STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GAIL B. DeGROAT	:	DECISION DTA NO. 821266
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2000.	:	

Petitioner, Gail B. DeGroat, filed an exception to the determination of the Administrative Law Judge issued on February 7, 2008. Petitioner appeared by Politi and Magnifico, LLC (Peter E. Politi, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a brief in opposition to the exception. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation correctly determined that petitioner failed to report additional income for the year 2000 and, therefore, owed additional personal income tax for such year.

FINDINGS OF FACT

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

Petitioner, Gail B. DeGroat, timely filed a New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) for the year 2000.[1] On line one of this return, petitioner reported wages, salaries and tips, etc., of $659,634.00 for federal income tax purposes and $103,974.00 for New York State income tax purposes, a difference of $555,660.00. As detailed below, this difference was a "special payment" received by petitioner from her former employer.

Petitioner had been employed in New York State by The MacManus Group, Inc. (the Company) or a successor entity until December 31, 1999, at which point she retired. It is undisputed that petitioner was a resident of Pennsylvania during the year 2000, and was not a resident of New York State.

On September 30, 2004, the Division of Taxation ("Division") issued to petitioner a Notice of Deficiency asserting additional personal income tax due for the year 2000 in the amount of $20,566.68, plus interest and penalties. This assertion of additional tax was computed upon the Division's allocation and treatment of some $412,205.00 out of the $555,660.00 special payment as New York source income for the year 2000. Specifically, the Division divided petitioner's New York State income for the years 1997, 1998 and 1999 ($309,895.00) by petitioner's federal income for such years ($495,899.00) to arrive at petitioner's New York allocation percentage of

[1] Petitioner filed her return jointly with her husband, John A. DeGroat. However, the amounts in question here relate solely to petitioner, Gail B. DeGroat.

62.49 percent. The Division then applied this allocation percentage to petitioner's federal wages, salaries and tips, etc. for 2000 ($659,634.00) to arrive at New York source wage, salary and tip income of $412,205.00. In turn, reducing such amount by New York wage, salary and tip income ($103,974.00), as reported on petitioner's Form IT-203 for 2000, resulted in additional New York source wage, salary and tip income of $308,231.00 for such year. Thus, the Division's assessment of additional tax is premised upon the assertion that the special payment constituted severance pay or deferred compensation for services rendered by petitioner as an employee during her prior years of employment in New York, allocable to and taxable by New York as New York source income based on the number of days worked within New York compared to the total number of days worked within and without New York.

The $555,660.00 special payment was received by petitioner in April 2000, and was paid pursuant to a letter agreement, termed a Settlement Agreement and Release (Agreement), between petitioner and her former employer. The Agreement provided in the record was accompanied by a cover letter from Morrison, Cohen, Singer & Weinstein, LLP, the law firm that represented petitioner in negotiations with the Company.

Paragraph 1(a) of the Agreement provided, as follows:

> In consideration of this Agreement, and provided you do not revoke this Agreement . . . , the Company agrees to pay you a special payment of $555,660.00, less all applicable withholdings, payroll taxes and contributions. This amount will be paid to you in a lump sum within ten (10) days following [the effective date of the Agreement].

Paragraph 1(b) of the Agreement specified four additional items of payment that petitioner received in April 2000, including a Growth and Accumulation Plan (GAP) payment of $25,780.00, a Profit Appreciation Account and Deferred Profit Allowance Account (PAC/DPA)

payment of $103,974.00, a payment of $1,472.28 for seven accrued and unused vacation days, and a net retirement check payment of $1,000.00. Neither the dollar amounts nor the tax treatment of these items are in issue in this proceeding. Paragraph 1(d) of the Agreement specified that, except for the dollar amounts specified above (per Paragraph 1[a], [b]), and except (per Paragraph [c]) for petitioner's continuing eligibility to participate in the Company's retiree medical plan and retiree life insurance plan and her retention of any vested benefits under the Company's pension and 401(k) plan, petitioner would no longer be entitled to receive any further compensation or other monies from the Company or its affiliates.

Paragraph 2 of the Agreement, which is specifically relevant to the special payment, provides as follows:

> (a) As used in this Agreement, the term "claims" shall include all claims, covenants, warranties, promises, undertakings, actions, suits, causes of action, attorneys' fees, obligations, debts, accounts, judgments, losses and liabilities, or [sic] whatsoever kind or nature, in law, equity or otherwise.
>
> (b) For and in consideration of the payment set forth in paragraph 1(a) above [the Special Payment], you, for and on behalf of yourself and your heirs, administrators, executors, and assigns, effective the date hereof, do fully and forever release, remise and discharge the Company, its direct and indirect parents, subsidiaries and affiliates (including, without limitation, B/com3 Group, Inc.), together with their respective officers, directors, parents, shareholders, employees and agents (collectively, the "Group") from any and all claims which you had, may have had, or now have against the Company and the Group, for or by reason of any matter, cause or thing whatsoever, including any claim arising out of or attributable to your employment or the termination of your employment with the Company, including but not limited to claims of breach of contract, wrongful termination, unjust dismissal, defamation, libel or slander, or under any federal, state or local law dealing with discrimination based on age, race, sex, national origin, handicap, religion, disability or sexual preference. This release of claims includes, but is not limited to, all claims arising under Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Civil Rights Act of 1991, the Family Medical Leave Act, the Equal Pay Act,

> the New York Human Rights Law, the New York City Administrative Code, and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on an employer's right to terminate the employment of employees.
>
> (c) You specifically release all claims under the Age Discrimination in Employment Act relating to your employment.
>
> (d) This release of claims specifically includes, but is not limited to, all claims regarding any interest or entitlement in the Company, the Group, or any of them, including any equity, redemption proceeds or rights, stock, membership interest, profits, dividends, sale proceeds or other participation of any kind in the Company or any of the Group. Without limitation to the foregoing, you expressly acknowledge that you have no ownership interest or rights to obtain ownership interest in any member of the Group, including without limitation B/com3 Group, Inc.
>
> (e) You are specifically agreeing to the terms of this release because the Company has agreed to pay you money to which you were not otherwise entitled under the Company's policies, and has provided such other good and valuable consideration as specified herein. The Company has agreed to provide this money because of your agreement to accept it in full settlement of all possible claims you might have or ever had, and because of your execution of this Agreement.
>
> (f) The Company represents that, as of the execution of this Agreement, it is not aware of any claims which it has against you, for or by reason of any matter, cause or thing whatsoever, including any claim arising out of or attributable to your employment or your resignation.

Paragraph 4(a) of the Agreement imposed an obligation of confidentiality on petitioner with respect to the Agreement, as follows:

> You agree to keep secret and strictly confidential the existence of this Agreement and further agree not to disclose, make known, discuss or relay any information concerning this Agreement, or any of the discussion leading up to this Agreement, to anyone other than members of your immediate family, and/or your tax advisor or attorney, provided that those to whom you make such disclosure agree to keep said information confidential and not disclose it to others. The foregoing shall not prohibit disclosure (I) as may be ordered by any regulatory agency or court or as required by other lawful process, or (ii) as may be necessary for the

> prosecution of claims relating to the performance or enforcement of this Agreement.

Petitioner's Form IT-203 for 2000 included an attached Wage Allocation Statement indicating that the $555,660.00 amount of the special payment represented "Wages allocated to Pennsylvania." This statement included the following explanation:

> Allocation based on fact that amount indicated was received due to a legal settlement subsequent to work related activity. Taxpayer (spouse) was a resident of Pennsylvania when received. No New York State related activity was necessary for this settlement, which is contained in a confidential agreement.

Petitioner included the special payment as part of her taxable compensation on her Pennsylvania income tax return (Form PA-40) for 2000. Petitioner claimed a Pennsylvania Resident Credit in the amount of $2,911.00 on PA Schedule G for the year 2000, on the basis that $103,974.00 of her income had been reported and subjected to income tax in both Pennsylvania and New York State (***see***, Finding of Fact above).

The record includes a GAP (Growth Accumulation Plan) Settlement Schedule showing petitioner's account balance due ($25,780.00) as of December 31, 1999. This amount was paid to petitioner in April 2000 (***see***, Finding of Fact above). The GAP Settlement Schedule reflects the number of shares and the years of their purchase, the cost per share for such stock, the total cost basis for petitioner's stock ($15,760.00), and the resulting amount of capital gain ($10,020.00) from the stock redemption. The GAP payment amount ($25,780.00) was not included in petitioner's New York source income or subjected to New York tax, presumably because the same resulted from the disposal of an intangible (shares of stock) by a nonresident.

By a letter dated November 3, 2005, petitioner's representative stated that the special payment amount was a "negotiated dollar figure which was somewhat commensurate with the stock buyouts of senior management when [the Company] was sold." The letter goes on to state that "[I]n November 1985 vice-presidents and below had to turn in their stock in [the Company] at a set value . . . . This amount was paid to [petitioner] and is referred to as GAP in the amount of $25,780.00. The negotiated amount is the additional value of these shares which was paid to senior management upon the sale [of the Company], but not to [petitioner] until a lawsuit was brought."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that for petitioner to prevail, she was required to show that the income in question was not secured or earned pursuant to activities connected with or derived from New York sources. However, the Administrative Law Judge concluded that the evidence did not establish that the Special Payment was for anything other than severance pay or retirement pay properly treated as source income allocable to and taxable by New York.

ARGUMENTS ON EXCEPTION

Petitioner continues to urge that the Special Payment was capital in nature. Petitioner focuses her attention on paragraph 2 of the Agreement, subparagraph (d) and requests that such contract language be given its due weight. Petitioner asserts that she accepted the terms and logistics of the Special Payment in order to end aggravated negotiations.

Petitioner maintains that the existence of the Pennsylvania audit and its related findings be considered and given its proper weight.

In opposition, the Division argues that the Administrative Law Judge correctly determined that petitioner failed to show that the income in question was not secured or earned pursuant to activities connected with or derived from New York sources (***see***, Division's brief in opposition, p. 5). The Division states that the evidence submitted was not sufficient to independently demonstrate that the Special Payment was in the nature of a capital item. Thus, the Division agrees with the Administrative Law Judge that it properly allocated the amount of the Special Payment to New York.

With respect to the audit conducted in Pennsylvania, the Division states that it is not bound by another taxing jurisdiction's determination of petitioner's income and that the Division is entitled to conduct its own examination and reach its own determination. Therefore, the Division claims that the audit results from Pennsylvania are irrelevant to this proceeding. The Division also maintains that the negligence penalty imposed by Tax Law § 685(b) be sustained in full due to petitioner's failure to submit any basis for abatement.

OPINION

We affirm the determination of the Administrative Law Judge.

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]). Income attributable to a business, trade, profession or occupation carried on in New York State is derived from or connected to New York sources (Tax Law § 631[b][1][B];[2]). When a nonresident individual, such as petitioner herein, renders personal services as an employee, the New York source income includes such compensation for personal services

entering into her federal adjusted gross income, but only to the extent such services were rendered within New York State (Tax Law § 631; 20 NYCRR 132.18).

In this case, the burden of proof was on petitioner to demonstrate that the Special Payment she received was not secured or earned pursuant to activities connected with or derived from New York sources. As we stated in ***Matter of Laurino*** (Tax Appeals Tribunal, May 20, 1993):

> in determining whether income is "derived from or connected with New York sources" it is necessary to identify the activity upon which the income was secured or earned (***Matter of Halloran***, Tax Appeals Tribunal, August 2, 1990). Thus, in making this determination, the consideration given by petitioner in exchange for the right to the income at issue is the controlling factor.

Petitioner claims that the Special Payment represented the additional value of the shares that she relinquished in connection with the sale of the Company, which was commensurate with the stock buyouts of senior management and as such was in the nature of a capital item. We agree with the Administrative Law Judge that this mere unsupported claim does not rise to the level of proof required to demonstrate that the payment was, in fact, a stock buyout and, thus, a capital item. As noted by the Administrative Law Judge, the Agreement is silent on this issue.

Petitioner asserts that the Agreement states that the Special Payment was made in consideration for petitioner's settlement and release of any possible claims that she might have against the company. However, there was no evidence presented that referred to any specific claim that petitioner had against the Company (***see***, ***Matter of DeLardi & DiFonzo***, Tax Appeals Tribunal, March 18, 1999 [wherein we held that the record contained no evidence to support the claim that a lawsuit was pending such that any income received through a settlement agreement would fall within the income exclusion

provision of Internal Revenue Code § 104(a)(2)]). Thus, we find that petitioner failed to sustain her burden of proof to demonstrate that the Special Payment was not derived from or connected to a New York source. Therefore, we agree with the Administrative Law Judge's determination that the Division properly determined that petitioner owed additional income tax to New York for the year 2000.

Petitioner argues that the state of Pennsylvania conducted an audit of presumably the same fact pattern and such result ended with no additional income tax due. Despite petitioner's assertion that Pennsylvania audited the same fact pattern, the determination made in Pennsylvania has no bearing on whether the Special Payment was derived from or connected to New York sources absent any evidence to the contrary (***see***, 20 NYCRR 159[4]).

Lastly, petitioner claims that the imposition of negligence penalties is harsh. Clearly, this assertion does not suffice as a valid basis for abatement of such penalty in this case. Therefore, we sustain the Notice of Deficiency in its entirety.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gail B. DeGroat is denied;

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

3. The petition of Gail B. DeGroat is denied; and

4. The Notice of Deficiency dated September 20, 2004 is sustained.

DATED:Troy, New York
October 23, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner