

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

M.L. WEISS & COMPANY

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DECISION

for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1980.

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Petitioner, M.L. Weiss & Company, 115 Broadway, New York, New York 10006, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1980 (File No. 47979).

A hearing was held before Allen E. Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on September 10, 1985 at 10:45 A.M., with all briefs to be submitted by October 1, 1985. Petitioner appeared by Seymour Schneidman & Associates, CPA's (Bernard Rappaport, CPA). The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq. of counsel).

#### ISSUES

I. Whether petitioner may deduct the New York City portion of stock transfer tax refunds as a subtraction modification under section 705(c)(6) of the Tax Law.

11. Whether the measure of a corporate partner's unincorporated business taxable income, for purpose of the exemption under section 709(2) of the Tax Law, is limited to the partner's entire net income, where the partner's franchise tax is based upon the alternative tax computed on entire net income and officers' salaries.

FINDINGS OF FACT

1. Petitioner, M.L. Weiss & Company, filed a New York State Partnership Return for the year 1980 on which it decreased its total income from business by subtracting the sum of \$174,114.00, which purportedly represented "Refunds of Transfer Taxes". Petitioner also took an additional specific exemption for income of partners subject to unincorporated business tax or State franchise tax of \$762,744.52 pursuant to section 709(2) of the Tax Law. This latter figure was computed as follows:

Judkap Corp.	\$379,381.82
Jamshey, Inc.	291,749.41
Celtictom Corp.	<u>91,613.29</u>
Total	\$762,744.52

The above amounts represented trading profits, dividends and payments to partners included in petitioner's operating expenses, less contributions.

2. On November 23, 1982, the Audit Division issued a Statement of Audit Changes to petitioner disallowing 50% of the \$174,114.00 modification, stating:

"Section 705(c)(6) of the Tax Law permits a subtraction modification for the amount of the New York State transfer tax refund included in income. Since Section 705(c)(6) does not permit a subtraction modification for New York City transfer tax refunds included in income, the New York City refunds must remain in unincorporated business taxable income. Your allowable Section 705(c)(6) modification for 1980 is \$87,057.00 and not \$174,114.00 as you reported on your return."

The Audit Division also reduced the exemption allowable under section 709(2) of the Tax Law to \$869.00, stating:

"Your allowable Section 709 exemption for 1980 is \$869.00 which consists of the corporate taxable income of Jamshey Inc. (\$305.00), Celtictom [sic] Corp. (\$564.00). No Section 709 exemption is allowed for Judkap Corp., since they did not report any New York corporate taxable income."

Subsequent to the hearing the Audit Division conceded that Judkap Corp. had reported entire net income of \$4,975.00 and that an adjustment should be made based thereon.

3. On August 10, 1983, the Audit Division issued a Notice of Deficiency to petitioner for additional unincorporated business tax due of \$33,284.40, plus interest, based on the Statement of Audit Changes.

4. Petitioner is a partnership comprised of individuals, trusts and corporations. It is engaged in business as a securities specialist.

5. In 1979, petitioner paid \$174,114.00 in New York State transfer taxes on securities transfers. Petitioner was a market maker with regard to those transactions and was entitled to refund or unincorporated business tax credit pursuant to section 701(e) of the New York State Tax Law and section S46-3.0(c) of the Administrative Code of the City of New York. The transfer tax had been deducted on petitioner's Federal partnership return for 1979. All of the transfer taxes paid, \$174,114.00, were added back to income subject to New York City unincorporated business tax. In 1980, the sum of \$174,114.00 was received in the form of refunds from New York State and New York City. That amount was included on petitioner's 1980 Federal partnership return and deducted for New York State purposes, as noted in Finding of Fact "1". Petitioner argues that the refund received was not for unincorporated business tax paid but was a refund of transfer taxes administered through the New York State and New York City unincorporated business tax collection system.

6. For their fiscal years relevant to petitioner's year at issue, petitioner's three corporate partners paid corporate franchise tax based on the alternative method of entire net income and officers' salaries provided for in section 210.1(a)(3) of the Tax Law. The computations of tax are as follows:

a. <u>Judkap Corp.</u>	
Entire Net Income	\$ 4,975.00
Officers' Salaries	<u>225,000.00</u>
Total	\$229,975.00
Less Statutory Exclusion	<u>15,000.00</u>
Subtotal	\$214,975.00
x 30%	64,493.00
Tax Rate 10%	
Alternative Tax	\$ 6,449.00
b. <u>Jamshey, Inc.</u>	
Entire Net Income	\$ 305.00
Officers' Salaries	<u>225,000.00</u>
Total	\$225,305.00
Less Statutory Exclusion	<u>15,000.00</u>
Subtotal	\$210,305.00
x 30%	63,092.00
Tax Rate 10%	
Alternative Tax	\$ 6,309.00
c. <u>Celtictom Corp.</u>	
Entire Net Income	\$ 564.00
Officers' Salaries	<u>72,000.00</u>
Total	\$ 72,564.00
Less Statutory Exclusion	<u>15,000.00</u>
Subtotal	\$ 57,564.00
x 30%	17,269.00
Tax Rate 10%	
Alternative Tax	\$ 1,727.00

Petitioner claims that the bases upon which the respective corporate taxes were computed should be used in calculating the exemptions under section 709, i.e., Judkap Corp., \$64,493.00; Jamshey, Inc., \$63,092.00; Celtictom Corp., \$17,269.00. These bases total \$144,854.00. (It is noted that this figure is substantially less than the \$762,744.52 noted above in Finding of Fact "1".) The Audit Division claims that the exemption may be claimed by using the corporate partners' entire net income only, i.e.: Judkap Corp., \$4,975.00; Jamshey, Inc., \$305.00; and Celtictom Corp., \$564.00. The total entire net income is \$5,844.00. This exceeds the \$869.00 allowed in the Statement of Audit Changes, since the Audit Division now concedes that Judkap Corp. did report \$4,975.00 in entire net income for the period at issue.

CONCLUSIONS OF LAW

A. That Chapter 444 of the Laws of 1986 amended Section 705(c)(6) of the Tax Law to provide that a refund or credit of unincorporated business income tax allowed by section §46-3.0(c) of the Administrative Code of the City of New York constitutes a modification reducing Federal gross income. The purpose of the amendment was to make the securities industry whole with respect to refunds of stock transfer tax paid in market making transactions. The amendment is applicable to those years commencing on and after August 1, 1977.

B. That Chapter 444 of the Laws of 1986 is applicable to the year at issue; accordingly, petitioner is entitled to the subtraction modification provided for in Section 705(c)(6) of the Tax Law.

C. That Section 709(2) of the Tax Law provides for the following exemption in the computation of unincorporated business taxable income:

"(2) if a partner in an unincorporated business is itself taxable under this article or under articles nine-a, **nine-b, nine-c,** thirty-two or thirty-three, an exemption for the amount of the partner's proportionate interest in the excess of the unincorporated business gross income over the deductions allowed under sections seven hundred six and seven hundred eight, but this exemption shall be limited to the amount which is included in the partner's unincorporated business taxable income allocable to this state, or included in a corporate partner's net income allocable to this state;"

D. That with respect to Section 709(2) the Court of Appeals has held:

"A logical interpretation of the plain words of the exemption provision indicates that the exemption is limited to the aggregate of the amounts of each corporate partner's distributive share which is not greater than its allocated net income. The apparent object of the exemption provision is to avoid double taxation of the distributed share of net income earned by an unincorporated business in New York City...". Richmond v. Tishelman, 61 NY2d 1, 7.

Since the distributions from petitioner to its corporate partners were subject to tax to the extent provided for under the alternate means of taxation set forth in section 210.1(a)(3) of Article 9-A of the Tax Law utilizing entire net income and officers' salaries, and since tax was in fact paid calculated on \$144,854.00 in income using said alternative method (Finding of Fact "6"), petitioner is permitted an exemption of \$144,854.00 under Section 709(2) of the Tax Law. To do otherwise would result in double taxation and would frustrate the intent of the statute. Petitioner, however, was not entitled to deduct \$762,744.00 as claimed on its return. Matter of Fishbach & Moore v. State Tax Commission (36 NY2d 605) is distinguishable from the instant case since it did not involve the section 210.1(a)(3) alternate means of computing corporate franchise tax. The standards for measuring the extent of double taxation vary with the different methods of computing tax under section 210.1 of the Tax Law.

E. That the notice of deficiency is to be reduced by allowing petitioner: (a) the subtraction modification provided for in section 705(c)(6) of the Tax Law and (b) an exemption of \$144,854.00 under Section 709(2) of the Tax Law, rather than the \$869.00 previously allowed in the Statement of Audit Changes. Except as so granted, the petition is denied and the Notice of Deficiency is otherwise sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1986

PRESIDENT

COMMISSIONER

COMMISSIONER