

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Neuberger Securities Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Year 1974. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of July, 1984, he served the within notice of Decision by certified mail upon Neuberger Securities Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Neuberger Securities Corp.  
7 Dey Street  
New York, NY 10007

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 July, 1984.



Authorized to administer oaths  
pursuant to Tax Law section 174



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

July 18, 1984

Neuberger Securities Corp.  
7 Dey Street  
New York, NY 10007

Gentlemen:

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) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Gerald D. Fischer  
Mandell, Zaroff & Fischer  
500 Park Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
NEUBERGER SECURITIES CORP. : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Franchise Tax on Business Corporations :  
under Article 9-A of the Tax Law for the Year :  
1974. :

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Petitioner, Neuberger Securities Corp., 7 Dey Street, New York, New York 10007, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the year 1974 (File No. 24773).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 22, 1984 at 10:45 A.M. Petitioner appeared by Mandell, Zaroff & Fischer, Esqs. (Gerald D. Fischer, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly recomputed petitioner's franchise tax liability on the third alternative base, entire net income plus salaries and other compensation paid to officers, pursuant to Tax Law section 210.1(a)(3).

#### FINDINGS OF FACT

1. Neuberger Securities Corp., a corporation organized under the laws of this state, was engaged in business as a stock brokerage firm from 1971 until approximately 1979.

2. For the year 1974, petitioner computed and paid franchise tax at the rate of nine percent on its entire net income of \$14,784.90. According to

Schedule F (Officers [Appointed or Elected] and Certain Stockholders) of petitioner's franchise tax report for such year, Richard Neuberger was the sole corporate officer and received salary and/or other compensation of \$104,166.64.

3. On November 18, 1977, the Audit Division issued to petitioner a Statement of Audit Adjustment, proposing additional franchise tax due for 1974 in the amount of \$7,048.99, plus interest. The Audit Division recalculated petitioner's tax liability on the third alternative base, entire net income plus salaries and other compensation paid to officers, pursuant to Tax Law section 210.1(a)(3) as shown below:

Entire net income	\$ 14,784.90
Officers' salaries per federal audit	361,683.96
	<u>\$376,468.86</u>
Exemption	(15,000.00)
Base	<u>\$361,468.86</u>
Alternative tax	\$ 9,759.66
Tax per report	(2,710.67)
Deficiency	<u>\$ 7,048.99</u>

On January 16, 1978, the Audit Division issued to petitioner a Notice of Deficiency, asserting franchise tax due for 1974 in the amount previously proposed in the Statement of Audit Adjustment.

The asserted deficiency was premised upon an Audit Information Report furnished to the Audit Division by the Internal Revenue Service. An examination of petitioner's returns conducted by the Service allegedly revealed corporate officers, in addition to Mr. Neuberger, who received compensation during 1974 in the following amounts:

<u>OFFICER</u>	<u>COMPENSATION</u>
Richard Neuberger	\$189,166.64
Arthur Lane	89,500.00
Frederick Winterberg	40,317.32
Mirella Miyamota	26,000.00
Frank Connolly	16,700.00
	<u>\$361,683.96</u>

4. Petitioner's representative and the Audit Division's representative stipulated to the following facts:

(a) Notwithstanding that Mr. Lane, Mr. Connolly and Ms. Miyamota were designated corporate officers, they in fact performed none of the customary and usual functions of officers of a corporation.

(b) These persons were named officers by reason of the rules and requirements of the New York Stock Exchange and also to enhance their prestige in the eyes of petitioner's customers.

CONCLUSIONS OF LAW


A. That Tax Law section 210.1(a), as in force during the year at issue, required the corporate taxpayer to calculate the franchise tax upon whichever of the following four alternative bases yielded the greatest liability: (1) nine percent of entire net income (or the portion thereof allocated to New York); (2) one and six-tenths mill for each dollar of its total business and investment capital (or the portion thereof allocated to New York); (3) nine percent on thirty percent of entire net income plus "salaries and other compensation paid to the taxpayer's elected or appointed officers and to every stockholder owning in excess of five per centum of its issued capital stock minus fifteen thousand dollars..."; or (4) \$125.00. The salaries and compensation paid to corporate officers must be included in the third alternative base without regard to the actual duties or functions of such individuals; there is no exemption for individuals who hold titles of executive positions but do not fulfill the functions thereof. Matter of Ter Bush & Powell, Inc. v. State Tax Comm., 58 A.D.2d 691, mot. for lv. to app. den. 43 N.Y.2d 644; Matter of Morton & Co. v. N.Y.S. Tax Comm., 91 A.D.2d 1080, affd. 59 N.Y.2d 690. Consequently, the Audit Division properly included in the calculation of the tax base compensation of all petitioner's designated officers.

B. That the petition of Neuberger Securities Corp. is hereby denied, and the Notice of Deficiency issued on January 16, 1978 is sustained.

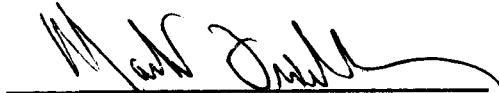
DATED: Albany, New York

STATE TAX COMMISSION

**JUL 18 1984**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER