

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward E. Moritt :
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 1971 & 1972. :
_____ :

AFFIDAVIT OF MAILING

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Edward E. Moritt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward E. Moritt
21A Whippoorwill Rd.
Armonk, NY 10504

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
18th day of March, 1983.

David Parchuck

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

March 18, 1983

Edward E. Moritt
21A Whippoorwill Rd.
Armonk, NY 10504

Dear Mr. Moritt:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
EDWARD E. MORITT	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1971	:	
and 1972.	:	

Petitioner, Edward E. Moritt, 21A Whippoorwill Road, Armonk, New York 10504, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1971 and 1972 (File No. 22075).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 18, 1982 at 9:15 A.M. Petitioner, Edward E. Moritt, appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner's activities as a floor broker on the New York Stock Exchange constituted the carrying on of an unincorporated business, thereby subjecting the income earned from said activity to unincorporated business tax.

II. Whether petitioner's failure to file unincorporated business tax returns on time and pay the tax when due was based on reasonable cause, and not willful neglect, thereby permitting waiver of the penalties asserted due under sections 722, 685(a)(1) and (a)(2) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Edward E. Moritt, timely filed New York State nonresident personal income tax returns for the years 1971 and 1972 wherein he reported business income from his activities as a stockbroker of \$35,142.00 for 1971 and \$32,999.00 for 1972. No unincorporated business tax returns were filed for the years at issue. Amended nonresident personal income tax returns were filed by petitioner for the years 1971 and 1972, however, the changes made on said amended returns are not germane to the issues addressed herein.

2. On February 27, 1978, the Audit Division issued a Notice of Deficiency to petitioner for the years 1971 and 1972, asserting that \$2,647.76 of unincorporated business tax was due together with penalties (imposed pursuant to sections 722, 685(a)(1) and (a)(2) of the Tax Law) and interest. The Notice was based on a Statement of Audit Changes, originally dated November 21, 1977, wherein the following explanation was offered:

"Your activities as a stockbroker constitute the carrying on of an unincorporated business and the net income derived from this source is subject to the unincorporated business tax."

The Statement of Audit Changes decreased the additional unincorporated business tax due by \$60.00 due to a "Reduction in 1970 New York State Personal Income Tax per IT-115 filed".

3. During the years at issue petitioner was an independent floor broker on the New York Stock Exchange. The business income shown on petitioner's 1971 and 1972 New York tax returns represented commission income generated from the execution of trades for the brokerage firm of Francis I. du Pont. Although petitioner executed trades solely for the firm of Francis I. du Pont, he was not bound, contractually or otherwise, to said firm. As a sole proprietor, petitioner was free to execute trades for any firm which gave him an order.

The firm of Francis I. du Pont did not exercise any direction or control over petitioner's activities as an independent floor broker.

4. Prior to the years at issue, petitioner was a partner in the firm of Francis I. du Pont. When petitioner left the partnership on December 31, 1970, he had a deficit in his capital account of approximately \$355,000.00. Petitioner was unable to raise the funds necessary to close out his capital account and, accordingly, he worked out an arrangement with the firm whereby the brokerage commissions he earned in 1971 and 1972 were returned to the firm in payment of his capital account deficit. Petitioner argues that since he never actually received or had constructive use of the commission income earned in 1971 and 1972 from Francis I. du Pont, that said income should not be subject to unincorporated business tax.

5. Petitioner's 1971 New York income tax return was prepared by a certified public accountant, while the 1972 New York return was prepared by petitioner. When the 1971 return was prepared, petitioner and his accountant discussed the possibility of an unincorporated business tax liability and, when posed the question whether or not his accountant advised him if he was or was not subject to unincorporated business tax, petitioner responded in the following manner:

"I think that we arrived at that conclusion. He didn't feel certain that I wouldn't have to pay unincorporated business tax, but I think it was mostly me that came to that determination because I don't believe that he was that well versed on how the State would look at it".

CONCLUSIONS OF LAW

A. That petitioner's business activities as an independent floor broker on the New York Stock Exchange constituted the carrying on of an unincorporated business [Tax Law section 703(a)] and the income generated from said activities

is subject to the unincorporated business tax imposed by section 701(a) of the Tax Law.

B. 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 income tax purposes..."

C. That section 61(a) of the Internal Revenue Code of 1954 defines gross income as "...income from whatever source derived, including (but not limited to) the following items:

* * *

(12) Income from discharge of indebtedness"

D. That commission income received by petitioner from the firm of Francis I. du Pont during the years 1971 and 1972 is includable in federal gross income and unincorporated business gross income within the meaning and intent of section 61(a) of the Internal Revenue Code and section 705(a) of the Tax Law, respectively.

E. That petitioner has failed to sustain the burden of proof imposed by sections 722 and 689(e) of the Tax Law to show that his failure to file unincorporated business tax returns for the years 1971 and 1972 and pay the tax when due was based on reasonable cause and not willful neglect. Accordingly, the penalties assessed pursuant to sections 722, 685(a)(1) and (a)(2) are sustained.


F. That petitioner is entitled to a credit of \$60.00 for the reduction in his 1970 personal income tax liability as set forth in Finding of Fact "2", supra.

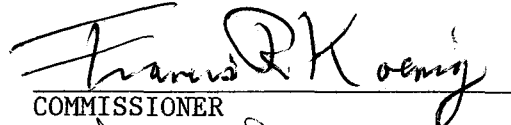
G. That the petition of Edward E. Moritt is granted to the extent indicated in Conclusion of Law "F", supra, and that the Notice of Deficiency, as modified, is sustained, together with such additional interest and penalty as may be lawfully due and owing.

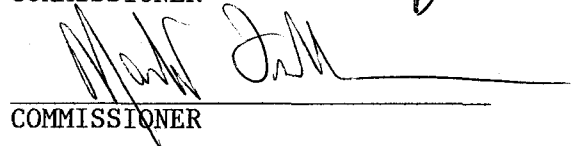
DATED: Albany, New York

MAR 18 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER