STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN A. AND DEBORAH D. LAURINO	:	DETERMINATION DTA NO. 807912
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1988.	:	

Petitioners, John A. and Deborah D. Laurino, 8 River Lane, Westport, Connecticut 06880, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1988.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 26, 1991 at 1:15 P.M. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether the severance payment to petitioner John A. Laurino, a nonresident employed by a New York employer, constituted New York source income subject to personal income tax.

II. Whether the days in 1988 following Mr. Laurino's retirement are to be included in the wage allocation formula for purposes of computing petitioners' personal income tax.

FINDINGS OF FACT

On January 5, 1990, the Division of Taxation issued to petitioners, John A. and Deborah D. Laurino, a Notice of Deficiencyasserting personal income tax for the year 1988 in the amount of $1,835.63, plus interest. The Notice of Deficiency also indicated a credit in the amount of $69.73. The notice was issued as a result of an audit of petitioners' personal income tax return for 1988.

The Statement of Personal Income Tax Audit Changes, dated November 24, 1989,

indicated the following adjustments to petitioners' personal income tax:

"Based on the information furnished your allocation of wages is as follows:

Total Days		36
Sundays	5	
Saturdays	5	
Holidays	1	
Total Nonworking Days		11
Total Working Days		25
Days worked outside NYS		3
Days worked inside NYS		22

22/25 x $45,000.00 = $39,600.00

Since you worked within and without New York State while employed for Bowery Savings Bank, the portion of the termination pay is taxable to New York State.

Years	Total Wages	NY Wages
1987	$ 89,202.00	$ 89,202.00
1988	45,000.00	39,600.00
Total	$134,202.00	$128,802.00

$128,802.00/$134,202.00 x $170,290.00 = $163,438.00"

Petitioners' wage income for 1988 was therefore computed to be $203,038.00.

Petitioners timely filed a joint New York State and City of New York Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for 1988. Attached to the return was a wage and tax statement, Form W-2, issued to John A. Laurino from The Bowery Savings Bank ("The Bowery") for wages in the amount of $215,290.51.

Petitioners allocated the wage income from The Bowery by employing a fraction with the numerator being 22 days worked in New York State and the denominator being 236 total days worked in the year.

On July 13, 1987, petitioner John A. Laurino[1] entered into an employment contract with The Bowery Savings Bank, 110 East 42nd Street, New York, New York 10017. The contract provided, in part, as follows:

(a) Petitioner's title would be Senior Vice President and Marketing Director.

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[1]Deborah D. Laurino is a petitioner only by reason of having filed a joint return with John Laurino. Therefore all references to "petitioner" will be to John Laurino only.

(b) The base salary would be $165,000.00 per annum to be effective on July 20, 1987.

(c) Petitioner's first year annual bonus would be a minimum of $10,000.00 and would be payable in January 1988.

(d) Petitioner was to receive a moving expense allowance, bridge loan financing and a discount on mortgage points when purchasing a new home in the New York metropolitan area and travel and entertainment expenses during his employment.

(e) Petitioner was entitled to a severance payment upon the change of control of The Bowery, provided in the employment contract as follows:

> "During your first two years of employment should there be a change in control of The Bowery and if, within 120 days of such change of control, your employment at your current salary is not extended in writing for at least one year by The Bowery, you would be entitled to receive a severance payment equal to one year's salary. The term 'change of control' means any transaction or series of transactions by virtue of which more than 50% of the
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> voting power of the stock of The Bowery changes hands." (Paragraph 7 of the employment contract).

Prior to accepting the position with The Bowery, Mr. Laurino had similar employment in Philadelphia, Pennsylvania. In addition, he turned down a position with another bank in New York City to accept the offer of The Bowery.

On January 29, 1988, The Bowery was acquired by H. F. Ahmanson & Company, a holding company for Home Savings of America. The company, located in California, was a highly-centralized organization with all senior and executive management positions located at the California offices. All marketing related activities were directed from California, and the chief marketing officer of Home Savings was stationed there. The individual who held this position became, after the acquisition of The Bowery and petitioner's resignation, the senior vice president and chief marketing officer of The Bowery as well, and continued to work in California.

During his employment, petitioner was engaged in various marketing projects, some jointly with Home Savings of America. The projects included a 1988 marketing plan, a study involving The Bowery's entry into the insurance and investment product businesses, a public

relations plan and a communications plan concerning the merger of The Bowery with Home Savings from a marketing perspective. Several of these projects were implemented after petitioner's resignation.

On January 27, 1988, The Bowery paid to petitioner a bonus of $10,000.00 pursuant to the agreement of employment dated July 13, 1987. Petitioner also received, in 1988, deferred compensation from 1987 of $18,500.00 and salary in the amount of $16,500.00. Petitioners concede that the total of this compensation ($45,000.00) is subject to the imposition of New York State personal income tax.

Petitioner and The Bowery entered into an employment termination agreement on February 4, 1988. The agreement was a direct result of the change of control of The Bowery on January 29, 1988 and related management changes. Pursuant to the agreement, The Bowery and petitioner agreed to the following:

(a) The Bowery paid to petitioner $165,000.00 in full satisfaction and discharge of The Bowery's obligations arising out of or in connection with petitioner's employment, its termination, the change in control of The Bowery and under the terms of the letter dated July 13, 1987 between The Bowery and petitioner relating to his employment.

(b) The Bowery transferred and delivered ownership of the following equipment to petitioner:

Apple MacIntosh SE Personal Computer
Image Writer Printer
Keyboard
"Mouse"
Carrying case for personal computer equipment
Personal computer software consisting of "X-Cel", "Project" and "MacWrite".

The estimated fair market value of the personal computer equipment and software transferred was $3,322.00.

(c) Petitioner was to be reimbursed for long-distance telephone calls made during the period February 4, 1988 (his last day of employment) to April 30, 1988 for the purpose of seeking employment.

(d) In consideration of the above, petitioner released The Bowery, its parents, subsidiaries and affiliates from any claim he might have had, arising out of or in connection with his employment, the change in control of The Bowery that occurred January 29, 1988, or for any payments or other obligations of The Bowery due under the employment agreement (letter of July 13, 1977). The payments were not conditioned upon any future services being rendered by petitioner, and,in fact, no services were thereafter rendered.

During the year at issue, petitioners were residents of the State of Connecticut.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that in allocating the New York source income, all non-working days in 1988 should be included in the denominator. In addition, with regard to the severance pay received upon termination, it is the position of petitioners that the termination agreement represented a settlement of all future rights and obligations, and that the severance pay was not attributable to past services performed in New York State.

The Division of Taxation contends that, when allocating the income of a nonresident employee who performed services both within and without New York State for only part of a taxable year, the total number of working days used in the calculation is based upon the period he was required to perform services both within and without New York State. With regard to the severance pay, it is the position of the Division that petitioner had no future rights under the employment contract, and that the payments made by The Bowery were pursuant to the employment contract and therefore were based upon past services rendered to the bank rather than a settlement of future rights.

CONCLUSIONS OF LAW

A. Tax Law § 631, describing New York source income of a nonresident individual, provides as follows:

> "(a) General. The New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources....

* * *

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

(B) a business, trade, profession or occupation carried on in this state....

(c) Income and deductions partly from New York sources. If 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."

The Personal Income Tax Regulations, at 20 NYCRR 131.4, concerning New York source income, provide as follows:

"(b) The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State.... Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 131.16 through 131.18 of this Part."

The allocation rules set forth in 20 NYCRR 131.18 provide as follows:

"(b) Where a nonresident employee...performs services both within and without New York State for only part of a taxable year, his income derived from New York State sources during that period includes only that portion of compensation received during the period he performs services both within and without New York State, multiplied by a fraction the numerator of which is the number of days he worked within New York State and the denominator of which is the number of days he worked both within and without New York State during the period he was required to perform services both within and without New York State."

B. The facts in this case are similar to the circumstances surrounding the taxpayer in Matter of Donahue v. Chu (104 AD2d 523, 479 NYS2d 889). In Donahue, the taxpayer, a nonresident, had a five-year employment agreement with his New York employer. The agreement provided that, at the conclusion of the five-year period, the taxpayer would be paid for an additional 10 years as a consultant. With one of the five years remaining, the taxpayer and the corporation entered into an agreement which provided for the termination of both his employment and his right to be paid for the future consulting services. In exchange, he received

his existing salary for four months or until he accepted a regular position with another employer, whichever occurred first, and a sum of money in settlement of the future consulting services. The court found that the benefits granted to the taxpayer under the termination agreement were the result of the corporation's deliberate purpose to terminate its relationship with the taxpayer; that the termination agreement was of mutual benefit to the contracting parties which settled all future rights and obligations of those parties; and finally that the future rights of the taxpayer would not have been exercised in New York had the employment continued under the employment contract. Therefore, the court concluded, the amounts received by the taxpayer pursuant to the termination agreement were not subject to New York State personal income tax.

In the present matter, the parties negotiated a termination agreement which provided petitioner with monetary payments, computer equipment and telephone expense reimbursement in exchange for releasing The Bowery, H. F. Ahmanson & Company, its subsidiaries and affiliates from any claims petitioner may have relating to his employment, its termination, the change in control of The Bowery or the employment contract. The computer equipment and telephone expense reimbursement were in excess of The Bowery's obligations under the employment contract. The purpose of the telephone expense reimbursement provision was to reduce petitioner's future financial hardship by reimbursing him for expenses incurred in seeking other employment.

It is noted that petitioner received a salary and bonus for past services rendered, and was employed by The Bowery for only six months. Furthermore, marketing projects created by petitioner were used by The Bowery and H. F. Ahmanson & Company after petitioner's departure, and petitioner, through the termination agreement, surrendered any and all future rights to these projects.

Under all the facts and circumstances, it must be inferred that the termination agreement was of mutual benefit to the contracting parties as a means of settling their future rights and obligations. The object of the termination agreement was to maintain petitioner in an

approximately equivalent financial position as that which he would have been in had he remained employed by The Bowery. The termination agreement's focus was petitioner's future status, not his past services. In addition, the payments received under the termination agreement cannot be said to arise from past services rendered, considering petitioner's receipt of a salary, bonus and deferred compensation payment, as well as to the short period of time that The Bowery employed petitioner. Furthermore, any future rights of petitioner would have been exercised in California, not New York State. Therefore, the amounts received by petitioner pursuant to the termination agreement are not subject to New York State personal income tax (Matter of Donahue v. Chu, supra).

C. The Division's reliance on paragraph 7 of the employment agreement, which provided that petitioner was to receive a year's salary if his employment was terminated within two years, is misplaced. Petitioner resigned from employment in Philadelphia, Pennsylvania and turned down similar employment with another bank in New York City to accept the job with The Bowery. The aim of this section of the employment agreement was to compensate petitioner for the loss of income in the situation where his job with The Bowery was terminated within a period of time which closely followed his hiring, and which was due to circumstances beyond his control. This provision related to petitioner's financial situation in the future, and was not based upon services previously rendered. Petitioner received more under the termination agreement than The Bowery was obligated to pay under the employment contract, and The Bowery was released of its obligations relating to petitioner's employment, termination and the bank's change in control, in addition to its obligations under the employment contract. The Division's position would be more persuasive if paragraph 7 of the employment contract provided for ever increasing severance payments as petitioner's period of employment increased, rather than having the severance payments end within two years of his hiring.

D. Pursuant to 20 NYCRR 131.18(b), the Division properly allocated the $45,000.00 in income which petitioner conceded to be subject to personal income tax, multiplying such amount by a fraction the numerator of which is the number of days petitioner worked within

New York State (22 days) and the denominator of which is the number of days petitioner worked both within and without New York State between January 1, 1988 and February 5, 1988 (25 days).

E. The petition of John A. and Deborah D. Laurino is granted to the extent indicated in Conclusion of Law "C"; the Notice of Deficiency is to be

modified accordingly. In all other respects the petition is denied (see Conclusion of Law "D").

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE