

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Matthew J. Tosti, (dec'd) :
and Evelyn C. Tosti : 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 1976.

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 Matthew J. Tosti, (dec'd) and Evelyn C. Tosti the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Matthew J. Tosti, (dec'd)
and Evelyn C. Tosti
34 Clearview St.
Huntington, NY 11743

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

Ann A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Matthew J. Tosti, (dec'd) :
and Evelyn C. Tosti :

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 1976.

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 Vincent J. Tosti the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vincent J. Tosti
Durben & Haskel
62 Drohan St.
Huntington, NY 11743

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 A. Skelly
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 1, 1983

Matthew J. Tosti, (dec'd)
and Evelyn C. Tosti
34 Clearview St.
Huntington, NY 11743

Dear Mrs. Tosti:

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
Vincent J. Tosti
Durben & Haskell
62 Drohan St.
Huntington, NY 11743
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MATTHEW J. TOSTI (dec'd) and EVELYN C. TOSTI : DECISION
for Redetermination of a Deficiency or for :
Refund of New York State and New York City :
Personal Income Taxes under Articles 22 and 30 :
of the Tax Law for the Year 1976.

Petitioners, Matthew J. Tosti (deceased) and Evelyn C. Tosti, 34 Clearview Street, Huntington, New York 11743, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976 (File Nos. 29707 and 29708).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 12, 1982 at 10:45 A.M. Petitioners appeared by Vincent J. Tosti, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioners are properly entitled to long-term capital losses attributable to securities alleged to be worthless during 1976.

FINDINGS OF FACT

1. Petitioners, Matthew J. Tosti (deceased) and Evelyn C. Tosti, timely filed a combined New York State Income Tax Resident Return for the year 1976 whereon they claimed capital losses of \$486.00 and \$487.00 respectively. Pursuant to a Federal Schedule D attached thereto, their joint net loss of

\$973.00 was computed incorporating, among other things, losses derived as the result of the worthlessness of securities held in two corporations as follows:

<u>Corporation</u>	<u>Basis of Securities</u>
Pathe Industries, Inc.	\$ 7,260.00
Blackman Merchandising Corp. now known as Green Cross Industries, Inc.	<u>5,940.00</u>
Total Loss Claimed from Worthless Securities	<u>\$13,200.00</u>

2. On September 27, 1979, the Audit Division issued a Statement of Audit Changes to petitioners wherein, based on schedules of audit adjustments annexed thereto, said losses of \$13,200.00 were disallowed "as not being worthless." As such, their net income from capital transactions was recomputed yielding a gain which, together with certain modifications resulting therefrom, were held applicable solely to the income of Matthew J. Tosti. Additionally, the capital loss of \$487.00 claimed by petitioner Evelyn C. Tosti was disallowed "as being unsubstantiated." Accordingly, a Notice of Deficiency was issued against Matthew J. Tosti on January 25, 1980 asserting additional New York State and New York City personal income taxes of \$1,449.13, plus interest of \$353.65, for a total of \$1,802.78. A second Notice of Deficiency was issued against Evelyn C. Tosti under the same date asserting additional New York State and New York City personal income taxes of \$25.45,¹ plus interest of \$6.21, for a total due of \$31.66.

3. Petitioner submitted two letters from Paine, Webber, Jackson & Curtis, Inc. Pursuant to such letters, there was no market in the securities of either Pathe Industries, Inc. or Green Cross Industries, Inc. during 1976.

¹ Pursuant to the tax computation schedules, the Notice of Deficiency issued against petitioner Evelyn C. Tosti inadvertently omitted the additional New York City personal income tax computed of \$9.88. The deficiency of \$25.45 represents only the additional personal income tax computed for New York State.

4. Petitioner submitted a letter from Pathe Industries, Inc. dated January 19, 1981 wherein it is stated that:

- (a) "Our company has been inactive since 1967 and there has been no change in the status of our company."
- (b) "Our company is not traded on any exchange and there is no market value for our shares."
- (c) "We have been seeking a possible merger or acquisition and to date nothing has materialized."

5. Petitioner submitted a letter from the trustee in the bankruptcy proceeding of Green Cross Industries, Inc. Pursuant to such letter:

- (a) "The Chapter XI proceeding was converted to a straight bankruptcy in June, 1975."
- (b) Green Cross Industries, Inc. was "liquidated" and "nothing was paid to non-priority unsecured creditors."
- (c) "There is no question that the stock of Green Cross Industries, Inc. (formerly Blackman Merchandising Corporation) was worthless as of June, 1975 when the corporation was adjudicated in straight bankruptcy."

6. No evidence, documentary or otherwise, was submitted to show that petitioner Evelyn C. Tosti is properly entitled to the capital loss of \$487.00 claimed on her return.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law 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 (though uncited) to corresponding sections of Article 30.

B. That section 165(g) of the Internal Revenue Code provides that:

"If any security which is a capital asset becomes worthless during the taxable year, the loss resulting therefrom shall, for purposes of this subtitle, be treated as a loss

from the sale or exchange, on the last day of the taxable year, of a capital asset."

Accordingly, since the securities of Green Cross Industries, Inc. became worthless in 1975, the loss attributable to such worthlessness is not properly allowable in taxable year 1976.

C. That petitioners have failed to sustain their burden of proof required pursuant to section 689(e) of the Tax Law to show that the securities of Pathe Industries, Inc. had become worthless during 1976. The fact that the company has been seeking a possible merger or acquisition leads to the conclusion that a market may subsequently be established for its securities. Accordingly, the loss claimed on securities of said company is disallowed.

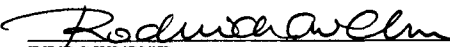
D. That petitioner Evelyn C. Tosti has failed to sustain her burden of proof required pursuant to section 689(e) of the Tax Law to show that she is properly entitled to the capital loss claimed of \$487.00. Accordingly, such loss is disallowed.

E. That the petition of Matthew J. Tosti (deceased) and Evelyn C. Tosti is denied and the notices of deficiency dated January 25, 1980 are hereby sustained together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

APR 01 1983


PRESIDENT


COMMISSIONER


COMMISSIONER