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MEMORANDUM

Income Tax Determination
A-2
McAtamney, Neil

TO: State Tax Commission

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: Application of Neil McAtamney
For Revision or Refund of Personal
Income Taxes under Article 16 of
the Tax Law for the Years 1953
Through 1957 and 1959

A hearing on the above entitled application was held before me at the office of the State Tax Commission, 80 Centre Street, New York, New York on August 16, 1968. Appearances and exhibits were as noted on the transcript.

The issue involved the imposition of a 50% fraud penalty based on a prior imposition of a similar penalty by the Treasury Department.

On May 16, 1967 the Income Tax Bureau issued Assessment No. ABTF 945703 imposing penalties against the taxpayer for the years involved in this proceeding, in the aggregate sum of \$429.22. The explanation for the assessment was stated on the notice of deficiency as, "Penalty is imposed to conform with the audit of your Federal income tax returns. This penalty is a lien off (sic) the 10% delinquency penalty paid with the filing of your returns." The sum of \$429.22 represented total penalties of 50% less the 10% previously paid.

The facts are not in dispute. Taxpayer failed to file timely income tax returns for the years in question. When the Treasury Department began an examination of his Federal returns, his attorney at that time, Peter J. LaBarbara, requested the Income Tax Bureau to advise him of the status of taxpayer's filings of personal income tax returns. By letter dated September 17, 1962 (Taxpayer's Exhibit "A") Counsel was advised that taxpayer had not filed returns for the years 1955 through 1958 and that a return filed for 1959 was incorrect. Taxpayer promptly, on October 1, 1962, filed an amended return for 1959 and remitted the balance due for that year, and, on the same day, filed returns for 1955, 1956 and 1957 on Form IT-201-D and remitted the taxes due, together with interest to the date of the return at 1/2 of 1% per month and penalty of 10% as provided for on the form furnished to him. No return was required to be filed for 1958, a forgiveness year.

Subsequently, on January 22, 1963 Federal changes were issued, (Taxpayer's Exhibit "B") on consent of the taxpayer, increasing his income for the years involved in this proceeding as well as 1953 and 1954, and imposing a 50% fraud penalty. Federal changes were also made for 1958, 1960 and 1961, years not involved in this proceeding. By letter dated September 30, 1966 (Taxpayer's Exhibit "C") the Income Tax Bureau requested the taxpayer to file reports of the Federal changes. As taxpayer had previously, on October 1, 1962, filed returns correctly stating his income for all years herein involved except 1953 and 1954 (See Taxpayer's Exhibit "A" where he was advised that only the years 1955 through 1958 were delinquent) he then filed returns for 1953 and 1954 on Form IT-201-B, and remitted the taxes due, together with interest at 1/2 of 1% per month to the date of the return and penalty of 10%, as provided for on the form furnished to him. The assessment of a 50% penalty for all years was thereafter issued on May 16, 1967.

Taxpayer contends that a settlement with the Treasury Department to pay a 50% penalty is neither an admission of fraud, nor any evidence of fraud, and that, in fact, because of his voluntary filing for 1955, 1956 and 1957 and his reliance on the letter advising him that only years from 1955 on were delinquent, only a 5% penalty should have been imposed instead of a 10% penalty. Inasmuch as there is no application for refund of penalties previously paid by the taxpayer, the latter contention will be considered only to the extent that it is relevant to the issue of the propriety of the imposition of the 50% penalty.

As there is no provision for Federal conformity in the imposition of penalties under Article 16, the only article involved in this proceeding, the stated ground on which the penalties were assessed, other authority must be found under the Tax Law if such penalties are to be sustained. No such authority exists. Section 376 of Article 16, the section dealing with penalties, does not provide specifically for a 50% penalty. Civil penalties may, under the section, be imposed in amounts of 5% or 100%, and in stated sums up to \$5,000. In addition, criminal penalties are prescribed. Imposition of fraud or other penalties based on Federal conformity, are not authorized under the Tax Law. The manual of policy for Article 16, at Article 957 thereof, provides that, (1) the burden of proof of fraud is on the Tax Commission, (2) a fraudulent return can be established only where a return is filed with fraudulent intent at the time of filing, and (3) failure to file is not fraud when there is no intent to evade, citing John B. Arnold, 14 B.T.A. 954, Donald B. Sample, 10 T.C.M. 793, People v. Caulfield, 207 Misc. 593. Article 959(1) of the manual of policy provides that the maximum fraud penalty of doubled tax and 1% per month interest is not always asserted; that in cases of voluntary disclosure after Federal audit a maximum penalty of 50% and interest at 1/2 of 1% per month are to be assessed.

Article 556(5) of the manual of policy prescribes a uniform policy established by the President of the Tax Commission on February 16, 1956 of penalties and interest to be assessed, under the Delinquency Follow-Programs. Penalties are imposed as follows:

<u>Action</u>	<u>Penalty</u>	<u>Interest Per Mo.</u>
(1) Voluntary Action	5%	1/2 of 1%
(2) Albany Office Letter	10%	1/2 of 1%
(3) District Office Letter	15%	1/2 of 1%
(4) District Office Subpoena	20%	1%
(5) District Office Field Follow-Up	25%	1%
(6) District Office Assessment (Within grace period)	30%	1%
(7) District Office Assessment (After grace period but prior to filing of warrant)	40%	1%
(8) When Warrant Has Been Filed (whether a return is filed or not)	50%	1%

In addition, a penalty of \$500 may be imposed for failure to file a required tax return. The same policy and schedule is promulgated in Memorandum E-41 dated May 16, 1961.

Consequently, under the various statutory and policy manual provisions, any of a number of penalties, some in amounts greater than were actually imposed against the taxpayer, could have been asserted, without the necessity of proving fraud. However, this was not done, and with respect to the question of fraud, the burden of proof on the Tax Commission must be satisfied before the assessment may be sustained. Article 556(1) of the manual of policy, dealing with fraud and habitual delinquency, makes it clear that the mere failure to file for several years does not constitute habitual delinquency, unless the taxpayer has been put on prior notice of his liability for additions to the tax; further provides that where delinquent returns are filed as a result of the 10% follow-up program, penalties and interest will be imposed as they are applicable to the program; and that if a delinquency for several years results from an error of understanding or honest belief, such delinquency will not be considered "habitual".

There is then no authority for assessment of any penalty for any of the years herein involved merely because such penalty or a similar one has been imposed by the Treasury Department.

That a determination of the Treasury Department is admissible, as evidence, in a proceeding under the Tax Law, does not, of itself, relieve the Tax Commission from the burden of proving the fraud for which the penalty is assessed. While a Federal determination may be sufficient prima facie evidence to support a determination of deficiency if not controverted, where the burden of proof is on the taxpayer, such determination, standing alone does not satisfy the burden of proof with respect to fraud. Furthermore, such a determination, imposing a fraud penalty, may not even be admissible where a closing agreement in the nature of a plea of nolo contendere is entered into by the taxpayer. See memorandum of E. H. Best, Counsel, to Deputy Commissioner Mitchell dated October 23, 1968 relating to admissibility of Federal determinations.

I am of the opinion that the Federal determination imposing fraud penalties on the taxpayer, if admissible as evidence at all, is insufficient, without additional evidence, to satisfy the burden of proof on the part of the Tax Commission with respect to the imposition of additional fraud penalties imposed on the taxpayer; that taxpayer's payment of his delinquent taxes with interest at 1/2 of 1% per month and penalties of 10% was in full compliance with the stated policy of the Tax Commission; and that the assessment imposing additional penalties against him is erroneous and should be vacated and annulled.

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

/s/

ALFRED RUBINSTEIN

Hearing Officer

AR:dv

Enc.

February 5, 1969

O.K. MS

2/20/69

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION
OF
NEIL McATAMNEY
FOR REVISION OR REFUND OF PERSONAL INCOME
TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR
THE YEARS 1953 THROUGH 1957 AND 1959

Neil McAtamney having filed an application for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1953 through 1957 and 1959, and a hearing having been held before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, at 80 Centre Street, New York, New York, on August 16, 1968, at which hearing the taxpayer appeared by his attorney, Margaret E. Ruggiero, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, Neil McAtamney, failed to file timely returns for the years 1953, 1954, 1955, 1956 and 1957; that the taxpayer, Neil McAtamney, filed a timely, but incorrect return for 1959; that on October 1, 1962, on the advice of the Income Tax Bureau, in responding to his inquiry, that he was delinquent in filing for 1953, 1956, 1957 and 1958 (a forgiveness year for which no return was required) and that his 1959 return, as filed, was incorrect, the taxpayer filed late returns for 1953, 1956 and 1957, correctly reporting his income for such years, and remitting interest at 1/2 of 1% per month and penalties of 10% as provided on Form IT-201-B furnished to him; that on October 1, 1962 the taxpayer filed an amended return for 1959, correctly reporting his income for such year, and remitting the balance due thereon.

(2) That on January 22, 1963 Federal changes were issued for years including 1953, 1954, 1955, 1956, 1957, and 1958, increasing the taxpayer's income as previously reported to the Treasury Department for such years, and imposing a 50% fraud penalty; that such Federal changes were made on consent of the taxpayer; that for the years 1955, 1956 and 1957 the Federal changes resulted in increasing the taxpayer's income to the same amounts as he had previously reported to New York; that subsequently the Income Tax Bureau on September 30, 1966 requested the taxpayer to file reports of the Federal changes; that thereafter, on February 23, 1967, the taxpayer filed returns for 1953 and 1954, reporting his income as stated on the Federal changes for such years and submitting interest at 1/2 of 1% per month and penalties of 10% as provided on Form IT-201-B furnished to him.

(3) That thereafter, on May 16, 1967 the Income Tax Bureau issued Assessment No. ABIF 345703 imposing fraud penalties in the sum of \$429.22; that such penalties consisted of 50% of the taxes due and paid for the years 1953, 1954, 1955, 1956, 1957 and 1959, less credit for the penalties of 10% previously paid by the taxpayer with his returns; that the taxpayer filed an application for revision and demanded a hearing; that the sole basis for imposition of a fraud penalty against the taxpayer was the imposition of such a penalty by the Treasury Department; that the fraud penalty imposed by the Treasury Department was so imposed on consent of the taxpayer, and in settlement of his Federal tax liabilities.

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

DETERMINES:

That the evidence is insufficient to satisfy the burden of proof that the taxpayer's failure to file timely returns for the years 1953, 1954, 1955, 1956 and 1957, his filing of a timely incorrect return for 1959 and his late payment of the taxes due was fraudulent or with intent to evade the taxes; that the assessment imposing fraud penalties against the taxpayer is erroneous and is hereby vacated and annulled, and that taxpayer's application be and the same is hereby granted.

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