

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry M. Ringel :

: 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 Years :
1973 & 1974.

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Harry M. Ringel, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry M. Ringel
2170 Century Park E.
Los Angeles, CA 90067

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
14th day of August, 1981.

Cornelia D. Hagelund

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

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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 14th day of August, 1981, he served the within notice of Decision by certified mail upon William Levy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Levy
Bushan & Levy
1 Old Country Rd.
Carle Place, NY 11514

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
14th day of August, 1981.

Annex A Hagedorn

J. Vredenburg

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

August 14, 1981

Harry M. Ringel
2170 Century Park E.
Los Angeles, CA 90067

Dear Mr. Ringel:

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) 1090 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
William Levy
Bushan & Levy
1 Old Country Rd.
Carle Place, NY 11514
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HARRY M. RINGEL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22 :	:	
of the Tax Law for the Years 1973 and 1974.	:	

Petitioner, Harry M. Ringel, 2170 Century Park East, Los Angeles, California 90067, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973 and 1974 (File No. 20301).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 14, 1979 at 9:15 A.M. Petitioner, Harry M. Ringel, appeared by Bushan & Levy, P.C. (William Levy, CPA). The Audit Division appeared by Peter Crotty, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner, pursuant to section 1033(a) of the Internal Revenue Code, has properly elected not to recognize a gain realized from the involuntary conversion of real property.

FINDINGS OF FACT

1. Petitioner, Harry M. Ringel, reported New York income of \$14,588.00 and \$17,468.00 for the years 1973 and 1974, respectively. He did not report as New York income his distributive share of long-term capital gains shown on the partnership returns of Krieger, Berkman & Ringel (hereinafter "K, B & R").

2. On June 29, 1977 a Notice of Deficiency was issued against petitioner for the years 1973 and 1974, asserting that additional personal income tax of \$34,247.08 was due together with interest. Said Notice of Deficiency was based on an explanatory Statement of Audit Changes wherein reported New York income for 1973 and 1974 was increased by petitioner's share of the long-term capital gains reported on the partnership returns of K, B & R. Said long-term capital gains, after taking into account the capital gain deduction, amounted to \$101,850.00 for 1973 and \$62,500.00 for 1974. It is the Audit Division's position that the long-term capital gains are taxable because "[t]he partnership of Krieger, Berkman & Ringel must make the election to defer gain on its condemnation of property. Since the partnership did not make the election, you cannot defer the gain". Adjustments were also made for the 20 percent long-term capital gain modification and minimum income tax. These adjustments were based solely upon the disallowance of the election to defer taxation of the long-term capital gains and any decision affecting the taxability of said gains will also necessarily affect these two adjustments.

3. On January 1, 1953, Harry M. Ringel, Henry Berkman and Minna Krieger formed the partnership of Krieger, Berkman & Ringel. The initial journal entry on the partnership books states the purpose of formation as "the sale of real estate at College Point Causeway". Sometime during 1953 a tract of vacant land was purchased at College Point Causeway in Queens, New York for \$195,176.20. Said tract of land consisted of approximately 70 acres and title was held in the names of Henry Berkman and Minna Krieger.

4. From 1953 through 1974 the abovementioned vacant land was sold unimproved and on a piece by piece basis. By the end of 1959, approximately 90 percent of the land had been sold, leaving about $7\frac{1}{2}$ acres unsold. The income or loss

generated from this activity was consistently reported on the partnership returns of K, B & R. The yearly income or loss was distributed 50 percent to petitioner Harry M. Ringel and 25 percent each to Henry Berkman and Minna Krieger.

5. The income shown on the partnership returns of K, B & R for the years 1953 through 1974 consisted almost exclusively of interest income and long-term capital gain income from the sale of land. Expenses charged against the income consisted primarily of professional fees and real estate taxes and, for years prior to 1962, material expenses also included commission fees and interest charges. A bank account was maintained in the name of "Henry Berkman or Minna Krieger Special, I. George Berkman, Attorney".

6. During the years 1953 through 1974, K, B & R did not maintain separate office facilities, have a telephone number or printed stationery. No written partnership agreement existed between petitioner Harry M. Ringel, Henry Berkman and Minna Krieger.

7. The long-term capital gains at issue herein and referred to in Finding of Fact "2", supra, were brought about by condemnation awards received from the City of New York on certain condemned property located at College Point Causeway.

8. As indicated in Finding of Fact "3", supra, title to said condemned property was held in the names of Henry Berkman and Minna Krieger. On July 17, 1973, Berkman and Krieger assigned to petitioner Harry M. Ringel "...an undivided one-half interest in all right, title and interest of, in and to the award made or to be made by the Supreme Court in the above entitled proceeding for the taking of Damaged Parcel Nos. ...".

9. Petitioner argues that his 50 percent share of the gain realized from the condemnation awards received in 1973 and 1974 were individually reinvested

in similar property located in the City of West Covina, California on June 14, 1974 and that, pursuant to section 1033 of the Internal Revenue Code, he has properly elected not to recognize the gain on the condemnation. It is asserted that a partnership never in fact existed and, for this reason, petitioner has properly made his own election to defer the gain realized from the condemnation awards. Petitioner argues in the alternative that if it is determined that a partnership existed, that said partnership was terminated on July 17, 1973, pursuant to Treasury Regulation 1.708-1(b)(1)(ii), with the affirmative action of the assignment of the condemnation award.

10. The partnership of Krieger, Berkman & Ringel did not elect to reinvest the proceeds received from the condemnation awards made in 1973 and 1974 and Minna Krieger and Henry Berkman included in taxable income their respective share of said awards.

CONCLUSIONS OF LAW

A. That in determining whether or not a partnership exists for tax purposes, the United State Supreme Court stated that:

"The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts -- the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent -- the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."

(Comm. v. Culbertson, 337 U.S. 733, 742).

B. That section 689(e) of the Tax Law places the burden of proof upon the petitioner to overcome a deficiency. As can be seen in Comm. v. Culbertson,

supra, intent is of prime importance in determining the existence of a partnership. Petitioner did not testify at the hearing held herein nor did he submit any credible evidence with respect to the key element of intent. Petitioner has failed to sustain the burden of proof to show that a partnership did not exist. In addition, the documentary proof in this case supports the existence of a partnership: (1) petitioner and his partners voluntarily acquired by purchase the land in Queens, New York, (2) petitioner shared in the profits and losses from the sale of said land to the extent of 50 percent, even though his name did not appear on any deed, and (3) all three of the partners at one time or another had individually signed New York State partnership returns thereby evidencing that all partners were aware of reporting on a partnership basis and also shedding some evidence on intent.

C. That pursuant to section 703(b) of the Internal Revenue Code, the partnership of Krieger, Berkman & Ringel must make the election under section 1033(a) of the Code to defer any gain realized on the involuntary conversion (Revenue Ruling 66-191). Petitioner, Harry M. Ringel, cannot individually elect to defer his distributive share of the gain realized from the involuntary conversion (Roy P. Varner and Mary A. Varner et al. v. Commissioner, 32 TCM 97). Since the partnership did not elect to or in fact acquire qualified replacement property, petitioner must include in total New York income the gains realized in 1973 and 1974 from said involuntary conversion.

D. That the partnership of Krieger, Berkman & Ringel was not terminated on July 17, 1973 within the meaning and intent of section 708(b) of the Internal Revenue Code and Treasury Regulation 1.708-1(b).

E. That the petition of Harry M. Ringel is denied and the Notice of Deficiency issued June 29, 1977 is sustained, together with such additional interest as may be lawfully due.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER