

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Jerome & Nancy Nammack :  
Sprague & Nammack :  
: 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 :  
1974. :

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State of New York  
County of Albany

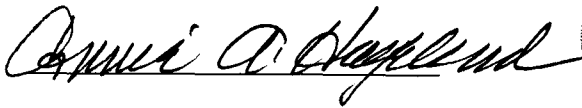
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Jerome & Nancy Nammack, Sprague & Nammack the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

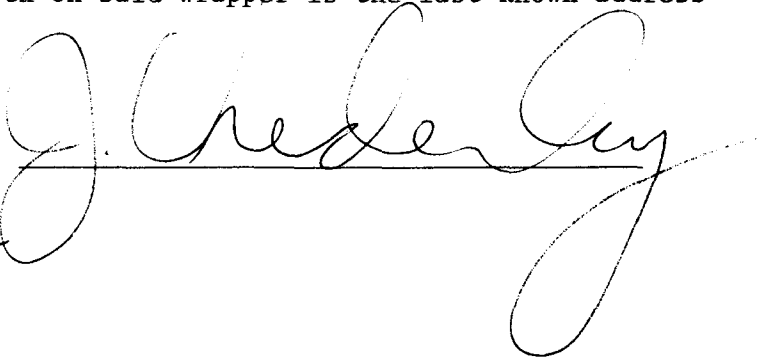
Jerome & Nancy Nammack  
Sprague & Nammack  
20 Exchange Place  
New York, NY 10005

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  
27th day of November, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Jerome & Nancy Nammack :  
Sprague & Nammack :  
: AFFIDAVIT OF MAILING  
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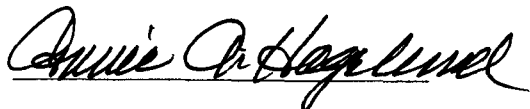
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Jack Wong the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

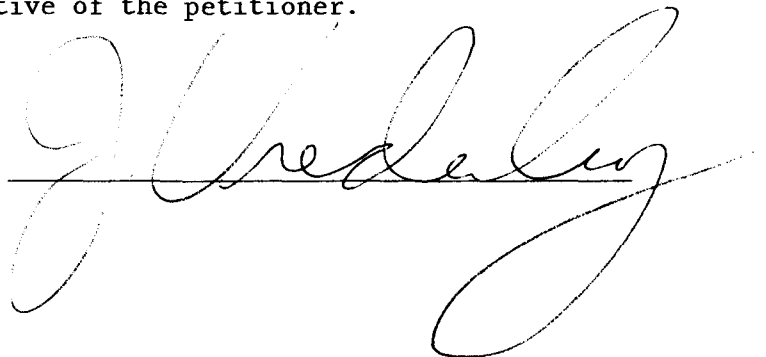
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004

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  
27th day of November, 1981.

  
Annie O. Haglund

  
Jay Vredenburg

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

November 27, 1981

Jerome & Nancy Nammack  
Sprague & Nammack  
20 Exchange Place  
New York, NY 10005

Dear Mr. & Mrs. Nammack:

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  
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JEROME W., JR. and NANCY NAMMACK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

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Petitioners, Jerome W., Jr. and Nancy Nammack, c/o Sprague & Nammack, 20 Exchange Place, New York, New York 10005, 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 1974 (File No. 23125).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 23, 1979 at 2:45 P.M. The hearing was continued and concluded before James T. Prendergast, Hearing Officer, at the same offices on July 24, 1979 at 2:45 P.M. Petitioner appeared by Jack Wong, CPA. The Audit Division appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUES

- I. Whether the sale of a seat on a stock exchange results in an ordinary business loss rather than a capital loss.
- II. Whether the loss was properly allocated to petitioners.

FINDINGS OF FACT

1. Petitioners, Jerome W., Jr. and Nancy Nammack, timely filed a joint New York State income tax return for 1974.
2. On February 1, 1978, the Audit Division issued a Statement of Audit Changes against petitioners. Said Statement asserted additional income tax due

for the year 1974, stating that Mr. Nammack's distribution from the partnership of Sprague & Nammack was increased by \$65,164.00, on the grounds that the loss on the sale of a stock exchange seat constitutes a capital loss rather than an ordinary business loss. Accordingly, on April 4, 1978, the Audit Division issued a Notice of Deficiency for 1974 against petitioners for \$7,629.00 in personal income tax, plus \$1,925.85 in interest, for a total of \$9,554.85.

3. Petitioners timely filed a petition for redetermination of a deficiency or for refund of personal income tax for the year 1974.

4. Jerome W. Nammack, Jr. is a general partner in the limited partnership of Sprague & Nammack.

5. Sprague & Nammack is a specialist firm on the New York Stock Exchange which has the duty of maintaining a market in particular securities sold on the exchange. Sprague & Nammack earns most of its income from buying and selling securities and from commissions paid to it for buying and selling for others. In order to do this it must own a beneficial interest in a membership on the New York Stock Exchange, commonly known as a seat.

6. In December, 1969, Sprague & Nammack purchased a seat for \$264,009.33. The partnership agreement provided that any increase or decrease in the value of the membership or stock exchange seat was to be distributed as follows:

"The profit or increase in the value of this said membership shall be credited, and the loss or depreciation therein shall be charged to each of the general partners in the same proportion in which they share profit and losses respectively."

7. Under the partnership agreement, 37 percent of the profit or loss of the partnership was to be apportioned to Jerome W. Nammack, Jr.

8. Sprague & Nammack had an "a-b-c" agreement in which the seat was held by Robert P. Kelly, a general partner of the partnership. He was the nominally registered owner of this seat. According to the partnership agreement, Mr.

Kelly agreed not to sell the seat unless he received the permission of the partnership.

9. In September, 1974, Sprague & Nammack sold the New York Stock Exchange membership in question for \$75,073.37. It claimed an ordinary business loss deduction on the New York State Partnership Return in the amount of \$188,935.96. The portion of the loss attributable to Jerome W. Nammack, Jr. is \$69,906.31.

10. The Internal Revenue Service audited the Federal partnership returns of Sprague & Nammack. No adjustment was made to the partnership's treatment of the loss on the sale of the stock exchange seat on the federal partnership return. Accordingly, petitioners argue that since New York State tax returns conform with the Federal tax returns, no adjustment should be made.

#### CONCLUSIONS OF LAW

A. That the Tax Commission is not required to accept as correct any Federal change in taxable income but may conduct an independent audit or investigation (20 NYCRR 153.4).

B. That section 1221 of the Internal Revenue Code and Treas. Reg. section 1.1221-1(a) define a "capital asset" to include all property held by the taxpayer (whether or not connected with his trade or business), with certain exceptions. The sale of the seat does not meet any of the exceptions of section 1221 and is therefore, a capital asset of the partnership.

C. That the seat was a capital asset of the partnership. The seat was bought under a partnership agreement to share profits and losses from the sale of the seat. "The agreement to share profits and losses on a seat is inconsistent with any reasonable theory that it was not a capital asset" (Munson v. Commission, 100 F.2d 363).

D. That the loss recognized on the sale of the seat is a capital loss and section 1211 of the Internal Revenue Code provides for the limitation of capital losses.

E. That the loss allocated to Jerome W. Nammack, Jr. was improperly characterized on an ordinary loss.

F. That the portion of the loss attributable to Jerome W. Nammack, Jr. is \$69,906.31. However, section 689(d)(1) of the Tax Law prohibits the increasing of the Notice of Deficiency, since a claim for increasing the Notice of Deficiency was not asserted by the Audit Division at or before the hearing.

G. That the petition of Jerome W., Jr. and Nancy Nammack is denied and the Notice of Deficiency issued on April 4, 1978 is sustained.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER