

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Murphey, Marselles & Smith :

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 1967 & 1968. :

AFFIDAVIT OF MAILING

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 2nd day of January, 1980, he served the within notice of Decision by certified mail upon Murphey, Marselles & Smith, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

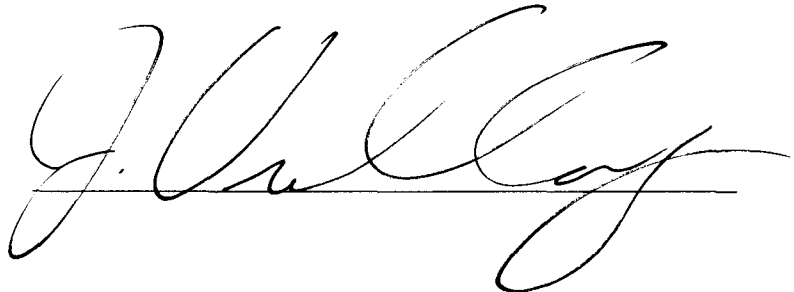
Murphey, Marselles & Smith  
c/o Louis Sternbach  
New York, NY 10016

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  
2nd day of January, 1980.

Jeanne Knapp



STATE OF NEW YORK  
STATE TAX COMMISSION

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Murphey, Marselles & Smith :

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AFFIDAVIT OF MAILING

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 2nd day of January, 1980, he served the within notice of Decision by certified mail upon John O'Shea 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. John O'Shea  
10 E. 40th St.  
New York, NY

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  
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 2, 1980

Murphey, Marselles & Smith  
c/o Louis Sternbach  
10 E. 40th St.  
New York, NY 10016

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  
John O'Shea  
10 E. 40th St.  
New York, NY  
Taxing Bureau's Representative

## STATE TAX COMMISSION

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 December 7, 1972 at 9:15 A.M. Petitioners appeared by John O'Shea, Esq. The Income Tax Bureau appeared by Saul Heckelman, Esq. (Francis X. Boylan, Esq., of counsel).

## ISSUE

Whether the gain from the sale of three stock exchange seats was subject to unincorporated business tax.

## FINDINGS OF FACT

1. Petitioner, Murphey, Marseilles & Smith, timely filed New York State partnership returns for 1967 and 1968.
2. On March 29, 1971, the Income Tax Bureau issued a Notice of Deficiency for 1967, asserting unincorporated business tax of \$8,440.00, plus interest of \$1,496.41, for a sum of \$9,936.41. On February 28, 1972, the Income Tax Bureau issued another Notice of Deficiency for 1968, asserting unincorporated business

tax of \$23,259.77, plus interest of \$4,003.70, for a sum of \$27,263.47. Each Notice was issued on the ground that the gain on the sale of a stock exchange seat was subject to unincorporated business tax, since the seat represented an asset used in a trade or business.

3. Petitioner was a stockbrokerage firm which carried on business solely within New York State during the years at issue. It was engaged in business as a broker-dealer and a specialist on the floor of the New York Stock Exchange. The Articles of Co-Partnership of Murphey, Marseilles & Smith, dated January 1, 1962, specifically stated that partners Welles Murphey, Sr., William P. Marseilles, Jr., Herbert L. Smith, Jr., and Welles Murphey, Jr. were members in good standing of the New York Stock Exchange and had agreed "to contribute the use of their memberships to the partnership." The Articles also stated the following:

Insofar as may be necessary for the protection of partnership creditors, and subject to the constitution and rules of the New York Stock Exchange, the proceeds of the transfer of their Exchange memberships shall be the assets of the partnership.

The agreement further provided that:

Upon the dissolution of the firm for any reason, the Exchange memberships of the individual partners ...shall be their sole property, including any profits or losses in said membership, subject, however, to the claims of creditors and the rules of the New York Stock Exchange...

Said agreement specified that each partner was to receive interest at the rate of six (6%) percent on the value of his membership in the New York Stock exchange, which value was to be based on the average sale in each quarter as established by the records of the Secretary of the Exchange.

4. On June 21, 1967, Welles Murphey, Sr., a general partner, sold his stock exchange seat for a profit of \$265,000.00. On June 27, 1967, he retired from said partnership, but remained with said firm as a limited partner. On November 30, 1967, Herbert Smith, Jr., a general partner, sold his seat for a profit of \$211,000.00. On June 27, 1967, he retired from said partnership, but remained with said firm as a limited partner. On November 28, 1968, William P. Marseilles,

Jr., a general partner, sold his seat for a profit of \$405,000.00. There was no evidence of his status at the time of the sale of his seat.

5. Petitioner contended that the decision in Shearson, Hammill & Co. and Winston v. State Tax Commission (Third Dept. 1963) aff'd 15 NY2d 608 (1964) (wherein it was held that securities contributed and owned by individual partners in whose names they were registered were never assets of the partnership), was applicable to a situation where a stock exchange seat was contributed to a firm by a partner. Petitioner also contended that section 705(a) of the Tax Law defines unincorporated business gross income as the sum of the items of income and gain of the business, of whatever kind and in whatever form paid, includible in gross income for the taxable year for Federal tax purposes and that based on said section, the gains on the sale of the seats were not required to be included in Federal gross income; therefore, said gains were not required to be reported on the New York State partnership returns.

#### CONCLUSIONS OF LAW

A. That unincorporated business gross income means the sum of the items of income and gain of a business, of whatever kind and in whatever form paid, includible in gross income for the taxable year for Federal income tax purposes, including income and gain from any property employed in the business, or from liquidation of the business, or from collection of installment obligations of the business. Therefore, since the three stock exchange seats were employed in the partnership business, the gains derived therefrom constituted unincorporated business gross income under section 705(a) of the Tax Law and as such, were subject to unincorporated business tax under section 701 of the Tax Law.

B. That petitioners' contention as set forth in Finding of Fact "5" is without merit, since the income from the securities in the partners' accounts in Shearson was never income to the partnership, whereas the income derived from the use of the stock exchange seats employed by petitioner was reported as partner-

ship gross receipts for both Federal and New York State income tax purposes.

C. That the petitions of Murphey, Marseilles & Smith are denied and the notices of deficiency issued on March 29, 1971 and February 28, 1972 are sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JAN 2 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER