

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Sheldon W. & Helene B. Newman :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Personal Income Tax :  
under Article 22 of the Tax Law :  
for the Year 1972. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of January, 1980, he served the within notice of Decision by certified mail upon Sheldon W. & Helene B. Newman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

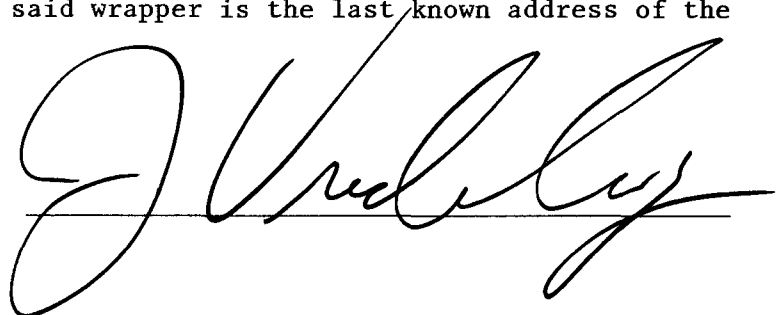
Sheldon W. & Helene B. Newman  
395 Janes Lane  
Stamford, CT 06903

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
11th day of January, 1980.

Joanne Knapp

A large, stylized handwritten signature, likely of Jay Vredenburg, is written over a horizontal line.

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

January 11, 1980

Sheldon W. & Helene B. Newman  
395 Janes Lane  
Stamford, CT 06903

Dear Mr. & Mrs. Newman:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :

SHELDON W. NEWMAN and HELENE B. NEWMAN : DECISION

for Redetermination of a Deficiency or :  
for Refund of Personal Income Tax under :  
Article 22 of the Tax Law for the Year :  
1972.

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Petitioners, Sheldon W. Newman and Helene B. Newman, 395 Janes Lane, Stamford, Connecticut 06903, 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 1972 (File No. 12284).

A formal hearing was held before George F. Murphy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 7, 1977 at 2:45 P.M. Petitioners appeared pro se. The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUE

Whether other compensation received of \$25,561.38 was taxable by the State of New York.

FINDINGS OF FACT

1. Petitioners, Sheldon and Helene B. Newman, timely filed a New York State personal income part year resident tax return and a New York State personal income part year nonresident tax return for 1972.

2. On the return for the resident period (1-1-72 to 6-26-72), petitioner Sheldon Newman reported wages of \$23,712.75, which included compensation received from Chesebrough-Pond's, Incorporated and from the City of New York.

On the return for the nonresident period, petitioner Sheldon Newman allocated wages of \$7,768.00 on the basis of days worked within and without New York State during the period June 27, 1972 to September 22, 1972. The withholding statement issued by Chesebrough-Pond's, Incorporated showed total wages paid of \$29,115.25 and other compensation paid of \$25,561.38, for a total of \$54,676.63.

3. On August 21, 1973, the Income Tax Bureau issued a Statement of Audit Changes on which the Bureau held that "other compensation" paid by Chesebrough-Pond's, Incorporated ("the Company"), in the amount of \$25,561.38, which amount was shown on the withholding statement issued to petitioner Sheldon Newman, was subject to New York State tax. Accordingly, on May 19, 1975, the Bureau issued a Notice of Deficiency asserting personal income tax of \$4,037.55, and interest of \$633.85, for a sum of \$4,671.40. The other adjustments were conceded to and are not at issue. On August 8, 1975, petitioners timely filed a "Petition for Redetermination of Deficiency or for Refund of Personal Income Tax", in which they contended that stock purchased pursuant to a 1967 stock plan, was sold when they were nonresidents of New York, and thus the gain was not reportable to New York State. Petitioners also contended that they paid a capital gains tax to Connecticut on the gains derived therefrom.

4. Pursuant to a stock purchasing plan for officers and administrative employees of the Company (in existence in 1967), petitioner Sheldon Newman subscribed in 1967 to the purchase of 310 shares of stock. The plan provided, in part, that

...all sales of shares under the plan shall be made upon the condition that the purchaser shall continue in the ownership of such shares and not sell, pledge or transfer any interest therein for a period of five (5) years after the date of acceptance of the purchase agreement by the Company.

He contended that it was the position of the corporation that the 1967 plan

and the shares issued were subject to Treasury Regulation 1.421-6 and that no ordinary income was realized in 1972 as a result of the gain on the sale of 310 shares of stock, which gain was reported as a long-term capital gain on Federal schedule "D" for 1972.

5. Pursuant to a stock purchase plan for officers and administrative employees of the Company (in existence in 1971), petitioner Sheldon Newman subscribed in 1971 to the purchase of 415 shares of one dollar par value common stock, for which he agreed to pay a consideration of \$21.20 per share, or a total of \$8,798.00 less the amount applied against the purchase price pursuant to the plan. The plan also provided that "...I will continue in the ownership of shares issued and will not sell, pledge or transfer any interest in the same for a period of five (5) years after the date of your acceptance hereof."

6. On May 5, 1972, the Company notified petitioner Sheldon Newman that the 415 shares which he agreed to purchase under the 1971 plan were not transferable and were no longer subject to a substantial risk of forfeiture. That based on its interpretation of Section 83 of the Internal Revenue Code (as amended in 1969), a taxable event had occurred and that the amount to be included as "other compensation" paid in 1972, on his Wage and Tax Statement, was \$18,799.50 (the excess of the average daily market price on May 5, 1972 over the purchase price of \$21.20 per share). The average of the market quotations for said stock on May 7, 1972 was 66-1/2.

7. The Company also included the amount of \$6,761.88 as other compensation on petitioner Sheldon Newman's Wage and Tax Statement, in addition to the \$18,799.50 more fully set forth in Findings of Fact "6", supra, for a total of \$25,561.38.

CONCLUSIONS OF LAW

A. That Section 83(a) of the Internal Revenue Code requires a taxpayer to include in gross income the excess of the stock's fair market value over its cost, as soon as the taxpayer's interest is no longer subject to a substantial risk of forfeiture. See SAKOL v. Commissioner of Internal Revenue, 574 F.2d 694 (1978) cert. denied. That the risk of forfeiture, with respect to the 415 shares purchased under the 1971 stock purchase plan was removed on May 5, 1972 and constituted ordinary income for 1972 for New York State tax purposes within the meaning and intent of Section 612(a) of the Tax Law and 20 NYCRR 116.1.

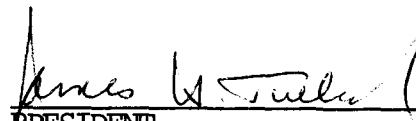
B. That the income realized by petitioner Sheldon Newman during 1972, from the sale of 310 shares of stock purchased in 1967, constituted ordinary income to the extent of the difference between the option price and the market value of the shares at the time he acquired the unrestricted right to receive said stock (5-10-72), in accordance with the meaning and intent of Section 421 of the Internal Revenue Code. Therefore, petitioner Sheldon Newman was required to report ordinary income on his return for the resident period.

C. That the petition of Sheldon W. and Helene B. Newman is denied. The Notice of Deficiency issued May 19, 1975 is sustained, together with such additional interest as may be lawfully owing.

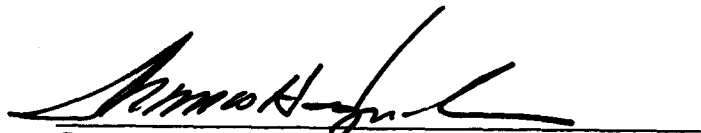
DATED: Albany, New York

**JAN 11 1980**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER