

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Blinder Robinson & Co. Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Stock Transfer Tax :
under Article 12 of the Tax Law for the Period :
1/1/78-6/30/80. :
_____ :

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 29th day of May, 1985, he served the within notice of Decision by certified mail upon Blinder Robinson & Co. Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Blinder Robinson & Co. Inc.
55 Post Ave.
Westbury, NY 11590

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
29th day of May, 1985.

David Parchuck

James A. Hegelund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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AFFIDAVIT OF MAILING

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 29th day of May, 1985, he served the within notice of Decision by certified mail upon Michael Greene, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Greene
Friedman and Shaftan
4 Park Ave. - Mezzanine Floor
New York, NY 10016

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 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
29th day of May, 1985.

David Parchuck

James J. O'Connell

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 29, 1985

Blinder Robinson & Co. Inc.
55 Post Ave.
Westbury, NY 11590

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) 279-a 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 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
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
Michael Greene
Friedman and Shaftan
4 Park Ave. - Mezzanine Floor
New York, NY 10016
Taxing Bureau's Representative

STATE TAX COMMISSION

On September 26, 1983, petitioner, by its representative Friedman & Shaftan, P.C., waived a formal hearing before the State Tax Commission and requested the Commission to render its decision on the Department of Taxation and Finance file, the stipulation executed by Friedman & Shaftan, P.C. (Michael E. Greene, Esq., of counsel) on behalf of petitioner and by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel) on behalf of the Audit Division, and affidavits, exhibits and memoranda of law to be submitted by March 1, 1984.

ISSUE

Whether an agreement to sell securities occurs in New York when petitioner communicates to its New York client the confirmation of the execution of an order, so as to subject the agreement to Article 12 taxation.

FINDINGS OF FACT

1. On August 4, 1980, the Audit Division issued to petitioner, Blinder, Robinson & Co., Inc. ("Blinder, Robinson"), a Notice of Determination of Tax Due, asserting additional taxes under Article 12 of the Tax Law for the period

January 1, 1978 through June 30, 1980 in the amount of \$625,949.00, plus penalty of \$156,385.00, for a total due of \$781,934.00.

2. On September 23, 1983, the Audit Division's representative and petitioner's representative entered into and executed a stipulation, which provides as follows:

- (a) The Audit Division concedes that the portion of its determination of tax in this case which was computed on the basis of projections and not on the actual examination of petitioner's books and records for the periods here involved, in the amount of \$564,749.00 is unenforceable as a matter of law.
- (b) The Audit Division concedes that it is not entitled to the penalties asserted in this case, in the amount of \$156,385.00.
- (c) The parties stipulate that the maximum amount of stock transfer taxes due from petitioner for the period January 1, 1978 to June 30, 1980, inclusive, which may be determined in this case is limited to \$60,800.00 in the aggregate.
- (d) The sole issue to be determined in this case is whether, based on the manner in which petitioner engages in stock transactions, a sale of stock takes place in the State of New York which is taxable under the New York State Stock Transfer Tax Law.

3. The relevant facts are not in dispute. Blinder, Robinson maintains offices in New York which receive orders by telephone from petitioner's customers to buy or sell stock. Petitioner's trading department is located in Colorado. When a customer calls in an order to the New York office, an account executive completes an order form, and then calls the trading room in Colorado to ascertain whether the stock is available at the price requested, or whether the stock can be sold. If the order can be filled, the trading room in Colorado executes the trade and advises the New York office that the transaction has been consummated. The New York office then advises the customer accordingly.

4. Blinder, Robinson may act as principal (market maker) or agent (buyer or seller on the customer's behalf). If Blinder, Robinson acts as principal and holds the particular stock in inventory, the main office in Colorado can readily determine whether to execute the trade at the price requested. If Blinder, Robinson does not hold the stock in inventory and must go into the market, as requested, no trade is executed until the main office first obtains the asked price. If the price exceeds that requested by a customer on a buy order (or is less than the price requested on a sell order), no trade is made unless and until the customer's offer is accepted.

5. It is the Audit Division's position that "the taxable stock transfer event occurs only when petitioner's confirmation of the buy or sell order is communicated in New York to the New York customer. Until that point an agreement to buy or sell has not been reached."

CONCLUSIONS OF LAW

A. That Article 12 of the Tax Law imposes tax on all sales, agreements to sell, memoranda of sales, deliveries and transfers of shares or certificates of stock. Section 270.1. If any one of these events occurs within this state with respect to any transaction, such transaction is subject to taxation regardless of where the remaining events occur. 20 NYCRR 440.2. The tax is imposed "not on the property represented by the shares of stock nor on the shares, but on the privilege of sale or the agreement to sell the shares (citation omitted)." O'Kane v. State of New York, 172 Misc. 829, 831 (Ct. Cl., 1939), affd., 283 N.Y. 439.

B. That the sales at issue herein were executed and consummated outside this state. The agreements of purchase or sale constituted unilateral contracts, under which New York customers' offers were accepted by petitioner's performance


in Colorado. The "confirmations" of the completed transactions were exactly as the term itself implies: mere proof of contracts previously made. Accordingly, communication of confirmations by petitioner's New York office to its New York customers did not subject the sales to the stock transfer tax. Lee v. Bickell, 292 U.S. 415; 1946 Opns. Atty. Gen. 321; 1934 Opns. Atty. Gen. 204; 1928 Opns. Atty. Gen. 125.

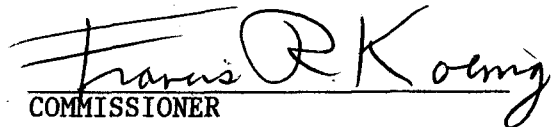
C. That the petition of Blinder, Robinson & Co., Inc. is hereby granted.

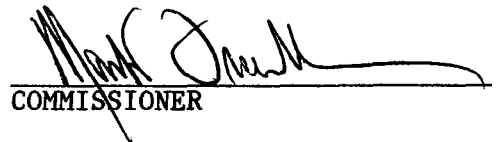
DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1985


PRESIDENT


COMMISSIONER


COMMISSIONER