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MEMORANDUM

Income Tax Determinations
M. S. A-Z
Hoffman, Leo
Milton
Sam

TO: Commissioners Murphy, Macduff and Conlon

FROM: Francis X. Boylan, Senior Attorney

SUBJECT: San Hoffman, Leo Hoffman, and Milton Hoffman--Personal Income Taxes, Article 16, for the year 1959

A hearing in this matter was held before me on June 9, 1965 at New York, New York. The taxpayers appeared by Morris A. Kaplan, Esq., of New York, New York, and an accountant, Milton H. Zalk, testified in behalf of the taxpayers.

The question is whether the gain received by the taxpayers by reason of a conveyance to them of real property in exchange for their shares in two closely held real property corporations upon their dissolution, was received in 1959 or 1960.

There is no question but that the deeds were dated January 1, 1960 and the proposed determination holds that the income or gain was received in 1960 rather than 1959 and, accordingly, cancels the additional assessments.

In the case of Lin-Es Realty Corporation, the minutes of the corporation's meeting on December 15, 1959 recorded a motion that the corporation be dissolved as of December 31, 1959 "under Section 333 of the Internal Revenue Code (one month dissolution)". There was evidently a similar meeting and motion in connection with the other company, the 842-852 Livenia Avenue Realty Corporation, and a penciled notation of our examiner records, apparently upon his examination of the minutes of that corporation at the time, that there was a separate motion that the corporation should be "liquidated" as of December 31, 1959. (Underlining done by the examiner). Consequently, it was evidently thought that since the corporations acted to dissolve as of December 31 to obtain tax benefits, and stated in terms at least in the case of the one corporation that the liquidation should be effected in 1959, that the taxpayers could be held to this result.

It may be noted that the tax benefits sought were evidently those under the Internal Revenue Code, Section 333 and that

they were not particularly referable to the year 1959. More importantly, liquidation is a question of fact which is not determined by the announced intention of the corporation and would not be subject to its stipulation.

The question whether the income was received in 1959 is to be determined under the rule of law on that question under Article 16.

A dividend, in kind, cannot be charged as income to taxpayer until he separately or with those interested with him receives it or the unlimited control of it. Further, in the case of real property transferred by deed, the income dates from the date of delivery of the deed. (Hines v. U. S. (1937), 90 F 2d 957). This is the general rule and is controlling here, it is concluded.

It is true that under state income tax law in some states, there is a doctrine of "constructive receipt of dividends", usually invoked, however, in cases where the taxpayer has ordinary dividends available to him upon his compliance with slight formalities and he lets the dividends lie for tactical reasons. The corporations here, however, had to deliver deeds before the real property became available to the taxpayers. Hines v. U. S., supra. See notes 120 ALR 1280 and 56 ALR 338; and note "Income Tax consequences to shareholder of dividends in kind" 56 ALR 2d 474, at pages 509 et seq.

It is, therefore, recommended that the determination be substantially in accordance with the proposed determination submitted.

/s/

FRANCIS X. BOYLAN

Senior Attorney

FXB:rlp

February 16, 1967

4-8-68

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

**SAM HOFFMAN, LEO HOFFMAN AND MILTON
HOFFMAN**

**FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 16 OF
THE TAX LAW FOR THE YEAR 1959**

The taxpayers, Sam Hoffman, Leo Hoffman, and Milton Hoffman, having filed applications for revision or refund of personal income taxes additionally assessed against them severally for the year 1959, and such applications having been denied, and a hearing having been held at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on June 9, 1965 before Francis X. Boylan, Hearing Officer, and the taxpayers having appeared by Morris A. Kaplan, Esq. of New York, New York, and Milton H. Zalk, C.P.A. having been present and having testified in their behalf, and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) By three notices of additional assessment, each dated January 27, 1961 and numbered B833592, B833593 and B833594, the State Tax Commission assessed net capital gain tax due in the amount of \$1,981.59 against each of the several taxpayers, Sam Hoffman, Leo Hoffman and Milton Hoffman. The three said taxpayers each held a one-third interest in two real property corporations, the 842-852 Livonia Avenue Realty Corporation and the Lin-28 Realty Corporation. The notices of additional assessment stated

that these corporations were liquidated as of December 31, 1959, and that the taxpayers realized gain therefrom (as computed in the notices of additional assessment) which had not been reported by the taxpayers in their 1959 returns.

(2) By applications for revision or refund, sworn to the 23rd of February, 1961 the taxpayers severally asserted that the corporations were liquidated early in 1960 and that title to the real property was transferred to the several taxpayers in 1960, and not in 1959.

(3) In their returns for the calendar year 1959, each dated April 18, 1960, the taxpayers had not reported any income or gain from the said exchange of their shares in the corporations for conveyances of real property made or to be made.

The taxpayers did duly report the income or gain upon the liquidation of said corporations in their Federal returns for 1960; and in their State returns for 1960 they also, in effect, reported this income or gain, since New York adjusted gross income, in accordance with provision of the Tax Law (§601 et seq.), was the same as the Federal adjusted gross income reported (except for modifications provided for by law).

(4) According to a transcript of a meeting of stockholders of the Lin-Ks Realty Corporation held December 15, 1959, it was resolved that that corporation was to be dissolved as of December 31, 1959, the dissolution to be one pursuant to Section 333 of the Internal Revenue Code.

A corporate resolution on December 15, 1959 proposed a dissolution and liquidation of the 842-852 Livenia Avenue Realty Corporation as of December 31, 1959.

(5) The deeds actually conveying the real property from the two corporations to the taxpayers were all dated and executed

January 1, 1960.

(4) It is found that the several taxpayers in exchange for their shares in the two said corporations in dissolution received conveyances of real property, and that the said conveyances were made in the year 1960, by deeds executed January 1, 1960.

Upon the foregoing facts and findings and all the evidence herein the State Tax Commission hereby,

DETERMINES:

(A) The question whether taxable gain was received by the taxpayers in 1959 or 1960, arising on the taxpayers' returns for the year 1959 (required to be filed on or before April 15, 1960), was governed by Article 16 of Tax Law governing such returns for the calendar year 1959, and not by Article 22 (in effect on and after April 15, 1960) which governed returns for the year 1960.

(B) That the taxpayers in exchanging their shares of stock in the corporation upon its dissolution for real property conveyed to them, did not receive "income", or "gain" (other than capital gain), or "capital gain", which are subject to tax pursuant to provision of the Tax Law (Section 359.1 of Article 16) until the delivery to them of deeds to such real property; and delivery was made on January 1, 1960. The assessment of gain in 1959 to the taxpayers was erroneous.

Accordingly, the said additional assessments dated January 27, 1961, described in paragraph (1) hereof, are cancelled in full.

AND IT BE SO ORDERED.

Dated: Albany, New York this 10th day of May ⁸, 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

A. BRUCE MANLEY
Commissioner

/s/

SAMUEL E. LEPLER
Commissioner