

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
The Estate of Francis A. Callery :  
James Callery, Executor :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Years :  
1960 - 1965.

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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of July, 1981, he served the within notice of Decision by certified mail upon The Estate of Francis A. Callery, James Callery, Executor the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Estate of Francis A. Callery  
James Callery, Executor  
RFD 1  
Charlotte, VT 05445

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 Postal Service within the State of New York.

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  
3rd day of July, 1981.

*G. P. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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The Estate of Francis A. Callery :  
James Callery, Executor :  
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Tax under Article 22 of the Tax Law for the Years :  
1960 - 1965.

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of July, 1981, he served the within notice of Decision by certified mail upon Howard Weitz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard Weitz  
Snow, Becker, Drull, & Krauss  
99 Park Ave., 117th Floor  
New York, NY 10016

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the 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  
3rd day of July, 1981.

*Quinn P. Hayward*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

July 3, 1981

The Estate of Francis A. Callery  
James Callery, Executor  
RFD 1  
Charlotte, VT 05445

Dear Mr. Callery:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Howard Weitz  
Snow, Becker, Drull, & Krauss  
99 Park Ave., 117th Floor  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
THE ESTATE OF FRANCIS A. CALLERY	:	DECISION
JAMES CALLERY, EXECUTOR	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the years 1960 through 1965.	:	

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Petitioner, The Estate of Francis A. Callery, James Callery, Executor, RFD #1, Charlotte, Vermont 05445, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1960 through 1965 (File No. 24301).

A formal hearing was held before Stanley Buchsbaum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on April 22, 1980 at 10:45 A.M. Petitioner appeared by Snow, Becker, Drull, Klaris & Krauss (Howard Weitz, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether Francis A. Callery ever paid additional income tax due as a result of federal audit changes for the years 1960 through 1965.

II. Whether Francis A. Callery filed Form IT-115 reporting the federal audit changes.

III. Whether the failure of the Department of Taxation and Finance to notify Francis A. Callery of his deficiency "as soon as practicable" after being informed of the federal audit changes bars recovery of the deficiency.

IV. Whether the Department of Taxation and Finance is estopped from recovering the deficiency.

V. Whether there was any error in computing the deficiency.

FINDINGS OF FACT

1. Francis A. Callery was a partner in a stock brokerage house. He then became a partner in the firm of Lehman Brothers. In 1957 he left the Lehman firm. Thereafter, until his death in December 1971, he operated his own business, dealing in oil.

2. The Internal Revenue Service completed an audit of Francis A. Callery's income tax returns for the years 1960 through 1965 on or about November 4, 1969. It resulted in audit changes which required payments of additional tax to the federal government.

3. There is no direct evidence that Francis A. Callery filed the required IT-115 forms with the State of New York after the federal audit changes. Mr. Callery's accountant testified that he was involved in the federal audit and that it was his regular practice to prepare IT-115 forms for his clients when there were federal audit changes, but at the time of the hearing he could not specifically recall preparing such forms for Mr. Callery for the year at issue. He had no reason to believe, however, that he had deviated from his regular practice. The accountant did not recall any instance in which Francis A. Callery had failed to file a tax return in the thirty years he had prepared returns for Mr. Callery. James Callery, the son of Francis Callery, testified that, as executor of his father's estate, he retained counsel and two accountants. He testified that they made a review for any federal or state tax liability and found none. He testified that in 1969 his father was active in his business and was in his office regularly, that he was a meticulous person and very demanding of others, and that his secretary, who had been with him for 30 years, handled administrative details and it would have been her responsibility, upon receiving the IT-115 forms from the accountant, to draw the check, sign it and

make payment. He testified that his father was not the type of man who would attempt to evade paying a tax owed by him since in 1969 and 1970 his net worth was \$1 million and, therefore, the tax of about \$18,000.00 was an inconsiderable amount to him. In 1977 a State tax auditor requested a search for any IT-115's filed by Francis A. Callery, but the result was there were no such forms on file. Francis A. Callery's income tax returns for the years 1960, 1961 and 1964 had been destroyed, but information concerning them was retained on a file reference card. There was, however, nothing about IT-115's in the Income Tax Bureau files.

4. The New York Department of Taxation and Finance was notified of the federal tax audit changes on December 8, 1969 and it received copies of the federal agent's reports on March 27, 1970.

5. The principal beneficiaries of the estate of Francis A. Callery were his wife, his two daughters, and his son.

6. The estate records were destroyed when the estate was wound up in 1975.

7. The New York Department of Taxation and Finance decided to audit the Lehman Brothers partnership for the years 1960 through 1970, but it held up the work on it while it awaited the completion of a federal audit of that firm. It was the Department's practice, when auditing a partnership, to first audit the firm and then audit the individual partners. Francis A. Callery mistakenly was believed by the Department to still be a partner in Lehman Brothers. As a result, his file was assigned to the auditor for that partnership.

8. The auditor assigned to Lehman Brothers began his audit in November, 1973. He completed the work on the firm in April, 1975. Because that auditor had a heavy workload, the audit of the partners in Lehman Brothers was reassigned to another auditor, Anibal Munoz, in May, 1975. Mr. Munoz also had a substantial

workload. There were 60 partners to be dealt with, and he started with the non-resident partners. He did not start on the audit of Francis A. Callery until 1977. He then, as a result of getting in touch with Lehman Brothers, learned that Francis A. Callery had ceased to be a partner in that firm before 1960.

9. When he reviewed the Callery file he became aware of the federal audit changes. His audit resulted in a tax of 10 percent of the amount of the net federal adjustment. The Callery file contained the New York income tax returns of Francis A. Callery for 1962, 1963 and 1965. Those for 1960, 1961 and 1964 were missing because they had been destroyed. Mr. Munoz, therefore, obtained tax information from the Income Tax Bureau records. For 1960 there was no information available. For 1961 it showed a total of "all payments" of \$24,889.91. For 1964 the bureau records showed gross income of \$131,926.00, itemized deductions of \$30,629.00, exemptions totalling \$1,800.00, and a statutory credit of \$25.00. It also showed total tax prepaid of \$25,626.82, estimated tax paid of \$19,800.00, and a credit of \$10,525.30. It also indicated a refund of \$5,826.82.

10. There was nothing in the record to show Francis A. Callery's total income, New York taxable income or New York income tax for 1960. The Internal Revenue Service reduced the taxable loss shown on petitioner Francis Callery's income tax return of \$27,430.85 by the amount of unallowable deductions of \$15,585.18 resulting in a corrected taxable loss of \$11,845.67. There was nothing in the record to show that there were New York modifications or adjustments which produced New York adjusted gross income.

11. For 1961 the bureau records showed a total payment for Francis A. Callery of more than \$24,000.00. This clearly indicates a taxable income in excess of the amount for the New York 10 percent tax bracket.

12. For 1964 the Income Tax Bureau records clearly show that Francis A. Callery's taxable income brought him into the 10 percent tax bracket.

13. The income tax returns in the record for 1962, 1963 and 1965 show that he was in the 10 percent tax bracket for each year.

14. On March 3, 1978, the Department of Taxation and Finance issued a Statement of Audit Changes for 1960 through 1965 showing additional tax due, based on federal audit changes made at the rate of 10 percent, in the total amount of \$18,772.45. Notices of deficiency were issued, which added interest to the amount of tax due. One of them combined 1960, 1961 and 1963 for a total amount due of \$7,939.44, including interest; the notice for 1964 showed a total due of \$15,152.98 including interest; the notice for 1965 showed a total due of \$2,102.85; and the notice for 1962 showed a total of \$9,686.55 including interest.

#### CONCLUSIONS OF LAW

A. That petitioner, The Estate of Francis A. Callery, failed to establish by adequate credible proof that Francis A. Callery paid the additional New York income taxes owed by him for the years 1960 through 1965 as a result of federal audit changes.

B. That the petitioner failed to establish by adequate credible proof that Francis A. Callery filed IT-115 forms reporting federal audit changes for the years in issue; therefore, there is no period of limitations barring the state from proceeding to determine the additional amount of tax due and to collect said tax within the meaning and intent of section 683(c)(1)(C) of the Tax Law.

C. That the Department of Taxation and Finance, whether or not it delayed unnecessarily in proceeding against Francis A. Callery or his estate, is not estopped from proceeding to collect any tax due from his estate. Turner Constr. v.



Tax Commission, 57 A.D.2d 201, 203 (1977); Matter of McMahan v. Tax Commission, 45 A.D.2d 624, 627 (1974); Matter of Jamestown Lodge v. Catherwood, 31 A.D.2d 981 (1969).

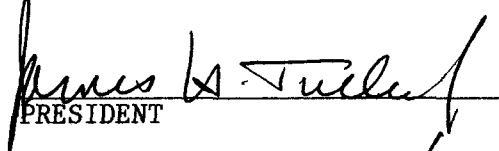
D. That the Department of Taxation and Finance failed to show any reasonable basis for its decision to tax the audit change amount for 1960 at the 10 percent rate; therefore, the Notice of Deficiency for that year is cancelled.

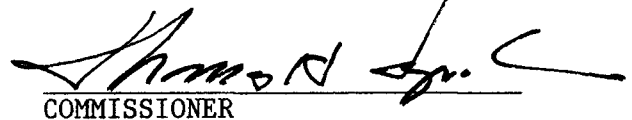
E. That, except as granted in Conclusion of Law "D", the petition of the Estate of Francis A. Callery is denied and the notices of deficiency for all the years involved except 1960 are sustained.

DATED: Albany, New York

JUL 03 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER