

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Wagner & Company	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Year 1968.	:	

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

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 29th day of February, 1984, he served the within notice of Decision by certified mail upon Wagner & Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

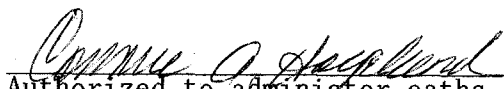
Wagner & Company
c/o S.W. Azriliant
36 W. 44th St.
New York, NY 10036

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
29th day of February, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wagner & Company :
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 Year 1968. :
:

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 29th day of February, 1984, he served the within notice of Decision by certified mail upon Donald G. Koch, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald G. Koch
S.W. Azriliant, P.C.
36 West 44th St.
New York, NY 10036

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 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
29th day of February, 1984.

David Parachuck

Constance P. Dugimund
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 29, 1984

Wagner & Company
c/o S.W. Azriliant
36 W. 44th St.
New York, NY 10036

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, 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: Petitioner's Representative
Donald G. Koch
S.W. Azriliant, P.C.
36 West 44th St.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WAGNER & COMPANY	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1968.	:	

Petitioner, Wagner & Company, c/o S. W. Azriliant, P.C., 36 West 44th Street, New York, New York 10036, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1968 (File No. 29768).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 25, 1983 at 1:15 P.M., with all briefs to be submitted by August 19, 1983. Petitioner appeared by S. W. Azriliant, P.C. (Donald G. Koch, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin L. Levy, Esq., of counsel).

ISSUE

Whether the gain from the sale of a stock exchange seat is attributable to petitioner's income for unincorporated business tax purposes.

FINDINGS OF FACT

1. On April 10, 1972, the Audit Division issued a Notice of Deficiency against petitioner, Wagner & Company, in the amount of \$11,820.42, plus interest of \$2,119.05, for a total due of \$13,939.47 for the year 1968. The basis of the deficiency was the determination by the Audit Division that a stock exchange

seat was an asset of petitioner and that the gain on the sale of the seat was subject to unincorporated business tax.

2. Petitioner paid the amount due and on May 18, 1973 and November 5, 1979 filed claims for refund of unincorporated business tax in the amount of \$11,820.42 plus interest. On January 28, 1980, the Audit Division disallowed petitioner's claim in full, stating that "[t]he gain on the sale of the stock exchange seat is taxable to the partnership rather than the individual."

3. Petitioner was a limited partnership formed in 1965. Allen M. Wagner was the sole general partner. The limited partners were Judith Wagner and Evelyn Rydell, Mr. Wagner's wife and mother-in-law, respectively. Petitioner was a broker's broker whose business was primarily to execute orders on the floor of the American Stock Exchange for other brokers and brokerage houses.

4. In order to conduct business, it was necessary for Mr. Wagner to obtain a "seat" on the Exchange. A "seat" is an Exchange membership and carries with it the right to do business on the floor. When petitioner was formed, Mr. Wagner applied for membership on the American Stock Exchange. The seat cost \$58,500.00, plus an initiation fee of \$2,500.00, for a total of \$61,000.00. To finance the acquisition of the seat, Mr. Wagner obtained a \$30,000.00 unsecured loan from his father-in-law, Sydney Rydell, under a subordination agreement providing for voluntary repayment. The rest of the financing for the seat came from Mr. Wagner's own funds. On the application for regular membership, Mr. Wagner indicated that part of the funds advanced for the seat was subject to an a-b-c agreement with the partnership. An a-b-c agreement provides for certain options for disposal of a seat upon withdrawal of a partner from the partnership.

5. In the present case, it is unclear as to which option Mr. Wagner chose or whether an a-b-c agreement actually existed. In any event, petitioner advanced no funds whatsoever for acquisition of the seat. The only funding came from Mr. Wagner and his father-in-law, who had no connection with petitioner other than his wife, Mrs. Rydell, who was a limited partner. In fact, the only reason Mr. Wagner selected a limited partnership form for doing business was to allow Mr. Rydell to have some security in his loan by having Mrs. Rydell and Mrs. Wagner as limited partners. Since, under the rules of the stock exchange, a seat may not be used as collateral, Mr. Rydell felt that by having his wife and daughter as limited partners he would have some protection.

6. It was never understood by any of the partners involved with petitioner that petitioner would have any interest or rights in the seat. Mr. Rydell merely wanted a share in the profits from the seat when it was sold. In 1968, petitioner was dissolved and Mr. Wagner sold the seat for \$275,000.00 and gave Mr. Rydell \$94,000.00, which was very roughly equivalent to Mrs. Rydell's 40 percent interest in petitioner. No part of the proceeds from the sale went to petitioner or any of the limited partners. Moreover, Mr. Wagner testified that he could have sold the seat without the consent of the partners, and that petitioner had no control over the seat and could not have pledged the seat as a partnership asset in obtaining loans from third parties.

CONCLUSIONS OF LAW

A. That section 705(a) of the Tax Law provides that unincorporated business income is "the sum of the items of income and gain of the business, of whatever kind, and in whatever form paid...including income and gain from any property employed in the business...".

B. That the seat in the present case was not subject to any ownership control by petitioner, nor was it an asset which could be pledged by petitioner. Petitioner provided no funds for the seat, nor did it receive any of the proceeds from the sale. All transactions with respect to the seat were handled privately by Mr. Wagner, with financial assistance from Mr. Rydell. Petitioner only existed to provide some level of security to Mr. Rydell. In a case such as this, "there remains no reasonable basis for considering asset gain transactions which do not and cannot inure to the benefit of the partnership as gains attributable to such partnership as its income..." (Gaines v. Tully, 66 A.D.2d 106, aff'd 49 N.Y.2d 1008).

C. That the petition of Wagner & Company is granted and the Audit Division is directed to refund the sum of \$11,820.42, together with such interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1984

Rodnicewicz
PRESIDENT

Francis Q. K. Long
COMMISSIONER

Mark J. Rydell
COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

UNCLAIMED
DO NOT REHAIL
IN THIS ENVELOPE

TAX APPEALS BUREAU
MAR 28 1984
RECEIVED

COULTY N. NY 112
PM
26 MAR
1984



Donald G. Koch
S.W. Azriliant, P.C.
36 West 44th St.
New York, NY 10036

COLTON TAX

CERTIFIED
P 470 315 247
MAIL

408
A. T.O. 2
3/2/84
Eugene

CLAIM CHECK
NO.

203852

☐ HOLD

DATE

11/1
1ST NOTICE

2/11/77
2ND NOTICE

RETURN

Detached from
PS Form 3849-A
Oct. 1980

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

February 29, 1984

Wagner & Company
c/o S.W. Azriliant
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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Donald G. Koch
S.W. Azriliant, P.C.
36 West 44th St.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
WAGNER & COMPANY
for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1968.

DECISION

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DATED: Albany, New York
FEB 29 1984

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