

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ROBERT C. KOBELL

DECISION

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

Petitioner, Robert C. Kobell, 185 East **85th** Street, New York, New York 10028, 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. 53972).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 6, 1986 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner's activities as a securities dealer constituted the carrying on of an unincorporated business, thereby subjecting the income earned from said activities to unincorporated business tax pursuant to Article 23 of the Tax Law.

FINDINGS OF FACT

1. Robert C. Kobell (hereinafter "petitioner") filed a New York State Income Tax Resident Return with City of New York Personal Income Tax for the year 1980. On said return, petitioner listed his occupation as "broker/dealer" and he attached thereto a Federal Schedule C, Profit or (Loss) From Business or

of \$15,180.00 for a total net business profit of \$26,253.00. Petitioner did not file an unincorporated business tax return for the year 1980.

2. On January 13, 1984, the Audit Division issued to petitioner a Statement of Audit Changes which advised petitioner that the income from his activities as a securities dealer is subject to the unincorporated business tax and which, therefore, asserted unincorporated business tax due in the amount of \$650.12, together with penalties (imposed pursuant to sections 722, 685(a)(1), 685(a)(2) and 685(c) **of** the Tax Law) and interest. Accordingly, on April 5, 1984, a Notice of Deficiency was issued to petitioner asserting additional tax due in the amount of \$650.12, plus penalty and interest, for a total amount due of \$1,087.83.

3. From September 20, 1979 to March 10, 1981, petitioner was employed by Bi-Planning Securities Corporation of New York (hereinafter "Bi-Planning"), **a** company which was a broker-dealer and a public stock company which traded over the counter. During the period at issue, Bi-Planning had only two employees. Petitioner's title was Assistant Vice-president and he acted as principal trader for Bi-Planning on the American Stock Exchange. As part of his employment contract, Bi-Planning provided petitioner with an options principal membership on the American Stock Exchange.

4. Bi-Planning's principal office was located in Melville, New York which was approximately one to one and one-half hours from New York City. Petitioner's supervisor was Arthur Lenowitz, President of Bi-Planning. Petitioner did not go to Bi-Planning's office each day, but reported to his supervisor by telephone. Petitioner used his own discretion in trading for Bi-Planning and did not need the permission of his supervisor to enter into a transaction.

5. Pursuant to the terms of his employment contract, petitioner made a subordinated loan of \$25,000.00 to Bi-Planning which served as security for petitioner's trading ability and which, along with \$50,000.00 made available by Bi-Planning, served as trading capital. Profits and losses from petitioner's trading were shared between Bi-Planning and petitioner on a 50 percent each basis. Petitioner received from Bi-Planning a monthly draw of \$2,500.00 plus 50 percent of the gross profit after deduction therefrom of petitioner's draw. In the event that petitioner's trading resulted in losses, his monthly \$2,500.00 draw would be deducted from the proceeds of his \$25,000.00 subordinated loan. Petitioner received a monthly check from Bi-Planning. Bi-Planning did not withhold social security, State or Federal income taxes, but did withhold certain sums from petitioner's check for medical insurance premiums. Petitioner was entitled to two weeks vacation during which time he still received his monthly draw.

6. Bi-Planning paid for some of petitioner's bookkeeping and secretarial expenses, but petitioner paid \$1,780.00 for additional bookkeeping and clerical expenses which amount he claimed on his Federal Schedule C. In addition thereto, petitioner claimed the following unreimbursed business expenses for the year 1980 on his Federal Schedule C:

Car and truck expenses	\$ 925.00
Dues and publications	510.00
Insurance	254.00
Legal and professional services	75.00
Rent on business property	3,407.00
Telephone	557.00
Lunches, dinners & customer contact	6,244.00
Exchange expenses	140.00
Business gifts	252.00
Travel & local fares	1,040.00

Beginning August 1, 1980, Bi-Planning also deducted \$500.00 per month from

that, in 1980, a seat on the American Stock Exchange was worth approximately \$30,000.00 per year, which is the reason that he did not seek to be reimbursed by Bi-Planning for these expenses. Petitioner further contends that many of the above expenses were incurred due to the fact that, because Bi-Planning's office was such a distance from the American Stock Exchange, he was forced to use part of his home for an office, hire additional clerical and bookkeeping services and incur other expenses claimed on his Federal Schedule C.

7. The employment contract entered into between petitioner and Bi-Planning states that petitioner "will be responsible for all personal taxes and will be treated as an independent agent...".

CONCLUSIONS OF LAW

A. That 20 NYCRR 203.10(c) provides, in pertinent part, as follows:

"Whether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon an examination of all the pertinent facts and circumstances of each case. The designation and description of the relationship by the parties, whether by contract or otherwise, is not necessarily determinative of the status of the individual for unincorporated business income tax purposes. Other factors to be considered in determining if there is sufficient exercise of direction and control resulting in an employer-employee relationship are whether the individual performing the services maintains his own office, engages his own assistants or hires his own employees, or incurs expenses without reimbursement... Still other factors which may have some bearing are whether or not

- (1) personal income taxes or federal insurance contributions are deducted from compensation to be paid to the individual,
- (2) whether or not the person or entity for whom the services are performed pays unemployment insurance,
- (3) whether or not the individual is a member of an employee pension plan, or
- (4) whether or not the individual is a member of an employee union **or** association."

B. That petitioner received no salary from Bi-Planning, but, instead, received a specific percentage of the profits generated by his activities as a trader on the American Stock Exchange together with a monthly draw which. **if no**

profits were generated, was paid from the proceeds of a subordinated loan which petitioner made to Bi-Planning. Social security, Federal and State income taxes were not withheld from petitioner's monthly check. Petitioner had extensive unreimbursed business expenses. Petitioner's supervisor exerted little or no control over his daily activities. Therefore, in view of all of the relevant facts and circumstances herein, petitioner was not subject to sufficient direction and control to be considered an employee of Bi-Planning, but rather was an independent contractor. Petitioner's activities for Bi-Planning for the year 1980 constituted the carrying on of an unincorporated business in accordance with the meaning and intent of section 703(a) of the Tax Law and his income from Bi-Planning for such activities was thus subject to the imposition of the unincorporated business tax.

C. That the petition of Robert C. Kobell is denied and the Notice of Deficiency dated April 5, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986


PRESIDENT


COMMISSIONER


COMMISSIONER