

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Estate of Isidor Tepper :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
Tax under Article 16 of the Tax Law for the Years :  
1955 - 1957. :  
\_\_\_\_\_

State of New York  
County of Albany

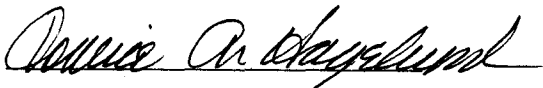
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of September, 1982, he served the within notice of Decision by certified mail upon Estate of Isidor Tepper, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Isidor Tepper  
c/o Seymour Marks  
350 Fifth Ave.  
New York, NY 10001

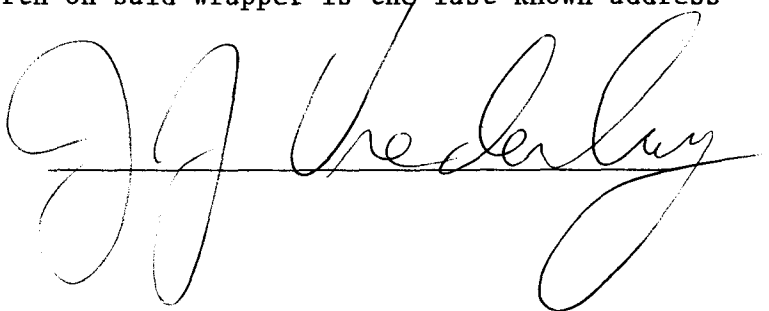
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
17th day of September, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Estate of Isidor Tepper :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
Tax under Article 16 of the Tax Law for the Years :  
1955 - 1957. :

State of New York  
County of Albany

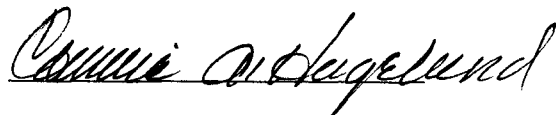
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of September, 1982, he served the within notice of Decision by certified mail upon Seymour Marks the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

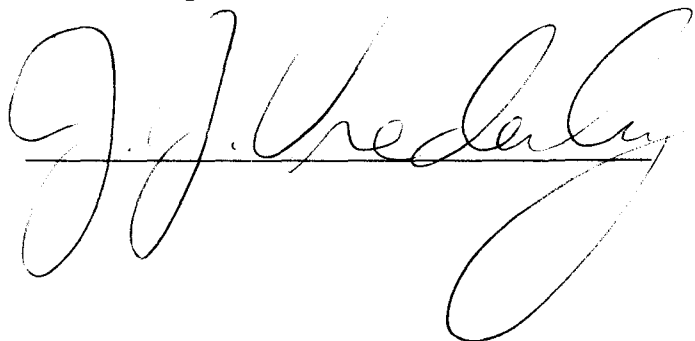
Seymour Marks  
350 Fifth Ave.  
New York, NY 10001

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  
17th day of September, 1982.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 205

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

September 17, 1982

Estate of Isidor Tepper  
c/o Seymour Marks  
350 Fifth Ave.  
New York, NY 10001

Dear Mr. Marks:

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) 375 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 90 days 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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Seymour Marks  
350 Fifth Ave.  
New York, NY 10001  
Taxing Bureau's Representative

1982

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition

of :

ESTATE OF ISIDOR TEPPER : DECISION

for Revision or Refund of Personal Income Taxes :  
under Article 16 of the Tax Law for the Years  
1955, 1956 and 1957. :

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Petitioner, Estate of Isidor Tepper c/o Seymour Marks, Esq., 350 Fifth Avenue, New York, New York 10001, filed a petition for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1955, 1956 and 1957 (File No. 00482).

A small claims hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 10, 1978. Petitioner appeared by Seymour Marks, Esq. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the Department of Taxation and Finance is barred from asserting a deficiency where petitioner's representative had tendered a certified check in an offer of compromise of the deficiency and the Department did not accept the proposal, but neither returned nor negotiated the check.

FINDINGS OF FACT

1. Isidor Tepper filed New York State income tax resident returns for the years 1955, 1956 and 1957. The amounts of tax due shown on each return and the amounts paid with each return were as follows:

<u>YEAR</u>	<u>TAX</u>	<u>AMOUNT PAID</u>
1955	\$1,265.18	\$307.55 <sup>1</sup>
1956	613.60	153.40
1957	669.19	167.30

2. Based on an audit of Isidor Tepper's Federal returns by the Internal Revenue Service, the Income Tax Bureau issued, on January 3, 1961, notices of additional assessment of personal income tax due for the years 1955 and 1956 in the amounts of \$161.28 and \$41.24, respectively.

3. On February 19, 1963, petitioner's attorney tendered a certified check payable to the State Tax Commission in the amount of \$250.00 with the following letter:

"Following the conference held with Mr. Garelick of your office, concerning an offer by Mr. Tepper to compromise the outstanding debt due from the judgment debtor, I am tendering herewith a certified check, drawn payable to the order of the State Tax Commission, in the sum of \$250.00, which check is subject to a compromise agreement. An affidavit setting forth the circumstances for the offer and compromise will be submitted to your office in a few days.

It is respectfully requested that you forbear from any further action in this matter, pending the determination of the taxpayer's offer and compromise."

The check was dated February 12, 1963 and was drawn on the account of F & F Salvage Co., Inc. and was marked "loan to I. Tepper".

4. On March 20, 1963, in response to the tender of the check, the Income Tax Bureau wrote to Mr. Tepper's attorney as follows:

"Before considering any offer of compromise in this case, it will be necessary for you and your client to arrange for a conference at this office to discuss same first."

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<sup>1</sup> According to the notice of additional assessment issued July 10, 1968 (*infra*), petitioner was credited with tax paid of \$615.10 for 1955. The additional payment is not otherwise treated in the record.

5. The affidavit promised in the attorney's letter of February 19, 1963 was never submitted. The certified check was retained by the Department of Taxation and Finance but has never been negotiated.

6. In a letter dated November 17, 1964, Mr. Tepper's attorney was advised by the Bureau of Law of the Department of Taxation and Finance, as follows:

"On October 27, 1964, you spoke with Mr. Garelick of this office and informed him that you would sent (sic) a letter to the office explaining the claim of the judgment debtor against a third party, and that you expected the judgment debtor to pay the warrants in full.

Please forward a letter setting forth the name and address of the third party the court in which the action is pending and nature of claim."

7. Isidor Tepper died in 1966 and Marvin Tepper and Bertha Tepper were appointed as executors of his will by Surrogate's Court, Queens County.

8. There were no written communications between the Department of Taxation and Finance and petitioner's representative from November 17, 1964 until November 30, 1967. In a letter dated November 30, 1967, the Department of Taxation and Finance informed petitioner's representative that the following warrants were outstanding against Isidor Tepper:

"W#LN-4711 representing unpaid taxes for the year 1955. The amount presently due is \$1,017.95, with interest on \$615.08 at the rate of  $\frac{1}{2}$  of 1% per month from December 15, 1967.

W#LN-4712 representing unpaid taxes for the years 1956 and 1957. The amount presently due is \$1,581.39, with interest on \$962.09 at the rate of  $\frac{1}{2}$  of 1% per month from December 15, 1967.

W#LN-4710 representing additional taxes for the years 1955 and 1956 per Federal audits for said years. The amount presently due is \$297.57, with interest on \$203.12 at the rate of  $\frac{1}{2}$  of 1% per month from December 15, 1967."

The letter also referred to the certified check which was submitted as an offer of compromise:

"This offer was incomplete as it was not properly documented."

The letter concluded:

"It is requested that you authorize this office, in writing, to apply the aforementioned certified check as payment on account of the above mentioned judgments and likewise withdraw the aforesaid offer."

9. On July 10, 1968, the Income Tax Bureau issued a Notice of Additional Assessment of Income Tax Against the Estate of Isidor Tepper for the years 1955, 1956 and 1957, which provided as follows:

"For the above years, the taxpayer elected the installment basis for paying the tax computed. The computation below shows the tax computed per return, the installment payments made and the remaining balance still due plus interest.

	<u>1955</u>	<u>1956</u>	<u>1957</u>
Tax computed per return	\$1,230.18	\$613.60	\$669.19
Less tax paid	<u>615.10</u>	<u>153.40</u>	<u>167.30</u>
Tax Due	\$ 615.08	\$460.20	\$501.89
Interest due from due date to July 15, 1968 at 6% per annum	<u>452.08</u>	<u>310.64</u>	<u>311.66</u>
Total plus Interest Due	\$1,067.16	\$770.84	\$813.55

TOTAL PERSONAL INCOME TAX PLUS INTEREST DUE \$2,651.55"

Petitioner timely filed a petition for Revision or Refund of Personal Income Taxes for said years.

10. On January 22, 1969, the Department of Taxation and Finance issued a notice of claim for income taxes against the Estate of Isidor Tepper in the amount of \$1,779.69 plus interest. The claim was rejected by the executors; the notice of rejection of claim was dated January 31, 1969. The Department did not commence an action at law or in equity on the claim within 60 days of rejection. The record does not reveal whether the claim was tried upon judicial settlement of the executors' account.

11. Petitioner contends that the Department is barred from enforcing the above deficiencies because of laches, collateral estoppel, compromise or accord and satisfaction, and rejection of claim under the Surrogate's Court Procedure Act.

#### CONCLUSIONS OF LAW

A. That laches, waiver, or estoppel may not be imputed to the State in the absence of statutory authority (Matter of Jamestown Lodge 1681 Loyal Order of Moose [Catherwood] 31 A.D.2d 981). An estoppel may not be invoked to prevent the State from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority (Matter of McMahan v. State Tax Commission 45 A.D.2d 624).

B. That although subdivision Fifteenth of section 171 of Article 8 of the Tax Law grants to the State Tax Commission the authority to compromise taxes under certain circumstances, there was no agreement of compromise or accord and satisfaction here (See: Moskowitz v. U.S., 61-1 U.S.T.C. ¶9204; Isaac Michael Green, 26 U.S.B.T.A. 719). Subdivision Eighteenth of section 171 of Article 8 of the Tax Law cited in petitioner's brief does not grant the Commission the authority to compromise taxes.

C. That the provision of Article 18 of the Surrogate's Court Procedure Act which grants an executor the power to reject claims and thus put a claimant to his proof, does not apply to taxes imposed by the State of New York (See: In re Sanford's Will, 280 A.D. 687, appeal dismissed 305 N.Y.697, appeal



dismissed 306 N.Y.823; see also practice commentary following section 1803 of the Surrogate's Court Procedure Act, McKinney's Consolidated Laws of New York Annotated).<sup>2</sup>

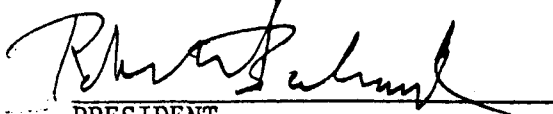
D. That the Department should either have deposited or have returned the certified check. Since it failed to do either, petitioner can not be charged with interest on \$250.00 from the date of the tender of the check, February 19, 1963. An attempt should be made to deposit the check for collection, but regardless of whether or not said sum is collected, it shall be deemed paid as of February 19, 1963.

E. That the petition of the Estate of Isidore Tepper is denied, and the Notice of Additional Assessment is sustained, except that petitioner is to be credited with the payment of \$250.00 as of February 19, 1963, with interest to be adjusted accordingly.

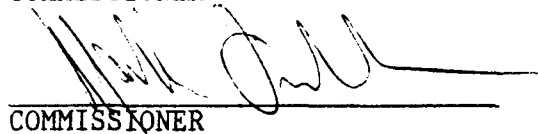
DATED: Albany, New York

SEP 17 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

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<sup>2</sup> It is noted that even if Article 18 were applicable, the effect of the rejection of claim coupled with a failure to commence an action within 60 days is merely to limit the claimant's forum to the Surrogate's Court. There was no showing here that the claim was tried and determined upon the judicial settlement of the executor's account (section 1808.1 Surrogate's Court Procedure Act).