

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

KEITH H. WOOD

DECISION

for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1969.

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Petitioner, Keith H. Wood, 5 Robert Drive, Chatham, New Jersey 07928,  
filed a petition for redetermination of a deficiency or for refund of unincor-  
porated business tax under Article 23 of the Tax Law for the year 1969 (File  
No. 13478).

A hearing was held before James Hoefer, Hearing Officer, at the offices of  
the State Tax Commission, Two World Trade Center, New York, New **York**, on  
March 12, 1985 at 9:15 A.M., with all briefs to be submitted by July 3, 1985.  
Petitioner appeared by Kelly, Drye & Warren (Barry L. Salkin, Esq., of counsel).  
The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of  
counsel).

#### ISSUES

I. Whether the gain realized by petitioner from the sale of his membership  
in the New York Stock Exchange was subject to unincorporated business tax.

II. Whether the notice of deficiency was barred by the three-year statute  
of limitations for assessment.

III. Whether petitioner was liable for a penalty under section 685(a) of  
the Tax Law for failure to timely file an unincorporated business tax return.

FINDINGS OF FACT

1. Petitioner herein, Keith H. Wood, timely filed a New York State Income Tax Nonresident Return for 1969 whereon he reported, inter alia, business income of \$1,558.14 from his activities as a "stock broker" and also a gain of \$123,500.00 from the sale of a membership in the New York Stock Exchange (hereafter "Exchange"). Petitioner did not file an unincorporated business tax return for 1969, however, attached to his personal income tax return were copies of Federal Schedule C, detailing the income and expenses from Mr. Wood's activities as a stock broker, Federal Schedule D, "Sales or Exchanges of Property", and a separate schedule of capital gains and losses which revealed the gain realized by petitioner from the sale of his membership in the Exchange.

2. On March 31, 1975, the Audit Division issued a Statement of Audit Changes to petitioner for 1969 which contained the following explanation and computation:

"Activities as a stockbroker constituted the carrying on of an unincorporated business. Therefore, the gain on the sale of the stock exchange seat, an asset used in your business, is held to be business income taxable on the full amount for the unincorporated business tax.

Section 685(a) penalty is imposed since you failed to file an unincorporated business tax return.

COMPUTATION:

Net business income reported from Federal Schedule "C"	\$ 1,558.14
Add gain on the sale of stock exchange seat	123,500.00
Net business income adjusted	<u>\$125,058.14</u>
Less allowance for taxpayers services	5,000.00
Balance	<u>\$120,058.14</u>
Statutory exemption to date of sale - 11/25/69	<u>4,507.30</u>
Amount subject to the unincorporated business tax	\$115,550.84

Unincorporated business tax @5½%	\$6,355.30
Section 685(a) penalty	1,558.14

3. Based on the aforementioned Statement of Audit Changes, the Audit Division, March 31, 1975, issued a Notice of Deficiency to petitioner asserting additional unincorporated business tax due of \$6,355.30, plus penalty of \$1,588.82 and interest \$1,891.53, for a total allegedly due of \$9,835.65.

4. On or about August 21, 1963, petitioner acquired a membership in the Exchange. Petitioner sold said membership on November 25, 1969, realizing a gain of \$123,500.00.

5. In September of 1963, petitioner became associated with the partnership of DeCoppet & Doremus as an associate odd lot broker. Petitioner continued with DeCoppet & Doremus as an associate odd lot broker until December 31, 1968. Effective January 1, 1969, petitioner became a general partner of DeCoppet & Doremus.

6. In order to operate as an associate odd lot broker for DeCoppet & Doremus it was necessary for petitioner to own a membership in the Exchange. Petitioner's activities as an associate odd lot broker from September, 1963 through December 31, 1968 constituted the carrying on of an unincorporated business and petitioner's membership in the Exchange was an asset used in said unincorporated business.

7. After petitioner became a general partner of DeCoppet & Doremus he no longer functioned as an associate odd lot broker. Mr. Wood's primary function as a general partner was to supervise the activities of six or seven associate odd lot brokers and from time to time enter the floor of the Exchange with "...positions that have been accumulated by DeCoppet & Doremus as brokers and execute offsetting trades to even out those positions," (transcript p.34). Petitioner's income as a general partner of DeCoppet & Doremus was not dependent upon his execution of trades on the Exchange. From January 1, 1969 forward Mr. Wood used his own capital to

the Exchange solely to conduct the business of DeCoppet & Doremus and said membership was not used for any other purpose.

8. Article XV of the Limited Partnership Agreement of DeCoppet & Doremus, amended to July 1, 1969, provided, with respect to those partners who owned exchange memberships, that such partner:

"...agrees that as long as he remains a member of the Partnership, he will not sell, assign or dispose of his membership during the term of the Partnership without the consent in writing of general partners having seventy-five per cent (75%) of voting power. Each such partner contributes the use of his membership to the Partnership and agrees that:

(a) Except for the purpose of crediting interest pursuant to the fifth paragraph of Section 1 of Article X hereof, no item attributing any value to his membership shall be set up on the books of account or taken into account between the partners for any purpose; and

(b) In so far as may be necessary for the protection of creditors of the Partnership and subject to the Constitution and Rules of the New York Stock Exchange, the proceeds of the transfer of his membership shall be an asset of the Partnership; provided, however, that for this purpose limited partners shall not be deemed to be creditors of the Partnership.

All expenses, dues and charges of whatsoever nature, levied or made by the New York Stock Exchange upon or against the board seats or memberships of such partners, shall be paid by and charged as expenses of the Partnership."

9. Article X of the aforementioned Limited Partnership Agreement also provided that each partner who owned a membership in the Exchange was entitled to receive interest at the rate of six per cent (6%) per annum on the value of a membership in the New York Stock Exchange..."

10. In mid 1969 DeCoppet & Doremus entered into merger negotiations with a firm of Carlisle & Jacquelin. Said firms merged effective January 1, 1970, with the successor firm being known as Carlisle, DeCoppet & Co. Petitioner was involved in the planned merger and in June or July of 1969 he approached the senior partner of DeCoppet & Doremus expressing his desire to both sell his membership in the Exchange and to withdraw from the partnership. Said senior partner requested

executed. The merger agreement was completed in the fall of 1969 and on or about November 24, 1969 petitioner received permission from the other general partners of DeCoppet & Doremus to sell his membership in the Exchange. Petitioner sold said membership on November 25, 1969, however, he remained a general partner of DeCoppett & Doremus until December 31, 1969. Petitioner did not become a partner of the successor firm of Carlisle, DeCoppet & Co.

11. It is undisputed that prior to January 1, 1969, petitioner was an independent contractor subject to unincorporated business tax and that his membership in the Exchange was an asset used in said unincorporated business. Effective January 1, 1969, petitioner ceased his unincorporated business activities and became a general partner of DeCoppet & Doremus. Petitioner maintains that as of January 1, 1969 his membership in the Exchange was held for investment purposes and that it could no longer be considered an asset used in his unincorporated business. The Audit Division asserts that the gain realized by petitioner on the sale of his membership in the Exchange constituted a gain from property employed in an unincorporated business and/or from the liquidation of the business.

12. Petitioner also maintains that the statute of limitations for assessment expired before the issuance of the Notice of Deficiency dated March 31, 1975 and that the penalty should be cancelled since reasonable cause existed for failure to timely file an unincorporated business tax return for 1969.<sup>1</sup> It is petitioner's

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1 It is noted that the State Tax Commission, in a corrected decision dated September 8, 1982, addressed these same two issues. However, it is clear that petitioner and the Audit Division had entered into a stipulation with the intention that the decision dated September 8, 1982 was to address only petitioner's liability for unincorporated business tax on the income generated from his activities as an associate odd lot broker. Subsequent to the decision

attention that sufficient information was contained on his 1969 personal income tax return, including the schedules appended to said return, to apprise the Audit Division of the nature and amount of all income and, accordingly, start the running of the statute of limitations.

13. Petitioner's 1969 New York State personal income tax return was timely filed and return was prepared by the accounting firm of Summer & Friedenber, the long-time accountants for DeCoppet & Doremus. Said accounting firm prepared the returns for all of the partners of DeCoppet & Doremus and also the partnership return. Petitioner relied entirely upon the expertise of Summer & Friedenber to correctly prepare all necessary returns. It is further noted that petitioner was a general partner in DeCoppet & Doremus for the entire 1969 tax year and that he did not individually carry on an unincorporated business.<sup>2</sup>

#### CONCLUSIONS OF LAW

A. That pursuant to section 705(a) of the Tax Law the gain realized from any property employed in the business or from the liquidation of the business must be included in unincorporated business gross income.

B. That effective December 31, 1968, petitioner ceased conducting his own unincorporated business as an associate odd lot broker. Petitioner's membership in the New York Stock Exchange was contributed to the partnership of DeCoppet & Doremus on January 1, 1969 and said membership was thereafter used exclusively in conducting the partnership

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2 Although petitioner's 1969 personal income tax return reported a small amount of business income (i.e., \$1,558.14), said amount represents income earned as an associate odd lot broker in 1968 but not received until 1969. Petitioner concedes that the \$1,558.14 is subject to unincorporated business tax, however, the Audit Division stipulated that the reported business income, by itself, was insufficient to generate any unincorporated business tax liability.

business. After December 31, 1968, the membership was no longer used by petitioner individually in a business. Accordingly, the Exchange membership in question, at the time of sale, cannot be considered as property employed by petitioner individually in an unincorporated business conducted by him and the gain derived from the sale of said membership is not subject to unincorporated business tax. (Matter of Frederick W. Whaley, State Tax Comm., June 7, 1977).

C. That Issues II and III are rendered moot in light of Conclusion of Law 1, supra.


D. That the petition of Keith H. Wood for the year 1969 is granted and the Notice of Deficiency dated March 31, 1975 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER