

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of

Nicholas J. & Barbara Gerbasi

:

:

AFFIDAVIT OF MAILING

for Redetermination of Deficiencies or for :
Refunds of New York State Income Tax under :
Article 22 of the Tax Law and New York City :
Personal Income Tax under Chapter 46, Title T :
of the Administrative Code of the City of New :
York for the Years 1981 & 1982. :

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 20th day of July, 1987, he/she served the within notice of Decision by certified mail upon Nicholas J. & Barbara Gerbasi the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas J. & Barbara Gerbasi
14 Aster Drive
New Hyde Park, NY 11040

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
20th day of July, 1987.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 20, 1987

Nicholas J. & Barbara Gerbasi
14 Aster Drive
New Hyde Park, NY 11040

Dear Mr. & Mrs. Gerbasi:

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, 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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
NICHOLAS J. GERBASI AND BARBARA GERBASI	:	DECISION
for Redetermination of Deficiencies or for	:	
Refunds of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Years 1981 and 1982.	:	

Petitioners, Nicholas J. Gerbasi and Barbara Gerbasi, 14 Aster Drive, New Hyde Park, New York 11040, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1981 and 1982 (File Nos. 62547 and 67897).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 1, 1986 at 2:45 P.M. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed petitioners' claimed subchapter S corporation losses for the years 1981 and 1982.

FINDINGS OF FACT

1. Petitioners, Nicholas Gerbasi and Barbara Gerbasi, timely filed New York State and City resident income tax returns for 1981 and 1982. On said returns, petitioners claimed small business corporation losses of \$34,576.00 for 1981 and \$28,854.00 for 1982.

2. On April 2, 1985 and February 13, 1986, the Audit Division issued a Statement of Audit Changes to petitioners for 1981 and 1982, respectively, which contained the following explanation:

"If a subchapter S corporation does not make the election provided under section 660 of the New York Tax Law, each shareholder must increase his Federal adjusted gross income by an amount equal to his proportionate share of the net operating loss of the corporation to the extent the shareholder deducted such loss in determining his Federal adjusted gross income.

This provision pertains to all subchapter S corporations with tax years beginning on or after January 1, 1981. (Section 612 (b) (19) of the New York State Tax Law)."

The statements of audit changes determined additional tax due of \$4,672.90 for 1981 and \$3,089.29 for 1982.

3. Based on the statements of audit changes, the Audit Division, on April 12, 1985 and April 11, 1986, issued separate notices of deficiency for 1981 and 1982 asserting the taxes due as indicated above, plus interest.

4. Petitioners were minority stockholders of Datacount Computer Systems, Inc. ("Data"). Data was organized in 1969. On January 1, 1971, Data elected Subchapter S status for Federal income tax purposes. Data showed net losses on Federal income tax returns (Form 1120S) filed for the years 1976 through 1985. For 1981 and 1982, petitioners reported their share of the corporation's loss on New York State income tax returns.

5. The shareholders of Data did not make election to take into account items of income or loss of the corporation on personal income tax returns by filing form CT-6 for the years 1981 and 1982. Data filed a CT-6 for 1983.

6. Petitioners argued that Data was not aware that it was required to file a CT-6 on behalf of the shareholders in order to qualify as an S corporation for New York State tax purposes and under equity they should be allowed to deduct their share of Data's losses for 1981 and 1982.

CONCLUSIONS OF LAW

A. That section 660 of the Tax Law (as added by L 1981, ch 103, § 32, effective May 15, 1981, applicable to years beginning January 1, 1981) provides that shareholders of an S corporation for Federal income tax purposes, may elect to take into account the S corporation items of income, loss, deduction and reduction for taxes on personal income tax returns filed for New York State.


B. That section 612(b)(19)(A) of the Tax Law provides that where the election provided for in subsection (a) of section 660 of the Tax Law has not been made with respect to an S corporation, any item of loss or deduction of the corporation included in Federal adjusted gross income of each shareholder must be added to Federal adjusted gross income to determine New York adjusted gross income. Accordingly, the Audit Division properly disallowed petitioners' claimed subchapter S losses for 1981 and 1982.

C. That the petitions of Nicholas J. Gerbasi and Barbara Gerbasi are denied and the notices of deficiency issued April 12, 1985 and April 11, 1986 are sustained together with such additional interest as may be lawfully due and owing.

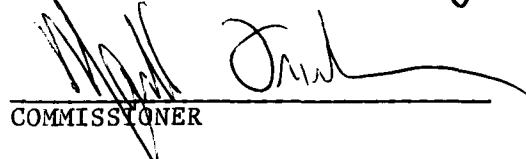
DATED: Albany, New York

STATE TAX COMMISSION

JUL 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER