

POOR
QUALITY
THE FOLLOWING
DOCUMENT (S)
ARE
FADED & BLURRED

PHOTO MICROGRAPHICS INC.

BUREAU OF LAW

MEMORANDUM

*Income Tax Determination.**A-2**Kaplan, Abraham*

TO: Commissioners Murphy, Palestine and Macduff
FROM: E. H. Best, Counsel
SUBJECT: ABRAHAM KAPLAN

**Formal Hearing
1952 Application for Revision or Refund Under
Article 16 of the Tax Law**

The issues raised herein are: (1) whether or not the taxpayer filed a timely demand for a hearing as required by Section 374 of the Tax Law and (2) whether a deduction for the purchase of treasury stock is allowable in computing earnings and profits for the purposes of subdivision 9 of Section 354 of the Tax Law.

With respect to the first issue, the facts in the above matter show that although an application for revision and refund was timely filed, there is no document in the record to show that any formal demand for a hearing was ever received. The taxpayer contends that he mailed such demand in time and the first knowledge that he had that the matter was not placed on the formal hearing calendar was when payment of the assessment was demanded.

At the hearing, the representative stated that he placed the letter in the outgoing mail receptacle in his secretary's office and that presumably she mailed the same. The hearing officer, after discussion with him, appears to be of the opinion that the taxpayer has failed to prove that such demand for formal hearing was placed in a United States Government post office receptacle and that accordingly there has been no proof of mailing.

The hearing officer, however, contends further that unlike the requirements of the Internal Revenue Code (except in the case of tax returns) proof of mailing does not constitute proof of filing, and that filing is evidenced by receipt of the same by the State Tax Commission. The hearing officer has found that there is no evidence to show receipt of the demand for the hearing by the State Tax Commission.

In the case of Crude Oil Corp. of America v. Com., (34-18) 47-1 USTC ¶9242, 161 F. 2d 304, on remand, the Tax Court entered a finding in accordance with the mandate of the Circuit Court of Appeals, 6 TCM 1091, Dec. 16, 1941 (N), which held where proof of the mailing of a capital stock tax return was made, such mailing raises a rebuttable presumption of receipt, and that in the absence of evidence of nonreceipt, a finding of nonfiling is against the weight of evidence.

I am of the opinion that although such presumption may very well apply to the matter before us, since no proof of actual mailing has been established, this question is moot at this time. Even, if however, the application were to be deemed timely filed, I am of the opinion as more fully indicated below that relief should be denied the taxpayer.

The facts, more fully set forth in the hearing officer's memorandum to Deputy Commissioner Igoe dated August 20, 1963, and Deputy Commissioner Klein dated April 27, 1956, disclose that the taxpayer elected to have his gain on the distributions by a corporation, Philbar Holding Co., Inc., of which both the taxpayer and one Morris Gerson held ten shares each, upon liquidation in accordance with subdivision 9 of Section 354 of the Tax Law; that a plan of such liquidation was adopted by the corporation in tax on December 26, 1952; that prior thereto and on December 23, 1952, an agreement was executed by the corporation with one Morris Gerson to repurchase the ten shares of corporate stock owned by Gerson for an amount in excess of the earnings and profits reported on the corporation's statement for the calendar month in which the liquidation occurred. In the Law Bureau memorandum former counsel expressed the opinion that no deduction for the cost of the purchased stock is permitted in computing earnings and profits pursuant to Section 354, subdivision 9 of the Tax Law since such purchase was in effect a distribution occurring in the same month as the liquidation.

The hearing officer is of the opinion, however, that there was no tax evasion but a valid purchase of treasury stock by the corporation and that the same should be allowed as a deduction. However, as heretofore stated, since the taxpayer actually failed to establish proof of filing as set forth in the proposed determination, of which I approve, consideration of the substantive question involved does not arise.

I am, therefore, forwarding the entire file for your review.

Kindly return the file after disposition.

Counsel

MB:lp
Enclosure
September 15, 1965

STATE OF NEW YORK

STATE TAX COMMISSION

----- :
IN THE MATTER OF THE APPLICATION :
 :
OF :
 :
ABRAHAM KAPLAN :
 :
FOR REVISION OR REFUND OF PERSONAL :
INCOME TAXES UNDER ARTICLE 16 OF THE :
TAX LAW FOR THE YEAR 1952 :
----- :

Abraham Kaplan having filed an application for revision or refund under Article 16 of the Tax Law for the year 1952, and the application having been denied by the Income Tax Bureau, and a hearing having been held on May 7, 1963 with respect to the question of whether the taxpayer failed to file a Demand for Hearing within the time prescribed by the tax statute, and the matter having been duly examined and considered, the State Tax Commission hereby finds:

(1) That the taxpayer filed a return of income for the year 1952 under Article 16 of the Tax Law; that on audit thereof by the Income Tax Bureau additional taxes were assessed against the taxpayer in the amount of \$2,369.23 on September 27, 1955, by assessment number AA-903675; that thereafter on October 26, 1955 the taxpayer filed an application for revision or refund of the assessment; that following a review of the matter by the Income Tax Bureau the application was denied under date of May 24, 1956 by letter sent to the taxpayer at his address of record.

(2) That a request or demand for a hearing in the matter was not filed with the Commission within 90 days of the date of the said denial on May 24, 1956 as specified by Section 374 of the Tax Law.

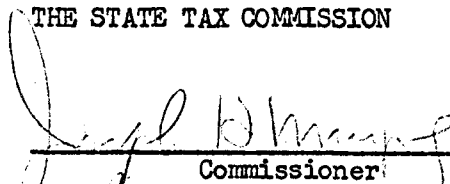
Upon the foregoing findings and all the facts and evidence submitted, the State Tax Commission hereby

DETERMINES:

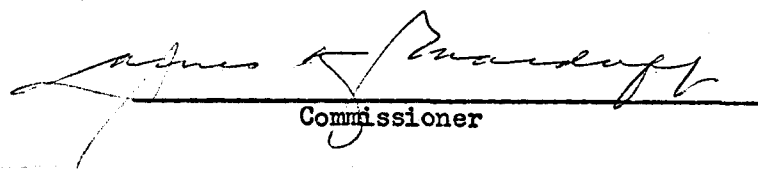
That the additional taxes assessed against the taxpayer for 1952 under Article 16 of the Tax Law (Finding No. (1) above) are legally due and owing and the taxpayer is not entitled to any revision or refund of taxes and/or statutory charges assessed and/or paid under Article 16 of the Tax Law for 1952 that may be shown to be due if the matter were reviewable on the merits, as the taxpayer did not file an application for revision or refund thereof within the time required (Finding No. (2) above) by Section 374 of the Tax Law.

Dated: Albany, N. Y., October 18 1965.

THE STATE TAX COMMISSION


Commissioner


Commissioner


Commissioner