STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Nathan H. & Virginia W. Wentworth	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1976.	

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 Nathan H. & Virginia W. Wentworth, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nathan H. & Virginia W. Wentworth
Windsong River Rd.
Essex, CT 06426

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.

Annie D Hackett

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Nathan H. & Virginia W. Wentworth	AFFIDAVIT OF MAILING
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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 Carolyn S. Wollen the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carolyn S. Wollen
Davidson, Dawson & Clark
330 Madison Ave.
New York, NY 10017

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

J. Vredenburg

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

Annie A. Hagglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 6, 1982

Nathan H. & Virginia W. Wentworth
Windsong River Rd.
Essex, CT 06426

Dear Mr. & Mrs. Wentworth:

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
Carolyn S. Wollen
Davidson, Dawson & Clark
330 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of NATHAN H. AND VIRGINIA W. WENTWORTH for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1976.	DECISION

Petitioners, Nathan H. and Virginia W. Wentworth, P.O. Box 164, Essex, Connecticut 06426, 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 1976 (File No. 26782).

On March 19, 1982, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file.

ISSUES

I. Whether petitioners may elect to treat a portion of a lump-sum distribution as a long term capital gain for New York purposes, when the entire amount was reported as ordinary income for Federal purposes.

II. Whether petitioners are entitled to a recomputation of tax liability on the lump-sum distribution based on a decreased allocation to New York sources.

FINDINGS OF FACT

1. Petitioner Nathan H. Wentworth was an employee of The Continental Insurance Companies ("Continental") during the period from 1960 to 1976, and retired from Continental in January of 1976.

2. On April 1, 1960, Continental established an Incentive Savings Plan ("the Plan") for its employees. The Plan qualifies under section 401(a) of the Internal Revenue Code.

3. Petitioner Nathan H. Wentworth participated in the Plan from its founding on April 1, 1960 until his retirement in January of 1976.

4. Upon his retirement, Mr. Wentworth received a complete distribution of his share in the Plan, a total of $224,590.00, such distribution qualifying as a lump-sum distribution under section 402(e) of the Internal Revenue Code.

5. Petitioners resided in New Jersey during the years 1964 through 1974, and in Connecticut from 1975 through the year at issue.

6. From 1964 through the year at issue, petitioner Nathan H. Wentworth performed services for Continental both in New York State and outside of New York State and allocated his salary income from Continental on the basis of days worked inside and outside New York State.

7. Petitioners filed a Federal income tax return for 1976 on which they elected to treat the entire lump-sum distribution as ordinary income under Internal Revenue Code sections 402(e)(3), and (4)(E) and (L), in order to elect a ten-year averaging method to compute the tax on the entire amount.

8. Petitioners filed a New York State Income Tax Nonresident Return for 1976 on which they allocated 71 percent of the lump-sum distribution to New York sources based upon salary amounts allocated to New York sources for the prior three years. Regarding said return, petitioners classified 40 percent of the pre-1974 portion of the allocable distribution as a long term capital gain, with the remainder of the pre-1974 portion and all of the post-1973 portion being classified as ordinary income.

9. Petitioners filed an amended New York State Income Tax Nonresident Return for 1976. Said return included a Form IT-220 Minimum Income Tax Computation Schedule which listed as an item of tax preference the portion of the allocable lump-sum distribution classified by the petitioners as capital gains.

10. On January 19, 1979, the Audit Division issued a Statement of Audit Changes to petitioners stating as follows:

> "Based on the information you submitted, it has been determined that for Federal income tax purposes you elected to treat the entire lump sum distribution as ordinary income...
>
> Therefore, in accordance with section 612(b)(12) of the New York State Tax Law, a modification is required to increase the Federal income by the amount of the lump sum distribution which was not reported in your Federal tax return.
>
> Furthermore, as you elected for Federal income tax purposes to treat the entire lump sum distribution as ordinary income, you lost the benefit of the capital gain treatment for New York State income tax purposes." (Emphasis in original.)

The Statement then set forth a computation of the modification and recomputed personal income tax by including the entire lump-sum distribution allocable to New York sources as ordinary income. This resulted in personal income tax due of $27,265.15. After allowing for $22,001.48 in payments previously made, and adding $681.63 in tax surcharge, a deficiency in tax of $5,945.30 resulted. Accordingly, a Notice of Deficiency for this amount, plus interest and a penalty for failure to file a declaration or underpayment of estimated tax, under section 685(c) of the Tax Law, was sent to petitioners on April 5, 1979.

11. With their waiver of a formal hearing, petitioners submitted a brief for petitioners and an affidavit by Nathan H. Wentworth, such brief and affidavit including copies of petitioners' New York State income tax nonresident returns for 1964 through 1975, inclusive, and asserting that the portion of the lump-sum

distribution allocable to New York sources should be recomputed based upon the information contained therein. Said information included a chart of "percentage of earned income applicable to New York," based upon the following income figures contained within the copies of petitioners' New York State income tax nonresident returns:

YEAR	INCOME TO BE ALLOCATED	INCOME ALLOCABLE TO NEW YORK SOURCES
1964	$ 62,500.00	$ 42,793.19
1965	81,666.64	57,130.03
1966	112,500.00	69,000.00
1967	125,000.04	91,111.14
1968	125,000.04	84,444.47
1969	132,500.00	93,378.93
1970	146,344.00	109,270.00
1971	150,094.00	122,766.00
1972	160,000.00	114,690.00
1973	178,333.00	140,289.00
1974	188,333.00	133,089.00
1975	205,000.00	129,424.00
1976	17,083.00	15,455.00
TOTALS	$1,684,353.72	$1,202,840.76

12. Petitioners' petition, brief and affidavit do not allege any error in the proposed penalty for failure to file a declaration or underpayment of estimated tax, under section 685(c) of the Tax Law.

CONCLUSIONS OF LAW

A. That section 632(a)(2) of the Tax Law provides that there shall be added to gross income:

> "(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner)."

B. That section 612(b)(12) of the Tax Law provided, for the year at issue, that there shall be added to gross income:

> "(12) The ordinary income portion of a lump sum distribution allowable as a deduction under section 402(e)(3) of the internal revenue code,

to the extent deductible under section 62(11) of the internal revenue code in determining federal adjusted gross income."

C. That section 1512 of the Tax Reform Act of 1976 modified section 402(e) of the Internal Revenue Code to provide that all of a lump-sum distribution was allowable as a deduction under section 402(e)(3) and classifiable as ordinary income, at the election of the taxpayer.

D. That the ordinary income portion, allocable to New York sources, of the petitioners' lump-sum distribution, which was deducted from their Federal gross income, must be added to their Federal gross income to determine their New York adjusted gross income under sections 632(a) and 612(b)(12) of the Tax Law. Therefore, none of the ordinary income portion, allocable to New York sources, of the petitioners' lump-sum distribution is available for, or entitled to, treatment as a long term capital gain.

E. That petitioners have failed to sustain the burden of proof imposed by section 689(e) of the Tax Law in asserting that the percentage of the lump-sum distribution attributable to New York sources should be recomputed, in that:

(1) Under 20 NYCRR 131.18, any percentage allocation must be computed on the basis of amount of total income attributable to each source for the entire period.

(2) Petitioners have failed to provide any income figures for the years 1960 through 1963, inclusive.

(3) Recomputation based upon the figures provided by petitioners for the years 1964 through 1975, inclusive, yields 71 percent of income attributable to New York sources, the same percentage used in petitioners' original allocation.

F. That the penalty, under section 685(c) of the Tax Law, was properly imposed.

G. That the petition of Nathan H. and Virginia W. Wentworth is denied and the Notice of Deficiency is sustained.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF
TAXATION AND FINANCE
ALBANY, NY 12227

MICHAEL ALEXANDER
SECRETARY TO THE
STATE TAX COMMISSION

December 10, 1982

Nathan H. and Virginia W. Wentworth
"Windsong" River Road
P. O. Box 164
Essex, CT 06426

RE: NATHAN H. AND VIRGINIA W. WENTWORTH

Dear Mr. and Mrs. Wentworth:

I am in receipt of your letter of November 5, 1982 in which you request that the State Tax Commission to reconsider its October 6, 1982 decision, specifically with regard to allocation.

In support of that request, you advise that copies of Federal returns for the years 1960-63 are enclosed which afford a basis for a different allocation based on the inclusion of these high contribution years in your plan. No such copies were enclosed. Regardless of this, the advice in the October 6, 1982 cover letter concerning exhaustion of administrative review and the sole remedy being the commencement of an Article 78 proceeding within four months of the decision date in the Supreme Court, Albany County makes your request moot. The Commission cannot now consider additional evidence or reconsider its decision.

Sincerely,

MICHAEL ALEXANDER
Secretary to the State Tax Commission

MA:mac

Nathan H. and Virginia W. Wentworth
"Windsong", River Road
P.O. Box 164
Essex, CT 06426
November 5, 1982

TAXATION AND FINANCE
NOV 22 1982
TAX INFORMATION SECTION

State of New York
State Tax Commission
Albany, NY 12227

Dear Sirs:

We have your letter of October 6, 1982 and the copy of your decision of that date on our 1976 income tax matter.

Our petition made two points. First, the unfairness of section 612(b)(12) as it applied in 1976. In that year alone taxpayers such as us were deprived of the benefit of conformity between the State and Federal income tax laws. We appreciate the limits of your authority with respect to defective State laws, but we had believed you would take the prejudice we experienced into account in considering the second point made in our petition.

Our second point relates to allocating the lump sum distribution between New York and non-New York sources. In your opinion, you made a partial application of Regulation 131.18 and held that we had failed to give you the amounts of my salaries for 1960 through 1963 as required by the Regulation.

We trust you realize that Regulation 131.18 provides a reasonable method of allocation only with respect to those defined benefit pension plans where unit benefits are based on career average salary. For defined contribution plans it does not take account of the fact that contributions in early years usually produce a far larger proportion of the final benefit than contributions in later years. The Regulation is wholly irrelevant to thrift plans such as the one involved here in which the employee's voluntary contribution, not necessarily based on his salary, is matched in whole or part by his employer. Thus in our view we did not fail to provide you with proof necessary to a reasonable method of allocation.

Even so, we now enclose copies of our Federal income tax returns for 1960 through 1963. The total salaries received after the Incentive Savings Plan became effective on April 1, 1960 are as follows:

RECD DEPT OF TAX & FINANCE
NOV 1982
SECRETARY

1960 (75% of $39,999.96)		$29,999.97
1961		48,749.94
1962		65,000.00
1963		65,000.04
	Total	$208,749.95

The total of these amounts increases the "Income to be Allocated" from $1,684,353.72 to $1,893,103.67 and reduces the percentage allocable to New York from 71% to 63.5%. Thus no more than 63.5% of the taxable distribution of $224,590. or $142,614.65 should properly be taken into account, rather than $159,459., the figure used in calculating the proposed deficiency.

We request you to reconsider your Decision of October 6, 1982 and to revise it by reducing the allocable percentage from 71% to 63.5%.

Very truly yours,

Nathan H. Wentworth

Nathan H. Wentworth

Virginia W. Wentworth

Virginia W. Wentworth