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MEMORANDUM

*Income Tax Determinations**A-2**Leonard, Homer H.*

TO: **State Tax Commission**

FROM: **Alfred Rubinstein, Hearing Officer**

SUBJECT: **Petition of Homer H. Leonard
for Redetermination of a Deficiency
or for Refund of Personal Income
Taxes Under Article 22 of the Tax
Law for the Year 1965**

The taxpayer has advised that he will be unable to appear at a hearing. He is an invalid, confined to his home, and, as appears from his letter dated February 19, 1968, he is willing to accept a decision based on the papers submitted. At no time has the taxpayer ever raised an issue as to his liability for the deficiency. The petition merely sets forth that the taxpayer is unable to pay. As no useful purpose would be served in scheduling a hearing in Buffalo at which the taxpayer would not appear, I am of the opinion that the Tax Commission may decide the matter on documents contained in the file.

Homer H. Leonard was the sole stockholder and president of H. H. Leonard, Inc. of 95 Main Street, Hamburg, New York. On July 15, 1965 the corporation went out of business, hopelessly insolvent (see letter of taxpayer dated February 11, 1966). At that time the corporation, as an employer, had withheld \$396.80 of New York income taxes from employees' salaries which sum had not been remitted. A jeopardy assessment was issued against the corporation on November 10, 1965. Taxpayer replied by letter, received November 22, 1965, advising that the corporation was defunct and unable to pay, stating further, "I know that I am personally responsible for said taxes."

On May 2, 1967 the matter was referred to Albany, as uncollectible against the corporation. A 100% penalty was imposed against the taxpayer, individually, pursuant to the provisions of section 685(g) of the Tax Law for his failure to pay over the withheld taxes, by Notice of Deficiency dated July 3, 1967 (File No. 16-0875151). On August 15, 1967 taxpayer filed a petition for redetermination, in which he raised no issue as to his liability or as to the amount of the deficiency, contending only that he was unable to pay, requesting the Tax Commission to "write this off as uncollectible."

The taxpayer was advised by letter dated December 11, 1967 that a hearing would be scheduled in Buffalo, and by his letter dated February 19, 1968, he advised the hearing officer of his inability to attend a hearing because of physical disability which confined him to his home.

The issue involves the personal liability of the taxpayer, as a corporate officer, for taxes withheld and not paid over. The taxpayer concedes his liability, but contends that the deficiency imposed against him should be abated because of his inability to pay.

The same issue arose in the Matter of the Petition of Charles A. Smith, decided July 21, 1966, and based upon the decision in that matter, and the cases cited by Hearing Officer Solomon Sies in his memorandum dated June 21, 1966, there is no question but that this taxpayer's failure to pay over and account for taxes withheld by the corporation of which he was the sole stockholder and president was willful. In fact, he concedes as much. The sole question remaining to be considered is his request for abatement.

Paragraph "Fifteenth" of section 171 of the Tax Law empowers the Tax Commission to compromise taxes, interest and penalties in cases of bankrupt or proven insolvent tax debtors, provided the amount payable in compromise is no less than is recoverable by legal proceedings.

Originally, under Article 16 of the Tax Law, section 373(6) permitted the Tax Commission to abate a small unpaid balance, pursuant to uniform rules, where collection costs would not warrant collection procedures, or where an assessment was excessive, erroneous or illegal, and further provided that no claim for abatement could be filed by the taxpayer. Also under Article 16 of the Tax Law, section 378 provided for abatement of unpaid taxes of certain members of the armed forces upon death.

The abatement provisions of section 373(6) were carried over to Article 22 of the Tax Law in section 697(c) and those contained in section 378 were likewise carried over in section 696(c). In addition, Article 22 provides, at section 690(d), for abatement of a deficiency disallowed after Court review; at section 694(c) for abatement of all or part of a jeopardy assessment to the extent such assessment is excessive; and at 694(g) for abatement of a jeopardy assessment where there is, in fact, no jeopardy.

While no uniform rule or regulation has been adopted under section 697(c) to permit abatement of small unpaid balances, a proposed resolution is now under consideration by the Tax Commission (and may have, in the meantime, been adopted) under which certain uncollectible balances may be abated. Under the proposed

resolution the maximum abatement, where a warrant has not been filed, is \$100.00, and then only after 20 years from the date of assessment, or due date or filing of the return, whichever is later.

It does not appear, consequently, that any present authority exists for abatement of this deficiency, nor are there present sufficient facts to warrant consideration of a compromise, if one should be offered in accordance with section 171 of the Tax Law. The taxpayer has not been discharged in bankruptcy, nor has there been offered any proof of his insolvency. His sole sources of income, at this time, are social security benefits and a pension from the Veterans Administration, and the deficiency may, ultimately, prove to be uncollectible. Nevertheless, it is my opinion that the determination of deficiency should be sustained, on the applicable law. In the event such deficiency should, in the future, qualify for abatement or compromise proper action may be taken at such time. If the decision of the Tax Commission is in accord with this opinion, the taxpayer should be advised that the District Office or appropriate Bureau may review the matter, should the deficiency subsequently qualify for abatement or compromise.

The decision of the Tax Commission should be substantially in the form herewith submitted.

/s/

ALFRED RUBINSTEIN

Hearing Officer

AR:jmm

Enc.

March 26, 1968

3-29-68

**STATE OF NEW YORK
STATE TAX COMMISSION**

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IN THE MATTER OF THE PETITION :

OF :

HOMER H. LEONARD :

FOR REDETERMINATION OF A DEFICIENCY OR :

FOR REFUND OF PERSONAL INCOME TAXES :

UNDER ARTICLE 22 OF THE TAX LAW FOR :

THE YEAR 1963 :

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Homer H. Leonard having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1963, and the matter having been assigned to Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, for hearing, and the taxpayer having requested a decision based on the papers submitted by him due to his inability to attend a hearing, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That H. H. Leonard, Inc. was a corporation doing business in Hamburg, New York until July 13, 1963 when it suspended its business activities because of insolvency; that during 1963, while conducting business in New York, H. H. Leonard, Inc., as an employer, withheld New York taxes from the salaries and wages of its employees in the total sum of \$396.80; that such taxes in the sum of \$396.80 were not remitted or paid over to the State of New York or accounted for; that on November 10, 1963, the Income Tax Bureau issued a jeopardy assessment (File No. 16-0873151) for such sum of \$396.80 pursuant to the provisions of section 634(a) of the Tax Law, and demanded payment of the taxes withheld by

H. H. Leonard, Inc.; that on May 2, 1967, the assessment was determined to be uncollectible as against H. H. Leonard, Inc.

(2) That during 1965, the taxpayer, Homer H. Leonard, was the sole stockholder and president of H. H. Leonard, Inc., and personally supervised, managed and controlled the corporation's business activities and operations; that the taxpayer, as a corporate officer, caused to be deducted and withheld from the salaries and wages of the employees of H. H. Leonard, Inc. New York taxes in the total sum of \$396.80; that the taxpayer, as a corporate officer, was under a duty to remit, pay over or account for such taxes to the State of New York; that such taxes were not remitted, paid over or accounted for to the State of New York; that such taxes withheld were co-mingled with the corporation's funds and treated as corporate assets.

(3) That on July 3, 1967, the Income Tax Bureau, pursuant to section 685 of the Tax Law, issued a notice of deficiency imposing a penalty of \$396.80 against the taxpayer, equal to the taxes withheld by H. H. Leonard, Inc. and not paid over to the State of New York, on a finding that the taxpayer, as a person required to collect and pay over taxes, had willfully failed to do so; that on August 15, 1967, the taxpayer filed a petition for redetermination, contending merely that he was unable to pay the deficiency and requesting abatement.

(4) That subsection (c) of section 697 of the Tax law provides in part: "No claim for abatement shall be filed by a taxpayer."

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

DECIDES:

(A) That the taxpayer, Homer H. Leonard, as the sole

stockholder and president of H. H. Leonard, Inc. during 1963 was a person as defined in section 685(1) of the Tax Law, required to collect, account for and pay over taxes within the meaning of section 685(g) of the Tax Law; that the taxpayer failed to pay over such taxes in the sum of \$396.80; that such failure to pay over taxes was willful within the meaning of section 685(g) of the Tax Law.

(B) That by virtue of finding of fact No. 4, the taxpayer's claim for abatement is hereby rejected.

(C) That, accordingly, the notice of deficiency imposing a penalty of \$396.80 against the taxpayer for 1963 is correct; that the amount set forth therein is due and owing together with interest, if any, and other statutory charges; that said notice of deficiency does not include any tax or other charges which could not have been lawfully demanded, and that taxpayer's petition for redetermination with respect thereto be and the same is hereby denied.

Dated: Albany, New York this 11th day of April, 1963.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

COMMISSIONER

/s/

A. BRUCE MANLEY

COMMISSIONER

/s/

SAMUEL E. LEPLER

COMMISSIONER