

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Marvin H. Warren :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income
Tax under Article(s) 22 of the Tax Law for the :
Year 1981.

State of New York :

ss.:

County of Albany :

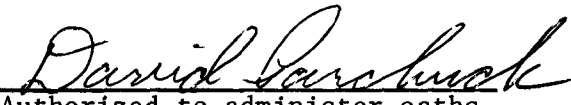
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 29th day of May, 1987, he/she served the within notice of decision by certified mail upon Marvin H. Warren the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

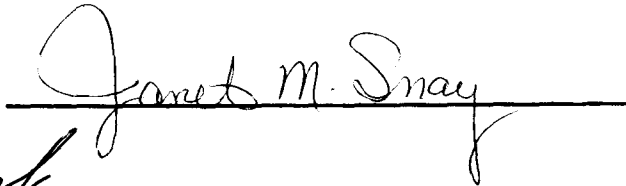
Marvin H. Warren
431 Eline Road
Louisville, KY 40207

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
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 29th day of May, 1987, he served the within notice of decision by certified mail upon Joseph J. Kaplan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

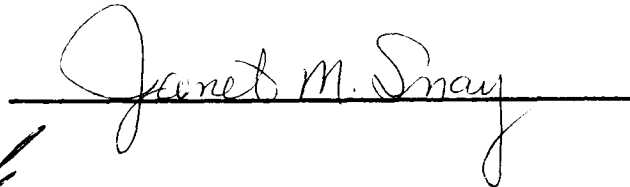
Joseph J. Kaplan
Washer, Kaplan, Rothschild, Aberson & Miller
Suite 725, Marion E. Taylor Bldg.
Louisville, KY 40202

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 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.

Sworn to before me this
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

May 29, 1987

Marvin H. Warren
431 Eline Road
Louisville, KY 40207

Dear Mr. Warren:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Joseph J. Kaplan
Washer, Kaplan, Rothschild, Aberson & Miller
Suite 725, Marion E. Taylor Bldg.
Louisville, KY 40202

STATE OF NEW YORK

STATE TAX COMMISSION

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

:
:
:
DECISION
:
:
:

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, Marvin 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 computation:

"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	\$3,208.00
 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 Warren 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

Roderick W. Allen
PRESIDENT

Francis Q. Koenig
COMMISSIONER

Mark J. [unclear]
COMMISSIONER