

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John J. & Carole E. McDougall :
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 :
1973. :

AFFIDAVIT OF MAILING

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 9th day of October, 1981, he served the within notice of Decision by certified mail upon John J. & Carole E. McDougall, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

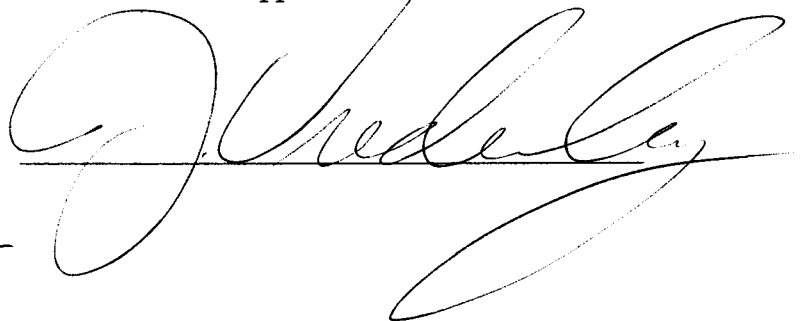
John J. & Carole E. McDougall
90 Dogwood Lane
Rye, NY 10580

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
9th day of October, 1981.


Carmi A. Hagelund



STATE OF NEW YORK
STATE TAX COMMISSION

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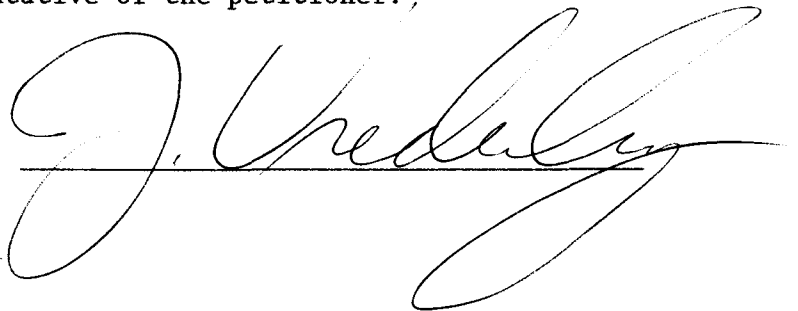

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1981, he served the within notice of Decision by certified mail upon Gary Jakalow the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gary Jakalow
Teichner & Swerlin
635 Madison Avenue
New York, NY 10022

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
9th day of October, 1981.

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

October 9, 1981

John J. & Carole E. McDougall
90 Dogwood Lane
Rye, NY 10580

Dear Mr. & Mrs. McDougall:

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
Gary Jakalow
Teichner & Swerlin
635 Madison Avenue
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOHN J. McDOUGALL and CAROLE E. McDOUGALL
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1973.

DECISION

Petitioners, John J. McDougall and Carole E. McDougall, 90 Dogwood Lane, Rye, New York, 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 1973 (File No. 18602).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 10, 1980 at 2:45 P.M. Petitioner John J. McDougall appeared with Gary Jakalow. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether a capital gain is reportable during petitioner's resident period of January 1, 1973 to June 30, 1973.

FINDINGS OF FACT

1. Petitioners, John J. McDougall and Carole E. McDougall, timely filed a New York State Income Tax Resident Return for the period January 1, 1973 to June 30, 1973. Attached thereto was a photocopy of a schedule of capital gains and losses indicating that on June 29, 1973, stock was sold which resulted in a long-term capital gain of \$46,817.00. A schedule for the computation of minimum income tax was not filed.

2. On February 28, 1977 the Audit Division issued a Notice of Deficiency for \$1,334.90, plus penalty and interest of \$359.98 for the year 1972, along with an explanatory Statement of Audit Changes which indicated, in part:

"The portion of long term capital gains not subject to New York personal income tax is an item of tax preference and subject to New York minimum income tax."

"Net long term capital gains are taxed by New York State at 60% rather than 50%. Accordingly, 20% of the capital gains deduction should be added to income."

Penalty under Section 685(c) of the Tax Law for underestimation of tax."

"To arrive at New York itemized deductions, Section 615(c)(4) of the State Tax Law requires that a modification must be made for allocable expenses attributable to items of tax preference in excess of the specific deduction."

The sole issue raised by petitioners was that the long-term capital gain reported of \$46,817.00 resulted from the sale of stock sold after June 30, 1973 and after they became residents of Seattle, Washington. Therefore, the capital gain was not subject to New York State taxes under Article 22 of the Tax Law, and personal income taxes of \$4,524.00 shown on the tax return were overstated by \$3,351.80.

3. Petitioner John J. McDougall was a resident of, and employed in, the State of New York when he was transferred to his employer's branch office in Seattle, Washington on July 1, 1973.

4. During his tenure with his New York employer, petitioner John J. McDougall purchased 4800 shares of various types of stock issued by his employer pursuant to a stock purchase agreement available to corporate officers. Petitioner contended that he was required to sell the stock back to his employer upon a change in his employment status, and that the stock would be purchased at the value as of the close of business on the last business day of the

previous month of his change of status. Accordingly, he argued that the reported sale date of June 29, 1973 was not the date the stock was sold, but the date used to value the stock. The aforementioned stock purchase agreement, as well as the contract of sale was not submitted for examination.

5. Petitioner submitted a copy of a memorandum dated July 5, 1973 from his New York employer granting him advance payment on the purchase of the corporate stock. Petitioner also submitted a letter from his New York employer indicating that the stock certificates purchased from petitioner were cancelled on July 18, 1973. The settlement and final payment of the net proceeds of the stock was made on August 1, 1973.

6. Petitioners, John J. McDougall and Carole E. McDougall, were cash basis taxpayers for Federal tax purposes reporting all income, gains, losses and deductions on a calendar year basis.

CONCLUSIONS OF LAW

A. That since petitioners changed their status from resident to nonresident on July 1, 1973, they must, regardless of the method of accounting they normally employ, accrue and include in their New York return for the portion of the year prior to such change, any items of income, gain, loss or deduction accruing prior to July 1, 1973. That is, petitioners must include all items as if they were filing a Federal return for the same period on the accrual basis. [20 NYCRR 148.10(a)].

B. That the gain on the sale of stock pursuant to the accrual method of accounting, is reportable in the year (or period) the contract of sale was entered into, which in this instant case constituted all the events that occurred to fix the right to receive such income and the amount thereof was

able to be determined with reasonable accuracy, in accordance with the meaning and intent of section 451 of the Internal Revenue Code and Treas. Regs. §1.451-1.

C. That petitioner John J. McDougall has failed to sustain the burden of proof required by section 689(e) of the Tax Law establishing that the date of the contract of sale was after June 30, 1973 or that the gain was accrued after June 30, 1973. Accordingly, the capital gain on the sale of the stock is reportable during his resident period (January 1, 1973 to June 30, 1973) within the meaning and intent of section 654(c) of the Tax Law and 20 NYCRR 148.10(a).

D. That the petition of John J. McDougall and Carole E. McDougall is denied and the Notice of Deficiency issued February 28, 1977 is sustained.

DATED: Albany, New York

SEP 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER