

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Martin E. Barzelay :
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

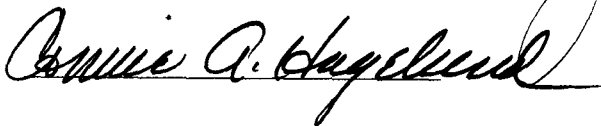
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon Martin E. Barzelay, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

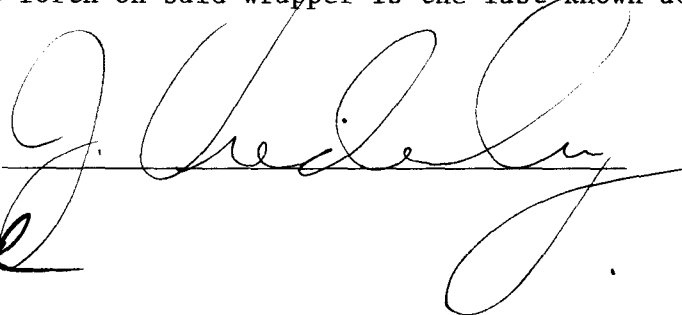
Martin E. Barzelay
205 Janet Dr.
Syracuse, NY 13224

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
4th day of June, 1982.


Camille A. Hagelund



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Martin E. Barzelay :

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 :

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 4th day of June, 1982, he served the within notice of Decision by certified mail upon Lowell L. Seifter the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

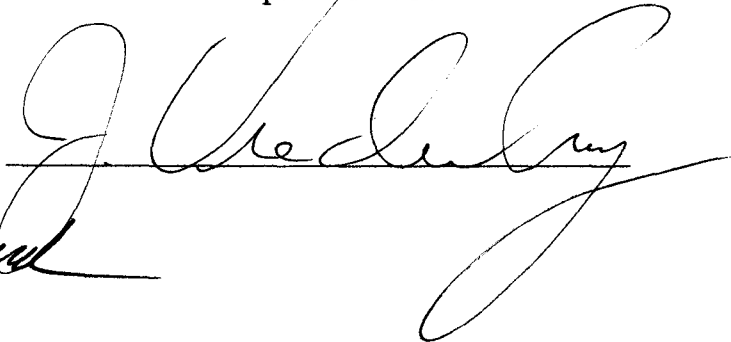
Lowell L. Seifter
1650 One Lincoln Center
Syracuse, NY 13202

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
4th day of June, 1982.





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

June 4, 1982

Martin E. Barzelay
205 Janet Dr.
Syracuse, NY 13224

Dear Mr. Barzelay:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lowell L. Seifter
1650 One Lincoln Center
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MARTIN E. BARZELAY	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1974.	:	

Petitioner, Martin E. Barzelay, 205 Janet Drive, Syracuse, New York 13224, 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. 20272).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on June 13, 1980 at 9:15 A.M. Petitioner, Martin E. Barzelay, appeared with Lowell Lapin Seifter, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the method in computing the modification in section 612(b)(7) is to be determined by the taxable year of the professional service corporation or the tax year of the petitioner.

FINDINGS OF FACT

1. Petitioner, Martin E. Barzelay, and his wife, timely filed a New York State Combined Income Tax Return for 1974 on which petitioner Martin E. Barzelay reported a modification pursuant to section 612 of the Tax Law in the amount of \$3,068.00.

2. On June 27, 1977, the Audit Division issued a Notice of Deficiency with the following explanation:

"As a result of the audit of your 1974 return, the changes are made as follows:

The line 2 Modification originally filed incorrectly has been amended and the copy of the amended IT-2102.1 has been adjusted as follows:

Section 612(b)(7) Modification per IT-2102.1 P.C. amended:

When an employee-shareholder is on a calendar year basis for 1974, and the Professional Service Corporation is on a fiscal year basis ending in 1974, the old Federal deduction limitation, the lessor of 10% of earned income or \$2,500 will apply. This policy is consistent with Federal Technical Information Release 1334.

Section 162(b)(8) $\$13,200 \times 4.95\% = \653.00	
PSC Modification as Reported	\$9,196.00
<u>Less: 10% Earned Income or \$2,500</u>	<u>2,500.00</u>
Section 612(b)(7) Corrected PSC Modification	6,696.00
<u>Add: Modification Per 612(6)(8) (sic)</u>	
$13,200 \times 4.95\%$	653.00
Total PSC Modification	<u>7,349.00</u>
Modification Originally Reported on Return	<u>3,068.00</u>
Additional Taxable Income	<u>\$4,281.00"</u>

Accordingly, the Notice imposed additional personal income tax of \$642.15, plus interest of \$120.08, for a total due of \$762.23.

3. Petitioner, reporting on a calendar year basis, was an employee-shareholder in a professional service corporation which reported on the basis of a fiscal year ending November 30.

Section 612(b)(7) of the Tax Law requires a shareholder in a professional service corporation to add to his Federal adjusted gross income, in computing his New York adjusted gross income, the amount deductible by the corporation for its taxable year ending in or with the taxpayer's taxable year for contributions on behalf of the taxpayer to a qualified retirement income plan, reduced by the maximum amount that would be deductible by such taxpayer for contributions to a qualified retirement income plan if he were a self-employed individual.

Under the Employee Retirement Income Security Act of 1974, the maximum deduction available for self-employed individuals has been increased to 15 percent of earned income up to \$7,500.00, effective for taxable years beginning after December 31, 1973.

4. The Audit Division contended the limit should be \$2,500.00 based on an interpretation of Federal Technical Information Release 1334 (hereinafter FTIR 1334), which was issued by the Internal Revenue Service on January 8, 1975, concerning the application of the Employee Retirement Income Security Act of 1974, stated that the new limits are not available to partners who are calendar year basis taxpayers and whose partnership is on fiscal-year with a taxable year beginning before and ending after December 31, 1973.

The Audit Division argues that if the "self-employed individual" referred to in section 612(b)(7) of the Tax Law was regarded as a partner in a partnership, the higher limit would not be available to him if his corporation was also considered the same as a partnership on a fiscal-year with a taxable year beginning before and ending after December 31, 1973.

The Audit Division then further contended its interpretation of the legislative history which added section 612(b)(7) of the Tax Law, lends support to the view that the term "self-employed individual", as used in section 612(b)(7), can reasonably be interpreted to mean a member of a partnership. Therefore, the petitioner must be treated as a member of a partnership.

5. The petitioner contended the limit should be \$7,500.00 in that the Audit Division erred in applying FTIR 1334 to the situation of an employee-shareholder of a New York State professional service corporation, since FTIR 1334 deals with the question of when the \$7,500.00 (15 percent Keogh contribution level) is available to partners of a partnership. The petitioner

argues that FTIR 1334 has nothing to do with an employee-shareholder of a professional corporation and in the absence of any legal authority the Audit Division's position is arbitrary and capricious and in direct violation of the clear language of section 612(b)(7) of the Tax Law.

CONCLUSIONS OF LAW

A. That a modification increasing Federal adjusted gross income is required to be made pursuant to section 612(b)(7) of the Tax Law as follows:

"In the case of a taxpayer who is a shareholder of a corporation organized under article fifteen of the business corporation law, the amount which is deductible by such corporation under paragraphs one, two or three of subdivision (a) of section four hundred four of the internal revenue code for its taxable year ending in or with such taxpayer's taxable year for contributions paid on behalf of such taxpayer minus the maximum amount which would be deductible for federal income tax purposes by such taxpayer under section sixty-two (7) of the internal revenue code or any amendment thereto, if such taxpayer were a self-employed individual."

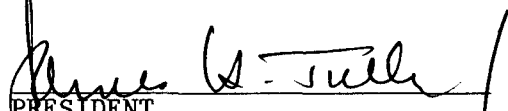
B. That Internal Revenue Service Technical Information Release No. 1334 ¶H-3 clearly indicates that the new contribution limits (\$7,500.00 or 15 percent) are applicable where a partnership's taxable year began after December 31, 1973 without regard to the taxable year of the individual. That if petitioner were self-employed, he could assume a fiscal year like the professional service corporation in which he was a shareholder. Accordingly, petitioner is required for the year 1974 to increase his Federal adjusted gross income by the professional service corporation's contributions which were in excess of \$2,500.00 or 10 percent of earned income, whichever is lower.

C. That the petition of Martin E. Barzelay is denied and the Notice of Deficiency dated June 27, 1977 is sustained together with such additional interest as may be lawfully owing.

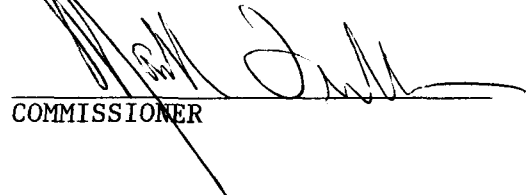
DATED: Albany, New York

JUN 04 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER