

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>STEPHEN AND REBECCA GREENWALD</b>	:	DECISION
	:	DTA No. 806467
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Taxes	:	
under Article 22 of the Tax Law and Chapter 46, Title T	:	
of the Administrative Code of the City of New York for the	:	
Years 1982 and 1983.	:	

---

Petitioners Stephen and Rebecca Greenwald, 390 West End Avenue, Suite 6B, New York, New York 10024, filed an exception to the determination of the Administrative Law Judge issued on October 1, 1992. Petitioners appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief on June 2, 1993 which began the six-month period for issuance of this decision. Petitioners' request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

***ISSUE***

Whether petitioners substantiated a partnership loss claimed on their 1983 tax return, part of which was deducted against income for that year, and part of which was carried back to 1982.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Stephen and Rebecca Greenwald, filed a Federal income tax return for 1983

showing, on Schedule E, partnership income of \$269,554.00 and partnership losses of \$920,841.00, for a net loss of \$651,287.00. The partnership losses included losses of \$763,836.00 and \$2,563.00 claimed with respect to Active, Ltd.

Petitioners filed a New York State and City of New York Resident Income Tax Return for 1983 based on Federal income which included the net partnership loss of \$651,287.00.

Petitioners subsequently filed a Form 1040-X, Amended U.S. Individual Income Tax Return, for 1982, claiming a net operating loss carryback of \$236,382.00 from 1983.

Petitioners also filed a New York State and City of New York claim for credit or refund of personal income tax, claiming a refund of \$35,000.00 for 1982, based on the carryback loss of \$236,382.00 and an alimony deduction of \$21,850.00 omitted from the original return.

The matter was assigned to an auditor on November 15, 1985. The case initially involved another partnership in which petitioner Stephen Greenwald was a partner, but any issue with respect to said partnership has apparently been resolved. On March 17, 1986, the auditor received the entire file on the net operating loss carryback from 1983 and petitioners' claim for refund.

On October 1, 1986, the auditor called petitioners' accountant and asked him to substantiate the partnership losses, the three Schedule C's filed by petitioners for 1983 and the alimony payments.

The auditor's log for December 23, 1986, states that the auditor "verified the computer for Active, Ltd. partnership loss", apparently confirming that the partnership had reported such loss. The auditor learned that petitioner Stephen Greenwald had filed a partnership return for an entity called Weber Associates with the same identification number as Active, Ltd. Petitioners' representative told the auditor that petitioners had moved to California and that he would contact petitioners and substantiate the partnership losses.

The auditor called the representative on April 7, 1987, June 12, 1987 and July 21, 1987, requesting documentation and on July 28, 1987 wrote a letter explaining what was needed for

the audit. The auditor called the representative again on August 26, 1987 and the representative expressed surprise that the auditor had not received the information requested.

On September 8, 1987, the auditor received a letter from the representative stating that petitioners' 1983, 1984 and 1985 Federal income tax returns were being audited by the Internal Revenue Service.

The auditor concluded that petitioners had not substantiated the Active, Ltd. partnership loss and the alimony deduction and recommended that the refund request be denied and a notice of deficiency be issued.

On September 30, 1987, the Division of Taxation (hereinafter the "Division") issued a Statement of Audit Changes to petitioners, denying the refund requested for 1982 and asserting \$18,084.08 in New York State and New York City personal income tax due for 1983.

Petitioners executed two consents extending the period of limitation upon assessment of personal income taxes for the years 1982 and 1983 to October 17, 1988.

On November 25, 1987, the Division issued a Notice of Deficiency to petitioners for \$18,084.08 in tax, \$904.20 in penalty and \$6,586.33 in interest, for a total due of \$25,574.61 for the year 1983.

A Bureau of Conciliation and Mediation Services conference was held on August 4, 1988. Petitioners' representative produced documentation to substantiate the \$21,850.00 alimony deduction and on August 22, 1988 the auditor recomputed the Statement of Audit Changes allowing a credit of \$3,171.53 for 1982 to be offset against the deficiency for 1983, resulting in a reduction in tax due to \$14,912.55, plus penalty and interest. A Conciliation Order reducing the deficiency to said amount was issued by the conferee on October 7, 1988.

Also on October 7, 1988 a letter was issued to petitioners by the Division's Audit Group 3 in Albany stating, in pertinent part, as follows:

"Our records indicate the entire \$35,522.45 refund on your 1982 amended return was disallowed, therefore based on the above the assessments are considered correct.

"If you now agree, please pay the total amount due shown at the bottom of this letter. Your payment if received within 15 days, will close this

matter."

The amounts shown due on the letter for the year 1982 were as follows:

Tax	0
Interest	\$ 805.74
Penalty	<u>\$2,393.85</u>
Total	\$3,199.59

It is unclear how Audit Group 3 arrived at this computation. No Notice of Deficiency was issued for 1982 and, as noted above, petitioners received a credit for the alimony deduction which was allowed for 1982.

Petitioners filed a timely petition dated January 4, 1989 protesting the deficiency, which had been reduced to \$14,912.55, and also protesting the denial of refund.<sup>1</sup> The petition stated, in pertinent part:

"Active limited's [sic] sole activity is an interest in SAGE ASSOCIATES. SAGE ASSOCIATES is currently under examination by the Internal Revenue Service. No determination has been made by the internal revenue service [sic] as of the date of this petition. The commissioner DID NOT examine SAGE ASSOCIATES or active limited [sic]."

Petitioner Stephen Greenwald, a lawyer, did not practice law during 1983. He was involved in a number of different ventures, most of which were related to the motion picture industry. The ventures included acquiring and developing motion picture projects.

***ACTIVE, LTD.***

Active, Ltd. is a general partnership formed on November 11, 1981 by petitioner Stephen Greenwald and his father, Samuel Wenegrat. The partnership was created so that Mr. Greenwald and his father could participate in business activities together. The offices of the partnership were apparently located in New York City during the years at issue. Under the partnership agreement, each of the partners was to contribute 50% of the capital. Profit and loss, which were to be computed at the end of each calendar year, were to be allocated equally

---

<sup>1</sup>Petitioners also challenged adjustments to their medical expense deduction and the imposition of penalty and interest, on the basis that such adjustments, penalty and interest were due to the increased income resulting from the disallowance and were thus incorrect; there is no separate issue herein with respect to same.

between the partners.<sup>2</sup>

The partnership agreement was amended as of May 23, 1983 to allow for unequal contributions of capital. Paragraph 4(b) of the agreement, relating to allocation, was modified to read as follows:

"(b) Allocation of Profits and Losses: The profits and losses of the Partnership shall be allocated equally among the Partners, provided, however, that in the event the Partners have made an unequal contribution to the capital of the Partnership, as is set forth on Exhibit 'A' to this Agreement, from time to time, the profits and losses of the Partnership, with respect to the investments made with the capital contributed unequally by the Partners, shall be allocated among the Partners in the same percentage that each Partner's unequal contribution bears to the total contribution made with respect to each such investment. It is, therefore, the understanding and agreement of the Partners that with respect to certain investments of the Partnership, that the profits and losses of the Partnership shall be allocated equally among the Partners and with respect to other investments of the Partnership, that the profits and losses shall be allocated on an unequal basis, all as is set forth on Exhibit 'A', attached hereto."

Exhibit "A" attached to the agreement provided as follows:

DATE OF CONTRI- BUTION <sup>3</sup>	<i><b>"EXHIBIT 'A'"</b></i>		
	INVESTMENT PERCENTAGE OF CONTRIBU- TION & LOSS	PARTNERS ALLOCATION OF PROFIT	PARTNERS
	Sage Associates, a New York Limited Partnership, 1.25 Units	Greenwald: 75% Wenegrat: 25%	Wenegrat: 25%
	Sage Assocaites [sic], a New York Limited Partnership, .25 Units	Greenwald: 75% Wenegrat: 25%	Greenwald: 75% Wenegrat: 25%
	Acquisition of an Option in a Screen Play entitled 'Aura'	Greenwald: 50% Wenegrat: 50%	Greenwald: 50% Wenegrat: 50%
	Acquisition of 50 shares of the common stock of	Greenwald: 50% Wenegrat: 50%	Greenwald: 50% Wenegrat: 50%

---

<sup>2</sup>Petitioners' Exhibit "3."

Smith-Greenwald Properties,  
Inc., a New York Corporation,  
representing 50% of the  
issued and outstanding  
shares of said corporation

3/31/83	6.25% Interest in West End Developers Associates, a New York General Partnership"	Greenwald: 50% Wenegrat: 50%	Greenwald: 50% Wenegrat: 50%
---------	---	---------------------------------	---------------------------------

The investments contributed to Active, Ltd. listed in Exhibit "A" to the amendment of the partnership agreement dated May 23, 1983 may be more particularly described as follows:

(a) Sage Associates. Sage Associates was and is a New York limited partnership in which Active, Ltd. was and is a limited partner. Sage Associates acquired for distribution a motion picture entitled "S.O.B."

(b) The option on the screenplay "Aura". Active, Ltd. owned a 50% interest in an option to purchase a screenplay entitled "Aura." The principals were unable to obtain financing and the option expired. Active, Ltd. lost its share of the funds invested in the option, the total of which was said by petitioner Stephen Greenwald to be in excess of \$100,000.00.

(c) The 50 shares of the common stock of Smith-Greenwald Properties, Inc. The 50 shares represented 50% of the outstanding stock. The corporation acquired an original screenplay entitled "The Grind" for \$175,000.00. One-half interest in the project was later sold to Dino DeLaurentiis Corporation. At the time of the hearing, Mr. Greenwald and his colleagues were still trying to get the film produced.

(d) The 6.25% interest in West End Developers Associates. West End Developers Associates is a New York general partnership which acquired a rental apartment building at 590 West End Avenue in New York City consisting of approximately 110 units and converted it to a cooperative. While most apartments have been sold, West End Developers Associates still owned about 30 units at the time of the hearing.

The partnership agreement was amended for the second time as of December 6, 1983, when Beryl Lewis was admitted as a general partner. It was stipulated, however, that Lewis was

to have no interest in the profits and losses of any investment previously made by the partnership, nor was she to be deemed to have made any capital investments with respect to same. Specifically, Lewis was not to be deemed as having an interest in the investments listed in Schedule A to the amendment of May 23, 1983.

The amendment of December 6, 1983 also recited that effective that date, the partnership had acquired, by assignment, an undivided 35% interest as tenant-in-common in a completed motion picture entitled "Angel". The investments and separate interests of profits and losses of the partners relating to the film were as follows:

Greenwald: 90%

Wenegrat: 5%

Lewis: 5%

The investment was encumbered by a promissory note executed by petitioner Stephen Greenwald and payable to Angel Venture, a general partnership, and certain financing provided by Crocker Bank. The partners were liable for the note and financing to the extent of their percentages set forth above. Wenegrat and Lewis also agreed to indemnify and hold petitioner Stephen Greenwald harmless to the extent he was required to repay an amount in excess of 90% of the principal and interest arising under the note and/or financing.

Assignments by petitioner Stephen Greenwald to Active, Ltd., were made as follows:

(a) Mr. Greenwald assigned his option to purchase the screenplay "Aura" to Active, Ltd. on May 31, 1983.

(b) Mr. Greenwald assigned his 50% stock interest in Smith-Greenwald Properties, Inc. to Active, Ltd. on June 6, 1983.

(c) Mr. Greenwald assigned his undivided 35% interest in "Angel" to Active, Ltd. on December 6, 1983.

Active, Ltd. filed a Federal partnership return for 1983 showing the following income and deductions:

Income:

Ordinary income (loss)	\$(138,849.00)
Other income (loss)	<u>1,215.00</u>
Total income (loss)	\$(137,634.00)

Deductions:

Interest	\$( 21,000.00)
Depreciation (from Form 4562) <sup>4</sup>	
(363,300.00)	
Other deductions - advertising	<u>(350,000.00)</u>
Total deductions	\$(734,300.00)
Ordinary income (loss)	\$(871,934.00)

Active, Ltd. issued a Schedule K-1 (Partner's Share of Income, Credits, Deductions, Etc.) to petitioner Stephen Greenwald showing a distributive share of ordinary loss of \$764,747.00 for 1983.

***OPINION***

The Administrative Law Judge determined that:

"[i]n computing net income, an individual partner is allowed his distributive share of a partnership net operating loss (Internal Revenue Code § 702[a][8]). The net operating loss consists of excess deductions over the gross income of the partnership (Treas Reg § 1.703-1[a][1][ii]).<sup>5</sup> 'Losses deductible by a partnership, and, therefore, distributable among the partners, must be connected with the partnership's business. The loss must be sustained in trade or business or for the production of income.' (Mertens, Law of Federal Income Taxation § 35.157)" (Determination, conclusion of law "A").

The Administrative Law Judge determined that in order for petitioners to substantiate the \$651,287.00 net partnership loss for 1983 with respect to Active, Ltd., "they must show the

---

4

Form 4562 is not attached to petitioners' Exhibit "1."

5

This regulation refers to Internal Revenue Code § 702(a)(9), which was redesignated § 702(a)(8) effective for taxable years beginning after December 31, 1976.



ordinary and necessary business expenses deductible under Internal Revenue Code § 162(a) and also that the losses exceeded receipts by said amount" (Determination, conclusion of law "B").

The Administrative Law Judge concluded that, while petitioners have established that petitioner Stephen Greenwald and Active, Ltd. were involved in the motion picture business, as well as other ventures, the amount of loss cannot be supported by the record; thus, petitioners failed to sustain their burden of proof under Tax Law § 689(e) and Administrative Code of the City of New York former § T46-189.0(e).

Specifically, the Administrative Law Judge (relying on Walker v. Commissioner, T.C. Memo 1972-209, 31 TCM 1037) found that the mere production by petitioners of copies of Active, Ltd.'s partnership return and the Schedule K-1 were not sufficient to prove the truth of their assertions. The Administrative Law Judge pointed out that the copy of the partnership return offered by petitioners did not offer any details as to the deductions and that while \$363,300.00 was claimed in depreciation, the requisite Form 4562 was not attached to the copy in the record.

The Administrative Law Judge made note of the fact that Mr. Greenwald was the controlling person behind Active, Ltd. and satisfactory evidence of the deductions was within his possession and control. However, such evidence was not produced.

On exception, petitioners assert that the Administrative Law Judge:

"erred in denying [their] claims because [the Administrative Law Judge] failed to give credence to, or indeed even acknowledge in reaching his conclusions of law . . . evidence submitted by the Petitioners in support of their claims. The issue here is a narrow one: should the ALJ be free to ignore and disregard evidence submitted by the Petitioners, none of which was challenged or refuted by the State, in reaching a conclusion on whether the Petitioners carried their burden of proof under NYS Tax Law Sect. 689(e)?" (Petitioners' brief, p. 8).

On exception, the Division asserts that petitioners did not meet their burden of proof. The Division makes particular objection to petitioners' inclusion in their brief on exception of the Schedule K-1 issued by Sage Associates to Active, Ltd.

Petitioners rely on the same proof of substantiation they offered at hearing and which was rejected by the Administrative Law Judge. Our review of the record indicates that the

Administrative Law Judge fully and correctly dealt with the issues and we sustain his determination for the reasons stated therein. For example, the evidence adduced by petitioners regarding the \$350,000.00 advertising deduction merely shows that Mr. Greenwald borrowed \$350,000.00 from Crocker National Bank and that the funds were repaid on or about January 30, 1984.<sup>6</sup> Accordingly, we cannot conclude that petitioners have presented sufficient evidence to support the claimed \$350,000.00 advertising deduction.

We must also reject petitioners' effort to document that Active, Ltd. received a loss of \$138,849.00 from Sage Associates<sup>7</sup> by including in their brief on exception as Exhibit "12" the Schedule K-1 issued by Sage Associates to Active, Ltd.

While a party taking an exception to the determination of the Administrative Law Judge may assert that the record contains facts in addition to those found by the Administrative Law Judge, or may protest findings of fact made by the Administrative Law Judge, this Tribunal has made it perfectly clear that, on exception, additional evidence may not be added to the record made at hearing (Matter of Abex Corp., Tax Appeals Tribunal, October 8, 1992; Matter of Great Eastern Print. Co., Tax Appeals Tribunal, February 20, 1992; Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

As we stated in Matter of Schoonover:

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the

---

<sup>6</sup>The Distribution Agreement between Messrs. Smith and Greenwald as "Producer" and New World Pictures as "Distributor" provides that the "Producer" is to pay the "Distributor" certain sums for marketing costs and a marketing fee on or before December 31, 1983. However, the photocopy of the Distribution Agreement in evidence is of poor quality and we cannot tell with any degree of certainty the actual amount of the marketing costs and marketing fee. Moreover, there is no evidence in the record to establish that Active, Ltd. ever paid the marketing costs and marketing fee to the "Distributor."

<sup>7</sup>Since Sage Associates, like Active, Ltd., was also involved in the alleged purchase and distribution of a motion picture film, the same concerns expressed later in this decision concerning the validity of the Active, Ltd. partnership loss would also appear to apply to Sage Associates.

record (see, Matter of Oggi Rest., Tax Appeals Tribunal, November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal,

March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)" (Matter of Schoonover, *supra*).

This Tribunal is charged with providing a just system for the resolution of controversies between taxpayers and the Department of Taxation and Finance. Essential to the system functioning as envisioned by the Legislature is that the parties be provided with the full opportunity at hearing to make a complete and full record. Our regulations and procedures are geared to allow this to happen. Here, petitioners had ample opportunity at the hearing to make a full record. Moreover, the Administrative Law Judge also allowed petitioners time after the hearing to submit additional evidence; however, they failed to avail themselves of this opportunity. Having been afforded ample opportunity to offer their evidence at hearing, petitioners cannot submit additional evidence during the exception process.

It is also observed that petitioners, although requested to do so on several occasions, did not submit any documentary evidence to the Division during the conduct of the audit concerning the Active, Ltd. partnership loss. Moreover, no explanation is offered for petitioners' failure to submit such documentary evidence for review. The very first time that petitioners submitted documentary evidence concerning the Active, Ltd. partnership loss was at the hearing held before the Administrative Law Judge. Our review of this evidence and subsequent research brings to light many unanswered questions concerning the deductions claimed by Active, Ltd. and by Sage Associates (see, Upham v. Commissioner, 923 F2d 1328, 91-1 USTC ¶ 50,050). As we stated in Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, August 25, 1988):

"Petitioners' failure to produce documentation concerning the transactions at issue during the audit is unfortunate since that was the appropriate time for adequate consideration by both parties of the documents and the nature of the transactions they represent. The formal nature of the hearing before the Administrative Law Judge operates against such discussion and analysis. While such documents can be reviewed post-hearing by the Administrative Law Judge, again the bilateral review

and consideration that can occur during audit is absent."

In sum, it was petitioners who elected, for whatever unexplained reason, not to submit supporting documentation to the Division and any unanswered questions which arise as the result of our review of petitioners' evidence must necessarily weigh against them.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stephen and Rebecca Greenwald is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Stephen and Rebecca Greenwald is denied; and
4. The denial of the request for refund for 1982 and the Notice of

Deficiency for 1983, as reduced pursuant to the Conciliation Order, are sustained.

DATED: Troy, New York  
November 24, 1993

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner