

BUREAU OF LAW

MEMORANDUM

Income Tax Determinations
A-Z
Krimm, Richard W. &
Mary E.

TO: **Commissioners Murphy and Macduff**

FROM: **Alfred Rubinstein, Hearing Officer**

SUBJECT: **Richard W. and Mary E. Krimm**
Petition for a redetermination of a
deficiency or for refund of personal
income taxes under Article 22 of the
Tax Law for the year 1963

A hearing with reference to the above matter was scheduled before me at 80 Centre Street, New York, New York on November 1, 1966. The taxpayers defaulted in appearance at the hearing.

The issues involve (1) whether the taxpayers were New York residents during 1963, and (2) disallowance of a deduction for a claimed capital loss.

Taxpayers filed a nonresident return, form IT-203, allocating to New York \$9,317.30 out of total income of \$10,073.03. Taxpayer Richard Krimm, an officer and stockholder of Pennayork Lumber Corporation, reported losses of \$3,000 for stock of Northern Pine Corporation and \$3,200 for stock of Pennayork Lumber Corporation, claiming the securities became worthless in 1963, and deducted \$1,000, the maximum deduction permitted on the Federal return. By audit changes dated May 10, 1965 the Income Tax Bureau disallowed the deduction for the claimed loss, on the ground that the taxpayers were nonresidents, and the loss claimed was not incurred in carrying on a business within the State. In answer to question "C" on the return, taxpayers denied that they were New York residents for any part of the year.

Taxpayers now contend (1) that they were residents of New York for 1963 and (2) that as the majority stockholder and president of Pennayork Lumber Corporation, Richard Krimm is entitled to deduct the loss on the Corporation's worthless stock (see taxpayer's petition for redetermination verified October 6, 1965).

Under Article 16 of the Tax Law section 360(11), formerly applicable, a nonresident's deductions for the purpose of computing income from New York sources are allowable "only if, and to the extent that, they are connected with income arising from sources within the state and taxable under this article to a nonresident taxpayer." Volume 20 NYCRM 268.2, the regulation applicable to

section 360(11) provides that loss from the sale, exchange or other disposition of stock shall not be deducted in computing New York income by a nonresident unless incurred in a business carried on within the State.

The Manual of Policy, Article 411, in referring to section 360(11) cites Travis v. Yale and Towne Manufacturing Co., 252 U.S. 60, Shaffer v. Carter, 252 U.S. 37 and Goodwin v. State Tax Commission, 286 App. Div. 694, aff'd 1 N Y 2d 680, as authority for the propriety of limiting deductions of nonresidents to expenses connected with income derived from sources within the State, since income derived from sources without the State is not within the State's taxing power. Residents, subject to the State's plenary taxing power on all their income, including income from without the State, may be allowed out-of-State deductions not allowable to nonresidents.

Article 22 of the Tax Law, applicable to this proceeding, provides:

Section 632(b)(1) provides that a nonresident's items of gain or loss from or connected with New York sources are items attributable to (A) ownership of real or tangible personal property within the State or (B) a business, trade, profession or occupation carried on in the State.

Section 632(b)(3) provides that a nonresident's capital loss deduction shall be based solely on loss derived from or connected with New York sources.

The relevant proposed Personal Income Tax Regulations are:

Reg. 131.2 which provides (a) a nonresident individual's items of income, gain, loss and deduction derived from or connected with New York sources are the items attributable to (1) the ownership of any interest or tangible personal property in this State; or (2) a business, trade, profession or occupation carried on in this State, and (b) the determination as to whether items of income, gain, loss and deduction are derived from or connected with New York sources is made in accordance with sections 131.3 and 131.4 below.

Reg. 131.3 provides that adjusted gross income of non-residents includes all items of his Federal adjusted gross income "attributable to the ownership of any interest in real or tangible personal property in this State", and includes rental income from such property.

Reg. 131.4 provides that adjusted gross income of non-residents includes all items of the Federal adjusted gross income "attributable to a business, trade, profession or occupation carried on in this State", and further provides that "a taxpayer may enter into transactions for profit within the State and yet not be engaged in a trade or business within the State."

Reg. 131.5 provides that "Items of income, gain, loss and deduction attributable to intangible personal property of a nonresident individual, including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property, do not constitute items of income, gain, loss and deduction derived from or connected with New York sources except to the extent attributable to property employed in a business, trade, profession or occupation carried on in this State."

EXAMPLE: A, a resident of New Jersey owns 100 per cent of the stock of X corporation, which operates a store in New York State. In 1960, the corporation pays A a salary of \$10,000, all of which was earned in New York, and a dividend of \$2,000. A's income from New York sources is his salary of \$10,000, since the dividend is not income derived from New York sources."

Reg. 131.6 provides that deductions for capital losses are included in New York adjusted gross income only to the extent that such deductions are based on items of income, gain, loss and deduction derived from or connected with New York sources.

Reg. 131.8 provides that "A nonresident individual, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, is not deemed to be carrying on a business, trade, profession or occupation in this State solely by reason of the purchase and sale of property for his own account. However, a nonresident is subject to tax upon items of income and gain attributable to the ownership of real or tangible personal property in this State (see section 131.3)."

The statutes, regulations and cases are clear and unambiguous. Inasmuch as the mere ownership of stock in a corporation does not constitute carrying on a business, trade, profession or occupation, and is not ownership of real or tangible personal property, taxpayer's claimed loss is neither from nor attributable to New York sources.

At the time the nonresident return was filed, the taxpayers considered themselves to be nonresidents. A portion of their income was allocated without the State and they denied that they were residents of New York for any part of the taxable year. This contradicts and controverts their subsequent claim that "I was a resident of New York State during the taxable year 1963", contained in the petition, a conclusion unsupported by any evidence.

I am, therefore, of the opinion that the notice of deficiency and statement of audit changes should be sustained.

The decision of the Tax Commission should be substantially in the form herewith submitted.

/s/

ALFRED RUBINSTEIN

Hearing Officer

December 13, 1966

AR:ew
Enc. (Dec. 16, 1966)

/s/

MARTIN SCHAPIRO

Approved

/s/

SAUL HECKELMAN

Approved

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION
OF

RICHARD V. AND MARY E. KRIMM

FOR A REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF PERSONAL INCOME TAXES UNDER
ARTICLE 22 OF THE TAX LAW FOR THE YEAR 1963

Richard V. and Mary E. Krimm, having filed a petition for a redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1963 (File # 3-6113357) and a notice of hearing having been duly served by mail on the taxpayers on September 19, 1966, setting down a hearing for November 1, 1966 at 2:00 p.m., at 80 Centre Street, New York, New York, before Alfred Rubinstein, Hearing Officer of the State Tax Commission, and the taxpayers having defaulted in appearing, and a notice thereafter having been served on the taxpayers by registered mail, according them further opportunity to appear and be heard, and an official receipt of the United States Post Office having been received as proof of delivery of said notice, and the taxpayers not having responded thereto, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed a nonresident personal income tax return for the year 1963, allocating to New York income of \$9,117.30 and reporting a tax of \$194.96; that after audit the Income Tax Bureau issued a notice of deficiency and statement of audit changes dated May 10, 1965 disallowing a

deduction of \$1,000 from taxpayer's New York income for a loss claimed to have been incurred on intangible personal property on the ground that such loss was not connected with a business carried on by the taxpayer in New York, and recomputed the tax to show a deficiency of \$50.

(2) That during 1963 the taxpayers had income from New York sources in the amount of \$10,317.30; that taxpayers' claimed loss on shares of stock of Pennsylvania Lumber Corporation, of which taxpayer, Richard Krinn, claims he was the president and majority stockholder, alleged to have become worthless, was not attributable to ownership by the taxpayers of real or tangible personal property within the State, nor attributable to a business, trade, profession or occupation carried on by the taxpayers within the State; and that at no time during 1963 were the taxpayers residents of New York.

Based on the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DECIDES:

(A) That the taxpayers were not residents of New York for any portion of the year 1963.

(B) That the deduction of \$1,000 claimed as a capital loss was properly disallowed as not being attributable to a business, trade, profession or occupation carried on in New York nor attributable to ownership of real or tangible personal property owned in New York; that accordingly, the taxpayers' income from New York sources for 1963 was \$10,317.30 and not \$9,317.30 as reported by the taxpayer.

(C) That, accordingly, the notice of deficiency imposing additional taxes upon the taxpayers for 1963 is correct and the

amount set forth therein is due and owing together with additional interest and other statutory charges; that the said notice of deficiency does not include any tax or other charges which could not have been lawfully demanded, and that the taxpayers' petition for a redetermination or refund with respect thereto be and the same hereby is denied.

DATED: Albany, New York, the 27th day of December , 1966 .

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

PRESIDENT

/s/

JAMES R. MACDUFF

COMMISSIONER