

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Osher Chechik
1728 51st St.
Brooklyn, NY 11204

Dear Mr. Chechik:

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
Murray M. Weinstein
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
OSHER CHECHIK	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Tax under Articles 22 and 23 of the	:	
Tax Law for the Years 1973, 1974 and 1975.	:	

Petitioner, Osher Chechik, 1728-51st Street, Brooklyn, New York 11204, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business tax under Articles 22 and 23 of the Tax law for the years 1973, 1974 and 1975 (File No. 23656).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 30, 1980 at 1:15 P.M. Petitioner appeared by Murray Weinstein, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether petitioner's activities conducted during the years 1973 and 1974 from which he earned commissions and/or finder's fees constituted the operation of an unincorporated business.

II. Whether a distributive share of the unincorporated business tax paid by Bruns, Nordeman, Rea & Co. for the years 1974 and 1975 is includable in petitioner's income for New York State Income Tax purposes for 1974 and 1975.

III. Whether the penalties asserted herein may be remitted for reasonable cause.

FINDINGS OF FACT

1. Petitioner, a stock broker with the firm Bruns, Nordeman, Rea & Co., timely filed New York State resident income tax returns for the years 1973, 1974 and 1975. He did not file any unincorporated business tax returns for 1973 and 1974.

2. On April 12, 1978, The Audit Division issued a Notice of Deficiency against petitioner for \$6,425.00 in tax plus \$4,490.45 in penalty and interest. Annexed to the Notice of Deficiency was a copy of a Statement of Audit Changes, dated December 5, 1977, that had previously been issued to petitioner. The Statement of Audit Changes provided, in part, as follows:

<u>"PERSONAL INCOME TAX</u>	<u>1974</u>	<u>1975</u>	
Unincorporated business tax adjustment	\$ 1,028.00	\$ 1,295.00	
Capital loss adjustment	-	500.00	
Total adjustment	<u>\$ 1,028.00</u>	<u>\$ 1,795.00</u>	
Additional Personal Income Tax			
Due at 15%	\$ 154.20	\$ 269.25	
Tax Surcharge	-	6.73	
Total Additional Personal Income Tax Due	<u>\$ 154.20</u>	<u>\$ 275.98</u>	\$ 430.18
 <u>UNINCORPORATED BUSINESS TAX</u>	 <u>1973</u>	 <u>1974</u>	
Business income reported	\$82,387.00	\$29,459.61	
Federal adjustment	17,150.11	-	
Business income corrected/reported	<u>\$99,537.11</u>	<u>\$29,459.61</u>	
Allowance for services	5,000.00	5,000.00	
Net Business Income	<u>\$94,537.11</u>	<u>\$24,459.61</u>	
Exemption	5,000.00	5,000.00	
Taxable business income	<u>\$89,537.11</u>	<u>\$19,459.61</u>	
Unincorporated Business Tax Due at 5%	\$ 4,924.54	\$ 1,070.28	\$ 5,994.82
Total Tax Due			<u>\$ 6,425.00</u>
Section 685(c) penalty			65.76
Section 685(a)(1) and (a)(2) penalty			2,592.77
Interest			<u>1,658.18</u>
TOTAL DUE			<u>\$10,741.71"</u>

3. Attached to the Statement of Audit Changes is a recomputation of taxes due in which a revision was made reducing the "Total Tax Due" from \$6,425.00 to

\$6,163.01. This revision was a result of a pre-hearing conference conducted on June 22, 1979. Petitioner's business income for 1973 was reduced by \$3,763.53 which represented executor's fees received by him.

4. Petitioner did not put in issue the 1975 capital loss adjustment.

5. Petitioner admitted that during 1973 and 1974 he conducted various transactions. These transactions were for his pecuniary gain and they were not in any way connected with his relationship with Bruns, Nordeman, Rea & Co. Petitioner reported said income for 1973 on Federal Schedule "C", Profit (or Loss) From Business or Profession. For 1974 petitioner reported said income on his New York income tax return as "other income".

6. The income in issue which petitioner characterized as finder's fees, commissions or gifts, is as follows:

	<u>1973</u>	<u>1974</u>
Merban	\$88,759.13	\$13,911.24
Universal Supply	20,000.00	20,000.00
Pollack	400.00	
Benedict	500.00	
Mayer		2,609.01
Eastman		308.22
Wang & American Bulk Carriers		2,531.74

7. Petitioner testified that the following are the sources of the income:

(a) Merban - The petitioner in 1973 made three transactions and in 1974 made a single transaction of finding a buyer of Korean Notes and accordingly earned finder's fees in each year.

(b) Universal Supply - In 1970 petitioner found charter parties for ships owned by Universal. Universal agreed to pay petitioner \$100,000.00 payable over a period of five years in the sum of \$20,000.00 per year. Petitioner did not have to perform any work for Universal in 1973 and 1974.

(c) Pollack - In 1973 Pollack desired to purchase a house. Petitioner introduced him to a broker through whom he made a purchase. He was so very happy with the purchase he made that he gave petitioner \$400.00 as a gift.

(d) Benedict - In 1973 Benedict paid petitioner a \$500.00 finder's fee for a one time transaction of finding a buyer for Israeli Bonds.

(e) Mayer - Petitioner did not recall what he did to earn \$2,609.01 in 1974.

(f) Eastman - Petitioner did not recall what he did to earn \$308.22 in 1974.

(g) Wang and American Bulk Carriers - In September 1974 and in December 1974 they paid petitioner commissions totaling \$2,531.74 for his assistance in the establishment of a Time Deposit Account and its subsequent renewal.

8. Petitioner alleged that \$1,817.00 of the \$13,911.24 received from Merban in 1974 represents an expense deduction which was not claimed against the reported income. He claimed that it represented an accommodation commission earned by and paid over to one Max Landau for the sale of Peruvian Notes. Petitioner did not offer any evidence as to why this arrangement was made other than to testify that Merban did not want to give a check to Landau because he was from London, England and that they did not know him very well. He also did not submit a list of expenses claimed for 1974 to show that said deduction was not claimed.

9. Petitioner asserted the transactions in issue herein were conducted from his office at Bruns, Nordeman, Rea & Co. Petitioner further asserted that Bruns, Nordeman, Rea & Co. did not share in the commissions.

10. Against the income in issue herein for 1973, petitioner deducted business expenses totaling \$27,272.00. The expenses were in part for such items as rent, \$1,800.00; insurance, \$322.00; telephone, \$1,311.00; travel, \$3,382.00; and entertainment, etc. \$16,613.00. The Internal Revenue Service audited petitioner's federal income tax return for 1973 and disallowed \$505.11 for rent, \$2,272.00 for travel and \$14,373.00 for entertainment. The record is

silent as to expenses incurred in connection with the 1974 income in issue herein.

11. The 1973 expenses petitioner claimed for rent, insurance and telephone were all in connection with his home. Petitioner alleged that all the expenses were incurred as a result of his activities as a stockbroker for Bruns, Nordeman, Rea & Co. from which he received \$9,320.00 in wages.

12. Petitioner was of the opinion that he was not conducting a business since his activities were not regular, continuous and sufficiently significant to constitute a business. Further, he related that he did not hold himself out to be conducting a business, nor did he have an office, nor did he have any stationery, nor business cards, nor did he have a business telephone listing. He alleged that he earned the income by making one or two phone calls and spent little time in negotiating the transactions. However, he testified that he incurred travel expenses to see "The American Bulk".

13. Petitioner relied on the advice of a certified public accountant that the income in issue was not subject to an unincorporated business tax. Further, petitioner was protesting a similar imposition of unincorporated business tax for tax years 1970, 1971 and 1972.

14. On August 16, 1977, the State Tax Commission, in a similar fact situation, sustained tax deficiencies against petitioner for the years 1970, 1971 and 1972.

15. Petitioner argued that in reference to Issue II, the fact that the unincorporated business taxes were charged off against his net distribution, did not make him a payor of the tax and therefore, it should not be added back to his net income.

CONCLUSIONS OF LAW

A. That in general, businesses which constitute unincorporated business when conducted or engaged in by an individual include, among other activities, all brokerage services. [see 20 NYCRR 203.1(a)] The activities of petitioner in the various transactions carried on by him during the years 1973 and 1974 constituted brokerage services, the conduct of which constitutes an unincorporated business within the meaning and intent of section 703(a) of Tax Law.

B. That generally the continuity, frequency and regularity of activities, as distinguished from casual or isolated transactions and the amount of time, thought and energy devoted to the activities are factors which are to be taken into consideration in determining whether an activity is subject to unincorporated business tax [20 NYCRR 203.1(a)] Petitioner carried on his activities over a period of five years. The activities involved various individuals and corporations. (see Matter of Osher Chechik, State Tax Commission, August 16, 1977) Therefore, petitioner has failed to sustain his burden of proof (section 689(e) of Tax Law) to show that the transactions were casual or isolated in nature or that he devoted little time or energy to the activities.

C. That section 612(b)(3) of the Tax Law requires income taxes imposed by this state or any other taxing jurisdiction, to the extent deducted in determining federal adjusted gross income, to be added to federal adjusted gross income. Since the unincorporated business taxes were charged off against petitioner's net distribution received from Bruns, Nordeman, Rea & Co., the taxes were deducted in determining federal adjusted gross income and are required to be added back pursuant to section 612(b)(3) of the Tax Law. Further, the taxes

paid by the partnership were paid on behalf of petitioner, since as a partner he is liable for taxes owed by the partnership.


D. That petitioner has shown reasonable cause to justify remission of the penalties imposed under section 685(a)(1) and (2) of the Tax Law. However, petitioner has not shown that he is entitled to an exception for underpayment of estimated tax under section 685(d) of the Tax Law. Therefore, the penalty imposed under section 685(c) of the Tax Law is sustained.

E. That the petition of Osher Chechik is granted to the extent indicated in Conclusion of Law "D", supra and is in all other respects denied and the Notice of Deficiency, as modified, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER