

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John R. & Dorothy Atwell :
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 :
1968.

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 9th day of October, 1981, he served the within notice of Decision by certified mail upon John R. & Dorothy Atwell, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. & Dorothy Atwell
Greenville, NY 12083

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
9th day of October, 1981.

Arnie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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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 9th day of October, 1981, he served the within notice of Decision by certified mail upon Bertram Gezelter the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bertram Gezelter
Biller & Snyder
75 Maiden Lane
New York, NY 10038

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
9th day of October, 1981.

Connie A. Gezelter

J. Vredenburg

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

October 9, 1981

John R. & Dorothy Atwell
Greenville, NY 12083

Dear Mr. & Mrs. Atwell:

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
Bertram Gezelter
Biller & Snyder
75 Maiden Lane
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOHN R. ATWELL and DOROTHY ATWELL
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1968.

DECISION

Petitioners, John R. Atwell and Dorothy Atwell, Greeneville, Greene County, New York, 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 1968 (File Number 00089).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1977. The petitioners appeared by Bertram Gezelter of Biller & Snyder, CPA's. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether for New York State income tax purposes petitioners may compute a net operating loss and a net operating loss carryback deduction which includes the addition and subtraction modifications required by sections 612 and 615 of the Tax Law.

FINDINGS OF FACT

1. Petitioners, John R. Atwell and Dorothy Atwell, filed New York State income tax resident returns for 1966 through 1970. On said returns petitioners reported addition and subtraction modifications required by sections 612 and 615 of the Tax Law.

2. On or about August 17, 1970 petitioners filed claims for refund of personal income taxes paid for the years 1966, 1967 and 1968. Said claims were the result of net operating loss carryback deductions which were based on a 1969 net operating loss. The Audit Division authorized refunds to be issued for these years. These refunds are not in dispute. On or about November 16, 1971 petitioners filed a claim for refund for the balance of the personal income tax paid for 1968. This claim was allowed to the extent of \$1,159.24 and disallowed to the extent of \$2,003.71 by an Audit Division letter dated March 27, 1972. On June 26, 1972 the Audit Division sent to petitioners a Notice of Disallowance based on the aforesaid letter.

3. During 1969 and 1970, John R. Atwell was a member of the partnership of Gregory & Sons of 40 Wall Street, New York City. That partnership sustained substantial losses in those years and these losses were reflected in the distributive share reported on petitioners' personal income tax returns.

4. Petitioners computed net operating losses for tax years 1969 and 1970. The carryback of the 1969 net operating loss to 1966, 1967 and 1968 is not at issue. For 1970 petitioners computed, for Federal income tax purposes a net operating loss of \$139,088.00. Said loss was computed with the modifications specified in section 172(d) of the Internal Revenue Code. Petitioners carried back the 1970 net operating loss to 1968 and they filed a claim for refund with the Internal Revenue Service. After the deduction of the 1969 net operating loss, petitioners' Federal adjusted gross income for 1968 was \$31,002.75 and their taxable income was \$8,280.30. Accordingly, the 1970 net operating loss carryback to 1968 was not fully absorbed and the balance of the 1970 loss was carried over to 1971. The computation of the 1968 Federal net operating loss carryback deduction is not in dispute.

5. For New York State income tax purposes petitioners computed for 1970 a net operating loss of \$155,774.00. Said loss was computed in the same manner as the Federal net operating loss except the modifications required by sections 612 and 615 of the Tax Law were included in the computation. They carried back the 1970 net operating loss to 1968 and they filed a claim for refund (see Finding of Fact "2", supra). After the deduction of the 1969 net operating loss, petitioners' total New York income was \$40,566.92 and their taxable income was \$33,056.78, since petitioners had reported modifications required by sections 612 and 615 of the Tax Law. The 1968 net operating loss carryback deduction allowed as the result of the 1970 net operating loss was limited by the Audit Division to \$8,280.30, since this was the amount allowed by the Internal Revenue Service.

6. Petitioners contended that a different net operating loss computation should be made for New York income tax purposes, since they were required to report the addition and subtraction modifications of section 612 and 615 of the Tax Law. They argued that the Audit Division had no authority to limit the net operating loss to the amount allowed by the Internal Revenue Service.

CONCLUSIONS OF LAW

A. That the computation of a net operating loss is not controlled by the amount of loss shown on the New York State income tax return of the loss year. In the absence of any provisions in the Tax Law for a computation of a net operating loss, the provisions of the Internal Revenue Code control the computation of any net operating loss. Section 172 of the Internal Revenue Code provides for the computation of a net operating loss and a net operating loss carryback deduction. Said section does not provide for the modifications required by sections 612 and 615 of the Tax Law. Therefore, petitioners cannot determine a

net operating loss or claim a deduction for such loss in a manner different from that provided in section 172 of the Internal Revenue Code. (See Matter of Sheils et al. v. State Tax Commission, 52 N.Y.2d 954, rev'g 72 A.D.2d 896).

B. That the interpretation of a statute by the agency charged with the statute's enforcement is entitled to great weight (Matter of Howard V. Wyman, 28 N.Y.2d 434, 322 N.Y.S.2d 683). Tax deductions and exemptions depend upon clear statutory provisions and the burden is upon the taxpayer to establish a right to them (Matter of Grace v. State Tax Commission, 37 N.Y.2d 193, 371 N.Y.S.2d 715). Petitioners have not shown upon a clear statutory provision that they are entitled to a net operating loss deduction greater than that allowed by the Audit Division. (Petition of James H. Sheils and Margaret L. Shiels, supra; Petition of David Berg, State Tax Commission, April 17, 1981).

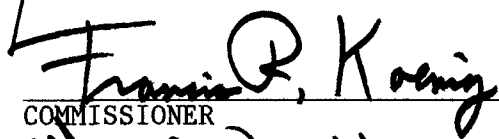
C. That the petition of John R. Atwell and Dorothy Atwell is denied and the Notice of Disallowance dated June 26, 1972 is sustained.

DATED: Albany, New York

OCT 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

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John R. & Dorothy Atwell
80 Weaver Dr. #3
Massapequa, NY 11758

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
27th day of November, 1981.

Bernie A. Shogren

J. Vredenburg

STATE OF NEW YORK

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AFFIDAVIT OF MAILING

State of New York
County of Albany

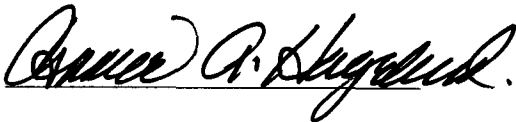
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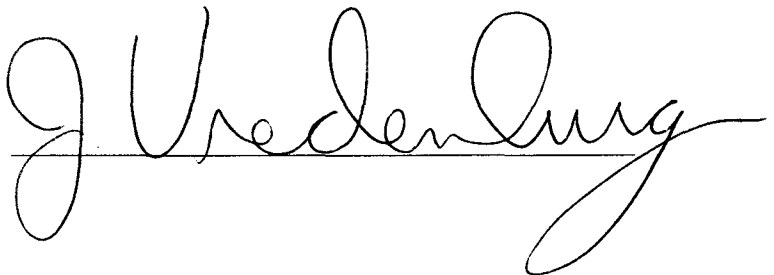
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TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

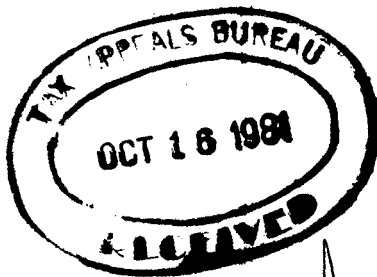
ALBANY, N. Y. 12227



AUTHORIZED TIME FOR FORWARDING HAS
EXPIRED.

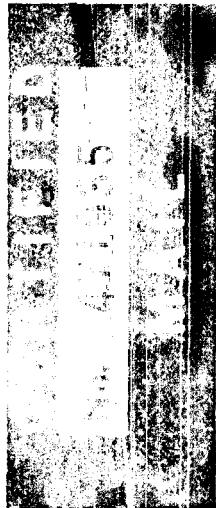
11-27-81

~~John R. & Dorothy Atwell
Greenville, NY 12083~~



BA
Per

11-27-81



REQUEST FOR BETTER ADDRESS

FD Requested by <i>J. H. Kelly</i>	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>10-15-81</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number <i>058-09-5719</i>	Date of Petition <i>50/00/00</i>
Name <i>John R. & Dorothy Atwell</i>	
Address <i>Greenville, N.Y.</i>	<i>12083</i>

Results of search by Files

<input checked="" type="checkbox"/> New address:	<i>1980 add. 80 Weaver St., # 3 Massapequa, N.Y. 11758</i>
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	<i>0-79-80 #</i>

Searched by <i>B. Kayal</i>	Section <i>Master Index</i>	Date of Search <i>10-29-81</i>
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER