

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
J. Warren & Lois McClure	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Years	:	
1974 - 1978.	:	

State of New York
County of Albany

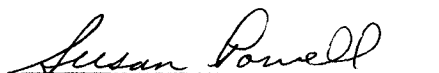
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon J. Warren & Lois McClure, the petitioners in the within proceeding,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

J. Warren & Lois McClure
19 East Snapper Point Dr.
Key Largo, Fl 33037

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 :
J. Warren & Lois McClure :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1974 - 1978. :

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 Ernest R. Field the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ernest R. Field
Field & Field
175 Great Neck Rd.
Great Neck, NY 110213376

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.

Susan Powell

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

J. Warren & Lois McClure
19 East Snapper Point Dr.
Key Largo, Fl 33037

Dear Mr. & Mrs. McClure:

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
Ernest R. Field
Field & Field
175 Great Neck Rd.
Great Neck, NY 110213376
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. WARREN McCLURE and LOIS McCLURE : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1974 through 1978. :

Petitioners, J. Warren McClure and Lois McClure, 19 East Snapper Point Drive, Key Largo, Florida 33037, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the Years 1974 through 1978 (File No. 34437).

On January 20, 1983, petitioners, J. Warren McClure and Lois McClure, advised the State Tax Commission in writing that they desired to waive a formal hearing and to submit the case to the State Tax Commission, based upon the entire record contained in the file and a memorandum of law which was later submitted on May 3, 1983. In addition, petitioners, by Ernest R. Field, Esq., and the Audit Division, by John P. Dugan, Esq., (Anna D. Colello, Esq., of counsel) executed a stipulation, the facts of which are incorporated into and made a part of this decision. After due consideration of said record, the State Tax Commission renders the following decision.

ISSUE

I. Whether petitioners may carryback New York net operating losses sustained in tax years when they were non-residents of New York to tax years when they were residents of New York.

II. Whether petitioners are entitled to a refund of minimum tax paid in 1978.

FINDINGS OF FACT

1. Petitioners filed resident New York State combined income tax returns for the years 1974, 1975 and 1976 and reported 1974 New York taxable income of \$240,262 and \$11,279 for petitioner J. Warren McClure and petitioner Lois McClure, respectively, 1975 New York taxable income of \$162,664 and \$10,490 for petitioner J. Warren McClure and petitioner Lois McClure, respectively, and 1976 New York taxable income of \$587,326 and \$4,015 for petitioner J. Warren McClure and petitioner Lois McClure, respectively.

2. Petitioners filed non-resident New York State income tax returns for the years 1977 and 1978 and reported a New York net operating loss of \$38,664 for 1977 New York income tax purposes and a net operating loss of \$34,839 for 1978 New York income tax purposes. In 1978, petitioners paid a New York State minimum income tax of \$430 on items of tax preference. In 1979, petitioners contended that petitioner J. Warren McClure sustained a net operating loss from New York partnerships totalling \$41,442.

3. Petitioners were residents of New York during 1974, 1975 and part of 1976.¹ They were non-residents of New York during 1977, 1978 and 1979.

4. Petitioners filed claims for credit or refund of personal income tax for 1974, 1975, 1976 and 1978 of \$5,233.48 plus interest, \$3,539.78 plus interest, \$4,927.00 plus interest and \$430.00 plus interest, respectively. Petitioners based their refund claims for their resident tax years of 1974, 1975 and 1976 on the carryback of New York net operating losses from their non-resident tax years of 1977, 1978 and 1979, respectively. Their refund claim for 1978 is based upon the elimination of a minimum tax liability since

¹ Petitioners' resident status changed during 1976. During their 1976 nonresident period, they sustained a New York net operating loss of \$43,028 and, accordingly, did not file a 1976 non-resident New York income tax return.

they contend that the items of tax preference originally reported in 1978 would be carried back to 1975 along with their 1978 New York net operating loss.

5. On November 24, 1980, the Audit Division disallowed petitioners' claims for refund for the 1974, 1975 and 1978 taxable years. The petition herein notes that although "(t)here has not been any notice of disallowance of the 1976 claim in the amount of \$4,927.00 plus interest received but since the issues are identical for each of the claims, it should be coordinated with the claims."

CONCLUSIONS OF LAW

A. That there is no specific statutory provision which allows petitioners to carryback net operating losses from tax years in which they were non-residents of New York to tax years in which they were residents. Rather, petitioners' right to deduct net operating loss carrybacks from their New York taxable income for resident tax years derives from Tax Law §612 which provides that the starting point for determining New York taxable income of a New York resident is the taxpayer's federal adjusted gross income.

B. That a resident of New York may not claim on his New York personal income tax return a net operating loss deduction in excess of the amount of the net operating loss deduction claimed on his federal income tax return. See Sheils v. State Tax Commission, 95 Misc.2d 605, rev'd, 72 A.D.2d 896, rev'd, 52 N.Y.2d 954 and Gurney v. Tully, 67 A.D.2d 303, rev'd, 51 N.Y.2d 818.

C. That petitioners have cited Graham v. State Tax Commission, 48 A.D.2d 444, aff'd, 40 N.Y.2d 889 in support of their position. However, in Graham, a nonresident taxpayer was allowed to carryback a net operating loss to a nonresident year even though there was no Federal net operating loss carryback.

In the case at hand, petitioners seek to carryback net operating losses for nonresident years to resident years.

D. That petitioners may not carryback New York net operating losses sustained in tax years when they were non-residents of New York to tax years when they were residents of New York since such losses did not enter into the petitioners' Federal adjusted gross income for the years that they were New York residents.

E. That the issue concerning whether petitioners are entitled to a refund of minimum tax paid in 1978 is rendered moot since the Audit Division properly disallowed the carryback of 1978 net operating losses to 1975, a tax year when petitioners were residents of New York, and the items of tax preference related to such losses were therefore properly reported and taxable in 1978.

F. That the Audit Division properly disallowed petitioners' claims for refund.

G. That the petition of J. Warren McClure and Lois McClure is denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1983


PRESIDENT


COMMISSIONER


COMMISSIONER