

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

John A. Weisser, Jr. :

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 1969. :

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 John A. Weisser, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

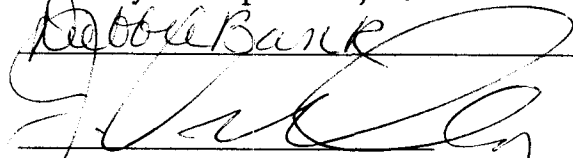
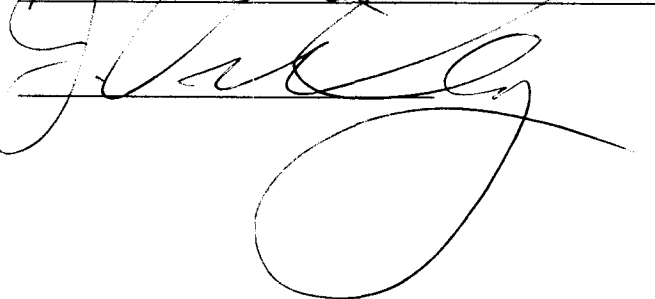
John A. Weisser, Jr.
445 East 80th St.
Apt. 17E
New York, NY 10021

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

19th day of September, 1980.

STATE OF NEW YORK
STATE TAX COMMISSION

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Personal Income Tax :

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for the Year 1969. :

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 Robert L. Gayette 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. Robert L. Gayette
7615 Carta Valley Dr.
Dallas, TX 75248

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.



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

September 19, 1980

John A. Weisser, Jr.
445 East 80th St.
Apt. 17E
New York, NY 10021

Dear Mr. Weisser:

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
Robert L. Gayette
7615 Carta Valley Dr.
Dallas, TX 75248
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOHN A. WEISSER, JR. : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax :
under Article 22 of the Tax Law for the :
Year 1969.

Petitioner, John A. Weisser, Jr., 445 East 80th Street, 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 1969 (File No. 13833).

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 December 21, 1979 at 9:15 A.M. Petitioner, John A. Weisser, Jr., appeared with Robert L. Gayette, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether a loss derived from worthless securities is an ordinary loss.

FINDINGS OF FACT

1. Petitioner, John A. Weisser, Jr., timely filed a New York State Income Tax Resident Return for the year 1969, on which he reported, as a miscellaneous deduction, a stock loss of \$14,316.00.
2. On November 17, 1972, the Income Tax Bureau validated a signed consent extending the period of limitation for the year 1969 to April 15, 1974, in accordance with section 683(c) (2) of the Tax Law.

3. On December 28, 1973, the Income Tax Bureau issued a Notice of Deficiency in the sum of \$1,262.03 for the year 1969, along with an explanatory Statement of Audit Changes, on which it stated:

"When stock purchased as condition of employment becomes worthless, it is considered a nonbusiness bad debt. Since losses from either nonbusiness bad debts or worthless securities must be treated as capital losses, the deduction is limited to \$1,000.00. Further, since you have already claimed the maximum capital loss deduction on Schedule-A, your loss, \$14,316.00, reported as a miscellaneous deduction has been disallowed in full."

4. Petitioner, John A. Weisser, Jr., was employed by McDonnell and Co., Inc. (hereinafter McDonnell) as a staff member from April, 1966 through 1968, with a starting salary of \$7,000.00, which progressively increased to \$15,000.00 by the end of 1968. Petitioner's compensation also included an annual bonus of 5 percent of his current annual salary.

5. In December, 1968, McDonnell offered petitioner the opportunity to purchase 200 shares of its non-voting stock for approximately \$14,000.00. Contingent upon the purchase, petitioner would be promoted to vice-president at an annual salary of \$20,000.00, with a 20 percent annual bonus. McDonnell made this offer to petitioner and similar offers to other employees in order to meet capital requirements mandated by the New York Stock Exchange.

6. Petitioner, John A. Weisser, Jr., was aware of McDonnell's financial difficulties and felt that his failure to accept their stock offer would probably result in his dismissal. However, petitioner did not have the necessary funds or the financial status to obtain a loan. Accordingly, McDonnell arranged with a bank to grant petitioner a loan for \$14,000.00, using the 200 shares of non-voting stock as collateral.

7. In January, 1969, the loan was granted and the proceeds were transferred to McDonnell. On February 6, 1969, the New York Stock Exchange approved the application of petitioner, John A. Weisser, Jr., as a holder of non-voting stock in McDonnell & Co., Inc.

8. Effective January 1, 1969, petitioner became vice-president of McDonnell at an annual salary of \$20,000.00, and a 20 percent annual bonus.

9. McDonnell continued to experience financial difficulties until November, 1969, when they filed for bankruptcy, and its stock became worthless. Petitioner remained as administrative liquidator of McDonnell until 1971.

10. Although the stock held by the bank as collateral became worthless, petitioner was personally liable for the loan, and subsequently repaid it in full.

CONCLUSIONS OF LAW

A. That petitioner, John A. Weisser, Jr., acquired stock from McDonnell and Co., Inc. with a business motive, and not an investment motive, and retained this motive until the stock became worthless. Accordingly, petitioner is entitled to an ordinary loss in accordance with the meaning and intent of section 165(a) of the Internal Revenue Code and Article 22 of the Tax Law. (Petition of Anthony P. Rizzuto and Jane M. Rizzuto, N.Y.S.T.C., February 15, 1980; Elmer and Cecile Carsello v. Commissioner, 35 TCM 832).

B. That the petition of John A. Weisser, Jr. is granted and the Notice of Deficiency issued December 28, 1973, for the year 1969, is cancelled.

DATED: Albany, New York

SEP 19 1980

STATE TAX COMMISSION

James W. Tuller
PRESIDENT

Thomas H. [Signature]
COMMISSIONER

Frank R. Koenig
COMMISSIONER