

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Burnham & 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 Years 1972 & 1973. :

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 28th day of November, 1980, he served the within notice of Decision by certified mail upon Burnham & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burnham & Co.

60 Broad St.

New York, NY 10004

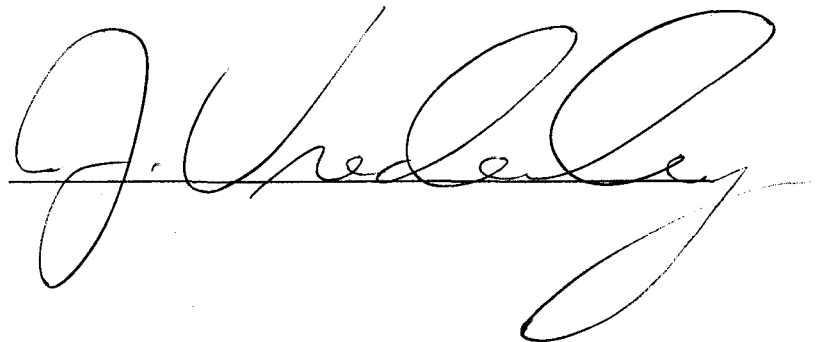
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this

28th day of November, 1980.





STATE OF NEW YORK  
STATE TAX COMMISSION

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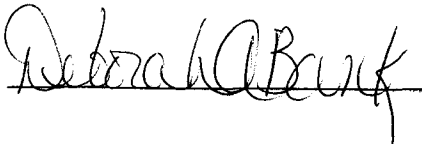
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon Alan K. Greene the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

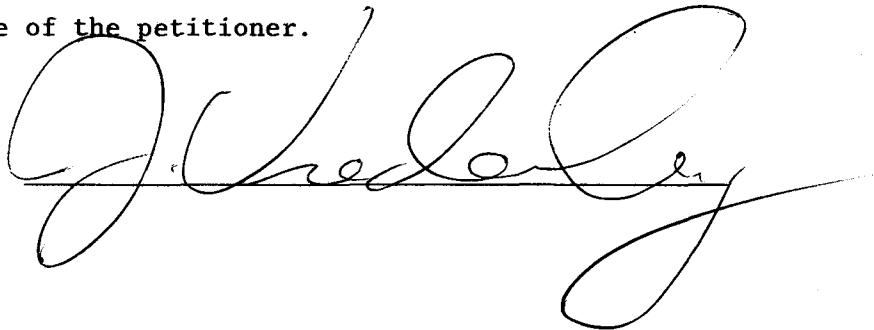
Mr. Alan K. Greene  
Price, Waterhouse & Co.  
153 E. 53rd St.  
New York, NY 10022

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 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  
28th day of November, 1980.





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

November 28, 1980

Burnham & Co.  
60 Broad St.  
New York, NY 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(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  
Alan K. Greene  
Price, Waterhouse & Co.  
153 E. 53rd St.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
of	:	
BURNHAM & CO.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Taxes under	:	
Article 23 of the Tax Law for the Years 1972	:	
and 1973.	:	

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Petitioner, Burnham & Co., 60 Broad Street, New York, New York 10004, filed petitions for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1972 and 1973 (File No. 15458 and 20715).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1978 at 10:45 A.M. Petitioner appeared by Price Waterhouse & Co. (Alan K. Greene, CPA, Robert H. Moses, CPA), and Sheldon Barnett, CPA. The Audit Division appeared by Peter Crotty, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether interest earned and gain realized on the sale of securities in 1972 and interest earned on commercial paper in 1973 constituted unincorporated business gross income as gain or income from partnership assets, or from liquidation of a partnership.

FINDINGS OF FACT

1. Prior to the close of business on December 31, 1971, Burnham & Co. ("Burnham") was a partnership engaged in trade or business as a securities broker-dealer.

2. Prior to the close of business on December 31, 1971, Burnham acquired certain securities which it contended were held as investments of the partnership. However, no books or records were produced to substantiate how the securities were carried on the books of the partnership.

3. The securities were paid for out of partnership funds.

4. The securities were credited to the general capital fund of the partnership.

5. The securities were registered to the partnership or its nominee.

6. The partnership received dividends and interest from the securities.

7. The securities were available to secure the liabilities of the partnership in its activities as a broker-dealer.

8. At the close of business on December 31, 1971, Burnham transferred its operating assets and liabilities to Burnham & Co., Inc. in a non-taxable reorganization.

9. Burnham contended that contemporaneous with the reorganization, the aforementioned securities were sold for cash to the individual partners at cost. However, petitioner's representative testified that "They did not sit down, that I know of, to write a check to buy them, although they might have...".

10. The securities were thereafter retained on the books of Burnham, which, petitioner contends, was solely an investment partnership after December 31, 1971. However, no documentary or other evidence was submitted to indicate the status of the partnership after December 31, 1971.

11. Burnham filed a New York State partnership return for 1972 (Form IT-204) in which it reported taxable business income of \$463,765.00 arising from interest and capital gains realized from the aforementioned securities. Burnham paid a tax thereon of \$25,507.00.

12. Petitioner filed a claim for credit or refund of unincorporated business income tax dated June 4, 1974 seeking a refund of \$25,507.00 for 1972. By notice of disallowance dated July 8, 1974, the Department of Taxation and Finance ("Department") disallowed the claim for the stated reason that the stock assets were acquired while the partnership was still in operation as a brokerage house.

13. Burnham filed a New York State partnership return for 1973 (Form IT-204) in which it reported no taxable business income.

14. The Department issued a Notice of Deficiency, dated September 26, 1977, claiming a deficiency due of \$1,656.60 plus interest of \$428.56, totalling \$2,085.16, for tax due on interest earned in 1973 arising from commercial paper which it is alleged constitutes income from liquidation of partnership assets.

#### CONCLUSIONS OF LAW

A. That prior to the close of business on December 31, 1971, Burnham was engaged in an unincorporated business. (Tax Law, section 703, subd. a.)

B. That the securities in question were an unsegregated part of the business property of Burnham. (Petition of Braemar Country Club, State Tax Commission, February 22, 1973; Petition of Richard and Raymond Karweck, d/b/a Seneca Motel, State Tax Commission, December 31, 1970.)

C. That petitioner failed to establish that the alleged investment account was, prior to January 1, 1972, separate and distinct from its activities as a broker-dealer.

D. That the securities were, prior to January 1, 1972, assets of Burnham and did not constitute individual property of the partners. (Cf. Matter of Gaines v. Tully, 66 A.D.2d 106; Matter of Shearson, Hammill & Co. and Winston v. State Tax Commission, 19 A.D.2d 245; aff'd 15 N.Y.2d 608.)

E. That petitioner offered no proof that the individual member partners purchased the securities at cost. Therefore, the retention of such securities on petitioner's books did not change their character as assets employed in a business. (Tax Law, section 705, subd. a.)

F. That the gain realized by Burnham from the sale of these assets or from interest thereon in 1972 and 1973 constituted unincorporated business gross income. (Tax Law, section 705, subd. a; Matter of Marshall v. State Tax Commission, 62 A.D.2d 1124.)

G. That the petitions are in all respects denied and the notice of disallowance dated July 8, 1974 and the Notice of Deficiency issued on September 26, 1977 are sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER