

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ELWELL & COMPANY

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article ~~(s)~~ 23 of the :
Tax Law for the Year ~~(s) or Period(s)~~ 1970. :

State of New York
County of Albany

John Huhn , being duly sworn, deposes and says that
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 6th day of October , 1978, ~~he~~ served the within
Notice of Decision by (certified) mail upon Elwell & Company


~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Elwell & Company
c/o Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, New York 10004

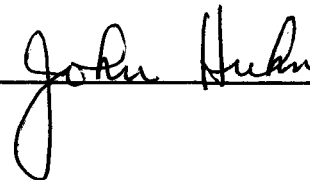
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~(representative of the)~~
~~XXXX~~ 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

6th day of October , 1978





STATE OF NEW YORK
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ELWELL & COMPANY

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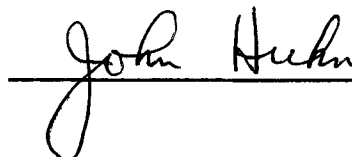
John Huhn, being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 6th day of October, 1978, he served the within
Notice of Decision by (certified) mail upon Jack Wong
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Jack Wong, CPA
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, New York 10004
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

6th day of October, 1978.







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

October 6, 1978

**Elwell & Company
c/o Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, New York 10004**

Gentlemen:

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 **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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**Michael Alexander
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ELWELL & COMPANY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax	:	
under Article 23 of the Tax Law for the	:	
Year 1970.	:	

Petitioner, Elwell & Company, c/o Oppenheim, Appel, Dixon & Co., One New York Plaza, New York, New York 10004, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1970 (File No. 13163).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, on October 17, 1977 at 2:45 P.M. Petitioner appeared by Jack Wong, CPA, of the firm of Oppenheim, Appel, Dixon & Co. The Income Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the subject stock exchange seat was an asset of the partnership employed in its business.

II. Whether the proceeds from the sale of the subject seat received by the partnership after its dissolution constituted a winding up or liquidation of the partnership.

III. Whether the gain realized on the sale of the aforementioned stock exchange seat was includible in the gross income of the partnership.

FINDINGS OF FACT

1. Petitioner/partnership, Elwell & Company, filed a partnership return for 1970. On February 22, 1974, petitioner/partnership executed a consent extending the period within which to issue an assessment to April 15, 1975.

2. On April 11, 1975, the Income Tax Bureau issued a Statement of Audit Changes against the New York partnership of Elwell & Company, imposing unincorporated business tax in the amount of \$3,373.73, with interest of \$807.77, for a total due of \$4,181.50. Accordingly, it issued a Notice of Deficiency therefor. The basis for the deficiency was stated as follows: "Gain on sale or disposition of a Stock Exchange seat is subject to unincorporated business tax, since the seat represents an asset used in a trade or business. A gain of \$84,428.03 was realized on the sale of an American Stock Exchange seat in 1970 registered in the name of Carmine Monteforte; the gain reported by Harold Manser. The net operating loss has been adjusted as shown below."

3. During 1970 and prior thereto, Vincent E. Elwell, John T. Ward, Harold M. Manser, James F. Kelly, Donald C. Elwell and Carmine J. Monteforte were general partners engaged in the general brokerage and securities business as a stock brokerage partnership under the firm name and style of Elwell & Co. The partnership maintained its principal place of business at 74 Trinity Place, New York, New York. Prior to 1970 W. Edward Griffin was a general partner of Elwell & Co., but he ceased to be a partner as of December 31, 1969.

4. Prior to 1968 Harold M. Manser was the owner of a seat on the American Stock Exchange, purchased by him in 1957. Pursuant to the partnership agreement dated August 8, 1968, Mr. Manser transferred his membership in the American Stock Exchange to his co-partner, Carmine J. Monteforte, for a nominal consideration. Vincent E. Elwell, John T. Ward, James F. Kelly and Donald C. Elwell also owned membership in said Exchange, which membership could only be held in the name of an individual. Under the rules of the American Stock Exchange, the rights of an

individual partner to his seat are required to be subordinated to the rights of the creditors of the partnership in the event of insolvency, which the partnership agreement so provided.

5. In accordance with the partnership agreement, the partners agreed not to sell, assign or dispose of Mr. Monteforte's membership so long as he continued to be a partner of the partnership. Each of the memberships were required to be held and used solely for the transaction of the business of the partnership. In connection with said membership's, the partnership was required to make all payments to the American Stock Exchange including all dues, assessments and contributions to the Gratuity Fund, and to charge same as an expense of the business before determining its profits.

6. The partnership agreement provided, in part, that upon termination of the of the partnership, Mr. Monteforte was required to promptly comply with one of three options: (a) retain his membership and pay to the partnership a sum sufficient to purchase another ~~mem~~bership, including the initiation fee payable to the said Exchange on the qualification of a new member or (b) sell his membership and pay the proceeds over to the partnership or (c) transfer such membership to a nominee of the partnership.

7. The partnership of Elwell & Company was dissolved effective May 8, 1970.

8. Effective May 28, 1970, Carmine Monteforte sold his membership on the American Stock Exchange for \$100,000.00 to one Donald Smith, who had no connection whatsoever with the partnership. The proceeds from the sale were received by Mr. Monteforte on June 1, 1970 and were turned over to the partnership in accordance with the provisions of the partnership agreement. The partnership then turned the aforementioned proceeds over to Mr. Manser.

9. On his Federal and New York State income tax returns for 1970, Mr. Manser reported capital gain on the sale of the American Stock Exchange seat in the amount of \$84,428.03.

CONCLUSIONS OF LAW

A. That although Carmine Monteforte was the nominal owner of the subject stock exchange seat, the parties to the partnership intended to and did treat said seat as an asset of the partnership to be used exclusively in the business of the partnership.

B. That the sale of the aforementioned seat and the receipt by the partnership of the proceeds therefrom constituted a partial winding up or liquidation of the assets of the partnership, within the intent and meaning of section 703(a) of the Tax Law.

C. That the gain on the sale of the aforesaid stock exchange seat constituted unincorporated business income includible in gross income of the partnership for the year 1970, within the intent and meaning of section 705(a) of the Tax Law.

D. That the petition of Elwell & Company for 1970 be and the same is hereby denied.

DATED: Albany, New York
October 6, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER