

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Albert A. & Tillie Kaplan :

AFFIDAVIT OF MAILING

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 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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Albert A. & Tillie Kaplan, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert A. & Tillie Kaplan  
460 Glenheath Dr.  
Hendersonville, NC 28739

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  
16th day of July, 1985.

David Parchuck

James A. O'Connell

Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 16, 1985

Albert A. & Tillie Kaplan  
460 Glenheath Dr.  
Hendersonville, NC 28739

Dear Mr. & Mrs. Kaplan:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALBERT A. KAPLAN AND TILLIE KAPLAN	:	DECISION
	:	
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 1977.	:	

---

Petitioners, Albert A. Kaplan and Tillie Kaplan, 460 Glenheath Drive, Hendersonville, North Carolina 28739, 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 1977 (File No. 34558).

On April 25, 1985, petitioners waived the right to a hearing and requested that a decision be rendered by the State Tax Commission based upon the Department of Taxation and Finance file. Upon review of the record, the State Tax Commission hereby renders the following decision.

ISSUES

I. Whether the Audit Division properly disallowed all but \$1,000.00 of petitioner Albert A. Kaplan's capital loss deduction of \$5,383.00 for the year 1977.

II. Whether the Audit Division properly recomputed petitioner Albert A. Kaplan's tax liability for the year 1977.

FINDINGS OF FACT

1. Albert A. Kaplan and Tillie Kaplan timely filed a New York State Income Tax Resident Return (with New York City Personal Income Tax) on form IT-201/208 for the year 1977 under filing status "married filing separately on one return" whereon petitioner Albert A. Kaplan reported a capital loss in the amount of \$5,383.00.

2. On December 18, 1980, as a result of information obtained from the Federal/State Tape Match Program, the Audit Division issued a Statement of Audit Changes (Assessment Number A801218201C) to petitioner Albert A. Kaplan in the amount of \$335.79, plus interest of \$76.30, for a total due of \$412.09 for the year 1977. Based upon petitioners' reply, this Statement of Audit Changes was subsequently cancelled.

3. On March 31, 1981, the Audit Division issued a new Statement of Audit Changes (Assessment Number A810331073C) which stated that Assessment Number A801218201C had been cancelled in full and contained the following explanation:

"The maximum capital loss allowable on a joint return in 1977 was \$2,000.00. The maximum capital loss allowable on the return of a married person filing separately was \$1,000.00.

Based on information submitted the wife has been allowed two (2) exemptions.

The total standard deduction has been allowed to the husband as this results in the least additional tax.

New Jersey tax of \$242.84 withheld from wages by Paris Knitting Mills was not remitted to New York and may not be claimed as a payment of New York State tax. However our computation indicates that the tax actually payable to New Jersey and allowable as a resident credit is \$113.00."

4. Petitioners' 1977 New York tax liability was, therefore, recomputed in the following manner:

	<u>Husband</u>	<u>Wife</u>
Wages	\$ 5,623.00	\$13,600.00
Interest	5,897.00	
Dividends	4,422.00	
Capital loss	(1,000.00)	
Total New York Income	\$14,942.00	\$13,600.00
Standard deduction	2,000.00	
Balance	\$12,942.00	\$13,600.00
Exemptions	650.00	1,300.00
New York Taxable Income	\$12,292.00	\$12,300.00

	<u>State</u>		<u>City</u>	
	<u>Husband</u>	<u>Wife</u>	<u>Husband</u>	<u>Wife</u>
New York Tax	\$623.36			
Resident credit	113.00			
Net New York tax	\$510.36	\$624.00	\$243.88	\$244.10
New York tax withheld	.28	587.30	107.03	230.00
Balance	\$510.08	\$ 36.70	\$136.85	\$ 14.10
Tax paid with return \$194.80	103.77	36.70	40.23	14.10
ADDITIONAL INCOME TAX DUE	\$406.31		\$ 96.62	\$502.93

5. On April 8, 1981, the Audit Division issued a Notice of Deficiency against petitioner Albert A. Kaplan in the amount of \$502.93, plus interest of \$126.62, for a total due of \$629.55.

6. Petitioners filed a Perfected Petition wherein they acknowledge error in their 1977 capital loss deduction, but question the recomputation of 1977 tax liability by the Audit Division.<sup>1</sup>

7. Petitioners submitted no evidence to show that petitioner Albert A. Kaplan is entitled to a capital loss deduction in excess of \$1,000.00 for 1977,

---

<sup>1</sup> In correspondence subsequent to the filing of their Perfected Petition, petitioners have claimed that the initial Notice of Deficiency was received by petitioners after the expiration of the period within which they would have been permitted to file amended returns for tax years immediately succeeding 1977 to carry forward the excess of the allowable loss for 1977. The question of capital loss carryover in years subsequent to 1977 is not, however, in issue in the Notice of Deficiency which is protested by petitioners.

nor that the Audit Division erred in its recomputation of petitioners' 1977 tax liability based on its disallowance of all but \$1,000.00 of petitioner Albert A. Kaplan's capital loss deduction.

CONCLUSIONS OF LAW

A. That during 1977, section 1211(b) of the Internal Revenue Code, in pertinent part, provided:

"(b) Other Taxpayers. --

(1) In General. -- In the case of a taxpayer other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus (if such losses exceed such gains) whichever of the following is smallest:

(A) the taxable income for the taxable year reduced (but not below zero) by the zero bracket amount,

(B) the applicable amount [for years beginning before 1977, the applicable amount is \$1,000], or

(C) the sum of --

(i) the excess of the net short-term capital loss over the net long-term capital gain, and

(ii) one-half of the excess of the net long-term capital loss over the net short-term capital gain.

(2) Applicable Amount. -- For purposes of paragraph (1)(B), the term 'applicable amount' means --

(A) \$2,000 in the case of any taxable year beginning in 1977; and

(B) \$3,000 in the case of any taxable year beginning after 1977.

In the case of a separate return by a husband or wife, the applicable amount shall be one-half of the amount determined under the preceding sentence."

B. That during 1977, section 612(f) of the Tax Law provided:

"(f) Husband and wife. -- If husband and wife determine their federal income tax on a joint return but determine their New York income taxes separately, they shall determine their New York adjusted gross incomes separately as if their federal adjusted gross income had been determined separately."

C. That during 1977, section T46-112.0(f) of Chapter 46, Title T of the Administrative Code of the City of New York provided:

"(f) Husband and wife. -- If husband and wife determine their federal income tax on a joint return but determine their city income taxes separately, they shall determine their city adjusted gross incomes separately as if their federal adjusted gross incomes had been determined separately."

D. That by his election to file separate State and City income tax returns for the year 1977, petitioner Albert A. Kaplan's federal capital loss deduction is limited by section 1211(b)(2) of the Internal Revenue Code to the amount of \$1,000.00. Accordingly, sections 612(f) of the Tax Law and T46-112.0(f) of Chapter 46, Title T of the Administrative Code of the City of New York likewise limit his capital loss deduction for State and City personal income tax purposes to \$1,000.00 (See also 20 NYCRR 116.6(d)).


E. That petitioners have failed to sustain their burden of proof required by section 689(e) of the Tax Law and section T46-189.0(e) of Chapter 46, Title T of the Administrative Code of the City of New York, to show that the Audit Division improperly recomputed their tax liability for the year at issue.

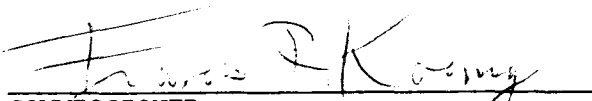
F. That the petition of Albert A. and Tillie Kaplan is denied and the Notice of Deficiency dated April 8, 1981 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER