

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
David M. & Susan S. Hawkings :
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.

AFFIDAVIT OF MAILING

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 David M. & Susan S. Hawkings, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David M. & Susan S. Hawkings
139 East 94th St.
New York, NY 10028

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.

Carrie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
David M. & Susan S. Hawkings :
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for Redetermination of a Deficiency or a Revision :
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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 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, CPA's
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.

Carmie P. Haglund

J. Vredenburg

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

October 9, 1981

David M. & Susan S. Hawkings
139 East 94th St.
New York, NY 10028

Dear Mr. & Mrs. Hawkings:

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, CPA's
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
DAVID M. and SUSAN S. HAWKINGS
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1968.

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DECISION
:
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Petitioners, David M. and Susan S. Hawkings, 139 East 94th Street, New York, New York, filed a petition for redetermination of a deficiency or for the refund of personal income tax under Article 22 of the Tax Law for the year 1968 (File No. 12110).

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. Petitioners appeared by Bertram Gezelter, of Biller & Snyder, CPA's. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. 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.

II. Whether the Audit Division properly limited petitioners' 1968 net operating loss carryback deduction, when they filed a joint return in the loss year and they filed a separate return in the carryover year.

FINDINGS OF FACT

1. Petitioners, David M. Hawkings and Susan Hawkings, a filed New York State income tax resident return for 1970 and they filed New York State combined income tax returns for 1967 and 1968. On said returns petitioners reported addition and subtraction modifications required by sections 612 and 615 of the Tax Law.

2. On September 26, 1972, petitioner David M. Hawkings filed two claims for refund, one for the year 1967 and one for the year 1968. On October 10, 1973, the 1967 claim was allowed in full and the 1968 claim was allowed to the extent of \$331.31 and disallowed to the extent of \$798.14. On December 28, 1973, the Audit Division sent to petitioners a Notice of Disallowance based on the aforementioned disallowance.

3. During 1970, petitioner David M. Hawkings was a member of the partnership of Gregory & Sons of 40 Wall Street, New York City. That firm suffered substantial losses in that year and Mr. Hawkings reported his distributive share of said losses on petitioners' tax returns.

4. For 1970 petitioners computed for Federal income tax purposes a net operating loss of \$47,717.00. Said loss was computed with the modifications specified in section 172(d) of the Internal Revenue Code. Said loss was reduced by the Internal Revenue Service to \$47,699.00 "because of an \$18.00 excess of non-business deductions which was added back". Petitioners carried back the 1970 net operating loss to 1967 and 1968. Since only \$45,333.00 of the net operating loss carryback deduction was absorbed in 1967, the balance of \$2,366.00 was carried over to 1968. They filed claims for refunds with the Internal Revenue Service. Other than the adjustment previously mentioned, the

Internal Revenue Service allowed the refunds as claimed. The computation of the Federal net operating loss carryback deduction for 1968 is not in dispute.

5. For New York State income tax purposes petitioners computed for 1970 a net operating loss of \$52,698.00 and because of a transposition error, the loss as computed should have been \$53,148.00. 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 1967 and 1968 and they filed claims for refunds. (See Finding of Fact "2", supra.) The Audit Division allowed petitioners' claim for refund for the year 1967, however, the 1968 claim was reduced based on the allowance of a net operating loss carryback deduction of \$2,366.47, the same amount allowed for Federal purposes. Petitioners had claimed for New York purposes a net operating loss carryback deduction of \$8,067.57.

6. Petitioners contended that a different net operating loss computation should be made for New York State income tax purposes, since they were required to report the addition and subtraction modifications of section 612 and 615 of the Tax Law. Further, they contended that since they filed joint Federal income tax returns for both years (1967 and 1968), the limitation imposed by the Audit Division failed to recognize the difference caused by their filing of separate New York State income tax returns. Petitioners argued that the Audit Division had no authority to limit the net operating loss deduction 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 Shiels et al. v. State Tax Commission, 52 N.Y.2d 954, rev'g 72 A.D.2d 869).

B. That the Audit Division properly limited petitioners' 1968 net operating loss carryback deduction to an amount which is identical to that allowed for Federal purposes. Where the husband and wife file separate New York State returns, the benefit of the net operating loss carryback or carryover may be claimed only by the spouse who sustained the loss [20 NYCRR 116.6(b)]. There are no provisions in the Tax Law or the Regulations for a recomputation of a net operating loss carryback or carryover when husband and wife elect to file separate returns for New York State income tax purposes.

C. 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, 332 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. Sheils, supra; Petition of David Berg, State Tax Commission, April 17, 1981).

D. That the petition of David M. Hawkings and Susan Hawkings is denied and the Notice of Disallowance dated December 28, 1973 is sustained.

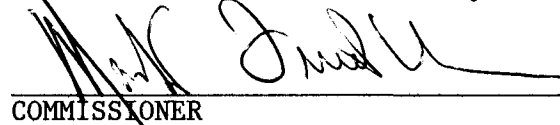
DATED: Albany, New York

STATE TAX COMMISSION

OCT 09 1981

PRESIDENT


COMMISSIONER


COMMISSIONER