STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

AGENCY FOR THE PERFORMING ARTS, INC. : DETERMINATION

for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended July 31, 1980, 1981, 1982 and 1983. :

Petitioner, Agency for the Performing Arts, Inc., c/o Braunstein & Chernin, 50 East 42nd Street, New York, New York 10017, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended July 31, 1980, 1981, 1982 and 1983 (File No. 802596).

On March 3, 1989 and March 13, 1989, respectively, petitioner by its representative, Harold B. Stern, CPA, and the Division of Taxation by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel) executed a consent to have the controversy determined on submission without hearing, with all documents and briefs submitted by September 29, 1989. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly recomputed petitioner's receipts factor by reallocating commissions earned by petitioner's New York office in its computation of petitioner's business allocation percentage.

FINDINGS OF FACT

Petitioner, Agency for the Performing Arts, Inc. ("APA"), is a theatrical booking agency for unionized professional entertainers. APA receives commissions of 10 percent of the amount paid to said entertainers for each booking it arranges. During the period in issue, viz., the fiscal years ended July 31, 1980, 1981, 1982 and 1983, APA had business offices in New York, New York, Chicago, Illinois and Beverly Hills, California.

The Division of Taxation ("Division") performed a field audit of petitioner's franchise tax returns for the fiscal years in issue and it determined that modifications were necessary to the property, receipts and wage factors used in determining the business allocation percentage to be applied to business income in determining entire net income for all of theyears in issue. The audit resulted in the following franchise tax adjustments:

(a) Property Factor. Adjustments were made for petitioner's failure to add back the leasehold improvement amortization and for petitioner's overstatement of other tangible personal property. These adjustments resulted in an additional franchise tax due of

$3,938.00.

(b) Receipts Factor. The Division determined that petitioner's commission receipts for services performed by employees working out of the New York office should be allocated to New York. This adjustment resulted in additional franchise tax due of $23,494.00.

The Division concluded that for the fiscal year ended July 31, 1980, petitioner properly allocated its receipts to the office making the booking contract. However, the Division further concluded that for the fiscal years ended July 31, 1981, 1982 and 1983, APA incorrectly allocated receipts to the jurisdiction where the entertainers performed.

(c) Wage Factor. The Division determined that certain modifications should be made for understated wages, for the double deduction of general executive officers' salaries and for the erroneous inclusion of general executive officers' salaries. Those adjustments resulted in additional franchise tax due of $2,862.00.

(d) MTA Surcharge. The Division determined that petitioner owed additional Metropolitan Transit Authority tax on each of the adjustments listed in subdivisions (a), (b) and (c) above in the amount of $1,509.00.

The above adjustments resulted in additional franchise tax due of $31,803.00.

APA executed consents extending the period of limitation for the assessment of tax under Article 9-A for the fiscal years ended July 31, 1980, 1981 and 1982 enabling the Division to assess additional tax at any time on or before June 30, 1986.

On August 13, 1985, the Division issued to APA five notices of deficiency which set forth the following information:

Period Ended	Tax	Interest	Total Due
7/31/80	$1,427.00	$1,059.00	$ 2,486.00
7/31/81	15,264.00	9,422.00	24,686.00
7/31/82	5,222.00	2,114.00	7,336.00
7/31/83	8,381.00	1,941.00	10,322.00
7/31/83 (MTA Surcharge)	1,509.00	350.00	1,859.00

Petitioner herein does not protest the adjustments made in the property factor which resulted in additional franchise tax due of $3,938.00 or the modification in the wage factor which resulted in additional franchise tax due of $2,862.00 or the resulting increase in the MTA surcharge tax on both of these additional liabilities. APA does protest the adjustment made to the receipts factor for each of the years in issue and the resulting additional franchise tax liability of $23,494.00 and the MTA surcharge tax thereon.

On field audit of APA's books and records, the Division noted that APA recorded its receipts, or in this instance commissions, for entertainment booking services performed by its employees according to the office from which the booking employee worked. However, except for the fiscal year ended July 31, 1980, APA allocated these receipts in accordance with whether the act was performed within or without the State of New York. The Division took the position that the receipts should have been allocated in accordance with the office out of which the entertainment booking agent worked, i.e., the New York, Chicago or Beverly Hills office.

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation takes the position that Tax Law § 210.3(a)(2)(B) and the regulation at 20 NYCRR 4-4.3 clearly state that services will be deemed to have been performed in New York State if commissions paid for said services were paid to salesmen attached to or working out of a New York State office.

APA contends that the jurisdiction where the performance takes place should dictate the allocation of the receipt. APA's belief is rooted in its experience with the States of New Jersey and Illinois which both purportedly tax APA's commissions on its clients' performances in those states, presumably without regard to the employees' office location.

Although APA alternatively concedes that commissions paid for services of salesmen working out of a New York office are deemed performed in New York State, it contends that its agents are not agents or salesmen within the meaning and intent of Tax Law § 210.3(a)(2)(B) and 20 NYCRR 4-4.3. APA contends that its agents perform many more services for its clients for which commissions are earned, to wit:

(a) spending large blocks of time forming personal relationships with prospective clients to establish whether personalities and ideas are compatible;

(b) subsequently developing a satisfactory personal relationship with the client;

(c) inducing the client to accept APA as a booking agent because of the developed personal relationship and the benefits derived in APA's management of his or her career;

(d) developing and managing a client's career including advising the client with regard to his or her "act" and on whether theater, nightclub, television or a mix is the appropriate media for career development;

(e) booking the client for an engagement for which the commission is earned, including selecting the appropriate venue, making the appropriate telephone calls and personal contacts to various producers; and

(f) physically attending many of the client's engagements including spending time with clients on location.

For these reasons, APA believes that its agents' services are those of a key executive and not those of a salesmen within the meaning of 20 NYCRR 4-4.3.

APA also points to the exception from 100 percent allocation set forth in the regulations at 20 NYCRR 4-4.3(c)(4) and 20 NYCRR 4-4.3(f).

CONCLUSIONS OF LAW

A. Section 209 of the Tax Law imposes a franchise tax on corporations doing business in this State. The franchise tax is based on the entire net income allocated within the State. Tax Law § 210(3) provides the formula for determining the entire net income to be allocated within the State. It provides that entire net income is to be determined by multiplying a corporation's business income by a business allocation percentage and then adding that amount to an investment income amount determined by multiplying investment income by an investment allocation percentage.

The business allocation percentage is determined by first computing percentages for the following factors:

1) Real and tangible personal property within the State divided by all real and tangible personal property;

2) receipts within the State divided by total receipts; and

3) wages within the State divided by total wages.

The percentages are then added together with the receipts percentage added twice. That sum is then divided by four to determine the business allocation percentage.

The receipts factor of the business allocation percentage is itself determined by comparing in-State receipts of the following to total receipts:

1) Sales of tangible personal property where shipments are made within the State;

2) services performed within the State;

3) rentals within the State; and

4) all other business receipts within the State.

The instant matter concerns the "services" component of the receipts factor.

B. The regulation at 20 NYCRR 4-4.3(b) provides as follows:

> "Commissions received by a taxpayer are allocated to New York State if the services for which the commissions were paid were performed in New York State. If the services for which the commissions were paid were performed for the taxpayer by salesmen attached to or working out of a New York State office of the taxpayer, the services will be deemed to have been performed in New York State."

Given the facts and circumstances of this case, it is determined that the Division's reallocation of APA's commission income and, therefore, its receipts percentage, was proper.

As noted in the facts, APA recorded commissions it deemed attributable to its New York office on the books of its New York office. Only after it learned that two other jurisdictions were taxing commissions based upon the location of performances did it change its allocation on its franchise tax reports allocating commission income to the location of performances.

Petitioner's argument that its agents were not "salesmen" as that term is used in the regulation at 20 NYCRR 4-4.3(b) lacks merit. Although the commissions received are the immediate result of performances by its clients, the basis of the commission lies in the contractual relationship between APA and its performer/clients. Although petitioner argues that only a small percentage of the work performed by the agents can be categorized as "sales", it is noted that its other duties are all oriented towards signing the client and booking engagements on his or her behalf, i.e., they are either preparatory to signing a client or necessary in maintaining the relationship and therefore within the sphere of a "salesman's" services.

C. Petitioner's reliance upon the regulation at 20 NYCRR 4-4.3(c) is misplaced since that section refers to taxpayers which are securities and commodities brokers and the allocation of their commissions.

D. Petitioner also cited the regulation at 20 NYCRR 4-4.3(f)(1) in support of its position. Said regulation states:

> "Where a lump sum is received by the taxpayer in payment of services performed within and without New York State, the portion of the sum attributable to services performed within New York State is determined on the basis of the relative values of, or amounts of time spent in performance of, such services within and without New York State, or by some other reasonable method. Full details must be submitted with the taxpayer's report." (20 NYCRR 4-4.3[f][1]).

Since petitioner in this case has not provided full details of services performed within and without New York State, it cannot rely upon the regulation at 20 NYCRR 4-4.3(f)(1) to support its allocation of commission receipts.

Given the books and records of the New York office and their indication of commissions paid through said office, the Division's modification of apportionment of receipts will not be set aside.

> "[A]n apportionment formula will not be upheld if the formula is intrinsically arbitrary or if it reaches an unreasonable result in a particular case [citation omitted]. However, one who attacks a formula of apportionment carries a distinct burden of showing by clear and cogent evidence that it results in extraterritorial values being taxed [citation omitted]." (Eastman Kodak Company v. State Tax Commission, 33 AD2d 298, 307 NYS2d 69, 74, affd 30 NY2d 558, 330 NYS2d 617.)

With certain exceptions not present herein, the burden of proof is on petitioner and it is held that APA has not carried its burden to show that the Division's formula was intrinsically arbitrary or reached an unreasonable result (Tax Law § 1089[e]). Nor has it shown that the apportionment formula resulted in an extraterritorial value being taxed.

E. For all the reasons set forth above, the petition of Agency for the Performing Arts, Inc. is denied and the five notices of deficiency issued on August 13, 1985 are sustained, together with such additional interest as may be lawfully owing.

DATED: Troy, New York
March 8, 1990

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE