

*Income Tax Determination
Levitow, Esther A-2*

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
:
of
:
Esther Levitow, Miriam Nicholson &
Guy Nicholson, ---K.G.O. Company :
For a Redetermination of a Deficiency or
a Refund of Personal Income :
Taxes under Article(s) 16 of the :
Tax Law for the (Year(s) 1949 :
through 1955

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Patricia Whitman , being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of September , 19 69, she served the within Notice of ~~Decision~~ (or ~~Determination~~) by (~~certified~~) mail upon K.G. O. Company (~~representative of~~) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: K.G.O. Company, 81-17 Lefferts Boulevard Kew Gardens, L.I., N.Y.

and by depositing same enclosed in a postpaid properly addressed wrapper in a (~~post office~~ or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (~~representative of~~) (~~of~~) petitioner herein and that the address set forth on said wrapper is the last known address of the (~~representative of the~~) petitioner.

Sworn to before me this
24th day of September , 1969
Grace E. Ritchard

Patricia Whitman

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

Esther Levitow, Miriam Nicholson &
Guy Nicholson, --K.G.O. Company

AFFIDAVIT OF MAILING
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BY ~~(CERTIFIED)~~ MAIL

For a Redetermination of a Deficiency or
a Refund of Personal Income
Taxes under Article ~~(e)~~ 16 of the
Tax Law for the (Year ~~(s)~~) 1949 through
1955

State of New York
County of Albany

Patricia Whitman, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of September, 1969, she served the within Notice of Decision ~~(or Determination)~~ by ~~(certified)~~ mail upon Jerome J. Kahan, Esq.

(representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Jerome J. Kahan, Esq., 122 East 42nd Street, New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a ~~(post office)~~ or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this

24th day of September, 1969.

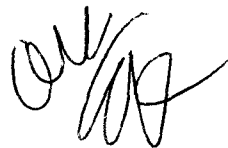
Grace E. Pritchard

Patricia Whitman

To.....Mr. Edward Rook.....

Prepared determination to be submitted to the
State Tax Commission. Memo dated March, 1965
is attached.

5/12/69

A handwritten signature in black ink, appearing to read 'F. X. Boylan', written in a cursive style.

(LH)

From Francis X. Boylan

BUREAU OF LAW

MEMORANDUM

Income Tax Determination
Levitow, Esther A-ZTO: *Monaghan & Koerner*
Commissioners Murphy, ~~Palutin~~ and ~~Harduff~~

FROM: Francis X. Boylan, Hearing Officer x ref

SUBJECT: Esther Levitow, Miriam Nicholson and
Guy Nicholson doing business as
K.G.O. Company, a partnership, application
for revision or refund of an assessment
of personal income tax (penalties for not
filing partnership return) for the years
1949 through 1955. x ref

A hearing with reference to the above matter was held before me at 88 Centre Street, New York, New York, on May 12, 1966. The taxpayers were represented by Jerome J. Kahan, an attorney, who was retained apparently by Esther Levitow. None of the taxpayers' partners appeared in person. Mr. East, an attorney, associated with Mr. Kahan, indicated that he was a son-in-law of the taxpayer, Esther Levitow, but he did not testify as a witness. The record of testimony and the exhibits are submitted herewith.

A penalty in the amount of \$500 had been imposed pursuant to provision of Tax Law section 378 for failure to file a partnership return in the years 1949 through 1951, as was required by Tax Law section 368. A like penalty was imposed, but in the amount of \$750 for the years 1952 through 1955.

In the years in question, the taxpayers filed their individual returns, but no tax or only a nominal amount was paid by any of them. An additional assessment dated September 17, 1951 had been made earlier against Esther Levitow for the year 1948 based upon her failure to report the full distributive share of the partnership earnings in her individual return for that year, as it was found.

The file shows a record of dilatory correspondence beginning with the statement, which of course may have been true, that the earliest letters requesting the filing of partnership returns were never received, and continuing down through the preliminary hearing to the formal hearing without adducing any convincing reason for noncompliance.

The account given in behalf of the taxpayers, but only indirectly by the statements in their behalf, was that their then accountant severed his relationships with the partnership in 1955

taking the basic records with him including the original records of the receipts and the checkbooks showing disbursements. In the application for revision or refund dated November 13, 1958 where the name of that accountant appears as the notary public, it was stated that tax "returns" for the earlier years under consideration were filed, without indicating clearly that the returns so referred to were partnership returns. It was further stated therein as a defense that partnership returns (sic) did not have to pay the unincorporated business tax. Further statements made in behalf of the taxpayer urged both that the partnership returns were filed by the accountant who had copies, and that if they weren't filed, they didn't have to be. Parenthetically, the latter position is mistaken in law, since under Tax Law section 368, a partnership must file a return apart from whether or not it would be responsible for unincorporated business tax. (Compare Tax Law section 368-b).

At both the preliminary hearing and the formal hearing, it was asserted that efforts to have the accountant return the books were unavailing, but as was pointed out in the report of the preliminary hearing, reportedly there was a proceeding brought against the accountant before the Association of New York Certified Public Accountants, and although the outcome of that hearing was not clearly reported at any point, there was no apparent censure action taken against the accountant.

I do not find that there was any satisfactory showing either that the accountant actually had all of the basic records or that he hadn't returned them down to date if he did have them initially, or that they could not have been obtained from him by legal process if necessary if he did so retain them, or that the taxpayers could not have filed partnership returns from information available to them even if some records were irretrievably lost. The taxpayers, it may be noted, claims to have filed a Federal return and to have undertaken at one point to get a photostat copy of the Federal return.

It would appear that the taxpayers were clearly enough invited to make out a partnership return as best they could. They have, however, insisted that it is impossible for them to comply. Consequently, I do not think that any case is made out for remitting the penalties.

The report of preliminary examination dated November 24, 1954, which is attached, should be seen; the situation reported there was basically unchanged by the formal hearing.

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

Hearing Officer

Approved

Approved

FXB:ca
Enc.

March 16, 1968

imposed for failure to file a partnership return for the years 1949, 1950 and 1951 in accordance with the requirements of Tax Law section 368.

Thereafter, by notice of additional assessment B-995428 dated January 4, 1962, a further penalty pursuant to the provisions of Tax Law section 376 was imposed against the said taxpayers for a failure to file such a partnership return for the years 1952, 1953, 1954 and 1955.

(2) The said taxpayers, as a partnership in the years under consideration operated a store called the Kew Gardens Outlet Shop at 81-17 Lefferts Boulevard, Kew Gardens, New York.

(3) In these years under consideration, the individual taxpayers filed individual income tax returns, but paid no tax or only nominal amounts, and such returns did not affirmatively show that the amounts so reported reflected their full distributive shares of the partnership earnings.

(4) The taxpayers did not establish adequately either at the formal hearing or a previous informal conference that it was impossible for them to comply with the requirement of filing a partnership return. The fact that there was a change of accountants in or about 1955 did not justify the failure to comply, it is found; and assuming, as was claimed, that the basic records at that time were in the said accountant's possession, it was not adequately established, as it is found, either that they were not ever finally returned, or that, if not returned, they could not have been obtained by legal proceedings, or that in the absence of such records it was actually impossible for the taxpayers to have filed the returns lawfully required.

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

DETERMINES:

(A) That pursuant to provisions of Tax Law section 368, the taxpayers who conducted a partnership were lawfully required to file a partnership return and pursuant to Tax Law section 374, the aforesaid penalties were lawfully imposed.

(B) That no adequate justification to permit remitting said penalties having been found, the said penalties in the amounts of \$500 by assessment dated November 21, 1956 and \$750 by assessment dated January 4, 1962 imposed against the said taxpayers, Esther Levitow, Miriam Nicholson and Guy Nicholson, individually and as co-partners are affirmed, and it is SO ORDERED.

Dated: Albany, New York this 19th
day of September , 1969 .

STATE TAX COMMISSION

Norman Gallivan

COMMISSIONER

Bruce Massey

COMMISSIONER

Milton Koerner

COMMISSIONER