STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Stanley A. Marks	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Nonresident Earnings Tax under Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1980.	:	

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of June, 1986, he/she served the within notice of Decision by certified mail upon Stanley A. Marks the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley A. Marks
4190 North 42nd Ave.
Hollywood, FL 33021

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
30th day of June, 1986.

David Parchuck

Janet M. Snay

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Stanley A. Marks	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Nonresident Earnings Tax under Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1980.	:	

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 30th day of June, 1986, he served the within notice of Decision by certified mail upon Jeffrey M. Marks, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jeffrey M. Marks
Reavis & McGrath
345 Park Ave.
New York, NY 10154

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
30th day of June, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 30, 1986

Stanley A. Marks
4190 North 42nd Ave.
Hollywood, FL 33021

Dear Mr. Marks:

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) 690 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Jeffrey M. Marks
Reavis & McGrath
345 Park Ave.
New York, NY 10154

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of STANLEY A. MARKS for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Nonresident Earnings Tax under Chapter 46, Title U of the Administrative Code of the City of New York for the Year 1980.	DECISION

Petitioner, Stanley A. Marks, 4190 North 42nd Avenue, Hollywood, Florida 33021, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1980 (File No. 55335).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 20, 1986 at 9:15 A.M. Petitioner appeared by Jeffrey M. Marks, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether commission income received by petitioner constituted part of his distributive share of partnership income, thereby rendering such income allocable to New York to the extent of the partnership's allocation percentage.

FINDINGS OF FACT

1. On June 15, 1981, Stanley A. Marks (hereinafter "petitioner") filed a New York State Income Tax Nonresident Return (with City of New York Nonresident

Earnings Tax) for the year 1980 whereon he failed to report, for New York State and City purposes, certain income derived from the New York security brokerage partnership, Kalb, Voorhis and Co. ("KVC"). The major portion of such income consisted of $182,150.79, which was reported as wages on petitioner's Federal return. KVC issued a Wage and Tax Statement to petitioner whereon said amount was reported in the box labeled "Wages, tips, other compensation."

2. On December 17, 1983, the Audit Division issued a Statement of Audit Changes to petitioner wherein, in addition to other related adjustments, the amount reported as wages was held allocable to New York State and City to the extent of KVC's allocation percentage of 97.27 percent. The adjustments included in said statement were explained therein as follows:

> "Based on a careful review of the information submitted, you are held to be a partner of the Kalb, Voorhis & Co. partnership. This determination is made based upon the Appellate Division decision on the matter of Faulkner, Dawkins and Sullivan.
>
> As a partner, Section 637(a)(1) provides that in determining the New York Adjusted Gross Income of a nonresident partner of any partnership, there shall be included only that portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income, such portion shall be determined under Regulation of the Tax Commission consistent with the applicable rules of Section 632.
>
> The Regulations of Section 632 provides [sic] that the allocation of income be determined by the partnership, and such allocation shall then apply to each member partner's share of income, gain, loss and deduction.
>
> Based upon an examination of the Kalb Voorhis & Co. partnership for fiscal year ending 4/30/80, the percentage of Federal income derived from or connected with New York sources has been computed to be 97.27%.
>
> The partnership ordinary income, dividends and modifications will be allocated at 97.27% while the capital gains are required to be reportable at 100%.

Since the salary received of $182,150.79 is considered to be a partnership distribution, the allocation percentage will be applied to determine the portion of New York State income.

Every City of New York nonresident who files or has to file a New York State income tax return has to file a City of New York nonresident earnings tax return, Form NYC-203, if he earns wages in New York City or carries on (or is a member of a partnership which carries on) a trade or business here.

Wages include all payments for services performed by an employee for his employer if these payments are subject to withholding of Federal tax are entered on line 1, column A, page 1. Net earnings from self-employment consists of your gross income from any trade or business carried on by you plus your distributive share of income or loss from a trade or business carried on by a partnership of which you are a member are entered on line 2, column B, page 1."

3. Based on the above, the Audit Division issued a Notice of Deficiency against petitioner on June 8, 1984 asserting additional New York State personal income tax of $19,914.05, New York City nonresident earnings tax of $867.46, plus interest of $7,937.49, for a total due of $28,719.00.

4. Petitioner alleged that the payments characterized as wages of $182,150.79 did not constitute a distributive share of partnership income from KVC. Accordingly, he contended that no part of such payments should be held taxable to New York State and City since they were earned solely in the state of Florida.

5. Prior to April 30, 1979, petitioner, a resident of the State of Florida, conducted business as a stockbroker from an office which he maintained in said state. On April 30, 1979, KVC amended its partnership agreement so as to establish a new class of partner designated as "special limited partner" and admitted petitioner to the partnership under said designation.

6. The aforesaid amendment to the partnership agreement provided, inter alia, that:

a - Petitioner was required to devote his entire time and attention and his skill and best efforts to the business of KVC.

b - Petitioner would share in profits and losses of KVC to the extent of 1 percent of profits and 1.15 percent of losses. Additionally, he was entitled to such compensation for his services as an expense of the business as agreed to by him and the general partners.

c - Petitioner had to make a contribution to the capital of KVC of $100,000.00.

7. The partnership agreement of KVC, entered into as of April 30, 1980, provided that petitioner would share in the profits and losses to the extent of 1.03 percent of profits and 1.13 percent of losses.

8. During 1980, KVC paid the expenses of maintaining petitioner's Florida office and treated such office as an office of the partnership for allocation purposes.

9. In addition to his reported distributive share of partnership items of income and gain, petitioner received 45 percent of the commission income derived from business generated by him in the Florida office. Such commission income earned by petitioner during 1980 totalled $182,150.79 and was reported as wages (see Finding of Fact "1").

10. During 1980, petitioner managed the Florida office. Other than himself, said office employed one secretary, who was paid directly by KVC.

11. In the computation of New York City nonresident earnings tax on the Statement of Audit Changes, petitioner's commission income of $182,150.79 was multiplied by KVC's allocation percentage of 97.27 percent. The resulting amount of $177,178.07 was taxed at the rate of .0045 percent, the rate applicable to wages, rather than .0065 percent, the rate applicable to earnings from self-employment. A claim asserting a greater deficiency was not made by the Audit Division.

CONCLUSIONS OF LAW

A. That section 637(a)(1) of the Tax Law provides that:

"In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income...".

B. That section 637(b) of the Tax Law provides that:

"In determining the sources of a nonresident partner's income, no effect shall be given to a provision in the partnership agreement which --

(1) characterizes payments to the partner as being for services or for the use of capital, or

(2) allocates to the partner, as income or gain from sources outside New York, a greater proportion of his distributive share of partnership income or gain than the ratio of partnership income or gain from sources outside New York to partnership income or gain from all sources...".

C. That since petitioner was a partner of KVC during the year at issue, his income of $182,150.79, characterized as wages, constituted a distributive share of partnership income. Accordingly, such income must be allocated to New York sources on the same basis as the firm used to allocate the distributive share of each partner within the meaning and intent of sections 637(b)(1) and (2) of the Tax Law. That petitioner did not have the same percentage of ownership as some of the other partners and thus did not have the same degree of control is of no moment. KVC chose to designate petitioner as a partner and even gave him a small proprietary share in the business. Petitioner is held to the tax ramifications of such a decision (cf. Matter of Ter Bush & Powell, Inc. v. State Tax Comm., 58 A.D.2d 691).

D. That although the New York City nonresident earnings tax was erroneously computed in petitioner's favor, said tax may not be adjusted since the Audit

Division made no attempt to assert a greater deficiency prior to or during the hearing as required under section U46-39.0(d)(1).

E. That the petition of Stanley A. Marks is denied and the Notice of Deficiency issued June 8, 1984 is sustained, together with such additional interest as may lawfully be owing.

DATED: Albany, New York

JUN 30 1986

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER