

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

J. Louis Lazarus :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 16 of the Tax Law
for the Years 1948 & 1949. :

State of New York

County of Albany

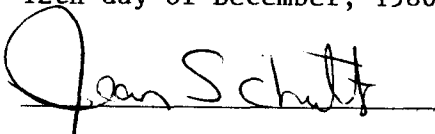
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Determination by certified mail upon J. Louis Lazarus, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

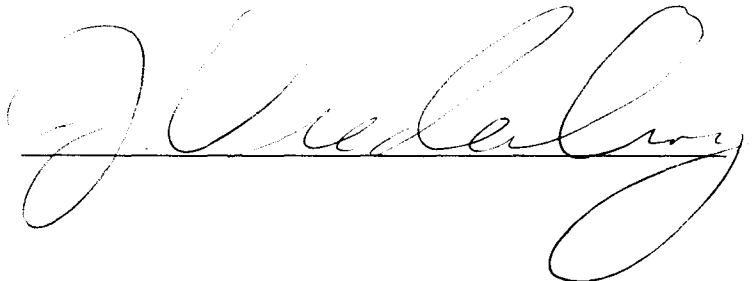
J. Louis Lazarus
c/o Harry Friedman
1910 Sunderland Pl., N.W.
Washington, DC 20036

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
12th day of December, 1980.


Jean Schutt


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 12, 1980

J. Louis Lazarus
c/o Harry Friedman
1910 Sunderland Pl., N.W.
Washington, DC 20036

Dear Mr. Lazarus:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
J. LOUIS LAZARUS	:	DETERMINATION
for Revision or for Refund of Personal	:	
Income Taxes under Article 16 of the Tax	:	
Law for the Years 1948 and 1949.	:	

Applicant, J. Louis Lazarus, c/o Harry Friedman, Esq., 1910 Sunderland Place, N.W., Washington, D.C. 20036, filed an application for revision or for refund of personal income taxes under Article 16 of the Tax Law for the years 1948 and 1949 (File No. 01908).

A formal hearing before the State Tax Commission was calendared for September 18, 1973. However, by letter of September 11, 1973, applicant requested that the matter be submitted to the State Tax Commission based on the entire record contained in the file of the Income Tax Bureau.

The State Tax Commission, after due consideration of the entire record, renders the following decision.

ISSUE

Whether applicant timely filed an application for revision or for refund of personal income taxes under Article 16 of the Tax Law.

FINDINGS OF FACT

1. On April 15, 1953, the Income Tax Bureau issued a Notice of Additional Assessment-Income tax for 1948 stating additional tax of \$407.91 and another such notice for 1949 stating additional tax of \$1,258.99. Both assessments

were predicated primarily on income received from apartment corporations which applicant treated as a capital gain but which the Bureau treated as non-capital gain income. Other recomputations were to the advantage of the taxpayer.

2. On May 14, 1953, applicant's accountant wrote to the Income Tax Bureau, which letter was received on May 16, 1953, and stated therein:

"The decision of the State Tax Department to tax these distributions as ordinary income controverts every similar distribution made which have been litigated in the Federal Courts, and in each case, held to be capital gain and not ordinary income. As a matter of fact, in those cases where the Federal Tax Department has made examinations, the cases have been held in a 'pending file' because of the regularity with which the Internal Revenue Department is losing these cases in court since it is expected shortly that the Commissioner will be forced to acquiesce to the Court's decision.

Formal Protest is hereby made and we respectfully request that the New York State Department of Taxation and Finance hold these assessments in abeyance until final determination by the Federal Court." (Underlining added for emphasis.)

3. On October 8, 1953, the Income Tax Bureau responded to the May 14, 1953 letter and stated in pertinent part therein:

"Since no application for revision has been filed on Form-113 as provided for under section 374 of the Tax Law, this letter is not intended as a denial upon which a demand for hearing may be submitted. If you do desire further review, Form-113 must be filed within one year from the date of the assessment. These forms will be mailed upon request, or may be obtained at our New York office.

When remitting, please refer to Division 44-File #P-3762 and to Assessment #AA-585273 and Assessment #AA-585274."

4. On October 12, 1953, applicant's accountant responded to the October 8, 1953 letter and advised that two checks dated August 26, 1953 were mailed to the State Tax Commission (both of which were received and deposited on September 3, 1953) in the amounts of the assessments for 1948 and for 1949, plus interest

(\$438.50 and \$1,353.41 respectively) and each check contained the notation "Paid under Protest for Assessment" for 1948 and for 1949 with the appropriate assessment number.

5. On May 15, 1956, applicant signed two Forms IT-113, Applications for Revision or Refund of Personal Income Taxes for the years 1948 and 1949, which applications were received by the Income Tax Bureau on May 22, 1956.

6. By letter of June 25, 1958, the Income Tax Bureau advised applicant that the applications (Finding of Fact No. "5" above) were not timely filed and that, in the event a demand for hearing is filed, the only matter reviewable would be the timely filing of the application for revision or refund.

7. On August 1, 1958, the Income Tax Bureau received a Demand for Hearing from applicant for the years 1948, 1949 and 1952.

8. On October 11, 1968, the Income Tax Bureau advised applicant's accountant that:

- a) the applications filed for 1948 and 1949, after careful consideration, were not timely filed;
- b) if a hearing to consider the question of timeliness were still desired the cases would be transferred to the Bureau of Law;
- c) the assessment for 1951 was cancelled in full (same issue - capital gain versus ordinary income);
- d) since the 1952 assessment was paid, "...and since a review shows the corporate distributions were properly reported as capital gains, a refund is being authorized for the amount paid" (underlining added for emphasis);
- e) refunds and cancellations were in order for 1954 on the same basis.

9. By letter of November 13, 1968, applicant's attorney reiterated applicant's desire for a formal hearing.

CONCLUSIONS OF LAW

A. That the Notice of Additional Assessment was erroneously issued for 1948 since the deficiency was not issued within the three year period prescribed in section 373 of the Tax Law. Therefore, no tax was due for said year.

B. That a refund will be made only if a timely Application for Revision or Refund has been filed and upon the form and in the manner prescribed by the State Tax Commission (Form I.T. 113) in accordance with the meaning and intent of section 374 of Article 16 of the Tax Law. Therefore, applicant's letter of May 14, 1953, formally protesting the assessments for 1948 and 1949, did not constitute proper notification of applicant's protest of the assessment to the State Tax Commission.

C. That applicant, J. Louis Lazarus, erroneously paid the tax plus interest due for 1948 as the period of limitation on assessment had expired; that applicant is entitled to a refund of the tax and interest paid since said moneys were erroneously collected under a mistake of facts (section 373(3) of the Tax Law); that applicant did not file a timely Application for Revision or Refund of Tax for 1949 and, as a result, was liable for the amount of normal tax due plus interest.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

Box 8
6/17
1/6/81

J. Louis Lazarus
c/o Harry Friedman
1910 Sunderland Pl., N.W.
Washington, DC 20036



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