

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JAMES E. DUFFY AND JULIE D. DUFFY

DECISION

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

Petitioners, James E. Duffy and Julie D. Duffy, 83 Delafield Island Road, Darien, Connecticut 06820, 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 1978 (File No. 38072).

A formal hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 7, 1984 at 1:15 P.M., with all briefs to be submitted by March 7, 1984. Petitioners appeared by Jerome Krell, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether a capital gain realized by petitioner James E. Duffy, a nonresident, from the sale of stock acquired through an employee stock option plan is subject to New York State personal income tax.

FINDINGS OF FACT

1. Petitioners herein, James E. Duffy and Julie D. Duffy,¹ timely filed a joint New York State Income Tax Nonresident Return for the year 1978. Included

¹ Petitioner Julie D. Duffy is involved in this proceeding due solely to her filing of a joint tax return with her husband. Accordingly, the term

in the "Federal Amount" column on page 2 of said return was a capital gain of \$92,117.00 generated from petitioner's sale or exchange of capital assets. No portion of the \$92,117.00 capital gain was included in New York adjusted gross income.

2. On January 4, 1982, petitioner executed Form AU-1, Consent Fixing Period of Limitation upon Assessment of Personal Income and Unincorporated Business Taxes, extending the period of limitation for assessment for the year 1978 to any time on or before April 15, 1983.

3. The Audit Division, on June 17, 1982, issued a Notice of Deficiency to petitioner for the years 1978 and 1979, asserting additional New York State and New York City tax due of \$10,930.19, plus interest of \$3,307.18, for a total allegedly due of \$14,237.37. The amount of tax and interest due for the year 1979 was agreed to between petitioner and the Audit Division prior to the hearing held herein and, therefore, said year is not at issue and will not be addressed hereinafter. Petitioner does, however, contest that portion of the Notice of Deficiency dated June 17, 1982 which asserts New York State personal income tax for the year 1978 in the amount of \$9,901.97, plus interest.

4. A Statement of Personal Income Tax Audit Changes dated December 7, 1981 sets forth in the following manner the grounds upon which the Audit Division asserts there is a deficiency due for the year 1978:

"When stock options are received by an employee because of his services performed by him for his employer, the income received by a nonresident from the sale of stock acquired under an employee stock option plan is taxable to N.Y.S.

Therefore your 1978 N.Y.S. income has been adjusted as follows:

| | |
|--|-------------------|
| Net long term capital gain per Federal return | \$92117.00 |
| N.Y.S. allocation percentage | x .53515 |
| Net long term capital gain allocated to N.Y.S. | <u>\$49296.00</u> |

The Audit Division increased petitioner's reported 1978 New York adjusted gross income by \$59,155.00 (\$49,296.00 + \$9,859.00). It also maintained that the portion of the capital gain from the sale of stock acquired from the employee stock option which was not included in New York adjusted gross income, i.e., \$39,437.00, was a New York item of tax preference subject to New York State minimum income tax.

5. During the year in question and for some years prior thereto, petitioner was a salaried employee of American Broadcasting Companies, Inc. (hereinafter "ABC"). In 1973, petitioner was granted an option to purchase shares of common stock of his employer, pursuant to a qualified stock option plan entitled "1973 Key Employees Stock Option Plan for American Broadcasting Companies, Inc." (hereinafter "the Plan").

6. In June of 1973, petitioner exercised a portion of the option granted under the Plan by purchasing 3,000 shares of common stock of ABC. Petitioner again exercised his option granted pursuant to the Plan in January of 1974, purchasing an additional 3,000 shares of common stock. In August 1978, petitioner disposed of all 6,000 shares of common stock of ABC, realizing a gain of some \$184,234.00. Since petitioner held the 6,000 shares of common stock for more than three years, as required by section 422(a)(1) of the Internal Revenue Code, the gain on the sale of said stock was taxed as a long-term capital gain. The 6,000 shares of common stock of ABC acquired by petitioner pursuant to the Plan were purchased with personal funds and any gain or loss on the disposition of said stock was borne solely by petitioner.

7. The record herein does not disclose the option price, the fair market value of the ABC stock on the dates petitioner exercised his option or the selling price of the stock upon disposition.

8. Petitioner maintains that the gain realized on the disposition of the 6,000 shares of ABC common stock represents income from the sale of intangible personal property as defined in section 632(b)(2) of the Tax Law and 20 NYCRR 131.5, and that he was not engaged in a business, trade, profession or occupation carried on in New York State as defined in 20 NYCRR 131.4(a). Petitioner asserts that the common stock acquired pursuant to the Plan was not property employed in a business, trade, profession or occupation carried on in New York and, therefore, the gain realized on the disposition of said stock is not taxable to a nonresident of New York.

CONCLUSIONS OF LAW

A. That section 632(a)(1) of the Tax Law partially defines the New York adjusted gross income of a nonresident individual as:

"The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income...derived from or connected with New York sources".

Section 632(b)(1)(B) of the Tax Law partially defines income and deductions derived from or connected with New York sources as those items attributable to a business, trade, profession or occupation carried on in New York. Section 632(b)(2) of the Tax Law provides, in pertinent part, that:

"Income from intangible personal property, including... gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state."

B. That in Michaelsen v. State Tax Commission, (___ NY2d ___ [July 8, 1986]), the Court of Appeals held that stock options granted to petitioner were:

"compensation attributable to his 'business, trade, occupation, or profession carried on in this state' and therefore taxable in New York under Tax Law §632(b) (1) (B)".

"the taxable gain is the difference between the option price and fair market value of the stock on the date the option is exercised, and that gain derived from the subsequent sale of such stock is not income derived from New York sources and thus not taxable."

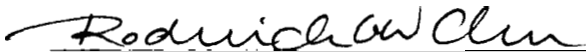
C. That the record in this matter does not reveal the option price, fair market value of the **ABC** stock on the dates the options were exercised and the selling price of said stock. Accordingly, this matter is remanded back to the Tax Appeals Bureau for a further hearing to determine, consistent with the Court's decision in Michaelsen, supra, those portions of the long-term capital gain and item of tax preference generated from petitioner's employee stock option plan which were derived from New York sources.

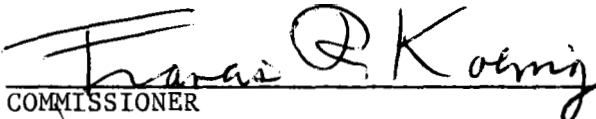
D. That the petition of James **E.** Duffy and Julie D. Duffy is granted to the extent indicated in Conclusions of Law "B" and "C", supra; and that, except as **so** granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER