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*Income Tax Determination*  
*Waxman, Jennie R. A-2*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
JENNIE R. WAXMAN  
For a Redetermination of a Deficiency  
or a Refund of PERSONAL INCOME  
Taxes under Article(s) 16-A of the Tax  
Law for the year(s) 1955, 1956, 1957, 1958 and  
1959.

Affidavit of Mailing  
of Notice of Decision,  
by Registered 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, and that on the 20th day of May, 1969, she served the within Notice of Decision (or of "Determination") by registered mail upon Jennie Waxman

the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mrs. Jennie Waxman, 1 Jackson Avenue, Middletown, New York

and by delivering the same at Room 214a, Building 8, Campus, Albany, marked "REGISTERED MAIL" to a messenger of the Mail Room, Building 9, Campus, Albany, to be mailed by registered mail.

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

Sworn to before me this  
20th day of May, 1969.

*Grace E. Pritchard*

*Patricia Whitman*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of :

JENNIE R. WAXMAN :

Affidavit of Mailing  
of Notice of Decision,  
by Registered Mail

For a Redetermination of a Deficiency :  
or a Refund of PERSONAL INCOME :  
Taxes under Article(s) 16-A of the Tax :  
Law for the year(s) 1955,1956,1957,1958 and :  
1959.

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, and that on the 20th day of May , 1969 , she served  
the within Notice of Decision (or of "Determination") by registered  
mail upon Harry Cohen, CPA, Representative for

the petitioner in the within proceeding, by enclosing a true copy  
thereof in a securely sealed postpaid wrapper addressed as follows:  
Mr. Harry Cohen, CPA, 11 West 42nd Street, New York, NY

and by delivering the same at Room 214a, Building 8, Campus, Albany,  
marked "REGISTERED MAIL" to a messenger of the Mail Room, Building  
9, Campus, Albany, to be mailed by registered mail.

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

Sworn to before me this

20th day of May , 1969 .

*Grace E. Pritchard*

*Patricia Whitman*

*Income Tax Determinations*  
**BUREAU OF LAW**  
**MEMORANDUM**

*M. S. A-Z*  
*Watman, Jennie R.*

*Manley & Koerner*

TO: **Commissioners Murphy, Macduff and Conlon**

FROM: **Francis I. Boylan**

SUBJECT: **Jennie R. Waxman  
 Personal Income Taxes  
 Article 16, 1952 & 1957.**

A hearing was held on this matter before me on May 27, 1965 at New York, New York. The taxpayer was represented by Harry Cohen, C.P.A. Taxpayer did not testify and there were no witnesses in her behalf. Mr. Cohen introduced no new documentary evidence, but only certain letters and papers that were already part of the file.

As to 1952, no evidence was submitted that was sufficient to impugn the additional assessment made, which arose out of disallowances of claimed deductions as the head of a family and of medical deductions taken in excess of the amount substantiated. A "loss on a motion picture venture" (in Waxman's Productions, Inc.) was reduced from \$4,000 claimed, to \$1,500, the amount that was substantiated (Exhibit L). The loss in the reduced amount of \$1,500 was allowed as a loss incurred in a transaction entered into for profit as an ordinary deduction and it was not held to be a capital loss.

The only important question in this hearing arises from the disallowance of a loss as an ordinary deduction of "an investment with Waxman Productions Inc.", the same corporation, in 1957 of the amount of \$2,500 in another motion picture. The ordinary loss claimed was disallowed in 1957 and only a capital loss was allowed.

It is the conclusion of this determination that the taxpayer's loss on her investment in the production of a motion picture in 1957, as well as her loss in 1952 on the earlier motion picture, was "a loss other than a capital loss on a transaction entered into for profit." (Tax Law Section 360.5). It was not a capital loss under Tax Law Sections 350.12, 350.14 and 350.15 or a worthless debt under Tax Law Section 360.7.

The letter of Jacob Landau, Esq., (Exhibit L) supports the conclusion that the funds of investors such as the taxpayer went into a common fund with the corporation's available funds to meet the costs of the production of the motion picture so that the taxpayer's rights to recover were subordinate to the general

creditors' rights. The loss to Waxman's Productions, Inc., was an ordinary loss resulting from the insufficiency of the total rentals of the film, due to lack of demand, to meet the production costs; and since the taxpayer suffered this loss directly in common with Waxman's Productions, Inc., it was an ordinary deductible loss to her also.

The investment was not a security (which would be a capital asset, resulting in a capital loss only) since it was not supported by any evidence of indebtedness "with interest coupons or in registered form" (Tax Law Section 350.15(d); see also Lloyd-Smith v. Commissioner, 116 F. 2d 642).

The loss to Waxman's Productions clearly was an ordinary business loss and it was also an ordinary loss to taxpayer if she sustained the loss directly in a transaction entered into for profit with Waxman's Productions, Incorporated. Commission of Internal Revenue v. D. J. Condit (1964), 333 F. 2d 585, Tax Law Section 360.5; 350.12 at 229.

It is true that to find that taxpayer participated directly in the loss is virtually to find that the investors of this kind were joint venturers with the corporation. Joint venturers are not uncommon in motion picture production financing. (30 Am. Jur. Section 24) An individual may engage in a joint venture with a corporation. (30 Am. Jur. Section 6) Contribution of capital is as much participation in the endeavor as is necessary for a joint venture. (30 Am. Jur. Section 9)

The transaction was not a "worthless debt" if the investors were on a parity with the corporation as immediate participants in the loss (nor is such a loss a capital loss). Comm. of Internal Revenue v. D. J. Condit (1964), 333 F. 2d 585, Tax Law Section 360.7.

Moreover, a worthless debt properly so characterized, (and not in itself a capital loss) including a non-business worthless debt, was totally deductible under Article 16, (Tax Law Section 360.7), although on Federal returns a non-business bad debt was and is "considered" as equivalently a short-term capital loss under Internal Revenue Code Section 166(d)(1)(B). (See also Internal Revenue Code Sections 165(d)(1) and (2); compare Tax Law Section 360.7)

Accordingly, it is recommended that the determination be substantially in the form of that submitted herewith.

/s/

FRANCIS X. BOYLAN

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Hearing Officer

FIB:ie  
June 19, 1967

STATE OF NEW YORK  
STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION :  
OF :  
JENNIE R. WAXMAN :  
FOR REVISION OR REFUND OF PERSONAL :  
INCOME TAXES UNDER ARTICLE 16 OF :  
THE TAX LAW FOR THE YEARS 1952 AND 1957 :  
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Jennie R. Waxman having filed applications for revision or refund of personal income taxes assessed for the years 1952 and 1957, and such applications having been denied, and a hearing having been held on the matter at the offices of the State Tax Commission at 80 Centre Street, New York, New York, on May 27, 1965 before Francis X. Boylan, Hearing Officer, and the taxpayer having been represented by Harry Cohen, C.P.A., of New York, New York, and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) By Notice of Additional Assessment AA-884113 dated August 9, 1955, the State Tax Commission made an additional assessment of normal personal income tax in the amount of \$137.51 on the taxpayer's return for the year 1952. After a warrant was issued this amount was paid in full on February 1, 1965.

This additional assessment resulted from a disallowance of a deduction in the amount of \$1,500 claimed by the taxpayer as the head of a family, from the further disallowance as unsubstantiated of \$2,500 of a loss claimed in the total amount of \$4,000, on a business venture in a motion picture, and by the disallowance, as unsubstantiated, of the amount of \$200 out of the total amount that was claimed as a deduction for medical expenses.

(2) By Notice of Additional Assessment, No. B-788692, dated June 6, 1960 an assessment was made on the taxpayer's return for the year 1957, of additional normal income tax in the amount of \$119.99. This additional assessment resulted from a recomputation of the taxpayer's taxes for the said year, consequent upon a disallowance of a deduction of \$2,500 claimed as a loss on an investment in Waxman's Productions, Incorporated. The said amount of \$2,500 was allowed only as a capital loss. This resulted in a capital loss carryover of \$1,698.56. The taxpayer did not avail herself of this carryover loss in her returns for the succeeding years.

(3) The taxpayer filed an application for revision or refund, unsworn to but received March 15, 1966, as to the assessment for 1952, in effect appealing therefrom and stating that new evidence would be submitted to support the deductions disallowed.

The taxpayer further claimed that the additional assessment for 1957 was not timely made.

By an application for a revision or refund sworn to July 19, 1960, the taxpayer appealed also from the additional assessment for the year 1957 claiming that the assessment was made in error and that the loss taken was an ordinary deductible loss as claimed and not a capital loss.

Both such applications for revision or refund were thereafter denied.

(4) As to the additional assessments for 1952, the taxpayer's claim to the status as the head of a household was a subject of determination, dated May 6, 1959, after a hearing, wherein it was determined that she was not the head of a household. No evidence indicating any change in the household situation or

any new evidence on the question was presented in behalf of the taxpayer in the instant hearing. No evidence was adduced either to support the claimed loss on a motion picture venture in 1952 in excess of the amount of \$1,500 which was allowed as a deductible loss; neither was there any evidence to support the medical deductions claimed in excess of the amount allowed.

(6) In both years under consideration, 1952 and 1957, the taxpayer on her returns reported her occupation as that of an executive employed by Bertonne Shops, Inc., at Middletown, New York.

The character of the taxpayer's 1957 investment in Waxman's Productions, Inc., for the production of an unnamed motion picture was, it is found, the same as her earlier investment with that corporation in 1952 in another motion picture, which was entitled "The Big Night". She was an investor in Waxman's Productions, Inc., in a class of investors whose rights to recover were subordinated by agreement to the claims of creditors for services or goods used in the production of the motion picture, including notably the charges made by the film's distributors, and costs and charges of loans made by bankers. Neither motion picture had sufficient gross rentals to meet these production costs, so that there was no recovery to the taxpayer's class of investor in either venture.

(7) The losses on said motion pictures were sustained by such investors in common with the corporation, as it is found.

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

DETERMINES:

(A) That the additional Assessment No. AA-884113 dated August 9, 1955 for 1952 was not untimely, having been made within three years of the related return, pursuant to the provisions of



Tax Law Section 373 so providing; and that the actual collection of the amounts assessed was not untimely, in view of the provisions of the Tax Law Section 381 providing for collection of a valid assessment at any time.

The said assessment for 1952 was correct; and it is accordingly affirmed.

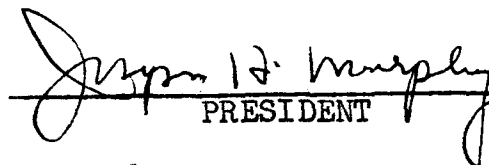
This assessment has been paid in full and is discharged.

(B) That the additional Assessment No. B-788692 dated June 6, 1960 for the year 1957, assessing the normal tax due in the amount of \$119.99 was incorrect. Accordingly, it is cancelled in full.

The loss was a loss other than a capital loss in a transaction undertaken for profit pursuant to provision of Tax Law Section 360.5, and the ordinary deduction claimed should have been allowed.

Dated: Albany, New York, this 12th day of May, 1969.

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER