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Income Tax Determinations
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# BUREAU OF LAW

MEMORANDUM Bromberger, Edgar, Est.

TO: Commissioners Murphy & Macduff

FROM: Solomon Sies, Hearing Officer

SUBJECT: EDGAR BROMBERGER ESTATE

1956 Assessment No. B-790802

Article 16

A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y., on December 10, 1963. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issues involved herein are: (1) whether accruals representing executor's and trustee's commissions due to the decedent taxpayer at the time of his death but not received until after his death were taxable and includible on his final return; (2) whether the option of the Executor of the taxpayer's estate or the residuary legatee under the Last Will and Testament of the decedent taxpayer, Edgar Bromberger, to include in any tax return by her such amounts of net income and net capital gains for the taxable period for which such amounts are received without the filing of a bond constituted a proper election to exclude the accruals from the final return of the decedent taxpayer in accordance with subdivision 1 of Section 358 of the Tax Law, as amended by Chapter 535 of the Laws of 1944; and (3) whether the amount of accruals received by the residuary legatee were exempt from the imposition of tax for the year 1958 in accordance with Section 1 of Chapter 60 of the Laws of 1959.

Edgar Bromberger was one of the executors and co-trustees of several trusts created under the Last Will & Testament of Clara S. Bromberger, his wife, who died on April 19, 1953. The decedent taxpayer, Edgar Bromberger, died on March 17, 1956. The decedent filed income tax returns for the years 1953, 1954 and 1955 on a calendar year cash receipt and disbursement basis. His executor filed a final return for the period of January 1 to March 17, 1956 but did not include accrued commissions due to the decedent taxpayer from the Estate of Clara S. Bromberger.

The executor of the decedent taxpayer filed a tentative Fiduciary return for the calendar year 1958 on or about November 12, 1958 reporting the receipt of accrued executor's and trustee's commissions due the decedent taxpayer in the sum of $46,692.21 and paid the tax thereon. Thereafter the executor filed an amended return for the year 1958 on or before April 15, 1959 indicating that

the accrued commissions had been distributed to the residuary legatee, Elsa H. Bronfman, and that there was no tax due. On or about the same time the executor filed an IT-113 requesting a refund of said amount so paid. On or about May 26, 1960, the Department of Taxation and Finance issued Form IT-111 granting the application for revision or refund for 1958 refunding to the executor the sum of $2,962.47 but retaining the sum of $2,999.90 to be applied toward the assessment about to be issued for the period January 1, 1958 through March 17, 1958 on the final tax return of the decedent taxpayer. On June 14, 1960, the Department of Taxation and Finance made an additional assessment (Assessment No. B-790802) holding that the accruals reported on the Fiduciary return for the year 1958 were due the decedent taxpayer at the time of his death on the final return required to be filed on his behalf. On March 14, 1961 the executor of the Estate of the decedent taxpayer filed an application for revision or refund for the period January 1, 1958 through March 17, 1958 and claimed that it elected to report the accruals and pay the tax when received in 1958; that the accruals were distributed to the residuary legatee who was required to pay no tax on this income for the year 1958 in accordance with Section 1, Chapter 60 of the Laws of 1959.

Subdivision 1 of Section 358 of the Tax Law was amended by Chapter 228 of the Laws of 1935 to conform with Section 42 of the Federal Revenue Act of 1934, to include in computing net income and net capital gain for the taxable period in which falls the date of a taxpayer's death, amounts accrued up to the date of his death if not otherwise properly includible in respect to such period or a prior period.

In construing Section 42 of the Revenue Act of 1934 the United State Supreme Court, in the case of Helvering v. Estate, 312 U.S. 636, held that Section 42 permits the inclusion as accrued items in the decedent's gross income for the period ending with his death, of his share of profits earned, but not yet received, by a partnership although both the decedent and his firm keep their accounts and make their income tax returns on a calendar year cash receipt and disbursement basis.

In the case of Helvering v. Mellon's Estate, 119 F. 2d 167, the Court held that where the decedent and executor had made a contractual arrangement before decedent's death as to executor's fees, executor's claim for fees was "fixed" rather than "inchoate" or "in the process of becoming", and fees were "accrued income" taxable for the year of death of the executor, who kept his accounts on cash receipts and disbursement basis, notwithstanding that the fees had not been allowed or received when the executor died.

Subdivision 1 of Section 358 of the Tax Law was further amended by Chapter 535 of the Laws of 1944 so as to give the decedent's representative or any other taxpayer, who acquires the right to receive such amount by reason of death, to include such income for the taxable period in which it is received. It further requires that a bond be filed with the Tax Commission "at such time as it may by regulation prescribe" conditioned upon return as income of such amounts in the same manner as if the decedent lived and received them. This provision was presumably added to provide some relief from the hardship resulting from including in the income for the decedent's last taxable year amounts which ordinarily would be receivable over a period of several years.

Article 542 of the Personal Income Tax Regulations states that the bond must be filed "at the time of filing the return for the period in which falls the date of death."

The Tax Commission requested an opinion of the Attorney General in 1953 as to the time limit within which a bond may be accepted in accordance with the laws and regulations. On February 24, 1953 an opinion was issued by the Attorney General, photostatic copy of which is appended to this memorandum, setting forth the history of subdivision 1 of Section 358 and also discussing the statutory time period within which a bond may be filed.

The final return of the decedent taxpayer is required to be filed within four months following the calendar year after the date of death. In the instant case the decedent taxpayer died on March 17, 1956. The final return would normally be required to be filed on or about April 15, 1957. The Opinion of the Attorney General indicates that the regulations (Article 542 of the Personal Income Tax Regulations) specifies that the bond be filed at the time of filing the return. A return is not final until the time granted by the statute for seeking revision has expired. In the instant case the final return could have been filed by the executor of the Estate on or before April 15, 1959, so that the bond in the instant case would have been required to be filed on or about April 15, 1959.

The opinion of the Attorney General states that there is one situation in which the acceptance of such a bond would seem authorized after the time for seeking revision of the return as filed may have expired. Where the return for a decedent, in good faith, fails to include amounts which should have been returned therein, only by reason of the provision of Section 358 of the Tax Law and the return is recomputed and an additional assessment made on that ground, the return itself then stands on a different basis subject to the taxpayer's right to apply for revision within a year. In such a case, the Attorney General is of the opinion that the acceptance of the bond

in question would be authorized in connection with an application for revision or refund made within that period.

In the case in issue the executor filed the Fiduciary return, which included the amounts of accruals on November 12, 1958 and paid the tax thereon. Up to this point the executor had complied with the law. However, on April 15, 1959 the executor filed an amended return and requested a refund. Although the Income Tax Bureau granted the refund, it still retained the cash and applied it towards payment of the tax due on the final return due on behalf of the decedent taxpayer for the period covered by said return, namely, January 1 through March 17, 1956. The retention of the cash was a substitute for a bond required to be filed. The cash in the hands of the Department required no further security.

If the decedent taxpayer had lived in 1958, he would have been exempt from including in his return the amounts of accruals by virtue of the forgiveness provisions of normal tax in accordance with Section 1, Chapter 60 of the Laws of 1959. Although the 1944 amendment to subdivision 1 of Section 358 permits, in the case of any other taxpayer who acquires the right to receive such amounts by reason of the death of the decedent, such taxpayer to elect to include such amounts in computing net income when received upon filing a bond with the Commission. In the instant case "any other taxpayer" is in fact the residuary legatee, who stands in the same position as the decedent taxpayer had he been alive in 1958. In other words, the residuary legatee likewise was not required for the year 1958 to pay a tax upon the accruals received by her in accordance with Section 1, Chapter 60 of the Laws of 1959. The application for revision or refund should, therefore, be granted and the refund made.

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

FEB 1 - 1965 (Dec. 20, 1966)

SOLOMON SIES
Hearing Officer

/s/ M. SCHAPIRO
Approved

/s/ S. HECKELMAN
Approved

SS/kk
Encls.

[¶ 98-312] Estate of Frank Wolf.

Surrogate's Court, New York County, N. Y. L. J., March 5, 1953, p. 733.

**Estate Tax—Widow's Elective Share.—The widow's elective share in one half of the decedent's intestate estate after deduction of debts, funeral and administrative expenses is subject to its pro rata share of Federal and New York estate taxes. The widow is entitled to her statutory exemptions and marital deduction.**

See ¶ 89-495.

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[¶ 98-313] Estate of Louis Heilbrunn.

Surrogate's Court, New York County, N. Y. L. J., March 2, 1953, p. 677.

**Estate Tax.—Basis for Assessment.—In estate transfer tax proceedings, the aggregate of all legacies to a single legatee must be taken into consideration as the basis for the assessment under Sec. 221-a, Tax Law.**

See ¶ 89-037.

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[¶ 98-314] Transmirra Corp. et al. v. The Magnavox Company, Ltd.

United States District Court, Southern District of New York, February 27, 1953.

**Doing Business—Service of Process.—A foreign corporation carrying on systematic business activities in this state, in an attempt to increase its sales and profits, is subject to service of process.**

See ¶ 2-012.

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[¶ 98-315] Opinion of Attorney General.

To Department of Taxation and Finance, February 24, 1953.

**Personal Income.—Exclusion of Net Income and Net Capital Gain of a Decedent in Period When Death Occurred.—Decedent's executor or other legal representative may only file a bond and agreement excluding the accrual of amounts not otherwise includible in a return for the period when death occurred if said bond and agreement is filed during the statutory period for applying for a revision of return. When a return for a decedent has become final, bonds and agreements to exclude accrued amounts may not be accepted.**

See ¶ 17-105.

You have asked my opinion whether:

"the Tax Commission has the authority, for the purpose of taxation under Article 16 of the Tax Law, to permit a representative of a decedent to exclude from the computation of net income and net capital gain of a decedent for the period during which his death occurred, amounts accrued to the date of death not otherwise includible in respect of such period or prior period, where the agreement and bond required under the provisions of section 358 of the Tax Law is not offered for filing until after the expiration of the statutory period of limitations for the filing of applications for revision or refund with respect to such return filed for the period prior to death, or where the accrued amounts have already been reported for personal income tax purposes in subsequent periods when received by the recipients."

Consideration of the issues raised by your inquiry begins with the provision added to Tax Law Section 358, subdivision 1, by Chapter 244 of the Laws of 1935, which, as last amended by Chapter 535 of the Laws of 1944, reads as follows:

"* * * in the case of the death of a taxpayer there shall be included in computing net income and net capital gain for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period, and with respect to such net income and net capital gain there shall

be allowed for the same period amounts deductible under section three hundred-sixty of this chapter accrued up to the date of his death if not otherwise properly allowable in respect of such period or a prior period; provided, however, that the decedent's executor or other legal representative may, at his option, exclude such amounts in computing net income and net capital gain for the taxable period in which falls the date of the decedent's death, upon the condition that (a) in case an executor or representative acquires the right to receive such amounts from the decedent, such executor or representative agrees to include such amounts in computing net income and net capital gain in a return filed by him under this article on behalf of the estate of the decedent for the taxable period in which such amounts are received, (b) in case any other taxpayer acquires the right to receive such amounts by reason of the death of the decedent, such taxpayer agrees to include such amounts in computing net income and net capital gain in a return filed by him under this article for the taxable period in which such amounts are received, (c) in case the right to receive such amounts is transferred by an executor or representative or other taxpayer, he agrees to include the fair market value of such right, plus the amount by which any consideration for the transfer exceeds such fair market value, in computing net income and net capital gain in a return filed by him under this article for the taxable period in which such transfer occurs, (d) such amounts are considered in such returns to have the character which they would have had in the hands of the decedent and to be includible in computing net income and net capital gain to the same extent as if the decedent had lived and received such amounts and (e) there is filed with the tax commission, at such time as it may by regulation prescribe, a bond in such amount and with such sureties as it may deem necessary, conditioned upon the return as income of such amounts or the value of such right by the executor or legal representative or other taxpayer in the same manner as such amounts would be returnable as income by the decedent if he had lived and received such amount."

The case of *Matter of Kernochan v. Gilchrist*, 214 App. Div. 114, affd. 241 N. Y. 589, had decided in 1925 that income accrued to a person prior to her death but received thereafter by her representatives did not have to be returned as income of the decedent where her reports had been made on the cash received basis of accounting during her lifetime. Subsequent cases indicated that income not taxable to the decedent under this principle would not be taxable as income when received by his estate on the ground that it constituted capital in the hands of the latter (*Peo. ex rel. Lee v. Gilchrist*, 215 App. Div. 576, affd. 244 N. Y. 514; *Peo. ex rel. Gwathmey v. State Tax Commission*, 221 App. Div. 812, affd. 251 N. Y. 545; *Peo. ex rel. Whitney v. Loughman*, 226 App. Div. 113, affd. 251 N. Y. 544).

The Federal government was faced with a similar situation in which "income accrued by a decedent on the cash basis prior to his death is not income to the estate" and escaped income tax altogther until Section 42 of the Revenue Act of 1934 was drawn to require the inclusion of all amounts accrued to the date of death in the return of the decedent for the period in which falls the date of his death, if not otherwise properly included in respect of such period or a prior period (*Helvering v. Enright*, 312 U. S. 636; *Nichols v. United States*, 64 Ct. Cls. 241; I. T. 3708, C. B. 1945, 129). The inclusion of such a provision in Tax Law Section 358 followed in 1935. As originally enacted, this did not include the present proviso added by the 1944 amendment permitting the decedent's representative to exclude the amount in question upon prescribed conditions. This proviso was presumably added to provide some "relief from the hardship resulting from including in the income for the decedent's last taxable year amounts which ordinarily would be receivable over a period of several years" (I. T. 3708, *supra*) following amendments of the Internal Revenue Code for that purpose in 1942. As so amended, the latter now provides in Section 42 (a) that amounts accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of death. Section 126 provides that all items of gross income "in respect of a decedent", not properly includible for the taxable period in which falls the date of death, are to be included in the taxable year received in the gross income of the estate, or beneficiary receiving such amounts, as the case may be.

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The 1944 amendment of the corresponding provisions of Tax Law Article 16 did not go so far. It gave the decedent's representative an option subject to conditions, and thus left the possibility that, if the option were not exercised, the death of the taxpayer would result in the accrual and inclusion in computing net income of amounts not otherwise includible in the taxable period in which death occurred.

The proviso requires an agreement by the decedent's representative or by another taxpayer who acquires the right to receive such amount by reason of death to include such income for the taxable period in which received. It further requires that a bond be filed with the Tax Commission "at such time as it may by regulation prescribe" conditioned upon return as income of such amounts in the same manner as if the decedent had lived and received them. The regulations state that the bond must be filed "at the time of filing the return for the period in which falls the date of death" (Art. 542, Personal Income Tax Regulations 51). The same article indicates that a return for the portion of a decedent's taxable year preceding the date of his death may be filed by the executor or administrator without waiting for the close of the year. However, the return need not be filed until the fifteenth day of the fourth month following the close of the taxable year which is, of course, the following April 15 for taxpayers on a calendar year basis.

Your question whether you may accept such a bond "after the expiration of the statutory period of limitations for filing of application for revision or refund" indicates that you do not question your authority to do so prior to that time. With that conclusion I agree. It is not inconsistent with the statute. The power to make a regulation as to the time of filing is left to the Commission and, while the regulation specifies the time of filing the return, a return is not final until the time granted by the statute for seeking revision has expired.

There is one situation in which the acceptance of such a bond would seem authorized after the time for seeking revision of the return as filed may have expired. Where a return for a decedent, in good faith, fails to include amounts which should have been accrued therein only by reason of the provision of Tax Law Section 358 and the return is recomputed and an additional assessment made on that ground, the return itself then stands on a different basis subject to the taxpayer's right to apply for revision within one year. In that case it is my view that acceptance of the bond in question would be authorized in connection with a revision application made within that period. If, however, a return becomes final by reason of the expiration of the statutory periods within which to seek revision, then the option granted by Section 358 must also be held to have terminated. These conclusions broadly construe the "time of filing the return" in your regulation as including the time during which there is statutory right to apply for revision of returns. That view accords with the liberal purpose of the proviso added to Section 358 to furnish some relief from the hardship of accruing in one year amounts otherwise receivable over a period of years while at the same time protecting the interest of the State against escape of such amounts from income taxation. The relief is, however, in the form of an option and there is no basis for any conclusion that it remains available after the return for the decedent has become final on the basis of the accrual of such amount therein.

Since the duty to file a decedent's return for the period in which falls the date of his death falls upon his executor or other legal representative, it is to these that the right is given to exclude amounts which must otherwise be accrued therein under Section 358 upon complying with the conditions prescribed in that section. I find no basis in the statute for permitting the bond and agreement to be filed after decedent's return has become final solely because the accrued amounts have been mistakenly reported for personal income tax purposes when received by the recipients.

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STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

CHEMICAL BANK NEW YORK TRUST CO., as executor of the ESTATE OF EDGAR BRONFENBRENER

FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR THE YEAR 1956.

Chemical Bank New York Trust Co., as executor of the Estate of Edgar Bronfenbrenner, the decedent taxpayer herein, having filed an application for revision or refund of personal income taxes under Article 16 of the Tax Law for the period January 1 to and including March 17, 1956 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York City, N.Y. on the 10th day of December, 1963 before Coleman Nies, Hearing Officer of the Department of Taxation and Finance, at which hearing William Berg, Trust Officer of the Executor, appeared and the executor having been represented by Agren, Lehmann & Co. by Irwin Lehmann, C.P.A., testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the decedent taxpayer, Edgar Bronfenbrenner, was a co-executor and trustee under the Last Will & Testament of Clara B. Bronfenbrenner, his wife during the years 1953 up until the date of his death on March 17, 1956; that the decedent taxpayer, Edgar Bronfenbrenner, filed income tax returns for the years 1953 up to an including the year 1955 on a cash basis; that certain executor's and trustee's fees accrued to the decedent taxpayer, Edgar Bronfenbrenner, up to the date of his death; that the final return on behalf of the decedent

taxpayer, Edgar Bromberger, for the period January 1 to March 17, 1956 was filed by his executor, Chemical Bank New York Trust Company, then known as Chemical Corn Exchange Bank, on or about April 15, 1957; that the amounts of accruals of the decedent taxpayer representing accrued executor's and trustee's commissions were not included in the aforementioned final return.

(2) That on or about November 12, 1958 the Chemical Bank New York Trust Company, as executor of the Estate of Edgar Bromberger, filed a tentative return for the calendar year 1958 and therein set forth amounts of accruals of executor's and trustee's commissions due to the decedent, Edgar Bromberger, in the sum of $46,392.21; that at the time of the filing of the aforementioned tentative Fiduciary income tax return, the executor paid the tax thereon in the sum of $2,962.45; that on or about April 15, 1959, the Chemical Bank New York Trust Company, as executor of the Estate of Edgar Bromberger, filed an amended New York State Fiduciary income tax return for the year 1958, setting forth that the amount reported as accruals in the tentative return had been distributed to the residuary legatee under the Last Will & Testament of the decedent, Edgar Bromberger, to the residuary legatee, Elsa K. Bromberger, and that no tax was due; that on July 11, 1960 the executor, Chemical Bank New York Trust Company, filed an application for revision or refund with respect to the year 1958 claiming a refund in the amount previously paid.

(3) That on or about May 26, 1960 the Department of Taxation and Finance issued a Form IT-111 (Explanation of Refund) refunding the sum of $2,962.45 to the executor but retained the sum of $2,950.90 in payment of the assessment on the final return of the decedent taxpayer for the period January 1, 1956 through March 17, 1956 which was being processed; that on June 14, 1960 the Department of Taxation and Finance issued an assessment against the Estate of Edgar Bromberger for the period January 1,

1956 to March 17, 1956 on the ground that the accruals due to the decedent on the date of his death were properly reportable and includible on the decedent's final return; that on February 28, 1961 the executor of the Estate of Edgar Bromberger filed an application for revision or refund of the aforementioned assessment claiming that the executor elected to report accruals and pay the tax thereon when they were received in 1958 and that the beneficiary under the will of Edgar Bromberger was not required to pay any tax on normal income for 1958 and that the amount retained by the Department of Taxation and Finance should be refunded.

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

DETERMINES:

(A) That the executor's and trustee's commissions, which accrued to the decedent taxpayer up to the date of his death on March 17, 1956, were properly includible and taxable as income for the period January 1 through March 17, 1956 on the final return required to be filed on his behalf in accordance with subdivision 1 of Section 359 of the Tax Law; that the executor of the Estate of Edgar Bromberger elected to and did include the amount of accruals on the Fiduciary return filed by it during the year when received, namely 1958, and did pay the taxes due thereunder; that the retention by the Department of Taxation and Finance of the cash in the sum of $2,962.45 constituted a substitute for the filing of a bond required in accordance with the provisions of subdivision 1 of Section 358 of the Tax Law as amended by Chapter 535 of the Laws of 1954, then in effect and Article 342 of the Personal Income Tax Regulations.

(B) That in accordance with subdivision 1, Chapter 60 of the Laws of 1959, the residuary legatee or beneficiary to whom the accruals were distributed was not required to pay any tax thereon for the year 1958.

(C) That, accordingly, no tax was due or lawfully demanded and that the amount of tax paid in the sum of $2,959.90 be and the same is hereby refunded to the executor, Chemical Bank New York Trust Company,

AND IT IS SO ORDERED.

DATED: Albany, New York on the 4th day of January , 1967 .

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
Commissioner

/s/ JAMES R. MACDUFF
Commissioner

Commissioner