STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM B. WARREN, EXECUTOR OF ESTATE OF MARGUERITE LAPORTE	:	DETERMINATION 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, William B. Warren, Executor of Estate of Marguerite LaPorte, 1301 Avenue of the Americas, New York, New York 10019, 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 1987.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 29, 1993 at 1:15 P.M. Petitioner submitted a brief on January 27, 1994. The Division of Taxation filed a brief on February 23, 1994 and petitioner filed a reply brief on March 10, 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).

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

Cloyd LaPorte was a former partner of the Dewey, Ballantine, Bushby, Palmer & Wood ("Dewey Ballantine") law firm who had retired prior tothe 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 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 he thought 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.

CONCLUSIONS OF LAW

A. Tax Law § 612 reads, in pertinent part:

> "(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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> * * *
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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 and 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 'pensions 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 . . . ."

B. The evidence produced by petitioner is found to be insufficient to establish that the payments made by Dewey Ballantine to Mrs. LaPorte qualified for exclusion from Federal adjusted gross income under Tax Law § 612(c)(3-a). Petitioner did not introduce into the record of this matter the partnership agreement which is claimed to be the basis of the payments made to Mrs. LaPorte. The partnership agreement could establish the elements of the Tax Law necessary to permit petitioner to subtract $20,000.00 of the yearly payments: the pension and annuity payments received by an individual must be paid periodically; the payments must be attributable to personal services performed by the individual prior to his retirement from employment; and the payments must arise from an employer-employee relationship or from contributions to a retirement plan which are deductible for Federal income tax purposes.

The record for this matter contains no information concerning how payments were made to petitioner except the unconfirmed statement of Mr. Close that Mrs. LaPorte received "basically monthly" payments. Similarly, there is no documentation or testimony that confirms that the payments received by petitioner were attributable to personal services performed by her husband. Documentation necessary to address this issue, such as the partnership return of Dewey Ballantine that was applicable to petitioner's husband, was not offered into the record. However, the record does reflect that the payment received by petitioner in 1987 was treated by the partnership as a distribution of partnership income to a partner and was therefore not attributable to an employer-employee relationship or as contributions from a retirement plan. Although Mr. Close claimed that such treatment on the partnership return was "probably not the correct treatment", petitioner did not offer any evidence that such treatment was, in fact, in error or as to how or why such claimed error was made. This record does not carry the taxpayer's burden of proof to establish that the determination of the Division was erroneous and/or improper (Tax Law § 689[e]).

C. Petitioner's reliance on Matter of Norris (State Tax Commn., April 23, 1987, confirmed 140 AD2d 876, 528 NYS2d 694) and Pidot v. State Tax Commn. (118 AD2d 915,

499 NYS2d 482, affd 69 NY2d 837, 513 NYS2d 965) is misplaced. In Norris, the former State Tax Commission allowed the Tax Law § 612(c)(3-a) subtraction modification with respect to certain payments the taxpayer, a nonresident, had received from his former employer pursuant to a written severance agreement. However, petitioner, unlike the taxpayer in Norris, 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. In essence, unlike the taxpayer in Norris, petitioner has not established the elements of Tax Law § 612(c)(3-a).

In Pidot, the issue was whether certain retirement payments made to a partner were excludable from a nonresident's New York source income pursuant to the annuity rule found in 20 NYCRR 131.4(d). The court concluded that a partner's retirement payments could constitute an annuity, reasoning that there was "nothing in the language of the relevant statute concerning annuities (Tax Law § 632[b][2]) which would justify disparate tax treatment for former employees and former partners . . ." (Pidot v. State Tax Commn., supra). Petitioner was denied the subtraction modification not because of a distinction drawn between partners and employees, but because petitioner failed to establish the elements of the statute. It is noted that in both Norris and Pidot, the taxpayers placed into evidence the respective partnership agreements.

D. This determination herein is distinguishable from the line of cases which establish, at the least, the general rule that a determination that rejects credible testimony because the testimony is not corroborated is a determination which is not supported by substantial evidence (see, Matter of Orvis Co. v. Tax Appeals Tribunal, ___ AD2d ___, 612 NYS2d 503 [where the court found that affidavits were sufficient to establish the facts and to satisfy the taxpayer's burden to prove an unconstitutional imposition of the use tax]; Matter of Capital District Better TV v. Tax Appeals Tribunal, 200 AD2d 911, 606 NYS2d 930, lv denied ___ NY2d ___ [June 16, 1994] [where the court concluded that the cable television companies were not required to introduce copies of their franchise agreements into evidence to support their claim

that the cable installations were required to be permanent]; Matter of Mobley v. Tax Appeals Tribunal, 177 AD2d 797, 576 NYS2d 412, appeal dismissed 79 NY2d 978, 583 NYS2d 195 [where the court held that testimonial evidence constituted clear and convincing evidence that the amount of tax assessed was erroneous]; Matter of Avildsen, Tax Appeals Tribunal, May 19, 1994 [where the Tribunal found credible testimony sufficient to overcome an income tax deficiency]). The record in this matter contains not only the testimony of Mr. Close in support of petitioner's position, but also petitioner's admission concerning the treatment of the payments by the partnership which contradicts petitioner's position. Therefore, in order to have prevailed on the issue arising in this matter, it was necessary for petitioner to introduce the partnership agreement or some other documentation in support of her position. The testimony of Mr. Close, standing alone, was insufficient to overcome the conclusion to be drawn by the treatment afforded the payments to petitioner by the partnership.

E. The petition of William B. Warren, Executor of Estate of Marguerite LaPorte, is denied and the Notice of Deficiency, dated April 5, 1991, is sustained.

DATED: Troy, New York
September 8, 1994

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE