

*U. B. T. Determinations*  
*A-2*  
*Auchincloss, Gordon*

December 19, 1966

The Honorable Louis J. Lefkowitz  
Attorney General  
State Capitol  
Albany, New York

*Carbon  
copy w. all  
attachments  
retd to  
Mr. Schapiro  
7/3/69*

Re: GORDON AUCHINCLOSS v. STATE TAX COMMISSION

Dear Mr. Lefkowitz:

Enclosed herein please find a copy of Notice of Petition and Petition of the taxpayer returnable at a Special Term of the Supreme Court, Albany County on the 20th day of February 1967. The copy of the Notice of Petition and Petition which was served on December 12, 1966 states that it is a petition, "To review a decision of the Tax Commission made after hearing in the matter of unincorporated business taxes under Article XVIIA of the Tax Law for the year 1959 and under Article XXIII of the Tax Law for the years 1960, 1961 and 1962." Please be advised that the petition is untimely with respect to the years 1959 and 1960 for the reasons set forth below.

On April 27, 1962 assessments were issued for Article 16-A unincorporated business taxes for the year 1959 and Article 23 unincorporated business taxes for the year 1960. Timely applications for revision and refund of the Article 16-A taxes for the year 1959 and for the Article 23 taxes for the year 1960 were filed pursuant to section 374 of Article 16 of the Tax Law. On April 20, 1964 a notice of deficiency of Article 23 unincorporated business taxes was issued for the years 1961 and 1962 pursuant to the provisions of Article 22 of the Tax Law. The taxpayer filed a timely petition for redetermination of a deficiency pursuant to the provisions of section 689 of Article 22 of the Tax Law for the years 1961 and 1962.

Sections 5 and 6 of Chapter 1011 of the Laws of 1962 which amended Part 6 of Article 22 of the Tax Law provide that,

"(A) If prior to January first, nineteen hundred sixty-three a timely application for revision or refund of tax under article twenty-

two or article twenty-three of the tax law has been filed pursuant to section three hundred seventy-four of the tax law, all further proceedings with respect to such application for revision or refund shall be carried out in accordance with the provisions of sections three hundred seventy-four and three hundred seventy-five of the tax law;"

The effect of such provision was to subject the application for revision of assessment for the 1960 taxes to the procedure of sections 374 and 375 of Article 16 of the Tax Law in a like manner as the application with respect to the year 1959 which was under Article 16 of the Tax Law. Accordingly, two separate hearing notices were issued; one with respect to the application for revision of the assessments with respect to the years 1959 and 1960, and the other with respect to the petition for redetermination of a deficiency for the years 1961 and 1962. Since there were common questions of fact and law involved, a combined hearing was held. Subsequent to such hearing the State Tax Commission issued (a) a determination pursuant to section 374 of Article 16 of the Tax Law denying the taxpayer's application for the years 1959 and 1960, and (b) a decision pursuant to section 689 of Article 22 of the Tax Law affirming the deficiencies and denying the petition with respect to the years 1961 and 1962. Both the determination and the decision were mailed to the taxpayer on August 12, 1966 with a forwarding letter. The letter advised the taxpayer that he had ninety days after the mailing of the notice of the determination with respect to the years 1959 and 1960 (that is up to November 10, 1966) to make an application to review the determination of the Tax Commission in accordance with the provision of section 375 of the Tax Law and four months (that is December 12, 1966) to make an application to review the decision of the Tax Commission with respect to the years 1961 and 1962 in accordance with the provision of section 690 of the Tax Law.

The taxpayer has paid the assessments for the years 1959 and 1960 in part only and has not paid the deficiency with respect to the years 1961 and 1962, nor has the taxpayer deposited any bond for the amount of the assessments for the years 1959 and 1960 or for the deficiency for the years 1961 and 1962 or for costs, with the State Tax Commission. Further, the depositing of a bond or undertaking is obligatory with respect to a determination issued pursuant to the provisions of Article 16 of the Tax Law (Sec. 375). The failure to deposit such bond with respect to the determination and the fact that the application for judicial review is untimely with respect to the years 1959 and 1960 are in issue. With respect to the failure of the

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taxpayer to file a bond for the amount of the deficiency issued for the years 1961 and 1962, it is to be noted that although section 690(c) of the Tax Law provides that the Commission may assess and institute collection procedures where the taxpayer has failed to make payment or deposit a bond, such failure is not a bar to the institution of an application for judicial review.

Transmitted herein are the entire files pertaining to both the petition of the taxpayer for the years 1961 and 1962 and the application of the taxpayer for the years 1959 and 1960.

Very truly yours,

EDWARD H. BEST  
Counsel

MS:ca  
Encs.

cc: Deputy Commissioner Igoe