

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert P. Barzak :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income Tax :
under Article 22 of the Tax Law for the Year 1978. :
AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of November, 1984, he served the within notice of Decision by certified mail upon Robert P. Barzak, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert P. Barzak
333 Puritan Rd.
Tonawanda, NY 14150

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of November, 1984.

David Parchuck

James A. Deane
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

Robert P. Barzak
333 Puritan Rd.
Tonawanda, NY 14150

Dear Mr. Barzak:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT P. BARZAK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioner, Robert P. Barzak, 333 Puritan Road, Tonawanda, New York 14150, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1978 (File No. 36329).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Part VI, Buffalo, New York, on March 19, 1984 at 1:15 P.M., with all briefs to be submitted by May 19, 1984. Petitioner, Robert P. Barzak, appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed petitioner's claimed casualty loss deduction.

FINDINGS OF FACT

1. Petitioner herein, Robert P. Barzak, timely filed a 1978 New York State Income Tax Resident Return wherein he claimed a casualty loss deduction of \$8,150.00.

2. On January 22, 1982, the Audit Division issued a Notice of Deficiency to petitioner for the year 1978, asserting that \$764.68 of personal income tax was due, together with interest of \$198.07, for a total allegedly due of

\$962.75. The aforementioned Notice of Deficiency was premised on a Statement of Personal Income Tax Audit Changes dated July 9, 1981, wherein the Audit Division disallowed, inter alia, the claimed casualty loss deduction of \$8,150.00. Petitioner contests only the disallowance of the casualty loss deduction.

3. During the year in question petitioner was the owner of a residence identified as Cottage #5, Cuba Lake, Cuba, New York (hereinafter "the cottage"). Petitioner and his family used the cottage primarily as a summer residence and, with the exception of occasional weekend visits, the cottage was unoccupied during winter months. During the latter part of January, 1978, the cottage shifted on its foundation, causing structural damage to the building. The damage sustained by the cottage and a boat house in late January, 1978 forms the basis of petitioner's claimed casualty loss deduction. Substantiation of the dollar amount of the casualty loss deduction is not in dispute, it being the Audit Division's position that petitioner has "...not verified that the damage done to the pilings was not due to progressive deterioration".

4. Petitioner's cottage was situated on a hillside which bordered on the shore of Cuba Lake. The access road leading to the cottage was elevated in relation to the cottage, creating a "V" or gully between the road and cottage approximating eight (8) feet in depth. The side of the cottage which faced the lake was elevated approximately ten (10) feet above the shore of the lake and its foundation consisted of multiple piers or pilings constructed of masonry block and mortar.

5. Cuba Lake is located approximately 50 miles south of Buffalo, New York and some 15 miles from the New York/Pennsylvania state line. Snowfall accumulations in the Cuba Lake area for the month of January, 1978 totaled approximately 50 inches. In late January, 1978, a storm system moved through the Cuba Lake area

with high winds (gusts up to 60 miles per hour) and snow, causing the "V" or gully between the road and petitioner's cottage (see finding of fact "4", supra) to completely fill with snow and blowing snow. The snow accumulated in the "V" or gully to a height which covered the entire side of the cottage facing the "V" and also up onto the roof of the cottage.

6. Petitioner maintains that the snow which filled the "V" or gully created extraordinary lateral pressure on the side of the cottage facing the "V", causing said cottage to shift towards the lake.

7. A claim was submitted by petitioner under his homeowner's insurance policy for reimbursement for the damage sustained to the cottage and boat house. The insurance company had the claim investigated by an independent adjuster, a construction estimator and an engineering firm. The engineer's opinion stated, in part, that:

"...the failure was caused by vertical load. It seems likely that failure would occur under the weight of the structure alone although it may have been initiated by weight of snow on the roof."

The independent adjuster concurred in the opinion rendered by the engineer and also noted that "...weight of ice and snow may have been the triggering device."

8. Petitioner's claim for reimbursement for damages sustained to the cottage and boat house totaled \$10,660.00, said amount based on an estimate of damages prepared by one Joseph Funk of Angelica, New York. The insurance company, as a result of its investigation, offered a compromise settlement of \$2,750.00 and said offer was accepted by petitioner. In a letter dated July 9, 1982, the insurance company explained its position in the following manner:

"While the position of the company was that the proximate cause of loss was not a covered peril, there was recognition that the weight of ice and snow had been a factor in this

loss and a compromise settlement of \$2,750.00 was made with the insureds."

It was the insurance company's position that the piers or pilings which supported the cottage (constructed in the early 1940's) had weakened due to age and that this was the proximate cause of loss.

9. When the cottage shifted off its foundation, windows broke, doors jammed, and walls were cracked. The estimate of damages prepared by Mr. Funk (Finding of Fact "8", supra) was not submitted into evidence nor was any evidence adduced at the hearing as to what portion of the estimate pertained to repairing the cottage and what portion of the estimate pertained to repairing the piers or pilings.

CONCLUSIONS OF LAW

A. That section 165(c)(3) of the Internal Revenue Code provides, in part, that an individual may deduct "...losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty...".

B. That based on the record developed herein, we cannot conclude that the damage sustained to petitioner's cottage was caused by an excessive buildup of snow as opposed to the progressive deterioration of the piers or pilings. Petitioner's testimony that the damage was caused by the weight of snow on the side and roof of the cottage is afforded little or no weight since he is not qualified as an expert on such matters to give opinion testimony as to what caused the damage to the cottage. Furthermore, the only opinion from an apparently qualified expert was that rendered by the insurance company's engineer, who stated in somewhat vague terms, "It seems likely that failure would occur under the weight of the structure alone although it may have been initiated by the weight of snow on the roof (emphasis added)." There is

nothing of substance in the record to support that the buildup of snow on the side and roof of the cottage caused the damage.

Also, we draw the inference that the piers or pilings were deteriorated from the fact that petitioner accepted a compromise settlement from his insurance company which covered only 25.8 percent of the alleged total damages. In sum, petitioner has failed to sustain his burden of proof [Tax Law §689(e)] to show that the damages to his cottage and boat house arose from fire, storm or other casualty and not progressive deterioration (see Kemper v. Comm., 30 T.C. 546, aff'd. 269 F.2d 184).

C. That Treasury Regulation §1.165-7(a)(2)(ii) provides that:

"(ii) The cost of repairs to the property damaged is acceptable as evidence of the loss of value if the taxpayer shows that (a) the repairs are necessary to restore the property to its condition immediately before the casualty, (b) the amount spent for such repairs is not excessive, (c) the repairs do not care for more than the damage suffered, and (d) the value of the property after the repairs does not as a result of the repairs exceed the value of the property immediately before the casualty."

Assuming, arguendo, that the damage to petitioner's cottage and boat house arose from fire, storm, shipwreck or other casualty, the cost to repair or replace deteriorated piers or pilings can not be claimed as a deduction since said repairs cared for more than the damage suffered (Treasury Regulation §1.165-7(a)(2)(ii)(c), supra). Without a breakdown of the estimate of damages prepared by Mr. Funk (Finding of Fact "8" and "9", supra) as to what portion of the \$10,660.00 represents the cost of repairs to the piers or pilings, it can not be found that petitioner suffered a casualty loss which was not compensated by insurance. The \$2,750.00 insurance reimbursement received by petitioner may have fully covered the cost of all repairs to the cottage and boat house exclusive of the cost of repairs to the piers or pilings.

D. That the petition of Robert P. Barzak is denied and the Notice of Deficiency dated January 22, 1982 is sustained, together with such additional interest as may be lawfully due and owing.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984

Rodney A. C. Chen
PRESIDENT

Frans R Koenig
COMMISSIONER


COMMISSIONER