STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions of Stanley N. Ausbrooks & Virginia Ausbrooks	AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1971, 1972 and 1977 and Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1977.	

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 13th day of July, 1983, she served the within notice of Decision by certified mail upon Stanley N. & Virginia Ausbrooks, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley N. & Virginia Ausbrooks
7529 Baltusrol Lane
Charlotte, NC 28210

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
13th day of July, 1983.

Connie A. Hagelund

Kathy A. Kaffenbach
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions of Stanley N. Ausbrooks & Virginia Ausbrooks	AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1971, 1972 and 1977 and Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1977.	

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 13th day of July, 1983, she served the within notice of Decision by certified mail upon Joseph H. Murphy the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 MONY Plaza
Syracuse, NY 13202

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
13th day of July, 1983.

Connie A. Hagelund

Kathy A. Kassenbach
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 13, 1983

Stanley N. & Virginia Ausbrooks
7529 Baltusrol Lane
Charlotte, NC 28210

Dear Mr. & Mrs. Ausbrooks:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 MONY Plaza
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions of STANLEY N. AUSBROOKS and VIRGINIA AUSBROOKS for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1971, 1972 and 1977 and Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1977.	DECISION

Petitioners, Stanley N. Ausbrooks and Virginia Ausbrooks, 7529 Baltusrol Lane, Charlotte, North Carolina 28210, filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1971, 1972 and 1977 and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1977 (File Nos. 01421 and 35241).

A formal hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on August 31, 1982 at 10:30 A.M., with all briefs to be submitted by January 24, 1983. Petitioners appeared by Hancock, Estabrook, Ryan, Shove & Hust (Joseph H. Murphy and E. Parker Brown, Esqs., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether partnership losses claimed on petitioners' returns were properly disallowed by the Audit Division on the basis that said partnerships were not carrying on a business, trade, profession or occupation in New York State and New York City and that, therefore, the partnership losses were not derived from or connected with New York sources.

II. Whether the aforementioned partnership losses, if determined to be derived from or connected with New York sources, can be properly disallowed as activities not engaged in for profit.

III. Whether the Audit Division has sustained the burden of proof to show that the assertion of a greater deficiency against petitioner for the year 1972 was proper.

FINDINGS OF FACT

1. Petitioners herein, Stanley N. Ausbrooks and Virginia Ausbrooks[1], timely filed New York State income tax nonresident returns for the years 1971 and 1972 and New York State and New York City nonresident returns for the year 1977. On the New York State returns, petitioner reported as New York source income his distributive share of partnership income received from Peat, Marwick, Mitchell & Company (hereinafter "PMM"), to the extent that his distributive share of partnership income was allocated to New York State sources on PMM's partnership returns. Also included in the computation of total New York income for the years at issue were petitioner's distributive share of income or losses derived from four (4) limited partnerships known as Copem 71, Copem 72, Copem Marts and Copem 73 (hereinafter collectively referred to as "Copem partnerships"). Petitioner's 1977 Nonresident Earnings Tax Return for New York City reported net earnings from self-employment of $26,502.00.

2. On March 25, 1974, the Audit Division issued a Notice of Deficiency to petitioners for the years 1970[2], 1971 and 1972. Said Notice asserted that

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[1] Petitioner Virginia Ausbrooks is involved in this proceeding solely by the virtue of filing joint income tax returns with Stanley N. Ausbrooks. Accordingly, the use of the term petitioner hereafter shall refer solely to Stanley N. Ausbrooks.

[2] The tax asserted due for the year 1970 was cancelled by the Audit Division via a letter dated June 25, 1974 (Dept. Exhibit "E"). Accordingly, the year 1970 is not at issue and will not be addressed hereafter.

additional New York State personal income tax was due in the amount of $5,908.83, together with interest of $684.66, for a total due of $6,593.49. The aforementioned Notice of Deficiency was premised on a Statement of Audit Changes, also dated March 25, 1974, wherein the following explanation of the deficiency was offered:

> "Income and losses, not connected with or derived from New York State sources, are neither includible nor deductible to arrive at New York income for nonresident member partners."

The Audit Division adjusted petitioner's 1971 and 1972 total New York State income to include only his distributive share of PMM partnership income derived from New York State sources as reported on PMM's partnership returns.

3. Pursuant to a letter dated April 30, 1974, the Audit Division advised petitioner that the tax due for 1971 was reduced from $1,871.82 to $394.08 and that the tax due for 1972 was reduced from $2,328.83 to $994.00. The aforementioned reductions were based on the Audit Division's allowance of partnership losses from Sage Investors.

4. By Notice of Claim dated November 29, 1974, the Audit Division asserted against petitioner for the year 1972 a deficiency greater than that asserted in its letter of April 30, 1974, supra. The greater deficiency was for $165.14, plus interest, and was based on a modification for allocable expenses and computation of minimum income tax due. Both the modification for allocable expenses and the computation of minimum income tax due were based on the Audit Division's assertion that petitioner had New York State items of tax preference from accelerated depreciation in the sum of $5,031.00. The Audit Division submitted no evidence to support the claim that petitioner had $5,031.00 of New York State items of tax preference from accelerated depreciation during the year 1972.

5. On May 22, 1981, the Audit Division issued a Notice of Deficiency to petitioners for the year 1977, asserting that $287.27 of New York State and New York City tax was due, together with interest of $75.72, for a total due of $362.99. The deficiency was explained in an accompanying Statement of Audit Changes as follows:

> "The Copem partnerships, whose only function is the investment in other partnerships, are not considered as engaged in carrying on a business, trade or profession. In asmuch (sic) as the partnerships in which Copem partnerships invested are located outside New York State, the losses resulting from such partnerships are not considered derived from or connected with New York State sources. Therefore, your shares of losses from the Copem partnerships are not deductible on your nonresident return."

Petitioner's 1977 total New York State income was adjusted to include only his distributive share of PMM partnership income derived from New York State sources as reported on PMM's 1977 New York partnership return. The net earnings from self-employment reported on petitioner's 1977 New York City return was increased to $31,444.00, the amount of petitioner's distributive share of PMM partnership income derived from New York City sources.

6. During the years at issue petitioner was a limited partner in the four (4) Copem partnerships. The following chart represents petitioner's distributive share of ordinary income or loss derived from each of the Copem partnerships for the years in question:

	1971	1972	1977
Copem 71	($ 4,983.00)	($ 4,114.00)	$2,610.00
Copem 72	(11,026.00)	1,940.00	(1,469.00)
Copem Marts	(4,140.00)	(8,209.00)	1,465.00
Copem 73	N/A	(8,204.00)	(1,476.00)
Total	($20,149.00)	($18,587.00)	$1,130.00

7. Petitioner Stanley N. Ausbrooks was a certified public accountant and, during the years at issue, a member partner in the accounting firm of Peat, Marwick, Mitchell & Company. PMM was (and is) a very large accounting firm with offices all over the United States and in many foreign countries. There were in excess of 1,000 partners in PMM.

8. Certain professional and other rules prohibited any taint or hint of lack of independence on the part of certified public accountants and these restrictions afforded the partners of PMM, including petitioner, little freedom in their personal investment opportunities. Because of the size of PMM and its constantly changing and expanding clientele, its partners were virtually precluded from investing in the securities of any publicly held company. If a partner of PMM owned stock in a particular corporation and said corporation later became a client of PMM, it would be necessary for the partner to immediately dispose of the stock, regardless of the financial consequences.

9. To circumvent the possible threat to independence, PMM devised a series of limited partnerships, some of which are the Copem partnerships involved herein. The Copem partnerships were formed to give the member partners of PMM an opportunity to invest in ventures which offered the potential to build a private estate and also offered protection against inflation.

10. The Copem partnerships were all limited partnerships formed in accordance with and pursuant to the provisions of the Partnership Law of the State of New York. Each of the Copem partnerships had three (3) general partners. The general partners of Copem 71 were Seymour Bohrer, James Cumpton and William Henderson, while Mr. Bohrer, Mr. Cumpton and one Charles Lees were the general partners of Copem 72, Copem Marts and Copem 73. Copem 71 had a total of 155 limited partners; Copem 72 had a total of 173 limited partners; Copem Marts had a total of 240 limited partners and Copem 73 had a total of 173 limited partners. Participation in the Copem partnerships, either as a general partner or limited partner, was restricted to active partners of PMM only.

11. The Copem partnerships were funded through capital contributions made by its general and limited partners. As each Copem was being formed, all

active member partners of PMM were invited to participate and, if they elected to participate, to subscribe in units varying from $1,250.00 to $2,000.00, to the extent of the number of units they chose. Copem 71, Copem 72, Copem Marts and Copem 73 started with capital contributions of $1,272,300.00, $2,120,000.00, $2,926,250.00 and $1,908,000.00, respectively.

12. The Copem partnerships functioned by becoming limited partners in other partnerships (hereinafter referred to as "second-tier partnerships"). These second-tier partnerships were all non-New York partnerships generally engaged in the business of acquiring, owning, holding, leasing, improving, developing (including subdividing), operating and managing real property, including constructing commercial, industrial and residential buildings and other improvements on said real property. All of the real property acquired, owned, held or leased by the second-tier partnerships had a situs outside New York State. The partnership agreements between the Copem partnerships and the second-tier partnerships were not submitted into evidence.

13. The Copem partnerships generally had a 50 percent interest in the profits and losses of the second-tier partnerships in which they invested. The following chart represents those second-tier partnerships in which the Copem partnerships invested:

Copem Partnership	Second-Tier Partnership
Copem 71	1) Crow-71, Ltd. 2) Baker-Jones-Crow-71, Ltd. 3) El Dorado Vineyard, Co.
Copem 72	1) Calabassas Crest, Ltd. 2) Horizon Village Apartments 3) El Dorado Vineyard, Co. 4) Copem 72 - Mesa Petroleum, Co. 5) Cal Park Bldg., Ltd. 6) Copem Marts 7) Kyp Properties, Ltd. 8) McKinley Arms Apt., Co.

Copem Partnership	Second-Tier Partnership
Copem 72 (con't.)	9) Santa Barbara Townhouse, Ltd. 10) 1617 Westcliff Dr., Ltd. 11) Ventura/Ojai, Ltd.
Copem Marts	1) Rope Associates, Ltd.
Copem 73	1) Rospec Associates 2) Park Plaza II, Ltd. 3) Santa Clara Office Bldg.

14. Mr. James Cumpton, a general partner in all four Copem partnerships, acted as the de facto chief executive officer of the Copem partnerships, while the other two general partners served as an investment committee. Mr. Cumpton was responsible for temporarily investing the contributed capital in interest-bearing accounts, until such time as he could locate an acceptable long-term venture in which to invest the capital[3]. Once capital was invested in a second-tier partnership, Mr. Cumpton would monitor the activities and progress of said second-tier partnership, both with respect to construction and operational activities and construction financing and permanent financing. The amount of time devoted to each second-tier partnership by Mr. Cumpton would vary depending on the performance of the general partner of the second-tier partnership and other factors, such as the economy and weather conditions during construction phases. At all times during the course of selecting a venture in which to invest and in monitoring its progress, Mr. Cumpton was careful not to jeopardize or compromise the independence of the partners of the Copem partnerships and PMM.

15. The general partners of the Copem partnerships were also active member partners of PMM. When working on Copem matters during normal business hours,

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[3] The one exception to this general modus operandi was the Copem Marts partnership. Copem Marts was formed with the knowledge that the contributed capital would be invested in limited partnership form with Rope Associates, Ltd., a second-tier partnership involved in the construction of 113 K-Mart shopping centers.

the general partners of the Copem partnerships would put charge slips on their time sheets. PMM would then bill the Copem partnerships, at the standard rate per hour, for said time. During the two year period, July 1, 1971 to July 1, 1973, PMM billed the Copem partnerships for 452 hours of Mr. Cumpton's time and 111 hours of Mr. Bohrer's time. On a percentage basis, when compared to total hours chargeable to clients, Mr. Cumpton spent between 38 percent and 56 percent of his time on Copem matters, while Mr. Bohrer spent between 9 percent and 14 percent of his time on Copem matters. No evidence was presented with respect to the time spent on Copem matters by the other general partners, nor was any evidence presented with respect to any period other than July 1, 1971 to July 1, 1973.

16. PMM maintained an office at 345 Park Avenue, New York, New York. As a partner in PMM, Mr. Cumpton had an office which was located at the 345 Park Avenue address. The other general partners of the Copem partnerships also worked for PMM out of the office located at 345 Park Avenue. The Copem partnerships operated primarily out of Mr. Cumpton's PMM office. The Copem partnerships' books and ledgers were kept in Mr. Cumpton's office and the filing cabinets were located just outside his office. The Copem partnerships paid a flat fee monthly to PMM for its use of office space, desk space, filing cabinets, incoming telephone calls and outgoing local calls. Long distance telephone calls, postage, messenger services and the use of PMM support staff, such as secretarial services, were put on charge slips and billed by PMM to the Copem partnerships on an as used basis. There was no written contract between the Copem partnerships and PMM with respect to the use of office space and equipment or the rate of reimbursement to be paid by the Copem partnerships.

17. The Copem partnershps were listed on the building directory at 345 Park Avenue and they also had their own stationery. Bank accounts, both checking and savings, were maintained by the Copem partnerships in New York City.

18. The partnership returns filed by the Copem partnerships during the years at issue listed their activity as real estate investment. The partnership agreements for Copem 71, Copem Marts and Copem 73 describe one of the purposes of each partnership as follows:

> "1.3(d) To make investments in joint ventures, general partnerships, limited partnerships, corporations, trusts, syndicates, or any other entity...".

19. The New York State partnership returns filed by the Copem partnerships reflected the following amounts of total income and deductions:

Copem 71	1971	1972	1977
Total income	($ 616,944.00)	($ 506,673.00)	$345,998.00
Total deductions	16,941.00	7,249.00	13,905.00
Net income or loss	($ 633,885.00)	($ 513,922.00)	$332,093.00

Copem 72	1971	1972	1977
Total income	($1,152,075.00)	$ 262,295.00	($136,712.00)
Total deductions	19,937.00	41,065.00	19,514.00
Net income or loss	($1,172,012.00)	$ 221,230.00	($156,226.00)

Copem Marts	1971	1972	1977
Total income	($ 791,203.00)	($1,591,979.00)	$299,897.00
Total deductions	16,416.00	9,363.00	20,378.00
Net income or loss	($ 807,619.00)	($1,601,342.00)	$279,519.00

Copem 73		1972	1977
Total income		($ 623,701.00)	($108,034.00)
Total deductions		22,316.00	9,268.00
Net income or loss		($ 646,017.00)	($117,302.00)

Of total deductions shown on the partnership returns, almost the entire amount represented expenses categorized as "management and accounting". Included in "management and accounting" expenses were fees for professional services rendered by PMM staff to the Copem partnerships (including the charges for the time spent on Copem matters by the general partners) and the monthly fees for the use of office space, desk space, etc. and other operating expenses. The record contains no evidence as to what portion of total "management and accounting" expenses pertained to the maintenance and operation of an office, as opposed to management and accounting fees.

CONCLUSIONS OF LAW

A. That section 637(a)(1) of the Tax Law provides that:

> "...In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission consistent with the applicable rules of section six hundred thirty-two."

B. That section 632(b) of the Tax Law defines income and deductions from New York sources as:

> "(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:
>
> * * *
>
> (B) a business, trade, profession or occupation carried on in this state."

C. That 20 NYCRR 134.1(a) provides that a nonresident partner shall include in New York income his distributive share of partnership income, gain, loss and deduction to the extent such items are derived from or connected with a business carried on in New York State, as determined pursuant to 20 NYCRR 131.4(a). It is provided by 20 NYCRR 131.4(a) that:

"A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within the State by a nonresident when he occupies, has, maintains or operates desk room, an office, a shop, a store, a warehouse, a factory, an agency or other place where his affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without the State. This definition is not exclusive. Business is carried on within the State if activities within the State in connection with the business are conducted in this State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within the State and yet not be engaged in a trade or business within the State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for his income or part thereof, he is carrying on a business or occupation...".

D. That section U46-1.0(f) of Chapter 46, Title U of the Administrative Code of the City of New York defines net earnings from self-employment as:

"...the same as net earnings from self-employment as defined in subsection (a) of section fourteen hundred two of the internal revenue code... . However, 'trade or business' as used in subsection (a) of section fourteen hundred two of such code shall mean the same as trade or business as defined in subsection (c) of section fourteen hundred two of such code...".

Section 1402(a) of the Internal Revenue Code, as pertinent herein, defines net earnings from self-employment as an individual's:

"...distributive share...of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member...".

Section 1402(c) of the Internal Revenue Code provides that:

"The term 'trade or business', when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to trade or business expenses)...".

E. That the Copem partnerships at issue herein were not involved in the carrying on of a business in New York State and New York City within the meaning and intent of sections 637(a)(1) and 632(b)(1)(B) of the Tax Law and section U46-1.0(f) of Chapter 46, Title U of the Administrative Code of the City of New York, respectively, but rather served as personal investment vehicles for the partners of PMM.

The Copem partnerships were formed not for a business purpose, but for the purpose of offering personal investment opportunities which would not present conflicts of interest to the partners of PMM. The member partners of PMM voluntarily participated in the Copem partnerships as a substitute for or in lieu of personal or individual investment activities. Testimony taken at the formal hearing from the de facto chief operating officer of the Copem partnerships indicated that said partnerships were formed to give PMM partners an opportunity to invest in ventures which offered the potential to build a private estate. The partnership returns filed by the Copem partnerships identified their activites as "real estate investment". One of the purposes of the Copem partnerships, as described in the partnership agreements, was to make investments.

As a further indicia of an investment activity and not a business activity, one must look to the amount of time and effort spent on Copem matters. Evidence presented at the formal hearing revealed that two of the general partners of the Copem partnerships spent a total of 563 chargeable hours on Copem matters during the two year period July 1, 1971 to July 1, 1973[4]. That during the two year period July 1, 1971 to July 1, 1973 the Copem partnerships had collectively invested funds as a limited partner in 16 different second-tier partnerships. Total hours spent per partnership per year amounted to 17.6 hours (563 divided by 2 divided by 16).

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[4] It should be noted that the period January 1, 1973 to July 1, 1973 is outside the tax years in dispute and that no evidence was adduced for the period January 1, 1971 to June 30, 1971 and for all of 1977.

Additionally, the relatively small amount of expenses or deductions claimed by the Copem partnerships in relation to the amounts invested and the losses incurred supports the conclusion of an investment as opposed to a business activity. Also, it is noted that the general partners of the Copem partnerships did not receive a salary for their services and that petitioner failed to submit into evidence the partnership agreements between the 16 second-tier partnerships and the Copem partnerships.

Finally, the Copem partnerships, in addition to serving as personal investment vehicles for the partners of PMM, also provided said partners with substantial reductions in their Federal and New York State income tax liabilities. Had petitioner Stanley N. Ausbrooks individually been a limited partner in the various real estate ventures listed in Finding of Fact "13", supra, in lieu of the Copem partnerships, he would not (as a nonresident of New York) have been entitled to deduct any losses or report any income generated from said out-of-state ventures pursuant to the situs rules or special rules for real estate provided in section 707(e) of Article 23 of the Tax Law and sections 632(b)(1)(A) and 637(a)(1) of Article 22 of the Tax Law. Serious tax ramifications would result if petitioner were allowed to circumvent the Tax Law through the formation of limited partnerships which in turn become limited partners in numerous out-of-state real estate ventures, the losses from which would not be deductible if petitioners had individually became partners in the out-of-state ventures. To rule otherwise would create an opportunity for other nonresident individuals with similar investment motives to avoid taxes properly owed to New York.

F. That the instant case is distinguishable from Vogt v. Tully, 79 A.D.2d 758, rev'd. 53 N.Y.2d 580. In Vogt, supra, the petitioner therein was a

limited partner in a partnership known as Endeavor Car. The Court of Appeals in Vogt found that Endeavor Car was an active business established and operated to arrange financing and to acquire and lease railroad tank cars. Endeavor Car owned the railroad tank cars and it had sole responsibility for all aspects of its business operations. The Copem partnerships, however, did not engage in any real estate ventures on their own, did not own any real property, did not arrange financing of the projects, did not perform any of the construction work and did not manage the property. The Copem partnerships' only activity was to invest funds as a limited partner in second-tier partnerships and to monitor the progress of its investments.

This view of the Copem partnerships' activity is consistent with section 93 of New York Partnership Law which provides that "The contributions of a limited partner may be cash or other property, but not services". Petitioner's contention that the Copem partnerships were so actively involved in the operation and management of the second-tier partnerships as to be considered carrying on a business places them outside New York Partnership Law. It should also be noted that management of a limited partnership is vested in the general partners and that limited partners may not interfere in any manner with the conduct or control of partnership business (See: Lichtyger v. Franchard, 18 N.Y.2d 528).

The Copem partnerships and Endeavor Car can also be distinguished in that Endeavor Car had one active general partner who spent approximately 30 percent of his time on its business. The Copem partnerships, however, had invested funds in 16 different second-tier partnerships and the general partners of the Copem partnerships spent an average of only 17.6 hours per year on each of its 16 different investments.

G. That pursuant to section 689(e)(3) of the Tax Law, the Audit Division bears the burden of proof to show that petitioner is liable for any increase in the deficiency. That no evidence was presented by the Audit Division to show that petitioner had New York State items of tax preference from accelerated depreciation in the sum of $5,031.00 during the year 1972. Accordingly, the Audit Division has failed to sustain its burden of proof to show that petitioner was liable for the greater deficiency asserted in its Notice of Claim dated November 29, 1974.

H. That the issue of whether or not the Copem partnerships were engaged in activities with a profit motive is rendered moot in light of Conclusion of Law "E", supra.

I. That the petitions of Stanley N. Ausbrooks and Virginia Ausbrooks are granted to the extent that the greater deficiency asserted via the Notice of Claim dated November 29, 1974 is cancelled; that the deficiency asserted for the year 1970 is cancelled; that the deficiency asserted for the years 1971 and 1972 is reduced to the amounts set forth in the Audit Division's letter dated April 30, 1974; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

JUL 13 1983

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER