

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of Petition

of

MAYFAIR ATLANTIC CORP.

for redetermination of
deficiency of franchise
tax under Article 9-A of
the tax law for 1966

Mayfair Atlantic Corp. having filed petition for redetermination of deficiency under Article 9-A of the tax law for 1966 and a hearing having been held on June 9, 1971 before John J. Genevich, Hearing Officer of the Department of Taxation and Finance at the office of the State Tax Commission, 80 Centre Street, New York City, at which hearing the taxpayer was represented by Stephen Nislick, Assistant Controller of The Walter Reade Organization, Inc., a subsidiary of the taxpayer, and the record having been duly examined and considered by the State Tax Commission,

It is hereby found:

(1) The taxpayer was incorporated in the State of New Jersey on September 10, 1946 and began doing business in New York on the same day.

(2) The taxpayer is primarily in the business of renting motion picture theatres, including drive-in theatres, located in New York and New Jersey. These theatres are rented to The Walter Reade Organization, Inc., a subsidiary which operates the theatres. It is the owner of some of the theatres, while others are leased from the owners.

(3) The general executive office and all employees of the corporation are located in Oakhurst, New Jersey.

(4) In 1966, the taxpayer sold real property located in New Jersey. Approximately 60% or 65% of the parcel sold was used as a drive-in theatre while the remainder was vacant land. In computing the tax due for 1966, a capital gain of \$799,148 on the sale of the parcel was eliminated from entire net income subject to allocation by the statutory three-factor formula on the basis that the property was not located in New York and the sale was not related to its normal business activity of renting property for the production of income.

(5) On April 2, 1969, notice of deficiency was issued for 1966 restoring the capital gain to income. The taxpayer filed a timely petition for redetermination of the deficiency.

(6) Information subsequently furnished by the taxpayer disclosed that the taxpayer has employees outside New York, and the business allocation of 40.43% was adjusted to 26.95% by use of a zero wage factor.

(7) A copy of the taxpayer's New Jersey franchise tax report discloses that the capital gain was taxed on an allocated basis by use of the three-factor formula. A comparison of the New Jersey allocation with the adjusted New York allocation discloses the following:

	<u>New York</u>	<u>New Jersey</u>	<u>Total</u>
Property	53.74%	88.65%	142.39%
Receipts	27.12%	72.88%	100.00%
Wages	0.00%	100.00%	100.00%
Total	80.86%	261.53%	342.39%
Allocation	26.95%	87.18%	114.13%

The total of the property factors is not 100% (as in the case of receipts and wages) because the New York statute provides for the inclusion in the property factor of real property rented from others while the New Jersey statute does

not, and most of the rented property is located in New York.

(8) Included in total business receipts for purposes of the computation of the receipts allocation are interest from subsidiaries of \$92,687.00 and non-subsidiary dividends of \$8,000.00. Since they are not business receipts, they have been excluded. Included in New York business receipts are interest from subsidiaries of \$92,687.00 and other interest of \$45,362.00 which should not have been allocated to New York. These adjustments result in a revised receipts factor of 19.75%.

(9) A recomputation of the deficiency for 1966 using the adjusted receipts factor is as follows:

Property	53.74%	
Receipts	19.75%	
Wages	0.00%	
Total	73.49%	
Adjusted allocation	24.5%	
Entire net income		\$670,429.00
Allocated entire net income		164,255.00
Tax at 5 $\frac{1}{2}$ %		9,034.03
Tax per report		1,027.02
Deficiency		\$ 8,007.01

(10) A review of New York State franchise tax reports filed for prior and subsequent years indicates that the tax due was computed by the statutory three-factor formula.

(11) Section 208.9 of Article 9-A of the tax law provides, in part:

"The term 'entire net income' means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, * * *, except as hereinafter provided, and subject to any modification required * * *."

None of the exceptions or modifications in the above section provides for the exclusion of capital gains.

(12) Section 210.8 of Article 9-A of the tax law provides, in part:

"If it shall appear to the tax commission that any business or investment allocation percentage determined as hereinabove provided does not properly reflect the activity, business, income or capital of a taxpayer within the state, the tax commission shall be authorized in its discretion, in the case of a business allocation percentage, to adjust it by (a) excluding one or more of the factors therein, (b) including one or more other factors, * * *, (c) excluding one or more assets in computing such allocation percentage, * * *, or (d) any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state, * * *."

The State Tax Commission hereby

DECIDES:

(A) The recomputation of the deficiency in paragraph (9) above properly reflects the tax due by the three-factor formula called for by the statute.

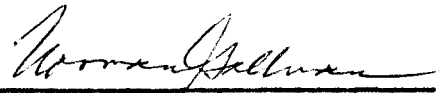
(B) Since both of the states in which the taxpayer does business use a three-factor allocation, there is no basis for an equitable adjustment under the discretionary authority provided for by Section 210.8 of Article 9-A of the tax law.

(C) The notice of deficiency issued on April 2, 1969 is revised to the deficiency computed in paragraph (9) above and is affirmed together with interest due in accordance with the provisions of Section 1084 of Article 27 of the tax law.

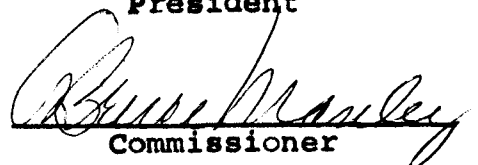
Dated : Albany, New York

this 22nd day of October 1971.

STATE TAX COMMISSION



President



Commissioner



Commissioner