

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Robert N. & Barbara J. Westerlund :  
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. :

---

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Robert N. & Barbara J. Westerlund, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert N. & Barbara J. Westerlund  
c/o Ziebarth, Geary & Co.  
60 Broad St.  
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 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.

*Donnie D. Hayland*

*Jay Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Robert N. & Barbara J. Westerlund :  
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. :

---

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 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:

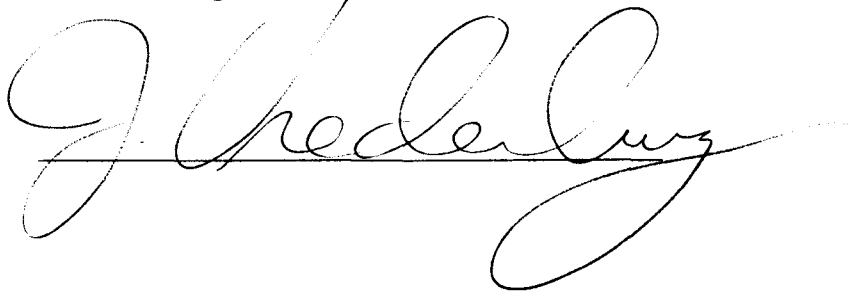
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004

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.





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

November 27, 1981

Robert N. & Barbara J. Westerlund  
c/o Ziebarth, Geary & Co.  
60 Broad St.  
New York, NY 10004

Dear Mr. & Mrs. Westerlund:

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

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBERT WESTERLUND and BARBARA WESTERLUND	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22 :	:	
of the Tax Law for the Year 1974.	:	

---

Petitioners, Robert Westerlund and Barbara Westerlund, c/o Ziebarth, Geary & Co., 60 Broad Street, New York, New York 10004, 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. 23141).

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 24, 1979 at 2:45 P.M. and continued to conclusion before James T. Prendergast, Hearing Officer, at the same offices on July 25, 1979 at 1:15 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 membership on a stock exchange results in an ordinary loss rather than a capital loss.
- II. Whether the loss was properly allocated to the partners.

FINDINGS OF FACT

1. Petitioners, Robert Westerlund and Barbara Westerlund timely filed a New York State income tax resident return for 1974.

2. On January 31, 1978, the Audit Division issued a Statement of Audit Changes against petitioners. Said Statement asserted additional income tax due for the year 1974, on the grounds that the loss on the sale of a stock exchange seat constituted a capital loss rather than an ordinary loss; as a result, petitioners' New York income was increased by \$20,625.00. Accordingly, on April 4, 1978, the Audit Division issued a Notice of Deficiency for 1974 against petitioners for \$2,853.45 in personal income tax, plus \$720.32 in interest, for a total of \$3,573.77.

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

4. Petitioner, Robert Westerlund, was a general partner in the limited partnership of Ziebarth, Geary & Co.

5. Ziebarth, Geary & Co. is a specialist firm on the New York Stock Exchange which performs the function of maintaining a market in particular securities sold on the Exchange. Ziebarth, Geary & Co. 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. The schedule of ordinary gains and losses which was attached to the partnership return showed an ordinary loss of \$258,790.00 from the sale of a New York Stock Exchange Seat purchased in September 1969 for \$323,790.00 and sold in October 1974 for \$65,000.00. The seat sold in 1974 was registered in the name of Wayne Collins who contributed said seat to the partnership pursuant to an "Agreement of Limited Partnership". Wayne Collins and Ziebarth, Geary & Co. entered into an a-b-c agreement whereby Wayne Collins agreed that he or his

legal representative would comply with the terms of one of the three following options:

(a) Retain his membership and pay to the partnership the amount necessary to purchase another membership; or

(b) sell his membership and pay the proceeds over to the partnership; or

(c) transfer his membership for a nominal consideration to a person designated by the partnership and satisfactory to the Board of Directors.

7. Pursuant to the Partnership Agreement, gains and losses with respect to stock exchange seats were to be shared by the member partners in proportion to their profit and loss ratios on an ongoing year-to-year basis. Thus, according to the Partnership Agreement, the distributive share schedule apportioned the seat loss of \$258,790.00 to the members of Ziebarth, Geary & Co. as follows:

Jack A. Ziebarth	\$ 74,370.00
John W. Geary II	79,500.00
Robert N. Westerlund	89,450.00
Wayne T. Collins	14,250.00
John J. Peppe	<u>1,220.00</u>
Total Loss	<u>\$258,790.00</u>

#### CONCLUSIONS OF LAW

A. That section 1221 of the Internal Revenue Code and Treas. Reg. 1.1221-1(a) define "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 exclusions of section 1221 and is therefore a capital asset of the partnership.

B. That the sale of a stock exchange seat constitutes the sale of a capital asset (Munson v. Commissioner, 100 F.2d 363). Therefore, the loss derived from the sale of said seat is a capital loss pursuant to Internal

Revenue Code section 1212(b) and is subject to the limitations prescribed in section 1211(b); that "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. Commissioner, supra, at p. 366).

C. That the partnership of Ziebarth, Geary & Co. erroneously deducted the loss from sale of the stock exchange seat as an ordinary loss rather than a capital loss.

D. That petitioner Robert Westerlund's distributive share of partnership income was erroneously understated by the Audit Division for 1974; however, the Audit Division is precluded from increasing the amount of the Notice of Deficiency since claim was not asserted at or before the hearing in accordance with the meaning and intent of section 689(d)(1) of the Tax Law.

E. That the Audit Division is limited to the amount of the adjustment shown on the Notice of Deficiency (Finding of Fact "2" supra); that petitioner is allowed a capital loss subject to the limitations provided for in Internal Revenue Code Section 1211(b); and that, except as so granted, the Notice of Deficiency issued April 4, 1978 is sustained.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER