

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Aaron & Chaye Kesserman :
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 8th day of September, 1982, he served the within notice of Decision by certified mail upon Aaron & Chaye Kesserman, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

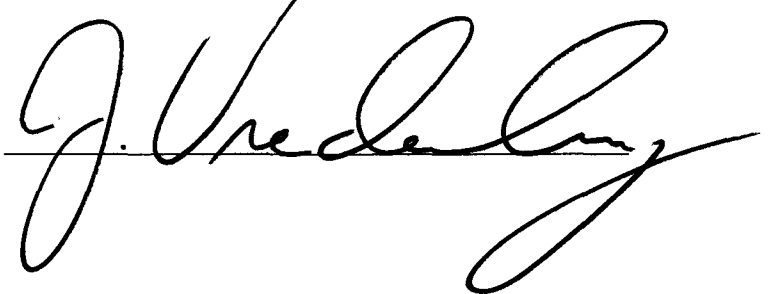
Aaron & Chaye Kesserman
4 Emes Lane
Monsey, NY 10952

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
8th day of September, 1982.


CARRIE P. HAGELUND
ADMINISTRATOR
OATHS PURSUANT TO TAX LAW
SECTION 174



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

September 8, 1982

Aaron & Chaye Kesserman
4 Emes Lane
Monsey, NY 10952

Rabbi & Mrs. Kesserman:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
AARON KESSERMAN and CHAYE KESSERMAN	:	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, Aaron Kesserman and Chaye Kesserman, 4 Emes Lane, Monsey, New York 10952, 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. 21605).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1981 at 11:00 A.M. Petitioner Aaron Kesserman appeared with Ben D. Eisenberg. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether a casualty¹ loss claimed by petitioners should be disallowed on the grounds that they have not shown that there was no possibility of recovery in the tax year in question.

FINDINGS OF FACT

1. Petitioners, Aaron Kesserman and Chaye Kesserman, filed a joint New York State Income Tax Resident Return for 1974.

¹ The loss at issue herein is a theft loss and not a casualty loss and will be addressed as such in this decision.

2. On June 16, 1977, the Audit Division issued a Statement of Audit Changes wherein, as the result of a desk audit, the following adjustments were made:

<u>ITEM</u>	<u>AMOUNT REPORTED ON RETURN</u>	<u>CORRECTED AMOUNT</u>	<u>ADJUSTMENT</u>
Contributions	\$ 2,360.00	\$ 2,033.00	\$ 327.00
Theft Loss	13,000.00	-0-	13,000.00
Miscellaneous Deductions	3,384.00	2,839.00	545.00
Employee Business Expenses	6,490.00	4,615.00	1,875.00
New York Adjusted Gross Income	27,464.00	27,964.00	500.00
		TOTAL ADJUSTMENT	<u>\$16,247.00</u>

Accordingly, a Notice of Deficiency was issued against petitioners on November 28, 1977 asserting additional personal income tax due in the amount of \$675.28, plus interest of \$150.49, for a total due of \$825.77.

3. At the hearing, the petitioners conceded all Audit Division adjustments other than the theft loss.

4. The Audit Division disallowed the theft loss of \$13,000.00 on the ground that petitioners had not shown there was no possibility of recovery in the tax year in issue.

5. At the hearing, petitioners submitted a letter signed by Ernest Seidenfeld and dated June 16, 1971 stating that:

"Receipt is hereby acknowledged of the sum of Ten Thousand (\$10,000.00) Dollars which sum represents initial payment to the undersigned for the following:

...

Payment by you of the further sum of \$6,600.00 at the time of closing of title to the premises involved will entitle you to an undivided 10% interest in and to the parcel involved in said contract."

The payment of \$10,000.00 was for the purchase of land in the Town of Walkill known as the "garden apartment site".

Petitioners also submitted a receipt which showed that a second payment was made to Ernest Seidenfeld for \$5,000.00 for the purchase of farm land in Upper Freehold Township. Petitioners stated that they did not claim a theft loss in excess of the \$13,000.00 (Finding fo Fact "4") claimed on their return since their New York taxable income was zero and no tax would be due.

6. Petitioners stated that they, and other investors, had paid Mr. Seidenfeld millions of dollars to purchase property and that said purchases had never taken place. They also stated that in May or the early part of June of 1974, Mr. Seidenfeld disappeared with the money and that law enforcement authorities were in search of him. It was petitioners belief that Mr. Seidenfeld was in California, or had left the United States and was residing in South America.

7. During the hearing, the Audit Division conceded there was an embezzlement, but asserted that petitioners had not shown that the embezzlement had taken place in 1974. Petitioners stated that in 1974 Ernest Seidenfeld closed his office in Monroe, New York, that Mr. Seidenfeld could not be found anywhere since that time, and that hiring a lawyer would be a waste of time and money since there was no money to collect or recover.

CONCLUSIONS OF LAW

A. That the petitioners have realized a true economic loss that is deductible. That the deduction is allowed despite the failure of petitioners to seek "compensation". The Audit Division attempted to expand the meaning of "compensation" from actual reimbursement to potential reimbursement; however, such meaning is not supported by legislative history or even the Treasury's own regulation which focuses on actual reimbursement (Section 165 of the Internal Revenue Code). That to have the petitioners seek legal action against a person

whose whereabouts and worth is unknown and to incur expenses where the possibility of recovery is nil would be an exercise in futility [Treasury Regulation 1.165-8(a)(2)].

B. That the petition of Aaron Kesserman and Chaye Kesserman is granted to the extent of allowing the theft loss. That the Audit Division is hereby directed to accordingly modify the Notice of Deficiency issued November 28, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 08 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER