No. 1100

BURTON
CLERK OF
COURT OF
OF COL
TAX DIVISION

SUPERIOR COURT OF THE DISTRICT OF

TAX DIVISION

MAY 1 1 1979

FILED

WILLIAM L. & GEORGIA I. BORDEN, Petitioner	)	
v.	)	Docket No. 2277
DISTRICT OF COLUMBIA, Respondent	)	

MEMORANDUM ORDER

The petitioners appeal from income tax assessments made against them for taxable year 1972 in the amount of $426.71. The tax was paid on December 12, 1974.

I

The parties presented evidence at the trial in this case and based upon that evidence the Court makes the following findings: On or about April 20, 1972, petitioner pledged 1700 shares of Westinghouse Electric Corporation (Westinghouse) stock with the American Security and Trust Co. (Bank) as security for a demand loan of $48,000. Petitioner William Borden was for many years prior to this transaction a management employee of Westinghouse and in that capacity he received options to purchase and did purchase a number of shares of Westinghouse common stock through that company's restricted stock option plan. He left Westinghouse in 1971 and set up his own Washington office as a business consultant. In September 1972 the market value of the stock declined and in accordance with a bank policy not permitting the amount of a loan to exceed 60 percent of the market value of the collateral

securities, petitioner was requested to reduce the loan, pledge additional securities, or sell a portion of the stocks sufficient to bring the loan back into conformance with the 60 percent policy.

In response to the request by the bank, petitioner directed an officer of the bank either to sell 600 shares at $41.50 per share or else to "stop-sell" 1,000 shares at $38.50 per share, whichever might occur first, depending upon the fluctuation of prices in trading on the New York Stock Exchange. During the afternoon of that same day the Bank sold not only the 1,000 shares which it was authorized to sell at $38.50 per share, but by mistake it sold the remaining 700 shares as well. The sale of those shares was in conflict with the instructions which the petitioner had given the Bank and with his understanding with the Bank. The petitioner discussed this discrepancy with the Bank and it was agreed by the Bank that it would purchase for the benefit of the petitioner the 700 shares sold by mistake and the Bank agreed to defray $1,162.01 of the cost of commissions and the excess of the repurchase price over the sales price. Thereafter in December 1972, he voluntarily sold 100 of the 700 repurchased shares in question and in 1973 the petitioner voluntarily sold the remaining 600 of the repurchased shares. When he filed his income tax returns for 1972 and 1973 he reported capital gains on all 700 shares of the stock at the original purchase price thus ignoring for this purpose the 1972 "sale - repurchase" transaction which resulted from the Bank's mistake.

As the result of the settlement with the Bank, the cost of the sale and repurchase of the stock in the amount of $2,393 was divided between the petitioner and the Bank with the Bank paying $1,165 and the petitioner $1,231. This agreement was reached after the petitioner had had several conversations with the Bank. This settlement resulted from the Bank's letter of October 3, 1972, in which the Bank agreed to settle petitioner's alleged claim against it by a "total and final reimbursement offer of the $1,162.01." The petitioner acknowledged that settlement and held the Bank "harmless from any and all claims of any nature from me or others, relating to the sale and purchase of the Westinghouse securities".

Petitioners appeal and make three contentions. First, the petitioner alleges that the sale of the 700 shares of Westinghouse stock which petitioner had pledged with the Bank as security for a loan was not a taxable event under the circumstances of this case. Second, the petitioners alleged that the sum of $1,231 which petitioner paid in connection with the repurchase of the 700 Westinghouse shares was deductible from petitioners income tax. Finally, petitioners also allege that the respondent erred when it refused to accept petitioners deductions of $1,550 for sales taxes for 1972 and only allowed $245.

II

Petitioners argued first that they are entitled to equitable relief under the facts of this case. That claim must be denied since the petitioners have an adequate remedy

at law; they can pay the tax and sue for a refund.

Petitioners next allege that the $1,231 paid by him as a part of the agreement with the Bank for the repurchase of the 700 shares of stock is deductible since the sale and repurchase were related and were in fact a Section 1036 (26 U.S.C. 1036) tax free exchange. Section 1036 of the Internal Revenue Code is made applicable to the District of Columbia by D. C. Code 1973, §47-1583(a). However, that section involves the exchange of stock in one coproration for the stock of the same kind or class of the same corporation. This transaction, although not the fault of the petitioners, was not an exchange of stock but was rather a sale and a later repurchase of stock. Section 1036 is inapplicable here even though the sale may not have been intended by the petitioner. Petitioners really ask the Court to create a legal fiction so that the transaction might be treated as a tax free exchange. However, while the court is sympathetic with their argument on this point, it has found no authority for such treatment. Thus, the transaction of 1972 was a sale of the stock and a repurchase of the stock, that repurchase forming the basis for any sale of the stock in the future.

Petitioners last argument is based upon the failure of the respondent to allow a sales tax deduction of $1,550. The petitioner presented testimony in support of its case on this point and also submitted a number of checks and other documents in support of their contention. Taking all of these

matters into consideration, the Court concludes and finds that a deduction in the amount of $850 should have been allowed the petitioners and the return for the year in question shall be accepted by the respondent as reflecting a deduction of $850.

ORDER

It is hereby

ORDERED that the petitioners appeal based upon the sale and repurchase of the Westinghouse Electric Corporation stock in 1972 is denied, and it is further

ORDERED that the amount of $850 shall be allowed petitioners as a deduction from their 1972 income taxes, that being an increase over the $245.00 allowed by the respondent and it is further

ORDERED that respondent shall recompute the tax based upon this court's findings and shall submit to the court a proposed order for a refund of additional taxes in the amount required under the terms of this order, together with interest thereon from December 12, 1974.

Dated: May 11, 1979

JOHN GARRETT PENN
Judge

William L. Borden
Pro Se

Henry E. Wixon, Esq.
Assistant Corporation Counsel

Copies mailed this date to [illegible] 5-11, 1979.

and to Kenneth Beck Finance Officer, We

R. Stanfield 5/14/79