STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH AND DEBRA MARTELLI	:	DETERMINATION DTA NO. 817523
for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Years 1995 and 1996.	:	

Petitioners, Joseph and Debra Martelli, 15851 Lisbon Court, Wellington, Florida 33414-1277, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1995 and 1996.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 3, 2000 at 10:30 A.M. Petitioners' reply brief was due on February 27, 2001 which date began the six-month period for issuance of a determination. After the hearing, this matter was transferred to Administrative Law Judge Jean Corigliano for determination. Petitioner appeared by Christopher B. Graham, Esq. The Division of Taxation appeared by Barbara G. Billett, Esq. (Peter B. Ostwald, Esq., of counsel).

***ISSUE*S**

I. Whether the Division of Taxation carries the burden of proof to establish the correctness of the Notice of Deficiency issued to petitioners.

II. Whether petitioners should have reported partnership income they received in 1995 and 1996 as New York income.

FINDINGS OF FACT

1. Petitioners, Joseph Martelli and Debra Martelli, filed joint New York State nonresident income tax returns for 1995 and 1996, the two years in issue. On those returns, both petitioners reported wage and salary income from Kay J. Operating Co., Inc., a New York company located in West Hempstead, New York, and they paid New York State personal income taxes on that income. Their New York State tax return and their wage and tax statements showed their address as Wellington, Florida.

2. Petitioners are the sole partners of Joseph Martelli & Co ("Martelli"), a traffic and warehouse consulting firm. From at least 1990 until 1994, Martelli filed New York State partnership tax returns, and petitioners filed New York State resident income tax returns reporting income from the Martelli partnership as New York income. In 1995 and 1996, petitioners filed Federal income tax returns reporting the receipt of partnership income from Martelli. That income was not reported on petitioners' New York State nonresident tax returns in 1995 and 1996.

3. The Division of Taxation ("Division") began an audit of petitioners' 1995 and 1996 tax returns to determine whether petitioners had changed their residence to Florida and whether the Martelli partnership income was allocable to New York. An audit letter and a residency questionnaire were mailed to petitioners on or about November 4, 1998.

4. On audit, petitioners were represented by Arthur Wigutow. Based on information provided by petitioners and their representative, the Division determined that petitioners changed their residence from New York State to Florida in 1994. The Division also learned that petitioners worked for Kay J. Operating Company out of their home in Florida and reported to

the New York office about once per week. Petitioners reported all income they received from Kay J. Operating Company as New York income.

5. Petitioners provided the Division with a copy of a Florida Department of State Certificate registering Joseph Martelli & Co. as a fictitious name as of May 5, 1995. The Division was unable to find a telephone listing for Martelli in any Florida telephone directory. Petitioners did not provide the Division with business records to substantiate that Martelli had no New York source income.

6. Mr. Wigutow provided the Division with copies of Martelli's Federal partnership returns (Schedule K-1, Form 1065) for 1995 and 1996. A review of the partnership returns showed that the partnership claimed expenses for overnight travel. Petitioners' representative stated that travel expenses were incurred when petitioners traveled to New York and other states to negotiate contracts with Martelli customers. Inasmuch as petitioners were in New York approximately once a week working for Kay J. Operating Company and traveled to New York on Martelli business, the Division concluded that all or a portion of the Martelli income was allocable to New York. The Division requested that petitioners submit an itemization of the gross receipts reported on the Form 1065 and documents to substantiate the source of those gross receipts. No information was provided. Accordingly, the Division concluded that 100 percent of the Martelli partnership income received by petitioners in 1995 and 1996 was allocable to New York.

7. Based on petitioners' Federal income tax returns, the Division determined that petitioners received income from Martelli of $235,720.07 in 1995 and $76,287.90 in 1996. These amounts were determined to be 100 percent New York income, and petitioners' New York taxable income was adjusted accordingly.

8. The Division issued to petitioners a Notice of Deficiency, dated March 1, 1999, asserting income tax deficiencies of $17,174.35 plus interest and penalty for 1995 and $5,117.45 plus interest and penalty for 1996.

9. This matter was originally scheduled for hearing on October 3, 2000. That hearing was adjourned at petitioners' request to enable their representative, at the time William H. Wishinsky, C.P.A., to secure documentation. Upon the agreement of Mr. Wishinsky and the Division, the hearing was rescheduled for November 3, 2000. On that date, Mr. Wishinsky appeared and moved for an adjournment explaining that he had obtained petitioners' approval to engage an attorney, Christopher B. Graham, Esq., on the preceding evening. Since Mr. Graham was not familiar with the facts of the case, petitioners sought an additional 30-day period to present their case. Administrative Law Judge Nero denied the motion but left the record open for the submission of documents by petitioners.

10. Following the hearing, petitioners submitted canceled checks from the First Union National Bank of Florida, drawn on the account of Joseph Martelli Co., Wellington, Florida. The checks were all dated in the period June 1, 1995 through December 31, 1995. No explanation was provided with the checks. Petitioners also submitted an undated letter on the letterhead of Joseph Martelli Co. Notations on the top of the document indicate that it was faxed to Mr. Graham on January 3, 2001. The letter states that Martelli has been based in Florida since January 1995 and is operated out of petitioners' home in Florida. There is a description of the services provided by Martelli. Essentially, the company is a consolidator of storage and transportation services, identifying companies with excess capacity who are willing to sell at a discount. It is not clear whether Martelli actually purchased and resold the services of others or merely provided information to its customers. The letter ends as follows: "Unfortunately, due to the lack of clients and to Mr. Martelli's desire to retire the company has done poorly over the

past several years. For that reason, Joseph Martelli & Co. has had limited and now no accounts receivables since 1995." The letter is not addressed to anyone, and it is unsigned. The Martelli letterhead bears a Florida address and telephone number.

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioners claim that the Division carries the burden of proving the correctness of its Notice of Deficiency where the taxpayers are not residents of New York. Petitioners argue that the Florida business certificate, the canceled checks and the Martelli letterhead showing a Florida address and telephone number prove that Martelli was a Florida partnership during the audit period. Based on this evidence, they argue that all Martelli partnership income was properly allocated to Florida.

12. The Division argues that petitioners' continuing physical presence in New York for business purposes demonstrates the existence of a connection between Martelli and New York State which provides a rational basis for the Division's notice. Based on its claim that the notice was properly issued, the Division contends that the burden of proof to show any incorrectness in the notice is on petitioners. Since petitioners failed to present any evidence to show that income received by Martelli was not from a business carried on in New York, the Division urges that the notice be sustained.

CONCLUSIONS OF LAW

A. Section 631 of the Tax Law states, in relevant part, that the New York source income of a nonresident individual "shall be the sum of the net amounts 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" (Tax Law § 631[a]). The New York source income of a nonresident individual includes "his distributive share of partnership income, gain, loss and deduction determined under section six hundred thirty-two" (Tax Law § 631[a][1]). As relevant

to this determination, items derived from or connected with New York sources include those items attributable to a business, trade, profession or occupation carried on in New York (Tax Law § 631[b][1][A], [B]).

The Division had a rational basis for asserting that the Martelli partnership received income from a business carried on in New York. From at least 1990 to 1994, Martelli reported all of its income as New York source income. Although petitioners, its sole partners, changed their residence to Florida in 1994, there is reason to believe that Martelli continued doing business in New York. The Division was informed that petitioners traveled to New York once a week in connection with salaried employment and that they traveled to New York to negotiate contracts on behalf of Martelli. Accordingly, it was reasonable for the Division to ask petitioners to substantiate their zero allocation of Martelli partnership income to New York. Inasmuch as petitioners provided no documentation to support that allocation, the Division properly allocated 100 percent of the partnership income to New York.

B. There is no support in the law for petitioners' claim that where the Division seeks to tax the income of a nonresident it bears the burden of proving the correctness of its notice. A properly issued Notice of Deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398; ***Matter of Kourakos v. Tully***, 92 AD2d 1051, 461 NYS2d 540, ***appeal dismissed*** 59 NY2d 967, 466 NYS2d 1030, ***lv denied*** 60 NY2d 556, 468 NYS2d 467, ***cert denied*** 464 US 1070, 79 L Ed 2d 215; ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner except in three specified instances which are not relevant here. The statute makes no exception for nonresidents.

The case cited by petitioners, ***Matter of Megson v. New York State Tax Commn.*** (105 AD2d 481, 480 NYS2d 615) does not support their proposition that New York State lacks jurisdiction to challenge petitioners' 100 percent allocation of partnership income to Florida. The ***Megson*** opinion distinguishes an older case requiring the State Tax Commission to carry the burden of proof where it seeks to tax nonresident income (***People ex rel. Monjo v. State Tax Commn.***, 218 App Div 1, 217 NYS 669) by noting that the taxpayer in ***Megson*** is a New York resident. Whatever the precedential value of ***Monjo*** may be, there is now no question that a nonresident partner seeking to challenge a notice of deficiency bears the burden of proving the incorrectness of the notice (***see***, ***e.g.***, ***Matter of Ward v. New York State Tax Commn.***, 97 AD2d 640, 468 NYS2d 926).

Although given ample opportunity to do so, petitioners presented no evidence to support any adjustment to the Division's 100 percent allocation of partnership income. The certification from the Florida Secretary of State and the bank statements merely show that Martelli did some business in Florida. They do not show that Martelli did not conduct business in New York. Since petitioners did not present any evidence that would support a modification of the Division's audit conclusions, the Notice of Deficiency must be sustained.

C. The petition of Joseph and Debra Martelli is denied, and the Notice of Deficiency dated March 1, 1999 is sustained.

DATED: Troy, New York
May 31, 2001

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE