

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rose Di Giacinto : AFFIDAVIT OF MAILING
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 :
1979.

State of New York }

ss.:

County of Albany }

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 31st day of January, 1984, he served the within notice of Decision by certified mail upon Rose Di Giacinto, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

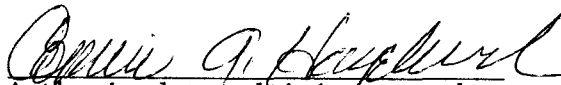
Rose Di Giacinto
68 Pilgrim Avenue
Yonkers, NY 10710

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
31st day of January, 1984.





Authorized to administer oaths
pursuant to Tax Law Section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rose Di Giacinto : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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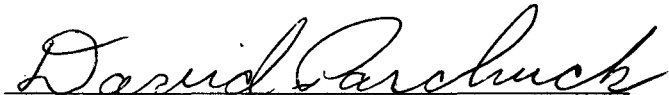
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of January, 1984, he served the within notice of Decision by certified mail upon Albert Di Giacinto, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

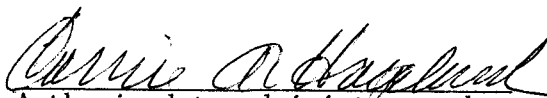
Albert Di Giacinto
68 Pilgrim Avenue
Yonkers, NY 10710

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 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
31st day of January, 1984.




Authorized to administer oaths
pursuant to Tax Law Section 174

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

January 31, 1984

Rose Di Giacinto
68 Pilgrim Avenue
Yonkers, NY 10710

Dear Ms. Di Giacinto:

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: Petitioner's Representative
Albert Di Giacinto
68 Pilgrim Avenue
Yonkers, NY 10710
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROSE DI GIACINTO	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1979.	:	

Petitioner, Rose Di Giacinto, 68 Pilgrim Avenue, Yonkers, New York 10710, 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 1979 (File No. 41689).

On September 14, 1983, petitioner waived her right to a small claims hearing and requested that a decision be rendered based on the entire record contained in her file. After due consideration of the record, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioner is entitled to claim a \$1,500.00 capital loss deduction on her separate 1979 New York State income tax return where no such loss was claimed on the joint Federal income tax return filed by petitioner and her husband.

FINDINGS OF FACT

1. Petitioner herein, Rose Di Giacinto, and her husband, Albert Di Giacinto, timely filed separate New York State resident income tax returns for the year 1979 on a single form. On her separate New York State return petitioner claimed a deduction for a capital loss in the amount of \$1,500.00.

2. On November 5, 1982, the Audit Division issued a Notice of Deficiency to petitioner for the year 1979 imposing additional tax due of \$130.20, plus interest of \$36.31, for a claimed total due of \$166.51. The aforementioned Notice of Deficiency was premised on the Audit Division's disallowance of petitioner's claimed \$1,500.00 capital loss. Said disallowance was based on the ground that since the capital loss was not claimed on petitioner's Federal income tax return that it could not be claimed on her New York State income tax return.

3. The \$1,500.00 capital loss claimed by petitioner and disallowed by the Audit Division was derived from an alleged \$11,919.77 long-term capital loss carryover from the year 1978.¹ For the year 1978 (the tax year prior to the year at issue), petitioner and her husband filed a joint Federal income tax return and separate New York State income tax returns. On the joint 1978 Federal income tax return, petitioner's long-term capital losses incurred during said year were fully absorbed by gains realized by her husband and, thus, for Federal purposes, there existed no long-term capital loss carryover to the year 1979. Since separate New York State returns were filed for 1978, petitioner's losses were reported separately [subject to the limitation of IRC §1211(b)(2)], while her husband reported the gains he realized without taking into consideration the losses separately reported by petitioner. The \$11,919.77 long-term capital loss carryover claimed by petitioner represents the balance of those losses incurred in 1978 which were not deducted on her 1978 separate New York State tax return.

¹ Pursuant to section 1211(b)(2) of the Internal Revenue Code, married taxpayers who filed separate Federal returns are each limited to a maximum deduction for capital losses of \$1,500.00.

4. Petitioner maintains that since capital gains and/or losses are computed separately by a husband and wife when separate New York returns are filed, that any unused New York State capital loss should be carried forward from year to year irrespective of the fact that no capital loss carryover is available for Federal income tax purposes.

CONCLUSIONS OF LAW

A. That section 612(a) of the Tax Law provides that:

"The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section."

That the modifications to income provided for in section 612 of the Tax Law are not applicable to the instant matter.

B. That section 612(f) of the Tax Law provides that:

"If husband and wife determine their federal income tax on a joint return but determine their New York income taxes separately, they shall determine their New York adjusted gross incomes separately as if their federal adjusted gross incomes had been determined separately."


C. That if petitioner, together with her husband, had elected to file separate 1979 Federal income tax returns, there would not have been any long-term capital loss carryover from 1978 available to be deducted on the separate 1979 Federal return. Since petitioner was not entitled to deduct any capital losses on her 1979 Federal income tax return, she is not entitled to deduct any capital losses on her 1979 separate New York State income tax return. [See 20 NYCRR 116.6(d) and Matter of Gurney v. Tully, 51 N.Y.2d 818, rev'g 67 A.D.2d 303.]

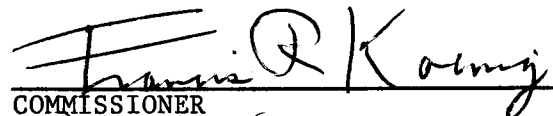
D. That the petition of Rose Di Giacinto is denied and the Notice of Deficiency dated November 5, 1982 is sustained, together with such additional interest as may be lawfully due and owing.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER