

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Albert E. & June R. Fagan :

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1973. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon Albert E. & June R. Fagan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert E. & June R. Fagan
c/o Oliver House
5333 Collins Ave.
Miami Beach, FL 33140

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
28th day of November, 1980.

Deborah A. Bank

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Albert E. & June R. Fagan :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1973. :

State of New York
County of Albany

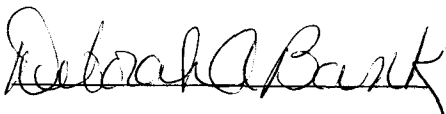
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon Abraham Zeidman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

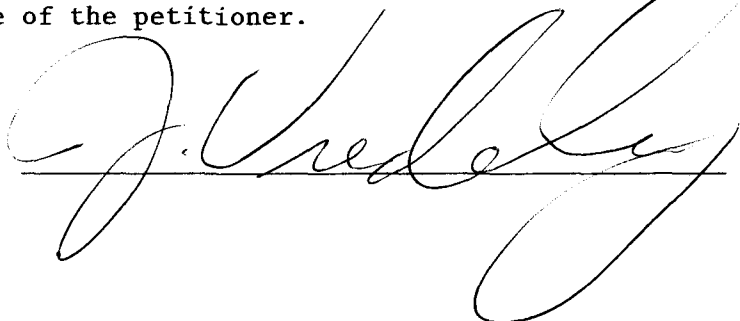
Mr. Abraham Zeidman
Zeidman & Kerzner
21 E. 40th St.
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
28th day of November, 1980.





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

November 28, 1980

Albert E. & June R. Fagan
c/o Oliver House
5333 Collins Ave.
Miami Beach, FL 33140

Dear Mr. & Mrs. Fagan:

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) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Abraham Zeidman
Zeidman & Kerzner
21 E. 40th St.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALBERT E. FAGAN and JUNE R. FAGAN	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1973.	:	

Petitioners, Albert E. Fagan and June R. Fagan, c/o Oliver House, 5333 Collins Avenue, Miami Beach, Florida 33140, 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 1973 (File No. 18653).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 27, 1980 at 2:45 P.M. Petitioners appeared by Abraham Zeidman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioners properly reported their items of income, gains and losses on their nonresident tax return.

FINDINGS OF FACT

1. Petitioners, Albert E. Fagan and June R. Fagan, timely filed a joint New York State Income Tax Nonresident Return for the year 1973, on which total income was reported as follows:

	<u>FEDERAL AMOUNT</u>	<u>N.Y.S. AMOUNT</u>
Dividends	\$ 161.95	\$ -0-
Interest Income	606.39	-0-
Sale or exchange of Capital assets	66,988.11	66,988.11
Sale or exchange of Non capital assets	(2,500.00)	(2,500.00)
Partnership loss	<u>(8,009.73)</u>	<u>(8,009.73)</u>
TOTAL INCOME	<u>\$57,246.72</u>	<u>\$56,478.38</u>

The dividend of \$161.95 (after a \$100.00 exclusion) was a distributive share of dividends received from the partnership of Fagan and Company. The sale or exchange of capital assets of \$66,988.11 consisted of a short term stock loss of \$1,603.20 and a short term capital gain of \$68,591.31 distributed from the partnership. The loss of \$2,500.00 was petitioner's cost of worthless stock issued pursuant to section 1244 of the Internal Revenue Code.

2. On March 28, 1977 the Audit Division issued a Notice of Deficiency against the petitioners for the year 1973 for \$595.91, plus interest of \$135.67, along with an explanatory Statement of Audit Changes on which;

- (a) dividends of \$161.95 were found to be taxable to New York State.
- (b) the stock losses of \$1,603.20 and \$2,500.00 were disallowed from New York income.
- (c) due to the aforementioned adjustments of \$161.95, \$1,603.20, and \$2,500.00 to New York adjusted gross income, New York itemized deductions and exemptions were increased accordingly.

3. Petitioner Albert E. Fagan was a resident of Florida and a partner in the partnership of Fagan and Company, a stock brokerage firm located and doing business in the City and State of New York. Fagan and Company distributed to petitioner Albert E. Fagan for the year 1973, the following distributive share items:

Ordinary loss	(8,009.73)
Dividends Qualifying for Exclusion	261.95
Short term Capital Gain	\$68,591.31
Contributions	1,049.92

Petitioner Albert E. Fagan argued that the aforementioned distributions of income, gain and losses should not be reportable on his New York State tax return, since these items were substantially derived from the partnership trading for its own account.

4. Sometime in 1972, petitioner Albert E. Fagan purchased four shares of Osceola Television Enterprises, Inc., for \$2,500.00. On September 28, 1973, petitioner was notified that the stock was worthless. Petitioner contended that since the worthless stock constituted an ordinary loss under section 1244 of the Internal Revenue Code, and since Osceola Television Enterprises, Inc. was a New York business, the ordinary loss of \$2,500.00 was reportable on his New York State tax return.

5. Petitioners, Albert E. Fagan and June R. Fagan, purchased 600 shares of Marine Protein for \$4,314.60 on January 31, 1973 and sold them on March 8, 1973 for \$2,711.40. Petitioner argued that the resulting short term capital loss of \$1,603.20 should be reportable if the short term capital gain of \$68,591.31 at issue is deemed to be reportable on his New York State tax return.

CONCLUSIONS OF LAW

A. That the ordinary loss of \$2,500.00 derived from worthless stock and the short term capital loss of \$1,603.20 derived from the sale of stock, resulted from the ownership of intangible personal property and any losses derived therefrom is not included in the New York adjusted gross income of petitioners, Albert E. Fagan and June R. Fagan, (nonresidents) in accordance with the meaning and intent of section 632(b)(2) of the Tax Law and 20 NYCRR 131.5.

B. That the ordinary loss of \$8,009.73, the dividends of \$161.95 (after the \$100.00 exclusion) and the short term capital gain of \$68,591.31 distributed

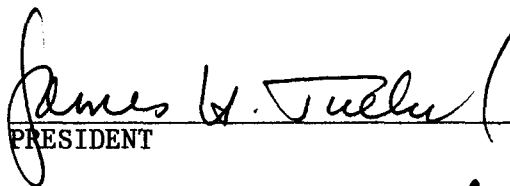
from a New York partnership are items derived from or connected with New York sources and must be included in petitioner's New York adjusted gross income in accordance with the meaning and intent of section 632(b) of the Tax Law and 20 NYCRR 131.2.

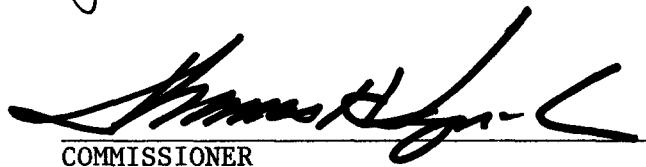
C. That the petition of Albert E. Fagan and June R. Fagan is denied and the Notice of Deficiency issued March 28, 1977 is sustained, together with such additional interest as may be lawfully due.

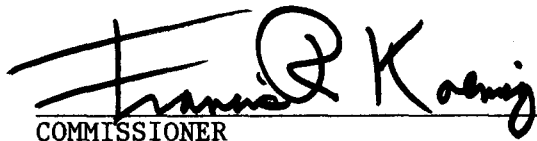
DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER