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MEMORANDUM

Income Tax Determinations
A-Z*Ritter, Max*

TO: Commissioners Murphy, Palestine & Needuff
FROM: Solomon Sles, Hearing Officer
SUBJECT: MAX RITTER

1942 Assessment #SIB-2070
1943 Assessment #SIB-2071

Article 16

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y., on October 30, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issues involved herein are: (1) whether the taxpayer filed willfully false or fraudulent returns for the years in issue with intent to evade the taxes for said years; (2) whether the assessment for the year 1942 should be cancelled, where no fraud has been established and the assessment was made more than five years from date of the filing of the return and no waiver executed to extend the statutory time period in accordance with subdivision 1, Section 373 of the Tax Law; and (3) whether the taxpayer is subject to tax on his distributive share of additional income from a co-partnership where the other co-partner was engaged in "black market activities" in which the taxpayer did not participate and claims he did not receive any part of the proceeds therefrom.

Max Ritter and Harry Breiblatt were engaged as co-partners doing business under the firm name and style of M & H Meat Market at 403 West 39th Street, New York City for the period from 1939 to about April 1, 1944. The co-partnership was engaged in the sale of wholesale meats, primarily to restaurants. Max Ritter originally invested \$2,000.00 in the partnership.

On August 15, 1951, the Special Investigations Bureau made additional assessments of unincorporated business tax against the co-partnership under Article 16A of the Tax Law for the years 1942, 1943 and 1944, attributing additional income to said co-partnership based upon field audit. At the same time, additional assessments were issued for said years against Harry Breiblatt under Article 16 of the Tax Law based upon his distributive share of the additional income of the co-partnership disclosed upon audit. All of these assessments were paid on August 31, 1951, by Harry Breiblatt.

On February 15, 1952, additional assessments were made against Max Ritter for the years 1942, 1943 and 1944 based upon his distributive share of the additional income of the co-partnership pursuant to the assessments previously mentioned. The taxpayer did not file an application for revision or refund with respect to the assessment for the year 1944. Although waivers to extend the statutory time period were executed by the taxpayer Max Ritter for the year 1943, no such waivers were executed by him with respect to the

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year 1943.

It is to be noted that the Internal Revenue Bureau audited the books and records of the co-partnership of M & H Meat Market for the years 1942 through 1944 and assessed the entire additional income against Harry Dreiblatt.

The taxpayer testified that he was the "inside man" performing the cutting and packaging orders; that the co-partner, Harry Dreiblatt, was the "outside man" taking care of purchases and sales; that the taxpayer's drawings were approximately \$125.00 per week; that the only additional income he received from the partnership besides his drawings was the sum of \$3750.00 for the purchase in his own name of a \$5,000.00 U.S. Savings Bond and also \$800.00 or \$900.00 for insurance premiums on an insurance policy in his individual name (Minutes of Hearing, page 40); that the taxpayer submitted a copy of the dissolution agreement of the partnership which indicates that he received the sum of \$30,000.00 from Harry Dreiblatt for his interest in the aforementioned partnership; that the taxpayer was aware of the fact that his co-partner, Harry Dreiblatt, was engaged in black market activities on behalf of the co-partnership (Minutes of Hearing, pp. 33 & 34); that the taxpayer signed the partnership return of the co-partnership for the year 1943; that he was not aware of the contents thereof (Minutes of Hearing, page 34); that although the taxpayer testified that he received as his distributive share of income from the partnership for the year 1943 the sum of \$19,537.07, as reported on his return for said year, he subsequently testified that he only drew \$125.00 a week (Minutes of Hearing, pp. 35 & 37).

The Special Tax Investigator testified at the hearing as follows: "In the course of my investigation I did not find any evidence that Mr. Ritter actually received any additional monies other than that shown on his tax return" (Minutes of Hearing, page 26).

Unless the taxpayer is guilty of fraud, the assessment for the year 1942 must fall since it was made more than five years after the filing of the return and no waiver was executed extending the statutory time period within which to make an additional assessment for said year.

The burden of proof to establish fraud rests upon the Department. In the case of Nicholas v. C.I.R., 185 F.2d 263, it was held that fraud cannot be lightly inferred but must be established by clear and convincing proof. In the case of Nicholas v. C.I.R., 38 B.T.A. 190, it was held that where a taxpayer did not know the amount of income of the partnership of which he was a member for a particular year, his failure to include it in his return did not subject him to fraud penalty and that the deficiency was barred by the limitation statute. The Tax Commission, in the instant case, has failed to establish that the taxpayer, Max Ritter, filed willfully false and

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fraudulent personal income tax returns with intent to evade the tax for the years 1942 and 1943. I am, therefore, of the opinion that the assessment for the year 1942 should be cancelled in accordance with subdivision 1, Section 373 of the Tax Law.

With respect to the additional income of the partnership for the year 1943, the evidence at the hearing disclosed that the inventory at the beginning of the year was \$7,648.93 and at the end of the year was \$4,313.01; that purchases during said year amounted to \$598,070.87; that the sales reported on said return amounted to \$703,364.75; that net income reported on said return amounted to \$30,418.36. The taxpayer, Max Ritter, testified that the profits in proportion to the merchandise bought ranged from 20% to 15% (Minutes of Hearing, page 36). The Special Tax Investigator testified that the sales as reflected on the partnership return for 1943 were understated and that the gross profit was estimated on a percentage of 26 1/2% of total sales which was prevalent in the industry at that time so that the cost of goods sold must have been 73 1/2% and that he took the cost of goods sold and divided it by 73 1/2% to arrive at what he believed was the proper sales for the partnership for that year (Minutes of Hearing, page 12). It appears that there was a very substantial increase in the net worth of the partnership in the year 1943. On the basis of the testimony of the taxpayer that profits in proportion to merchandise bought ranged about 20%, the profits of the partnership in 1943 amounted to approximately \$150,000.00 instead of \$30,000.00 reported on the return, and therefore, constituted additional income of the partnership which was not reported on said return.

In the absence of fraud, the burden of proof rests upon the taxpayer to show that the assessment for the year 1943 was improper. The taxpayer, Max Ritter, has failed to establish or submit evidence through books or records to show that the additional income of the partnership for the year 1943 as disclosed upon audit was erroneous.

In Mertens' "Law of Federal Income Taxation", Volume 6, Sect. 35.22, Chap. 35, pp. 59, 60, it is stated:

"Each partner is held accountable for the tax upon his proportion of the profits. ... A partner is taxable on his distributive share, even though it is not actually withdrawn but remains in the custody and control of the partnership and he never lays hands on it personally because of going into individual bankruptcy. Moreover, a partner is not relieved of the tax with respect to his distributive share of partnership income although concealed by him from his co-partner and in fact never actually received or received in a later year only after suit had been brought."

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In the case of Frank T. Korman, 15 B.T.A. 349, the taxpayer was a member in a partnership. The firm filed a partnership return for the year 1920 and the taxpayer filed an individual return in which he showed as income the distributive share attributed to him upon said partnership return. Thereafter, upon examination by a revenue agent, the Commissioner of Internal Revenue found additional income to the partnership and asserted a deficiency against the taxpayer based upon his distributive share of such income. Although the taxpayer contended that no part of the additional income of the partnership discovered by the revenue agent was actually distributed to him during the year in issue, the Board held that he was liable for deficiency on his distributive share, whether distributed or not. To the same effect, see G.I.R. v. Goldberg's Estate, 213 F.2d 78 and First Mechanics' Bank v. Commissioner, 205 F.2d 903.

In the case of A. Son & Sons Products Co. v. Gannett, 14 AD 2d 487, 217 N.Y.S. 2d 277, it was held that fraud by one partner, whereby money or property is gained by the partnership, renders all of the partners similarly liable despite the discharge in bankruptcy.

I am, therefore, of the opinion that the additional assessment against the taxpayer Max Ritter for the year 1943 should be sustained.

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

SEP 16 1965

/s/

MARTIN SCHAPIRO

Approved

/s/

E. H. BEST

Approved

SS:tc

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

MAX BITTER

FOR REVISION OR REFUND OF PERSONAL INCOME
TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR
THE YEARS 1942 AND 1943

Max Bitter, the taxpayer herein, having filed applications for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1942 and 1943 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N.Y. on the 30th day of October, 1964, before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Joseph Tiefenbrun, Esq., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, Max Bitter, and Harry Dreiblatt were co-partners doing business under the firm name and style of M & H Meat Market at 523 9th Avenue, New York City; that said co-partnership was commenced in 1939 and was dissolved on April 1st, 1944; that profits from said co-partnership were shared equally; that on the partnership return of M & H Meat Market for the year 1942 there was reported a distributive share of net income to the taxpayer, Max Bitter, in the sum of \$7,826.92 and a like sum as the distributive share of the other partner, Harry Dreiblatt; that on the partnership return of M & H Meat Market for the year 1943 there was reported a distributive share of net income to the taxpayer, Max Bitter, in the sum of \$19,537.07 and a like sum to the other partner, Harry Dreiblatt; that the aforementioned return for the year 1943 was signed by the taxpayer, Max Bitter; that the co-partnership filed unincorporated business tax returns for the years 1942 and 1943 and reported unincorporated business tax due in the sums

of \$202.35 and \$1016.73 for the years 1942 and 1943, respectively; that the taxpayer Max Ritter, reported on his personal income tax returns for the years 1942 and 1943, the aforementioned distribution of income from the co-partnership of M & H Meat Market.

(2) That on August 15, 1951, the Department of Taxation and Finance made additional assessments against the co-partnership, M & H Meat Market for the years 1942 and 1943 imposing additional unincorporated business tax on the basis of additional income disclosed upon audit; that the additional income for the years 1942 and 1943 subject to unincorporated business tax amounted to \$76,115.42 and \$149,196.42, respectively; that said assessments of unincorporated business tax were paid on August 31, 1951 by Harry Dreiblatt.

(3) That the taxpayer, Max Ritter, duly executed waivers or consents extending the period of limitations to issue assessments of additional personal income taxes against him for the year 1943 but did not execute such waivers for the year 1942; that on February 15, 1952, the Department of Taxation and Finance made additional assessments against the taxpayer for the years 1942 and 1943 (Assessment Nos. SIB-2070 and SIB-2071, respectively) assessing additional income on audit in the sums of \$37,738.78 for 1942 and \$62,561.14 for 1943 as his distributive share of additional income from the co-partnership of M & H Meat Market and in addition thereto imposed for each of the aforementioned years a penalty of 25% plus interest at 6% per annum.

(4) That during the years in issue the co-partnership of M & H Meat Market was engaged in the sale of meats primarily to restaurants; that the taxpayer Max Ritter originally invested in the partnership \$2,000.00; that the taxpayer Max Ritter was the "inside man" attending to the cutting of meats and the packing of orders; that his co-partner, Harry Dreiblatt was the "outside man" attending to the buying and selling of meats and collecting from customers; that during the years 1942 and 1943, Harry Dreiblatt was engaged in "black market activities" in the purchase and sale of meats on behalf of the co-partnership; that the taxpayer, Max Ritter, was not actively engaged in

said "black market activities", nor did he participate in the aforementioned "black market activities"; that the taxpayer, Max Ritter, testified that he was aware that his co-partner was engaged in said "black market activities" and stated "At that time everybody did the same thing. I didn't know how far he would go" (Minutes of Hearing, page 13); that he knew that his co-partner was engaged in "black market activities", stating "Naturally, I was there, too" (Minutes of Hearing, page 34); that either of the co-partners had authority to sign checks individually; that although the taxpayer testified that he received as his distributive share of income from the partnership for the year 1943 the sum of \$19,537.07, as reported on his return for said year, he subsequently testified that he only drew \$125.00 a week (Minutes of Hearing, pages 35 and 37); that the taxpayer, Max Ritter, testified that in 1943 in addition to his drawings of \$125.00 a week, he also received from the co-partnership the sum of \$3750.00 for the purchase of a \$7000.00 U. S. Treasury Bond and also approximately \$800.00 or \$900.00 to pay his personal life insurance premiums; that the taxpayer submitted a copy of the dissolution agreement of the partnership which indicates that he received the sum of \$30,000.00 from Harry Breiblett for his interest in the aforementioned partnership.

(5) That the additional assessment made against the taxpayer Max Ritter for the year 1942 (Assessment #SIB-2070) was not made within five years from the date of the filing of such return; that the taxpayer filed no waiver or consent extending the period of limitation within which to make such additional assessment for said year; that the State tax Commission has failed to establish that the taxpayer, Max Ritter, filed willfully false and fraudulent personal income tax returns with intent to evade the taxes for the years 1942 and 1943.

(6) That with respect to the additional income of the partnership for the year 1943, the evidence at the hearing disclosed that the inventory at the beginning of the year was \$7,648.93 and at the end of the year was \$4,113.01; that purchases during said year amounted to \$598,070.87; that the purchases and sales were made mostly in cash

(Minutes of Hearing, page 36); that the sales reported on said return amounted to \$703,564.56; that net income reported on said return amounted to \$30,418.36; that the taxpayer Max Ritter testified that the profits in proportion to the merchandise bought ranged from 20% to 15% (Minutes of Hearing, page 36); that the sales as reflected on the partnership return for 1943 were understated; that the income reported therein was likewise understated; that there was a very substantial increase in the net worth of the partnership in the year 1943; that on the basis of the testimony of the taxpayer that profits in proportion to merchandise bought ranged about 20%, the profits of the partnership in 1943 amounted to about \$150,000.00 instead of the \$30,000.00 reported on the return; that such additional income was not reported on said return of the partnership; that the taxpayer Max Ritter has failed to establish or submit evidence through books and records that the additional income of the co-partnership for the year 1943 as disclosed upon audit was erroneous or incorrect; that the additional income of the partnership as discovered upon audit for the year 1943 is correct; that the distributive share of said additional income of the partnership for the year 1943 was attributable to the taxpayer Max Ritter.

(7) That although the taxpayer contends that since no part of the additional income of the co-partnership discovered on audit was actually distributed to him during the year 1943 he could not be taxed upon it, Section 364 of the Tax Law provides, in part, as follows:

"Individuals carrying on business in partnerships shall be liable for income tax only in their individual capacity. There shall be included in computing the net income and net capital gain of each partner his distributive share, whether distributed or not of the net income and net capital gain and his distributive share of the net loss and net capital loss of the partnership for the taxable year." * * *

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

DETERMINES:

(A) That the taxpayer was taxable on his distributive share of additional income of the co-partnership of M & H Meat Market for the year 1943 as more fully set forth in Finding (6) above in accordance

with the intent and meaning of Section 364 of the Tax Law then in effect; that the assessment against the taxpayer Max Ritter (Assessment No. SIR-2071) for the year 1943 is correct; that said assessment does not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's application for revision or refund with respect thereto be and the same is hereby denied.

(B) That in accordance with Finding (5) above, the assessment for the year 1942 (Assessment No. SIR-2070) was not made within the statutory time period in accordance with Section 373 of the Tax Law; that the tax contained in said assessment was not due and owing and not lawfully demanded and that the aforementioned assessment be and the same hereby is cancelled in full.

AND IT IS SO ORDERED.

DATED: Albany, New York, on the 7th day of December, 1965.

STATY TAX COMMISSIONER

/s/

JOSEPH H. MURPHY
President

/s/

IRA J. PALESTIN
Commissioner

/s/

JAMES R. MACDUFF
Commissioner