

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James F. Draper : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1977 - 1979. :

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon James F. Draper, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James F. Draper
912 Fifth Ave.
New York, NY 10021

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
5th day of October, 1984.

David Parchuck

Ann C. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

James F. Draper
912 Fifth Ave.
New York, NY 10021

Dear Mr. Draper:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JAMES F. DRAPER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1977,	:	
1978 and 1979.	:	

Petitioner, James F. Draper, 912 Fifth Avenue, New York, New York 10021, 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 1977, 1978 and 1979 (File No. 39211).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 13, 1984 at 9:15 A.M., with all additional evidence to be submitted by April 13, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the income reported by petitioner as profit from his business activity as an investment broker was properly subject to the unincorporated business tax.

FINDINGS OF FACT

1. On January 26, 1981, the Audit Division issued a Statement of Audit Changes against petitioner, James F. Draper, alleging unincorporated business tax due of \$3,409.51, \$7,125.05 and \$9,341.37 for the 1977, 1978 and 1979 tax years, respectively. Penalties of \$154.39 and \$323.05 were imposed on the

alleged deficiencies for 1977 and 1978, respectively, under Tax Law §685(c)¹ for failure to pay estimated unincorporated business tax. The alleged deficiencies were based upon the following computations:

	<u>1977</u>	<u>1978</u>	<u>1979</u>
Business income - investment broker	\$71,991.00	\$152,736.00	\$217,880.00
Business income - farm		(235.00)	(294.00)
Net business income	<u>\$71,991.00</u>	<u>\$152,501.00</u>	<u>\$217,586.00</u>
Allowance for services	5,000.00	5,000.00	5,000.00
Balance	<u>\$66,991.00</u>	<u>\$147,501.00</u>	<u>\$212,586.00</u>
Exemption	5,000.00	5,000.00	5,000.00
Income Subject to Unincorporated Business Tax	<u>\$61,991.00</u>	<u>\$142,501.00</u>	<u>\$207,586.00</u>

The following explanation was provided: "The income from your activities as an investment broker is subject to the New York State unincorporated business tax".

2. On February 26, 1982, the Audit Division issued a Notice of Deficiency against petitioner alleging unincorporated business tax due of \$19,875.93 plus penalty of \$1,769.71 and interest.

3. Petitioner attached a copy of a Federal Schedule C Form 1040, Profit or (Loss) From Business or Profession, to each of his New York income tax returns for the years at issue. On each of such schedules, he reported a net profit from his principal business activity as an investment broker: net profit of \$71,991 in 1977, of \$152,736 in 1978, and of \$217,880 in 1979. The Audit Division used these figures in calculating the alleged deficiencies as noted in Finding of Fact "1", supra.

4. Petitioner offset the amounts he reported as net profit from his business activity as an investment broker with substantial partnership losses

¹ Tax Law §722 incorporates this section into Article 23, "Unincorporated Business Income Tax".

including losses of \$28,131 and \$33,356 for 1977 and 1978, respectively, from FSI Group. In 1979, petitioner reported a gain of \$12,862 from FSI Group. However, he reported a loss of \$110,000 from Anglo American Financial. Petitioner did not report any New York taxable income for 1977. In 1978, he reported New York taxable income of \$111,298 and in 1979, \$11,837. He did not report any "wages, salaries, tips, and other employee compensation" for any of the years at issue.

5. According to a letter dated March 15, 1984 submitted by petitioner to the hearing officer after the hearing held herein, the amounts which he reported as "gross receipts or sales"² on Federal Schedule C Form 1040, were from the following sources:

<u>1977</u>	<u>1978</u>	<u>1979</u>
\$16,500 R.W. Pressprich bonus	\$166,675 FSI Group	\$ 25,000 Anglo American Commission
<u>57,000 FSI Group</u>		<u>196,575 FSI Group</u>
\$73,500		\$221,575

6. In November, 1977, petitioner, Robin C. Rodriguez and Charles C. Bell, as general partners, made a private offering of Federal Securities, a New York limited partnership. (In 1978, Federal Securities became FSI Group.) The private placement memorandum of this limited partnership described petitioner's background as follows:

"Mr. Draper is presently an Independent Financial Consultant. In the past he has organized, trained, and administered successful Ginnie Mae Operations both as Senior Vice-President of R. W. Pressprich & Company and as Vice-President of White, Weld & Company.

Prior to that time he was Special Assistant to the President of the Government National Mortgage Association for the marketing and development of mortgage-backed securities. In addition, Mr. Draper has been the President of the James F. Draper Corporation, Stock

² Petitioner deducted business expenses of \$1,509, \$13,939 and \$3,695 in calculating net profit from his business activity as an investment broker for 1977, 1978 and 1979, respectively.

specialists on the Boston Stock Exchange, Manager of the New York Office of Butcher and Sherrerd, and Vice-President of McDonnell & Co., Members of New York Stock Exchange.

Mr. Draper is a graduate of Harvard College and attended the Harvard Graduate School of Business Administration and the School of Mortgage Banking".

7. FSI Group was a company in the government bond and interest rate futures business. In 1977, petitioner received \$57,000 in general partner's fees which were paid directly to him by the limited partners of FSI Group as individuals, apparently as a type of sales commission from his sale of limited partnership units in FSI Group. In 1978 and 1979, the income attributable to his involvement with FSI Group included, in addition to general partner fees, management fees which, according to petitioner, were "something like \$7,500 a month, but I am not sure". In 1979, petitioner's co-partner in FSI Group, Robin Rodriguez, organized a limited partnership, Anglo American Financial, which, according to petitioner, was "involved in the futures business for metals, London/New York metals dealer". He testified that he received about \$50,000 in commissions from Anglo American Financial for bringing investors into that partnership. However, in his letter dated March 15, 1984 (Finding of Fact "5", supra), he stated that he received commissions of only \$25,000 from Anglo American Financial.

8. FSI Group employed approximately fifteen individuals including traders, salesmen, accounting and secretarial staff. The partnership reported net losses of \$9,423,827, \$21,757,556 and \$55,504,561 for 1977, 1978 and 1979, respectively. Petitioner testified that he received monthly management fees

from FSI Group when it "was making money,"³ and we did not pay ourselves anything when the company had to call for more money from its limited partners".

CONCLUSIONS OF LAW

A. That pursuant to Tax Law §722, which incorporates Tax Law §689(e) into Article 23, "Unincorporated Business Income Tax",⁴ the burden of proof is imposed upon the petitioner to show that the income he reported as net profit from his business activity as an investment broker is not subject to the unincorporated business tax.

B. That pursuant to Tax Law §703, "An unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity..."

C. That the source of petitioner's income, as reported on the Federal Schedules C, Form 1040, was primarily commission income from the sale of limited partnership interests in FSI Group and compensation for his introduction of investors to Anglo American Financial. Income from such activities is properly subject to the unincorporated business tax. In addition, petitioner failed to establish that the management fees which he received from FSI Group were compensation for services he rendered as an employee. There is nothing in the record showing that FSI Group had the right to control and direct petitioner concerning results to be accomplished by him, and the details and means by

³ "Making money" does not mean that FSI Group was showing a net profit because Mr. Draper received management fees from FSI Group during 1978 and 1979 when it was reporting net losses. It is unclear how Mr. Draper is using the term "making money".

⁴ Article 23 was repealed, effective December 31, 1982. However, this article was effective for the years at issue.

which he was to accomplish such results. See 20 NYCRR 203.10(b) and Matter of William Tischler, State Tax Commission, February 4, 1983.


D. That, however, the bonus of \$16,500 paid to petitioner in 1977 by his former employer, R. W. Pressprich, is properly excluded from the 1977 income subject to unincorporated business tax.

E. That the petition of James F. Draper is granted to the extent noted in Conclusion of Law "D", but in all other respects, is denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER