

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Thomas E. & Ann R. Dewey, Jr. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Year 1978.

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 15th day of July, 1983, she served the within notice of Decision by certified mail upon Edward W. Morris the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward W. Morris
90 John St., Penthouse
New York, NY 10038

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
15th day of July, 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
Thomas E. & Ann R. Dewey, Jr. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
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State of New York
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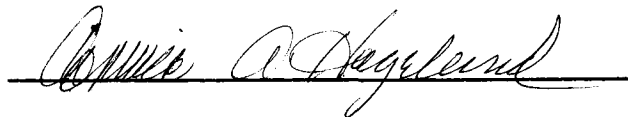
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Thomas E. & Ann R. Dewey, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas E. & Ann R. Dewey, Jr.
14 Wall St., Rm. 2910
New York, NY 10005

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

July 15, 1983

Thomas E. & Ann R. Dewey, Jr.
14 Wall St., Rm. 2910
New York, NY 10005

Dear Mr. & Mrs. Dewey:

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
Edward W. Morris
90 John St., Penthouse
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS E. DEWEY, JR. AND ANN R. DEWEY	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law and Chapter 46, Title T of	:	
the Administrative Code of the City of New	:	
York for the Year 1978.	:	

Petitioners, Thomas E. Dewey, Jr. and Ann R. Dewey, 14 Wall Street, Room 2910, New York, New York 10005, 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 Chapter 46, Title T of the Administrative Code of the City of New York for the year 1978 (File No. 31771).

On November 24, 1982, petitioners waived their right to a small claims hearing and requested that a decision be rendered based on the entire record contained in their file, with all briefs to be submitted by January 17, 1983. After due consideration of the record, the State Tax Commission hereby makes the following decision.

ISSUE

Whether the modifications provided for in section 622(a)(3) of the Tax Law and section T46-122.0(a)(3) of Chapter 46, Title T of the Administrative Code of the City of New York are limited to the amount of the current year net operating loss which remains as a carryover to succeeding years, or whether the computation of the amount of the net operating loss which remains as a carryover

to succeeding years include both the current year net operating loss and/or prior year net operating losses which were carried forward to the current year.

FINDINGS OF FACT

1. Petitioners herein, Thomas E. Dewey, Jr. and Ann R. Dewey, timely filed a New York State and New York City resident income tax return for the year 1978. Attached to said return was Form IT-220, New York State Minimum Income Tax Computation Schedule - With City of New York Resident Minimum Income Tax. In computing New York State and New York City minimum taxable income, petitioners subtracted from total New York State and New York City items of tax preference the sum of \$343,762.00, said amount representing the net operating loss carryover reduction provided for in section 622(a)(3) of the Tax Law and section T46-122.0(a)(3) of Title T.

2. On September 8, 1980, the Audit Division issued a Notice of Deficiency to petitioners for the year 1978, asserting that \$2,421.91 of New York State and New York City personal income tax was due, together with interest of \$282.42, for a total due of \$2,704.33.

3. The aforementioned Notice of Deficiency was premised on a Statement of Audit Changes dated May 30, 1980, wherein the \$343,762.00 subtraction from total New York State and New York City items of tax preference for the net operating loss carryover reduction was disallowed in total. It is the Audit Division's position that the net operating loss carryover reduction is limited to that portion of the current year (1978) net operating loss which remains as a carryover to succeeding years and does not include that portion of prior year net operating losses which were carried forward to the current year and remain as a carryover to succeeding years.

4. In 1976 petitioners sustained a net operating loss of which \$620,762.00 was available to be carried to other tax years. The 1976 net operating loss was applied to the years 1975 and 1977 in the amounts of \$91,955.00 and \$72,016.00, respectively, leaving a balance of \$456,791.00 ($\$620,762.00 - \$91,955.00 - \$72,016.00$) to be carried forward to the year 1978. The balance which was carried forward from 1976 to 1978, to wit \$456,791.00, was partially absorbed in the year 1978 in the amount of \$113,029.00, leaving a balance to be carried forward to 1979 of \$343,762.00 ($\$456,791.00 - \$113,029.00$).

5. It is petitioners' contention that the net operating loss carryover reduction provided for in section 622(a)(3) of the Tax Law and section T46-122.0(a)(3) of Title T is computed using both the current year net operating loss and/or prior year net operating losses which were carried forward to the current year.

CONCLUSIONS OF LAW

A. That section 622(a)(3) of the Tax Law provides that the New York State minimum taxable income of a resident individual is to be reduced by:

"...the amount of any net operating loss of the taxpayer, as determined for federal income tax purposes, which remains as a net operating loss carryover to a succeeding taxable year."
(emphasis added)

That section T46-122.0(a)(3) of Chapter 46, Title T of the Administrative Code of the City of New York is in all material respects identical to section 622(a)(3) of the Tax Law.

B. That section 172(c) of the Internal Revenue Code of 1954 defines net operating loss in the following manner:

"For purposes of this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d)."

Section 172(d)(1) of the Internal Revenue Code provides that in determining the amount of a net operating loss, no deduction shall be allowed for a net operating loss carryback or carryover from other tax years. [See also: Treasury Regulation 1.172-3(a)(1)(ii).]

C. That pursuant to section 172(d)(1) of the Internal Revenue Code, petitioners must eliminate, inter alia, the \$456,791.00 net operating loss deduction carried forward from 1976 to 1978 to determine the amount, if any, of their 1978 net operating loss. That with the elimination of the \$456,791.00 net operating loss deduction carried forward from 1976 to 1978, petitioners' allowable deductions do not exceed the gross income for the year 1978 and, therefore, they had no net operating loss for the year 1978 within the meaning and intent of section 172(c) of the Internal Revenue Code.

D. That section 56(b) of the Internal Revenue Code permits a taxpayer to defer his Federal minimum income tax liability in the case of certain net operating losses. Treasury Regulation 1.56-2(a) provides that:

"Section 56(b) provides for the deferral of liability for the minimum tax where, for the taxable year, the taxpayer has -

- (1) A net operating loss for such taxable year any portion of which (under sec. 172) remains as a net operating loss carryover to a succeeding taxable year..." (emphasis added)

E. That Internal Revenue Ruling 75-299 (1975-2 C.B. 21) states that:

"With respect to the question of whether section 56(b) of the Code will permit a deferral of the 1970 minimum tax liability, it must be noted that the statutory language of section 56(b) requires that the minimum tax to be deferred must arise in the net operating loss year, not in a carryback or carryover year to which the net operating loss is applied. The minimum tax liability deferral provisions of section 56(b) refer only to minimum tax liability arising from a year for which there was a net operating loss and that deferral is allowed only to the extent that realization of the benefit of the tax preference items is postponed to a loss carryover year. M's minimum tax

liability arose not from the year in which the net operating loss was incurred (1971) but from a prior year (1970) to which the net operating loss was carried.

Accordingly, the minimum tax liability deferral provisions of section 56(b) of the Code are not applicable in this case since the liability did not arise in the year in which the net operating loss arose but rather in a year to which the net operating loss was carried."


F. That section 622(a)(3) of the Tax law and section T46-122.0(a)(3) of Title T are patterned after and produce a tax benefit similar to that produced by section 56(b) of the Internal Revenue Code. That since petitioner did not have a net operating loss for the year 1978 there necessarily can not be any carryover of a 1978 net operating loss to a succeeding taxable year. That the computation of the 1978 net operating loss carryover reduction is limited solely to the net operating loss sustained in 1978 and does not include net operating carryovers or carrybacks from other tax years, within the meaning and intent of section 622(a)(3) of the Tax Law and section T46-122.0(a)(3) of Title T. [See also 20 NYCRR 123.1(a)(3) and 123.1(c)(1), effective January 28, 1982].

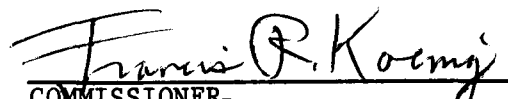
G. That the petition of Thomas E. Dewey, Jr. and Ann R. Dewey is denied and the Notice of Deficiency dated September 8, 1980 is sustained, together with such additional interest as may be lawfully due and owing.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER