STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition of Bernard & Ruth Weinflash | : | |
| | : | 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 1967-1970 | : | |

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 June, 1981, he served the within notice of Decision by certified mail upon Bernard & Ruth Weinflash, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard & Ruth Weinflash
33 Phelps Ave.
Creskill, NJ 07626

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 June, 1981.

Annie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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| In the Matter of the Petition of Bernard & Ruth Weinflash | : | |
| | : | 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 1967-1970 | : | |

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 June, 1981, he served the within notice of Decision by certified mail upon Nathan Weinflash the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Nathan Weinflash
163-57 17 Ave.
Whitestone, NY 11357

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
5th day of June, 1981.

Connie A. Hayeland

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

June 5, 1981

Bernard & Ruth Weinflash
33 Phelps Ave.
Creskill, NJ 07626

Dear Mr. & Mrs. Weinflash:

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
Nathan Weinflash
163-57 17 Ave.
Whitestone, NY 11357
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| BERNARD WEINFLASH and RUTH WEINFLASH | : | DECISION |
| for Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law for the Years 1967, 1968, 1969 and 1970. | : | |

Petitioners, Bernard Weinflash and Ruth Weinflash, 33 Phelps Avenue, Creskill, New Jersey 07626, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1967, 1968, 1969 and 1970 (File No. 14229).

A formal hearing was held before Harvey Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 25, 1977 at 2:45 P.M. and was continued to conclusion before Harry Issler, Hearing Officer, at the same location on February 8, 1979 at 2:45 P.M. Petitioners appeared by Nathan Weinflash, CPA. The Audit Division appeared by Peter Crotty, Esq. (James J. Morris, Jr. and Bruce M. Zalaman, Esqs., of counsel).

## ISSUES

I. Whether petitioners sustained a New York net operating loss for the tax year 1970 entitling them to a carryback to the tax years 1967, 1968 and 1969 thereby reducing deficiencies in tax for 1968, 1969 and 1970.

II. Whether petitioner Bernard Weinflash was allowed to determine his own percentage of allocation in computing his New York income or whether he was required to allocate his distributive share of partnership income based on the partnership allocation percentage.

III. Whether the increased deficiency attributable to the Notice of Deficiency insofar as it applies to tax year 1968 was barred by the Statute of Limitations.

FINDINGS OF FACT

1. Petitioners timely filed joint New York State income tax nonresident returns for the years 1967, 1968, 1969 and 1970.

2. Petitioners, on September 15, 1971, filed three separate IT-113X's (Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax) for years 1967, 1968 and 1969. They paid respectively personal income tax of $4,841.00, $8,666.38 and $7,233.62. The basis alleged for the refunds is a carryback resulting from an alleged 1970 business loss in the sum of $177,100.00; first carried back to 1967 and then to succeeding years 1968 and 1969. On April 12, 1974 the Income Tax Bureau issued a formal Notice of Disallowance in full of petitioners' claims for refunds for 1967, 1968 and 1969.

3. Petitioners on February 20, 1973 signed a consent extending the period of limitation on assessment for 1969 to April 15, 1974.

4. On June 5, 1972, the Income Tax Bureau issued separate statements of audit changes against petitioners imposing additional income taxes plus interest due for the years 1968, 1969 and 1970. The additional personal income taxes due were as follows:

| | |
|---|---|
| 1968 | $3,132.36 |
| 1969 | 3,654.00 |
| 1970 | 2,281.00 |
| TOTAL | $9,067.36 |

On February 25, 1974, the Income Tax Bureau issued a Notice of Deficiency against petitioners based on the aforesaid statements of audit changes.

5. The statements of audit changes issued to petitioners contained the following explanations for each of the respective taxable years as follows:

(1968) "As recomputation of your 1970 New York State return resulted in taxable income rather than a net operating loss, your 1968 claim for refund based on a 1970 net operating loss carryback deduction is disallowed.

Examination of the 1968 partnership return of Charles Plohn & Company disclosed that New York State income is reportable at 90.119% rather than the 70.8645% as shown on your return. As there is an omission of more than 25% of your New York adjusted gross income, your tax liability is recomputed by virtue of section 683(b) (sic) of the Tax Law.

| | FEDERAL AMOUNT | NEW YORK STATE AMOUNT |
|---|---|---|
| Reported total NY income | $135,400.00 | $ 91,674.00 |
| Additional partnership income | | 26,716.00 |
| Modification at Line 2, Page 1 also reportable under Federal amount | 2,681.00 | |
| Adjusted total New York Income | $138,081.00 | $118,390.00 |
| Deductions: $118,390/$138,081 x $24,083 = | | 20,649.00 |
| Balance | | $ 97,741.00 |
| Reported balance | | 75,367.00 |
| Additional taxable income | | $ 22,374.00 |

ADDITIONAL PERSONAL INCOME TAX DUE AT 14% $3,132.36"

(1969) "As recomputation of your 1970 New York State return resulted in taxable income rather than a net operating loss, your 1969 claim for refund based on the 1970 net operating loss carryback deduction is disallowed.

Examination of the partnership return of Charles Plohn & Company for 1969 disclosed that New York State income is reportable at 96.043% rather than the 71.23754% as shown on your return.

| | FEDERAL AMOUNT | NEW YORK STATE AMOUNT |
|---|---|---|
| Reported total NY income | $171,710.00 | $ 79,433.00 |
| Additional partnership income | | 31,832.00 |
| Adjusted total NY income | $171,710.00 | $111,265.00 |
| Deductions: $111,265/$171,710 x $30,912 = | | 20,030.00 |
| Balance | | $ 91,235.00 |
| Reported balance | | 65,133.00 |
| Additional taxable income | | $ 26,102.00 |

ADDITIONAL PERSONAL INCOME TAX DUE AT 14% $3,654.00"

(1970) "Examination of the 1970 return of the partnership, Charles Plohn & Co. disclosed that your distributive share of income was $39,875.00. The percentage reportable for New York State is 80.74912%. Your tax liability is recomputed below.

| | FEDERAL AMOUNT | NEW YORK STATE AMOUNT |
|---|---|---|
| Wages | $12,042.00 | $ 9,286.00 |
| Dividend | 1,633.00 | |
| Interest | 4,894.00 | |
| Sale or exchange | (1,000.00) | |
| Partnership income | 39,875.00 | 32,199.00 |
| Adjustment | (7,853.00) | (5,497.00) |
| Total New York income | $49,596.00 | $35,988.00 |
| deductions: $35,988/$49,596 x $8,416 = | | 6,107.00 |
| Balance | | $29,881.00 |
| Exemptions | | 3,125.00 |
| Adjusted NY taxable income | | $26,756.00 |
| Tax | | 2,306.00 |
| Statutory credit | | 25.00 |
| PERSONAL INCOME TAX DUE | | $2,281.00" |

6. Petitioners filed their timely petition, herein, on May 15, 1974. They took issue with their 1967, 1968, 1969 and 1970 tax liability. They denied a deficiency existed and asserted grounds for the denial as follows:

"1968 (1) Statute of Limitations

In accordance with the law an amount is not deemed to be omitted if sufficiently disclosed. Taxpayer reported total partnership income on IT-203 (1968) in Federal column. New York partnership income was reported on a percentage of time spent out of New York State to generate commissions. Taxpayer was compensated on a commission basis.

(2) Taxable income not reported was considered non NY income due to time spent out of NY State performing services, obtaining information, solicitations, etc.

1969

Taxpayer was only a 1 percent partner. Earnings were paid on a commission basis. Although it was reported on return as partnership income, reported income from partnership was calculated from commissions earned. Taxpayer spent more than 30 percent of his time out of New York State to generate and earn these commissions.

1970

Taxpayer incurred an operating tax loss carryback when his capital account which included his security account was involuntarily liquidated in order to meet customer and creditor liabilities of Charles Plohn & Co. All monies and securities were lost during said year and no funds were or will be available to repay taxpayer who was a general partner."

7. Petitioner Bernard Weinflash on the aforementioned tax returns for 1968 and 1969 stated his occupation as salesman and on the 1970 return he stated his occupation as sales executive. Petitioner Ruth Weinflash for 1968 and 1969 stated her occupation as housewife and for 1970 her occupation was omitted.

8. On February 16, 1967 petitioner Bernard Weinflash entered into an agreement with Charles Plohn & Co., a stock brokerage partnership with its principal offices at 200 Park Avenue, New York, New York, (hereinafter, at times, referred to as "Plohn"). The agreement was effective for the period March 13, 1967 to and through March 12, 1970. The agreement provided for petitioner Bernard Weinflash to be a general partner with a 1 percent profit sharing arrangement, while not requiring him to make any capital contributions to Plohn or to share in the losses of Plohn. The agreement further provided petitioner Bernard Weinflash with the following benefits:

(1) $12,000.00 salary
(2) $12,000.00 draw
(3) 45% of the gross commissions earned by Plohn as a result of all security transactions consumated by petitioner Bernard Weinflash.

He was not required to nor did he participate in the management of Plohn. He was made a general partner in order to impress his customers.

9. On May 4, 1967 the New York Stock Exchange approved Plohn's application to admit petitioner Bernard Weinflash as an allied member and as a general partner of Plohn. On January 23, 1974, Robert P. Patterson, Jr., Receiver for Plohn, advised the Income Tax Bureau that Bernard Weinflash was a

general partner and he submitted his resignation from the firm in 1970. He also stated that to the best of his knowledge, his (Bernard Weinflash) capital account, which included his security account, was involuntarily liquidated in order to meet customer and creditor liabilities of Plohn. However, no letter of resignation was submitted at the hearing and the 1971 New York State partnership return had Mr. Weinflash listed as a general partner with a beginning capital balance of $119,090.20.

10. Petitioner Bernard Weinflash determined his alleged loss as follows:

"Loss Due to Being a General Partner

| | | |
|---|---|---|
| Loss on securities due to involuntary liquidation by order of the N.Y. Stock Exchange | | $117,153 |
| Loss in capital account -- | | |
| Proceeds from sale of stock | $115,989 | |
| Additional credit balance in capital accounts | 3,101 | |
| Capital used to pay off creditors per accountant's reconciliation partnership accounts | | 119,090 |
| | | $236,243 |
| Adjustments for | | |
| dividends - 1099 Plohn & Co. | $ 9,681 | |
| interest inc. - " " | 1,759 | |
| dividends - Axelrod & Co. | 19 | |
| interest inc. " | 72 | |
| | $ 11,531 | |
| Less - Interest expense for period | 19,639 | 8,108 |
| Total liquidation loss | | $244,351 |
| Less Earnings per (1065) 1970 partnership 39,875 NY State Allocation 80.74912 | | 32,199 |
| | | $212,152 |
| Add Partnership loss on off Broadway play "Summertree" | | 500 |
| Correct partnership operating losses available for carryback | | $212,652 |
| Taken on 1970 tax return | | 180,889 |
| Additional loss to be taken | | 31,763" |

11. Petitioner Bernard Weinflash submitted a letter from Plohn dated June 3, 1970 advising their clients of a transfer of clearing and accounting operations to Axelrod & Company. Mr. Weinflash's personal trading account was transferred to Axelrod & Company upon his signing documents accompanying the aforementioned letter. On July 22, 1970, Plohn advised Axelrod & Company to

return the account back to Plohn. Mr. Weinflash submitted a letter from the New York Stock Exchange dated July 24, 1970 directing him to inform Axelrod & Company to disregard his previous instructions and to re-instruct Axelrod & Company to deliver his accounts back to Plohn. Petitioner Bernard Weinflash submitted a schedule of securities sold indicating a loss of $117,153.00. All the securities on that schedule were listed on his personal trading account with Plohn prior to the transfer of his account to Axelrod & Company. A schedule of his account with Axelrod & Company listed only 50 percent of the named stock on the schedule of securties indicating the loss and a schedule of his account with Plohn after the transfer from Axelrod & Company listed approximately 42 percent of the named stock on the schedule indicating the loss. The cost basis of the securities on the schedule indicating the loss was not substantiated by any documentary evidence. The majority of the securities on the schedule indicating the loss were also checked off on a separate schedule prepared by Arthur Andersen & Co and submitted to the Board of Governors, New York Stock Exchange. This schedule was titled "Statement of Other Marketable Securities In Individual Accounts of General Partners Who Have Signed Agreements Which Specifically Provide That Cash and Securities Recorded In These Accounts Are To Be Included As Partnership Property Question 9(A)(2)...April 24, 1970". No evidence was submitted to show petitioner Bernard Weinflash signed any such agreement.

12. Petitioner Bernard Weinflash submitted a Reconciliation of Partner's Capital Accounts for Calendar Year 1971. The reconciliation indicated Mr. Weinflash's capital account at the beginning of 1971 had a credit balance of $119,090.20. He alleges that there were insufficient funds available for subordinated lenders and no funds were or will be available for general partners. Mr. Weinflash

did not submit any agreement to show he was a subordinated lender. No reconciliation of partners' capital accounts was submitted for 1970. A copy of a schedule of partners' share of income, credits, deductions, etc. for 1970 was submitted by Mr. Weinflash and the original of such schedule was attached to the New York State partnership return filed by Plohn for 1970. Neither schedule showed any loss distributed to Mr. Weinflash but instead both schedules showed he received a distribution of $39,878.84 under the heading payments to partners. Mr. Weinflash alleges that a law suit was instituted but because of legal costs, legal delays and counterclaims, uncollectible judgments discouraged the fight. No documentary or any other evidence was submitted to substantiate that a law suit was filed for a recovery of any loss he may have sustained.

13. Petitioner Bernard Weinflash did submit a letter from Lazarow & Company which indicated a New York State partnership return was being filed for Summertree Co. and his distributive share was a loss of $500.00 for 1970.

CONCLUSIONS OF LAW

A. That in any case before the tax commission under this Article, the burden of proof shall be upon the petitioner except in certain enumerated instances which are not relevant here (section 689(e) of the Tax Law).

To be allowable as a deduction, a loss must be evidenced by closed and completed transactions, and actually sustained during the taxable year. (Treasury Regulation §1.165-1(b)).

B. That petitioner Bernard Weinflash has not shown that he sustained a New York net operating loss during 1970. He has not substantiated the cost basis of the securities held in his personal trading account with Axelrod & Company, which account was later transferred to Charles Plohn & Company and liquidated as required by the New York Stock Exchange, nor did he submit

evidence to show that a subordination agreement existed at such time. Therefore, the character of the securities remained personal in nature when transferred to Charles Plohn & Company and, as a result, the loss cannot be claimed as a loss derived from New York State sources. He has claimed as part of his loss his beginning capital balance as shown on the Reconciliation of Partners' Capital Accounts for 1971. Since the account showed a credit balance in 1971, it may not be claimed as a loss sustained in 1970 in accordance with Treasury Regulation §1.165-1(b). Mr. Weinflash did not submit a Reconciliation of Partners' Capital Accounts for 1970, to substantiate the alleged loss in his capital account for 1970. Petitioner Bernard Weinflash has failed to sustain his burden of proof as imposed by section 689(e) of the Tax Law, to substantiate that he incurred a New York net operating loss for 1970.

C. That petitioner Bernard Weinflash was a partner of Charles Plohn & Company during the years at issue. (See Faulkner, Dawkins & Sullivan v. State Tax Commission, 63 A.D.2d 764, 404 N.Y.S.2d 735.) In determining the sources of a nonresident partner's share of partnership income, no effect shall be given to a provision in the partnership agreement which characterizes payments to the partner as salary or other consideration paid or distributed for services rendered to the partnership by the partner. (20 NYCRR 134.2). The New York adjusted gross income of a nonresident partner shall include his distributive share of all items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income to the extent such items are derived from or connected with New York sources. (20 NYCRR 134.1). Petitioner Bernard Weinflash's compensation is a distribution of partnership income in accordance with 20 NYCRR 134.2 (Jablin v. State Tax Commission, 65 A.D.2d 891, 410 N.Y.S.2d 414). His allocation percentage is the same as the partnership allocation

percentage, pursuant to 20 NYCRR 134.1. (Debeviose v. State Tax Commission, 52 A.D.2d 1023, 383 N.Y.S.2d 698).

D. That the tax may be assessed at any time within six years after the return was filed, if an individual omits from his New York adjusted gross income an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income. (section 683(d)(1) of the Tax Law). Petitioner Bernard Weinflash reported on his New York non-resident return for 1968 under the Federal amount column his distributive share of partnership income. The use of an incorrect allocation percentage in determining New York income is not an omission of income, when the income is reported under the Federal amount column on the New York return. Therefore, the six year statute does not apply and the Notice of Deficiency as it applies to tax year 1968 was barred by the Statute of Limitations.

E. That the Audit Division is directed to modify the Notice of Deficiency by cancelling that part of the deficiency that applies to tax year 1968 and to reduce New York income for tax year 1970 by $500.00 as indicated in Finding of Fact "13" supra.

F. That the petition of Bernard Weinflash and Ruth Weinflash is granted to the extent indicated in Conclusion of Law "E" supra, and except as so granted, the Notice of Deficiency dated February 25, 1974 is in all other respects sustained. That the Notice of Disallowance dated April 12, 1974 for refund claimed for 1967, 1968 and 1969 is sustained.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER