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Income Tax Determinations
1966 A-2
Falbo, Dorothy and
Victor G.

**BUREAU OF LAW
MEMORANDUM**

TO: Commissioners Murphy, Palestin & Macduff

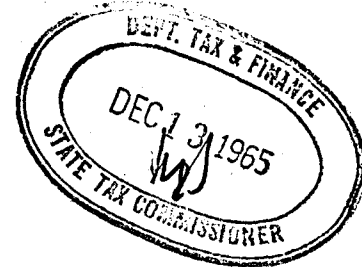
FROM: Solomon Sies, Hearing Officer

SUBJECT: VICTOR G. FALBO and DOROTHY FALBO,
his wife

1959 Assessment No. B-826924

Article 16

Formal Hearing



A hearing with reference to the above matter was held before me at 80 Centre Street, New York, N.Y., on February 10, 1964. The appearances and the evidence produced were as shown in the stenographic minutes and the exhibits submitted herewith.

The issue involved herein is whether the taxpayer, a non-resident, employed as a security salesman or customer's man on a straight commission basis by a stock brokerage firm in New York City, is entitled to allocate commissions claimed to have been earned outside the State.

In 1958 the taxpayer was employed as customer's man by Dreyfus & Co. He terminated his employment with said firm in January, 1959 and was thereafter employed as a security salesman by Theodore Tsolainos & Co., a brokerage firm having its sole place of business in New York City. The taxpayer in his return for 1959 reported gross commissions from Dreyfus & Co. in the sum of \$22,071.83, although the same were earned in 1958 but were received by him in 1959. He reported as net compensation from both firms the sum of \$38,346.58. The taxpayer deducted the sum of \$9,586.64 approximating 25% of his commissions and allocated said amount as earnings outside of the State of New York. The taxpayer became a registered security salesman in the State of New Jersey in 1960.

The taxpayer presented at the hearing his trade book, which is a regular binder in which he indicates the trades which are consummated, the name and address of the customer, the date the security is bought, the date it is sold, the name of the security, purchase and selling prices and the amount involved in the transaction. The taxpayer testified that one of his accounts was a Mr. Anastassatos of Montreal, Canada; that in 1959 the trade book indicated 17 transactions involving this customer with gross commissions of \$2,633.43 of which the taxpayer received a 43% commission or \$1,132.37; that the taxpayer saw this customer in both Canada and New Jersey during the year 1959 and spoke to him on various occasions by phone from his home in New Jersey; that the orders to buy and sell were received either in Canada or New Jersey but not in New York. In addition thereto, the taxpayer testified that the gross commissions on orders received by him within the State of New Jersey during the year 1959

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totalled \$14,832.70; that his gross commission of 43% on said amount amounted to \$6,378.06; that these customers comprised his relatives and neighbors all of whom reside in New Jersey, where the orders were taken. The total commissions earned by the taxpayer outside of the State of New York amounted to \$7,510.43. The taxpayer submitted a letter from his employer indicating that the taxpayer has been empowered since the day he joined the firm to transact business in New Jersey or any other state he deems desirable. He also contends that the Income Tax Bureau allowed him an allocation for out-of-state earnings for the years 1960 and 1961 based upon the same facts that existed in 1959 for which the assessment was issued disallowing the allocation.

It is to be noted that no unincorporated business tax was ever assessed against the taxpayer since the Income Tax Bureau apparently deemed him to be an employee and not an independent contractor; that the only assessment issued against the taxpayer was for the year 1959.

It is to be noted that if the taxpayer were held to be an independent contractor and not an employee of the principal, whose sole place of business is located in New York City, the sole place of the taxpayer's business as an independent contractor would be the office of the principal in New York City since the taxpayer maintained no other office outside of the State. In that event, any commissions received by the taxpayer as an independent contractor would be attributable to the New York City office in accordance with Article 457 of the Income Tax Regulations. In explaining this article, the Income Tax Bureau, Manual of Policy, Article 457, Page 2 (Promulgated 8/25/58) states:

"If the facts show that an independent contractor who is a non-resident maintains his only place of business outside New York State, such as an office maintained in his home, no part of his commissions would be taxable, even if paid for sales made in New York. On the other hand, if the only place of business maintained by such independent contractor is located in New York State, all of his commissions would be taxable even though he sells outside the State. Such place of business might be, for example, office space provided for his use at the New York location of one of his principals (Opinion of Deputy Commissioner and Counsel, dated July 17, 1953)".

On the other hand, since the Income Tax Bureau has consistently held the taxpayer to be an employee and since his employment as a customer's man by a New York firm supports such action, the question arises as to whether or not, as an employee, the taxpayer is entitled to an allocation outside the State of New York.

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In interpreting Article 451 of the Income Tax Regulations, the Income Tax Bureau Manual of Policy states:

"In the apportionment of commission income of a non-resident on the basis of sales made within and without New York State, the locations to be used are where the sales were actually made and not the geographic locations of the customers. It often happens that sales are made to out-of-state customers while they are visiting the New York place of business of the salesman's employer. Other sales to such customers may be made by mail or telephone from within New York State."

In interpreting Article 16 of the Business Tax Regulations, the Income Tax Bureau Manual of Policy (Business Tax Article 16-Page 1-5/15/59), states:

"The fact that an employee may be a non-resident who is entitled to allocate his commissions on the basis of sales made within and without New York State for Personal Income Tax purposes, has no bearing on whether or not allocation is permitted to his employer."

Accordingly, even if the taxpayer is permitted to allocate commissions to sources within and without the State of New York as an employee, the principal whose sole place of business is located in New York would not be permitted an allocation.

The next question which arises is to determine the location where the sales were made. In the case of a non-resident salesman apportioning commission income on the basis of sales made outside the state, such commissions would be attributable to sources outside the State, notwithstanding the practice of ratification and final approval of all sales by the home office of the salesman located within the state. However, if such salesman receives an order by phone or mail within the state, commission income would be attributable to sources within the State of New York as previously explained.

The question, therefore, arises whether the taxpayer is to be deemed a salesman authorized to make sales outside of the State of New York. Ordinarily, the hours of a customer's man employed by a brokerage firm are the regular hours set by his employer. The transactions of buying and selling stock are ordinarily conducted during the hours of employment. We are, thus, confronted with the question of whether sales made by the taxpayer outside the State of New York, not during the regular hours of employment, are to be deemed sales attributable to sources within this state on the ground that such sales were made outside the state merely for the convenience of the employee and could have been made within the state during regular hours. We must, therefore, decide whether the employee is required pursuant to his contract of employment with his employer or pursuant to the employer's direction to transact