L 9 (6-65)

Income Tax Determinations A-Z
Bix, Norton Norbert
& Mary

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin and Macduff

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: NORTON NORBERT BIX and MARY BIX, his wife; Application for revision or refund of additional assessments of personal income taxes and of unincorporated business taxes for the year 1959.

In advance of the hearing scheduled for May 4, 1965 the taxpayers had indicated that they would not attend and that they relied rather on materials submitted by letters earlier.

By notice of additional assessment, an additional assessment of normal income taxes had been made on three different bases, and additional unincorporated business taxes were also assessed. The taxpayers filed an application for revision or refund, objecting to the additional taxes imposed.

However, they withdrew by letter all of their objections to the additional assessments except as to the portion of the additional normal income tax assessed that was based upon rentals in the amount of $1,734.44 received by Mrs. Bix from renting an apartment house in Vienna, Austria. The taxpayers claimed that a treaty between Austria and the United States in effect at that time, made income of a resident of the United States received from real property in Austria subject to tax only in the country that was the source of the rentals; and they claimed in effect that this treaty overrode any provisions of New York State Tax Law making such rentals from foreign real estate subject to normal income taxes when received by a resident. (See Tax Law section 359.1) The determination holds that this view was mistaken because in fact the Austrian Convention by its express terms was applicable only to federal income taxes and did not affect the income tax law provisions of any state. Consequently, it follows that the rentals were subject to normal income taxes under the provisions of Tax Law section 359.1, which imposes the tax on foreign rentals received by a resident of the State subject to any constitutional restrictions. In the case of a resident, a state may constitutionally impose income taxes on rents received outside the state. People ex rel Cohn v. Graves, 271 NY 353; 57 S. Ct. 466, 300 U.S. 308; 81 L. Ed 668.

A "convention for the avoidance of double taxation with respect to taxes on income" was entered into by the United States generally with a number of foreign countries; and that with

Austria was signed in Washington D.C., October 25, 1956, and was ratified and in force October 10, 1957, operative retroactively as of January 1, 1957. It was in force in 1959, therefore. United States Treaties and Other International Agreements, 8 UST; Department of State, Treaties and Other International Acts Series, TIAS 3923; United States Treaty Series, 299 UNTS 123. The treaty did provide in effect that in the case of rental income received by a resident of one of the signatory countries, from real property in the other country, such rentals were to be subject to income tax only in that country that was the source of the rentals. The treaty, however, as has been stated, by its terms, had application only to Federal income taxes and not to any state income taxes. Article 1 of the treaty provides:

"Article I

(1) The taxes referred to in this Convention are:

(1)[(a)] In the case of the United States of America: The federal income taxes, including surtaxes.

(b) In the case of the Republic of Austria: The Einkommensteuer (income tax), the Koerperschaftsteuer (corporation tax) and the Beitrag vom Einkommen zur Foerderung des Wohnbaues un fuer Zwecke des Familienlastenausgleiches (housing reconstruction and family allowance contribution)."

The related report of the Department of State also states in part:

"* * * As to the United States, the provisions for avoidance of double taxation and for administrative cooperation apply only to the Federal income taxes, including surtaxes. They do not apply to the imposition or collection of taxes by the several States, the District of Columbia, or the Territories or possessions of the United States. As to Austria, the convention applies to the income tax, the corporation tax, and the housing reconstruction and family allowance contribution."

In 1959, the year under consideration, the taxpayers resided at Woodside, Long Island, New York. The taxpayer, Herman Bix, had left Austria in 1939, according to his written statement, probably with Mrs. Bix. It does not affirmatively appear clearly that they are citizens of the United States. They filed a resident return for 1959, and normal income and unincorporated business

income were reported. Mr. Bix was self-employed as an importer of miniature lamps doing business as the New York Manufacturing & General Supply Co. and also was a manufacturer's sales agent representing The Gluehlampenfabrik W. Albrecht KG in Hamberg, West Germany. He reported his earnings from self-employment but took the position that his earnings as the manufacturer's agent were not subject to unincorporated business tax.

By notice of additional assessment B601813 dated July 28, 1960, additional normal income tax in the amount of $357.58 and additional unincorporated business tax in the amount of $248.50 to a total of $606.08 were imposed.

As to the additional normal income tax, the bases of assessment besides the adding of the rents received by Mrs. Bix from the apartment house in Vienna, Austria were the disallowances of a carryover loss of $1,000 as part of a loss of over $7,000 sustained by the taxpayers in the sale of Austrian real property in 1955, and the further disallowance of a capital loss on sales of stocks made by the taxpayers in 1959. The carryover loss and the 1959 capital loss were both properly disallowed because the taxpayers had no reported capital gains in 1959 against which they might be offset. Tax Law section 360.4; see also Tax Law sections 350.14, 351 and 359.5.

The including of Mr. Bix's income as a manufacturer's sales agent as income subject to unincorporated business tax also was correct. In the first place, he was evidently an independent contractor rather than an employee, because he was not subject to any supervision of the kind characteristic of an employee relationship, by his foreign principal in West Germany. Consequently, apart from whether his income from such commission as a sales agent of the foreign manufacturer was to be regarded as an extension of his earnings in his own business as an importer, both incomes were lawfully subject to tax in common as unincorporated business income. It would appear further that the business as a sales representative was quite similar to his own importing business since both had to do with trade in lamps and lamp parts, so that even if he was an employee of the West German company nominally, his commissions from that source would be deemed to be an extension of his self-employment and so part of an unincorporated business.

The proposed determination upheld all the additional assessments for the reasons stated, and I recommend that the determination of the State Tax Commission be substantially in the form submitted herewith.

/s/ FRANCIS X. BOYLAN
Hearing Officer

/s/ M. SCHAPIRO
APPROVED

/s/ S. HECKELMAN
APPROVED

FXB:jee

January 14, 1966

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION OF

NORTON NORBERT BIX AND MARY BIX, HIS WIFE

FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 AND UNINCORPORATED BUSINESS TAXES UNDER ARTICLE 16-A FOR THE YEAR 1959

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Norton Norbert Bix and Mary Bix, his wife, having filed an application for revision or refund of personal income taxes under Article 16 and of unincorporated business taxes under Article 16-A for the year 1959, and such application having been denied, and a demand for a hearing on such application having been made by the taxpayers, and such hearing having been duly scheduled and the taxpayers having voluntarily defaulted on such hearing, and the taxpayers having relied upon information supplied by them to the Department of Taxation and Finance by letter, and upon an issue of law claimed by them to be controlling here; and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) In 1959, the year under consideration, the taxpayers, Norton Norbert Bix and Mary Bix, his wife, resided at Woodside, Long Island, New York, in Queens County, and were residents of the State of New York. They filed a joint resident return for the said year.

(2) By notice of additional assessment No. B601813, dated July 26, 1960, the Department of Taxation and Finance of the State of New York restated the taxpayers' reported income. An amount of of $1,734.44 received in 1959 as rents from an apartment house in

Vienna, Austria was added to the income reported as constituting additional income subject to normal personal income tax; a claimed loss in the amount of $1,000, part of a greater loss on a sale of real property situated in Austria, sold in 1955, was disallowed on the grounds that the said carried-over loss was not assertible against normal income but only against any capital gain; further, a capital loss in the amount of $1,052.04 from sales of stocks and bonds in 1959, which the taxpayers on their return deducted from normal income, was similarly disallowed on the grounds that such capital loss was lawfully deductible only from capital gain rather than from normal income; and finally there was added to the reported income subject to unincorporated business taxes the amount of $6,859.29, which the taxpayer, Herman Bix, earned as commissions as a sales agent at New York for a West German manufacturing company. Upon such recomputation, additional normal income taxes in the of $357.50, and additional unincorporated business taxes in the amount of $248.50 were assessed to a total of $606.00 additional taxes due for the year 1959 as of the date of the said assessment.

(3) The taxpayers filed an application for revision or refund, in effect appealing from all such bases for said additional assessment of taxes but thereafter withdrew their exceptions to the said additional assessment except as to so much thereof as was related to the including of the rentals received from the Austrian real property in the said amount of $1,743.44. As to these rentals, the taxpayer asserted that pursuant to provisions of the Vienna Convention of 1956 entered into between the United States and Austria, such income under the provisions of the said treaty was property subject to income tax only in the country that was the source of the said income, that is to say, in Austria.

(4) A treaty, termed: a convention for the avoidance of double taxation with respect to taxes on income, was entered into by the United States and Austria on October 25, 1956. Said treaty was in force upon ratification October 10, 1957, and was operative retroactively from January 1, 1957. It provided in substance that citizens of both countries were not to be subject to special or burdensome taxes over and above those imposed on residents of said countries and it did provide, further in effect that income received by a resident of one country from a source situated in the other country was to be subject to income taxes only in the country that was the source of the said income; but that stated provision and all provisions in the treaty on the part of the United States as a party thereto, was expressly limited to Federal income taxes only, and the said convention or treaty did not restrict or modify the provisions of the income tax laws of any State, as it is found. Article I of the treaty provided:

"Article I

(1) The taxes referred to in this Convention are:

(1)[(a)] In the case of the United States of America: The federal income taxes, including surtaxes."

Upon the foregoing facts and findings and all the evidence herein, the State Tax Commission hereby

DETERMINES:

(A) That the additional assessment insofar as it was made on rents in the amount of $1,743.44 received from foreign property, situated in Austria, was not erroneous as in violation of the Austrian Convention of 1956 as taxpayers asserted, since such treaty had application only to Federal income taxes and not to any state income taxes.

(B) That such income from rents from a foreign source was

lawfully subject to tax under Tax Law section 359.1 of the Consolidated Laws of New York; and the said subdivision of the said section defines gross income to include rent, including expressly rent derived from real property situated outside the state, subject to any constitutional restriction; and no such constitutional restriction obtains as to such income received by a resident of this State.

(C) That the further bases of the additional assessments have been reviewed and were not improper.

(D) That, therefore, the additional assessments of normal income taxes in the amount of $357.56 and of additional unincorporated business taxes in the amount of $248.50 to a total of additional taxes in the amount of $606.06 for the year 1959 were correct and are affirmed as of the date of the said additional assessment, subject to interest from said date; and accordingly, the taxpayers' related application for revision or [illegible] is denied.

And it is So Ordered.

DATED: Albany, New York this 28th day of January 1966.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ IRA J. PALESTIN
COMMISSIONER

/s/ JAMES R. MACDUFF
COMMISSIONER