

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

MODEL, ROLAND & CO.

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

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) 1963, 1964, :
1965 and period ending June 30, 1965

State of New York
County of Albany

JOYCE S. VAN PATTEN, 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 1st day of December, 1972, she served the within
Notice of Decision (or Determination) by (certified) mail upon MR. IRWIN A.

BRODSKY ~~(representative of)~~ the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: MR. IRWIN A. BRODSKY
Model, Roland & Stone
120 Broadway
New York, New York

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

1st day of December, 1972

Lynn Wilson

Joyce S. Van Patten

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

MODEL, ROLAND & CO.

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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)) 1963, 1964,
1965 and period ending June 30, 1965

State of New York
County of Albany

JOYCE S. VAN PATTEN, 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 1st day of December, 1972, she served the within
Notice of Decision (or Determination) by (certified) mail upon LEWIS HELPHAND, CPA
(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: LEWIS HELPHAND, CPA
Accountant for Taxpayer
342 Madison Avenue
New York, New York
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

1st day of December, 1972

Lynn Wilson

Joyce S. Van Patten



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A
STATE CAMPUS

ALBANY, N. Y. 12227

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

Rook's
STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

Dated: Albany, New York

December 1, 1972

Nigel G. Wright

Mr. Irwin A. Brodsky
Model, Roland & Stone
120 Broadway
New York, New York

Dear Mr. Brodsky:

Please take notice of the **Decision** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to **section 722 of**
the Tax Law any proceeding in court to review an adverse decision
must be commenced within **four months** after
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 relat-
ing hereto may be addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,

NIGEL G. WRIGHT
HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MODEL, ROLAND & CO.	:	
	:	DECISION
for a Redetermination of a Deficiency	:	
or for Refund of Unincorporated Business	:	
Taxes under Article 23 of the Tax Law	:	
for the fiscal years ending January 31,	:	
1963, January 31, 1964, January 31, 1965	:	
and the fiscal period ending June 30, 1965.	:	
	:	

Model, Roland & Co. filed petition for a redetermination of deficiencies dated March 27, 1967, in unincorporated business taxes under Article 23 of the Tax Law for the fiscal years ending January 31, 1963 through January 31, 1965 and the short period ending June 30, 1965. A hearing was held on May 12, 1971, at the offices of the State Tax Commission, 80 Centre Street, New York City before Nigel G. Wright, Hearing Officer. Lewis A. Helphand, C.P.A. represented the petitioners. Edward H. Best, Esq., (Francis X. Boylan, Esq., of Counsel) represented for the Income Tax Bureau. The record of said hearing has been duly examined and considered.

ISSUES

The issues in this case are whether certain amount paid out by a stock brokerage firm constitute "interest", which would be deductible, or rather whether said amounts constitute profits paid to partners, which would not be deductible, where (a) these amounts are denominated as interest and paid on the credit balances of the

trading accounts of the partners in the firm and (b) when said amounts are denominated as interest and are paid on capital left on deposit by a retired partner in the firm.

FINDINGS OF FACT

1. Model, Roland & Co. was a securities broker in New York City having succeeded Model, Roland & Stone in 1961 and having been succeeded in turn by a corporation, Model, Roland & Co., Inc. in June, 1965.

2. The petitioner firm is engaged primarily in the business of the international arbitrage of securities. They have a large inventory of securities and capital is accordingly necessary for the business.

3. The firm had a capital account to which each partner contributed and on which each partner received interest. The interest paid on this account was for tax purposes, considered as part of the partners distributive share and was not deducted by the firm as interest expense. This is not here in issue.

4. In addition to the capital accounts, each partner maintained a personal trading account in which he kept securities and cash. These accounts were subordinated to the firms general creditors. The cash in these accounts could be withdrawn by the partner at any time without notice. The securities could not be withdrawn as such without permission of the firm but they could at any time be sold by the partner and the proceeds thereof could be withdrawn without notice. The purpose of the provision as to notice was explained to be to insure that the firm had notice of the nature of each partner's securities transactions. On these accounts, the firm also paid interest and, for tax purposes, deducted such interest

as interest expense. The interest amounted to \$61,084.84, \$21,081.87 and \$21,893.08 for the fiscal years ending in 1963, 1964 and 1965 and \$14,112.26 for the short period ending June 31, 1965. This interest was included in each partners income tax on the basis of the time when it was received as if the partner had been a stranger to the firm instead of being deferred until the end of the partnership's fiscal year which would be required for sums received by a partner as a partner.

5. One general partner, Fritz Markins retired as of January 31, 1962. As is the practice in the securities industry he was barred from participation in the firm and even from entry onto the premises of the firm after that date. In accordance with the partnership agreement and the rules of the New York Stock Exchange, he left on deposit with the firm his capital of \$300,000.00 for one year. The firm paid interest on that at the rate of 6% for a sum of \$18,000.00. The firm deducted this as interest expense for tax purposes.

6. While the petitioner firm could borrow money and securities from their customers they were prohibited from paying interest to such customers under provisions of Federal Law. If the petitioner had borrowed money from a bank it would have had to put up collateral worth three times the amount of the loan.

7. The deficiencies in issue amount to: F/Y/E 1963, \$3,123.39 plus \$730.19 interest for a total of \$3,853.58; F/Y/E 1964, \$843.27 plus \$197.14 interest for a total of \$1,040.41; F/Y/E 1965, \$875.72 plus \$99.64 interest for a total of \$975.36, and for the period ending June 30, 1965, there is an overpayment credit of \$752.18 plus \$18.62 interest for a total of \$770.80.

CONCLUSIONS OF LAW

A. The amounts deducted as interest on trading accounts cannot be allowed. Under Federal Law these amounts do not constitute interest since the alleged loans of cash and securities were not loans but were capital contributions. The standards for this determination are the same for a partnership as for a corporation (Stanchfield U.S. Tax Court memo. Dec. 1965 No. 305). These standards include the consideration of the availability and terms of true loans from strangers, the use of the proceeds for vital expenditures of the firm and subordination to other loans (see e.g. Nassau Lens Co. v. C.I.R. 308 F2d 39). Petitioner has not met the burden of proof on this issue. In any event such a deduction could not be allowed under State Law because of the specific provisions of section 706(3) of the Tax Law that "no deduction shall be allowed for amounts paid or incurred to a proprietor or partner for services or for use of capital".

B. The payments to the retired partner were explicitly on account of capital left with the firm. The deduction of these amounts cannot be allowed under the provision of section 706(3) of the Tax Law which states that "no deduction shall be allowed... for amounts paid or received to a proprietor or partner for services or for use of capital". Under Federal Law (U.S. Treas. Regs. 1.736-1(a)(1)(ii) and 1.771-1(d) the retired partner is treated as a continuing partner until all payments to him have been completed. In any event section 706(3) of the New York Tax Law applies to former partners as well as current partners.

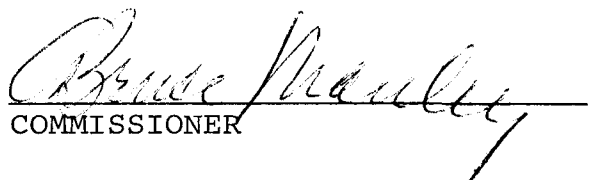
DECISION

The petition is denied and the deficiency is found correct and is due together with such additional interest as is imposed by section 684 of the Tax Law.

DATED: Albany, New York
December 1, 1972

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER