

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Sam Cohen

:

: 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

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Sam Cohen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sam Cohen  
7300 N.W. 17th St., Apt. 116  
Plantation, FL 33313

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  
6th day of May, 1983.

David Parchuck

William R. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Sam Cohen :

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

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Bernard Gross the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard Gross  
8761 Holly Court  
Tamarac, FL 33321

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  
6th day of May, 1983.

David Parchuck

Cornia R. H. H. H.

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

May 6, 1983

Sam Cohen  
7300 N.W. 17th St., Apt. 116  
Plantation, FL 33313

Dear Mr. Cohen:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Bernard Gross  
8761 Holly Court  
Tamarac, FL 33321  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SAM COHEN	:	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.	:	

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Petitioner, Sam Cohen, 7300 N.W. 17th Street, Apt. 116, Plantation, Florida 33313, 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. 30304).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 15, 1982 at 10:45 A.M. Petitioner appeared by Bernard Gross, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner may properly use fair market value in lieu of face value of a purchase money mortgage received on the sale of real property in computing the long-term capital gain derived from such sale.

FINDINGS OF FACT

1. Sam Cohen (hereinafter petitioner) and his wife Ruth Cohen filed a combined New York State Income Tax Resident Return with New York City Personal Income Tax for the period January 1, 1976 through October 26, 1976. Petitioner's return was filed for the period indicated because of his change of residence to

the State of Florida on October 27, 1976. Pursuant to such return petitioner reported a long-term capital gain of \$23,701.00 derived from the sale of 33 1/3 shares of Ditmas Estate, Inc. computed as follows:

Face Value of mortgage	\$41,333.00
Less: 35% discount	<u>14,800.00</u>
	\$26,533.00
Cash Received on liquidation	<u>6,635.00</u>
	\$33,168.00
Basis	<u>9,467.00</u>
Gain	<u>\$23,701.00</u>

2. On May 2, 1978, the Audit Division issued a Statement of Audit Changes to petitioner wherein his reported long-term capital gain from said transaction was increased by \$14,800.00, reflecting a disallowance of petitioner's claimed "35% discount". Accordingly, a Notice of Deficiency was issued against petitioner on April 11, 1980 asserting additional New York State personal income tax of \$1,252.75, additional New York City personal income tax of \$588.46, plus interest of \$678.84, for a total due of \$2,520.05.

3. During 1976, petitioner owned 1/3 (33 1/3 shares) of the outstanding capital stock of Ditmas Estates, Inc., whose principal asset was a building and land located at 8702 Ditmas Avenue, Brooklyn, New York.

4. On July 27, 1976, said real property, in which Bankers Trust Company held a first mortgage of approximately \$35,000.00, was sold by the corporation for \$185,000.00 subject to said first mortgage. After closing adjustments the net credit due the seller totaled \$151,405.53. Such balance was paid to the corporation as follows:

Cash	\$ 27,405.53
Purchase Money Mortgage	<u>124,000.00</u>
Total	<u>\$151,405.53</u>

5. The purchase money mortgage was payable in monthly installments over a period of 240 months bearing interest at 7% per annum.

6. As of October 15, 1976, the purchase money mortgage was assigned by the corporation equally to the three stockholders and petitioner received his share of \$41,333.34. Additionally, petitioner received a cash distribution from the corporation of \$6,634.67 in final liquidation thereof.

7. Petitioner contended that he had continuously attempted to sell his interest in the mortgage but he was unable to do so in view of the subordinate nature of the mortgage and the long payment period involved. Evidence was submitted establishing that petitioner's attempts to sell in 1980 for a price of \$22,000.00 were unsuccessful.

8. Petitioner submitted an appraisal of his interest in the mortgage as of July 27, 1976. Such appraisal, which was dated June 14, 1978, valued petitioner's interest at \$27,000.00.

9. Petitioner contended that the "35% discount" taken in the amount of \$14,800.00 actually represented the amount subtracted from the face value of the mortgage to arrive at the fair market value which should properly be used for the purpose of computing the capital gain.

#### 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 corresponding sections of Article 30.

B. That section 654(c)(1) of the Tax Law provides in pertinent part:

Special Accruals - (1) If an individual changes his status from resident to nonresident, he shall, regardless of his method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income,

gain, loss or deduction accruing prior to the change of status....

C. That in computing New York taxable income for the resident period pursuant to section 654(c)(1) of the Tax Law, a taxpayer must include all the items he would be required to include if he were filing a Federal return for the same period on the accrual basis [20 NYCRR 148.10(a)]. The special accruals referred to herein are not required if the taxpayer complies with section 654(c)(4) of the Tax Law.

D. That petitioner did not comply with section 654(c)(4). Therefore, he must compute his New York taxable income for the period of his New York State residency as if a Federal return had been filed on the accrual basis for that period.

E. That the amount realized under section 1001(b) of the Internal Revenue Code by an accrual method taxpayer receiving a long term obligation on the sale of property is the principal or face amount of the notes received plus the sum of money, if any, received (Rev. Rul. 79-292, 1979-2 C.B.287).

F. That the petitioner must use the face value of his share of the mortgage received on the sale of the real property located at 8702 Ditmas Avenue in computing his capital gain income derived therefrom.

G. That the petition of Sam Cohen is denied and the Notice of Deficiency dated April 11, 1980 is hereby sustained together with such additional interest as may lawfully be owing.

DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION

*Rodrich wclm*  
PRESIDENT

*Francis Q Koeng*  
COMMISSIONER

*[Signature]*  
COMMISSIONER