

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
HERBERT G. TULLY

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income & Unincorporated Business :
Taxes under Article(s) 22 & 23 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1968

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 16th day of August, 1977, she served the within
Notice of Decision by (certified) mail upon Herbert G. Tully
~~representative of~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Herbert G. Tully
926 Bloomfield Avenue
Glen Ridge, New Jersey 07028
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~~
~~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

16th day of August, 1977.

Marsina Donnini

Janet Bush

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
HERBERT G. TULLY

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income & Unincorporated Business :
Taxes under Article(s) 22 & 23 of the :
Tax Law for the Year ~~1967 or 1968~~ :
1968

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 16th day of August, 1977, she served the within

Notice of Decision by (certified) mail upon John K. Richardson & Kenneth R.

Parker of Peat, Marwich, (representative of) the petitioner in the within proceeding,
Mitchell & Co.

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: John K. Richardson & Kenneth R. Parker of
Peat, Marwich, Mitchell & Co.
50 Wolf Road
Albany, New York 12205

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

16th day of August, 19 77

Marsina Donnini

Janet M. [Signature]



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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

August 16, 1977

**Herbert G. Tully
926 Bloomfield Avenue
Glen Ridge, New Jersey 07028**

Dear Mr. Tully:

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) **690 & 722** 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 **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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**PAUL B. COBURN
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

ISSUES

I. Whether the American Stock Exchange seat owned by the petitioner and used by him in his business as a dealer in securities, was converted from a business asset to a personal asset held for investment purposes only.

II. Whether the sale of the stock exchange seat in 1968 was attributable to New York sources and subject to New York State personal income tax.

III. Whether the proceeds from the sale of the stock exchange seat was subject to the unincorporated business tax.

IV. Whether the penalty imposed under section 685(a) of the Tax Law for failure to file an unincorporated business tax return should be waived.

FINDINGS OF FACT

1. The petitioner, Herbert G. Tully, a resident of Glen Ridge, New Jersey, filed a New York State nonresident personal income tax return for 1967. He also filed a New York State unincorporated business tax return for 1967 indicating income as a stock broker and dealer in securities, as a sole proprietor conducting business at 86 Trinity Place, New York, New York. At that time, the petitioner was a member of the American Stock Exchange and used his seat on said exchange in connection with his stock brokerage business.

2. The petitioner filed a 1968 New York State nonresident income tax return in which he reported gain on sale of American Stock Exchange seat in the amount of \$112,100.00, and \$3,600.00 as a liquidating fee from business. The petitioner did not file an unincorporated business tax return for 1968. The petitioner signed a consent on December 8, 1971 extending to April 15, 1973 the time within which to issue an assessment of personal income and unincorporated business taxes for the year ending December 31, 1968.

3. On April 13, 1973, the Income Tax Bureau issued a Statement of Audit Changes against the petitioner imposing additional personal and unincorporated business taxes for 1968 as follows: Personal income tax due \$3,540.65, unincorporated business tax due \$13,741.01, total tax due \$17,281.66, penalty under section 685(a) 25% of \$13,741.01, or \$3,435.25-plus additional interest of \$4,143.45, for a grand total of \$24,860.36. Accordingly, it issued a Notice of Deficiency therefor. The petitioner timely filed a petition for redetermination of said deficiency.

4. On or about June 8, 1972, the petitioner filed a claim for refund of personal income tax paid in the amount of \$13,471.11 for the year 1968. He claimed that he had retired from business as a stock broker and dealer in securities on July 1, 1967, and that from that date until the date of the sale of his seat on the American

Stock Exchange, he did not use his seat to transact any business, and that no attempt was made to sell the seat until the date of sale. He further alleged that as a result, the seat was transformed from a business asset to a capital asset held for investment purposes only, and therefore, as a nonresident, he was not liable for any personal income tax. The Income Tax Bureau denied the claim for refund.

5. On his personal income tax return for 1968, the petitioner adjusted the cost of the stock exchange seat on the basis of the fair market value as of December 31, 1959, and subtracted therefrom the amount of \$25,288.81. The Income Tax Bureau disallowed said subtraction on the ground that there is no modification based solely on the difference in cost and the December 31, 1959 fair market value.

6. The basis for the imposition of unincorporated business tax is that unincorporated business income includes any gain from the liquidation of a business. The gain from the sale of the stock exchange seat and other business income was, therefore, held subject to tax for unincorporated business tax purposes. The gain was computed at \$254,167.00 using \$20,833.00 as the cost basis which was the fair market value as of January 1, 1935, in accordance with section 705(c)(3) and 386-b of the Tax Law.

7. The petitioner did not appear at the hearing. The proceeds from the sale of the stock exchange seat on August 1, 1968 amounted to \$275,000.00. The petitioner became a member of the American Stock Exchange on June 13, 1917, when he purchased a seat on said exchange for \$9,500. He continued in business as stock broker and dealer in securities until July of 1967.

8. The petitioner was advised by his accountants that he was not liable for unincorporated business taxes for 1968 and he relied on said advice.

CONCLUSIONS OF LAW

A. That the situs of the American Stock Exchange seat owned by the petitioner and used by him in his business was the State of New York; that the gain from the sale of said seat was attributable to New York sources within the intent and meaning of section 632 of the Tax Law. (Whitney v. Graves, 246 App. Div. 652, aff'd. 271 N.Y. 594, aff'd. 299 U.S. 366).

B. That the petitioner was liable for additional personal income tax, and the imposition of additional income tax was correct; that the petition of Herbert G. Tully with respect thereto be and the same is hereby denied. Additional interest shall be added, as required pursuant to the Tax Law, until paid.

C. That the petitioner's stock exchange seat was not converted from a business asset to a personal asset held solely for investment purposes.

D. That the liquidation of the petitioner's business did not occur until he sold his stock exchange seat on August 1, 1968. The liquidation of the petitioner's business on August 1, 1968 constituted the carrying on of an unincorporated business subject to unincorporated business tax, within the intent and meaning of section 703(a) of the Tax Law.

E. That reasonable cause exists for failure to file an unincorporated business tax return for 1968 in accordance with Finding of Fact "8", supra; that the petition is granted to the extent that the penalty imposed pursuant to section 685(a) of the Tax Law be waived.

F. That the petition of Herbert G. Tully with respect to the imposition of unincorporated business tax, except as modified above, be and the same is in all other respects denied.

DATED: Albany, New York
August 16, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER



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

P 1-485

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

August 16, 1977

Herbert G. Tully
926 Bloomfield Avenue
Glen Ridge, New Jersey 07028

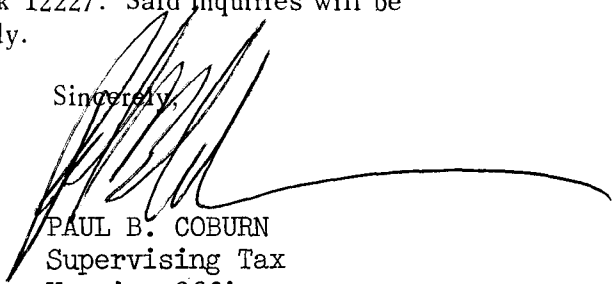
Dear Mr. Tully:

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of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 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 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


PAUL B. COBURN
Supervising Tax
Hearing Officer

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
HERBERT G. TULLY : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income and :
Unincorporated Business Taxes under :
Articles 22 and 23 of the Tax Law for :
the Year 1968. :

Petitioner, Herbert G. Tully, residing at 926 Bloomfield Avenue, Glen Ridge, New Jersey 07028, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1968. (File No. 01242).

A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on November 26, 1974 at 10:00 A.M.. The petitioner appeared by John K. Richardson and Kenneth R. Parker of Peat, Marwick, Mitchell & Co.. The Income Tax Bureau appeared by Saul Heckelman, Esq. (Solomon Sles, Esq. of counsel).

ISSUES

I. Whether the American Stock Exchange seat owned by the petitioner and used by him in his business as a dealer in securities, was converted from a business asset to a personal asset held for investment purposes only.

II. Whether the sale of the stock exchange seat in 1968 was attributable to New York sources and subject to New York State personal income tax.

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IV. Whether the penalty imposed under section 685(a) of the Tax Law for failure to file an unincorporated business tax return should be waived.

FINDINGS OF FACT

1. The petitioner, Herbert G. Tully, a resident of Glen Ridge, New Jersey, filed a New York State nonresident personal income tax return for 1967. He also filed a New York State unincorporated business tax return for 1967 indicating income as a stock broker and dealer in securities, as a sole proprietor conducting business at 86 Trinity Place, New York, New York. At that time, the petitioner was a member of the American Stock Exchange and used his seat on said exchange in connection with his stock brokerage business.

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7. The petitioner did not appear at the hearing. The proceeds from the sale of the stock exchange seat on August 1, 1968 amounted to \$275,000.00. The petitioner became a member of the American Stock Exchange on June 13, 1917, when he purchased a seat on said exchange for \$9,500. He continued in business as stock broker and dealer in securities until July of 1967.

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CONCLUSIONS OF LAW

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B. That the petitioner was liable for additional personal income tax, and the imposition of additional income tax was correct; that the petition of Herbert G. Tully with respect thereto be and the same is hereby denied. Additional interest shall be added, as required pursuant to the Tax Law, until paid.

C. That the petitioner's stock exchange seat was not converted from a business asset to a personal asset held solely for investment purposes.

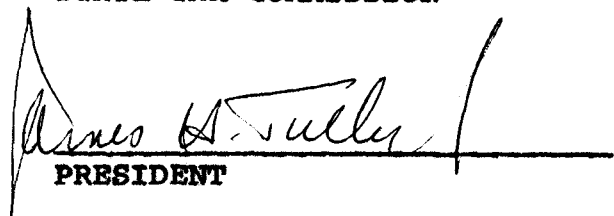
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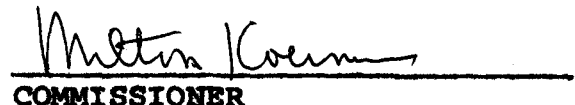
E. That reasonable cause exists for failure to file an unincorporated business tax return for 1968 in accordance with Finding of Fact "8", supra; that the petition is granted to the extent that the penalty imposed pursuant to section 685(a) of the Tax Law be waived.

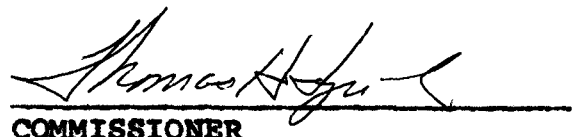
F. That the petition of Herbert G. Tully with respect to the imposition of unincorporated business tax, except as modified above, be and the same is in all other respects denied.

DATED: Albany, New York
August 16, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

FORMAL HEARING

Department of Taxation and Finance
TAX APPEALS BUREAU

ALBANY, N. Y. 12227

MOVED NOT FORWARDABLE

~~Herbert G. Tully
926 Bloomfield Avenue
Glen Ridge, New Jersey 07028~~



Expended
T.
K.