

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Thomas J. & Jean R. Thomas	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1975.	:	

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Thomas J. & Jean R. Thomas, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

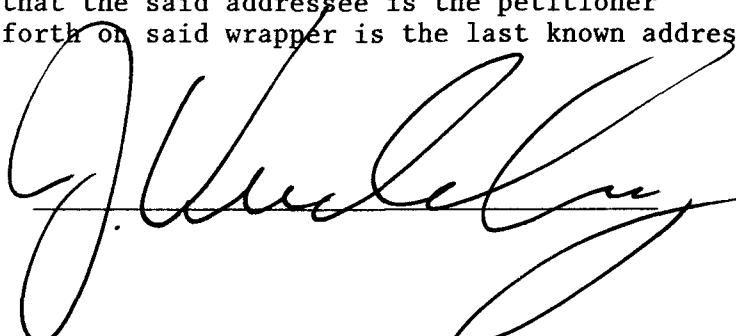
Thomas J. & Jean R. Thomas  
172 Rensselaer Rd.  
Essex Fells, NJ 07021

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of October, 1982.

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

October 6, 1982

Thomas J. & Jean R. Thomas  
172 Rensselaer Rd.  
Essex Fells, NJ 07021

Dear Mr. & Mrs. Thomas:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
THOMAS J. THOMAS and JEAN R. THOMAS  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law for the Year 1975.

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DECISION

Petitioners, Thomas J. Thomas and Jean R. Thomas, 172 Rensselaer Road, Essex Fells, New Jersey, 07201, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1975 (File No. 28345).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 26, 1982 at 10:30 A.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel). After commencement of the hearing, both parties agreed to submit the case for decision by the State Tax Commission based on the documents contained in the file and on oral statements made on the record.

ISSUE

Whether termination pay received by a nonresident employee, who had previously performed services both in and out of New York State for his employer, is subject to allocation for New York State income tax purposes.

FINDINGS OF FACT

1. On June 25, 1976, petitioners, Thomas J. Thomas and Jean R. Thomas, husband and wife, filed a New York State Combined Income Tax Return for the year 1975. Petitioners were nonresidents of New York during 1975.

2. On May 29, 1979, the Audit Division issued a Notice of Deficiency to petitioners asserting additional tax due for 1975 in the amount of \$7,142.23 plus interest. A Statement of Audit Changes, also dated May 29, 1979, explained that the deficiency was based on disallowance of petitioners' allocation of income (in and out of New York State) and itemized deductions. Also, no adjustment to income was allowed in computing petitioners' New York income.

3. Petitioner Thomas J. Thomas went to work for W.R. Grace & Company ("Grace") in August, 1974. Mr. Thomas held the position of President of the Automotive Specialities Group, a division of Grace. At this time, petitioners were residents of Ohio.

4. In May, 1975, petitioners moved from Ohio to New Jersey. Mr. Thomas continued in his employment with Grace. Sometime thereafter, it was decided that Mr. Thomas would terminate his employment with Grace and seek work elsewhere.

5. Pursuant to the terms of an agreement between Mr. Thomas and Grace, Mr. Thomas was to terminate his activities for Grace on October 12, 1975. However, the agreement provided that Mr. Thomas would remain on Grace's payroll until the earlier of either March 31, 1976 or the date on which Mr. Thomas would start working for another company.

6. Mr. Thomas did not perform work for Grace after October 12, 1975, but did receive termination pay from Grace until December 14, 1975, at which time he went to work for the Echlin Manufacturing Company ("Echlin") in Branford, Connecticut. None of Mr. Thomas' duties for Echlin in 1975 were performed in New York State.

7. On their 1975 New York State income tax return, petitioners allocated the salary income, less adjustments ( $\$70,208.02 - \$3,628.22 = \$66,579.80$ ), earned by Mr. Thomas from Grace partly in and partly out of New York State on

the basis of days worked in New York State over the total number of days worked.

8. At a pre-hearing conference, petitioners' records and information concerning substantiation of the right to allocate, the number of days worked out of New York State up to October 12, 1975, the adjustment to income and the itemized deductions, all previously disallowed by the Audit Division, were provided. Thus, the only remaining dispute involves the treatment to be accorded the termination pay received by petitioners.

9. Audit worksheets contained in the file provide information as to the number of days worked in and out of New York State in 1975, and as to holidays, vacations, and other non-working days claimed by petitioners. The following information taken from these worksheets pertains to the period January 1, 1975 through October 12, 1975 during which time Mr. Thomas performed work for Grace:

Total: Number of Days (1/1/75 through 10/12/75).....	284
less: non-working Saturdays & Sundays.....	<71>
less: holidays.....	< 4>
less: vacations.....	<20>
equals: total working days.....	189
less: days worked out of New York.....	<90>
equals: days worked in New York.....	<u>99</u>

10. Petitioners did supply certain documents, including their Ohio and New York State income tax returns and withholding tax forms, for the year 1974. However, it is not possible to determine from these documents either the total number of days Mr. Thomas worked for Grace (as opposed to any other employer) in 1974, or the number of such days, if any, which he worked for Grace in New York State during 1974.

#### CONCLUSIONS OF LAW

A. That the termination pay received by Mr. Thomas did not constitute an annuity as defined by regulations of the State Tax Commission [20 NYCRR 131.4(d)],

but rather constituted a form of pension or other retirement benefit attributable to past contractual services performed within and without New York State.

B. That with respect to a pension or other retirement benefit which does not qualify as an annuity, regulations of the State Tax Commission in pertinent part provide:

"[w]here the employee's services were performed partly within and partly without New York State, the amount includible in the individual's New York adjusted gross income shall be the proportion of the amount included in the individual's Federal adjusted gross income which the total compensation received from the employer for the services performed in New York State during a period consisting of the portion of the taxable year prior to retirement and the three taxable years immediately preceding the retirement bears to the total compensation received from the employer during such period for services performed both within and without New York State." (20 NYCRR 131.18). See also Matter of Bernard L. and Agnes C. Carnevale, State Tax Comm., June 21, 1978.

C. That information is not available in the record from which to establish the ratio by which petitioners allocated income received from Grace in any years prior to 1975. However, information is available from which to establish such an allocation ratio for the year 1975 up to the time of Mr. Thomas' termination of duties for Grace. Accordingly, the ratio arrived at for allocating petitioners' 1975 salary income from Grace will also be used to allocate the termination pay received by petitioners. This ratio for allocation consists of a fraction, the numerator of which is 99 and the denominator of which is 189. (See Finding of Fact "9").

D. That the petition of Thomas J. Thomas and Jean R. Thomas is granted in part and denied in part. The Audit Division is hereby directed to recompute and modify the Notice of Deficiency in accordance with Finding of Fact "8" and

Conclusion of Law "C", and the Notice of Deficiency as so modified, together with such interest as may be lawfully owing, is sustained.

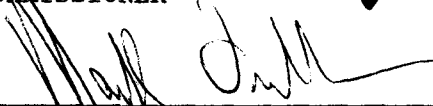
DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER