

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN W. DONOGHUE AND PATRICIA DONOGHUE

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Personal Income :
Taxes under Article(x) 22 of the :
Tax Law for the Year(s) ~~or Period(s)~~ :
1964 & 1965.

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of July, 1977, she served the within Notice of Decision by (certified) mail upon John W. Donoghue & Patricia Donoghue ~~(representative of)~~ the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Mr. & Mrs. John W. Donoghue
1110 Jackson Avenue
River Forest, Illinois 60305
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~~ ~~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

29th day of July, 1977.

Marsina Donnini

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN W. DONOGHUE AND PATRICIA DONOGHUE

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
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Taxes under Article ~~(x)~~ 22 of the :
Tax Law for the Year(s) ~~xxx Period(x)~~ :
1964 & 1965.

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 29th day of July, 1977, she served the within
Notice of Decision by (certified) mail upon Ralph F. Anthony

(representative of) the petitioner in the within proceeding,

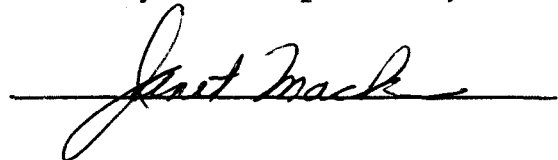
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Ralph F. Anthony, Esq.
Gibney, Anthony & Ferguson
420 Lexington Avenue
New York, New York 10017

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

29th day of July, 1977.







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

July 29, 1977

Mr. & Mrs. John W. Donoghue
1110 Jackson Avenue
River Forest, Illinois 60305

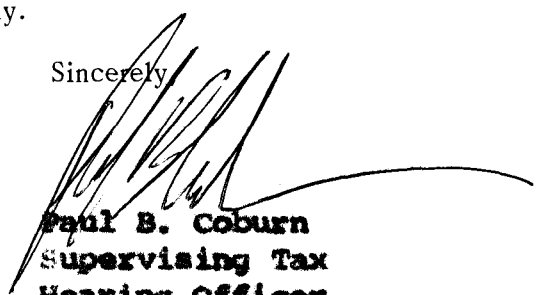
Dear Mr. & Mrs. Donoghue:

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 **(a) 690** 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely


Paul B. Coburn
Supervising Tax
Hearing Officer

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN W. DONOGHUE AND PATRICIA DONOGHUE	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1964 and 1965.	:	

Petitioners, John W. Donoghue and Patricia Donoghue, 1110 Jackson Avenue, River Forest, Illinois 60305, timely filed a petition for redetermination of a deficiency for personal income tax for the years 1964 and 1965. (File No. 00004).

A hearing was calendared for November 17, 1976 but in lieu thereof petitioners, by stipulation, agreed to submit the matter to the State Tax Commission for decision based on the material contained in the Income Tax Bureau file.

The State Tax Commission renders the following decision after due consideration of the entire record.

ISSUE

The issue in this matter will be determined in accord with the decision of the State Tax Commission in the Matter of the Petition of Sincere & Co., and Related Cases, a copy of which is

attached hereto. To the extent that there is a change in that partnership's allocated income, there would be a corresponding change in the distributive shares of each of the nonresident partners.

FINDINGS OF FACT

1. Petitioners, John W. Donoghue and Patricia Donoghue, filed a New York State nonresident income tax return for the year 1965.

2. On June 28, 1971, the Income Tax Bureau timely issued a Notice of Deficiency to petitioners for the years 1964 and 1965. Said Notice was based on petitioner John W. Donoghue's share, as a partner, of partnership income earned by Sincere & Co. during the years in issue. Since the disposition of John W. Donoghue and Patricia Donoghue's petition is contingent on the State Tax Commission's decision in the Matter of the Petition of Sincere & Co., and Related Cases, the "Findings of Fact" in said decision are hereby adopted.

CONCLUSIONS OF LAW

A. That the "Conclusions of Law" state in the State Tax Commission's decision in the Matter of the Petition of Sincere & Co., and Related Cases, a copy of which is attached hereto, are hereby adopted.

B. That petitioners, John W. Donoghue and Patricia Donoghue, are liable for New York personal income tax due on petitioner, John W. Donoghue's proportionate share of the partnership, Sincere & Co.'s income allocated to New York for the years 1964 and 1965, as determined in the State Tax Commission decision in the Matter of the Petition of Sincere & Co., and Related Cases.

C. That the petition of John W. Donoghue and Patricia Donoghue is granted to the extent indicated in the Matter of the Petition of Sincere & Co., and Related Cases; that the Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency dated June 28, 1971, and, that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
July 29, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SINCERE & CO., and	:	DECISION
Related Cases	:	
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
and Personal Income Tax under Articles	:	
23 and 22 of the Tax Law for the Years	:	
1964 and 1965.	:	

Petitioner, Sincere & Co., with a home office at 208 South LaSalle Street, Chicago, Illinois 60804, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1964 and 1965. (File No. 00028).

A formal hearing was scheduled before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 17, 1976 at 9:15 A.M. On November 12, 1976 petitioner, Sincere & Co., agreed, with counsel to the Income Tax Bureau, to waive a formal hearing and to submit the matter to the State Tax Commission upon the documents, correspondence and all other papers contained in the file.

The State Tax Commission renders the following decision after due consideration of the entire record.

ISSUES

I. Whether petitioner, Sincere & Co., a broker-dealer in securities and commodities, with offices within and without New York, used the proper method in allocating income and expenses in determining New York net income for purposes of the unincorporated business tax.

II. Whether, in the alternative, petitioner can allocate based on the three factor formula.

FINDINGS OF FACT

1. Petitioner, Sincere & Co., timely filed New York State partnership returns for the years 1964 and 1965. Therein, petitioner allocated the receipts within and without New York by allocating commissions to New York as follows:

(a) 100% on orders originating in New York and executed over a New York exchange; and

(b) 60% on orders originating in New York but executed in another state; and

(c) 40% on orders originating outside New York but executed on a New York exchange.

Expenses were allocated to New York in the same ratio as receipts allocated to New York bore to receipts everywhere. That percentage was 21.51% in 1964 and 21.90% in 1965.

2. The Income Tax Bureau issued a Statement of Audit Changes to the partnership for unincorporated business tax for the years 1964 and 1965 on October 22, 1970, and subsequently issued a revised Statement of Audit Changes on June 28, 1971 for those two years stating tax due of \$4,485.74 and \$7,354.38, respectively, plus interest to that date of \$3,964.80. In accordance with the revised statement, a Notice of Deficiency was issued to petitioner, Sincere & Co., asserting the deficiencies stated in that latter statement, plus interest for 1964 and 1965 of \$1,669.29 and \$2,295.52, respectively.

3. Petitioner, Sincere & Co., is a broker and dealer in commodities and securities, and is a member of all major stock and commodity exchanges. Petitioner does no underwriting or syndication work.

4. In the years 1964 and 1965, petitioner had its home office in Chicago and had eight branch offices, one of which was located in New York State.

5. The primary purpose of all offices except New York was to generate income from commissions and services. The New York office was used primarily as a relay office. A wire was open between the Chicago home office and the New York office for the relaying of orders to be executed on the New York and American

Stock Exchanges and any pertinent commodity orders where the markets or clearing houses therein were located in New York. All accounting and banking functions were performed in Chicago.

6. The operation of the New York office was conducted by approximately 12 people. Their duties were to handle the wire messages and relay them to the proper exchanges. Securities purchased were shipped to the appropriate branch offices. All pickup and delivery in New York was by messenger. All checks, where money was due on a settlement date, were transmitted to the clearing house.

7. The portion of total income generated in 1964 and 1965 and the attribution of the New York portion thereof contained in petitioner's returns were:

	<u>Gross Receipts</u>	<u>Receipts Allocable to New York</u>
1964	\$2,438,393.41	\$417,161.41
1965	3,036,881.34	556,945.69

8. The Income Tax Bureau, in its schedule of audit adjustments (a part of the Statement of Audit Changes described in Finding of Fact "2" above), found the receipts from commissions allocable to New York for 1964 and 1965 to be \$463,351.64 and \$622,786.94.

9. The expenses computed by petitioner, as described in Finding of Fact "1" above, totalled \$406,767.72 and \$521,728.30 for 1964 and 1965, respectively.

10. The Income Tax Bureau, in the Schedule of Audit Adjustments, employed an "office to office method" of allocation. This method resulted in the following expense allocations to New York:

	<u>1964</u>	<u>1965</u>
1. Brokerage commissions to others for N.Y. execution	\$ 46,189.73	\$ 66,341.24
2. Adjusted N.Y. expenses (minus commissions paid to a partner)	229,837.61	273,998.39
3. Bookkeeping chargeable to N.Y.	2,550.04	3,562.17
4. Stock brokerage expenses	<u>36,172.34</u>	<u>36,911.25</u>
	\$314,749.72	\$380,813.05

11. The Income Tax Bureau computed the net income of petitioner allocated to New York for the years 1964 and 1965 to be \$148,601.92 and \$241,973.89, respectively (whereas petitioner showed on its returns, for those years, New York net income of \$10,393.69 and \$35,217.39, respectively).

12. The Income Tax Bureau then utilized the New York net income for each year as the numerators of fractions, the denominators of which were, for the appropriate year, the sum of the net income of petitioner for the year in question, payments to partners and qualifying dividends (minus an amount in 1965 for first year

depreciation). This fraction was converted into income allocation percentages of 69.78% for 1964 and 83.93% for 1965.

13. The books and records of the petitioner, Sincere & Co., clearly disclose the income and expenses of its New York operation.

14. Petitioner, Sincere & Co., computed the allocation of net income in accordance with previous computations in prior returns, which were the subject of an audit by New York State and which computations were then deemed to be properly reflective of income and expenses within and without New York by the Income Tax Bureau.

CONCLUSIONS OF LAW

A. That the net income from business allocated to New York of petitioner, Sincere & Co., was properly determinable from the books and records of petitioner. (Tax Law section 707(b); 20 NYCRR 287.1; and see 20 NYCRR 207.3(c), a subsequently promulgated regulation of the State Tax Commission which is substantially the same as section 287.1).

B. That the direct accounting method employed by the Income Tax Bureau is the preferred method and the use of the three factor formula (Tax Law section 707(c)) to allocate petitioner's net business income would not be warranted herein, and that the need to estimate certain expenses is not too difficult a task to warrant the preclusion of the preferred direct accounting method where

such method appears best adapted to equitably reflect New York income. Piper, Jaffray and Hopwood v. State Tax Commission, 42 A.D. 2d 381, affd. _____ N.Y. 2d _____.

C. That the Income Tax Bureau properly computed the unincorporated business gross income of petitioner, Sincere & Co.

D. That the Income Tax Bureau computations of the business deductions should be modified for 1964 and 1965. All direct expenses incurred by the New York office including salaries, rent, taxes, depreciation, wires, tickers, floor brokerage, other brokerage and clearing expenses are deductions or allocable expense deemed to total the amounts set forth in Finding of Fact "10", subparagraphs 1 and 2 and contained in the 1964 and 1965 Schedule of Audit Adjustments. All indirect expenses, however, are to be apportioned among the various offices and such allocation shall be made on the basis of the ratio of receipts attributable to the New York office to total receipts of the partnership.

E. That the total of the indirect expenses for the year 1964 multiplied by 21.51% (ratio described in Conclusion of Law "D", above, as a percentage) results in a product of \$94,312.25 which constitutes indirect expenses allocable to New York and deductible from New York gross business income.

F. That the New York net business income of petitioner for 1964 totals \$93,012.05 and the percentage allocation of income to New York is 43.68%.

G. That the total of the indirect expenses for 1965 multiplied by 21.90% (ratio described in Conclusion of Law "D", above, expressed as a percentage) results in a product of \$116,934.64 which constitutes the indirect expenses allocable to New York and deductible from New York gross business income.

H. That the New York net business income of petitioner for 1965 totals \$165,512.67 and the percentage allocation of income to New York is 57.42%.

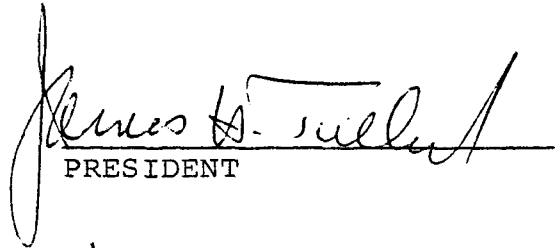
I. That the net business income of petitioner taxable pursuant to Article 23 of the Tax Law for the years 1964 and 1965, after computing the appropriate modification, allowance for services and allowing for such income previously stated, is \$57,904.60 and \$130,471.96, respectively; and that the resultant deficiency of unincorporated business tax thereon is \$2,250.98 for 1964 and \$4,291.92 for 1965, or a total of \$6,542.90.

J. That the State Tax Commission is not bound by the position taken on prior audits as to allocation and utilization in petitioner's returns for 1964 and 1965, but is required to determine that the income allocable to New York is fairly and equitably reflected in petitioner's allocation and computation of tax due, which determination is made as set forth herein.

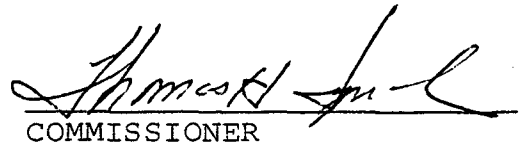
K. That the petition of Sincere & Co. is granted to the extent of the computations contained in the Conclusions of Law above, and the resultant unincorporated business tax due (Conclusion of Law "I"); that the Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency issued June 28, 1971 and to compute the interest due thereon; and, that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
July 29, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER