

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Jorge & Martha Mendez-Penate :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1970. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Jorge & Martha Mendez-Penate, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jorge & Martha Mendez-Penate
94 Second St.
North Arlington, NJ 07032

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
3rd day of October, 1980.

Julia Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Personal Income Tax :
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for the Year 1970. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of October, 1980, he served the within notice of Decision by certified mail upon James M. Gallagher the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. James M. Gallagher
2550 Independence Ave.
Bronx, NY 10463

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
3rd day of October, 1980.

Quetta Kunk

J. Vredenburg

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

October 3, 1980

Jorge & Martha Mendez-Penate
94 Second St.
North Arlington, NJ 07032

Dear Mr. & Mrs. Mendez-Penate:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James M. Gallagher
2550 Independence Ave.
Bronx, NY 10463
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JORGE MENDEZ-PENATE AND MARTHA MENDEZ-PENATE : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Year 1970. :

Petitioners, Jorge Mendez-Penate and Martha Mendez-Penate, 94 Second Street, North Arlington, New Jersey 07032, 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 1970 (File No. 13811).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1979 and March 20, 1980 at 1:15 P.M. and 9:15 A.M., respectively. Petitioner Jorge Mendez-Penate appeared with James M. Gallagher, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioners, as nonresidents of New York, are properly entitled to a capital loss carryover attributable to the Cuban government's confiscation of their wholly owned Cuban corporation.

FINDINGS OF FACT

1. Petitioners, Jorge Mendez-Penate and Martha Mendez-Penate, timely filed a nonresident New York State Combined Income Tax Return for the year 1970 wherein each claimed a capital loss carryover of \$1,000.00.

2. On December 29, 1971, the Audit Division issued a Statement of Audit Changes wherein it disallowed each petitioner's claimed capital loss carryover on the basis that, "A nonresident may not deduct a capital loss carryover from stocks, bonds or other intangible personal property unless it is connected with a trade or business carried on within New York State". Accordingly, on July 29, 1974, a Notice of Deficiency was issued against petitioners asserting additional personal income tax of \$118.08, plus interest of \$23.30, for a total due of \$141.38. (On November 16, 1973, petitioners had signed a consent extending to April 15, 1975 the statutory period of limitation for assessment of personal income tax.)

3. On December 4, 1960, petitioner Jorge Mendez-Penate entered the United States with the Cuban government's permission for a one year stay for the purpose of affording his children a better education. After arrival, he went directly to New York State where he was met by his wife and children in January 1961.

4. As a result of the Cuban Revolution, petitioners decided not to return to Cuba and on December 6, 1961 their wholly owned company, Compania Inmobiliaria San Jorge, S.A., was nationalized through confiscatory decree.

5. As a result of the confiscation, petitioners' 900 shares of capital stock in said company became worthless. Ultimately, the Internal Revenue Service allowed petitioners a worthless security loss of \$90,000.00 of which petitioners have been carrying over the remainder to subsequent years, including the year at issue.

6. Since their arrival in New York, petitioners have been New York State residents until October 30th 1966, at which time they changed their residence to New Jersey, where they continued to reside to date.

7. Petitioners have claimed a capital loss carryover, attributable to the confiscation, on each New York State Return filed during their period of residence.

8. Petitioners argued that said carryover losses are properly deductible in 1970, even though they were nonresidents of New York, since the Federal government has allowed same and it is the policy of the State to provide benefits to refugees so that they may maintain a better life in this country.

CONCLUSIONS OF LAW

A. That pursuant to section 632(a)(1) of the Tax Law, the New York adjusted gross income of a nonresident individual shall include the net amount of items of income, gain, loss and deduction entering into his Federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources.

B. That section 632(b) of the Tax Law provides that:

- (1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:
 - (A) The ownership of any interest in real or tangible personal property in this State; or
 - (B) A business, trade, profession or occupation carried on in this State.

Since the capital loss carryovers at issue were not derived from or connected with New York sources, as defined above, they are therefore not allowable on the nonresident return of the petitioners for the taxable year 1970.

C. That the petition of Jorge Mendez-Penate and Martha Mendez-Penate is denied and the Notice of Deficiency, dated July 29, 1974 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER