

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
COLIN HOCHSTIN CO.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Income Tax	:	
under Article 23 of the Tax Law for the Years	:	
1978, 1979 and 1980.	:	

Petitioner Colin Hochstin Co., 120 Broadway, New York, New York 10005, filed an exception to the determination of the Administrative Law Judge issued on March 30, 1989 with respect to its petition for redetermination of a deficiency or for refund of unincorporated business income tax under Article 23 of the Tax Law for the years 1978, 1979 and 1980 (File No. 806022). Petitioner appeared by Connolly & Grimes (Edward B. Connolly, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq. of counsel).

Petitioner filed a brief on exception. The Division filed a letter brief in lieu of a brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether, for purposes of New York State unincorporated business income tax, petitioner properly excluded from income refunds of New York City unincorporated business income tax.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge except that we modify finding of fact "4". Such facts are stated below.¹ We find additional facts which are separately stated.

On April 7, 1982, the Division of Taxation issued a Notice of Deficiency for the years 1978, 1979 and 1980 to petitioner, Colin Hochstin Co., in the amount of \$42,474.28, plus penalty and interest.

Petitioner is engaged in the stock brokerage business. During each year in issue, petitioner paid stock transfer tax to New York State and New York City and received a refund of State and City unincorporated business income tax equal to 50 percent of the amount of the stock transfer tax paid on securities traded for its own account. Petitioner received refunds of \$603,724.50 in 1978, \$621,086.08 in 1979 and \$554,862.92 in 1980. The refunds were equally divided between New York State and New York City. Petitioner's tax year corresponds to the calendar year.

In calculating its unincorporated business income under Article 23 of the Tax Law, petitioner subtracted from its Federal gross income the full amount of the refunds received as shown above. Upon examination of petitioner's returns, the Division disallowed 50 percent of the refund deduction, maintaining that, although 100 percent of stock transfer taxes taken as a deduction for Federal purposes must be added back to New York State income in determining New York State entire net income, only the State portion of the refunds received could be excluded from Federal taxable income in determining New York State entire net income. The Division took the position that the New York City portion of the unincorporated business tax

¹On March 10, 1986, petitioner and the Division stipulated to six facts. Those facts have been adopted and substantially incorporated into this decision. The modification to finding of fact "4" merely incorporates the explanation of the audit changes provided by the Division to the petitioner.

refund could not be excluded in determining New York State entire net income since the applicable statute allowed an exclusion of only the State refund.

As a result of its audit, the Division made the following adjustments to petitioner's reported unincorporated business income:

(a) for each year at issue, petitioner's Federal gross income was increased by the amount of its New York City unincorporated business income tax refund;

(b) for 1978, a net operating loss carried forward from 1977 was disallowed. This loss was predicated in part on petitioner's exclusion of the New York City refund from its calculation of its 1977 taxable unincorporated business income.

On March 15, 1982, the Division issued to petitioner a Statement of Audit Changes showing the following calculations:

	<u>1978</u>	<u>1979</u>	<u>1980</u>
Reported taxable income	\$ 97,826.00	(\$115,792.00)	\$552,259.00
1977 Net Operating Loss disallowed	141,389.00		
NYC Stock Transfer tax refund	<u>301,862.25</u>	<u>310,543.04</u>	<u>277,431.46</u>
Corrected taxable income	\$541,077.25	\$194,751.04	\$829,690.46
 Additional tax due	 \$ 22,412.86	 \$ 8,763.80	 \$ 11,297.62

The Statement explained that a penalty of \$1,752.76 was imposed for late filing of the 1979 tax return.

We find the following additional facts:

The Statement of Audit Changes contained an explanation of the above computation stating, in relevant part, as follows:

"When an accrual basis taxpayer offsets the transfer tax refund against the transfer tax expense, they are still required to make the modifications under Section 705(b)(4) and 705(c)(6) of the Unincorporated Business Tax Law. Since the New York City transfer tax refund is not a permissible subtraction for unincorporated business tax purposes, the net result of the modification is that Federal income is increased by the New York City portion of the refund. Accordingly, when the offset method is used, a shortcut for the above procedures can be made by merely increasing Federal income by the amount of New York City transfer tax refund.

* * *

"Your 1978, 1979 and 1980 tax liability is recomputed using the offset method of accounting for transfer tax refunds. Your New York

City refund in 1978 amounted to \$301,862.25, the 1979 refund was \$310,543.04 and in 1980 your refund was \$277,431.46.

"Since you did not make the 705(b)(4) and 705(c)(6) modifications on your 1977 return, the net operating loss of \$141,389.00 claimed on your 1978 return is disallowed. If the 705(b)(4) and 705(c)(6) modifications were made, your net income would have been \$75,745.60. ($\$141,389 + \$218,134.60$).

"Section 685(a)(1) penalty - failure to file your return on or before the due date is imposed for the tax year 1979. Your return was late filed on August 11, 1980."

In 1986, the applicable statute was amended to allow an exclusion for all refunds of New York State income taxes, refunds of New York City income taxes except unincorporated business taxes, but allowing (an exclusion for) refunds of New York City unincorporated business income taxes attributable to stock transfer tax paid. The language of the effective date of the amendment provided that it was applicable to all tax years commencing on and after August 1, 1977. Because of the amendment, the Division recalculated petitioner's tax deficiency for the years in issue, subtracting the New York City refund from petitioner's Federal gross income. This review also disclosed that in its original audit the Division had overstated petitioner's 1978 Federal gross income in the amount of \$5,000.00. The Division continued to disallow the net operating loss deduction carried forward by petitioner from 1977 to 1978. The 1977 loss was disallowed because it was based on an exclusion from income of the New York City refund, and the Division maintains that the exclusion does not apply to tax years commencing on or before July 31, 1977. Based on this review, the Division agreed to cancel the tax deficiencies asserted for the years 1979 and 1980, and it reduced the 1978 asserted deficiency to \$7,069.75 plus interest.

OPINION

The New York State unincorporated business tax was repealed by Chapter 69 of the Laws of 1978, effective December 31, 1982. Former section 701 of the Tax Law imposed a tax on the unincorporated business taxable income of every unincorporated business doing business wholly or partly in New York State. The starting point for calculating unincorporated business taxable income, as relevant to the issues in this case, was Federal gross income for the taxable year (Tax Law former § 705[a]) to which the law required certain modifications, i.e., additions and subtractions, in order to arrive at unincorporated business taxable income.

Chapter 444 of the Laws of 1986 amended the unincorporated business tax relative to this calculation by allowing an exclusion from Federal gross income for refunds of New York City unincorporated business taxes attributable to stock transfer tax paid. Section 4 of the Bill

provided, "This act shall take effect immediately and apply to taxable years commencing on or after August first, nineteen hundred and seventy-seven." Based on this language, the Administrative Law Judge determined that the amendment did not apply to petitioner's 1977 tax year which commenced on January 1, 1977. The Administrative Law Judge also rejected petitioner's assertion concerning the unconstitutionality of the statute.

Petitioner on exception reiterates its assertion that the 1986 amendments (L 1986, ch 444) are applicable to it for its 1977 tax year which began January 1, 1977 notwithstanding the effective date of the amendment which provided it applied to tax years commencing on or after August 1, 1977.

Petitioner also asserts that the Legislature has no constitutional authority to tax refunds of New York City tax.

We affirm the determination of the Administrative Law Judge.

We deal first with the effective date of the 1986 amendment. The language of the effective date of Chapter 444 of the Laws of 1986 is clear and unambiguous and expresses the Legislature's intention that the amendment apply to tax years commencing on or after August 1, 1977. Where the words of a statute are free from ambiguity, there is no occasion to give effect to legislative intent through interpretation and construction of the statute (see, McKinney's Cons Laws of NY, Book 1, Statutes § 76).

We deal next with petitioner's assertion concerning the constitutionality of the law in effect for 1977. In essence, petitioner argues that the effect of the definition of unincorporated gross business income of an unincorporated business in Tax Law § 705(a) and the modifications in § 705(b) and (c) before their amendment was to subject a New York City unincorporated business tax refund to State unincorporated business tax. Petitioner argues this is unconstitutional. The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass constitutional challenges to the enactment of State legislation. It is presumed that State laws are constitutional, and, in particular, that the provisions of the State unincorporated business tax at issue in this case are constitutional (see, Matter of Fourth Day Enterprises, Inc., Tax Appeals Tribunal, October 27, 1988).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Colin Hochstin Co. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Colin Hochstin Co. is granted to the extent indicated in the Administrative Law Judge's conclusions of law "F" and "G" but is in all other respects denied;
and
4. The Division of Taxation shall modify the Notice of Deficiency issued on April 7, 1982 accordingly, but in all other respects the Notice is sustained.

DATED: Troy, New York
November 30, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner