

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dudley W. Nearing, Jr. :
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. :
:

AFFIDAVIT OF MAILING

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Dudley W. Nearing, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dudley W. Nearing, Jr.
20 King Ave.
Weehawken, NJ 07087

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
27th day of May, 1983.

David Parchuck

William A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

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for Redetermination of a Deficiency or for Refund :
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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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Marvin Schwer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marvin Schwer
J. M. Stern & Company
500 Fifth Ave., Suite 4224
New York, NY 10110

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
27th day of May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Dudley W. Nearing, Jr.
20 King Ave.
Weehawken, NJ 07087

Dear Mr. Nearing:

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
Marvin Schwer
J. M. Stern & Company
500 Fifth Ave., Suite 4224
New York, NY 10110
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DUDLEY W. NEARING, JR.

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.

Petitioner, Dudley W. Nearing, Jr., 20 King Avenue, Weehawken, New Jersey 07087, filed a petition 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 (File No. 31908).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, 2 World Trade Center, New York, New York, on October 27, 1982 at 2:45 P.M. Petitioner appeared by J.M. Stern & Company, P.C., (Marvin Schwer, P.A.) The Audit Division appeared by Paul B. Coburn, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioner was entitled to offset capital losses against capital gains during a taxable year in which he changed his status from resident to nonresident of New York State.

FINDINGS OF FACT

1. Petitioner, Dudley W. Nearing, Jr., filed New York resident and nonresident income tax returns for the year 1978 as a result of his moving from New York to New Jersey during the year.

2. On August 21, 1980 the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$3,934.19 plus interest of \$445.75 for a total due of \$4,379.94. A Statement of Audit Changes issued February 26, 1980 explained that the deficiency was based, in part, on the fact that gain from the sale of rental property located in New York State was taxable to New York. The Audit Division also combined the taxable incomes from the resident and nonresident periods and determined tax on the total pursuant to section 654(d) of the Tax Law. Other factors, not in issue herein, also entered into the deficiency. On February 6, 1981 petitioner paid \$3,355.00 of the deficiency leaving a balance of \$579.19 plus interest.

3. Petitioner had been advised not to include gain received from the sale of New York rental property, by an accountant who erroneously believed that a nonresident of New York was not liable for tax on such gain and who, as a result, arbitrarily fixed the beginning of petitioner's nonresident period at April 30, 1978 in order to take advantage of his erroneous understanding of the law.

4. Petitioner had lived in Brooklyn, New York for some 30 years. On January 30 or 31, 1978 petitioner purchased a house in Weehawken, New Jersey. However, the closing on the Brooklyn house did not occur until June 2, 1978. Until that date petitioner continued to live in Brooklyn, contrary to what his first accountant had recorded on petitioner's New York State tax return. Petitioner did not register to vote in New Jersey nor did he obtain a New Jersey driver's license until after June 2, 1978 when he moved into the New Jersey house. During the period between January 30 and June 2 petitioner had access to the New Jersey house and began to gradually move his personal belongings to

the house. He did not actually take up residence in New Jersey until after the closing on his Brooklyn house.

5. In January, 1978, while petitioner was still a New York resident, he sold some securities at a loss of \$8,348.00. He desired to offset this long term capital loss against the long term capital gain from the sale of the house in June, 1978. He was, however, limited to a \$3,000.00 loss because the Audit Division had determined that the loss occurred in the resident period and the gain occurred in the nonresident period.

6. Petitioner argued that since he was a resident of New York during the period when both the loss and the gain occurred he should be allowed to offset the losses against the gains. Petitioner further argued that if, where a resident and nonresident return are required the taxes due shall not be less than would be due if the New York income were reported on one return, then it is implied that neither shall the taxes due be more than would be due on a single return.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York 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 to the corresponding sections of Chapter 46, Title T.

B. That section 1211(b)(1) of the Internal Revenue Code provides that losses from sales of capital assets shall be allowed only to the extent of gains from such sales. If such losses exceed such gains the excess will only be allowed to the extent of \$3,000.00 or other limits not applicable herein.

C. That section 654(a) of the Tax Law provides that if an individual changes his resident status during the taxable year he must file one return for the resident period and one return for the nonresident period.

D. That section 654(b) of the Tax Law provides that New York taxable income for the resident period is determined as if the taxable year for Federal income tax purposes were limited to the resident period. The New York taxable income for the nonresident period is determined as if the taxable year for Federal income tax purposes were limited to the nonresident period.

E. That 20 NYCRR 148.7(a) provides that "[n]et capital gains and losses of a taxpayer who changes his resident status during the year are to be computed separately for the resident period covered by his return." Inasmuch as petitioner showed that he was a resident of New York during the period when both the capital gain and capital losses occurred, his tax liability is to be completely recomputed using June 2, 1978 as the last day of his New York residency period thus allowing the capital losses to offset the capital gain from the sale of the New York property.

F. That section 654(d) of the Tax Law provides that if two returns for one taxable year are required because of a change of resident status, the tax due "shall not be less than would be due if the New York taxable incomes reportable on the two returns were includible in one return." There is no implication in the aforesaid statute that the tax due shall not be more than would be due if New York income were reportable on one return.

G. That the petition of Dudley W. Nearing, Jr. is granted to the extent indicated in Conclusion of Law "D" and Finding of Fact "2"; that the Audit

Division is hereby directed to modify the Notice of Deficiency issued August 21, 1980; and that, except as so granted the petition is in all other respects denied.

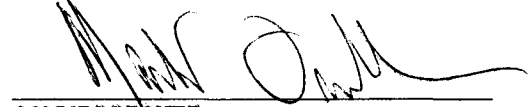
DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER