

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas E. McGeorge :
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 :
1979. :
_____ :

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Thomas E. McGeorge, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas E. McGeorge
5607 East Texas St.
Bodner City, LA 71111

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
7th day of November, 1985.

David Parchuck

Connie A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
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Tax under Article 22 of the Tax Law for the Year :
1979. :
:

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Joseph J. Gumkowski, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph J. Gumkowski
Lipsitz, Green, Fahringer, Roll, Schuller & James
One Niagara Square
Buffalo, NY 142023398

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
7th day of November, 1985.

David Parchuck

James A. Heglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Thomas E. McGeorge
5607 East Texas St.
Bodner City, LA 71111

Dear Mr. McGeorge:

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
Joseph J. Gumkowski
Lipsitz, Green, Fahringer, Roll, Schuller & James
One Niagara Square
Buffalo, NY 14203398
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THOMAS E. McGEORGE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1979.	:	

Petitioner, Thomas E. McGeorge, 5607 East Texas Street, Bodner City, Louisiana 71111, 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 1979 (File No. 43166).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on April 3, 1985 at 10:45 A.M., with final briefs submitted on May 21, 1985. Petitioner appeared by Joseph J. Gumkowski, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a casualty loss deduction in the amount of \$3,658.00 for the year 1979.

FINDINGS OF FACT

1. On March 10, 1983, the Audit Division issued a Notice of Deficiency to petitioner Thomas E. McGeorge asserting a deficiency of \$383.42 plus interest for the year 1979. Said notice of deficiency contained a statement that:

"A deficiency has been determined as shown. The statement previously sent to you shows the computation of the deficiency."

The Statement of Personal Income Tax Audit Changes dated December 27, 1982 provided to petitioner made an adjustment to petitioner's taxable income for the year 1979 in the amount of \$3,658.00 by not "allowing" a claimed casualty loss of such amount. The explanation of such adjustment contained in the statement of audit changes was that:

"The casualty loss claimed is disallowed in full since there does not appear to have been a theft of the property in question, rather a domestic problem per court action."

2. Petitioner was a resident of New York State for the year 1979 and filed a Form IT-201 New York State Income Tax Resident Return for such tax year as a single individual. Petitioner itemized his deductions on Schedule B of such return and one of such deductions was a casualty and theft loss in the amount of \$3,658.00.

3. In July of 1979, petitioner was residing at a house at 106 West Klein Road, Amherst, New York. The building was jointly owned by petitioner and his business partner, who was also petitioner's former girlfriend. Petitioner and his business partner were never married to each other and although they had lived together prior to July 1979, they did not reside together at the Amherst address.

4. On or about July 25, 1979, upon returning home from work, petitioner noticed that many of his personal belongings had been removed from the premises of 106 West Klein Road, Amherst, New York.

5. It is petitioner's belief that his former girlfriend and business partner used her key to gain entrance to the West Klein Road residence and, together with several of her friends, without his permission, removed certain of petitioner's personal belongings.

6. Petitioner made a criminal complaint against his business partner and several of her friends. Said persons were tried on criminal theft charges before a judge sitting without a jury and the trial concluded with a finding of "not guilty". The record does not reflect upon what grounds such finding was based (i.e., that there was no theft; or that it was not proved that the defendants were the perpetrators of the theft; or otherwise).

7. Petitioner filed a claim with his insurance company concerning his loss. Based upon petitioner's allegations that it was his business partner who appropriated his belongings, the insurance company disclaimed coverage for a theft from the West Klein Road residence occasioned by a named insured (i.e. his business partner and co-owner of the real property) with respect to such property.

8. Petitioner retained legal counsel with regard to said loss from the West Klein Road residence. Said counsel ultimately advised petitioner, in view of the results of the criminal action (see Finding of Fact "6", supra), not to further pursue civil legal remedies with regard to such loss.

CONCLUSIONS OF LAW

A. That section 615(a) of the Tax Law, in pertinent part, provides that:

"The New York itemized deductions of a resident individual means the total amount of his deductions from federal adjusted gross income...as provided in the laws of the United States for the taxable year..."

B. That section 165(a) of the Internal Revenue Code ("I.R.C.") provides for a deduction for any loss sustained during the taxable year and not compensated for by insurance or otherwise.

Section 165(c)(3) of the I.R.C. provides that, with respect to individuals, the deduction for losses is to be limited to "losses of property not connected

with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft."

Section 165(e) of the I.R.C. provides that losses from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss and section 165(h) of the I.R.C. provides that the loss of an individual, as described in I.R.C. §165(c)(3), is allowed only to the extent that the amount of loss arising from such theft exceeds \$100.00.

C. That a person need not have sufficient evidence for a successful civil or criminal lawsuit against a particular alleged thief to be entitled to the loss deduction, nor must petitioner prove the identity of the thief or thieves. If reasonable inferences from evidence point to theft rather than mysterious disappearance, petitioner is entitled to a theft loss. [See Jacobson v. Comm., 73 T.C. 610, 613 (1980).]

Likewise, the Tax Court has recognized a theft loss deduction in the case of theft by a co-habitor [see Wilson v. Comm., 43 T.C.M. 699 (1982)].

D. That petitioner was the owner of certain tangible personal property which was taken without his consent from a residence petitioner jointly owned. Petitioner reported such theft to the police and was the complainant in a criminal action concerning such appropriation of his property. Petitioner made claim for such loss to his insurance company but the losses at issue herein were not compensated for by insurance or otherwise. Petitioner sought legal counsel and was advised against pursuing said matter in civil litigation.


E. That petitioner was entitled to a loss deduction on his 1979 return for a theft loss in excess of \$100.00 which occurred and was discovered by petitioner during such year.

F. That in accordance with Conclusion of Law "E", the petition of Thomas E. McGeorge is granted and the Notice of Deficiency dated March 10, 1983 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER