STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LOUIS E. AND FLORENCE R. FRIEDMAN	:	DETERMINATION DTA NO. 816142
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1992 and 1993.	:	

Petitioners, Louis E. and Florence R. Friedman, 7136 NW 103rd Avenue, Tamarac, Florida 33321-2274, 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 1992 and 1993.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 27, 1998 at 11:00 A.M., with all briefs to be submitted by September 4, 1998, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Lloyd W. Winfield, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether wage income received by petitioner Florence R. Friedman, a nonresident, from Lo-Man Outdoor Store, Ltd. was for services performed entirely outside the State of New York and was thus not properly subject to New York State personal income tax.

II. Whether penalties imposed against petitioners pursuant to Tax Law § 685(b) and (p) should be sustained.

FINDINGS OF FACT

1. Petitioners, Louis E. Friedman and Florence R. Friedman, filed a New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) for each of the years 1992 and 1993, indicating their filing status on each such return as "Married filing joint return." On their 1992 return, petitioners reported Federal line "1" income ("Wages, salaries, tips, etc.") of $100,700.00, and reported the New York amount of such income as $49,934.00. On their 1993 return, petitioners reported Federal line "1" income of $104,000.00, and reported the New York amount of such income as $51,352.00. Petitioners listed their address on each of these returns as 7136 Northwest 103rd Ave., Tamarac, Florida 33321 and indicated, by checking the "no" box at item "G" on the face of each return, that they did not maintain living quarters in New York State.

2. Forms W-2 ("Wage and Tax Statement") for each petitioner, as attached to their returns, indicate that petitioners' employer was Lo-Man Outdoor Store, Ltd. ("Lo-Man"), located in Babylon, New York, and that Mr. and Mrs. Friedman received wage income of $48,700.00 and $52,000.00, respectively, for 1992 (totaling $100,700.00 as reported), and $52,000.00 each for 1993 (totaling $104,000.00 as reported). These statements also indicate that Federal and New York State personal income tax, Social Security tax and Medicare tax was withheld from petitioners' wages for each year.

3. Each of petitioners' returns included an attached "Supplement to IT-203--Allocation of Wages and Salary Income to New York State," which presented a schedule by which each petitioner allocated to New York State a portion of his or her reported wage income from Lo-Man Outdoor Store, Ltd., as follows:

	1992	1993

Total days in year	366	365
Nonworking days[1]	(124)	(124)
Days worked	242	241
Days worked outside of New York State	(122)	(122)
Days worked in New York State	120	119

4. Petitioners used the ratio of days worked in New York State to total days worked in each year, as determined by the foregoing schedule, as the basis for allocating a portion of their reported wage income to New York, as follows:

Petitioner	Year	Wage Amount	Allocation Ratio	Wages Allocated to New York State
Louis R. Friedman	1992	$ 48,700.00	120/242	$ 24,149.00
Florence E. Friedman	1992	52,000.00	120/242	25,785.00
		$100,700.00		$ 49,934.00
Louis R. Friedman	1993	$ 52,000.00	119/241	$ 25,676.00
Florence E. Friedman	1993	52,000.00	119/241	25,676.00
		$104,000.00		$ 51,352.00

5. The Division of Taxation ("Division") conducted an audit of petitioners' returns for the years 1992 and 1993. This audit initially focused on whether petitioners were properly taxable as nonresidents of New York. Petitioners spent time in New York each year and, contrary to the information on the face of their returns, maintained a home in Bay Shore, New York. After examination, the auditor nonetheless concluded that petitioners, who had moved to Florida in or about 1981, were Florida domicilliaries and spent fewer than 183 days per year in New York State. Accordingly, petitioners were found to be properly taxable as nonresidents of New York. However, the auditor noted that petitioners continued to own the Lo-Man Outdoor Store, Ltd., received wage income from such business, and reported a portion of such wage income as allocable to and taxable by New York State on the basis of the number of days worked in New

[1] For each year, nonworking days consisted of 104 Saturdays and Sundays, 10 holidays and 10 vacation days.

York State over the total number of days worked in each year. Based on this manner of reporting, and because there was no evidence that petitioners performed services outside of New York State of necessity in the service of their employer, Lo-Man Outdoor Store, Ltd., rather than for their own convenience, the auditor concluded that all of petitioners' wage income was properly subject to tax by New York State.

6. Based on the foregoing audit results, the Division issued to petitioners a Statement of Personal Income Tax Audit Changes dated November 1, 1995. As is specifically relevant to the issue in this proceeding, the Division included the entire amount of petitioners' reported wage income for each of the years in question as properly subject to tax by New York State. Thus, the Statement reflects an "additional wage allocation" to New York in the amount of $50,766.00 for 1992 ($100,700.00 [total wages] less $49, 934.00 [reported allocated wages] equals $50,766.00), and in the amount of $52,648.00 for 1993 ($104,000.00 [total wages] less $51,352.00 [reported allocated wages] equals $52, 648.00).[2] The statement goes on to show the computation of additional tax due in the amounts of $4,012.58 for 1992 and $3,996.69 for 1993, and to include the assertion of a penalty for a deficiency due to negligence (Tax Law § 685[b]) and a penalty for substantial understatement of liability (Tax Law § 685[p]). The statement provides, with regard to the penalties, that "[a]s you maintained your NY home . . . but on your NYS return marked 'no' box sec. 685B and P penalties assessed."

7. The Division issued to petitioners a Notice of Deficiency, dated March 25, 1996, asserting additional personal income tax due for the years 1992 and 1993 in the aggregate amount of $8,009.27, plus penalties and interest. This notice parallels the Statement of Personal

[2] The Division's Statement also reflects IRA distributions ($9,559.00 for 1992 and $3,000.00 for 1993) and pension/annuity income ($2,000.00 for each year) as subject to tax by New York State. The propriety of these two audit adjustments has not been challenged by petitioners and is not in dispute.

Income Tax Audit Changes and asserts the tax, penalties and interest determined to be due as the result of the above-described audit. Petitioners challenged the notice by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). In turn, the statutory notice was sustained by a Conciliation Order (CMS No. 155859) dated July 11, 1997, and petitioners continued their challenge by petitioning for a hearing before the Division of Tax Appeals.

8. On or about July 5, 1996 (i.e., after the issuance of the Notice of Deficiency), petitioners filed an amended Nonresident and Part-Year Resident Income Tax Return for each of the years in issue. These returns specify that the only amendments are to Item G, where petitioners have checked the "yes" box indicating that they did maintain living quarters in New York State during the years in question, and to their wage allocation. With regard to the latter item, petitioners have changed their reported wage allocation such that all of petitioner Louis E. Friedman's reported wage income is allocated to New York, and none of petitioner Florence R. Friedman's reported wage income is allocated to New York.[3]

9. Petitioners have owned Lo-Man for many years and are its sole shareholders, with each owning 50 percent of its stock. Lo-Man operates a retail establishment, selling various items including clothing and uniforms. Petitioners retired in or about 1981, and moved from New York to Florida. However, they continued to own Lo-Man, and it appears that petitioner Louis E.

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[3] For 1992, the changed allocation schedule attached to petitioner's amended return shows the allocation of Mr. Friedman's entire $48,700.00 reported wage income to New York. This amount is, however, less than the $49,934.00 amount of wage income allocated by petitioners as reported on their returns as originally filed. Moreover, the latter $49,934.00 amount appears on the face of petitioners' amended return. For 1993, the changed allocation schedule reflects Mr. Friedman's entire $52,000.00 reported wage income as allocable to New York. This amount is greater than the $51,352.00 amount of wage income allocated by petitioners as reported on their returns as originally filed. Again, the originally allocated amount, rather than the amended allocated amount, appears on the face of petitioners' amended return. It would appear that these anomalies are the result of oversight or inadvertence accompanying the filing of the amended returns.

Friedman has remained actively involved in overseeing the operation of Lo-Man's business from the time of petitioners' move to Florida through and beyond the years in issue.

10. Lo-Man filed a U.S. Corporation Income Tax Return (Form 1120) for each of the years in issue. Schedule "E" ("Compensation of Officers") attached to each such return, lists each of the petitioners as owning 50 percent of the corporation's stock, as devoting 100 percent of their time to the business, and as receiving annual compensation of $52,000.00 each from the corporation. Consistently, line "12" of Lo-Man's Form 1120 lists a $104,000.00 deduction for compensation of officers for each of the years in issue.[4]

11. Petitioners did not appear to give testimony at hearing. Instead, testimony was provided by petitioners' representative, and by Lo-Man's general manager and its office manager. According to the testimony of these individuals, and to an audit questionnaire completed and sworn to by petitioners, Lo-Man's day-to-day operations are handled by its general manager and its office manager, who are employed on-site at Lo-Man's store location in Babylon, New York.

12. Petitioners spend approximately nine months of each year in Florida (from mid-September to mid-June) and approximately three months of each year in New York (from mid-June to mid-September). Mr. Friedman remains involved throughout the year in overseeing Lo-Man's operations through telephone contact with Lo-Man's managers on a three-to-four call per week basis. During these calls, general business matters of any nature are discussed with Lo-

[4] As above, it is noted that the $104,000.00 total amount listed on Form 1120 for the year 1992 as compensation of officers is higher than the $100,700.00 amount of wage income reported for such year on petitioners' Form IT-203. Specifically, the $3,300.00 difference may be found from the fact that the Form W-2 issued to Mr. Friedman lists his wage income as $48,700.00, versus the $52,000.00 amount listed on Schedule "E" of the Lo-Man corporate income tax return for 1992. As above, this discrepancy is not addressed or explained in the record.

Man's general manager and financial matters are discussed with Lo-Man's office manager. While Lo-Man's managers take care of all "hands-on" aspects of the business, they would specifically keep Mr. Friedman apprised of any unusual occurrence or problems.

13. The Friedmans' summer months were generally described as vacation time, during which they were based in New York and took trips including visits to their daughter in New England. During this time period, Mr. Friedman went to Lo-Man's retail location and worked in an office at that location. On the basis of this involvement and performance of services for Lo-Man at its New York location, and consistent with their amended returns, petitioners concede that all of Mr. Friedman's reported wage income from Lo-Man is properly allocable to and taxable by New York State. In this connection, petitioners admit that Mr. Friedman's work for Lo-Man while in Florida, which was performed at petitioners' home in Florida, was not performed there of necessity in the service of Lo-Man but rather was performed there as Mr. Friedman's choice and for his convenience. While petitioners' representative alluded to the existence of a separate office in petitioners' home in Florida, the record provides no description or other specifics concerning such an office. Any expenses incurred, such as telephone, travel, postage, stationery, and the like are included as expenses on Lo-Man's corporation income tax returns. In this regard, petitioners' representative explained that there is no separate segregation or statement on such returns for an office in Florida, noting that the dollar amounts of the expenses are not, comparatively, significant.

14. Petitioners' position with respect to Florence R. Friedman is that she performs no services for Lo-Man during the period of time when petitioners are in New York State, and instead receives compensation for her duties only when she is in Florida. In this regard, petitioners' witnesses testified that Mrs. Friedman does not telephone them at the Lo-Man store

premises, and performs no work at the store. Petitioners' witnesses also stated that the wage income paid to Mrs. Friedman was not based on any specific hours worked or duties performed by her on a regular basis, but instead that the wage amounts paid to both Mr. and Mrs. Friedman were simply determined to be "appropriate" salary amounts based on the profitability of the business. In fact, petitioners' witnesses could not describe or specify any particular services performed by Mrs. Friedman for Lo-Man, or any instances where they consulted Mrs. Friedman concerning any aspect of Lo-Man's business, either when she was in Florida or in New York State. Petitioners' representative alleged that Mrs. Friedman was compensated by Lo-Man for holding corporate office and for being available to be consulted when corporate decisions had to be made, noting that as an owner and officer of the corporation she has the right to be consulted in such instances. Petitioners' representative admitted that any such consultations were infrequent, occurring "possibly" two or three times per year. No particular instances of consultation or involvement were described, except for one reference to a meeting several years prior to the years in issue concerning the implementation of a profit sharing plan by Lo-Man. Lo-Man's Federal income tax returns list Mrs. Friedman as an officer, on Schedule "E" titled "Compensation of Officers," and petitioners' representative claimed that Mrs. Friedman was an officer of the corporation. However, the record does not further disclose the particular corporate officer title held by Mrs. Friedman.

15. At hearing, petitioners admitted that they were audited on this same issue of their manner of allocation of reported wage income for certain years prior to those at issue herein, and that a Notice of Deficiency was issued based on the Division's reallocation of all wage income received by petitioners as subject to New York State personal income tax. These prior year audit

results were conceded, and the resulting asserted tax deficiencies were paid by petitioners, allegedly because the dollar amounts were less significant than those at issue herein.

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident individual includes the net amount of items of income, gain, loss and deduction reported in the Federal adjusted gross income that are "derived from or connected with New York sources." Included among these items are those attributable to a business, trade, profession or occupation carried on in this State (Tax Law § 631[b][1]).

B. Tax Law § 631(c) provides, in part, that:

> [i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

C. Regulations of the Commissioner of Taxation with regard to "Methods of Allocating Income and Deductions From Sources Within and Without New York State" provide as follows:

> § 132.15 *Apportionment and allocation of income from business carried on partly within and partly without New York State.*
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> (a) If a nonresident individual . . . carries on a business, trade, profession or occupation both within and without New York State, the items of income . . . attributable to such business, trade, profession or occupation must be apportioned and allocated to New York State on a fair and equitable basis in accordance with approved methods of accounting.
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> § 132.18 *Earnings of nonresident employees and officers.*
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> (a) If the nonresident employee . . . performs service for his employer both within and without New York State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed

> within New York State bears to the total number of working days employed both within and without New York State . . . . However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay.
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> § 132.24 *Other methods of allocation*
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> (a) Sections 132.15 through 132.23 of this Part are designed to apportion and allocate to New York State, in a fair and equitable manner, a nonresident's items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. Where the methods provided under those sections do not so allocate and apportion those items, the department may require a taxpayer to apportion and allocate those items under such method as it prescribes, as long as the prescribed method results in a fair and equitable apportionment and allocation. A nonresident individual may submit an alternative method of apportionment and allocation with respect to items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. The proposed method must be fully explained in the taxpayer's New York State nonresident personal income tax return. If the method proposed by the taxpayer is approved by the department, it may be used in lieu of the applicable method under sections 132.15 through 132.22 of this Part. (20 NYCRR part 132.)

D. The only issues presented in this case are: (a) what portion, if any, of the wage income paid to petitioner Florence R. Friedman by Lo-Man is properly allocable to and taxable by New York State and, (b) whether penalties imposed against petitioners for negligence and for substantial understatement of liability should be upheld. Petitioners have conceded that the wage income paid by Lo-Man to petitioner Louis E. Friedman was fully allocable to and taxable by New York State, on the basis that he performed services for Lo-Man both in New York State and at his home in Florida, and that the services he performed for Lo-Man at his home in Florida

were performed there as a matter of choice or convenience to petitioners rather than of necessity for Lo-Man (20 NYCRR 132.18[a]; ***see, Matter of Speno v. Gallman***, 35 NY2d 256, 360 NYS2d 855).

In contrast, however, petitioners maintain that none of the wage income paid to petitioner Florence R. Friedman by Lo-Man was allocable to or taxable by New York State. Specifically, petitioners argue that Mrs. Friedman performed no services for Lo-Man in New York State, and that the compensation she received from Lo-Man was for services performed for Lo-Man only while she was in Florida. Hence, petitioners claim that Mrs. Friedman was a nonresident who performed no services for her employer in New York State, thus leaving no connection upon which to support taxation of any of her wage income by New York State.

E. The Division alluded (at the hearing) to the possibility that Mrs. Friedman's reported compensation from Lo-Man might more accurately be considered a dividend rather than compensation for services rendered. In its brief, however, the Division specifically concedes and does not challenge petitioners' position that Mrs. Friedman's income from Lo-Man was not dividend income, but was compensation for services rendered. The Division maintains, in turn, that petitioners have not established that Mrs. Friedman performed services for Lo-Man *only* while in Florida but not in New York State. The Division goes on to argue that since Mrs. Friedman received wage income from Lo-Man, initially allocated such wage income within and without New York on the basis of days worked within and without New York, and has not established that she either: (a) only performed services for Lo-Man outside of New York State or, (b) that any services performed for Lo-Man in Florida were performed there of necessity for Lo-Man as opposed to by her choice or for her convenience, it follows that all of her wage income was properly allocable to and taxable by New York State.

F. It is well settled that a nonresident employee, who works *entirely* outside the State and performs no work within New York, is not subject to New York State personal income tax on the wages received from said employment (***Matter of Linsley v. Gallman,*** 38 AD2d 367, 329 NYS2d 486, ***affd*** 33 NY2d 863, 352 NYS2d 199; ***Matter of Hayes v State Tax Commn.,*** 61 AD2d 62, 401 NYS2d 876; ***Matter of Gleason v. State Tax Commn.,*** 76 AD2d 1035, 429 NYS2d 314). In this regard, the location where an employee's services are performed rather than the location of the employer paying for such services is determinative for income sourcing purposes (***id., see*** 20 NYCRR 132.4[b]). Petitioners claim that Mrs. Friedman performed no services for Lo-Man in New York State and that all of the wage compensation she received from Lo-Man was for services rendered only while she was in Florida. The initial focus therefore becomes determining what services Mrs. Friedman performed for Lo-Man and where such services were performed.

G. From the record in this matter, it appears as though Mrs. Friedman in fact performed no specific services for Lo-Man, but instead received payment, denominated wage income, based on the profitability of Lo-Man. In this regard, Lo-Man's store managers could not describe any specific services or duties performed by Mrs. Friedman either in Florida or in New York State, noting that she did not come to the store premises to work, did not discuss business or other matters with them by telephone, and that she had no set duties, hours or job requirements for which she was compensated. Similarly, petitioners' representative, who has known petitioners for some 15 years and has served as the accountant for petitioners and for Lo-Man, could not specify what services, if any, Mrs. Friedman performed for Lo-Man. He explained that compensation amounts paid to Mr. and Mrs. Friedman were based simply on Lo-Man's profitability. He alluded, without any specifics, to Mrs. Friedman's being available for

consultations on corporate matters, but not store operational decisions, and to a small number of instances where she might have been consulted (in essence speculating that she was consulted "possibly" two or three times per year). In sum, petitioners' representative (and petitioners) take the position that Mrs. Friedman was compensated because she was a 50-percent owner of Lo-Man, held a corporate office (the particular office is not specified in the record), was available and was entitled as an owner to be consulted on corporate matters, and was allegedly so consulted, albeit on matters unspecified and only when she was in Florida.

H. It may be that petitioner Florence R. Friedman performed no services for Lo-Man and any payments to her based simply on Lo-Man's profitability represented dividends, which would not properly have been deductible as an expense by Lo-Man and which, in the case of a nonresident such as Mrs. Friedman, would not have been subject to personal income taxation by New York State. However, the Division's audit did not result in this conclusion, or attempt to recast the nature of any payments to Mrs. Friedman. In fact, Lo-Man reported payments to Mrs. Friedman as wage compensation, withheld required taxes therefrom (***see***, Finding of Fact "2"), and deducted such payments as compensation expense on its own corporation tax return (***see***, Finding of Fact "10"). Presumably, Lo-Man chose to compensate Mrs. Friedman in the form of wage compensation for business reasons, and reaped the benefit of a deduction at the corporate level as one of the results. Petitioners have adamantly held to the position that Mrs. Friedman was entitled to compensation for services rendered, i.e., wages, and the Division for its part has specifically conceded that petitioners received wage compensation. Accordingly, this determination will not disturb such treatment and result, but will proceed to conclusion on the assumption that Mrs. Friedman performed no particular duties for Lo-Man either in New York or

in Florida, and was simply compensated for holding a corporate office and for being available for discussions on corporate matters on an "as needed, when needed" basis.

I. Petitioners hinge their case on the claim that Mrs. Friedman performed all of her "services" for Lo-Man while she was in Florida, and performed no services for Lo-Man while she was in New York State. In fact, however, Mrs. Friedman performed no specific services clearly identifiable to either location, and instead received compensation for holding corporate office and for being available for consultation year round. Given the record, it cannot plausibly be accepted that Mrs. Friedman actually consulted only in Florida, but for some unexplained reason was specifically unavailable to do so (or specifically refused to do so) for the three-month period of each year when she and Mr. Friedman were in New York State. That is, there is no evidence to even suggest that she ceased these functions for which she was compensated, or did anything more or less for Lo-Man when she was in either Florida or New York State. As a result, at least a portion of her "wage" income must be considered "earned" during the period when she was in New York State holding corporate office and remaining available for consultation. Accordingly, such income is properly treated as derived from or connected to New York sources and is therefore properly allocable to and taxable by New York State.

J. The regulations and case law in this area have dealt primarily with allocating a nonresident's compensation income for services rendered within and without New York State by using working days within and without the State as one means of determining the respective portion of such compensation allocable to New York State. As a result, the focus has been on services actually rendered on an ongoing working daily basis. In this context, when a nonresident taxpayer has performed services at an office in his out-of-State home, the so-called "convenience of the employer" test has been utilized, whereunder such at-home working days

have been treated as New York working days unless the employee could establish that such days were worked at home of necessity from the perspective of the employer and not out of convenience to the employee. The case law on this issue holds in essence that services performed at an out-of-State home, which could have been performed at the employer's in-State office, are performed for the employee's convenience and not for the employer's necessity (***Matter of Speno v. Gallman, supra., see Matter of Fass v. State Tax Commn.,*** 68 AD2d 877, 414 NYS2d 780, ***affd*** 50 NY2d 932, 431 NYS2d 526; ***Matter of Wheeler v. State Tax Commn.,*** 72 AD2d 878, 421 NYS2d 942; ***Matter of Kitman v. State Tax Commn.,*** 92 AD2d 1018, 461 NYS2d 448, ***lv denied*** 59 NY2d 603, 463 NYS2d 1028; ***Matter of Fischer v. State Tax Commn.,*** 107 AD2d 918, 484 NYS2d 345).

The distinction in this case is that Mrs. Friedman performed no discernable services other than holding corporate office and being available for consultation, and thus it would appear inappropriate in any event to allocate based on the number of days "worked" within and without New York. In fact, under the "days worked" method of 20 NYCRR 132.18, no account is to be taken of any days other than working days (e.g., Saturdays, Sundays, vacation days, and the like). In this case, Mrs. Friedman had no specific working days as opposed to nonworking days, but rather was a corporate officer who was apparently available for consultation year round, when and if needed, whether within or without New York State. Accordingly, under the facts of this case, if there is to be an allocation of wage compensation within and without New York State, the most appropriate method of allocating would be on the basis of time spent in New York State versus time spent in Florida over the course of the entire year (***see*** 20 NYCRR 132.24). In this case, since petitioners spent one-fourth of the year in New York State and three fourths of the year in Florida, any wage allocation could be based on such ratio. However, in order to allow for

any allocation of wage compensation, it remains to be shown that the employee, Mrs. Friedman, performed services for her employer at her home in Florida of necessity rather than for her own convenience.

K. As detailed above, the evidence does not support the claim that Mrs. Friedman performed services for Lo-Man only while in Florida, but for some reason ceased being an officer and ceased being available for consultation on corporate matters while she was in New York State. With no evidence to the contrary, it must be accepted that she was compensated to be an officer and to be available year round, including when she was in New York State. Hence, the portion of her compensation earned when she was in New York State was clearly and properly allocable to New York State. In turn, since petitioners' argument that all of Mrs. Friedman's compensation should be allocated to Florida has been rejected, the only remaining question is whether she may allocate *any* of her compensation to Florida. Unfortunately, there is no basis in the record upon which to conclude that the services (holding office and being available to consult) for which Mrs. Friedman received wage compensation from Lo-Man when she was in Florida were required to be performed at petitioners' home in Florida rather than in New York. In plain terms, petitioners chose to retire and live in Florida nine months of the year, and Mrs. Friedman continued to receive wage income from Lo-Man while living there. There being no evidence to the contrary, it follows that she performed services, albeit "passive" in nature, for which she was compensated by Lo-Man while she was in Florida as a result of her own choice or convenience and not as the result of any necessity for Lo-Man. Thus, petitioner Florence R. Friedman may not apportion and allocate any of her compensation from Lo-Man to Florida, and

the Division properly deemed her compensation fully allocable to and taxable by New York State.[5]

L. The facts of this case obviously lead to something of a strained result in any event. Accepting that Mrs. Friedman was compensated for holding office and for being available to be consulted must be balanced against the lack of evidence that she was ever consulted or otherwise called upon to perform any such services. Unlike Mr. Friedman, who was involved in the operational aspects of the business, she did not "work" anywhere. That is, Mrs. Friedman worked no particular days, in a traditional sense, so as to be in a position to allocate based on working days. Petitioners argue that she consulted "possibly" two or three times per year and allege that such consultations would have only occurred in Florida. This does not change the fact that she was paid to be a corporate officer and to be available on a year round basis, including when she was in New York State. In fact, petitioners did not testify at hearing and the record does not otherwise explain or allow for a conclusion that Mrs. Freidman somehow stepped out of these roles whenever she was in New York State, or fulfilled them *only* when she was in Florida.

M. Finally, petitioners have advanced no grounds warranting the abatement of penalties imposed in this case and, based on the facts and circumstances as set forth in the record, the penalties imposed are sustained. In this regard, petitioners were previously audited on this issue of allocation and paid the tax asserted by the Division. Moreover, petitioners have agreed that they did not properly allocate Mr. Friedman's wage income for the years in question, conceding

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[5] It should be recognized that the conclusion reached herein does not limit the positions the parties may take in other years vis-a-vis treating the payment as a dividend (with whatever ensuing consequences might befall Lo-Man as a result). It is also observed that a decision herein recasting the payments to Mrs. Friedman as dividends would not only be inconsistent with the parties' arguments, but would result in a double benefit in that there would be no New York State personal income tax liability to Mrs. Friedman on such dividend income while Lo-Man would nonetheless receive the benefit of having deducted such payment as compensation expense on its corporate return.

that he in fact performed services for Lo-Man in New York State and that none of the services he performed for Lo-Man in Florida were performed there of necessity for his employer rather than for his own convenience or as a matter of personal choice.

N. The petition of Louis E. Friedman and Florence R. Friedman is hereby denied and the Notice of Deficiency dated March 25, 1996 is sustained.

DATED: Troy, New York
February 18, 1999

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE