

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Herbert G. Einstein (Deceased) :
Stanley Friedenberg, Executor

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 1965. :

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Herbert G. Einstein (Deceased), Stanley Friedenberg, Executor, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert G. Einstein (Deceased)
Stanley Friedenberg, Executor
150 East 77th St.
New York, NY

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
21st day of August, 1985.

David Parchuck

James P. Haggan
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Herbert G. Einstein (Deceased)	:	
Stanley Friedenber, Executor	:	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 1965.	:	

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 21st day of August, 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.
1 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
21st day of August, 1985.

David Parchuck

James P. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 21, 1985

Herbert G. Einstein (Deceased)
Stanley Friedenber, Executor
150 East 77th St.
New York, NY

Dear Mr. Friedenber:

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.
1 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	:	
HERBERT G. EINSTEIN, DECEASED	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1965.	:	

Petitioner, Herbert G. Einstein, Deceased, c/o Stanley Friedenbergs, Executor, 20 East 80th Street, 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 year 1965 (File No. 01077).

A formal 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 October 17, 1984 at 10:45 A.M., with all briefs to be submitted by February 21, 1985. Petitioner appeared by Jack Wong, C.P.A., of the accounting firm of Oppenheim, Appel, Dixon & Co. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the gain realized by petitioner on the sale of a seat on the New York Stock Exchange is subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner herein, Herbert G. Einstein, deceased, timely filed a New York State Income Tax Resident Return for 1965 wherein he reported, inter alia, business income of \$426.00 and a long-term capital gain of \$99,768.00. On said return, petitioner listed his occupation as "stockbroker". Petitioner also filed

an unincorporated business tax return for 1965, reporting thereon the business income of \$426.00.

2. The aforementioned long-term capital gain of \$99,768.00 was comprised of a gain of \$141,355.00 realized by petitioner on the sale of a seat on the New York Stock Exchange and a gain of \$58,182.00 realized on the sale of a seat on the American Stock Exchange. The combined gain of \$199,537.00 (\$141,355.00 + \$58,182.00) was reduced by 50 percent, pursuant to section 1202 of the Internal Revenue Code, to arrive at the reported gain of \$99,768.00.

3. On March 17, 1969, the Audit Division issued a Statement of Audit Changes to petitioner for 1965, providing him with the following explanation and computation:

"Gain on sale of New York stock exchange seat¹ employed in your business constitutes additional business income pursuant to Article 23, Section 705.

You are permitted exemption up to September 17, 1965.

COMPUTATION:

Gain on sale of seat	\$141,355.00
Salary allowance	5,000.00
Balance	<u>\$136,355.00</u>
Exemption prorated to September 17, 1965	<u>3,356.66</u>
Taxable business income	<u>\$132,998.34</u>
U. B. Tax at 4%	\$5,319.94"

4. Based on the Statement of Audit Changes, the Audit Division, on March 17, 1969, issued a Notice of Deficiency to petitioner for 1965, proposing

1 The Audit Division did not assert, either at or before the hearing, that the gain realized by petitioner on the sale of his American Stock Exchange seat was also subject to unincorporated business tax. Similarly, the Audit Division did not assert that petitioner's reported business income of \$426.00 should be combined with the gain realized on the sale of the New York Stock Exchange seat.

additional unincorporated business tax of \$5,319.94, plus interest of \$932.69, for a total allegedly due of \$6,252.63.

5. Petitioner acquired his seat on the New York Stock Exchange (hereinafter "Exchange") on April 25, 1935. From the date of acquisition until approximately June or July of 1964, petitioner used said seat in his business activities as a stockbroker on the floor of the Exchange. Effective June or July of 1964, petitioner, then approximately 80 years old, discontinued doing business on the floor of the Exchange due to poor health. Subsequently, petitioner did not use the seat to execute any orders on the floor of the Exchange. The business income reported on petitioner's 1965 return of \$426.00 represented commission income earned as a customers' representative on business transacted over the telephone by Mr. Einstein from his apartment. This business was transacted by petitioner through outside brokerage firms.

6. Petitioner maintained that after June or July of 1964, he held his seat on the Exchange solely for personal investment purposes. Petitioner asserted that the nature of the seat had changed from a business asset to a capital asset since it had not been used to transact any business on the floor of the Exchange for a period in excess of one year and three months.

CONCLUSIONS OF LAW

A. That petitioner has failed to show [Tax Law §§722 and 689(e)] that his seat on the New York Stock Exchange was converted from a business asset to a personal asset held solely for investment purposes. Furthermore, the liquidation of petitioner's business did not occur until September 17, 1965, the date said seat was sold. The liquidation of petitioner's business on September 17, 1965 constituted the carrying on of an unincorporated business within the meaning and intent of subsection (a) of section 703 of the Tax Law. Accordingly, the gain realized by petitioner

on the sale of the New York Stock Exchange seat is subject to unincorporated business tax (Herbert G. Tully, State Tax Comm., August 16, 1977).

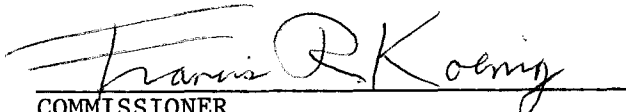
B. That the petition of Herbert G. Einstein, now Deceased, is denied and the Notice of Deficiency dated March 17, 1969 is sustained, together with such additional interest as may be lawfully due and owing.

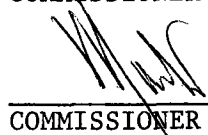
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER

 
COMMISSIONER