STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GAIL B. DeGROAT	:	DETERMINATION DTA NO. 821266
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 2000.	:	

Petitioner, Gail B. DeGroat, 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 2000.

On March 30, 2007 and April 17, 2007, respectively, petitioner, appearing by Politi and Magnifico, LLC (Peter E. Politi, CPA), and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by August 10, 2007, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation correctly determined that petitioner failed to report additional income for the year 2000 and therefore owed additional personal income tax for such year.

FINDINGS OF FACT

1. Petitioner, Gail B. DeGroat, timely filed a New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) for the year 2000.[1] On line one of this return, petitioner reported wages, salaries and tips, etc., of $659,634.00 for federal income tax purposes and $103,974.00 for New York State income tax purposes, a difference of $555,660.00. As detailed below, this difference was a "special payment" received by petitioner from her former employer.

2. Petitioner had been employed in New York State by The McManus Group, Inc. (the Company) or a successor entity until December 31, 1999, at which point she retired. It is undisputed that petitioner was a resident of Pennsylvania during the year 2000, and was not a resident of New York State.

3. On September 30, 2004, the Division of Taxation (Division) issued to petitioner a Notice of Deficiency asserting additional personal income tax due for the year 2000 in the amount of $20,566.68, plus interest and penalties. This assertion of additional tax was computed upon the Division's allocation and treatment of some $412,205.00 out of the $555,660.00 special payment as New York source income for the year 2000. Specifically, the Division divided petitioner's New York State income for the years 1997, 1998 and 1999 ($309,895.00) by petitioner's federal income for such years ($495,899.00) to arrive at petitioner's New York allocation percentage of 62.49 percent. The Division then applied this allocation percentage to petitioner's federal wages, salaries and tips, etc. for 2000 ($659,634.00) to arrive at New York source wage, salary and tip income of $412,205.00. In turn, reducing such amount by New York

[1] Petitioner filed her return jointly with her husband, John A. DeGroat. However, the amounts in question here relate solely to petitioner, Gail B. DeGroat.

wage, salary and tip income ($103,974.00), as reported on petitioner's Form IT-203 for 2000, resulted in additional New York source wage, salary and tip income of $308,231.00 for such year. Thus, the Division's assessment of additional tax is premised upon the assertion that the special payment constituted severance pay or deferred compensation for services rendered by petitioner as an employee during her prior years of employment in New York, allocable to and taxable by New York as New York source income based on the number of days worked within New York compared to the total number of days worked within and without New York.

4. The $555,660.00 special payment was received by petitioner in April 2000, and was paid pursuant to a letter agreement, termed a Settlement Agreement and Release (Agreement), between petitioner and her former employer. The Agreement provided in the record was accompanied by a cover letter from Morrison, Cohen, Singer & Weinstein, LLP, the law firm which represented petitioner in negotiations with the Company.

5. Paragraph 1(a) of the Agreement provided, as follows:

> In consideration of this Agreement, and provided you do not revoke this Agreement . . . , the Company agrees to pay you a special payment of $555,660.00, less all applicable withholdings, payroll taxes and contributions. This amount will be paid to you in a lump sum within ten (10) days following [the effective date of the Agreement].

6. Paragraph 1(b) of the Agreement specified four additional items of payment which petitioner received in April 2000, including a Growth and Accumulation Plan (GAP) payment of $25,780.00, a Profit Appreciation Account and Deferred Profit Allowance Account (PAC/DPA) payment of $103,974.00, a payment of $1,472.28 for seven accrued and unused vacation days, and a net retirement check payment of $1,000.00. Neither the dollar amounts nor the tax treatment of these items are in issue in this proceeding. Paragraph 1(d) of the Agreement specified that, except for the dollar amounts specified above (per Paragraph 1[a], [b]), and except

(per Paragraph [c]) for petitioner's continuing eligibility to participate in the Company's retiree medical plan and retiree life insurance plan and her retention of any vested benefits under the Company's pension and 401(k) plan, petitioner would no longer be entitled to receive any further compensation or other monies from the Company or its affiliates.

7. Paragraph 2 of the Agreement, which is specifically relevant to the special payment, provides as follows:

> (a) As used in this Agreement, the term "claims" shall include all claims, covenants, warranties, promises, undertakings, actions, suits, causes of action, attorneys' fees, obligations, debts, accounts, judgments, losses and liabilities, or [sic] whatsoever kind or nature, in law, equity or otherwise.
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> (b) For and in consideration of the payment set forth in paragraph 1(a) above [the Special Payment], you, for and on behalf of yourself and your heirs, administrators, executors, and assigns, effective the date hereof, do fully and forever release, remise and discharge the Company, its direct and indirect parents, subsidiaries and affiliates (including, without limitation, B/com3 Group, Inc.), together with their respective officers, directors, parents, shareholders, employees and agents (collectively, the "Group") from any and all claims which you had, may have had, or now have against the Company and the Group, for or by reason of any matter, cause or thing whatsoever, including any claim arising out of or attributable to your employment or the termination of your employment with the Company, including but not limited to claims of breach of contract, wrongful termination, unjust dismissal, defamation, libel or slander, or under any federal, state or local law dealing with discrimination based on age, race, sex, national origin, handicap, religion, disability or sexual preference. This release of claims includes, but is not limited to, all claims arising under Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Civil Rights Act of 1991, the Family Medical Leave Act, the Equal Pay Act, the New York Human Rights Law, the New York City Administrative Code, and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on an employer's right to terminate the employment of employees.
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> (c) You specifically release all claims under the Age Discrimination in Employment Act relating to your employment.
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> (d) This release of claims specifically includes, but is not limited to, all claims regarding any interest or entitlement in the Company, the Group, or

> any of them, including any equity, redemption proceeds or rights, stock, membership interest, profits, dividends, sale proceeds or other participation of any kind in the Company or any of the Group. Without limitation to the foregoing, you expressly acknowledge that you have no ownership interest or rights to obtain ownership interest in any member of the Group, including without limitation B/com3 Group, Inc.
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> (e) You are specifically agreeing to the terms of this release because the Company has agreed to pay you money to which you were not otherwise entitled under the Company's policies, and has provided such other good and valuable consideration as specified herein. The Company has agreed to provide this money because of your agreement to accept it in full settlement of all possible claims you might have or ever had, and because of your execution of this Agreement.
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> (f) The Company represents that, as of the execution of this Agreement, it is not aware of any claims which it has against you, for or by reason of any matter, cause or thing whatsoever, including any claim arising out of or attributable to your employment or your resignation.

8. Paragraph 4(a) of the Agreement imposed an obligation of confidentiality on petitioner with respect to the Agreement, as follows:

> You agree to keep secret and strictly confidential the existence of this Agreement and further agree not to disclose, make known, discuss or relay any information concerning this Agreement, or any of the discussion leading up to this Agreement, to anyone other than members of your immediate family, and/or your tax advisor or attorney, provided that those to whom you make such disclosure agree to keep said information confidential and not disclose it to others. The foregoing shall not prohibit disclosure (i) as may be ordered by any regulatory agency or court or as required by other lawful process, or (ii) as may be necessary for the prosecution of claims relating to the performance or enforcement of this Agreement.

9. Petitioner's Form IT-203 for 2000 included an attached Wage Allocation Statement indicating that the $555,660.00 amount of the special payment represented "Wages allocated to Pennsylvania." This statement included the following explanation:

> Allocation based on fact that amount indicated was received due to a legal settlement subsequent to work related activity. Taxpayer (spouse) was a resident of Pennsylvania when received. No New York State related

> activity was necessary for this settlement, which is contained in a confidential agreement.

10. Petitioner included the special payment as part of her taxable compensation on her Pennsylvania income tax return (Form PA-40) for 2000. Petitioner claimed a Pennsylvania Resident Credit in the amount of $2,911.00 on PA Schedule G for the year 2000, on the basis that $103,974.00 of her income had been reported and subjected to income tax in both Pennsylvania and New York State (***see*** Finding of Fact "1").

11. The record includes a GAP (Growth Accumulation Plan) Settlement Schedule showing petitioner's account balance due ($25,780.00) as of December 31, 1999. This amount was paid to petitioner in April 2000 (***see*** Finding of Fact "6"). The GAP Settlement Schedule reflects the number of shares and the years of their purchase, the cost per share for such stock, the total cost basis for petitioner's stock ($15,760.00), and the resulting amount of capital gain ($10,020.00) from the stock redemption. The GAP payment amount ($25,780.00) was not included in petitioner's New York source income or subjected to New York tax, presumably because the same resulted from the disposal of an intangible (shares of stock) by a nonresident.

12. By a letter dated November 3, 2005, petitioner's representative stated that the special payment amount was a "negotiated dollar figure which was somewhat commensurate with the stock buyouts of senior management when [the Company] was sold." The letter goes on to state that "[I]n November 1985 vice-presidents and below had to turn in their stock in [the Company] at a set value . . . . This amount was paid to [petitioner] and is referred to as GAP in the amount of $25,780.00. The negotiated amount is the additional value of these shares which was paid to senior management upon the sale [of the Company], but not to [petitioner] until a lawsuit was brought."

CONCLUSIONS OF LAW

A. New York State imposes personal income tax on the income of nonresident individuals to the extent that their income is derived from or connected to New York sources (Tax Law § 601[e]). The portion of the individual's income derived from or connected with New York sources is determined per Tax Law §§ 631 - 639 (Tax Law § 601[e][3]). Included in such income is that which is attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[b][1][B];[2]). If a taxpayer's business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the Commissioner of Taxation, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

B. The New York source income of a nonresident individual, such as petitioner, rendering personal services as an employee includes the compensation for personal services entering into his federal adjusted gross income, but only if and to the extent such services were rendered within New York State (***id.***; 20 NYCRR 132.4[b]). Where such personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with 20 NYCRR 132.15 through 20 NYCRR 132.18. An allocation of such personal service income on the basis of the number of working days employed in New York State in relation to the total number of working days employed both within and without New York State, as was made by the Division in this case, is provided for pursuant to 20 NYCRR 132.18(a).

C. To prevail in this matter, petitioner was required to show that the income in question was not secured or earned pursuant to activities connected with or derived from New York

sources (***Matter of Laurino***, Tax Appeals Tribunal, May 20, 1993). The controlling factor in making this determination is the consideration given by petitioner in exchange for the right to the income (***id., citing Matter of Halloran***, Tax Appeals Tribunal, August 2, 1990). That is, "it is necessary to examine what petitioner gave up in exchange for the right to the income at issue" (***Matter of Haas***, Tax Appeals Tribunal, April 17, 1997). Where the consideration has no connection to New York, the income will not be subject to tax by the state (***Matter of Donohue v. Chu***, 104 AD2d 523, 479 NYS2d 889 [1984]).

D. Petitioner has failed to show that the special payment, a lump sum amount, was not secured or earned pursuant to activities connected with or derived from New York sources and was thus not properly considered New York source income subject to New York taxation (***Matter of Laurino, supra.***). Petitioner's primary contention is that the amount paid was the "additional value" of the shares she relinquished in connection with the sale of the Company (i.e., the amount over and above the $25,780.00 GAP amount), was "somewhat commensurate with the stock buyouts of senior management," and thus was in the nature of a capital item. However, the evidence is simply not sufficient to independently bear out this characterization. An unsupported claim that the payment was commensurate with and in the nature of a stock value buyout does not suffice to establish or convert such payment to a stock buyout and hence a capital item. In fact, the Agreement is silent on this issue, save for its delineation of the $25,780.00 GAP payment at paragraph 1(b). Moreover, the Agreement only very generally states, at paragraph 2(b) and (e), that the Special Payment was made in consideration for petitioner's settlement and release of any possible claims she might have against the company and for her execution of such Agreement (***see*** Finding of Fact "7"). The evidence in the record does not specify any particular claim or claims petitioner assertedly had against the Company,

nor does the Agreement show that the Special Payment was accorded to any particular claim or claims. A standard or general release which lists a wide range of claims and does not accord a payment to a specific claim is in the nature of severance pay and not damages received in settlement of litigation (***see Matter of DeLardi & DeFonzo***, Tax Appeals Tribunal, March 18, 1999).[2]

E. There is no evidence of any contract for employment extending beyond the December 31, 1999 ending date of petitioner's employment with the Company. Thus, petitioner appears to have been an "at will" employee subject to termination at any point. In this regard, the record contains no evidence to establish that the Special Payment was made in exchange for petitioner's relinquishment of any right to future employment with the Company, nor is there any evidence that petitioner received the special payment for entering into a covenant not to compete pursuant to which her entitlement to future employment in her field of endeavor was circumscribed (***Matter of Laurino, supra.***). Finally, petitioner's claim that her employer improperly or erroneously treated the special payment as compensation subject to withholding because, unlike a capital payout, such treatment entitles the employer to deduct the same is unsupported. In fact, such treatment may well have been a matter of negotiation between petitioner and her former employer with regard to the special payment. In sum, the evidence does not establish that the Special Payment was anything other than severance pay or retirement pay properly treated as

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[2] The Agreement specifies a very broad range of potential claims released by petitioner, but never accords the Special Payment to any particular claim. In fact, while petitioner was represented by counsel in negotiations with her former employer, and notwithstanding the assertion that a lawsuit was brought (***see*** Finding of Fact "9"), the record contains no evidence in support of such claim or to affirmatively establish that a suit was in fact instituted. Thus, the Special Payment may not be considered on this record to fall within the ambit of Internal Revenue Code § 104(a)(2), an income exclusion provision pertaining to damages received through the prosecution of an action based upon tort or tort type rights or through a settlement agreement entered into in lieu of such prosecution (***Matter of DeLardi & DiFonzo, supra.***, ***citing Commissioner v. Schleier***, 515 US 323, 132 L Ed 2d 294).

New York source income allocable to and taxable by New York in the manner calculated by the Division and reflected in its Notice of Deficiency.[3]

F. The petition of Gail B. DeGroat is hereby denied, and the Notice of Deficiency dated September 20, 2004 is sustained.

DATED: Troy, New York
February 7, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[3] There is no jurisdiction herein to address the extent, if any, to which petitioner might be entitled to request or obtain a Resident Credit from the State of Pennsylvania on the basis that the Special Payment has been subjected to tax in both Pennsylvania and New York State (***see*** Finding of Fact "10").