

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

J. WESLEY VIBBARD (DECEASED) AND LOUISE VIBBARD:

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the **Tax** Law for the Year 1982.

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Petitioners, J. Wesley Vibbard (deceased) and Louise Vibbard, 110 Orchard Street, Schoharie, New York 12157, 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 1982 (File No. 61931).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman Campus, Albany, New York on February 24 1987, with all briefs to be submitted by May 19, 1987. The petitioner appeared by Frank A. Decker, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly concluded that the amount claimed by Mr. Vibbard as a business bad debt should have been treated as a nonbusiness bad debt.

#### FINDINGS OF FACT

1. Petitioners, J. Wesley Vibbard and Louise D. Vibbard, filed a New York State Resident Income Tax Return for the year 1982 wherein they elected a filing status of "Married filing separately on one return". On this return, Mr. Vibbard claimed a business bad debt arising from a default on the balance of a promissory note.

2. On April 8, 1985, the Audit Division issued a Notice of Deficiency to petitioners asserting a deficiency of personal income tax in the amount of \$3,127.98 plus interest of \$695.23 for a balance due of \$3,823.21. The basis of the asserted deficiency was that the default on the promissory note should be treated as a nonbusiness bad debt.

3. Prior to 1970, Mr. Vibbard and a Mr. Cornelius Wright were partners in a store known as the Schoharie Department Store ("the business"). The business was located on Main Street in Schoharie, New York. In January 1970, Mr. Vibbard became the sole owner of the business.

4. Prior to and during the years 1970 through 1972 Mr. Vibbard practiced law in an office located on Main Street in Schoharie, New York. Several times a day Mr. Vibbard would leave his law office and go to the business.

5. Mr. Vibbard's duties with respect to the business consisted of maintaining the recordkeeping system, banking, participating in decisions with respect to the quantity and quality of inventory, pricing, determining insurance coverage, maintaining payroll and hiring and firing employees.

6. In 1973, Mr. Vibbard sold the business to Wayne J. Willey. Mr. Willey's purchase of the business was financed in part by a promissory note signed by Mr. and Mrs. Willey. The promissory note represented a portion of the purchase price for the sale of the business inventory.

7. Petitioners reported the sale of the business on their Federal and New York State income tax returns.

8. In or about April 1977, Mr. Willey ceased making payments on the promissory note. At the time of the default, the amount due on the promissory note was \$31,055.16.

9. In 1982, Mr. Willey filed a petition in bankruptcy in the United States Bankruptcy Court for the Northern District of New York. The petition included the balance due on the promissory note.

10. The Internal Revenue Service has not questioned Mr. Vibbard's treatment of the debt as a business bad debt.

CONCLUSIONS OF LAW

A. That I.R.C. § 166(d)(2) defines a "nonbusiness debt" as a debt other than:

"(A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer; or

(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business."

B. That the Audit Division properly concluded that the debt in issue was a nonbusiness bad debt since Mr. Vibbard was not in the business of providing financing for the purchase of a store's entire inventory. Therefore, the Audit Division properly treated the debt as a short-term capital loss (I.R.C. § 166[d][1]).

C. That the fact that the Internal Revenue Service did not question petitioner's Federal return is irrelevant. The State Tax Commission may conduct an independent audit or examination.

D. That since Mr. and Mrs. Vibbard filed separately on one return and the bad debt in issue was only claimed by Mr. Vibbard, the Notice of Deficiency is cancelled with respect to Mrs. Vibbard.

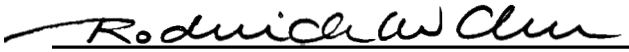
E. That the petition of J. Wesley Vibbard (deceased) and Louise Vibbard is granted only to the extent of Conclusion of Law "D", except as so granted,

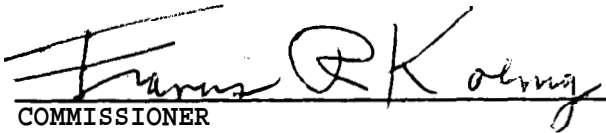
the petition is denied and the Notice of Deficiency, dated April 8, 1985 is sustained.

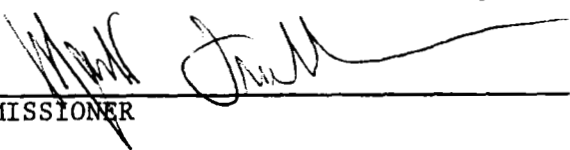
DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987

  
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