

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Charles B. & Alice H. Schubert : 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 :
1968 - 1970.

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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Charles B. & Alice H. Schubert, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles B. & Alice H. Schubert
592 Ridge St.
Newark, NJ 07104

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
1st day of April, 1983.

David Parchuck

James A. Haglund
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

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State of New York
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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 1st day of April, 1983, he served the within notice of Decision by certified mail upon James F. Watson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James F. Watson
206 Kilburn Rd.
Garden City, NY 11530

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
1st day of April, 1983.

David Parchuck

James R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 1, 1983

Charles B. & Alice H. Schubert
592 Ridge St.
Newark, NJ 07104

Dear Mr. & Mrs. Schubert:

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 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
James F. Watson
206 Kilburn Rd.
Garden City, NY 11530
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CHARLES B. AND ALICE H. SCHUBERT
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1968, 1969
and 1970.

DECISION

Petitioners, Charles B. and Alice H. Schubert, 592 Ridge Street, Newark, New Jersey 07104, 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 1968, 1969 and 1970 (File Nos. 12006 and 12007).

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 November 18, 1980 at 9:30 A.M. Petitioners appeared by James F. Watson, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq., (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioners are precluded from off-setting carryback losses against asserted tax deficiencies.

FINDINGS OF FACT

1. The petitioners herein, Charles B. and Alice H. Schubert, are husband and wife. They timely filed their New York State income tax non-resident returns for the years 1968, 1969 and 1970.

2. On April 14, 1972, petitioner signed a consent fixing the period of limitation upon assessment of their 1968 tax liability until April 30, 1973. Petitioners did not sign a similar consent for 1969 or 1970.

3. The timely notices of deficiency herein, dated February 28, 1972 and April 13, 1973, asserted an income tax deficiency against petitioners as follows:

	<u>DEFICIENCY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1968 -	\$ 1,238.02	\$ 213.10	\$ 1,451.12
1969 -	6,467.94	1,162.67	7,630.61
1970 -	3,016.69	361.28	3,377.97
Total -	<u>\$10,722.65</u>	<u>\$1,737.05</u>	<u>\$12,459.70</u>

Petitioners timely filed petitions in reference to deficiencies for the tax years in issue.

4. The Statement of Audit Changes for the 1968 tax year provided the following explanation:

"In computing New York income for the personal income tax you failed to include your share of the New York City unincorporated business tax deduction taken on the partnership return of Emanuel, Deetjen & Company in the amount of \$7,679.26.

	<u>FEDERAL AMOUNT</u>	<u>N.Y. AMOUNT</u>
Total income per line 5	\$168,220.00	
Ordinary income		\$112,357.00
Additional 1st year depreciation		(1,294.00)
Payments to partners		23,930.00
New York State unincorporated business tax	8,294.00	8,294.00
New York City unincorporated business tax	7,679.00	7,679.00
Interest on government bonds	(173.00)	(173.00)
Adjusted total income	<u>\$184,020.00</u>	<u>\$150,793.00</u>
New York portion @ 94%		141,745.00
Itemized Deductions: $\frac{\$141,745.00}{\$184,020.00} \times \$11,470.00 =$		8,835.00
Balance		<u>\$132,910.00</u>
Exemption		2,400.00
New York taxable income		<u>\$130,510.00</u>
New York tax		\$ 16,831.40
Statutory credit		25.00
New York tax due		<u>\$ 16,806.40</u>
New York tax previously stated		<u>15,568.38</u>

ADDITIONAL PERSONAL INCOME TAX DUE

\$1,238.02"

5. On April 24, 1973, the Audit Division served a Notice of Claim on petitioners claiming a deficiency greater than that asserted in the 1968 Notice

of Deficiency dated February 28, 1972. The greater deficiency was in the additional sum of \$6,497.73.

6. The Statement of Audit Changes for the 1969 and 1970 tax years rendered the following explanation:

"[Petitioners'] New York taxable income is adjusted to reflect the changes made in the total New York partnership income of Emanuel, Deetjen & Company for the fiscal years ended April 30, 1969 and April 30, 1970.

RECOMPUTATION:	1969	1970	
Corrected total New York income	\$81,032.00	\$42,864.00	
Itemized deductions	8,094.41	8,351.95	
Balance	\$72,937.59	\$34,512.05	
Exemptions	2,400.00	2,500.00	
Corrected New York taxable income	\$70,537.59	\$32,012.05	
Tax per tax rate schedule	\$ 8,435.26	\$ 3,041.69	
Statutory credit	25.00	25.00	
New York tax due	\$ 8,410.26	\$ 3,016.69	
New York tax previously stated	1,942.32	-0-	
ADDITIONAL PERSONAL INCOME TAX DUE	\$ 6,467.94	\$ 3,016.69	\$9,484.63"

7. On October 31, 1977, the auditor herein prepared an Examiner Worksheet - IT-38 Statement of Audit Changes for the tax years in issue herein. The worksheet rendered an explanation as follows:

"As the result of field audit for the above-indicated years, additional tax is due in accordance with attached schedules as follows:

ADDITIONAL PERSONAL INCOME TAX	1968	\$4,202.40	
	1969	469.68	
	1970	798.25	\$5,470.33"

Annexed to the worksheet is a recomputed Tax Computation Schedule setting forth the final tax deficiencies for the years in issue herein as follows:

"Tax Year or Period Ended	1968	1969	1970
Type of Return	IT-203	IT-203	IT-203
PERSONAL INCOME			
Net adjustment per audit	\$ 30,010.00	\$ 3,355.00	\$ 16,069.93
Taxable income previously stated	121,667.00	24,338.00	(1,474.93)
Corrected taxable income	\$151,677.00	\$ 27,693.00	\$ 14,595.00

Tax on corrected taxable income	\$ 19,795.78	\$ 2,437.00	\$ 823.55
Less statutory credit	\$ 25.00	\$ 25.00	\$ 25.00
Corrected tax due	19,770.78	2,412.00	798.25
Tax previously computed	15,568.38	1,942.32	-0-
Deficiency	\$ 4,202.40	\$ 469.68	\$ 798.25"

8. Petitioners did not contest the accuracy of the recomputed tax deficiencies, because they had carryback losses from the tax years 1971, 1972 and 1973 and they believed that such losses would reduce the asserted tax deficiencies, herein. Their claim for credit as to the carryback losses was asserted in their Perfected Petition filed on March 14, 1980 and March 25, 1980 for the tax years (1) 1968 and (2) 1969 and 1970, respectively.

9. The asserted carryback losses are as follows:

1971 -	\$14,495.00
1972 -	792.00
1973 -	7,208.44

10. Petitioners maintained that their 1971 New York net operating loss would, when carried back, reduce their 1968 deficiency from \$4,202.40 to \$2,192.10. As for their 1969 deficiency, they maintained that it would be reduced to \$358.78 by virtue of their 1972 net operating loss in the sum of \$792.00, and as for their 1970 deficiency, they maintained that it would be reduced to \$256.42 by virtue of their 1973 net operating loss in the sum of \$7,208.44.

11. The auditor herein was aware of the petitioners' 1971 net operating loss derived from their interest in the partnership of Emanuel, Deetjen and Company when he issued the change orders in issue on October 31, 1977. However, he did not allow the carryback of such net operating loss to the tax years in issue.

12. The Audit Division's position was that if petitioners were to avail themselves of the net operating loss for 1971 they should have either amended

their New York State income tax return for 1968 by April 15, 1975 or filed a claim for a refund by April 15, 1975.

13. Petitioners did not amend their 1968, 1969 or 1970 tax returns nor did they ever file a timely claim for refund for 1968, 1969 or 1970.

14. Petitioners relied on professional advice in the preparation of their tax returns in issue and in connection with the furtherance of their hearing, herein.

CONCLUSIONS OF LAW

A. That Tax Law section 687(d) provides:

"Overpayment attributable to net operating loss carryback. - A claim for credit or refund of so much of an overpayment as is attributable to the application to the taxpayer of a net operating loss carryback shall be filed within three years from the time the return was due for the taxable year of the loss, or within the period prescribed in subsection (b) in respect of such taxable year..., whichever expires the latest."

B. That the period of limitation with respect to claims for credit or refund of a net operating loss carryback terminates with the expiration of the three-year period from the due date of the return for the loss year or, alternatively, with the expiration of the period prescribed in Tax Law section 687(b) in respect of the loss year, whichever expires later. Petitioners' claim for credit or refund for net operating losses arising from the 1971, 1972 and 1973 tax years should have been filed by April 15, 1975, April 15, 1976, and April 15, 1977, respectively, in order to be deemed timely under Tax Law section 687(d). Since petitioners' claims for credit as to the carryback losses were not asserted by them until March 14, 1980 and March 25, 1980, when they filed their perfected petitions for the tax years (1) 1968 and (2) 1969 and 1970, respectively, such claims are not timely under Tax Law section 687(d).

C. That, however, the period provided in Tax Law section 687(d) "was intended to constitute an additional period within which a claim for credit or refund of an overpayment of tax for the year to which the loss is carried might be made.... The additional period was designed to preclude the barring of a claim for credit or refund based on a net operating loss carry back in cases where the normal three (3) year period of limitation within which a claim would have to be filed for the prior year, would expire before it would be possible to determine whether there would be a net operating loss in a subsequent year." See Rev. Rul. 65-281, 1965-2 C.B. 444 which discusses section 6511(d)(2)(A) of the Internal Revenue Code from which Tax Law section 687(d) is derived.

D. That, therefore, Tax Law section 687(d) is not a substitute for section 687(a), the general period of limitation for filing a claim for credit or refund, as applied to the tax year to which a net operating loss is carried back.

E. That Tax Law section 687(f) provides as follows:

"Effect of petition to tax commission. -- If a notice of deficiency for a taxable year has been mailed to the taxpayer under section six hundred eighty-one and if the taxpayer files a timely petition with the tax commission under section six hundred eighty-nine, it may determine that the taxpayer has made an overpayment for such year (whether or not it also determined a deficiency for such year). No separate claim for credit or refund for such year shall be filed, and no credit or refund for such year shall be allowed or made...".

F. That Tax Law section 687(f) expressly prohibits petitioners from filing separate claims for credit or refund based on net operating losses carried back to the tax years at issue.

G. That, since petitioners timely filed petitions in reference to deficiencies for the tax years in issue, this commission, pursuant to Tax Law section 687(f), may determine that petitioners have made overpayments for the tax years at issue, whether or not it also determines deficiencies for such years.

H. That since petitioners have asserted the loss carrybacks in their perfected petitions, an appropriate offset may be allowed under Tax Law section 687(f). See Family Group, Inc. v. United States, 76-2 USTC 84,918 which discusses I.R.C. Sec. 6512(b) from which Tax Law sec. 687(f) is derived.

I. That if petitioners had filed claims for credit or refund on February 28, 1972 and April 13, 1973, the dates of the mailing of the notices of deficiency for (1) the 1968 and (2) the 1969 and 1970 tax years, respectively, on the grounds as stated in their perfected petitions (net operating loss carrybacks from 1971, 1972 and 1973), such claims would have been timely under Tax Law section 687(b) for the 1968 tax year and under Tax Law section 687(a) for the 1969 and 1970 tax years. See Matter of Peter W. Liu and Lydia W. Liu, State Tax Commission, November 27, 1981 [TSB-H-81(411)I]; Matter of Lamonte Kennedy and Valerie Kennedy, State Tax Commission, January 9, 1981 [TSB-H-81(53)I]; Matter of Ford Motor Company, State Tax Commission, June 18, 1982.


J. That petitioners' overpayments for the years at issue were not in excess of the amounts of taxes it paid for such years and, therefore, were within the limitations set forth in Tax Law section 687(g).

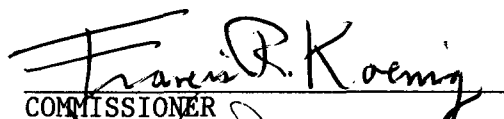
K. That, therefore, petitioners may carryback net operating losses incurred in 1971, 1972 and 1973 to the tax years at issue. The Audit Division is directed to recompute the tax deficiencies and interest as may be lawfully owing. The notices of deficiency, in all other respects, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 01 1983


PRESIDENT


COMMISSIONER


COMMISSIONER