

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William J. & Carol L. Nammack :
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 Year :
1974. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

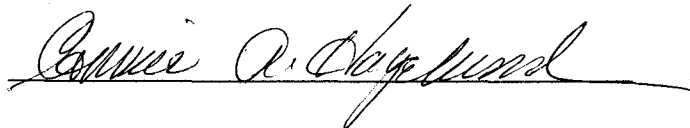
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon William J. & Carol L. Nammack, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


William J. & Carol L. Nammack
20 Exchange Place
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

In the Matter of the Petition :
of :
William J. & Carol L. Nammack :
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 Year :
1974. :

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 Jack Wong the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

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
ALBANY, NEW YORK 12227

July 15, 1983

William J. & Carol L. Nammack
20 Exchange Place
New York, NY 10005

Dear Mr. & Mrs. Nammack:

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
Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM J. and CAROL L. NAMMACK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

Petitioners, William J. and Carol L. Nammack, 20 Exchange Place, New York, New York 10005, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1974 (File No. 23495).

On April 20, 1983, petitioners filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether the sale of a seat on a stock exchange results in an ordinary business loss, rather than a capital loss.

FINDINGS OF FACT

1. Petitioners, William J. and Carol L. Nammack, timely filed a joint New York State income tax resident return for 1974.

2. On February 1, 1978, the Audit Division issued a Statement of Audit Changes against petitioners. Said statement asserted additional income tax due for the year 1974, stating that Mr. Nammack's distribution from the partnership of Sprague & Nammack was increased by \$88,120.00, on the grounds that the loss on the sale of a stock exchange seat constituted a capital loss rather than an

ordinary business loss. Accordingly, on April 4, 1978, the Audit Division issued a Notice of Deficiency for 1974 against petitioners for \$11,589.75 in personal income tax, plus \$2,925.70 in interest, for a total of \$14,515.45.

3. Petitioners timely filed a petition for redetermination of a deficiency or for refund of personal income tax for the year 1974.

4. William J. Nammack is a general partner in the limited partnership of Sprague & Nammack.

5. Sprague & Nammack is a specialist firm on the New York Stock Exchange which has the function of maintaining a market in particular securities sold on the exchange. Sprague & Nammack earns most of its income from buying and selling securities and from commissions paid to it for buying and selling for others. In order to conduct its business, it must own a beneficial interest in a membership on the New York Stock Exchange, commonly known as a "seat".

6. In December, 1969, Sprague & Nammack purchased a seat for \$264,009.33. The partnership agreement provided that any increase or decrease in the value of the membership or stock exchange seat was to be distributed as follows:

"The profit or increase in the value of this said membership shall be charged to each of the general partners in the same proportion in which they share profit and losses respectively."

7. Sprague & Nammack had an "a-b-c-" agreement, in which the seat was held by Robert P. Kelly, a general partner of the partnership. He was the nominally registered owner of this seat. According to the partnership agreement, Mr. Kelly agreed not to sell the seat unless he received the permission of the partnership.

8. In September, 1974, Sprague & Nammack sold the New York Stock Exchange membership in question for \$75,073.37. It claimed an ordinary business loss

deduction on the New York State Partnership Return in the amount of \$188,935.96. The portion of the loss attributable to Jerome W. Nammack, Jr. was \$88,120.00.

9. The Internal Revenue Service audited the Federal partnership returns of Sprague & Nammack. No adjustment was made to the partnership's treatment of the loss on the sale of the stock exchange seat on the federal partnership return. Accordingly, petitioners argue that since New York State tax returns conform with the Federal tax returns, no adjustment should be made.

CONCLUSIONS OF LAW

A. That the Commission is not required to accept as correct any Federal change in taxable income, but may conduct an independent audit or investigation (20 NYCRR 153.4).

B. That section 1221 of the Internal Revenue Code and Treas. Reg. section 1.1221-1(a) define a "capital asset" to include all property held by a taxpayer (whether or not connected with his trade or business), with certain exceptions. The seat does not meet any of the exceptions of section 1221 and is therefore, a capital asset.

C. That the seat was a capital asset of the partnership. The seat was purchased under a partnership agreement to share profits and losses from the sale of the seat. "The agreement to share profits and losses on a seat is inconsistent with any reasonable theory that it was not a capital asset" (Munson v. Commissioner, 100 F.2d 363, 366).

D. That the loss recognized on the sale of the seat was a capital loss and section 1211 of the Internal Revenue Code provides for a limitation on capital losses.

E. That the loss allocated to William J. Nammack was improperly characterized as an ordinary loss.

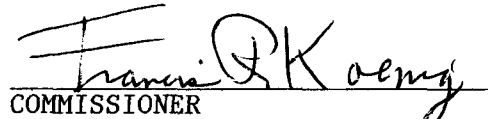
F. That the petition of William J. and Carol L. Nammack is denied and the Notice of Deficiency issued on April 4, 1978 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER