

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SHARON L. AMES

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1980.

Petitioner, Sharon L. Ames, 55 East 86th Street, New York, New York 10028, 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 1980 (File No. 52527).

A hearing was commenced before Sandra F. Heck, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 20, 1986 at 4:10 P.M., continued before Sandra F. Heck on May 22, 1986 at 1:15 P.M. at the same offices, and concluded before Joseph W. Pinto, Jr., Hearing Officer, at the same offices on July 14, 1986 at 2:45 P.M., with all briefs submitted by November 1, 1986. Petitioner appeared by Patrick J. Carr, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner is entitled to an investment tax credit in the amount of \$6,080.00 for tax year 1980 with respect to master audio tapes purchased by Quiptape Associates, a partnership, in which petitioner Sharon L. Ames was a limited partner.

FINDINGS OF FACT

1. Petitioner Sharon L. Ames claimed an investment tax credit on her 1980 New York State Income Tax Resident Return in the sum of \$6,080.00 with respect

to a master audio tape purchased by Quiptape Associates, a partnership, in which petitioner was a limited partner.

2. On April 5, 1984, the Audit Division issued a Notice of Deficiency against petitioner asserting additional tax due of \$6,080.00 and interest of \$2,176.25, for a total amount due of \$8,256.25. The Notice of Deficiency was based on a Statement of Audit Changes issued against petitioner on March 8, 1984, which stated the explanation for said deficiency as follows:

"The investment credit claimed on your 1980 return has been disallowed since you failed to reply to previous correspondence."

The "previous correspondence" referred to a letter from the Audit Division with a questionnaire concerning the partnership and the investment property.

3. Petitioner became a limited partner in Quiptape Associates sometime in late 1980. Quiptape Associates was a New York limited partnership of which Jil-Jal Enterprises, Inc. was the general partner. Petitioner's loss and profit sharing percentage in the partnership was 4.95 percent. The partnership was formed to engage in the business of purchasing and leasing various kinds of equipment and purchasing all other types of property, including original master audio tapes of music and instructional material created by Slim Goodbody Corporation entitled, "Slim Goodbody's Musical Encyclopedia of Good Health", from which duplicate cassettes would be reproduced. Said master tapes were purchased at approximately the same time petitioner became a limited partner.

4. It was the partnership's intent to use the master audio tapes to produce several duplicates which in turn would be used to produce thousands of audio cassettes for sale to the public. In order to accomplish their wide-range marketing goals, the partnership entered into a distribution

agreement with Pro Arts, Inc., an Ohio corporation formed in 1967 with main offices in Medina, Ohio.

5. The Private Placement Memorandum with regard to Quiptape Associates submitted by petitioner at the hearing is not conclusive with regard to who actually produced the cassette tapes from the masters and duplicates or where the master and duplicate tapes were kept, viz., their situs. Additionally, the model "Publishing and Distribution" agreement between quiptape Associates and Pro Arts, Inc., attached to the Private Placement Memorandum, is not dispositive with regard to the issues of production or situs. Section 4 of the "Publishing and Distribution" agreement states that the distributor could have requested that the owner maintain an inventory of one thousand cassettes. Section 9 of the same agreement provides that legal title to the master tape cassettes would remain in quiptape Associates, but that the distributor, Pro Arts, Inc., would carry a blanket all risk insurance policy covering said cassettes, thereby implying that the master and/or duplicates would be in the possession of Pro Arts, Inc.

6. Further supporting that Pro Arts, Inc. had possession of the tapes, petitioner's representative submitted a letter authored by Mark Gasarch, attorney for Quiptape Associates, stating that Quiptape Associates paid Pro Arts, Inc. \$24,000.00 so that they might "develop" an initial inventory of the twelve master tapes.

7. Petitioner did not know where the master tapes were located in 1980.

8. Dawna Cobb, an employee of the law firm which represented Quiptape Associates in 1980, testified that it was her understanding, per Mark Gasarch, Esq., that the master tapes and duplicates had a situs in Ohio until returned to New York upon the bankruptcy of Pro Arts, Inc. However, the precise date of the bankruptcy was not determined.

9. No evidence was offered at hearing to establish that the master audio cassettes had a legal situs in the State of New York or that they were being used by Quiptape Associates in the production of goods in the State of New York.

CONCLUSIONS OF LAW

A. That Tax Law § 606(a)(2) provides, in pertinent part, as follows:

"(2) A credit shall be allowed under this subsection with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing."

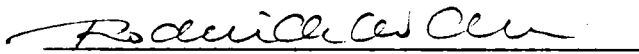
B. That petitioner has failed to establish that the subject property, the master and duplicate cassette tapes, had the required New York State situs during the year in issue, 1980. It is therefore not necessary to determine whether or not the master and duplicate cassette tapes meet the other four criteria of qualified property as that term is defined in the above-stated statute since each of the five criteria must be satisfied in order to qualify for the investment tax credit.

C. That the petition of Sharon L. Ames is denied and the Notice of Deficiency dated April 5, 1984 is hereby sustained, together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER