STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ULRICH V. AND BARBARA HOFFMAN	:	DECISION DTA No. 809966
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1986.	:	

Petitioners Ulrich V. and Barbara Hoffman, R.R. #2, Box 2102, Westport, New York 12993, filed an exception to the determination of the Administrative Law Judge issued on October 21, 1993. Petitioners appeared by Davis & Finucane, Esqs. (William M. Finucane, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Craig Gallagher, Esq., of counsel).

Petitioners filed a brief in support of their exception and a reply brief in response to the Division of Taxation's brief in opposition. Oral argument was heard on May 16, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the lump sum payment received by petitioner, Ulrich Hoffman, a nonresident employed in New York, constitutes New York source income subject to personal income tax.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioners, Ulrich V. and Barbara

Hoffman,[1] a Notice of Deficiency dated April 5, 1990 asserting additional income tax for the year 1986 in the amount of $5,220.99 plus interest of $1,295.15 for a total amount due of $6,516.14. Such Notice of Deficiency was supported by a statement of audit adjustments dated October 18, 1988. Subsequent to the issuance of the Notice of Deficiency petitioners submitted certain information to the Division which, after due consideration, resulted in the Division's determination that petitioners are entitled to a refund for tax year 1986, the details and computation of which will be discussed following an outline of the key facts.

Petitioners filed Form IT-203, New York Nonresident Income Tax Return for 1986 while residents of Connecticut. Pertinent to the controversy herein petitioners reported Federal wages of $475,897.00, with $137,123.00 as the portion attributable to New York. The portion allocated to New York was computed with reference to days worked in New York State and days worked outside the State, and is the subject of this controversy.

In correspondence dated August 22, 1988, which was made a part of the record, petitioners' representative provided the Division with details of the composition of Mr. Hoffman's W-2 compensation for 1986 in the amount of $475,897.29. Such amount included wages of $12,037.00 for each of the months of January and February 1986, accrued vacation pay for the years 1984 through 1986 in the amount of $23,823.29, and other compensation in the amount of $428,000.00.

Petitioner held the position of chief legal counsel for Trans World Airlines ("TWA"), a major domestic and international air carrier, until TWA's takeover by Carl Icahn, from which the payments in controversy arose. Petitioner had been professionally associated with TWA's legal department from 1964 until his official termination date of January 31, 1986.

In explanation of payments received by petitioner from Trans World Airlines for tax year 1986, the following correspondence dated January 20, 1986 was exchanged between Mr.

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[1]Petitioner Barbara Hoffman's name appears in this proceeding solely by virtue of the fact that petitioners filed a joint return. Hence, all references to "petitioner" shall be references to petitioner Ulrich Hoffman only.

Hoffman and his former employer:

"Dear Mr. Hoffman:

"In view of your anticipated termination of employment with TWA and the uncertainty of the status of your Senior Executive Severance Agreement, dated May 20, 1985, as clarified by agreement dated June 13, 1985 and amended by agreement dated August 8, 1985, TWA proposes the following for your consideration:

"1. Your last day of active status at TWA will be January 31, 1986 and you will be paid on the basis of your salary in effect during 1985 (i.e. $12,037 per month) through that date. For the period from February 1, 1986 through June 30, 1986 you will be available to TWA on a consulting basis. You will continue to be paid at the same rate for the month of February and at one-half that amount for each of the following four months. During this period you will be expected to cooperate and assist in the transfer of your duties to others and to do such other things as you may be requested to do within your previous areas of responsibility.

"2. Promptly upon execution of this letter by you, TWA will make a lump sum payment to you of $428,000, less appropriate statutory withholdings.

"3. You may retire in accordance with TWA's Retirement Plan, effective on a date of your choice, and will be entitled to all benefits and provisions thereof and all TWA policies in regard thereto except that you and your spouse will retain, for life, and your family members will retain, for as long as they are eligible, pass privileges on TWA on the same basis currently applicable to you.

"4. You will be entitled to office space and telephone usage, and reasonable access to secretarial help at TWA's offices at 605 Third Avenue through June 30, 1986.

"5. You will be entitled to reasonable use of out-placement services at TWA's expense.

"6. Your participation in the TWA Thrift, Retirement, Dental, Disability, Medical and Life Insurance Plans and Policies for non-contract Employees will be governed by the terms of those plans and policies with respect to non-contract employees in effect on the date of your termination.

"7. You will be entitled to payment of earned, banked and accrued vacation in accordance with normal procedures under the TWA Management Policy and Procedure Manual in effect on the date of your termination.

"8. Any reference herein to TWA shall be deemed also to be a reference to any successor corporation of TWA.

"9. You hereby agree that you (i) waive any claims you may have for employment or reemployment by TWA in the future, (ii) release and forever discharge TWA, its officers, shareholders, employees and agents and their affiliates from any and all claims and causes of action, known or unknown, to the date hereof, arising out of or relating to your employment by TWA or the termination thereof, including, but not limited to, breach of contract, impairment of economic opportunity, tort, or any federal, state or local legislation relating to discrimination in employment, or otherwise and (iii) waive any and all rights or claims you may

> have under your Senior Executive Severance Agreement, as amended, the TWA Stock Option Plan relative to both exercisable and non-exercisable stock options (which are cancelled hereby) and any and all other TWA plans, programs or policies, except for the payments and benefits expressly provided herein or due to you hereunder and as stated in Section 3.13 of the By-Laws of TWA, as amended to October 26, 1983."

Submitted into evidence was an undated, unsigned document that petitioner's representative described as a statement made by petitioner outlining his employment history at TWA and the circumstances surrounding his termination. In such statement, petitioner indicated that it had become apparent in the latter part of 1984 that a hostile takeover of TWA was imminent. Mr. Hoffman was among the key individuals charged with primary responsibility to handle the company's affairs with respect to the takeover efforts. As a direct result of the takeover of TWA, petitioner was notified of his impending termination. His statement further indicated that his negotiated termination agreement is evidenced by the correspondence between petitioner and TWA dated January 20, 1986 (reproduced above). Regarding the lump sum payment and other provisions of the proposal, he stated the following:

> "The consideration for the lump sum payment was my waiver of rights under the Severance Agreement and of discrimination, breach of contract, tort and other listed claims against TWA and/or Mr. Icahn . . . It should be noted, as well, that it was understood that upon termination I should not report for work or communicate with my staff as I had previously done, and that I should be available only on call. The office space provided under the July 20, 1986 [sic] letter was located in a portion of the TWA offices which served as a file cabinet and records storage area and was intended for use only in conjunction with my personal efforts to find alternate employment. It was not intended for use by me in regard to any matters relative to TWA business. Indeed, I was expected totally to divorce myself from TWA business and its facilities. In short, I was a persona non grata at TWA's executive offices in New York City."

By correspondence dated November 7, 1990, the Division notified petitioner's representative that it had reviewed petitioners' income tax file and Request for Conciliation Conference. In addition to its request for additional information, the Division's correspondence stated the following:

> "If a pension or other retirement benefit of a non-resident individual is attributable to former services performed in New York State, it does not constitute an annuity. Therefore, it is considered compensation for personal services and is taxable for New York State personal income tax purposes.
>
> "Section 131.20 provides for proper allocation of pension or other retirement

income which constitute taxable income to New York State. However, in order to make this computation, we will need copies of the 1983, 1984 and 1985 tax returns."

Petitioner provided the Division with the requested returns.

The Division adjusted the notice in issue (and revised a previously incorrect computation) by the following calculation provided in its correspondence addressed to petitioner's representative dated February 11, 1991:

"The 1986 federal wages have been broken down into the following three components: 1) regular wages for January, 2) severance pay, and 3) consulting fees.

"Based on prior year tax returns, the income earned in and out of New York State was determined under Regulation Section 131.20. The formula used consisted of total wages earned in New York State for the tax year 1986 plus the prior three years over the total wages earned times the severance pay. This determines the amount allocable to New York State.

Year	Federal Wages	New York Wages
1983	$180,602.00	$153,053.00
1984	174,493.00	149,885.00
1985	179,361.00	165,221.00
1986	12,037.00	12,037.00
Total	$546,493.00	$480,196.00

480,196 x 427,749 = New York Income		$375,820.00
546,493 Plus regular wages		12,037.00
Wages - NY income		387,857.00
IRA		(1,834.00)
Corrected New York Income	$386,023.00	

	1986 Federal	1986 State
Income originally reported	$477,606.00	$112,904.00
Wage change		250,734.00
IRA change		(1,258.00)
Corrected New York income		$362,380.00
Less: Itemized deductions ($33,791 x .7587)		25,637.00
Less: Exemptions ($1,700 x .7587)		1,290.00
New York Taxable Income		335,453.00
Tax on above		43,871.00
Less: Tax benefit		(12,142.00)
Balance ($362,380 x .0045)		31,729.00
Other taxes (Form IT-203ATT)		70.00
Balance		31,799.00
New York City tax		1,631.00

Balance	33,430.00
Less: Tax withheld	(35,392.00)
Net New York Personal Income Tax Refund	$ 1,962.00"

OPINION

The Administrative Law Judge, citing Matter of Laurino (Tax Appeals Tribunal, May 20, 1993), held that petitioner did not establish entitlement to future employment and, therefore, that this case was not like Matter of Donahue v. Chu (104 AD2d 523, 479 NYS2d 889). The Administrative Law Judge also found no support in the record for petitioner's contention that the lump sum payment was consideration received in exchange for petitioner's waiver of rights under the severance agreement and other potential claims against petitioner's new employer and owner. Absent evidence to the contrary, the Administrative Law Judge determined that claims referred to in the January 20, 1986 agreement as being waived by petitioner must have arisen from prior employment and, thus, were derived from services performed in New York.

The Administrative Law Judge found that the lump sum payment received constituted a retirement benefit pursuant to 20 NYCRR 131.4(d) and was attributable to services performed both within and without New York. The Administrative Law Judge found the Division correctly applied allocation rule 20 NYCRR former 131.20 to determine what portion of the lump sum payment was sourced to New York.

On exception, petitioner argues the payment made is analogous to the payment made to the taxpayer in Matter of Donahue v. Chu (supra). Petitioner argues the termination agreement entered into between petitioner and his former employer is the only agreement relevant to the lump sum payment. Petitioner argues there is no evidence in the record to suggest the lump sum payment was a retirement benefit or accrued wages. Petitioner contends that the payment is more accurately characterized as a settlement negotiated to avoid litigation.

Petitioner further argues that the payment was not compensation for services rendered within New York State. Petitioner states that the record reflects that the payment was given as consideration for the termination agreement and did not represent compensation from a "business, trade, profession or occupation" carried on in New York. Petitioner contends that the

lump sum payment made under the terms of the letter agreement dated January 20, 1986 should be viewed as income from intangible personal property and was not attributable to property employed in a business, trade, profession or occupation carried on in New York State.

Petitioner further argues that there is no proof that the lump sum payment was a retirement benefit. Petitioner then notes that the only reason pensions or other retirement benefits are referred to in 20 NYCRR former 131.4(d) is to distinguish them from annuities and that petitioner is not claiming that the payments were an annuity.

Petitioner also argues that the Administrative Law Judge failed to address petitioner's position that the Division improperly applied its own regulations for the allocation of income. Petitioner argues the income should have been allocated in accordance with 20 NYCRR former 131.18 rather than pursuant to 20 NYCRR former 131.20. Petitioner reasons that there is no evidence in the record to establish the payment was a retirement benefit, nor to establish that he worked in New York for more than six months in 1986. Petitioner does note, however, that there is evidence in the record documenting the days in which he worked in New York and Connecticut.

On exception, the Division urges the Tax Appeals Tribunal to affirm the Administrative Law Judge's determination in every respect. Relying on Matter of Laurino (supra), the Division states that petitioner failed to establish the basis for the lump sum payment. The Division contends that petitioner's characterization of the January 20, 1986 letter as a "termination agreement" is consistent with the Division's position that amounts received in connection with termination of employment are retirement benefits pursuant to 20 NYCRR former 131.4(d). Further, the Division points out that petitioner has admitted that the bases for any potential claims by Mr. Hoffman were not made part of the record. Absent such evidence, the Division argues there is nothing in the record to support petitioner's claim that the payment was in settlement of future claims.

With regard to petitioner's argument that the lump sum payment should be viewed as income from intangible personal property, the Division notes that such an assertion is

unsupported by the record.

The Division contends that petitioner incorrectly argues that there is no definition for the phrase "other retirement benefit." The Division, citing 20 NYCRR former 131.4(d), points out that the phrase is defined and it includes "amounts received in connection with the termination of employment."

The Division also contends that petitioner's argument that the Administrative Law Judge failed to address petitioner's alternate computation for allocation based upon days worked in and out of New York is inaccurate. The Division argues the Administrative Law Judge could not address the argument because petitioner submitted no proof that he performed any services for TWA after January of 1986. The Division submits that the schedule of days worked outside of New York State appears to relate solely to attempts to locate new employment and not services for TWA.

In his reply brief, petitioner argues the termination letter could not be reasonably determined to be in recognition of past services, given that his new employer was terminating petitioner's employment. Relying on the Administrative Law Judge's determination in Matter of McSpadden (Tax Appeals Tribunal, September 15, 1994), petitioner also argues that it is irrelevant that the severance agreement was not included in the record, given that it was superseded by the "termination agreement."

We first turn to petitioner's claim that the lump sum payment was not given for consideration derived from or connected to New York sources, but rather for the relinquishment of future claims.

We affirm the determination of the Administrative Law Judge.

Tax Law former § 632(a) provided that the New York adjusted gross income of a nonresident was:

> "the sum of . . . the net amount of items of income, gain, loss and deduction entering into his adjusted federal gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources."

Tax Law former § 632[b][1][B] provided that income "derived from or connected with New

York sources" shall be attributable to "a business, trade profession or occupation carried on in this state."

In order to prevail, it was incumbent upon petitioner to establish that the lump sum payment was not secured or earned pursuant to activities connected with or derived from New York sources (Matter of Laurino, supra). In making this determination, the controlling factor is the consideration given by petitioner in exchange for the right to the income at issue (Matter of Laurino, supra, citing Matter of Halloran, Tax Appeals Tribunal, August 2, 1990). Where the consideration has no connection with New York, the income will not be subject to tax by the State (Matter of Donahue v. Chu, supra). Where a taxpayer relinquishes his right to future employment and such right has no connection to New York, the income paid for the relinquishment will not be taxable in New York (see, Matter of Donahue v. Chu, supra; Matter of McSpadden, supra).

Turning to the facts of this case, we find they are distinguishable from the decisions petitioner has relied on in his briefs. In Matter of Donahue v. Chu (supra) and Matter of McSpadden (supra), taxpayers had clearly established, through documentary evidence, that the subject payments were not derived from or connected to New York sources. Petitioner, by submitting the January 20, 1986 letter and a written statement, has raised two issues. The first is whether petitioner relinquished the right to future employment connected to New York. The second is what portion, if any, of the lump sum payment is attributable to such consideration. We find neither issue can be resolved in petitioner's favor.

The evidence presented by petitioner, at best, merely suggests that some portion of the consideration was given in relinquishment of future employment rights, without addressing whether these future rights were connected to New York. Specifically, paragraph nine of the "termination agreement" provides that petitioner agrees to "waive any claims [petitioner] may have for employment or reemployment by TWA in the future" (January 20, 1986 letter, p. 2). The remaining portion of the paragraph, however, raises the prospect that some part of the lump sum payment should be sourced in New York because it provides that petitioner relinquishes

claims arising out of or relating to his employment with TWA. Claims arising from past employment in New York State would be derived from or connected to New York sources.

Unfortunately, in this matter, we are constrained to mere conjecture, given the dearth of evidence in the record. As noted by the Administrative Law Judge, petitioner has chosen not to include the severance agreement into evidence, nor any employment contract that may have existed, nor any other evidence. As a result, the record does not allow for a determination that petitioner had a right to future employment. Even if such a determination were possible, we would still be unable to allocate any portion of the lump sum payment between consideration secured by New York and non New York sources, i.e., the amount related to the past versus the future employment.

As a result, petitioner has not met his burden. Given petitioner's failure to present proof as to the incorrectness of the deficiency, petitioner has surrendered to the statutory presumption of correctness and the determination must be sustained (Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174).

With regard to petitioner's claim that the Administrative Law Judge erred in allowing the Division's calculations pursuant to 20 NYCRR former 131.20, we conclude that petitioner raised this issue on submission and it was adequately and fully addressed in the Administrative Law Judge's determination. The Administrative Law Judge held that the lump sum payment was a retirement benefit under 20 NYCRR former 131.4(d) and that this regulation directed allocation pursuant to 20 NYCRR former 131.20. As a result, we affirm the determination of the Administrative Law Judge for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ulrich V. and Barbara Hoffman is denied;

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

3. The petition of Ulrich V. and Barbara Hoffman is denied; and

4. The Notice of Deficiency dated April 5, 1990, as modified, is sustained.

DATED: Troy, New York
November 23, 1994

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

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