STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD G. DELARDI AND LINDA L. DIFONZO	:	DECISION DTA NO. 814042
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1993.	:	

Petitioners Richard G. Delardi and Linda J. DiFonzo, c/o Anderson, 79 Forrester, Palm Coast, Florida 32137, filed an exception to the determination of the Administrative Law Judge issued on January 21, 1998. Petitioners appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Felicia Gordon, Esq. and Laura J. Witkowski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Oral argument was heard on September 24, 1998 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the lump sum payment received by petitioner[1] from his employer is excludable from petitioner's 1993 New York State gross income because it constituted damages received due to personal injury or sickness pursuant to Internal Revenue Code § 104(a)(2).

II. Whether petitioner is entitled to an additional New York State resident tax credit for taxes paid to Connecticut on the lump sum payment for the tax year 1993.

FINDINGS OF FACT

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

Background - Petitioner's Employment With International Business Machines

1. Testifying on behalf of petitioner regarding the circumstances of both his employment with IBM and his departure from IBM were petitioner, Mr. Michael Silverman and Mr. John Reitter. Mr. Silverman began working for IBM in 1981 and continues to be employed by IBM. He has known petitioner through their mutual employment at IBM since 1988 or 1989. He worked either for or with petitioner from that time until apparently the time petitioner left IBM. Mr. Reitter has known petitioner through their mutual employment at IBM since 1968. It appears he also worked with petitioner from 1989 through December of 1993, when Mr. Reitter also left his employment at IBM. Mr. Reitter currently has a petition pending with the Division of Tax Appeals involving the same issue as the present matter. The testimony of Mr. Silverman and Mr. Reitter primarily corroborated petitioner's testimony regarding his employment with

[1]Petitioners were married during 1993, and filed a joint New York State tax return for 1993. However, the income in dispute pertains exclusively to Mr. Delardi's employment with International Business Machines. Therefore, all references to petitioner shall refer solely to Mr. Delardi, while references to petitioners shall refer to Mr. Delardi and Ms. DiFonzo.

IBM. Therefore, the testimony of all three witnesses has been combined and appears in Findings of Fact "2" through "13".

2. Petitioner was employed by IBM for approximately 28 years. In 1989 he was a "second line manager in the financial area for the IBM Corporation" (tr., p. 12). Petitioner was responsible for the "financial requirements associated with reporting the operations" (tr., p. 13) for the ROLM Telephone Company (hereinafter "ROLM"). At that time ROLM was a division within IBM. While he occupied this position petitioner had an office, a conference room and a personal secretary. There were 4 managers that reported directly to petitioner, with a total of approximately 70 employees under petitioner's supervision.

3. During 1989 IBM determined to sell off the manufacturing operation and one-half of the marketing aspects of ROLM. Petitioner had previously been dedicated to integrating ROLM into IBM and now worked on reversing the steps previously taken in order to make ROLM an attractive stand alone company for sale. Once the divestiture of ROLM was completed, IBM requested that petitioner leave IBM and go to work for ROLM. Petitioner, not wanting to give up his tenure with IBM, refused and attempted to find a new position within IBM. Petitioner located an assignment within IBM. The responsibility of this position was to work with those ROLM employees remaining with IBM towards total divestiture of ROLM (i.e., the sale of the remaining piece of the marketing operations). In this position petitioner no longer held any supervisory responsibilities; no employees reported to petitioner and petitioner reported directly to a director. Petitioner had to commute to the location of this new position.

4. Petitioner explained that IBM had two separate means of evaluating jobs within the organization. The first was by job rank. This was an evaluation of a position and the importance it held within the organization. The second was a performance evaluation, which evaluated the performance of the specific individual currently holding a given position. Petitioner testified that prior to 1989 he had always held a high ranking and his appraisals were always at the highest or next to the highest level obtainable.

5. Maintaining a high rank was difficult in petitioner's new position because he no longer had supervisory responsibilities. Petitioner, therefore, worked diligently in his new assignment in an attempt to keep a high ranking. He received several awards and accommodations for this work. Introduced into evidence was a Distinguished Contribution Award in petitioner's name dated May 18, 1992 "in appreciation for: Your Outstanding Efforts in the Sale of ROLM to Siemens" (Petitioners' Exhibit 1). Petitioner testified that he received a monetary award together with this certificate in the amount of $10,000.00. This monetary award was included in petitioner's gross income for 1992, he paid taxes on this amount and IBM allowed deferred compensation contributions and stock purchases to be made from this amount.

6. After the total divestiture of ROLM from IBM petitioner received another assignment. This position was physically located in Norwalk, Connecticut and was with the Pennant organization.[2] Petitioner's initial task in this assignment was to try and divest IBM of Pennant, or parts thereof, or obtain outside investors for Pennant. His territory consisted of the United States, Canada, Mexico, Argentina and Brazil. This position necessarily involved frequent job

[2]The witnesses used Pennant organization and printing organization interchangeably throughout their testimony. The function of the Pennant or printing organization (hereinafter referred to as "Pennant") was to "design, develop, build and sell computer printers" (tr. p. 62).

related travel. The person petitioner reported to in this assignment spent most of his time in Paris, France, as did the other four or five people in this department. Most of the department meetings were held in Paris. Petitioner was never requested to appear personally in Paris and was told that it was not necessary that he report on his activities to the Paris office. Petitioner's office accommodations were also changed when he moved to the new position in Norwalk. He did not receive an office, but was assigned a cubicle in an area that was primarily occupied by hourly or contract employees. Petitioner voiced his objections to his working conditions based on IBM guidelines as to what office accommodations are given to what level employee. Petitioner was eventually provided with an office in the Norwalk location.

7. Prior to petitioner's assignment to Pennant, he had attempted on his own to find other assignments within IBM. He did actually locate a finance assignment in Tampa with someone he had previously worked with and who expressed to petitioner that he would be happy to have petitioner in the financial position. However, petitioner was not allowed to interview for the Tampa position.

8. While working for Pennant petitioner learned of an open financial assignment within Pennant. Petitioner expressed an interest in this position but was not allowed to interview for it. It is petitioner's belief, based on what his director told him, that it had been determined that the position would be given to a female employee. A female employee was appointed to this position. Petitioner expressed his opinion on cross-examination that this person had less financial experience than he had. However, petitioner also admitted that this person was the same "label" as he was, presumably referring to job title or ranking.

9. The circumstances of petitioner's employment with IBM from 1989 on, as outlined above, caused stress in petitioner's life. Petitioner believes that these circumstances, particularly

not being able to be home because of commuting time and job-required travel, eventually caused the breakup of his marriage. While going through a divorce petitioner did see a psychiatrist. Petitioner's divorce became final in 1992. Petitioner was again married in 1993.

10. At some point in 1993 petitioner determined that he would speak with someone at IBM about what would be available to him should he leave. Petitioner was motivated by his working conditions and his belief that "something was going to happen" (tr., p. 31).[3] It was petitioner's belief that IBM did not any longer appreciate older experienced employees, which he expressed by stating that "gray hair experience was no longer welcome" (tr., p. 41) at IBM. Petitioner had considered filing legal claims against IBM but determined that it was probably not cost effective. Petitioner approached a Mr. Dennis Garcia who was an attorney for IBM located at the Norwalk, Connecticut facility. He related his concerns with his working conditions to Mr. Garcia, which included being denied job opportunities, lack of job protection since he was working virtually alone and the territory he covered which required constant travel. The negotiations with Mr. Garcia began in the late summer of 1993.

11. At the time of petitioner's negotiations with Mr. Garcia, there were apparently no special retirement incentive programs available at the Pennant organization. Furthermore, on November 29, 1993, IBM issued an IBM News Bulletin entitled "CHANGES TO IBM'S

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[3]There was no more specific testimony at the hearing explaining what the something was that was going to happen. However, petitioner stated in the petition filed in this matter that IBM was attempting to force him out, and specifically with regard to the year 1993:

> IBM AGAIN PRESENTED A TERMINATION PACKAGE WHICH INCLUDED A GENERAL RELEASE NOT TO SUE FOR TORT OR CONTRACT CLAIMS. AGAIN, AGE BOUNDARIES WERE PUBLISHED, WITH MANAGEMENT EMPHASIS THAT THOSE NOT ACCEPTING THE OFFER COULD SUBJECT THEMSELVES TO LOSS OF PENSION BENEFITS. *I WAS TOLD BY MY MANAGER THAT SENIOR MANAGEMENT HAD FOCUSED ON ME AS A TARGET CANDIDATE.* (Division's Exhibit B, Schedule B; emphasis added.)

SEPARATION ALLOWANCE PLANS ANNOUNCED," curtailing certain benefits under normal separation plans, which provided:

> IBM's separation allowance plans, which provide a transition payment to individual employees upon their termination of employment, are changed as follows, effective today:
>
> -- Payments to employees under the Normal Separation Allowance Plan will now require a Release and Covenant Not To Sue. Employees who elect not to sign the release upon their departure may receive only a base payment of up to two weeks' pay. As previously announced, the maximum normal separation allowance payment has changed, effective July 1, 1993, to 13 weeks' pay.
>
> -- The maximum payment provided to employees under IBM's individual separation allowance plans is changed from 52 weeks' pay to 26 weeks' pay. This change is being made to be consistent with the maximum payment which is being provided under resource reduction programs announced after July 1, 1993.
>
> In addition, payment under the terms of certain modified separation plans may now be made in conjunction with the Retirement Bridge Leave of Absence.
>
> For details regarding IBM's separation allowance plans, please refer to the publication "About Your Benefits: Employee Retirement Income Security Act", available on the Online Personnel Reference Library (OPRL) or from your manager (Division's Exhibit E).

12. Petitioner testified that the result of these negotiations was that if he agreed not to institute legal action against IBM he would receive a payment equal to 52 weeks salary upon separation from service. Petitioner also testified that he would have received only two weeks pay had he refused to sign the release pursuant to the November 29, 1993 IBM News Bulletin. Petitioner determined to accept the offer. In furtherance of this determination, petitioner executed the "GENERAL RELEASE AND COVENANT NOT TO SUE" (hereinafter

"Release") that is at issue in these proceedings on December 30, 1993. The relevant portions of the Release provide:

> *In exchange for the sums and benefits which you will receive pursuant to the terms of the Pennant Systems Opportunity Program* (PSOP), **RICHARD G. DELARDI** (hereinafter 'you') *agrees to release International Business Machines Corporation* (hereinafter "IBM") and its benefits plans *from all claims, demands, actions or liabilities you may have against IBM of whatever kind*, including but not limited to those which are related to your employment with IBM, the termination of that employment or other severance payments or your eligibility or participation in the Retirement Bridge Leave of Absence. You agree that this also releases from liability IBM's agents, directors, officers, employees, representatives, successors and assigns (hereinafter "those associated with IBM").
>
> You agree that you have voluntarily executed this release on your own behalf, and also on behalf of any heirs, agents, representatives, successors and assigns that you may have now or in the future. You also agree that *this release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, and any other federal, state or local law dealing with discrimination in employment, including but not limited to discrimination based on sex, race, national origin, religion, disability, veteran status or age. You also agree that this release includes claims based on theories of contract or tort, whether based on common law or otherwise*. This agreement covers both claims that you know about and those that you may not know about which have accrued by the time you execute this release. This release does not include your nonforfeitable rights to your accrued benefits (within the meaning of Sections 203 and 204 of the Employee Retirement Income Security Act of 1974, as amended), as of the date of your retirement from IBM under IBM Retirement Plan and the IBM Tax Deferred Savings Plan, which are not released hereby but survive unaffected by this document.
>
> You agree that you will never institute a claim of any kind against IBM, or those associated with IBM, including but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility or participation in the Retirement Bridge Leave of Absence. If you violate this release by suing IBM or those associated with IBM, you agree that you will pay all costs and expenses of defending against the suit incurred by IBM or those associated with IBM, including reasonable attorneys' fees.

You acknowledge and agree that:

1. *The payment and benefits provided pursuant to the terms of the PSOP constitute consideration for this release, in that they are payments and benefits to which you would not have been entitled had you not signed this release.*

2. You have been given the opportunity to take a period of at least forty-five (45) days within which to consider this release and *to review: (a) the terms of the PSOP, (b) a list of the job titles and ages of employees eligible to participate in the PSOP, and (c) a list of employees in your job classification or organization unit, if any, who were not eligible to participate in the PSOP.*

3. This release does not waive any claims that you may have which arise after the date you sign this release.

4. *You have not relied on any representations, promises, or agreements of any kind made to you in connection with your voluntary decision to accept the PSOP except for those set forth in the PSOP Summary Plan Description* and other official plan documentation, including all the materials in the Employee Information Package.

5. *In the event of rehire by IBM* or any of its subsidiaries as a regular employee, you understand that *IBM reserves the right to require repayment of a prorated portion of the PSOP payment. The amount of repayment will be calculated as one week of pay at the rate used to calculate the PSOP payment,* multiplied by the difference between the number of weeks used to calculate the PSOP payment and the number of weeks away from IBM, less associated payroll taxes withheld by IBM.

6. If at the time of executing this release you are on a leave of absence, this release also waives any rights that you may have regarding your leave of absence - - including but not limited to return rights, whether or not statutory. (Division's Exhibit F; emphasis added.)

Petitioner also executed a leave of absence agreement on December 30, 1993, which in the relevant parts provided:

PENNANT SYSTEMS OPPORTUNITY PROGRAM (PSOP)
PRE-RETIREMENT LEAVE OF ABSENCE AGREEMENT

DATE: **August 4, 1993**

TO: **RICHARD G. DELARDI** SERIAL: **123514**

Your request for a Pennant Systems Opportunity Program (PSOP) Pre-Retirement Leave of Absence without pay under the provisions of the PSOP has been approved. Your leave will begin **JANUARY 01, 1994** and will end April 30, 1994. Based on your committed plan to retire immediately following your leave, your effective date of retirement will be May 1, 1994. Once your leave begins, the committed retirement date may not be changed to a later one; however, you may advance your retirement to an earlier date upon which you are retirement eligible[4] (Division's Exhibit H; emphasis added).

13. Petitioner testified that when he left IBM he did receive payment of a year's salary. This payment was made in two payments of approximately six months' salary each. Petitioner further testified that he was not allowed to make any 401(k) contributions or stock purchases from either of these payments. In support of his testimony petitioner introduced copies of three statements of earnings and deductions (i.e., pay stubs, payments were made electronically). The first of these statements was for the period ending December 15, 1993 and represents what would have been petitioner's normal salary. There are indications on the face of the statement that stock purchases were made and compensation was deferred. The other two statements are for the period ending December 31, 1993 and obviously represent the payment petitioner received upon leaving IBM. One is in the amount of $38,908.11 and one is in the amount of $39,007.43. There are no deductions, stock purchases or any other adjustments appearing on the face of either of these statements. The amounts of each payment are listed on each statement as "OTHER". The bottom left hand corner of each statement indicates that the payments were listed as salary

[4]The dates April 30, 1994 and May 1, 1994 were handwritten in the spaces provided for that purpose.

advances.[5] Submitted with these statements was an additional statement showing the calculations of these two payments. This statement indicates that no gross amount would be indicated on the statements of earnings and deductions, but that Federal and State income taxes and FICA were deducted prior to arriving at the net amount listed on such statements. $109,321.98 is listed as the total amount and appears to the right of the notation "SEP PAY 52 wks",[6] indicating separation pay.

Background - Audit Program

14. The Division of Taxation (hereinafter the "Division") introduced the affidavit of David Brocca, a Tax Technician II in the Audit Division, to provide both general background on an audit program relating to claims similar to petitioner's, and to provide details about the processing of petitioner's return, including the resulting Notice of Deficiency. The background of the audit program is set forth below. While this information does not relate specifically to petitioner's case, it is helpful in understanding the processing of petitioner's return.

15. During the 1994 tax year, the Division received large numbers of claims for refund of personal income tax from former IBM employees who had received lump sum payments upon their separation from service during the 1990 through 1993 tax years. The basis for the refund claims was as follows: When the taxpayers had originally filed their New York State personal income tax returns for the years in question, they had included in both their Federal and New York State adjusted gross income the lump sum payments that had been received upon their

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[5]The copies of the statements introduced by petitioner were somewhat cut off on the left hand side. The actual letters appearing were "LARY ADVANCE".

[6]It is unclear whether this is 52 or 55 weeks, but petitioner testified that he received two payments totaling a year's salary.

separation from service pursuant to the execution of a General Release and Covenant Not To Sue. This income was included in the taxable income set forth on the taxpayers' Wage and Tax Statements (W-2s). The taxpayers now sought to have this income excluded from both Federal and New York State adjusted gross income pursuant to IRC § 104(a)(2), claiming that the money had been received pursuant to a settlement of claims for personal injuries based on tort type rights.

16. Due to the large numbers of taxpayers involved, the Division's Audit Division established a special audit program to handle the aforementioned refund claims. This audit program was known as the "CIAM" program ("C" = Central Office Audit Bureau; "IA" = Amended Returns; "M" = former IBM employees claiming nontaxable severance pay).

17. Due to the fact that these refund claims were based upon an exclusion provided for in the Federal tax law, the Audit Division contacted the Internal Revenue Service (hereinafter "IRS") to see if that agency had received similar refund claims and to ascertain its position with respect to such claims.

As a result of the Audit Division's discussions with the IRS, and a review of internal IRS documents, the Division determined that the IRS had also received similar refund claims and that its policy was to deny such claims on the basis that the payments did not qualify for the exclusion provided by Internal Revenue Code (hereinafter "IRC") § 104(a)(2).

18. The Audit Division subsequently determined that the refund claims of the former IBM employees must be denied. As a result, on or about November 24, 1995, the Audit Division issued Notices of Disallowance to the approximately 2,300 former IBM employees that had filed refund claims to date.

19. Following the Audit Division's issuance of the statutory notices of disallowance in these matters, the Division received many telephone calls and letters from taxpayers, their representatives and their elected officials. As a result the Commissioner of Taxation and Finance, Mr. Michael H. Urbach, sent a letter to various New York State Senators, wherein it was explained that the taxpayers who had received the notices of disallowance were not required to take any additional action with New York State while they pursued their Federal claims. It was decided that the Division would treat the filings as protective refund claims and that it would grant the same relief that the taxpayers received at the Federal level.

On or about April 1, 1996, the Audit Division sent letters to the approximately 2,300 individual taxpayers involved to inform them of the policy outlined by the Commissioner's letter.

Petitioners' 1993 New York State Personal Income Tax Return

20. Prior to April 16, 1994, petitioners filed a 1993 New York State Resident Income Tax Return (form IT-201). Attached to the return was a Wage and Tax Statement (form W-2) which indicated that petitioner had received $219,143.00 in total state/local wage income from IBM during 1993.

On line #16 of the IT-201, petitioners excluded $105,120.00 of the $219,143.00 in total IBM W-2 wage income. The explanation given by petitioners on the return for excluding this income was that it constituted "payment for covenant." The calculation of the income excluded showed a lump sum payment of $109,325.00[7] minus $4,205.00 listed as payment without

[7]It should be noted that there is a $3.00 discrepancy between the gross amount of the lump sum payment listed on the attachment to the petitioners' 1993 return and the amount set forth on the IBM calculation submitted by petitioners. Due to the small amount of the discrepancy, and since petitioners have not raised this issue, the figure as listed on petitioners' return is deemed correct.

covenant. The $4,205.00 of the lump-sum payment received by the petitioner for signing the Release was included in petitioners' New York State adjusted gross income, due to the fact that this amount represents the amount that he would have received (i.e., two weeks pay) had he not signed the document, according to his understanding of IBM's policy. Attached to petitioners' IT-201 was a copy of the November 29, 1993 IBM News Bulletin.

21. Petitioners' 1993 return also claimed a refund of $8,760.00 on line #77.

22. At the time petitioners' return was filed, the CIAM audit program was not yet in existence. Therefore, because petitioners listed all of their W-2 income on line #1 (the exclusion was not taken until line #16), the return was simply reviewed by Division personnel who process incoming returns (non-audit personnel) by key-punching the numbers listed on selected lines of the return to verify only that the calculations had been done correctly by the taxpayer. Once the calculations were so verified, the refund claim was approved and forwarded to the New York State Comptroller's Office for payment.

23. The Comptroller's Office generally has three options when it receives a request for a refund from the Division: (1) it can issue the refund outright; (2) it can issue the refund but refer the matter back to the Division for further investigation into the validity of the claim; or (3) it can refuse to issue the refund based upon its own investigation into the legality of the taxpayers' claims. In this particular case, the Comptroller's Office issued the refund check, but referred the matter back to the Division for further investigation regarding the validity of the taxpayers' exclusion of a large portion of W-2 income (lump sum payment from IBM) on line #16. This referral is evidenced by the "OSC - Stratified Audit" stamp located on the first page of petitioners' return.

24. The Comptroller's Office issued the aforementioned refund check on or about March 24, 1994 and petitioners cashed said check on or about March 30, 1994.

25. Although the CIAM audit program was not yet in place when petitioners' matter was referred back to the Division, the Audit Division applied the same principles to petitioners' case. As a result, the Audit Division subsequently issued a Statement of Proposed Audit Changes to petitioners (notice number L-009146269) on July 11, 1994, wherein it disallowed the subtraction of the W-2 income claimed on line #16, thereby increasing both petitioners' Federal adjusted gross income and their New York State adjusted gross income. Based upon these adjustments, petitioners were calculated to have a 1993 tax liability of $8,842.11, plus interest.

26. The Division issued a Notice of Assessment Resolution (notice number L-009146269) on September 30, 1994. This document indicated that the Audit Division's adjustments were confirmed to be appropriate and that petitioners failed to provide any substantiation of the claimed exclusion under IRC § 104(a)(2).

27. The Division issued a Notice of Deficiency (notice number L-009146269) on October 31, 1994, asserting that petitioners owed $8,842.11 in additional New York State personal income tax, plus interest, for the 1993 tax year.

28. The Division issued a second Notice of Assessment Resolution (notice number L-009146269) on December 9, 1994. This document indicated that petitioners had not provided any additional information which would warrant a change in the Audit Division's adjustments.

29. Petitioners filed a Request for Conciliation Conference and on April 21, 1995 an order was issued sustaining the statutory notice. On July 7, 1995 the present petition was received by the Division of Tax Appeals.

30. Petitioners filed a Federal return and a Connecticut nonresident return for 1993 both excluding the IBM lump sum payment, to the extent of approximately 50 weeks' salary, from their adjusted gross income. Neither the IRS nor the state of Connecticut has informed petitioner of any outstanding tax liability for 1993 based on this issue.

31. At no time has petitioner ever commenced an employment related lawsuit of any kind against IBM.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

After noting that exclusions must be narrowly construed and that the taxpayer must demonstrate that his interpretation is the only reasonable interpretation and that the Division's interpretation is unreasonable, the Administrative Law Judge determined that petitioner did not qualify for the exclusion from gross income provided for in IRC § 104(a)(2), which allows an exclusion for damages received on account of personal injuries or sickness. The Administrative Law Judge held that petitioner did not demonstrate that the underlying cause of action giving rise to the recovery (the lump sum payment) was based on tort or tort type rights and that petitioner had not demonstrated that the damages were received on account of personal injuries or sickness.

After concluding that petitioner could not establish causes of action based on age or sex discrimination, the Administrative Law Judge assumed that petitioner was arguing that the tort claim was in the nature of intentional infliction of emotional distress. However, since the Administrative Law Judge found no proof of damages sustained by petitioner as a result of the alleged tortious conduct, she held that petitioner did not meet his burden of proving that the payment received in exchange for a general release was for settlement of a tort or tort type

action.

Additionally, the Administrative Law Judge determined that petitioner did not prove that the lump sum payment by IBM was on account of personal injuries and, therefore, said payment was not excludable from gross income pursuant to IRC § 104(a)(2).

Also, the Administrative Law Judge considered several alternative arguments, which could have been made if injuries had actually been sustained and demonstrated by petitioner. However, after reviewing the evidence in the record and numerous Tax Court decisions involving IBM employees who received similar lump sum payments (particularly ***Phillips v. Commissioner***, T.C. Memo 1997-336, 74 TCM 187) she found that the payment received was for retirement or severance pay and not in settlement of a tort or tort type claim.

Finally, the Administrative Law Judge refused to grant petitioner a credit for taxes paid to the State of Connecticut for the simple reason that petitioner did not prove that any tax was paid to Connecticut on the lump sum payment in issue. The Administrative Law Judge noted that petitioner consistently averred that he did not pay tax on the lump sum to Connecticut.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the amount he excluded from income constituted a payment by IBM in exchange for his agreement to relinquish any and all tort and tort like claims against his employer. He cites IRC § 104(a)(2) and the Treasury regulation at § 1.104.1(c) in support of his position and notes that several Tax Court cases have found that the injuries required by the Internal Revenue Code need not be physical and included damages received as a result of a violation of constitutional rights and sex and age discrimination actions.

Petitioner argues that his treatment at the hands of his employer between 1989 and 1993 caused mental and physical stress, hampered the expansion of his career, prevented his full retirement and caused the trauma associated with his divorce. Petitioner claims he considered suing IBM but decided the time and money that would be consumed in such an action would not be worth his while and instead chose to negotiate a settlement with his employer which specified a different compensation package than one generally offered by IBM at the time. Petitioner attached a copy of the "PSOP" Program Highlights to his memorandum of law on exception.

The Division objected to petitioner's submission of new evidence with his memorandum of law on exception, noting that such submissions have been rejected by this Tribunal in the past. In addition, the Division argues that petitioner has not established an entitlement to the exemption set forth in IRC § 104(a)(2), stressing the rule that exemptions from taxation must be narrowly construed. The Division contends that petitioner has not demonstrated that the payment received from IBM was in settlement of a tort or tort type claim or that the payment constituted damages on account of personal injury.

The Division maintains that even if a part of the payment was based on a tort or tort type claim, the failure of petitioner to apportion the payment between tort and non-tort claims required the entire payment to be treated as income. Finally, the Division claims that there has been no proof that any tax was paid by petitioner to the State of Connecticut and petitioner is not entitled to any offset therefor.

OPINION

Initially, we address petitioner's submission of the *Pennant Systems Opportunity Program* description with the submission of his memorandum of law to this Tribunal. It is well settled that we will not consider any documentary material included with the exception or with the briefs on exception by petitioners based on our policy as stated in ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991):

> In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. . . . For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (***see also***, ***Matter of Wetherby,*** Tax Appeals Tribunal, March 4, 1999).

On the merits of this matter, we affirm the determination of the Administrative Law Judge. As noted in her determination, exemptions from tax are narrowly and strictly construed (***Commissioner v. Schleier,*** 515 US 323, 132 L Ed 2d 294) and the taxpayer must clearly establish that it is entitled to the claimed exemption (***see***, ***Matter of Lever v. New York State Tax Commn.***, 144 AD2d 751, 535 NYS2d 158). The broad and sweeping definition of gross income in IRC § 61(a) (the starting point for New York income) must include petitioner's lump sum payment from IBM unless he can establish that he is entitled to exclude it under the provisions of another section of the Code. In this case, petitioner argued that the payment he received was *on account of personal injuries or sickness* as provided for in IRC § 104(a)(2) and, therefore, exempt from taxation. The regulation at 26 CFR 1.104-1(c) specifies that the damages must be 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*. The United States

Supreme Court clarified the statute and regulation in ***Schleier*** wherein it stated that taxpayers must meet two independent requirements before excluding income in reliance upon IRC § 104(a)(2). "First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is 'based upon tort or tort type rights'; and second, the taxpayer must show that the damages were received 'on account of personal injuries or sickness'" (***Commissioner v. Schleier***, ***supra,*** 132 L Ed 2d, at 307).

The Administrative Law Judge correctly noted that ***Schleier*** prohibited recovery of damages for age discrimination (Age Discrimination in Employment Act of 1967 [ADEA] 29 USC §§ 621 et seq.) under IRC § 104(a)(2) because the injuries were not within the scope of the statute or regulations. Further, petitioner's claim of damages received for sex discrimination under Title VII of the Civil Rights Act of 1991 (42 USC § 1981 et seq.) was correctly rejected due to his failure to prove that the actions of his employer forming the basis of his claim occurred after the effective date of the act. Although damages from injuries sustained through violations of Title VII are within the purview of IRC § 104(a)(2) (***see, United States v. Burke,*** 504 US 229, 119 L Ed 2d 34), petitioner has not established if the actions of his employer took place after the effective date of the act.

As determined below and affirmed herein, petitioner did not establish what tort or tort like action he might have brought against his employer for the injuries he allegedly incurred. The Administrative Law Judge deduced from the record that petitioner was alleging a tort in the nature of intentional infliction of emotional distress. Petitioner argued that the stress and its fallout caused by the actions of his employer constituted the injuries sustained and the payment he received was compensation therefor. The Administrative Law Judge determined and we agree

that petitioner did not meet his burden of proving damages herein and, therefore, his claim must fail (***see***, ***Knuckles v. Commissioner***, T.C. Memo 1964-33, 23 TCM 182, ***affd*** 349 F2d 610 [where the Tax Court found in a similar case under IRC § 104(a)(2) that a fatal weakness in such cases is the lack of competent evidence to prove personal injuries]).

Petitioner executed a general release which he has been unable to prove was anything other than a payment for retirement or severance pay. As noted by the Administrative Law Judge and the Division, the Tax Court has issued many decisions on this very issue regarding payments by IBM under similar circumstances and with similar documents and has consistently held that the payment was not excludable from income (***see,*** footnote "17" of the determination below for a list of such cases). In ***Webb v. Commissioner*** (T.C. Memo 1996-50, 71 TCM 2004), a substantially identical release given by an IBM employee in exchange for a lump sum payment under an incentive program was deemed to be severance pay and not damages. In ***Webb***, the petitioner had no claims against IBM when he signed the release, the payment was based on a certain number of weeks pay and Federal income and FICA taxes were withheld. In the instant matter, petitioner made no claims against IBM before signing a release which was a standard form used by IBM with many other former IBM employees. The release specifies a wide range of potential tort and non-tort claims and never accords the payment to any particular claim. The calculation of petitioner's payment was related to his years of service with IBM. If petitioner was rehired, a prorated portion might have had to be repaid and Federal income and FICA taxes withheld. These factors indicate that the payment was in the nature of severance pay and not damages received as a result of a tort claim or settlement thereof (***see also, Phillips v. Commissioner, supra*** [where the Court held that Mr. Phillips may have established an existing

claim against IBM under the Americans with Disabilities Act (42 USC §§ 12101 et seq.), but there was no proof that the payment made was received in settlement of a personal injury claim]).

The Administrative Law Judge determined that the result of petitioner's negotiations with IBM were not distinguishable from those reached in ***Phillips*** and, based on the record, we must agree. Therefore, the result reached herein cannot be contrary. Since we find that the entire payment was in the nature of severance pay, we do not reach the issue of allocation between tort and non-tort claims covered by the release. It is our opinion that petitioner had the duty to prove that all or a portion of the payment was attributable to a tort or tort like claim and, in failing to do so, has not met his heavy burden of demonstrating an entitlement to the exclusion provided for in IRC § 104(a)(2).

Finally, we address petitioner's claim that he has not been accorded proper credit for taxes paid to the State of Connecticut on the payment from IBM. We find this issue perplexing since petitioner has stated on the record that no tax was paid to Connecticut on the lump sum amount. No taxes having been paid, no credit is due since entitlement to the credit is based on payment (Tax Law § 620).

Regarding the remaining arguments raised by petitioner, we find that the Administrative Law Judge fully and correctly addressed each of them and we affirm her determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard G. Delardi and Linda L. DiFonzo is denied;

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

3. The petition of Richard G. Delardi and Linda L. DiFonzo is denied; and

4. The Notice of Deficiency, dated October 31, 1994, is sustained.

DATED: Troy, New York
March 18, 1999

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner