

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Abraham & Charlotte Schlissel	:	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	:	
1973, 1974 & 1976.	:	

State of New York
County of Albany

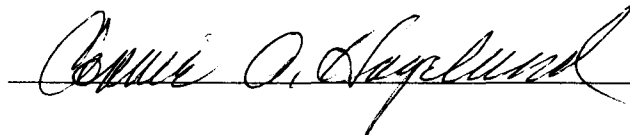
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon Abraham & Charlotte Schlissel, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Abraham & Charlotte Schlissel
6020 N.W. 44th Street
Lauderhill, FL 33319

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
30th day of September, 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 :
Abraham & Charlotte Schlissel :
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 :
1973, 1974 & 1976. :

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 State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon Frank L. Fernandez the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank L. Fernandez
Helm, Shapiro, Ayers, Anito & Aldrich
111 Washington Avenue
Albany, NY 12210

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
30th day of September, 1983.

Susan Powell

Connie R. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 30, 1983

Abraham & Charlotte Schlissel
6020 N.W. 44th Street
Lauderhill, FL 33319

Dear Mr. & Mrs. Schlissel:

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
Frank L. Fernandez
Helm, Shapiro, Ayers, Anito & Aldrich
111 Washington Avenue
Albany, NY 12210
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ABRAHAM SCHLISSEL and CHARLOTTE SCHLISSEL	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Taxes under Article	:	
22 of the Tax Law for the Years 1973, 1974	:	
and 1976.	:	

Petitioners Abraham Schlissel and Charlotte Schlissel, 6020 N.W. 44th Street, Lauderhill, Florida 33319, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973, 1974 and 1976 (File Nos. 23466 and 31944).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Room 107, Albany, New York, on March 31, 1982 at 9:30 A.M., with all briefs to be submitted by September 1, 1982. Petitioner appeared by Helm, Shapiro, Ayers, Anito & Aldrich, P.C. (Frank L. Fernandez and Howard Shapiro, Esqs., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the Audit Division is bound by an agreement reached at a conference with petitioners on September 12, 1979.

II. Whether petitioners may offset a loss derived from a New York partnership which was realized during their 1976 New York nonresidency period against their New York taxable income earned during their 1976 New York residency period.

III. Whether petitioners' New York loss realized while they were nonresidents during the latter part of 1976 may be carried back to their 1976 resident period or to their earlier taxable years of 1973 and 1974.

IV. Whether the Audit Division properly limited petitioners' deduction for a New York State pension.

V. Whether petitioners' rights under the United States Constitution have been violated by the Audit Division.

FINDINGS OF FACT

1. Petitioners were residents of the State of New York for the first four months of 1976 and residents of Florida for the remainder of the year. They timely filed resident and nonresident New York State personal income tax returns for 1976 and reported New York gross income of \$128,695.00 during their period of residency and a New York loss of \$84,220.00 during their period of nonresidency. After deductions, including the exclusion of a New York State pension of \$3,712.00, petitioners reported New York taxable income for the entire year of \$36,297.00. Petitioner Abraham Schlissel also timely filed a 1976 nonresident earnings tax return for New York City on which he reported an earnings tax of \$411.29. Petitioners claimed a refund of \$9,340.00 for such year.

2. On February 3, 1978, the Audit Division issued a Statement of Audit Changes against petitioners showing additional New York State income tax due of \$3,577.77 plus interest and additional New York City income tax due of \$411.29 plus interest. The following explanation was provided:

"Since the total income for the residence period includes New York State pension of \$1,237.00 rather than \$3,712.00, the subtraction modification on the resident return is limited to \$1,237.00.

When two returns are filed due to a change of residence, the tax due may not be less than would be payable if the taxable incomes shown on the two returns were reported on a single return. As there was no New York taxable income in the nonresident period, your return is computed as follows:

	<u>RESIDENT</u>	<u>NONRESIDENT</u>	
		<u>FEDERAL</u>	<u>NEW YORK</u>
Total Federal Income, per return	\$128,695.00	(\$57,331.00)	(\$84,220.00)
Add: UBT Adjustment	2,747.00		
Total	<u>\$131,442.00</u>		
Less: N.Y.S. Pension	1,237.00		
New York Income	<u>\$130,205.00</u>		
New York Itemized Deductions	6,346.00		
Balance	<u>\$123,859.00</u>		
Exemptions	867.00		
New York Taxable Income	<u>\$122,992.00</u>		
Tax on Income	\$ 16,758.80		
Surcharge	418.97		
New York State Tax	<u>\$ 17,177.77</u>		
	<u>NEW YORK STATE</u>	<u>NEW YORK CITY</u>	
Tax	\$17,177.77	\$411.29	
Amounts of Payments			
on Estimated Tax	<u>\$13,600.00</u>	-0-	
ADDITIONAL INCOME TAX DUE	<u>\$ 3,577.77</u>	<u>\$411.29"</u>	

Accordingly, a Notice of Deficiency was issued for the year 1976 against petitioners, Abraham Schlissel and Charlotte Schlissel, on June 9, 1978 asserting additional personal income tax of \$3,989.06 and interest of \$390.17.

3. Petitioners filed two Claims for Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax dated October 26, 1979 showing a refund or credit claimed of \$5,791.10 for the 1973 taxable year and \$3,311.82 for the 1974 taxable year. The basis for each of the claims for refund or credit is the "carryback of loss from 1976 form IT 203/209".

4. On June 30, 1980, the Audit Division issued a Notice of Disallowance wherein petitioners' claims for refund or credit described in Finding of Fact "3", herein, were disallowed in full. The following explanation for the denial was provided:

"In order for a nonresident or resident of New York State to claim a net operating loss carryback to a year in which the taxpayer was a resident of New York State he is required to have a similar net operating loss carryback for Federal tax purposes, since the starting point of the resident return is the same as for Federal tax purposes."

5. A Tax Appeals Bureau conference held on September 12, 1979 resulted in the allowance of claims for refund for the 1973 and 1974 taxable years and an undated voucher for Income Tax Refund was issued showing claims for refund allowed of \$5,791.10 for the 1973 taxable year and \$3,311.82 for the 1974 taxable year. After deducting the tax liabilities described in Finding of Fact "2", herein, the voucher showed a total refund of \$3,523.26 plus interest.

6. However, the Office of the State Comptroller in a letter dated August 19, 1981 advised the Audit Division that it would not agree to the refund described in Finding of Fact "5", herein, and would not allow payment of such refund to petitioners.

7. Petitioners were advised by a letter dated September 14, 1981 of Paul B. Coburn, in his capacity as Secretary to the State Tax Commission, that since the Department of Audit and Control¹ would not allow the payment of petitioners' refund agreed upon at the conference held on September 12, 1979, they should "file a perfected petition with reference to the year 1976 and a petition for the years 1973 and 1974 in connection with the denial of the refund claims for those years."

8. Petitioners filed a perfected petition dated December 4, 1981 wherein they challenged the Audit Division's computation of their New York personal income tax liability for the 1976 taxable year which did not allow them to deduct their New York loss of \$84,220.00 incurred during their nonresidency period from their New York income earned during their residency period and

¹ The Department of Audit and Control is within the Office of the State Comptroller.

which denied their exclusion of their entire New York State pension for 1976 from their New York taxable income. Petitioners also argued that if it is determined that the Audit Division properly disallowed their deduction of \$84,220.00 in New York taxable income for 1976, then they should be entitled to a refund of New York personal income taxes paid for the 1973 and 1974 taxable years on the basis of their carrying back their New York loss of \$84,220.00 to such earlier taxable years.

9. Prior to petitioners' relocation to Florida and while they were still New York residents, petitioner Abraham Schlissel liquidated various investments. As a result, he realized capital gains of \$63,083.00 which petitioners reported as income during the period of residency. The \$84,220.00 loss, noted in Finding of Fact "1", herein, was petitioners' distributive share of the loss of a New York partnership, Saratoga Properties, which has a partnership year ending December 31. Accordingly, petitioners were required to take the loss into account as of December 31, 1976, during the period when they were non-residents.

10. Petitioners reported one-third of \$3,712.00, the total New York pension received in 1976, or \$1,237.00, in their New York gross income for their period of residency. The remaining two-thirds was included in the federal amount for the nonresidency period as noted in Finding of Fact "2", herein.

11. Petitioners also argued that their rights to equal protection under the United States Constitution have been violated by the Audit Division.

12. The Audit Division in its answering brief conceded that petitioners are entitled to deduct the entire New York State pension of \$3,712.00 rather than the portion thereof allocable to the period of residency during 1976.

CONCLUSIONS OF LAW

A. That the Comptroller of the State of New York is the chief fiscal officer and auditor of the State and under the New York State Constitution and statutes, he is required to audit all vouchers before payment. Furthermore, the State Tax Commission's Rules of Practice and Procedure provide that where a resolution of the controversy entails a refund, approval of the Comptroller is necessary. 20 NYCRR 601.4(c)(3). Since the State Comptroller, as noted in Finding of Fact "6", herein, would not agree to the refund described in Finding of Fact "5", herein, the agreement did not become final. Accordingly, it was proper for the Audit Division to reinstate the Notice of Deficiency against petitioners.

B. That Tax Law §654(a) provides as follows:

"If an individual changes his status during his taxable year from resident to nonresident,... he shall file one return as a resident for the portion of the year during which he is a resident and one return as a nonresident for the portion of the year during which he is a nonresident...".

C. That Tax Law §654(b) provides as follows:

"New York taxable income and minimum taxable income as resident and nonresident. The New York taxable income and New York minimum taxable income for the portion of the year during which he is a resident shall be determined, except as provided in subsection (c), under part II of this Article as if his taxable year for federal income tax purposes were limited to the period of his resident status. The New York taxable income and New York minimum taxable income for the remaining portion of his taxable year during which he is a nonresident shall be determined, except as provided in subsection (c), under part III of this Article as if his taxable year for federal income tax purposes were limited to the period of his nonresident status.

D. That pursuant to 20 NYCRR 148.6, which was effective during the year at issue, the loss from Saratoga Properties as described in Finding of Fact "9", herein, was properly allocated to the nonresidency period.

E. That 20 NYCRR 101-1.1, which was effective during the years at issue, provides in part that:

"The taxable year may be a calendar year or fiscal year consisting of 12 consecutive months. However, under certain circumstances, the period may be less than 12 months (e.g., in case of death, change of accounting period, or change of resident status)... [emphasis added]."

Pursuant to this regulation and Tax Law §654(a) and (b), it was proper for the Audit Division to calculate separately petitioners' New York taxable income for their resident and nonresident periods and thereby treat the resident and nonresident periods as two separate taxable years. The fact that petitioners had a New York loss during the period of nonresidency does not mean that such separate computations are not required and that the New York loss during the period of nonresidency may offset the New York taxable income during the period of residency. Cf. Arredondo v. State of New York, 55 A.D.2d 978, aff'd 42 N.Y.2d 823, and Kritzik v. Gallman, 41 A.D.2d 994.

F. That Tax Law §654(d) provides that "(w)here two returns are required under this section, the total of the taxes due thereon shall not be less than would be due if the New York taxable incomes reportable on the two returns were includible in one return."

This provision is not applicable herein since petitioners had no New York taxable income during their nonresident period.

G. That there is no specific statutory provision which allows a New York resident to deduct a net operating loss or to carryback a net operating loss. Rather, the right of a New York resident to deduct a net operating loss from his New York taxable income or to carryback the unused portion of a net operating loss derives from Tax Law §612 which provides that the starting point for determining New York taxable income of a New York resident is his federal

adjusted gross income.

H. That residents of New York may not claim on their New York personal income tax return a net operating loss deduction in excess of the amount of the net operating loss deduction claimed on their 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, Gurney v. Tully, 67 A.D.2d 303, rev'd, 51 N.Y.2d 818, and 20 NYCRR 148.8(c), which was effective during the years at issue.

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 non-resident year even though there was no Federal net operating loss carryback. In the case at hand, petitioners, as nonresident taxpayers, seek to carryback a net operating loss to a resident year.

I. That pursuant to Tax Law §654(a) and (b), the Audit Division properly limited the modification for petitioner Abraham Schlissel's New York pension during petitioners' residency period to an amount equal to the pension income reported by petitioners in such period, i.e. one-third of the total pension for the year as noted in Finding of Fact "2", herein. The remaining two-thirds of the pension income is properly allowable as a modification in the nonresidency period. It is of no import that the Audit Division apparently conceded this issue as noted in Finding of Fact "12", herein, since it is clear that Tax Law §654(b) requires the allocation of the pension between petitioners periods of residency and nonresidency. We note that the Audit Division's concession

occurred in its answering brief, after the hearing herein, and that the petitioner fully argued this pension issue and were not lulled into foregoing such argument by the Audit Division's concession. Therefore, we are not bound by such concession. Cf. Kaufman Associates v. Levy, 74 Misc.2d 209, at 214.

J. That there is no jurisdiction to determine the issues of constitutionality at the administrative level of the State Tax Commission. Matter of Thomas Tivnan & Pamela A. Tivnan, State Tax Commission, May 27, 1982.

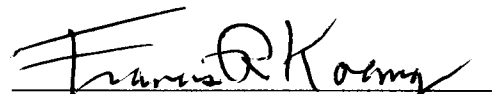
K. That the petition of Abraham Schlissel and Charlotte Schlissel is denied and the Notice of Deficiency dated June 9, 1978 and the Notice of Disallowance dated June 30, 1980 are sustained.

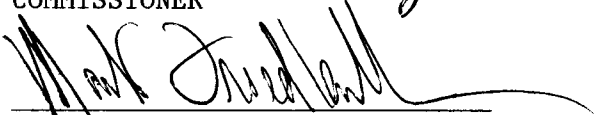
DATED: Albany, New York

STATE TAX COMMISSION

SEP 30 1983


PRESIDENT


COMMISSIONER


COMMISSIONER