

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Russell C. Swain : 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 :
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 9th day of August, 1984, he served the within notice of Decision by certified mail upon Russell C. Swain, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

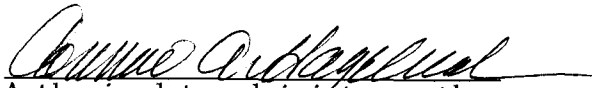
Russell C. Swain
P.O. Box 156
Buffalo, NY 14202

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.




Authorized to administer oaths
pursuant to Tax Law section 174

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

August 9, 1984

Russell C. Swain
P.O. Box 156
Buffalo, NY 14202

Dear Mr. Swain:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RUSSELL C. SWAIN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioner, Russell C. Swain, P.O. Box 156, Buffalo, New York 14202, 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 1978 (File No. 37197).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Part VI, Buffalo, New York, on March 21, 1984 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed petitioner's claimed theft loss deduction of \$4,969.00.

FINDINGS OF FACT

1. Petitioner herein, Russell C. Swain, timely filed a New York State Income Tax Resident Return for the year 1978 wherein he claimed, inter alia, a theft loss deduction totaling \$4,969.00.

2. On March 30, 1982, the Audit Division issued a Notice of Deficiency to petitioner for the year 1978, asserting that additional personal income tax of \$495.63 was due, together with interest of \$140.23, for an alleged total due of \$635.86.

3. The aforementioned Notice of Deficiency was premised on a Statement of Personal Income Tax Audit Changes dated December 8, 1981, wherein the Audit Division disallowed petitioner's claimed theft loss deduction. The Audit Division's basis for the disallowance of the casualty or theft loss deduction was set forth in the following statement:

"A casualty or theft loss is deductible only by the person who owns the property. Since you failed to establish that you were the owner of the automobile which was stolen from your son the loss has been disallowed."

4. On May 20, 1976, petitioner, Russell C. Swain, initially advanced to his teenaged son, Russell D. Swain, the sum of \$1,500.00 for the purchase of a 1972 automobile. Petitioner also allowed his son the use of his credit card to purchase parts and have extensive repairs made to the automobile. All funds advanced by petitioner to his son for the purchase and repair of said automobile were advanced with the understanding that repayment would be made. On or about November 25, 1978, the automobile was stolen and the only items recovered were the engine hood, part of the transmission case and the convertible roof. At the time the automobile was stolen it had an adjusted cost basis of approximately \$5,069.00.

5. Russell D. Swain, petitioner's son, was listed as the sole owner of the 1972 automobile on the registration issued by the New York State Department of Motor Vehicles. The agreement for the purchase of the automobile also reflected that petitioner's son was the sole purchaser. The purchase agreement was signed only by petitioner's son.

6. The automobile in question was insured under petitioner's insurance policy and all premiums were paid by petitioner. At the time the automobile was stolen all insurance coverage had been cancelled since the vehicle had been taken off the road and was in process of being prepared for winter storage.

Petitioner was unable to collect any insurance reimbursement for the theft of the automobile.

CONCLUSIONS OF LAW


A. That in order to be entitled to a theft loss deduction a taxpayer must, inter alia, be the owner of the property when it was criminally appropriated (Green v. Comm., 44 T.C.M. (CCH) 923; Berens v. Comm., 19 T.C.M. (CCH) 697; Draper v. Comm., 15 T.C. 135). Petitioner, in the instant matter, was not the owner of the stolen automobile in question and, therefore, was not entitled to claim the loss generated from said theft.

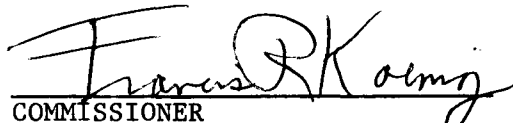
B. That the petition of Russell C. Swain is denied and the Notice of Deficiency dated March 30, 1982 is sustained, together with such additional interest as may be lawfully due and owing.

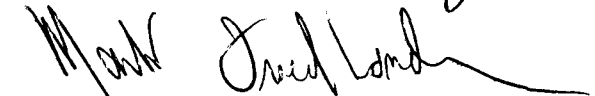
DATED: Albany, New York

STATE TAX COMMISSION

AUG 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER