

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rolf Merton :
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 :
1976. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Rolf Merton, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rolf Merton
Fiddlers Roost Knapton Est.
Smiths Parish, BERMUDA

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
6th day of May, 1983.

David Parchuck

James P. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

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of :
Rolf Merton :
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for Redetermination of a Deficiency or a Revision :
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Tax under Article 22 of the Tax Law for the Year :
1976. :

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Stephen R. Buschel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen R. Buschel
Seidman & Seidman
1 N. Broadway
White Plains, NY 10601

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
6th day of May, 1983.

David Parchuck

Annunzio A. Magliocco

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Rolf Merton
Fiddlers Roost Knapton Est.
Smiths Parish, BERMUDA

Dear Mr. Merton:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Stephen R. Buschel
Seidman & Seidman
1 N. Broadway
White Plains, NY 10601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROLF MERTON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	

Petitioner, Rolf Merton, Fiddlers Roost, Knapton Estate, Smith's Parish, Bermuda, 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 1976 (File No. 26427).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 2, 1982 at 11:10 A.M. Petitioner appeared by Stephen R. Buschel, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether long-term capital gains, resulting from the redemption of preferred stock by a corporation located in a foreign country, received "preferential treatment" pursuant to section 58(g)(2)(B) of the Internal Revenue Code.

FINDINGS OF FACT

1. On December 1, 1978, the Audit Division issued a Statement of Audit Changes to petitioner, Rolf Merton, wherein his New York personal income tax liability was recomputed on the basis that "(t)he remainder of Long Term Capital Gains not subject to New York Personal Income Tax is considered to be

an Item of Tax Preference and subject to New York Minimum Income Tax." Accordingly, on April 10, 1979, it issued a Notice of Deficiency in the amount of \$5,044.68, plus interest of \$850.54, for a total of \$5,895.22.

2. Petitioner timely filed his 1976 New York State income tax return. In 1976, Sulpetro of Canada, Ltd. ("Sulpetro"), a Canadian corporation, redeemed 8,394 shares of its preferred stock owned by petitioner resulting in a long-term capital gain to petitioner of \$342,689.00. Petitioner reported fifty percent of said amount in computing his net capital gain for federal income tax purposes. A Canadian form, similar to Federal form 1099, provided as follows, "Redemption of Preferred Shares - Deemed Dividend - \$340,253.27"¹. Thus, the redemption of the preferred stock was treated as an ordinary dividend by Canada.

3. As a result of a treaty between the United States and Canada, petitioners nonresident tax was limited to fifteen percent of \$340,253.27 or \$51,037.99, the amount shown as nonresident tax on the Canadian information return.

4. Petitioner claimed that since preferential treatment was not accorded his dividend of \$340,253.27 by Canada, the capital gain deduction under I.R.C. §1202 attributable to such gain should not be taken into account as an item of tax preference for purposes of the New York State minimum tax computation.

CONCLUSIONS OF LAW

A. That I.R.C. §58(g)(2)(B) provides that items of tax preference attributable to foreign sources shall not be taken into account for purposes of

¹ The record herein does not explain the discrepancy between the long-term capital gain reported on petitioner's federal income tax return of \$342,689.00 and the amount shown on the Canadian information return of \$340,253.27.

computing tax preference items under I.R.C. §57 if "under the tax laws of such country or possession...preferential treatment is not accorded gain from the sale or exchange of capital assets...".

B. Treas. Reg. 1.58-8(c) defines preferential treatment as follows:

"For purposes of this section, gain, profit, or other income is accorded preferential treatment by a foreign country or possession of the United States if (1) recognition of the income, for foreign tax purposes, is deferred beyond the taxpayer's taxable year or comparable period for foreign tax purposes which coincides with the taxpayer's U.S. taxable year in cases where other items of profit, gain or other income may not be deferred; (2) it is subject to tax at a lower effective rate (including no rate of tax) than other items of profit, gain or other income, by means of a special rate of tax, artificial deductions, exemptions, exclusions, or similar reductions in the amount subject to tax; (3) it is subject to no significant amount of tax; or (4) the laws of the foreign country or possession by any other method provide tax treatment for such profit, gain or other income more beneficial than the tax treatment otherwise accorded income by such country or possession. For the purposes of the preceding sentence, gain, profit or other income is subject to no significant amount of tax if the amount of taxes imposed by the foreign country or possession of the United States is equal to or less than 2.5 percent of the gross amount of such income."

C. That petitioner has failed to show that the dividend income which was taxed at a maximum rate of fifteen percent, as provided for by treaty, was not granted preferential treatment when compared to the rate of tax which would have been levied had the treaty not been controlling. See Elmendorf v. Commissioner, 43 TCM 466. Accordingly, although a significant amount of tax may have been imposed by Canada, petitioner is considered to have received "preferential treatment" for purposes of section 58(g)(2)(B) of the Internal Revenue Code. Treasury Regulation 1.58-8(c) supra, lists four situations in which preferential treatment can be accorded. One of these situations is when income is subject to tax at a lower rate. Therefore, petitioner is considered to have been accorded preferential treatment by Canada and the capital gain deduction pursuant to Internal Revenue Code section 1202, creates an item of tax preference


for New York minimum income tax in accordance with section 622(b)(4) of the Tax Law.

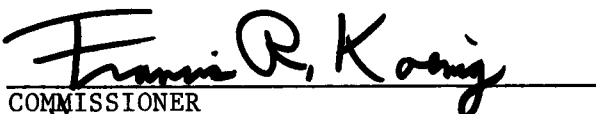
D. That the petition of Rolf Merton is denied and the Notice of Deficiency issued April 10, 1979 is sustained.

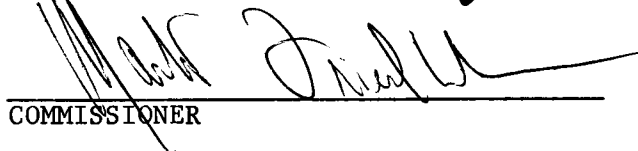
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER