STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GREGORY & SONS

For a Redetermination of a Deficiency or a Refund of Unincorporated Business Taxes under Article(s) 23 of the Tax Law for the (Year(s) 1966.

AFFIDAVIT OF MAILING OF NOTICE OF DECISION BY (CERTIFIED) MAIL

State of New York
County of Albany

Lynn Wilson , being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of June , 1972, she served the within Notice of Decision (or Determination) by (certified) mail upon GREGORY & SONS (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gregory & Sons
54 Pine Street
New York, New York 10005

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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
19th day of June , 1972

Lynn Wilson

Pat Zimmerman

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GREGORY & SONS

For a Redetermination of a Deficiency or a Refund of Unincorporated Business Taxes under Article(s) 23 of the Tax Law for the (Year(s) 1966

AFFIDAVIT OF MAILING OF NOTICE OF DECISION BY (CERTIFIED) MAIL

State of New York
County of Albany

Lynn Wilson , being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of June , 19 72, she served the within Notice of Decision (or Determination) by (certified) mail upon STEPHEN F. SCHWARTZ c/o WEIL, GOTSHAL & MANGES (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen F. Schwartz
c/o Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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
19th day of June , 19 72

Lynn Wilson

Rae Tannenbaum

STATE OF NEW YORK

DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A
STATE CAMPUS
ALBANY, N. Y. 12226
AREA CODE 518
457-2655, 6, 7

STATE TAX COMMISSION

NORMAN F. GALLMAN, ACTING PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York
June 19, 1972

Gregory & Sons
54 Pine Street
New York, New York 10005

Gentlemen:

Please take notice of the DECISION of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to Section(s) 722 of the Tax Law, any proceeding in court to review an adverse decision must be commenced within 4 months from the date of this notice.

Any inquiries concerning the computation of tax due or refund allowed in accordance with this decision or concerning any other matter relative hereto may be addressed to the undersigned. These will be referred to the proper party for reply.

Very truly yours,

Nigel G. Wright

Nigel G. Wright
HEARING OFFICER

Enc.

cc: Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GREGORY & SONS	:	DECISION
for a Redetermination of a Deficiency or for Refund of Unincorporated Business Tax under Article 23 of the Tax Law for the Year 1966.	:	

John R. Atwell, Robert D. Antolini, Andrew M. Blum, et al, individually and copartners d/b/u the firm name and style of Gregory & Sons, filed a petition under section 722 and 689 of the Tax Law for the redetermination of a deficiency in unincorporated business tax under Article 23 of the Tax Law for the Year 1966. A hearing was held on October 28, 1970, at the offices of the State Tax Commission, 80 Centre Street, New York City,before Nigel G. Wright, Hearing Officer. Stephen F. Schwartz, Esq. of Weil, Gotshal & Manges appeared for petitioner. Edward H. Best, Esq. (Francis X. Boylan, Esq. of Counsel) appeared for the Income Tax Bureau. The record of said hearing has been duly examined and considered.

ISSUE

The issue in this case is whether the gain from the sale of a stock exchange seat, nominally owned by a partner in Gregory & Sons, is taxable to Gregory & Sons for purposes of the unincorporated business tax.

FINDINGS OF FACT

1. Gregory & Sons began business in 1939 as Bonner & Gregory. It has been known by its present name since October 1966. It does

a general stock brokerage business and trades in securities for its own account. Subsequent to the sale of the stock exchange seat here in issue the firm had financial difficulties and was suspended under Article 13 of the Constitution of the New York Stock Exchange and is now in the hands of a liquidator appointed by the New York Stock Exchange.

2. Mr. Henry Townsend became a general partner in the firm in 1939. At that time he owned a seat on the New York Stock Exchange which he had purchased entirely with his own funds. While a general partner he acted as a floor broker on the floor of the New York Stock Exchange. Mr. Townsend sold this stock exchange seat on December 8, 1966, through the office of the Secretary to the Exchange to a person having no connection with the firm. He received the proceeds of the sale directly from the purchaser. He ceased to be a general partner on January 1, 1967, but has continued on as a limited partner.

3. A "seat" on the New York Stock Exchange is a membership in such Exchange which membership entitles the owner to admission to the floor of the Exchange where facilities are maintained for the buying and selling of securities. Such memberships are limited in number by the Exchange. This membership is both a personal privilege and a property right obtained by election by the Board of Governors of the Exchange, and the purchase of a former member's right of membership. The admission to the floor is a personal privilege of the member and, except in rare instances, cannot be assigned or delegated.

4. The rules of the New York Stock Exchange provide, in part, as follows: A member of the Exchange can enter into a partnership

only if his partners are also members or if they agree to become "allied"members of the Exchange. The partnership is then considered a "member organization". It is mandated that a member must "specifically agree....that he contributes the use of his membership to the organization and that, insofar as may be necessary for the protection of creditors of the organization....the proceeds of the transfer of his membership shall be an asset of the member organization". (Rule 314.20). All floor commissions must be for the account of the firm. (Rule 314.24).

5. When Mr. Townsend became a partner he agreed to contribute to the firm the "use" of his seat on the New York Stock Exchange and not to dispose of the seat while he was a general partner. The firm would pay any assessments relating to the seat except with respect to any "gratuity fund" the rights to which were reserved to Mr. Townsend. The proceeds of such seat were deemed an asset of the firm "as far as is necessary for the protection of creditors". He also made a cash contribution to capital. In return he was to receive a four percent interest in the profits of the partnership and an amount characterized as "interest" at the rate of five percent annually computed on the value of his stock exchange seat as determined by the average market price for the sale of such seats for each three-month period.

6. The deficiency notice is dated October 28, 1970, and is in the amount of $4,704.40 plus interest of $997.94 for a total of $5,702.34. A net operating loss carryback was allowed by the Income Tax Bureau at the hearing, and the deficiency in issue is hereby accordingly reduced to $1,182.77 plus interest.

CONCLUSIONS OF LAW

The proceeds from the sale of the seat are subject to tax. Such proceeds are included in gross income under section 705(a) of the Tax Law either as "gain from any property employed in the business" or as income includible for federal income tax purposes. The income here in question must be considered to be first income of the partnership and then as an income distribution to the partner who is the nominal owner of the seat rather than as the direct income of the nominal owner alone. The petitioner argues that the income is not the income of the partnership on the grounds that the stock exchange seat here in question had been merely "loaned" or "leased" to the partnership. But this is not the case. The determination of whether the asset here in question is to be characterized as a loan or a lease on the one hand or as a capital contribution on the other hand is to be made by the same criteria which obtain for debt-equity cases involving shareholders and their corporations. (Hambuechen (1964) 43 U.S. Tax Ct. 90 at 100-102; Stanchfield U.S. Tax Ct. memo dec. 1965 No. 305).

Under the case law concerning the debt-equity distinction, it is relevant to consider the extent to which the alleged loans "bear a substantial risk of the enterprise and like risk capital, are tied up indefinitely with the success of the venture" and whether the alleged loans are "subordinate to those held by outsiders or whether they specify a relatively fixed date upon which the creditor may demand a definite sum regardless of the profits earned" (Nassau Lens Co. v. C.I.R. 308 F2d 39 at 47). Under these criteria

and those of other federal cases, the stock exchange seat here in question is properly considered to be part of the capital of the partnership. It follows that the income therefrom is the income of the partnership.

DECISION

The petition is granted and the deficiency is restated to be $1,182.77 as found in paragraph six and as restated the deficiency is affirmed together with such interest, if any, as may be due under section 684 of the Tax Law.

DATED: Albany, New York
June 19, 1972.

STATE TAX COMMISSION

Norman Gallman
COMMISSIONER

Bruce Manley
COMMISSIONER

Milton Koerner
COMMISSIONER