STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ESTATE OF MARGUERITE LAPORTE	:	DECISION DTA No. 811507
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1987.	:	

Petitioner the Estate of Marguerite LaPorte, William B. Warren, Executor, c/o Dewey Ballantine, 1301 Avenue of the Americas, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on September 8, 1994. Petitioner appeared by Dewey Ballantine (Daniel K. Devine, Michael J. Close and Amy E. Coates, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a letter in lieu of a brief referring the Tax Appeals Tribunal to its brief filed before the Administrative Law Judge and statements and arguments set forth in its exception. The Division of Taxation filed a letter in lieu of a brief referring the Tax Appeals Tribunal to its brief filed before the Administrative Law Judge. This letter was received on December 13, 1994, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner is entitled to the $20,000.00 reduction from Federal adjusted gross income provided by Tax Law § 612(c)(3-a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge.[1] These facts are set forth below.

Cloyd LaPorte was a former partner of the Dewey, Ballantine, Bushby, Palmer & Wood ("Dewey Ballantine") law firm who had retired prior to the tax year at issue. Mrs. Marguerite LaPorte was not a lawyer nor was she a partner of Dewey Ballantine at any time.

Michael J. Close, Esq., a partner in Dewey Ballantine in charge of the tax matters of the firm, testified that he was familiar with the partnership agreement which generated the payments in issue. According to Mr. Close, the agreement covers those situations pertaining to separation, for whatever reason, from the partnership of its partners and for retirement benefits payable to partners and their spouses. Mr. Close testified that Mr. LaPorte entered into a written agreement with Dewey Ballantine under which he received lifetime benefits upon retirement. Mr. Close further testified that the payments at issue were paid pursuant to the agreement and were "payments scheduled basically monthly." In addition, according to Mr. Close, the retirement payments were pursuant to a fixed formula set forth in the agreement.

Mr. Close stated that the agreement provides that, in the case of a widow, the payments would last the lesser of her life or 25 years from the date the partner commenced receiving retirement payments, and the payments were consideration for services rendered by Mr. LaPorte to Dewey Ballantine as a partner in such law firm. Under the agreement, according to the testimony of Mr. Close, Mr. LaPorte's partnership capital account with Dewey Ballantine was returned to him at or before his death so the only interest that Mrs. LaPorte had was the right to receive payments under the agreement. Thus, Mr. Close concluded that the retirement

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[1]On exception, petitioner disagrees with finding of fact "6" of the Administrative Law Judge's determination which rejected certain proposed findings submitted by petitioner and requests the Tax Appeals Tribunal to incorporate said facts herein. Our review of the record reveals that the Administrative Law Judge correctly found the facts.

payments made to petitioner under the agreement were not a return of Mr. LaPorte's partnership capital account.

Mr. Close further testified that Mr. LaPorte's capital account was refunded to him under a different provision of the agreement than that which provided for the retirement benefits. In response to a question concerning Mr. LaPorte's relationship to the partnership, Mr. Close stated that he did not "remember when the Judge [Mr. LaPorte] became a member of the firm, it was probably in the teens, if not, no later than the 1920's. He was a partner until his death, I think was around 1980." Mr. Close stated that had Mr. LaPorte survived, he would have been older than 59 1/2 in 1987. Finally, Mr. Close testified that the bulk of capital "would have been" received by Mr. LaPorte by the time he was 69 and whatever the small amount of capital returns after 69 was paid to his estate immediately after his death.

The agreement was not submitted into the record of this matter because, according to petitioner's representatives, it contained very confidential matters.

Mrs. Marguerite LaPorte filed a New York State Resident Income Tax Return, Form IT-201, for the year 1987. On the return, Mrs. LaPorte subtracted from Federal adjusted gross income $20,000.00 representing the pension and annuity income exclusion provided by Tax Law § 612(c)(3-a). The payment to Mrs. LaPorte was treated by Dewey Ballantine on its partnership return as a distribution of partnership income. Mr. Close testified that hethought that it was probably not the correct treatment for the payment to Mrs. LaPorte.

On April 5, 1991, the Division of Taxation ("Division") issued to petitioner a Notice of Deficiency for the year 1987 asserting tax of $1,750.30, plus interest. The notice was based upon the Division's disallowance of the $20,000.00 pension and annuity income exclusion claimed by Mrs. LaPorte on her 1987 resident income tax return.

Petitioner submitted proposed findings of fact "1" through "11". Proposed findings "1", "6", "7" and "11" are accepted and have been, in substance, incorporated into the Findings of Fact herein. Proposed findings "2", "3", "4", "5", "8", "9" and "10" are rejected because they are not supported by the record.

OPINION

The Administrative Law Judge held that the evidence produced at hearing was insufficient to establish that the payments made by the partnership qualified as an annuity under section 612(c)(3-a) of the Tax Law and, as such, disallowed the $20,000.00 pension and annuity income exclusion on Mrs. LaPorte's 1987 resident income tax return. The Administrative Law Judge stated that "petitioner . . . has failed to establish that the payments from Dewey Ballantine were made periodically and were attributable to an employer-employee relationship or as contributions from a retirement plan" (Determination, conclusion of law "C").

On exception, petitioner asserts that the payments received by Mrs. LaPorte were payments received "on a monthly periodic basis, were attributable to personal services performed by Mr. LaPorte prior to his retirement from employment and arose from an employer-employee relationship" and were not a return of Mr. LaPorte's capital account (Exception, Attachment A, ¶ 9). Petitioner also asserts that the treatment of these payments as a distribution of partnership income on Dewey Ballantine's partnership return does not mandate a finding that such payments were indeed distributions of partnership income.

In response, the Division contends that the evidence presented at hearing is insufficient to establish that the payments received by Mrs. LaPorte were annuity payments as defined by Tax Law § 612(c)(3-a). The Division also contends that the pension and annuity exclusion does not apply to partners just employees.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law former § 612 provides, in pertinent part, that:

> "(a) General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.
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> * * *
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> "(c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:
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> * * *

> "(3-a) Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half . . . to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment, which arise (i) from an employer-employee relationship or (ii) from contributions to a retirement plan which are deductible for federal income tax purposes . . . . Where a payment would otherwise come within the meaning of the term 'pension and annuities' as set forth in this paragraph, except that such individual is deceased, such payment shall, nevertheless, be treated as a pension or annuity for purposes of this paragraph if such payment is received by such individual's beneficiary . . . ."

Thus, in order to qualify for the exclusion, the plain language of the statute mandates that the payments are: (1) pension and annuity payments; (2) included in Federal gross income; (3) received periodically; and (4) attributable to personal services arising from an employer-employee relationship or from contributions to a retirement plan which are deductible for Federal income tax purposes.

First, the record is unclear as to whether the payments at issue were made on a periodic basis. The only evidence of how the payments were calculated and/or paid was Mr. Close's testimony that payments were scheduled basically monthly pursuant to a fixed formula in the partnership agreement. There was no evidence presented, either documentary or testimonial, as to exactly how the payments were calculated. There was no testimony as to whether Mrs. LaPorte had the absolute right to receive payments on a periodic basis regardless of the partnership's profits or available funds or whether this right was contingent on the partnership's earnings. In sum, the evidence presented was insufficient to determine whether the payments were made on a periodic basis.

A second basis for denying petitioner the pension and annuity exclusion is that the statute specifies that the payments must arise from an employer-employee relationship. Here, this element of the statute is absent. Mr. LaPorte was a partner, and not an employee of the partnership. Petitioner, relying on Matter of Pidot v. State Tax Commn. (118 AD2d 915, 499 NYS2d 482, affd 69 NY2d 837, 513 NYS2d 965), argues that the annuity also applies to former partners. We disagree.

In Matter of Pidot v. State Tax Commn. (supra), a nonresident taxpayer claimed a refund asserting that pension payments received by him as a former partner in a New York partnership

were excludible from his New York adjusted gross income pursuant to 20 NYCRR former 131.4(d). The former State Tax Commission denied the refund claiming that the pension and annuity rule contained in 20 NYCRR 131.4(d) applied only to former employees and not to former partners. The Appellate Division, Third Department disagreed, holding that there was nothing in the relevant statute upon which 20 NYCRR former 131.4(d) was based "which would justify disparate tax treatment for former employees and former partners who retain no interest in the partnership and do not share in partnership profits or losses" (Matter of Pidot v. State Tax Commission, supra, 499 NYS2d 482, 483).[2] "In contrast, here the relevant statutory language is explicitly limited to employees" (Matter of Blue, Tax Appeals Tribunal, April 6, 1995).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Estate of Marguerite LaPorte is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of the Estate of Marguerite LaPorte is denied; and
4. The Notice of Deficiency dated April 5, 1991 is sustained.

DATED: Troy, New York
May 18, 1995

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

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

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[2]20 NYCRR former 131.4(d) was based upon Tax Law former § 632(b)(2) which provided as follows:

"(b) Income and deductions from New York sources.

* * *

"(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession or occupation carried on in this state."