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BUREAU OF LAW

MEMORNADUM

Income Tax Determin.
A-Z

Engelman, Abraham
& Max

TO: The State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: MAX ENGELMAN

1955 Assessment No. B-442130
1956 Assessment No. B-727933

ABRAHAM ENGELMAN

1955 Assessment No. B-442129
1956 Assessment No. B-727932

Article 16

Since identical issues of fact and law are involved in both cases, a combined hearing was held with the consent of the representative for the taxpayers.

The issues involved herein are: (1) whether the taxpayers filed a timely application for revision or refund with respect to the year 1956 in each case; and (2) whether the disallowance of accelerated depreciation and in lieu thereof, allowance of depreciation on the straight line method, in connection with income reported by the taxpayers from the partnership of The Greenwich Company was proper.

The taxpayer, Abraham Engelman, is not contesting the disallowance of expenses in accordance with Federal audit of his Federal return for the year 1955.

The taxpayers, Max Engelman and Abraham Engelman, were members of the co-partnership known as "The Greenwich Company", which was organized in 1950, and maintained a principal place of business at 20 Broad Street, New York City, N.Y. The co-partnership owned and operated an apartment house located at 44-58 East 8th Street, New York City, N.Y. which was built in 1951. Abraham Engelman and Harry Landes were general partners and Max Engelman and twenty (20) others were limited partners. The co-partnership used a 150% declining method of depreciation on its partnership returns for 1955 and 1956. The estimated life of the depreciable assets stated in the respective returns was 28 1/4 years for the building and 6 1/4 years for the alterations, furniture and equipment. Assessments were issued against the taxpayers herein increasing their distributive share of partnership income as a result of the disallowance of the accelerated method of depreciation claimed and allowance of depreciation, in lieu thereof, on a straight line basis.

Section 360(8) of the Tax Law, permitting a reasonable allowance for the exhaustion, wear and tear and obsolescence of property used in a trade or business is based upon the provisions of the early Internal Revenue Acts which were carried over into Section 23(l) Internal Revenue Code of 1939. At first Federal practice only permitted the declining balance method in isolated instances (see I.T. 2369, C.B. VI-2 p. 63, for example). The Board of Tax Appeals extended the types of business and assets to which the declining balance method could be applied. (See Leady Manufacturing Company, 2 B.T.A. 230; Matter of Eaton, 2 B.T.A. 463 and Simmons Brick Company, 14 B.T.A. 878) In fact the Commissioner of Internal Revenue had, where the initial cost was unknown, used the depreciated cost as a basis for further depreciation. In 1946 the Bureau of Internal Revenue held that the use of the declining balance method of computing depreciation would be approved, for Federal income tax purposes, provided it accords with the method of accounting regularly employed in keeping the books of the taxpayer and results in reasonable depreciation allowances and proper reflection of net income for the taxable year or years involved. It held further that the declining balance method and other methods of computing depreciation are methods of accounting for a change in the use of which, for Federal income tax purposes, the Commissioner's consent must first be obtained as prescribed in Section 29.41-2 of Regulations 111. (I.T. 3813, C.B. 1946-2 p. 42.)

In any event, the methods of declining balance and the sum of the year's digits were incorporated in Section 167(b)(2)(3) of the 1954 Internal Revenue Code. In 1957 an initial 150% of straight line rates was permitted with respect to any tangible property. Presently 200% of the straight line rate is allowed.

Article 175 of the Income Tax Regulations under Article 16 of the Tax Law provides for depreciation in equal annual installments (straight line method) or in accordance with any other recognized trade practice. In Income Tax Bureau Manual of Policy, Article 175 (8/25/58), pertaining to the method of computing depreciation allowance, it is stated as follows:

> "Double Declining Balance and Sum-of-the-digits Methods. These accelerated depreciation methods are allowable for Federal tax purposes under the Internal Revenue Code of 1954, but neither method is allowable under the New York State Income Tax Law. Neither method is in accordance with 'recognized trade practice.'"

The instructions for preparing income tax returns under Article 16 of the Tax Law state that accelerated depreciation regardless of the basis used is not permitted. Article 531 of the Income Tax Regulations under Article 16 of the Tax Law provides, in part, that "The forms and instructions contained therein have the force and effect of regulations."

The assessments for the year 1956 were mailed to the taxpayers, Max Engelman and Abraham Engelman, on January 20, 1960. The applications for revision or refund with respect to said assessments for the year 1956 were not filed until March 28, 1961, more than one year after the date of the making of said assessments. The taxpayers failed to file timely applications for revision or refund with respect to the year 1956 in accordance with Section 374 of the Tax Law.

I am of the opinion that the applications for revision or refund of each of the taxpayers with respect to the year 1956 be dismissed for timeliness; that the assessments for 1955 be sustained.

For the reasons stated above, I recommend that the determinations of the Tax Commission in the above matters be substantially in the forms submitted herewith.

SOLOMON SIES
Hearing Officer

SS:aa
Enc.

August 15, 1969

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS

OF

MAX ENGELMAN

FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR THE YEARS 1955 AND 1956.

Max Engelman, the taxpayer 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 a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York City, N.Y. on the 14th day of September, 1960 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and having been represented by Max Rothenberg & Co., C.P.A.'s by Joshua Rodner and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Max Engelman was a limited partner in the co-partnership of The Greenwich Company, which was organized in 1950 and maintained a principal place of business in the City and State of New York; that the aforementioned co-partnership owned and operated an apartment house located at 44-58 East 8th Street, New York City, N.Y.; that on the New York State income tax partnership returns for the years 1955 and 1956 the co-partnership used the 150% declining balance method of computing depreciation; that the estimated life of the depreciable assets stated in the respective returns was 28 1/4 years for the building and 6 1/4 years for the alterations, furniture and equipment.

(2) That the taxpayer filed income tax returns for the years 1955 and 1956 and included his distributive share from the co-partnership of The Greenwich Company in the amount of $1,371.45 for the year 1955 and the amount of $3,994.64 for the year 1956; that on July 2, 1958

the Department of Taxation and Finance made an additional assessment against the taxpayer for the year 1955 (Assessment No. B-[illegible]) increasing the distributive share of net income received from The Greenwich Company in the amount of $1,592.65 as a result of the disallowance of accelerated depreciation in the amount of $12,906.97 based upon the 150% declining balance method used by said co-partnership in computing depreciation allowing in lieu thereof depreciation on a straight line basis and imposing additional normal tax in the sum of $129.69; that the taxpayer filed a timely application for revision and a timely demand for a hearing with respect to said assessment.

(3) That on January 28, 1960 the Department of Taxation and Finance made an additional assessment against the taxpayer herein for the year 1956 (Assessment No. B-727933) increasing the distributive share of net income received from The Greenwich Company in the sum of $1,486.85 as a result of the disallowance of excessive depreciation in the sum of $14,868.51 based upon the 150% declining balance method used by said co-partnership in computing depreciation and allowance of depreciation on a straight line basis in lieu thereof; that as a result thereof additional tax was imposed against the taxpayer for the year 1956 in the amount of $99.88.

(4) That although the notice of additional assessment for the year 1956 was mailed to the taxpayer on January 28, 1960, he did not file his application for revision or refund with respect thereto until March 28, 1961, more than one year after the making of the assessment for said year.

(5) That the taxpayer has failed to establish that the declining balance method used by the co-partnership of The Greenwich Company represented a reasonable allowance for the exhaustion, wear and tear of the property used in the trade or business of said co-partnership or that the method used by said co-partnership in computing depreciation was in accordance with a regular trade practice or that it resulted in the proper reflection of net income for the taxable years involved.

(6) That the instructions for the preparation of New York State

resident returns for the years in issue specifically provided that accelerated depreciation, regardless of how computed, is not permitted; that Article 531 of the Personal Income Tax Regulations under Article 16 of the Tax Law, states that the instructions with respect to the preparation of returns shall have the force and effect of regulations.

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

DETERMINES:

(A) That the taxpayer's application for revision or refund with respect to the year 1956 was not timely filed within the prescribed statutory time period required in accordance with the provisions of Section 374 of the Tax Law.

(B) That, accordingly, the taxpayer's application for revision or refund filed with respect to the assessment for the year 1956 (Assessment No. B-787931) be and the same is hereby dismissed.

(C) That the accelerated depreciation claimed on the 150% declining method of the property owned and used by the co-partnership, The Greenwich Company, in its trade or business was properly disallowed for New York State Income Tax purposes for the years in issue pursuant to the instructions for the preparation of resident returns as more fully set forth in Finding (6) above; that the depreciation allowed on the straight-line basis was proper and in accordance with the aforementioned instructions, Article 273 of the Personal Income Tax Regulations and within the intent and meaning of Section 360(8), Article 16, of the Tax Law, then in effect.

(D) That, accordingly, the assessment for the year 1955 (Assessment No. B-[illegible]130) is correct; that the same 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 filed with respect thereto be and the same is hereby denied.

DATED: Albany, New York on the 6th day of October, 1969.

STATE TAX COMMISSION

/s/ NORMAN GALLMAN
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

/s/ MILTON KOERNER
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS

OF

ABRAHAM ENGELMAN

FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR THE YEARS 1955 AND 1956.

Abraham Engelman, the taxpayer 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 a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York City, N.Y. on the 14th day of September, 1964 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer was represented by Max Rothenberg & Co., C.P.A.'s by Joshua Rednor and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Abraham Engelman was a general partner in the co-partnership of The Greenwich Company, which was organized in 1950 and maintained a principal place of business in the City and State of New York; that the aforementioned co-partnership owned and operated an apartment house located at 44-58 East 8th Street, New York City, N.Y.; that on the New York State income tax partnership returns for the years 1955 and 1956 the co-partnership used the 150% declining balance method of computing depreciation; that the estimated life of the depreciable assets stated in the respective returns was 26 1/4 years for the building and 6 1/4 years for the alterations, furniture and equipment.

(2) That the taxpayer filed income tax returns for the years 1955 and 1956 and included his distributive share from the

co-partnership of The Greenwich Company in the amount of $2,697.16 for the year 1955 and the amount of $3,195.71 for the year 1956; that on July 2, 1958 the Department of Taxation and Finance made an additional assessment against the taxpayer for the year 1955 (Assessment No. D-448129) disallowing business expenses in the sum of $2,000.00 in accordance with the Federal audit of his return for said year and increased the distributive share of net income received from The Greenwich Company in the sum of $1,482.13 as a result of the disallowance of accelerated depreciation in the amount of $18,986.58 based upon the 150% declining balance method used by said co-partnership in computing depreciation, allowing in lieu thereof, depreciation on a straight line basis, imposing additional normal tax in the sum of $280.25; that the taxpayer is not contesting the disallowance of business expenses in the amount of $2,000.00 for the year 1955; that the taxpayer filed a timely application for revision and a timely demand for a hearing with respect to said assessment.

(3) That on January 20, 1960 the Department of Taxation and Finance made an additional assessment against the taxpayer herein for the year 1956 (Assessment No. D-727932) increasing the distributive share of net income received from The Greenwich Company in the sum of $1,141.48 as a result of the disallowance of accelerated depreciation claimed in the sum of $14,268.91 based upon the 150% declining balance method used by said co-partnership in computing depreciation and allowance of depreciation on a straight line basis in lieu thereof; that as a result thereof additional tax was imposed against the taxpayer for the year 1956 in the amount of $68.90.

(4) That although the notice of additional assessment for the year 1956 was mailed to the taxpayer on January 20, 1960, he did not file his application for revision or refund with respect thereto until March 28, 1961, more than one year after the making of the assessment for said year.

(5) That the taxpayer has failed to establish that the declining balance method used by the co-partnership of The Greenwich Company represented a reasonable allowance for the exhaustion, wear and tear of the property used in the trade or business of said co-partnership or that the method used by said co-partnership in computing depreciation was in accordance with a regular trade practice or that it resulted in the proper reflection of net income for the taxable years involved.

(6) That the instructions for the preparation of New York State resident returns for the years in issue specifically provided that accelerated depreciation, regardless of how computed, is not permitted; that Article 531 of the Personal Income Tax Regulations under Article 16 of the Tax Law, states that the instructions with respect to the preparation of returns shall have the force and effect of regulations.

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

DETERMINES:

(A) That the taxpayer's application for revision or refund with respect to the year 1956 was not timely filed within the prescribed statutory time period required in accordance with the provisions of Section 374 of the Tax Law.

(B) That accordingly, the taxpayer's application for revision or refund filed with respect to the assessment for the year 1956 (Assessment No. B-727932) be and the same is hereby dismissed.

(C) That the accelerated depreciation claimed on the 150% declining balance method of the property owned and used by the co-partnership, The Greenwich Company, in its trade or business was properly disallowed for New York State income tax purposes for the years in issue pursuant to the instructions for the preparation of resident returns as more fully set forth in Finding (6) above; that the depreciation allowed on the straight line basis was proper and in accordance with the aforementioned instructions, Article 175 of the Personal Income Tax Regulations and within the intent and meaning of Section 360(8), Article 16, of the Tax Law, then in force and effect.

(D) That, accordingly, the assessment for the year 1935 (Assessment No. B-448129) is correct; that the same 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 filed with respect thereto, be and the same is hereby denied.

DATED: Albany, New York on the 6th day of October , 1949.

STATE TAX COMMISSION

/s/ NORMAN GALLMAN
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

/s/ MILTON KOERNER
COMMISSIONER