

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Roy R. Plum :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 1977. :

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Roy R. Plum, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roy R. Plum
c/o Benton, Corcoran, Leib
20 Broad St.
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
18th day of March, 1983.

David Parchuck

Emile A. Hagelund

NOTARIES TO ADMINISTER
OATHS UNDER THE TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Roy R. Plum :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 1977. :

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Thomas C. McEvoy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas C. McEvoy
F. J. Hammes & Co.
122 E. 42nd St.
New York, NY 10168

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
18th day of March, 1983.

David Parchuck

James A. Hagelund

NOTARIES TO ADMINISTER
OATHS UNDER THE TAX LAW
SECTION 174

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

March 18, 1983

Roy R. Plum
c/o Benton, Corcoran, Leib
20 Broad St.
New York, NY 10005

Dear Mr. Plum:

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 Laws 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
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas C. McEvoy
F. J. Hammes & Co.
122 E. 42nd St.
New York, NY 10168
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ROY R. PLUM

DECISION

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Tax under Article 22 of the Tax
Law and Title T of Chapter 46 of the New York
City Administrative Code for the Year 1977.

Petitioner, Roy R. Plum, c/o Benton, Corcoran, Leib & Co., 20 Broad Street, New York, New York 10005, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and Title T of Chapter 46 of the New York City Administrative Code for the year 1977 (File No. 28954).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1982 at 9:15 A.M. Petitioner appeared by F. J. Hammes & Co. (Thomas C. McEvoy, CPA). The Audit Division appeared by Paul B. Coburn, Esq., (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the sale of a membership on a stock exchange results in an ordinary loss or a capital loss.

FINDINGS OF FACT

1. On June 19, 1978, petitioner, Roy R. Plum, filed his IT-201/208 New York State Income Tax Resident Return for 1977.

2. On the return, petitioner claimed a deduction for an ordinary loss of \$155,000.00. A rider attached to the return described the the aforementioned loss as follows:

"NY STOCK EXCHANGE MEMBERSHIP -

DATE ACQUIRED 02/11/65 DATE SOLD 11/25/77

GROSS SALES PRICE		45,000.00
ADJUSTED BASIS		
COST OR OTHER BASIS	200,000	
TOTAL ADJUSTED BASIS		200,000.00
TOTAL GAIN OR LOSS		-155,000.00
TOTAL GAIN OR LOSS FROM OTHER THAN CAPITAL ASSETS		-155,000.00"

3. On January 17, 1979, the Audit Division issued a Statement of Audit Changes against petitioner. The Statement asserted additional income tax due for the year 1977, on the basis that the loss on the sale of a stock exchange membership (seat) constituted a capital loss rather than an ordinary loss.

4. On January 30, 1980 the Audit Division issued a Notice of Deficiency for 1977 against petitioner for \$8,474.96 in additional tax due and \$1,534.51 in penalty and/or interest due.

5. The Audit Division in its answer to the petition, averred that the amount of additional tax due, as stated in the Notice of Deficiency, should be reduced by \$3,600.00. As a result, the total tax due was reduced to \$4,874.96 plus penalty and/or interest.

6. The petitioner did not offer any argument relating to mitigation of the asserted penalties.

CONCLUSIONS OF LAW

A. That section 1221 of the Internal Revenue Code and Treas. Reg. 1.1221-1(a) define "capital asset" to include all property held by the taxpayer (whether or

not connected with his trade or business), with certain exclusions. The seat does not meet any of the exclusions of section 1221 and is therefore a capital asset.

B. That the sale of the stock exchange seat constitutes the sale of a capital asset (Munson v. Commissioner, 100 F.2d 363). Therefore, the loss derived from the sale of said seat is a capital loss pursuant to Internal Revenue Code section 1212(b) and is subject to the limitations prescribed in section 1211(b) (See: In the Matter of the Petition of John Peppe, Jr. and Norlene Peppe, State Tax Commission, November 27, 1981; and In the Matter of the Petition of John W. Geary II, State Tax Commission, November 27, 1981).

C. That the petition is granted to the extent that the amount of additional tax due in the Notice of Deficiency is to be reduced by \$3,600.00, as provided in Finding of Fact "5"; the petition is otherwise denied and the balance of the Notice of Deficiency is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983

PRESIDENT

Frank Q. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER