

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

WILLIAM R. NOLDY AND THERESA NOLDY

DETERMINATION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1982 through 1984.

Petitioners, William R. Noldy and Theresa Noldy, RD 5, Montrose, Pennsylvania 18801, 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 1982 through 1984 (File No. 67889).

A hearing was held at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Campus, Albany, New York, on June 10, 1987 at 9:15 A.M. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether income or **loss** from a farming operation carried on by petitioners was includible in the calculation of petitioners' New York taxable income.

FINDINGS OF FACT

1. Petitioners, William R. Noldy and Theresa Noldy, residents of Pennsylvania, timely filed joint New York State nonresident personal income tax returns for the years 1982, 1983 and 1984.

2. Mr. Noldy **was** an employee of International Business Machines, Inc. ("IBM") and worked full time at IBM facilities located in New York State. For the years in question, Mr. Noldy reported his wages from IBM as New York taxable income.

3. From the early 1960's until 1981, Mr. and Mrs. Noldy operated a hobby farm in Pennsylvania where they resided. They grew primarily potatoes, tomatoes, corn and other vegetables which were sold to Mr. Noldy's friends and co-workers at IBM. Petitioners increased the size and scope of their farming operations over a period of time, and by 1981 they began operating the farm for profit.

4. In June 1984, petitioners filed amended tax returns for 1981 and 1982 where they reported income and losses from farming and subtracted the farming losses from total New York income. Petitioners also filed 1983 and 1984 returns where they reported farming income and losses and claimed such losses as offsets against total New York income.

5. Based upon an audit of petitioners' returns, the Audit Division determined that petitioners' farming operations were not-for-profit; therefore, petitioners were not allowed to deduct their farm expenses from their gross income for Federal purposes. Furthermore, since the farm was located outside New York State, income or loss attributable to the farm was not to be included in petitioners' New York income. The Audit Division recalculated petitioners' New York tax liability for the years 1981, 1982, 1983 and 1984 and issued a Statement of Audit Changes on January 22, 1986 showing additional tax due for the latter three years of \$2,518.37. No assessment was issued for 1981 because the statute of limitation for that year had expired. However, by issuance of the statement, the Audit Division denied petitioners' refund claim for 1981.

6. On April 11, 1986, the Audit Division issued to petitioners a Notice of Deficiency for 1982, 1983 and 1984, asserting additional tax due of \$2,518.37 plus interest.

7. Petitioners timely protested the above notice and provided the Audit Division with additional information regarding their farming operations. On

the basis of the new information, the Audit Division conceded that the farm operation was a business for profit and that the claimed losses were allowable as Federal deductions. However, it took the position that because the farm property was located outside New York State and petitioners did not occupy, maintain or operate property in New York State, no portion of the income or loss from the farm operation could be considered in computing New York taxable income. By letter dated April 24, 1986, the Audit Division revised its prior calculations, asserting a tax due of \$621.00 for 1982, \$804.00 for 1983 and \$905.62 for 1984 plus interest for each of the three years.

8. Petitioners conducted a full range of farming activities in Pennsylvania. By 1984, the farm produced approximately 50,000 pounds of potatoes, 200 bushels of tomatoes, 1,800 ears of sweet corn and other vegetables. All of petitioners' sales occurred in New York State. Sales were solicited through advertisements in a Binghamton newspaper and word of mouth. During the audit period, petitioners had 200 to 300 customers, almost all of whom were Mr. Noldy's friends and co-workers at IBM. During the harvesting season, September through November, Mr. Noldy would truck produce to his workplace where it was distributed to his customers. Over the years, Mr. Noldy developed a network among his co-workers for taking orders, collecting payment and distributing the produce.

9. In 1983, petitioners began storing their produce in a friend's basement in Johnson City, New York. Such storage occurred from November through January of the year. No sales took place at this location. Petitioner did not pay rent or any other fee for the use of the basement.

10. It is petitioners' position that advertisement, recurrent sales and storage of produce in New York State is sufficient to establish that they were doing business in New York State for State tax purposes.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a nonresident individual shall be the net amount of items of income, gain, loss and deduction entering into his or her Federal adjusted gross income, derived from or connected with New York sources, with certain modifications not at issue herein (Tax Law § 632[a][1]).

B. That Tax Law § 632(c) provides that:

"If a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

C. That 20 NYCRR 131.14 provides as follows:

"A business, trade, profession or occupation (as distinguished from personal services as an employee) **is** carried on partly within and partly without New York State when one or more of the activities described in subdivision (a) of section 131.4 of this Part is systematically and regularly carried on within New York State and one or more of such activities is systematically and regularly carried on outside New York State, or when one or more of such activities is systematically and regularly carried on both within and without New York State."

D. That 20 NYCRR 131.4(a)(2) provides that:

"A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when he occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where his affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. **If** a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for his income or part thereof, he is carrying on a business or occupation."

E. That petitioners have not established that their activities were carried on in New York State with a sufficient measure of permanency and continuity to be a business (see 20 NYCRR 131.4[a][2]). Although petitioners regularly carried out transactions for profit in this State, they maintained no business situs in New York State. The mere solicitation of sales and delivery of goods does not constitute the carrying on of business for tax purposes. Furthermore, even if it was concluded that petitioners carried on some portion of their business in New York State, it would also be apparent that they carried **on** business without New York State as well. Under such circumstances, an apportionment and allocation of items of income, gain, loss and deduction is required (Tax Law § 632[c]; 20 NYCRR 131.12). Under no circumstances would it have been appropriate for petitioners to attribute all items of income and loss to their New York State adjusted gross income.

F. That the petition of William R. Noldy and Theresa Noldy is denied, and the Notice of Deficiency issued on April 11, 1986 is sustained, as modified by the Audit Division on April 24, 1986.

DATED: Albany, New York

SEP 03 1987


ADMINISTRATIVE LAW JUDGE