

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Robert M. & Barbra A. Regazzi :

AFFIDAVIT OF MAILING

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 1972. :

State of New York
County of Albany

Jay Vredenburg, 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 11th day of January, 1980, he served the within notice of Decision by certified mail upon Robert M. & Barbra A. Regazzi, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert M. & Barbra A. Regazzi
952 Plymouth St.
Pelham Manor, NY 10803

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
11th day of January, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Robert M. & Barbra A. Regazzi

AFFIDAVIT OF MAILING

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 1972.

State of New York
County of Albany

Jay Vredenburg, 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 11th day of January, 1980, he served the within notice of Decision by certified mail upon Anthony Rella the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Anthony Rella
180 McLean Ave.
Yonkers, NY 10705

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
11th day of January, 1980.

Joanne Krapp

J. Vredenburg

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

January 11, 1980

Robert M. & Barbra A. Regazzi
952 Plymouth St.
Pelham Manor, NY 10803

Dear Mr. & Mrs. Regazzi:

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Anthony Rella
180 McLean Ave.
Yonkers, NY 10705
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT M. REGAZZI and BARBARA A. REGAZZI	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1972.	:	

Petitioners, Robert M. Regazzi and Barbara A. Regazzi, 952 Plymouth Street, Pelham Manor, New York, 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 1972 (File No. 17123).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 18, 1978 at 10:45 A.M. Petitioners appeared by Anthony Rella, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irving Atkins, Esq., of counsel).

ISSUE

I. Whether petitioner Robert M. Regazzi acquired a beneficial interest in shares of stock which he agreed to purchase, pursuant to the restricted stock option plan for employees of Chesebrough-Pond's, Inc.

II. Whether the risk of forfeiture regarding the 1971 stock option plan was removed in 1972.

III. Whether a taxable event occurred in 1972 with respect to the 1971 stock option plan, so that taxable income was realized for that year.

IV. Whether petitioner Robert M. Regazzi realized taxable compensation in 1972 with respect to the 1967 stock option plan.

V. Whether the taxable compensation regarding the 1967 stock option plan is an amount equal to the difference between the option price and the market value at the time petitioner Robert M. Regazzi acquired an unrestricted right to receive the stock.

FINDINGS OF FACT

1. Petitioners, Robert M. Regazzi and Barbara A. Regazzi, filed a Resident New York State Income Tax Return, to which was attached a W-2 (Wage and Tax Statement - 1972) from Chesebrough-Pond's, Inc. in the name of petitioner Robert M. Regazzi. The W-2 showed that wages of \$32,056.59 and other compensation of \$17,563.31 were paid. Petitioner Robert M. Regazzi attached a statement to said return in which he alleged that the \$17,563.31 did not constitute taxable income.

2. On October 27, 1975, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, including (as an adjustment to income) the \$17,563.31 and other modifications, plus minimum tax on items of tax preference. Accordingly, a Notice of Deficiency was issued on October 27, 1975, against petitioners for \$3,644.19, plus interest of \$692.55, for a total of \$4,336.84. Petitioners paid \$4,600.03 with respect to said Notice of Deficiency and timely filed a Claim for Refund.

3. Prior to 1967, petitioner Robert M. Regazzi was employed by Chesebrough-Pond's, Inc. (hereinafter referred to as "The Company"). He was employed by The Company from 1967 through 1972.

4. Pursuant to a stock purchasing plan for officers and administrative employees of The Company (in existence in 1967), petitioner Robert M. Regazzi subscribed in 1967 to the purchase of 255 shares of stock at an amount equal to 14 times The Company's average earnings during the preceding five years, as shown in the annual reports to the stockholders. The plan provided, in part, that:

"...all sales of shares under the Plan shall be made upon the condition that the purchaser shall continue in the ownership of such shares and not sell, pledge or transfer any interest therein for a period of 5 years after the date of acceptance of the purchase agreement by the Company."

The shares of stock were held in escrow by a bank for the benefit of petitioner Robert M. Regazzi.

5. In 1971 petitioner Robert M. Regazzi subscribed to the purchase of 260 shares of The Company, pursuant to a stock purchase plan more fully set forth in Finding of Fact "4", supra. The purchase price of said shares amounted to \$5,512.00. The shares of stock were held in escrow by a bank for the benefit of petitioner Robert M. Regazzi, who could not sell, pledge or transfer same for a period of five years from the date of issue.

6. On May 12, 1972, The Company notified petitioner Robert M. Regazzi that on May 7, 1972, the 260 shares which he agreed to purchase under the 1971 plan were no longer subject to forfeiture. Based on The Company's interpretation of Section 83 of the Internal Revenue Code (as amended in 1969), a taxable event had occurred. The amount to be included as "other compensation" paid in 1972 on Form W-2 would be \$11,778.00 (the excess of the average daily market price on May 5, 1972, which was the last business day prior to May 7, 1972) over the purchase price of \$21.20 per share. The mean average of the market quotation for said stock on May 5, 1972, was 66 1/2.

7. The Company also included on petitioner's W-2 other compensation paid in 1972, in addition to the \$11,778.00 more fully set forth in Finding of Fact "6", supra, plus \$5,785.31 (the difference between the cost and market value at the date the stock was issued), for a total of \$17,563.31. On their 1972 Federal return, petitioners deducted the \$17,738.00 on the grounds that said amount was not taxable in 1972. They also deducted this amount on their New York State

return. They appended a Statement to their Federal return to the effect that they intended to include the \$11,778.00 in the tax return they would file for 1976.

8. Section 83(a) of the Internal Revenue Code provides, in part, that:

"If, in connection with the performance of services property is transferred to any person other than the person for whom such services are performed, the excess of

(1) the fair market value of such property (determined without regard to any restriction other than a restriction by which its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property shall be included in the gross income of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable..."

CONCLUSIONS OF LAW

A. That under the restricted stock plans of The Company for 1967 and 1971, petitioner Robert M. Regazzi has a beneficial interest in the shares of stock which he agreed to purchase pursuant to said plans.

B. That regarding the 1971 stock option plan of The Company, the risk of forfeiture is removed within one year from the date of purchase of the shares if the employee is still employed by The Company, being applicable to stock option plans after April 30, 1969.

C. That the risk of forfeiture with respect to the shares of stock purchased by petitioner Robert M. Regazzi under the 1971 stock option plan of The Company was removed on May 7, 1972. Section 83(a) of the Internal Revenue Code requires a taxpayer to include in gross income the excess of the stock's fair market value over the stock's cost as soon as the taxpayer's interest is no longer subject to a substantial risk of forfeiture. See SAKOL v. Commissioner of Internal Revenue Service, 574 F 2d 694 (1978) cert. denied.

D. That taxable income with respect to petitioner Robert M. Regazzi's purchase of shares under the 1971 stock option plan was realized in 1972 to the extent of the difference between the purchase price and the market value on May 7, 1972, in accordance with the intent and meaning of Section 83 of the Internal Revenue Code.

E. That with respect to the 1967 option plan, petitioner Robert M. Regazzi acquired an unrestricted right to receive the shares of stock thereunder in 1972.

F. That regarding the 1967 option, petitioner Robert M. Regazzi realized taxable compensation in an amount equal to the difference between the option price and the market value at the time he acquired the unrestricted right to receive said stock, in accordance with the intent and meaning of Sections 421, 422 and 423 of the Internal Revenue Code.

G. That the petition and claim for refund of Robert M. Regazzi and Barbara A. Regazzi is hereby denied.

DATED: Albany, New York

JAN 11 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER