

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Charles & Sylvia Potter :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and New York City Nonresident Earnings Tax :
under Chapter 46, Title U of the Administrative :
Code of the City of New York for the Year 1976. :

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 August, 1985, he served the within notice of Decision by certified mail upon Charles & Sylvia Potter, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles & Sylvia Potter
475 Sunset Ave.
Haworth, NJ 07641

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 August, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Charles & Sylvia Potter :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law and New York City Nonresident Earnings Tax :
under Chapter 46, Title U of the Administrative
Code of the City of New York for the Year 1976. :

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 August, 1985, he served the within notice of Decision by certified mail upon Jack Wong, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

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 August, 1985.

David Parchuck

Annunzio A. DeSantis

Authorized to administer oaths
pursuant to Tax Law section 174

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

August 6, 1985

Charles & Sylvia Potter
475 Sunset Ave.
Haworth, NJ 07641

Dear Mr. & Mrs. Potter:

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 U 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
Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
CHARLES AND SYLVIA POTTER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and New York City Nonresident	:	
Earnings Tax under Chapter 46, Title U of the	:	
Administrative Code of the City of New York for	:	
the Year 1976.	:	

Petitioners, Charles and Sylvia Potter, 475 Sunset Avenue, Haworth, New Jersey 07641, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File No. 27780).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 18, 1982 at 3:15 P.M., continued on June 20, 1983 at 1:30 P.M. and continued to conclusion on May 22, 1984 at 9:15 A.M., with all briefs to be submitted by August 3, 1984. Petitioners appeared by Oppenheim, Appel, Dixon & Co. (Jack Wong, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed petitioners' allocation of wage income within and without New York.

II. Whether the Audit Division properly disallowed petitioners' deduction for a call option loss on their New York nonresident return.

III. Whether an adjustment for employee business expenses which was taken on petitioners' Federal tax return should be allowed on their New York nonresident return.

FINDINGS OF FACT

1. Petitioners, Charles and Sylvia Potter, are and during 1976 were, residents of Haworth, New Jersey and filed a New York State Income Tax Nonresident Return with New York City Nonresident Earnings Tax for 1976. On their return, petitioners claimed an allocation of wage and salary income to New York State of 102 days worked in New York out of 212 total days worked in 1976. Petitioners claimed an amount to be refunded of \$3,628.94.

2. On April 5, 1979, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$3,800.63, plus penalty and interest of \$1,587.39, for a total due of \$5,388.02 for the taxable year 1976. A Statement of Audit Changes issued January 26, 1979 explained that petitioners' wages were being "deemed to be for services performed in New York and taxable in full to New York State and New York City". The Statement also explained that a \$24,035.00 loss which petitioners claimed as other income was being disallowed.

3. Petitioner Charles Potter was a registered account executive and chartered financial analyst employed by Bear Stearns & Co. A chartered financial analyst is an analyst in the securities research field who is required to have an extensive background in accounting and financial analysis. As part of its financial analysis service, Bear Stearns & Co. researches and analyzes numerous publicly-owned corporations whose stocks are traded in the stock markets. Mr. Potter's duties involve travel to various corporate headquarters to analyze the financial condition, operations and management of the respective corporations.

4. As a registered account executive, Mr. Potter is registered by the New York Stock Exchange and the National Association of Securities Dealers and is

licensed to buy and sell securities for clients and receive commissions for doing so. Mr. Potter's activities as a registered representative include talking to clients, reviewing their securities portfolios and making recommendations. Mr. Potter's clients occasionally come to his Bear Stearns & Co. office to consult with him, but more often he must visit his clients at their homes or places of business. Mr. Potter estimated that his duties require him to travel 25 to 50 percent of his time. Many of the places he visits are outside of New York State and, occasionally, outside of the United States.

5. Mr. Potter worked on a commission basis for Bear Stearns & Co. He was not reimbursed for any of his travel and entertainment expenses in connection with his sales and analytical work. In 1976, petitioners claimed \$18,981.00 in unreimbursed business expenses on their Federal income tax return. This return was audited by the Internal Revenue Service and accepted as filed. The unreimbursed expenses were not claimed on petitioners' New York nonresident return. An affidavit from petitioners' former accountant indicated that due to a computer error, the aforesaid business expenses were not properly reflected on petitioners' New York return. Petitioners maintain that the unreimbursed expenses, prorated for days worked in New York State, should be allowed in determining petitioners' tax liability.

6. Mr. Potter did not apprise the Audit Division that he was employed on a straight commission basis until the hearing. At that time, both parties realized that the correct basis for allocation by petitioners was volume of business transacted within and without New York rather than days worked within and without the state. Mr. Potter worked at a 45 percent commission rate. His total commissions for the year in issue amounted to \$87,922.00 thus the total sales commissions earned for Bear Stearns amounted to \$195,382.00. Of the

total sales volume for 1976, petitioners claimed that \$114,521.00 constituted business transacted outside of New York State. In support of their claim, petitioners submitted Bear Stearns settlement statements and Mr. Potter's calendars which he used as diaries to record his business trips. A close examination of the diaries and statements revealed that only \$80,414.00 in sales were actually transacted outside New York State. The out-of-state transactions, when measured against total transactions, result in a 58.9 percent volume of business transacted within New York State.

7. Mr. Potter also traded in the commodities market for his own account. During 1976, he realized a net loss from the sale of put and call options in the amount of \$33,668.00. Mrs. Potter also traded for her own account and realized a profit of \$143.00 on sales of put and call options. Mrs. Potter also did free lance public relations work out of petitioners' New Jersey home. From this activity, Mrs. Potter earned \$9,190.00, none of which was earned in New York State. Petitioners netted the \$9,190.00 and \$143.00 earned by Mrs. Potter against the loss of \$33,668.00 incurred by Mr. Potter to arrive at a net loss of \$24,035.00 which was claimed as other income on their Federal and New York returns. Petitioners now maintain that, pursuant to a Revenue Ruling of the Internal Revenue Service, gains and losses from sales of options constitute ordinary income and losses and are to be included as ordinary income or deducted as itemized deductions and that therefore, the \$33,668.00 loss should have been taken as an itemized deduction, and not reported as other income. Moreover, petitioners argue that since Mrs. Potter's income from fees and sales of put and call options was earned entirely outside New York State, such income should not be included in New York income and, therefore, was incorrectly netted against Mr. Potter's option loss.

CONCLUSIONS OF LAW

A. That section 632(a)(1) of the Tax Law provides, in part, that New York adjusted gross income of a nonresident individual includes the net amount of items of income, gain, loss and deduction entered into Federal adjusted gross income which are derived from or connected with New York sources. Items of income, gain, loss and deduction derived from or connected with New York sources include those items attributable to "a business, trade, profession or occupation carried on in this state..." [Tax Law §632(b)(1)(B)]. Additionally, section U46-2.0 of Chapter 46, Title U of the Administrative Code of the City of New York imposes a tax on the wages earned within New York City of every nonresident individual.

B. That 20 NYCRR 131.15 in effect during the periods in issue provided, in part, that:

"If the commissions for sales made or other compensation for services performed by a nonresident traveling salesman, agent or other employee depend directly upon the volume of business transacted by him, his items of income, gain, loss and deduction (other than deductions entering into the New York itemized deduction) derived from or connected with New York State sources include that proportion of the net amount of such items attributable to such business which the volume of business transacted by him within New York State bears to the total volume of business transacted by him within and without New York State."

Similar treatment of income earned in and out of New York City is provided for in 20 NYCRR Appendix 20 §4-4(c).

C. That the evidence in the record, as discussed in Finding of Fact "6", indicates that the proportion of the volume of business transacted within New York to the total volume of business transacted was 58.9 percent. Thus Mr. Potter's New York commission income should have been determined by multiplying the Federal amount of \$87,922.00 by 58.9 percent to arrive at the New York amount of \$51,786.05. Moreover, since Mr. Potter worked on a straight commission

basis for Bear Stearns & Co. with no reimbursement for expenses, he is entitled to an adjustment to income of a portion of the \$18,981.00 in business expenses he incurred and which were accepted without change by the Internal Revenue Service. The amount to be allowed as an adjustment is to be determined by multiplying the \$18,981.00 by the 58.9 percent New York allocation determined supra. Thus the allowable expenses are \$11,179.81.


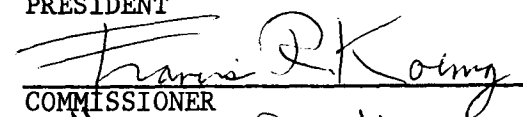
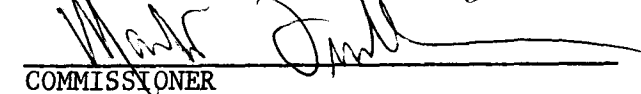
D. That, while Revenue Ruling 78-181, 1978-1 C.B. 261, holds that the repurchase of a call option is not a capital asset and losses therefrom may not be taken as adjustments to income, but rather are ordinary losses to be taken as an itemized deduction, the ruling is expressly limited to the repurchase of 30 day call options originally written before September 2, 1976. The evidence submitted by Mr. Potter indicates that he engaged in numerous put and call transactions during the latter half of 1976. However, it is impossible to determine whether any of the call transactions were repurchases of 30 day options of the type specified in the Revenue Ruling. Petitioners, therefore, may not take the losses as an itemized deduction on their New York return.

E. That the petition of Charles and Sylvia Potter is granted to the extent that the Audit Division is directed to recompute petitioners' tax liability in accordance with Conclusion of Law "C" above and to refund an appropriate amount, together with such interest as may be lawfully owing and the Notice of Deficiency dated April 5, 1979 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 06 1985


PRESIDENT

COMMISSIONER

COMMISSIONER