

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sidney A. & Doris M. Johnson : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 1976.

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of January, 1984, he served the within notice of Decision by certified mail upon Sidney A. & Doris M. Johnson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney A. & Doris M. Johnson
6417 Tulip Lane
Dallas, TX 75230

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of January, 1984.

David Parchuck

Burne G. Haglund
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sidney A. & Doris M. Johnson : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 1976. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of January, 1984, he served the within notice of Decision by certified mail upon James C. Oster, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James C. Oster
Groben, Liddy, Cardamone & Gilroy
185 Genesee St., P.O. Box 423
Utica, NY 13503

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of January, 1984.

David Parchuck

William A. Hapner
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 20, 1984

Sidney A. & Doris M. Johnson
6417 Tulip Lane
Dallas, TX 75230

Dear Mr. & Mrs. Johnson:

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 & 1312 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James C. Oster
Groben, Liddy, Cardamone & Gilroy
185 Genesee St., P.O. Box 423
Utica, NY 13503
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SIDNEY A. JOHNSON AND DORIS M. JOHNSON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax Under Articles	:	
22 and 30 of the Tax Law for the Year 1976.	:	

Petitioners, Sidney A. Johnson and Doris M. Johnson, 6417 Tulip Lane, Dallas, Texas 75230, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Article 30 of the Tax Law for the year 1976 (File No. 27701).

On January 31, 1983, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and to submit the case to the State Tax Commission based on the entire record contained in the file and their brief, which was submitted on August 22, 1983, by Groben, Liddy, Cardamone & Gilroy (James C. Oster, Esq., of counsel). The Audit Division, by John P. Dugan, Esq. (Anna D. Colello, Esq., of counsel), submitted an answering brief on September 20, 1983.

ISSUE

Whether petitioners may treat a portion of a lump sum distribution as a long-term capital gain for New York tax purposes, when the entire amount was reported as ordinary income for Federal tax purposes.

FINDINGS OF FACT

1. Petitioners timely filed a joint New York State income tax resident return for the year 1976 on which they indicated their address as 6417 Tulip

Lane, Dallas, Texas, and that they had been New York State residents for nine months of the year. In arriving at total income of \$72,530.35 on their Schedule for Change of Resident Status (CR-60.1), petitioners deducted a capital loss of \$14,668.59¹ and reported a capital gain distribution of \$37,604.30, said amount representing fifty percent of the long-term capital gain portion of a lump sum distribution.

2. On February 1, 1978, the Audit Division issued a Statement of Audit Changes to petitioners proposing personal income tax and minimum income tax of \$2,951.40 plus interest. The statement was issued on the grounds that (1) since net long-term capital gains are taxed by New York State at 60% rather than 50%, 20% of the capital gains deduction should be added to income; (2) in computing the specific deduction, New York items of tax preference must be divided by Federal items of tax preference; and (3) New York State long-term capital losses are subject to the same limitations as Federal. The computations made on the statement included a modification for allocable expenses as provided for by section 615(c)(4) of the Tax Law.

3. On March 9, 1979, a revised Statement of Audit Changes was issued stating that "Section 612(b)(12) of the New York Tax Law provides for a plus modification for the ordinary income portion of a lump sum distribution allowable as a deduction under section 402(e)(3) of the Internal Revenue Code. Since you elected to treat your entire distribution of \$90,059.23 as ordinary income for Federal purposes it is held that such amount is required to be added to Federal adjusted gross income in determining your New York adjusted gross income under section 612".

¹ Petitioners claimed a \$1,000.00 capital loss for Federal tax purposes but did not limit their New York capital loss to said amount.

The Audit Division recomputed petitioners' income as follows:

Wages	\$ 10,000.00
Dividends	6,646.51
Interest Income	1,621.33
Business Income	25,708.33
Capital Loss	(1,000.00)
Pensions	<u>5,618.47</u>
Federal income (resident period)	\$ 48,594.64
Section 612(b)(12) modification	<u>90,059.23</u>
Total New York Income	\$138,653.87

Accordingly, a Notice of Deficiency was issued on April 6, 1979, showing personal income tax due of \$8,203.45, plus interest.

4. Petitioner Sidney A. Johnson was an employee of Mobil Oil Corporation and participated in its Employees Savings Plan (a qualified retirement plan under Internal Revenue Code § 401(a)) from its inception in September of 1951 until his retirement on December 31, 1975.

5. Petitioners filed a Federal income tax return for 1976 on which they elected to treat the entire lump-sum distribution as ordinary income under Internal Revenue Code sections 402(e)(3), 4(E) and (L), in order to elect a ten-year averaging method to compute the tax on the entire amount.

6. In October of 1977, petitioner Sidney A. Johnson submitted a copy of Form IT-2102.1, "New York State Information Return for Calendar Year", showing the long-term capital gain and ordinary income portions of his lump-sum distribution made by Bankers Trust Company, as Trustee of the Employees Savings Plan of Mobil Oil Corporation. In November of 1977, petitioners submitted Federal form 4972, "Special 10-Year Averaging Method", which form is used by employees who receive a total distribution from a qualified retirement plan and elect to average the income derived therefrom over a 10 year period. In using form 4972, petitioners agreed to make an irrevocable election to treat the entire

lump sum distribution as ordinary income for "all calendar years of active participation ...as years of active participation after December 31, 1973".

7. Petitioners submitted a brief in which they asserted that their election under Internal Revenue Code section 402(e)(4)(L) to treat the entire amount of the lump-sum distribution as ordinary income was for computational purposes only and that said election did not alter the essential character of the income except for calculating the amount of federal tax due; therefore, they claimed that the long-term capital gain portion of the lump-sum distribution should be taxed as such on their New York State income tax return.

CONCLUSIONS OF LAW

A. That during the year at issue, section 612(a) of the Tax Law provided that:

"The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

(b) Modifications increasing federal adjusted gross income.

* * *

(12) The ordinary income portion of a lump sum distribution allowable as a deduction under section 402(e)(3) of the internal revenue code, to the extent deductible under section 62(11) of the internal revenue code in determining federal adjusted gross income. (As added by L. 1975, Ch. 771, effective August 9, 1975, but applicable to lump sum distributions made in taxable years beginning on or after January 1, 1974.)"

B. That during the year at issue, section 1303 of the Tax Law (Article 30) provided that the city taxable income of a city resident individual shall mean and be the same as his New York taxable income as defined in section six hundred eleven of the Tax Law (Article 22).

C. That petitioners' election under internal revenue code section 402(e)(4)(L) to treat pre-1974 participation (years) as post-1973 participation (years) in

determining the ordinary income portion described in section 402(e)(4)(E) is binding for New York State and City income tax purposes. Therefore, no part of the ordinary income portion of petitioners' lump sum distribution is available for long-term capital gain treatment. (see Matter of Nathan and Virginia Wentworth, State Tax Commission, October 6, 1982)

D. That the petition of Sidney A. Johnson and Doris M. Johnson is denied and the Notice of Deficiency issued on April 6, 1979, is sustained.

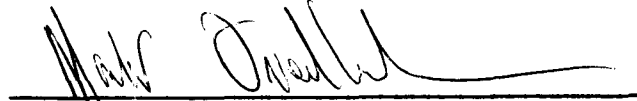
DATED: Albany, New York

STATE TAX COMMISSION

JAN 20 1984


PRESIDENT


COMMISSIONER


COMMISSIONER