

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dishy, Easton & Co. :
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 Fiscal Year Ended 9/30/68. :
:

AFFIDAVIT OF MAILING

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Dishy, Easton & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dishy, Easton & Co.
1 Whitehall St.
New York, NY 10004

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
7th day of November, 1985.

David Parchuck

Arnold A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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Dishy, Easton & Co. :
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:

AFFIDAVIT OF MAILING

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Jack Wong, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

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
7th day of November, 1985.

David Parchuck

Annunzio Ottogelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Dishy, Easton & Co.
1 Whitehall St.
New York, NY 10004

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
Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DISHY, EASTON & CO.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Fiscal Year	:	
Ended September 30, 1968.	:	

Petitioner, Dishy, Easton & Co., 1 Whitehall Street, New York, New York 10004, 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 September 30, 1968 (File No. 01069).

A 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 June 4, 1985 at 9:30 A.M., with all briefs to be submitted by October 7, 1985. Petitioner appeared by Jack Wong, C.P.A. and Allan S. Sexter, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On February 28, 1972, the Audit Division issued a Notice of Deficiency against petitioner, Dishy, Easton & Co., in the amount of \$11,776.75, plus interest of \$2,203.78, for a total due of \$13,980.53 for the fiscal year ended September 30, 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 is a limited partnership formed in 1962 to engage in the business of buying and selling stocks, bonds, securities and commodities on an agency commission basis for the account of others and also buying and selling for its own account.

3. James L. Kirby was admitted as a general partner of petitioner on May 12, 1966. Mr. Kirby had purchased an American Stock Exchange membership or "seat" on September 14, 1921 for \$4,000.00. Upon joining petitioner, Mr. Kirby agreed to contribute the use of the seat to petitioner. All income derived from the seat belonged to petitioner and petitioner paid all expenses associated with use of the seat. The seat was subject to the claims of creditors and, pursuant to the rules of the stock exchange, the partnership agreement provided, in part:

"[I]nsofar as is necessary for the protection of the creditors of the Partnership, and subject to the Constitution and Rules of said Exchange, the proceeds of the sale of his membership shall be deemed to be an asset of the Partnership..."

However, the agreement also expressly stated that the seat, "and the proceeds of any sale thereof, shall remain the individual property of such owner and shall not constitute assets of the Partnership between the parties thereto."

Any fluctuations in the value of the seat were considered to be "solely a matter for the owner of such membership" and such fluctuations had no effect on either Mr. Kirby's capital account or petitioner's balance sheet.

4. Due to a serious illness and continued ill health, Mr. Kirby tendered his resignation from petitioner on November 11, 1967. On December 13, 1967, petitioner acknowledged Mr. Kirby's resignation and indicated that his seat would be returned within two weeks. Mr. Kirby sold the seat for \$260,000.00 on

January 22, 1968 which sale became effective on February 8, 1968. Petitioner was not involved in any way with the negotiations leading to the sale of the seat and received none of the proceeds of the sale. Mr. Kirby reported the sale of the seat and the proceeds realized therefrom on his 1968 Federal and State personal income tax returns.

5. Along with its brief, petitioner submitted proposed findings of fact, all of which have been substantially incorporated herein.

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 facts in the instant matter, in particular the terms of the partnership agreement, are virtually identical to those in Gaines v. Tully, 66 A.D.2d 106, aff'd, 49 N.Y.2d 1008, where the court held that:

"While the seat was collateral for the protection of all of the partnership's creditors, the seat was not ever made an asset which the partnership could specifically pledge as a part of its business... [T]here 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, where such gains are not in any way attributable to the partnership activity or business." 66 A.D.2d at 107-108.

Furthermore, in Freiday & Co. v. State Tax Commission, 69 A.D. 2d 944, aff'd, 49 N.Y.2d 1010, another similar case, the court held that "the fact that only [the partner] was entitled to receive or required to bear any profit or loss accruing from any increase or decrease in value of the seat, and the fact that petitioner paid all dues, fines and other charges on the seat were entirely consistent with the expressed intention to contribute only the 'use' of the seat to petitioner." 69 A.D.2d at 946.

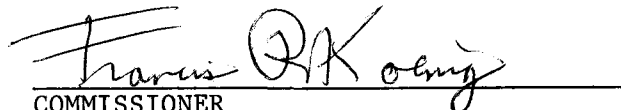
C. That the petition of Dishy, Easton & Co. is granted and the Notice of Deficiency issued February 28, 1972 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER