

POOR
QUALITY
THE FOLLOWING
DOCUMENT (S)
ARE
FADED & BLURRED

PHOTO MICROGRAPHICS INC.

Income Tax Determinations
BUREAU OF LAW

MEMORANDUM

A-2
Lipian, Louis

TO: State Tax Commission

FROM: Francis V. Dow, Hearing Officer

SUBJECT: LOUIS LIPIAN

Application for Revision or Refund of
Personal Income Taxes under Article 16
of the Tax Law for the Year 1957

Hearings with reference to the above matter were held before me at 80 Centre Street, New York, New York on June 21, 1967 and at the State Campus, Albany, New York on August 1, 1967. The appearances and the exhibits produced were as shown in the stenographic minutes submitted herewith.

The taxpayer filed a New York resident tax return in which he reported net income of \$11,419.30 and claimed deductions for excludable sick pay of \$1,300, contributions of \$415 and medical expenses of \$1,018.51. He also reported that he had a profit of \$67,618.51 on the distribution of assets of PKL Eats, Inc. on its liquidation. He claimed that the capital gain was subject to installment sales treatment and that he collected \$30,000 during the year of which 43.87% or \$13,044 was reportable profit. He claimed an unused capital loss carryover from 1951 in the amount of \$7,387.50 and an unused capital loss carryover from 1955 in the amount of \$16,000. He deducted the alleged capital loss carryovers from the \$13,044 and reported that he had no taxable capital gains for the year.

An assessment of additional tax for 1957 was issued on September 27, 1963 (Assessment No. NYA 00099). It assessed additional normal tax, net capital gains tax, penalty and interest in the sum of \$9,003.47 on the basis that the deductions claimed for excludable sick pay, contributions and medical expenses were disallowed as unsubstantiated; that as audited, the taxpayer received assets valued at \$75,798.48 on the liquidation of PKL Eats, Inc. which were subject to net capital gains tax; that the capital gains tax transactions reported on the taxpayer's return were not established and were not considered and that a 100% penalty was imposed on the additional tax due plus interest at the rate of 1% per month on the additional tax and penalty.

PKL Eats, Inc. was incorporated on January 15, 1953. On January 16, 1953, the taxpayer was the purchaser on a foreclosure sale of a chattel mortgage of all the machinery, fixtures, furniture and equipment used in connection with the business of Roth Grill, Inc. which operated a restaurant in Manhattan. The taxpayer paid \$1,300

for the assets. These assets were transferred to PXL Eats, Inc.

On March 19, 1956, the Board of Directors of PXL Eats, Inc. resolved to liquidate the corporation. On May 15, 1956, the corporation sold the restaurant equipment to Senior's Restaurant, Inc. for \$250,000. The purchase price was paid partly in cash and partly in purchase money notes secured by a chattel mortgage on the equipment. During 1957, PXL Eats, Inc. was liquidated and its assets were distributed.

During 1958, Senior's Restaurant, Inc. stopped making payments on the purchase money notes and abandoned the restaurant equipment. \$118,000 was still outstanding on the notes. The taxpayer purchased the equipment for \$1,000 on the foreclosure of the chattel mortgage which he held on the equipment. On June 18, 1958, the taxpayer again sold the equipment for \$140,000. The expenses of the 1958 purchases and sales of the equipment amounted to \$15,679.65.

On the Federal audit of the taxpayer's 1957 tax return, deductions claimed for medical expenses in the amount of \$1,014.98, excludable sick pay in the amount of \$1,300 and a capital loss of \$1,000 were disallowed as unsubstantiated and capital gains of \$30,007.68 were added to the taxpayer's income since he did not establish installment basis treatment for the gains.

The taxpayer did not submit any evidence to substantiate the deductions claimed for excludable sick pay, contributions and medical expenses nor that he had a capital loss carryover which could be utilized to reduce the amount of his capital gains taxable during the year. No satisfactory evidence was submitted to show the taxpayer's cost in acquiring his interest in PXL Eats, Inc. Although the restaurant equipment of Roth Grill, Inc. was transferred by the taxpayer to PXL Eats, Inc., the taxpayer failed to show that PXL Eats, Inc. did not pay or obligate itself to pay the taxpayer the value of the equipment. No evidence was submitted to show the value of the assets distributed to the taxpayer on the liquidation of PXL Eats, Inc. during 1957. Accordingly, it is my opinion that the additional assessment of normal income tax and the net capital gains tax was properly imposed.

Section 377, subd. 3 of the Tax Law provides that if the understatement of tax is false or fraudulent with intent to evade the tax, the tax on the additional income discovered to be taxable shall be doubled and an additional one per centum shall be added to the amount so due for each month or fraction of a month. The burden of proof to establish fraud is upon the Tax Commission. The evidence at the hearing did not establish fraud since the taxpayer reported the transactions which resulted in net capital gains tax. Fraud penalties were not imposed by the Internal Revenue Service. The

understatement appears to be due to negligence. The Tax Law provides that if the understatement is due to negligence without intent to defraud, there shall be added to the amount of the deficiency five per centum thereof, and in addition, interest at the rate of one per centum per month. As a result, the penalty and interest imposed should be modified by reducing it from \$6,291.98 to \$1,925.94. (See KANT, 6 TCM 1215, Dec. 16, 1956(M).)

For the reasons stated above, I recommend that the determination of the State Tax Commission, modifying the assessment and as modified, denying the taxpayer's application, be substantially in the form submitted herewith.

/s/

FRANCIS V. DOW

Hearing Officer

FVD:10

Enc.

May 21, 1968

5-23-68

STATE OF NEW YORK

STATE TAX COMMISSION

.....
IN THE MATTER OF THE APPLICATION

OF

LOUIS LIPMAN

**FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 16 OF THE
TAX LAW FOR THE YEAR 1937**
.....

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 1937, and hearings having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, New York on June 21, 1937 and at the State Campus, Albany, New York on August 1, 1937 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, at which hearings the taxpayer appeared and testified, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer filed a New York resident tax return for 1937 in which he reported net income of \$11,419.30 stating on his return that his wife had no separate income during that year; that the taxpayer reported a capital gain on the distribution of the assets of PHL Hats, Inc. on its liquidation, in which corporation the taxpayer was a stockholder; that the taxpayer alleged that the distribution was subject to installment sales treatment and stated that the "balance of installment profit at the shareholder level was \$67,613.41" for 1937, the year in issue; that the taxpayer further alleged that he collected \$50,000 in 1937 of which amount 43.67% or \$21,844 was the reportable profit for the year in issue; that the taxpayer reported

this amount as a capital gain; that an offset claimed against this amount was an unexplained item of capital loss in the amount of \$23,249.29 allegedly from the sale of the corporation in which the taxpayer had reported his installment profit; that the taxpayer further claimed a net capital loss carry over sustained in the year 1955 in the amount of \$14,000.

(2) That on his return, the taxpayer also claimed as deductions, excludable sick pay in the amount of \$1,300, contributions in the amount of \$435 and medical expenses in the amount of \$1,012.51.

(3) That on September 27, 1963, a notice of additional tax for the year 1957 was issued (Assessment No. 274 00009) assessing additional normal tax and net capital gains tax in the total amount of \$2,711.89; that the assessment was issued on the basis that the taxpayer received assets valued in the amount of \$73,792.48 on the liquidation of FUL Mfg. Inc. which was subject to capital gains tax in its entirety, instead of the amount of \$67,512.41 reported as the total profit on the installment sale in 1957 by the taxpayer, or the amount of \$13,044 reported by the taxpayer as his profit for such year; that the assessment further disallowed any capital loss transactions or any net capital loss carry over reported by the taxpayer.

(4) That the assessment further disallowed the deductions claimed for excludable sick pay, contributions and medical expenses as unsubstantiated.

(5) That the assessment imposed a 100% penalty and interest on the additional tax due computed to October 15, 1963 pursuant to section 377 of the Tax Law in the amount of \$6,291.98 resulting in a total assessment of \$9,003.87.

(6) That on audit of the taxpayer's 1937 Federal income tax return, a capital loss deduction by the taxpayer in the amount of \$1,000 was disallowed since the taxpayer failed to substantiate any net capital losses sustained by him; that the Federal government disallowed installment treatment of the taxpayer's net capital gains on the ground that an installment basis was not established by the taxpayer and added the amount of \$30,067.68 to the taxpayer's taxable income; that, accordingly, an amount not exceeding twice the aforesaid amount of \$30,067.68 or \$60,135.36 was found by the Federal government to be the taxpayer's net capital gains for the taxable year.

(7) That the Federal government disallowed as deductions includable sick pay in the amount of \$1,300 and medical expenses in the amount of \$1,014.94.

(8) That on January 15, 1933, FHL Eats, Inc. was incorporated; that on January 16, 1933, the taxpayer was the purchaser at a foreclosure sale of a chattel mortgage on all machinery, fixtures, furniture, equipment and all other items used in connection with the business of Roth Grill, Inc. which operated a restaurant located in the Borough of Manhattan in the City of New York; that the taxpayer paid \$1,300 for the assets; that the assets of Roth Grill, Inc. which the taxpayer purchased were transferred by him to FHL Eats, Inc.; that the taxpayer failed to establish that he was not paid or compensated by FHL Eats, Inc. for the assets of Roth Grill, Inc. which were transferred to FHL Eats, Inc. by the taxpayer; that no documentary or other sufficient evidence was submitted to show the taxpayer's cost of acquiring his interest in FHL Eats, Inc.

(9) That on March 19, 1936, the Board of Directors of FHL Eats, Inc. resolved to liquidate the corporation; that on May 15,

1936, FHL Eats, Inc. sold its business equipment to Senior's Restaurant, Inc. for \$250,000; that the purchase price was paid partly in cash and partly in purchase money notes secured by a chattel mortgage; that in 1937, FHL Eats, Inc. was liquidated and the assets of FHL Eats, Inc., which consisted of an excess of \$30,000 in cash and the purchase money notes secured by a chattel mortgage, were distributed to the shareholders of the corporation; that the value of the assets of FHL Eats, Inc. after including the amount realized from the sale of its business assets and after subtracting therefrom the liabilities of the corporation was in the amount of \$73,792.48; that the taxpayer failed to establish that he was not the sole stockholder of the corporation, or that the assets were distributed to anyone other than himself.

(10) That during 1938, subsequent to the year in issue, Senior's Restaurant, Inc. discontinued making payments on the purchase money notes which it gave for payment of the business equipment of FHL Eats, Inc.; that \$115,000 was outstanding and due and owing on the notes at the time payments were discontinued; that the taxpayer purchased the equipment and resold the same for \$140,000.

(11) That the taxpayer did not submit any evidence to substantiate the deductions claimed for excludable sick pay, contributions and medical expenses, nor that he had a capital loss carry over which could be utilized to reduce the amount of his taxable capital gains during the year 1937.

(12) That the taxpayer understated his taxes for 1937 as a result of his negligence in his not maintaining adequate records to show the amount of his taxable income or the manner in which his income was realized and in arbitrarily reporting that

income earned during the year was not taxable and subject to installment sales treatment and in further reporting capital losses without any explanation as to how they were derived; that by virtue of the above grounds and upon the entire record, the taxpayer was negligent in computing the amount of his tax liability for the year.

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

(A) That the capital gains tax was properly assessed on the amount of \$73,798.48, since the taxpayer did not substantiate that the cost basis of the stock was other than zero and that the value of the assets received by him on distribution on the liquidation of PEL Auto, Inc. was less than the amount of \$73,798.48; that the taxpayer has failed to substantiate the 1938 capital loss carry over which he deducted from his capital gains realized during 1937.

(B) That the taxpayer did not substantiate the deductible sick pay, medical expenses and contributions deducted by him on his 1937 return since he did not submit any evidence to show that they were allowable for such year.

(C) That the imposition of a 100% penalty computed on the additional tax due was improper, since the understatement of the tax reported on the taxpayer's return was not false or fraudulent with intent to evade the tax, but was due to the negligence of the taxpayer; that a 5% penalty computed on the amount of the taxpayer's additional tax should have been added to the amount of deficiency together with interest at the rate of 1% per month under the provisions of section 377, subd. 3 of the Tax Law.

(D) That the taxpayer's additional tax liability for the year 1957 is recited as follows:

Additional normal tax due	\$ 125.04
Additional capital gains tax due	2,827.08
Penalty and interest computed to October 15, 1953 pursuant to section 377 of the Tax Law	<u>1,001.44</u>
Total amount due	<u>\$4,053.56</u>

(E) That by virtue of (D) above, the assessment for additional taxes (Assessment No. NYA 00000) is hereby modified by cancelling \$4,330.04 thereof; that the assessment for 1957 in the modified amount of \$4,053.56 is correct and lawfully due and owing together with interest and other lawful charges.

Dated: Albany, New York this 28th day of May, 1958.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

COMMISSIONER

/s/

A. BRUCE MANLEY

COMMISSIONER

/s/

SAMUEL E. LEPLER

COMMISSIONER