requested that they remit the amounts due for interest. Since such request was not complied with, on February 19, 1982, the Audit Division issued two (2) notice and demand forms to each petitioner for total interest due from Mr. Zaffos of \$89.17 and total interest due from Mrs. Zaffos of \$105.82. Said amounts were subsequently paid by petitioners "under protest "

5. On June 8, 1983, each petitioner filed a claim for credit or refund of the personal income taxes and interest paid with the Statement of Audit Changes and notice and demand forms, respectively. Petitioners' basis for said claims was explained thereon as follows:

"A notice of additional tax was issued to me on form AU18 dated 11/12/81 for tax year 1979. I paid under protest only the tax on 11/23/81. Consent to findings was not signed. After receipt of Notice and Demand, the interest was also paid under protest.

The issue concerning the notice of additional tax due is whether section 612(b)(11) is still applicable after a change in Federal law was made concerning the long-term capital gain deduction after 10/31/78 and no corresponding change was made in the New York State Tax Law.

An Administrative Memorandum dated 11/21/73 issued by Jacob Bodian (copy attached) refers to providing taxpayers deficiency proceedings on issues stated above.

Another Administrative Memorandum (TSB-M-78-(20)I) dated 12/22/78 (copy attached) refers to an interpretation of section 612(b)(11) by the State Tax Commission. If section 612(b)(11) has to be interpreted by the State Tax Commission, it would seem that deficiency proceedings are certainly in order.

I did not sign the consent on form AU18 (11/12/81). I made payments under protest. I was not given any hearings nor was a 90-day letter issued to me.

Therefore since claim is made within two years after payment of tax and interest, it is requested that a refund plus interest as shown above be issued."

6. On October 24, 1983, the Audit Division issued a formal notice of disallowance to petitioners advising them that their claims for refund totaling \$1,410.99 had been disallowed in full.

7. On November 14, 1983, petitioners filed a petition for refund of the New York State and City personal income taxes and interest at issue. The grounds claimed for relief were substantially similar to those as stated in their respective claims for refund filed June 8, 1983.

8. Petitioners alleged that section 612(b)(11) of the Tax Law was inapplicable during 1979 since it required a modification in the case of a taxpayer who had deducted "one-half" but not more than one-half, of his net capital gains and that in 1979, due to previous changes in Federal tax law, the Federal capital gain deduction was increased from 50 percent to 60 percent, which constitutes more than one-half of net capital gains.

9. Petitioners alleged that a Notice of Deficiency was not issued based on the Audit Division's erroneous assumption that their failure to make the 20 percent long-term capital gain modification constituted a "mathematical error" under section 681(d) of the Tax Law. They now contend that the period of limitations on assessment has expired since a Notice of Deficiency was not initially issued. Accordingly, they believe that the taxes and interest were improperly collected and should therefore be refunded.

10. The hearing record shows no indication that the Audit Division considered petitioners' failure to make the aforestated modification to be a "mathematical error."

CONCLUSIONS OF LAW

A. That the capital gains amendments contained in the Federal Revenue Act of 1978 revised the deduction for net capital gains (excess of net long-term capital gain over net short-term capital loss) to 60 percent instead of 50 percent on all sales and exchanges of capital assets made after October 31, 1978.

B. That during the year at issue section 612(b) of the Tax Law and section T46-112.0 of the Administrative Code of the City of New York provided that there shall be added to Federal adjusted gross income:

"(11) In the case of a taxpayer who has deducted one-half of the

C. That in deducting 60 percent of their net capital gain for Federal income tax purposes, petitioners have deducted more than one-half of the net capital gain. Since the intent of sections 612(b)(11) and T46-112.0(b) (11) was to tax net capital gains at 60 percent for New York State and City purposes, said sections are applicable despite the aforesated change in Federal law.

D. That section 681(g) of the Tax Law and section T46-181.0(g) of the Administrative Code of the City of New York define a deficiency as follows:

"-- For purposes of this article, a deficiency means the amount of the tax imposed by this article part, less (i) the amount shown as the tax upon the taxpayer's return..., and less (ii) the amounts previously assessed (or collected without assessment) as a deficiency..."

E. That section 681(a) of the Tax Law and section T46-181.0(a) of the Administrative Code of the City of New York provide for the issuance of a Notice of Deficiency where it is determined that there is a deficiency of income tax.

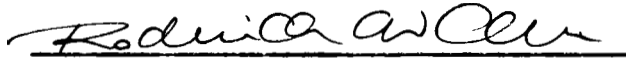
F. That pursuant to sections 681(g) and T46-181.0(g), no deficiency of income taxes existed subsequent to petitioners' payment of the income taxes determined to be due on the Statement of Audit Changes. Accordingly, the Audit Division was not required to issue a Notice of Deficiency within the meaning and intent of sections 681(a) and T46-181.0(a).

G. That the Audit Division followed proper procedure under the circumstances and did not deny petitioners their rights to an administrative hearing.

H. That the petition of Salvatore Zaffos and Mollie Zaffos is denied and the formal notice of disallowance dated October 24, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER