STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD H. AND CARLA E. EVANS	:	DETERMINATION DTA NO. 813539
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1991.	:	

Petitioners, Richard H. Evans and Carla E. Evans, 2802 Opryland Drive, Nashville, Tennessee 37214-1200, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1991.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 11, 1996 at 9:15 A.M., with all briefs to be submitted byNovember 7, 1996, which date began the six-month period for the issuance of this determination. Petitioners appeared by Kenneth T. Zemsky, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

ISSUE

Whether consideration received by a nonresident under the terms of a departure agreement with his employer constituted New York source income.

FINDINGS OF FACT

1. Petitioners, Richard H. Evans and Carla E. Evans, timely filed a 1991 New York State Nonresident and Part-Year Resident Income Tax Return(form IT-203).[1] They were residents of Connecticut during all periods relevant to this determination.

2. On the 1991 return, petitioner reported Federal wage income of $1,514,832.00 and New York wage income of $388,347.00. Petitioner's calculation of the New York amount was explained in two attachments to the return. Petitioner subtracted $1,026,456.00 from the Federal amount claiming that this represented a "payment of future contract rights". The remainder, $488,376.00, was allocated in and out of New York using the formula provided in Schedule A of the return. Petitioner reported 217 working days in 1991. From this, he subtracted 48 Saturdays and Sundays and 3 holidays, resulting in 166 total days worked in the year. He claimed 34 days worked outside of New York yielding 132 days worked in New York. Total wages of $488,376.00 were multiplied by a fraction, the numerator of which was 132 and the denominator of which was 166. This calculation resulted in the New York amount of $388,347.00. A Wage and Tax Statement attached to petitioner's return shows that in 1991 that he received wage income from Madison Square Garden Corporation ("MSG") of $1,514,832.00.

3. By letter dated August 5, 1993, the Division of Taxation ("Division") informed petitioner that his 1991 return was under review by the Division. Additional information was requested from petitioner, including: petitioner's dates of employment with MSG; a list of days worked outside New York State or New York City; the nature of services performed outside of New York State or New York City and the locations where those services were performed; a list of days worked at home and the reason work was performed at home; and the dates of each nonworking day claimed by petitioner other than Saturdays and Sundays. The Division also

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[1]Carla E. Evans is included as a named party because petitioners filed a joint return and a petition in both of their names; however, almost all of the relevant facts pertain to Mr. Evans alone. Accordingly, where the term petitioner is used in this determination, it should be understood to refer to Mr. Evans.

requested copies of petitioner's 1988, 1989 and 1990 income tax returns. The Division did not ask petitioner to explain or clarify his claim that a portion of the amount shown on his W-2 form as Federal wage income was in fact a lump-sum payment for the cancellation of future contract rights.

4. Petitioner's accountant responded to the Division's requests in a letter dated October 8, 1993. The requested copies of petitioner's 1988, 1989 and 1990 tax returns were enclosed. The Division was told that petitioner was employed by MSG from January 1, 1991 through August 5, 1991. The Division was also informed that petitioner had moved to Tennessee and placed his personal records in storage. For this reason, petitioner requested additional time to answer the questions asked by the Division and to assemble the necessary documentation.

5. The Division decided that it had all the information it needed to arrive at a determination of petitioner's 1991 New York State and New York City income. It accepted petitioner's allocation of income, but included the full amount of petitioner's Federal wage income, $1,514,832.00, in the New York amount and recalculated petitioner's tax liability accordingly. This resulted in a New York State tax deficiency of $55,856.00 and a New York City tax deficiency of $3,320.00.

6. The Division issued a Notice of Deficiency to petitioners, Carla E. Evans and Richard H. Evans, dated December 13, 1993, asserting a 1991 deficiency of New York State and New York City income tax of $59,176.04 plus interest.

7. Petitioner was chief executive officer of MSG, a Delaware corporation, from January 1, 1987 through August 5, 1991. When he was first hired, petitioner and MSG entered into a four-year employment contract, dated October 29, 1986, which was to commence no later than January 1, 1987. Petitioner's base salary under the contract began at $350,000.00 and increased to $410,000.00 by the fourth year of the contract. Petitioner was entitled to bonus payments under certain circumstances, and petitioner was included in all of the parent corporation's existing employee benefit plans such as group life insurance, hospitalization,

medical, pension and similar benefits. Petitioner was granted stock options in the stock option plan of MSG's parent corporation, Paramount Communications, Inc. ("Paramount"), under section 4 of the contract which states:[2]

> "In consideration of the Executive entering into this Agreement, options will be granted as of the Commencement Date to the Executive to purchase 25,000 shares of G+W's Common Stock pursuant to G+W's 1984 Stock Option Plan. Such options shall become exercisable in accordance with the terms of such Plan, in each case on and after the anniversary date of the grant, at the rate of 6,250 shares per year, on a cumulative basis, beginning one year from the date of grant."

8. Section 7 of the 1986 contract covered the parties' agreement with respect to termination of employment. In case of termination because of death, physical impairment or mental impairment, petitioner, or his estate, was entitled to salary accrued and payable to the date of termination plus a proportionate share of the bonus that would have been paid in the year the termination occurred. Paramount reserved the right to terminate petitioner for cause, defined as a material breach of the employment contract, including neglect of duties, refusal to perform duties reasonably assigned, abuse of office, malfeasance or conviction of a felony. If this right was exercised, Paramount was obligated to pay petitioner only salary accrued and payable to the date of termination.

9. Until April 1991, petitioner reported to the chairman and chief executive officer of Paramount, Martin Davis. Since petitioner's employment contract with Paramount was to expire on December 31, 1990, he began negotiating a new contract with Mr. Davis and Donald Orsman who was then counsel for Paramount. Those negotiations lasted from the summer of 1990 through the fall of that year. In approximately October 1990, petitioner and Mr. Davis came to an agreement on a five-year contract. Elements of that agreement were subsequently submitted to the Paramount Communications compensation committee for its approval.

10. The agreement reached by petitioner with Mr. Davis was never reduced to writing; however, petitioner believed that certain elements of the contract were approved by the

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[2]The employment contract between petitioner and MSG indicates that the parent corporation was Gulf+Western, Inc. Petitioner testified that the parent corporation was Paramount Communications, Inc. and other documents in evidence establish this fact. From this, I surmise that Paramount succeeded G+W Entertainment Group. References to Gulf+Western in the 1987 employment contract shall be deemed to refer to Paramount.

compensation committee. He asked Kenneth Munoz, general counsel for MSG, to review the minutes of the compensation committee. Mr. Munoz reported that he had done so and the agreement had been approved. In addition, petitioner remembers being congratulated on his new contract by a member of the compensation committee. Petitioner was certain that the agreement had been accepted by Paramount because elements of that agreement were implemented. Mr. Orsman instructed Mr. Munoz to increase petitioner's salary to $500,000.00 annually, effective January 1, 1991, and petitioner's salary was increased. Also, a stock option for 75,000 shares of additional stock was issued.

11. In April 1991, Paramount appointed a new president and chief operating officer, Stanley Jaffee. Petitioner then began reporting to Mr. Jaffee rather than Mr. Davis. The relationship between the two men was not a good one, and in August 1991 they mutually agreed that it would be preferable for Mr. Evans to terminate his employment with MSG.

12. Petitioner, advised by his attorney Harold Rubin, negotiated the terms of his departure with Mr Jaffee. In return for his resignation, he was first offered a sum of money which he considered inappropriate. He and Mr. Rubin then reminded Mr. Jaffee that petitioner and Paramount had negotiated a five-year employment agreement beginning in January 1991. Shortly thereafter, Paramount agreed to pay petitioner an amount approximately equal to what he would have received in compensation over a period of four years at an annual salary of $500,000.00 per year. Petitioner believed that Paramount would not have paid him the amount that it agreed to if it were not for the existence of a prior employment contract.

13. Petitioner, MSG and Paramount then entered into a written agreement, dated August 9, 1991 (the "Departure Agreement"). The relevant portions of the Departure Agreement provide as follows.

> "WHEREAS, MSG wishes to assure itself of the consulting services of Evans for the period and upon the terms and conditions provided in this Agreement, and Evans is willing to provide such services for said period and upon said terms and conditions;
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> "NOW, THEREFORE, in consideration of the premises and of the mutual covenants and undertakings set forth herein, the parties covenant and agree as follows:

"1. Forthwith upon the execution of this Agreement, MSG shall pay to Evans the sum of $1,026,456.00 less appropriate withholding deductions.

* * *

"3. Evans shall and hereby does resign from the position of President and Chief Executive Officer of MSG and from any other office he may hold within MSG or Paramount or on MSG's or Paramount's behalf. Evans shall be reassigned as a consultant on a non-exclusive basis through December 31, 1992.

"4. Evans shall continue to be paid at his current annual salary rate of $500,000.00 per year, payable in accordance with MSG's normal payroll practices, through December 31, 1992. In the event of Evans' death prior to January 1, 1993, the payments in this paragraph 4 shall be made to Evans's estate. Evans shall not be eligible for, and shall have no right to receive, any (i) bonus award or payments under the Paramount Corporate Annual Performance Plan or the Paramount Long Term Performance Plan or (ii) future stock awards under the 1989 Paramount Stock Option Plan (or any successor plan).

"5. With respect to employee benefits under this Agreement, Evans shall be entitled to receive only (i) individual and dependent medical and dental insurance One Plus Medical/Dental Plan; (ii) the continuation of his life insurance coverage under the Paramount Life Insurance Plan; and (iii) continued service in the Paramount Retirement Plan. . . . Effective January 1, 1993, Evans' eligibility for all benefit programs shall cease and neither MSG nor Paramount shall have any further obligation to Evans with respect to any employee benefits expect [sic] for such rights that may have vested on or before December 31, 1992 . . . .

"6. In the event Evans commences employment elsewhere during the term of this Agreement, Evans' individual and dependent medical and dental insurance under the One Plus Medical/Dental Plan and life insurance coverage shall terminate as soon as he becomes eligible to participate in such other employer's health and insurance plans. All other terms and conditions of this Agreement shall remain in effect until the expiration or termination of this Agreement.

* * *

"7. Evans' outstanding stock options for 50,000 shares (Options Nos. 1901 and 1902) shall remain in effect, pursuant to the 1989 Paramount Stock Option Plan, until December 31, 1992. On December 31, 1992 all outstanding stock options shall terminate. Evans shall have no right, title or interest in any other stock options.

"8. Upon the expiration or termination of this Agreement, the distribution of any vested and accrued employee benefits that Evans has obtained under the Paramount Retirement Plan, Savings Plan or Employee Stock Ownership Plan shall be made pursuant to the terms and conditions of the applicable plans.

* * *

"13. (a) Except as specified in subparagraph (b) hereof, Evans hereby irrevocably releases, remises and forever discharges MSG, Paramount and their respective subsidiaries and affiliates, and the officers, directors, employees, agents [sic] attorneys and representatives of each of them (in their capacity as such) from any and all promises, agreements, contracts, losses, claims, demands and causes of

> action arising prior to the date of this Agreement, including, without limiting the generality of the foregoing, any and all claims for compensation, benefits, severance pay, bonuses, stock rights, rights in any stock option or bonus plan, and any other benefits or form of compensation which Evans alleges he is entitled to arising out of or relating to his employment relationship with MSG.
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> "19. It is understood that this Agreement is a compromise of disputed claims and that the payments and agreements herein set forth are not to be construed as admissions of liability upon the part of any party, and that all liability is expressly denied."

14. Paramount and petitioner agreed to the wording of a press release announcing his departure from MSG, and both agreed not to release other communications concerning the Departure Agreement to the media. The press release states: "Richard H. Evans has resigned as president and chief executive officer of Madison Square Garden, it was announced today by Paramount Communications, Inc." No other details of the Departure Agreement were released.

15. MSG, Paramount and petitioner agreed not to make disparaging statements about one another in any context in which it could reasonably be foreseen that the statement, or the substance of the statement, would be published in the media. In addition, MSG and Paramount agreed not to make such statements about petitioner in connection with any prospective employment, although they were permitted, in the exercise of their professional judgement, to provide prospective employers with their assessment of petitioner's skills.

16. Petitioner provided no services to MSG or Paramount after August 1991. His appointment as a consultant to MSG was apparently intended to enable him to retain the medical insurance and other benefits mentioned in paragraph 6 of the Departure Agreement.

17. During the period in which petitioner was president of MSG, he put in place a severance policy for senior level employees, not under contract to MSG. That policy called for the payment of six months pay plus one week of pay for every year of service. If a contract employee left MSG under the terms of a mutual agreement, as petitioner did, MSG would fulfill the terms of the existing contract.

18. Petitioner pointed out that if he had been compensated under the terms of the MSG severance policy he would have received approximately seven months pay or approximately

$291,666.00. Under the Departure Agreement, he received a salary of $488,376.00, plus a lump-sum payment of $1,026,456.00, in 1991 and an additional $500,000.00 payable in accordance with MSG's normal payroll practices through December 31, 1992, for a total amount paid to him of $2,014,832.00. In addition, petitioner received medical, dental and life insurance benefits through December 31, 1992. Petitioner stated in his testimony that Paramount had no grounds for dismissing him, since under his employment contract he could only be terminated for cause as defined in his contract.

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioner claims that in 1991 he received wages from MSG in the amount of $488,376.00 under the terms of a prior oral agreement and of the written Departure Agreement with MSG and Paramount. His allocation of this amount to New York State and City was accepted by the Division. Accordingly, there is no issue regarding tax due on this amount.

20. Petitioner contends that the lump-sum payment of $1,026,456.00 provided for in the Agreement was consideration paid for the relinquishment of his contractual right to continued employment as president and chief executive officer of MSG under the terms of an agreement negotiated with Martin Davis (then chairman and chief executive officer of Paramount).

21. The Division maintains that petitioner has not proven that there was an enforceable employment contract and, therefore, that he was an employee at will without a contractual right to future employment. Hence, the Division argues, petitioner has failed to carry his burden of proof to show that the lump-sum payment was not New York source income.

CONCLUSIONS OF LAW

A. Tax Law § 631 provides that New York source income of a nonresident individual includes income or gain derived from or connected with New York sources including income derived from a business, trade, profession or occupation carried on in New York. The statute also provides that:

> "[i]ncome 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 [New York State]" (Tax Law § 631[b][2]).

The Tax Appeals Tribunal has held that in determining whether income is derived from or connected with New York sources within the meaning of the statute:

> "it is necessary to identify the activity upon which the income was secured or earned . . . [and that] in making this determination, the consideration given by petitioner in exchange for the right to the income at issue is the controlling factor" (Matter of Laurino, Tax Appeals Tribunal, May 20, 1993).

B. Petitioner emphasizes that the Division did not conduct an inquiry into the source of the lump-sum payment and argues that the Division has not presented even a prima facie case to support its deficiency notice. It is well accepted that a determination of tax must have a rational basis (Matter of Donahue v. Chu, 104 AD2d 523, 479 NYS2d 889); however, a presumption of correctness is raised by the issuance of the assessment itself (see, Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174; Matter of Leogrande, Tax Appeals Tribunal, July 18, 1991), and, with certain enumerated exceptions not relevant here, the burden of proof is upon the petitioner to overcome that presumption (Tax Law § 689[e]; Matter of Golden v. State Tax Commn., 90 AD2d 941, 457 NYS2d 905). To overcome the presumption of correctness, it was incumbent upon petitioner to produce substantial evidence that the lump-sum payment was not connected to New York sources. Petitioner makes a three-prong argument regarding the payment. First, he claims that the payment was for extinguishing a contracted right to future employment with MSG. He then claims that a promise to work in the future is, by its nature, intangible property which cannot be sourced to New York. Even if such a right may be found to have a connection with New York employment, petitioner argues that there is no evidence that he would have performed his future duties entirely in New York.

C. The Division maintains that there is no credible evidence that petitioner and Paramount had an enforceable contract for employment and, therefore, that the lump sum cannot have been paid in exchange for petitioner's rights under such a contract. The Division argues that it is unlikely that MSG would have entered into an oral employment contract for five years duration. It points out that petitioner failed to produce any written evidence of the

contract and did not offer the testimony of any witness other than himself. The Division also notes that the employment contract was not mentioned in the Departure Agreement, and it argues that such an omission would have been unlikely if a contract existed. The Division claims that petitioner's testimony is not credible and cannot support a finding that a contract existed. Even if petitioner had an oral agreement for continued employment, the Division claims that it was void under the statute of frauds because the contract was not capable of performance within one year, and there is no writing memorializing the agreement (see, General Obligation Law § 5-701).[3]

D. The determinative factor in ascertaining whether the lump-sum payment is New York source income is "the consideration given by petitioner for the right to the income" (Matter of Laurino, supra). The Departure Agreement provides for the lump-sum payment, and it is the best evidence of what consideration petitioner gave in exchange for the right to the income received. By August 1991, petitioner, MSG and Paramount agreed that the termination of petitioner's employment relationship would be to the benefit of all parties. By the terms of their agreement, petitioner received a lump-sum of $1,026,456.00, and he continued to be paid his annual salary of $500,000.00 through December 31, 1992, payable to petitioner's estate in the event of his death prior to January 1, 1993. He also received medical, dental and life insurance benefits and remained enrolled in Paramount's retirement plan through December 31, 1992. In addition, outstanding stock options for 50,000 shares remained in effect until December 31, 1992.

The consideration given by petitioner in return for the payments received is set forth in the Departure Agreement. Petitioner released Paramount from "all promises, agreements, contracts, losses, claims, demands and causes of action . . . arising out of or relating to his

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[3]The Division incorrectly invokes the statute of frauds. An employment contract created by oral agreement or by a course of conduct is subject to the statute of frauds (Cunnison v. Richardson Greenshields Securities, 107 AD2d 50, 485 NYS2d 272). However, "[a] contract not drawn in accordance with the statute of frauds is not ipso facto void but only voidable" (Felicie, Inc. v. Leibovitz, 67 AD2d 656, 412 NYS2d 625), and third parties to a contract may not raise the statute of frauds as a defense because it is personal to the parties to the agreement (Stiff v. Ward, 142 App Div 626, 127 NYS2d 470; Vincent v. Seaman, 152 AD2d 841, 544 NYS2d 255). The statute of frauds is not a rule of evidence which can be applied in an administrative proceeding where there is a factual dispute over the existence, or nonexistence, of a contract.

employment relationship with MSG" (Departure Agreement, paragraph 13). This provision does not establish that petitioner had a contracted right to future employment. It merely proves that he had legal claims relating to his employment. In paragraph 19 of the Departure Agreement, both parties acknowledge that the "Agreement is a compromise of disputed claims. . . ." Whether petitioner had an enforceable contract right to future employment is a question outside the scope of this proceeding. By the terms of the Departure Agreement, petitioner relinquished the right to litigate that question in a court of law. The only reasonable inference that can be drawn from the facts is that the lump sum was paid in settlement of legal claims related to petitioner's employment.

E. Because the parties argued assiduously over whether petitioner had a contract right to future employment, I will address that issue briefly. I agree with the Division that petitioner did not prove that there was a binding contract. To create a contract, there must be evidence of a meeting of the minds of the parties to the contract (Kreisler Borg Florman Gen. Constr. Co. v. Rosen & Morelli Masons, 181 AD2d 813, 581 NYS2d 104). Petitioner testified that there were mutual agreements on each side, and he argues that his testimony, supported by affidavits, is sufficient to prove the existence of a contract. It is not. It cannot be concluded that petitioner had a contract right to future employment in light of Paramount's express denial of liability in paragraph 19 of the Departure Agreement. Petitioner seems to argue that the Departure Agreement is an admission by Paramount that he would have prevailed in a contract action, but the Departure Agreement explicitly states that it is not to be construed as an admission of liability on the part of either party.

F. I have found that consideration given by petitioner in exchange for the lump-sum payment was his relinquishment of any claims he might have had against Paramount relating to his employment relationship with MSG. Since a legal claim, like a contract right, is a form of intangible personal property, the income received by petitioner to settle his claim is subject to Tax Law § 631(b)(2). Petitioner offered little evidence regarding the nature of his claim against Paramount. He alleges that the claim was for nothing more than continued employment at an

agreed upon salary. Even if that was the full extent of the claim, petitioner has not shown that the claim was not connected to or derived from New York employment.

G. Petitioner is wrong when he states that the settlement of a right to future employment is never New York source income. Matter of Donahue v. Chu (supra) presented a fact pattern similar to the one under consideration here, but with one significant difference: the evidence supported the petitioner's claim that his future rights to employment would not be exercised in New York. The petitioner, a resident of Connecticut, was paid a lump sum in settlement of a contract for future services. The Appellate Division found that the lump sum was not subject to New York tax, not simply because the payment was in settlement of an intangible right, but because "[t]here was no evidence supporting a conclusion that those rights would have been exercised in New York had the employment continued" (Matter of Donahue v. Chu, supra, 479 NYS2d at 892). Not only was the petitioner in Donahue a Connecticut resident, but the company for which he worked had moved its corporate headquarters from New York to Connecticut before petitioner terminated his relationship with his employer.

The primary case cited by petitioner, Matter of McSpadden (Tax Appeals Tribunal, September 14, 1994), considers the question of whether the contract rights of the petitioner would have been exercised in New York. The Tribunal found that the petitioner had not made a promise to work in New York and that the agreement specifically provided that petitioner could have consented to work outside of New York if he wished. The Tribunal concluded that the evidence did not support a conclusion that the petitioner's contractual rights would have been exercised in New York had his employment continued. McSpadden does not hold, as petitioner asserts, that a lump-sum payment for the relinquishment of a future right to employment is never derived from New York sources. The case law establishes that a payment to extinguish a right to future employment, like income from other other intangible property, is subject to tax if the payment is "derived from or connected with New York sources" (Tax Law § 631[a][2]; cf., Matter of Brophy, Tax Appeals Tribunal, December 7, 1995).

Accordingly, the burden was on petitioner to prove that the contract claim settled under the Departure Agreement was for providing future services, as petitioner claims, and that the future services were not connected with a business, trade, profession or occupation carried on in New York. Petitioner's proof fails at this juncture. In his reply brief, petitioner states that there is no evidence that he would have performed his duties entirely in New York; however, petitioner had the burden of proof on this issue, and he offered no testimony or documentation to establish that his future employment would not have been carried on in New York. This issue was not directly addressed at hearing. The only known facts pertinent to this issue are that petitioner held the title of president and chief executive officer of MSG, that Madison Square Garden is located in New York City, and that in 1991 the majority of his work days (132 out of a total of 166) were spent in New York. Even if the claim was for employment for a term of five years at an annual salary beginning at $500,000.00, the facts in the record support the conclusion that the right relinquished by petitioner would have been exercised in New York, and there are no facts that argue otherwise.

In addition to relinquishing his claim to future employment, the facts suggest that petitioner relinquished his right to exercise certain stock options. The prior written employment contract included a stock option for a total of 50,000 shares under the 1984 stock option plan. Petitioner testified that additional stock options for 75,000 shares were approved by the Paramount compensation committee. Petitioner had outstanding stock options for 50,000 shares at the time the Departure Agreement was executed, and he agreed that those options would remain in effect until December 31, 1992 and would then terminate. Whether the stock options were granted under the older written contract or the later oral agreement is not known. There is no question that stock options are a form of compensation and considered to be New York income if granted during the course of employment in New York (Matter of Donahue v. Chu, supra). If petitioner exchanged the right to exercise stock options granted in connection with his New York employment for a lump sum, that lump sum would be derived from or connected to New York sources. The factual confusion on this point must be decided to the

detriment of petitioner since he carried the burden of proof to show that the consideration given for the lump sum was not connected to an activity or occupation carried on in New York.

H. The petition of Richard H. and Carla E. Evans is denied, and the Notice of Deficiency, dated December 13, 1993, is sustained.

DATED: Troy, New York
April 17, 1997

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE