

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DANIEL T. AND ANITA G. SWEENEY** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 817520  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 1994. :

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Petitioners, Daniel T. and Anita G. Sweeney, filed a petition 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 1994.

On September 18, 2000 and September 26, 2000, respectively, petitioners, by their representative, Bogardt & Company, LLP (Richard J. Bogardt, CPA) and the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by January 22, 2001, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioners' exclusion of a portion of their income from Federal and New York State taxable income for 1994 was proper.

***FINDINGS OF FACT***

1. Daniel T. Sweeney and Anita G. Sweeney filed a timely New York State resident income tax return, under the filing status “Married filing joint return” for the year 1994.<sup>1</sup> Petitioner received a wage and tax statement (form W-2) from his employer, Cablevision Systems Corp. (“Cablevision”), which indicated that he had received wages in the amount of \$914,026.21 for 1994. On both his Federal and New York State income tax returns filed for the year, petitioner excluded, when reporting his income, \$578,500.00 of the total amount paid to him by Cablevision. On his New York State return, petitioner indicated that the amount of \$578,500.00 had been excluded pursuant to Internal Revenue Code § 104 which related to an “Agreement Not to Sue.”

2. On June 13, 1997, the Division of Taxation (“Division”) issued a Statement of Proposed Audit Changes to petitioners which asserted additional personal income tax due in the amount of \$45,937.57, plus interest. The Statement of Proposed Audit Changes contained an explanation which provided in part as follows: “Wages reported on your return do not agree with your wage and tax statement(s). The income received from Cablevision Systems Corporation is not excludable as income on your federal return.”

3. On December 8, 1997, the Division issued a Notice of Deficiency to petitioners in the amount of \$45,937.57, plus interest of \$10,820.30, for a total amount due of \$56,757.87 for the year 1994.

4. Petitioners thereafter requested a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services and on October 15, 1999, a Conciliation Order (CMS No.

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<sup>1</sup> Since the issues in this matter relate solely to income received by Daniel T. Sweeney, all references to “petitioner” shall refer to Daniel T. Sweeney.

166780) was issued which recomputed the deficiency to \$45,804.68, plus interest computed at the applicable rate.

5. By letter to petitioner dated May 9, 1994, Cablevision offered him a voluntary early retirement which set forth the terms on which the employer indicated that it was prepared to provide petitioner with “enhanced benefits in connection with your early retirement.” The letter explained as follows:

As you know, the Federal Communications Commission recently announced changes in its rules which will have a serious effect on the operations of Cablevision Systems Corporation (the “Company”) and its subsidiaries and affiliates. As a result, the Company has had to reevaluate its business plan and has decided to make certain changes in its workforce. As part of that process, the Company has offered you a voluntary early retirement, the terms of which are set forth below.

Pursuant to the terms of the letter, upon agreement by petitioner, Cablevision was to pay the lump sum of \$578,500.00 plus an amount equal to the fair market value of 1,675 shares of the company’s stock at the close of business on June 30, 1994 along with certain other benefits not relevant to this proceeding. The letter also contained a release clause which stated as follows:

By countersigning the enclosed copy of this letter, and in consideration of the Company’s promise to pay you the amounts described above, you hereby release and discharge the Company and each of its subsidiaries, parents, officers, directors, employees, agents or causes of action, known or unknown, through the date on which you countersign the enclosed copy of this letter arising out of or in any way connected with or related to your employment or the termination of your employment, including, without limitation, any claims: (i) based on any local, state or federal statute relating to age, sex, race, veteran or marital status, disability or other form of discrimination (including, without limitation, the Age Discrimination in Employment Act of 1967, as amended), (ii) of wrongful discharge, (iii) relating to any implied or express contract (whether oral or written), (iv) for intentional or negligent infliction or emotional harm, defamation or any other tort, and (v) for additional severance pay, retirement pay or benefits.

### ***SUMMARY OF PETITIONERS' POSITION***

6. Petitioners contend that Internal Revenue Code § 104(a)(2), prior to its amendment by the Small Business Job Protection Act of 1996, provided for the exclusion from gross income, amounts received with respect to damages for the release from “tort type rights” related to personal injuries or sickness which included damages received for emotional distress. In a letter dated November 22, 2000 which was submitted in lieu of a brief, petitioners allude to “damages received for emotional distress.” Since petitioner waived all rights to sue to recover damages related to his personal injury for any “tort type” damages resulting from his termination, in a written binding agreement entered into prior to September 13, 1995, the amount received from Cablevision is excludable from income pursuant to this statute.

### ***CONCLUSIONS OF LAW***

A. Internal Revenue Code § 104(a) former (2), in effect during the year at issue, provided that gross income does not include “the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.”

26 CFR 1.104-1(c) states that “[t]he term ‘damages received (whether by suit or agreement)’ means an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.”

B. In *Commissioner v. Schleier* (515 US 323, 132 L Ed 2d 294), the United States Supreme Court noted that before a recovery may be excluded under section 104(a)(2) of the Internal Revenue Code, two independent requirements must be met, i.e., the taxpayer must first demonstrate that the underlying cause of action which gave rise to the recovery was based upon

tort or tort type rights and the taxpayer must also show that the damages were received on account of personal injuries or sickness.

C. Other than an unsubstantiated allegation of emotional distress, in a letter submitted in lieu of a brief (*see*, Paragraph “6”), there has been no evidence presented to indicate that petitioner received the payment from Cablevision as damages resulting from personal injuries or sickness. In fact, the record, i.e., the letter of May 9, 1994 which outlines the consideration for the termination of petitioner’s employment, clearly states that the benefits paid to petitioner were in consideration for his *voluntary* early retirement.

D. Provisions authorizing tax exemptions are to be strictly construed against the taxpayer who must clearly demonstrate his entitlement thereto (*see, Matter of Old Nut Co. v. State Tax Commn.*, 126 AD2d 869, 871, 511 NYS2d 161 *lv denied* 69 NY2d 609, 516 NYS2d 1025). In the present matter, petitioners have failed to prove that at the time of the execution of the agreement, there existed any claim whatsoever against Cablevision and, as previously noted, that the payments received were damages for personal injuries or sickness.

Even assuming, *arguendo*, that petitioner did suffer from some emotional or psychological harm from his termination by Cablevision, absent a showing that petitioner had commenced a legal suit based upon tort or tort type rights (or had negotiated a settlement in lieu of a legal suit), the payments received by petitioner may not be excluded from gross income. This matter is somewhat analogous to *Schleier* wherein the Supreme Court noted: “Moreover, though respondent’s unlawful termination may have caused some psychological or ‘personal’ injury comparable to the intangible pain and suffering caused by an automobile accident, it is clear that no part of respondent’s recovery of back wages is attributable to that injury.” (*Commissioner v. Schleier, supra*, 132 L Ed 2d, at 303).

E. The petition of Daniel T. an Anita G. Sweeney is denied and the Notice of Deficiency issued on December 8, 1997, as modified by Conciliation Order (CMS No. 166780), is hereby sustained.

DATED: Troy, New York  
July 12, 2001

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE