

BUREAU OF LAW

MEMORANDUM

Corporation Tax Determination
1966 9-2
Union News Company

TO: Commissioners Murphy and Macduff

FROM: E. H. Best, Counsel

SUBJECT: Application of Union News Company for revision or refund of Franchise Taxes under Article 9-A of the Tax Law for the privilege year ending December 31, 1957

A hearing with reference to the above matter was held on May 17, 1966 at 60 Centre Street, New York, New York. The appearances and the evidence produced were as shown in the stenographic minutes.

The issue involved is whether \$215,140.61 representing the normal contribution of the taxpayer to a pension plan should be allowed as a deduction. In 1957 the American News Company and its wholly owned subsidiaries, the Union News Company (the taxpayer) and the American Lending Library, Inc. were participants in one pension plan. In that year the American News Company discontinued a large part of its business and discharged most of its employees. As a result, withdrawal credits arose with the insurance company underwriting the pension plan which exceeded the normal cost of the plan for the three companies for that year. The Union News Company paid to the American News Company \$240,194.51 as its share of its pension costs. \$215,140.61 of the amount paid represented the normal costs of the Union News Company for that year. The Internal Revenue Service disallowed the latter amount by the Union News Company as a deduction on the consolidated Federal tax returns and the income reported by the American News Company for its retention of these monies was eliminated. Separate returns are filed in New York State.

Under Federal law, contributions paid by an employer to a pension plan must meet the requirements of section 162 (relating to trade or business expenses) or section 213 (relating to expenses for the production of income), and further satisfy the requirements of section 404 of the Internal Revenue Code before they can be deducted as business expenses.

To satisfy section 404(a)(2) credits arising from dividends, experience rating, surrender or cancellation, as they are determined, must be applied within the current taxable year of

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the employer in which received or within the next succeeding taxable year toward the purchase of retirement annuities under the plan. Section 1.404(a)-8 of the Regulations of the Treasury Department provides that there must be a definite written arrangement between the employer and the insurer that refunds of premiums shall be so applied. No refund may be made during the continuance of the plan unless applied as aforesaid.

The taxpayer contends that it made a bona fide payment for its share of the cost of the pension plan and should be allowed a deduction by New York State for the payment on the basis of equity and should not be penalized by the improper acts of its parent, American News Company. The Federal audit disallowed the deduction on the grounds that the retention by the American News Company of the funds paid to it by the Union News Company for its normal costs of the plan and using the withdrawal credits belonging to the American News Company to pay the contributions of all participants of the plan rendered the plan improper. American News had in effect converted its credits into cash. Since the plan was rendered improper, all employer contributions to it by the participating companies were not deductible by them.

In order to comply with the provisions of section 404(a)(2) of the Internal Revenue Code, American News Company should have transferred the monies received from Union News Company to the insurance company. If this were done, American News Company would have retained additional credits applicable to the cost of the plan in succeeding years. The retention of the insurance premiums for its own business purposes with the consent of Union News Company therefore resulted, in effect, in the payment by Union News Company of monies to American News Company for the business purposes of the latter and was not in compliance with the plan.

I am of the opinion that a deduction for the normal contributions of the taxpayer to the pension plan should not be allowed in conformity with the Federal disallowance. The file is hereto attached. Kindly return it after disposition.

/s/

E. H. BEST

Counsel

November 23, 1966

FVD:ken

Enc.

(Dec 8, 1966)

STATE OF NEW YORK

THE STATE TAX COMMISSION

In the Matter of the Application

of

THE UNION NEWS COMPANY

**for revision or refund of franchise
tax assessed under Article 9-A of
the Tax Law for the privilege year
ended December 31, 1957.**

The Union News Company, the taxpayer herein, having filed application for revision or refund of franchise tax under Article 9-A of the Tax Law for the privilege year ended December 31, 1957, and a hearing having been held in connection therewith at the office of the State Tax Commission in New York City on May 17, 1958 before Donald E. Gilhealy, Hearing Officer of the Department of Taxation and Finance, at which hearing Henry A. Lauer, comptroller of the taxpayer, appeared personally and testified, and the record having been duly examined and considered by the State Tax Commission,

It is hereby found:

(1) That the taxpayer was incorporated under the laws of New York on May 14, 1910;

(2) That on the basis of a field audit report, which included final Federal determinations, the tax was reviewed and recited as follows:

Privilege Year Ended December 31, 1957

Corrected Net Income	\$3,337,439.32
Business Allocation	\$2,61772
New York Base	1,720,822.00
Tax at 5 1/2%	\$ 95,205.21

(3) That in arriving at the corrected entire net income of \$3,337,439.31, a deduction for pension expense in the amount of \$240,149.31 was disallowed;

(4) That the tax was computed and restated on February 21, 1964 and application for revision or refund was filed on May 19, 1964;

(5) That in 1967 The American News Company and its two wholly owned subsidiaries, American Lending Library, Inc. and the taxpayer, were participants in a pension plan; that during 1967 The American News Company discontinued a substantial part of its business and terminated most of its employees; that due to these terminations, withdrawal credits arose during 1967 which exceeded the total normal costs of the plan to The American News Company and the two subsidiaries; that during 1967 the taxpayer paid to The American News Company \$240,149.31 as its share of the pension costs;

(6) That in 1967 The American News Company and the two subsidiaries were included in a consolidated Federal income tax return; that the United States Treasury Department made a final Federal determination disallowing all pension expenses deducted on the consolidated Federal income tax return filed for the calendar year 1967 since the withdrawal credits exceeded the total normal costs of the plan;

(7) That taxpayer contends \$213,149.61 of the amount paid to The American News Company, representing the normal contributions it would have been required to make as its share of the pension costs, if the withdrawal credits were not available, should be allowed as a deduction;

(8) That Section 205.9 of Article 9-A of the Tax Law provides in part:

"9. The term 'entire net income' means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department * * * * *."

Upon the foregoing findings and upon all of the evidence presented, it is hereby

FINDINGS:

(1) That the amount of \$215,140.61 was not allowed as a deduction by the United States treasury department in computing entire taxable income for Federal income tax purposes;

(2) That, similarly, the amount of \$215,140.61 is not allowable as a deduction in computing entire net income for franchise tax purposes pursuant to Section 230.9 of Article 9-A of the Tax law quoted at (3) above;

(3) That the tax for the privilege year ended December 31, 1967, as shown at (2) above, is affirmed as assessed;

(4) That the aforesaid tax does not include taxes or other charges which are not legally due.

Dated: Albany, New York

this 27th day of December 1966.

THE STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

COMMISSIONER

/s/

JAMES R. MACDUFF

COMMISSIONER

COMMISSIONER