

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Shelby C. & Kathryn W. Davis : 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 Years :
1965, 1968-1971. :

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Shelby C. & Kathryn W. Davis, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Shelby C. & Kathryn W. Davis
School House Ledge
Northeast Harbor, Maine

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
2nd day of October, 1981.

Annex C Hagedorn

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Shelby C. & Kathryn W. Davis :
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 Years :
1965, 1968 - 1971.

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Bertram Gezelter, CPA 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, CPA
c/o 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
2nd day of October, 1981.

Annice A. Hagedorn

J. Vredenburg

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

October 2, 1981

Shelby C. & Kathryn W. Davis
School House Ledge
Northeast Harbor, Maine

Mr. & Mrs. Davis:

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,

Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Bertram Gezelter, CPA
c/o 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	:	
SHELBY C. DAVIS and KATHRYN W. DAVIS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1965, 1968,	:	
1969, 1970 and 1971.	:	

Petitioners, Shelby C. Davis and Kathryn W. Davis, School House Ledge, Northeast Harbor, Maine, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1965, 1968, 1969, 1970 and 1971 (File No. 11489).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 18, 1978 at 9:15 A.M. Petitioners appeared by Bertram Gezelter, CPA, of the firm Biller and Snyder, CPA's. The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioners were entitled to claim a different net operating loss deduction for New York State income tax purposes than that claimed for Federal income tax purposes.

FINDINGS OF FACT

1. Petitioners, Shelby C. Davis and Kathryn W. Davis, filed a New York State combined income tax return (Form IT-208, "For resident married persons filing a joint Federal Return who elect to file separate New York State Returns") for 1965, a joint New York State income tax resident return for 1968, a New

York State combined income tax return for 1969, and nonresident income tax returns for 1970 and 1971.

2. On March 10, 1971, petitioners filed an amended combined income tax return (Form IT-208) for 1969, on which they claimed they were New York residents for the period January 1, 1969 through June 29, 1969 and nonresidents for the remainder at the year. Mr. Davis reported a New York tax due for the six-month resident period of \$1,048.50, and Mrs. Davis reported a New York tax due of \$587.76 for the same period. The Income Tax Bureau issued a refund to petitioners of \$6,574.46 for 1969.

3. Petitioners executed consents extending the period within which to issue assessments to October 15, 1975 for 1970 and 1971.

4. In November 1974, petitioners filed notices of Federal changes in taxable income (Form IT-115) for 1965 and 1968 through 1971. Said notices for 1965, 1969, and 1971 requested refunds based on net operating loss deductions. The notices for 1968 and 1970 included adjustments which decreased the Federal taxable loss for said years.

5. On June 9, 1975, the Income Tax Bureau issued a Statement of Refund Adjustment which stated, in part, as follows:

"Based on the Federal Audit Reports submitted, adjustments must be made for the taxable years 1965, 1969 and 1971.

The 1965 net adjustment decreasing taxable income totaled \$209,757.93 for the taxable year 1965 which includes the net operating loss deduction from the year 1968 and other adjustments. As the New York net operating loss or decrease in taxable income is the same as that for Federal purposes, the 1965 overpayment is being increased.

Also, based on the Federal Audit Report submitted, there is no portion of the 1970 loss available for the year 1971 as the total net operating loss was fully absorbed in the year 1969.

The net operating loss allowed as a deduction on the New York State income tax return is limited to the Federal taxable income of the carryback year and is computed as follows:

Original Federal taxable income for 1969	\$14,475.00
Additional income per Federal Audit Report	<u>61,911.07</u>
Adjusted Federal taxable income before net operating loss carryback	\$76,386.07

The maximum net operating loss deduction is being apportioned on the percentage for husband and wife on the total loss shown on Forms IT-115 at 68.5667% for the husband and 31.4333% for the wife."

On the basis of adjustments made, the 1968 net operating loss was \$209,757.93, resulting in an adjusted overpayment of \$20,975.79. Additional income tax was recomputed for 1969 in the amount of \$1,080.66. Additional income tax was recomputed for 1971 in the amount of \$22,643.63, totalling \$23,724.29. This resulted in a net additional income tax due of \$2,748.50.

6. The Income Tax Bureau denied petitioners' claims for refund. Petitioners timely filed a petition with respect to said denial and with respect to the imposition of additional tax due.

CONCLUSIONS OF LAW

A. That the amount of net operating loss and the portion thereof allowable as a deduction in each of the carryback years, is determined in accordance with the provisions of the Internal Revenue Code. The portion of the net operating loss allowable as a carryback deduction is limited (under section 172(b)(2) of the Internal Revenue Code) to the amount of Federal taxable income which may not be less than zero. The portions of the net operating loss allowed as deductions in the carryback years were deductions used in recomputing petitioners' Federal adjusted gross income for said years. Therefore, the amount allowed as a carryback for New York State income tax purposes is the lesser of the amount of the carryback for federal income tax purposes or the amount of federal

taxable income. The New York Tax Law makes no provision which would allow a net operating loss deduction in excess of that allowed for Federal income tax purposes (See Matter of James H. Sheils et al., v. State Tax Commission, 52 N.Y. 2d 954 rev'g 72 A.D. 2d 896).


B. That the petition of Shelby C. Davis and Kathryn Davis for 1965 and 1968 through 1971 is denied; the claims for refund for 1965, 1969, and 1971 are denied, and the Statement of Refund Adjustment dated June 9, 1975 is sustained.


DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

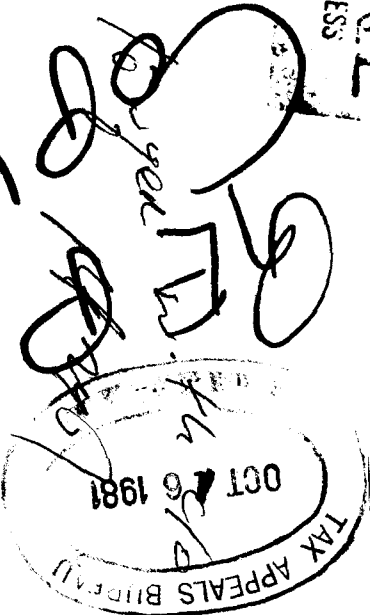
REGISTERED

MAIL

MOVED - LEFT NO ADDRESS
NEW YORK, N.Y. 10038
Bertram Gezelter, c/o Biller & Snyder
75 Maiden Lane
New York, NY 10038



NC



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

October 2, 1981

Shelby C. & Kathryn W. Davis
School House Ledge
Northeast Harbor, Maine

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NYS Dept. Taxation and Finance
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Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,
Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Bertram Gezelter, CPA
c/o 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
SHELBY C. DAVIS and KATHRYN W. DAVIS
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1965, 1968,
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B. That the petition of Shelby C. Davis and Kathryn Davis for 1965 and 1968 through 1971 is denied; the claims for refund for 1965, 1969, and 1971 are denied, and the Statement of Refund Adjustment dated June 9, 1975 is sustained.

DATED: Albany, New York

OCT 02 1981

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PRESIDENT


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