

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Jason & Helen Seltzer :  
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 1972. :

State of New York  
County of Albany

Jean Schultz, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of February, 1980, she served the within notice of Decision by certified mail upon Jason & Helen Seltzer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jason & Helen Seltzer  
810 Carol Pl.  
Oradell, NJ 07649

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  
29th day of February, 1980.

Joanne Knapp

Jean Schultz

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Jason & Helen Seltzer :

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 1972. :

State of New York

County of Albany

Jean Schultz, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of February, 1980, she served the within notice of Decision by certified mail upon Norman Greenberg 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. Norman Greenberg  
110 E. 59th St.  
New York, NY 10022

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  
29th day of February, 1980.

Jeanne Knapp

Jean Schultz

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

February 29, 1980

Jason & Helen Seltzer  
810 Carol Pl.  
Oradell, NJ 07649

Dear Mr. & Mrs. Seltzer:

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  
Norman Greenberg  
110 E. 59th St.  
New York, NY 10022  
Taxing Bureau's Representative

## STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
JASON SELTZER and HELEN SELTZER : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article :  
22 of the Tax Law for the Year 1972. :

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 9, 1977 at 9:30 A.M. and was continued to conclusion at the Offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on June 6, 1978 at 9:30 A.M. Petitioners appeared by Norman Greenberg, accountant. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss and Francis Cosgrove, Esqs., of counsel).

II. Whether the Audit Division failed to allow for interest deductions attributable to New York State real property.

III. Whether the fact that a nonresident partner in a New York partnership is entitled to deduct losses attributable to New York properties only, while a New York resident is entitled to deduct losses of such partnership regardless of where the property is located, violates the constitutions of United States and the State of New York.

FINDINGS OF FACT

1. Petitioners were residents of New Jersey during 1972. They filed a New York State Income Tax Nonresident Return for that year. Their total reported New York State income included net losses from two partnerships, Madison Seventy Co. and 72nd Partnership Company.

2. On March 29, 1976, the Audit Division issued a Notice of Deficiency against petitioners disallowing losses attributable to Madison Seventy Co. and 72nd Partnership Company. The Division determined that losses from partnerships of which 72nd Partnership Company was a member partner were not derived from or connected with New York sources and disallowed this loss in full. The Division also determined, however, that three partnerships of which Madison Seventy Co. was a member partner had their business operations or situs of real property within New York State and thus allowed Mr. Seltzer's distributive share of partnership losses and capital gains attributable to said three partnerships.

3. Petitioner Jason Seltzer was a member of a New York law firm during the year at issue. The partners of the law firm created Madison Seventy Co. in 1970 and 72nd Partnership Company in 1972 as investment vehicles. Each of the law firm's partners was given an opportunity to invest in the vehicles based on the percentage of his ownership of the law firm. The law firm dealt primarily in real estate matters and the investments were principally in real estate. Most of the investments were in projects developed by clients of the law firm.

4. Both Madison Seventy Co. and 72nd Partnership Company were New York general partnerships which owned, either directly or as partners in other investment vehicles, real estate located in New York State and elsewhere.

5. In computing the deficiency, the Audit Division determined that the following partnerships, of which Madison Seventy Co. had been a partner, had their business operations or situs of real property within New York State:

(a) Watertown Associates;

(b) Westbury Associates;

(c) South Pierre Associates; and allowed Mr. Seltzer's share of partnership losses and long term capital gain attributable thereto.

6. At the hearing, it was stipulated that Mr. Seltzer was entitled to his share of the loss attributable to Stat-Land Holiday Associates, a partnership in which Madison Seventy Co. was a partner.

7. Petitioners established at the hearing that 333 Associates, a limited partnership in which 72nd Partnership Company was a limited partner, owned an apartment house in New York City during 1972.

8. Petitioners claim that all of the interest expense for the partnerships had been disallowed and that regardless of the determination of the other issues presented herein, they are at least entitled to an allocation of interest expense between or among the various assets of the partnerships. The adjustments made in the Statement of Audit Changes and Notice of Deficiency, however, showed that petitioners were allowed Mr. Seltzer's distributive share of the net ordinary loss attributable to those properties which the Audit Division found to be located in New York State. For example, Mr. Seltzer's distributive share of partnership losses from Madison Seventy Co. was found to be \$8,078.05, calculated as follows:

<u>NAME OF PARTNERSHIP</u>	<u>ORDINARY INCOME OR LOSS</u>
Watertown Associates	\$ 1,125.00
Westbury Associates	( 34,505.00)
South Pierre Associates	( 75,903.00)
TOTAL	(\$ 109,283.00)

7.392% (Mr. Seltzer's partnership interest) X (\$109,283) = (\$8,078.20)  
(the 15 cent difference is possibly due to rounding of numbers).

9. Petitioners also contend that the disallowance of the full amounts of the losses of Madison Seventy Co. and 72nd Partnership Company violated the constitutions of the United States and the State of New York, in that petitioners, as nonresidents, would be limited to deducting only losses from New York properties, while residents of New York State could deduct losses regardless of where the properties were located. To illustrate this, petitioners submitted a dummy New York State income tax resident return computing their tax as if they were residents. The tax computed as residents amounted to \$1,039.52 as opposed to the \$6,279.66 computed by the Audit Division after disallowance of the income or loss from non-New York properties.

#### CONCLUSIONS OF LAW

A. That section 632(a) (1) (A) of the Tax Law provides that the New York adjusted gross income of a nonresident includes his distributive share of partnership income, gain, loss and deduction as determined under section 637 of the Tax Law.

B. That section 637(a) (1) of the Tax Law provides:

"In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission and consistent with the applicable rules of section six hundred thirty-two."

C. That 20 NYCRR 134.1 (Regulation promulgated under section 637(a) of the Tax Law) provides in part as follows:

"(a) The New York adjusted gross income of a nonresident partner shall include his distributive share of all items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income to the extent such items are derived from or connected with New York sources, i.e., attributable to the ownership of any interest in real or tangible personal property in this State or to a business, trade, profession or occupation carried on in this state..."

D. That Madison Seventy Co. and 72nd Partnership Company were passive investment vehicles and were not actively engaged in a "business, trade, profession or occupation". Moreover, there was no showing that the said partnerships owned any interest in tangible personal property in New York State. Accordingly, petitioners' New York adjusted gross income includes petitioner Jason Seltzer's distributive share of all items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income only to the extent attributable to the ownership of real property in New York State.

E. That the Audit Division is hereby directed to recompute the deficiency by including Mr. Seltzer's share of the loss attributable to Stat-Land Holiday Associates with respect to Madison Seventy Co. and Mr. Seltzer's share of the loss attributable to 333 Associates with respect to 72nd Partnership Company.

F. Petitioners have failed to sustain the burden of proof imposed by section 689(e) of the Tax Law to show that the Audit Division had disallowed interest deductions attributable to the New York properties. In fact, the record indicates that the Audit Division used the amounts of ordinary income or loss supplied by Madison Seventy Co. and 72nd Partnership Company.

G. That the constitutionality of the laws of the State of New York are presumed at the administrative level of the State Tax Commission; the commission has no authority to declare such laws unconstitutional and does not pass on Issue III hereof.



H. That the petition of Jason Seltzer and Helen Seltzer is granted to the extent set forth in the Conclusion of Law "E". Except as so granted, the Notice of Deficiency is in all other respects sustained.

DATED: Albany, New York

FEB 29 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER