STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Leo W. Tobin, Jr. and Clair T. Tobin (Deceased)	:	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 Years 1975 - 1977.	:	

State of New York
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Leo W. Tobin, Jr.,and Clair T. Tobin (Deceased) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leo W. Tobin, Jr.
and Clair T. Tobin (Deceased)
320 N. Pitt Street
Alexandria, VA 22314

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
24th day of January, 1983.

Kathy Pfaffenbach

Connie A Hagglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Leo W. Tobin, Jr.
and Clair T. Tobin (Deceased)
320 N. Pitt Street
Alexandria, VA 22314

Dear Mr. Tobin:

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

In the Matter of the Petition of LEO W. TOBIN, JR. AND CLAIR T. TOBIN (DECEASED) for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1975, 1976 and 1977 and New York City Non-Resident Earnings Tax under Chapter 46, Title U of the Administrative Code of the City of New York for the Years 1976 and 1977.	DECISION

Petitioners, Leo W. Tobin, Jr. and Clair T. Tobin (Deceased), 320 North Pitt Street, Alexandria, Virginia 22314, 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 years 1975, 1976 and 1977 and New York City non-resident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1976 and 1977 (File No. 27205)

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1982 at 10:45 A.M. Petitioner Leo W. Tobin, Jr. appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether petitioner Leo W. Tobin, Jr. properly allocated his income to sources within and without New York State.

II. Whether income derived from the exercise of a non-qualified stock option is taxable to New York State.

FINDINGS OF FACT

1. Petitioners, Leo W. Tobin, Jr. and Clair T. Tobin (deceased), filed joint New York State income tax nonresident returns for the years 1975, 1976 and 1977 whereon Leo W. Tobin, Jr. (hereinafter petitioner) allocated his income derived each year from his employer, American Standard, Inc., to sources within and without New York State. Petitioners also filed New York City nonresident earnings tax returns for 1976 and 1977 whereon similar allocations were claimed.

2. Pursuant to petitioner's returns, the portion of his income allocated to New York State and New York City for each year at issue was computed as follows:

Year	New York State	New York City
1975	$\frac{117}{365}$ x $81,482.28 = $26,118.98	--
1976	$\frac{107}{366}$ x $96,254.27 = $28,139.91	(same as State)
1977	$\frac{132}{365}$ x $106,448.37 = $38,496.40	$\frac{127}{365}$ x $106,448.37 = $37,038.20

In each case, the numerator represents days worked in New York State (or New York City) and the denominator represents the total number of days worked in each year. Pursuant to petitioner's allocation schedules, he worked for American Standard, Inc. every day of each year at issue.

3. Petitioner derived income from American Standard, Inc., as reported on W-2 forms, of $80,500.08 (1975), $90,500.08 (1976) and $222,375.25 (1977). The greater amounts allocated by petitioner for 1975 and 1976 included additional taxable sums representing company contributions for excess term life insurance and reimbursed moving expenses. The income reported on petitioner's W-2 form for 1977 was comprised of the following:

Salary	$ 81,333.40
Bonus	17,400.00
Excess group term life insurance	2,614.97
Financial counseling	4,750.00
Tax counseling	350.00
Exercise of nonqualified stock option	115,926.88
Total income per W-2	$222,375.25

Petitioner's reported income to be allocated for 1977 of $106,448.37 is comprised of his total income per W-2 of $222,375.25, reduced by the stock option of $115,926.88, which petitioner contended is nontaxable for New York State and City purposes.

4. On February 5, 1979 the Audit Division issued a Statement of Audit Changes wherein petitioner's allocations were adjusted as follows:

Year	New York State	New York City
1975	$\frac{116}{235}$ x $81,482.28 = $40,221.04	--
1976	$\frac{107}{252}$ x $96,254.27 = $40,869.86	$\frac{105}{252}$ x $96,254.27 = $40,105.94
1977	$\frac{132}{256}$ x $222,375.25 = $114,662.23	$\frac{127}{256}$ x $222,375.25 = $110,318.96

In each case, the numerator was as reported in a schedule submitted by petitioner on October 16, 1978. The denominator was determined pursuant to said schedule, exclusive of those days petitioner claimed to have worked in his home.

The Statement of Audit Changes explained the adjustments contained therein as follows:

> "Days worked at home do not form a proper basis for allocation of income by a nonresident. Any allowance claimed for days worked outside New York State must be based upon performance of services which, because of the necessity of the employer, obligate the employee to out of State duties in the service of his employer. Such duties are those which, by their very nature, cannot be performed in New York. For purposes of the allocation schedule, all days worked at home are considered to be nonworking days."

With respect to the income derived from the exercising of a nonqualified stock option in 1977, it was held that:

> "Income received related to discounts on certain stock transactions is connected with services rendered in New York and must be allocated to New York in the same manner as wages."

5. On February 23, 1979, in accordance with the above, the Audit Division issued a Notice of Deficiency against petitioners asserting additional New York State personal income tax of $5,646.19, reduced by a credit of $109.30 for New York City nonresident earnings tax, plus interest of $739.31, for a total due of $6,276.20.

6. During the years at issue herein, petitioner held the position of Vice President - Technology of American Standard, Inc. His duties were to furnish assistance to the company's worldwide operations in the disciplines relating to technology. His responsibilities involved engineering and manufacturing activities, new products, energy conservation, gas and oil well drilling programs, and certain environmental matters. Much of his work involved worldwide travel for the purpose of inspecting the company's plants and working with the engineering and manufacturing people. His compensation was on an annual salary basis which was paid by American Standard, Inc.'s corporate headquarters in New York City.

7. In addition to petitioner's executive functions, he was involved with working on concepts for possible new products and processes. This activity was carried on in a laboratory maintained by petitioner in the basement of his personal residence. During the years at issue, American Standard, Inc. did not maintain corporation laboratory facilities. Other work allegedly performed at home involved the writing of reports. Petitioner testified that he did "creative" work that "you just can't sit in an office and do it. It requires a little

concentration and uninterrupted activity. That's why a considerable amount of the work was done at home."

8. Petitioner contended that he was paid to work 365 days a year and that he essentially did. He classified himself as a "workaholic" and claimed that he worked at home during vacation time, even if it just involved thinking.

9. The schedule submitted by petitioner of days worked during the years at issue did not list actual dates worked at home or the nature of services purportedly rendered during such days. Said schedule merely indicated the total number of days worked in various states and abroad and noted that "balance of days worked at home."

10. Petitioner indicated in his petition that:

> "The employer delegated the choice and responsibility to the taxpayer of what work was to be performed and when and where it was to be performed, and has relied solely on his judgement of where his services were to be performed."

Furthermore, petitioner testified that "American Standard left the choice of where work was done strictly up to me. They didn't tell me what I had to do either." And that he "acted totally independently and did what he wanted."

11. Petitioner contended that he was not assigned to a specific office, but rather he could associate himself with any American Standard, Inc. office he chose. Although he claimed that he came to the New York office only occasionally for a staff meeting, his schedule of days worked indicates that he worked in New York more than 100 days during each year at issue.

12. Petitioner's secretary was located in the New York office.

13. Petitioner contended that the income of $115,926.88, derived from the exercise of the nonqualified stock option for American Standard stock, is exempt from New York State and New York City taxes since said option was granted for services rendered wholly in the State of Virginia between March 1969 and May

1972, the date which he assumed his position of Vice President - Technology. No evidence was submitted to support such contention.

CONCLUSIONS OF LAW

A. That NYCRR 131.16 provides that:

> "If a nonresident employee --- performs services for his employer both within and without the 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 the State bears to the total number of working days employed both within and without the State. The items of gain, loss and deduction --- of the employee attributable to his employment, derived from or connected with New York sources, are similarly determined. However, any allowance claimed for days worked outside of the 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."

B. That since American Standard, Inc. left the choice of what work was to be done and where it was to be done strictly up to petitioner (Finding of Fact "10", supra), it cannot be said that the employer's necessity obligated petitioner to out-of-state duties in the service of his employer. Rather, it must be held that it was petitioner's own convenience which led him to perform services for his employer at his out-of-state residence. Furthermore, petitioner has failed to show both the actual dates worked at his residence and the specific nature of the services actually rendered during such individual days. Accordingly, the adjustments made by the Audit Division modifying petitioner's claimed allocations are sustained.

C. That petitioner has failed to sustain his burden of proof required pursuant to section 689(e) of the Tax Law and section U46-39.0(e) of Chapter 46, Title U of the Administrative Code of the City of New York to show that the stock option at issue was granted for services rendered wholly in the State of Virginia. Accordingly, the income of $115,926.88 derived from the exercise of such option is allocable to New York in the same manner as wages.

D. That the petition of Leo W. Tobin, Jr. and Clair T. Tobin (deceased) is denied and the Notice of Deficiency dated February 23, 1979 is hereby sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER