

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CARLOS R. AND LILLIAN A. CHAMELI

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1977 and 1978.

In the Matter of the Petition

of

HECTOR AND PAULA CKAMELI

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977 and 1978.

DECISION

In the Matter of the Petition

of

PETER AND AURORA CORNEJO

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1977 and 1978.

In the Matter of the Petition

of

RAYMOND A. AND JOSEPHINE OCCHINO

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977 and 1978.

Petitioners Carlos R. and Lillian A. Chameli, 238 Irving Terrace, Kenmore,

New York 14223, filed a petition for redetermination of a deficiency

refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1978 (File No. 36752).

Petitioners Hector and Paula Chameli, 220 Depew Avenue, Buffalo, New York 14214, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1978 (File No. 36753).

Petitioners Peter and Aurora Cornejo, 74 Dana Place, Buffalo, New York 14216, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1978 (File No. 36754).

Petitioners Raymond A. and Josephine Occhino, 1400 North French Road, North Tonawanda, New York 14120, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1978 (File No. 36755).

A consolidated hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on February 5, 1985 at 1:15 P.M., with all briefs filed by September 6, 1985. Petitioners appeared by Harold Fein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' income for the years 1977 and 1978 attributable to the gain on the 1977 sale of property owned by their closely-held corporation which was liquidated in 1977.

FINDINGS OF FACT

1. The Audit Division issued a "Statement of Personal Income Tax Audit Changes" for the years 1977 and 1978 to petitioners Carlos R. and Lillian A. Chameli, Raymond A. and Josephine Occhino, and Hector Chameli on January 7, 1980 and to petitioners Peter and Aurora Cornejo, on January 23, 1980. These statements of audit changes each explained:

"As a result of the audit of R.B.C. Plaza Inc., it has been determined that the corporation assets were sold prior to the adoption of a plan of liquidation under Section 333 of IRC. As a result of this sale, the corporation's earnings and profits have been increased as shown on the attached schedules.

Since you have elected to liquidate your shares in R.B.C. Plaza under the one-month liquidation provisions, your gain must be recognized as ordinary income to the extent of your ratable share of the liquidating corporation's earnings and profits accumulated after February 28, 1913.

The basis of property (other than money) received by a shareholder whose recognized gain **was** determined under the one-month liquidation rules is the same as the basis **of** the shareholder's stock in the liquidating corporation reduced by any money received and increased by any recognized gain. The basis of the mortgage received has been recomputed on the schedule which shows that 42% of the face value of the mortgage must **be** declared as ordinary income."

2. The statements of audit changes provided the following computations and schedules:

"Computation of Corporation's Accumulated Earnings & Profits at date of liquidation"

Accumulated Earnings & Profits, 7/13/77	37768.40	
Gain on sale of Plaza	232092.11	
Total	269860.51	
Less: Federal Corporation Tax	67940.21	
N.Y. Franchise Tax	23209.21	91149.42
Corporation's Accumulated Earnings & Profits at liquidation	178711.09	

Determination of Realized & Recognized gain to Stockholders:

Distributions to shareholders	
Mortgage	217000.00
Deposit by purchaser less commission of sale	38000.00
Accumulated Earnings & Profits, 7/13/77	

Basis of Stock	30000.00	
Less: Treasury stock	<u>7500.00</u>	<u>22500.00</u>
Realized gain to shareholders		270268.40
Recognized gain limited to Earnings & Profits		<u>178711.09</u>
Gain to be recognized during the life of the mortgage		<u>91557.31</u>
<u>Computation of Basis of Property received--Mortgage:</u>		
Basis of stock		22500.00
Less: Money received:		
Dividends 7/13/79	37768.40	
Deposit by purchaser	<u>38000.00</u>	<u>75768.40</u>
Balance		(53268.40)
Add: Recognized gain		<u>178711.09</u>
Adjusted basis of property received--mortgage		<u>125442.69</u>
Face value of mortgage		217000.00
Adjusted basis of mortgage		<u>125442.69</u>
Amount to be taxed as ordinary income during the life of the mortgage--42%		<u>91557.31</u>

Computation of Shareholders' reportable income as a result of the liquidation:

	<u>1977</u>	<u>1978</u>
Recognized gain at date of liquidation	178711.09	
Mortgage collections:		
Payments received @ \$2073.79	10368.95	24885.48
Interest income reported	<u>(7191.24)</u>	<u>(16814.08)</u>
Principle payments received	3177.71	8071.40
Amount of mortgage principle (sic) collections to be taxed as ordinary income (42%)	<u>1334.64</u>	<u>3389.99</u>
Total shareholders recognized income	<u>180045.73</u>	<u>3389.99</u>

Stockholders share of income:

Raymond A. Occhino - President	45011.43	847.50
Peter Cornejo - Secretary	45011.43	847.50
Carlos R. Chamili. - Treasurer	45011.43	847.50
Hector Chamili - Vice President	45011.44	847.49
	<u>180045.73</u>	<u>3389.99"</u>

	<u>1977</u>	<u>1978</u>
Income from liquidation of R.B.C. Plaza, Inc.	45011.43	847.50
Income previously reported:		
Dividend	(9442.10)	
Capital gains	(5871.50)	
NY 20% capital gains modification	(1168.70)	
Net Adjustment	<u>28529.13</u>	<u>847.50</u>

4. On February 17, 1981, a Notice of Deficiency was issued to Carlos and Lillian Chameli asserting additional tax of \$4,364.02 plus accrued interest for the years 1977 and 1978.

5. On February 17, 1981, notices of deficiency were issued to:

a) Peter Cornejo asserting additional tax of \$4,282.61 plus accrued interest for the year 1977;

b) Peter Cornejo asserting additional tax of \$67.79 plus accrued interest for the year 1978;

c) Aurora Cornejo asserting additional tax of \$60.12 for the year 1977.

The notices with respect to Peter Cornejo relate to the R.B.C. Plaza, Inc. adjustments. The notices with respect to petitioner Aurora Cornejo relate to additional interest income of \$1,001.79.

6. Petitioners Peter and Aurora Cornejo, filed a "joint" return for the year 1978, but only petitioner Peter Cornejo was issued a Notice of Deficiency for the year 1978.

7. On February 17, 1981, a Notice of Deficiency was issued to petitioners Raymond and Josephine Occhino, asserting additional tax of \$4,265.11 plus accrued interest for the year 1977. Said Notice of Deficiency concerns a medical adjustment of \$1,187.91 for the year 1977 in addition to the R.B.C.

Plaza, Inc. (Finding of Fact "3") adjustment. Furthermore, said petitioners' 1978 liability was adjusted as follows:

Income from R.B.C. Plaza, Inc.	847.56
Income previously reported:	
Capital gains	(920.90)
NY 20% capital gains modification	(148.53)
Medical adjustment	(2.20)

for a net credit adjustment of \$224.13, which resulted in a tax credit of \$11.20 which credit was applied against the deficiency for the year 1977.

8. On February 17, 1981, the Audit Division issued a Notice of Deficiency to petitioners Hector and Paula Chameli., asserting additional tax of \$4,405.35 plus accrued interest for the years 1977 and 1978. Petitioners Hector and Paula Chameli filed a "joint" return for the year 1977 and on a "married filing separately on one return" basis for the year 1978.

9. Petitioners Raymond Occhino, Peter Cornejo, Carlos Chameli and Hector Chameli were each officers and 25 percent shareholders of R.B.C. Plaza, Inc. ("RBC").

10. RBC's principal assets were certain real property, buildings, fixtures and equipment located in Getzville, New York ("Property").

11. Sometime in May of 1977, RBC entered into an agreement to sell the Property to Attazay, Inc. The proposed sale price was \$325,000.00, including a \$63,000.00 mortgage balance to be assumed by the purchaser, the proposed closing date was July 1, 1977 and the agreement (Contract for Sale and Purchase of Real Property - Hearing Exhibit "F") was executed by Morton H. Levy as secretary of Attazay, Inc.

12. Although it appears that the sale of the Property by RBC to Attazay was still contemplated as of at least July 6, 1977 (Mortgage Statement of Conditions

for Assumption Purposes - Hearing Exhibit "G"), for reasons not explained at the hearing said sale was not completed.

13. On or about the 8th day of July, 1977, the directors and shareholders of RBC adopted a plan to liquidate the corporation and to do so pursuant to the provisions of section 333 of the Internal Revenue Code. In pursuit thereof, the corporation and shareholders filed "Form 966 - Corporate Dissolution or Liquidation" and "Form 964 - Election of Shareholder under Section 333 Liquidation" with the Internal Revenue Service, said forms being received by the District Director of Internal Revenue in Buffalo, New York on or about July 13, 1977.

14. The Property was purchased by B.H.S. Investors, Inc. on or about the 13th day of July, 1977 for \$325,000.00, less a mortgage balance to be assumed by the purchaser.

15. On July 13, 1977, a deed dated July 13, 1977 conveying the Property from R.B.C. Plaza, Inc. to B.H.S. Investors, Inc. subject to a mortgage on said Property held by Marine Midland Bank was recorded at the Erie County Clerk's Office. Said deed was executed by Morton Levy as vice-president of and on behalf of B.H.S. Investors, Inc. and by Raymond Occhino as president of and on behalf of R.B.C. Plaza, Inc.

16. On July 13, 1977, a mortgage on the Property dated July 13, 1977 with B.H.S. Investors, Inc. as the mortgagor and Peter Cornejo, Raymond Occhino, Hector Chameli and Carl (sic) Chameli as mortgagees was recorded in the Erie County Clerk's Office.

17. On the 27th day of July, 1977, between 12:14 p.m. and 12:18 p.m., there were recorded in the Erie County Clerk's Office (a) a deed dated July 12, 1977 conveying the Property from B.H.S. Investors, Inc. to R.B.C. Plaza, Inc.

(b) a deed dated July 12, 1977 conveying the Property from R.B.C. Plaza, Inc. to Peter Cornejo, Raymond Occhino, Carl Chameli and Hector Chameli, and (c) a deed dated July 12, 1977 conveying the Property from Peter Cornejo, Raymond Occhino, Carl Chameli and Hector Chameli to B.H.S. Investors, Inc.

18. Each of the deeds dated the 12th of July, 1977 and filed in the County Clerk's office on July 27, 1977 (Finding of Fact "17") bore the following inscription:

"THIS IS a correcting Deed to show true conveyance in chain of title."

19. The deed dated the 12th of July, 1977 and filed in the County Clerk's office on July 27, 1977 from petitioners to B.H.S. Investors, Inc. stated that the conveyance was subject to a mortgage on the Property held by Marine Midland Bank.

20. Documents concerning the purchase of the Property were executed by Morton H. Levy as vice-president of B.H.S. Investors, Inc.

21. The petitioners contend that:

(a) they and the corporation made valid elections to dissolve the corporation and to be taxed pursuant to section 333 of the Internal Revenue Code;

(b) that the corporation did **so** dissolve and transfer its principal asset, the Property, to petitioners;

(c) that the petitioners thereafter sold the Property as individuals;

(d) that the petitioners thus reported properly on their returns for the year 1978 (i) as dividend income their respective portions of the earned surplus **of** R.B.C. Plaza, Inc. and (ii) as capital gains income their respective shares of the gain on the sale of the Property; and

(e) on their returns for the year 1978 petitioners reported as capital gains income their allocable portion of the recognized gain received in said year.

22. Petitioners Raymond and Josephine Occhino's 1978 return clearly shows inclusion of \$1,069.43 in capital gain income which reflects a New York State modification to federal gain for the year 1978 in respect of the sale of the Property.

23. Petitioners Peter and Aurora Cornejo's 1978 return reflects inclusion of \$1,782.37 in income subject to capital gains treatment for the year 1978 in respect of the sale of the Property; however, said return fails to reflect the required New York State modification from federal gain.

24. The Audit Division contends that R.B.C. Plaza, Inc. negotiated the sale of the Property, thereby subjecting the gain therefrom to corporate tax and likewise changing the tax consequence thereto as outlined in the statements of audit changes.

25. None of the petitioners testified **at** the hearing.

26. The Audit Division and petitioners both argue that section 333 of the Internal Revenue Code was properly elected and all requirements thereof were met.

CONCLUSIONS OF LAW

A. That the petitioners presented no evidence or testimony (see Ripy Bros. Distillers, Inc. v. Comm., 11 TC 326 [1948]) and have otherwise failed to sustain their burden of proof that they, in their individual capacities, negotiated the sale of the principal asset of R.B.C. Plaza, Inc. to B.H.S. Investors, Inc. and that they likewise, **in** their individual capacities, did ~~thereafter~~ ~~as~~ ~~said~~ ~~Presenters~~

B. That it is clear that petitioners intended to elect to be taxed pursuant to section 333 of the Internal Revenue Code based upon the belief that R.B.C. Plaza, Inc. would liquidate and distribute the Property to the individual shareholders, who would then, in their individual capacities, sell such Property, which election would, ~~inter alia~~, avoid realization of gain by the corporation.

C. That, in general, Commissioner of Int. Rev. v. Court Holding Co., 324 U.S. 331 (1945), stands for the proposition that where (as here) it is determined that the sale of the liquidating corporation's property was not negotiated by the individuals, the gain on the sale may be properly attributed to the corporation resulting in individual personal income tax consequences ~~to~~ the shareholders of the liquidating corporation (as asserted by the Audit Division against the petitioners herein).

D. That DiAndrea Incorporated v. Commissioner, TC Memo 1983-768 (1983), held that, in circumstances similar to those as found herein, the individual shareholders made an Internal Revenue Code section 333 election based upon a mistake of fact that they, rather than the corporation, would be deemed the sellers of the liquidating corporation's appreciated assets, thus vitiating the election to be taxed pursuant to said section, therefore subjecting the transaction to the provisions of section 337 of the Internal Revenue Code (generally otherwise inapplicable where ~~a~~ section 333 election was made) concerning sales by ~~a~~ corporation disposing of assets within a twelve-month period beginning with the date of the adoption of a plan to liquidate.

E. That the Audit Division is directed to recompute the petitioners' personal income tax liabilities for the years 1977 and 1978 based upon the sale of the Property by the corporation and liquidation of said corporation pursuant to the provisions of section 337 of the Internal Revenue Code and such other

provisions of said code as are therefore applicable (see DiAndrea, Incorporated v. Commissioner, supra).

F. That there being no request at or before the hearing for imposition of a greater deficiency than originally was asserted, the Audit Division in recomputing the petitioners' liabilities, is limited to the amounts of the deficiencies asserted for said years 1977 and 1978 against the petitioners (see Tax Law §689(d)(1); Findings of Fact "4", "5", "7" and "8").

G. That, there being no testimony or other evidence to the contrary, the Notice of Deficiency issued to Aurora Cornejo with respect to the year 1977 is sustained in full.

H. That having filed separate returns for the year 1978, that portion of the Notice of Deficiency issued to Hector and Paula Chameli for the years 1977 and 1978 which relates to the year 1978 is cancelled with respect to petitioner Paula Chameli.

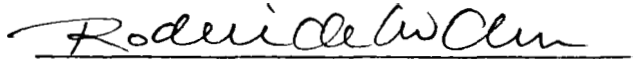
I. That in recomputing his liability for the year 1978, petitioner Peter Cornejo is to be credited with the \$1,783.37 in income subject to capital gains treatment included on his return for such year in respect to the monies collected in 1978 concerning the sale of the principal asset of R.B.C. Plaza, Inc. in 1977.

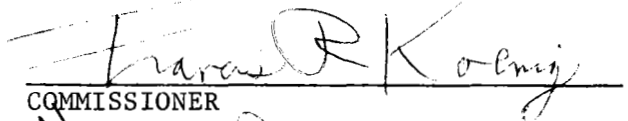
J. That the petitions herein are granted to the extent provided in Conclusions of Law "E", "F", "H" and "I" and are in all other respects denied and the notices of deficiency herein are sustained to the extent provided in

Conclusions of Law "E", "F" and "G", together with such interest as by law allowed.

DATED: Albany, New York

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER