

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Herbert Dobuler	: : : : : :	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1974 & 1975.		

State of New York
County of Albany

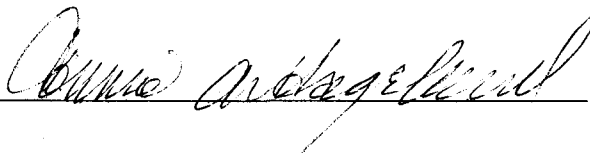
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Herbert Dobuler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

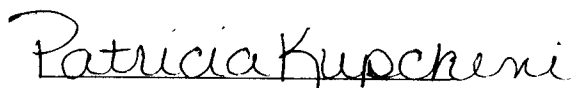
Herbert Dobuler
12550 Biscayne Blvd. Suite 704
N. Miami Beach, FL 33181

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
21st day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herbert Dobuler :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1974 & 1975. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Lester G. Merritt the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

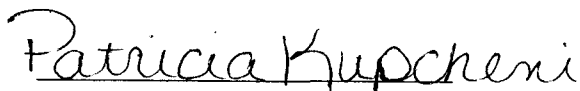
Lester G. Merritt
Panfel, Merritt & Co.
8 Freer St.
Lynbrook, NY 11563

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
21st day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 21, 1983

Herbert Dobuler
12550 Biscayne Blvd. Suite 704
N. Miami Beach, FL 33181

Dear Mr. Dobuler:

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 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Lester G. Merritt
Panfel, Merritt & Co.
8 Freer St.
Lynbrook, NY 11563
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HERBERT DOBULER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1974 and 1975.	:	

Petitioner, Herbert Dobuler, 12550 Biscayne Boulevard, Suite 704, North Miami Beach, Florida 33181, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1974 and 1975 (File No. 29441).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 19, 1982 at 10:55 A.M., with all briefs to be submitted by February 1, 1983. Petitioner appeared by Tanner & Gilbert, Esqs. (Anders R. Sterner, Esq., of counsel) and Panfel, Merritt & Co. (Lester G. Merritt, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

Whether petitioner, in maintaining a trading account, was acting as an individual trading for his own account or a partner in Purcell, Graham & Co.

FINDINGS OF FACT

1. On July 11, 1978, the Audit Division issued a Statement of Audit Changes against petitioner for the years 1974 and 1975 showing personal income tax due of \$23,193.27, penalties pursuant to section 685(a)(1) and (a)(2) of the Tax Law of \$8,825.26 and interest of \$5,086.63, for a total sum of \$37,105.16.

Said Statement was issued on the ground that petitioner was a partner of Purcell, Graham & Co., a securities firm doing business within and without New York State, and that he failed to file New York State income tax returns reporting his distributive share of partnership income. Petitioner's tax liability was computed allowing the standard deduction and one exemption. Accordingly, a Notice of Deficiency was issued on October 13, 1978.

2. Prior to and during the years in issue, Herbert Dobuler (hereinafter "petitioner") lived and resided in Florida where he managed trading accounts in his own name and for others. In 1973, Frank Graham, Sr., a partner of Purcell, Graham & Co. ("the Partnership"), a member firm of the New York Stock Exchange, approached petitioner with an offer of becoming a partner in the firm. The Partnership was seeking to have someone manage their Florida office, supervise approximately twenty-five salesmen and get its operations in order. Petitioner had a reputation of being successful in trading for his own account, while the Partnership's own success in trading had been both limited and disappointing.

3. Petitioner submitted an affidavit which stated, in part, that he

"...agreed to run the Partnership's Florida office, and in that connection to join the firm. For that service I was to have, as a partner, a 5% interest in profits and losses of the Partnership, and a salary of \$35,000.00 a year. My capital contribution was to be \$50,000.00, which I duly and separately contributed."

This represented one of two separate propositions made by the Partnership through Mr. Graham. The second proposition was for petitioner to maintain a trading account called "The Stern Dobuler" account in which petitioner had a \$75,000.00 interest in the beginning capital and the Partnership had an interest of \$225,000.00. The trading account, located in Florida, was in substance two separate accounts maintained as one. The understanding between the Partnership and petitioner was that he alone would conduct or manage both the Partnership's

trading account and his own and that the Partnership would supply its capital of \$225,000.00 and petitioner's capital of \$75,000.00. The \$75,000.00 supplied by the partnership represented an interest-free loan to petitioner.

The two propositions were embodied in a letter dated December 6, 1973, signed by Mr. Graham and addressed to petitioner and Richard H. Stern, a friend and business associate of petitioner "who had agreed to join the partnership at the same time as (petitioner)".

4. Petitioner asserted that his only partnership income from the trading account was from his five percent interest in the Partnership's separate interest, and that all other income he received from said account was in his separate capacity as a nonresident individual trading for his own account. The record does not show the amount of income derived from petitioner's own trading account.

5. Petitioner asserted that his trading for the Partnership in his individual capacity in exchange for the use of its capital, and his becoming a partner in order to improve the operation of the Partnership's Florida office, were separate matters and negotiated as such. Petitioner also asserted that nowhere in the partnership agreement¹ was there any mention of separate compensation for operating the trading account since said account was not an aspect of the Partnership and he operated that account for the Partnership as a private individual and not as a partner or employee of the Partnership. He stated that he participated in the partnership trading account both as an individual and as a partner. Petitioner did not dispute that he was a partner or that he participated in the Partnership trading account.

¹ The partnership agreement, a copy of which was filed with the New York Stock Exchange, was not available during the hearing because of a strained relationship between petitioner and Purcell, Graham & Co.

CONCLUSIONS OF LAW

A. That "the New York adjusted gross income of a nonresident partner shall include his distributive share of all items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income to the extent such items are derived from or connected with New York sources." (20 NYCRR 134.1).

B. That an agreement to share both profits and losses is an indispensable element of a contract of partnership (15 NY JUR 2d, Business Relationships § 1313); and one who actually invests capital in a business partnership for a share of the profits (Finding of Fact "3") usually becomes a partner therein (15 NY JUR 2d, Business Relationships § 1319).


C. That petitioner has failed to sustain his burden of proof imposed by section 689(e) of the Tax Law to show that he was not a partner of Purcell, Graham & Co. during the years 1974 and 1975. Although petitioner managed the two trading accounts in the State of Florida, he utilized the facilities of Purcell, Graham & Co. which funded him with capital of \$75,000.00 through an interest free loan. Therefore, petitioner Herbert Dobuler was not trading for his own account but rather as a partner on behalf of the Partnership, and income derived therefrom constituted a distributive share of partnership income allocable to New York sources to the extent provided by section 637 of the Tax Law (cf. Wohlreich v. Tully, 72 A.D.2d 825, 826).


D. That the petition of Herbert Dobuler is denied and the Notice of Deficiency issued on October 13, 1978 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1983


PRESIDENT


COMMISSIONER


COMMISSIONER