

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Howard & Nanette Ross

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the
Year 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 5th day of February, 1982, he served the within notice of Decision by certified mail upon Howard & Nanette Ross, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard & Nanette Ross
720 Park Ave.
New York, NY 10021

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
5th day of February, 1982.

Annie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Howard & Nanette Ross :
AFFIDAVIT OF MAILING :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC :
Income Tax under Article 22 & 30 of the Tax Law :
for the Year 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 5th day of February, 1982, he served the within notice of Decision by certified mail upon Richard E. Halperin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard E. Halperin
Shea & Gould
330 Madison Ave.
New York, NY 10017

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
5th day of February, 1982.

Bernie G. Haylund

J. Vredenburg

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

February 5, 1982

Howard & Nanette Ross
720 Park Ave.
New York, NY 10021

Dear Mr. & Mrs. Ross:

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard E. Halperin
Shea & Gould
330 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HOWARD ROSS and NANETTE ROSS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Articles 22	:	
and 30 of the Tax Law for the Year 1976.	:	

Petitioners, Howard Ross and Nanette Ross, 720 Park Avenue, New York, New York 10021, 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 personal income tax under Article 30 of the Tax Law for the year 1976 (File No. 25607).

Petitioners have waived a formal hearing and have submitted their case for decision based on the record as it exists. After due consideration of the record, the Commission renders the following decision.

ISSUE

Whether it is proper to use only the total New York itemized deduction (as opposed to the total of Federal itemized deductions) for purposes of computing the extent to which itemized deductions are considered items of tax preference and, as such, are subject to the New York Minimum Tax.

FINDINGS OF FACT

1. On October 15, 1977, petitioners Howard Ross and Nanette Ross, husband and wife, filed a joint New York State Income Tax Resident Return (Form IT 201/208) for the tax year 1976. Petitioners had previously sought and received permission extending until October 15, 1977, the time within which to file their 1976 return.

2. On November 13, 1978, the Audit Division issued a Notice of Deficiency to petitioners asserting additional tax due for 1976 in the amount of \$13,872.69 plus interest. The Statement of Audit Changes explaining this Notice of Deficiency provided:

"Since New York State adopts a Federal definition of preference items, the portion of Federal itemized deductions considered to be excess deductions under the... Internal Revenue Code must be included in New York items of tax preference. There is no provision for modification of this item, and Federal amounts must be reported in full on the New York return."

3. On November 28, 1978 petitioners were issued a second Notice of Deficiency increasing the amount of tax originally asserted as due for 1976 to \$19,226.59 plus penalty and interest.

4. In a letter dated October 13, 1978, petitioners were notified by the Audit Division that:

"The Section 685(c) penalty of \$6,709.99 (State) and \$1,978.52 (City) or \$8,688.51 has been cancelled on the basis of the limitation. However, there is no provision in New York Tax Law for the modification of State income taxes from tax preference excess itemized deductions. As of this date, the legislature has not passed any retroactive laws modifying excess itemized deductions nor has there been any retroactive amendment to the allocable expense modification. Until final legislative changes are made, if any, the income tax bureau policy is to follow the Federal rules until modified. Accordingly, the tax as assessed is sustained."

5. In a letter dated January 26, 1979, petitioners were notified by the Audit Division to disregard the Notice of Deficiency dated November 13, 1978, and that the Notice of Deficiency dated November 28, 1978 was the correct one.

6. Petitioners timely filed a petition and a joint power of attorney and by a letter dated August 14, 1981, petitioners, through their representative, submitted their case for decision by the State Tax Commission based on the record as it exists.

7. For purposes of computing their New York minimum tax on items of tax preference, petitioners compared sixty percent (60%) of their adjusted gross income (line "5" of Form IT 201/208) with the total allowable New York itemized deduction (line "6(b)" of form IT 201/208). Since the total allowable New York itemized deduction did not exceed sixty percent (60%) of adjusted gross income, petitioners did not include any portion of their itemized deduction as subject to the New York minimum tax.

8. The Audit Division, by contrast, argues that petitioners should have used the total of federal itemized deductions rather than the New York itemized deduction as the amount against which sixty percent (60%) of petitioners' adjusted gross income should have been compared. Using this method of computation results in an adjustment increasing petitioners' total items of tax preference subject to the minimum tax. Such increase is the amount by which the total of federal itemized deduction exceeds sixty percent (60%) of petitioners' adjusted gross income.

9. Petitioners assert that the Audit Division's method of computation is inequitable in that for purposes of determining the amount of excess itemized deductions which constitute items of tax preference subject to New York minimum tax, there is no allowable adjustment reducing federal itemized deductions by the amount of State and Local taxes paid in New York. Petitioners argue that using the federal definition of itemized deductions results in a New York minimum tax being imposed on certain itemized deductions which are not allowable as itemized deductions for New York purposes.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as

Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30.

B. That section 622 of the Tax Law in pertinent part provides:

"New York minimum taxable income of resident individual. --

(a) The New York minimum taxable income of a resident individual,... shall be the sum of the items of tax preference, as described in subsection (b) of this section,...

* * *

"(b) For purposes of this article, the term "items of tax preference" shall mean the federal items of tax preference, as defined by the laws of the United States, of a resident individual,... for the taxable year, ..."

C. That section 57 of the Internal Revenue Code in pertinent part provides:

"Section 57. Items of Tax Preference.

(a) In General. -- For purposes of this part, the items of tax preference are --

(1) Excess Itemized Deductions.-- An amount equal to the excess itemized deductions for the taxable year (as determined under subsection (b)).

* * *

(b) Excess Itemized Deductions.--

(1) In General-- For purposes of paragraph (1) of subsection (a) the amount of the excess itemized deductions for any taxable year is the amount by which the sum of the deductions for the taxable year other than--

(A) deductions allowable in arriving at adjusted gross income,

(B) the standard deduction provided by section 141,

(C) the deduction for personal exemptions provided by section 151,

(D) the deduction for medical, dental, etc. expenses provided in section 213, and

(E) the deduction for casualty losses described in section 165(c)(3),

exceeds 60 percent (but does not exceed 100 percent)
of the taxpayer's adjusted gross income for the
taxable year."

D. That there is no provision in the Tax law permitting use of the New York itemized deduction rather than Federal itemized deductions for purposes of computing excess itemized deductions which are items of tax preference subject to New York minimum tax. Furthermore there is no provision in the definition of excess itemized deductions which allows a modification reducing such deductions by the amount of State and Local taxes paid in the taxable year. Accordingly, for the period at issue herein, petitioners improperly calculated their items of tax preference subject to New York minimum tax.

E. That the petition of Howard Ross and Nanette Ross is hereby denied and the Notice of Deficiency dated November 28, 1978, together with such minimum interest as may be lawfully owing, is sustained.

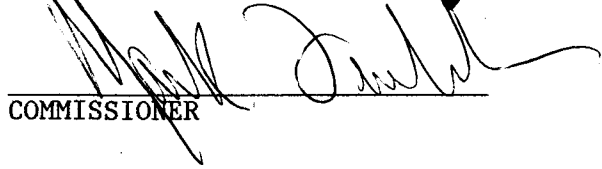
DATED: Albany, New York

FEB 5 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER