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Income Tax Determinations
Ar. 100, George L. & Frances

Commissioners Murphy & Macduff

Isidore Shaw, Hearing Officer

**GEORGE L. ARMOUR and
FRANCES ARMOUR, his wife**

1953 Assessment #B 289953

1954 Assessment #B 324162

1955 Assessment #B 577452

Article 16

A hearing with reference to the above matter was held before me at 80 Centre Street, New York City, on March 24, 1966. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issues involved herein are (1) whether the deduction by the taxpayer, George L. Armour of \$33,312.70 paid in settlement of a claim for surcharge as a trustee of various inter vivos trusts was a proper deductible expense in accordance with the provisions of subdivision 1, Section 360 of the Tax Law; (2) whether the value of stock sold by the taxpayer on an installment basis which was purchased by him under an option granted to him under the will of his deceased brother should have been \$4,408,664.82, the cost of said stock upon purchase rather than \$4,966,950.00, the appraised value for federal estate tax purposes as claimed by the taxpayer in accordance with subdivision 6, Section 353 of the Tax Law or whether the gain should be computed on the actual cost basis pursuant to subdivision 1, Section 353; and (3) whether the taxpayer, is entitled to a deduction of legal fees in the sums of \$25,000.00 and \$21,000.00 respectively for the years 1954 and 1955 as an expense incurred in the acquisition of the stock deductible from capital gains on Schedule E for said years.

On November 26, 1934, the taxpayer, George L. Armour, was named sole trustee of four separate (irrevocable) inter vivos trusts, which had been created by his late brother, Bernard L. Armour, under the Laws of the State of New York for the benefit of his infant children and sister. It appears that Bernard was divorced from his wife, and desired to create these trusts primarily for their education. The settlor of the trust transferred to each trust certain shares of stock of certain corporations. Under the terms of the trust agreement, the trustee was required to retain the principal in the form in which he had received the same and was empowered in his discretion to sell said property and reinvest the proceeds in such securities as he deemed proper and pay a portion of the income for the education of the minor children as he deemed necessary and to accumulate the balance for their benefit until they reached their majority.

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The taxpayer submitted an agreement dated September 2, 1937, entered into between himself, as trustee and the settler of the trusts, (his brother, Bernard R. Armour) whereby taxpayer, agreed to purchase for each trust 5,000 shares of common stock in the Aspinock Corporation at 10 cents per share and \$25,000.00 first mortgage 6% bonds maturing February 14, 1948. Pursuant to the agreement the taxpayer granted his brother the exclusive right and option for a period of ten years from the date of the agreement to repurchase the aforementioned common stock of Aspinock Corporation at ten cents per share in consideration of the settler agreeing to indemnify the taxpayer from any liability as a result thereof. On August 22, 1945, Bernard R. Armour exercised the option given him under the agreement and did purchase the stock at the original cost thereof. Bernard R. Armour died on December 1, 1949, a resident of New Jersey and the stock of Aspinock Corporation had become part of the assets in his estate. His will was admitted to probate in Superior Court, New Jersey on December 19, 1949 and George L. Armour (taxpayer), Chase Manhattan Bank and George F. Lewis, Esq. were duly appointed as executors and trustees under said will.

The taxpayer, as trustee of the inter vivos trusts commenced an action in the Supreme Court, New York County in 1949 for judgment permitting him to render an intermediate account of his proceedings as trustee for the period from November 26, 1934 to December 19, 1945 or until such date prior to entry of judgment as to the Court may seem proper. A guardian ad litem had been appointed by the Court to protect the interest of the minor beneficiaries of the trust who filed an answer containing counter-claims. It was contended that the Aspinock Corporation's stock which had greatly appreciated in value at the time of the resale to the settler should not have been sold by the taxpayer trustee to his brother, Bernard L. Armour since the agreement was invalid; that the agreement had been pre-dated to avoid possible surcharge; that the proceeds of the stock should revert to the various trusts and that the taxpayer as trustee should be surcharged for improper administration of the trusts. While the action was pending Bernard Armour died in 1949 leaving a will which was admitted to probate in State of New Jersey. The complaint in the action was amended and the executors of the estate (the taxpayer was one of the co-executors named in the will) and the testamentary guardians were brought in as additional parties.

In 1953, the executors of the estate of Bernard L. Armour and the taxpayer entered into an agreement with the testamentary guardian and the guardian ad litem representing the beneficiaries of the trust to settle the matter in controversy. The taxpayer submitted an intermediate account of his proceedings on trustee for period

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November 26, 1934 to March 31, 1950 and waived his commissions for said period pursuant to the agreement of settlement. The taxpayer was also required to file a supplemental account of his proceedings for period subsequent to March 31, 1950. The executors of the estate of Bernard L. Armour agreed to and did transfer to each of the trusts the sum of \$492,500.00 and the taxpayer, agreed to and did pay a total of \$33,312.70 into the aforementioned trusts in settlement of all pending litigation pertaining to him directly as trustee of the inter vivos trusts and indirectly as one of the executors and trustees of the estate. Releases were exchanged between the parties. An order was entered by the Court approving the aforementioned settlement.

The taxpayer on his return deducted "expenses incurred as professional fiduciary - surcharge as trustee of various trusts upon an accounting" the aforementioned \$33,312.70 from normal income. This deduction was originally disallowed by Internal Revenue Service. Thereafter the case came on for hearing before the Tax Court but was settled on a 50% basis.

Under the terms of the will of Bernard Armour, the taxpayer was given the right within one year from the date of the death of the testator to purchase all the shares of stock of American Aniline Products, Inc. (a closely held corporation controlled by decedent) which the decedent owned at the time of his death at a purchase price equal to the book value of said shares of stock without including any valuation for good will upon such terms as the executors and trustees may in their sole discretion determine. The taxpayer elected to exercise his option to purchase the aforementioned stock on February 2, 1950. An agreement was entered into between the taxpayer and the executors of the Estate on June 17, 1953 whereby the latter sold to the taxpayer 99,339 shares of the common stock of American Aniline Products Inc. for the sum of \$4,400,664.82 with a down payment of cash in the sum of \$8,664.82 and the balance of \$4,400,000.00 by a series of twelve promissory notes payable on the 15th day of January, 1955 and annually thereafter. On December 21, 1953, the taxpayer entered into an agreement with Columbia Dye Stuffs, Inc., a corporation organized under the laws of the State of New York for the sale of the shares of common stock of American Aniline Products, Inc. on an installment basis for the sum of \$6,457,035.00, with a cash down payment of \$50,000.00. In 1955 Columbia Dye Stuffs, Inc. sold the aforementioned stock to another corporation which was in no way connected with the estate of Bernard L. Armour or the taxpayer. Columbia Dye Stuffs, Inc. paid the balance of its obligation in full to the taxpayer who in turn repaid the executors of the estate of Bernard L. Armour in full for the purchase of said stock.

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The stock of American Aniline Products, Inc. was fixed for federal estate tax purposes at \$50.00 per share. In computing the basis of the capital gain reported by the taxpayer for the years in issue, he used the value of the stock as appraised for federal estate tax purposes. The Income Tax Bureau, however, in issuing its assessments computed the basis of the stock on the actual cost to the taxpayer relying upon the decisions of Helvering v. San Joaquin Investment Co., 279 U.S. 496 and Macv. Connor, 148 F. 2d 62.

Although the taxpayer acquired the American Aniline Products, Inc. stock from the estate in 1953, certain heirs of the estate commenced litigation against the taxpayer in the New Jersey Courts. He retained the services of attorneys in said state to represent him individually and was successful in such litigation. The Income Tax Bureau disallowed the legal expenses as a capital charge added to the cost of the property because of failure to substantiate the same. The Superior Court of New Jersey decided that the privilege given to the taxpayer under the will was in the nature of a legacy or bequest and overruled the contentions of the heirs. The taxpayer at the hearing submitted receipts from the law firm of Tener, Crowley, Woolper & Vanderbilt, Esqs., attorneys licensed in the State of New Jersey acknowledging receipt of payment from the taxpayer of \$25,000.00, on account, on April 27, 1954 and the sum of \$21,000.00 on March 29, 1955 for legal services rendered to him individually in connection with the acquisition of stock of the American Aniline Products, Inc. from the estate of Bernard L. Arnour. I am of the opinion that the same should have been allowed. (Bowers v. Lumpkin, 140 F. 2d 927, cert. den., 322 U.S. 755).

With respect to the payment by taxpayer in compromise of the surcharge as trustee of the inter vivos trusts, the instant case is analogous to the case of Carl F. Fayen, 34 T.C. 630. In 1953 Carl F. Fayen, the sole trustee and life-income beneficiary of the Carl F. Fayen Trust, paid \$4,664.37 into the principal of said trust in compromise of surcharge proceedings filed by the guardian ad litem for the remaindermen of the trust. Held, that petitioner is not engaged in carrying on a trade or business as trustee. His claim for deduction under section 23(a)(1)(A), I.R.C. 1939, is accordingly denied. Held, further, that said payment in settlement of the surcharge suit is not an expense incurred in the collection or production of income and hence not deductible under section 23(a)(2).

The provisions of subdivision 1, Section 360 of the Tax Law are similar to those contained in section 23(a)(1)(A) and (a)(2) of I.R.C. 1939. Section 360 (1), provides, in part, as follows:

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"In computing net income, there shall be allowed as deductions:

1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business or for the production or collection of income required to be included in gross income under this article, or for the management, conservation, or maintenance of property held for the production of such income ~~same~~."

On his returns for the years 1953, 1954 and 1955, the taxpayer reported salary income in the sums of \$269,029.62, \$192,359.81 and \$93,578.47, respectively, as an executive of American Aniline Products, Inc. He did not file any unincorporated business tax return for said years. This appears to be practically the only occasion for the taxpayer acting as trustee. It cannot be said that the taxpayer was one who regularly engages in the business of serving as an executor or trustee. Estate of Hyman Y. Josephs, 12 T.C. 1969. In addition, it cannot be said that the expenditure was paid or incurred "for the production or collection of income" (Estate of Edward W. Clark, III, 2 T.C. 676, or for "the management, conservation or maintenance of property" (Commissioner v. Helde, 165 F. 2d 699; Commissioner v. Josephs, 168 F. 2d 233). I am of the opinion, therefore, that the payment in settlement of the surcharge claim was not a proper deduction within the intent and meaning of subdivision 1, Section 360 of the Tax Law.

In the San Joaquin case (supra) real property was leased to the taxpayer prior to March 1, 1913. The lease contained a provision which granted the taxpayer an option to purchase the real property ten years later. The lessee had made improvements to the property. The taxpayer claimed that the option had a value on March 1, 1913 which should have been included in its basis for the purpose of determining the gain upon the subsequent sale. The United States Supreme Court held that the real property was acquired at the time of the exercise of the option and did not relate back to the date of the original option.

In the Hack case (supra) (decided in 1945) the taxpayer exercised an option granted to him by will to purchase stock from testamentary trustees at approximately one-half of its market value. He then resold such stock at a price in excess of the amount which he had paid. The United States Circuit Court of Appeals, Third Circuit, relying on the San Joaquin case held that the basis of the property acquired by the exercise of an option obtained under the will was the amount paid under the option rather than the option price plus the value of the option.

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In the case of Kalbas v. Commissioner 298 F. 2d 251, decided in 1962 by the United States Circuit Court of Appeals, Eighth Circuit, the petitioner exercised an option granted him by will to purchase 59 shares of stock from testator's estate in a closely held corporation at a greatly reduced price. Two and a half years later, he surrendered the stock to the corporation and received a liquidation dividend. In reporting his taxable gain, he used as a basis, the fair market value of stock at time of testator's death. The Commissioner recomputed the gain on the basis of the actual cost. The Tax Court sustained the Commissioner's determination. The Court of Appeals affirmed the decision of Tax Court insofar as it determined that the shares of stock were not acquired by "bequest, devise or inheritance" but vacated the decision of the Tax Court insofar as it sustained the Commissioner's computation of the deficiency and remanded the matter to the Tax Court to enable it to determine whether petitioner is legally entitled to a more favorable basis of ascertaining capital gain on the shares acquired by exercise of the option granted. The Court stated at page 254:

"Counsel for the Commissioner, during the oral argument of this case, raised the question whether the Sol Joachim Fruit & Investment Co. case, which the Third Circuit thought controlled the decision of the Hack case, actually precludes the petitioners from having a more favorable basis for the calculation of gain. At our request, counsel for the Commissioner furnished us with a supplemental memorandum, expressing the view that to allow a taxpayer in the position of petitioners a basis equal to the fair market value of the option, acquired by bequest, at the date of the testator's death, plus the amount paid in exercising the option, might be legally permissible. Counsel says in the last paragraph of their supplemental memorandum:

"As stated in the course of oral argument, the Commissioner is of the view that, so long as Hack v. Commissioner remains the only judicial pronouncement of this question, he is not free, administratively, to allow to any taxpayer the right in computing his basis in property purchased through the exercise of an option taken by bequest, to add to his Section 1014 basis in the option to the cash price paid. However, in view of the unusual factors which led to this decision and the doubtful propriety of the rule thus established, the Commissioner interposes no objection to a reconsideration by this court of the entire

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question in the light of these factors, or alternatively, to a remand to Tax Court for such consideration * * *."

The representative for taxpayer submitted a copy of the decision of the Tax Court, upon remand, in the Kalbag case, which permitted the taxpayers to use as a basis for computing gain the value of the stock for Federal estate tax purposes.

Subdivision 1, Section 353 of Tax Law provides, in part,
that:

"1. For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be, in case of property acquired on or after 1/1/19, the cost thereof, or the inventory value if the inventory is made in accordance with this article. * * *"

A similar provision is contained in Section 1012, I.R.C.
1954.

Subdivision 6, Section 353 (a similar provision is contained in Section 1014 I.R.C. 1954), provides in part, that:

"6." If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, gain or loss shall be determined as provided in subdivision one or two of this section, except that the word 'cost' as used in said subdivision shall mean the fair market value of such property. * * *"

I am of the opinion that the option granted in the will was a valuable property right; that the taxpayer, in computing capital gain on the sale of the shares of stock acquired from the Estate of Bernard Armour was entitled to use as a basis the fair market value thereof as determined for Federal estate tax purposes on the basis of the decision in the Kalbag case and the determination by I.R.S. in favor of taxpayer with respect to this issue.

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For the reasons stated above, I recommend that a determination be made by the Tax Commission in the form submitted herewith.

DEC 21 1966

SOLOMON SIES

Hearing Officer

/s/ M. SCHAPIRO
Approved

/s/ S. HECKELMAN
Approved

(Dec. 29, 1966)

SS:HM

CITY OF NEW YORK

STATE TAX COMMISSIONER

IN THE MATTER OF THE APPLICATION

OF

**GEORGE L. AMMER AND FRANCES AMMER,
his wife**

**FOR REVIEW ON RETURN OF PERSONAL INCOME
TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR
THE YEARS 1933, 1934 & 1935.**

The taxpayers herein, having filed applications for review or refund of personal income taxes under Article 16 of the Tax Law for the years 1933, 1934 and 1935 and a hearing having been held in connection therewith at the office of the State Tax Commission, at 60 Centre Street, New York, N. Y., on the 20th day of March, 1936, before Solomon Sles, Hearing officer of the Department of Taxation and Finance, at which hearing the taxpayer George L. Ammer appeared personally and having been represented by Joseph Gates & Co., CMA's, 522 Fifth Avenue, New York, N. Y., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

1. That the taxpayer George L. Ammer and Frances Ammer, his wife, filed a joint New York State income tax resident return for the year 1933 in which the taxpayer, George L. Ammer reported salary income as executive of American Airlines Products Inc., in the sum of \$250,000.00; that in addition he reported interest dividends and other income which included trustee commissions from Martha C. Ammer Trust, \$46.41 and commissions as co-executor and/or co-trustee of Estate of Edward L. Ammer, \$5,007.42; that taxpayer did not file any unincorporated business tax return for said year; that taxpayer included in his itemized deductions "expenses in-

acted as professional fiduciary - exchange as trustee of various trusts upon an accounting" the sum of \$33,312.70; that the taxpayer reported a capital gain on the installment sale of stock of American Airlines Products, Inc.; that the taxpayer claimed that the basis for the cost of said stock was not the actual cost thereof in the sum of \$4,499,884.82 purchased pursuant to an option contained in the will of Bernard S. Anner but the sum of \$4,955,550.00 the fair market value thereof, as fixed and determined for Federal estate tax purposes in the Estate of Bernard S. Anner, deceased; that on February 3, 1957, the Department of Treasury and Finance made an additional assessment against the taxpayer George L. Anner for the year 1953 (document 43-210522) disallowing the deduction of \$33,312.70 as not representing a proper allowable deduction and computed additional annual tax due in the sum of \$2,032.70; that in addition, the net profit realized on the sale of the stock was adjusted so that the actual cost was used as the basis for the stock sold on the installment plan and additional capital gain tax was computed to be due in the sum of \$136.17; that the taxpayer paid said assessment on February 27, 1957 and now seeks a refund thereof.

2. That the taxpayers, George L. Anner and Frances Anner filed New York State resident income tax returns for the years 1954 and 1955; that the taxpayer George L. Anner reported capital gain on the installment sale of stock in American Airlines Products Inc. which he had purchased from Estate of Bernard S. Anner pursuant to an option contained in said will at book value without consideration for good will; that the basis used by him

in computing said capital gain was not the actual cost but the fair market value thereof as fixed and determined for Federal estate tax purposes in the Estate of Bernard L. Anner, deceased; that in addition, the taxpayer in computing the aforementioned capital gain, added to the cost of said stock the sum of \$25,000.00 in 1954 and the sum of \$21,000.00 expended in connection with the acquisition of said stock in 1955 as legal fees; that on August 21, 1957, the Department of Revenue and Finance made an additional assessment against the taxpayer for the year 1954 (assessment 65-221352) disallowing the \$25,000.00 for lack of substantiation thereof claimed for legal fees and adjusted the capital gain reported on the basis of the actual cost of the stock in American Aniline Products Inc. and assessed additional net capital gain tax due in the sum of \$1,106.20; that the taxpayer has paid said assessment and now seeks a refund thereof; that on March 21, 1959 the Department of Revenue and Finance made an additional assessment against the taxpayer for the year 1955 (assessment 65-577452) adjusting a portion of capital gain in connection with the sale of American Aniline Products Inc. stock upon the basis of the actual cost thereof; that in addition, the \$21,000.00 for legal expenses was disallowed for lack of substantiation; that as a result thereof, additional net capital gain tax was assessed in the sum of \$19,799.73; that the taxpayer has paid said assessment and now seeks a refund thereof.

3. That on or about November 25, 1934, the taxpayer George L. Anner was named sole trustee of four separate inter-vivos (living) trusts which had been created by his late brother, Bernard L. Anner under the laws of the State of New York for the benefit of his three minor children and a sister; that the

settles of the trusts transferred to each trust certain shares of stock; that under the terms of the trust agreements the trustee was required to retain the principal in the form in which he had received the same and was empowered in his discretion to sell said principal and reinvest the proceeds in such securities as he deemed proper and to pay to the adult beneficiary in equal quarterly payments the income thereof and so much of the income as he deemed necessary for the education and maintenance of the minor beneficiaries and accumulate the balance of such unexpended income for their benefit until they reach their majority; that on September 2, 1907 the taxpayer as trustee entered into an agreement with his brother (the settlor of the trusts) whereby the taxpayer agreed to purchase for each trust 2,000 shares of common stock in the Republic Corporation at 10 cents per share and \$25,000.00 first mortgage 6% bonds maturing February 15, 1930; that pursuant to said agreement the taxpayer George L. Amner granted the settlor the exclusive right and option for a period of ten years from the date of the agreement to repurchase the aforementioned common stock of Republic Corporation at the original cost thereof in consideration of the settlor agreeing to indemnify the taxpayer from any liability as a result thereof; that on August 22, 1912, Edward L. Amner, exercised the aforementioned option given him under the agreement and did purchase such securities hereinafter mentioned at the original cost thereof; that Edward L. Amner (the settlor) died on December 1, 1920, a resident of the State of New Jersey and the stock of the Republic Corporation which had greatly appreciated in value, at the time of the bequest to him, became part of the assets in his estate; that the last will and Testament of Edward L. Amner was duly admitted to probate in the Superior Court of New Jersey, Chancery Division on December 10,

1900 and George L. Anner (the taxpayer) Chase Manhattan Bank and George F. Lewis, Esq. were duly appointed as Executors and Trustees under said will of Edward R. Anner.

4. That the taxpayer George L. Anner as trustee of the first inter-vivos trusts instituted an action in the Supreme Court, New York County in 1945 for an adjudication with respect to an inter-vivos accounting of his proceedings as trustee thereof; that a guardian ad litem was appointed by the Court to protect the interests of the minor beneficiaries of the trusts; that while said action was pending the settlor of the trusts, Edward Anner died; that the guardians ad litem of minor beneficiaries under the last will and testament of Edward R. Anner were permitted to intervene in this action; that the executors under the will of Edward Anner were added as parties defendants; that answers which contained counter-claims were filed by the guardian ad litem in which it was claimed that the agreement entered into between the taxpayer and the settlor with regard to the sale of shares of stock mentioned above was invalid; that it was claimed that the agreement dated September 2, 1907 had been pre-arranged to avoid possible claim of mortgage; that taxpayer was guilty of malfeasance and misfeasance in the management of said trusts and sought judgment directing plaintiff-trustees and the Executors and Trustees under will to restore the proportionate share of stock in Republic Corporation or their proceeds to the trust estate and further sought to mortgage taxpayer individually as trustee with respect to certain transactions concerning the trust estates; that on July 2, 1953 an agreement was entered into between the taxpayer individually and as trustee of the inter-vivos trust mentioned, the Executors and Trustees under last will

and Testament of Edward L. Ammer and the Guardian of Litem in the State of New Jersey of the Infant Beneficiaries under the Will of Edward Ammer and the Guardian of Litem of the Infant Beneficiaries of the Inter-vivos trusts whereby the parties stipulated that the action be compromised and settled by the taxpayer individually paying to himself as Trustee of the Inter-vivos trusts the total sum of \$52,312.75 and that the Executors of Estate of Edward Ammer pay to taxpayer as Trustee the sum of \$442,500.00 to each of the trusts and that taxpayer waive his commission; that pursuant to said agreement which was approved by the Court an order was entered in said action directing the aforementioned payments and providing for exchange of releases and filing of supplemental account for period from and after March 20, 1939 and that upon compliance therewith all of the causes of action in the complaint and answer be dismissed upon the merits and with prejudice but without costs; that the taxpayer did pay the aforementioned \$52,312.75 in July 1939.

3. That under the terms of the last will and Testament of Edward L. Ammer the taxpayer George L. Ammer was given the right within one year from the date of the death of the testator to purchase all of the shares of stock of American Lotion Products, Inc. which the decedent owned at the time of his death at a purchase price equal to the book value of said shares of stock which was to be determined by inventory taken and balance sheet at the end of the fiscal year of said corporation during the year in which the death of the decedent should occur but without including any valuation for good will upon such terms as the executors and trustees may in their sole discretion determine; that the taxpayer elected to exercise his option to purchase the aforementioned stock on

February 2, 1933; that an agreement was entered into between the taxpayer and the executors of the estate on June 17, 1933 whereby the latter sold to the taxpayer 99,339 shares of common stock of American Aniline Products, Inc. for the sum of \$4,400,004.02 with a down payment of cash in the sum of \$9,004.02 and the balance of \$4,400,000.00 as evidenced by a series of 12 promissory notes payable on the 15th day of January, 1935 and annually thereafter; that on December 31, 1933, the taxpayer entered into an agreement with Columbia Dye Stuffs, Inc., a domestic corporation organized under the laws of the State of New York for the sale of the aforementioned 99,339 shares of common stock of American Aniline Products, Inc. on an installment basis for the sum of \$6,437,035.00 with a cash down payment of \$50,000.00; that the agreement further provided that the taxpayer was to be paid the sum of \$107,035.00 on January 14, 1934 with a balance to be paid over a period of 15 years commencing December 31, 1934, and annually thereafter until December 31, 1949; that in 1935 Columbia Dye Stuffs, Inc. sold the aforementioned stock to another corporation in no way connected with the Estate of Bernard R. Armour or the taxpayer; that in 1938, Columbia Dye Stuffs, Inc. paid the balance of its obligation to the taxpayer who in turn repaid the executors of the Estate of Bernard R. Armour in full for the purchase price of said stock.

6. That certain heirs of the Estate of Bernard R. Armour instituted proceedings in the Superior Court of New Jersey against the taxpayer with respect to the acquisition by him from the estate of the stock of American Aniline Products Inc.; that the taxpayer in his individual capacity retained the services of Toner, Crowley, Weisner & Vanderbilt, Esqs. of New Jersey to represent him in such litigation; that the taxpayer was successful

in such litigation; that the taxpayer, at the hearing submitted receipts from said law firm acknowledging receipt from the taxpayer of the sum of \$25,000.00 on account on April 27, 1934 and the sum of \$21,000.00 on March 25, 1935 for legal services rendered to the taxpayer in connection with the acquisition of the aforementioned shares of stock; that said expenditures were proper charges added to the cost of the property in computing capital gains for the years 1934 and 1935.

7. That the taxpayer was not regularly engaged in the carrying on of a trade or business as a trustee or fiduciary; that he did not file any unincorporated business tax returns indicating that he was carrying on business as a trustee or fiduciary; that the expenditure of \$33,312.75 paid in settlement of the surcharge claim was not an expense incurred in the collection or protection of income or for the management, conservation or maintenance of property.

Based upon the foregoing findings and all of the evidence presented herein,

The State Tax Commission hereby

DETERMINE:

(A) That the payment of \$33,312.75 in settlement of the surcharge claim was not a proper deduction within the intent and meaning of Sub-Division 1, §260 of the Tax Law.

(B) That the legal expenses of \$25,000.00 and \$21,000.00 for the years 1934 and 1935, respectively, incurred by the taxpayer in connection with the acquisition of the stock of American Aniline Products Inc. were proper capital charges properly added to the cost of said stock in computing capital gains on the installment sale of same for said years.

(C) That the shares of stock of American Aniline Products Inc. acquired by the taxpayer under the option contained in the will of

his deceased brother was not acquired by "bequest, devise or inheritance"; that the option constituted a valuable property right; that the taxpayer was entitled, in computing capital gains, to a basis equal to the fair market value of the option at the date of testator's death.

(b) That, accordingly, the additional net capital gain taxes assessed for the years 1954 and 1955 (Assessment Nos. B 334162 and B 577452, respectively) were not lawfully due and owing and the same are hereby cancelled in full.

(c) That the additional capital gain tax of \$3,136.17 contained in Assessment No. B 339923 for the year 1953 was not lawfully due and owing and the same is hereby cancelled; that the additional annual tax in the sum of \$2,000.70 is correct; that the same does not contain any tax or other charge which could not have been lawfully demanded and that the taxpayer's application for revision or refund filed with respect thereto, except as herein modified, be and the same is hereby denied.

(d) That in accordance with Determinations 3 and 2, above, the additional capital gain taxes paid by the taxpayer in the sum of \$136.17 for 1953, \$1,166.26 for 1954 and \$19,799.73 for 1955, be refunded to him with lawful interest thereon.

AND IT IS SO ORDERED.

Witness: Albany, N. Y. the 4th day of January 1957.

STATE TAX COMMISSIONER

/s/

JOSEPH H. MURPHY

President

/s/

JAMES R. MACDUFF

Commissioner

20-441