

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

MOLL DAVID L & EGAN GEORGE I5143 5144 040380 TAC

STATE OF WISCONSIN
TAX APPEALS COMMISSION

STATE OF WISCONSIN
DEPARTMENT OF REVENUE

RECEIVED
APR 4 1980

321

LEGAL DIVISION

* * * * *
DAVID L. MOLL and
GEORGE EGAN, JR.,

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.
* * * * *

DOCKET NO. I-5143
DOCKET NO. I-5144

DECISION AND ORDER

(Drafted by
Chairman Boykoff)

Clu
was
no
for
100

RGM
H

The above-entitled matters were heard by the Commission. The petitioners, David Moll and George Egan, Jr., appeared in person and by their attorney, Norman C. Fritz. The respondent, Wisconsin Department of Revenue, appeared by its attorney, John R. Evans. Because the cases involve the same issues, the parties agreed to consolidate the cases for purposes of hearing and the resolution of the issues. Having considered the evidence and arguments of the parties, this Commission hereby finds and decides as

FINDINGS OF FACT

1. This is a timely filed appeal to this Commission for review of the respondent's decision on the petitioners' petitions for redetermination of assessments of additional income taxes for the taxable years 1970, 1972 and 1973 for David L. Moll and 1970, 1971 and 1973 for George Egan, Jr.
2. During the periods under review, the petitioners were Wisconsin residents, subject to the income tax provisions of Chapter 71, Wis. Stats.

3. On March 20, 1975, respondent issued an assessment against each petitioner in the following amounts:

	<u>Income Taxes</u>	<u>Interest</u>	<u>Total</u>
David L. Moll (for 1970, 1972 and 1973)	\$14,887.27	\$ 2,609.98	\$17,497.25
George Egan, Jr. (for 1970, 1971 and 1973)	\$ 9,035.30	\$ 2,109.85	\$11,145.15

4. Each petitioner, with his attorney, Norman C. Fritz, filed a petition for redetermination with respondent, dated April 11, 1975. On September 25, 1975, respondent denied both petitions for redetermination in full.

5. Several issues were involved in the assessments which are not in dispute here. This case involves transactions relating to 2 parcels of real estate, herein referred to as the Carroll Street Apartments, Inc. and the federal project property. The facts relating to each transaction are set out separately below.

Carroll Street Apartments, Inc.

6. In taxable year 1970, each petitioner owned 50% of the outstanding stock in the Carroll Street Apartments of Waukesha, Inc., a Wisconsin corporation, located in Waukesha County, Wisconsin. Mr. Egan was the corporation's president.

7. In 1970, petitioners decided to dissolve the corporation under section 333 of the Internal Revenue Code and s.71.333, Wis. Stats., and transfer its assets to a partnership in which the petitioners were the only partners.

8. The corporation adopted a plan of liquidation on December 5, 1970 and transferred all the corporation's property under the plan by December 31, 1970.

9. Under date of December 22, 1970, on behalf of petitioners, Attorney Fritz wrote a letter to the Wisconsin Secretary of State transmitting a document referred to as "State of Intent to Dissolve" and a \$5 filing fee. The letter contained a statement that a copy of the letter was being sent to the "Wisconsin Department of Taxation" (sic!) to advise it of the corporation's election to dissolve "under IRS Code Sec. 333 and the corresponding Wisconsin statute relating to one-month liquidation".

10. Under date of December 22, 1970, on behalf of petitioners Attorney Fritz sent to the District Director of the Internal Revenue Service in Milwaukee, Wisconsin, a completed federal Form 966 ("Corporate Dissolution or Liquidation") relating to the corporation, together with an attachment. The attachment consisted of a single page which contained a description of the voting power of each class of stock, a list of shareholders as of the time of adoption of the plan of liquidation, and 3 sentences: "There were no corporate shareholders as of January 1, 1954. The corporation was formed in 1963 (.) All shareholders elect under Section 333." Form 966 was signed by George Egan, Jr., designated as the corporation's president, and was dated December 2, 1970. A copy of this material was not sent to the respondent.

11. Federal Form 964 ("Election of Shareholder under Section 333 Liquidation") was not filed by either petitioner with the respondent.

12. Respondent contends that petitioners' failure to file federal Form 964 with it makes petitioners' election under s.71.333, Wis. Stats., defective and invalidates any benefits petitioners have

claimed under that statute. Petitioners contend they gave sufficient notice to respondent of their election under s.71.333 in 2 ways: by their attorney's sending respondent a copy of his December 22, 1970 letter addressed to the Wisconsin Secretary of State and by their attorney's filing federal Form 966 with the Internal Revenue Service (the "assessing authority" under s.71.333(3), claim petitioners).

Federal Project Property

13. On October 31, 1969, a warranty deed was signed by Winifred A. Connell conveying 2 1/2 lots in the City of Waukesha to George Egan, Jr. and David L. Moll, as tenants in common. The deed was recorded in the Waukesha County Register of Deeds Office on November 10, 1969 in Volume 1177 of Deeds at page 32. These lots were located at the corner of Pleasant and Arcadian Streets and at the time of their purchase, one lot was vacant and each of the other 2 had a single family residence on it.

14. Mr. Egan testified that he did not recall when these lots were purchased, that he was contacted by Winifred A. Connell in 1967 about purchasing them, that at some time a \$2,000 payment (referred to as a "deposit", "down payment" and "earnest money") was made to Mrs. Connell, and that a contract was entered into with her to purchase the lots. However, Mr. Egan was not precise about the dates of these occasions and no contract nor cancelled checks were introduced into evidence. No land contract for the lots had been recorded at the Waukesha County Courthouse either.

15. Mr. Egan testified that the lots were purchased for investment purposes, that he had no specific plans for them when he purchased them, that the lots were located across the street from some apartments owned by the petitioners' partnership, and that after

the lots' purchase, the homes on 2 lots were rented out to people.

16. Mr. Moll testified that prior to and at the time the 2 1/2 lots were purchased, he did not have any other use in mind for them other than their then-current use.

17. Both petitioners testified that officials or employees of the City of Waukesha had requested them to improve or repair one of the 2 houses on one lot. Mr. Moll testified that the repairs were too costly for them to do. Mr. Egan testified that City of Waukesha officials or employees "hounded" petitioners to bring one of the houses "up to standard" as set out in a letter but that they could not afford to.

18. Mr. Egan testified that at the time petitioners purchased the lots, they had not planned to build a low-rent apartment building for the elderly under a U.S. Department of Housing and Urban Development (HUD) or Federal Housing Authority (FHA) program. He did not recall when petitioners decided to build such building but recalled reading newspaper articles to the effect that the City of Waukesha and the FHA wanted a private builder to get involved in such project.

19. On October 23, 1970, petitioners caused a building on one of their lots to be demolished and claimed a loss of \$15,941.87 on their 1970 U.S. partnership return. On the return was a notation "Building was under threat of condemnation by City of Waukesha. Costs necessary to remove threat excessive". Respondent appears to have disallowed this loss, contending that petitioners knew that they were going to demolish the building when they purchased it on October 31, 1969.

20. A letter dated July 31, 1970 from Mr. Egan to Mr. Ivan Kaste of the Waukesha Freeman newspaper contained the following paragraph:

"In November of 1968, FHA and City of Waukesha officials were contacted concerning the feasibility of an FHA project for the elderly on the Southeast corner of Arcadian and Pleasant. The proposal was received by both the FHA and the city officials with enthusiasm. The cooperation of the City of Waukesha Planning Department, Planning Commission, Zoning Board of Appeals and the Common Council were needed to meet the rigid FHA requirements."

The letter described in detail the low-rent housing project for the elderly which was constructed on the 2 1/2 lots purchased by petitioners.

21. The respondent introduced into the record a copy of 3 newspaper articles which appeared in the Waukesha Freeman. A May 13, 1969 article, captioned "Housing for Elderly Planned for Waukesha", discussed a planned 33-unit apartment house project for elderly citizens which was being planned by the petitioners on the site of the lots they purchased on October 31, 1969. A May 27, 1969 article discussed the Waukesha Plan Commission's scheduled meeting for May 28 to discuss petitioners' planned apartment house project on the site of the lots they purchased on October 31, 1969. An August 4, 1970 article, captioned "Housing Project for Elderly Being Built in Waukesha", contains much of the factual information set out in Mr. Egan's July 31, 1970 letter to Mr. Ivan Kaste and contains the sentence: "Approval of the project in June (1970)

culminated a year and a half of planning, negotiations and discussions between the developers, city officials and the FIA."

22. At a hearing before this Commission on May 24, 1978, petitioners testified as set out in Findings of Fact 16 and 18. This testimony conflicts with the testimony and exhibits discussed in Findings of Fact 20 and 21.

23. After examining the testimony and evidence of the parties, and after consideration of all relevant facts and circumstances and the reasonable inferences to be drawn therefrom, this Commission finds that the real property herein involved had been purchased with the intention of demolishing the building involved in this controversy.

ISSUES FOR DETERMINATION

1. Did petitioners' file proper written election with respondent to claim the benefits of s.71.333, Wis. Stats.? Was petitioners' failure to file federal Form 964 ("Election of Shareholder under Section 333 Liquidation") with respondent a defect to deny them the application of s.71.333, Wis. Stats.?

2. May petitioners claim a loss for their demolition loss sustained in 1970 under section 165 of the Internal Revenue Code for a "loss sustained during the taxable year and not compensated for by insurance or otherwise"?

WISCONSIN STATUTES INVOLVED (1971)

Section 71.02 Definitions.

"(2) DEFINITIONS APPLICABLE TO NATURAL PERSONS AND FIDUCIARIES. As used in this chapter:

"(b) 'Internal revenue code' means. . .for the taxable years 1970 and thereafter of any taxpayer who so elects it means the internal revenue code as amended to

December 31, 1970, and in such case 'federal taxable income' and 'federal adjusted gross income' mean taxable income and adjusted gross income as defined by such code. . .

Section 71.333 Election as to recognition of gain in certain corporate liquidations.

"(3) In this section, 'qualified electing shareholder', means a shareholder, other than an excluded corporation, of any class of stock whether or not entitled to vote on the adoption of the plan of liquidation who is a shareholder at the time of the adoption of such plan, and whose written election to have the benefits of this section is filed with the assessing authority within 30 days after the adoption of the plan of liquidation. . ."
(Emphasis added)

INTERNAL REVENUE CODE PROVISION INVOLVED

Section 165. LOSSES.

"(a) GENERAL RULE.--There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise."

INTERNAL REVENUE REGULATIONS INVOLVED

§ 1.165-3. Demolition of buildings.

"(a) Intent to demolish formed at time of purchase.

"(1) Except as provided in subparagraph (2) of this paragraph, the following rule shall apply when, in the course of a trade or business or in a transaction entered into for profit, real property is purchased with the intention of demolishing either immediately or subsequently the buildings situated thereon: No deduction shall be allowed under section 165(a) on account of the demolition of the old buildings even though any demolition originally planned is subsequently deferred or abandoned. . .

"(c) Evidence of intention.

"(1) Whether real property has been purchased with the intention of demolishing the buildings thereon or whether the demolition of the buildings occurs as a result of a plan formed subsequent to their acquisition is a question of fact, and the answer depends upon an examination of all the surrounding facts and circumstances. The answer to the question does not depend solely upon the statements of the taxpayer at the time he acquired

the property or demolished the buildings, but such statements, if made, are relevant and will be considered. Certain other relevant facts and circumstances that exist in some cases and the inferences that might reasonably be drawn from them are described in subparagraphs (2) and (3) of this paragraph. The question as to the taxpayer's intention is not answered by any inference that is drawn from any one fact or circumstance but can be answered only by a consideration of all relevant facts and circumstances and the reasonable inferences to be drawn therefrom.

"(2) An intention at the time of acquisition to demolish may be suggested by:

(i) A short delay between the date of acquisition and the date of demolition;

(ii) Evidence of prohibitive remodeling costs determined at the time of acquisition;

(iii) Existence of municipal regulations at the time of acquisition which would prohibit the continued use of the buildings for profit purposes;

(iv) Unsuitability of the buildings for the taxpayer's trade or business at the time of acquisition; or

(v) Inability at the time of acquisition to realize a reasonable income from the buildings."

CONCLUSIONS OF LAW

1. Petitioners filed a timely written election with respondent within 30 days of the adoption of the plan of liquidation under s.71.333(3), Wis. Stats., to be covered by the definition of "qualified electing shareholder" for purposes of claiming the election allowed by s.71.333, Wis. Stats.

2. Petitioners may not claim a loss for their demolition loss sustained in 1970 under section 165 of the Internal Revenue Code because, they had had the intention of demolishing the building involved prior to their purchase of the real property on which it was located.

Authority: Internal Revenue Regulations 1.165-3(a) and (c).

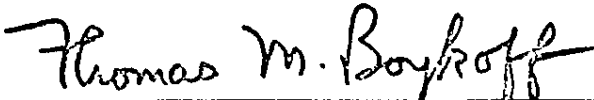
Therefore,

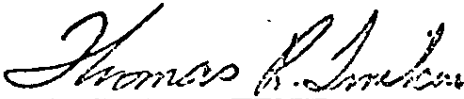
IT IS ORDERED

That the respondent's action on petitioners' petition for redetermination be modified to conform to the Findings of Fact and Conclusions of Law above and as so modified, is affirmed.

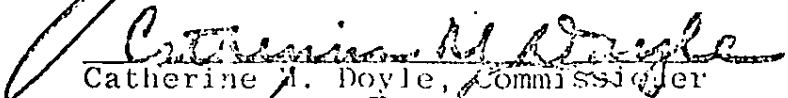
Dated at Madison, Wisconsin, this 3rd day of April, 1980.

WISCONSIN TAX APPEALS COMMISSION


Thomas M. Boykoff, Chairman


Thomas R. Timken, Commissioner


John P. Morris, Commissioner


Catherine M. Doyle, Commissioner


Keith R. Clifford, Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

* * * * *
DAVID L. MOLL and
 GEORGE EGAN, JR.

 Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

 Respondent.
* * * * *

DOCKET NO. I-5143
DOCKET NO. I-5144

O P I N I O N

(Drafted by
Chairman Boykoff)

To properly qualify for an election under s.71.333, Wis. Stats., that statute provides several conditions. Among them is that the taxpayer must file a "written election to have the benefits of this section. . .with the assessing authority within 30 days after the adoption of the plan of liquidation. . ." (s.71.333(3), Wis. Stats.).

Respondent has contended that the only proper form of filing this written election is by filing a completed copy of federal Form 964. Respondent cites Internal Revenue Regulation 1.333-3 which specifically requires a written election of the benefits of section 333 of the Internal Revenue Code to be made by the filing of federal Form 964 with the Internal Revenue Service. It is not disputed that this is a requirement of federal law.

Section 71.333, Wis. Stats., does not specifically require the filing of a particular form in making an election under that section. At the time under review in this case, no administrative rule specified the manner in which the election for Wisconsin tax purposes must be filed.

Administrative rule Tax 2.83, entitled "Requirements for written elections as to recognition of gain in certain corporation liquidations", has since been adopted to codify respondent's contention. In the rule, to qualify for the benefits of s.71.333, Wis. Stats., federal Form 964 must be filed with respondent within 30 days after the adoption of the plan of liquidation (Tax 2.83(2) and (5)). However, this rule became effective on February 1, 1979 and was not in effect at the time of the dispute in this case.

The provisions of Chapter 71, Wis. Stats. which apply to corporations were not "federalized" to the same extent as were provisions of Chapter 71 which apply to individuals. Section 71.02(2), Wis. Stats., contains definitions which apply to natural persons under Chapter 71. One of these definitions is of the "internal revenue code", which is defined as the federal code, with all of its amendments until a certain date, and includes federal interpretations of these provisions.

No similar "federalization" of the provisions in Chapter 71 applies to corporations. There is an absence of a definition of "internal revenue code" in s.71.02(1), Wis. Stats., containing definitions applicable to corporations. (Also cf. Wis. Adm. Code, s. Tax 1.06.) It cannot be held that when Wisconsin enacted s.71.333 (which is admittedly similar, though not, identical to section 333 of the Internal Revenue Code), in Chapter 541, Laws of 1955, it ipso facto enacted all then existing and subsequently adopted regulations pertaining to section 333 of the Internal Revenue Code. If the Legislature wished to achieve this result, it could have written it into the statute.

In December 1970, s.71.333(3) merely required "written election" of the benefits of the statute with the "assessing authority". On December 22, 1970, petitioners' attorney wrote the Wisconsin Secretary of State of petitioners' election "under IRS Code Sec. 333 and the corresponding Wisconsin statute relating to one-month liquidation." A carbon copy was sent to the "Wisconsin Dept. of Taxation" (sic!) as indicated on the December 22 letter. Respondent did not deny that this document was in writing, was timely, nor that it was sent by petitioners' representative and received by it. Nor did respondent contend that the designation "Wisconsin Dept. of Taxation" rather than the "Wisconsin Department of Revenue" made the letter defective. This Commission holds that this December 22, 1970 letter constituted compliance with the "written election" provision of s.71.333(3), Wis. Stats., as it existed in December 1970 and in absence of a statute or an administrative rule comparable to Tax 2.83. This Commission also holds that the "assessing authority" under s.71.333(3) is the Wisconsin Department of Revenue.

This Commission recognizes that 2 cases previously decided by it involved elections under section 333 of the Internal Revenue Code and s.71.333, Wis. Stats.: John E. Vick and Mary R. Vick v. Wisconsin Department of Revenue, 7 WTAC 174 (October 30, 1968); and Louis Boxhorn and Arline Boxhorn v. Wisconsin Department of Revenue, 10 WTAC 183 (March 31, 1977). These cases, however, are distinguishable from the case currently before us. In both the Vick and Boxhorn cases, the issue was whether a written election was timely filed. In the current case, the issue is the adequacy of a timely filed written election.

The phrase "assessing authority" in s.71.333(3), Wis. Stats., appears to be misleading as to who the written election must be filed with. The phrase appears inappropriate, obsolete and may cause further confusion to taxpayers.

Submitted by:

Thomas M. Boykoff

Thomas M. Boykoff, Chairman