

STATE OF NEW YORK  
STATE TAX COMMISSION

HEARING UNIT - File COPY

TAX Personal Income  
ART. 16 SECS. 374

In the Matter of the Application	:	
of	:	
VINCENT P. VIGILANTE	:	
For Revision or Refund of Personal	:	
Income taxes under Article 16 of the	:	
Tax Law for the Year 1957	:	

DETERMINATION

CASE LAW CITATIONS

REMARKS

The taxpayer having filed applications pursuant to Tax Law Section 374 for revision or refund of Personal Income tax imposed by Article 16 of the Tax Law for the Year 1957 under an assessment dated October 15, 1959 and a further assessment dated October 2, 1961, and such applications having been denied and a hearing thereon having been duly demanded and held before Vincent P. Molineaux, Hearing Officer and the record having been duly examined and considered,

The State Tax Commission hereby

FINDS:

1. On his 1957 return, timely filed on April 15, 1958, the taxpayer reported a capital gain of \$6,500 indicated as the amount received on sale of 10 shares of Citywide Family Sales Corp. Taxpayer filed no return for 1958 claiming to be a resident of Florida for the entire year.

2. The Commission adopts the findings filed July 7, 1966 of the United States Tax Court to the following effect:

On July 20, 1957, the other shareholders in Citywide Family Sales Corp. agreed orally to purchase taxpayer's interest for the sum of \$25,000. A down payment of \$6,500 was to be made on or before October 1, 1957, \$5,500 was to be paid before January 1, 1958 and \$13,000 was to be paid in monthly installments of \$1,000

each beginning in January 1958. A written agreement was prepared which showed the consideration to be only \$6,500 because of certain plans of the purchaser concerning the source of funds for payment. The taxpayer received in 1957 only the \$6,500 cash payment and the notes. Taxpayer gave up attempts to collect the \$5,500 payment sometime in January 1958. The notes for \$13,000 were all paid in 1958 (*Vigilante v. C.I.R.* 1966 T.C. memo No. 161).

3. Assessment No. B-676994 dated October 15, 1959 increased the capital gain shown on the taxpayer's return by \$13,000 to \$19,500. The taxpayer protested on October 28, 1959 that the \$13,000 was received in 1958 when he was a resident of Florida.

4. Assessment No. B-982507 dated October 2, 1961, but mailed September 9, 1963, asserted that the \$13,000 in notes due in 1958 and the \$5,000 due in 1957 represented back salary and further that \$769.60 was received by the taxpayer as dividends from Citywide Family Sales Corp. This assessment also made conforming adjustments in the taxpayer's medical deduction and gave credit for the assessment of October 15, 1959.

5. Applications for revision or refund of both assessments were received on November 12, 1963 and were denied on April 20, 1964. The late filing of the application was put in issue with respect to the first assessment. Demand for a hearing was made on May 14, 1964.

6. At the hearing the first assessment was not put in issue. Since the taxpayer filed no. 1958 return, the \$13,000 in issue was never reported to New York State as accrued income upon his alleged change in residence (See Tax Law Sec. 367-a) in 1958.

7. With regard to the second assessment; taxpayer denied receiving the asserted dividends and no other evidence with respect thereto was forthcoming. The assertion of back pay is directly contrary to the findings of fact in *Vigilante v. CIR* (1966 T.C. memo No. 161).

Based upon the foregoing findings and all of the evidence herein,

The State Tax Commission hereby

DETERMINES:

A. The protest and application with respect to the first assessment, even if timely made, were abandoned at the hearing.


B. The second assessment for the year 1957 was timely made within six years after the return was filed (Tax Law Sec. 373(1) as amended by Laws of 1958, chap. 403) since the asserted understatement of income was over 25% of the gross income or capital gain shown on the return without regard to any increase shown on the first assessment (compare *Goldring v. C.I.R.*, T.C. 79).

C. The application for revision or refund with respect to the assessment of October 2, 1961, is granted and the assessment is cancelled in full. The application for revision or refund with respect to the assessment of October 15, 1959, in the amount of \$440.00 is denied and the assessment is affirmed together with such additional charges and interest, if any, as may be due under Tax Law Section 377(3).

Dated: Albany, New York

March 9, 1970

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER