

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edwin H. Stern, III :
and Eve Stern : 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

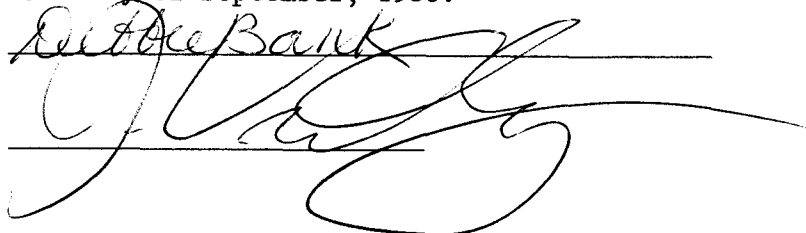
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of September, 1980, he served the within notice of Decision by certified mail upon Edwin H. Stern, III, and Eve Stern, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edwin H. Stern, III
and Eve Stern
c/o Lasker, Stone & Stern
20 Broad St.
New York, NY 10005

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
19th day of September, 1980.

Quill Bank


STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edwin H. Stern, III :
and Eve Stern : 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

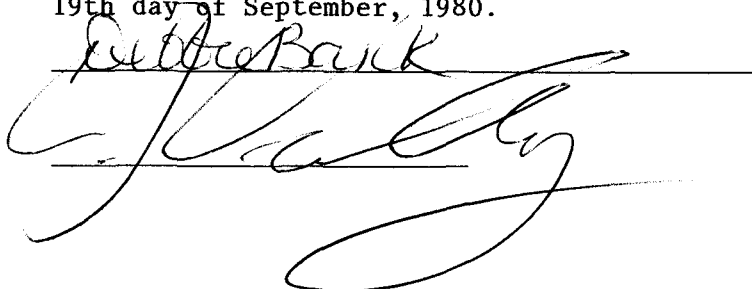
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of September, 1980, he served the within notice of Decision by certified mail upon Jack Wong the representative of the petitioner in the 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
19th day of September, 1980.


Notary Public

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

September 19, 1980

Edwin H. Stern, III
and Eve Stern
c/o Lasker, Stone & Stern
20 Broad St.
New York, NY 10005

Dear Mr. & Mrs. Stern:

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 :
EDWIN H. STERN III and EVE STERN : 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, Edward H. Stern III and Eve Stern, c/o Lasker, Stone and Stern, 20 Broad Street, New York, New York 10005, 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. 13889).

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 January 16, 1980 at 2:45 P.M. Petitioners, Edwin H. Stern III and Eve Stern, appeared by Oppenheim, Appel, Dixon & Co. (Jack Wong, CPA). The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether long term capital gains and losses from partnerships were properly reported.

FINDINGS OF FACT

1. Petitioners, Edwin H. Stern III and Eve Stern, filed a joint New York State Income Tax Resident Return for the year 1970, along with a schedule for minimum income tax indicating no minimum taxable income.

2. On January 10, 1974, the Audit Division informed petitioners that their 1970 New York State personal income tax return was being audited and, therefore, requested "a copy of Federal schedule D showing how the capital gains of \$40,136.00 were determined".

3. On March 25, 1974, the Audit Division issued a Notice of Deficiency for \$3,206.00, plus interest of \$566.31, for a total of \$3,772.31, along with an explanatory Statement of Audit Changes on which a minimum income tax was computed on the following tax preference item:

Capital gains per return	\$ 40,136.00
Long term capital gains per partnership returns	71,164.69
Tax preference item	<u>\$111,300.69</u>

In addition, a modification pursuant to section 615(c)(4) of the Tax Law was computed and subtracted from New York State itemized deductions.

4. On May 21, 1974, the Audit Division abated \$2,493.09 of tax and \$440.38 of interest of the aforementioned deficiency by recomputing the tax preference item as follows:

Long term capital gain per partnership return	\$142,329.39
Long term capital gain per 1040 schedule D submitted	<u>138,001.00</u>
Additional long term capital gain	\$ 4,328.39
Capital gain per return	80,272.00
Adjusted capital gain	<u>\$ 84,600.39</u>
Tax preference item - Capital gain	\$ 42,300.20
Total tax preference item per original return	<u>5,468.00</u>
(Modified Federal excess investment interest)	
Adjusted tax preference item	<u>\$ 47,768.20</u>

The sole issue raised by petitioners, Edwin H. Stern III and Eve Stern, was the additional long term capital gain of \$4,328.39 (supra).

5. The additional capital gain of \$4,328.39 at issue was obtained by the Audit Division by comparing the capital gain on the partnership return of Lasker, Stone, and Stern to the partnership capital gain reported on the

Federal schedule D. However, petitioner Edwin H. Stern III argued that the comparison was inaccurate since the total partnership capital gain reported on the Federal schedule D also contained a long term capital loss of \$4,328.28 from the partnership of Tsevani Associates. In support of his argument, he submitted a schedule of partnership distribution from the partnership return of Tsevani Associates and a memorandum from the certified public accounting firm who prepared the aforementioned schedule. The schedule and the memorandum indicated that a long term capital loss of \$4,328.28 was distributed to petitioner Edwin H. Stern III during the year 1970. Accordingly, the net long term capital gain of \$138,001.00 reported from partnerships consisted of a long term capital gain of \$142,329.00 distributed from the partnership of Lasker, Stone and Stern, and a long term capital loss of \$4,328.28 distributed from the partnership of Tsevani Associates.

CONCLUSIONS OF LAW

A. That petitioners, Edwin H. Stern III and Eve Stern sustained the burden of proof required by section 689(e) of the Tax Law in establishing that the capital gain of \$80,272.00 (before the 50 percent exclusion) as originally reported was correct.

B. That the petition of Edwin H. Stern III and Eve Stern is granted to the extent that the items of tax preference are computed as follows:

Modified Federal excess investment interest	\$ 5,468.00
Capital gains	40,136.00
Total items of tax preference	<u>\$45,604.00</u>

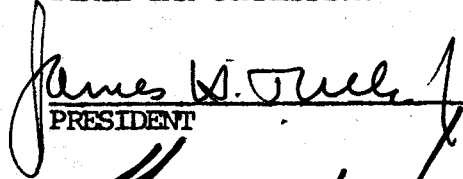
C. That the Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued March 25, 1974, within the purview of the abatement of May 14, 1974.

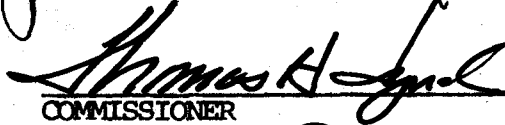
D. That, except as so granted, the petition is in all other respects denied.

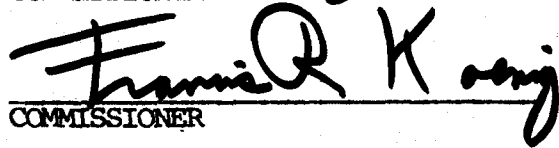
DATED: Albany, New York

SEP 19 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER