STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL AND ANDREA KOLA	:	DETERMINATION DTA NO. 816145
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1991.	:	

Petitioners, Michael and Andrea Kola, 7531 Ladson Terrace, Lake Worth, Florida 33467, 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 1991.

On April 29, 1998 and May 4, 1998, respectively, petitioners, by Andrea Kola, and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Kevin R. Law, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by September 11, 1998, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined that petitioners, who were part-year residents of New York during 1991, were liable for New York income tax on a portion of their 1991 interest and dividend income.

II. Whether interest should be abated on income tax that was promptly paid by petitioners, once they actually received an explanation from the Division of Taxation that such income tax

was due on the sale of their Long Island home.

III. Whether the Division properly imposed penalty on income tax determined due on a portion of petitioner's interest and dividend income earned during 1991.

FINDINGS OF FACT

1. In the late summer of 1991, petitioners, Michael and Andrea Kola, and their two daughters moved from New York to Florida. Petitioners had a gain of $35,833.00 on the sale of their Long Island home, located in Glen Cove (Nassau County) calculated as follows:

Selling price of Long Island home	$193,000.00
Less-cost basis in home	155,185.00
Less-selling expenses	1,982.00
Capital gain	$ 35,833.00

The actual sale of petitioners' Long Island home was on September 12, 1991, a couple of weeks after they had moved to Florida.

2. On March 29, 1993, approximately a year and a half later, petitioners purchased a home at 7531 Ladson Terrace in Lake Worth, Florida, which is also their current address, for $155,000.00.

3. Petitioners filed a joint nonresident and part-year resident New York income tax return for 1991. Their tax return was prepared by a paid preparer, George Chapekis, a Florida accountant, who is also their representative in this matter. On this return, petitioners reported wages of $3,840.00, subject to New York income tax, which represented Mr. Kola's wages from the Glen Cove firm of Colorbrite Painting Plus Inc. Petitioners reported no other income subject to New York income tax and calculated New York income tax due for 1991 of $80.60. In

particular, they allocated no part of their (i) interest income of $1,276.00, (ii) dividend income of $37.00, and (iii) capital gain from the sale of their Long Island home of $35,833.00 to New York.

4. The Division of Taxation ("Division") issued a Statement of Proposed Audit Changes dated May 16, 1994 against petitioners asserting 1991 income tax due of $770.73 plus interest. The Statement of Proposed Audit Changes included the following explanation for the tax asserted due:

> Since you filed Form IT-203, New York Nonresident and Part-Year Resident Income Tax Return for 1991, and moved out of New York, the following rule applies. The total of all income you received while you were a resident and all income received from New York sources during your nonresident period must be entered in the New York column of your return. . . .
>
> Based on the above, your interest and/or dividend income has been prorated based on your period of residency.
>
> You made an error computing your reportable capital gains.
>
> Capital gains from the sale of real property located in New York State are reportable at 100%.
>
> * * *
>
> Interest is due for late payment or underpayment at the applicable rate. Interest is required under the New York State Tax Law.

5. The Statement of Proposed Audit Changes dated May 16, 1994 also included the following detailed recalculation of petitioners' 1991 income tax liability to New York:

Line on the tax return Number & description	Previous amount	Adjustment amount	Corrected amount
002 Taxable interest income	$ 0.00	$ 851.00	$ 851.00
003 Dividend income	0.00	25.00	25.00
007 Capital gain	0.00	35,833.00	35,833.00
019 NYS amount of federal gross income	3,840.00	36,709.00	40,549.00

019 Federal adjusted gross income	28,627.00	0.00	28,627.00
030 New York adjusted gross income	28,627.00	0.00	28,627.00
043 Itemized deductions after adjustments	11,695.00	0.00	11,695.00
047 New York deduction	11,695.00	0.00	11,695.00
049 Dependent exemptions	2,000.00	0.00	2,000.00
050 New York taxable income	14,932.00	0.00	14,932.00
051 New York State tax	636.00	0.00	636.00
053 New York State household credit	35.00	0.00	35.00
054 Credits before base tax	35.00	0.00	35.00
055 Base tax	601.00	0.00	601.00
056 Income percentage	13.41%	128.24%	141.65%
057 Allocated New York State tax	80.59	770.73	851.32
061 Total New York State tax	$ 80.59	$ 770.73	$ 851.32

6. As noted above, the Division allocated $851.00 or ⅔ of petitioners' interest income for 1991 of $1,276.00 and $25.00 or ⅔ of petitioners' dividend income for 1991 of $37.00 to New York. Petitioners reported on their New York income tax return that they moved out of New York State on September 1, 1991. Consequently, the Division allocated ⅔ of their interest and dividend income in 1991 to New York, based upon their residency in New York for ⅔ of the 12 months in 1991, i.e., the months of January through August represent 8 of the 12 months or ⅔ of the months in 1991.

7. The Division then issued a Notice of Deficiency dated June 27, 1994 against

petitioners, mirroring the Statement of Proposed Audit Changes dated May 16, 1994 detailed above, which asserted 1991 New York income tax due of $770.73 plus interest of $112.80. The Notice of Deficiency was sent by the Division to the Florida address of 10010 Boynton Place, Circle # 111, Boynton Beach, Florida 33437, as shown by petitioners on their 1991 New York income tax return. The Notice of Deficiency was returned to the Division by the United States Postal Service as undelivered. The Notice of Deficiency was then remailed by the Division to petitioners' current address in Lake Worth, Florida, after it obtained petitioners' new Florida address from either "the U.S. Postal Service, sources outside the Tax Department, or a recently filed return," as noted on a Form AU-402 which was sent with the Notice of Deficiency to the new address.

8. Petitioners, in response to their receipt of the Notice of Deficiency, filed a request for conciliation conference dated November 15, 1994. Approximately six months later, petitioners made a payment dated May 4, 1995 of $733.91 towards the 1991 income tax due of $770.73 as asserted by the Division, conceding that their gain from the sale of their Long Island home was subject to New York income tax. However, petitioners' representative maintains that only after making numerous requests for the basis of the Notice of Deficiency did petitioners receive an explanation, and that once they received the explanation, they promptly made payment of the $733.91. Petitioners apparently did not receive in due course the Statement of Proposed Audit Changes dated May 12, 1994, described in Finding of Fact "5", because they had moved in March of 1993 from Boynton Beach to their current home in Lake Worth, Florida, and the Statement of Proposed Audit Changes was directed to their Boynton Beach address.

9. Petitioners continue to contest the Division's allocation of ⅔ of their 1991 interest and dividend income to New York, maintaining that no part of their 1991 interest and dividend

income should be allocated to New York. The record on submission included a photocopy of petitioners' Schedule B to their Federal income tax return for 1991 which provided the following breakdown of their interest income for the year:

Name of Payer	Amount
World Savings[1]	$ 969.00
1st Nationwide Bank	212.00
Green Point Savings Bank	19.00
Total	$1,276.00

The Schedule B also listed dividend income of $37.00 from an entity identified as "A T & T-American Transtech." Petitioners offered no documentation concerning their interest and dividend income.

10. By a letter dated October 8, 1996 from a tax technician in the Audit Division, petitioners were advised that their "payment of $773.91 dated 5/4/95, has been applied to [the liability asserted by the Notice of Deficiency dated June 27, 1994]." They were further advised that "Your payment of *$250.45*, if received within twenty (20) days, will close this matter (emphasis in original)." The letter did not indicate what the $250.45 constituted, and there was no mention of any penalty being imposed against petitioners.

11. The first mention that penalty was being imposed against petitioners was in the letter dated December 11, 1997 of the Division's representative, which transmitted the Division's answer to the petition filed by petitioners in this matter. This letter noted that the "outstanding

[1] Petitioners financed the purchase of their new home in Lake Worth, Florida with a loan from World Savings and Loan Association as noted on a settlement statement on a U.S. Department of Housing and Urban Development form included in the record, which also indicated that the settlement date was March 29, 1993.

liability as of December 31, 1997 was $277.12 ($36.82 tax, $225.79 interest and $14.51 penalty)." The only explanation provided for this assertion of penalty against petitioners was in the letter brief dated August 17, 1998 filed by the Division, wherein the Division contended that "petitioners have advanced no reason to abate the section 685(a)(3) penalty for failing to pay the tax required to be shown that has accrued since the original notice was issued."

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioners and their representative maintain that they did not know that the gain on the sale of the Long Island home was New York source income subject to New York income tax at the time petitioners' 1991 New York income tax return was prepared. Apparently, they believed that since the sale of the Long Island home occurred a couple of weeks after petitioners and their two daughters had moved to Florida, the gain on the sale of the Long Island real property was not subject to New York income tax. Consequently, petitioners argue that they did not have to pay tax on their gain until it was made clear to them by the Division that such gain was subject to New York income tax. According to petitioners, as noted in their letter brief dated July 10, 1998 consisting of one page, they paid "promptly" the New York income tax on the gain "[a]fter numerous correspondence to ascertain what the tax was for." Further, petitioners contend that "100% of the interest earned" was on the proceeds from the sale of their Long Island home and was on "funds [maintained] in a Florida institution and only earned interest for the last four months - - - after Mr. and Mrs. Kola moved to Florida" (Petitioners' letter brief). Therefore, they maintain that:

> [T]his should settle the matter. This case has gone on way too long for the money involved in preparing this case on both sides and the disputed amount (Petitioners' letter brief).

13. The Division rejects petitioners' claim that all of their interest and dividend income

was earned in the last four months of 1991 when they were residents of Florida and nonresidents of New York. The Division contends that petitioners "have not provided any evidence to substantiate this allegation" (Division's letter brief, p. 2). The Division also argues that there is no basis for abating interest because "[i]nterest on an underpayment of tax is mandatory", and there was no "showing of delay [by a Division employee in performing a ministerial act] . . . that would allow an abatement of interest" under Tax Law § 3008(a) (Division's letter brief, p. 2).

CONCLUSIONS OF LAW

A. Under Tax Law § 631(b)(2), a nonresident's investment income is not subject to New York personal income tax. However, petitioners presented very little evidence in support of their position that their 1991 interest income was earned during the last four months of the year when they were residents of Florida and nonresidents of New York. For example, they did not produce copies of their bank statements to establish the dates on which their interest income was earned. Since the Notice of Deficiency dated June 27, 1994 issued by the Division against petitioners for 1991 is presumed correct unless petitioners prove by clear and convincing evidence that the Division's assertion of tax due was in error, they were required to present sufficient evidence to support their claim that their interest and dividend income was earned entirely during the last four months of 1991 when they were nonresidents of New York (***see, Bello v. Tax Appeals Tribunal***, 213 AD2d 754, 623 NYS2d 363). Nonetheless, as noted in Finding of Fact "9", the record includes a photocopy of petitioners' Schedule B to their Federal income tax return for 1991, which shows that the major portion of their interest income for 1991 consisted of $969.00 from World Savings. As noted in footnote "1", this bank also financed petitioners' mortgage on their new Florida home. Consequently, it is reasonable to conclude that the interest income of $969.00 was from World Savings, a bank which provided banking services

in Florida, the state of petitioners' new residency, and that such interest income was earned by petitioners, during the last four months of 1991, on the proceeds from the sale of their Long Island home. However, there is no evidence in the record which would support petitioners' claim that the interest income from 1st Nationwide Bank of $212.00 and from Green Point Savings Bank of $19.00 was earned only in the last four months of 1991. In fact, according to petitioners' letter brief, as noted in paragraph "12", the proceeds from the sale of their Long Island home were maintained "in a Florida *institution*" (emphasis added) not *institutions*. As a result, it cannot be concluded that the Division erroneously prorated these two lesser amounts of interest income over the entire year. Similarly, since petitioners have presented no evidence to support their claim that their dividend income of $37.00 was earned during the last four months of 1991, the Division was not in error when it prorated a portion of this income to New York. Therefore, the Division may prorate ⅔ of petitioners' interest income of $231.00 ($212.00 from 1st Nationwide Bank plus $19.00 from Green Point Savings Bank) and ⅔ of their dividend income of $37.00 to New York.

B. Tax Law § 3008(a) was recently amended, effective September 10, 1997, to provide for the abatement of interest accruing on a tax deficiency which resulted from unreasonable error or delay by an employee of the Department of Taxation and Finance in performing a managerial act (as well as a ministerial act as under the prior law) (***see***, L 1997, ch 577, § 26). This new law is applicable to interest accruing after the effective date of September 10, 1997 (***see***, L 1997, ch 577, § 56[f]). The interest at issue in this matter has been accruing on 1991 income tax that was due and payable (except to the extent modified above) on April 15, 1992, five years prior to the effective date of the more liberal statutory provision authorizing the abatement of interest for error or unreasonable delay in performing managerial acts as well as ministerial acts. Moreover,

the record does not support a conclusion that interest has accrued on the underlying deficiency by the unreasonable error or delay of a Tax Department employee in performing either a managerial or ministerial act. Any delay (i) in petitioners' receipt of the Notice of Deficiency and (ii) in their apparent lack of receipt of the Statement of Proposed Audit Changes resulted from petitioners' failure to advise the Division of the change in their Florida address from the one in Boynton Beach, reported on their 1991 tax return, to their new Lake Worth address. The Boynton Beach address was the Florida address last known to the Division and was properly utilized for purposes of mailing the Notice of Deficiency and the Statement of Audit Changes. Further, petitioners' claim that they promptly paid the tax due on the gain from the sale of their Long Island home is disingenuous. Even though petitioners were apparently nonresidents of New York at the time they sold their Long Island home, their gain from such sale was income "derived from or connected with New York sources" so as to be subject to New York income tax (***see***, Tax Law § 631[b][A] [which provides that income attributable to "the ownership of any interest in real or tangible personal property in this state" is income derived from or connected with New York sources]). Their delay in paying New York income tax on such gain resulted from their ignorance of the law not from any unreasonable error or delay of a Tax Department employee. In sum, the Division is correct that, under Tax Law § 684, interest on an underpayment of tax is mandatory except to the extent that it may be abated under Tax Law § 3008(a), which, as discussed above, is not applicable (***cf.***, ***Matter of Antonio Rizzo and Giusepina Mauceri***, Tax Appeals Tribunal, May 13, 1993).

C. As noted in Finding of Fact "11", the first mention that penalty was being imposed against petitioners was in the letter dated December 11, 1997 of the Division's representative, which transmitted the Division's answer to the petition. Further, the basis for the imposition of

penalty against petitioners was not provided by the Division until, in its letter brief dated August 17, 1998, it referenced Tax Law § 685(a)(3). Neither the Statement of Proposed Audit Changes dated May 16, 1994 nor the Notice of Deficiency dated June 27, 1994 asserted penalty against petitioners. Only tax plus interest were asserted due. Tax Law § 685(a)(3), relied upon by the Division in its letter brief, authorizes the imposition of penalty for the "failure to pay any amount in respect of any tax required to be shown on a return . . . which is not so shown . . . within twenty-one calendar days of the date of a notice and demand therefor." Since the Division has proceeded against petitioners by the issuance of a Notice of Deficiency, which, in fact, did not assert penalty against petitioners, rather than a Notice and Demand, penalty may not be imposed against petitioners pursuant to Tax Law § 685(a)(3).

D. Finally, petitioners' contention that the assertion of any additional liability against them should be canceled because the time and cost to resolve this matter through the Division of Tax Appeals was not justified, given the modest amount in dispute, is not pertinent. By filing a petition, petitioners chose to utilize an administrative process that entails the full airing of their complaint concerning the imposition of additional tax, interest and penalty against them for 1991. Petitioners took advantage of the provisions in the Rules of Practice and Procedure which authorize the submission of a controversy for determination without the need for petitioners' appearance at a hearing so that petitioners, in fact, avoided the time and expense of a formal hearing (***see***, 20 NYCRR 3000.12). However, there is no basis for further short-cutting the process prescribed by the Rules of Practice and Procedure because the amount in dispute is modest. Even if petitioners chose to proceed in the small claims unit of the Division of Tax Appeals, they still would have been required to present evidence in support of their allegations, and the Division of Taxation still would have been able to present its case in opposition (***see***, 20

NYCRR 3000.13).

E. The petition of Michael and Andrea Kola is granted to the extent indicated in Conclusions of Law "A" and "C", and the Division of Taxation is directed to modify the Notice of Deficiency dated June 27, 1994 to so conform, but, in all other respects, the petition is denied.

DATED: Troy, New York
December 31, 1998

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE