L 9 (3-68)

Income Tax Determin, A-Z

BUREAU OF LAW

MEMORANDUM Hunt, Clinton N.

TO: State Tax Commission

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: CLINTON N. HUNT

Application for a Refund of Personal Income Taxes under Article 16 of the Tax Law for the Year 1959

A hearing was held before me on this matter on June 10, 1965 at New York, New York. The taxpayer was present and testified.

There are two questions in the case, one of the timeliness of the application for refund and the other, whether the Department was correct in denying totally a claimed deduction of $1,500.00 for a casualty loss by reason of the theft of a certain painting.

The determination holds that the application for refund was not untimely (Tax Law, Sections 371 and 374, third and fourth unnumbered paragraphs). As to the merits, the taxpayer was entitled to a deduction for the value of the painting as a casualty loss due to theft (Tax Law, Section 360.6). The value is to be determined in accordance with the statutory norm at its value on acquisition less depreciation, if any (Tax Law, Section 353.6). In the circumstances, this value is fixed in the proposed determination at $1,200.00, an amount that it was appraised at in 1946.

The return (IT-201) for the year 1959, made by the taxpayer in June, 1960, included a claim for a refund in an amount which represented the excess of the taxes paid, entirely by withholding, over the total taxes due, as computed by the taxpayer in the return. The deductions the taxpayer took in his return included the claimed casualty loss in the amount of $1,500.00 for a loss by theft of a certain painting, called a "portrait" of Benjamin Franklin, but said to date from about the year 1830.

By letter dated December 1, 1960, the taxpayer had forwarded a copy of a letter from a person, assertedly qualified, setting a value on the painting in the amount of $1,500.00 and also a copy of an earlier appraisal included in an appraisal of household furnishings appraising the painting at $1,200.00 as of 1946.

By refund voucher A26372, dated March 1, 1961, the Bureau disallowed the claimed casualty loss in its entirety and, accordingly, recomputed the refund reducing it from $260.80, claimed initially, to $179.39. After some correspondence, the taxpayer was informed by letter, dated April 23, 1962, that he would not be entitled to a hearing or

further appeal unless and until he filed an Application for Revision or Refund (Form 113) "within one year of the date of refund" (already past). His request for the form, by letter dated May 4, 1962, was not answered until October 10, 1962 when the form was mailed to him with a letter stating that the form should be "filed" by April 15, 1963. This formal Application for Revision or Refund was sworn to April 15, 1963, and was filed at New York, April 16, 1963. The Application for Revision or Refund was denied as untimely made by letter dated June 20, 1963. The taxpayer thereupon made application for a hearing received at New York, September 17, 1963 (which was within 90 days of June 20, 1963).

As to timeliness, Tax Law, Section 374 mandates that an application for revision or refund on "a form prescribed" is to be filed by the taxpayer within two years from the time of the filing of the return or payment of tax, whichever is earlier, or if there is a recomputation, then within one year of the date of recomputation (but in that case, the refund recoverable is limited to the amount additionally assessed upon recomputation).

The section further provides, however, in the third unnumbered paragraph that a return filed within two years from the time it was due, "showing a credit" for estimated tax paid under Section 366 (which provides for "withholding") "shall be considered an application for refund of such excess . . . ." The section also provides further in the succeeding paragraph that taxes paid by means of withholding payments are deemed to have been made as of April 15 of the year following the tax year, which here would be April 15, 1960.

Two years from the date of "payment," which here is "earlier" than the date of return would have been April 15, 1962; and this date is more favorable than the date one year after the recomputation, which was March 1, 1962. So, if the taxpayer's application for refund was to be determined by the making of the formal Application for Revision or Refund, it would have been due April 15, 1962 and it was late. The section, however, expressly provides in its quoted language that in the case of an application for a refund of withholding made in the return, the return is the effectual application for refund, and it is timely if made within two years of the April 15 following the closing of the year, or here within two years of April 15, 1960. The return itself was made in June, 1960, well within the two year period. Such a return is an "application" for a refund if it shows an overpayment on its face.

While no doubt, for administrative reasons, it was convenient for the Department to require that the taxpayer further file a Form 113 if his request for a refund was to receive further consideration, and by different personnel, with a right to a preliminary hearing and a formal hearing, it was not correct to conclude that the timeliness of the application for refund in the circumstances here was to have been

determined by the date of the Form 113. It is clearly the intention of the provision of Tax Law, Section 374 that a return that includes a claim for refund of withholding is equivalently the application for purposes of timeliness. The return is the controlling application in such a case. Tax Law, Section 374, third unnumbered paragraph; Booklet, Income Tax Regulations as of December 31, 1959, No. 572(c) at p. 144 of booklet; 20 NYCRR 270.22(c), sixth sentence.

It is true that a "recomputation" of taxes requires an application for revision or refund if it is to be disputed, but the "recomputation" meant in the context does not include a recomputation that is incident to an application for refund that is granted only "in part," since then there is an application for refund to begin with. The third paragraph of the section states that the "return" in the circumstances here is equivalently an application for refund; its denial in part is not the "recomputation" meant which requires filing an application for refund in order to have the ruling reviewed.

The taxpayer acquired the portrait in question by inheritance, it is indicated. When he had had it for some time, he turned it over in 1956 to a gallery which conducted sales of pictures to be sold on his account. According to a letter in 1959 from Sigmond Rothschild, one of the two partners in the firm conducting the gallery, the other partner effected a sale of the picture without making any record of it and made off with the proceeds. The letter from Sigmond Rothschild, which further states that he was a member of the American Society of Appraisers and comparably accredited in England, stated that he had appraised the painting at $1,500.00. An appraisal of the taxpayer's household effects for insurance purposes made by a Mr. Dean A. Hawley, an appraiser, appraised the painting at $1,200.00 as of 1946.

The claimed deduction was originally rejected on the grounds that there was no competent evidence of the value of the painting at the time of its acquisition less depreciation down to the time of loss which is the proper basis for fixing the loss as was stated in a penciled notation in the file.

As to the casualty loss, a loss by "theft" is liberally interpreted and includes an embezzlement of the proceeds of a sale. Penal Law, Section 1290; Edwards v. Bromberg, 231 F. 2d 107. The loss should be taken in the year of discovery. (Tax Law, Section 360.6). That there was a loss by theft within the meaning intended, and that the loss was discovered in the year 1959, was adequately established.

It is settled for the Department by regulation that a casualty loss is to be determined by the definition of (gain and) loss in Tax Law, Section 353, and in the case here, by Tax Law, Section 353.6 and 353.1. This is the implication of former regulation Article 151 and Article 491,

we have held. (Memorandum, Deputy Commissioner Kassell to Deputy Commissioner Greene, August 6, 1958). The basis of the loss here is, therefore, the value at the time of acquisition less any depreciation, down to the date of the casualty loss by theft. A loss by theft constitutes a disposition of the asset equivalent to a sale at zero, so that the amount of the loss is the full amount that is fixed as the basis.

In an object of this character, there would not be any depreciation with the passage of time short of serious physical damage to the painting but rather the value of the painting should increase (and the 1959 appraisal so indicates).

The evaluations put on the painting at different times other than the date of acquisition were not irrelevant but should have served as a guide to value under the statutory norm.

The date of acquisition was 1946 or somewhat earlier. The appraisal in 1946 was probably somewhat low, since it was for insurance purposes. Since, in an object of this kind, there is considerable latitude in fixing value, in the total circumstances the value at the time of acquisition is found to have been $1,200.00.

Accordingly, it is requested that the determination be substantially in accordance with the proposed determination submitted.

/s/ FRANCIS X. BOYLAN
Hearing Officer

FXB:rlp
Enc.
February 19, 1969
Sent to Commission 3/4/69

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

CLINTON N. HUNT

FOR A REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR THE YEAR 1959

Clinton N. Hunt, having requested a refund of personal income taxes withheld for the year 1959 in his return for that year duly filed, and the requested refund having been denied in part, and a formal application for revision or refund having been made thereafter and having been denied, and a hearing having been held thereon at the offices of the New York State Department of Taxation and Finance, 80 Centre Street, New York, New York on June 10, 1965 before Francis X. Boylan, Hearing Officer, and the taxpayer having been present and having testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) The taxpayer filed a resident return (Form IT-201) for the year 1959, dated June 22, 1960 and received June 24, 1960, in which he requested a refund in the amount of $260.80, an amount which represented the difference between the taxes due, as computed in the return, and the amount earlier paid entirely by income tax withheld from wages.

In so computing the tax due, the taxpayer took a $1,500.00 deduction for a casualty loss by reason of the claimed theft of a certain painting. This deduction was disallowed entirely and the refund was recomputed on a form, Explanation of Refund, dated

March 1, 1961. In consequence of the disallowance of this claimed casualty loss, a refund in the lesser amount of $179.39 was made by Refund Voucher A26372.

(2) The evidence indicates and it is found that the taxpayer in 1956 authorized a certain partnership of two men which was operating a gallery for the sale of paintings to sell the said painting in his behalf, and that the painting thereafter was sold secretly and the proceeds converted by one of the partners, and that this loss was first discovered by the taxpayer in the year 1959.

(3) The taxpayer acquired the painting by inheritance in the year 1946 or somewhat earlier. In 1946, it was appraised by an insurance appraiser in the amount of $1,200.00 as part of an appraisal of taxpayer's general household furnishings for insurance purposes. After the loss, a written statement, dated 1959, made by the innocent partner in the gallery enterprise who assertedly was a qualified art appraiser, put a value on it of $1,500.00.

(4) It is found that the painting did not suffer any depreciation from the time of its acquisition to the time of its loss and the discovery thereof in 1959, and may have appreciated in value.

(5) The value of the painting at the time of acquisition is found to have been $1,200.00.

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

DETERMINES:

(A) That the return (Form IT-201) filed by the taxpayer for the year 1959 on June 24, 1960 constituted a timely application for refund as to the amount therein claimed as a credit for income

taxes paid as income withheld from wages, pursuant to provision of Tax Law, Section 374, which states that a return made within two years of the time it was due, that shows a credit for income withheld in excess of the tax due, is an application for refund, and so seems to make such a return made within such time a timely application for refund as to such withheld funds.

(B) That the taxpayer suffered a casualty loss of the painting hereinabove described by reason of theft within the meaning intended in Tax Law, Section 360.6 which allows a deduction for such a loss.

(C) That the value of the painting as of its date of acquisition by the taxpayer less any depreciation down to the time of the loss is an allowable deduction pursuant to the provisions of Section 360.6 allowing a casualty loss as a deduction, and of Section 353.6 which so fixes the basis of such a loss in the case of an inherited item; and this amount is held to be the sum of $1,200.00, its value on acquisition as found, since there was no depreciation.

(D) That the amount of the allowable refund is recomputed as follows:

Taxable balance reported		$6,203.52
Additional income ($1,500.00 deduction claimed, less $1,200.00 allowed)		300.00
Corrected taxable balance		$6,503.52
Normal tax @ 2-3-4% on $5,000; @ 3% on $1,503.52	$160.00 45.18	
Total Normal tax		215.18
Less statutory deduction		10.00
Normal tax due		205.18
Normal tax withheld		321.60
Refund of Normal tax		116.42
Previously refunded		129.33
Additional refund (or credit)		$ 67.01

(E) Accordingly, an additional refund in the amount of $67.03, but without interest in accordance with provision of Tax Law, Section 377.4, which so states, is to be paid (or credited) to the taxpayer.

And IT IS SO ORDERED.

Dated: Albany, New York, this 10th day of March, 1969.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ A. BRUCE MANLEY
Commissioner

/s/ MILTON KOERNER
Commissioner