STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION DTA NO. 825989
PATRICK J. CARR	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2007, 2008 and 2009.	:	

Petitioner, Patrick J. Carr, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2007, 2008 and 2009.

On September 11, 2014 and September 22, 2014, respectively, the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), and petitioner, appearing pro se, waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by February 16, 2015, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that income earned in Florida by petitioner, a nonresident attorney licensed to practice law in New York and New Jersey and admitted to practice pro hac vice in Florida, is subject to New York State income tax.

FINDINGS OF FACT

1. Petitioner, Patrick J. Carr, was a domiciliary and resident of Florida during the years at issue.

2. Petitioner is an attorney who was admitted to the New York State bar in 1964 and was licensed to practice law in New York during the years at issue.

3. Petitioner was admitted to the New Jersey bar in 1987 and was licensed to practice law in New Jersey during the years at issue.

4. By order of the Circuit Court in Sarasota County, Florida, dated July 2, 2001, petitioner was admitted to practice pro hac vice to represent Elena Duke Benedict in a matter before the Sarasota County Circuit Court. Petitioner received income during the years at issue for the services he rendered in the Florida proceedings.

5. During the years at issue, petitioner maintained an office in Florida.

6. Petitioner did not maintain an office or other place of business in New York during the years at issue.

7. For the years at issue, petitioner filed federal income tax returns reporting a Florida home address. Petitioner reported business income and attached a schedule C for 2007, 2008 and 2009, reporting his principal business as "retired legal," with a business address in Florida.

8. Petitioner did not file New York income tax returns for the years at issue.

9. The Division of Taxation (Division) performed an audit for the years at issue, which began as a review of a change of domicile from New York to Florida. The Division conceded that petitioner had changed his domicile to Florida. However, the Division determined that petitioner improperly allocated his schedule C income to Florida. The Division's report of audit states:

> "The taxpayer received a large amount of money in tax year 2007 from a case he litigated in Florida. Schedule C income for 2008 and 2009 were relatively smaller compared to 2007. The taxpayer stated that all of his schedule C income from legal services was sourced to the state of Florida.
>
> However, the taxpayer is not licensed to practice law in the State of Florida. It was determined that he was admitted as counsel pro hac vice in the Circuit Court of the 12th Judicial Circuit in Sarasota County, Florida. This means that he was given special permission to help litigate this particular case even though you are not licensed to practice law in the state of Florida.
>
> Therefore, all of your income is subject to New York income tax, since your income was attributable to a profession carried out in New York State pursuant to Tax Law article 22, Section 631 as explained by the Court's decisions in the Vigliano and Carpenter cases."

10. On December 12, 2012, the Division issued to petitioner a Notice of Deficiency of personal income tax due in the amount of $68,260.00, plus interest, for the years 2007, 2008 and 2009.

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner contends that the income for the years at issue is attributable solely to legal services and work he conducted exclusively in Florida, in his Florida office and in the Sarasota County Circuit Court. Petitioner argues that, since none of the work was done in New York during the years at issue and he did not maintain a New York office, his income was not from New York sources. Petitioner argues that the Division misapplied Tax Law § 631 and the related regulations regarding tax on out-of-state income. Petitioner further contends that the Division improperly used his pro hac vice admission as a basis for taxation, and ignored his New Jersey bar admission. Petitioner also raises various constitutional arguments, contending that the Division's imposition of tax violated the Privileges and Immunities, Equal Protection and Due Process clauses of the United States Constitution.

12. The Division does not dispute that petitioner performed no services or work in New York during the years at issue, but argues that regardless of the actual location where the work was done, the income is subject to New York income tax as being attributable to a profession carried out in New York State, because the income was received from Florida on the basis of petitioner's pro hac vice admission.

CONCLUSIONS OF LAW

A. New York State imposes personal income tax on the income of nonresident individuals to the extent that their income is derived from or connected to New York sources (Tax Law § 601[e][1]). A nonresident individual's New York source income includes the net amount of items of income, gain, loss and deduction entering into the individual's federal adjusted gross income derived from or connected with New York sources, including income attributable to a business, trade, profession or occupation carried on in New York State (***see*** Tax Law § 631[a][1], [b][1][B]). Income from intangible property constitutes income from New York sources only to the extent that it is from property employed in a business, trade, profession or occupation carried on in New York (Tax Law § 631[b][2]; 20 NYCRR 132.5[a]; NY Const, art XVI, § 3).

B. The regulations provide that a business, trade, profession or occupation is carried on in New York by a nonresident when:

> "such nonresident occupies, has, maintains, or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity" (20 NYCRR 132.4[a][2]).

With respect to income and deductions partly from New York sources, the regulations state:

> "Since the New York adjusted gross income of a nonresident individual takes into account only items of income, gain, loss and deduction derived from or connected with New York State sources, an apportionment and allocation of items of income, gain, loss and deduction is required when a nonresident individual . . . carries on a business, trade, profession or occupation partly within and partly without New York State" (20 NYCRR 132.12[a]).

The regulations further provide that a business, trade, profession or occupation is carried on wholly within New York State when:

> "the activities described in section 132.4(a) of this Part are carried on solely within New York State, and no such activities are carried on outside New York State, even though the nonresident or such nonresident's representative travels outside New York State for purposes of buying, selling, financing or performing any duties in connection with the business, and even though sales may be made to, or services performed for, or on behalf of, persons or corporations located outside New York State. If a nonresident individual carries on a business, trade, profession or occupation wholly within New York State, all of such nonresident individual's items of income, gain, loss and deduction attributable to the business are derived from or connected with New York State sources" (20 NYCRR 132.13).

A business, trade, profession or occupation is carried on partly within and partly without the state when:

> "one or more of the activities described in section 132.4(a) of this Part is systematically and regularly carried on within New York State and one or more of such activities is systematically and regularly carried on outside New York State, or when one or more of such activities is systematically and regularly carried on both within and without New York State" (20 NYCRR 132.14).

When a business, trade, profession or occupation is carried on partly within and partly without New York State, the items of income, gain, loss and deduction derived from or connected with New York sources are determined by apportionment and allocation, pursuant to the regulations (Tax Law § 631[c]; 20 NYCRR 132.12). The regulations provide that:

> "(a) If a nonresident individual . . . carries on a business, trade, profession or occupation both within and without New York State, the items of income, gain,

loss and deduction attributable to such business, trade, profession or occupation must be apportioned and allocated to New York State on a fair and equitable basis in accordance with approved methods of accounting.

(b) If the books of the business are so kept as regularly to disclose, to the satisfaction of the Tax Commission, the proportion of the net amount of the items of income, gain, loss and deduction derived from or connected with New York State sources, the New York State nonresident personal income tax return of the taxpayer must disclose the total amount of such items, the net amount of such items allocated to New York State, and the basis upon which such allocation is made.

(c) If the books and records of the business do not disclose, to the satisfaction of the Tax Commission, the proportion of the net amount of the items of income, gain, loss and deduction attributable to the activities of the business carried on in New York State, such proportion will . . . be determined by multiplying (1) the net amount of the items of income, gain, loss and deduction of the business by (2) the average of the percentages described in subdivisions (d) through (f) of this section.

(d) *Property percentage*. (1) General. The property percentage is computed by dividing (i) the average of the values, at the beginning and end of the taxable year, of real and tangible personal property connected with the business and located within New York State, by (ii) the average of the values, at the beginning and end of the taxable year, of all real and tangible personal property connected with the business and located both within and without New York State. . . .

* * *

(e) *Payroll percentage*. The payroll percentage is computed by dividing (1) the total wages, salaries and other personal service compensation paid or incurred during the taxable year to employees, in connection with business carried on within New York State, by (2) the total of all wages, salaries and other personal service compensation paid or incurred during the taxable year to employees in connection with the business carried on both within and without New York State.

(f) *Gross income percentage*. The gross income percentage is computed by dividing (1) the gross sales or charges for services performed by or through an office, branch or agency of the business located within New York State, by (2) the total of all gross sales or charges for services performed within and without New York State. The sales or charges to be allocated to New York State include all sales negotiated or consummated, and charges for services performed, by an employee, agent, agency or independent contractor chiefly situated at, connected by contract or otherwise with, or sent out from, offices, branches of the business, or other agencies, situated within New York State" (20 NYCRR 132.15).

Neither the property percentage nor the payroll percentage are applicable here, as petitioner did not have any real or tangible personal property connected with a business located in New York State during the years at issue and did not pay any employees in connection with business carried on in New York State. Additionally, the Division does not contend that petitioner had any gross sales or charges for services performed by an office of the business located within New York State. The Division did not apply any method of apportionment and instead taxed 100% of petitioner's income.

C. The Division argues that all of the income petitioner earned in the years at issue is taxable as New York source income. The Division does not contend that petitioner performed any services in New York or maintained a New York office. Instead, the Division argues that "because the income was received from Florida on the basis of his pro hac vice admission, it is subject to New York income tax since it was attributable to a profession carried out in New York State." The Division does not cite to a specific regulation to support its position. Indeed, it does not even discuss the regulations that define when a business, trade, profession or occupation is carried on in New York and the appropriate allocation and apportionment for nonresident income. Rather, it argues that ***Carpenter v. Chapman*** (276 AD 634 [3d Dept 1950]) and ***Matter of Vigliano*** (Tax Appeals Tribunal, January 20, 1994) are controlling. However, an examination of these cases reveals that they are factually distinguishable from this matter. In both ***Carpenter v. Chapman*** and ***Matter of Vigliano*** the attorneys were only licensed to practice in New York State and nowhere else, had a New York office, maintained a law practice in New York, and did not have a law office outside of the state. The court in ***Carpenter v. Chapman*** narrowly framed the issue to be addressed as:

> "whether an attorney admitted to practice in this State and in no other, and who maintains his only established office for the practice of law in this State but whose residence is now in the State of New Jersey, is entitled to an apportionment of his income from legal work in determining his income tax liability as a nonresident."

The court found that the services the petitioner performed outside of New York were "in connection with his New York practice" and that "he could lawfully hold himself out as only entitled to practice law in the State of New York, and services performed elsewhere were incidental to the practice he maintained in this state. Except for petitioner's admission to practice in this State it would be beyond his authority to act as an attorney elsewhere" (***Carpenter v. Chapman*** at 636).

Similarly, in ***Matter of Vigliano***, which relied on the holding in ***Carpenter v. Chapman***, the Tribunal noted that the petitioner maintained an office and practiced law in New York State. The Tribunal found that because petitioner agreed that he was only licensed to practice in New York and nowhere else during the year at issue, the administrative law judge correctly determined that the income in question was attributable to petitioner's profession carried on in New York.

The holdings in ***Vigliano*** and ***Carpenter*** are consistent with the regulation, which provides that a business is carried on in New York State when a nonresident maintains an office or other place in New York where the business activities are systematically and regularly carried on (***see*** 20 NYCRR 132.4[a][2]). In each of those cases, the taxpayers maintained a New York office for the practice of law. Additionally, because the taxpayers in both of those cases did not have offices or other places where their business was systematically and regularly carried on outside of New York, those holdings are also consistent with the regulation, which provides that a business

is wholly within New York State when the activities described in section 132.4(a) are carried on solely in New York and no such activities are carried on outside New York (20 NYCRR 132.13).

In contrast, petitioner here did not maintain a New York office or other place within New York where his business affairs were systematically and regularly carried on during the years at issue. To the contrary, his only office was in Florida and his business activities relating to the Florida case from which he earned income were carried on solely in Florida during the years at issue. The only connection petitioner had with New York was his retention of his New York law license. Unlike the petitioners in ***Carpenter*** and ***Vigliano***, petitioner here was also licensed to practice law in New Jersey and was admitted to practice pro hac vice in Florida.

There is no support in the record for the Division's contention that "although the Petitioner also had New Jersey Bar membership, pro hac vice status was granted based on his New York law license." The Florida rules for foreign attorneys applying to appear in particular cases in a Florida court require that the attorney file a verified statement identifying all jurisdictions in which the attorney is an active member in good standing and currently eligible to practice law (***see*** Florida Rules of Judicial Administration, Rule 2.510[b][1]). Petitioner was eligible to practice law in both New Jersey and New York at the time of his pro hac vice application. As such, the Division's argument that the pro hac vice admission was solely attributable to his New York law license is without merit.

Petitioner's practice of law differs from the taxpayers in ***Carpenter*** and ***Vigliano*** in various respects. As noted above, those taxpayers were only entitled to practice law in New York, and "[e]xcept for [their] admission to practice in this State it would be beyond [their] authority to act as an attorney elsewhere" (***see Carpenter v. Chapman*** at 636). Petitioner here was licensed to practice in New Jersey and authorized to practice in the Florida court for the particular case,

which resulted in the income at issue. Petitioner was subject to the rules of the Florida court and his eligibility was based on the Florida court granting his motion for admission.

Moreover, unlike ***Carpenter v. Chapman***, where the court found that the taxpayer's services performed elsewhere were "incidental to the practice he maintained in [New York]," the services petitioner performed in Florida were not "incidental" to a practice he maintained in New York. Petitioner did not maintain a practice in New York. He simply maintained a New York licence. Contrary to the Division's contention, merely holding a license to practice in New York is not the equivalent of carrying on a profession in New York State. Rather, the regulations provide that a business or profession is carried on in New York if the business's activities are "systematically and regularly carried on" and conducted in New York with a fair measure of permanency and continuity (20 NYCRR 132.4[a][2]; ***see also Matter of Oxnard v. Murphy***, 19 AD2d 138 [1963], ***affd*** 15 NY2d 593 [1964] ["business is being carried on if it is here with a fair measure of permanency and continuity"]; ***Matter of Hayes v. State Tax Commission***, 61 AD2d 62 [1978] ["a nonresident who works in another State but who performs no work in New York is not subject to New York State tax liability"]). Since petitioner did not perform any legal services in New York, did not maintain an office or any other place in New York where business activities were conducted, and all of his business activities and office were restricted to Florida during the years at issue, it cannot be said that petitioner's business activities were "conducted in New York State with a fair measure of permanency and continuity" (20 NYCRR 132.4[a][2]).

D. The Division's contention that merely holding a license to practice law in New York subjects all income from legal services to New York's taxing authority is without merit. A professional license is an intangible asset (***see Keane v. Keane***, 8 NY3d 115 [2006]). Income from intangible personal property of a nonresident individual does not constitute items of income

connected with New York sources, except to the extent attributable to property employed in a business, trade, profession or occupation carried on in New York (20 NYCRR 132.5[a]). As such, the Division cannot assert tax merely based on a New York license.

E. The position espoused by the Division that 100% of petitioner's income is subject to New York State taxation regardless of where the services were performed is inconsistent with its own regulations. The rules set out in sections 132.4 and 132.12 - 132.15 of the regulations express an apportionment based on the percentage of business carried on systematically and regularly in New York State. If the Division wishes to depart from the rules provided by those sections and create a separate set of new rules for nonresident attorneys licensed to practice in New York, such change should be effected through legislation or adopted in regulations, as was done in the case of salespeople, persons performing duties on vessels, recipients of pensions and other retirement benefits, securities and commodity brokers, and professional athletes (20 NYCRR 132.17, 132.19, 132.20, 132.21 and 132.22, respectively; ***see Matter of Stuckless***, Tax Appeals Tribunal, August 17, 2006). Whether such regulation would survive constitutional scrutiny is not appropriate for discussion herein. Petitioner here does not challenge the regulations as currently in effect, but argues that the regulations were not properly applied. As discussed above, petitioner's argument is correct, in that the Division failed to apply the regulations in determining whether the income at issue was attributable to New York sources.

F. The Division's position that holding a New York law license is the equivalent of carrying on a profession for the practice of law in New York State is also inconsistent with New York Judiciary Law § 470 as was in effect during the years at issue. Judiciary Law § 470 required that nonresident attorneys who were licensed to practice in New York maintain a physical office in New York in order to practice law within the state (***see Schoenefeld v. State of***

New York, 25 NY3d 22 [2015]).[1] Petitioner did not have a New York office during the years at issue and thus was not authorized to practice in the state pursuant to Judiciary Law § 470. The Division's assertion that petitioner was automatically carrying on a profession of practicing law in New York by virtue of his law license is thus in contravention of section 470 as in effect for the years at issue. An attorney cannot be deemed to be engaged in the practice of law within the state merely because he is licensed in that jurisdiction.

G. Based on the foregoing, it is concluded that the Division improperly determined that petitioner's income for the years at issue was subject to New York income tax. As such, it is not necessary to address petitioner's constitutional arguments.

H. The petition of Patrick J. Carr is granted and the Notice of Deficiency dated December 12, 2012 is cancelled.

DATED: Albany, New York
July 23, 2015

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE

[1] Judiciary Law § 470 was declared unconstitutional in 2011 by the federal district court (***Schoenefeld v. State of New York***, 907 F Supp 2d 252 [ND NY 2011], but the law was in effect and applicable for the years at issue. Courts in other jurisdictions continue to enforce the statute (***see Webb v. Greater New York Auto. Dealers Assn, Inc.***, 93 AD3d 561 [2012]; ***EIC Associates, Inc. v. Nacirema Environmental Services Company, Inc.***, 2012 WL 10008215 [Sup Ct, NY County, Aug. 27, 2012, Schweitzer, J.]; ***Haciiette Eilipacchi Media US, Inc. v. Smile Photo Corp.***, 2011 WL 12306667 [Sup Ct, NY County, Oct. 13, 2011, James, J.]).