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Income Tax Determinations
A-Z
MEMORANDUM *Hupert, Benjamin*

TO: State Tax Commission

FROM: Solomon Sles, Hearing Officer

SUBJECT: BENJAMIN HUPERT

1953 Assessment No. B 400740
1954 Assessment No. B 400741
1956 and 1957 Applications for Refund
Article 16

A hearing was held in the above matter at the New York City office on December 17, 1963. The taxpayer did not appear but was represented by Gabriel T. Pap, Esq., who failed to submit additional information although afforded a reasonable opportunity to do so.

The issues involved herein are: (1) exemption claimed as head of family; (2) dependency credit; (3) disallowance of a portion of business expenses, as not fully substantiated; (4) timeliness in the filing of the application for revision or refund for the year 1956.

The taxpayer is unmarried and claims head of family exemption on the ground that he is the chief support of his mother who is incapable of self-support and maintains a home for her. On the basis of the meager information submitted by the taxpayer and his representative, part of which is inaccurate, conflicting and contradictory, it appears that taxpayer's mother was committed to a mental institution where she has remained continuously since 1951; that, prior to her commitment, she resided at 505 Belmont Avenue, Newark, New Jersey; that in 1953, the taxpayer resided with his sister at 211 Conklin Street, Hillside, New Jersey; that they removed to 20 Marshall Street, Irvington, New Jersey in the summer of 1954. It is to be noted that the taxpayer is not claiming his sister as a dependent since she was self-supporting and filed separate individual Federal income tax returns for the years in issue. There is nothing in the record to indicate that the taxpayer resided with his mother prior to her commitment and exercised family control at that time or that he exercised family control and maintained a home for his mother during the years in issue. Since no returns of the taxpayer could be located for years 1946 through 1952, the taxpayer was requested to furnish copies thereof but failed to do so. On the head of family questionnaire for 1956 (Tax Comm. Esh. N) in response to the question, "If you did not reside in the same household that you claim you maintained - state the reason therefor", the taxpayer stated, "mother needed attention and I could not be home".

Subdivision 1, Section 362 of the Tax Law is derived from 1934 Revenue Act, subsequently included in Internal Revenue Code of 1939 and provides for an exemption of \$2,500 in the case of the head of a

family. Article 206 of the Personal Income Tax Regulations is derived from Federal Income Tax Regulations under 1939 Code and defines "head of a family" as an unmarried or widowed individual or a married individual not living with his or her spouse, who is the chief support of a home in which he or she resides with one or more dependent relatives, over whom he or she exercises family control. A separation which is temporary or involuntary would not preclude the allowance of head of family exemption if the other requirements are met. (Manual Income Tax Policy, Art. 206, p. 3 (8/25/58)) The Revenue Act of 1951 added a new provision establishing a special rate of tax for persons who qualify as the "head of a household". This is now found in Internal Revenue Code of 1954 and in Article 22 of the Tax Law.

The instant case is to be distinguished from the case of Olive Ross, 37 B.T.A. 928, where the taxpayer was held to be entitled to head of family exemption during a period in which her mother, who was without means of support and had made her home and was supported by the taxpayer, was confined to a state mental institution. In that case, however, the taxpayer actually maintained a home for her mother before and after commitment and in addition, partially supported and maintained her mother during the taxable years. In the case cited, it was believed that the mother's confinement would be temporary and the mother stayed at the taxpayer's home at various periods during which she was paroled in the care and custody of the taxpayer on convalescent care. In the instant case, it has not been established that the taxpayer maintained a home for his mother before the date of commitment or that he continued to maintain a home for her during the years in issue.

Although the taxpayer did not appear and testify with respect to his statement of contributions towards the support of his mother, that dependency credit was nevertheless allowed him for the years 1956 and 1957 on the strength of his written statements. I am of the opinion, therefore, that a similar dependency credit be allowed for the years 1953 and 1954.

The application for revision or refund for the year 1956 was filed on December 9, 1959, more than two years from the date of filing of the return as prescribed by Section 374 of the Tax Law. The recomputation of the taxes for said year was made on November 19, 1958. Although Section 374 of the Tax Law further provides that if an application for revision or refund is not filed within two years from the time of filing of the return but is filed within one year from the time of the making of a recomputation, the Tax Commission may consider any facts specified in such application as a set-off to the extent of the taxes shown to be due by such recomputation, the taxpayer is not entitled to a set-off because his application for refund for the year 1956 was not filed within one year from the date of such recomputation. In any event, the taxpayer would not be entitled to any further refund since he has failed to establish that he was entitled to head of the family exemption, as more fully set forth above.

During the years in issue the taxpayer was employed as a used car salesman on a commission basis and was not reimbursed for any of his expenses. The Income Tax Bureau disallowed a portion of contributions to organizations located in New Jersey, miscellaneous taxes and interest on loan as improper deductions applicable to a nonresident. The attorney stated at the hearing that the taxpayer was not contesting the disallowance of these deductions but was contesting the disallowance of a portion of business expense in the amount of \$1,000 for each of the years 1953 and 1954. The full amount of business deductions claimed for each of said years was \$3,000 and the Income Tax Bureau disallowed \$1,000 for each year for lack of substantiation. Although the attorney promised to submit a breakdown and substantiation of said expenses, he has failed to do so. I am of the opinion that the disallowance of said business expenses by the Income Tax Bureau was proper.

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

/s/

SOLOMON SIES

Hearing Officer

SS:ac
Enc.

September 27, 1968

10-25-68

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

BENJAMIN HUPERT

**FOR REVISION OR REFUND OF PERSONAL INCOME
TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR
THE YEARS 1953, 1954, 1956 and 1957**

The taxpayer herein having filed applications for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1953, 1954, 1956 and 1957 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on the 17th day of December, 1963 before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer did not appear but was represented by Gabriel T. Pop, Esq., and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a nonresident New York State income tax return for the year 1953 on August 15, 1955; that he filed nonresident New York State income tax returns for the years 1954, 1956 and 1957 on or before the dates when such returns became due; that on said returns he claimed head of family exemption upon the ground that, as an unmarried individual he was the chief support of his dependent mother and maintained a home for her; that for 1953 and 1954, the taxpayer claimed deduction of business expenses in the amounts of \$3,225.00 and \$3,003.00, respectively; that the taxpayer deducted interest on loans for 1953 and 1954; that for 1953, 1956 and 1957, the taxpayer deducted miscellaneous taxes; that for 1954, the taxpayer deducted contributions in the sum of \$420.00 a portion of which represented charitable organizations located in New Jersey; that on March 10, 1958,

the Department of Taxation and Finance made additional assessments against the taxpayer for the years 1953 and 1954 (Assessment Nos. B 400740 and B 400741, respectively) disallowing head of family exemption for said years upon the ground that taxpayer failed to submit complete information to substantiate his claim to such exemption, disallowing \$1,000.00, a portion of business expenses claimed for each of said years for failure to substantiate same and further disallowed miscellaneous taxes, a portion of the contributions paid to charitable organizations in New Jersey and interest as not constituting proper deductions for a nonresident; that the taxpayer is not contesting that portion of the assessments with regard to the disallowance of interest, contributions and miscellaneous taxes.

(2) That on November 19, 1958, the Department of Taxation and Finance made recomputations of the taxpayer's taxes for the years 1956 and 1957 on Form IT-111 (Explanation of Refund) disallowing personal exemption claimed by him as head of family but allowed him a personal exemption of \$1,000.00 and dependency credit of \$400.00 for the support of his dependent mother and further disallowed miscellaneous deductions in the sum of \$283.00 for the year 1956 and \$299.00 for the year 1957 as improper deductions for a nonresident; that the taxpayer is not contesting the disallowance of miscellaneous tax deductions; that refunds were issued to the taxpayer in the sums of \$30.69 and \$60.63 for the years 1956 and 1957, respectively; that the taxpayer filed applications for further refunds on Forms IT-113 for the years 1956 and 1957 on December 9, 1959.

(3) That during the years in issue the taxpayer was an unmarried individual; that during said years his mother was his sole dependent; that the taxpayer's mother, Rose Hupert, who was incapable of self-support has been continuously confined to a mental institution in New Jersey since 1931; that prior to her confinement at the institution, the taxpayer's mother resided at 307 Belmont Avenue, Newark,

New Jersey; that prior to 1951, the taxpayer did not reside in the same home with his mother and did not exercise family control; that the taxpayer resided with his sister at 211 Genkln Street, Hillside, New Jersey until the summer of 1954 when they moved to 20 Marshall Street, Irvington, New Jersey where they have resided since.

(4) That the taxpayer has failed to establish that during the years 1953, 1954, 1956 and 1957, he maintained one or more dependent individuals as a family unit and exercised family control.

(5) That during the years 1953 and 1954, the taxpayer's mother, who was incapable of self-support, was dependent upon him and received her chief support from the taxpayer.

(6) That the taxpayer failed to substantiate or submit any evidence with respect to the portion of business expenses disallowed in the sum of \$1,000.00 claimed by him on his income tax returns for each of the years 1953 and 1954.

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

DETERMINES:

(A) That the disallowance of a portion of business expenses in the sum of \$1,000.00 for each of the years 1953 and 1954 was proper for lack of proper substantiation thereof.

(B) That the taxpayer was not entitled to "head of the family" exemption during the years in issue, 1953, 1954, 1956 and 1957, in accordance with the provisions of Section 362(1) of the Tax Law and Article 206 of the Personal Income Tax Regulations, then in effect.

(C) That in accordance with Finding (5) above, the taxpayer was entitled to a dependency credit of \$400.00 for each of the years 1953 and 1954; that, accordingly, the assessments for the years 1953 and 1954 (Assessment Nos. B 400740 and B 400741, respectively) are hereby recomputed as follows:

	1953	1954
Net income as shown on return	\$5,159.17	\$4,857.66
Deductions disallowed	<u>1,305.50</u>	<u>1,217.00</u>
Adjusted net income	3,853.67	3,640.66
Personal exemption	<u>1,400.00</u>	<u>1,400.00</u>
	2,453.67	2,240.66
Normal tax due	163.43	146.99
Less 10% reduction	<u>16.34</u>	
Balance of normal tax due	147.09	
Normal tax paid	<u>62.80</u>	<u>62.73</u>
Balance of normal tax due	84.29	
Penalty due (late filing) \$6.26		
Penalty paid <u>2.22</u>		
Additional penalty \$4.26		
Additional interest from due date to date of filing <u>5.02</u>	<u>2.30</u>	
Total amount due	\$ 93.59	\$ 86.26

together with any additional interest and other charges that may be lawfully due and owing; that the assessments for the years 1953 and 1954 be cancelled to the extent of \$18.00 and \$16.73 for the aforementioned years, respectively; that said assessments, except as herein modified, are correct and do not include any tax or other charge which could not have been lawfully demanded; that the applications for revision or refund filed with respect thereto, except as herein modified, be and the same are hereby denied.

(B) That the taxpayer's application for revision or refund for the year 1956 was not timely filed within two years from the date of the filing of said return in accordance with the provisions of Section 374 of the Tax Law; that since the taxpayer did not file his application for refund for said year within one year from the date of recomputation of said taxes, the Tax Commission may not consider any facts specified in such application as a set-off to the extent of such taxes shown to be due by such recomputation; that, in any event, even if the taxpayer had filed a timely application for revision or refund, he would not be entitled to any further refund since he has failed to establish that he is entitled to a refund of the family exemption.

(E) That no further recomputation, revision, refund or resettlement can be made of the taxes for the years 1956 and 1957 and that the taxpayer's applications for further refunds filed with respect thereto be and the same are hereby denied.

DATED: Albany, New York on the 1st day of November , 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

A. BRUCE MANLEY
Commissioner