

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
BETTY WOLD JOHNSON, ROBERT J. MORTIMER :
and SEYMOUR M. KLEIN, as Trustees, : DECISION
for a Hearing to Review a Determination of :
Stock Transfer Taxes Due or Denying a Refund :
of Stock Transfer Taxes under Article 12 :
of the Tax Law. :

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein, as trustees, c/o Lynton, Klein, Opton & Saslow, Esqs., 100 Park Avenue, New York, New York 10017, filed an application for a hearing to review a determination denying a refund of stock transfer taxes paid under Article 12 of the Tax Law. (File No. 10325).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 9, 1976 at 1:15 P.M.

The applicants appeared by Lynton, Klein, Opton & Saslow, Esqs. (Edward L. Skolnik, Esq., of counsel). The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether the maximum amount of stock transfer tax set forth in the clause beginning "provided" in subdivision 2 of section 270-a of the Tax Law, was to be applied in the public offering of 1,200,000 shares of Johnson and Johnson common stock sold by 16 trusts for which applicants are the trustees.

FINDINGS OF FACT

1. Applicants, Betty Wold Johnson, Robert J. Mortimer and Seymour Klein are trustees for 16 trusts named below (hereinafter Trusts):

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein, as trustees u/w/o Robert Wood Johnson, Jr., f/b/o Betty Wold Johnson

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein, as trustees of the trust under Article II of the 2nd Codicil of the Will of Robert Wood Johnson, Jr., f/b/o Christopher Johnson (10/19/60--Outside Trust)

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein, as trustees of the trust under Article II of the 2nd Codicil of the Will of Robert Wood Johnson, Jr., f/b/o Elizabeth Ross Johnson (10/19/60--Outside Trust)

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein, as successor trustees of the Robert Wood Johnson Charitable Trust #1 dated February 3, 1961 (Outside Trust)

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein, as successor trustees of the Robert Wood Johnson Charitable Trust #2 under agreement dated February 3, 1961 (Outside Trust)

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees f/b/o Christopher Johnson under agree-
ment dated February 3, 1961 (Outside Trust)

Betty Wold Johnson, Robert J. Mortimer and Seymour Klein,
as successor trustees of the Robert Wood Johnson 1962
Charitable Trust (Outside Trust)

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees under agreement dated June 24, 1968
between Robert Wood Johnson, IV, and Robert Wood Johnson,
Jr., f/b/o Robert Wood Johnson, IV

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as trustees under agreement dated September 15, 1971 f/b/o
Elizabeth Ross Johnson

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees under declaration dated September 8,
1969 f/b/o Elizabeth Ross Johnson

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees under declaration dated September 8,
1969 f/b/o Willard Case Johnson

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees under declaration dated September 8,
1969 f/b/o Keith Wold Johnson

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees under agreement dated March 19, 1969
between Robert Wood Johnson, IV, and Robert Wood Johnson,
Jr., f/b/o Robert Wood Johnson, IV

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees under agreement dated December 29,
1969 between Keith Wold Johnson and Robert Wood Johnson, Jr.,
f/b/o Keith Wold Johnson

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein,
as successor trustees under declaration dated August 15,
1949 f/b/o Willard Case Johnson

Betty Wold Johnson, Robert J. Mortimer and Seymour M. Klein, as successor trustees under declaration dated August 15, 1949 f/b/o Christopher Johnson

2. On August 15, 1972, the trustees entered into a distribution agreement with Kuhn, Loeb & Co., providing for the sale by the Trusts of 1,200,000 shares of common stock (the Stock) of Johnson and Johnson through a public offering of the Stock to be conducted by Kuhn, Loeb & Co.

3. The distribution agreement appointed Kuhn, Loeb & Co., and said company agreed to act as agent and broker for the selling stockholders on the terms and conditions set forth therein. Kuhn, Loeb & Co. agreed to manage the sale of the Stock as a secondary distribution under the rules of the New York Stock Exchange.

4. On August 15, 1972, Kuhn, Loeb & Co. entered into a syndication agreement with 108 participating firms at its 40 Wall Street, New York City offices. Each participating firm and Kuhn, Loeb & Co. executed a distribution agreement at the same time and place, authorizing Kuhn, Loeb & Co. to act as agent and broker in the purchase of the Stock from the Trusts.

5. On August 16, 1972, at 40 Wall Street, New York, New York, a price agreement setting the offering price of the Stock at \$125.00 per share was executed by and between the Trusts and

Kuhn, Loeb & Co. with Kuhn, Loeb & Co. agreeing to purchase all the Stock for which it did not secure purchasers.

6. The agreement among participating firms authorized Kuhn, Loeb & Co., at its discretion, to reserve shares from the participating firms for its own marketing. Such shares in the aggregate were known as the "pot." This pot totalled 304,900 shares which Kuhn, Loeb & Co. sold in brokerage transactions for the Trusts.

7. Kuhn, Loeb & Co. retained and sold its entire participation of 236,000 shares of the Stock.

8. The total number of shares sold directly by Kuhn, Loeb & Co. from its own retention and from the pot, was 540,900 shares.

9. On August 25, 1972, the closing took place at the offices of Kuhn, Loeb & Co. at 40 Wall Street, New York, New York. The transfer agent demanded and received payment of \$60,000.00 in stock transfer tax at \$.05 per share for 1,200,000 shares of common stock. Kuhn, Loeb & Co. paid the tax under protest, reserving the right to seek refund of the tax as agent for the Trusts.

10. On June 28, 1973, the applicant trustees filed a refund application. On December 17, 1975, the Miscellaneous Tax Bureau issued a Notice of Determination denying the refund

application. On January 9, 1976, the applicant trustees, filed an application for a formal hearing on the denial of the refund.

11. As "Annex 1" to the refund application, applicant Trust submitted a list denominated "Underwriters". Kuhn, Loeb & Co. headed the list of 109 firms, each with the number of shares it had agreed to sell according to the Distribution Agreement. At the foot of the list appeared "August 15, 1972 (109 Underwriters)."

12. On August 25, 1972, Kuhn, Loeb & Co. issued its own checks to the trustees for each of the 16 trusts, for the several portions of the total 1,200,000 shares authorized to be sold by Kuhn, Loeb & Co. as agent. On the same date, Kuhn, Loeb & Co. issued to the applicant Trusts confirmation of the sale of that portion of the total delineated in the Distribution Agreement. The transfer agent was present and the entire transaction took place at 40 Wall Street, New York, New York, in the offices of Kuhn, Loeb & Co.

13. After the closing at the offices of Kuhn, Loeb & Co., each participating firm's representative took possession of certificates representing the shares which it had sold as a participating firm.

14. Of the 1,200,000 shares sold by the applicant Trusts, an aggregate of 1,087,000 shares were sold through participating firms, the principal offices and syndicate departments of which were located in New York City.

15. By its own denomination, and by the determination of the Miscellaneous Tax Bureau, Kuhn, Loeb & Co. was an underwriter of the 1,200,000 share secondary issue of Johnson and Johnson common stock.

CONCLUSIONS OF LAW

A. That the transfer of title to the stock of Johnson and Johnson from each of the applicant Trusts to Kuhn, Loeb & Co. was subject to the New York stock transfer tax under section 270 of the Tax Law.

B. That Kuhn, Loeb & Co. had a contingent liability under the Distribution Agreement to purchase all of the shares of Johnson and Johnson offered for sale by the applicant trustees. Each trust sold through Kuhn, Loeb & Co., as a broker, a portion of its shares equal to $\frac{540,900}{1,200,000}$.

C. That the sales of Johnson and Johnson common stock were not the result of a single order, or multiple orders through a single broker of a single class of stock, within the meaning and intent of section 270-a of the Tax Law, but

were made in accordance with the underwriting of the secondary issue covered by the distribution agreement. As an underwriting, these sales were not subject to the \$500.00 exemption under section 270-a of the Tax Law.


D. That the United States Supreme Court has declared section 270-a of the Tax Law unconstitutional as it stands, and has remanded its determination to the New York State Court of Appeals for further proceedings. Boston Stock Exchange v. State Tax Commission, 45 A.D. 2d 365, 357 N.Y.S. 2d 116, aff'd 37 N.Y. 2d 535, 375 N.Y.S. 2d 308, 337 N.E. 2d 758, reversed and remanded U.S. Supreme Court No. 75-1019, January 12, 1977 (CCH 5 N.Y. Tax Cases 99-990).

E. That the Notice of Determination dated December 17, 1975, denying the application for refund of stock transfer taxes of Betty Wold Johnson, Robert J. Mortimer and Seymour Klein, as Trustees, is sustained.

DATED: Albany, New York
June 24, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER