

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ARTHUR A. GROSSMAN AND ETHEL R. GROSSMAN

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 1981.

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Petitioners, Arthur A. Grossman and Ethel R. Grossman, 62-95 Saunders Street #60, Rego Park, New York 11374, 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 1981 (File No. 62220).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 12, 1986 at 10:45 A.M. Petitioner, Arthur A. Grossman, appeared ~~pro se~~ and also as representative for his wife, Ethel R. Grossman. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

#### ISSUES

I. Whether petitioners, in computing their New York State minimum taxable income, are entitled to reduce their total New York items of tax preference by the amount of New York City personal income taxes paid by petitioners in tax year 1981.

II. Whether the Audit Division properly issued the Notice of Deficiency against petitioners.

FINDINGS OF FACT-

1. On January 25, 1985, the Audit Division issued to petitioners, Arthur A. Grossman and Ethel R. Grossman, a Statement of Audit Changes for the tax year 1981, stating total minimum income tax due of \$1,306.24, and interest of \$435.15, for a total amount due of \$1,741.39. The explanation given by the Audit Division on said statement was as follows:

"The portion of Long Term Capital Gains not subject to New York Personal Income Tax is an Item of Tax Preference and subject to New York Minimum Income Tax. Computation of New York Items of Tax Preference is as follows:

Capital Gains Deduction	\$33,353.10
20% Modification	<u>6,670.62</u>
New York Items of Tax Preference	\$26,682.48
<u>New York Minimum Income Tax:</u>	
New York Items of Tax Preference	\$26,682.48
Less: Specific Deduction	<u>5,000.00</u>
Balance	\$21,682.48
Less: New York State Personal Income Tax After Credits	<u>6,315.00</u>
Minimum Taxable Income	\$15,367.48
State Minimum Tax Due at 6%	\$ 922.05
City Minimum Tax Due at 2 1/2%	<u>384.19</u>
Total Minimum Income Tax Due	\$1,306.24"

2. On April 5, 1985, the Audit Division issued to the petitioners a Notice of Deficiency for additional tax due for the tax year 1981 in the sum of \$1,306.24 and interest of \$468.87, for a total amount due of \$1,775.11.

3. In response to the Notice of Deficiency, petitioners timely filed a petition with the Tax Appeals Bureau on June 28, 1985, along with full payment of the additional tax due and interest in the sum of \$1,775.11.

4. Petitioners contend that their paid New York City-personal income taxes for the year 1981 should be subtracted from items of tax preference in arriving at minimum taxable income and also that the Audit Division waited to assess them until just before the expiration of the statute **of** limitations thus causing a larger amount of interest to be due. Additionally, petitioners contend that the failure of the Audit Division to reduce the minimum income tax due by the New York City personal income tax paid by petitioners was an unconstitutional violation of due process.

CONCLUSIONS OF LAW

A. That Tax Law § 622(a)(2) provides, in pertinent part, as follows:

"(a) The New York minimum taxable income of a resident individual, estate or trust shall be the sum of items **of** tax preference, as described in subsection (b) of this section, reduced (but not below zero) by the aggregate of the following:

(1) the applicable specific deduction described in subsection (c) of this section;

(2) the tax on New York taxable income determined under section six hundred two for the taxable year, reduced by the sum **of** the credits allowable under subsections (a), (e) and (b) of section six hundred six and section six hundred twenty and six hundred twenty-one; and

(3) to the extent that the sum of the items of tax preference exceeds the applicable specific deduction described in subsection (c) of this section plus the tax described in paragraph two above, the amount of any net operating **loss** of the taxpayer, as determined for federal income tax purposes, which remains as a net operating **loss** carryover to a succeeding taxable year."

B. That the only applicable item **of** tax preference in issue is the capital gain deduction taken by petitioners on their 1981 New York State Resident Income Tax Return. Petitioners did not have any net operating loss for the taxable year and, therefore, the total amount of tax preference items was reduced only by the specific deduction, defined in Tax Law § 622(c)(1) as

\$5,000.00 for married persons filing joint returns, and the New York State personal income tax, reduced by various credits which are not applicable herein.

C. That Tax Law § 622 does not provide for the reduction of the items of tax preference by New York City personal income tax paid and, therefore, said taxes cannot be used to reduce the amount of items of tax preference.

D. That Tax Law § 1301-A provides that the New York City minimum income tax is computed at the rate of  $\frac{2}{100}$  per centum of the City minimum taxable income, defined in subsection (b) of that section as the same as the New York minimum taxable income of a resident individual. That, to the extent that the calculation of the City minimum taxable income of a resident individual is different from that described in Chapter 46, Title T of the Administrative Code of the City of New York, the provisions of Article 30 are deemed to have been incorporated into such provision and to have replaced any conflicting provision therein (Local Law Number 36, 1976).

E. That Tax Law § 683 provides that:

"(a) General. Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed).

(b) Time Return Filed. -- (1) Early return. For purposes of this section, a return of income tax, except withholding tax, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be deemed to be filed on the last such day."

Since the return of the petitioner was filed on or before April 15, 1982, the Notice of Deficiency issued by the Audit Division was timely since the tax was assessed within three years of the April 15, 1982 deemed filing date.

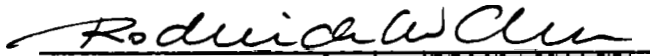
F. That the constitutionality of the laws of the State of New York and their application in particular instances is presumed at the administrative level of the State Tax Commission.

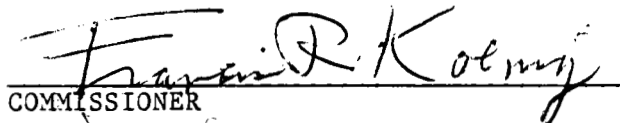
G. That the petition of Arthur A. Grossman and Ethel R. Grossman is denied and the Notice of Deficiency dated April 5, 1985 is hereby sustained.

DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER