

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
415 East 52nd Street Corp. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ending 4/30/79. :
_____ :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon 415 East 52nd Street Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

415 East 52nd Street Corp.
415 East 52nd Street
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of January, 1984.

David Parchuck

James J. Haggard
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

_____ :
In the Matter of the Petition :
of :
415 East 52nd Street Corp. :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ending 4/30/79. :
_____ :

State of New York }
 ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Robert Samsel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Samsel
Louis Sternbach & Company
6 East 43rd Street
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
18th day of January, 1984.

David Parchuck

Annice A. [Signature]
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 18, 1984

415 East 52nd Street Corp.
415 East 52nd Street
New York, NY 10022

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert Samsel
Louis Sternbach & Company
6 East 43rd Street
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
415 EAST 52ND STREET CORP. : DECISION :
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Fiscal Year :
Ended April 30, 1979. :

Petitioner, 415 East 52nd Street Corp., 415 East 52nd Street, New York, New York 10022, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended April 30, 1979 (File No. 34132).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 13, 1983 at 2:45 P.M., with all documents to be submitted by June 27, 1983. Petitioner appeared by Louis Sternbach & Company, (Robert Samsel, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly required the recomputation of petitioner's business capital figure using average fair market value of assets and current liabilities on a quarterly basis, rather than on an annual basis.

II. Whether the Audit Division properly disallowed the inclusion of certain mortgage notes among petitioner's current liabilities in computing average fair market value of current liabilities.

FINDINGS OF FACT

1. On March 4, 1981, the Audit Division issued to petitioner, 415 East 52nd Street Corp., a Notice of Deficiency asserting additional tax due for the fiscal year ended April 30, 1979 in the amount of \$9,202.00, plus interest. A Statement of Audit Adjustment issued previously to petitioner on November 10, 1980, provided computations and explanation with regard to the additional tax asserted as due, as follows:

"Adjusted total assets (average fair market value)	10,364,672.00
Adjusted current liabilities (a.f.m.v.)	130,899.00
Adjusted total capital	10,233,773.00
Tax at .00178	18,216.00
Tax per report	9,014.00
Deficiency	9,202.00

The adjusted figures as indicated above are based on the quarterly figures that were submitted.

In accordance with Regulations Section 3-4.6 - Average Fair Market Value, the Tax Commission, may at their discretion require the taxpayer to compute the average fair market value on a more frequent basis other than annual to reflect a more fair and equitable value."

2. Petitioner was, until its liquidation and dissolution, a corporation incorporated under the laws of New York on October 14, 1977. Petitioner began its principal business activity of owning and renting real property, specifically a large apartment building located at 415 East 52nd Street, New York, New York, on May 2, 1978.

3. On or about November 21, 1979, petitioner filed its State of New York Corporation Franchise Tax Report (Form CT-3) for the fiscal year ended April 30, 1979. Petitioner determined its business capital, and computed tax due thereon, by averaging the fiscal year beginning and ending balances of total assets and current liabilities (reported on Schedule E of its Form CT-3) as follows:

	<u>BEGINNING OF YEAR *</u>	<u>END OF YEAR</u>	<u>AVERAGE FAIR MARKET VALUE</u>
Total Assets	None	\$10,337,031	\$5,168,516
Current Liabilities	None	209,437	<u>104,719</u>
		TOTAL CAPITAL:	<u>\$5,063,797</u>

4. By a letter and attached schedule dated January 14, 1981, petitioner supplied information, in response to an Audit Division request, reflecting the quarterly balances of its assets and current liabilities for each of the quarterly periods ended July 31, 1978, October 31, 1978, January 31, 1979 and April 30, 1979, as follows:

	<u>QUARTER ENDED 7/31/78</u>	<u>QUARTER ENDED 10/31/78</u>	<u>QUARTER ENDED 1/31/79</u>	<u>QUARTER ENDED 4/30/79</u>
<u>(Total) Assets:</u>	\$10,392,314	\$10,373,885	\$10,355,458	\$10,337,031
<u>(Total) Current Liabilities:</u>	\$ 52,360	\$ 104,720	\$ 157,078	\$ 209,437
<u>Mortgages Payable:</u> (paid 11/15/79)	-0-	-0-	\$10,150,000	\$10,150,000

Average total assets for the fiscal year (quarterly balances totalled and divided by four) equalled \$10,346,672. Average total current liabilities as computed by petitioner (quarterly total of current liabilities, including mortgages in the third and fourth quarters, divided by four) equalled \$5,205,899. The Audit Division, however, did not include the mortgages in its computation of average current liabilities, and thus its computation equalled \$130,899.

5. The above-mentioned "mortgages payable", as reflected by petitioner in each of the quarters ended January 31, 1979 and April 30, 1979, consisted of two mortgage notes, each of which was incurred by petitioner on May 2, 1978. These two notes were payable by petitioner on May 1, 1981 and May 1, 1988, respectively, or upon sale of the real property securing the notes and were

* Petitioner did not commence doing business until May 2, 1978.

reflected on the balance sheet attached as Schedule L to petitioner's Form CT-3 (at line 19) as "Mtges., notes, bonds payable in 1 yr. or more".

6. At a special meeting of petitioner's Board of Directors held on October 26, 1979, the adoption of a plan of liquidation under Section 337 of the Internal Revenue Code and a contract of sale of (petitioner's) land and building dated September 20, 1979 were ratified.

7. The terms of the aforementioned plan of liquidation required petitioner, within the twelve month period commencing on October 26, 1979, to (inter alia) "...sell, exchange or otherwise dispose of or reduce to cash all of its assets, properties, and rights...and pay, or make provision for the payment of, all obligations of and claims against [petitioner]...", to thereafter (within the twelve month period) distribute its assets to its shareholders in complete cancellation or redemption of all outstanding stock, and to be formally dissolved in accordance with Article 10 of the Business Corporation Law.

8. On November 15, 1979, petitioner paid the two mortgage notes at issue, and thereafter distributed all remaining assets to its shareholders and was dissolved.

9. Petitioner objects to the computation of average capital on the basis of quarterly totals, and also asserts that if such method is employed, the mortgages should properly be included as current liabilities in the third and fourth quarters. Petitioner maintains its adoption of the plan of liquidation mandated payment of the mortgages within twelve months of such adoption, that the mortgages were actually paid on November 15, 1979, and, thus, should properly be included as current liabilities since they did come due within twelve months of the third and fourth quarters of petitioner's fiscal year ended April 30, 1979. Finally, petitioner maintains that averaging on a

quarterly basis without including the mortgage notes as current liabilities causes distortion of petitioner's business capital which should be remedied under 20 NYCRR 3-4.9; 3-1.4.

CONCLUSIONS OF LAW

A. That petitioner's tax liability was based upon the measure of its total business capital and investment capital (Tax Law section 210.1(a)(2); 20 NYCRR 3-4.1). Since petitioner had no investment capital, it is solely the measure of its business capital upon which the proper determination of tax liability rests.

B. That section 208.7 of the Tax Law, in pertinent part, defines business capital as:

"...all assets, other than subsidiary capital, investment capital and stock issued by the taxpayer, less liabilities not deducted from subsidiary or investment capital which are payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report,..." (emphasis added).

Regulations of the State Tax Commission further specify that business capital is determined by computing total average fair market value, during the period covered by the report, of all the taxpayer's assets (with noted exceptions), less certain liabilities (see 20 NYCRR 3-4.4; 20 NYCRR 3-4.3).

C. That the dollar amounts supplied by petitioner as reflecting the fair market value of its assets at the end of each of the four quarters at issue are not questioned; rather, it is the propriety of determining the average fair market value of such assets on these quarterly totals and not on an annual basis (as originally reported by petitioner) which is challenged by petitioner.

D. That 20 NYCRR 3-4.6, and the examples cited therein, describe how to determine the average fair market value of those items included in calculating business capital, providing in pertinent part as follows:

"[A]llowance must be made for variations in the amount of assets held by the taxpayer during the period covered by the report, as well as for variations in market prices. Average fair market value generally is computed on a quarterly basis where the taxpayer's usual accounting practice permits such computation. However, at the option of the taxpayer, a more frequent basis (such as a monthly, weekly or daily average) may be used. Where the taxpayer's usual accounting practice does not permit a quarterly or more frequent computation of average fair market value, a semiannual or annual computation may be used where no distortion of average fair market value will result. If, because of variations in the amount or value of any class of assets, it appears to the Tax Commission that averaging on an annual, semi-annual or quarterly basis does not properly reflect average fair market value, the Tax Commission may require averaging on a more frequent basis...

Example 1: A taxpayer owns shares of common stock of X Corporation. The fair market values, during the period covered by its report, on a quarterly basis, were as follows:

- 1) at the end of first quarter, it owned no shares;
- 2) at the end of second quarter, it owned no shares;
- 3) at the end of the third quarter, it owned no shares;
- 4) at the end of the fourth quarter, it owned 100 shares with a fair market value of \$100 a share -- \$10,000.

The average fair market value during the period covered by the report, on a quarterly basis, of the taxpayer's holdings of X Corporation's common stock would be \$2,500, computed as follows:

	Fair market values of stock
End of 1st quarter	0
End of 2nd quarter	0
End of 3rd quarter	0
End of 4th quarter	\$10,000
Total	<u>\$10,000</u>

$$\frac{\text{Total fair market value}}{\text{Number of quarters covered by report}} = \frac{\$10,000}{4} = \$2,500"$$

E. That the Audit Division properly required the average fair market value of petitioner's assets to be determined on a quarterly rather than an annual basis. Averaging on an annual basis fails to recognize the fact that petitioner's primary asset, the apartment building, was acquired by petitioner

on May 2, 1978 and thus was owned as an asset for all but one (1) day of petitioner's fiscal year ended April 30, 1979. Annual basis averaging significantly understates (by approximately fifty percent) the value of the assets owned by petitioner throughout its (first) full fiscal year.

F. That the mortgage notes at issue may not properly be included among current liabilities deductible from total assets in arriving at business capital for the fiscal year ended April 30, 1979. Such notes were neither payable on demand nor within one year from the date incurred and, as of the April 30, 1979 close of petitioner's fiscal year, represented long-term debt. Events undertaken subsequent to April 30, 1979, including specifically the adoption of a plan of liquidation, the sale of the building and payment of the mortgage notes on November 15, 1979 and the dissolution of petitioner, did not serve to convert the mortgage notes into current liabilities deductible during the fiscal year at issue. Finally, such events did not affect business capital during the fiscal year at issue and thus there is no reason to adjust current liabilities to correct for distortion (see 20 NYCRR 3-4.9; 3-1.4).

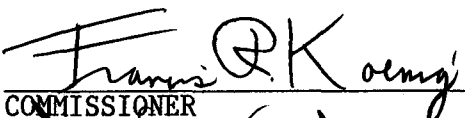
G. That the petition of 415 East 52nd Street Corp. is hereby denied and the Notice of Deficiency dated March 4, 1981 is sustained.

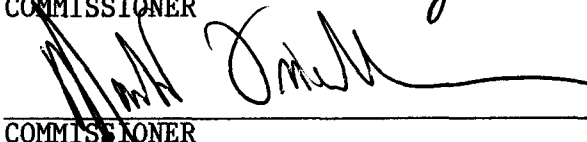
DATED: Albany, New York

JAN 18 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER