

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DREW NETTER AND CARIN NETTER

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1981.

Petitioners, Drew Netter and Carin Netter, 160 Country Ridge Drive, Rye Brook, New York 10573, 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 1981 (File No. 61990).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax **Commission**, Building **#9** W. A. Harriman State Office Building Campus, Albany, New York, **on** October 22, 1986 at **10:45 AM**, with additional documents to be submitted by October 28, 1986. Petitioners appeared by Simel & Kutz (Stuart A. Sirnel, CPA). The Audit Division appeared by John P. Dugan, **Esq.** (Thomas C. Sacca, **Esq.**, of counsel).

ISSUE

Whether the Audit Division properly determined that petitioner Drew Netter was required to increase his Federal adjusted gross income by the amount he claimed as his proportionate share of the **loss** of a corporation **on** the ground that said corporation did not make the election provided by Tax Law § 660.

FINDINGS OF FACT

1. Petitioner, Drew Netter, together with his wife, Carin Netter, timely filed a New York State Resident Income Tax Return wherein they elected a filing

Netter reported a loss from the corporation of Stuart, Coleman International, Ltd. (the "corporation") of **\$10,616.00**.

2. On April 8, 1985, the Audit Division issued a Notice of Deficiency to Drew and Carin Netter asserting a deficiency of personal income tax for the year 1981 in the amount of **\$1,137.43**, plus interest of **\$408.70**, for a total amount due of **\$1,546.13**. The Statement of Audit Changes explained, to the extent at issue herein, that since the corporation did not make the election provided by Tax Law § 660, each shareholder must increase his Federal adjusted gross income by an amount equal to his proportionate share of the net operating loss of the corporation. The amount of the increase in adjusted gross income is determined by the extent which the shareholder deducted such **loss** in determining his Federal adjusted gross income.

3. The corporation filed a State of New York Corporation Franchise Tax Report for the calendar year 1981. The report stated that the corporation did not file an election to be a small business corporation for New York State purposes. For the years 1982 through 1985, the corporation filed a New York State Corporation Franchise Tax Report, form **CT-4**, rather than a New York State Small Business (Tax Option) Corporation Information Report, form CT-3s. In addition, each of the foregoing reports stated that the corporation had a net **loss** during the respective calendar year and that there was a balance due of **\$250.00**.

4. The corporate tax returns were prepared by an accountant in the foregoing manner ostensibly because he had failed to inquire whether the New York State small business corporation election had been filed.

5. In or about November 1985, the corporation filed a Claim for Credit or Refund of Corporation Tax Paid for the year 1982 in the amount of **\$250.00**

Similar claims for refund have been prepared for the years 1983 through 1985. In each instance, the refund claims were premised **on** the corporation's position that **it** was an electing **small** business corporation and that the preparer of the reports **was** not aware that the corporation was not subject to minimum corporation franchise tax.

6. **On** or about July 17, 1981, the shareholders of the corporation submitted an election to be treated as a subchapter **S** corporation for Federal tax purposes. This election **was** accepted. At or about the **same** time, the shareholders prepared an election to be treated as a small business corporation for New York State personal income tax and corporation franchise tax purposes. The cover letter prepared for the New York State election indicated that petitioners planned to **mail** the election by certified mail return receipt requested. However, petitioners have been unable to locate a copy **of** this receipt.

7. **At** the hearing, petitioners' representative maintained that **it** had been the corporation's practice to file all Federal and State forms simultaneously. The **New** York State election did not have the employer's identification number on **it**. **As** a result of this omission, petitioners submit that the Department of Taxation and Finance either lost or misplaced the form.

CONCLUSIONS OF LAW

A. That Tax Law § 209.8, as **in** effect during the period **in** question, permitted shareholders of a corporation which had made an election under subchapter **S** of the Internal Revenue Code, to elect to be taxed under the **New** York State personal income tax law, with the corporation thereby becoming exempt from corporation franchise tax. This provision pertained to corporate taxable years beginning **on** or after January 1, 1981, and required that every

shareholder of the corporation make the election to be taxed under Article 22 of the Tax Law.

B. That Tax Law § 660(d)(3), as in effect during the period in question, provided that the aforementioned election of subchapter S treatment by the shareholders of the corporation, for any taxable year beginning **on** or after January 1, 1981 and ending prior **to** December 31, 1982, was to be made within nine months from the beginning date of such taxable year.

C. That although the shareholders of the corporation may have intended to file an election to have the corporation treated as a **small** business Corporation pursuant to Tax Law § 660, petitioners have failed to sustain their burden of proof pursuant to section 689(e) of the Tax Law to show that said election was mailed to the New York State Department of Taxation and Finance. Accordingly, the Audit Division properly increased **Drew Netter's** adjusted gross income by the amount he claimed as his share of the **loss** by the corporation.


D. That since **Drew Netter** and **Carin Netter** filed separately **on one** return and **Carin Netter** did not claim any portion of the **loss** from the corporation, the Audit Division **is** directed to delete **Carin Netter** from the Notice of Deficiency.

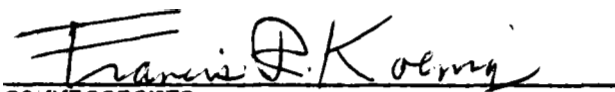
E. That the petition of **Drew Netter** and **Carin Netter** **is** granted to the extent of Conclusion of Law "D"; except as **so** granted, the Notice of Deficiency dated April 8, 1985 is, in all other respects, sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987


PRESIDENT


COMMISSIONER