

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
The Estate of Lee Shubert :
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 :
1953 - 1957 & 1959. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon The Estate of Lee Shubert, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Estate of Lee Shubert
c/o Charles E. Fedden
444 Madison Ave.
New York, NY 10022

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
18th day of March, 1983.

David Parchuck

James A. Fitzgerald

CLERK OF THE COMMISSIONER
OFFICE PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
The Estate of Lee Shubert :

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 :
1953 - 1957 & 1959.

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Charles E. Fedden the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles E. Fedden
Appleton, Rice & Perrin
444 Madison Ave.
New York, NY 10022

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
18th day of March, 1983.

David Parchuck

Constance M. Hegeler

CLERK OF THE COMMISSIONER
OF THE STATE TAX COMMISSION
SECTION 174

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

March 18, 1983

The Estate of Lee Shubert
c/o Charles E. Fedden
444 Madison Ave.
New York, NY 10022

To the Executors:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Charles E. Fedden
Appleton, Rice & Perrin
444 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
THE ESTATE OF LEE SHUBERT : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 16 :
of the Tax Law for the Years 1953 through 1957 :
and 1959.

Petitioner, The Estate of Lee Shubert, c/o Charles E. Fedden, Esq., 132 East 79th Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 16 of the Tax Law for the years 1953 through 1957 and 1959 (File No. 23493).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 27, 1981 at 1:30 P.M. Petitioners appeared by Appleton, Rice & Perrin (Charles E. Fedden, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the sums attributed to petitioner on a partnership return should be characterized as a return of capital or as a distributive share of partnership income.

II. Whether the Audit Division erred in not allowing offsetting charitable deductions for net capital gains realized by or attributed to petitioner.

FINDINGS OF FACT

1. Lee Shubert and Jacob J. Shubert began a partnership in 1919. This partnership owned real property and stock in corporations which owned and operated real estate.

2. Lee Shubert died December 25, 1953.

3. The Estate of Lee Shubert ("Estate") filed a New York State Income Tax Fiduciary Return and a U.S. Fiduciary Income Tax Return for each of the years in issue.

4. Jacob J. Shubert continued to file Federal and New York State partnership returns after the death of Lee Shubert. For the years 1954, 1955 and 1956 Jacob J. Shubert filed a partnership return under the name:

J. J. Shubert as Surviving Partner of
Former Partnership of Lee and J.J. Shubert
223 West 44th Street
New York City, N.Y.

For the years 1957 and 1959 Jacob J. Shubert filed partnership returns under the name:

J.J. Shubert as Surviving Partner
of Lee & J.J. Shubert
223 West 44th Street
New York City, N.Y.

5. The partnership returns filed by Jacob J. Shubert indicated that the Estate had received distributive shares of income subject to normal tax and income subject to net capital gains tax in addition to that reported on the New York State Income Tax Fiduciary Returns for the years in issue.

6. The amounts reported by the Estate to New York State before deductions and exemptions and the amount of income attributed to the Estate by the partnership return filed by Jacob J. Shubert were as follows:

YEAR	AMOUNT REPORTED BY ESTATE		INCOME ATTRIBUTED TO ESTATE	
	<u>Normal Income</u>	<u>Capital Gains</u>	<u>Normal Income</u>	<u>Capital Gains</u>
12/25-12/31/53			\$ 2,445.53	
1954	\$ 477.13		25,519.49	
1955	39,207.44	\$ (5,745.47)	34,982.68	\$ 177,078.16
1956	91,601.27		53,067.40	1,416,622.98
1957	269,977.46	(11,146.90)	261,134.19	181,211.89
1959	353,140.00		354,673.63	1,788.37

7. Notices of Additional Assessment Income Tax were issued to petitioner based upon the additional distributive shares of income subject to normal tax and income subject to net capital gain tax indicated by the partnership returns filed by Jacob J. Shubert. The foregoing notices were issued as follows:

<u>YEAR</u>	<u>DATE ISSUED</u>	<u>AMOUNT</u>	
		<u>Additional Normal Tax</u>	<u>Additional Net Capital Gains Tax</u>
12/25-12/31/53	July 17, 1957	\$ 30.04	
1954	July 17, 1957	1,475.13	
1955	February 4, 1959		\$ 5,791.56
1956	February 26, 1960		48,608.94
1957	February 15, 1961		5,785.42
1959	May 4, 1962		129.18

The Audit Division made no adjustment to the charitable deductions which petitioner claimed against its ordinary income when the notices of additional assessment income tax were issued.

On April 6, 1978, the assessment for 1954 was cancelled in full and on same date, \$107.35 of the assessment for the year 1959 was cancelled by the Audit Division.

8. Lee Shubert died testate. Paragraphs f and g of the twenty-first article of Lee Shubert's will provided:

"(f) I authorize and empower my Executors and Trustees to continue any corporate enterprise or business which I am interested in for such time or times as in their discretion is for the best interests of my estate.

(g) In view of the fact that I am interested in various corporate enterprises whose stock is owned by myself and my brother Jacob J. Shubert, and in view of the fact that a great portion of my estate consists of an undivided interest in business ventures and real and personal property owned by myself and my brother Jacob J. Shubert, I expressly request that my Executors and Trustees retain as part of the trust funds herein created so far as feasible and practicable the said investments and that my Executors and Trustees to the extent permitted by law shall be guided in the disposition and administration of my said estate by the wishes of my brother Jacob J. Schubert to the end that so

long as my said brother shall live, there shall be no forced liquidation or partition of the properties jointly owned by us."

9. In Shubert v. Lawrence (1 A.D.2d 654, aff'd. 1 N.Y. 2d 914) the Appellate Division, First Department determined that in spite of the provisions of the will, there should be an accounting of the Estate's interest in the partnership's assets and profits. In an amended order dated September 10, 1979 the Surrogate's Court of New York determined that the Estate's interest in the partnership of Lee and Jacob J. Shubert on December 25, 1953 was \$16,205,806.41.

10. Lee Shubert's will also provided that the residue of his estate was to be divided into six trusts and bequeathed to four trustees. The Sam S. Shubert Foundation was designated the remainderman and income beneficiary for a period of the joint lives of three of the trustees. The income from the remaining trusts was to be paid to certain named individual beneficiaries. Upon the death of the individual beneficiaries the will provided that the trust fund was to be paid to the Sam S. Shubert Foundation.

11. On or about November 26, 1965, the Internal Revenue Service asserted a deficiency against the Estate for the years 1954 and 1955. This deficiency was premised principally upon the attribution of income from the partnership of "Jacob J. Shubert as surviving partner of the former partnership of Lee and J. J. Shubert." At the time of the federal audit, the Estate was permitted a charitable contribution for the capital gains set aside for the Sam S. Shubert Foundation. In a decision dated May 17, 1972, the Appellate Division of the Internal Revenue Service determined that there was no deficiency or overassessment for said years.

12. No evidence was presented as to whether Lee Shubert or Jacob J. Shubert had a partnership agreement which contained clauses providing for the disposition

of partnership assets or income in the event of a dissolution of the partnership. Moreover, no evidence was presented as to whether the Estate performed services for the successor "partnership" or had an interest in the capital of the successor business organization in excess of Lee Shubert's interest in the partnership at the time of his demise.

CONCLUSIONS OF LAW

A. That since the record does not establish that the Estate made an investment or provided services for the successor "partnership", the amounts paid to the Estate for 1953, 1955, 1956 and 1957 are deemed to be payments made to extinguish the interest of Lee Shubert and are income to the partnership and taxable to the surviving partner. (See People ex rel Whitney v. Loughman, 226 App. Div. 108, aff'd 251 N.Y. 544; People ex rel. Gwathmey v. State Tax Comm., 221 App. Div. 812, aff'd 251 N.Y. 545; People ex rel. Lee v. Gilchrist, 215 App. Div. 576, aff'd 244 N.Y. 514; see also Governor's Bill Jacket, L. 1958, ch. 309).

B. That Tax Law section 364-a was added by section 1 of Chapter 309 of the Laws of 1958. This section provides:

"§364-a. Payments to a retiring partner or the estate of deceased partner

Payments made in liquidation of the interest of a retiring partner or a deceased partner shall, to the extent that they represent such partner's interest in partnership assets, be taxed as a sale or exchange of such partner's interest in the partnership assets. The balance of such payments shall be taxed as such partner's distributive share of partnership income. For purposes of this section, amounts paid for unrealized receivables of the partnership or for good will of the partnership (except to the extent that the partnership agreement provides for a payment with respect to good will) shall not be included in payments representing a partner's interest in partnership assets. As used in this section, the term "unrealized receivables" includes, to the extent not previously includible in income under the method of accounting used by the partnership, any rights (contractual or otherwise) to payment for (i) goods

delivered, or to be delivered, to the extent that the proceeds therefor would be treated as amounts received from the sale or exchange of property other than a capital asset, or (ii) services rendered, or to be rendered."

C. That the Legislature enacted Tax Law 364-a in order to, inter alia, conform the law of the State of New York to the Internal Revenue Code of 1954 (Governor's Bill Jacket, L. 1958 ch. 309).

D. That the Audit Division properly attributed additional income subject to capital gains tax to the Estate for the year 1959 based upon the 1959 partnership return filed by Jacob J. Shubert (Tax Law §364-a).

E. That subdivision 2 of section 365 of Article 16 of the Tax Law, which was in effect during 1959, provided, in part:

"The net income and net capital gain of an estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual taxpayers,...which pursuant to the terms of the will or deed creating the trust, is paid to or held for...any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes..."

Since the will provided that the residue of the Estate was to pass to a charitable organization, the petitioner is entitled to a deduction equal to the net capital gains realized in 1959. Therefore, the deficiency for the year 1959 is cancelled.

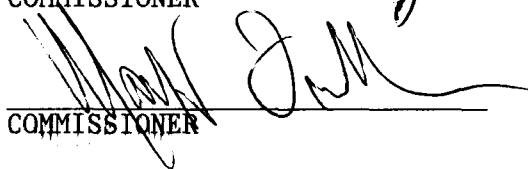
F. That the petitions of The Estate of Lee Shubert are granted for 1953, 1955, 1956, 1957 and 1959 and the Notices of Additional Assessment Income Tax for said years are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER