

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stuart, Olga & Patricia Robinson :
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 :
1968-1971.

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 11th day of December, 1981, he served the within notice of Decision by certified mail upon Stuart, Olga & Patricia Robinson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stuart, Olga & Patricia Robinson
220-55 46th Ave., Apt. 7W
Bayside, NY 11361

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
11th day of December, 1981.

Barrie A. Hagelund

J. Vredenburg

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

December 11, 1981

Stuart, Olga & Patricia Robinson
220-55 46th Ave., Apt. 7W
Bayside, NY 11361

Dear Mr. & Mrs. Robinson:

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 TAX COMMISSION

I. Whether petitioner's filing of amended returns for the years 1968 through 1970 in May, 1972 was a timely application for a claim of foreign

expropriation loss under section 165(i) of the United States Internal Revenue Code.

II. Whether a determination of timeliness for federal tax purposes controls the issue under the Tax Law of the State of New York.

III. Whether a letter from the Internal Revenue Service, dated August 23, 1972, permitting recognition in 1971, binds the Tax Commission as to the years for which the loss is available.

IV. Whether the Foreign Claims Settlement Commission's Decision No. CU-6809, dated October 20, 1971, amounts to evidence petitioner can urge as satisfying his burden of persuasion with respect to his expropriation loss.

V. Whether the Cuban Community Property Law, which was applied by the Foreign Claims Settlement Commission for purposes of the United States-Cuban Settlement, is inapplicable under the laws of the State of New York.

VI. Whether section 687 of the Tax Law precludes petitioner's recovery of interest.

VII. Whether petitioner, with respect to losses claimed to be in excess of those accepted by the Foreign Claims Settlement Commission, adduced sufficient evidence to substantiate such losses.

VIII. Whether petitioner adduced sufficient evidence to substantiate any additional losses with respect to the years herein involved.

IX. Whether petitioner substantiated the business expenses for 1969 and 1970 and itemized deductions for 1970 disallowed by the Audit Division.

FINDINGS OF FACT

1. Petitioners Stuart Robinson and Olga Robinson timely filed a New York State Combined Income Tax Return (IT208) for 1968. Petitioner timely filed a New York State Income Tax Return (IT201) for 1969. Petitioners Stuart Robinson

and Patricia Robinson timely filed a New York State Combined Income Tax Return (IT208) for 1970. Petitioners Stuart Robinson and Patricia Robinson timely filed a New York State Income Tax Return (IT201) for 1971.

2. On May 31, 1972 petitioner filed amended New York State income tax returns for 1968, 1969 and 1970 claiming a refund of all income taxes paid on said returns. Attached to each return was an explanation that on October 28, 1971 the Foreign Claims Settlement Commission of the United States confirmed petitioner's Cuban expropriation losses. Petitioner claimed said loss on his 1971 Federal and New York State income tax returns and computed a net operating loss for 1971 which he carried back to 1968, 1969 and 1970.

3. On March 5, 1973 the Audit Division issued notices of disallowance to petitioners for 1968, 1969 and 1970. Said notices stated:

"Even though the Foreign Claims Settlement Commission has certified that you suffered a loss as a result of the actions of the government of Cuba, the Commission only determines the validity and amount of the claim against such foreign country. Therefore, the loss claimed on your 1971 return has been disallowed and there is no net operating loss available as a carryback."

4. On April 13, 1973, the Audit Division issued notices of deficiency with attached statements of audit changes to petitioner and to petitioners Stuart Robinson and Patricia Robinson for 1969 and 1970 respectively, for additional personal income taxes of \$599.53 and \$1,052.24, respectively, plus interest. The Statement of Audit Changes for 1969 disallowed business expenses of \$4,790.50 and the Statement for 1970 disallowed business expenses of \$5,475.26, medical expenses of \$1,053.00, contributions of \$550.00 and miscellaneous expenses of \$600.00, because petitioners did not appear for an examination of their returns.

5. On August 26, 1974 the Audit Division issued to petitioners Stuart Robinson and Patricia Robinson a Notice of Deficiency for 1971 in the amount of

\$1,857.90 plus interest. The Statement of Audit Changes attached to said Notice stated:

"Even though the Foreign Claims Settlement Commission of the United States certified in 1971 that you suffered a loss as a result of the actions of the government of Cuba, such action does not give rise to a loss on your 1971 return as the losses were incurred during the years 1960 and 1961. Therefore, the loss claimed on your 1971 return is disallowed..."

6. Petitioner founded, as sole shareholder and president, International Lema Co. (Lema), a New York corporation, to engage in the export sales of lighting fixtures to Latin America and to pass on discounts to his Cuban-Latin American companies as a bulk purchaser of materials.

7. Petitioner, pursuant to his plan to establish a series of manufacturing enterprises throughout Latin America, moved to Cuba in 1955. He and Inocencia A. Blanco each invested \$25,000.00 and incorporated Compania Lamparas Futurama SA (Lamparas) in Havana, Cuba, to engage in the manufacture of lighting fixtures. In 1957 he bought out Mr. Blanco for \$41,000.00 and assumed full ownership and control of Lamparas.

8. Petitioner and his family departed from Cuba in 1960. In May 1961 Lamparas was intervened by the Cuban Government and in October 1961 it was nationalized. During his stay in Cuba, petitioner remained a domiciliary and resident of New York State.

9. Petitioner and his then wife, Olga, executed a separation agreement, dated August 23, 1968. The agreement was governed by the laws of New York State. He subsequently divorced Olga and married Patricia.

10. Petitioner submitted a copy of Internal Revenue Service Form 1909, Computation of Income Tax - Individuals which showed additional tax of \$1,684.45 for 1961. Attached to said form was an explanation which indicated the Internal Revenue Service (I.R.S.) disallowed as Cuban losses, stock loss from Lamparas

of \$25,000.00 and a personal property loss of \$5,700.00. The I.R.S. allowed a capital loss composed of the following:

Lema	\$ 5,000.00
Lamparas	25,000.00
Lamparas	<u>41,000.00</u>
Total Capital Loss	\$71,000.00
Statutory Limitation	\$ 1,000.00

11. Petitioner submitted a copy of his 1967 U.S. Individual Income Tax Return. Attached to said return was a schedule for long-term capital loss carryover which indicated a loss for 1961 of \$75,000.00 and the statutory limitation taken of \$1,000.00 from 1961 through 1965 and \$2,500.00 for 1966. A notation at the bottom of the schedule states: "Settled with IRS 1/7/66-Appellate Court #238289204/62."

12. Petitioner submitted two reports from the Foreign Claims Settlement Commission (Commission), a proposed decision dated September 8, 1971 and a final decision dated October 20, 1971. The Commission determined that petitioner and his first wife, Olga, as a result of the actions of the Cuban Government suffered a loss as follows:

<u>Item</u>	<u>Stuart E.</u>	<u>Olga</u>	<u>Date of Loss</u>
Lamparas	\$ 43,696.37	\$ 43,696.37	May 31, 1961
Debt	2,090.07	--	May 31, 1961
Ford Car	490.00	490.00	December 1, 1960
Mercury Car	1,130.00	1,130.00	December 1, 1960
Personal Property	4,955.00	4,955.00	December 1, 1960
Sub-Total	<u>\$ 52,361.44</u>	<u>\$ 50,271.37</u>	
Interest	52,361.44	50,271.37	
Total	<u>\$104,722.88</u>	<u>\$100,542.74</u>	

The Commission, applying Cuban community property law, determined Olga's loss. Petitioner claimed that the full \$102,632.81 loss should be attributable to him because Olga was never a claimant before the Commission and both were residents of New York State so that Cuban community property law would not apply to them.

13. Petitioner submitted a letter from the I.R.S. dated August 23, 1972 which stated that his application for tentative carryback refund had been processed. The letter indicated that he reported a net operating loss in 1971 and carried back said loss to his 1968, 1969 and 1970 returns.

14. Petitioner testified that the loss years were actually 1960 and 1961 and that the statute of limitations had run for those years. Further, he testified that neither he nor the Federal government had his returns available for computing his operating loss for 1960 or 1961 and based on mitigation of the statute of limitations (section 1311 of the I.R.C.) the I.R.S. allowed him to claim the loss in 1971.

15. At a conference prior to the hearing, petitioner substantiated part of the business expenses deducted for 1969 and 1970 and part of the itemized deductions for 1970. Business expenses for 1969 were allowed in the amount of \$2,101.50. The adjustments allowed for 1970 were business expenses \$2,672.26, medical expenses of \$672.00, contributions of \$150.00 and miscellaneous expenses of \$200.00.

16. At the hearing held on July 17, 1979, petitioner claimed that his Cuban expropriation loss should be about \$180,000.00 plus interest. He had reported on his 1971 returns said loss in the amount of \$99,397.00. The \$180,000.00 loss consisted of his \$52,361.44 plus Olga Robinson's share of \$50,271.37 reported by the Commission, the \$25,000.00 and \$41,000.00 attributable to Lamparas and the \$5,000.00 attributable to Lema (see Finding of Fact "10", supra) and a \$5,000.00 (\$4,000.00) additional loss claimed to be allowed by the Appellate Court (see Finding of Fact "11", supra).

17. Copies of petitioner's 1969 and 1970 Federal income tax returns contained a schedule for his long-term capital loss carryover of \$75,000.00

from 1961. As of 1969 said loss had been reduced to \$63,105.00 and as of 1970 the loss was reduced to \$62,105.00 as a result of the statutory limitation for capital losses deducted on his prior year returns. No adjustment was made for these deductions already claimed by petitioner on his prior year returns.

CONCLUSIONS OF LAW

A. That there shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise I.R.C. §165(a).

In the case of an individual, the deduction under subsection (a) shall be limited to -...

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft... I.R.C. §165(c)

A loss shall be allowed as a deduction under I.R.C. §165(a) only for the taxable year in which the loss is sustained. Treas. Reg. section 1.165-1(d).

B. That section 165(i) of the I.R.C. was added by section 238 of P.L. 88-272 and amended by section 3 of P.L. 88-348. Said section provided that any loss of tangible property resulting from expropriation by the Government of Cuba is treated as a loss from a casualty within the meaning of section 165(c)(3) of the Code, relating to limitation on loss of individuals. Such loss is treated as having been sustained on October 14, 1960, unless it is established that the loss was sustained on some other day. In any case, where the statutory period of limitations has expired, refund or credit of any overpayment of tax attributable to the application of section 165(i) of the Code may nevertheless be made or allowed if claim therefor was filed before January 1, 1965. Section

165(i) of the Code applies in respect of losses sustained as the result of Cuban expropriations occurring before January 1, 1964, with respect to taxable years ending after December 31, 1958 (Rev. Rul. 65-87, 1965-1 C.B. 111).

Section 165(i) was also amended by P.L. 91-677. Said bill provided that Cuban expropriations losses of individuals with respect to investment property are to be treated in the same way as Cuban expropriation losses of individuals with respect to personal property under present law; that is, as casualty losses which may be carried back and carried over under the net operating loss provisions. The bill also provided that, notwithstanding any law or rule of law, refund or credit of any overpayment attributable to the amendments made by the bill, may be made or allowed if a claim for refund or credit is filed before July 1, 1971. As in the case of expropriations of personal use property, an investment property loss is to be treated as having been sustained on October 14, 1960, unless it is established that it was sustained on some other day. (See Committee Report on P.L. 91-677, '72 vol. 2 Stand. Fed. Tax Rep. (CCH) 21, 007-3).

C. That petitioner's filing of amended returns for the years at issue in May, 1972 was not a timely application for a claim of foreign expropriation loss under section 165(i) of the I.R.C. Refund claims for losses on tangible property were required to be filed before January 1, 1965 and refund claims for losses on investment property were required to be filed before July 1, 1971 (see Ogden v. United States, 432 F.Supp. 214). Further, under Treas. Reg. section 1.165-1(d) losses are required to be deducted in the year sustained. Since petitioner's losses were sustained in 1960 and 1961, such losses are required to be deducted in said years.

D. That section 1311 of the I.R.C. does provide for the mitigation of the statute of limitations when an inconsistent position is held. However, the disallowances by the I.R.S. of petitioner's losses in 1961 were correct under the then current law. When the law was amended allowing such losses to be deducted without regard to the statute of limitation on refund or credit, petitioner was allowed to claim a refund for the closed year. Since the I.R.S. did not hold an inconsistent position at the time of the disallowance of the losses and petitioner was allowed to claim a refund within the time allowed by section 165(i) of I.R.C., section 1311 would not apply in this instance.

E. That section 687 of the Tax Law provides for the limitation on credit or refund. There are no provisions under said section for Cuban expropriation losses. Therefore, a determination of timeliness for Federal tax purposes would control for New York State tax purposes.

F. That the Tax Commission is not required to accept as correct any (Federal) changes in income but may conduct an independent audit or investigation within the meaning and intent of section 697(b) of the Tax Law.

G. That issues IV, V, VI, VII and VIII are rendered moot, since the statute of limitations tolled with respect to petitioner's filing for refunds as a result of Cuban expropriation losses.

H. That petitioner substantiated in part, the business expenses for 1969 and 1970 and itemized deductions for 1970 disallowed by the Audit Division. The Audit Division is directed to modify the notices of deficiency dated April 13, 1973 for 1969 and 1970 as shown in Finding of Fact "15", supra.

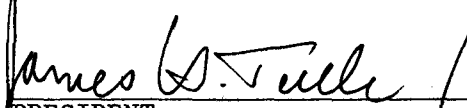
I. That the petition of Stuart E. Robinson and Olga Robinson is denied and the Notice of Disallowance for 1968 dated March 5, 1973 is sustained. The petitions of Stuart E. Robinson and Stuart E. Robinson and Patricia Robinson


are granted to the extent indicated in Conclusion of Law "H", supra but in all other respects denied; the notices of deficiency for 1969 and 1970 dated April 13, 1973 are sustained as modified; the notices of disallowance for 1969 and 1970 dated March 5, 1973 are sustained. The petition of Stuart E. Robinson and Patricia Robinson is denied and the Notice of Deficiency for 1971 dated August 26, 1974 is sustained.


DATED: Albany, New York

DEC 11 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER