STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of James F. & Dorothy S. Tao	:
for Redetermination of a Deficiency or Revision of a Determination or Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1979.	:

AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 30th day of April, 1985, he served the within notice of Decision by certified mail upon James F. & Dorothy S. Tao, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James F. & Dorothy S. Tao
92 Keswick Road
Amherst, NY 14226

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
30th day of April, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 30, 1985

James F. & Dorothy S. Tao
92 Keswick Road
Amherst, NY 14226

Dear Mr. & Mrs. Tao:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of JAMES F. AND DOROTHY S. TAO for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1979.	DECISION

Petitioners, James F. and Dorothy S. Tao, 92 Keswick Road, Amherst, New York 14226, 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 1979 (File No. 36545).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, General Donovan State Office Building, 125 Main Street, Buffalo, New York on April 26, 1984 at 10:45 A.M., and was continued to conclusion before the same Hearing Officer at the offices of the State Tax Commission, 65 Court Street, Part I, Buffalo, New York on May 25, 1984 at 11:30 A.M. Petitioners appeared at both hearing dates pro se. The Audit Division appeared at both hearing dates by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division is correct in its assertion that petitioners became residents of New York State during the latter part of 1978, rather than as of April 16, 1979 as indicated on petitioners' New York State income tax returns for 1979.

II. Whether, assuming petitioners did not become residents until April 16, 1979, the Audit Division (Law Bureau) may properly amend its Answer at the

April 26, 1984 commencement date of the instant proceedings to address the issue of whether petitioners' returns, as filed, correctly reflected petitioners' tax liability to New York State.

III. Whether, if such amendment was proper, all or any part of the asserted deficiency is barred by operation of the Statute of Limitations.

FINDINGS OF FACT

1. Petitioners, James F. and Dorothy S. Tao, husband and wife, timely filed (pursuant to an approved extension of time) a New York State Income Tax Resident Return (Form IT-201) and a New York State Income Tax Nonresident Return (Form IT-203) for the year 1979. Included with petitioners' filing was, inter alia, a Schedule for Change of Resident Status (Form CR-60.1), indicating that petitioners were New York State residents from April 16, 1979 through December 31, 1979. Petitioners' resident period return reflects total New York income (at line "1") of $29,074.77, while their nonresident period return reflects total income (at line "1") of $61,282.68, of which $12,406.54 was attributed to New York sources. Also attached to petitioners' returns was a note from petitioner James F. Tao, which provided as follows:

"Dear Sir:

> With reference to my Form CR-60.1, the amount in line 1, Column C was inflated by amounts Xerox paid for my relocation to Rochester, including my commission on selling of Connecticut home. The amounts on line 7 of CR-60.1 reflect the gain from selling of Connecticut home and losses in the stock market after my move into N.Y.".

2. By a letter to petitioner James F. Tao dated September 12, 1980, the Audit Division requested, in order to complete an audit of petitioners' 1979 returns, a "...detailed explanation showing how wages were computed for both your resident and non-resident period", and (in regard to certain relocation

payments) "...a statement from your employer which gives the dates of payments, the amount of the payments, and nature of the payments".

3. Mr. Tao responded to the above request for information by a letter dated September 21, 1980, providing, in relevant part, as follows:

> "[Y]ou are correct in the total amount of $92,114.90 I received from Xerox...in 1979,... My relocation payment from Xerox was $41,085.69, as shown on the attached copy of Xerox form. Subtracting 41,085.69 from 92,114.90, I obtained $51,029.21 as apportionable wages & income. In 1979, out of a total of 261 working days, I was a non-resident during 76 working days. So my non-resident portion of wages was $14,859.08: which was split into $12,024.12 for the 61.5 days I worked in N.Y.; and $2,834.96 for days not worked in N.Y. The resident portion of my wages was $36,170.13, to which I added $4,361.20 which Xerox paid as my State Tax Assistance (shown on attached form), and an amount $226.50 (the purpose for this is forgotten and I can't trace it without extensive work). In sum, my N.Y. State resident income was $40,757.83 (see my Form CR-60.1) and all else was non-resident income. Of my non-resident income, $12,024.12 was taxable in N.Y., and the remainder represents relocation payments, non-taxable non-resident income, and my wife's wages in Connecticut."

4. The foregoing explanation by Mr. Tao and the manner in which the noted items were reported by petitioners may be presented in numerical format as follows:

a) Calculation of Income Taxable to New York:

Total paid by Xerox to James Tao	$92,114.90
less: total relocation payment	41,085.69
equals: apportionable compensation	$51,029.21
less: compensation apportioned to non-resident period	14,859.08*
equals: compensation apportioned to resident period	$36,170.13
plus: New York wages earned by Dorothy Tao	226.50
plus: State Tax Assistance paid by Xerox as part of relocation payment	4,361.20
equals: Total amount apportioned to resident period	$40,757.83
plus: amount of compensation apportioned to non-resident period, but allocated as taxable to New York based on days worked	12,024.12**
Total of Above Items (resident plus non-resident periods) Reported as taxable to New York	$52,781.95

* $\frac{\text{non-resident period working days}}{\text{total working days}} = \frac{76}{261} \times \$51,029.21 = \$14,859.08$

** $\frac{\text{days worked in New York; non-resident period}}{\text{total days worked; non-resident period}} = \frac{61.5}{76} \times \$14,859.08 = \$12,024.12$

b) Petitioners thus (by elimination), claimed the following items as apportioned to their nonresident period and not properly taxable by New York State:

Balance of relocation reimbursement remaining after State Tax Assistance ($41,085.69 less $4,361.20)	$36,724.49
plus: Connecticut wages earned by Dorothy Tao	62.50
plus: compensation allocated to Connecticut based on formula of days worked ($14,859.08 less $12,024.12)	2,834.96
Total Amount Apportioned to Nonresident period not taxable to New York	$39,621.95

5. On October 27, 1980, the Audit Division issued to petitioners a Statement of Audit Changes consisting of three pages (the Statement plus two attachment sheets). This Statement provided brief explanations and related computations pertaining to several changes in petitioners' tax liability for 1979. Although rather extensive, it is useful to present for reference the various changes set forth in this Statement of Audit Changes, which is attached to this decision as Appendix "A".

6. The October 27, 1980 Statement of Audit Changes, issued after receipt of Mr. Tao's September 21, 1980 letter of explanation differs from the manner in which petitioners reported income on their returns in one major respect, as follows:

a) The October 27, 1980 Statement of Audit Changes asserts, with regard to the entire relocation payment from Xerox ($41,085.69), that such "[a]mounts received by a nonresident from his employer in payment of, or in reimbursement of, moving expenses in connection with new employment in New York State constitutes income from New York sources. The taxability of such payments are not affected by the fact that he was paid or reimbursed for the moving expenses prior to reporting for work in New York. Accordingly, total compensation of $41,085.69 is considered New York income."

As on petitioners' returns, the Statement of Audit Changes placed State Tax Assistance ($4,361.20) in the resident period with the balance of the relocation payment ($36,724.49) in the nonresident period. In simplest terms, the Audit Division asserted, via this Statement, that the entire relocation payment was subject to tax by New York State, regardless of when paid, whereas petitioners assert (per their returns as filed) that only State Tax Assistance of $4,361.20 is taxable by New York with the balance of such payment not subject to New York taxation.

7. The other adjustments to petitioners' tax liability specified on the October 27, 1980 Statement of Audit Changes (e.g. determination and application of limitation percentage, subtraction of State and local income taxes from Federal itemized deductions to arrive at New York itemized deductions, combination of taxable income from both returns and computation of tax liability on such combined amount rather than on the separate amounts from each return, etc.) do not appear to be in issue, but rather would follow mechanically after determination of the taxability of the relocation payment. It is noted that the amount of income attributed to the resident period on the October 27, 1980 Statement of Audit Changes ($40,757.83) is identical to the amount so attributed by petitioners on their returns. Finally, the allocation of Mr. Tao's non-resident period compensation, [$14,859.08; of which $12,024.12 was allocated as taxable to New York based on days worked in New York (61.5/76)] was not questioned and was reflected on the October 27, 1980 Statement of Audit Changes as well as on petitioner's returns. In sum, it is the taxability of the relocation payment which was the main thrust of the October 27, 1980 Statement.

8. Following the issuance of the above-noted Statement of Audit Changes, the Audit Division issued to petitioners a second Statement of Audit Changes, consisting of one page, dated July 8, 1981, which provided as follows:

"REVISION OF STATEMENT DATED OCTOBER 27, 1980

Explanation: As a result of a recent conference, it has been determined that in 1979 you were a New York State Resident the entire year. Accordingly, additional tax is due as shown below.

Total Federal adjusted gross income	$87,913.69	
Add N.Y. State capital gain modification	814.59	
Total N.Y. State adjusted gross income		$88,728.28

Total Federal itemized deductions	$15,046.55	
Less Local and State taxes claimed	- 1,440.02	
Total N.Y. State itemized deductions	(13,606.53)	
Total N.Y. State exemption (4x700)	(22,800.00)*	
		(16,406.53)
Corrected N.Y. State taxable income per audit		$72,321.75
Tax on above		7,744.86
Less N.Y. State tax per return		1,440.02
Additional tax due per audit		6,304.84"

9. Correspondence between petitioner James Tao and the Audit Division during the interim period between the October 27, 1980 Statement of Audit Changes and the July 8, 1981 Statement of Audit changes was offered in evidence, specifically letters from Mr. Tao dated November 25, 1980 and December 23, 1980, as well as a letter from the Audit Division dated July 8, 1981 and signed by James A. Dobson of the Audit Division's Rochester office. Mr. Tao's letters indicate, in relevant part, petitioners' disagreement with the October 27, 1980 Statement of Audit Changes and a request for detailed computations of the sources of the numbers found therein, together with the suggestion of a meeting at the Audit Division's Rochester District Office to discuss the same. Mr. Dobson's letter, apparently mailed with the July 8, 1981 Statement of Audit Changes, notes a conference date of June 17, 1981, which is presumably the "recent conference" referred to in the July 8, 1981 Statement of Audit Changes. Mr. Dobson's letter states, in part, as follows:

> "[b]ased on information presented by you prior to our June 17, 1981 conference and from discussions with you at that conference, I hold the view that you became a resident of New York State on or about September 1, 1978. Consequently, you therefore would have been a resident of New York State the entire taxable year 1979."

10. On November 25, 1981, the Audit Division issued to petitioners' a Notice of Deficiency asserting additional tax due in the same amount as was

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* Erroneously multiplied but clearly intended to be $2,800.00.

reflected on the second (July 8, 1981) Statement of Audit Changes; to wit $6,304.84, plus interest.

11. Petitioners filed a petition, dated February 21, 1982, protesting the above asserted deficiency. By its Answer thereto, dated June 30, 1983, the Audit Division (Law Bureau) indicated that the "...amount of tax due has been reduced from $6,304.84 to $3,381.94", and alleged, in substance, that petitioners had changed their domicile from Connecticut to New York in or about the Fall (September or October) of 1978 and thus were taxable as residents of New York State for the entire year 1979.[1]

12. At the commencement of the April 26, 1984 hearing, the Audit Division's representative stated that if the issue of residence were to be decided in petitioners' favor (i.e. that New York State resident status was acquired by petitioners, as they assert, on April 16, 1979 rather than during the Fall of 1978), a "subissue" as to the propriety of petitioners' return as filed, more specifically as noted in the original Statement of Audit Changes dated October 27, 1980 involving the taxability of the relocation payment and the mathematical correctness of petitioners' computations, remained to be determined. Petitioners objected strenuously to the Audit Division's oral amendment of the Answer, claiming that the "subissue" was barred from being heard because such "subissue" was not contained in the pleadings (the Answer), that such issue was barred by operation of the statute of limitations and that petitioners were surprised, in view of the fact that they did not anticipate addressing such issue, and were

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[1] The asserted deficiency dated November 25, 1981, was computed as though the $2,922.90 refund claimed per petitioners' returns had been granted, thus reflecting only $1,440.02 as credit allowed against the asserted deficiency for taxes paid. However, since no refund has in fact been granted, the petitioners should have received credit for the entire amount of taxes withheld from wages ($4,362.92). Accordingly, reduction of the deficiency as noted in Finding of Fact "11", upon such basis, was clearly proper.

not prepared to go forward on such issue at the hearing. In view of the final point raised, the hearing was continued to May 25, 1984, in order that petitioners could prepare to address the additional issue and that both parties could offer evidence and argument regarding such issue. The Audit Division's representative stated that computations reflecting the asserted tax liability under its alternative argument would be prepared prior to the May 25, 1984 continued hearing date.

13. With regard to the issue concerning petitioners' residence, testimony was given by Mr. Tao in amplification of the statements contained in petitioners' petition. Regarding such issue, the following facts are found:

a) Petitioner James F. Tao commenced employment with Xerox Corporation on or about November of 1973, as an attorney in its litigation group. His office was located in Stamford, Connecticut, and it is undisputed that petitioners were then residents of Connecticut.

b) On or about September 1, 1978, Mr. Tao was offered a position of employment at Xerox's Rochester, New York offices. This offer was occasioned by the impending elimination of the litigation group in Stamford.[2]

c) Mr. Tao decided to "try out" the new position in Rochester to determine whether it would be satisfactory or whether he would seek employment elsewhere.

d) Between September, 1978 and August, 1979, petitioner apportioned his working time between two Xerox offices, one in Stamford, Connecticut and one in Rochester, New York. He travelled between these two offices via a Xerox chartered airplane. During this period of time, petitioners owned a home located at 18 Rocky Brook Road, New Canaan, Connecticut. Mr. Tao stayed in

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[2] Most of the group's major litigation had been tried, settled or otherwise disposed of and the remaining work load in Stamford did not justify the expense of maintaining the group.

hotels in Rochester when he was working in Rochester during this time period, and stayed with his family at their New Canaan, Connecticut home the remainder of the time.

e) In or about December, 1978, petitioners contracted to have a house built in Rochester, New York. Mr. Tao testified he was still not absolutely certain, at that time, whether petitioners would ultimately be moving to Rochester, but felt the house was suitable for petitioners' living accomodations if that choice were made or, alternatively, that the house was a viable investment in its own right in view of rising prices for generally comparable houses in the area.

f) During the period from September 1978 through April 1979, petitioners:

-- Owned no "home" or permanent place of abode in Rochester.
-- Had children in the schools in Connecticut.
-- Paid Connecticut taxes.
-- Belonged to a few clubs and organizations (e.g. New Canaan Tennis Club, Raquet Club, Connecticut Patent Law Association) in Connecticut and did not belong to any such organizations in Rochester.
-- Had automobiles registered in Connecticut, and had Connecticut driver's licenses.
-- Had no personal automobile in Rochester, and only rented a car there on occasion.
-- Voted in Connecticut, and did not vote in Rochester.
-- Had bank accounts in Connecticut;
-- Spent holidays and vacation time in Connecticut and not in Rochester.
-- Had no personal telephone in Rochester, but had a phone at Connecticut home.
-- Had no bank and store credit cards in Rochester, but had those cards from Connecticut stores.

g) Mr. Tao ultimately decided to accept the Rochester position and, on or about April 16, 1979, upon completion of the construction of the house in Rochester, petitioners moved from Connecticut to Rochester, New York. Mr. Tao remained in the employment of Xerox, in Rochester, through approximately August

1981, and has since become employed by Hooker Chemical Company in Buffalo, New York.

14. At the May 25, 1984 hearing date, the Audit Division submitted computations prepared by auditor Eugene Pickop which represent the Audit Division's calculation of petitioners' tax liability assuming the petitioners were, as they assert and as their tax returns indicate, residents of New York as of April 16, 1979 and were nonresidents prior thereto. Petitioners' return (and their petition) claim a refund due in the amount of $2,922.90. By contrast, the Audit Division's computations (as prepared by auditor Pickop) assert a deficiency of $2,847.03. Auditor Pickop sent a copy of the Audit Division's revised calculation, as prepared by him, to petitioners by ordinary mail. The envelope used for this mailing was introduced in evidence by petitioners, and bears the date of May 18, 1984 from the Buffalo Post Office. Accompanying the revised calculations was a handwritten note, also submitted in evidence, which provided as follows:[3]

"Dear Mr. & Mrs. Tao

I am sending you a copy of the computation of residency as of 4/16/79.

Miss Dwyer requested that you have a copy before 5/25 for review. Miss Dwyer & the Hearing Officer are in agreement with the computation. I hope it is helpful to you.

Please excuse the handwritten note. We are short of typists and I did not wish to delay sending this to you.

If you have any questions regarding the computation my number is 847-7660.

Eugene J. Pickop
Tax Technician I"

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[3] The record herein reflects that the Hearing Officer did not see auditor Pickop's computation prior to its submission into evidence at the continued hearing and therefore could not have been "...in agreement with the computation", as suggested in auditor Pickop's note.

15. The recalculation prepared by auditor Pickop differs from the petitioners' returns and from the October 27, 1980 Statement of Audit Changes, in two major respects, as follows:

a) Auditor Pickop's calculations do not allow an allocation of Mr. Tao's apportionable wage compensation between New York and Connecticut during the nonresident period based on days worked. This is contrary to the method used by petitioners in preparing their returns (see Findings of Fact "3" and "4"), which method was also reflected on the October 27, 1980 Statement of Audit Changes (see Finding of Fact "7"). Auditor Pickop's recalculation placed Mr. Tao's apportionable income ($51,029.21) partly within the nonresident period and partly within the resident period based on fractions representing the respective number of weeks in the two periods (i.e. 15 weeks in the non-resident period, 37 weeks in the resident period), over the number of weeks in the year (i.e. 52).

b) Auditor Pickop's calculations, the October 27, 1980 Statement of Audit Changes and the July 8, 1981 Statement of Audit Changes are all premised upon the same major assertion; namely that the entire relocation payment of $41,085.69 is subject to taxation by New York regardless of when paid. Unlike the petitioners' calculations and the October 27, 1980 Statement of Audit Changes, however, the entire relocation payment was placed by auditor Pickop in the resident period.[4]

The recalculation by auditor Pickop also included the various mechanical, computational items found on the October 27, 1980 Statement of Audit Changes and noted previously in Finding of Fact "7".

16. Mr. Tao's Wage and Tax Statement (Form W-2) from Xerox for 1979 indicated, inter alia, wages, tips and other compensation of $92,114.90, which included excess life insurance payments of $1,195.21. A Xerox form entitled

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[4] By contrast, the October 27, 1980 Statement of Audit Changes placed State Tax Assistance ($4,361.20) in the resident period with the balance of the relocation payment ($36,724.49) placed in the nonresident period which, but for the assertion that such latter amount is taxable by New York, is in accord with the placement of such amount per petitioners' returns. (The July 8, 1981 Statement of Audit Changes of necessity places the entire relocation payment as resident period income since this Statement asserts petitioners were full year residents during 1979.)

"Relocation Expenses To Update Payroll Earnings", issued to Mr. Tao and submitted in evidence, reflected information regarding the relocation payment of $41,085.69, as follows:

"I.	TRAVELING	230.65
II.	MOVING	3,672.00
III.	HOUSE HUNTING	47.54
IV.	TEMPORARY LIVING	375.98
V.	REAL ESTATE	13,270.87
VI.	OTHER (Explain)	2,655.65
VII.	REAL ESTATE TAXES	-
	INTEREST	-
	RELOCATION TOTAL	20,252.69
	Tax Assistance Federal	16,471.80*
	Paid for Employee State	4,361.20*
	Total Reported Income	41,085.69*"

This latter form was signed as prepared by one E. Pribanic under date of December 7, 1979 and as reviewed by one Diana B. Wolfe under date of December 11, 1979, and was also machine stamp-dated December 15, 1979. Further details regarding the particular items of expense, when they were incurred, when Mr. Tao was unconditionally entitled to receive such reimbursement payments, and when such reimbursement payments were actually made were not provided.

17. Petitioners object, as noted, to the Audit Division's amendment to the pleadings. Petitioners also object to inclusion of the entire relocation payment as subject to tax by New York, asserting that some of this reimbursement included real estate commissions paid on the sale of petitioners' Connecticut home and, in this regard, that auditor Pickop had no personal knowledge of the particular items of expense upon which the reimbursement payments specified on the relocation expense reimbursement form were premised. Petitioners specifically maintained that such issue was barred from consideration, noting that even if petitioners were residents only as of April 16, 1979, the issue of relocation

* These figures were handwritten rather than typed on the form.

payments "...has been in the case since at least October, 1980 but was not included in the Audit Division's (Law Bureau's) Answer".

CONCLUSIONS OF LAW

A. That section 605(a) of the Tax Law, in pertinent part, provides:

"...--(a) Resident Individual. -- A resident individual means an individual:

(1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state,..., or

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state,..." (emphasis as in original).

B. That Regulations of the State Tax Commission provide, in part, as follows:

"[a] domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there." [20 NYCRR 102.2(d)(2); emphasis added].

That "...to effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another." Aetna Nat'l. Bank v. Kramer, 142 A.D. 444, (1st Dep't., 1911).

C. That petitioners were domiciled in and residents of Connecticut from at least as early as November of 1973. Petitioner James Tao did spent a portion of his working time during 1978 in New York in conjunction with the new position of employment offered to him by Xerox, and petitioners had contracted in late 1978 to have a house built in New York. However, Mr. Tao always stayed in hotels when working in New York and always returned to Connecticut when not working in New York. Moreover, petitioners' New York house was not completed until April of 1979, and petitioners did not actually move to New York until

April 16, 1979. Accordingly, petitioners were neither domiciliaries of New York nor did they maintain a permanent place of abode in New York until their move to New York on April 16, 1979. Activities undertaken prior to such date are best described as preparations evidencing their intent to change their domicile to New York. However, no change of domicile occurred until petitioners actually moved to New York on April 16, 1979. Accordingly, petitioners became domiciled in New York and were taxable as residents of New York only as of April 16, 1979 (Matter of John J. Frey and Barbara G. Frey, State Tax Comm., April 9, 1982).

D. That the Commission's Rules of Practice and Procedure provide, in part, as follows:

> "(c) Amended pleadings. Either party may amend a pleading once without leave of the Commission, if the amended pleading is served on the adversary within 30 days after service of the original pleading. After such time, a pleading may be amended only by consent of the Commission or its designee. All such requests for leave to amend must be made prior to the hearing, and must be accompanied by the proposed amendments or amended pleadings. Where a pleading is amended, the party which must respond to such pleading shall have the full time allowed pursuant to this section. The one exception to the requirement that a pleading be amended prior to a hearing is where a party, at the hearing, requests leave to amend a pleading to conform to the proof. In such an instance, the hearing officer shall determine whether such amendment would work to the prejudice of the adverse party, affect a person not present at the hearing or unduly delay the proceeding.
>
> If none of these problems would result, and good cause exists, leave may be granted to so amend the pleading. No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading." [20 NYCRR 601.6(c)].

E. That it was proper to allow the Audit Division (Law Bureau) to amend its Answer to specify and clarify the issue involving the relocation payment (Matter of Thomas Wolfstich, State Tax Comm., May 27, 1983).

In Matter of Thomas Wolfstich, supra, petitioner was allowed to amend his petition at the commencement of the hearing to raise, in addition to a legal

defense of satisfaction of certain tax warrants, certain (new) affirmative defenses and also the (new) issue of whether petitioner therein was in fact a responsible officer of a given corporation, with a continuation of the hearing granted to allow the Audit Division to prepare for and address such amendment(s).

Similarly herein the Audit Division was properly allowed to amend its pleadings. As in Wolfstich, a continuance was granted to enable the party facing the amendment to prepare for and address the question presented [here concerning the relocation payment]. In addition, it is noted that while the Audit Division's (Law Bureau's) Answer did not specifically address the taxability of the relocation payment, such issue was the main basis upon which the first Statement of Audit Changes, dated October 27, 1980 was premised, and indeed petitioner noted that the "issue of relocation payments...has been in the case since at least October, 1980..." (see Finding of Fact "17"). Moreover, the theory upon which the deficiency is based has not in any event been changed. The underlying consistent thread or basis is the issue of taxability by New York State of the relocation reimbursement payment regardless of when petitioners became New York residents. The change (increase) to petitioners' tax liability for 1979 was occasioned on both the October 27, 1980 Statement of Audit Changes and the July 8, 1981 Statement of Audit Changes by treating such reimbursement as taxable in its entirety.[5]

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[5] The former (October 27, 1980) Statement does so more explicitly by distinguishing between resident and nonresident periods but nonetheless includes the entire amount as taxable New York source income, while the latter (July 8, 1981) Statement does so implicitly by including the entire reimbursement as among all income received by petitioners in 1979 as New York residents. The latter Statement (July 8, 1981), indicating that petitioners were domiciled in and taxable as full-year residents of New York for 1979 would necessarily cause the relocation reimbursement payment to be fully subject to tax by New York since a resident individual is generally taxable on all income earned regardless of its source (refer Conclusion of Law "J", infra) It should be noted that taxing petitioners as full-year residents for 1979 actually reduced their income tax liability from $7,816.63, as proposed in the Statement dated October 27, 1980 to $7,744.86 as proposed in the Statement dated July 8, 1981.

Accordingly, although an original pleading of alternative grounds via the Answer by the Audit Division (Law Bureau) would have been preferable, in view of the continuance of the hearing granted to allow for preparation by petitioners, and noting that the issue involving the relocation reimbursement is not new to the case, the amendment to specify such issue was not improper. Finally, in view of the foregoing, no part of the deficiency, including that portion raised by the amendment to the Answer, is barred by operation of the Statute of Limitations.

F. That section 82 of the Internal Revenue Code states:

> "There shall be included in gross income (as compensation for services) any amount received or accrued, directly or indirectly, by an individual as a payment for or reimbursement of expenses of moving from one residence to another residence which is attributable to employment or self-employment."

G. That there is no argument that the relocation reimbursement paid to petitioner James F. Tao was attributable to his employment with Xerox. Rather, it is the propriety of subjecting such reimbursement to New York State taxation which is at issue.

H. That section 654(c)(2) of the Tax Law provides, in relevant part, as follows:

> "[i]f an individual changes his status from nonresident to resident, he shall, regardless of his method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status, other than items derived from or connected with New York sources, if not otherwise properly includible (whether or not because of an election to report on an installment basis) or allowable for federal income tax purposes for such portion of the taxable year or for a prior taxable year." (emphasis supplied).

I. That the relocation reimbursement paid to petitioner James F. Tao was properly attributable to the new work location in Rochester, New York, and thus was connected with New York sources and properly subject to taxation by New York.

Unless the taxpayer can demonstrate the existence of an understanding between himself and his employer establishing that relocation reimbursement payments are attributable to prior services rendered or to a work location other than the new work location, such payments are properly attributable to the taxpayer's new work location. (Dammers v. Commissioner, 76 T.C. 835 (1981); Redding v. Commissioner, 43 TCM 719). The record herein contains no evidence of any agreement or understanding, either oral or written, between petitioner James F. Tao and his former employer (Xerox) whereby all or any part of the relocation reimbursement payment at issue was attributable to any work location other than the new work location in Rochester, New York. In the absence of such an agreement, the reimbursement is deemed connected with and attributable to such new employment, and thus was properly subject to taxation by New York State as New York source income within the meaning and intent of section 632 (b)(1)(B) of the Tax Law. (See Matter of Arthur B. March, State Tax Comm., December 20, 1983).

J. That although auditor Pickop placed the relocation reimbursement payment entirely in petitioners' resident period, while both petitioners and the October 27, 1980 Statement of Audit Changes placed such payment (except for State Tax Assistance) in the nonresident period, there is no difference as to the ultimate result, inasmuch as such payment is New York income regardless of whether taxable in the resident or the nonresident period.[6] Moreover, assuming arguendo that the relocation reimbursement payment was attributable to the nonresident period, since Mr. Tao's new work location was not outside of New

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[6] The weight of evidence on this point tends, however, to indicate that the relocation reimbursement payment was made during the resident period (see Finding of Fact "16"). From a computational standpoint, in instances involving a change of residence, a taxpayer must in any event combine taxable income(s) from both periods (resident and nonresident) and calculate tax liability on such combined amount [Tax Law §654(d); 20 NYCRR 148.15].

York no accrual under Tax Law section 654(c)(2) would be required inasmuch as the relocation reimbursement payment is an item derived from or connected to New York sources.

K. That petitioners' apportionment of total wage income between the resident and nonresident periods, exclusive of the relocation reimbursement payment, was correct as reflected on their returns for the respective periods ($36,396.63 for the resident period and $14,859.08 for the nonresident period).[7] Such apportionment was not challenged by the Audit Division on either of the statements of audit changes and the record contains no explanation as to why auditor Pickop reapportioned said wage income to the resident and nonresident periods based on the number of weeks in each of such periods. Accordingly, petitioners' method of apportioning such total wage income, exclusive of the relocation reimbursement payment, is accepted. Furthermore, Auditor Pickop's computation did not allow an allocation of Mr. Tao's apportioned nonresident period wage income received from Xerox ($14,859.08) on the basis of days worked within and without New York during such period. Accordingly, such allocation, which was not challenged by the Audit Division is to be allowed as claimed (61.5 days/76 days x $14,859.08 = $12,024.12; see Finding of Fact "7").

L. That the Audit Division is directed to revise auditor Pickop's computations to allow apportionment and allocation as provided for in Conclusion of Law "K".

M. That the petition of James F. Tao and Dorothy S. Tao is granted to the extent indicated in Finding of Fact "11" and Conclusions of Law "C" and "L",

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[7] To be more specific, per the returns the total apportioned resident period amount ($36,396.63) includes Mr. Tao's apportioned Xerox wage income ($36,170.13) plus Mrs. Tao's New York wage income ($226.50), while the total apportioned nonresident period amount includes Mr. Tao's apportioned Xerox wage income ($14,859.08).

but is in all other respects denied, and that auditor Pickop's computation, as modified in accordance herewith, is sustained.

DATED: Albany, New York

APR 30 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

APPENDIX A

a) Explanations of changes made:

"Amounts received by a nonresident from his employer in payment of, or in reimbursement of, moving expenses in connection with new employment in New York State constitutes income from New York sources. The taxability of such payments are not affected by the fact that he was paid or reimbursed for the moving expenses prior to reporting for work in New York. Accordingly, total compensation of $41,085.69 is considered New York income.

Dividend income is excluded from the State amount in computing total New York income for the nonresident period.

Married taxpayers filing a joint return are limited to a $3,000.00 deduction for losses from the sale or exchange of capital assets.

Twenty percent of one half Net Long Term Capital Gain is required to be added to total income to arrive at total New York income.

Limitation percentage is required to be computed and applied to itemized deductions and exemptions on the nonresident return when total Federal income exceeds total New York income by $100.00 or more.

State and local income taxes are required to be subtracted from total Federal itemized deductions to arrive at New York deductions.

	RESIDENT	NONRESIDENT
Total Federal itemized deductions per Schedule CR-60.1	$8,870.04	$4,736.49
Less: State and local income taxes ($1,440.02)	1,080.01	360.01
New York deductions	$7,790.03	$4,376.48

Where two (2) returns are required to be filed because of change of residence, taxable balances must be combined.

Tax is recomputed in accordance with the maximum tax on personal service income provision as there is a tax benefit when personal service taxable income exceeds $21,000.00."

b) Recomputation of Nonresident Taxable Income:

	FEDERAL AMOUNT	STATE AMOUNT
Wages	$14,921.58	$12,024.12
Other compensation includable in wages	36,724.49	36,724.49
Total wages, salaries, etc.	$51,646.07	$48,748.61
Dividends	472.59	-0-
Gain from sale or exchange of capital assets	16,530.38	-0-
Total	$68,649.04	$48,748.61
Adjustments	7,366.36	-0-
Total income	$61,282.68	$48,748.61
Long Term Capital Gains Modification	1,653.04	-0-
Total New York Income	$62,935.72	$48,748.61

APPENDIX A (con't)

Limitation percentage: $\frac{\$48,748.61}{\$62,935.72} = 77\%$

New York deductions ($4,376.48 X 77%)	3,369.89
Balance	$45,378.72
Exemptions ($700.00 X 77%)	539.00
Corrected nonresident taxable income	$44,839.72

c) Recomputation of Resident Taxable Income:

Wages	$40,757.83
Dividends	1,150.37
Loss from sale or exchange of capital assets	(3,000.00)
Total	$38,908.20
Adjustments	375.98
Total New York income	$38,532.22
New York deductions	7,790.03
Balance	$30,742.19
Exemptions	2,100.00
Corrected resident taxable income	$28,642.19
Corrected nonresident taxable income	44,839.72
Combined New York taxable income	$73,481.91
Tax on taxable income	$ 8,846.07
LESS Maximum tax benefit	1,029.44
Tax due	$ 7,816.63
Tax withheld	4,362.92
ADDITIONAL PERSONAL INCOME TAX DUE	$ 3,453.71