STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KENNETH J. CORT	:	DECISION DTA No. 811179
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioner Kenneth J. Cort, 91 Meadow Ridge, Avon, Connecticut 06001, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on April 14, 1994. Petitioner appeared by Goodkind, Labaton, Rudoff & Sucharow (Mark S. Arisohn, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioner's exception. Petitioner filed a brief in opposition to the Division of Taxation's exception and in reply to the Division of Taxation's brief in response to petitioner's exception. The Division of Taxation further submitted a brief in reply to petitioner's opposition brief. The Division of Taxation submitted a letter withdrawing its request for oral argument. This letter was received on October 17, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Administrative Law Judge erred in calculating a nonresident taxpayer's New York State and New York City income tax for the years 1986 and 1987 based on an allocation ratio calculating time spent performing services in New York on the half day.

II. Whether petitioner's allocation ratio for 1987 is properly allocated over a 45-day work year.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Kenneth J. Cort, began his career in the retail business in 1965 with the department store of Abraham & Strauss in New York City. In 1973 he was promoted to a vice-president position with Abraham & Strauss and moved from New York to a house in New Jersey.

In January of 1984, petitioner took a position as a high-level executive with Zale Corporation, which sold moderately priced fine jewelry at the retail level. Zale Corporation was located in Irving, Texas, a suburb of Dallas. Petitioner relocated to Texas from New Jersey and bought a home in Texas in July of 1984. Petitioner rented his New Jersey home until its sale in 1986.

Zale Corporation maintained a New York City office which occupied space of approximately 10,000 to 12,000 square feet. The New York office dealt with the procurement of raw materials and the transformation of raw materials into finished products.

Petitioner was responsible for sales and in 1984 spent a great deal of time developing an organizational structure for the company. As a result, petitioner spent less time travelling in 1984 than he did in subsequent years.

From the beginning of 1986 through the end of February of 1987, petitioner took frequent trips to New York City. Petitioner explained in his testimony that these trips were for both personal and business reasons. During 1986, Zale Corporation, which was a family business, was experiencing a possible hostile takeover. Therefore, as a senior executive, petitioner visited New York City periodically in 1986 and the beginning of 1987 to attend trade shows and to establish personal contacts with the corporation's suppliers to ensure a continued level of

supplies by reassuring suppliers, in the face of takeover rumors, that the company was financially stable. Petitioner testified that the situation required more trips to New York than would have normally occurred. In addition, petitioner and his wife separated after their move to Texas. Petitioner's wife moved back to New York City and was living there during the time period in question. Petitioner's children, ages 12 and 17 at that time, remained in Texas with him to attend school. Therefore, the business trips to New York were often combined with petitioner's desire to spend time with his wife to attempt a reconciliation. Petitioner testified that Zale Corporation was a family-oriented business that was very supportive of his attempts at reconciliation.[1] Petitioner also used these trips as opportunities to visit his daughter attending summer camp in upstate New York during July of 1986 and to spend a few days in August of 1986 to vacation at the Saratoga Race Track.

Petitioner and his wife filed joint New York State nonresident income tax returns for 1986 and 1987.

In 1989, the Division of Taxation ("Division") commenced a tax audit of petitioner and his wife.[2] After a full audit and analysis of petitioner's diaries for 1986 and 1987, the auditor concluded that the following days were days that petitioner worked in his New York office:

1986 - Total 72 days

January 9-12
January 31
February 1-7
February 24-25
April 9-16
April 30
May 1-2
May 6-8
May 27-28
June 19-20
July 25 - August 4
September 9-13
September 25-29
October 22-25
November 3-12
December 10-13
December 29

[1]Petitioner and his wife subsequently reconciled their marriage.

[2]Deficiencies found by the Division with respect to Mrs. Cort's income are not the subject of this petition.

1987 - Total 26 days

January 8-11
January 13-16
January 20
January 22
January 27 - February 9
February 16
March 4

In her workpapers, the Division's auditor calculated the ratio of New York days to the total number of days worked in 1986 to be 27.9% (72 [New York days] divided by 258 [total workdays]) and multiplied that percentage by the 1986 income of $321,225.00 to arrive at New York income of $89,644.00 to which she applied a $42,595.00 partnership loss. Similarly, the auditor calculated the ratio in 1987 (through March 6, 1987) to be 57.77% (26 [New York days] divided by 45 [total workdays]).[3] The auditor averaged the two ratios (42.83%) and then applied the 27.9% to 1987 New York wages of $391,689.00 for a total of $109,281.00 and applied the average ratio of 42.83% to New York benefits of $1,314,440.00 for a total of $562,975.00. At the hearing, the auditor, who testified on behalf of the Division,[4] explained that the calculation of the 1987 wages was an error in favor of the taxpayer because she applied the lower 1986 ratio to the 1987 wages. Thus, for 1987 the auditor calculated New York wages and benefits to be $109,281.00 and $562,975.00, respectively, for a total amount of $672,256.00. From this amount the auditor subtracted a partnership loss of $42,023.00.

The Division issued to petitioner a Notice of Deficiency, dated March 4, 1991, asserting State and City income tax due in 1986 for the amounts of $2,373.69 and $403.40, respectively, and State and City income tax due in 1987 for the amounts of $50,239.91 and $2,394.15,

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[3] Using March 6, 1987 as petitioner's retirement date from Zale Corporation, the auditor subtracted 18 Saturdays and Sundays and two holidays (January 1, 1987 and February 22, 1987) from the total number of days from January 1, 1987 through March 6, 1987 (65) for the total number of workdays of 45. The auditor excluded from the total workdays 3 Saturdays and 3 Sundays that she included as New York workdays.

[4] The auditor who conducted the audit retired in 1991 and was not made available to testify as to how she calculated the tax. Instead, her supervisor testified as to how the audit was done.

respectively. Interest and penalty were added to these amounts for the total amount of tax due of $87,247.60.

A conciliation conference was held on January 15, 1992 and the conferee sustained the Notice of Deficiency in a Conciliation Order, dated June 19, 1992.

Petitioner filed a petition, dated September 14, 1992, alleging errors by the Division in calculating the allocation of time petitioner worked in New York to the total number of days worked. Specifically, petitioner alleged that the auditor incorrectly counted as New York workdays weekends, vacation days or days on which he did not work or was not in New York State, and that the auditor incorrectly included as New York days those days on which petitioner spent only a portion of the day working or days on which his only activity in New York was his early departure from, or late arrival to, New York.

The Division filed an answer, dated January 21, 1993, affirmatively stating, inter alia, that the computation of the allocation of days spent in New York State was based on petitioner's diaries and "Platinum Card" charges and that petitioner has the burden of proving that the deficiency is erroneous or improper.

At the hearing held on July 26, 1993, petitioner submitted excerpts from his diary covering the days the auditor counted as New York workdays. He testified that the entries in the diary were made by either his secretary or himself in anticipation of scheduled events. One diary was kept by petitioner's secretary with only her entries and a second diary was kept by petitioner at his Texas office. Petitioner testified that sometimes he would phone in to his secretary with changes to the diary or make certain changes himself in his own diary when he was in Dallas. Petitioner asserted that the purpose of the diary was to plan his schedule in advance, keep informed of scheduled appointments and travels and to keep a record of his business dealings for future use. He noted that the diary represented a road map of his business dealings. With respect to the accuracy of the diary entries, petitioner noted certain changes to scheduled appointments that were not recorded in the diary, but affirmed that in general the diary was 95% accurate.

When petitioner worked in Texas, he generally would arrive at his office early in the morning and leave between 5:00 or 5:30 P.M. and only on occasion would he work on a Saturday or Sunday. Petitioner noted in his testimony that he might work four or five Saturdays or Sundays over the course of an entire year. In calculating the number of total workdays outside of New York, the auditor excluded a total of 89 Saturdays and Sundays for 1986 and 18 Saturdays and Sundays for 1987. However, the auditor included every Saturday and Sunday petitioner spent in New York as a New York workday.

In his testimony, petitioner conceded that he worked and/or attended a trade show in New York on the following days either a couple of hours or for the entire day:

1986	1987
1/10/86 (2-3 hours)	1/30/87 (2 hours)
1/31/86 (2 hours)	2/2/87 (½ day)
2/3/86	2/3/87
2/4/86 (½ day)	
2/5/86 (½ day)	
2/25/86 (3 hours)	
4/10/86 (½ day)	
4/16/86 (½ day)	
5/7/86	
5/8/86 (1 hour)	
5/28/86	
6/20/86 (1 hour)	
7/28/86	
7/29/86	
8/4/86	
9/10/86	
9/11/86 (½ day)	
10/23/86	
10/24/86	
12/11/86 (2 hours)	

In referring to his diary, petitioner testified that on November 4, 1986 he left New York at 3:00 P.M. to return to Texas but that he could not remember what he did prior to his flight inasmuch as there were no notations in the diary on that day other than the flight information. He also noted that a 2:00 P.M. appointment was scheduled in his diary on January 14, 1987 and that the appointment was in connection with his Zale employment, but that he could not recall whether the appointment was kept.

Petitioner testified that he did not work on the following Saturdays or Sundays when he was in New York, but spent the time at his leisure with his wife or attended an appointment or evening engagement that was totally unrelated to his work:

1986	1987
1/11/86	1/10/87
2/1/86	1/31/87
2/2/86	2/1/87
7/27/86	

Petitioner's diary contained an entry on Saturday, January 11, 1986 of "24 Kt. Club Dinner - Waldorf Astoria" followed by a second entry "'Yes' to M. Zale at 6:00 P." In his testimony, petitioner explained that he attended the 24 Carat Club Dinner, which was a charity fund raiser sponsored by the organization of jewelry manufacturers, that he was not a member of the club (nor was the corporation) and that he purchased the ticket for the dinner out of his own funds. Petitioner also explained that the second notation was to remind him that he would meet Mr. Zale at the dinner at 6:00 P.M. Petitioner further testified, after referring to entries on Saturday, January 10, 1987, that he attended the 24 Carat Club Dinner on that date as well.

With respect to Saturday, February 1, 1986, and Saturday, January 31, 1987, petitioner testified that he attended another charitable function, the annual Juvenile Diabetes Foundation dinner, but did not engage in Zale-related activities.

Petitioner testified that on the following New York days he did not engage in any work-related activity in New York because on those days he either departed from New York on an early morning flight back to Texas, or arrived late in New York and either went straight to his hotel or had dinner with a friend:

1986	1987
1/12/86 (7:30 A.M. departure)	1/8/87 (5:00 P.M. arrival)
2/7/86 (9:30 A.M. departure)	1/11/87 (7:30 A.M. departure)
2/24/86 (late arrival)	1/13/87 (9:00 P.M. arrival)
4/9/86 (7:00 P.M. arrival)	1/29/87 (5:00 P.M. arrival)
4/15/86 (late arrival)	
5/6/86 (5:00 P.M. arrival)	
5/27/86 (7:00 P.M. arrival)	
6/19/86 (5:00 P.M. arrival)	
7/31/86 (11:00 P.M. arrival)	
9/9/86 (7:00 P.M. arrival)	
10/22/86 (5:00 P.M. arrival)	
10/25/86 (7:30 AM. departure)	
11/3/86 (7:00 P.M. arrival)	
12/10/86 (5:00 P.M. arrival)	

With the exception of February 24, 1986, petitioner's testimony concerning these arrivals and departures is confirmed by flight information recorded in his secretary's handwriting in the diary.

On January 9, 1986, petitioner testified that he arrived in New York at 12:30 P.M. (arrival flight entered in diary) and spent the afternoon visiting with his wife and did not engage in any work-related activity; that on December 12, 1986 petitioner met with his lawyer and a recruiter prior to his departure for Texas;[5] that on January 15, 1987 he spent the day with his wife and flew back to Texas that evening (6:00 P.M. flight departure entered in diary); and that on February 5, 1987 he left New York for Texas on a 12:30 P.M. flight (confirmed by entry in diary) and did not engage in any work-related activity in New York prior to his departure.

Referring to notations made in his diary, petitioner testified that on the following dates he was not in New York at all but was in either Texas, Louisiana or Toronto:

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[5] In his diary for that date, there are entries for a 2:47 P.M. departure flight and backup flight at 5:59 P.M. The diary also contains an entry in petitioner's handwriting indicating a 10:00 A.M. meeting with Bob Goodkind, petitioner's attorney, and a 12:30 P.M. lunch appointment.

1986	1987
4/12/86 (Texas)	1/16/87 (Texas)
4/13/86 (Texas)	1/20/87 (Texas)
4/14/86 (Texas)	1/22/87 (Texas)
4/30/86 (Texas/Louisiana)	1/27/87 (Texas)
5/1/86 (Texas)	1/28/87 (Texas)
5/2/86 (Texas)	2/6/87 (Texas)
7/30/86 (Texas)	2/7/87 (Texas)
9/12/86 (Texas)	2/8/87 (Texas/Toronto)
9/13/86 (Texas)	2/9/87 (Toronto)
11/5/86 (Texas)	
12/13/86 (Texas)[6]	
12/29/86 (Texas)	

In most cases the entries in the diary confirm petitioner's testimony concerning his location on those dates. However, notwithstanding the absence in the diaries of an entry specifying a location, there are no entries in the diary on any of those days that would indicate petitioner's presence in New York.

Petitioner testified that from September 25, 1986 through September 29, 1986 and from November 6, 1986 through November 12, 1986, he cancelled all meetings in New York to be in Texas preparing with others from Zale Corporation a defense to a new takeover offer that the corporation became aware of on September 24, 1986. A notation in petitioner's handwriting was entered in the diary on November 7, 1986 - "Trip cancelled due to take over fight." Petitioner testified that in that week of November, he and other Zale representatives presented a plan at meetings with an investment bank firm to obtain a loan to counter the takeover offer. He stated that these meetings took place over several days resulting in his cancelling his trip to New York and the New York appointments that were listed in the diary for those days.

Petitioner testified that on July 25, 1986 he took a flight from Dallas to LaGuardia Airport arriving at 10:00 A.M., stayed at LaGuardia to take a 1:00 P.M. flight to Albany and from there drove to upstate New York to visit his daughter who was attending a summer camp in the Adirondacks. He stated that the next day, Saturday, July 26, 1986, he returned to New

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[6] December 13, 1986 fell on a Saturday and petitioner testified that he returned to Texas on the prior day, December 12, 1986 (3:00 P.M. and 6:00 P.M. flight listed in diary), and that although he was in Texas on that date, he did not work at all on that date.

York City on a flight from Albany arriving at 7:00 P.M. The flights on July 25, 1986 and July 26, 1986 are confirmed by entries in petitioner's diary.

Petitioner testified that he returned to Dallas on July 29, 1986 for meetings in Dallas the next day and returned to New York on July 31, 1986 arriving in Albany, New York at 11:00 P.M. Petitioner explained that he spent from August 1, 1986 through August 3, 1986 on vacation at the Saratoga Racetrack and then worked in New York City on August 4, 1986. The entries in petitioner's diary on July 31, 1986 contained flight information indicating arrival in Albany at 11:00 P.M., entries on August 1, 2 and 3 noting a vacation at Saratoga, and flight information on August 3, 1986 indicating a flight from Albany arriving at 8:15 P.M. in LaGuardia.

Petitioner testified that on April 11, 1986 he did not engage in any work-related activities but instead met with his tenant in New York and drove out to petitioner's New Jersey house which he was leasing to the tenant at that time. Petitioner stated that the purpose of the New Jersey trip was to ensure that the house was in good shape and that periodically he would make such checks. Petitioner then noted that he flew back to Dallas that evening. The diary entries for April 11, 1986 indicated a 10:30 A.M. appointment with the tenant and a flight from LaGuardia departing at 6:00 P.M.

Petitioner further testified that on the following dates he did not engage in any work-related activities but instead cancelled appointments and either spent the day with his wife or met with recruiters in his efforts to seek future employment:

1986	1987
2/6/8	1/9/87
12/12/86[7]	1/15/87[8]
	2/4/87

On February 8, 1987, petitioner flew to Toronto[9] to attend a budget meeting with the new owners of Zale Corporation. At that meeting, petitioner and the new owners mutually agreed to terminate petitioner's employment. On March 1, 1987, petitioner signed a letter sent by Jerry W. Davis, a senior vice-president of Zale Corporation, setting forth the terms and conditions of the termination of petitioner's employment. According to the agreement, the termination was effective on February 28, 1987.

In that letter, Zale Corporation agreed to pay petitioner in consideration for petitioner's execution of the termination agreement a lump-sum payment of $250,000.00, less normal wage deductions, before March 12, 1987. The letter further provided for petitioner's continued employment until December 31, 1988 under certain terms and conditions. Petitioner's attendance was not required from February 28, 1987 through December 31, 1988. For the

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[7] Petitioner testified that he flew back to Texas after meeting with a recruiter. Entries in his diary confirm the flight back to Texas.

[8] Petitioner testified that after spending the day with his wife he flew back to Texas. The entries in his diary for that day confirm the flight departure at 6:00 P.M.

[9] Petitioner's diary entries and testimony confirm that he was in Toronto on February 8 and 9, 1987 and was not in New York on those dates.

period March 1, 1987 through February 28, 1988, petitioner was to receive semi-monthly payments of $1,458.34 and that if petitioner had not obtained other employment by March 1, 1988, Zale Corporation was to pay petitioner $11,875.00 semi-monthly until December 31, 1988 or until he obtained other employment. If petitioner accepted other employment before December 31, 1988, then he was to terminate his employment with Zale Corporation and Zale's obligation to "make the foregoing salary payments" would be diminished by the amount of any remuneration petitioner received "directly or constructively from any other employer for [his] services during such period." Zale Corporation also continued to provide to petitioner during his "continued employment" certain benefits such as medical and life insurance programs and a company car. Petitioner agreed to waive any severance pay in accordance with the following terms as provided in the letter:

> "Severance Pay
>
> "In consideration for the payments the Company agrees to make to you hereunder, you hereby agree to:
>
> "(a) Waive any right that you may have to receive severance pay; and
>
> "(b) Waive any right to receive any payment for all currently accrued, vacation and personal holiday benefits, and it is further understood that no vacation or personal holiday benefits will be accrued to you from the date of this letter."

During the period from the end of February 1987 through the end of December 1988, petitioner performed some consulting services for Zale Corporation in Texas but did no travelling for the corporation.

In addition to his salary and other wages, petitioner reported on his 1987 income tax return the sale of Zale stock for the sum of $1,200,000.00. The new owners of Zale Corporation purchased from petitioner 24,000 shares of unvested stock at $50.00 a share. Petitioner had previously received from Zale Corporation two grants of stock: one grant of 15,000 shares in January of 1984, 20% of which was to vest each year for five consecutive years from 1985 through 1989; and a second grant of 15,000 shares in May-June 1986 of which 20%, or 3,000 shares, was to vest each year over the next five consecutive years from 1987 through 1991.

These stock grants were given as an incentive to ensure the continued successful employment of petitioner.[10] According to the stock plan, if petitioner terminated his employment prior to the date each 20% of the stock vested, the unvested stock would be forfeited and returned to the corporation. If, however, another corporation, individual, firm or entity acquired more than 50% of the outstanding voting securities of the corporation, the unvested stock would become "immediately freely transferable and non-forfeitable." Thus, in accordance with the corporation's stock plan, petitioner was free to sell the 24,000 shares that were unvested just prior to the takeover. With respect to this sale, petitioner testified as follows:

Q. "Now, when the company was taken over by the Toronto-based organization in 1987, did that have any impact on the amount of Zale stock you had that was not yet vested?"[11]

A. "Yes. As the Court probably knows, in takeovers of this kind the arriving company doesn't want to have minority stockholders, so it bought out all of those options, all of those grants."

Q. "Is that the transactions that resulted in you having income in 1987 of a million two?"

A. "Yes, because that would have related to 24,000 shares of unvested stock at $50 a share."

Q. "What price was the stock bought out at?"

A. "$50 a share."

Q. "Was that takeover price?"

A. "That is the takeover price." (Tr., p. 119.)

* * *

Q. "And would it be fair to say that million two that you received in income from the purchase of these stocks by the company that took over Zale's had to do with re remuneration for your service to the company in the year 1987?"

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[10]The Division submitted into the record a document, dated March 10, 1982, entitled "Zale Corporation Restricted Stock Plan." In that document, it was stated that stock grants may be given to key executive employees of the company taking into account the "duties of the respective individuals, their present and potential contributions to the success of the Company or the subsidiary and such other factors as the Committee shall deem relevant in accomplishing the purposes of the Plan."

[11]The transcript contains the term "invested"; however, it is clear from the context that the word should be "vested."

A. "No. The purpose -- the purpose of these stock grants was to tie the executive into the performance of the stock share price so that both the stockholder and the executive had a commonality of interest in getting the stock price high. It was an investment that was given to each executive to keep them employed by the company for an extended period of time. So these grants ran out five years from the date you got the grant. You were not able to fully vest for five full years, and that was a way of keeping the executive with an equity investment interest in the company."

Q. "Is that $1,200,000 in gain that you realized, would that be akin to termination pay?"

A. "No, it had nothing to do with termination."

Q. "Salary?"

A. "No."

Q. "Did it have anything to do with your services as an employee?"

A. "No." (Tr., pp. 120-121.)

OPINION

Tax Law former § 632(a)(1) provided that the New York adjusted gross income of a nonresident individual shall be the sum of the net amount of items of income and gain entered into the Federal adjusted gross income "derived from or connected with New York sources."

Tax Law former § 632(c) provided that:

> "[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations."

20 NYCRR former 131.18[a] provided that where a nonresident employee or corporate officer performs services on behalf of his employer both within and without New York State, the:

> "income derived from New York State sources includes that portion of [the] total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State."

Further, in computing the allocation of income, "no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay."

The Administrative Law Judge found petitioner's testimony to be credible and a reliable basis for concluding that petitioner worked in New York only 16 days in 1986, down from the 72 New York workdays the auditor included in the numerator of the allocation ratio. The Administrative Law Judge also concluded petitioner worked only 3½ days in 1987, which reduced the 26 days the auditor concluded petitioner worked in New York. The reduction was based, in part, on the fact that petitioner established that he did not always work a full day on days treated by the auditor as New York workdays. On these days where the Administrative Law Judge concluded petitioner only worked a half day in New York, the Administrative Law Judge made a corresponding reduction of the denominator if petitioner did not work at all the second half of that given day. The Administrative Law Judge further found through petitioner's credible testimony that a number of the days the auditor concluded were New York workdays, petitioner was either not working while in New York or he was not even in the State. The denominator was also reduced where on an entire day considered a New York workday by the auditor, no work was in fact performed.

Relying on 20 NYCRR former 131.18(a) (example 1), the Administrative Law Judge determined that the numerator would be further reduced by the number of days concluded by the auditor to be New York workdays, where petitioner performed no other work-related duties in New York except for traveling to New York from Dallas or from New York to Dallas. The Administrative Law Judge further concluded that these days must remain in the denominator as non-New York workdays.

The Administrative Law Judge found that the denominator of the allocation ratio must be reduced from 258 days in 1986 to 247, and in 1987 the denominator must be reduced by 42.5 days. The Administrative Law Judge concluded that the allocation ratio of New York workdays in 1986 is 16 divided by 247 and the allocation ratio for 1987 is 3.5 divided by 42.5.

The Administrative Law Judge found petitioner's contention that he worked as a consultant for Zale Corporation after February 1987 to be unsupported by the record. The Administrative Law Judge also determined that because petitioner's attendance was no longer required after February 1987, the semi-monthly payments from March 1, 1987 through the end of that year are more appropriately characterized as a form of severance pay. Thus, the Administrative Law Judge concluded that the auditor correctly calculated the allocation ratio for 1987 by using a denominator of 45 days (recalculated to 42.5 days) rather than 254 (365 days less 104 weekend days and seven holidays).

As a final matter, the Administrative Law Judge also addressed an issue that petitioner appeared to raise at hearing but chose not to address in his brief: whether petitioner's receipt from the sale of 24,000 shares of Zale stock for $1,200,000.00 was subject to nonresident income tax at all. Relying on Matter of Laurino (Tax Appeals Tribunal, May 20, 1993), the Administrative Law Judge found petitioner's right to the stock was conditioned on his continued employment, but vested in the event Zale was acquired. When Zale was subsequently acquired, the stock vested on the acquisition date and was no longer contingent on his continued employment, based upon the terms of the stock grants. The Administrative Law Judge concluded that the income from the stock sale was based upon petitioner's services up until the acquisition and was, therefore, derived from or connected to New York sources to the extent services were performed in New York.

We affirm the determination of the Administrative Law Judge.

We shall first address the Division's exception with respect to allocation of travel days to and from New York. The Division requests that all travel days to and from New York be considered New York workdays as petitioner was present in the State. In the alternative, the Division argues that days spent traveling to New York should be treated as New York workdays and days where petitioner left New York as work days in petitioner's home State. The Division presents a third alternative: travel days be excluded from the equation entirely.

We reject the Division's argument that upon arriving in New York petitioner is treated as working in the State merely because he is physically in the State for the purpose of conducting business. The regulations are clear in stating that a nonresident is taxed in New York on the basis that he performed services on behalf of his employer in New York (20 NYCRR former 131.18[a]). Consequently, where a nonresident's only business activity on a given day is his arrival in New York, or departure therefrom, this day cannot be considered a New York workday as no services were performed on this particular day. The fact petitioner may have performed services on subsequent or preceding days does not change the treatment of a travel day for tax purposes. This result is consistent with the position stated in the Commissioner's regulations (see, 20 NYCRR former 131.18[a] [example 1] if a nonresident is in New York on a given day solely for the purpose of boarding an airplane, this does not constitute a New York workday). Accordingly, the days that petitioner did no work-related activities save for boarding or disembarking from an airplane cannot be treated as New York workdays. The Division's first two proposals for treating workdays must be rejected.

We also note that the Division's third alternative for treating travel days, i.e., consider them non-workdays, must be rejected. The regulations clearly contemplate that travel days for the purpose of conducting business are to be treated as workdays (see, 20 NYCRR former 131.18[a] [example 2], travel days for business out-of-state are treated as workdays even where travel occurred on a Saturday or Sunday). As noted above, however, these days will not be included in the numerator of the allocation ratio unless services were also performed in New York.

We next address the Administrative Law Judge's decision to calculate New York days based on the half day. The Division excepts to the Administrative Law Judge's use of half days in New York when petitioner was not required to account for half days while he was in Texas. The Division argues that petitioner was required to so account for days worked both in and outside of New York State. As a result, the Division requests all New York half days be treated as whole days.

We cannot agree with the Division that petitioner's burden was to account for not only the days it was asserted he worked in New York, but in addition every other day he worked during the year. The Notice of Deficiency issued to petitioner asserted tax due based on a certain number of days that the auditor found petitioner worked in New York in 1986 and 1987, compared to the total number of days the auditor found that petitioner worked in each year. Petitioner's burden was to establish that this Notice of Deficiency was in error (Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, 175). Petitioner met his burden by establishing that a number of the days asserted by the Division as days worked in New York by petitioner were days he was either not in New York, or was, but was not performing services or he only performed services during a fraction or half of the day. There is no dispute that petitioner could allocate his New York income in such a manner (see, TSB-A-83-[1]-I). It was not necessary that petitioner disprove the other element of the Division's allocation formula: the total number of days worked during each of 1986 and 1987.

We next address petitioner's exception to the Administrative Law Judge's conclusion that petitioner was not employed by Zale Corporation for the entire year of 1987.

Petitioner argues that the Administrative Law Judge erred in concluding that petitioner was not employed for the entire year of 1987 by Zale. Petitioner points to the Agreement dated February 26, 1987 to support petitioner's position that he was to remain employed by Zale until December 31, 1988 unless he accepted other employment. Petitioner argues that he did not accept other employment and he continued to perform services for Zale throughout the year. Petitioner contends that in addition to the lump sum payment received, he also continued to receive monthly payments.

We find the Administrative Law Judge correctly and completely addressed this issue and we affirm for the reasons stated in the determination.

As a final matter, we note that petitioner elected not to address on exception the issue of whether the income from the sale of stock was taxable in New York.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kenneth J. Cort is denied;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is affirmed;

4. The petition of Kenneth J. Cort is granted to the extent indicated in the Administrative Law Judge's conclusions of law "A," "B," "C," "D," "E" and "G," but is otherwise denied; and

5. The Division of Taxation is directed to modify the Notice of eficiency dated March 4, 1991 as indicated in paragraph "4" above, but such Notice is otherwise sustained.

DATED: Troy, New York
April 13, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner