

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of

Fortune R. Pope :

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 1957 - 1959. :

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 mail upon Fortune R. Pope, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fortune R. Pope  
136 W. 52nd St.  
New York, NY

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 Schultz

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of

Fortune R. Pope :

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 1957 - 1959. :

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 mail upon Herbert M. Haber the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Herbert M. Haber  
135 E. 42nd St.  
New York, NY

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

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

Jean Schults

Jay Vredenburg

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

December 12, 1980

Fortune R. Pope  
136 W. 52nd St.  
New York, NY

Dear Mr. Pope:

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) 375 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 90 days 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  
Herbert M. Haber  
135 E. 42nd St.  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Applications	:	
of	:	
FORTUNE POPE	:	DETERMINATION
for Revision or for Refund of Personal	:	
Income Tax under Article 16 of the Tax	:	
Law for the Years 1957, 1958 and 1959.	:	

Applicant, Fortune Pope, 136 West 52nd Street, New York, New York, filed applications pursuant to section 374 of the Tax Law for a refund of \$938.43 for 1957, a refund of \$270.27 for 1958 and a refund of \$4,987.48 for 1959, each for personal income tax paid under Article 16 of the Tax Law. Said applications were denied and a hearing was demanded (File No. 01880).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on April 1, 1966 and on November 9, 1967. Applicant appeared by Herbert M. Haber, Esq.

ISSUE

Whether applicant can, in effect, amend his returns to exclude from income amounts reported as received under "claim of right" when such sums have been repaid or returned to their rightful owner in a year subsequent to the year in which said income was reported.

FINDINGS OF FACT

1. In 1955, Anthony Pope and Fortune Pope, who are brothers, individually obtained from Bulk Carriers Corporation, a supplier of salt to the City of New York, contracts for the transportation of salt from points on the waterfront to the various points in the City where the salt would be used for snow removal.

2. The Pope brothers subcontracted the salt transportation contracts to four newly formed close corporations organized by themselves. These corporations were F.A.P. Contractors, Inc., Forn Contractors, Inc., Rona Contractors, Inc. and Anforth Contractors, Inc. These corporations received profits from the New York City contracts. However, these corporations had no equipment of their own. They rented equipment from another corporation wholly owned by the Popes, Empire Sand and Gravel Corp., which in turn rented equipment from a publicly owned corporation, Colonial Sand and Stone Co., Inc., of which the Popes were officers and directors.

3. In 1957, the Popes formed a new corporation, Basic Industries, Inc., which was based in Panama and did business outside of the United States. The business of this corporation was to purchase salt from producers and sell it to Bulk Carriers Corp., the supplier for New York City.

4. The corporations owned by the Popes, other than Empire Sand and Gravel Corp., were subsequently liquidated. Each of the Pope brothers received liquidating distributions in 1957, 1958 and 1959. On these distributions each one reported the following capital gains: In 1957, F.A.P. Contractors, Inc., \$18,372.57 and Forn Contractors, Inc., \$14,200.00; in 1958, Rona Contractors, Inc., \$16,781.00; in 1959, Anforth Contractors, Inc., \$14,208.08 and Basic Industries, Inc., \$87,195.46. These gains totaled \$150,757.11 to each brother.

5. In 1960, the Pope brothers and Empire Sand and Gravel Corp. were threatened with litigation commenced by the stockholders of Colonial Sand and Stone Co., Inc., claiming a loss of corporate opportunity to Colonial and diversion of profits from Colonial by the Popes, who were its officers, to interests controlled by the Popes. The Popes and Empire agreed to settle this litigation and did settle it in July 1960 by the payment to Colonial of \$405,817.04. This was composed of \$48,435.55 paid by Empire and represented

its profits on the salt contracts. The remainder was paid one-half (\$178,690.75) by each of the Pope brothers. This represented the complete profit on the sale of the Basic Industries' shares and the computed net profits before taxes of the four remaining corporations. The profits of said remaining corporations were in each case more than the liquidating profit received by the Pope brothers.

6. Fortune Pope had filed timely tax returns for 1957, 1958 and 1959. In 1957, he had reported capital gains of \$30,383.68 and paid a capital gains tax thereon of \$938.43. In 1958, he had reported capital gains of \$14,593.50. He paid a capital gains tax thereon of \$270.57. In 1959, he reported capital gains of \$106,242.04 and paid a capital gains tax thereon of \$4,992.10.

7. On Federal audit, dated December 20, 1962, applicant was found to have deficiencies for 1958 and 1959, and a large overpayment for 1960. Said audit found additional income deriving primarily from dividends for two of the years in question. That audit also allowed a recomputation of tax for 1960 under section 1341 of the Internal Revenue Code for the amounts which had been repaid to Colonial. The result of said computation was determined by the limitation of IRC 1341(a)(5)(B) reflecting the elimination of the disputed income in the years in which it was received, 1957, 1958 and 1959.

7(a). For 1957, the Federal audit eliminated capital gains amounting to \$32,572.57 (\$18,372.57 from F.A.P. Contractors, Inc. and \$14,200.00 from Forn Contractors, Inc.). This resulted in a \$1,000.00 deduction against ordinary income with \$1,188.89 being available for carryover.

7(b). For 1958, the Federal audit eliminated a capital gain amounting to \$16,781.00 from Rona Contractors, Inc. This resulted in a \$1,000.00 deduction against ordinary income with a capital loss carryover (including the 1957 carryover) of \$2,376.39.

7(c). For 1959, the Federal audit eliminated capital gains of \$101,403.54 (\$87,195.46 from Basic Industries, Inc. and \$14,208.08 from Anforth Contractors, Inc.). This also applied the full amount of the capital loss carryover as computed from 1957 and 1958.

8. On March 14, 1963, Fortune Pope filed with New York State notices of change in his Federal tax for 1957, 1958 and 1959. These were purportedly based on the Federal audit dated December 20, 1962.

8(a). For 1957, he reported a decrease in capital gains of \$32,572.57. He requested a refund of the entire \$938.43 paid with respect to capital gains on the return and showed an excess capital loss of \$2,188.89. (Applicant had filed an amended return for 1957 and later a notice of Federal changes dated March 1959, which had found additional dividend income. Neither is at issue.)

8(b). For 1958, he reported a decrease in capital gains of \$16,781.00. (Additional dividend income for 1958 was not reported because of the forgiveness of normal tax in that year.) He claimed a refund of the entire \$270.27 paid on capital gains with the return and showed an excess capital loss of \$2,187.50.

8(c). For 1959, he reported ordinary income additions (dividends) of \$6,000.00 resulting in additional normal tax of \$600.00, which has been assessed separately and which, in any event, is not contested. He also reported the elimination of capital gains of \$101,403.54 and claimed capital loss carryovers from 1957 and 1958 of \$2,188.89 and \$2,187.50. He thus computed a refund attributable to capital gains of \$4,987.48.

#### CONCLUSIONS OF LAW

A. That the deductions or exclusions here claimed must be denied. The New York personal income tax, like the Federal income tax, assumes and prescribes an annual accounting period so that the computation of income of one year is

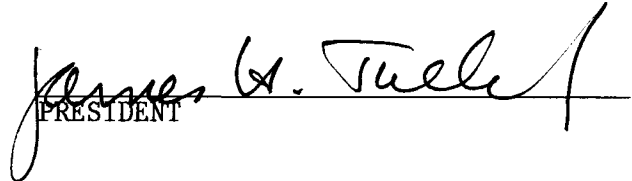
not affected by the events of a subsequent year. See U.S. v. Lewis, 340 U.S. 590.

B. That the denial of the refund claims here under review was proper.

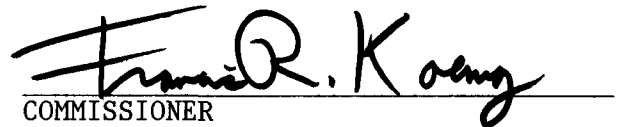
DATED: Albany, New York

STATE TAX COMMISSION

DEC 12 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

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

December 12, 1980

Fortune R. Pope  
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Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Herbert M. Haber  
135 E. 42nd St.  
New York, NY  
Taxing Bureau's Representative

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STATE OF NEW YORK

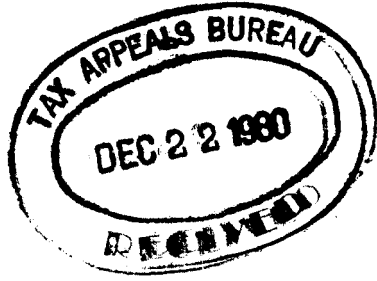
State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

Herbert M. Haber  
135 E. 42nd St.  
New York, NY



REP. Copy

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Applications  
of  
FORTUNE POPE  
for Revision or for Refund of Personal  
Income Tax under Article 16 of the Tax  
Law for the Years 1957, 1958 and 1959.

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DETERMINATION

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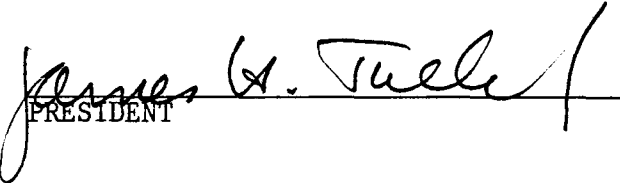
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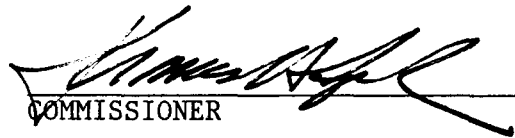
B. That the denial of the refund claims here under review was proper.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 12 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER