

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Philip Scharf :
and Est. of Anne Scharf : 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 Year :
1974.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Philip Scharf, and Est. of Anne Scharf the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Scharf
and Est. of Anne Scharf
110-45 Queens Blvd.
Forest Hills, NY 11375

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
9th day of April, 1982.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip Scharf :
and Est. of Anne Scharf :

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 Year :
1974.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Morris Meyerson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris Meyerson
4 Peter Cooper Rd.
New York, NY 10010

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
9th day of April, 1982.

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

April 9, 1982

Philip Scharf
and Est. of Anne Scharf
110-45 Queens Blvd.
Forest Hills, NY 11375

Dear Mr. Scharf:

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
Morris Meyerson
4 Peter Cooper Rd.
New York, NY 10010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PHILIP SCHARF and ANNE SCHARF
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1974.

DECISION

Petitioners, Philip Scharf and Anne Scharf (now deceased), 110-45 Queens Boulevard, Forest Hills, New York 11375, 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. 24917).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 7, 1981 at 2:45 P.M. Petitioner Philip Scharf appeared with Morris Meyerson, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioners are entitled to claim a theft loss deduction of \$165,940.00 and, if so, have they properly substantiated said loss.

FINDINGS OF FACT

1. Petitioners, Philip Scharf and Anne Scharf (now deceased), filed a 1974 New York State Income Tax Resident Return on July 2, 1975. On said return petitioners claimed a theft loss deduction of \$165,940.00.

2. On April 4, 1978 the Audit Division issued to petitioners a Notice of Deficiency asserting that for the year 1974 additional personal income tax of \$1,783.92 was due together with interest. Said Notice of Deficiency was based

on an explanatory Statement of Audit Changes, dated February 1, 1978, wherein the claimed \$165,940.00 theft loss deduction was disallowed as said loss was considered a "...non-business connected bad debt and should be treated as a short-term capital loss". A second adjustment was also made by the Audit Division which petitioners do not contest and, accordingly, same will not be addressed hereinafter.

3. During the year 1974 and for three years prior to this, petitioner Philip Scharf, a practicing Certified Public Accountant, utilized the services of a certain individual as his stockbroker. Petitioners alledge that approximately April, 1973 they began loaning sums of money to this individual and that a total of \$165,940.00 was embezzled from them by said broker.

4. Submitted into evidence was an analysis of monies allegedly due to petitioner Philip Scharf from his stockbroker. Said analysis was prepared by petitioner and consisted of 41 transactions, totaling \$165,940.00, between petitioner Philip Scharf and either his broker, or other persons or financial institutions. Many of the transactions were supported by copies of cancelled checks, however, only eight of the transactions involved checks written by petitioner Philip Scharf payable to his broker. The aforementioned eight checks totaled \$19,733.35. Nine of the cancelled checks were made payable to petitioner Philip Scharf or cash and totaled \$5,772.00.

5. Petitioners did not report the alledged embezzlement to any law enforcement agency. At the hearing held herein petitioners' representative testified that approximately \$70,000.00 or \$80,000.00 was given by petitioners to their broker in the form of loans. No breakdown was submitted segregating that portion of the \$165,940.00 which represented loans as opposed to embezzled funds.

6. The analysis referred to in Finding of Fact "4", supra, indicated that petitioner Philip Scharf gave to his broker the following sums of money on the dates indicated:

<u>DATE</u>	<u>AMOUNT</u>
1/17/75	\$1,500.00
1/20/75	\$1,500.00
2/7 & 2/10/75	\$3,700.00
4/14/75	\$ 50.00

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law places the burden of proof upon petitioners to overcome the State's deficiency. That petitioners' have failed to meet their burden of proof to show that the \$165,940.00 were funds embezzled from them and not loans given to their broker. It has not been shown that the \$165,940.00 was unlawfully taken or removed from petitioners' possession or that any criminal intent existed.

B. That Treasury Regulation 1.165-8(a)(2) states in part that "A loss arising from theft shall be treated under section 165(a) as sustained during the taxable year in which the taxpayer discovers the loss" (emphasis added). That petitioners' own analysis of monies due from the broker indicated that four advances, totaling \$6,750.00, were made to said broker in 1975, the last of said advances being consummated on April 14, 1975. If one were to consider the monies advanced by petitioners to their broker as qualifying for theft loss deduction, which this Commission does not, it must be noted that petitioners have claimed the deduction in the wrong tax year. The fact that Philip Scharf advanced monies to his broker on four separate occasions in 1975 leads to the assumption that petitioners could not have discovered any loss until the 1975 tax year and not 1974.

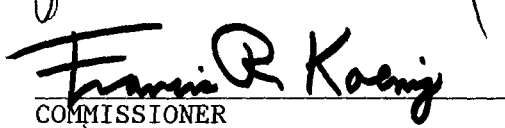
C. That the petition of Philip Scharf and Anne Scharf (now deceased) is denied and the Notice of Deficiency dated April 4, 1978 is sustained, together with such additional interest as may be lawfully due and owing.

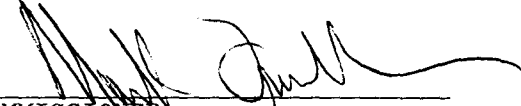
DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER