

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Bernard & Patricia Goldstein : 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 9th day of August, 1984, he served the within notice of Decision by certified mail upon Bernard & Patricia Goldstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard & Patricia Goldstein
2 Manursing Way
Rye, NY 10580

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 August, 1984.

David Parchuck

William D. Hayward

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Bernard & Patricia Goldstein : 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 9th day of August, 1984, he served the within notice of Decision by certified mail upon Larry J. Abowitz, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Larry J. Abowitz
Ernst & Whinney
153 E. 53rd St.
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 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
9th day of August, 1984.

David Parchuck

Annice A. Hargrave
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 9, 1984

Bernard & Patricia Goldstein
2 Manursing Way
Rye, NY 10580

Dear Mr. & Mrs. Goldstein:

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
Larry J. Abowitz
Ernst & Whinney
153 E. 53rd St.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BERNARD AND PATRICIA GOLDSTEIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1979.	:	

Petitioners, Bernard and Patricia Goldstein, 2 Manursing Way, Rye, New York 10580, 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. 38085).

On December 1, 1983, petitioners, by their representative, Larry J. Abowitz, Esq., filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record with all briefs to be submitted by January 7, 1984. After due consideration, the Tax Commission renders the following decision.

ISSUES

I. Whether petitioners properly excluded a capital gains deduction as an item of tax preference in computing their 1979 New York State minimum income tax.

II. Whether penalty should be waived.

FINDINGS OF FACT

1. Petitioners, Bernard and Patricia Goldstein, filed a joint New York State income tax resident return and a New York City nonresident earnings tax return for 1979. Petitioners had a Federal capital gain deduction of \$352,439.00

for 1979, however, they did not include said deduction in their New York State minimum income tax computation schedule.

2. On April 7, 1982, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$14,397.19 plus penalty of \$719.86 and interest of \$2,423.48 for a total due of \$17,540.53 for the year 1979. The notice indicated that \$17,474.30 had been paid or credited leaving a balance due of \$66.23. A Statement of Personal Income Tax Audit Changes issued December 23, 1981 indicated that, among other adjustments not at issue herein, the minimum tax was being recomputed with the inclusion of the \$352,439.00 capital gain deduction as an item of tax preference.

3. Petitioners' position is that, under the Revenue Act of 1978, the Federal minimum tax was restructured for tax years beginning after December 31, 1978 so that there were two minimum tax computations, the "add-on" minimum tax, which was a continuation, with modifications, of the existing minimum tax and an alternative minimum tax. The capital gains deduction became an item of tax preference under the alternative minimum tax. Previously it had been an item of tax preference under the "add-on" minimum tax. Petitioner argued that, since the New York minimum tax had always paralleled the "add-on" minimum tax with respect to items of tax preference and since the capital gains deduction was no longer an item of tax preference for "add-on" minimum tax purposes but was an item of tax preference for alternative minimum tax purposes, the capital gains deduction was no longer an item of tax preference for New York minimum tax purposes.

4. Petitioner concedes that, for taxable years subsequent to 1979, the capital gains deduction again became an item of tax preference since the New

York Tax Law was amended to modify the method of computing the capital gains deduction.

CONCLUSIONS OF LAW

A. That section 622(b)(4) of the Tax Law, in effect during the year in issue, provided:

"For purposes of this article, the term 'items of tax preference' shall mean the federal items of tax preference, as defined in the laws of the United States, of a resident individual, estate or trust..., as the case may be, for the taxable year with the following modifications -

* * *

(4) The federal item of tax preference for capital gains shall be computed by subtracting from such tax preference item one-fifth of the net long-term capital gain deduction."

Section 622(b)(4) was amended by Chapter 103 of the Laws of 1981 and applicable to taxable years commencing on or after January 1, 1982 to provide:

"(4) The federal item of tax preference for capital gains shall be computed by subtracting from such tax preference item an amount sufficient (if necessary) to reduce such tax preference item to sixty percent of net capital gains."

B. That prior to taxable year 1979 there was one Federal minimum tax on certain items of tax preference (I.R.C. § 56). One of the items of tax preference was the untaxed portion of the net capital gain for the year (I.R.C. § 57). For tax years beginning after December 31, 1978 the capital gains deduction was eliminated as an item of tax preference under the original Federal minimum tax and made an item of tax preference under the alternative minimum tax [I.R.C. §§ 55(b)(1), 57(a)].

C. That section 622(b) of the Tax Law defines State items of tax preference to mean Federal items of tax preference (the same definition applied prior to January 1, 1982). No distinction is made between items of tax preference under the "add-on" minimum tax and items of tax preference under the alternative

minimum tax. The statutory intent is clear that all Federal items of tax preference become State items of tax preference. The change enacted by Chapter 103 of the Laws of 1981 merely amended the method of computing the capital gains deduction, it did not add or delete any items of tax preference. Therefore, petitioners' argument that the capital gains deduction did not regain status as an item of tax preference until after the law was amended is without merit.

D. That section 685(b) of the Tax Law provides for the imposition of a penalty if any part of a deficiency is due to negligence or intentional disregard of the law or rules or regulations without intent to defraud. Based on Finding of Fact "3", petitioners were not negligent and no part of the deficiency was due to negligence or intentional disregard of the law or rules or regulations. Therefore, the Audit Division is directed to abate the penalty imposed pursuant to section 685(b) of the Tax Law.

E. That the petition of Bernard and Patricia Goldstein is granted to the extent of Conclusion of Law "D", supra, and in all other respects denied, and the Notice of Deficiency issued April 7, 1982 is sustained as modified by the Audit Division.

DATED: Albany, New York

AUG 09 1984

STATE TAX COMMISSION

Richard W. Olen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Muller
COMMISSIONER