STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **E. RANDALL STUCKLESS AND JENNIFER OLSON** | : | ORDER & OPINION DTA NO. 819319 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1997 and 1998. | : | |

Petitioners E. Randall Stuckless and Jennifer Olson, 68 Partridge Hill, Honeoye Falls, New York 14472, filed an exception to the determination of the Administrative Law Judge issued on July 8, 2004. Petitioners appeared by Petralia, Webb & O'Connell, P.C. (Arnold R. Petralia, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel). Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on November 17, 2004 in Troy, New York. The Tax Appeals Tribunal issued a decision dated May 12, 2005.

The Division of Taxation filed a motion for reargument dated September 9, 2005 accompanied by a memorandum of law in support. Petitioners filed an affirmation and memorandum of law in opposition dated September 20, 2005.

Commissioner Nesbitt took no part in the consideration of this order.

## *ORDER AND OPINION*[1]

A motion for reargument is provided for in section 3000.16(c) of the Tax Appeals Tribunal's ("Tribunal") procedural rules. In ***Matter of Schulkin*** (Tax Appeals Tribunal, November 20, 1997, ***granting motion and modifying decision of April 10, 1997***), the Tribunal set forth the standard to be applied to such motions as follows:

> A motion to reargue is based on no new proof, seeking only to convince the court that it was wrong and ought to change its mind (Siegel, NY Prac § 254, at 383 [2d ed]). There is no statutory authority for this Tribunal to reconsider its decisions and, therefore, our authority to do so as a quasi-judicial body is limited (***Matter of Trieu***, Tax Appeals Tribunal, June 2, 1994, ***confirmed Matter of Trieu v. Tax Appeals Tribunal***, 222 AD2d 743, 634 NYS2d 878, ***appeal dismissed*** 87 NY2d 1054, 644 NYS2d 146, ***lv denied*** 88 NY2d 809, 647 NYS2d 714; ***Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal***, 195 AD2d 625, 600 NYS2d 281, ***lv denied*** 82 NY2d 664, 610 NYS2d 151; ***see also***, ***Evans v. Monaghan***, 306 NY 312). However, although our authority to reconsider may be limited, it is not prohibited (***see***, 20 NYCRR 3000.16[c] [wherein motions for reargument and orders thereon are specifically authorized]). Instead, we believe any reconsideration must be undertaken with great care and vigilance, and only in cases where a valid basis for doing so has been raised by the movant.
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> In ***Foley v. Roche*** (68 AD2d 558, 418 NYS2d 588, 593, ***lv denied*** 56 NY2d 507, 453 NYS2d 1025), the Court stated:
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> > [a] motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful

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[1]Jennifer Olson is a petitioner in this matter solely because she filed a joint New York nonresident and part-year resident income tax return with her spouse, E. Randall Stuckless, for 1998. All of the income at issue was paid to E. Randall Stuckless. Accordingly, unless otherwise indicated, all references to petitioner herein shall refer to E. Randall Stuckless.

> party to argue once again the very questions previously decided.

The Division of Taxation's ("Division") memorandum in support of its motion states that the Tribunal decision of May 12 has raised significant confusion for the Division and tax practitioners as to the treatment of stock option income and submits that reconsideration of the issue is essential to establish a clear and definitive method for the treatment of such income. The memorandum states that this is an appropriate case for reargument because the Tribunal's decision overlooked a controlling principle of law as affirmed by the Court of Appeals in ***Brady v. State of New York*** (80 NY2d 596, 592 NYS2d 955, ***cert denied*** 509 US 905, 125 L Ed 2d 692), which was not previously argued by the parties or addressed in the Tribunal's decision. In ***Brady***, the court rejected a constitutional challenge to changes in the personal income tax which were enacted in 1987. Under the 1987 amendments, the tax calculation for a nonresident of New York was to be based on the taxpayer's total income determined as if the taxpayer were a resident of New York and then that income was to be apportioned to New York. By contrast, the prior method began with New York source income as if it were the taxpayer's only income. The court rejected the assertion that the new method violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Privileges and Immunities Clause. According to the Division, the Tribunal's decision in ***Matter of Stuckless*** (Tax Appeals Tribunal, May 12, 2005) excludes from the tax calculation "accretions in value to the stock options while petitioner was employed" outside New York under a "direct accounting method" that is inconsistent with the "formula apportionment" method approved in ***Brady***. The latter method contemplates a determination of total income from all sources followed by the allocation of that income to New York and elsewhere. The

memorandum then states that the "Division's application of a formula apportionment method to petitioner's income was permissible and reasonable" citing numerous decisions of the Supreme Court of the United States holding that formula apportionment methods do not violate the United States Constitution (Division's memorandum in support of motion, p. 7).

The memorandum next asserts that the method applied by the Tribunal's decision erroneously "assumes that each day of work coincides with the appreciation (or depreciation) in the value of the stock for that day" (Division's memorandum in support of motion, p. 7). Apparently, what this means is that the goal of our analysis is to assign a portion of the income realized on exercise of the options to work done in New York and a portion to work done outside New York based on some rational measurement of work done. Following the price of the employer's stock in the daily newspaper tables is not, in the Division's view, a sound way of measuring petitioner's work.

Finally, the memorandum sets out a series of examples in support of the assertion that "the direct accounting method used by the Tribunal in ***Stuckless*** would be both impractical to administer and overly burdensome on taxpayers for record keeping purposes" (Division's memorandum in support of motion, p. 9).

Petitioner's memorandum of law in opposition to the motion rejects the Division's reliance on ***Brady***. It then goes on to its central argument–i.e., that the case is governed by section 132.18(b) of the regulations, not section 132.18(a). It states as follows:

> Our analysis is supported by § 132.18(a) and (b) of the regulations. Section 132.18(a) deals with a nonresident who works both in and out of New York within the same taxable year [footnote omitted]. In that situation his New York income is based on the number of days worked in and out of New York. But that is not this case.

> This case is covered by Section 132.18(b). It deals with the nonresident who severs his ties with New York and ceases to have New York employment [footnote omitted]. The Division has never addressed subparagraph (b) and that is one of the flaws in its motion. Under subparagraph (b), the allocation by days worked methodology is not applied in the part of the year in which there is no New York employment.
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> There are two relevant parts to § 132.18. The Division addressed only subparagraph (a) dealing with a nonresident who works both in and out of New York. It has totally ignored subparagraph (b) which deals with the nonresident who no longer has any New York employment. Under (b) no income from out of state employment is taxed in New York where there is no New York employment (Petitioner's memorandum in opposition to motion, pp. 4-8).

With respect to the applicability of TSB-M-95(3)I, petitioner's memorandum states as follows:

> *Memorandum TSB-M-95(3)I* (the "TSB") addresses only a nonresident who works both in and out of New York in the same tax period. It does not address the case in which a nonresident has no New York employment during the tax year. The TSB is confined to Reg. § 132.18(a) and does not address Reg. § 132.18(b). It is irrelevant to this case (Petitioner's memorandum in opposition to motion, p. 6).

With respect to alternative methods of allocation and apportionment under section 132.24, petitioner describes the holding of the May 12 Tribunal decision and states, "We think this was wrong and that an alternative method under Reg. § 132.24 must comport with other tax rules. Section 132.24 does not grant carte blanche to fill gaps where the statutes are silent. Where there is no statutory authority to apportion there is no room to adopt an 'alternative method'" (Petitioner's memorandum in opposition to motion, p. 8). Petitioner, while opposing the motion for reargument, nevertheless agrees with the Division that the Tribunal erred and seems to

abandon the secondary argument advanced in petitioner's earlier briefs before the Tribunal (***see,*** Petitioner's brief, pp. 5, 17-19) and the Division of Tax Appeals (***see***, Petitioner's brief, p. 17; ***see also***, Petitioner's reply brief, pp. 2, 10, 13) that section 132.24 authorizes an alternative method of allocation and apportionment based on the trading price of the stock subject to petitioner's options at the time he left New York. This is, of course, the very result reached in the Tribunal decision of May 12– "[T]he Division could have adopted, *as we do here*, an alternative method of apportionment and allocation (***see***, 20 NYCRR 132.24)" (***Matter of Stuckless, supra***, emphasis added).

Based on the foregoing, we conclude that the standard for granting a motion for reargument stated by Justice Fein's opinion in ***Foley v. Roche*** (***supra***), and relied upon by the Tribunal in ***Matter of Schulkin*** (***supra***), has been met–namely, it will "afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (***Foley v. Roche***, ***supra***, 418 NYS2d, at 593). The Division asserts in its memorandum in support of its motion that the misapplied principle in the decision of the Tribunal is the rule of the ***Brady*** case. Petitioner asserts in its memorandum in opposition that section 132.24 of the regulations was misapplied. We also think it appropriate to consider (i) whether the decision properly interpreted the scope of TSB-M-95(3)I, (ii) the applicability of section 132.4(c) of the regulations, (iii) whether TSB-M-95(3)I represents an alternative method which the Division is authorized to apply pursuant to 20 NYCRR 132.24 and (iv) if the Division was not authorized to adopt an alternative method pursuant to 20 NYCRR 132.24, whether there is any other legal authority for imposition of the disputed tax.

ORDERED that the motion for reargument of the Division of Taxation be, and hereby is, granted.

DATED: Troy, New York
December 15, 2005

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner