

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Morgan Stanley & Co., Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Stock Transfer :  
Tax under Article 12 of the Tax Law for the Period :  
4/30/74 - 10/31/75.

\_\_\_\_\_  
State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1981, he served the within notice of Decision by certified mail upon Morgan Stanley & Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morgan Stanley & Co., Inc.  
1251 Ave. of the Americas  
New York, NY 10020

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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  
9th day of October, 1981.

*Conne A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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of :  
Morgan Stanley & Co., Inc. :

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4/30/74 - 10/31/75 :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1981, he served the within notice of Decision by certified mail upon John A. Corry the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John A. Corry  
Davis, Polk & Wardell  
One Chase Manhattan Plaza  
New York, NY 10005

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
9th day of October, 1981.

*Cornelia A. Hagelund*

*[Signature]*

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

October 9, 1981

Morgan Stanley & Co., Inc.  
1251 Ave. of the Americas  
New York, NY 10020

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) 279A of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 90 days 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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
John A. Corry  
Davis, Polk & Wardell  
One Chase Manhattan Plaza  
New York, NY 10005  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition                 | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| MORGAN STANLEY & CO., INC.                    | : | DECISION |
|   | : |          |
| for a Hearing to Review a Determination of    | : |          |
| Tax Due or a Determination Denying a Refund   | : |          |
| of Stock Transfer Tax under Article 12 of the | : |          |
| Tax Law for the Period April 30, 1974 through | : |          |
| October 31, 1975.                             | : |          |

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Petitioner, Morgan Stanley & Co., Inc., 1251 Avenue of the Americas, New York, New York 10020, filed a petition for a hearing to review a determination of tax due or a determination denying a refund of stock transfer tax under Article 12 of the Tax Law for the period April 30, 1974 through October 31, 1975 (File No. 24866).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 12, 1981 at 9:15 A.M. Petitioner appeared by Davis, Polk & Wardwell, Esqs. (John A. Corry, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the maximum New York stock transfer tax provided under section 270-a.2 of the Tax Law applied to group sales made by petitioner as a managing underwriter, to the extent that such sales represented petitioner's own allocation as a co-underwriter of such shares.

FINDINGS OF FACT

1. On February 23, 1976, the Audit Division issued to petitioner Morgan Stanley & Co., Inc. ("Morgan Stanley") a Notice of Determination of Tax Due,

asserting additional taxes due under Article 12 of the Tax Law for the period April 30, 1974 through October 31, 1975 in the amount \$788,166.59. By letter dated December 7, 1976, the Division adjusted this amount (for reasons explained infra) to \$185,164.50.

2. Petitioner paid such amount, under protest, on February 7, 1977 and on February 4, 1979 filed a Refund Application. By letter dated February 20, 1979, the Audit Division notified Morgan Stanley that its claim was rejected in its entirety. Morgan Stanley thereafter filed a demand for hearing.

3. Morgan Stanley, a Delaware corporation, is a member firm of the New York Stock Exchange and is engaged in the business of investment banking, including participation in the underwriting of securities as an underwriter, and also as a manager acting on behalf of syndicates of co-underwriters.

4. During the period at issue, pursuant to written contracts, Morgan Stanley acted as manager or co-manager, and also as a member of certain underwriting syndicates making public offerings of securities. Each written contract, or "Agreement Among Underwriters", authorized Morgan Stanley as manager to make group sales on behalf of the syndicate to dealers for resale or to retail purchasers. (A group sale is one in which the syndicate manager sells a large block of securities to such dealer or retail purchaser and allocates the shares sold to each member of the underwriting syndicate in accordance with the particular member's underwriting proportion.)

5. The Agreement Among Underwriters delineated the rights and obligations of the underwriters among themselves as members of the underwriting syndicate, and the rights and obligations between the syndicate manager and the members, including the manager. The contract committed each underwriter in the syndicate to buy a specified number of shares (its underwriting proportion) for resale by

public offering. The compensation each member received for its underwriting proportion was dependent upon the number of shares each member agreed to buy; as a matter of practice, those members which were additionally syndicate managers usually had the highest underwriting proportion. The manager received a fee for organizing and managing the offering and for assisting in preparation of the registration statement. The manager's fee was based upon the total number of shares offered to the public by all underwriters in the syndicate, including the manager; the manager's underwriting proportion played no part in calculating this fee.

6. A representative Agreement Among Underwriters, received into evidence at the hearing in this matter, provided in relevant part:

"Except for sales for the accounts of Underwriters designated by a purchaser, aggregate sales of Shares to institutions shall be made for the accounts of the several Underwriters as nearly as practicable in their respective underwriting proportions.... Sales of Shares to dealers shall be made for the account of each Underwriter approximately in the proportion that Shares of such Underwriter held by you for such sales bear to the total Shares so held."

7. At the time of such underwriting transactions, Morgan Stanley determined its stock transfer tax liability, and the liability of each other co-underwriter, by applying the maximum tax provided by section 270-a.2 of the Tax Law to the total amount of sales allocable to each co-underwriter (including itself). This method was in lieu of the application of the fixed rate per share of stock sold, provided by subdivision 2 of section 270 of the Tax Law.

8. The Audit Division asserted against petitioner additional taxes in the amount \$788,166.59, based on imposition of the "per share" rate upon all sales in each transaction, other than sales to a single purchaser.

9. Subsequently, in a letter dated December 7, 1976, the Audit Division in effect conceded that the maximum tax applied to all sales allocable to each

individual co-underwriter. However, the Division maintained its position that the maximum tax was not applicable to those sales allocable to Morgan Stanley as a participating co-underwriter, on the theory that it acted as "principal" in these transactions. The amount of tax was accordingly reduced to \$185,164.50.

#### CONCLUSIONS OF LAW

A. That the stock transfer tax of Article 12 of the Tax Law is generally computed, pursuant to subdivision 2 of section 270, on the basis of a fixed rate per share of stock sold, with the rate dependent upon the selling price of the shares (e.g., 3.25 cents per share when the selling price is between \$10.00 and \$19.99 per share).

B. That, however, under subdivision 2 of section 270-a of the Tax Law, as in effect during the period involved,<sup>1</sup> a maximum tax was imposed upon single sales of stock made in New York.

"Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale shall not exceed...the sum of three hundred fifty dollars; provided, however, that sales made within this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale." (Emphasis added.)

Thus, several sales of shares of the same class of the same issuer, made by a member of a securities exchange to several different buyers, were considered to constitute a single taxable sale (for purposes of the maximum tax), if such

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<sup>1</sup> Repealed by Ch. 878, Laws 1977.

sales were made pursuant to the order of one person on one day and were executed on a single day.

C. That an opinion of counsel for the Department of Taxation and Finance, September 7, 1976, found the above-quoted provision applicable to certain sales by co-underwriters, as follows:

"[W]here a co-underwriter places an order with the managing or another underwriter to sell shares from his underwriting commitment and the sale is made within this State by the underwriter who is a member of a securities exchange or by a registered dealer and who is permitted or required pursuant to the provisions of section 281-a of the Tax Law to pay the taxes imposed by Article 12 without the use of stamps, such sales by each co-underwriter executed on any one day of the same class of security issued by the same issuer are subject to the single taxable sale provision determined under the clause beginning with the word 'provided' of subdivision 2 of section 270-a of the Tax Law. Thus, with respect to each co-underwriter there would be one maximum amount of tax payable per day with respect to all such sales."

D. That the proviso does not, however, apply to the group sales made by the syndicate manager which were allocated to its underwriting proportion. Petitioner did indeed assume and fulfill two roles with respect to the syndicate, as manager and as a participating member. And by the terms of the Agreement Among Underwriters, petitioner was prevented from allocating group sales to the advantage of its own account; the Agreement required that sales be credited as equitably as practicable to the several underwriters' accounts. But as to those sales allocated to petitioner's underwriting proportion, petitioner had clearly sold for its own account. The manager selling stock for its own account is obviously not doing so "pursuant to one or more orders placed" with it "by the same person". Such is the clear import of the statutory language.

E. That this result is consistent with the treatment of a specialist vis-a-vis the same proviso, Opinion of Counsel, Dept. of Taxation and Finance,



August 26, 1974, 2 N.Y. State Tax Rep. (CCH) ¶57-401.60, and of an underwriter selling shares from his net retention.

F. That the petition of Morgan Stanley & Co., Inc. is hereby denied and the notice of determination, as adjusted on December 7, 1976, is sustained in full.

DATED: Albany, New York

OCT 09 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER