

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of

Robert J. & Mary A. Duhon

: 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 :  
1975.

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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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Robert J. & Mary A. Duhon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert J. & Mary A. Duhon  
95 Springhurst Rd.  
Bedford Hills, NY 10507

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  
23rd day of May, 1985.

David Parchuck

Bonnie D. Hagellund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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David Parchuck

William A. Havelund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 23, 1985

Robert J. & Mary A. Duhon  
95 Springhurst Rd.  
Bedford Hills, NY 10507

Dear Mr. & Mrs. Duhon:

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  
Allen C. Moche  
S. W. Azriliant  
36 W. 44th St.  
New York, NY 10036  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition                  | : |          |
|  | : |          |
| of   | : |          |
|  | : |          |
| ROBERT J. DUHON AND MARY A. DUHON              | : | DECISION |
|  | : |          |
| for Redetermination of a Deficiency or for     | : |          |
| Refund of Personal Income Tax under Article 22 | : |          |
| of the Tax Law for the Year 1975.              | : |          |

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Petitioners, Robert J. Duhon and Mary A. Duhon, 95 Springhurst Road, Bedford Hills, New York 10507, 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 1975 (File No. 41513).

A formal hearing was held before Thomas E. Drake, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1984 at 12:00 noon, with all briefs to be submitted by January 15, 1985. Petitioners appeared by S. W. Azriliant, P.C. (Allen C. Moche, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

#### ISSUES

I. Whether a net operating loss deduction claimed for 1975, a year in which petitioners were nonresidents of New York State, is limited to losses from New York sources, when the loss was incurred in 1978, a year in which petitioners were residents of New York State.

II. If such deduction is limited to losses from New York sources, whether a loss sustained by petitioners on the disposition of small business stock pursuant to section 1244 of the Internal Revenue Code is from New York sources.

FINDINGS OF FACT

1. Petitioners, Robert J. Duhon and Mary A. Duhon, sustained a net operating loss in 1978 in the amount of \$43,330.00. Said loss resulted from the sale of stock which qualified as small business corporation stock under section 1244 of the Internal Revenue Code.<sup>1</sup> Petitioners were residents of New York State during 1978.

2. On February 25, 1980, petitioners filed a claim for refund in the amount of \$4,181.00 for the year 1975 based on the net operating loss sustained in 1978. Said loss was carried back to 1975 in accordance with section 172 of the Internal Revenue Code. Petitioners were nonresidents of New York State during 1975.

3. On July 28, 1980, the Audit Division issued a Notice of Disallowance to petitioner Robert J. Duhon wherein petitioners' claim for refund was denied in full. Said claim was denied on the grounds that the net operating loss was not from New York sources and therefore, not deductible in 1975, since petitioners were nonresidents of New York State in said year.

4. At a pre-hearing conference, it was determined that based on a change to petitioners' limitation percentage, which resulted from the net operating loss deduction reducing petitioners' 1975 federal adjusted gross income, petitioners were entitled to a refund of \$451.35 on their 1975 refund claim, plus appropriate interest.

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1 Section 1244(a) provides that, "In the case of an individual, a loss on section 1244 stock issued to such individual...which would (but for this section) be treated as a loss from the sale or exchange of a capital asset shall, to the extent provided in this section, be treated as an ordinary loss."

5. Petitioner Robert J. Duhon was the sole stockholder in Robert J. Duhon Associates, Ltd. ("Associates"), a corporation which was engaged in business in New York State as a broker on the floor of a New York stock exchange. During 1978, Mr. Duhon disposed of his stock in Associates at a loss and reported said loss on his 1978 New York State and federal income tax return as an ordinary loss pursuant to section 1244 of the Internal Revenue Code.

6. Petitioners filed a refund claim with the Internal Revenue Service for 1975 based on the net operating loss and received notification, dated December 24, 1979, that the federal refund was approved.

7. Petitioners maintain that since the net operating loss was sustained in 1978 when petitioners were residents of New York State, it is not necessary for the loss to be from New York sources in order to be carried back to a year in which they were nonresidents of New York State. Alternatively, petitioners argue that the loss on the sale of the stock in question constitutes New York source income by virtue of section 1244(d)(3) of the Internal Revenue Code.<sup>2</sup>

#### CONCLUSIONS OF LAW

A. That in determining the New York adjusted gross income of a nonresident individual, deductions with respect to capital losses, net long-term capital gains and net operating losses shall be based solely on income, gain, loss and deduction derived from or connected with New York sources, but otherwise shall be determined in the same manner as the corresponding federal deduction.

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2 Section 1244(d)(3) provides that, "For purposes of section 172 (relating to the net operating loss deduction), any amount of loss treated by reason of this section as an ordinary loss shall be treated as attributable to a trade or business of the taxpayer."

Accordingly, since petitioners were nonresidents in 1975, the net operating loss carryback must be derived from or connected with New York sources in order to be considered in determining their New York adjusted gross income for said year (section 632(b)(3) of the Tax Law).


B. That the loss incurred by petitioners on the stock of Robert J. Duhon, Associates, Ltd., does not constitute a loss derived from New York sources or from the disposition of intangible personal property employed in a business, trade, profession or occupation carried on in New York State within the meaning and intent of section 632(b)(2) and (3) of the Tax Law. Accordingly, the net operating loss deduction is not from New York sources and cannot be deducted from petitioners' New York source income in 1975 (see Matter of Robert and Elinor Ferdon, State Tax Commission, May 1, 1981; see also 20 NYCRR 131.8(c), effective January 25, 1983).

C. That the petition of Robert J. Duhon and Mary A. Duhon is granted to the extent indicated in Finding of Fact "4", supra; and that, except as so granted, is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER