

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jones, Kreeger & Co. :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 of :
the Tax Law for the Fiscal Year Ended 7/31/70. :

In the Matter of the Petition :
of :
Ruth G. Adler :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1970. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Marvin E. Gordon :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1970. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Ruth G. Adler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ruth G. Adler
8003 Whittier Boulevard
Bethesda, MD 20034

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
27th day of May, 1983.

David Parchuck

James A. Haylund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Ruth G. Adler
8003 Whittier Boulevard
Bethesda, MD 20034

Dear Ms. Adler:

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) 690 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 Law 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas B. Carr
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W. Suite 500
Washington, DC 20037
Taxing Bureau's Representative

STATE OF NEW YORK

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State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Marvin E. Gordon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marvin E. Gordon
Sade & Company
Rt. 1, Box 2
Fort Defiance, VA 24437

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
27th day of May, 1983.

David Parbuck

James A. Haylund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Marvin E. Gordon
Sade & Company
Rt. 1, Box 2
Fort Defiance, VA 24437

Dear Mr. Gordon:

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) 690 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 Law 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.

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Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas B. Carr
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, DC 20037
Taxing Bureau's Representative

STATE OF NEW YORK

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of :
Marvin E. Gordon :
for Redetermination of a Deficiency or for Refund :
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Law for the Year 1970. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Jones, Kreeger & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jones, Kreeger & Co.
c/o Miller, Cassidy, Larroca & Lewin
2555 M Street N.W., Suite 500
Washington, DC 20037

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
27th day of May, 1983.

David Parchuck

David A. Hupland

AUTHORIZED TO ADMINISTER
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SECTION 174

STATE OF NEW YORK

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AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Marvin E. Gordon :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1970. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Thomas B. Carr the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas B. Carr
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, DC 20037

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
27th day of May, 1983.

David Parschuck

Annie O. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Jones, Kreeger & Co.
c/o Miller, Cassidy, Larroca & Lewin
2555 M Street N.W., Suite 500
Washington, DC 20037

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) 690 & 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 Law 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
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Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas B. Carr
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, DC 20037
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JONES, KREEGER & CO.
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Fiscal
Year Ended July 31, 1970.

In the Matter of the Petition
of
RUTH G. ADLER
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1970.

DECISION

In the Matter of the Petition
of
MARVIN E. GORDON
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1970.

Petitioner, Jones, Kreeger & Co., c/o Miller, Cassidy, Larroca & Lewin,
2555 M Street, N.W., Suite 500, Washington, D.C. 20037, 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 ended July 31, 1970 (File
No. 01290).

Petitioner, Ruth G. Adler, c/o A.G. Edwards & Sons, Inc., 4801 Massachusetts
Avenue, N.W., Washington, D.C., filed a petition for redetermination of a

deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1970 (File No. 17312).

Petitioner, Marvin E. Gordon, c/o Sade and Company, Route 1, Box 2, Fort Defiance, Virginia 24437, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1970 (File No. 17314).

A consolidated formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, State Campus, Albany, New York, on August 12, 1982 at 1:15 P.M., with all briefs submitted by November 29, 1982. Petitioner appeared by Miller, Cassidy, Larroca & Lewin, Esqs. (Thomas B. Carr, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether commissions earned by a nonresident partnership's floor brokers located at the New York and American Stock Exchanges, and gains realized from the sales of its memberships on the New York and American Stock Exchanges are subject to unincorporated business tax, notwithstanding that the partnership sustained a large loss from its overall business activities.

II. If such commissions and gains are subject to unincorporated business tax, whether they must be allocated over all the operations of the partnership.

III. If such commissions and gains are subject to unincorporated business tax under sections 701 and 707 of the Tax Law, without taking into account countervailing losses and expenses incurred in business operations outside New York, whether such sections violate the United States and New York Constitutions.

IV. Whether the nonresident partner's share of such commissions and gains is subject to New York personal income tax.

V. If so, whether the deficiency should properly have been asserted for 1969 rather than 1970.

FINDINGS OF FACT

1. (a) On December 28, 1973, the Audit Division issued to petitioner Jones, Kreeger & Co. a Notice of Deficiency, asserting unincorporated business tax due under Article 23 of the Tax Law for the fiscal year ended July 31, 1970 in the amount of \$26,633.42, plus interest. The asserted deficiency, as explained in the accompanying Statement of Audit Changes, was composed of two elements: (1) unincorporated business tax on commissions earned by the partnership's floor brokers located at the New York and American Stock Exchanges, and (2) unincorporated business tax on gains realized from the sales of the partnership's stock exchange memberships.

Commissions, floor trading	\$ 20,722.00
Direct expenses connected with N.Y. activities	5,078.00
Net commission income attributable to N.Y.	<u>\$ 15,644.00</u>
Gain on sale of stock exchange memberships	543,600.00
Balance	<u>\$559,244.00</u>
Allowance for partners' services	(70,000.00)
Net income from business	<u>\$489,244.00</u>
Exemption	(5,000.00)
Taxable business income	<u>\$484,244.00</u>

(b) On September 27, 1976, the Audit Division issued to petitioner Ruth G. Adler a Notice of Deficiency, asserting personal income tax due under Article 22 of the Tax Law for the year 1970 in the amount of \$647.28, plus penalty and interest. The accompanying Statement of Audit Changes offered the following explanation for the asserted deficiency:

"Your share of New York income based on the audit of the partnership Jones, Kreeger & Co. for fiscal year ending July 31, 1970 has been determined at \$782.20 and your share of partnership long term gains from the sale of New York and American Stock Exchange seats is \$27,180.00."

(c) On September 27, 1976, the Audit Division issued to petitioner Marvin E. Gordon a Notice of Deficiency, asserting personal income tax due under Article 22 of the Tax Law for the year 1970 in the amount of \$2,017.40, plus penalty and interest. The accompanying Statement of Audit Changes offered the following explanation for the asserted deficiency:

"Your share of New York income based on the audit of the partnership Jones, Kreeger & Co. for fiscal year ending July 31, 1970 has been determined at \$1,407.96 and your share of partnership long term gains from the sale of the New York and American Stock Exchange seats is \$48,924.00."

2. Prior to October 3, 1969, Jones, Kreeger & Co. was a partnership formed in Washington, D.C. with offices in the District of Columbia, Maryland and Virginia, and engaged in business as a securities broker. It maintained separate books for each of the states in which business was conducted. At October 3, 1969, Jones, Kreeger & Co. consisted of 14 partners, including petitioner Adler and petitioner Gordon, whose relative participation in partnership profits and losses was five and nine percent, respectively.

3. On October 3, 1969, the partnership was dissolved. A final New York State partnership (income and unincorporated business tax) return was filed on February 9, 1971 for the fiscal year ended July 31, 1970, reflecting gross receipts of \$4,849.51, interest income of \$27,048.35, and total deductions of \$742,652.11, for a net loss in the amount of \$710,754.25. Said loss represented the amount shown on the Federal partnership return of Jones, Kreeger & Co. With respect to this loss, a statement appended to the return explained, "A net loss from the operations of Jones, Kreeger and Company exists for the year ended July 31, 1970. Any apportionment of this loss among the several states in which the Company did business would also result in taxable loss. Therefore, no apportionment is shown." Federal Schedule D (Sales or Exchanges of Property),

also appended to the return, showed a long-term capital gain of \$304,100.00 realized from the sale of the partnership's New York Stock Exchange membership and a long-term capital gain of \$239,500.00 realized from the sale of its American Stock Exchange membership. Finally, Schedule K (Partners' Shares of Income, Credits, Deductions, etc.) of the return disclosed Mrs. Adler's and Mr. Gordon's respective federal distributive share of income or loss, as follows:

	ORDINARY INCOME (LOSS)	PAYMENTS TO PARTNERS-SALARIES	NET LONG-TERM GAIN - CAPITAL ASSETS	NET EARNINGS FROM SELF EMPLOYMENT
R. Adler	(\$35,537.71)	\$ 5,589.93	\$27,180.00	(\$29,947.78)
M. Gordon	(\$63,967.88)	\$10,050.86	\$48,924.00	(\$53,917.02)

4. Jones, Kreeger & Co. filed a federal partnership return for the fiscal year ended July 31, 1971, during which period it was winding up its affairs, reflecting a loss of \$173,059.00. Schedule D exhibited a long-term capital gain of \$24,500.00 realized from the sale of two seats on the Philadelphia - Baltimore - Washington Stock Exchange (now, the Philadelphia Stock Exchange). Schedule K disclosed Mrs. Adler's and Mr. Gordon's respective federal distributive share of income or loss, as follows:

	ORDINARY INCOME (LOSS)	NET LONG-TERM GAIN - CAPITAL ASSETS	NET EARNINGS FROM SELF EMPLOYMENT
R. Adler	(\$ 8,653.00)	\$1,225.00	(\$ 8,653.00)
M. Gordon	(\$15,575.00)	\$2,205.00	(\$15,575.00)

5. Because of the passage of time and the routine destruction of returns by the Internal Revenue Service and the Department of Taxation and Finance, petitioner Adler was unable to produce a copy of her 1969 New York State personal income tax return or her 1970 federal income tax return.

6. Petitioner Gordon produced his file copy of the joint New York State nonresident return which he and his wife submitted for 1969. The return showed

income as reported on the federal return and income from New York sources, as follows:

	<u>FEDERAL AMOUNT</u>	<u>N.Y.S. AMOUNT</u>
Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc.	\$30,045.37	\$7,828.53
Total income	\$41,999.66	\$7,828.53

The Gordons believed that they had no income from New York sources during 1970 and accordingly, did not submit a New York return for that year. Their federal income tax return for 1970 showed itemized deductions and two exemptions. They reported all income and filed all returns pursuant to the advice of their accountants, Alexander Grant & Company.

CONCLUSIONS OF LAW

A. That (prior to the repeal of Article 23 of the Tax Law, effective December 31, 1982) where an unincorporated business is conducted both within and without New York, section 707, subdivision (a) of the Tax Law provides for allocation to New York of "a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions." Where the taxpayer maintains separate books and records for each state in which it conducts business, and the portion of income or loss allocable to this state is determinable directly from such books and records, use of the direct accounting method is proper. Tax Law section 707(b); Matter of Advest Co., State Tax Comm., May 23, 1980, and the authorities cited therein. The Audit Division thus correctly made reference to the books of Jones, Kreeger & Co., subjecting to taxation gain from the sale of its memberships on the New York Stock Exchange and the American Stock Exchange (partnership assets in the nature of intangible personal property having a business situs in New York), but allowing no deductions for losses or expenses incurred outside New York.

That portion of the unincorporated business tax deficiency asserted to be due on income derived from the activities of Jones, Kreeger & Co.'s floor brokers, however, lacks a rational basis and must be cancelled. Gross receipts as shown on the partnership's New York return for fiscal year 1970 were \$4,849.51, and not \$20,722.00, the figure utilized by the Audit Division in computing the deficiency.

B. That the constitutionality of section 701, which imposes the unincorporated business tax, and section 707, regarding allocation of taxable income to New York, is presumed at the administrative level of the Tax Commission.

C. That the New York adjusted gross income of a nonresident individual consists of the net amount of income, gain, loss and deduction entering into his federal adjusted gross income, derived from or connected with New York sources, including his distributive share of partnership income, gain, loss and deduction. Tax Law section 632(a)(1). Income from the disposition of intangible personal property constitutes income derived from New York sources only to the extent that such income is from property used in a business, trade, profession or occupation carried on in New York. Tax Law section 632(b)(2). Section 637, subdivision (a), paragraph (1) provides, in relevant part:

"In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income..."

The Audit Division properly calculated the portion of the deficiencies asserted against petitioner Adler and petitioner Gordon which subjected to personal income tax their respective shares of the gain from the sale of the partnership's New York and American exchange memberships. Reference to the partnership's books and records disclosed no loss attributable to New York for the year under

consideration; consequently, no loss is deductible by the partners. Cf.
Matter of Graham v. State Tax Comm., 48 A.D.2d 444 (3d Dept.), affd. mem., 40
N.Y.2d 889, where the court annulled a Commission decision, finding the Commission's
regulation denying a nonresident taxpayer a net operating loss by way of
carryback or carryover, which deduction was based solely on income, gain, loss
or deduction derived from or connected with New York sources, to be invalid.

On the other hand, the portion of the deficiencies which subjected to
personal income tax their respective shares of the partnership commissions
earned in New York is cancelled, in accordance with the reasoning of Conclusion
of Law "A".

D. That the deficiency against petitioner Adler and the deficiency
against petitioner Gordon were properly asserted for their taxable year 1970 in
accordance with Internal Revenue Code section 706, subdivision (a) which states
that in computing a partner's taxable income, "the inclusions required by
section 702 [income and credits of partner] and section 707(c) [guaranteed
payments] with respect to a partnership shall be based on the income, gain,
loss, deduction or credit of the partnership for any taxable year of the
partnership ending within or with the taxable year of the partner."

E. That the penalties and interest asserted against petitioner Gordon in
excess of the amount of interest prescribed by statute are remitted.

F. That the petition of Jones, Kreeger & Co. is granted to the extent
indicated in Conclusion of Law "A"; the Notice of Deficiency issued on December
28, 1973 is to be modified accordingly; and except as so modified, the deficiency
is in all other respects sustained.

The petition of Ruth G. Adler is granted to the extent indicated in
Conclusion of Law "C"; the Notice of Deficiency issued on September 27, 1976 is

to be modified accordingly; and except as so modified, the deficiency is in all other respects sustained.

The petition of Marvin E. Gordon is granted to the extent indicated in Conclusions of Law "C" and "E"; the Notice of Deficiency issued on September 27, 1976 is to be modified accordingly, also taking into account the percentage of itemized deductions and the personal exemptions to which he is entitled; and except as so modified, the deficiency is in all other respects sustained.

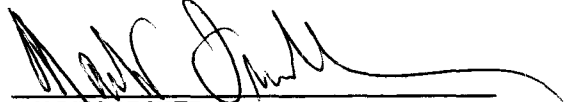
DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER