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1966 Income Tax Determinations A-Z
Kirsch, Bernard

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin and Macduff

FROM: Solomon Sies, Hearing Officer

SUBJECT: BERNARD KIRSCH

1951 Assessment #B-163405

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N. Y. on July 1, 1963. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The principal issue involved herein is whether the assessment which was made on August 20, 1956 should have been made within the three-year period instead of the five-year period in accordance with subdivision 1 of section 373 of the Tax Law where the taxpayer reported as a capital gain the profit realized on the sale of depreciable assets located in California and used by him in connection with his business there instead of reporting same as normal income. On his return for such year the taxpayer reported on a schedule of capital gains attached to the return full information concerning the acquisition and sale of all machinery, equipment and inventory used in the taxpayer's business.

One issue before the court in the matter of Warnecke v. State Tax Commission, 15 A.D. 2d 320, 223 N.Y.S. 2d 776, was whether the three year or five year statutory time limitation applied where the taxpayer had reported as capital gain upon his personal income tax return, the gain accrued upon the sale of hotel property. The court remanded the matter to the State Tax Commission in order to inquire into the applicability of the three-year statute of limitations.

Although, in an opinion issued prior to the decision of the U.S. Supreme Court in the case of Colony v. Commissioner of Internal Revenue, 357 U.S. 28, the Attorney General has stated,

> "Where either gross income or capital gain has been understated by more than 25% of the amount reported on the return the Tax Commission may revise the return within five years after it has been filed even though the amount has been erroneously included in the return as capital gain or gross income as the case may be."

the Attorney General by letter of May 25, 1965 to Counsel has recently distinguished his opinion as one where the question of full disclosure is not an issue.

The Attorney General, therefore, held that in the Warnecke case where there was full disclosure in the return, the three year limitation applied.

I am of the opinion that the Income Tax Bureau correctly determined the gain subject to tax as ordinary income instead of capital gain; that since the taxpayer did not conceal any information or omit specific receipts, but made full disclosure on his return, the assessment should have been made within the three year statutory time period in accordance with the case of Colony v. Commissioner of Internal Revenue, supra.

For the reasons stated above, I recommend that the determination of the Tax Commission in the above matter be substantially in the form submitted.

SOLOMON SIES

Hearing Officer

/s/ M. SCHAPIRO
APPROVED

/s/ S. HECKELMAN
APPROVED

SS/tc

December 21, 1965

(January 13, 1966)

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

EDWARD [illegible]

FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR THE YEAR 1951.

The taxpayer herein, having filed an application for revision or refund of personal income taxes under Article 16 of the Tax Law for the year 1951 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, NY, on July 1, 1963 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared in person and was represented by Arthur Young & Company, Certified Public Accountants, by E. Avery Rafuse, CPA, testimony having been taken and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a personal income tax return for the year 1951 in which he reported subject to normal income a business loss in the sum of $41,160.43; that in addition, the taxpayer listed schedules of capital gains and reported a net capital gain of $924,010.64 subject to capital gain tax on gain realized from the sale of timber, timber lands and depreciable business assets; that on August 20, 1956, the Department of Taxation and Finance made an additional assessment against the taxpayer (Assessment No. B-163405) holding the gain realized on the sale of depreciable business assets to constitute income subject to normal tax rather than net capital gain tax.

(2) That the taxpayer made full disclosure of the transactions by reporting the sales of the business property on his personal income tax return for 1951 and did not conceal or omit specific receipts or inaccurately report such receipts.

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

DETERMINES:

(A) That the assessment for the year 1951 made on August 20, 1956, was not timely made within three years from the date of the filing of the return in accordance with subdivision 1, Section 373 of the Tax Law.

(B) That, accordingly, the additional assessment for the year 1951 (Assessment No. B-153405) in the sum of $13,657.14 was not due and was not lawfully demanded and that the aforementioned assessment be and the same is hereby cancelled in full.

AND IT IS SO ORDERED.

DATED: Albany, New York, on the 28th day of January, 1966.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ IRA J. PALESTIN
Commissioner

/s/ JAMES R. MACDUFF
Commissioner