

## STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Herbert Singer :

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

State of New York }  
County of Albany }

SS. :

Page 2

Affidavit of Mailing

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Herbert Singer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Singer  
745 Fifth Ave.  
New York, NY 10022

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  
21st day of September, 1984.

David Parchuck

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

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

September 21, 1984

Herbert Singer  
745 Fifth Ave.  
New York, NY 10022

Dear Mr. Singer:

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  
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Julian C. & Eleanor Frankel :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
John & Judith Sangimino :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
Calmon J. & Hortense S. Ginsberg : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
Roslyn Gumbinner :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1974 and 1975. :

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In the Matter of the Petition :  
of :  
Herbert Singer :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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State of New York }

ss.:

County of Albany }

Page 2

Affidavit of Mailing

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon John & Judith Sangimino, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John & Judith Sangimino  
147 Schuyler Rd.  
Allendale, NJ 07401

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  
21st day of September, 1984.

David Parchuck

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

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

September 21, 1984

John & Judith Sangimino  
147 Schuyler Rd.  
Allendale, NJ 07401

Dear Mr. & Mrs. Sangimino:

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  
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
1 New York Plaza  
New York, NY 10004  
Taxing Bureau's Representative

## STATE TAX COMMISSION

In the Matter of the Petition  
of  
Herbert Singer  
for Redetermination of a Deficiency or for Refund  
of Personal Income Tax under Article 22 of the Tax  
Law for the Year 1974.

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

Page 2

Affidavit of Mailing

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Roslyn Gumbinner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roslyn Gumbinner  
1095 Park Ave.  
New York, NY 10028

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  
21st day of September, 1984.

David Parchuck

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



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

September 21, 1984

Roslyn Gumbinner  
1095 Park Ave.  
New York, NY 10028

Dear Ms. Gumbinner:

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.

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Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004  
Taxing Bureau's Representative

## STATE TAX COMMISSION

In the Matter of the Petition  
of  
Herbert Singer  
for Redetermination of a Deficiency or for Refund  
of Personal Income Tax under Article 22 of the Tax  
Law for the Year 1974.

County of Albany }

SS.:

Page 2

Affidavit of Mailing

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Calmon J. & Hortense S. Ginsberg, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Calmon J. & Hortense S. Ginsberg  
80 Broad St.  
New York, NY 10004

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  
21st day of September, 1984.

David Parchuck

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

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

September 21, 1984

Calmon J. & Hortense S. Ginsberg  
80 Broad St.  
New York, NY 10004

Dear Mr. & Mrs. Ginsberg:

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.

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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  
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
1 New York Plaza  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Julian C. & Eleanor Frankel :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
John & Judith Sangimino :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
Calmon J. & Hortense S. Ginsberg : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
Roslyn Gumbinner :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1974 and 1975. :

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In the Matter of the Petition :  
of :  
Herbert Singer :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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State of New York }

ss.:

County of Albany }

Page 2

Affidavit of Mailing

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Julian C. & Eleanor Frankel, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Julian C. & Eleanor Frankel  
245 East 68th St.  
New York, NY 10021

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  
21st day of September, 1984.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Julian C. & Eleanor Frankel :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
John & Judith Sangimino :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
Calmon J. & Hortense S. Ginsberg : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

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In the Matter of the Petition :  
of :  
Roslyn Gumbinner :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Years 1974 and 1975. :

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In the Matter of the Petition :  
of :  
Herbert Singer :  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law for the Year 1974. :

---

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

Page 2

Affidavit of Mailing

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Jack Wong, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Wong  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004

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  
21st day of September, 1984.

David Parchuck

Bennie A. Hershman  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

September 21, 1984

Julian C. & Eleanor Frankel  
245 East 68th St.  
New York, NY 10021

Dear Mr. & Mrs. Frankel:

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  
Jack Wong  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
JULIAN C. AND ELEANOR FRANKEL  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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In the Matter of the Petition  
of  
JOHN AND JUDITH SANGIMINO  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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In the Matter of the Petition  
of  
CALMON J. AND HORTENSE S. GINSBERG  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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DECISION

In the Matter of the Petition  
of  
ROSLYN GUMBINNER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1974 and 1975.

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In the Matter of the Petition  
of  
HERBERT SINGER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1974.

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Petitioners Julian C. and Eleanor Frankel, 254 East 68th Street, New York, New York 10021, 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 1974 (File No. 23062).

Petitioners John and Judith Sangimino, 147 Schuyler Road, Allendale, New Jersey 07401, 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 1974 (File No. 23130).

Petitioners Calmon J. and Hortense S. Ginsberg, 80 Broad Street, New York, New York 10004, 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 1974 (File No. 23144).

Petitioner Roslyn Gumbinner, 1095 Park Avenue, New York, New York 10028, 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 1974 and 1975 (File No. 23147).

Petitioner Herbert Singer, 745 Fifth Avenue, New York, New York 10022, 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 1974 (File No. 23133).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1983 at 1:15 P.M., with additional documentary evidence and briefs submitted by April 4, 1984. Petitioners appeared by Oppenheim, Appel, Dixon & Co. (Jack Wong, CPA). The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly treated a loss incurred on the sale of a partnership's stock exchange membership as capital.

II. Whether the Audit Division properly allocated such loss among the firm's partners.

FINDINGS OF FACT

1. American Capital Partners, a partnership with its principal offices at 25 Broad Street, New York, New York, was engaged as a broker-dealer in securities. The Third Amendment to and Restatement of Agreement of Limited Partnership made February 1, 1974 ("the partnership agreement") states that petitioner Julian C. Frankel and petitioner John Sangimino were general partners and that petitioner Calmon J. Ginsberg, petitioner Roslyn Gumbinner, and petitioner Herbert Singer were limited partners in the firm.

2. Article Eighth of the partnership agreement recites that petitioner Julian C. Frankel contributed to the partnership the exclusive use of his membership on the New York Stock Exchange; petitioner John Sangimino contributed to the partnership his membership on the New York Stock Exchange; and a nonpetitioning partner contributed to the partnership his membership on the American Stock Exchange. Frankel was entitled to retain as his individual property all right, title and interest in and to the membership and any proceeds from the sale thereof. Upon the disposition of the membership of Sangimino and of the nonpetitioning partner, all proceeds therefrom were to be paid to the partnership, and any profit or loss realized as a result thereof was to constitute profit or loss of the partnership. In all three cases, the proceeds of the transfer of the membership were considered an asset of the partnership.

3. By the terms of the partnership agreement, the partners who are petitioners herein shared in all realized net profits and sustained all realized net losses arising from the partnership (with certain exceptions not relevant to this decision) in the proportions set forth below, with respect to profits and losses up to and including \$600,000.00 for any fiscal year or any shorter accounting period:

	<u>BASE PERCENTAGE</u>
Julian C. Frankel	9.53
John Sangimino	4.00
Calmon J. Ginsberg	9.576-2/3
Roslyn Gumbinner	3.830-2/3
Herbert Singer	3.830-2/3

4. Sometime during 1974, the partnership sold a stock exchange seat,<sup>1</sup> realizing a loss in the amount of \$100,500.00. On its United States Partnership Return of Income and its New York State Partnership Return for 1974, the partnership characterized and reported the loss as ordinary in nature.<sup>2</sup>

Petitioners maintain that the loss was allocated among them in accordance with the provisions of the partnership agreement and submitted a schedule purporting to show such allocation:

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<sup>1</sup> The record does not disclose in whose name the seat was held nor on which exchange the seat was located.

<sup>2</sup> Schedule L of the federal partnership return shows the disposition during 1974 of an American Stock Exchange membership, apparently at a gain which was not reported.

	<u>ALLOCATED LOSS</u>
Julian C. Frankel	\$9,689.65
John Sangimino	3,530.00
Calmon J. Ginsberg <sup>3</sup>	6,716.42
Roslyn Gumbinner	2,686.23
Herbert Singer	2,686.23

A simple calculation, applying petitioners' respective base percentages to the total amount of the loss, demonstrates that the schedule does not correspond to the partnership agreement.

5. The 1974 federal Schedules K-1, Partner's Share of Income, Credits, Deductions, etc., for each of the petitioner-partners reflect the following amounts of salary, interest and ordinary income (or loss) paid or distributed:

Julian C. Frankel	\$31,144.72
John Sangimino	27,768.49
Calmon J. Ginsberg <sup>4</sup>	(47,892.28)
Roslyn Gumbinner	(15,498.76)
Herbert Singer	(15,497.51)

No explanation, in the form of a worksheet, schedule or otherwise, has been furnished by petitioners to indicate the composition of the above aggregate amounts.

6.(a) Petitioners Julian C. and Eleanor Frankel jointly filed a New York State Income Tax Resident Return and Unincorporated Business Tax Return for the year at issue. Submitted with these returns was federal Schedule E, Supplemental Income Schedule, upon which was reported income from the partnership in the amount of \$31,145.00.

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<sup>3</sup> The schedule actually shows such portion of the loss distributed to petitioner Hortense S. Ginsberg, who, according to the partnership agreement, was not a partner.

<sup>4</sup> A Schedule K-1 was also issued to petitioner Hortense S. Ginsberg, showing her distributive share of partnership loss as \$179,131.45.

(b) Petitioners John and Judith Sangimino jointly filed a 1974 New York State Income Tax Nonresident Return. On federal Schedule E, they reported income from the partnership in the amount of \$27,768.00.

(c) Petitioners Calmon J. and Hortense S. Ginsberg jointly filed a 1974 New York State Income Tax Resident Return. Their federal Schedule E indicates income in the amount of \$73,725.30 from partnerships, estates or trusts, and/or small business corporations; the portion of this amount which represents a distribution from American Capital Partners is unknown.

(d) Petitioner Roslyn Gumbinner filed a 1974 New York State Income Tax Resident Return, appended to which was a federal Schedule E showing a loss from the partnership of \$15,498.76.

(e) Petitioner Herbert Singer, together with his wife, Nell, filed a 1974 New York State Combined Income Tax Return, appended to which was a federal Schedule E showing a loss from the partnership of \$15,498.00.

7.(a) On April 4, 1978, the Audit Division issued to petitioners Julian C. and Eleanor Frankel a Notice of Deficiency, asserting personal income tax due under Article 22 of the Tax Law for the year 1974 in the amount of \$897.48, plus interest of \$226.55, for a total allegedly due of \$1,124.03.

(b) On April 4, 1978, the Audit Division issued to petitioners John and Judith Sangimino a Notice of Deficiency, asserting personal income tax due for 1974 in the amount of \$871.20, plus interest of \$219.92, for a total allegedly due of \$1,091.12.

(c) On April 4, 1978, the Audit Division issued to petitioners Calmon J. and Hortense S. Ginsberg a Notice of Deficiency, asserting personal income tax due for 1974 in the amount of \$8,172.31, plus interest of \$2,062.99, for a total allegedly due of \$10,235.30.

(d) On April 4, 1978, the Audit Division issued to petitioner Roslyn Gumbinner a Notice of Deficiency, asserting personal income tax due for 1974 and 1975 in the amount of \$3,730.87, plus interest of \$789.86, for a total allegedly due of \$4,520.73.

(e) On April 4, 1978, the Audit Division issued to petitioner Herbert Singer a Notice of Deficiency, asserting personal income tax due for 1974 in the amount of \$557.93, plus interest of \$140.84, for a total allegedly due of \$698.77.

Each asserted deficiency is founded upon characterization of the loss on the sale of the exchange seat as capital, with a concomitant decrease in each partner's distributive share of partnership ordinary loss.<sup>5</sup> By reference to the partnership returns, including the Schedules K-1, the Audit Division allocated the loss among the petitioner-partners as follows:

	<u>PERCENTAGE OF INTEREST</u>	<u>SHARE OF LOSS</u>
Julian C. Frankel	7.437	\$ 7,474.19
John Sangimino	6.631	6,664.16
Calmon J. Ginsberg	11.436	11,493.18
Hortense S. Ginsberg	42.775	42,988.88
Roslyn Gumbinner	3.701	3,719.51
Herbert Singer	3.701	3,719.51

According to the audit program prepared by the income tax examiner, "The percent (sic) of interest for each partner was determined by totaling the partners' distributive shares of partnership ordinary loss and payments to partners as positive distributions." The partnership agreement was not available to the examiner when he performed his calculations.

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<sup>5</sup> The deficiency issued to Mrs. Gumbinner was also based, in part, on the disallowance of percentage depletion. She does not contest this adjustment to her taxes.



8. Petitioners maintain, in the alternative, that if the loss was capital rather than ordinary, it should be apportioned among the partners in accordance with the partnership agreement, in the amounts as shown in Finding of Fact "4".

CONCLUSIONS OF LAW

A. That in reliance on Internal Revenue Code section 1221, Munson v. Commr. 100 F.2d 363 (2d Cir. 1938), and Cummins v. Commr. 19 T.C. 246, affd. mem., 54-2 U.S.T.C. ¶9698 (2d Cir. 1954), we have consistently held that a partnership's stock exchange membership constitutes a capital asset, loss on the sale or exchange of which is properly characterized as capital. E.g., Matter of William J. Nammack, July 15, 1983; Matter of Wayne Collins, November 27, 1981. The Audit Division thus correctly treated the loss realized by the partnership on the sale of the exchange membership as a capital loss.

B. That petitioners have failed to establish that the capital loss should be apportioned among the petitioner-partners in the amounts as shown in Finding of Fact "4". As earlier noted, these amounts do not represent the respective partner's distributive share of the loss as would be anticipated under the terms of the partnership agreement; petitioner Hortense S. Ginsberg is not even mentioned in the agreement. Furthermore, petitioners have not provided any specific allegations or evidence of error in the Audit Division's computations.

C. That the petitions are denied, and the notices of deficiency issued on April 4, 1978 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984

Radwica W. Chen  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

W. J. J. J.  
COMMISSIONER