

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Charles S. Klesitz : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC Income :
Tax under Article 22 of the Tax Law and Chapter 46, :
Title T of the Administrative Code of the City of :
New York for the Year 1978. :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Charles S. Klesitz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles S. Klesitz
115-16 127th St.
S. Ozone Park, NY 11420

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
18th day of January, 1984.

David Parchuck

James A. Haggard
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Charles S. Klesitz
115-16 127th St.
S. Ozone Park, NY 11420

Dear Mr. Klesitz:

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 & 1312 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	:	
CHARLES S. KLESITZ	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York	:	
for the Year 1978.	:	

Petitioner, Charles S. Klesitz, 115-16 127th Street, South Ozone Park, New York 11420, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1978 (File No. 34214).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 20, 1983 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioner's stock investment related expenses are properly deductible from gross income in determining adjusted gross income or are such expenses deductible solely as itemized deductions.

FINDINGS OF FACT

1. Charles S. Klesitz (hereinafter petitioner) timely filed a New York State Income Tax Resident Return (With City of New York Personal Income Tax) for the year 1978 whereon he reported his occupation as "securities trader".

Pursuant to Schedule A of said return, his total income was comprised of the following:

<u>ITEM</u>	<u>AMOUNT</u>
Interest income	\$ 168.00
Dividends	2,462.00
Business income	(7,639.00)
Sale or exchange of capital assets	29,781.00
Total Income	<u>\$24,772.00</u>

2. Petitioner's reported business loss of \$7,639.00 was comprised solely of expenses incurred relative to his activities of purchasing and selling securities for his own account. Such expenses, as reported on his Federal Schedule C, were as follows:

<u>EXPENSE</u>	<u>AMOUNT</u>
Interest on margin account	\$6,472.61
Investment publications	535.88
Travel	472.90
Telephone	92.83
Office supplies	64.77
Total	<u>\$7,638.99</u>

3. On January 5, 1981, the Audit Division issued a Statement of Audit Changes to petitioner wherein his securities related expenses of \$7,639.00 were allowed as itemized deductions based on the explanation incorporated therein as follows:

"You do not qualify as a trader in securities since you do not trade with the frequency necessary to be a trader.

Therefore, Schedule C expenses must be claimed as itemized deductions. We have disallowed the standard deduction of \$2,400.00 since your itemized deductions exceed the standard deduction."

Accordingly, a Notice of Deficiency was issued against petitioner on April 8, 1981 asserting additional New York State personal income tax of \$316.18, additional New York City personal income tax of \$94.78, plus interest of \$68.53, for a total due of \$479.49.

4. Petitioner contended that his activities qualified him as a securities "trader" since:

- (a) he bought and sold securities for his own account;
- (b) he was primarily interested in profits generated by market changes rather than dividend or interest income;
- (c) the profits from security sales were his principal source of income;
- (d) he devoted a substantial amount of time and effort to this end;
- (e) he had substantial investment expenses attendant to these operations, including substantial margin account interest incurred to carry securities held on speculation.

5. Petitioner alleged that he has been a securities "trader" since 1976 and that during 1978 he spent approximately thirty (30) hours per week on security investment related activities. Such activities consisted of buying and reading investment publications, making decisions, visiting libraries and brokerage houses to secure research material and keeping daily records.

6. Petitioner did not maintain a business office. His activities were carried on at his personal residence.

7. On petitioner's 1978 Federal Schedule D (Capital Gains and Losses), he reported one short-term and three long-term transactions. The short-term transaction and the most substantial long-term transaction reported had sales dates of December 27, 1977. The two remaining long-term transactions occurred in August, 1978. Petitioner testified that he had made no security purchases during 1978.

CONCLUSIONS OF LAW

A. That a trader in securities is a person who buys and sells securities in frequent and continuous operations for his own account rather than for the account of customers (as distinguished from a dealer in securities) to such extent that he may be said to be regularly engaged in such activities as a trade or business. He must be actively and continuously occupied in the purchase and sale of securities, with his time and energy devoted to such work. If he maintains an office and employs assistants, those facts are significant, but not conclusive [(Kales v. C.I.R.), (CA-6) 39-1 USTC ¶9255, 101 F.2d 35].

B. That an investor in securities is a person whose activities either are limited to occasional transactions for and on his own account and are less than those required in a trade or business, or if his investments and transactions are extensive, a person who merely passively receives the dividends and interest, the details being taken care of by others (Higgins v. C.I.R., 312 U.S. 212, 41-1 USTC ¶9233).

C. That a trader who meets the above tests (Conclusion of Law "A", supra) may deduct his expenses (exclusive of commissions) from gross income in determining adjusted gross income within the meaning and intent of sections 62 and 162 of the Internal Revenue Code.

D. That an investor may only deduct his expenses (exclusive of commissions) as nonbusiness itemized deductions within the meaning and intent of section 212 of the Internal Revenue Code.

E. That petitioner's activities relating to the buying, owning and selling of securities were not so extensive as to constitute the carrying on of the business of a trader in securities. Accordingly, petitioner's activities must be characterized as those of an investor. As such, the expenses at issue

herein are deductible as itemized deductions. (See Matter of R. Fitzgerald, 15 T.C.M. 1450.)

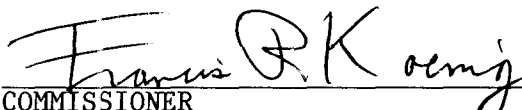
F. That the petition of Charles S. Klesitz is denied and the Notice of Deficiency dated April 8, 1981 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JAN 18 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER