

TAX APPEAL BOARD OF THE STATE OF DELAWARE

ALBERT D. NEMECEK, JR.

Petitioners,

v.

DIRECTOR OF REVENUE,

Respondent.

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DOCKET NO. 1216

BEFORE: John H. Cordrey, Esquire, Chairman; David C. Eppes, Regina Dudziec and Cynthia H. Jarman; Members.

Albert D. Nemecek, Jr., Pro Se.

Jos. Patrick Hurley, Esquire, Deputy Attorney General for Respondent.

DECISION AND ORDER

DAVID C. EPPES, MEMBER.

The issue before the Board in this matter is the same issue as was decided by the Board in *Littig v. Director of Revenue*, Docket No. 1081, December 10, 1993. In both cases, Petitioner was a non-resident of Delaware who owned rental property in Delaware. Each Petitioner experienced operating losses for several years and a capital gain upon the sale of the property. Because the Petitioners had no other Delaware source income to offset against the rental losses in years prior to the sale of the property, they contend that they received no tax benefit in Delaware from the operating losses. They further contend that since a portion of the rental losses consists of depreciation expense, they should not have to reduce the basis of their properties for purposes of calculating the gain taxable in Delaware. The Board found for the Respondent in the *Littig* case and denied Petitioner's claim. We will not recite the *Littig* decision here, but direct the reader to that decision for an analysis of the arguments presented and the Board's conclusions.

Petitioner in this case tried to distinguish his case from *Littig* in two ways. First, Petitioner contends that it is the basis reduction from depreciation that he is challenging, not the disallowance of the net operating loss. Specifically, Petitioner contends that he received no tax benefit from the depreciation deductions so he should not have to reduce his basis. Respondent argued that there are two major flaws in this theory. A) Petitioner **did** receive a tax benefit in that he received gross rental income in Delaware on which he paid no Delaware income taxes because of offsetting deductions. One of those deductions was depreciation. For Petitioner's argument to hold water, he would have to assume that deductions were expended against rental income in a specific order, with depreciation being among the last. There is clearly no basis in law for such an "ordering" of deductions. B) Delaware law piggybacks on federal law, with only expressed modifications. There is nothing in federal law to permit a taxpayer to avoid reducing basis for depreciation which did not provide a specific benefit. In fact, federal law requires that taxpayers must reduce the basis of their property by depreciation **allowed or allowable**. The purpose of this provision is to prevent taxpayers from not claiming depreciation deductions in years in which they provide no tax benefit. There is clearly no modification in Delaware law which would achieve the Petitioner's objective.

Petitioner also attempted to distinguish his argument from *Littig* on constitutional grounds. He argues that the state's position is discriminatory against non-residents since almost all non-residents who operate and later sell Delaware rental property will end up in the same position. Respondent contends that the reason non-residents get a different tax result is because they generally have no other Delaware source income against which they could offset their ongoing rental losses. Thus it is Petitioner's particular circumstances, not the operation of some discriminatory law, which yields the objectionable results. Respondent writes, "The crux of the matter is not that Delaware law denies the deduction of the item Petitioner complains about, but that the law does not permit their deduction in a manner and at the time Petitioner desires to deduct them".

FINDING

The Board finds Petitioner's basis reduction argument no more compelling than those arguments offered in *Littig*. We reiterate, in part, our decision in *Littig*: "Although the Board agrees that the end result may seem inequitable in this case, this Board is not in a position to grant deductions that are clearly not sanctioned in Delaware or federal law".

With regard to Petitioner's constitutional arguments, we find nothing in Delaware's methodology that inherently discriminates against non-residents. It is the particular circumstances of this taxpayer, and not some discriminatory scheme, that prevents Petitioner from gaining a full tax benefit for depreciation deductions claimed in earlier years and recaptured in the year of sale.

Accordingly, the petition is denied.

IT IS SO ORDERED. 11/3/97

John H. Condy
Cynthia H. Jarman

Regina C. Rudzine
[Signature]
