

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

HARRY L. BERGMAN AND CHRISTINE E. BERGMAN

DETERMINATION

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

Petitioners, Harry L. Bergman and Christine E. Bergman, P.O. Box 90699, Honolulu, Hawaii 96835, 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 for the year 1980 (File No. 63397).

On June 9, 1987, petitioner waived a hearing in the Division of Tax Appeals and agreed to submit the case for determination based on the Division of Taxation file, with all briefs submitted by July 8, 1987. After due consideration of the record, Daniel J. Ranalli, Administrative Law Judge, hereby renders the following determination.

ISSUES

I. Whether petitioners failed to include in reported New York income dividend income of \$1,221.00 and interest income of \$1,673.00.

II. Whether a long-term capital **loss** carryover computed on petitioners' 1982 tax return can be carried back to 1980.

FINDINGS OF FACT

1. Petitioners herein, Harry L. Bergman and Christine E. Bergman, timely filed a joint New York State Income Tax Resident Return for 1980 wherein total income of \$35,013.14 was computed in the following manner:

<u>ITEM</u>	<u>AMOUNT</u>
Wage income	\$47,727.77
Interest income	1,015.64
Dividend income	7,522.55
40% of capital gain distribution	<u>1,961.05</u>
Subtotal	58,227.01
Less: adjustments to income	<u>23,213.87</u>
Total income	<u>\$35,013.14</u>

2. On October 24, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1980 which contained, as relevant herein, the following explanation and computation:

"The interest and dividend incomes on your New York return have been increased to reflect the Federal adjustments.

If you were entitled to a 60% net capital gain deduction in computing your Federal adjusted gross income, you must add 20% of one-half of the net capital gain in computing your total New York income.

* * *

Total income reported/adj'd	\$35,013.14
Adjustment	2,894.00
Capital gain modification	<u>490.26</u>
Total income corrected	<u>\$38,397.40"</u>

3. Based on the aforementioned statement, the Audit Division, on April 5, 1984, issued a Notice of Deficiency to petitioners for 1980 asserting additional tax due of \$479.78, plus interest of \$171.72, for a total allegedly due of \$651.50.

4. On September 7, 1982, the Brookhaven Service Center of the Internal Revenue Service issued a statement to petitioners proposing the following adjustments to their 1980 reported Federal adjusted gross income:

<u>Item</u>	<u>Shown On</u> <u>Return</u>	<u>Reported</u> <u>By Payers</u>	<u>Increase</u>
Taxable dividends	\$7,522.00	\$8,743.00	\$1,221.00
Interest	\$1,015.00	\$2,688.00	\$1,673.00
Total increase			<u>\$2,894.00</u>

5. The assertion that petitioners failed to report all of their dividend income and interest income is based on information received by the Internal Revenue Service from Merrill Lynch Pierce Fenner & Smith, Inc. (hereafter "Merrill Lynch") and The Dreyfus Income Trust. The information received from Merrill Lynch indicates that petitioners maintained three accounts with said firm and had received dividend income from said accounts totaling \$1,221.00. The information received from The Dreyfus Income Trust revealed that petitioners maintained two accounts with said firm and had earned interest income of \$1,673.00 from said accounts. After examination of petitioners' 1980 Federal income tax return, the Internal Revenue Service determined that the dividend income received from the three Merrill Lynch accounts and the interest income earned on the two The Dreyfus Income Trust accounts "was not identified or fully reported on your [petitioners'] income tax return for 1980."

6. Petitioners paid the tax asserted due by the Internal Revenue Service in its notice dated September 7, 1982, however, in a letter dated May 4, 1987 Mr. Bergman stated that, "When I originally got the IRS notice I was having personal problems and due [to] a lack of time I just paid it and didn't look into it." The Internal Revenue Service forwarded the results of its examination to the Audit Division and said results were used by the Audit Division to determine that petitioner had also understated the interest income and dividend income reported on their New York return by the same amount (\$2,894.00) as determined by the Internal Revenue Service.

7. Petitioners assert that they did not own or maintain any accounts entitled The Dreyfus Income Trust and that the \$1,673.00 of interest income from said accounts was not attributable to them and, as such, not includable in their income for 1980. As evidence that they did not maintain any accounts

entitled The Dreyfus Income Trust, petitioners submitted a letter from the Bank of New York which referenced "Dreyfus Family of Funds" and stated that:

"Please be advised that the account numbers you provided were invalid on our systems.

Kindly resubmit your request indicating the full fund name and account number."

8. Petitioners also argued that the \$1,221.00 of dividend income received from the three Merrill Lynch accounts was included in reported dividend income of \$7,522.00 as "CMA Money Trust", which title they assert "is the exact name of the Merrill Lynch investment." The record herein contains no evidence identifying the sources and amounts which comprised the \$7,522.00 of dividend income reported by petitioners on their return or that the \$1,221.00 of dividend income in question was included in reported dividend income of \$7,522.00.

9. In 1982 petitioners had a long-term capital loss carryover of \$16,263.92. Petitioners maintain that the 1982 loss of \$16,263.92 should be carried back to the 1980 tax year.

CONCLUSIONS OF LAW

A. That Tax Law § 689(e) places the burden of proof on petitioners except in three specifically enumerated instances, none of which are present in the instant matter.

B. That petitioners have failed to sustain their burden of proof to show that interest income and dividend income were not understated by the sums of \$1,673.00 and \$1,221.00, respectively.

C. That Internal Revenue Code § 1212(b)(1)(B) provides that when a taxpayer has a long-term capital loss carryover said loss "shall be a long-term capital **loss** in the succeeding taxable year" (emphasis supplied). Accordingly,

under the Federal conformity provisions of Tax Law § 612(a), petitioners may not carry back their 1982 excess long-term capital **loss** to 1980.

D. That the petition of Harry L. Bergman and Christine E. Bergman is denied and the Notice of Deficiency dated April 5, 1984 **is** sustained in full, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

SEP 11 1987.


ADMINISTRATIVE LAW JUDGE