

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Max L. & Christine Petschek :

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 1970. :

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Max L. & Christine Petschek, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Max L. & Christine Petschek
c/o Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

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
3rd day of October, 1980.

Justine Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Max L. & Christine Petschek :

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 1970. :

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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Jack Wong the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

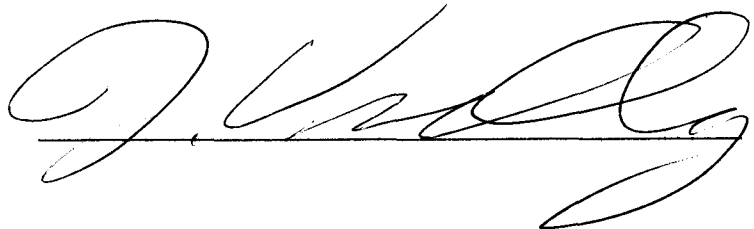
Mr. Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

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
3rd day of October, 1980.

Scottie Bank



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

October 3, 1980

Max L. & Christine Petschek
c/o Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

Dear Mr. & Mrs. Petschek:

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
Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

MAX L. PETSCHKE and CHRISTINE PETSCHKE :

DECISION

for Redetermination of a Deficiency or for Re :
fund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1970. :

Max L. Petschek and Christine Petschek, c/o Oppenheim, Appel, Dixon & Co., One New York Plaza, New York, New York 10004, 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 1970 (File No. 14828).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1977 at 11:00 A.M. Petitioners appeared by Jack Wong, CPA, of the accounting firm of Oppenheim, Appel, Dixon & Co. The Audit Division appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUES

I. Whether the receipt by petitioners of capital gains from an estate in 1970 constituted items of tax preference.

II. Whether the modification for allocable expenses attributable to these capital gains was proper.

III. Whether petitioners are entitled to a refund of minimum income tax paid on these capital gains.

FINDINGS OF FACT

1. Charles Petschek, Sr. died on December 18, 1959. The Estate of Charles Petschek, Sr. filed a final United States fiduciary income tax return for the fiscal year ending February 28, 1970.

2. During its fiscal year ending February 28, 1970, the Estate of Charles Petschek, Sr. disposed of its security holdings at a long term gain of \$3,846,150.00. Substantially all the gains were realized prior to October 9, 1969. The proceeds of the sale were distributed prior to February 28, 1970, but after January 1, 1970.

3. Petitioners reported their income on a cash, calendar year basis. In 1970 petitioners received a capital gain distribution amounting to \$817,224.00 from the Estate of Charles Petschek, Sr.

4. Petitioners filed joint Federal and resident New York State income tax returns, on which they reported items of tax preference and minimum income tax.

5. Petitioners filed an amended United States individual income tax return (Form 1040x) for 1970, in which they claimed a refund of \$12,976.00, on the ground that the capital gains were not subject to minimum tax because they were realized before December 31, 1969. A refund check was issued by the United States Treasury Department to petitioners on or about July 26, 1974.

6. On January 22, 1975, petitioners filed a Notice of Change in Taxable Income and Items of Tax Preference by U.S. Treasury Department pursuant to Section 659 of the New York State Tax Law (Form IT-115) with the Audit Division, claiming refund of \$8,855.00 for 1970.

7. On April 9, 1976, the Audit Division notified petitioners (via Form IT-50.2) that their claim for refund was being disallowed for the following reasons:

"Your refund must be denied in full as the capital gain distributions from the partnership must be adjoined with the other items of gains and losses on your individual return and treated in accordance with the Tax Law for the year of the return.

Based on the above, the capital gain distribution is subject to minimum income tax and must be used in computing the modification for allocable expenses.

It would appear that the Internal Revenue Service action was in error and the adjustment is not taken into account as liability must be computed on the correct figures for minimum income tax purposes."

8. On May 24, 1976, the Audit Division issued a formal Notice of Denial of petitioners' claim for refund for 1970. Petitioners timely filed a petition with respect to said Notice of Denial.

CONCLUSIONS OF LAW

A. That the capital gains received by petitioners in 1970 constituted items of tax preference, as defined in section 57(a)(9) of the Internal Revenue Code and section 622(b) of the New York State Tax Law.

B. That the tax preference items received by petitioners in 1970 are subject to minimum tax within the intent and meaning of section 622 of the Tax Law, as added by Chapter 1005, Laws of 1970 (applicable to taxable years commencing after December 31, 1969) and as amended by Chapter 1006, Laws of 1970.

C. That the modification for allocable expenses attributable to items of tax preference was proper, in accordance with the provisions of sections 623 and 615(c) of the Tax Law.

D. That the Statement of Disallowance of Claim for Refund and the formal Notice of Disallowance in full of petitioners' claim for refund in the amount of \$8,855.00 for 1970 are correct; that the petition of Max Petschek and Christine Petschek for redetermination of the denial of the claim for refund is hereby denied.

DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION

James W. Tully
PRESIDENT

Thomas H. G. C.
COMMISSIONER

Francis R. Koenig
COMMISSIONER