

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

NICHOLAS J. GERBASI AND BARBARA GERBASI

DECISION

for Redetermination of Deficiencies or for
Refunds 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 Years 1981 and 1982.

Petitioners, Nicholas J. Gerbasi and Barbara Gerbasi, 14 Aster Drive, New Hyde Park, New York 11040, filed petitions for redetermination of deficiencies or for refunds 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 years 1981 and 1982 (File Nos. 62547 and 67897).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 1, 1986 at 2:45 P.M. Petitioners appeared **pro se**. The Audit Division appeared by John P. Dugan, **Esq.** (Gary Palmer, **Esq.**, of counsel).

ISSUE

Whether the Audit Division properly disallowed petitioners' claimed subchapter S corporation losses for the years 1981 and 1982.

FINDINGS OF FACT

1. Petitioners, Nicholas Gerbasi and Barbara Gerbasi, timely filed New York State and City resident income tax returns for 1981 and 1982. On said returns, petitioners claimed small business corporation losses of \$34,576.00 for 1981 and \$28,854.00 for 1982.

2. On April 2, 1985 and February 13, 1986, the Audit Division issued a Statement of Audit Changes to petitioners for 1981 and 1982, respectively, which contained the following explanation:

"If a subchapter S corporation does not make the election provided under section 660 of the New York Tax Law, 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 to the extent the shareholder deducted such **loss** in determining his Federal adjusted gross income.

This provision pertains to all subchapter S corporations with tax years beginning on or after January 1, 1981.
(Section 612 (b) (19) of the New York State Tax Law)."

The statements of audit changes determined additional tax due of \$4,672.90 for 1981 and \$3,089.29 for 1982.

3. Based on the statements of audit changes, the Audit Division, on April 12, 1985 and April 11, 1986, issued separate notices of deficiency for 1981 and 1982 asserting the taxes due as indicated above, plus interest.

4. Petitioners were minority stockholders of Datacount Computer Systems, Inc. ("Data"). Data was organized in 1969. On January 1, 1971, Data elected Subchapter S status for Federal income tax purposes. Data showed net losses on Federal income tax returns (Form 1120S) filed for the years 1976 through 1985. For 1981 and 1982, petitioners reported their share of the corporation's loss on New York State income tax returns.

5. The shareholders of Data did not make election to take into account items of income or loss of the corporation on personal income tax returns by filing form CT-6 for the years 1981 and 1982. Data filed a CT-6 for 1983.

6. Petitioners argued that Data was not aware that it was required to file a CT-6 on behalf of the shareholders in order to qualify as an S corporation for New York State tax purposes and under equity they should be allowed to deduct their share of Data's losses for 1981 and 1982.

CONCLUSIONS OF LAW

A. That section 660 of the Tax Law (as added by L 1981, ch 103, § 32, effective May 15, 1981, applicable to years beginning January 1, 1981) provides that shareholders of an S corporation for Federal income tax purposes, may elect to take into account the S corporation items of income, loss, deduction and reduction for taxes on personal income tax returns filed for New York State.


B. That section 612(b)(19)(A) of the Tax Law provides that where the election provided for in subsection (a) of section 660 of the Tax Law has not been made with respect to an S corporation, any item of loss or deduction of the corporation included in Federal adjusted gross income of each shareholder must be added to Federal adjusted gross income to determine New York adjusted gross income. Accordingly, the Audit Division properly disallowed petitioners' claimed subchapter S losses for 1981 and 1982.

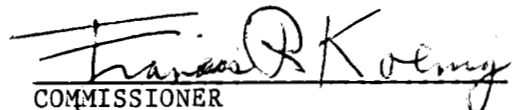
C. That the petitions of Nicholas J. Gerbasi and Barbara Gerbasi are denied and the notices of deficiency issued April 12, 1985 and April 11, 1986 are sustained together with such additional interest as may be lawfully due and owing.

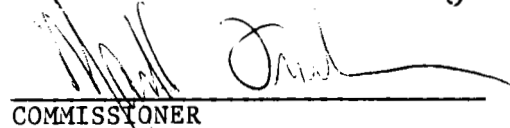
DATED: Albany, New York

STATE TAX COMMISSION

JUL 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER