STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Walter E. Heller & Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Corporation Franchise Tax :
under Article 9A of the Tax Law
for the Years 1960,1962-1971. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of September, 1980, he served the within notice of Decision by certified mail upon Walter E. Heller & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter E. Heller & Co.
105 West Adams St.
Chicago, IL 60690

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
19th day of September, 1980.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Walter E. Heller & Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Corporation Franchise Tax :
under Article 9A of the Tax Law
for the Years 1960,1962-1971. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of September, 1980, he served the within notice of Decision by certified mail upon Joseph H. Murphy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
N. Syracuse, NY 13202

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
19th day of September, 1980.

Kathy Banks

J. Vredenburg

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

September 19, 1980

Walter E. Heller & Co.
105 West Adams St.
Chicago, IL 60690

Gentlemen:

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) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
N. Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
WALTER E. HELLER & CO.	:	DECISION
for Redetermination of Deficiencies or for Refund of Corporation Franchise Taxes under Article 9-A of the Tax Law for the Year 1960, and for the Years 1962 through 1971.	:	

Petitioner, Walter E. Heller & Co., 105 West Adams Street, Chicago, Illinois 60690, filed petitions for redetermination of deficiencies or for refund of corporation franchise taxes under Article 9-A of the Tax Law for the year 1960 and for the years 1962 through 1971 (File No. 16952).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on March 31, 1977 at 9:15 A.M. Petitioner appeared by Hancock, Estabrook, Ryan, Shove & Hust (Joseph H. Murphy, Esq., of counsel). The Corporation Tax Bureau appeared by Peter Crotty, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether receipts received by petitioner from clients whose names appeared on the records of the New York office, and whose accounts were predominantly handled by the New York office of petitioner, should be included in the numerator of the receipts factor of the allocation formula contained in subdivision 3 of section 210 of the Tax Law, where the clients are located outside New York State.

II. Whether the greater deficiencies asserted by the Corporation Tax Bureau, after the issuance of a statutory notice and after the filing of an application for revision or refund, or after a petition for redetermination of a deficiency or refund, should be sustained.

III. Whether an alternative method of allocating petitioner's portion of its entire net income within New York should be employed by the State Tax Commission, pursuant to section 210 subdivision 8 of the Tax Law.

IV. Whether the allocation formula employed by the Bureau results in the possibility and/or actuality of multiple taxation, thereby giving rise to an unconstitutional imposition.

FINDINGS OF FACT

1. Petitioner, Walter E. Heller & Co., filed corporation franchise tax reports for the years 1960 and 1962 through 1971. Therein petitioner, in computing its allocation and apportionment of entire net income, included in the numerator of its receipts factor fraction only those receipts received from clients located in New York State.

2. The Corporation Tax Bureau issued either notices of assessment of additional franchise taxes or notices of deficiency for the years in issue and for the following amounts:

DOCUMENT	DATE OF NOTICE	PERIOD ENDED	TAX	INTEREST	TOTAL
Notice of Assessment of Franchise Tax	8/15/69	12/31/60	$ 22,499.15	-	$ 22,499.15
Notice of Assessment of Franchise Tax	8/15/69	12/31/62	55,644.61	-	55,644.61
Notice of Assessment of Franchise Tax	8/15/69	12/31/63	71,052.84	-	71,052.84
Notice of Deficiency	8/15/69	12/31/64	110,044.19	$29,161.71	139,205.90
Notice of Deficiency	8/15/69	12/31/65	86,771.19	17,788.09	104,559.28
Notice of Deficiency	8/15/69	12/31/66	72,497.39	10,512.12	83,009.51
Notice of Deficiency	8/15/69	12/31/67	64,779.41	5,506.25	70,285.66
Notice of Deficiency	11/15/73	12/31/68	50,295.30	14,082.68	64,377.98
Notice of Deficiency	11/15/73	12/31/69	24,166.94	5,316.94	29,483.67*
Notice of Deficiency	11/15/73	12/31/70	9,196.14	1,471.38	10,667.52
Notice of Deficiency	11/15/73	12/31/71	102.92	10.29	113.21
			$567,050.08	$83,849.46	$650,899.33*

(*error of 21 Cents in 1969 total of tax & interest)

In computing the allocation of entire net income, the Corporation Tax Bureau included in the numerator of the receipts factor fraction all receipts from clients, whose names appeared on the books of petitioner's New York division.

On November 15, 1973, the Corporation Tax Bureau also advised petitioner that a greater deficiency had been determined and that the Bureau had asserted such deficiency for the years 1962 through 1967 as follows:

CALENDAR YEAR	ADDITIONAL TAX CURRENT AUDIT	Minus	ADDITIONAL TAX PRIOR AUDIT	DIFFERENCE
1962	$ 56,116.55		$ 55,644.61	$ 471.94
1963	71,418.21		71,052.84	365.37
1964	118,175.89		110,044.19	8,131.70
1965	101,936.62		86,771.19	15.165.43
1966	83,850.89		72,497.39	11,353.50
1967	105,386.83		64,779.41	40,607.42

Of the additional greater deficiencies, $63,550.00 was asserted as a result of Federal audit changes and $12,545.00 was asserted as a result of changes in receipts from services. (These two figures are rounded off, thereby omitting 36 cents of the difference.) The Corporation Tax Bureau did not submit the audit on which the greater deficiencies were determined, but rather offered only a summary of the amounts asserted, plus the related sections of the Tax Law.

4. Petitioner, Walter E. Heller & Co., is a domestic finance company and a subsidiary of Walter E. Heller International Corporation.

5. Petitioner's headquarters are in Chicago, Illinois, with divisions throughout the United States. The divisions were either unincorporated branch offices (as were its New York, New York, and Portland, Oregon, divisions) or separate corporations which were subsidiaries of petitioner (e.g., Walter E. Heller & Company of New England).

6. Petitioner had principal offices in Chicago, Illinois; Los Angeles, California; Miami, Florida; Boston, Massachusetts; Dallas, Texas; Atlanta, Georgia; Portland, Oregon; Charlotte, North Carolina, and New York, New York. The larger of these offices (New York, Chicago, Miami and Los Angeles) were full "service" offices, while the others offered limited financial services. In addition, there were smaller offices at other locations with only one or two employees for the solicitation of new business. These latter offices offered no substantial services and acted more as satellites for the larger offices, including the New York office. One such office was in Syracuse, New York.

7. Petitioner's office in New York was in existence during the entire audit period in issue and the staff of that office numbered between 100 and 130 employees.

8. During the period involved, petitioner had about $200 million in advances to its customers outstanding. Of this amount, the New York division had about $80 million outstanding. The financial services performed by petitioner consisted of its making secured loans to businesses, old-line factoring, buying accounts receivable and assuming all credit risks entailed, as well as some interim financing. Petitioner's income was primarily from interest on loans and service commissions from factoring.

9. The majority of the business handled by the New York office originated on the Eastern seaboard; however, that office did have clients located all over the United States. Business came to petitioner from a wide variety of sources, including the satellite offices, personal solicitation, mailings, advertising, contact with attorneys, accountants and bankers, as well as personal references and individual contacts.

10. Where a client was to be handled by the New York office, the documents were usually prepared in New York. Thereafter, the money was advanced from New York and the document and operating files on the account, plus all records with respect to collateral, were kept in New York. The money advanced by the New York office was budgeted by the Chicago headquarters, with larger credit arrangements requiring approval from Chicago.

11. The New York books of petitioner would usually reflect only accounts handled by that office; however, on an infrequent occasion a New York-orginated financial arrangement, though handled in another division, would be reflected on the books of the New York office. No evidence was adduced with respect to specific entries of this nature.

12. By agreement between petitioner and the Department of Taxation and Finance in 1943, petitioner would be subject to franchise tax on one-half of the business handled by the New York office, based on the origination of only one-half the business in New York. Sometime thereafter, petitioner abandoned this mode of computation and commenced to include only receivables with a New York situs in the numerator of the receipts factor of its allocation formula (as petitioner did for the periods in issue).

13. In some instances petitioner was required to include receipts from a loan handled by the New York office (where the debtor had a situs in another state) in the numerator of the receipts factor of the allocation formula for that other state.

CONCLUSIONS OF LAW

A. That subdivision 3 of section 210 of the Tax Law provides for the allocation of a portion of a taxpayer's entire net income to New York on the basis of a formula consisting of three factors (expressed as percentages) namely, the taxpayer's real and tangible personal property, business receipts

and payroll. The percentages of these three factors result from fractions, the numerator of which is the property, receipts or payroll within New York and the denominator of which is all property, all receipts and all payroll of the taxpayer. The three resultant percentages are totalled and divided by three to arrive at the taxpayer's business allocation percentage (20 NYCRR 4.12).

B. That section 210 subdivision 8 of the Tax Law provides that where it appears to the State Tax Commission that the business allocation percentage (§210 subdivision 3) does not properly reflect the activity, business, income or capital of the taxpayer within New York, the Commission may adjust such business allocation percentage by either excluding or including one or more factors, or by excluding an asset or employing a different method calculated to effect a fair and proper allocation.

C. That in the vast majority of instances, the receipts of petitioner contained in the numerator of the receipts factor fraction employed by the Corporation Tax Bureau, constituted receipts from interest on loans made by the New York division, or receipts from the provision of various other financial services (e.g., factoring) by the New York division. Receipts from such interest and for services properly belong in the numerator of that fraction in the absence of a specific showing that receipts were not so produced. It is the situs where the service and the financing are performed which is determinative of whether the receipts are includable in the numerator of the receipts factor fraction, not the situs of the borrower (20 NYCRR 4.15b.4).

D. That the receipts factor of the three-factor-formula employed by the Coporation Tax Bureau resulted (in combination with the property and payroll factors) in an average business allocation percentage to New York for the years in issue of approximately 23 percent, whereas the percentage of the New York divisions outstanding financing of all of petitioner's outstanding financing approximated 40 percent.

E. That the business allocation percentage computed by the Bureau pursuant to section 210 subdivision 3 of the Tax Law is not unreasonable but is instead, fair and reflective of the activity, business, and income of petitioner within New York.

F. That pursuant to Conclusion of Law "E", above, the Commission need not decide whether its discretion should or can be exercised as provided for by section 210 subdivision 8 of the Tax Law.

G. That the greater deficiencies asserted for the years 1962 through and including 1967 were determined pursuant to the provisions of section 214 subdivision 1 for the years 1962, 1963 and section 1089 (d)(1) for the years 1964 to 1967. The former section provides, in pertinent part:

> "if an application for revision or refund be filed with the tax commission by a taxpayer...if the tax of such taxpayer shall have been recomputed...then within one year from the time of such recomputation or assessment the tax commission shall grant a hearing thereon, and if it shall be made to appear upon any such hearing by evidence submitted to it that...the tax as originally reported or assessed was less than should have been exacted, the tax commission shall resettle the same according to law and the facts by increasing or diminishing the taxes and other charges, and adjust the computation or assessment of taxes accordingly..."

The latter section provides, in pertinent part:

> "(d) Assertion of deficiency after filing petition.
>
> (1) Petition for redetermination of deficiency. - If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency... if claim therefor is asserted at or before the hearing..."

H. That section 1089(e)(3) further provides, in pertinent part:

> "(e) Burden of proof - In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:...(3) whether the petition is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed, unless such increase in deficiency is the result of an increase in federal taxable income or federal tax or a federal change or correction or renegotiation, or computation or recomputation of tax,

which is treated in the same manner as if it were a deficiency for federal income tax purposes, required to be reported under subdivision three of section two hundred eleven...and of which increase, change or correction or renegotiation, or computation or recomputation, the tax commission had no notice at the time it mailed the notice of deficiency;"

I. That in regard to the years 1962 and 1963, there existed no provision in Article 9-A of the Tax Law placing the burden of proof on the State Tax Commission in regard to the assertion of a franchise tax liability in excess of that stated on the Notice of Assessment. In the absence of specific provisions to the contrary, the petitioner has the burden to establish that the assertion is in error and having failed to do so, the additional tax asserted regarding the years 1962 and 1963 must be sustained.

J. That the Corporation Tax Bureau had the burden of proof (§1089(e)) regarding the increase in the deficiencies asserted for the years 1964 through and including 1967, based on service receipts ($12,545.00), and that the Bureau failed to meet said burden.

K. That petitioner (pursuant to §1089(e)) has the burden of proof regarding the increase in the deficiencies asserted for the years 1964 through and including 1967, based on Federal audit changes, which changes are required to be reported pursuant to section 211 of the Tax Law.

L. That in the absence of evidence to establish that Federal audit changes were either incorrect or inapplicable in regard to the computation of the entire net income of petitioner and the tax due thereon, additional deficiencies predicated on such Federal audit changes must be sustained.

M. That the State Tax Commission is not empowered to decide questions regarding the constitutionality of statutes, which constitutionality is presumed at the administrative level.

N. That the petitions of Walter E. Heller & Co. are granted to the extent that the additional deficiencies based on other than Federal audit changes are cancelled, together with such interest as may be lawfully owing; that the Corporation Tax Bureau is hereby directed to accordingly modify the additional deficiencies asserted in the letter of November 15, 1973, and that, except as so granted, the petitions are otherwise denied and the notices of assessment, the notices if deficiency and the additional deficiencies asserted, are sustained.

DATED: Albany, New York

SEP 1 9 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER