

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Albert & Sylvia Waxman :
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 Years :
1973 - 1975. :
_____ :

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 6th day of January, 1983, he served the within notice of Decision by certified mail upon Albert & Sylvia Waxman, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert & Sylvia Waxman
665 N.E. 195th St.
N. Miami Beach, FL 33179

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
6th day of January, 1984.

David Parchuck

Barrie A. DeGroot
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Albert & Sylvia Waxman	: : :	: : :
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 Years 1973 - 1975.	: : : :	: : : :

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 6th day of January, 1983, he served the within notice of Decision by certified mail upon Edward L. Dublin, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward L. Dublin
370 Lexington Ave.
New York, NY 10017

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
6th day of January, 1984.

David Parchuck

Conrad J. Engelund
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 6, 1984

Albert & Sylvia Waxman
665 N.E. 195th St.
N. Miami Beach, FL 33179

Dear Mr. & Mrs. Waxman:

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
Edward L. Dublin
370 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
ALBERT and SYLVIA WAXMAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1973, 1974 and	:	
1975.	:	

Petitioners, Albert and Sylvia Waxman, 665 N.E. 195th Street, North Miami Beach, Florida 33179, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973, 1974 and 1975. (File Nos. 19519 and 23359).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on November 16, 1982, at 9:40 A.M., with all briefs to be submitted by April 14, 1983. Petitioners appeared by Edward L. Dublin, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq., (Alexander Weiss, Esq., of counsel).

ISSUES

- I. Whether the Notice of Deficiency for 1973 was timely issued.
- II. If so, whether the nonresident petitioners are entitled to offset an unreported capital gain for 1973 with certain short term capital losses.
- III. Whether petitioners are entitled to self-employed retirement plan deductions for each of the years at issue.

FINDINGS OF FACT

1. Petitioners, Albert and Sylvia Waxman, filed joint New York State nonresident income tax returns for 1973, 1974 and 1975 on which they reported partnership losses of \$9,594.18, \$26,529.50 and \$57,685.00, respectively.

2. On April 14, 1977, the Audit Division issued a Statement of Audit Changes and a Notice of Deficiency to petitioners for the year 1973 in the amount of \$7,147.46, plus interest. Petitioners' income was adjusted by these documents as follows:

- a. Certain partnership losses were disallowed as not having been derived from or connected with New York sources;
- b. A 20% long term capital gain modification was made because petitioners had failed to report their share of capital gain from the partnership Smithtown Associates;
- c. The remainder of the long term capital gain not subject to New York personal income tax was deemed to be an item of tax preference and subject to New York minimum income tax.

3. On March 24, 1978, the Audit Division issued a Notice of Deficiency to petitioners for the years 1974 and 1975 in the amount of \$3,913.07, plus interest. The accompanying copy of a Statement of Audit Changes showed that \$1,683.13 in additional tax was due for 1974 and \$2,229.94 for 1975. The deficiencies were due to the exclusion of business losses for businesses carried on outside of New York State.

4. At the Formal Hearing, petitioners' representative claimed that the Notice of Deficiency for 1973 was not timely issued and that petitioners were entitled to deduct certain capital losses incurred by petitioner Albert Waxman. He also claimed that petitioners were entitled to Keogh Plan (self-employed

retirement plan) deductions for 1973, 1974 and 1975. He conceded petitioners' liability for 1974 and 1975, except for the Keogh Plan deductions.

5. The envelope in which the Notice of Deficiency for 1973 was mailed bears the postage meter date April 14, 1977, a Thursday. It also bears certification No. 27397 and a Post Office new address label showing it had been rerouted from 100 Kings Point Drive, North Miami Beach, Florida 33160 to 665 N.E. 195 Street, #425, North Miami (sic), Florida 33179. Petitioners' representative claimed that the Notice was not received by petitioners in Florida until April 18, 1977, a Monday. The Audit Division was unable to locate its mailing list for April 14, 1977, as requested by the Hearing Officer, but submitted affidavits to the effect that in the regular course of business, notices of deficiency are mailed on the same day as the date stamped on such notices.

6. Petitioners' representative admits that a long term capital gain from Smithtown Associates in the amount of \$22,531.66 had been erroneously omitted from their return for 1973. He claims however, that said amount should be offset by a capital loss carry forward based upon:

- a. A bad debt loss from Limmac Realty Corp. (Limmac), a New York corporation, which occurred in 1968 in the amount of \$64,098.30, of which \$1,000.00 was deducted in 1968 and the remainder carried forward to 1970, 1971, 1972 and 1973.
- b. Another loss from Limmac resulting from a payment to Bankers Trust Co. in New York by Mr. Waxman, as guarantor, to the extent of \$20,000.00, which was similarly carried forward to 1973.
- c. A bad debt incurred as guarantor to Republic Insurance Co. ("Republic") on behalf of Neptune Realty Corp. ("Neptune"), a New York corporation, in the amount of \$35,000.00 in 1972, deducted as a short term loss on

petitioners' 1972 return to the extent allowable and the balance carried forward to 1973.

7. Petitioners' federal schedule D for 1968 shows a short term capital loss of \$64,098.30 due to "Limmac Realty Corp. (Bad Debt)". The loss was partially offset by a \$1,377.39 short term capital gain and a \$21,911.36 net long term capital gain. The sum of \$1,000.00 was deducted for 1968 and the balance, \$39,809.55 carried over. Petitioners' federal schedule D for 1969 shows a \$20,000.00 short term capital loss attributed to "Limmac Realty Corp. (Bad Debt) Uncollectible", which was offset by a short term gain of \$3,897.00 and added to the previous year's carryover for a net short term loss of \$55,912.55, which was in turn partially offset by a net long term gain of \$18,951.13. The sum of \$1,000.00 was deducted for 1969 and the balance, \$35,961.42, carried over to 1970. The 1970 schedule D shows \$2,011.33 in gains applied against the carryover and a deduction of \$1,000.00. Accordingly, \$32,950.09 was carried forward as a short term capital loss to 1971. The 1971 schedule D shows this figure offset by a net long term gain of \$11,921.16 for a net loss of \$21,028.93 of which \$1,000.00 was deducted for 1971 and the balance carried over. The 1972 schedule D shows a short term capital loss of \$35,000.00 due to "Bad Debt - Guarantor Republic Bonding Co. & Neptune Realty Corp.". This was added to the carryover of \$20,328.93 for a total short term loss of \$55,028.93. There was also a net long term capital loss for 1972 of \$418.21. The sum of \$1,000.00 was deducted for 1972 and a short term capital loss of \$54,028.93 and a long term capital loss of \$418.21 were carried forward to schedule D for 1973. The short term carryover was applied against the net long term gain of \$97,806.41 for 1973 for a net gain of \$43,777.48, 50% of which was reported on petitioners' federal 1040 for 1973.

8. There is little in the record with respect to the details of the Limmac losses except for the notations on the federal schedules D for 1968 and 1969. Petitioners introduced a copy of a 1973 judgment of the Supreme Court of the State of New York, Queens County against Albert Waxman and Limmac, among other defendants, but the record does not reveal its connection with the 1968 and 1969 losses.

9. On or about July 12, 1972, petitioner Albert Waxman paid a sum of \$35,000.00 to satisfy another New York judgment obtained against him by Republic. The judgment was based on Mr. Waxman's indemnification of Republic with respect to a certain surety bond issued by Republic to East Windsor Township, New Jersey, to assure the installation of certain improvements upon a subdivision of land in East Windsor Township by Neptune. Neptune's offices were located at 17 Neptune Avenue, Brooklyn, New York.

10. Petitioner Albert Waxman reported the following self-employed retirement plan contributions on his federal income tax returns for the years at issue:

<u>YEAR</u>	<u>AMOUNT</u>
1973	\$2,500.00
1974	\$6,000.00
1975	\$5,849.00

All of the 1973 contribution, \$3,742.00 of the 1974 contribution and \$4,281.00 of the 1975 contribution were made by the partnership Waxman & Nagelburg, on behalf of Mr. Waxman and were attributable to a profession carried on in this State. The balance of the 1974 and 1975 contributions were attributable to activities carried on outside of New York State.

CONCLUSIONS OF LAW

A. That in order for a Notice of Deficiency to ultimately constitute a timely assessment, it must be mailed by certified or registered mail within three years after either the last day prescribed by law for the filing of an income tax return (except withholding tax returns) or the date the return was filed, whichever is later (Tax Law Sections 683(a) and (b); 682(a); 681(a) and (b)).¹ Accordingly, the last day for mailing the Notice of Deficiency for 1973 was Friday, April 15, 1977.

Although the Audit Division was unable to produce any affidavit of mailing or list of certified mail for April 14, 1977, petitioners' receipt of the Notice of Deficiency on Monday, April 18, 1977, supports no inference but that the Notice was timely mailed. The Notice had to travel from Albany to North Miami Beach, with a rerouting by the Post Office Department due to change of address, and obviously had to have been mailed by the previous business day, April 15th, at the latest. Moreover, the affidavits as to the Department's general mailing practices would indicate mailing on April 14th.

B. That in order for a nonresident to claim a capital loss deduction, the deduction must be derived from or connected with New York sources, meaning those deductions attributable to the ownership of any interest in real or tangible personal property in New York State, or to a business, trade, profession or occupation carried on in New York (sections 632(a)(1) and (b)(1) of the Tax Law). Petitioners have not sustained their burden of proof under Section 689(e) of the Tax Law to show that the short term capital losses incurred in connection with Limmac Realty Corp. and Neptune Realty Corp. were derived from

¹ Section 683(c) and (d) provide certain exceptions which are not applicable in this case.

New York sources. There is virtually nothing of substance in the record pertaining to the Limmac Realty Corp. losses, while the Neptune Realty Corp. losses appear to have been losses derived from New Jersey real estate development. (It is noted that petitioners offered no testimony at the hearing.) Thus, the capital gain attributable to Smithtown Associates may not be offset by said capital losses.

C. That the New York adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his federal adjusted gross income which are attributable to a business, trade, profession or occupation carried on in this State (20 NYCRR 131.4). Accordingly, petitioners are entitled to adjustments to income of \$2,500.00 for 1973, \$3,742.00 for 1974 and \$4,281.00 for 1975, due to the self-employed retirement plan contributions attributable to a profession carried on in New York.

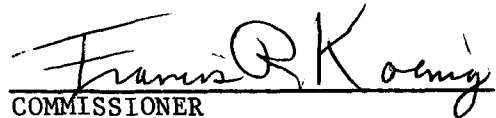
D. That except as set forth in Conclusion of Law C, the petitions of Albert and Sylvia Waxman are denied and the Notices of Deficiency are otherwise sustained.

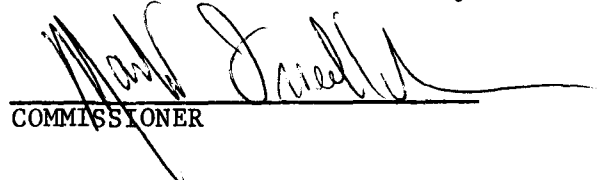
DATED: Albany, New York

JAN 06 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER