

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Bernard & Lily Wezenter :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of New York State and New York City Personal Income :  
Taxes under Articles 22 and 30 of the Tax Law and :  
Chapter 46, Title T of the Administrative Code of :  
the City of New York for the Years 1976 & 1977. :

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Bernard & Lily Wezenter, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard & Lily Wezenter  
142 Kerschner Place  
Fairlawn, NJ 07410

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  
31st day of December, 1984.

David Parchuck

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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for Redetermination of a Deficiency or for Refund :  
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Taxes under Articles 22 and 30 of the Tax Law and :  
Chapter 46, Title T of the Administrative Code of  
the City of New York for the Years 1976 & 1977. :

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Michael Strauss, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Strauss  
Strauss, Comas & Co.  
250 Fifth Ave.  
New York, NY 10001

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  
31st day of December, 1984.

David Parchuck

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

December 31, 1984

Bernard & Lily Wezenter  
142 Kerschner Place  
Fairlawn, NJ 07410

Dear Mr. & Mrs. Wezenter:

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 and Chapter 46, Title T of the Administrative Code of the City of New York, 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  
Michael Strauss  
Strauss, Comas & Co.  
250 Fifth Ave.  
New York, NY 10001  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
BERNARD AND LILY WEZENTER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Articles 22 and	:	
30 of the Tax Law and Chapter 46, Title T of	:	
the Administrative Code of the City of New	:	
York for the Years 1976 and 1977.	:	

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Petitioners, Bernard and Lily Wezenter, 142 Kerschner Place, Fairlawn, New Jersey 07410, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1976 and 1977 (File No. 34196).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 28, 1984 at 9:15 A.M., with all briefs submitted by August 27, 1984. Petitioners appeared by Strauss, Comas & Company (Michael Strauss, CPA). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly disallowed Mr. Wezenter's deduction of losses from the partnership Lee and Wezenter, on the ground that the activities of the partnership did not constitute a trade or business.

FINDINGS OF FACT

1. For the years 1976 and 1977, Bernard and Lily Wezenter, then residing at 2715 Grand Concourse, Bronx, New York, filed joint New York State Income Tax Resident Returns with New York City Personal Income Tax. (Mrs. Wezenter is a party to this proceeding solely as the result of filing such joint returns with her husband; therefore, the term "petitioner" shall hereinafter refer only to Mr. Wezenter.)

2. On January 22, 1981, subsequent to the conduct of an examination of petitioner's personal and business books and records, the Audit Division issued to Mr. Wezenter a Notice of Deficiency, asserting New York State and New York City personal income taxes due for the years 1976 and 1977 in the combined amount of \$7,618.45, plus interest. As the result of a pre-hearing conference held, the Audit Division reduced the adjustments to taxable income and the deficiencies asserted, to the amounts set forth below.

	<u>1976</u>	<u>1977</u>
N.Y.S. taxable income reported	\$15,470.42	\$19,951.00
Add: adjustments	<u>21,371.42</u>	<u>9,923.95</u>
Corrected taxable income	\$36,841.84	\$29,874.95
N.Y.S. tax	\$ 3,836.28	\$ 2,791.24
Tax surcharge of 2½% (1976 only)	95.91	---
N.Y.C. tax	<u>1,184.20</u>	<u>884.62</u>
Total tax due	\$ 5,116.39	\$ 3,675.86
Less: tax shown on return	<u>(1,265.30)</u>	<u>(1,876.00)</u>
Additional personal income taxes	\$ 3,851.09	\$ 1,799.86

There is only one adjustment which remains in dispute: the Audit Division's disallowance of petitioner's deduction of losses from the partnership Lee and Wezenter, on the ground that the activities of the partnership did not constitute a trade or business. For federal, New York State and New York City purposes, petitioner deducted losses in 1976 and 1977 in the respective amounts of \$12,123.55 and \$9,501.00.

3. From sometime prior to 1967 through approximately 1974, petitioner was an employee of Ace Packing Company ("Ace"), a New York partnership engaged in the wholesale meat business. In general, petitioner worked from 3:00 A.M. to 1:00 P.M. five days per week and earned a salary of approximately \$13,000 per year. In or about 1975, petitioner became a five-percent partner in Ace; his federal schedule E (Supplemental Income Schedule) for 1976 reflects his distributive share of income from Ace for such year as \$28,363.44.<sup>1</sup> His partnership interest thereafter gradually increased to its present level of 35 percent.

4. In January, 1967, petitioner and one Jim G. Lee formed the partnership of Lee and Wezenter for the purpose of breeding and racing harness horses. At that time, as above-stated, petitioner was employed by Ace. Mr. Lee, a man of considerable business experience, owned and operated several restaurants in New Jersey. Petitioner hoped to become an entrepreneur and with Mr. Lee, to engage in horse breeding and racing on a full-time basis.

5. Lee and Wezenter maintained a checking account for the payment of partnership expenses and retained a certified public accountant to keep the partnership books and prepare its tax returns.

6. In 1969, Lee and Wezenter purchased a colt, "Mercury King", which received the 1969 Harness Horse Breeders of New York State, Inc. award for outstanding two-year-old trotting colt in the New York Sire Stakes program, and which generated approximately \$120,000 in winnings during 1969 and 1970. This initial success provided the impetus for Messrs. Lee and Wezenter to continue their activities and also to make substantial investments in the partnership (some investments made possible by borrowings).

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<sup>1</sup> Neither party offered in evidence petitioner's federal schedule E filed for 1977.

7. The federal partnership returns of income of Lee and Wezenter for the years 1969 and 1970 show gross profits for such years in the respective amounts of \$11,680 and \$4,325, ordinary income for 1969 in the amount of \$2,697, and ordinary loss for 1970 in the amount of \$1,712. For all subsequent years until the termination of the partnership in 1982, Lee and Wezenter sustained losses.

8. Lee and Wezenter's federal partnership return for 1976 discloses that the partnership owned four horses during that year: "Mercury King", "Scots Prize", "Leslie Eden" and "Gold Wall". "Gold Wall" was acquired during February, 1976 at a cost of \$10,000. Other relevant amounts from the return are set forth below.

Gross receipts (winnings)	\$51,722.61
Expenses*	
Stud fees	\$ 3,000.00
Stake fees	4,020.00
Veterinarian	2,129.50
Training	59,081.50

\*Not all expenses claimed are shown.

The partnership showed an ordinary loss for the year of \$24,247.10.

The 1977 federal partnership return indicates that Lee and Wezenter owned eleven horses during a portion or the entirety of that year: "Mercury King", "Bettys Prize" (sold on May 2, 1977), "Leslie Eden" (sold on March 10, 1977), "Gold Wall", "Berkshire Girl", "Barbara's Girl", "Great Jeff",<sup>2</sup> "Jims Lucky Streak",<sup>2</sup> "Winning Sally",<sup>2</sup> "Career C"<sup>2</sup> (sold on June 7, 1977) and "Boodles"<sup>2</sup> (sold on December 15, 1977). Relevant amounts from the return are set forth below.

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<sup>2</sup> These were offspring of other horses owned by Lee and Wezenter and no depreciation was claimed as to them.

Race winnings	\$40,960
Gains from sales of horses	14,954
Expenses*	
Training	\$16,298
Veterinarian	4,577
Trimming and shoeing	2,197
Harness repairs and supplies	4,020
Feed and board	15,122
Groom expenses	11,014

\*Not all expenses claimed are shown.

The partnership showed an ordinary loss for 1977 of \$19,001.

9. Lee and Wezenter boarded its horses at various farms situated in New York, New Jersey, Pennsylvania and Florida.

10. In support of his position that Lee and Wezenter conducted its breeding and racing activities as a regular business, petitioner points to the considerable amounts of time both he and Mr. Lee devoted to the partnership; petitioner spent most weekday afternoons and weekends supervising and managing the trainers, veterinarians and farms. Petitioner further asserts that during the years in question, he could ill-afford the losses suffered by Lee and Wezenter, many of which losses were met through personal borrowings.

#### CONCLUSIONS OF LAW

A. That the precise issue presented is whether Lee and Wezenter's horse breeding and racing operation was an "activity...not engaged in for profit" within the meaning of Internal Revenue Code section 183(a). If the activity was not engaged in for profit, then no deduction attributable to the activity is permitted except as otherwise provided by Code section 183(b). The determination of whether a taxpayer engages in a particular activity with the purpose and intention of realizing a profit rests upon an examination of all the facts and circumstances [Treas. Reg. § 1.183-2(b)].



B. That on balance, the evidence presented establishes that Lee and Wezenter continued its activities with a bona fide intention and expectation of making a profit. The partnership maintained separate books and records and a separate checking account for the payment of expenses; utilized the services and advice of veterinarians and professional trainers regarding breeding and racing; and in 1977, actually acquired five new horses through breeding. (See Engdahl v. Commr., 72 T.C. 659.) Petitioner aspired to make these activities his full-time vocation. Finally, this is hardly the case of a taxpayer whose aim is to reap tax benefits from "hobby losses" (see Golanty v. Commr., 72 T.C. 411); the losses from Lee and Wezenter offset petitioner's salary from Ace but were nonetheless ill-afforded and not easily borne.

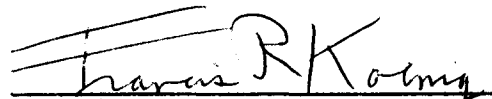
C. That the petition of Bernard and Lily Wezenter is granted, and the Notice of Deficiency, issued on January 22, 1981 and subsequently adjusted, is cancelled.

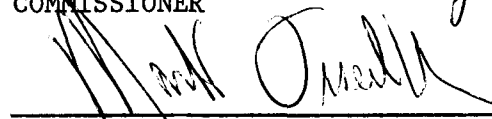
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER