

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Sidney & Debra S. Morgenbesser :

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 1971 & 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 5th day of February, 1981, he served the within notice of Decision by certified mail upon Sidney & Debra S. Morgenbesser, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney & Debra S. Morgenbesser  
5 Dahlia Rd.  
Somerset, NJ 08873

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  
5th day of February, 1981.

*Conrad A. Haglund*

*J. Vredenburg*

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

February 5, 1981

Sidney & Debra S. Morgenbesser  
5 Dahlia Rd.  
Somerset, NJ 08873

Dear Mr & Mrs. Morgenbesser:

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  
SIDNEY MORGENBESSER and DEBRA S. MORGENBESSER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law for the Years 1971 and  
1972.

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DECISION

Petitioners, Sidney Morgenbesser and Debra S. Morgenbesser, 5 Dahlia Road, Somerset, New Jersey 08873, 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 1971 and 1972 (File No. 12271).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1980 at 2:45 P.M. Petitioner Sidney Morgenbesser appeared pro se and for his wife, petitioner Debra S. Morgenbesser. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether carryover capital losses and capital losses distributed from a partnership constitute losses from New York sources.

FINDINGS OF FACT

1. On June 19, 1972, the Income Tax Bureau received a joint New York State Income Tax Nonresident Return for the year 1971, on which petitioners, Sidney Morgenbesser and Debra S. Morgenbesser, allocated total income of \$28,377.00, based on the number of days worked within and without New York State.

2. On June 18, 1973, the Income Tax Bureau received a joint New York State Income Tax Nonresident Return for the year 1972, on which petitioners, Sidney Morgenbesser and Debra S. Morgenbesser, reported business income of \$32,194.00 and a capital loss of \$1,000.00.

3. On June 6, 1975, the Audit Division issued a Notice of Deficiency against petitioners for the years 1971 and 1972 imposing tax due of \$1,119.37, plus penalty and interest, along with an explanatory Statement of Audit Changes, which indicated:

- (a) that for the year 1971, partnership income could not be allocated based on the number of days worked within and without New York State. This adjustment was conceded by petitioner Sidney Morgenbesser and is not at issue.
- (b) that for the year 1972, net long-term capital gains (from a New York Partnership) are taxed by New York State at 60 percent. This item was not challenged by petitioners.
- (c) that for the year 1972, petitioners failed to increase their New York income by their distributive share of New York City unincorporated business tax deducted by a New York partnership. This item was conceded by petitioner Sidney Morgenbesser and is not at issue.
- (d) that a penalty of \$3.65 was imposed for the year 1971 pursuant to section 685(a)(1) of the Tax Law. Petitioners did not challenge this item.

Accordingly, petitioners New York taxable income was adjusted and recomputed as follows:

<u>PARTNERSHIP</u>	<u>1971</u>	<u>1972</u>
Ordinary Income	\$29,946.00	\$32,747.00
Additional First Year Depreciation	(48.00)	
Net Long Term Capital Gain at 50% of \$469.00	234.50	
Net Long Term Capital Gain at 60% of \$378.00		226.80
Total New York City Unincorporated Business Tax Modification		1,236.17
Total New York Income	\$30,132.50	\$34,209.97
New York Itemized Deductions	7,267.00	8,715.00
Balance	\$22,865.50	\$25,494.97
Exemptions	2,600.00	2,600.00
New York Taxable Income	<u>\$20,265.50</u>	<u>\$22,894.97</u>

4. Petitioner Sidney Morgenbesser raised three issues. The first issue was that the deficiency did not reflect contributions of \$537.00 for the year

1971 and \$516.00 for the year 1972, as distributed by a New York partnership. This item was conceded by the Audit Division and is no longer an issue.

5. The second issue raised by petitioner Sidney Morgenbesser was that the deficiency did not reflect carryover capital losses incurred prior to 1970, when petitioner was a resident of New York State. Petitioner argued that since the carryover capital losses were originally incurred when he was a resident of New York, they could be carried over into the nonresident years of 1971 and 1972. Petitioners, Sidney Morgenbesser and Debra S. Morgenbesser, did not submit any documentary evidence establishing the source, nature and character of the carryover losses at issue.

6. The third issue raised by petitioner Sidney Morgenbesser was that the deficiency did not reflect capital losses distributed from other New York partnerships. Petitioner submitted a Federal schedule K-1 (partner's share of income credits, deductions, etc.) for the year 1972, which revealed the following:

<u>DISTRIBUTIONS SHARE ITEM</u>	<u>AMOUNT</u>
Ordinary partnership loss	(\$ 37.00)
Dividends	44.00
Short term capital loss	( 78.00)
Long term capital loss	( 223.00)

These items were from a New York partnership and were reported on petitioners' Federal tax returns for 1972. No documentary evidence was submitted for the year 1971 establishing other capital losses from New York sources.

#### CONCLUSIONS OF LAW

A. That petitioners, Sidney Morgenbesser and Debra S. Morgenbesser, have failed to sustain the burden of proof as required under section 689(e) of the Tax Law to establish that certain capital losses claimed for 1971 were from New York sources and that the carryover losses incurred prior to the year 1970, constituted losses from New York sources within the meaning and intent of sections 637(a)(1) and 632(b) of the Tax Law.

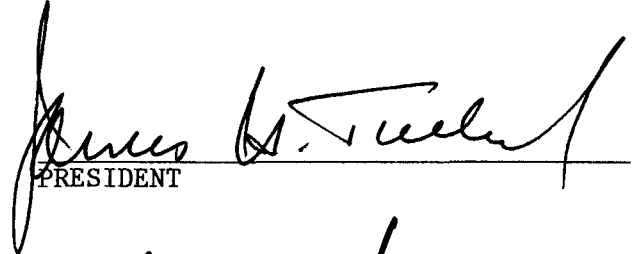
B. That the petition of Sidney Morgenbesser and Debra S. Morgenbesser is granted to the extent established by a fair preponderance of all the evidence submitted, to wit; contributions of \$469.00 for the year 1971 and \$516.00 for the year 1972 and the 1972 distributive share items listed in paragraph 6 of this decision.

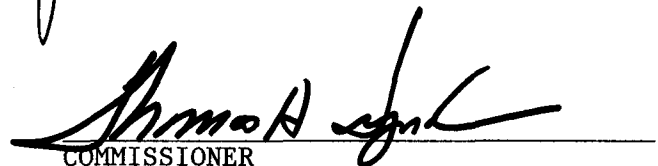
C. That the Audit Division is hereby directed to modify accordingly the Notice of Deficiency issued June 6, 1975; and that except as so granted, the petition is in all other respects denied.

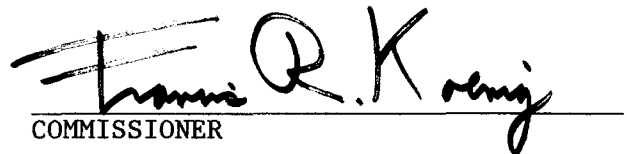
DATED: Albany, New York

FEB 05 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER