

OPINION OF COUNSEL

PROPER AMOUNT ALLOWABLE AS A RESIDENT CREDIT UNDER
NEW YORK STATE TAX LAW

November 27, 1978

Dear:

This responds to your most recent letter, dated _____, which has been referred to me for reply, in which you protested the Statement of Audit Changes which was originally mailed to you on _____. You stated that your reasons for protest were set forth in your letter to the Audit Division dated _____.

As I understand it, your position is that you are entitled to a credit against the New York Personal Income Tax otherwise due for the taxable year 1976 for \$1268.06 which was the amount of income tax withheld by California during that year. However, during 1977, you received a refund of \$773.00 from California, which was the amount over withheld during 1976 by that State. Since you are and always have been a calendar year cash basis taxpayer, you assert that the amount of the credit should be the actual amount paid by you to California during the year 1976, rather than that amount reduced by the refund received in 1977.

Under section 164 of the Internal Revenue Code, provision is made for itemized deductions for certain taxes. That section states, in part: ". . . The following taxes shall be allowed as a deduction for the taxable year within which paid or accrued: . . . (3) State and local, and foreign, income . . . taxes." (Internal Revenue Code, §164(a)(3)) (emphasis added)

The Internal Revenue Service has held that under section 164 of the Code, a \$6,000 payment of estimated State income taxes reported on a tentative calendar year return by a cash basis taxpayer was deductible in the year of payment, despite the fact that a final State income tax return, filed the following year, indicated an overpayment of \$3,000. (Rev. Rul. 71-190, 1971-1 C.B. 70)

Unlike the foregoing provision, the New York Personal Income Tax provides: ". . . A Resident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States . . ." (Tax Law, §620(a)) (emphasis added) Hence, under the New York Personal Income Tax, a credit is allowed for the amount of tax "imposed" by another state, rather than for the amount "paid" to such other state. This interpretation of section 620(a) follows the State Tax Commission's Income Tax Regulations, which have been in effect for a number of years. The pertinent regulations state in part:

"The credit cannot exceed the tax payable to the other jurisdiction. If a taxpayer in his return claims a credit pursuant to this Part for the tax of another jurisdiction

or any portion thereof, and it is later determined that the amount of such tax (or the portion for which credit was claimed) is more or less than the amount of credit claimed in the taxpayer's return, he shall immediately notify the New York State Income Tax Bureau. The bureau will then recompute the amount of the New York tax. Any additional tax due upon such recomputation must be paid by the taxpayer upon notice and demand by the Income Tax Bureau. Any overpayment of tax shown by such recomputation will be refunded to the taxpayer if claim for refund is filed within the period provided by section 687 of the Tax Law." (20 NYCRR § 121.2(a))

Hence, it is the amount of the tax liability to the other state for the taxable year, rather than the amount paid to such state during the taxable year, that is allowable as a credit.

From the foregoing, it is my opinion that the Statement of Audit Changes, which allowed a credit of \$495.00 for tax payable to California and which showed an additional New York Personal Income Tax liability of \$276.00, rather than a refund as claimed on your amended return, was correct.

I hope the foregoing serves to answer the questions you raised in your letters of
and .

Please sign the "Consent to Findings" which was sent to you on _____, if you are now in agreement, and return it with your remittance for the amount due referring to the assessment number shown.

Very truly yours,

PETER CROTTY
Deputy Commissioner and Counsel