

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Morris & Elsie Goldberg

:

:

: 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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Morris & Elsie Goldberg, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris & Elsie Goldberg
870 Fifth Ave.
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
6th day of November, 1981.

Annex A Hageland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Morris & Elsie Goldberg :

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for Redetermination of a Deficiency or a Revision :
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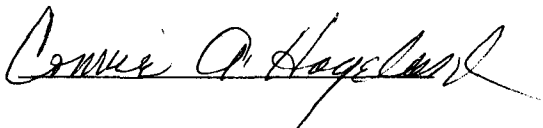
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of November, 1981, he served the within notice of Decision by certified mail upon Ernest H. Gelman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

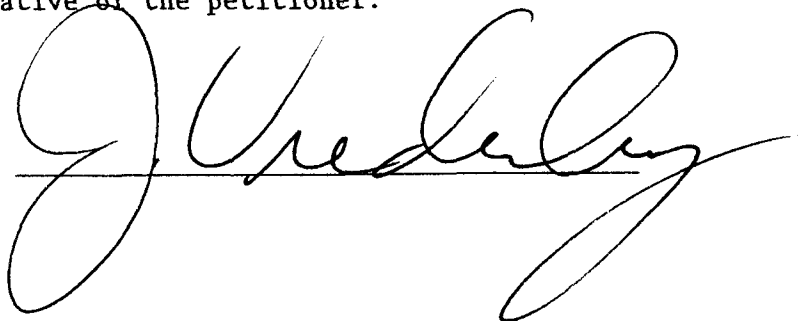
Ernest H. Gelman
Goldberg, Gelman, Robbins & DuBroff
230 Park Ave., Rm. 2315
New York, NY 10017

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
6th day of November, 1981.





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

November 6, 1981

Morris & Elsie Goldberg
870 Fifth Ave.
New York, NY 10021

Dear Mr. & Mrs. Goldberg:

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
Ernest H. Gelman
Goldberg, Gelman, Robbins & DuBroff
230 Park Ave., Rm. 2315
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MORRIS GOLDBERG and ELSIE GOLDBERG	:	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, Morris and Elsie Goldberg, 870 Fifth Avenue, 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 1971 (File No. 22672).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 21, 1980 at 11:45 A.M. Petitioner appeared by Goldberg, Gelman, Robbins & Dubroff, Esqs., (Ernest H. Gelman, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether petitioners sustained a net operating business loss for the tax year 1974 which may be carried back to the tax year 1971 and accordingly result in an overpayment of taxes for 1971 and thereby entitle petitioners to a partial refund of their 1971 taxes.

II. Whether deductions for interest expense and for real estate taxes relating to real estate development constituted business or nonbusiness deductions.

FINDINGS OF FACT

1. Petitioners, Morris and Elsie Goldberg, timely filed a New York State combined income tax return for 1971. Mr. Goldberg, a certified public accountant, was also engaged in the business of real estate development.

2. On March 25, 1976 petitioners timely filed a Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Tax paid for the tax year 1971. The claim was in the sum of \$4,301.91. Petitioners asserted the basis for the refund was their net operating business loss for the tax year 1974 which resulted in an allowable carryback to the tax year 1971. On February 25, 1977, the Audit Division issued a Notice of Disallowance (IT 50.2) in which it denied petitioners' claim in full on the ground that there was no carryback loss to 1971. Said Notice showed the following computation for 1974:

Federal taxable income		\$(30,585)
Exemptions	\$ 3,000	
50% long-term capital gain	1,309	
Excess deductions	<u>42,456</u>	<u>46,765</u>
Net Operating Loss		\$ -0-

3. In 1971 petitioners, with other partners, purchased over two hundred acres of land in Riverhead, New York. Petitioners became the exclusive owners of the land in 1969 and subsequently sold their son-in-law a 20 percent interest, therein for \$100,000.00.

4. Petitioners did not take any overt action towards developing residential housing on the land until 1976. As of the date of the hearing, herein, the petitioners still have not commenced the construction of any housing on the land in issue, asserting that the money market was slow. Prior to 1976 the land was unproductive; petitioners contending their sole reason for purchasing the land was to develop housing on it.

5. Petitioners, on both their 1974 State Income Tax Return and their 1974 Federal Income Tax Return, claimed deductions for mortgage interest and real property taxes attributed to the 200 acres of land. Originally, on both returns, the deductions were claimed as itemized deductions. However, subsequent to a Federal audit of their 1974 Federal income tax return, petitioners sought to enter the deductions as a business expense, resulting in a business loss, on their 1974 New York State combined income tax return thus becoming eligible for a business loss carryback to their 1971 State combined income tax return.

6. Petitioners testified that the Internal Revenue Service considered the aforementioned deductions as business deductions resulting in a business loss and accordingly allowed them a carryback from their 1974 Federal income tax return to their 1971 Federal income tax return. However, notwithstanding this testimony, petitioners did not offer any documentary proof that the deductions should be properly considered business deductions rather than nonbusiness deductions as originally claimed.

7. The Audit Division maintained the position that petitioners purchased the land in issue for speculation purposes.

CONCLUSIONS OF LAW

A. That petitioners did not sustain their burden of proof (section 689(e) of the Tax Law) to establish that the amount of the 1974 net operating loss which was a carryback to 1971 was properly computed pursuant to Treasury Regulation §1.172-3.

B. That petitioners failed to sustain their burden or proof that the land in issue was purchased and/or held for business purposes. Although, the deductions claimed for interest expense and for real estate taxes are allowable

deductions pursuant to sections 163 and 164 of the Internal Revenue Code they are not business deductions pursuant to section 162 of the Internal Revenue Code.

C. That the State Tax Commission is not bound to accept as correct any Federal change in taxable income but may conduct its own independent audit or investigation (20 NYCRR 153.4).

D. That the petition of Morris Goldberg and Elsie Goldberg is denied and the Notice of Disallowance is sustained.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER