

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Simon Chilewich	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund	:	
of New York State and New York City Income Tax	:	
under Article 22 of the Tax Law and Chapter 46,	:	
Title T of the New York City Administrative Code	:	
for the Year 1977.	:	

State of New York
County of Albany

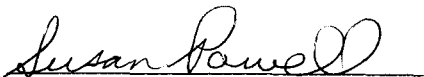
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Simon Chilewich, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Simon Chilewich
911 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
7th day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Simon Chilewich :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Income Tax :
under Article 22 of the Tax Law and Chapter 46, :
Title T of the New York City Administrative Code :
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 State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Norman Toporovsky the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

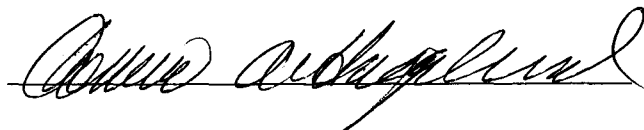
Norman Toporovsky
David L. Lieb & Company
200 Park Ave., Rm. 2920
New York, NY 10166

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
7th day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Simon Chilewich
911 Park Ave.
New York, NY 10021

Dear Mr. Chilewich:

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 and Chapter 46, Title T of the New York City Administrative Code, 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
Norman Toporovsky
David L. Lieb & Company
200 Park Ave., Rm. 2920
New York, NY 10166
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SIMON CHILEWICH	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Tax under Article 22 of the Tax Law	:	
and Chapter 46, Title T of the New York City	:	
Administrative Code for the Year 1977.	:	

Petitioner, Simon Chilewich, 911 Park Avenue, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of New York State and New York City Income Tax under Article 22 of the Tax Law and Chapter 46, Title T of the New York City Administrative Code for the year 1977 (File No. 31963).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 20, 1982 at 9:40 A.M. Petitioner appeared by David L. Lieb & Co., CPA's (Norman Toporovsky, CPA). The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Federal item of tax preference for excess itemized deductions should be reduced and/or modified by a portion of the New York State and New York City income taxes included therein in arriving at New York State and New York City items of tax preference.

II. Whether, in the event no reduction or modification (as above) is allowable in arriving at New York State and New York City items of tax preference, section 622 of the Tax Law is rendered constitutionally invalid.

FINDINGS OF FACT

1. On October 16, 1978, after having been granted an extension of time, petitioner Simon Chilewich, and his wife Virginia, filed separately on a combined New York State Income Tax Resident Return with New York City Personal Income Tax for 1977.

2. On December 11, 1980, the Audit Division issued a Notice of Deficiency against both the petitioner and his wife asserting additional income tax due for 1977 in the sum of \$12,348.75,¹ plus interest and/or penalty of \$2,768.58. A Statement of Audit Changes stated that the itemized deductions, except for medical expenses and casualty loss, exceeded 60 percent of Federal adjusted gross income and that the excess is an item of tax preference that must be included on Form IT-220 and is subject to New York state and New York City minimum income tax.

3. Petitioner's Federal items of tax preference for 1977 included capital gains and excess itemized deductions. Petitioner contends that Federal excess itemized deductions of \$74,929.40 should be reduced by the amount of New York State and New York City income taxes deducted as itemized deductions, thereby eliminating excess itemized deductions from New York items of tax preference. Petitioners assert that section 58(h) of the Internal Revenue Code of 1954 (as amended) mandates a result contrary to that asserted by the Audit Division.²

¹ The adjustments resulted in an increase in tax due from Mr. Chilewich in the amount of \$12,587.17 and a reduction of Mrs. Chilewich's tax by the sum of \$238.32. The net total tax due was found to be \$12,348.85. The reason for the ten cent discrepancy is unknown.

² Section 58(h) of the Internal Revenue Code provides:

"Regulations to include tax benefit rule. -- The Secretary shall prescribe regulations under which items of tax preference shall be properly adjusted where the tax treatment giving rise to such items will not result in the reduction of the taxpayer's tax under this subtitle for any taxable years."

To date, no regulations have been promulgated under section 58(h).

CONCLUSIONS OF LAW

A. 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 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..."

New York City Administrative Code Section T 46-122.0(a) and (b) contain similar provisions with respect to city resident individuals.

B. That during the year at issue, section 57 of the Internal Revenue Code, in pertinent part, provided:

"Section 57. Items of Tax Preference.

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

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

* * *

(b) Adjusted Itemized Deductions. --

(1) In General. -- For purposes of paragraph (1) of subsection (a), the amount of the adjusted 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 deduction for personal exemptions provided by section 151,
- (C) the deduction for medical, dental, etc. expenses provided in section 213, and
- (D) 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."

C. That in 1977 there was no provision in the Tax Law which allowed a portion of New York State and New York City income taxes to be deducted from Federal items of tax preference in arriving at New York items of tax preference. Section 622(b)(5) of the Tax Law, added by L. 1980, Ch. 669, effective June 30, 1980, and applicable to taxable years beginning after December 31, 1979, provides for the reduction of adjusted itemized deductions by a portion of income taxes includible therein. Section 622(b)(5) is not retroactive to 1977. (Matter of Dwight W. Winkelman and Marguerite P. Winkelman, State Tax Commission, March 5, 1982). New York City Administrative Code Section T 46-122.0(b)(5) contains similar provisions and is likewise not applicable to the year at issue. Furthermore, no adjustment for Federal income tax purposes would be allowable under Internal Revenue Code section 58(h) with respect to the items of deduction at issue herein, inasmuch as the (Federal) tax treatment of those items resulted in a reduction of petitioner's tax.

D. That accordingly, for the period at issue herein, petitioner improperly calculated his New York items of tax preference subject to New York minimum tax (Matter of Robert G. Goelet and Alexandra C. Goelet, State Tax Commission, May 6, 1983; Matter of Henry G. Jarecki and Gloria F. Jarecki, State Tax Commission, May 6, 1983).

E. That the laws of New York are presumed to be constitutionally valid at the administrative level of the New York State Tax Commission.

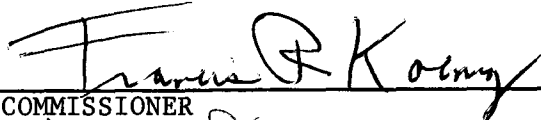
F. That the petition herein is denied and the Notice of Deficiency issued on December 11, 1980 is sustained, together with any additional interest that may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1983


PRESIDENT


COMMISSIONER


COMMISSIONER