

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Louis & Roslyn Kirsch :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
22 of the Tax Law and New York City Non-Resident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1975 and 1976. :

State of New York
County of Albany

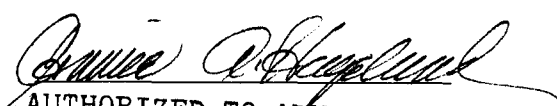
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Louis & Roslyn Kirsch, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

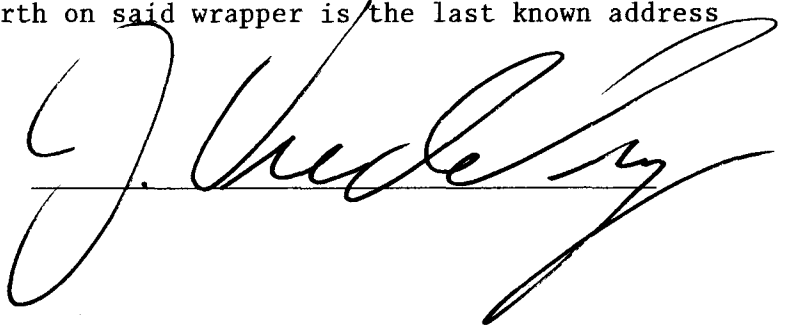
Louis & Roslyn Kirsch
40 Lovell Rd.
New Rochelle, NY 10804

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
14th day of December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Louis & Roslyn Kirsch

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of New York State Personal Income Tax under Article :
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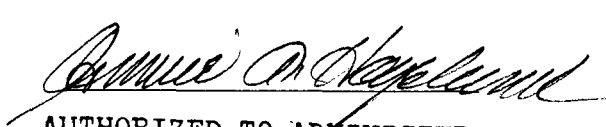
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Arthur E. Eisman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

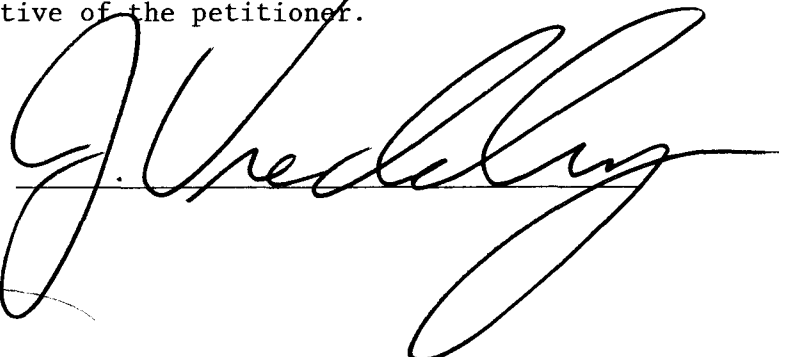
Arthur E. Eisman
Eisman & Co., P.C.
2001 Palmer Ave.
Larchmont, NY 10538

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
14th day of December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 14, 1982

Louis & Roslyn Kirsch
40 Lovell Rd.
New Rochelle, NY 10804

Dear Mr. & Mrs. Kirsch:

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 & 1312 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
Arthur E. Eisman
Eisman & Co., P.C.
2001 Palmer Ave.
Larchmont, NY 10538
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LOUIS KIRSCH AND ROSLYN KIRSCH	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Non-Resident Earnings Tax under Chapter	:	
46, Title U of the Administrative Code of the	:	
City of New York for the Years 1975 and 1976.	:	

Petitioners, Louis Kirsch and Roslyn Kirsch, 40 Lovell Road, New Rochelle, New York 10804, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City non-resident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1975 and 1976 (File No. 28755).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 18, 1982 at 10:45 A.M. Petitioner appeared by Arthur E. Eisman, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioners are required to increase their Federal adjusted gross income by petitioner Louis Kirsch's share of the New York State and New York City unincorporated business tax deduction taken on the 1975 partnership return of Spanro Sales Company.

II. Whether \$13,333.00 reported as a long term capital gain for 1975 should properly be treated as ordinary income.

III. Whether certain employee business expenses claimed for 1975 and 1976 were personal in nature and accordingly not properly deductible.

IV. Whether a distribution to petitioner Louis Kirsch from Norwich Industries Profit Sharing Trust is excludable from gross income for 1976 although such distribution was rolled over to an individual retirement account later than the 60 day time limit prescribed under Section 402(a)(5)(c) of the Internal Revenue Code.

FINDINGS OF FACT

1. Louis Kirsch (hereinafter petitioner) timely filed joint New York State income tax resident returns with his wife for the years 1975 and 1976.

2. On November 13, 1978 the Audit Division issued a Statement of Audit Changes to petitioners wherein, as the result of a field audit, the following contested adjustments were made pursuant to schedule of audit adjustments attached thereto:

(a) 1975 New York total income was increased by \$5,190.00, said amount representing petitioner's share of the New York State and New York City unincorporated business tax deduction taken on the 1975 partnership return of Spanro Sales Company.

(b) Reported net long term capital gain for 1975 was reduced by \$13,333.00. Said amount was determined to represent commissions received and accordingly treated as ordinary income.

(c) A 1975 deduction claimed for travel expenses of \$5,258.00 was disallowed in full as personal. Additionally, adjustments were made disallowing half of the 1975 amounts claimed for promotional expenses, auto expenses and depreciation expense (auto) as personal.

(d) 1976 deductions claimed for promotional expenses of \$3,124.00, auto expenses of \$1,448.00, and telephone expense of \$1,031.00 were disallowed in full as personal.

(e) A 1976 profit sharing trust fund distribution of \$3,957.50 was held partially taxable as ordinary income and partially taxable as capital gain since petitioner "did not meet the 60 day roll over".

In addition to the aforesaid contested adjustments, other adjustments were made which were either uncontested or resulted from the aforesaid adjustments (i.e. adjustments to minimum income tax, modification for allocable expenses and capital gain modification). An adjustment of \$66,667.00 for 1976, which resulted in the assertion of New York City non-resident earnings tax, was not contested by petitioner and accordingly will not be addressed in the findings contained herein.

3. On August 2, 1979 the Audit Division issued a Notice of Deficiency against petitioners asserting New York State personal income tax of \$4,566.36, less a credit against minimum income tax for 1975 of \$559.32, plus New York City non-resident earnings tax of \$433.34, for a total tax deficiency of \$4,440.38. Penalties and interest were additionally asserted totaling \$1,195.52. Said penalties were imposed pursuant to sections U 46-35.0(a) and U 46-35.0(c) of Chapter 46, Title U of the Administrative Code of the City of New York for failure to file a city return and underestimation of tax respectively. The Notice of Deficiency herein was timely issued for taxable year 1975 since petitioner had executed a consent form extending the period for assessment with respect to said year to April 15, 1980.

4. Prior to, and during the early part of 1975, petitioner was engaged in activities as a garment salesman for Spanro Sales Company (Spanro), a New York partnership, and Norwich Industries, Inc. (Norwich), a New York corporation. Petitioner held a fifty percent interest in each of said entities.

5. On June 30, 1975 petitioner sold his interests in said entities and simultaneously terminated his affiliations therewith.

6. Petitioner contended that since he was not a partner in Spanro at the time the partnership return was filed, he is not required to increase his Federal adjusted gross income by any portion of the unincorporated business tax deductions taken on Spanro's 1975 partnership return.

7. Spanro's 1975 New York State Partnership Return shows petitioner's shares of the New York State and New York City unincorporated business taxes were \$2,952.79 and \$2,236.96 respectively, for a total of \$5,189.75. Said amount represents 25.6 percent of the total unincorporated business tax deduction taken by Spanro. Although petitioner held a 50 percent interest in Spanro, Schedule K of said return indicates his percentage as 25.6. Said percentage appears adjusted based on petitioner's mid year termination with Spanro.

8. Petitioner's Federal Schedule D for 1975 shows his sale of Norwich stock on July 3, 1975 for \$93,883.00. Said sale, as reported, yielded a long term capital gain of \$90,883.00.

9. Pursuant to an agreement entered into on June 30, 1975 between petitioner and Norwich, the sales price of said stock was set at \$80,500.00. Such agreement also provided for petitioner's receipt of \$40,000.00 commissions earned prior to June 30, 1975 to be paid "in six equal consecutive monthly installments of \$6,666.67, without interest, commencing August 1, 1975".

10. Adjustments to business expenses for 1975 and 1976 were made on the basis that such expenses were unrelated to petitioner's business activities since he was not actively engaged as a salesman for the last half of 1975 and the full year 1976. Travel expenses to Europe and Florida claimed for 1975 were disallowed in full on the basis that petitioner had failed to establish a bona fide business purpose for such travel.

11. Petitioner contended that during the latter part of 1975 and the full year 1976 he was actively engaged in establishing a new perfume marketing business, Lark Group, Inc. No income was reported by petitioner from Lark Group, Inc. during the years at issue. Travel expenses incurred for a trip to Europe in October 1975 and subsequent trips to Florida, were undertaken, pursuant to petitioner, in order to work on styles, inspect what was available, and keep abreast of what was going on. Mrs. Kirsch accompanied petitioner on his European trip.

12. Although petitioner submitted diaries and receipts for the years at issue, a bona fide business purpose was not established for the expenses purportedly incurred.

13. Petitioner received a distribution of \$154,023.01 from the Norwich Industries Profit Sharing Trust on March 12, 1976. This amount was properly rolled over to an individual retirement account within the 60 day period prescribed under Internal Revenue Code Section 402(a)(5)(c). Accordingly such distribution was excludable from gross income for 1976.

14. On July 13, 1976 a second distribution of \$3,957.50 was made to petitioner from said fund. This distribution was not rolled over until December 30, 1976. Accordingly, since the 60 day requirement was not satisfied, said distribution was held taxable to the extent of 20 percent as ordinary income and 80 percent as capital gain.

15. Petitioner contended that Federal legislation was passed which extended the required roll over period to December 31, 1978, thereby rendering the roll over of petitioners July 13, 1976 distribution timely, and accordingly, excludable from gross income for 1976.

CONCLUSIONS OF LAW

A. That section 612(b) of the Tax Law provides that there shall be added to Federal gross income:

(3) Income taxes imposed by this state or any other taxing jurisdiction, to the extent deductible in determining federal adjusted gross income and not credited against federal income tax.

Accordingly, petitioner's share of the New York State and New York City unincorporated business tax deductions taken on the partnership return of Spanro must properly be added to petitioner's federal gross income.

B. That since the agreement dated June 30, 1975 provided for petitioner's sale of Norwich stock at a sales price of \$80,550.00, rather than \$93,883.00 as reported by petitioner, the difference of \$13,333.00 is deemed to be commission income, and as such, is properly treated as ordinary income.

C. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that the expenses adjusted for 1975 and 1976 for travel, promotional expenses, auto expenses, telephone expenses and depreciation (auto) were ordinary and necessary business expenses and attributable to an income producing activity. Accordingly, the adjustments to said expenses are sustained.

D. That Internal Revenue Code section 402(a)(5)(c) provides that with respect to a qualifying roll over distribution, "transfer must be made within 60 days of receipt" for exclusion of such distribution from gross income for the taxable year in which paid.

E. That Internal Revenue Code section 402(a)(5)(c), as amended by P.L. 95-458 § 4(d), applicable to taxable years beginning after December 31, 1974 provides:

(2) Validation Of Certain ~~Attempted~~ Rollovers - If the taxpayer -

(A) Attempted to comply with the requirements of section 402(a)(5) or 403(a)(4) of the Internal Revenue Code of 1954 for a taxable year beginning before October 14, 1978, and

(B) Failed to meet the requirements of such section that all property received in the distribution be transferred, such section (as amended by this section) shall be applied by treating any transfer of property made on or before December 31, 1978, as if it were made on or before the 60th day after the day on which the taxpayer received such property.

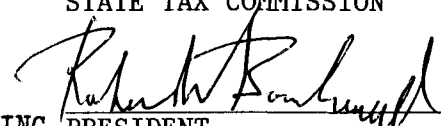
F. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law to show that he had initially attempted to comply with section 402(a)(5) of the Internal Revenue Code with respect to the rollover of the July 13, 1976 distribution of \$3,957.50. Accordingly, the amendment provided by P.L. 95-458 § 4(d) is deemed inapplicable and the adjustment made with respect to such distribution is sustained.

G. That the petition of Louis Kirsch and Roslyn Kirsch is denied and the Notice of Deficiency dated August 2, 1979 is sustained together with such additional penalties and interest as may be lawfully owing.


DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER