

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Shep E. Gordon :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1974 and 1975. :

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In the Matter of the Petition :  
of :  
Jeff Dell and Bunny Dell :  
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In the Matter of the Petition :  
of :  
Morton Perlstein and Marlene Perlstein :  
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AFFIDAVIT OF MAILING

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In the Matter of the Petition :  
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Madeline Kahn :  
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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 21st day of October, 1983, she served the within notice of Decision by

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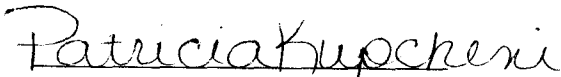
certified mail upon Madeline Kahn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Madeline Kahn  
c/o Padell, Nadell, Fine, Weinberger & Co.  
1775 Broadway  
New York, NY 10019

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  
21st 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 21, 1983

Madeline Kahn  
c/o Padell, Nadell, Fine, Weinberger & Co.  
1775 Broadway  
New York, NY 10019

Ms. Kahn:

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 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  
Bert Padell  
Padell, Nadell, Fine, Weinberger & Co.  
1775 Broadway  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

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certified mail upon Jonathan & Monica Podell, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jonathan & Monica Podell  
328 Maple Street  
Englewood, NJ 07631

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.

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Conni A. Hoglund

Patricia Kupcheni

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
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ALBANY, NEW YORK 12227

October 21, 1983

Jonathan & Monica Podell  
328 Maple Street  
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STATE TAX COMMISSION

cc: Petitioner's Representative  
Bert Padell  
Padell, Nadell, Fine, Weinberger & Co.  
1775 Broadway  
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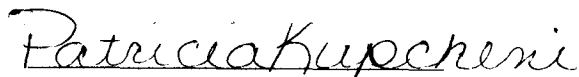
certified mail upon Morton & Marlene Perlstein, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morton & Marlene Perlstein  
17 Jason Lane  
Mamaroneck, NY 10543

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.

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SECTION 174



STATE OF NEW YORK  
STATE TAX COMMISSION  
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October 21, 1983

Morton & Marlene Perlstein  
17 Jason Lane  
Mamaroneck, NY 10543

Dear Mr. & Mrs. Perlstein:

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STATE TAX COMMISSION

cc: Petitioner's Representative  
Bert Padell  
Padell, Nadell, Fine, Weinberger & Co.  
1775 Broadway  
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STATE OF NEW YORK

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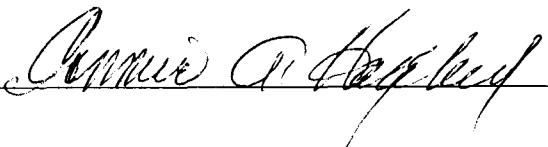
certified mail upon Bert Padell the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Bert Padell  
Padell, Nadell, Fine, Weinberger & Co.  
1775 Broadway  
New York, NY 10019

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.

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Sworn to before me this  
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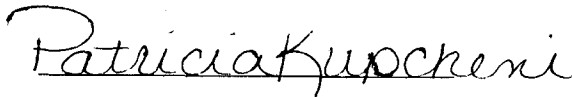
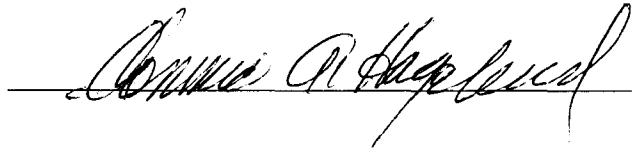
certified mail upon Jeff & Bunny Dell, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jeff & Bunny Dell  
1195 The Strand  
Teaneck, NJ 07666

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Jeff & Bunny Dell  
1195 The Strand  
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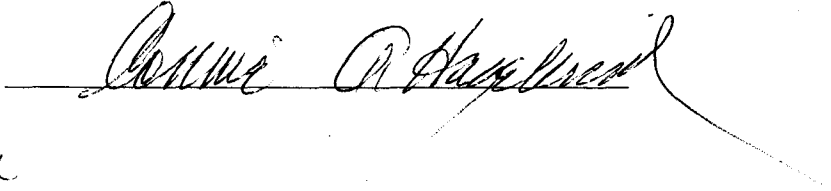
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Shep E. Gordon  
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Bert Padell  
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STATE OF NEW YORK

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In the Matter of the Petition  
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SHEP E. GORDON  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1974 and 1975.

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In the Matter of the Petition  
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JEFF DELL AND BUNNY DELL  
for Redetermination of a Deficiency or for  
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of the Tax Law for the Year 1974.

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In the Matter of the Petition  
of  
MORTON PERLSTEIN AND MARLENE PERLSTEIN  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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In the Matter of the Petition  
of  
JONATHAN PODELL AND MONICA PODELL  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1975.

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DECISION

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In the Matter of the Petition :  
of :  
MADELINE KAHN :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1976. :  

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Petitioners, Shep E. Gordon and Madeline Kahn, c/o Padell, Nadell, Fine, Weinberger & Co., 1775 Broadway, New York, New York 10019, Jeff Dell and Bunny Dell, 1195 The Strand, Teaneck, New Jersey 07666, Morton Perlstein and Marlene Perlstein, 17 Jason Lane, Mamaroneck, New York 10543, and Jonathan Podell and Monica Podell, 328 Maple Street, Englewood, New Jersey 07631, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1974, 1975, 1976, as individually specified above (File Nos. 23400, 24956, 30324, 23255, 23532 and 24547).

A consolidated small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 26, 1982 at 1:15 P.M. and continued to conclusion on October 27, 1982 at 1:15 P.M., with all briefs to be submitted by February 15, 1983. Petitioners appeared by William Mander, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas C. Sacca, Esq., of counsel).

#### ISSUES

I. Whether a determination as to the propriety of investment tax credit on the state level may be made prior to a federal determination on a similar issue.

II. Whether the subject master film negatives were (1) physically located in New York State and (2) were principally used in the production of goods by

manufacturing, processing or assembling as required by section 606(a)(2) of the Tax Law and thus qualify for investment tax credit.

FINDINGS OF FACT

1. Petitioners herein, Shep E. Gordon, Jeff Dell and Bunny Dell, Morton Perlstein and Marlene Perlstein, Jonathan Podell and Monica Podell and Madeline Kahn claimed an investment tax credit on their New York State personal income tax returns during the period in issue for each petitioner. The investment tax credit claimed was with respect to their distributive share of master film negatives acquired by certain partnerships.

2. The Audit Division issued statements of audit changes to petitioners disallowing the claimed investment tax credits on the ground that the subject property did not constitute qualified property for New York State investment credit purposes. Notices of deficiency were issued against petitioners as represented by the following chart, plus appropriate interest:

<u>DATE ISSUED</u>	<u>PETITIONER</u>	<u>TAX YEAR</u>	<u>TAX</u>
4/4/78	Shep E. Gordon	1974	\$1,187.00
1/24/79	Shep E. Gordon	1975	\$1,895.00
4/4/78	Jeff & Bunny Dell	1974	\$2,373.00 <sup>1</sup>
4/4/78	Morton & Marlene Perlstein	1974	\$ 952.40 <sup>1</sup>
12/18/78	Jonathan & Monica Podell	1975	\$2,288.00 <sup>2</sup>
5/21/80	Madeline Kahn	1976	\$ 62.00

3. Petitioners were investors in one or more partnerships namely, Reno Associates, Vista Company and Devon Company. The partnerships, which were formed for the purpose of purchasing and distributing full-length motion picture films, were supervised by the Persky-Bright Organization. The offices of the Persky-Bright Organization were located at 555 Madison Avenue, New York,

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<sup>1</sup> Includes other adjustments which are not at issue herein.

<sup>2</sup> Payments totaling \$2,145.19 have been applied against this deficiency.

New York. The petitioners' distributive share of the master film negatives, acquired by the partnerships during the years in issue, form the basis of the investment tax credit claimed by the respective petitioners.

4. Petitioners submitted a letter in evidence from Columbia Pictures Industries, Inc. addressed to Persky-Bright Films, dated May 2, 1978, which they contend is representative of how Persky-Bright Films handled the subject master film negatives during the periods in issue. Said letter states:

"...this will serve to confirm to you that from time to time in the ordinary course of business Columbia maintains negative and preprint materials relating to the motion pictures which it distributes at its laboratory facility in Woodside, New York. In addition, after a reasonable period of time following the release of a picture being distributed by Columbia, we generally remove any negative held at our laboratory facility in Los Angeles and transfer it to our Woodside facility."

Petitioners' brief states that based upon the Columbia letter "it is clear and well founded...that the tangible personal property in this matter, master film negatives, have been and are stored in New York State".

5. Petitioners further contend that a master film negative is a manufacturing or processing device used to produce finished goods and that the master film negatives in question were so used by the partnerships. In support of their contention petitioners submitted four letters from different companies connected with the film industry. One such letter, which is representative of the others, from Movielab, Inc. and dated April 18, 1979, defines a master film negative as follows:

"...a master film negative is a manufacturing and processing device or mold from which items, such as reels of film, are produced. These films can include duplicate negatives and prints which are sent to theatres or television stations for viewing or transmission.

\* \* \*

After the director or cinematographer have contributed their artistry in exposing or "shooting" the original negative, the editor, sound studio, film laboratory, etc., work the raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery or other similar equipment. This processing then puts together a mold from which multiple copies can be manufactured."

No evidence was offered at the hearing to establish that the partnerships were involved with such production in New York State.

6. Petitioners are under federal audit regarding the federal investment tax credit claimed for the subject master film negatives. Petitioners argue that as the federal determination would be relevant to the issue at hand, the State should not make a determination concerning the New York State investment tax credit until the federal issue is decided.

#### CONCLUSIONS OF LAW

A. That the substantive issues, whether the subject property had its situs in New York State and whether the property was used in the production of goods, are questions which must be decided in order to determine if the subject property qualifies for New York investment credit. It is not premature for this Commission to decide both of these issues independently of any federal determination as the federal authorities would not necessarily concern themselves with these questions.

B. That section 606(a)(2) of the Tax Law makes available to a taxpayer an investment tax credit with respect to tangible personal property and other tangible property which are depreciable pursuant to section 167 of the Internal Revenue Code, have a useful life of four years or longer, are acquired by purchase as defined in section 179(d) of the Internal Revenue Code, have a situs in New York and are principally used by the taxpayer in the production of goods by (inter alia) manufacturing, processing or assembling.

C. That assuming, without deciding, that the subject master film negatives were depreciable personal property otherwise eligible for the investment tax credit, petitioners have failed to establish that during the years in issue, the subject property had the required New York State situs or that the subject property was principally used by the partnership in qualifying activities. While it is noted that the subject master film negatives may have been stored from time to time in this State and that they may have been used in a production process, no evidence was introduced to show that such production, if any, occurred in New York State.

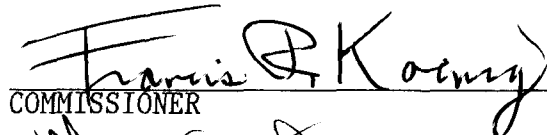
D. That the petitions are denied and the notices of deficiency as noted in Finding of Fact "2" are hereby sustained.

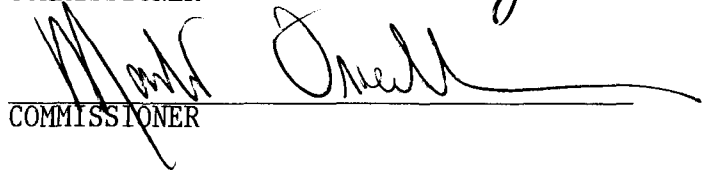
DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER