

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Allan & Phyllis Kriegel

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 :
1973. :

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 18th day of June, 1982, he served the within notice of Decision by certified mail upon Allan & Phyllis Kriegel, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allan & Phyllis Kriegel
320 Thornton Rd.
Englewood, NJ 07631

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
18th day of June, 1982.

Carrie A. Haglund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Allan & Phyllis Kriegel :
for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
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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 18th day of June, 1982, he served the within notice of Decision by certified mail upon Seymour Wissner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour Wissner
Herman J. Dobkin & Co.
488 Madison Ave.
New York, NY 10022

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
18th day of June, 1982.

Connie A. Haglund

Jay Vredenburg

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

June 18, 1982

Allan & Phyllis Kriegel
320 Thornton Rd.
Englewood, NJ 07631

Dear Mr. & Mrs. Kriegel:

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
Seymour Wissner
Herman J. Dobkin & Co.
488 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALLAN KRIEGEL and PHYLLIS KRIEGEL	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioners, Allan Kriegel and Phyllis Kriegel, 320 Thornton Road, Englewood, New Jersey 07631, 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 1973 (File No. 22681).

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 May 4, 1981 at 2:45 P.M. Petitioners appeared by Seymour Wissner CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner Allan Kreigel properly reported his distributive share of a long-term capital gain distribution made by 7 Park Avenue Company to the Schultz Management partnership.

II. Whether penalties imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law were properly asserted.

FINDINGS OF FACT

1. On May 10, 1976 petitioners Allan Kreigel and Phyllis Kriegel untimely filed a joint New York State Income Tax Nonresident Return for the year 1973.

2. On July 13, 1976 the Audit Division issued a Statement of Audit Changes to petitioners wherein petitioner Allan Kriegel's distributive share of a long-term capital gain distribution from the 7 Park Avenue Company partnership to the Schultz Management partnership was increased from his reported amount of \$10,540.00 to \$41,540.00, based on the partnership return of 7 Park Avenue Company. Accordingly, a Notice of Deficiency was issued against petitioners on May 22, 1978 asserting additional personal and minimum income tax of \$2,596.21, penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law of \$865.71, for failure to timely file their return and failure to pay the tax determined to be due, respectively, plus interest of \$908.74, for a total due of \$4,370.66.

3. During the year at issue, petitioner Allan Kriegel and another individual, Kenneth Kriegel, were the sole partners in Schultz Management, a New Jersey investment partnership which operated on a fiscal year ended March 31.

4. Schultz Management was a general partner in 7 Park Avenue Company, a real estate partnership. Pursuant to the final New York State Partnership Return of 7 Park Avenue Company for the period January 1 through September 30, 1972, a long-term capital gain distribution of \$75,394.71 was made to Schultz Management.

5. Petitioner contended that Schultz Management's investment cost in 7 Park Avenue Company has increased over the years through transactions which were not reflected on the books of 7 Park Avenue Company. Accordingly, he argued that Schultz Management's increased basis in its interest in 7 Park Avenue Company properly reduced the long-term capital gain distribution at issue to an amount which yielded a distributive share to him of \$10,540.00.

6. The transactions which petitioner argued had increased Schultz Management's basis in its investment in 7 Park Avenue Company arose from payments made to the estates of three deceased partners for their interests in Schultz Management. The amounts paid to the estates, which were allocated by Schultz Management to each deceased partner's interest in 7 Park Avenue Company, were purportedly in excess of the investments per the partnership's books. Such excesses, petitioner argued, constituted proper increases to the partnership's basis of its interest in 7 Park Avenue Company as follows:

<u>Estate of</u>	<u>Total Paid</u>	<u>Amount of Investment Per Books of Schultz Management Attributable To Each</u>	<u>Excess Amount To Conform To Market Value Attributable To Each</u>
Joseph Schultz	\$ 28,333.33	\$24,406.42	\$ 3,926.91
Louis J. Kriegel	52,190.56	41,321.26	10,869.30
Harry Schultz	49,290.19	17,320.39	31,969.80
Total	<u>\$129,814.08</u>	<u>\$83,048.07</u>	<u>\$46,766.01</u>

7. In addition to the above transactions, petitioner contended that Schultz Management purchased an additional 3 percent interest in 7 Park Avenue Company from a then partner for the sum of \$9,200.00 in January, 1966. Petitioner argued that this transaction also was not reflected in the books of 7 Park Avenue Company. However, the partnership return filed by 7 Park Avenue Company listed Schultz Management as a general partner having a 3 percent interest and Schultz Management as a limited partner having a 13 percent interest.

8. Petitioners did not establish that their failure to timely file their 1973 personal income tax return and their failure to pay the tax determined to be due were the result of reasonable cause rather than willful neglect.

9. Petitioners also stated that Internal Revenue Code section 754 is not pertinent in this matter and that 7 Park Avenue Company partnership did not, at the time Schultz Management paid out its former partners, elect a change in basis so that additional depreciation might have been available to that entity.

CONCLUSIONS OF LAW

A. That section 743(a) of the Internal Revenue Code states:

"The basis of partnership property shall not be adjusted as the result of a transfer of an interest in a partnership by sale or exchange or on the death of a partner unless the election provided by section 754 (relating to optional adjustments to basis of partnership property) is in effect with respect to such partnership."

B. That an election under section 754 of the Internal Revenue Code could have been made only in the case of the purchase of the 3 percent interest of 7 Park Avenue Company by Schultz Management. However, no such election was made. The payments made to the estates of the three deceased partners of Schultz Management would have no effect on 7 Park Avenue Company, since they were partners in Schultz Management and not partners in 7 Park Avenue Company. Therefore, no adjustment to the basis of partnership property of 7 Park Avenue Company could be made.

C. That since the property sold was an asset of 7 Park Avenue Company, the basis of the property is the basis as shown on the books of 7 Park Avenue Company. Since Schultz Management was the partner in 7 Park Avenue Company, Schultz Management has to report its distributive share of the net long term gain in the same amount as distributed to it by 7 Park Avenue Company within the meaning and intent of section 702(a)(2) of the Internal Revenue Code and Treas. Reg. section 1.702-1(2). Therefore, no adjustment to that distribution

can be made by Schultz Management or the individual partners of Schultz Management, since such distribution would flow directly from 7 Park Avenue Company through Schultz Management to the individual partners.

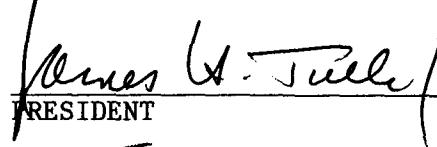
D. That the penalties imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are sustained.


E. That the petition of Allan Kriegel and Phyllis Kriegel is denied and the Notice of Deficiency dated May 22, 1978 is hereby sustained, together with such additional interest as may be lawfully owing.

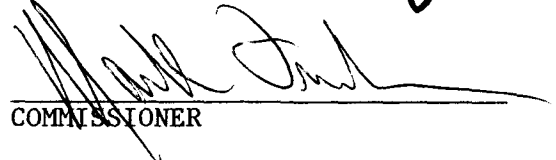
DATED: Albany, New York

JUN 18 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER