

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RONAL,, INDUSTRIES, INC.

DECISION

for Redetermination **of** a Deficiency: or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Periods Ending April **30, 1980**, April **30, 1981** and April 30, **1982**.

Petitioner, Ronal Industries, Inc., **25** Martin Place, Port Chester, New York **10573**, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A **of** the Tax Law for the periods ending April 30, **1980**, April **30, 1981** and April 30, **1982** (File No. **55551**).

A hearing was held before Joseph **W. Pinto, Jr.**, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September **10, 1986** at 2:45 P.M. Petitioner appeared by Fred **C. Sanders & Associates** (Leon Berg, C.P.A.). The Audit Division appeared by John **P. Dugan, Esq.** (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly excluded from the wage and payroll factor of the business allocation percentage compensation paid by the corporation to two of its employees.

FINDINGS OF FACT

1. Petitioner, Ronal Industries, Inc. (hereinafter "Ronal"), is a New York corporation which manufactures metal products, primarily in fulfillment of Federal government contracts for which it competitively bids. The manufacturing

bidding operations are primarily located in the State of Michigan, where Ronal also maintains an office.

2. The Audit Division performed an audit of Ronal for the tax years ending April 30, 1980, April 30, 1981 and April 30, 1982 which resulted in the issuance of three notices of deficiency, dated August 13, 1984, which disallowed certain investment tax credits taken by Ronal and adjusted the property and wage factors of its business allocation percentage, thus subjecting more of Ronal's entire net income to New York taxation.

3. Said notices of deficiency were mailed to Ronal with corresponding statements of audit adjustment which set forth the tax deficiencies, interest and total balance due as of August 13, 1984. The amounts set forth on each of the notices of deficiency are as follows:

<u>Date of Notice</u>	<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total Due</u>
8/13/84	4/30/80	\$2,917.00	\$1,688.78	\$ 4,605.78
8/13/84	4130181	9,913.00	4,798.96	14,711.96
8/13/84	4130182	1,515.00	457.08	1,972.08

4. All of the disputed issues in the audit were resolved prior to hearing, with the exception of the adjustment to exclude two employees from the wage factor. The tax due for the period ended April 30, 1981 was reduced to \$2,413.00 plus interest.

5. The wage factor reported by Ronal in its franchise tax reports for the years in issue set forth wages it paid in New York State and wages it paid in all other jurisdictions and then expressed the relationship between the two figures as a percentage of wages paid in New York State. These figures were as follows:

Year	<u>New York State Wages</u>	<u>Wages Paid Everywhere</u>	<u>Percentage of Wages in New York State</u>
4/30/80	\$511,194.98	\$773,790.73	66.06%
4/30/81	528,004.48	798,537.04	66.12%
4/30/82	660,662.91	954,050.25	69.25%

6. The field audit disclosed that Ronal had properly reported its wages in New York State for all of the years **in** the audit period, but that it had overstated its wages in the "everywhere" column for each **of** those years.

7. Ronal has one officer, **K. J. Altman**, president, who **owns** 40 percent of the stock of the corporation. Mr. Altman's wages during the audit period were as follows:

Year	<u>Amount</u>
4/30/80	\$165,000.00
4/30/81	180,000.00
4/30/82	200,000.00

8. Additionally, Ronal employed Abraham Minowitz, a 40 percent stockholder in the corporation, and Milton Fishman, a 10 percent stockholder in the corporation, both **of** whom worked for the corporation in the State **of** Michigan.

Mr. Minowitz received the following salaries for the years in issue:

Year	<u>Amount</u>
4/30/80	\$165,000.00
4/30/81	180,000.00
4/30/82	200,000.00

Mr. Fishman received the following salaries for the years **in** issue:

Year	<u>Amount</u>
4/30/80	\$76,325.00
4/30/81	79,800.00
4/30/82	88,000.00

9. The salaries of Mr. Minowitz and Mr. Fishman were determined annually

at a meeting of the corporation held in 1981.

10. Abraham Minowitz is a graduate engineer responsible for obtaining government contracts on behalf of the corporation. Milton Fishman, also a graduate engineer, **is** responsible for estimating the costs associated with the bids made for government contracts. Both of these employees spend substantially all of their time in the State of Michigan and only come to New York on rare occasions. The two employees also work for other businesses in the State of Michigan.

11. The Audit Division determined that the salaries paid to Mr. Minowitz and Mr. Fishman should be excluded from the wage factor of the business allocation percentage because the two employees were deemed to be "general executive officers" based upon the relative size of their salaries, duties which appear to be executive in nature and ownership of stock.

12. Based upon the Audit Division's determination in Finding of Fact "11", the wage factor stated in Finding of Fact "5", above, was adjusted to reflect the exclusion from wages in the "everywhere" column of Mr. Fishman's and Mr. Minowitz salaries as follows:

Year	<u>New York State Wages</u>	<u>Wages Paid Everywhere</u>	<u>Percentage of Wages in New York State</u>
4/30/80	\$511,194.98	\$532,466.00	96%
4/30/81	528,004.48	538,737.00	98%
4/30/82	660,662.91	666,050.00	99.19%

13. It **is** Ronal's contention that neither Mr. Fishman nor Mr. Minowitz **was** a general executive officer as that term **is** defined in the Tax Law and Regulations

CONCLUSIONS OF LAW

A. That Tax Law § 210.3 states, in pertinent part, as follows:

"3. The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

* * *

(3) ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of employees within the state, except general executive officers, to the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's employees within and without the state, except general executive officers;...."

B. That the regulation promulgated pursuant to Tax Law § 210,3(a)(3)

states:

"(a) The percentage of the taxpayer's payroll allocated to New York State is determined by dividing the wages, salaries and other personal service compensation of the taxpayer's employees, except general executive officers, within New York State during the period covered by the report, by the total amount of compensation of all the taxpayer's employees, except general executive officers, during the period covered by the report.

(b) Wages, salaries and other compensation include all amounts paid for services to the taxpayer, but do not include amounts paid by the taxpayer which do not have the element of compensation for personal services actually rendered or to be rendered." (20 NYCRR § 4-5.1.)

C. That 20 NYCRR § 4-5.3 defines general executive officers as follows:

"(a) A general executive officer, for purposes of this Subpart only, must be an officer of the corporation, elected by the shareholders, elected or appointed by the board of directors, or if initially appointed by another officer such appointment must be ratified by the board of directors. If the State of incorporation is other than New York State, the officer of the corporation must be elected or appointed in accordance with the laws of the state of incorporation.

(b) General executive officers include the chairman, president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer, comptroller, and any other officer, charged with and performing general executive duties of the corporation.

(c) A general executive officer is therefore an appointed or elected officer of the corporation having companywide authority with respect to its business.

designated as an officer but who **is** not an appointed or elected officer, as described in subdivision (a) of this section, is not a general executive officer.

(d) Personal service compensation paid to a general executive officer of the taxpayer for acting as such should not be included in the computation of the payroll factor."

D. That since Abraham Minowitz and Milton Fishman were not officers of the corporation, either elected by the shareholders or appointed by the board of directors, they are not general executive officers as that term **is** defined in **20 NYCRR § 4-5.3**. Even though both employees had substantial salaries, performed duties which appeared to be executive in nature and owned stock in the corporation, they were not general executive officers of the corporation and, therefore, their wages should not have been excluded from the wage factor of the business allocation percentage.


E. That the petition of Ronal Industries, Inc. is hereby granted to the extent set forth in Finding of Fact "4" and Conclusion of Law "D" above, that the Audit Division is directed to modify the notices of deficiency issued August 13, 1984 accordingly; and that, except as so granted, the petition **is** in all other respects denied.

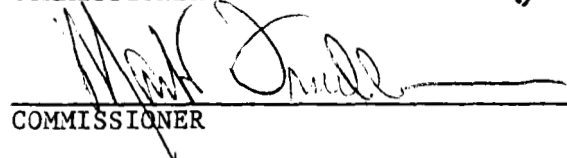
DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987


PRESIDENT


COMMISSIONER


COMMISSIONER