STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM AND GLORIA KATZ	:	DECISION DTA No. 805768
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1984.	:	

Petitioners William and Gloria Katz, 217 Harborview North, Lawrence, New York 11559, filed an exception to the determination of the Administrative Law Judge issued on March 24, 1994. Petitioners appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on May 26, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioners, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners were entitled to claim a credit against their New York State personal income tax liability for 1984 based on income taxes they paid to another state on slot machine winnings from a casino located in such other state.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

For the year 1984 petitioners, William and Gloria Katz, were residents of New York State and New York City. In 1984, petitioner William Katz hit a jackpot on a slot machine at Bally's

Casino and Hotel in Atlantic City, New Jersey, winning $2,202,482.00.

Petitioners filed a New Jersey Non-Resident Gross Income Tax Return for 1984, reported the slot machine winnings thereon, and paid tax in the amount of $76,318.00 to New Jersey. Petitioners also filed a New York State Resident Income Tax Return for 1984, on which they claimed a credit against their New York State personal income tax liability (the "resident taxcredit") in the amount of $76,318.00, i.e., the amount of tax paid by them to New Jersey.

The Division of Taxation ("Division") audited petitioners' 1984 New York return and thereafter issued a Statement of Audit Changes dated May 20, 1987 which disallowed petitioners' claimed resident tax credit. This statement explained that:

> "New York State does not allow a resident credit based on gambling winnings earned in another state as the income is not connected with personal service income or a trade or business carried on in the other jurisdiction."

The statement asserted additional income tax due in the amount of $58,372.00,[1] plus interest. Penalty was not asserted by the Division on such statement.

The Division next issued to petitioners a Notice of Additional Tax, dated July 10, 1987, showing tax due of $58,372.00, plus interest. Again, penalty was not asserted on the document. This notice provided, in part, as follows:

> "If you do not agree with this adjustment, you may submit additional information pertinent to your case by writing to this office [Tax Compliance Division], referring to the above assessment number.
>
> "Your failure to respond to this letter within 15 days will result in the issuance of a statutory Notice of Deficiency for the amount of the additional tax plus accrued interest. The issuance of this Notice represents the Division's first formal step towards taking legal action to compel payment."

The Notice of Additional Tax described above was followed by the Division's issuance of a Notice of Deficiency, dated August 20, 1987, asserting additional tax due in the amount of

---

[1]The dollar variance between the amount of resident tax credit claimed by petitioners ($76,318.00) versus the amount of the asserted deficiency following disallowance of such credit ($58,372.00) stems from other adjustments to petitioners' New York return (principally concerning refunds for other years based on application of a net operating loss carryback). This dollar variance is not in dispute and has no impact on resolving the resident tax credit issue presented herein.

$58,372.00, plus interest. As before, no penalty was asserted by the Division.

On or about May 9, 1988, petitioners filed an Amended New Jersey Gross Income Tax Return for the year 1984, claiming that there was no provision in the New Jersey Income Tax Law under which a nonresident could be taxed on slot machine winnings. Petitioners thus claimed they owed no tax to New Jersey and requested a refund of the entire tax previously reported and paid to New Jersey, i.e., $76,318.00.

Petitioners' request for refund was denied by the New Jersey Division of Taxation ("N.J. Division"), as was a subsequent request for a conference regarding such denial.

On May 19, 1989, petitioners filed an action in the Tax Court of New Jersey requesting a refund of all taxes paid for the year 1984. Petitioners' position in this action was stated as follows:

> "The entire amount of income originally reported as from New Jersey sources was from winnings of a slot machine jackpot in Atlantic City. There is no provision in the New Jersey Income Tax Law under which a nonresident of New Jersey is taxable on such winnings. Section 54A:5-5 states that 'the income of a nonresident individual shall be that part of his income derived from sources within this State as defined in this act.' New Jersey source income for nonresidents is defined in N.J.S.A. 54A:5-8. The Division of Taxation has denied the refund claim citing Section 54A:5-8(3) which refers to income from 'work done' or 'business activities' conducted in New Jersey. It is the taxpayers' contention that the winning of money by the mere pulling of a slot machine handle on an infrequent visit to a casino in Atlantic City is not income from 'work done' or 'business activities' in New Jersey. Further, it is clear that it was not the Legislature's intent to subject non-residents to the New Jersey Gross Income Tax on such winnings as N.J.S.A. 54A-5-1(g) and (1) specifically include 'gambling' and 'amounts received as prizes and awards...' as income taxable to residents of New Jersey. No similar language is found in the definitions of income from New Jersey sources for a nonresident which is set forth in N.J.S.A. Section 54A:5-8. Further, New Jersey Gross Income Tax Regulations Section 18.35-1.20(b)(2) indicates that the Gross Income Tax will not be withheld from payments 'of winnings from a slot machine, or a keno or bingo game.' Therefore, even this Regulation which became effective September 6, 1988, well after the year at issue, recognizes the non-taxability of the taxpayer's winnings by New Jersey."

On September 12, 1990, a Stipulation of Dismissal of petitioners' action in the Tax Court of New Jersey was executed. Pursuant to this dismissal, the N.J. Division issued a refund in the amount of $76,318.00, plus interest at the rate of 6% from the date of the filing of the claim for refund to the date of its payment, in full payment of petitioners' claim for refund.

Petitioners' representative mailed a Notice of Withdrawal of Petition (the "Withdrawal"),

dated January 14, 1991, to the Division of Tax Appeals, together with a covering letter which indicated that the Withdrawal should be considered as becoming effective only if the Division of Tax Appeals did not grant the relief (modification or waiver of interest per Tax Law § 2006.12) requested in the covering letter. A copy of this letter was sent to counsel for the Division. Thereafter, petitioners' representative sent another letter to the Division of Tax Appeals, dated January 18, 1991, in which he indicated that he was "withdrawing" the Withdrawal and requesting that the case proceed to determination. As before, a copy of this letter was sent to counsel for the Division.

On January 22, 1991, the Administrative Law Judge then assigned to this case sent a letter to petitioners' representative indicating: a) that he had received the January 18, 1991 letter (withdrawing the Withdrawal); b) that he had not received the January 14, 1991 letter containing the Withdrawal (as referenced in the January 18, 1991 letter); and c) that petitioners' representative should submit a copy of the January 14, 1991 letter. Thereafter, on January 29, 1991, the Administrative Law Judge sent another letter to petitioners' representative indicating that he had received the January 14, 1991 letter including the Withdrawal on January 29, 1991.

The Division submitted, as part of its documentary evidence, copies of petitioners' representative's January 14, 1991 and January 18, 1991 letters. The Division's copies of the January 14, 1991 and January 18, 1991 letters, as submitted herein, did not include the envelopes in which they were received by the Division. Each of such letters bears a Division of Taxation - Law Bureau indate stamp of January 24, 1991. By comparison, the Division of Tax Appeals' case file in this matter includes the originals of such letters together with the envelopes in which they were mailed. The envelope in which the original January 14, 1991 letter was mailed bears a machine-metered (Pitney-Bowes) postmark of January 17, 1991, no United States Postal Service ("USPS") postmark, and a Division of Tax Appeals indate stamp of January 29, 1991. In turn, the envelope in which the January 18, 1991 letter was mailed (withdrawing the Withdrawal) bears machine-metered (Pitney-Bowes) and USPS postmarks of January 18, 1991, while the letter itself bears a January 22, 1991 Division of Tax Appeals indate

stamp.

On February 5, 1993, petitioners' representative was advised, by a letter from the Division's representative, that the Division's then-current records regarding this case indicated the amount at issue to consist of $58,372.00 in tax, $57,828.84 in interest and $14,593.00 in penalties.

OPINION

The Administrative Law Judge first addressed the Division's contention that the Notice of Withdrawal of Petition submitted by petitioners was effective upon filing and was not withdrawn by a subsequent writing. The Administrative Law Judge, distinguishing this case from our decision in Matter of D & C Glass Corp. (Tax Appeals Tribunal, June 11, 1992), rejected the Division's position. The Administrative Law Judge found that, unlike D & C Glass,[2] where the notice of cancellation was received by the Division of Tax Appeals prior to a telephone call indicating that the same had been mailed in error and was being retracted, the Withdrawal in this case was not received until after its cancellation in writing had been received by the Division of Tax Appeals. In so finding, the Administrative Law Judge noted that in determining when a Notice of Withdrawal was filed, in the absence of a USPS postmark, the delivery date should control. The Notice of Withdrawal in this case bore a January 29, 1991 indate stamp of the Division of Tax Appeals. The letter of cancellation, however, was governed by its USPS postmark date of January 18, 1991.

It was also noted by the Administrative Law Judge that the Division did not attempt to terminate the prior administrative proceedings between petitioners and the Division in this matter. Further, the Administrative Law Judge and the Tax Appeals Tribunal issued rulings in these earlier proceedings, thus, evidencing their impression that the Withdrawal was cancelled.

On the substantive issue, the Administrative Law Judge, relying on our decision in Matter of Mallinckrodt (Tax Appeals Tribunal, November 12, 1992), set out the three elements that a taxpayer must prove under Section 620(a) of the Tax Law in order to receive credit: 1) that

[2]In D & C Glass, the document involved was a "Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding" submitted by the Division of Taxation to the Division of Tax Appeals.

another state of the United States imposed a tax on the subject income; 2) that the income was derived from another state of the United States; and 3) the income was subject to tax under Article 22 of the Tax Law. The Administrative Law Judge determined that petitioners failed to meet the first two parts of this test.

In looking at the relevant New Jersey Tax Law, in effect during the period at issue, the Administrative Law Judge noted that the law was not written in a manner so as to require a New Jersey nonresident individual to report and pay gross income tax on income resulting from gambling winnings (NJ Stat Ann former Section 54A:5-8). The Administrative Law Judge distinguished then existing Section 54A:5-8 from the current statute, as amended, which specifically provides that nonresidents are taxed on the income from any wagering transaction in New Jersey. The Administrative Law Judge also noted that the State of New Jersey agreed to refund to petitioners all the tax paid based on such winnings, apparently abandoning an earlier position that such income was subject to taxation. As a result, the Administrative Law Judge concluded that petitioners had not established that New Jersey imposed tax on the subject income.

The Administrative Law Judge also concluded that petitioners did not satisfy the second part of the test. Looking to our decision in Mallinckrodt for further guidance, the Administrative Law Judge noted that

under 20 NYCRR former 121(4)(d) the degree of contact is sufficient where the income arises from either the taxpayer's commercial activities within the taxing state or from real or tangible personal property situated therein. In looking at the facts of this case, the Administrative Law Judge stated that it was:

> "clear that the slot machine income in question was not the result of commercial activities undertaken by petitioners within New Jersey (there is no evidence that gambling was petitioners' business or profession), nor was such income derived from real or tangible property situated therein. There is no evidence that such winnings represented compensation for personal services performed in the other jurisdiction" (Determination, conclusion of law "G").

In addition to the above, the Administrative Law Judge concluded his survey of this issue

by noting that to allow petitioners a New York resident tax credit after New Jersey had refunded tax paid on the winnings would result in a windfall for petitioners as no tax would be paid in either jurisdiction.

With regard to the other arguments presented by petitioners on the matter of "recapture" of a credit based on the New Jersey refund, the Administrative Law Judge pointed out that there is no issue of recapture. The matter is resolved by the finding that no credit was to be issued in the first instance in light of then effective law in New Jersey.

As a final note, the Administrative Law Judge addressed in a footnote the claim by petitioners that they are not subject to penalty on the assessed tax. The Administrative Law Judge, upon review of the record, concluded that the Division was not asserting the imposition of penalty and, as a result, the matter need not be addressed.

On exception, petitioners assert that the Administrative Law Judge erred in his interpretation of Matter of Mallinckrodt (supra); overlooked and disregarded the appropriate regulation, i.e., 20 NYCRR 131.4(e); and disregarded the arguments made concerning double taxation.

We believe the Administrative Law Judge correctly applied Mallinckrodt.

Next, we disagree with petitioners that 20 NYCRR 131.4(e) is the relevant regulation. The regulation applied by the Administrative Law Judge, 20 NYCRR former 121(4)(d), interprets section 620 of the Tax Law. Because section 620 is the statutory authority for the resident credit, 20 NYCRR former 121(4)(d) is the applicable regulation. Section 121(4)(d) states that "income derived from sources within another state" will be construed in accordance with the definition of the term "derived from or connected with New York State sources" as set forth in Part 131 of the regulation: it does not state, as petitioners assert, that "income derived from sources within another state" will be construed as defined in Part 131 of the regulations. Thus, we see no basis to petitioners' argument that the Administrative Law Judge erred in not applying section 131.4(e) of the regulations.

Finally, as petitioners have not been subject to double taxation, we see no need to address this argument.

Given the election by petitioners to incorporate the same arguments raised in their post-hearing brief on exception as opposed to submitting a brief, there are no other new arguments we need address. We find the determination of the Administrative Law Judge dealt fully and correctly with the issues raised below and we affirm for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William and Gloria Katz is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of William and Gloria Katz is denied; and

4. The Notice of Deficiency dated August 20, 1987 is sustained.

DATED: Troy, New York
November 3, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner