

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kennett L. Rawson : 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 Years :
1975 & 1976. :
_____:

State of New York
County of Albany


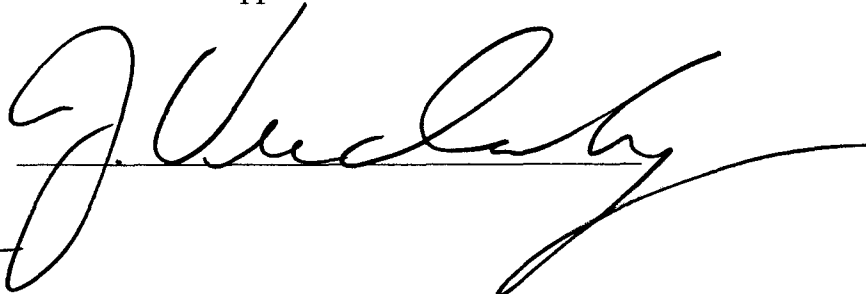
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Kennett L. Rawson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kennett L. Rawson
23 Brewster Ln. E.
Setauket, NY 11733

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
12th day of October, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of
Kennett L. Rawson : AFFIDAVIT OF MAILING
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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 12th day of October, 1982, he served the within notice of Decision by certified mail upon Frank Slezak the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

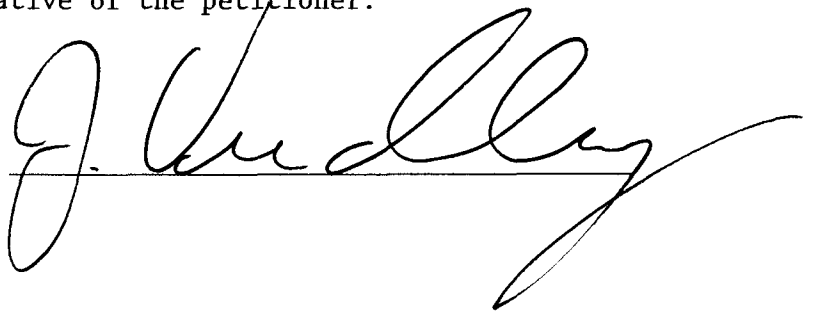
Frank Slezak
Burlingame, Field, Pierce & Browne, Inc.
24 Garnet Lane
Plainview, NY 11803

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
12th day of October, 1982.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO REG. 174
SECTION 174

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

October 12, 1982

Kennett L. Rawson
23 Brewster Ln. E.
Setauket, NY 11733

Dear Mr. Rawson:

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
Frank Slezak
Burlingame, Field, Pierce & Browne, Inc.
24 Garnet Lane
Plainview, NY 11803
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
KENNETT L. RAWSON
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1975 and 1976.

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DECISION

Petitioner, Kennett L. Rawson, 23 Brewster Lane East, Setauket, New York 11733, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1975 and 1976 (File No. 29918).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 17, 1981 at 9:15 A.M. Petitioner Kennett L. Rawson appeared by Frank Slezak, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (A. Scopellito, and I. Levy, Esqs., of counsel).

ISSUES

- I. Whether petitioner is entitled to deduct farm losses for 1975 and 1976.
- II. Whether the computed overpayments due petitioner's wife for 1975 and 1976 should be used as an offset of petitioner's tax due.

FINDINGS OF FACT

1. Petitioner, Kennett L. Rawson, and his wife timely filed combined income tax returns for the years 1975 and 1976. Subsequently, two claims for refund for 1976 were filed amending the original combined income tax return. The first claimed that petitioner was entitled to an additional exemption since

he had reached age 65 during 1976. The second claim asserted that petitioner had understated a small business corporation loss by \$3,514.00. Because of the increased loss, adjustments were also required to be made to the joint modification for allocable expenses attributable to items of tax preference and to the wife's computation of minimum income tax. Additionally, the claim re-allocated the New York itemized deductions and prepayments between petitioner and his wife which resulted in the net overpayment being claimed by petitioner.

2. A consent extending the period of limitation upon assessment for both petitioner and his wife for tax year 1975 was signed on December 29, 1978 and subsequently validated on February 19, 1979. The consent extended the period of limitation to April 15, 1980.

3.(a) On November 1, 1979, a revised Statement of Audit Changes was issued to petitioner and his wife indicating the following:

	<u>1975</u>	<u>1976</u>	
Personal Income Tax - Husband	\$1,672.08	\$1,323.73	
Personal Income Tax - Wife	(685.00)	(540.00)	
Total	<u>\$ 987.08</u>	<u>\$ 783.73</u>	\$1,770.81

In addition to other adjustments for the years in issue, petitioner's claimed farm loss for each of said years was disallowed in full, with the following explanation:

"The farm loss is disallowed as a hobby. The totality of circumstances, including your background (sic), your substantial independent (sic) income and the magnitude of losses incurred, indicates the farm was operated with no expectation of profit."

For tax year 1976, the Statement of Audit Changes recognized and allowed the basic arguments raised by petitioner in the claims for refund indicated in Finding of Fact "1" supra.

(b) A Notice of Deficiency in the amount of \$1,770.81 plus interest was issued against petitioner on January 30, 1980.

4. A timely petition, dated April 23, 1980, was filed by petitioner and his wife, Eleanor S. Rawson. Said petition was footnoted that "Eleanor S. Rawson joins in this petition as a protective measure because a refund found to be due her in the amount of \$1,225.00 was applied against the Kennett L. Rawson proposed deficiency."

5. Petitioner purchased the farm where he and his wife presently reside in 1949. From the onset of the operation through the years at issue, no profit was shown from the operation of the farm. For the period 1970 through and including 1976, petitioner's average farm loss was \$13,900.31. Evidence submitted shows that a profit in the amount of \$1,121.82 was reported for tax year 1979.

6. The testimony offered at the hearing by petitioner's representative with regards to the farm operation and the amount of petitioner's effort and time devoted to the farm was at best vague and unconvincing. His testimony was prefaced by stating "My testimony will consist of answering cross-examination questions in relation to the deposition submitted and signed by the taxpayer." In response to questioning about his personal knowledge concerning the farm, the representative testified that "I know of my own knowledge to the extent that I go to the farm twice a year to summarize the accounting information." The representative referred to or read from material attached to petitioner's affidavit dated November 25, 1981.

7. Petitioner had at least two full-time employees at the farm. However, since the farm was relatively small and did not need two year-round employees, their wage expense was allocated between the farm operation and petitioner as a

personal expense. One of said employees lived with his family on the property rent free.

8. While the affidavit and memorandum submitted by petitioner in general endeavors to prove the profit motive, areas of the memorandum involving expectation of profit, the manner in which the activities are carried on, the expertise of petitioner and his advisors, the amount of advice sought and used, as well as the actual time and effort of petitioner and his staff, inter alia, were too general and its value is diminished by the lack of testimony by anyone having first-hand knowledge of the material contained therein.

9. Petitioner has a publishing business in New York City. He maintains and uses an apartment in New York City. Petitioner alleges that on the average, three days and four nights per week were spent on the farm, and during such three days he devoted substantial personal time and effort to the carrying on of the farm activity.

10. The offsetting overpayment of tax of petitioner's wife evolved from the recomputation of their joint modification for allocable expenses attributable to items of tax preference which was necessitated because of the disallowance of petitioner Kennett L. Rawson's claimed farm loss.

11. Neither petitioner nor his wife testified at the hearing. No request for adjournment was made on their behalf, and no explanation was offered as to their absence at the time of the scheduled hearing.

12. No arguments of fact or law were discussed at the hearing with regard to Issue II.

CONCLUSIONS OF LAW

A. That, in general, the burden of proof in any case before the State Tax Commission shall be upon the petitioner except for three instances, none of which is present herein [Tax Law section 689(e)].

B. That "where one party to an action knowing the truth of a matter in controversy and having the evidence in his possession omits to speak, every inference warranted by the evidence offered will be indulged against him." Dowling v. Hastings, 211 N.Y. 199.

C. That petitioner Kennett L. Rawson has failed to sustain his burden of proof imposed by section 689(e) supra to show with clear and convincing evidence that he operated the farm with a profit motive.

D. That the pattern established by petitioner and his wife, in that they reallocated deductions and prepayments in order to arrive at a net amount (Finding of Fact "1") was also followed by the Audit Division in the preparation of the Notice of Deficiency (see also Finding of Fact "10"). That in view of the above, Finding of Fact "12" and Conclusion of Law "A", the adjoining argument is likewise dismissed.

E. That the Notice of Deficiency against Kennett L. Rawson for tax years 1975 and 1976 is sustained, together with such interest lawfully due.

DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER