

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard Freeman :
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. :
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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Richard Freeman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard Freeman
RD #1 Box 64
Springwater, NY 14560

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
5th day of October, 1984.

David Parchuck

William R. Hugoburn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Richard Freeman	: : :	: : :
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.	: : : :	: : : :

AFFIDAVIT OF MAILING

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Peter E. Nilsson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

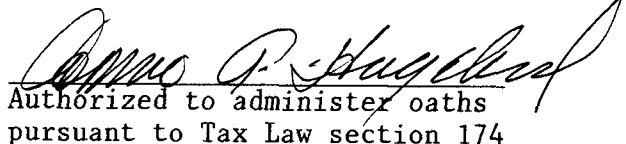
Peter E. Nilsson
Barker & Nilsson
13 N. Main Street
Honeoye Falls, NY 14472

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
5th day of October, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Richard Freeman
RD #1 Box 64
Springwater, NY 14560

Dear Mr. Freeman:

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
Peter E. Nilsson
Barker & Nilsson
13 N. Main Street
Honeoye Falls, NY 14472
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RICHARD FREEMAN

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1979.

DECISION

Petitioner, Richard Freeman, RD #1, Box 64, Springwater, New York 14560, 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. 37245).

A small claims hearing was held before Anthony Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Room 1300, Rochester, New York, on April 24, 1984 at 10:45 A.M., with all briefs to be submitted by June 7, 1984. Petitioner, Richard Freeman, appeared by Barker & Nilsson (Peter E. Nilsson, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether damages sustained to petitioner's barn arose from fire, storm or other casualty thereby qualifying for casualty loss treatment pursuant to section 165 of the Internal Revenue Code and, if qualified, what the proper amount of petitioner's casualty loss deduction is.

FINDINGS OF FACT

1. Petitioner herein, Richard Freeman, timely filed a New York State Income Tax Resident Return for 1979 whereon he claimed, inter alia, a casualty loss deduction totalling \$26,102.50.

2. The Audit Division, on February 19, 1982, issued a Notice of Deficiency to petitioner for the year 1979, asserting additional personal income tax due of \$2,928.51,¹ plus interest of \$534.51, for a total allegedly due of \$3,463.02. The aforementioned Notice of Deficiency was primarily based on the Audit Division's disallowance of petitioner's claimed casualty loss deduction. Other adjustments were proposed by the Audit Division which petitioner does not contest and, therefore, said other adjustments will not be addressed hereinafter.

3. The Audit Division's disallowance of petitioner's claimed casualty loss deduction was explained in a Schedule of Audit Adjustments dated October 16, 1981 in the following manner:

"Damage caused by faulty construction methods in construction of a taxpayer's property is not a casualty within meaning and definition of IRS code. Since collapse of your barn was due to faulty construction methods, it does not qualify as a casualty. Also, you have failed to establish any cost basis for the barn. Thus, casualty is disallowed based on the above stated reasons."

4. In mid-November, 1977, petitioner's barn sustained structural damage when it was struck by a tractor-trailer. The damage to the barn was limited primarily to its wooden frame, although the barn was pushed slightly off its foundation. The structural integrity of the foundation was not compromised as the result of this accident.

5. In September, 1978, petitioner received an insurance settlement of approximately \$10,000.00 for the damage sustained to the barn. Rather than keep the barn on its original foundation, petitioner decided it would be an opportune time to move the barn to a slightly different location further from the highway. Petitioner entered into a contract with a building mover to

¹ The tax shown due on the Notice of Deficiency was computed taking into consideration a small refund due petitioner's spouse of \$.66 (\$2,929.17 - \$.66). The refund due petitioner's spouse is not in dispute.

repair the frame structure of the barn and also move it to its new foundation. The cost to repair the barn and move it to its new foundation was approximately equal to the \$10,000.00 insurance settlement received by petitioner. It was petitioner's responsibility to provide the new foundation.

6. The building mover had completed all repairs to the wooden frame of the barn by November, 1978 and had also moved the barn to its new location. The barn was supported by a temporary foundation consisting of 18 housemoving jacks on 18 cribs, two 14 inch by 12 inch steel carrier beams and seven 12 inch by 12 inch cross timbers. The temporary foundation was somewhat elevated so that the permanent foundation could be built beneath the barn and, once the permanent foundation was completed, the barn was to be lowered onto it.

7. Petitioner started laying the block for the barn's permanent foundation in late November, 1978; however, he was unable to complete the foundation before the onset of winter. The barn sat on the temporary foundation all winter long without incident. The owner of the firm which rebuilt the barn and moved it to its new location regularly checked on the barn and temporary foundation because of their exposed location on a hillside. No structural deficiencies were noted in the barn or the temporary foundation.

8. Petitioner, an engineer, had been working on the barn's permanent foundation on April 13, 1979 and he noted no abnormalities in the barn's structure or its temporary foundation. Sometime during the night of April 13, 1979 or the morning of April 14, 1979, petitioner's barn was blown off its temporary foundation by strong, gusty winds. Had it not been for a large tree on the north side of the barn, it would have fallen completely to the ground. The damage sustained to the barn as the result of being blown off its temporary

foundation was so extensive that the entire structure was beyond repair and had to be razed.

9. Petitioner received no insurance reimbursement for the destruction of his barn on April 13/14, 1979. The company which carried his homeowner's insurance policy disclaimed responsibility since the barn was not on a permanent foundation when it was destroyed. The building mover's insurance company also disclaimed responsibility since it was petitioner who had failed to complete the permanent foundation and not the building mover. The \$26,102.50 casualty loss deduction was computed by petitioner in the following manner:

An estimate of the replacement value of the barn	\$25,700.00
The cost of obtaining the estimate	18.00
Labor in the foundation which was destroyed when the barn came down. 74 hours @ \$5 per hour	370.00
Value of mortar lost in collapse. 7 bags @ \$3.50	24.50
Value of blocks destroyed in collapse. Approx. 150 @ 60¢	90.00 ²
Total	<u>\$26,202.50</u>

10. The \$25,700.00 replacement value of the barn used by petitioner to compute his casualty loss deduction was obtained from Wilson & Longwell, Inc., general contractors and property damage appraisers. This firm indicated that it could "...reconstruct the barn not including concrete footings nor concrete block foundation walls for \$25,700.00". No documentary evidence was adduced at the hearing concerning the fair market value of the property immediately before the casualty. However, it is apparent from all the evidence presented that the fair market value of said barn before the casualty was at least equal to petitioner's adjusted basis. The fair market value of the property immediately after the casualty was zero.

² Petitioner reduced the claimed total loss of \$26,202.50 by \$100.00 pursuant to section 165(c)(3) of the Internal Revenue Code to arrive at the deductible loss of \$26,102.50.

CONCLUSIONS OF LAW

A. That section 165(c)(3) of the Internal Revenue Code provides, in part, that losses of property are deductible if said losses arise from fire, storm or other casualty. The loss sustained by petitioner as the result of the destruction of his barn by strong, gusty winds qualifies as a loss which arose from fire, storm or other casualty.

B. That in determining the amount of the casualty loss deduction, Treasury Regulation §1.165-7(b)(1) provides, in pertinent part, that:

"In the case of any casualty loss whether or not incurred in a trade or business or in any transaction entered into for profit, the amount of loss to be taken into account for purposes of section 165(a) shall be the lesser of either --

(i) The amount which is equal to the fair market value of the property immediately before the casualty reduced by the fair market value of the property immediately after the casualty; or

(ii) The amount of the adjusted basis prescribed in §1.1011-1 for determining the loss from the sale or other disposition of the property involved..."

C. That in lieu of establishing the fair market value of the property immediately before and after the casualty, Treasury Regulation §1.165-7(a)(2)(ii) provides that:

"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."

D. That, in the instant matter, petitioner has failed to submit any evidence to show that the fair market value of the property immediately before the casualty exceeded his adjusted basis in said property. Petitioner has, however, established that it would cost \$25,700.00 to reconstruct the barn and

he apparently argues that said reconstruction cost constitutes acceptable evidence of the loss of value pursuant to Treasury Regulation §1.165-7(a)(2)(ii), supra. This argument must be rejected since the cost to construct an entire new barn to replace petitioner's aged barn would clearly cause the value of the property after the repairs to exceed the value of the property immediately before the casualty [Treasury Regulation §1.165-7(a)(2)(ii)(d)]. Accordingly, based on the evidence presented, petitioner's casualty loss deduction is limited to the adjusted basis of the property pursuant to section 165(b) of the Internal Revenue Code and Treasury Regulation §1.165-7(b)(1)(ii), supra.

E. That the evidence adduced at the hearing held herein establishes that petitioner's adjusted basis in the barn was \$10,502.50. Said amount is computed in the following manner:



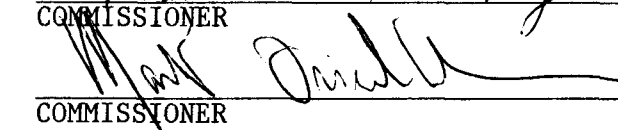
Amount paid to the building mover to	\$10,000.00
repair and move the barn	
Cost of obtaining estimate	18.00
Labor in partially completed foundation	370.00
Value of mortar	24.50
Value of blocks	90.00
Adjusted basis in barn	<u>\$10,502.50</u>

F. That the petition of Richard Freeman is granted to the extent indicated in Conclusion of Law "E", supra; that the Audit Division is directed to recompute the Notice of Deficiency dated February 19, 1982 allowing petitioner a casualty loss deduction of \$10,402.50 (\$10,502.50 - \$100.00 for Internal Revenue Code §165(c)(3) limitation); and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER