

Unincorp. Bus. Tax
BUREAU OF LAW *Determinations A-Z*
MEMORANDUM *Brown, Lester D.*

TO: Commissioners Murphy, Macduff and Conlon

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: Petition of Lester D. Brown for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1960.

A hearing on the above entitled petition was held before me at the office of the State Tax Commission, 80 Centre Street, New York, New York on June 26, 1967. The appearances and exhibits were as noted on the transcript.

The issues involved (1) the actual cost of taxpayer's seat on the stock exchange, (2) whether taxpayer's activities as a floor broker and specialist constituted the practice of an exempt profession, and (3) whether taxpayer's activities constituted trading solely for his own account.

Taxpayer filed a personal income tax return for 1960 reporting Federal adjusted gross income of \$29,883.52 of which \$30,000.00 was attributed to the recognized portion of the gain of \$60,000.00 realized on the sale of his seat on the stock exchange, and the balance, a deduction of \$116.48, was claimed as a loss from his business as a stock broker. By notice of deficiency and audit changes dated February 8, 1965 (File No. 6597587) the Income Tax Bureau recomputed taxpayer's business income at \$62,145.04 by disallowing deductions taken for taxes in the amount of \$955.46 and mortgage interest in the amount of \$841.06 both attributable to his residence, and for medical expenses of \$465.00, and by including the gain of \$60,000.00 realized on the sale of his seat on the exchange, and imposed unincorporated business taxes of \$2,085.80 with interest. Taxpayer filed a petition for redetermination on April 29, 1965. At the hearing, the taxpayer conceded the propriety of the disallowance of the deductions for taxes, interest and medical expenses from business income, and limited the issue to the inclusion therein of the gain on the sale of his seat on the stock exchange. An assessment for additional personal income taxes for the same year, dated November 29, 1962 (No. ABO34412) was not involved in the hearing although taxpayer filed a timely application for revision, as he had failed to file a demand for a hearing.

Taxpayer contended (1) that no gain was realized on the sale of his seat inasmuch as the purchase price in 1933 was \$150,000.00, although he admittedly paid only \$80,000.00, (2) that a floor

broker practices a profession within the meaning of section 703(c) of the Tax Law, (3) that a specialist is not a dealer within the meaning of section 703(d) of the Tax Law, and (4) that capital was not a material income producing factor in his occupation.

The taxpayer purchased a seat on the New York Stock Exchange in 1933 and became a partner in the firm of F. V. Foster & Co. He acted as a floor broker and specialist. As a floor broker, he executed buy and sell orders for other brokers, earning a share of the commissions paid by the traders. As a specialist, he was required to maintain an orderly market in certain securities by buying and selling for his own account when the demand or supply was insufficient to prevent precipitous fluctuations in prices. The funds for the purchase of his seat, and the capital required of a specialist, were borrowed on the security of his seat on the exchange.

In 1960 the taxpayer sold his seat for \$140,000.00, and reported as a long term capital gain, \$60,000.00, as the difference between his cost and selling price. He now alleges that the actual cost of the seat was \$150,000.00; that the entire sum was borrowed in 1933; and that in 1958 he settled the indebtedness by payment of \$80,000.00 which he borrowed elsewhere, and repaid in 1960 from the proceeds of the sale. Taxpayer was requested to furnish a copy of the agreement or any other document relating to the purchase of his seat in 1933 to substantiate that he had paid \$150,000.00, but no such papers nor any other substantiation have been furnished. Accordingly, the gain on the sale of the seat was properly computed at \$60,000.00, the amount reported on his Federal return. The sale of the seat, in effect, liquidated the taxpayer's business, and the gain realized was includible in business income pursuant to section 705(a) of the Tax Law.

The taxpayer's activities as a floor broker consisted of executing purchase and sale orders for other brokers who were physically unable to transact the business because of heavy trading or other temporary conditions. No discretion was exercised in these activities, fees being earned merely by going to the post of the specialist on the floor of the exchange and executing the order in the name of the principal broker. His activities as a specialist required him to maintain an inventory of certain stocks and a minimum amount of cash, in order to maintain an orderly market. By providing a source of supply of stock in heavy demand and standing ready to purchase stock for which no purchaser is readily available, the specialist exercises a stabilizing influence, preventing runaway markets. Little, if

any, discretion is permitted the specialist. His inventory of stock and cash must be kept at minimum levels, pursuant to SEC and stock exchange regulations, and he is required to purchase and sell at prices fixed by regulation within fractions of the price of the last sale. In both cases, as a floor broker and as a specialist, a seat on the exchange is required.

Accordingly, I am of the opinion that no element of special knowledge or learning was applied to the affairs of others in any of taxpayer's business activities sufficient to constitute the practice of an exempt profession; that capital, in the form of a seat on the exchange, and an inventory of stock and cash are essential income producing factors in all of such activities, within the meaning of section 703(e) of the Tax Law; that taxpayer's activities as a specialist constituted dealing in securities and his inventory of stock was held primarily for sale to customers in the ordinary course of business, within the meaning of section 703(d) of the Tax Law.

For the reasons stated above, the taxpayer's petition should be denied. The decision of the Tax Commission should be in the form submitted herewith.

/s/

ALFRED RUBINSTEIN

Hearing Officer

September 19, 1967

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10-10-67

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

LESTER D. BROWN

FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF UNINCORPORATED BUSINESS
TAXES UNDER ARTICLE 23 OF THE TAX LAW
FOR THE YEAR 1960

Lester D. Brown, having filed a petition for redetermination of a deficiency or for refund of unincorporated business taxes under Article 23 of the Tax Law for the year 1960, and a hearing having been held before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, at 80 Centre Street, New York, New York, on June 26, 1967, at which hearing the taxpayer appeared, in person, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That Lester D. Brown filed a personal income tax return for 1960 reporting adjusted gross income of \$29,883.52 of which \$30,000.00 represented the recognized portion of a gain of \$60,000.00 realized on the sale of his seat on the stock exchange, and from which a deduction of \$116.48 was claimed as a loss from his business as a stock broker; that by notice of deficiency and statement of audit changes dated February 8, 1965 (File No. 8597587) the Income Tax Bureau disallowed as business deductions real estate taxes of \$955.46 and mortgage interest of \$841.06, both relating to taxpayer's residence, and medical expenses of \$465.00, making in all a total sum of \$2,261.52, and recomputed taxpayer's business income

at \$62,145.04 by adding thereto the gain realized on the sale of his seat on the stock exchange, and imposed unincorporated business taxes in the amount of \$2,065.80, with interest; that taxpayer filed a petition for redetermination on April 29, 1965.

(2) That in 1933 the taxpayer purchased a seat on the New York Stock Exchange at a cost of \$80,000.00; that at that time the taxpayer borrowed \$80,000.00 to finance the purchase of his seat; that such seat was used by the taxpayer in pursuit of his occupation as a floor broker and specialist on the New York Stock Exchange; that as a floor broker the taxpayer executed purchase and sale orders for other brokers, receiving commissions for such services; that as a specialist the taxpayer was required to purchase and sell certain securities, for his own account, at prices fixed by regulation of the exchange and the SEC in order to maintain an orderly market in such securities; that as a specialist the taxpayer was required to maintain an inventory of stock and cash at minimum levels set by regulation of the exchange and the SEC; that none of taxpayer's business activities permitted the exercise of independent judgment or discretion on his part; that in 1960 the taxpayer sold his seat on the exchange for \$140,000.00 and repaid the balance then still outstanding on the debt he incurred in 1933 when he purchased the seat.

(3) That the taxpayer concedes that the deductions taken on his personal income tax return for 1960 for real estate taxes and mortgage interest, both related to his residence, and medical expenses, all in the total sum of \$2,261.52, were personal expenses and not connected with his business for such year.

Based upon the foregoing findings and all the evidence presented herein, the State Tax Commission hereby

DECIDES:

(A) That in 1960, the taxpayer was engaged in the business of floor broker and specialist on the New York Stock Exchange; that taxpayer's activities required the use of capital for the purchase of a seat on the exchange and maintenance of an inventory of stock and cash; that such necessary capital was a material income producing factor in taxpayer's occupation; that taxpayer's activities as a floor broker and specialist did not constitute the practice of a profession, within the meaning of section 703(c) of the Tax Law.

(B) That taxpayer's activities as a specialist required him to maintain an inventory of securities; to purchase additional shares thereof on the open market; to sell shares thereof on the open market; that such securities were so held and purchased by the taxpayer, as a dealer, primarily for sale to customers in the ordinary course of his business or trade; that taxpayer's activities as a specialist did not constitute the purchase and sale of property solely for his own account, within the meaning of section 703(d) of the Tax Law.

(C) That on the sale of his seat on the New York Stock Exchange in 1960 the taxpayer realized a gain of \$60,000.00; that such gain was derived from the sale of business property and was attributable to taxpayer's business activities and constituted business income within the meaning of section 705(a) of the Tax Law.

(D) That claimed deductions for real estate taxes in the sum of \$955.46 and mortgage interest in the sum of \$841.06, both attributable to the taxpayer's residence, and medical expenses in the sum of \$465.00, being in all the total sum of \$2,261.52, were

not connected with nor incurred in the conduct of taxpayer's business, within the meaning of section 706 of the Tax Law, and were properly disallowed in recomputing the taxpayer's business income.

(E) That, accordingly, the taxpayer's net business income for 1960 was in the amount of \$62,145.04; that the notice of deficiency imposing unincorporated business taxes upon the taxpayer for 1960 is correct and the amount set forth therein is due and owing together with additional interest and other statutory charges; that the said notice of deficiency does not include any tax or other charges which could not have been lawfully demanded, and that taxpayer's petition for a redetermination or refund with respect thereto be and the same is hereby denied.

Dated: Albany, New York this 27th day of November, 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
PRESIDENT

COMMISSIONER

/s/

WALTER MACLYN CONLON
COMMISSIONER