

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
MARVIN H. WARREN :
: DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law for the Year
1981.

Petitioner, Marvin H. Warren, 431 Eline Road, Louisville, Kentucky 40207,
filed a petition for redetermination of a deficiency or for refund of New York
State personal income tax under Article 22 of the Tax Law for the year 1981
(File No. 51201).

On July 21, 1986, petitioner waived his right to a hearing and requested the
State Tax Commission to render a decision based on the entire record contained
in his file, including additional documentation submitted on September 16,
1986. After due consideration, the State Tax Commission hereby renders the
following decision.

ISSUE

Whether payments received by the nonresident petitioner from Coopers &
Lybrand constituted a pension qualifying as income from an annuity and
therefore not taxable to New York, or a distribution of partnership profits and,
as such, taxable to New York.

FINDINGS OF FACT

1. Petitioner herein, l&arvin H. Warren, did not file a New York State
income tax return for 1981.
2. On October 22, 1982, the Audit Division issued a Statement of Audit
Changes to petitioner for 1981 which contained the following explanation and

"The amounts received by you from the firm of Coopers and Lybrand which they categorize as pension payments to retired partners are considered distributive shares of partnership income and as such are reportable for New York State tax purposes based on the partnership allocation percentage.

Your New York taxable income for the audit year(s) has been determined by applying the partnership's New York allocation percentage to your Federal distributive share of firm income, the allowance of the standard deduction and one personal exemption.

	<u>1981</u>
Income	\$5,458.00
Standard Deduction	1,500.00
Exemption	<u>750.00</u>
New York Taxable Income	<u>\$3,208.00</u>
 NEW YORK STATE TAX DUE	 <u>\$ 88.32"</u>

3. Based on the aforementioned statement, the Audit Division, on March 26, 1984, issued a Notice of Deficiency to petitioner for 1981, asserting additional tax due of \$88.32, plus interest of \$19.98, for a total allegedly due of \$108.30.

4. Petitioner, during the year at issue and for many years prior thereto, was domiciled in and a resident of the State of Kentucky. Mr. Warren was never domiciled in or a resident of New York State.

5. Petitioner had been a partner in the local accounting firm of Yeager, Ford & Warren (hereinafter "Y, F & W") a partnership with principal offices in Louisville, Kentucky.. Effective August 31, 1970, petitioner retired from Y, F & W and the terms of his retirement were set forth in a retirement agreement dated August 26, 1970. Said retirement agreement provided that petitioner was to receive payment of the balance in his capital account in two equal installments, payable February 28, 1971 and September 30, 1971. Paragraph 3 of the retirement agreement also provided that:

"3. Y, F & W agrees to pay Warren as retirement compensation and in consideration of his past services, the sum of Fifteen Thousand Dollars (\$15,000.00) per annum for the rest of his natural life. The sum shall be paid to Warren **in** monthly installments **of** One Thousand Two Hundred Fifty Dollars (\$1,250 .00)per month.."

6. Effective September 1, 1970, Y, F & W merged into the firm **of** Lybrand, Ross Bros. & Montgomery (now known as Coopers & Lybrand and hereinafter "Lybrand"). Lybrand was, and is, a large firm of certified public accountants with offices "in principal areas of the world", including New York State.

7. Due to the merger of Y, F & W and Lybrand, the retirement agreement between petitioner and Y, F & W dated August 26, 1970 was assigned to Lybrand. On September 1, 1970, petitioner and Lybrand entered into an "Assumption Agreement" which provided, inter alia, that:

"the undersigned Barren and Lybrand, as Assignee, affirm each and every provision of the Agreement dated August 26, 1970 by and between Yeager, Ford & Warren and Marvin H. Warren, made part hereof by reference thereto,' and Lybrand assumes each and every obligation of Yeager, Ford & Warren **as** therein set forth and **is** entitled to all of the benefits thereof and Marvin H. Warren agrees to abide by every obligation therein set forth and accepts the obligation **of** Lybrand in lieu of Yeager, Ford & Warren."

8. Petitioner never participated as a partner of Lybrand nor did he render any services to said partnership. Furthermore, petitioner did not participate in Lybrand's profits or losses and did not maintain a capital account **on** Lybrand's **books**. Upon his retirement from Y, F & W, petitioner received full payment of his capital account in accordance with the terms **of** the retirement agreement dated August 26, 1970.

CONCLUSIONS OF LAW

A. That the monthly payments received by petitioner from Lybrand during the year at issue did not constitute a distribution of partnership profits.

(Matter of Kestenbaum v. State Tax Commission, 107 AD2d 955; Matter of Pidot

v. State Tax Commission, 118 AD2d 915, affd NY2d [March 17, 1987].)

Furthermore, the monthly payments qualify as an annuity pursuant to 20 NYCRR 131.4(d) and, since petitioner was a nonresident, said payments are not taxable to New York (see Matter of Kestenbaum v. State Tax Commission, supra and Matter of Pidot v. State Tax Commission, supra).

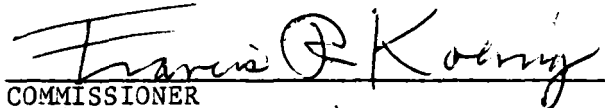
B. That the petition of Marvin H. Warren is granted and the Notice of Deficiency dated March 26, 1984 is cancelled in its entirety.

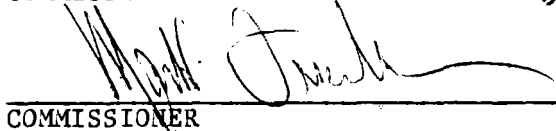
DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER