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## BUREAU OF LAW

## MEMORANDUM

*Income Tax Determination*  
*A-2*  
*Lieb, David L. & Sylvia*

TO: Commissioners Murphy, Palestine & Macduff  
FROM: Solomon Sles, Hearing Officer  
SUBJECT: DAVID L. LIEB and SYLVIA LIEB, his wife

1955 Assessment #B-810015  
1956 Assessment #B-810016  
1957 Demand for Hearing  
Article 16

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y. on May 25, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issues involved herein are: (1) whether or not the loss reported on the partnership return of Barcha Trading Company of which the taxpayers were partners is to be considered a capital loss rather than a normal loss; and (2) whether the taxpayers are entitled to offset contributions omitted from their return for the year 1957 and failed to file an amended return or an application for revision or refund for the year 1957 within two years from the date of the filing of said return.

During the years in issue and for some years prior thereto, the taxpayer, David L. Lieb, was and still is a certified public accountant and a co-partner in the accounting firm of David L. Lieb & Co., with offices at 274 Madison Avenue, New York City. During the years 1955 and 1956 the taxpayers traded in securities (stocks and bonds) on their own account. They reported on their return for the year 1955 cost of securities \$927,326.87 (stocks and bonds) which were sold for \$1,020,363.76, showing a capital gain of \$90,036.89. For the year 1956 they reported cost of securities (stocks and bonds) in the sum of \$494,418.22 which were sold for \$529,336.53 showing a capital gain for said year in the sum of \$34,918.31. It is to be noted that the taxpayers were not dealers in securities. In addition, the taxpayer, David L. Lieb, on his 1956 return reported salary income as an executive for Titra Film Laboratories, Inc. in the sum of \$15,000.00.

On July 12, 1955, the taxpayers filed in the New York County Clerk's office a certificate of doing business under the name of Barcha Trading Company at 274 Madison Avenue, New York City. This is the same office from which the taxpayer, David L. Lieb, conducted his accounting work at that time.

During the years 1955 and 1956, the taxpayers in the name of Barcha Trading Company purchased commodities consisting of hides

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and rubber. The taxpayers did not take physical delivery of the commodities so purchased. The commodities were resold shortly after they were purchased, all at a loss. The number of transactions during 1955 consisted of 4 and during 1956 consisted of 3. The total loss reported by them on the partnership return of Bareha Trading Company for 1955 was \$25,426.29 and for 1956 \$44,961.63. At no time did this company show any profit. The taxpayers did not have regular customers for the sale of the commodities which they purchased. It appears that the taxpayers were not dealers in commodities but were rather "traders".

In Merton on Federal Taxation, Vol. 3B, chap. 22 §22.15, pages 75-78, with reference to the exclusion from the term "capital assets" of property held primarily for sale to customers in the ordinary course of trade or business, it is stated:

"The phrase 'property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business', while having the casual appearance of being readily understood and easily applied, has proved difficult of application and has required repeated consideration by the courts. Each case must be decided on its own facts.

A distinction must be made between a dealer and a trader. In one case (George R. Kemn, 16TC1026) the Tax Court said that a dealer was one who purchased property for resale to customers he had or hoped to have for a price in excess of his cost, the premium representing his compensation for acting as a middleman. A trader, on the other hand, was defined as one who purchased property with the expectation of reselling it after a rise in the value during the interval of time he held it and who performed no merchandising function for which he sought compensation since his source of supply was not significantly different from that of those to whom he eventually sold the property. Following this distinction the courts have held that speculative investments in non-income producing property may receive capital gain treatment.

It is to be noted that this exclusion applies only where 'property is held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business'. The following factors have been considered in determining whether property sold by a taxpayer was held by him primarily for sale to customers in the ordinary course of his trade or business: (1) the purpose for which the property was acquired for sale or investment; (2) the number, continuity and frequency of sales as opposed to isolated or casual transactions; (3) the activity of the seller or those acting under his instructions or his behalf; (4) the

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extent or substantiality of the transactions; and (5) any other facts tending to indicate that sales or transactions were in furtherance of an occupation of the taxpayer. The exercise of a power and not the possession of it is the material factor to be weighed in testing whether a corporation is in a particular business.

Where the facts show that the property is held primarily as an investment for revenue and speculation, it is classed as a capital asset and not as property held 'primarily for sale to customers in the ordinary course of trade or business'."

I am of the opinion that the taxpayers intended to speculate in hides and rubber and did not actually intend to become dealers in said commodities; that they intended, in all probability, to materially offset their capital gains in stocks and bonds by taking as large a deduction as they possibly could through the setup of a trading company in commodities and taking a normal loss. This is borne out by the fact that the purchases and sales of commodities for both the calendar years 1955 and 1956 took place toward the end of said calendar years; that despite the fact that each of the sales resulted in a loss, purchases were immediately made thereafter. This appears to contradict the contention of the taxpayers that they intended to deal in commodities and make a profit but were caught in a declining market. It is to be noted that in 1954 the taxpayers were engaged in a similar activity under the name of Dalsey Trading Co. where they also reported normal losses. Although much ado is made of the fact that the Internal Revenue Service accepted without change the returns of Barcha Trading Company, I am of the opinion that they were not fully aware of the complete operations of the taxpayers since apparently they only examined the returns of Barcha Trading Co.

In addition, I am of the further opinion that the taxpayers may not now claim a deduction for contributions omitted from their return for the year 1957 since they did not file any amended return nor did they file an application for revision or refund for said year within the statutory time limit in accordance with §374 of the Tax Law. They did, however, file a demand for a hearing for the year 1957 on December 15, 1961.

For the reasons stated above, I recommend that the determination of the Tax Commission in the above matter be substantially in the form submitted herewith.

SOLOMON SIES

Hearing Officer

OCT 26 1965 (NOV. 5, 1965)

MARTIN SCHAPIRO

Approved

E. H. BEST

Approved

**STATE OF NEW YORK  
STATE TAX COMMISSION**

**-----  
IN THE MATTER OF THE APPLICATION**

**OF**

**DAVID L. LIEB and SYLVIA LIEB, his wife**

**FOR REVISION OR REFUND OF PERSONAL INCOME  
TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR  
THE YEARS 1955, 1956 and 1957.**  
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The taxpayers herein, having filed applications for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1955 and 1956 and having filed a demand for hearing for the year 1957 on December 15, 1961 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, NY, on the 25th day of May, 1964, before Solomon Glas, Hearing Officer of the Department of Taxation and Finance at which hearing the taxpayers were represented by Emmanuel E. Finder, C.F.A., of the accounting firm of David L. Lieb and Co. and the matter having been duly examined and considered,

**The State Tax Commission hereby finds:**

(1) That at all of the times hereinafter mentioned, the taxpayer was and still is a certified public accountant and a partner in the accounting firm of David L. Lieb and Co., maintaining offices at 274 Madison Avenue, New York City; that the taxpayers, David L. Lieb and Sylvia Lieb, filed a certificate of doing business under the firm name and style of Barcha Trading Company in the office of the Clerk of the County of New York on July 12, 1955; that the office of Barcha Trading Company was located in the same office where the taxpayer David L. Lieb maintained his accounting firm.

(2) That the taxpayers reported their income on joint returns filed by them for the years 1955 and 1956; that for the year 1955, the taxpayers reported income from interest on bank deposits in the sum of \$8,439.36 and income from dividends in the sum of \$19,796.02; that David L. Lieb included income from the partnership of David L. Lieb and Co. in the sum of \$19,217.99; that they reported

cost of securities (stocks and bonds) in the sum of \$927,326.87 which were sold for \$1,020,363.74, showing a capital gain of \$90,036.87 for said year; that the taxpayers deducted for the year 1955 from normal income, loss from Barcha Trading Co. in the sum of \$25,426.29; that with respect to the return for the year 1956, the taxpayers reported interest on bank deposits in the sum of \$6,477.92 and income from dividends in the sum of \$22,972.65; that the taxpayer David L. Lieb reported for said year compensation as an employee for Titra Film Laboratories, Inc., in the sum of \$15,000.00; that the taxpayer David L. Lieb also reported as a distributive share of income from the co-partnership of David L. Lieb and Co. the sum of \$19,717.99; that they reported cost of securities (stocks and bonds) in the sum of \$494,418.22 which were sold for \$529,336.53, showing a capital gain of \$34,918.31 for said year; that the taxpayers deducted from normal income loss from Barcha Trading Co. in the sum of \$4,961.63; that on September 13, 1960, the Department of Taxation and Finance made additional assessments against the taxpayers for the years 1955 and 1956 (Assessment Nos. B-810015 and B-810016, respectively) disallowing the losses reported on the partnership returns of Barcha Trading Co. as normal losses but permitting them to be deducted and considered as capital losses.

(3) That during the years 1955 and 1956 the taxpayers were not dealers in securities but bought and sold securities during said years for their own account.

(4) That during the years 1955 and 1956, the taxpayers in the name of Barcha Trading Co. purchased commodities consisting of hides and rubber; that the taxpayers did not take physical delivery of the commodities so purchased; that the commodities were resold shortly after they were purchased, all at a loss; that the sales and the selling price thereof together with the loss on said purchases were as follows: (Taxpayer's Exhibit #7)

**Calendar Year 1955**

<u>Date of Purchase</u>	<u>Number of Pieces</u>	<u>Amount</u>	<u>Cost</u>	<u>Date of Sale</u>	<u>Selling Price</u>	<u>Gross Loss on Sale</u>
12/19/55	4,717	270,000	30,838.46	12/20/55	24,743.67	6,084.79
12/20/55	5,532	311,890	35,609.43	12/21/55	28,591.94	7,017.49
12/21/55	4,646	266,715	30,696.03	12/22/55	24,694.95	6,001.06
12/22/55	4,691	262,797	29,961.04	12/23/55	24,048.11	5,912.93
	19,586	1,112,802	127,104.96		102,078.67	25,026.29

**Calendar Year 1956**

12/18/56	490	112,104	41,618.61	12/19/56	27,045.09	
12/18/56	490	112,183	41,647.94	12/21/56	27,064.15	
12/24/56	490	112,104	41,618.61	12/26/56	27,045.09	
	1,390	336,391	124,885.16		81,154.33	43,735.83
Commissions on Purchases			172.32			122.48
			125,057.48			43,858.31

(5) That the taxpayers did not have regular customers for the sale of the commodities which they purchased; that the taxpayers were not engaged during the years in issue in the usual trade for resale of commodities consisting of hides and rubber but were engaged in the purchase and sale of commodities for speculation; that the taxpayers during the years in question were not engaged as dealers in commodities but merely engaged as traders in such commodities; that the commodities so purchased by the taxpayers did not constitute stock in trade of the taxpayers or other property of a kind which would properly be included in the income of the taxpayers or property held by them primarily for sale to customers in the ordinary course of their trade or business; that the purchases and sales of commodities for both the calendar years 1955 and 1956 took place at the end of said calendar years; that despite the fact that each of the sales resulted in a loss, purchases were immediately made thereafter; that the commodities purchased by the taxpayers as more fully set forth in Finding 4 constituted "capital assets" of the taxpayers.

(6) That although the taxpayers contended at the hearing that they are entitled to a deduction for charitable contributions omitted from their return for the year 1957, they did not file any

amended return nor did they file an application for revision or refund with respect to the year 1957 within two years from the date of filing of said return; that no application for revision of the recomputation included in refund voucher for the year 1957 issued on September 13, 1960 had been filed within one year from such recomputation; that the taxpayers' demand for a hearing for the year 1957 filed on December 15, 1961 was ineffectual.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

**DETERMINES:**

(A) That the taxpayers, having failed to file an application for revision or refund or an amended return with respect to the year 1957 within two years from the date of filing of said return in accordance with Section 37<sup>1/2</sup> of the Tax Law, they are not entitled to any further consideration or review of said return for the year 1957; that the taxpayers failed to file an application for revision of the recomputation included in refund voucher for the year 1957 within one year from the date of such recomputation in accordance with the provisions of Section 37<sup>1/2</sup> of the Tax Law.

(B) That the purchases by the taxpayers of commodities for speculative purposes as more fully set forth in Findings<sup>4</sup> and 5 above constituted "capital assets" as defined in subdivision 12 of Section 350 of the Tax Law; that the loss from the sale of said capital assets constituted a capital loss deductible from capital gains only in accordance with subdivision 1<sup>1/2</sup> of Section 350 of the Tax Law.

(C) That, accordingly, the assessments made against the taxpayers (Assessment Nos. B-810015 and B-810016, for the years 1955 and 1956, respectively) are correct; that said assessments do not include any tax or other charge which could not have been lawfully demanded and the taxpayers' applications for revision or refund with respect to said assessments be and the same are hereby denied.



