STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Don B. & Sherry D. Allen	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision of a Determination or Refund of Personal Income Tax under Article(s) 22 of the Tax Law for the Year 1980.	:	

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of June, 1987, he/she served the within notice of Decision by certified mail upon Don B. & Sherry D. Allen the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Don B. & Sherry D. Allen
136 Knickerbocker Rd.
Pittsford, NY 14534

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
18th day of June, 1987.

Janet M. Snay

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

June 18, 1987

Don B. & Sherry D. Allen
136 Knickerbocker Rd.
Pittsford, NY 14534

Dear Mr. & Mrs. Allen:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

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 DON B. ALLEN and SHERRY D. ALLEN for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1980.	DECISION

Petitioners, Don B. Allen and Sherry D. Allen, 136 Knickerbocker Road, Pittsford, New York 14534, 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 1980 (File No. 51019).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September 15, 1986 at 2:45 P.M., with all briefs to be submitted by December 12, 1986. Petitioner Don B. Allen appeared pro se and on behalf of his wife, Sherry D. Allen. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioners must pay a tax on an "add-back" of one-fifth of one-half of the net capital gain deduction claimed on their Federal return in 1980.

II. Whether petitioners must pay minimum tax on their net capital gain deduction claimed in 1980.

FINDINGS OF FACT

1. On January 5, 1984, the Audit Division issued to petitioners, Don B. and Sherry D. Allen, a Notice of Deficiency for the year 1980 asserting $7,032.78 in additional personal and minimum income tax plus interest.

2. Petitioners filed joint State and Federal returns for the year at issue.

3. The tax asserted due herein was premised upon the results of an audit of petitioners' 1980 New York return and the basis of the deficiency, together with the calculations pertaining thereto, was set forth in a Statement of Audit Changes issued to petitioners on October 29, 1983.

4. On their 1980 Federal return, petitioners reported a net long-term capital gain of $157,646.00, and took a corresponding 60% capital gain deduction with respect to the reported gain ($94,588.00). For State tax purposes, petitioners reported the 40% of net long-term capital gain subject to Federal income tax ($63,058.00) as a component of their New York adjusted gross income (A.G.I.). Petitioners did not modify their calculation of New York A.G.I. by "adding back" to A.G.I. any portion of their Federal capital gain deduction. Petitioners contended that they were not subject to the so-called capital gain "add-back" provision of section 612 of the Tax Law.

5. In its calculation of the deficiency herein, the Audit Division added back $15,764.60 to petitioners' New York A.G.I., resulting in an increase in the capital gain component of petitioners' New York A.G.I. from $63,058.00 to $78,823.00. The basis for this adjustment, as set forth in the Statement of Audit Changes, was as follows:

> "If you were entitled to a 60% net capital gain deduction in computing your Federal adjusted gross income, you must add 20% of one-half of the net capital gain in computing your total New York income."

6. This adjustment resulted in $15,764.60 in additional New York taxable income to petitioners and, ultimately, in $4,198.74 of the deficiency herein.

7. Additionally, petitioners took the position that their net capital gain deduction of $94,588.00 was not an item of tax preference within the meaning of section 622 of the Tax Law. Consequently, they paid no New York minimum income tax on this deduction.

8. The Audit Division contended that petitioners' net capital gain deduction was an item of tax preference in 1980; and that therefore, this deduction, subsequent to modification, constituted New York minimum taxable income to petitioners. The Audit Division's computations of petitioners' New York items of tax preference and minimum income tax were as follows:

Items of Tax Preference

Capital Gains Deduction	$94,588.00
20% Modification (Tax Law § 622[b][4])	(18,917.60)
New York Items of Tax Preference	$75,670.40

Minimum Income Tax

New York items of tax preference	$75,670.40
Less: specific deduction	5,000.00
Balance	$70,670.40
Less: New York State personal income tax after credits	23,436.40
Minimum taxable income	$47,234.00
State Minimum Tax Due @ 6%	$ 2,834.04

9. The Federal Revenue Act of 1978 revised the Federal deduction for the excess of net long-term capital gain over net short-term capital loss from 50 percent to 60 percent on all sales and exchanges made after October 31, 1978.

10. Section 612(b)(11) of the Tax Law, as in effect during the year at issue, was amended by Laws of 1981 (ch 103, § 41) effective for taxable years commencing on or after January 1, 1981. This new section 612(b)(11) required an "add-back" to New York A.G.I. of the excess, if any, of the amount of the

Federal capital gain deduction over sixty percent of such gain. The practical effect of this amendment was, of course, to eliminate the "add-back" to New York A.G.I. so long as the Federal capital gain deduction did not exceed sixty percent.

11. Petitioners argued that the statute at issue made reference to taxpayers who deducted one-half of their net capital gain, not at least one-half of such gain. Consequently, inasmuch as they did not deduct one-half of their net capital gain, petitioners claimed that they should not be required to add back any portion of such gain. Moreover, petitioners argued, the statute called for the adding back of "one-fifth of the amount so deducted" (Tax Law § 612[b]) (emphasis supplied), not one-fifth of one-half of net capital gain, as was asserted herein by the Audit Division.

CONCLUSIONS OF LAW

A. That, during the year at issue, section 612(a) of the Tax Law defined New York adjusted gross income as "federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section."

B. That, with respect to modifications increasing Federal adjusted gross income for purposes of determining New York adjusted gross income in 1980, section 612(b)(11) required the addition of the following to Federal A.G.I.:

> "In the case of a taxpayer who has deducted one-half of the amount by which net long-term capital gain exceeds net short-term capital loss for the taxable year, one-fifth of the amount so deducted."

C. That the Audit Division properly added back one-fifth of one-half of petitioners' net capital gain. Petitioners' argument in favor of a strict, literal interpretation of section 612(b)(11) is rejected, for such an interpretation would, in effect, render section 612(b)(11) a nullity for the

period at issue. It is presumed, notwithstanding subsequent changes in the amount of the Federal capital gain deduction, that the legislature did not intend such an anomalous result (see 56 N.Y. Jur., Statutues, § 212). The Audit Division's interpretation of this statute, while not in precise conformity with a strict, literal reading thereof, nonetheless produces a result reasonably within the meaning of Tax Law § 612(b)(11).

D. That the reasonableness of the Audit Division's position regarding this section may be seen in reading section 612(b)(11) in conjunction with Tax Law § 622(b)(4). As noted previously, during the year at issue, Tax Law § 612(b)(11) required an add-back to New York A.G.I. of a portion of the taxpayer's Federal capital gain deduction. Section 622(b)(4) set forth the manner of computing the capital gain component of a taxpayer's items of tax preference (I.T.P.) for purposes of the New York minimum taxable income, and allowed for the reduction of this capital gain component by subtracting from a taxpayer's I.T.P. "one-fifth of the net long-term capital gain deduction". Thus, under the Audit Division's interpretation, while a portion of the capital gain deduction is added back to A.G.I., a portion is also, in effect, deducted from the computation of minimum tax. Under petitioners' interpretation, no portion of the capital gain deduction is added back, and in addition, a portion of the capital gain deduction remains available to reduce the capital gain component of I.T.P. for minimum tax purposes. A reading of these two sections in conjunction thus makes clear the reasonableness of the Audit Division's interpretation of Tax Law § 612(b)(11) as opposed to that urged by petitioners herein. It is further noted that this Commission reached the same conclusion as that reached herein in the Matter of Salvatore Zaffos and Mollie Zaffos (State Tax Commission, February 18, 1986).

E. That, during the year at issue, section 601-A of the Tax Law imposed a minimum income tax on the "New York minimum taxable income" of each resident individual. Section 622(a) of the Tax Law defined New York minimum taxable income as "the sum of the items of tax preference as described in [Tax Law § 622(b)]", together with certain reductions not relevant herein. Section 622(b), in turn, defined "items of tax preference" for purposes of Article 22 as "the federal items of tax preference as defined in the laws of the United States...for the taxable year".

F. That, during the year at issue, sections 55 and 56 of the Internal Revenue Code imposed an alternative minimum tax and a minimum tax, respectively, each of which required a calculation of items of tax preference to determine a taxpayer's liability under these respective sections.

G. That section 57 of the Internal Revenue Code defined items of tax preference for purposes of IRC §§ 55 and 56. Included among the items of tax preference was the net capital gain deduction for the relevant taxable year determined under section 1202 of the Code (IRC § 57[b][9][A]). During the year at issue, the net capital gain deduction did not constitute an item of tax preference for purposes of IRC § 56 (the minimum tax). The capital gain deduction did, however, remain an item of tax preference for purposes of IRC § 55 (alternative minimum tax).

H. That the Audit Division properly determined that petitioners' net capital gain deduction of $94,588.00 was an item of tax preference within the meaning of section 622(b) of the Tax Law and therefore properly determined the minimum income tax component of the deficiency herein. Section 622(b) makes reference only to "the federal items of tax preference, as defined in the laws of the United States". This section does not distinguish between items of tax

preference for purposes of the Federal minimum tax or the alternative minimum tax (see Matter of Bernard and Patricia Goldstein, State Tax Commission, August 9, 1984). For purposes of section 622, it is enough that the capital gain deduction was defined in the Internal Revenue Code as an item of tax preference. The fact that, during the year at issue, this deduction was not an item of tax preference for purposes of IRC § 56, but rather, was an item of tax preference under IRC § 55, does not cause the deduction to be any less of an item of tax preference for purposes of section 622(b) of the Tax Law.

I. That the petition of Don B. Allen and Sherry D. Allen is in all respects denied, and the Notice of Deficiency, dated January 5, 1984, is sustained.

DATED: Albany, New York

JUN 1 8 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER