

STATE OF NEW YORK
STATE TAX COMMISSION

_____ :

In the Matter of the Petition

of

JOHN W. SABOTKA

_____ :

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

_____ .

DECISION

Petitioner, John W. Sabotka, 14 Pioneer Street, Cooperstown, New York 13326, 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. 66951) .

On January 5, 1987, petitioner waived his right to a hearing and requested that the State Tax Commission render a decision based on the entire record contained in his file. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioner, a full year resident of New York, may, for New York State income tax purposes, exclude the sum of \$5,739.00 from the computation of a long-term capital gain where no such exclusion was taken in the computation of said gain for Federal income tax purposes.

FINDINGS OF FACT

1. Petitioner herein, John W. Sabotka, timely filed a New York State Resident Income Tax Return for 1981 wherein he reported, inter alia, a long-term capital gain of \$19,078.00. On Page 2, Schedule B of his return, petitioner reported the following New York adjustments to reported Federal adjusted gross income:

<u>New York Additions</u>	
Capital gain adjustment	\$4,769.00
<u>New York Subtractions</u>	
State and local refunds	(885.00)
Non-New York capital gains	<u>(4,769.00)</u>
<u>Net New York Adjustment</u>	<u>(\$885 .00)</u>

2. On March 4, 1985, the Audit Division issued a Statement of Audit

Changes to petitioner for 1981 which contained the following explanation:

"The subtraction modification reported on Page 2, Schedule B in the amount \$4,769.00 is disallowed because this is not a proper modification for New York State. The capital gain adjustment addition modification reported in the amount of \$4,769.00 is correct because because [sic] a New York State resident is taxed on all income regardless of where the income is earned.

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."

3. Based on the aforementioned Statement of Audit Changes, the Audit

Division, on April 5, 1985, issued a Notice of Deficiency against petitioner for 1981 asserting additional tax due of \$1,765.51, plus interest of \$633.71, for a total allegedly due of \$2,399.22. of the total tax asserted due, \$665.56 is for additional personal income tax and \$1,096.95 represents minimum income tax due.

4. Petitioner was taxable as a resident of New York for the entire 1981 tax year. Sometime during said year, petitioner sold rental property situated in Rutland, Vermont. For Federal income tax purposes, the long-term capital gain realized on the disposition of said rental property was computed in the following manner:

Net sale price		\$166,86.1.00
Cost of real property	\$128,185.00	
Less: depreciation	<u>- 9,018.00</u>	
Net cost		<u>-119,167.00</u>
Total gain on sale of property		\$ 47,694.00
Less: Internal Revenue Code § 1202 long-term capital gain deduction		<u>- 28,616.00</u>
Net long-term capital gain		<u>\$ 19,078.00</u>

5. Petitioner concedes that additional personal and minimum income tax of \$1,223.00 is due for the year 1981. Mr. Sabotka essentially agrees with the methodology utilized by the Audit Division to recompute his personal and minimum income tax due, with the one exception that, for New York purposes, he contends that the total gain on the sale of the rental property should be reduced by \$5,739.00 for depreciation taken on prior year income tax returns. In his perfected petition Mr. Sabotka alleges the following:

"The real estate **sold** was located in Vermont. Thus, depreciation that was never taken in New York (Before 1/1/81) should NOT be used in the calculation of the New York Minimum Income and Regular Personal Income Tax. The amount of the Non-New York Depreciation is \$5,739. A tax benefit was never derived in New York from this Depreciation of \$5,739. Accordingly, the tax basis for New York purposes does not include the Depreciation of \$5,739 and should be increased."

6. In the computation of the gain realized on the sale of the Vermont rental property, petitioner reduced his cost basis, thus increasing his gain, by \$9,018.00 for depreciation (see Findings of Fact "4" supra). Of the 59,018.00 cost basis reduction for depreciation, \$3,279.00 represents the depreciation deduction claimed on petitioner's 1981 Federal and New York State Income tax returns, while the balance, \$5,739.00, represents depreciation deductions claimed in prior tax years. Petitioner maintains that the \$5,739.00 of depreciation deductions taken in prior years were never claimed on New York returns thus generating no New York tax benefit. Since no New York tax

petitioner believes said amount should be excluded, for New **York** purposes, from the computation **of** the gain realized on the sale of the Vermont rental property.

CONCLUSIONS OF LAW

A. That Tax Law § 612(a) defines a taxpayer's New York adjusted **gross** income as "his federal adjusted gross income" with certain modifications specified in subsections (b) and (c) of said section 612.

B. That for personal income tax purposes there is no provision in Tax Law §§ 612(b) or (c) which would permit a resident taxpayer to reduce the gain realized **on** the disposition of rental property by prior year depreciation deductions for which no New York tax benefit was derived.


C. That in the computation **of** the New York minimum taxable income **of** a resident individual, Tax Law § 622(b) defines items of tax preference as a taxpayer's "federal items **of** tax preference" with certain modifications. Once **again, there is no provision in the Tax Law, for minimum income tax purposes,** which **allows** the exclusion or deduction petitioner seeks.

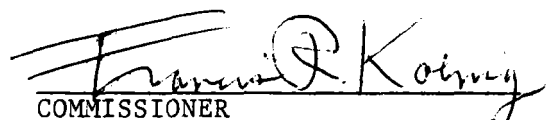
D. That the petition of John W. Sabotka is denied in its entirety and the Notice of Deficiency dated April 5, 1985 is sustained in full, together with such additional interest as may be due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1983


PRESIDENT


COMMISSIONER

