

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Van Alstyne, Noel & Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Unincorporated Business Tax :  
under Article 23 of the Tax Law  
for the Period 12/1/62-1965 & 1968. :

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 14th day of November, 1980, he served the within notice of Decision by certified mail upon Van Alstyne, Noel & Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Van Alstyne, Noel & Co.  
120 Broadway  
New York, NY 10005

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  
14th day of November, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
Van Alstyne, Noel & Co. :

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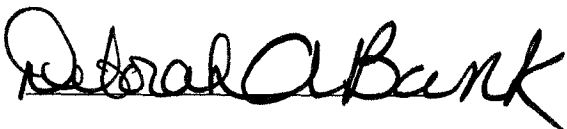
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Decision by certified mail upon E.E. Finucan & Douglas Greenwood the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

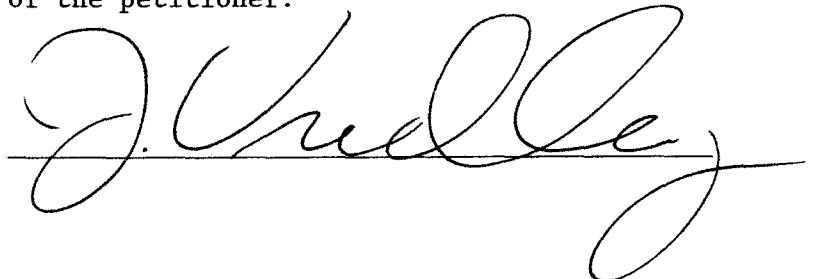
Mr. E.E. Finucan & Douglas Greenwood  
Finucan & Greenwood, CPA  
10 East 40th St.  
New York, NY 10016

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  
14th day of November, 1980.

  
Notary Public



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

November 14, 1980

Van Alstyne, Noel & Co.  
120 Broadway  
New York, NY 10005

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) 722 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  
E.E. Finucan & Douglas Greenwood Finucan & Greenwood, CPA  
10 East 40th St.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
VAN ALSTYNE, NOEL & CO.	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Fiscal Years Ending January 31, 1961	:	
and January 31, 1962, for the Short	:	
Period February 1, 1962 to December 31,	:	
1962 and for the Calendar Years 1963,	:	
1964, 1965 and 1968.	:	

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Petitioner, Van Alstyne, Noel & Co., 120 Broadway, New York, New York 10005, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the fiscal years ending January 31, 1961 and January 31, 1962, for the short period February 1, 1962 to December 31, 1962 and for the calendar years 1963, 1964, 1965 and 1968 (File No. 01766).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 17, 1975 at 1:20 P.M. and continued on August 5, 1976 at 9:15 A.M. The formal hearing was continued to conclusion before Edward Johnson, Hearing Officer, on June 24, 1977 at 12:40 P.M. Petitioner appeared by E. E. Finucan, CPA, and Douglas Greenwood, CPA. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the Income Tax Bureau properly allocated petitioner's net business income by using the direct accounting method.



II. Whether the percentage allocation of stock brokerage commission income, as provided for in the Income Tax Regulations, was proper.

III. Whether the allocation of interest expense to branch offices was proper.

IV. Whether averaging losses and/or income attributable to the Los Angeles office was proper.

V. Whether petitioner sustained the burden of proof to show that it was entitled to deduct travel and entertainment expenses.

#### FINDINGS OF FACT

1. Petitioner, Van Alstyne, Noel & Co., filed partnership and unincorporated business income tax returns for the years ending January 31, 1961 and January 31, 1962, for the short period February 1, 1962 through December 31, 1962 and for calendar years 1963, 1964, 1965 and 1968. Petitioner signed consents extending the period of time within which to issue assessments to April 15, 1974. On November 26, 1973, the Income Tax Bureau issued a Notice of Deficiency against the partnership for the years ending January 31, 1961 and January 31, 1962, for the short period February 1, 1962 to December 31, 1962 and for calendar years 1963, 1964 and 1965. Said notice asserted unincorporated business tax of \$57,856.00, penalty, pursuant to section 685(c) of the Tax Law, of \$2,246.00 for 1964 and 1968, and interest of \$34,494.15. A refund of \$4,253.00, based on a net operating loss carryback from 1971 to 1968, was offset against the unincorporated business tax due for a net amount due of \$90,343.15. Petitioner timely filed a petition for redetermination of a deficiency or for refund of unincorporated business tax.

2. Van Alstyne, Noel & Co. was a limited partnership consisting of 11 partners, with its principal or home office located in New York City. During the years in issue, the partnership maintained branch offices in Hartford,



Connecticut; Maplewood and Passaic, New Jersey; Pittsburgh and Philadelphia, Pennsylvania; Boston, Massachusetts; Los Angeles, California; and Denver, Colorado. It maintained no offices outside New York State after December 31, 1965.

3. Petitioner was engaged in business as a security broker. Its business included the purchase and sale, as agent for its customers, of securities listed on the various exchanges, including the New York Stock Exchange and the American Stock Exchange. In addition, petitioner acted as agent or principal in connection with the purchase and sale by its customers of "over-the-counter" or unlisted securities, mutual funds and municipal and corporate bonds. Petitioner also participated in public underwritings of corporate stocks and bonds and municipal bonds.

4. In connection with the audit covering the period February 1, 1962 through December 31, 1962, the auditor determined that for New York State unincorporated business tax purposes, the net loss attributable to the home or principal office in New York, as adjusted by Federal settlement, amounted to \$2,143.00, whereas the net loss attributable to the branch offices outside New York State amounted to \$376,037.00. No deficiency was asserted for the period February 1, 1962 to December 31, 1962.

5. Petitioner contended that the net loss for the period February 1, 1962 to December 31, 1962 should be attributable to the New York City home or principal office to the extent of \$437,856.11, and that the net income attributable to sources outside New York State for said period should be \$59,676.11.

6. The partnership did not allocate net income and net losses on its unincorporated business tax returns for the periods in issue. It reported, for unincorporated business tax purposes, the income and expenses as shown on





its U.S. Partnership Return of Income. The Internal Revenue Service made adjustments to petitioner's Federal partnership returns for the fiscal years ending January 31, 1961 and 1962, for the short period February 1, 1962 to December 31, 1962, and for the calendar year 1965.

7. It was agreed that the issues raised as to the period February 1, 1962 to December 31, 1962 should be applied to the other periods in issue.

8. The books of account of petitioner, Van Alstyne, Noel & Co., were maintained on a basis which accounted for the activities of each of the branch offices separately. Separate profit and loss statements were prepared for each branch office, except for the Los Angeles office.

9. The Los Angeles office was unlike that of the other branch offices which were "brokerage" offices. It consisted of one man, Mr. John P. Sellas, a partner of the firm. Mr. Sellas' function was that of an investment banker. His purpose was to attract clients for the firm in the areas of private placements, financial arrangements, mergers, acquisitions, etc. He worked alone, sometimes closing a deal in conjunction with partners in New York City by introducing prospective clients to the firm. Since Van Alstyne, Noel & Co. had no profit and loss statement for the Los Angeles office, the auditor averaged out the losses of all branch offices and charged the Los Angeles branch with the average loss.

10. The auditor allocated interest expense to the out-of-state offices by dividing the total interest income of each out-of-state office by total Federal interest income reported on the Federal return. This percentage was then applied to the total interest expense reported on petitioner's Federal partnership return.

11. The books and records of petitioner clearly disclosed the income and expenses of its New York operation.



12. Petitioner contended that the allocation with respect to the gross commissions earned by the branch offices fails to allow for commissions paid to salesmen who earned said commissions. Petitioner also contended that the formula used to allocate commissions was unreasonable because it did not provide for the allocation of any expenses and, as a result, the branch offices would have to show a net loss.

13. Petitioner further contended that the allocation of indirect expenses to the out-of-state branch offices resulted in a net loss to the branch offices and a profit to the New York office.

14. No evidence was presented to substantiate estimated travel and entertainment expenses, which were disallowed by the Income Tax Bureau.

15. On June 3, 1980 and July 7, 1980, letters were mailed to petitioner's representative requesting information as to the commission and/or execution rate which was in effect for the years in issue. Petitioner's representative has not responded to said correspondence.

#### CONCLUSIONS OF LAW

A. That petitioner, Van Alstyne, Noel & Co., erroneously allocated to New York State all of its unincorporated business gross income over its unincorporated business deductions. The "direct accounting" method is the preferred method when the portion allocable to this State can be determined from the books and records of the business within the meaning and intent of section 707(b) of the Tax Law. [Piper, Jaffray and Hopwood v. State Tax Commission, 42 A.D.2d 381, 348 N.Y.S.2d 242. See also 20 NYCRR 207.3, effective February 1, 1974. This regulation is substantially the same as 20 NYCRR 287.1, Question 77, which had been promulgated under Article 16A of the Tax Law.]



B. That the allocation of interest expense to New York, on the basis of a percentage of total New York interest income divided by the total interest income of the partnership, was proper.

C. That the method used in determining the loss attributable to the Los Angeles office was erroneous and arbitrary and should be eliminated from the Notice of Deficiency.

D. That direct expenses incurred and paid in the operation of the New York office were properly deducted since said expenses were attributable to business carried on solely in this State; that indirect expenses incurred by petitioner, which benefited all offices, including New York, were properly allocated on the basis of total New York income divided by total income of the partnership. Petitioner's argument that a portion of the salesman's commission expense should be assigned to commissions earned on orders originating outside New York but executed on a New York exchange is without merit since payroll expenses are attributable to the office in which the employee was assigned or where the expenses were incurred within the meaning and intent of section 707(b) of the Tax Law [see 20 NYCRR 207.3(c) promulgated under Article 23 of the Tax Law].

E. That petitioner failed to sustain the burden of proof imposed under section 689(e) of the Tax Law in establishing that it was entitled to a commission and/or execution rate other than that claimed on its original returns.

F. That petitioner, Van Alstyne, Noel & Co., has not met the substantiation requirements pursuant to Treasury Regulation §1.274-5 in establishing that travel and entertainment expenses were proper; accordingly, it has not sustained the burden of proof within the meaning and intent of sections 722 and 689(e) of the Tax Law.



G. That the petition of Van Alstyne, Noel & Co. is granted to the extent shown in Conclusion of Law "C", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
\_\_\_\_\_  
COMMISSIONER



NOV 14 1980

John T. W. and  
Mary T. W.  
and  
John T. W. and  
Mary T. W.