

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Girard Henderson :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for the :
Year 1968. :

State of New York
County of Albany

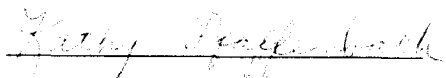
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Girard Henderson, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Girard Henderson
P.O. Box 19720
Las Vegas, NV 89119

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
29th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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of :
Girard Henderson :
AFFIDAVIT OF MAILING
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the Year 1968. :

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Albert R. Durso the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

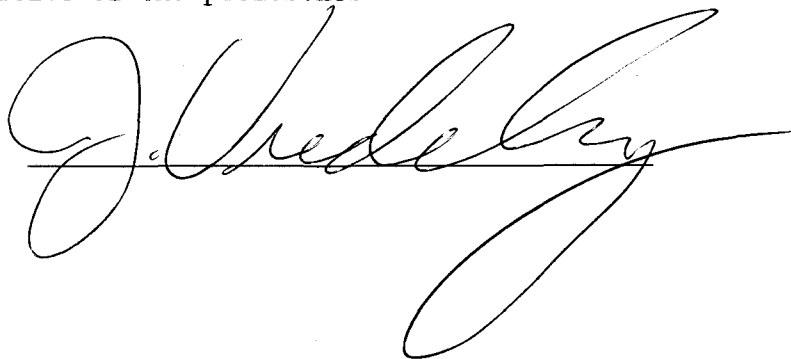
Albert R. Durso
Main & Hurdman
Park Ave. Plaza, 55 E. 52nd St.
New York, NY 10055

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
29th day of December, 1982.

Kathy Plaffenbach
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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the Year 1968. :
:

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Mario P. Borini the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mario P. Borini
One Washington Square Village
New York, NY 10012

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
29th day of December, 1982.

Kathy Applegate

J. Vredenburg

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

December 29, 1982

Girard Henderson
P.O. Box 19720
Las Vegas, NV 89119

Dear Mr. Henderson:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Mario P. Borini
One Washington Square Village
New York, NY 10012
AND
Albert R. Durso
Main & Hurdman
Park Ave. Plaza, 55 E. 52nd St.
New York, NY 10055
Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on November 17, 1981 at 9:15 A.M. Petitioner appeared by Albert R. Durso, C.P.A. and Mario P. Borini, C.P.A. The Audit Division appeared by Ralph J. Vecchio (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Notice of Deficiency should be dismissed for failure to conduct a prompt hearing.

II. Whether New York personal income tax and unincorporated business tax were properly imposed on the gain from the sale of petitioner's New York Stock Exchange membership and on commission income related to the sale of securities.

FINDINGS OF FACT

1. Petitioner did not file a New York State Personal Income Tax Return or an unincorporated business tax return for the year 1968.

2. Petitioner and his wife filed a joint U.S. Individual Income Tax Return for 1968. On this return petitioner reported shared commissions on the sales of securities with Eastman Dillon Company in the amount of \$10,137.00 and with Sartorius & Co. in the amount of \$1,586.00. Petitioner also reported as a long-term capital gain the gain on the sale of a stock exchange seat in 1968 in the amount of \$328,985.00.

3. On December 29, 1971, petitioner executed a consent extending the statute of limitations for assessment of personal income and unincorporated business taxes until on or before April 15, 1973.

4. On January 29, 1973, the Audit Division issued a Notice of Deficiency accompanied by an explanatory Statement of Audit Changes which asserted a deficiency of personal income tax of \$15,760.60 and unincorporated business tax of \$18,188.94. In addition, penalties were asserted pursuant to section 685(a) of the Tax Law, for failure to file a return, and section 685(b) of the Tax Law, for negligence, in the total amount of \$10,184.87. The total amount of the deficiency, asserted for personal income tax, unincorporated business tax, penalties and interest, was \$51,851.14. The Statement of Audit Changes showed that the gain on the sale of the New York Stock Exchange membership or seat and the commissions received from the use of the stock exchange seat were subject to personal income tax and unincorporated business tax.

5. Girard Henderson's petition was received by the Audit Division on May 1, 1973. The formal hearing on the perfected petition was held on November 17, 1981.

6. In 1968 petitioner was 64 years old and resided in Nevada. During the year in issue petitioner owned a seat on the New York Stock Exchange. Petitioner

viewed his seat on the New York Stock Exchange as a passive investment similar to the way one would view the ownership of stocks or bonds.

7. In 1968, petitioner was the chairman and chief executive of a family investment company called Alexander Dawson, Inc. Petitioner owned seventy-three percent of the stock of Alexander Dawson, Inc. Petitioner was also on the board of directors of several companies including Avon Products, Inc. ("Avon"). Petitioner would travel to New York from his home in Nevada approximately ten times a year to attend meetings with Avon personnel.

8. In 1968, petitioner used his seat on the New York Stock Exchange to reduce commissions on the trading of securities for himself or Alexander Dawson, Inc. Petitioner stated that he was not a floor broker or trader, because he did not take the examination which would have enabled him to trade on the floor of the New York Stock Exchange. Petitioner did not have office space in New York City. However, his name was listed on a plaque at Sartorius & Co.

9. In 1968, it was the practice of the New York Stock Exchange members to receive a portion of the commission paid to trading brokers on sales transacted on their own behalf. The commission income reported by petitioner on his 1968 U.S. Individual Income Tax Return reflected refunds by Sartorius Company and Eastman Dillon Company of a portion of the commissions charged for petitioner's trading for his own account and for the account of Alexander Dawson, Inc.

CONCLUSIONS OF LAW

A. That the record does not establish that petitioners have been prejudiced by the asserted delay in conducting a hearing following the filing of the petitions. Moreover, "...the State cannot be estopped from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority."

(Matter of McMahan v. State Tax Comm., 45 A.D.2d 624, 627, mot. for lv. to app. den. 36 N.Y.2d 646. Accord, Matter of Walker & Co. v. State Tax Comm., 62 A.D.2d 77, 80). Accordingly, the argument to dismiss on the ground of laches is hereby denied.

B. That in view of the fact that petitioner was trading the stock of or owned by a family investment company he was carrying on a business in the State of New York. The stock exchange seat was intangible personal property which had a business situs in the State of New York (New York ex. rel Whitney v. Graves, 299 U.S. 366). Therefore, the gain on the sale of the stock exchange membership was subject to New York personal income tax (Accord, Matter of Welles Murphey, Sr. and Ann Murphey, State Tax Commission, January 2, 1980).

C. That unincorporated business gross income includes gain from the sale of property employed in a business in New York (Tax Law §705). Therefore, the gain on the sale of the stock exchange seat was properly subject to unincorporated business tax.

D. That the petition of Girard Henderson is hereby denied.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

Robert E. Brundage
ACTING PRESIDENT

Francis R. Koeng
COMMISSIONER

Mark J. Fried
COMMISSIONER