

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Bioren and Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Year FYE 11/30/66. :

State of New York
County of Albany

Jay Vredenburg, 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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Bioren and Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

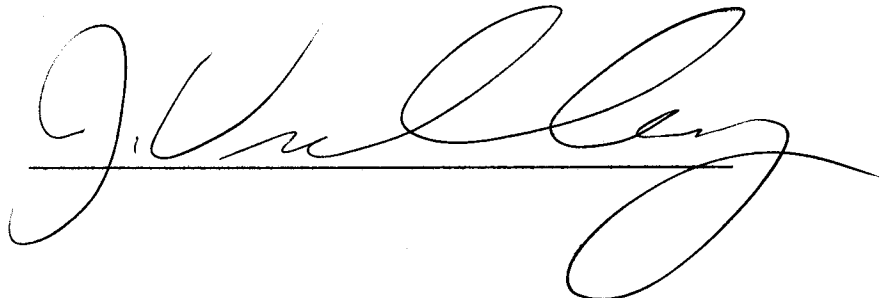
Bioren and Co.
120 Broadway
New York, NY 10005

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 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
3rd day of October, 1980.

Loeffler Bank

A large, stylized handwritten signature, likely of Jay Vredenburg, written in dark ink. The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

STATE OF NEW YORK
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Bioren and Co.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Year FYE 11/30/66. :

State of New York
County of Albany

Jay Vredenburg, 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 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Frederic Lindeberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Frederic Lindeberg
Peat, Marwick, Mitchell & Co.
1500 Walnut St.
Philadelphia, PA 19102

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
3rd day of October, 1980.

Debbie Bank

Jay Vredenburg

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

October 3, 1980

Bioren and Co.
120 Broadway
New York, NY 10005

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(s) 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Frederic Lindeberg
Peat, Marwick, Mitchell & Co.
1500 Walnut St.
Philadelphia, PA 19102
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BIOREN & CO.	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Fiscal Year Ending November 30, 1966.	:	

Petitioner, Bioren & Co., 120 Broadway, New York City, New York 10005, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the fiscal year ending November 30, 1966 (File No. 01951).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on April 21, 1972 at 10:15 A.M. Petitioner appeared by Frederic Lindeberg of Peat, Marwick, Mitchell & Co., CPAs. The Income Tax Bureau appeared by Saul Heckelman, Esq. (Francis X. Boylan, Esq., of counsel).

ISSUES

I. Whether petitioner, a partnership, was subject to unincorporated business tax on the gain derived from the sale of a stock exchange membership owned by one of its member partners and used in the partnership business.

II. Whether the Income Tax Bureau properly determined the amount of gain derived from the sale of the stock exchange membership.

FINDINGS OF FACT

1. On April 13, 1967, petitioner, Bioren & Co., filed a New York State partnership return for the fiscal year ending November 30, 1966 on which petitioner reported income derived from its stockbrokerage activities carried on both within and without New York State.

2. On March 30, 1970, the Income Tax Bureau issued a Notice of Deficiency against petitioner on the ground that gain derived from the sale of a New York Stock Exchange seat was subject to unincorporated business tax since the seat represented an asset used in a trade or business.

3. Petitioner, a member firm of the New York Stock Exchange ("Exchange"), had its principal office in Philadelphia, Pennsylvania and a branch office in New York City.

4. John C. Korn, a resident of New Jersey, was admitted as a general partner of Bioren & Co. on January 1, 1964. His capital contribution was \$20,000.00, plus the use of his stock exchange seat under the conditions set forth in the rules of the Exchange. He used his seat for a period of two years beginning in 1964, during which time he transacted business for Bioren & Co. as a "floor broker" on the Exchange. Petitioner contended that the contribution of Mr. Korn's seat was equivalent to any brokerage partner contributing securities to a firm to be used as collateral for borrowing purposes, and therefore, based on the decision in Shearson Hammill & Co. and Winston v. State Tax Commission, 15 NY 2d 608, aff'g. 19 AD 2d 245, the gain would not be subject to unincorporated business tax.

5. While it was asserted that beginning January 1, 1966, Mr. Korn did not use his seat for firm business, no evidence to that effect was introduced. There was some indication in the record that Mr. Korn ceased being a general partner on September 1, 1966 and became a limited partner as of that date. However, there is insufficient evidence to support a finding to that effect.

6. On or about September 1, 1966, the stock exchange seat held in the name of Mr. Korn was sold and the proceeds of said seat were received by him. The firm did not report said proceeds on the Federal partnership return or on the New York partnership return.

7. On January 1, 1964, the market value of the seat in issue was \$197,500.00, and on December 31, 1965 the market value was \$217,500.00.

8. The gain on the sale of the seat as stated in the Notice of Deficiency was \$184,355.00. This was assumed to be the increase in value of the seat from the date on which Mr. Korn purchased the seat to the date of its sale on September 1, 1966.

CONCLUSIONS OF LAW

A. That the stock exchange seat owned by Mr. Korn was used in the business of the partnership and, therefore, the gain from such sale constitutes unincorporated business gross income of Bioren & Co. under section 705(a) of the Tax Law and is subject to tax under section 701 of the Tax Law.

B. That this case is distinguishable from Shearson Hammill & Co. and Winston v. State Tax Commission (Finding of Fact No. "4", supra), since the seat was used by Bioren & Co. to transact its business, whereas the securities contributed by partners of Shearson Hammill & Co. and Winston were never used by said firm.

C. That the Income Tax Bureau failed to determine a basis for the estimated gain on the sale of the stock exchange seat as shown on the Notice of Deficiency. Therefore, the deficiency issued for the fiscal year ending November 30, 1966 is void since the sole purpose was to extend the statutory period of limitation. (Matter of Oscar J. Brown v. State Tax Commission, Supreme Court Onondaga County, 1950, CCH New York State Tax Reporter Para 98-153 aff'd. mem. 279 A.D.837 (1952)).

D. That the petition of Bioren & Co. is granted and the Notice of Deficiency issued on March 30, 1970 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 03 1980

James W. Teller
PRESIDENT

Arnold J. ...
COMMISSIONER

Francis R. Koenig
COMMISSIONER