

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Berton J. & Margaret M. Delmhorst :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1967 - 1970. :

AFFIDAVIT OF MAILING

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 11th day of January, 1980, he served the within notice of Decision by certified mail upon Berton J. & Margaret M. Delmhorst, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Berton J. & Margaret M. Delmhorst
91 Elm St.
Stonington, CT 06378

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
11th day of January, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Berton J. & Margaret M. Delmhorst :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax & UBT :
under Article 22 & 23 of the Tax Law :
for the Years 1967 - 1970. :

AFFIDAVIT OF MAILING

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 11th day of January, 1980, he served the within notice of Decision by certified mail upon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sirs
Edwin A. McGuire & Kenneth R. McGuire
Suite 1113, 150 Broadway
New York, NY 10038

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
11th day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 11, 1980

Berton J. & Margaret M. Delmhorst
91 Elm St.
Stonington, CT 06378

Dear Mr. & Mrs. Delmhorst:

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:

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
Edwin A. McGuire & Kenneth R. McGuire
Suite 1113, 150 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petitions :
of :
BERTON J. DELMHORST : DECISION
and :
MARGARET M. DELMHORST :
for Redetermination of a Deficiency or :
for Refund of Personal Income and Unin- :
corporated Business Taxes under Articles :
22 and 23 of the Tax Law for the Years :
1967, 1968, 1969 and 1970. :

Petitioners, Berton J. Delmhorst and Margaret M. Delmhorst, 91 Elm Street, Stonington, Connecticut 06378, filed petitions 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 years 1967, 1968, 1969 and 1970 (File Nos. 01949 and 01950).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on May 2, 1973 at 2:30 P.M. Petitioners appeared by Edwin A. McGuire and Kenneth R. McGuire, Esqs. The Income Tax Bureau appeared by Saul Heckelman, Esq. (Solomon Sies, Esq., of counsel).

ISSUES

I. Whether the total gain derived from the sale of a New York Stock Exchange seat was subject to personal income tax, where the gain was not reportable for Federal income tax purposes.

II. Whether interest income received by a nonresident on the sale of a stock exchange seat constituted income derived from a trade, business, profession, or occupation carried on in this State.

FINDINGS OF FACT

1. Petitioners, Berton J. and Margaret M. Delmhorst, timely filed a New York State Combined Income Tax Return for 1967. On January 1, 1968, petitioners became residents of Connecticut and did not file New York State income tax returns for 1968, 1969 and 1970.

2. On April 10, 1972, the Income Tax Bureau issued a Notice of Deficiency against petitioner Berton J. Delmhorst for 1967 in the amount of \$21,400.00 in personal income tax, plus interest of \$5,120.38, for a total of \$26,520.38. Said Notice was issued on the grounds that the gain on the sale of a New York Stock Exchange seat was subject to personal income tax. On April 10, 1972, the Income Tax Bureau issued another Notice of Deficiency against both petitioners for 1968, 1969 and 1970 in the amount of \$4,152.00 in personal income tax, plus penalty (pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law) of \$1,190.24, and interest of \$495.21, for a total of \$5,837.45. Said Notice was issued on the grounds that interest income which was received from the sale of petitioner Berton J. Delmhorst's stock exchange seat constituted income from New York State sources and, therefore, was subject to personal income tax.

On August 31, 1971, the Income Tax Bureau issued a Statement of Audit Changes in which it claimed that the interest income derived from the sale of the stock exchange seat was subject to unincorporated business tax. Petitioner Berton J. Delmhorst filed a petition protesting the proposed audit changes. However, the Income Tax Bureau apparently failed to issue a Notice of Deficiency with respect to unincorporated business tax.

3. Petitioner Berton J. Delmhorst purchased a stock exchange seat in April of 1941 for \$29,000.00. On December 31, 1953, he became a partner of Whitehouse & Co., a stockbrokerage firm doing business solely within New York State, to which he pledged the use of the seat but retained ownership of it.

The partnership agreement provided that he was to contribute \$20,000.00 plus the use of the seat to said partnership, and that said seat was his capital contribution to the firm. The partnership terminated its business operations in the latter part of 1967. On December 28, 1967, the membership owned by petitioner Berton J. Delmhorst was sold to his son for \$457,000.00, pursuant to a voluntary payment subordination agreement.

4. At the time of the formal hearing, petitioner Berton J. Delmhorst had not received any payments on the principal of the note, but for 1968, 1969 and 1970, did receive interest of 5% on the unpaid balance of said principal.

5. Petitioner contended that the gain on the sale of the stock exchange seat could not be taxed by New York, since the gain was not reported as income on his Federal tax return.

CONCLUSIONS OF LAW

A. That petitioner Berton J. Delmhorst is subject to personal income tax on the entire gain derived from the sale of his stock exchange seat. Although the gain had not been reported for Federal income tax purposes, it was sold while he was a New York resident; therefore, it was accruable and taxable within the meaning and intent of section 654(c) of the Tax Law and 20 NYCRR 148.10(b).

B. That interest income received by petitioner Berton J. Delmhorst from the sale of his stock exchange seat during 1968, 1969 and 1970, constituted income derived from a business, trade, profession, or occupation carried on solely within New York State; therefore, said income is subject to New York State personal income tax within the meaning and intent of section 632(b)(1)(B) of the Tax Law and 20 NYCRR 131.2(a)(2). See also: Matter of Louis Berry, State Tax Commission, January 11, 1972.

C. That if no Notice of Deficiency was issued against petitioner Berton J. Delmhorst for unincorporated business tax, his petition would be premature. In any event, petitioner Berton J. Delmhorst was not engaged in business as a sole proprietor prior to the time he retired, or at the time the seat was sold; therefore, aside from his liability as a partner, he is not liable for unincorporated business tax on interest which he received from the sale of his stock exchange seat.

D. That the petitions of Berton J. and Margaret M. Delmhorst are granted to the extent indicated in Conclusion of Law "C" and that, except as so granted, they are in all other respects denied. The Notice of Deficiency, as modified, is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JAN 11 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER