

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James H. & Emily M. Scheuer : 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 :
1972.

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 17th day of January, 1986, he served the within notice of Decision by certified mail upon James H. & Emily M. Scheuer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James H. & Emily M. Scheuer
c/o Oppenheim, Appel, Dixon & Co.
101 Park Ave.
New York, NY 10178

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
17th day of January, 1986.

David Parchuck

James H. & Emily M. Scheuer

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James H. & Emily M. Scheuer : 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 :
1972.

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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Jack Wong, the representative of the petitioner 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.
101 Park Ave.
New York, NY 10178

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
17th day of January, 1986.

David Parchuck

Conrad A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 17, 1986

James H. & Emily M. Scheuer
c/o Oppenheim, Appel, Dixon & Co.
101 Park Ave.
New York, NY 10178

Dear Mr. & Mrs. Scheuer:

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
Jack Wong
Oppenheim, Appel, Dixon & Co.
101 Park Ave.
New York, NY 10178
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMES H. AND EMILY M. SCHEUER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

Petitioners, James H. and Emily M. Scheuer, c/o Oppenheim, Appel, Dixon & Co., 101 Park Avenue, New York, New York 10178, 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 1972 (File No. 24288).

A hearing was commenced before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 23, 1982 at 2:00 P.M. and continued to conclusion before Doris E. Steinhardt, Hearing Officer, on June 5, 1985 at 9:15 A.M., with all briefs to be submitted by September 25, 1985. Petitioners appeared by Oppenheim, Appel, Dixon & Co. (Jack Wong, CPA). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether petitioners properly considered the modification to the item of tax preference for capital gains required by Tax Law section 622(b)(4) to be equivalent in amount to the capital gain modification to federal adjusted gross income required by section 612(b)(11).

II. Whether petitioners were entitled to carry back to 1972 a net operating loss of \$77,956.00 incurred in 1975.

FINDINGS OF FACT

1. For the taxable year 1972, petitioners, James H. and Emily M. Scheuer, filed a joint federal income tax return and a joint New York State income tax resident return, reporting income in the categories and amounts shown below.

Wages:	
U.S. House of Representatives, net of expenses (H)	\$ 23,509
Renewal & Development Mgt. Co. (H)	11,343
District Furniture Corp. (H)	3,000
Emily Malino Assoc. (W)	13,505
Total Wages	<u>51,357</u>
Dividends net of exclusion	219,024
Interest income	14,329
Business income (Schedule C)	(277,978)
Capital gains less I.R.C. section 1202 deduction of \$560,415	526,591
Income from rent, partnerships and trusts	(234,254)
Other income	<u>(295,446)</u>
Total adjusted gross income	39,623
Less itemized deductions	<u>39,623</u>
	-0-
Less exemptions	4,500
Taxable income (loss)	<u>(4,500)</u>

The loss in the amount of \$295,446.00 reported as "other income" was calculated as follows:

Gilbert & Gilbert - consulting fee (H)	\$ 20,000
Washington Post - consulting fee (W)	75
CP 5 Inc. - Income recognized on liquidation of assets under I.R.C. section 333	170,349
Miscellaneous income	415
Balance	<u>\$190,839</u>

Less: net operating loss carryforwards

1967	\$128,303	
1968	87,839	
1969	188,870	
1970	200,609	
1971	78,338	
Total NOL	<u>\$683,959</u>	
NOL applied to reduce taxable income to zero	<u>(486,285)</u>	<u>(486,285)</u>
NOL to be applied against section 1202 deduction	<u>197,674</u>	
Total other income (loss)		<u><u>(295,446)</u></u>

Petitioners also reported the following federal items of tax preference:

Accelerated depreciation		\$ 3,084
Capital gains, section 1202 deduction	560,415	
Less: NOL carryforward	(197,674)	
Net capital gains, section 1202 deduction		<u>362,741</u>
Federal items of tax preference		<u>\$365,825</u>

2. On November 12, 1975, petitioners filed a refund claim with the Internal Revenue Service, seeking to carry back to the year 1972 a net operating loss of \$189,609.00 incurred in 1973. The loss was applied against the tax preference income of 1972, as shown below, resulting in a decrease of petitioners' federal tax from \$33,558.00 to \$14,622.00.

Accelerated depreciation		\$ 3,084
Capital gains, section 1202 deduction	\$560,415	
Less: NOL carryforward	(197,674)	
NOL carryback, 1973	<u>(189,609)</u>	
Net section 1202 capital gains		<u>173,132</u>
Revised total tax preference income		<u>176,216</u>
Tax computed due		<u>\$ 14,622</u>

3. On December 20, 1976, petitioners filed with the Service a refund claim, seeking to carry back to the 1972 year a net operating loss of \$77,956.00 incurred in 1975. This loss was applied against the 1972 tax preference income, reducing petitioners' revised federal tax of \$14,622.00 to \$6,836.00.

Accelerated depreciation		\$ 3,094
Capital gains, section 1202 deduction	\$560,415	
Less: NOL carryforward	(197,674)	
NOL carryback, 1973	(189,609)	
NOL carryback, 1975	<u>(77,956)</u>	
Net section 1202 capital gains		<u>95,176</u>
Revised total tax preference income		<u>98,260</u>
Revised tax due		<u>\$ 6,836</u>

4. On April 26, 1977, the Service concluded its examination of petitioners' 1972 return and accepted the return, including the net operating loss carry-forwards and carrybacks, as filed. Petitioners' revised federal tax liability, as reflected in the Service's report, is summarized below.

Original tax computed per 1972 return		\$33,558
Less: 1973 NOL carryback refund	18,961	
1975 NOL carryback refund	7,796	
		<u>(26,757)</u>
Revised liability		\$ 6,801

The federal adjustments were based on proposed regulation section 1.57-4.

5. On their 1972 New York State resident return, petitioners reported adjusted gross income of \$39,623.00 and items of tax preference of \$365,825.00, which they modified as shown in the following computations:

(a) Personal income tax

Federal adjusted gross income	\$ 39,623
Add: capital gain modification, section 612(b)(11)	
20% x \$560,412	112,083
Less: interest income on U.S. obligations	<u>(4,983)</u>
Total N.Y. income	\$146,722
Less: itemized deductions	<u>(16,783)</u>
exemptions	<u>(3,900)</u>
N.Y. taxable income	\$126,039
Personal income tax	\$ 17,216

(b) Minimum income tax

Federal items of tax preference	\$365,825
Less: capital gain modification, section 622(b)(4)	
20% x \$560,412	(112,083)
specific deduction	(5,000)
personal income tax	<u>(17,216)</u>
Minimum taxable income	\$231,526
Minimum tax	\$ 13,892

(c) Total tax liability

Personal income tax	\$ 17,216
Minimum tax	13,892
Surcharge	778
Total	<u>\$ 31,886</u>

6. On or about November 12, 1975, petitioners submitted to the Audit Division a claim for refund of \$13,426.00 for the taxable year 1972, based on the carryback of the 1973 net operating loss of \$189,609.00. According to

petitioners' calculation, the carryback reduced their minimum taxable income to \$43,748.00.

Accelerated depreciation	\$ 3,084
Capital gains, I.R.C. section 1202 deduction	560,415
Less: NOL carryforwards	(197,674)
NOL carryback, 1973	<u>(189,609)</u>
	\$176,216
Less: capital gain modification, section 622(b)(4)	(112,083)
specific deduction	(5,000)
personal income tax (also reduced)	<u>(15,385)</u>
Minimum taxable income	\$ 43,748
 Minimum tax	 \$ 2,625

7. By notice dated December 20, 1976, the Audit Division advised petitioners that their refund claim of \$13,426.00 was partially disallowed in the amount of \$5,769.00. The Division calculated the modification to the item of tax preference for capital gains by applying 20 percent to the capital gains deduction as reduced by the net operating loss carryforwards and carryback.

Capital gains deduction	\$560,415
Less: NOL carryforwards, 1970 and 1971	(197,674)
NOL carryback, 1973	<u>(189,609)</u>
Capital gains deduction remaining	\$173,132
Less: capital gain modification	<u>(34,626)</u>
Capital gains deduction	\$138,506
Accelerated depreciation	3,084
Items of tax preference	<u>\$141,590</u>

Petitioners, on the other hand, had applied the 20 percent modification to the full deduction.

8. On or about October 15, 1976, petitioners submitted a refund claim, together with an amended personal income tax return, requesting a refund in the amount of \$24,745.00, premised on the carryback to 1972 of a net operating loss incurred in 1975. Their revised computations of their 1972 personal income tax and minimum income tax liability are set forth below.

(a) Minimum income tax

Accelerated depreciation		\$ 3,084
Capital gains, I.R.C. section 1202 deduction	560,415	
Less: NOL carryforward	(197,674)	
NOL carryback, 1973	(189,609)	
NOL carryback, 1975	(77,956)	
Capital gains deduction remaining		<u>95,176</u>
Items of tax preference		\$98,260
Less: capital gains modification		
20% x \$95,176		<u>(19,035)</u>
Total items of tax preference		\$79,035
Minimum tax, after specific deduction and personal income tax		\$ 4,274

(b) Personal income tax

Federal adjusted gross income		\$39,623
Add: capital gains modification		
20% x \$95,176		19,035
Less: interest income on U.S. obligations		<u>(4,984)</u>
Total N.Y. income		\$53,674
Personal income tax, after itemized deductions and exemptions		\$ 2,997

(c) Total tax liability

Personal income tax		\$ 2,997
Minimum tax		4,274
Surcharge		<u>182</u>
Tax due		\$ 7,453
Tax withheld		<u>(312)</u>
Net tax due		\$ 7,141
Less: tax originally computed		<u>(31,886)</u>
Tax overpayment		\$24,745*

* The \$24,745.00 overpayment was computed, not giving effect to the amount of \$7,657.00 previously refunded.

The Audit Division has no record of having received petitioners' October 15, 1976 refund claim.

CONCLUSIONS OF LAW

A. That the minimum taxable income of resident individuals is calculated in accordance with Tax Law section 622. Subsection (b), paragraph (4) of such section, as in effect during the year under consideration, provided as follows:

"The federal item of tax preference for capital gains shall be computed by subtracting from such tax preference item one-fifth of the net long-term capital gain deduction."

The federal item of tax preference for capital gains must be reduced by available net operating loss carrybacks and carryforwards before computation of the modification required by section 622(b)(4). This treatment is in consonance with the computation of the addition modification to federal adjusted gross income required by section 612(b)(11) in arriving at New York adjusted gross income: the net capital gain deduction of Internal Revenue Code section 1202 is similarly reduced by loss carrybacks and carryforwards. Indeed, petitioners effectively conceded these principles by their assertion that their 1972 tax liability is properly reflected in the refund claim dated October 15, 1976 (Finding of Fact "8").

B. That petitioners are entitled to a refund or credit in the amount of \$24,745.00, less any amount previously credited or refunded to them. They submitted their claim to the Audit Division in a timely fashion and satisfactorily proved the 1975 net operating loss by, inter alia, documentary evidence of allowance of the same loss by the Internal Revenue Service.

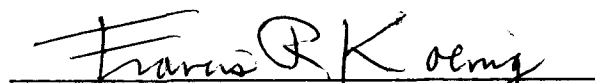
C. That the petition of James H. and Emily M. Scheuer is granted to the extent indicated in Conclusion of Law "B", and the Audit Division is directed to process their claim for credit or refund in accordance therewith.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER