STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of ESTATE OF CHARLES D. KYLE for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1988 and 1989.	:	DETERMINATION DTA NO. 812405

Petitioner, Estate of Charles D. Kyle, 258 Carlton Avenue, Brooklyn, New York 11205, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1988 and 1989.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on September 9, 1994 at 10:00 A.M. Petitioner appeared by David J. Marshall, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel). The Division of Taxation submitted additional evidence on September 29, 1994. Petitioner submitted additional evidence which was received on October 4, 1994. Petitioner filed a brief on November 14, 1994. The Division of Taxation filed a letter brief on December 6, 1994. Petitioner filed a reply brief on December 14, 1994.

ISSUE

Whether payments received by petitioner, a retired nonresident partner, pursuant to a partnership agreement, were properly characterized as a nontaxable annuity or whether such payments properly constituted New York source income.

FINDINGS OF FACT

Petitioner, Charles D. Kyle, was born on September 16, 1904. He died on October 9, 1989. During the years at issue, petitioner resided in Bucks County, Pennsylvania. He was a nonresident of New York within the meaning of Tax Law § 605(b)(B)(2).

On December 31, 1976, petitioner retired as a partner at the New York City law firm of Milbank, Tweed, Hadley & McCloy ("the firm"). Petitioner had worked in New York his entire professional career. Under the firm's retirement plan then in effect, petitioner received payments from the firm which were directly tied to the firm's earnings. That is, as a retired partner petitioner received a reduced share of the firm's profits. The firm issued to petitioner an annual schedule K-1 in respect of these payments.

In 1988, the firm approved a new retirement plan to become effective January 1, 1988. The terms of the plan were set forth in the firm's Twenty-Second Amendment to Articles of Partnership, dated February 15, 1988 (hereinafter the "Articles"). The Articles created a retirement plan for future retirees of the firm and also created a "transition plan" for current retirees and those eligible to become retirees as of the plan's effective date. Under the terms of this transition plan, petitioner was given the option of continuing to receive payments from the firm as a retired partner under the same terms and conditions as had been in effect since his retirement on December 31, 1976. Alternatively, petitioner could elect "eligible retired partner" status under the transition plan, which provided for a basic payment to such "eligible retired partner" of $190,000.00 for 1988. For subsequent years, the transition plan provided that this basic payment would be subject to annual cost-of-living adjustments, both up and down. With respect to 1989, the transition plan further provided that in no event would the basic payment be less than $200,000.00. Such basic payments were to be made in substantially equal monthly installments.

Additionally, under the transition plan basic payments would not be subject to reduction as a result of decreases in the firm's net income. Basic payments would, however, be subject to an annual "cap" (with no carryover) under which payments could not exceed 60% of the average share of net profits of general partners other than senior partners. This cap provision is set forth in the Articles and is also explained in a letter dated May 24, 1988 from the firm to petitioner which discussed the transition plan in general and petitioner's retirement options in particular. In reference to the cap provisions, the May 24, 1988 letter stated the following:

> "All payments will be subject to a cap (with no carry-over) under which payments to any . . . Retired Partner may not exceed 60% of the average share of net profits of all General Partners other than Senior Partners."

By a "Notice of Election" dated May 26, 1988, petitioner elected "eligible retired partner" status effective January 1, 1988. Said notice stated, in relevant part:

> "The undersigned . . . hereby selects Eligible Retired Partner status in accordance with § 10.7 of the Twenty-Second Amendment to the Articles of Partnership of the Firm.
>
> * * *
>
> "The undersigned has received a copy of said Twenty-Second Amendment. The undersigned hereby elects to convert the Retirement Compensation payable to him as described in said Twenty-Second Amendment into an optional benefit of actuarial equivalent value to a straight life annuity for his life, without survivor benefits.
>
> "The undersigned agrees to be bound by and subject to all of the provisions of the said Twenty-Second Amendment in all respects and agrees that he shall have no rights under any other Partnership Agreement or Article of Partnership of the Firm or of any predecessor firm."

Petitioner did receive basic payments pursuant to the terms of the firm's new retirement plan during 1988 and 1989. Specifically, petitioner received $190,000.00 in basic payments in 1988 and $185,000.00 in 1989. The total payments to petitioner for 1989 were less than the full amount scheduled for that year solely because of petitioner's death on October 9, 1989.[1]

The firm issued to petitioner a Form 1099-Misc in respect of both the 1988 and 1989 payments.

From the time of his retirement on December 31, 1976 until early 1988, petitioner maintained a current account with the firm. Petitioner's share of the firm's profits were deposited into this account and subsequently paid to him. At the end of 1987, petitioner's balance in his account was $29,868.00. In early 1988, this balance was paid to him and the account was closed.

Following his retirement on December 31, 1976, petitioner had maintained a nominal

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[1]The full amount scheduled for 1989 was $210,000.00, determined by applying a cost-of-living adjustment to the basic payment in 1988.

capital account with the firm as was customary for retired partners at that time. By January 1, 1988, petitioner's capital account had been extinguished and he did not maintain such an account at any time during the years at issue.

The transition plan provided for an optional survivor benefit payable to a surviving spouse. Election of this option resulted in a

reduced payment during the lifetime of the retired partner. Since petitioner was unmarried at the time, this option did not apply to him.

During the years at issue, there were three individuals, including petitioner, who elected into the transition plan without survivor's benefits. As noted previously, payments to such eligible retired partners under the plan for 1988 and 1989 were set at $190,000.00 and $210,000.00, respectively. The average net income of a full-year general partner of the firm during 1988 and 1989 was $471,693.00 and $516,567.00, respectively. 60% of such average net income amounts was thus $238,016.00 and $309,940.00, respectively.

As may be observed, during 1988 and 1989 payments to retirees without survivor's benefits under the transition plan were well below the level at which the 60% "cap" would become effective.

At the time that the new retirement plan was to be implemented, the firm's profitability had been steadily increasing over a long period of time.

Given this income history and the level of payments required under the transition plan, the firm anticipated that the "cap" would never apply to payments made to eligible retired partners without survivor's benefits.

In fact, the cap never did apply to the three individuals (petitioner included) who elected into the transition plan without survivor's benefits and the firm made all payments to these individuals as required under the plan. All three individuals have since died.

The firm intended that the 60% cap and other caps which were applicable to payments to future retired partners would likely become applicable at a point in time when the number of retired partners had increased well above 1988 levels.

Upon his election to become an eligible retired partner under the transition plan, petitioner gave up the percentage interest in the firm which he had previously held. At the time of the election, petitioner's percentage interest was .0075%.

The firm's Articles, at § 10.11 thereof, provided that no retired partner:

> "shall make any commitment or incur any obligation or liability for the account of the Partnership, participate in or bear any part of any losses of the Partnership, or have any obligation for the debts of the Partnership."

The Articles further provided that a retired partner was under no obligation to provide services to the partnership. In addition, the Articles prohibited retired partners from participating in the firm's management and denied retired partners any voting rights at partnership meetings. The Articles also precluded retired partners from reacquiring partnership status.

The retirement benefits paid to petitioner and the other two similarly situated retired partners were paid without regard to the firm's income and were treated as an expense of doing business by the firm. Such payments were deducted by the firm for income tax purposes as compensation for past services.

A partner in the firm prepared a memorandum for the benefit of eligible retired partners which addressed "the principal Federal, State and City tax consequences of electing to convert to the Firm's new formula for determining the retirement pay . . . ." The memorandum, dated July 13, 1988, stated the following regarding the characterization of payments:

> "Characterization of Payments: (a) Because the annual amount of your payments under the new formula will, subject to the limitations, under the Articles of Partnership, be determined without regard to the income of the Firm, the payments will be reported in your K-1 as guaranteed payments rather than as distributive shares of partnership profits. In our view, the guaranteed payment characterization is correct notwithstanding that a case might be made for a different characterization, e.g., deferred compensation. We also think, although our conclusion is not free from doubt because of the transitional year adjustment required by the new formula, that your 1988 payments (inclusive of your pre-election payments) are properly reportable as guaranteed payments."

Petitioner provided no services to the firm during the years at issue.

Petitioner did not employ intangible personal property in any New York State business during the years at issue.

New York nonresident returns (Form IT-203) for the years 1988 and 1989 were timely filed on petitioner's behalf on August 15, 1989 and April 15, 1990, respectively. The payments received by petitioner under the new retirement plan were not included in petitioner's New York adjusted gross income as reported on said returns. The payments were reported in the "Federal Amount" columns on said returns.

Based upon the returns as filed, the Division of Taxation ("Division") issued refunds to petitioner of $12,000.00 for 1988 and $6,000.00 for 1989. Such refunds were issued within three months of the filing of the respective returns.

On September 9, 1991, the Division issued to petitioner a Notice of Deficiency which asserted a total of $27,551.77 in personal income tax due, plus interest, for the years 1988 and 1989.

The Division's assessment herein is premised on its determination that the payments made to petitioner by the firm during the years at issue pursuant to the transition plan constituted New York source income properly subject to New York State personal income tax.

Petitioner subsequently paid the tax as asserted, but not the interest, and now seeks a refund of the amount so paid.

CONCLUSIONS OF LAW

A. Tax Law §631 (former [a]) defines New York source income of a nonresident individual, in pertinent part, as:

> "the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:
>
> "(1) his distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-two . . . ."

B. Tax Law § 632(a)(1) provides, in pertinent part:

> "In determining New York source 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, as such portion shall be determined under regulations of the tax commission

consistent with the applicable rules of section six hundred thirty-one."

C. Petitioner argued that the payments from the firm at issue herein did not constitute a distributive share of the firm's income. Rather, petitioner argued that such payments constituted an annuity and that such payments were therefore not subject to New York personal income tax for petitioner, a nonresident. In support of this position, petitioner cited Matter of Pidot v. State Tax Commn. (118 AD2d 915, 499 NYS2d 482, affd 69 NY2d 837, 513 NYS2d 965).

Pidot involved an attorney who retired from a New York City law partnership and became a Florida resident. Upon his retirement, the partnership paid him in full for his share of the firm's capital. He subsequently received annual retirement benefits from the partnership pursuant to a formula under the partnership agreement. Pidot reported $136,324.00 in income from the partnership on his 1981 New York nonresident return. He subsequently filed a claim for refund asserting that the retirement income was a nontaxable annuity. The Appellate Division held that the annuity rule of 20 NYCRR former 131.4 was not limited in application to former employees and could be applied to former partners. The court further held that since the taxpayer had retired from the partnership and had received a payment fully liquidating his interest therein in 1977, then the retirement payments paid to him in 1981 were not guaranteed payments pursuant to Internal Revenue Code § 736(a).[2] The court further stated:

> "It is undisputed that upon his retirement in 1977, petitioner retained no interest in the partnership; he could not participate in partnership profits, nor was he liable for partnership losses. Pursuant to the partnership agreement, petitioner was entitled to

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[2]Internal Revenue Code § 736(a) provides:

> "PAYMENTS CONSIDERED AS DISTRIBUTIVE SHARE OR GUARANTEED PAYMENT.--Payments made in liquidation of the interest of a retiring partner or a deceased partner shall, except as provided in subsection (b), be considered --
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> "(1) as a distributive share to the recipient of partnership income if the amount thereof is determined with regard to the income of the partnership, or
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> "(2) as a guaranteed payment described in section 707(c) if the amount thereof is determined without regard to the income of the partnership."

> an annual payment by the partnership of an amount fixed at the time of his retirement, using a formula based on petitioner's five highest earnings years as a partner" (Matter of Pidot v. State Tax Commn., supra, 499 NYS2d at 483).

D. The Division took the position that the retirement payments to petitioner did constitute distributive shares of partnership income within the meaning of Tax Law former § 631(a)(1). The Division examined the Federal tax treatment of payments to retired partners and observed that a partnership may make payments to a retired partner in the form of distributive shares or guaranteed payments (see, Internal Revenue Code § 736[a]). The Division further observed that although these forms of payment result in different tax consequences to the partnership, both the distributive share form and guaranteed payment form are taxable as ordinary income to the recipient. The Division then asserted that guaranteed payments are properly regarded as distributive shares of partnership income for purposes of Tax Law former §§ 632(a)(1) and 637(b)(2).

E. The Tax Appeals Tribunal recently considered the meaning of "distributive share" for purposes of Tax Law former § 632(a)(1).

> "Together Matter of Pidot v. State Tax Commn. (supra) and Matter of Kestenbaum v. State Tax Commn. (107 AD2d 955, 484 NYS2d 371) establish that the meaning of 'distributive share' for purposes of Tax Law former § 632(a)(1)(A) is determined by the meaning of this phrase in sections 704(a) and 736(a) of the Internal Revenue Code. Under section 704(a) of the Code, the Court in each case held, that a partner's distributive share is determined by the partnership agreement. If the agreement gives the taxpayer no interest in the partnership's income or losses and distributes 100% of income and losses to individuals other than the taxpayer, then the Court concluded the taxpayer has no interest in the partnership and did not receive a distributive share under section 704(a) of the Internal Revenue Code. Further, the Court in Kestenbaum and Pidot held that payments were not a distributive share under section 736 of the Code, if the payments were made after the taxpayer's interest in the partnership had already been completely liquidated" (Matter of Blue, Tax Appeals Tribunal, April 6, 1995).

F. Upon review of the record in this matter, it is concluded that the facts herein are not distinguishable from those in Kestenbaum, Pidot or Blue. During the years at issue, petitioner herein, like the taxpayers in Kestenbaum, Pidot and Blue, had no right to share in the profits or losses of the partnership. Indeed, petitioner gave up his percentage interest in the firm when he elected into the new retirement plan. Also, petitioner, like the taxpayers in the prior cases, had retired from the partnership prior to the years at issue and his interest in the partnership was liquidated as of the commencement of the period at issue (see, Findings of Fact "8" and "9"). Accordingly, pursuant to the Tribunal's analysis in Matter of Blue (supra), it is concluded that the retirement payments to petitioner herein were not distributive shares under either section 704(a) or section 736 of the Internal Revenue Code or, therefore, under Tax Law § 632(a)(1).

G. The court in Pidot specifically determined that the payments in that case were not guaranteed payments within the meaning of Internal Revenue Code § 736(a). Given the identity of facts between the instant matter and Pidot as discussed, it follows that the payments at issue herein were likewise not guaranteed payments.

H. Having determined that the subject payments were neither distributive shares nor guaranteed payments, it is appropriate to determine what they were. From the record it appears that the subject payments were compensation for past services (see, Findings of Fact "2" and "20"). Indeed, there appears to be no evidence in the record to the contrary. As such, the payments were derived from or connected with New York sources within the meaning of Tax Law § 631(b)(1)(B) and 20 NYCRR former 131.4(d) (see, Matter of Walsh, Tax Appeals Tribunal, November 19, 1992, confirmed on other grounds Walsh v. Tax Appeals Tribunal, 196 AD2d 367, 609 NYS2d 405; Matter of Blue, supra).

I. Notwithstanding the foregoing, the payments at issue would be excluded from petitioner's New York income under 20 NYCRR former 131.4(d) if such payments constituted an annuity as defined in said regulation, which provided, in relevant part:

> "(1) General. Where an individual formerly employed in New York State is retired from service and thereafter receives a pension or other retirement benefit attributable to his former services, the pension or retirement benefit is not taxable for New York State personal income tax purposes if the individual receiving it is a nonresident and if it constitutes an annuity as defined in paragraph (2) of this subdivision. Where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services and, if the individual receiving it is a nonresident, it is taxable for New York State personal income tax purposes to the extent that the services were performed in New York State . . . .
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> "(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements.
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> "(i) It must be paid in money only, not in securities of the employer or other

property.

"(ii) It must be payable at regular intervals, at least annually, for the life of the individual receiving it, or over a period not less than half such individual's life expectancy, as of the date payments begin . . . .

"(iii) It must be payable:

"(a) at a rate which remains uniform during such life or period; or

"(b) at a rate which varies only with:

"(1) the fluctuation in the market value of the assets from which such benefits are payable;

"(2) the fluctuation in a specified and generally recognized cost-of-living index; or

"(3) the commencement of social security benefits; or

"(c) in such a manner that the total of the amounts payable is determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory. The term annuity starting date in the case of any contract or plan is the first day of the first period for which an amount is received as an annuity by the individual under the contract or plan.

"(iv) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees" (20 NYCRR former 131.4[d]).

J. In dispute herein is whether the payments met the uniformity requirement of 20 NYCRR former 131.4(d)(2)(iii).[3] The Division argued that the payments failed to meet this requirement because the partnership agreement provided for a cap, with no carryover, on annual retirement payments under the transition plan at 60% of the average share of net profits paid to all general partners in any given year. The Division sought to distinguish this provision from the situation in Pidot, where the relevant agreement provided that payments to retired partners should be reduced in any year in which the partnership's net income failed to exceed certain criteria. The unpaid amounts from any such year would remain due and would be paid in later

[3]It is noted that, except for the question of whether the 60% cap violates the uniformity requirement, the Division raised no other issues regarding whether the subject payments constituted an annuity.

years when the limitation did not apply. The court held that such "potential deferral" of retirement payments was insufficient to disqualify such payments as an annuity (see, Matter of Pidot v. State Tax Commn., supra, 499 NYS2d at 483).

The Division also cited Matter of Norris v. State Tax Commn. (140 AD2d 876, 528 NYS2d 694), as supportive of its position. In that case, retirement payments were set by an agreement at the lesser of a fixed amount or the retiree's share of the partnership's profits. The court held that such benefits depended upon and varied with the amount of the former employer's profits and were thus violative of the uniformity requirement of the regulations. The court distinguished Pidot, noting that while the agreement in that case allowed for a potential deferral of benefits, there was "no similar provision for the potential deferral of a portion of the retirement benefit here" (Matter of Norris v. State Tax Commn., supra, 528 NYS2d at 695).

Questions regarding the uniformity requirement are addressed in two decisions of the Tax Appeals Tribunal and therefore merit discussion herein.

In Matter of Walsh (supra), the annual adjustment to retirement payments was pegged to the percentage increase in average compensation paid to the ten highest paid partners in the partnership except that such annual adjustment could not exceed the change in the consumer price index for that year. Where the percentage increase in average compensation was less than the increase in the consumer price index, then the shortfall would be made up in subsequent years except that any such shortfall which accrued for five years and remained unpaid would be cancelled. The Tribunal held that this cancellation provision failed to satisfy the uniformity requirement of the regulations and, further, that the petitioner had failed to show that the variance in payments was not impermissibly based on partnership profits as in Matter of Norris v. State Tax Commn. (supra).

Matter of Blue (supra) involved retirement payments by a New York partnership to a retired nonresident partner under three different partnership agreements. The 1978 and 1979 agreements provided that annual retirement payments could be reduced to the extent that the aggregate of such payments exceeded 20% of the profits of the partnership for that year. The agreement also required a reduction in all of the retirement payments if a general partner's compensation was to be less than the highest retired partner's retirement compensation. Under the 1980 agreement, annual retirement payments would be reduced if, in any year, the annual amount of retirement payments made by the partnership agreement exceeded 15% of annual partnership earnings. Also, annual adjustments to retirement payments for the years 1983 and 1984 could be and sometimes were limited by "average partner net earnings" for the previous year.[4]

In its decision, the Tribunal affirmed the Administrative Law Judge's determination on this issue for the reasons stated in the determination. Specifically, the Administrative Law Judge determined that the provisions outlined above meant that Blue's retirement payments depended upon and varied with annual partnership profits or average partner net earnings and that, pursuant to Matter of Norris v. State Tax Commn. (supra) and Matter of Walsh (supra), this type of variation did not fall within the uniformity requirement. The Tribunal specifically noted, and rejected, the petitioner's argument that the limitations contained in the agreements never applied to the petitioner or any other retired partner during the years in question.

K. As noted previously, the transition plan capped annual retirement payments at 60% of the average share of net profits of general partners in any given year. This provision ties the amount of retirement benefits payable under the transition plan to the firm's profits. The level of payments is thus dependent, at least in part, upon the firm's profits. Such a rate variation is not authorized under the uniformity rules contained in

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[4]In Blue, the annual retirement payments for 1983 and 1984 were set at a basic level with an annual cost-of-living adjustment except that this adjustment was limited in that the percentage of increase in the retirement payments could not exceed the percentage of increase in average partner net earnings for the preceding year. The annual adjustment was further limited in that the annual retirement payment for any given year could not be increased so as to exceed 26% of average partner net earnings for the preceding year.

the regulations (see, Matter of Norris v. State Tax Commn., supra, 528 NYS2d at 695; 20 NYCRR former 131.4[d][2][iii]).

Petitioner argued that the subject payments were, in fact, uniform since the cap did not apply during the years at issue and, moreover, that given the level of retirement payments and the level of firm profits, it would be highly unlikely that the 60% cap would ever be applicable during petitioner's lifetime. This contention is rejected. Whether the unauthorized rate variation is applicable to the years in question has not been considered a factor in determining whether the uniformity requirement has been met (see, e.g., Matter of Norris v. State Tax Commn., supra; Matter of Walsh, supra; Matter of Blue, supra). The analysis of the court and the Tax Appeals Tribunal has focused on the terms of the relevant agreement rather than the amount actually paid to determine whether the subject payments constitute an annuity.

Petitioner also argued that the 60% cap was never intended to apply to petitioner or to the other two similarly situated retirees, and that even if the 60% cap did become applicable, the firm would not have imposed the cap with respect to petitioner and the other similarly situated retirees. As to this contention, it is noted that the cap provisions are explicitly and unequivocally set forth in the Agreement. Moreover, the letter dated May 24, 1988 (see, Finding of Fact "4") explaining the transition plan makes a plain and unambiguous reference to the cap. Under such circumstances, the testimony presented in support of this contention regarding the firm's intent with respect to the imposition of the cap is unpersuasive. Additionally, petitioner's contention that the firm would not have invoked the cap even if it were applicable is rejected as speculative.

L. On brief, petitioner contended, alternatively, that the retirement compensation paid to petitioner was not subject to any cap. In support of this contention petitioner noted that section 10.6(C) of the Articles provided that the compensation for an eligible retired partner for 1988 "shall be $190,000.00" and that the compensation for 1989 "shall not be less than $200,000.00" (emphasis supplied). In contrast, the cap provision of section 10.8(B) of the Articles states that if the amount of retirement compensation that would be payable exceeds 60% of the average share of net profits for a general partner, then the retirement compensation payable for such year shall be reduced to eliminate such excess. Petitioner asserted that this section 10.8(B) provision merely allows the firm to defer its obligation to pay retirement benefits which are set pursuant to the mandatory language of section 10.6(C). Petitioner further asserted that, in subsequent years, an eligible retired partner could recoup any shortfall in payments resulting from the cap.

This contention is rejected. The Articles make no provision for a deferral or carryover of payments resulting from the imposition of the cap. Moreover, the letter from the firm to petitioner outlining the new retirement plan, including the transition plan, clearly indicates that the annual retirement compensation payable under the plan is subject to the 60% cap with no carryover. This contention is thus clearly without merit.

M. At hearing, petitioner contended, alternatively, that if the subject payments at issue did constitute New York income, then petitioner is entitled to an exclusion from income to the extent of $20,000.00 of such payments under Tax Law § 612(c)(3-a). Since petitioner presented no argument with respect to this contention and did not raise it on brief, it is concluded that petitioner has abandoned this issue.

N. In its post-hearing submission of evidence, petitioner obliquely raised an issue regarding the payment of interest on refunds paid to petitioner with respect to the years at issue. As the Division correctly notes, the record herein shows that the Division paid such refunds within three months of the filing of the relevant returns (see, Finding of Fact "25"). Accordingly, no interest is due on such refunds (Tax Law § 688[c]).

O. The petition of the Estate of Charles D. Kyle is denied and the Notice of Deficiency dated September 9, 1991 is sustained.

DATED: Troy, New York
May 18, 1995

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE