L 9 (2-67)

Income Tax Determinations
A-2

BUREAU OF LAW
MEMORANDUM

Petty Elizabeth E. and Travis L.

TO:

Commissioners Murphy, Kosoff and Conlon

FROM:

Francis V. Dow, Hearing Officer

SUBJECT:

In the matter of the application of Travis L. & Elizabeth E. L. Petty for revision or refund of personal income taxes under Article 22 of the Tax Law for the year 1961

A hearing with reference to the above matter was scheduled before me on November 16, 1966. The taxpayers defaulted at the hearing. A letter was subsequently written to them which afforded them an opportunity to have the hearing rescheduled at a later date. No response to the letter was received.

The question involved herein is whether the taxpayers are allowed to modify their 1961 Federal adjusted gross income by deducting therefrom a 1960 capital loss carryover and income earned outside New York State.

The taxpayers filed a joint 1961 New York resident return in which they modified their Federal adjusted gross income in computing their New York adjusted gross income. An assessment (Assessment No. AS 022626) was issued on September 12, 1962 which disallowed these modifications. The taxpayers were permitted to revise their 1961 return on January 5, 1964 to recompute their tax liability on a separate basis rather than on a joint basis as originally computed by them. As a result of this revision and payments made on the original assessment, the taxpayers' additional tax liability was restated on March 23, 1964 to be in the sum of $56.17. The modifications claimed by the taxpayers represented a capital loss sustained in 1960 which could not be deducted by the taxpayers in computing their 1960 or 1961 Federal adjusted gross income and which could not be deducted by them in computing their 1960 New York adjusted gross income; the sum of $1,295.48 which represented income from the rental of real property located in Rhode Island; and the further sum of $720 which represented dividends earned from a company not doing business in New York State.

The taxpayers became residents of New York State on June 19, 1960. Their net capital gains on the sale of stock during the period from January 1, 1960 to June 19, 1960, while they were nonresidents, amounted to $1,765.45. From June 20, 1960 through December 31, 1960 the period during which they were residents they sustained a net capital loss on the sale of stock of $3,295.52. Their net capital loss for the entire year of 1960 was $1,529.07 ($3,295.52 capital loss less $1,765.45 capital gain). The taxpayers deducted $1,000 of their capital losses in computing their 1960 Federal adjusted gross income.

In 1961, the taxpayers had net capital gains of $2,087.05. They deducted $569.07, the balance of their unused 1960 Federal capital loss carryover, from their 1961 net capital gains. This reduced their 1961 net capital gains to $1,517.98. 50% of this amount or $758.99 was reported as their income from the sale or exchange of property and was included in their 1961 Federal adjusted gross income of $55,751.90.

The taxpayers claim to be entitled to modify their 1961 Federal adjusted gross income by deducting $1,766.45 the amount of capital gains realized in 1960 while they were not residents of New York. Subsequently, the taxpayers changed their position and claimed a modification in the sum of $758.99, the amount of their federal income from the sale or exchange of property, rather than the sum of $1,766.45. The taxpayers contended that if they are not allowed to modify their federal income in this manner, they are being taxed on capital gains realized in 1960 during a time when they were not residents of New York.

The taxpayers' argument, while erroneous, points up the fact that they are not being allowed to deduct capital losses sustained while residents of New York from capital gains realized while residents of New York. Prior to the adoption in 1960 of the provisions of the laws of the United States relating to personal income tax, a net capital loss could be carried over for the next succeeding five taxable years and deducted from net capital gains of any such taxable years to the extent that such capital losses exceeded the total of net capital gains for the taxable years.

It is my opinion that the taxpayers cannot compute their New York adjusted gross income by modifying their Federal adjusted gross income by the deductions claimed by them. Section 612 of the Tax Law provides that New York adjusted gross income of a resident is his Federal adjusted gross income with modifications specified in that section. There is no provision allowing a modification with respect to an "unused capital loss carryover from New York sources".

This view is supported by section 148.7(b) of the proposed regulations of the Department of Taxation and Finance which have been signed by the State Tax Commission but which have not yet been filed with the Secretary of State. Section 148.7(b) of the proposed regulations, applicable to taxpayers who change their resident status during the year, provides that net capital gains and losses are to be computed separately for the resident period and the nonresident period covered by their tax returns. Computation is to be made in the same manner as the corresponding Federal computation and on the same basis as if the taxable year for Federal income tax purposes were limited to the taxable period covered by the applicable New York return. It further provides that in any year subsequent to the year in which the resident status [illegible] effect shall be given to any net capital loss carryover computed on the New York return for the period subsequent to the change [illegible] only to that return to which it is applicable in computing capital gains or gross income for the subsequent year or years for which it is claimed. (Emphasis added)

There is no provision of the Tax Law which permits a resident taxpayer to deduct rental income from property located outside of New York State. The U. S. Supreme Court has held that a state may tax a resident on income received from the rental of real property located outside the taxing state (Cohn v. Graves, 300 U. S. 308). The Cohn case arose in New York and [illegible] New York's highest court in holding that the state may tax the income from rent a resident receives from real property located in another state (Cohn v. Graves, 271 N. Y. 353). There is no provision in the Tax Law that permits a resident taxpayer to modify his Federal adjusted gross income by deducting dividends received from a company not doing business in New York State.

For the reasons stated above, I recommend that the determination of the Tax Commission denying the taxpayers' application in the above matter be substantially in the form submitted herewith.

/s/ FRANCIS V. DOW
[illegible]

FVD:lb
Enc. 1-5-67

March 30, 1967

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

TRAVIS L. & ELIZABETH G. E. PETTY

FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 22 OF THE TAX LAW FOR THE YEAR 1961

The taxpayers, Travis L. & Elizabeth G. E. Petty, having filed an application for revision or refund of income taxes under Article 22 of the Tax Law for the year 1961, and a hearing having been scheduled in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on the 16th day of November, 1966 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, and the taxpayers having defaulted in appearance at the scheduled hearing, and a letter having subsequently been sent to the taxpayers on November 23, 1966 affording the taxpayers an opportunity to have the hearing rescheduled, and the taxpayers having failed to respond to such letter and the matter having been reviewed and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers became residents of the State of New York on June 19, 1960 and as such residents filed a joint income tax return for the year 1961.

(2) That the taxpayer's net capital gain from January 1, 1960 to June 19, 1960 was $1,766.45; that the taxpayer's net capital loss from June 19, 1960 to December 31, 1960 was $3,295.52; that their net capital loss in the entire year of 1960 was $1,529.07.

(3) That the taxpayers deducted $1,000 of their 1960 capital loss in computing their 1960 Federal and New York adjusted gross income; that the taxpayers deducted their Federal capital loss carryover of $529.07 in computing their 1961 Federal adjusted gross income.

(4) That the taxpayers claimed modification of their reported 1961 Federal adjusted gross income by deducting therefrom (1) the sum of $1,254.48 which represented income from the rental of real property located in Rhode Island, (2) the sum of $720 which represented dividends from a company not doing business in New York State and (3) the sum of $1,766.45 which represented the unused capital loss carryover sustained while residents of New York during the year 1960; that subsequently the taxpayers modified their claim by claiming to be entitled to a modification of $756.99, the amount of their Federal income from the sale and exchange of property instead of the amount of $1,766.45 as stated above in computing their New York adjusted gross income.

(5) That a notice of assessment of additional income taxes in the sum of $266.42 was issued (Assessment No. AR 022828) disallowing modification of their reported Federal adjusted gross income as claimed in (4) above; that the taxpayers were permitted to compute their tax liability on a separate basis; that the taxpayers' tax liability was recomputed and the said assessment was restated in the sum of $56.17 on March 25, 1964.

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

DETERMINES:

(A) That the income of the taxpayers from rental of real property located outside of New York State amounting to $1,254.48 is taxable since rental income is subject to taxation without regard to the location of the source from where it is derived or where it is received and there is no provision under section 612 of the Tax Law which allows computation of New York adjusted gross income by deducting from reported Federal adjusted gross income from property located outside of New York State.

(B) That the dividend income of the taxpayers received from a company not doing business in New York State amounting to $720 is taxable since dividend income is subject to taxation without regard to the location of its source from where it is derived or where it is received and there is no provision under section 612 of the Tax Law which allows computation of New York adjusted gross income by deducting from reported Federal adjusted gross income dividends from a company not doing business in New York State.

(C) That taxpayers cannot deduct a capital loss sustained while residents of New York in 1960, not previously deducted by them, in the sum of $736.99 or $1,766.45 from their reported Federal adjusted gross income in computing 1961 New York adjusted gross income since there is no provision in the Tax Law which provides for such a modification.

(D) That accordingly the assessment (Assessment No. AB 022828) as restated in the sum of $56.17 for the year 1961 is correct and lawfully due and owing, together with interest and other statutory charges, and does not include any other taxes or charges which are not lawfully due and owing.

Dated: Albany, New York this 12th day of April , 1967.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

COMMISSIONER

/s/ WALTER MACLYN CONLON
COMMISSIONER