

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert S. & Janet M. Etzkorn :
: 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 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 10th day of April, 1981, he served the within notice of Decision by certified mail upon Robert S. & Janet M. Etzkorn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert S. & Janet M. Etzkorn
14 Taylor Dr.
Farmingdale, NY 11735

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
10th day of April, 1981.

Cornie A. Highland

Jay Vredenburg

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

April 10, 1981

Robert S. & Janet M. Etzkorn
14 Taylor Dr.
Farmingdale, NY 11735

Dear Mr. & Mrs. Etzkorn:

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
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| ROBERT S. ETZKORN and JANET M. ETZKORN | : | DECISION |
| | : | |
| for Redetermination of a Deficiency or | : | |
| for Refund of Personal Income Tax under | : | |
| Article 22 of the Tax Law for the Year | : | |
| 1971. | : | |

Petitioners, Robert S. Etzkorn and Janet M. Etzkorn, 14 Taylor Drive, Farmingdale, New York 11735, 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 1971 (File No. 15751).

Petitioners waived their right to a small claims hearing and have requested that a decision be rendered based on the record as presently contained in their file. Upon review of the file, the State Tax Commission hereby finds:

ISSUES

- I. Whether petitioners are subject to minimum income tax on items of tax preference.
- II. Whether petitioners are required to make a modification for allocable expenses pursuant to section 615(c)(4) of the Tax Law.
- III. Whether a penalty has been properly imposed for failure to file a declaration of estimated tax.

FINDINGS OF FACT

1. Petitioners, Robert S. Etzkorn and Janet M. Etzkorn, timely filed a joint New York State Income Tax Resident Return for the year 1971. On said return, petitioners reported a gain from the sale or exchange of capital assets of \$38,170.13. This gain represents the excess of long-term capital gains over short-term capital losses.

2. On April 11, 1975, the Audit Division issued a Notice of Deficiency against petitioners for the year 1971, asserting that additional personal income tax of \$576.06 was due together with penalty of \$103.36 (imposed pursuant to section 685(c) of the Tax Law) and interest. The deficiency is based on a Statement of Audit Changes, also dated April 11, 1975, wherein it was determined that the long-term capital gain deduction of \$38,170.13 represented a tax preference item and a minimum income tax due thereon. Also, a modification for allocable expenses totaling \$1,210.72 was made pursuant to section 615(c)(4) of the Tax Law.

3. In computing their 1971 Federal adjusted gross income petitioners, pursuant to section 1202 of the Internal Revenue Code of 1954, properly deducted from gross income fifty percent of the excess of long-term capital gains over short-term capital losses.

4. Petitioners have failed to produce any documentary evidence which refutes the Audit Division's deficiency nor have they shown that they meet any of statutory exceptions provided for in section 685(d) of the Tax Law which would permit the cancellation of the penalty imposed for failure to file a declaration of estimated tax.

CONCLUSIONS OF LAW

A. That the \$38,170.13 deducted from Federal gross income pursuant to section 1202 of the Internal Revenue Code is equal to one-half of the amount by which net long-term capital gains exceed net short-term capital losses and said amount constitutes an item of tax preference within the meaning and intent of section 57(a)(9)(A) of the Code. That New York minimum income tax has been properly assessed and computed within the meaning and intent of sections 601-A and 622 of the Tax Law.

B. That the modification for allocable expenses has been properly made and computed within the meaning and intent of sections 615(c)(4) and 623 of the Tax Law.

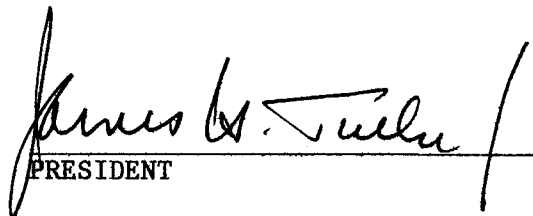
C. That petitioners have failed to meet the burden of proof imposed by section 689(e) of the Tax Law to show that the penalty asserted for failure to file a declaration of estimated tax is improper.

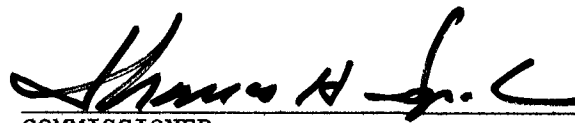
D. That the petition of Robert S. Etzkorn and Janet M. Etzkorn is denied and the Notice of Deficiency issued April 11, 1975 is sustained.

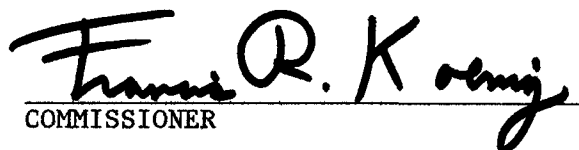
DATED: Albany, New York

APR 10 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER