

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of  
Drew & Carin Netter :

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 :

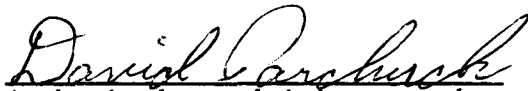
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of April, 1987, he/she served the within notice of Decision by certified mail upon Drew & Carin Netter the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

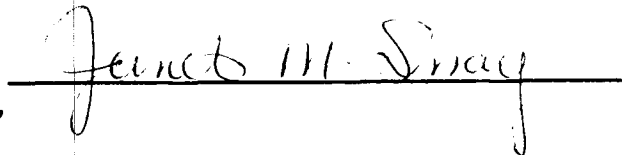
Drew & Carin Netter  
160 Country Ridge Drive  
Rye Brook, NY 10573

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  
15th day of April, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Drew & Carin Netter :

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 15th day of April, 1987, he served the within notice of Decision by certified mail upon Stuart A. Simel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stuart A. Simel  
Simel & Kutz  
10 Cutter Mill Rd.  
Great Neck, NY 11021

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  
15th day of April, 1987.

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

Janet M. Snay

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

April 15, 1987

Drew & Carin Netter  
160 Country Ridge Drive  
Rye Brook, NY 10573

Dear Mr. & Mrs. Netter:

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:  
Stuart A. Simel  
Simel & Kutz  
10 Cutter Mill Rd.  
Great Neck, NY 11021

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

DREW NETTER AND CARIN NETTER

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1981.

---

DECISION

Petitioners, Drew Netter and Carin Netter, 160 Country Ridge Drive, Rye Brook, New York 10573, 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. 61990).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Building Campus, Albany, New York, on October 22, 1986 at 10:45 A.M., with additional documents to be submitted by October 28, 1986. Petitioners appeared by Simel & Kutz (Stuart A. Simel, CPA). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined that petitioner Drew Netter was required to increase his Federal adjusted gross income by the amount he claimed as his proportionate share of the loss of a corporation on the ground that said corporation did not make the election provided by Tax Law § 660.

#### FINDINGS OF FACT

1. Petitioner, Drew Netter, together with his wife, Carin Netter, timely filed a New York State Resident Income Tax Return wherein they elected a filing status of "married filing separately on one return". On this return, Drew

Netter reported a loss from the corporation of Stuart, Coleman International, Ltd. (the "corporation") of \$10,616.00.

2. On April 8, 1985, the Audit Division issued a Notice of Deficiency to Drew and Carin Netter asserting a deficiency of personal income tax for the year 1981 in the amount of \$1,137.43, plus interest of \$408.70, for a total amount due of \$1,546.13. The Statement of Audit Changes explained, to the extent at issue herein, that since the corporation did not make the election provided by Tax Law § 660, 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. The amount of the increase in adjusted gross income is determined by the extent which the shareholder deducted such loss in determining his Federal adjusted gross income.

3. The corporation filed a State of New York Corporation Franchise Tax Report for the calendar year 1981. The report stated that the corporation did not file an election to be a small business corporation for New York State purposes. For the years 1982 through 1985, the corporation filed a New York State Corporation Franchise Tax Report, form CT-4, rather than a New York State Small Business (Tax Option) Corporation Information Report, form CT-3S. In addition, each of the foregoing reports stated that the corporation had a net loss during the respective calendar year and that there was a balance due of \$250.00.

4. The corporate tax returns were prepared by an accountant in the foregoing manner ostensibly because he had failed to inquire whether the New York State small business corporation election had been filed.

5. In or about November 1985, the corporation filed a Claim for Credit or Refund of Corporation Tax Paid for the year 1982 in the amount of \$250.00.

Similar claims for refund have been prepared for the years 1983 through 1985. In each instance, the refund claims were premised on the corporation's position that it was an electing small business corporation and that the preparer of the reports was not aware that the corporation was not subject to minimum corporation franchise tax.

6. On or about July 17, 1981, the shareholders of the corporation submitted an election to be treated as a subchapter S corporation for Federal tax purposes. This election was accepted. At or about the same time, the shareholders prepared an election to be treated as a small business corporation for New York State personal income tax and corporation franchise tax purposes. The cover letter prepared for the New York State election indicated that petitioners planned to mail the election by certified mail return receipt requested. However, petitioners have been unable to locate a copy of this receipt.

7. At the hearing, petitioners' representative maintained that it had been the corporation's practice to file all Federal and State forms simultaneously. The New York State election did not have the employer's identification number on it. As a result of this omission, petitioners submit that the Department of Taxation and Finance either lost or misplaced the form.

#### CONCLUSIONS OF LAW

A. That Tax Law § 209.8, as in effect during the period in question, permitted shareholders of a corporation which had made an election under subchapter S of the Internal Revenue Code, to elect to be taxed under the New York State personal income tax law, with the corporation thereby becoming exempt from corporation franchise tax. This provision pertained to corporate taxable years beginning on or after January 1, 1981, and required that every

shareholder of the corporation make the election to be taxed under Article 22 of the Tax Law.

B. That Tax Law § 660(d)(3), as in effect during the period in question, provided that the aforementioned election of subchapter S treatment by the shareholders of the corporation, for any taxable year beginning on or after January 1, 1981 and ending prior to December 31, 1982, was to be made within nine months from the beginning date of such taxable year.

C. That although the shareholders of the corporation may have intended to file an election to have the corporation treated as a small business corporation pursuant to Tax Law § 660, petitioners have failed to sustain their burden of proof pursuant to section 689(e) of the Tax Law to show that said election was mailed to the New York State Department of Taxation and Finance. Accordingly, the Audit Division properly increased Drew Netter's adjusted gross income by the amount he claimed as his share of the loss by the corporation.

D. That since Drew Netter and Carin Netter filed separately on one return and Carin Netter did not claim any portion of the loss from the corporation, the Audit Division is directed to delete Carin Netter from the Notice of Deficiency.


E. That the petition of Drew Netter and Carin Netter is granted to the extent of Conclusion of Law "D"; except as so granted, the Notice of Deficiency dated April 8, 1985 is, in all other respects, sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER