

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Abraham & Vivian Halpern :
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 :
1972.

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Abraham & Vivian Halpern, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Abraham & Vivian Halpern
8447 N. West 10th St.
Ft. Lauderdale, FL 33322

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
30th day of October, 1981.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Abraham & Vivian Halpern :
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for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
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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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Bernard Halpern the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard Halpern
130 West 42nd St.
New York, NY 10036

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
30th day of October, 1981.

Carrie A. Bagellink

J. Vredenburg

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

October 30, 1981

Abraham & Vivian Halpern
8447 N. West 10th St.
Ft. Lauderdale, FL 33322

Dear Mr. & Mrs. Halpern:

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
Bernard Halpern
130 West 42nd St.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of
ABRAHAM HALPERN and VIVIAN HALPERN
for Redetermination of Deficiencies or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1972.

DECISION

Petitioners, Abraham Halpern and Vivian Halpern, 8447 N. West 10th Street, Fort Lauderdale, Florida 33322, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 (File Nos. 17696 & 17697).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on Wednesday, January 7, 1981 at 1:15 P.M. Petitioners, Abraham Halpern and Vivian Halpern, appeared by Bernard Halpern, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether section 612(b)(11) of the Tax Law, as added by Chapter 1 of the Laws of 1972, is violative of due process and unconstitutional, when applied to a 1972 long-term capital gain deduction which was generated as the result of the installment method of reporting a gain realized from a sale consummated in 1969.

II. Whether the notices of deficiency mailed to petitioners on November 22, 1976 were timely issued.

FINDINGS OF FACT

1. Petitioners, Abraham Halpern and Vivian Halpern, timely filed separate New York State nonresident income tax returns for 1972 on combined form IT-209. In the New York State columns of said return each petitioner reported a long-term capital gain of \$84,271.45.

2. On December 15, 1975 petitioners executed a consent extending the period of limitation upon assessment of personal income tax for the year 1972 until April 15, 1977. Said consent was validated by the Audit Division on December 30, 1975.

3. On November 22, 1976 separate notices of deficiency were issued to petitioners Abraham Halpern and Vivian Halpern for the year 1972. Additional personal income tax asserted against Abraham Halpern amounted to \$1,512.15, while personal income tax assessed against Vivian Halpern totaled \$1,399.33. Both notices of deficiency were based on statements of audit changes wherein total New York income reported by each petitioner was increased by \$16,854.29, said amount representing the 20 percent long-term capital gain deduction modification provided for in section 612(b)(11) of the Tax Law. The modification was computed by multiplying petitioners' long-term capital gain deduction (\$84,271.45 for each petitioner) by 20 percent. An adjustment was also made reducing New York itemized deductions by \$883.56 for the modification for allocable expenses [Tax Law section 615(c)(4)]. Petitioners did not protest the modification for allocable expense adjustment and, accordingly, same is not at issue.

4. In 1969 petitioners entered into a sale which produced a long-term capital gain. Petitioners elected to report said gain via the installment method [Internal Revenue Code section 453] whereby income is recognized in the

year the installment payments are actually received. In 1972 each petitioner realized a net long-term capital gain from the 1969 installment sale of \$168,542.90. Pursuant to section 1202 of the Internal Revenue Code, 50 percent of said capital gain (\$84,271.45) was deducted from gross income.

5. Section 612(b)(11) of the Tax Law was added by Chapter 1 of the Laws of 1972, approved on January 4, 1972 and effective for all taxable years beginning on or after January 1, 1972. Petitioners argue that to apply section 612(b)(11) of the Tax Law to a 1972 long-term capital gain deduction generated from a 1969 sale reported on the installment basis constitutes retroactive application of a substantive change in law, not merely a rate increase and, therefore, violates due process and is unconstitutional.

6. It was also contended that petitioners Abraham Halpern and Vivian Halpern did not receive the notices of deficiency dated November 22, 1976 and that the statute of limitations had therefore expired. Both notices of deficiency were addressed to petitioners at their Fort Lauderdale, Florida residence, the address shown on their 1972 New York return and the address still used by petitioners in December, 1978. The notices of deficiency were timely protested by petitioners within the statutory 90 day period via separately filed petitions for redetermination.

CONCLUSIONS OF LAW

A. That the constitutionality of the laws of the State of New York is presumed by the State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional; therefore, it must be presumed that the relevant sections of the law are constitutional to the extent that they relate to the imposition of the income tax liability on petitioners.

B. That the notices of deficiency dated November 22, 1976 were timely issued within the extended period of limitation upon assessment (April 15, 1977) and that said notices were also mailed to petitioners at their last known address pursuant to section 681(a) of the Tax Law. Additionally, the fact that petitions were timely filed for redetermination of the notices of deficiency provides ample evidence that said notices were in fact received by petitioners.

C. That petitioners chose to report the 1969 gain on the installment basis and, in doing so, took the chance that the rate of tax might change or that the proportionate amount of capital gain to be taken into account might change (Golden v. Commissioner, 47 B.T.A. 94). That the nature of any gain and the rate of tax to be applied is determined by the law in effect when payment is received (Rosenblatt v. New York State Tax Commission, 106 Misc.2d 490; 433 N.Y.S.2d 987).

D. That the petitions of Abraham Halpern and Vivian Halpern are denied and the notices of deficiency dated November 22, 1976 are sustained, together with such additional interest as is lawfully due and owing.

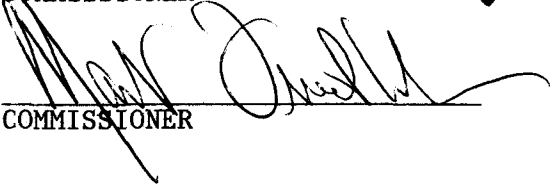
DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER