

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

John W. Sabotka : 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 1981. _____ :

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 23rd day of April, 1987, he/she served the within notice of Decision by certified mail upon John W. Sabotka the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John W. Sabotka
14 Pioneer Street
Cooperstown, NY 13326

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
23rd day of April, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

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Tax under Article(s) 22 of the Tax Law for the :
Year 1981. :

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 23rd day of April, 1987, he served the within notice of Decision by certified mail upon Robert E. Buzzell, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert E. Buzzell
Siliski, Buzzell, P.C.
P.O. Box 802, Rt. 4 East
Rutland, VT 057010802

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
23rd day of April, 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

April 23, 1987

John W. Sabotka
14 Pioneer Street
Cooperstown, NY 13326

Dear Mr. Sabotka:

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

Petitioner's Representative:
Robert E. Buzzell
Siliski, Buzzell, P.C.
P.O. Box 802, Rt. 4 East
Rutland, VT 057010802

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOHN W. SABOTKA
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1981.

DECISION

Petitioner, John W. Sabotka, 14 Pioneer Street, Cooperstown, New York 13326, 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 1981 (File No. 66951).

On January 5, 1987, petitioner waived his right to a hearing and requested that the State Tax Commission render a decision based on the entire record contained in his file. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioner, a full year resident of New York, may, for New York State income tax purposes, exclude the sum of \$5,739.00 from the computation of a long-term capital gain where no such exclusion was taken in the computation of said gain for Federal income tax purposes.

FINDINGS OF FACT

1. Petitioner herein, John W. Sabotka, timely filed a New York State Resident Income Tax Return for 1981 wherein he reported, inter alia, a long-term capital gain of \$19,078.00. On Page 2, Schedule B of his return, petitioner reported the following New York adjustments to reported Federal adjusted gross income:

<u>New York Additions</u>	
Capital gain adjustment	\$4,769.00
<u>New York Subtractions</u>	
State and local refunds	(885.00)
Non-New York capital gains	<u>(4,769.00)</u>
<u>Net New York Adjustment</u>	<u>(\$885.00)</u>

2. On March 4, 1985, the Audit Division issued a Statement of Audit Changes to petitioner for 1981 which contained the following explanation:

"The subtraction modification reported on Page 2, Schedule B in the amount \$4,769.00 is disallowed because this is not a proper modification for New York State. The capital gain adjustment addition modification reported in the amount of \$4,769.00 is correct because because [sic] a New York State resident is taxed on all income regardless of where the income is earned.

The portion of Long Term Capital Gains not subject to New York Personal Income Tax is an Item of Tax Preference and subject to New York Minimum Income Tax."

3. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 5, 1985, issued a Notice of Deficiency against petitioner for 1981 asserting additional tax due of \$1,765.51, plus interest of \$633.71, for a total allegedly due of \$2,399.22. Of the total tax asserted due, \$668.56 is for additional personal income tax and \$1,096.95 represents minimum income tax due.

4. Petitioner was taxable as a resident of New York for the entire 1981 tax year. Sometime during said year, petitioner sold rental property situated in Rutland, Vermont. For Federal income tax purposes, the long-term capital gain realized on the disposition of said rental property was computed in the following manner:

Net sale price		\$166,861.00
Cost of real property	\$128,185.00	
Less: depreciation	<u>- 9,018.00</u>	
Net cost		<u>-119,167.00</u>
Total gain on sale of property		<u>\$ 47,694.00</u>
Less: Internal Revenue Code § 1202 long-term capital gain deduction		<u>- 28,616.00</u>
Net long-term capital gain		<u><u>\$ 19,078.00</u></u>

5. Petitioner concedes that additional personal and minimum income tax of \$1,223.00 is due for the year 1981. Mr. Sabotka essentially agrees with the methodology utilized by the Audit Division to recompute his personal and minimum income tax due, with the one exception that, for New York purposes, he contends that the total gain on the sale of the rental property should be reduced by \$5,739.00 for depreciation taken on prior year income tax returns. In his perfected petition Mr. Sabotka alleges the following:

"The real estate sold was located in Vermont. Thus, depreciation that was never taken in New York (Before 1/1/81) should NOT be used in the calculation of the New York Minimum Income and Regular Personal Income Tax. The amount of the Non-New York Depreciation is \$5,739. A tax benefit was never derived in New York from this Depreciation of \$5,739. Accordingly, the tax basis for New York purposes does not include the Depreciation of \$5,739 and should be increased."

6. In the computation of the gain realized on the sale of the Vermont rental property, petitioner reduced his cost basis, thus increasing his gain, by \$9,018.00 for depreciation (see Findings of Fact "4" supra). Of the \$9,018.00 cost basis reduction for depreciation, \$3,279.00 represents the depreciation deduction claimed on petitioner's 1981 Federal and New York State income tax returns, while the balance, \$5,739.00, represents depreciation deductions claimed in prior tax years. Petitioner maintains that the \$5,739.00 of depreciation deductions taken in prior years were never claimed on New York returns, thus generating no New York tax benefit. Since no New York tax benefit was received from the \$5,739.00 of prior year depreciation deductions,

petitioner believes said amount should be excluded, for New York purposes, from the computation of the gain realized on the sale of the Vermont rental property.

CONCLUSIONS OF LAW

A. That Tax Law § 612(a) defines a taxpayer's New York adjusted gross income as "his federal adjusted gross income" with certain modifications specified in subsections (b) and (c) of said section 612.

B. That for personal income tax purposes there is no provision in Tax Law §§ 612(b) or (c) which would permit a resident taxpayer to reduce the gain realized on the disposition of rental property by prior year depreciation deductions for which no New York tax benefit was derived.


C. That in the computation of the New York minimum taxable income of a resident individual, Tax Law § 622(b) defines items of tax preference as a taxpayer's "federal items of tax preference" with certain modifications. Once again, there is no provision in the Tax Law, for minimum income tax purposes, which allows the exclusion or deduction petitioner seeks.

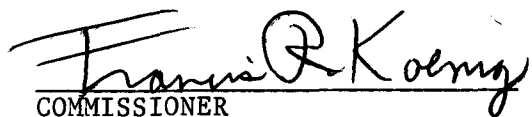
D. That the petition of John W. Sabotka is denied in its entirety and the Notice of Deficiency dated April 5, 1985 is sustained in full, together with such additional interest as may be due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1987


PRESIDENT


COMMISSIONER


COMMISSIONER