

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wright B. Lewis :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
for the Year 1968. :
:

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 29th day of May, 1985, he served the within notice of Decision by certified mail upon Wright B. Lewis, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wright B. Lewis
c/o Lehman Brothers
2 Broadway
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
29th day of May, 1985.

David Parchuck

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

STATE OF NEW YORK

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Business Tax under Article 23 of the Tax Law for :
the Year 1968. :
:

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 29th day of May, 1985, he served the within notice of Decision by certified mail upon Barry M. Strauss, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Barry M. Strauss
Shearson-Lehman/American Express
2 Broadway
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
29th day of May, 1985.

David Parchuck

James A. Hagedorn

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 29, 1985

Wright B. Lewis
c/o Lehman Brothers
2 Broadway
New York, NY 10004

Dear Mr. Lewis:

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
Barry M. Strauss
Shearson-Lehman/American Express
2 Broadway
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WRIGHT B. LEWIS	:	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, Wright B. Lewis, c/o Lehman Brothers, 2 Broadway, 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 year 1968 (File No. 01319).

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 September 21, 1984 at 9:00 A.M., with all briefs to be submitted by November 30, 1984. Petitioner appeared by Barry M. Strauss, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the delay in providing a hearing warrants cancellation of the Notice of Deficiency

II. Whether petitioner's activities as an odd-lot broker constituted the carrying on of an unincorporated business and, if so, whether petitioner's gain arising from the sale of a stock exchange seat was subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner and his wife filed a New York State Income Tax Resident Return for the year 1968. Petitioner annexed to this return a New York State Unincorporated Business Tax Return for the year 1968 upon which he reported his business activity as a stockbroker and that the net profit from his business was \$11,173.00. In addition, petitioner reported a gain on the sale of a stock exchange seat as subject to personal income tax, but did not report the gain as subject to unincorporated business tax. Petitioner also reported business deductions for dues and expenses, travel, entertainment and professional fees. He did not attach a wage and tax statement to his return.

2. On February 16, 1972 and on November 4, 1972, petitioner executed documents encaptioned Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Taxes. The second document permitted the assessment of unincorporated business taxes for the years ended December 31, 1968 and December 31, 1969 at any time on or before April 15, 1974.

3. On February 26, 1973, the Audit Division issued a Notice of Deficiency to petitioner, Wright B. Lewis, asserting a deficiency of unincorporated business tax for the year 1968 in the amount of \$9,885.02, plus interest of \$2,291.35, for a total of \$12,176.37. To the extent at issue herein, the Notice was premised upon the Audit Division's conclusion that petitioner's gain on the sale of his stock exchange seat was subject to unincorporated business tax.

4. On or about May 22, 1973, petitioner filed a petition challenging the asserted deficiency of unincorporated business tax and seeking a refund of the unincorporated business tax paid.

5. Petitioner began working for DeCoppet & Doremus in April, 1965 as a clerk. On May 13, 1966, petitioner commenced employment for DeCoppet & Doremus as an odd-lot broker. In order to obtain this position, petitioner was required to purchase a seat on the New York Stock Exchange. Accordingly, on May 12, 1966, petitioner had purchased a stock exchange seat. At this time, a seat on the New York Stock Exchange cost approximately \$250,000.00 and, therefore, petitioner was required to borrow funds in order to make the purchase.

6. While employed by DeCoppet & Doremus, petitioner was not permitted to work for other firms. Petitioner was supplied with a desk, telephone, business cards and the services of secretaries.

7. DeCoppet & Doremus required petitioner to report to work at a particular time and was directed to a "trading post" where a limited number of stocks were traded. At this location, petitioner would receive orders from a customer of DeCoppet & Doremus instructing him to buy or sell. When petitioner's inventory of a particular stock exceeded a certain number of shares, petitioner was required to reduce the inventory of that stock to the levels set by the firm.

8. Petitioner was directed by the partnership when he was to have his lunch and vacations.

9. DeCoppet & Doremus did not withhold income taxes or social security taxes from petitioner's wages nor provide coverage for petitioner under the Unemployment Insurance Law or Workmen's (now Worker's) Compensation Law.

10. On January 1, 1968, petitioner began negotiating for a position with the firm of Paine, Webber, Jackson & Curtis ("Paine, Webber"). In the course of these negotiations, petitioner was advised that he had the option to either retain or dispose of his New York Stock Exchange seat. On February 13, 1968, petitioner sold his stock exchange seat and, on February 15, 1968, he ceased

providing services to DeCoppet & Doremus and became a general partner of Paine, Webber.

CONCLUSIONS OF LAW

A. That the argument to dismiss on the ground of laches is denied.
"[T]he State cannot be estopped from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority (citation omitted)".
(Matter of G.H. Walker & Co. et al, v. State Tax Comm., 62 A.D.2d 77, 80).
It is also noted that the record does not establish that petitioner has been damaged or prejudiced by the delay.

B. That an "unincorporated business" is defined, in pertinent part, as
"...any trade, business or occupation conducted, engaged in or being liquidated by an individual..." [Tax Law §703(a)]. However, the rendering of services by an individual as an employee is not considered an unincorporated business [Tax Law §703(b)].

C. That the determination of whether the particular services were performed as an "employee" or as an "independent contractor" depends upon the facts and circumstances of each case (Matter of Keith H. Wood, State Tax Commission, September 8, 1982). In Lieberman v. Gallman (41 N.Y.2d 774, 778), the Court stated:

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.' (citation omitted). It is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee." (citations omitted).

D. That petitioner has failed to sustain his burden of proof of establishing that the income from the services he performed was as an employee rather than

as an independent contractor (Tax Law §§689(e); 722; see Matter of Miller v. State Tax Comm., 94 A.D.2d 841). It is noted, in this regard, that petitioner did not appear and present testimony on his behalf. Moreover, a written employment contract was not provided as an exhibit. Further, it is clear that DeCoppet & Doremus treated petitioner on its employment records as an independent contractor as evidenced by the failure to withhold income taxes and social security taxes from petitioner's wages and petitioner's lack of coverage under the Unemployment Insurance Law and Workmen's Compensation Law. Lastly, petitioner voluntarily filed an unincorporated business tax return for the year 1968 and, therefore, obviously considered himself subject to the tax.

E. That Tax Law §705(a) of the Tax Law provides:

"General. -- Unincorporated business gross income of an unincorporated business means 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, including income and gain from any property employed in the business, or from liquidation of the business, or from collection of installment obligations of the business, with the modifications specified in this section." (emphasis added).

F. That the stock exchange seat was not transformed from a business asset to an asset used for investment during the two-day period prior to the time he went to work at Paine, Webber. Therefore, since the stock exchange seat was an asset employed in petitioner's business of being an odd-lot broker, the gain on the sale of the seat was subject to unincorporated business tax.

G. That the petition of Wright B. Lewis is denied and the Notice of Deficiency is sustained.


DATED: Albany, New York

MAY 29 1985

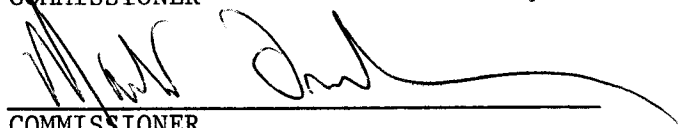
STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER