

## BUREAU OF LAW

## MEMORANDUM

*Income Tax Determinations**A-Z**Stringer, Katharine G.*

TO: Commissioners Murphy, Palestin and Macduff

FROM: E. H. Best, Counsel

SUBJECT: Estate of Katharine G. Stringer  
 1956 Assessment No. B-781234  
 1957 Assessment No. B-781235  
 Request for Waiver of Penalties and Interest

A determination in the above matter was issued on March 2, 1965 sustaining the assessments and holding that the taxpayers were residents of New York rather than Maryland where the taxpayers had spent time in a hospital and nursing home. The taxpayer has requested a waiver of penalties and interest for each of the above years. Accumulated and assessed interest up to July 15, 1965 to be waived amounts to \$725.17 for the year 1956 and \$652.50 for the year 1957. Although I believe the hearing officer's decision in holding the taxpayer's nonresidence is sound, the question is extremely close (see Mr. Kelliher's memorandum of October 28, 1964). I, therefore, recommend that this matter should be settled by accepting basic taxes of \$1465 for 1956 and \$1500 for 1957 and the waiver of all accumulated and assessed interest.

Kingly return the file after disposition indicating your comments on the margin of this memorandum.

*E H Best*  
 Counsel

MS:rlp

July 2, 1965

*2 do not*  
*showed change*  
*determination*  
*of Penalties*  
*8/16/65*

*2 approve the*  
*waiver of accumulated*  
*interest and assessed*  
*interest*  
*8/24/65*

*concur*  
*JAM 8-25-65*

BUREAU OF LAW  
MEMORANDUM*Income Tax Determinations**A-2**Stringer, Katharine G.*

TO: Commissioners Murphy, Palestin and Macduff

FROM: E. H. Best, Counsel

SUBJECT: Estate of Katharine G. Stringer  
1956 Assessment No. B-781234  
1957 Assessment No. B-781235  
Request for Waiver of Penalties and Interest

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Kingly return the file after disposition indicating your comments on the margin of this memorandum.

*E H Best*  
Counsel

MS:rlp

July 2, 1965

*I do not think we should change our determination of nonresidence*  
*8/16/65*

*concur*

*JAM 8-17-65*

## BUREAU OF LAW

## MEMORANDUM

*Income Tax Determinations*  
*A-2*  
*Stringer, Katharine G.*

TO: Commissioners Murphy, Palestin and Macduff

FROM: Francis Kelliher, Assistant Director

SUBJECT: ESTATE OF KATHARINE G. STRINGER  
 1956 Assessment No. B-781234  
 1957 Assessment No. B-781235  
 Article 16  
 Formal Hearing

DEPT. TAX &amp; FINANCE

OCT 29 1964

PRESIDENT'S OFFICE-ALBANY

The question here is the taxpayer's resident status for income tax purposes. Attached is a memorandum drafted for my signature by the hearing officer, setting forth many of the facts and proposing a determination that the taxpayer had not changed her domicile to Maryland and maintained no permanent place of abode in Maryland.

Other facts shown in the minutes lead me to the opposite conclusion. When the decedent and her husband gave up their New York apartment and entered the retirement home in Maryland (in May, 1956), she was almost 70 and he was a couple of years older (Minutes, page 26). They had both been born in Maryland, in the vicinity of Baltimore, and lived there for about 40 years before coming to New York. When they went back they had two daughters living in Baltimore and Washington and the husband had other relatives in the immediate vicinity of Baltimore (pages 25-27). They took with them their TV set, a favorite rug, all their bedroom furniture and their personal belongings from the New York apartment and apparently gave the rest of the furniture, china, etc. to their children (page 30). While the decedent was described as senile, her husband was suffering only from lung congestion and was perfectly capable of deciding on a change of domicile (page 31). In my opinion, the circumstances strongly indicate that he did intend to change his domicile to Maryland when he went to the retirement home there and I believe that the decedent's domicile followed his.

If you agree, please let me know and I will have a determination drafted on this basis.

October 28, 1964  
 FK:EB

Enc. OK

*F. Kelliher*  
 Assistant Director

*2 agree with hearing officer*  
*2/19/65*

*Disagreed with the file, including the date 8/20/962*  
*memo dated 8/20/962*  
*from [unclear] as the [unclear] of [unclear] with [unclear] 11/5/64*

Ed:

Pending

I have signed  
the determination  
prepared for the  
commission supporting  
the hearing officer  
Evidently you should  
submit this to  
Commissioner Salomon for  
his signature as he  
ok'd the hearing officer  
findings but neglected to sign  
the determinations JH

Warnecke vs State Tax Commission - Tax Year: 1951

I agree that the three-year limitation applies here, not the five.

Section 373 of the Tax Law applies the five-year limitation where there has been ". . . omitted from gross income or capital gain, as stated in the return, an amount which should have been included therein and which is in excess of 25 per centum of the amount of gross income, or capital gain as so stated . . ." While the file submitted to me does not contain the 1951 return, I understand from memorandum notes within Law Bureau that, under capital gains, the return reported the sale of real property at 27 West 72nd Street, New York City, giving the selling price, taxpayer's basis, the capital gain, and the expenses of the sale. Other data consistent with the foregoing were also included.

As stated in Matter of Warnecke vs State Tax Commission, 15 App. Div. (2d) 320, 323-4:

"Petitioner did, however, report as capital gain, upon his personal return for 1951, the gain accrued in that year upon the sale of the hotel property, which gain we have held . . . returnable as ordinary income for purposes of the personal income tax."

Thus, the taxpayer reported the sale and the gain, but mistakenly included it as capital gain rather than within ordinary income.

Our statute speaks of omission from gross income or capital gain. This taxpayer did not omit or fail to report. He reported, however mistaken he may have been as between ordinary income and capital gain. Sufficient appeared in his return to apprise the Income Tax Bureau that a money gain was realized. Conflicts of interpretation, questions of audit, with respect to data appearing in the return will not extend the three-year statute to five years unless the extent of the difference can be deemed the equivalent of an omission to report. There was no omission here. Colony vs Commissioner 357 U.S. 28, 36 appears to be decisive on this point.

On the facts herein and on reliance on Colony, I approve the settlement.

*Consent*  
*J. J. J.*  
*7-27-65*  
July 27, 1965

*Ira J. Palestine*  
IRA J. PALESTIN  
State Tax Commissioner

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin, and Macduff  
 FROM: E. H. Best, Counsel  
 SUBJECT: Matter of Warnecke v. State Tax Commission  
 15 A D 2d 320

On April 15, 1963, review by the Attorney General of an opinion rendered by a previous Attorney General (1953 Op. Atty. Gen. 197) was requested, following the remission of the statute of limitations question to the Tax Commission by the Appellate Division in the above cited matter.

This office recently received an Attorney General's opinion, dated May 25, 1965, to the effect that the three year rather than the five year statute provided for in section 373 of the Tax Law is applicable and that his holding is not inconsistent with that of the 1953 opinion nor with the United States Supreme Court decision in Colony, Inc. v. Commissioner, 357 U. S. 28, 2 L. Ed. 2nd 1119.

Copies of said correspondence are enclosed herewith.

On the approval of the members of the Tax Commission of the opinion of the Attorney General, I shall request the Income Tax Bureau to issue a refund to the taxpayer in accordance with the opinion of the Attorney General.

*E H Best*  
 Counsel

JS:mez

June 8, 1965

Enc.

*2 appellate*  
*7/9/65*