

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Peter J. & Margaret Allison Sharp :
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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Peter J. & Margaret Allison Sharp, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter J. & Margaret Allison Sharp
778 Park Ave.
New York, NY 10021

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Peter J. & Margaret Allison Sharp :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
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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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Mark A. Vogel 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. Mark A. Vogel
Weil, Gotshal & Manges
767 Fifth Ave.
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
23rd day of May, 1980.

Joanne Knapp

[Signature]

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

May 23, 1980

Peter J. & Margaret Allison Sharp
778 Park Ave.
New York, NY 10021

Dear Mr. & Mrs. Sharp:

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
Mark A. Vogel
Weil, Gotshal & Manges
767 Fifth Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PETER J. SHARP	:	
and	:	
MARGARET ALLISON SHARP	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1970.	:	

Petitioners, Peter J. Sharp and Margaret Allison Sharp, 778 Park Avenue, New York, New York 10021, 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. 13827).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 27, 1977 at 1:15 P.M. Petitioners appeared by Weil, Gotshal & Manges, Esqs. (Mark A. Vogel and Martin J. Rabinowitz, Esqs., of counsel). The Audit Division appeared by Peter J. Crotty, Esq. (Irving Atkins, Esq., of counsel).

ISSUE

Whether interest paid by petitioner Peter Sharp during 1970, while he was a general partner in various real estate partnerships which he promoted, managed and financed for the purpose of acquiring and/or constructing income producing real property, constituted an itemized deduction, an expense incurred in the production or collection of income or an expense incurred in a trade or business.

FINDINGS OF FACT

1. Petitioners, Peter J. Sharp and Margaret Allison Sharp, timely filed a New York State income tax resident return for 1970.

2. On August 26, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioners for 1970 in the amount of \$95,653.00 in personal income tax, plus interest of \$19,302.78, for a total of \$114,955.78. Said Notice was issued on the ground that interest expense of \$683,870.00, which was paid in connection with petitioner's partnership interests, was erroneously deducted from Federal gross income in arriving at Federal adjusted gross income. The Income Tax Bureau contended that said interest was deductible solely as an itemized deduction, pursuant to Treasury Regulation §1.163-1, and was not deductible from Federal gross income and, as a result, total New York income and itemized deductions (Interest Expense) should be increased by \$683,870.00. The increase in interest expense resulted in an increase in the deduction for allocable expenses as provided for in section 615(c)(4) of the Tax Law.

3. Petitioners timely filed a petition for redetermination of a deficiency or for refund of personal income tax.

4. During the hearing, petitioner introduced into evidence a "Stipulation of Facts," which stipulation was agreed to by the Audit Division and which was entered as an actual stipulation of the facts in the case. The Audit Division contended that Peter Sharp was a general partner in various real estate partnerships which he promoted, managed and financed for the purpose of acquiring and/or constructing income producing real property and that he operated such property for the production of income. The partnerships prior to and during 1970 held property for the production of rental income. Said partnerships required substantial sums of capital to purchase real property, to pay interest, to pay debts incurred by the partnerships when it purchased such real property, to cover operating losses, and to construct new income producing office buildings.

As principal general partner in the partnerships, it was Peter Sharp's responsibility to provide capital required by the partnerships, to provide additional debt or equity capital required as a result of short falls of other participating partners and to provide interim financing pending permanent financing. During 1970 and in the years prior thereto, Peter Sharp was obligated on various loans which he incurred to provide capital required by the partnerships. During 1970, he paid interest expense in the total amount of \$1,082,475.00 with respect to his outstanding loans. As promoter, general partner and managing agent of the partnerships, Peter Sharp was often required to obtain capital for the partnerships from various sources, including banks, related entities such as other partnerships, Peter Sharp & Co., Inc., Omicron Holding Corp., Douglas Elliman & Co., Inc., Martins American Co. and from private lenders including Alvin Dworman and his lending company, Security Alliance Corp. Accordingly, many of the loan transactions reflected repayment of such loans which originally were incurred to make investments in partnerships.

5. Petitioner Peter Sharp contended that he incurred interest expense on loans he obtained to provide capital to partnerships whose activities included the production of income, and the management, conservation or maintenance of property held for the production of income, within the meaning of section 212 of the Internal Revenue Code. Therefore, interest paid of \$683,870.00 was deductible from Federal gross income and not deductible as an itemized deduction.

CONCLUSIONS OF LAW

A. That interest expenses incurred by petitioner Peter J. Sharp during 1970, as a general partner in various real estate partnerships which he promoted, managed and financed for the purpose of acquiring and/or constructing income

producing real property, constituted an expense incurred in a trade or business within the meaning of section 162 of the Internal Revenue Code and is a deduction from Federal gross income. [See Burgher et ux. v. Campbell, 58-1 U.S.T.C. 9494; McNutt-Boyce Co. v. Commissioner of Internal Revenue, 38 T.C. 462 (1962), acq. 1966-2 C.B. 6; aff'd. 324 F.2d 957 (5th Circuit 1963); Brown v. U.S., 434 F.2d 1065 (5th Circuit 1970).]

B. That interest expenses deductible under section 162 of the Internal Revenue Code (even if the same interest expenses may be deductible under section 163 of the Code) are not subject to allocation under section 623. That the phrase contained in section 623(b)(1), "interest deductible solely by reason of section 163 of the Internal Revenue Code", is intended to distinguish interest which relates to business or rental income that is deductible in computing adjusted gross income from interest deductible only as an itemized deduction. Therefore, the Income Tax Bureau's inclusion of interest expenses of \$683,870.00, as an itemized deduction, was erroneous.

C. That the petition of Peter J. Sharp and Margaret Allison Sharp is granted and the Notice of Deficiency issued on August 26, 1974 is cancelled.

DATED: Albany, New York

MAY 23 1980

STATE TAX COMMISSION

James W. Tull
PRESIDENT

Thomas H. Lynch
COMMISSIONER

Francis R. Koenig
COMMISSIONER