STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LOIS A. MORGAN	:	DECISION DTA NO. 818746
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1994.	:	

Petitioner Lois A. Morgan, 26 Birchwood Court, West Windsor, New Jersey 08550, filed an exception to the determination of the Administrative Law Judge issued on May 22, 2003. Petitioner appeared by Charles C. Morgan, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a letter brief in lieu of a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether the instant matter is precluded because the Division of Taxation canceled a preexisting notice of deficiency which asserted tax due with respect to the same income.

II. Whether the doctrine of collateral estoppel precludes the Division of Taxation from asserting liability against petitioner for the tax at issue herein.

III. Whether the Division of Taxation waived its right to pursue this matter by its cancellation of a preexisting notice of deficiency.

IV. Whether the doctrine of judicial estoppel bars the Notice of Deficiency at issue.

V. Whether the Notice of Deficiency at issue and a preexisting notice were merged as a matter of law and, therefore, whether the notice at issue was canceled by the cancellation of the preexisting notice.

VI. Whether income paid to petitioner while on a paid leave of absence was derived from or connected with New York sources.

FINDINGS OF FACT

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

Petitioner, Lois A. Morgan, and her spouse, Charles C. Morgan, timely filed their joint New York nonresident personal income tax return for the year 1994 (Form IT-203). Both petitioner and her spouse signed the return. Form IT-203-C ("Nonresident or Part-Year Resident Spouse's Certification") was not attached to the return. A completed Form IT-203-C identifies the spouse with New York source income where married nonresident taxpayers file a joint return and only one spouse has New York source income.

Petitioner's and her spouse's 1994 nonresident return allocated $7,256.00 in income to New York. Schedule A of Form IT 203-ATT attached to the return indicates that petitioner's wages of $26,951.00 paid to her by Prudential Insurance Company of America ("Prudential")

were subject to allocation.[1] The Schedule A allocates petitioner's wages to New York by dividing the reported 14 days worked in New York by the reported 52 total days worked in the year and multiplying the result by wages paid to petitioner by Prudential. Additionally, the Schedule A reports 38 total days worked outside New York, including 36 days worked at home.

The 1994 nonresident return filed by petitioner and her spouse was audited by the Division of Taxation ("Division"). On November 21, 1997 the Division issued to petitioner and Mr. Morgan a Statement of Proposed Audit Changes bearing assessment identification number L-014431075 which asserted $1,300.34 in additional income tax due, plus interest, for the year 1994. The statement indicated that the 36 days claimed on the return as worked at home had been disallowed, and that such days were properly considered days worked in New York. The Division thus increased petitioner's days worked in New York from 14, as reported, to 50. This change increased the income allocable to New York from $7,256.00, as reported, to $25,914.00, and increased the tax liability accordingly. The statement explained the reason for the change in days worked in New York as follows:

> Days worked at home do not form a proper basis for allocation of income by a nonresident. Any allowance for days worked outside New York State must be based upon the performance of services which, because of the necessity of the employer, obligate the employee to out-of-state duties in the service of his employer. Such duties are those which, by their very nature, cannot be performed at the employer's place of business.
>
> Applying the above principles to the allocation formula, normal work days spent at home are considered days worked in New York, and days spent at home which are not normal work days are considered to be non-working days.

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[1] Charles Morgan had no New York source income during the year at issue. Mr. Morgan's income was therefore not subject to allocation.

Petitioner and her spouse responded to the Statement of Proposed Audit Changes by indicating disagreement with the Division's findings on Form DTF-968 dated November 23, 1997. A letter from petitioner and her spouse attached to the Form DTF-968 took the position that the 36 days in dispute were properly classified as nonworking days spent at home by petitioner on a paid leave of absence.

The Division subsequently issued a Response to Taxpayer Inquiry dated January 12, 1998 which took the position that, while the 36 days on paid leave of absence were nonworking days, income paid in respect of such days was New York source income. The response offered the following rationale:

> Salary paid for non-working days is a form of wage continuation wherein payment is made in respect of work performed in prior periods of employment. Such payments constitute regular earnings as an employee, even though the taxpayer did not actually render any services for compensation. Consequently, your wage income is considered taxable as shown in our allocation.

The Response to Taxpayer Inquiry also modified the proposed assessment to $1,227.00, plus interest.[2]

Petitioner and Mr. Morgan responded to the Division's Response to Taxpayer Inquiry by letter dated January 18, 1998. In that letter, petitioner and Mr. Morgan reiterated their position that the income in question was not New York source income. Petitioner and Mr. Morgan also requested that the Division provide citations to the authorities upon which the Division based its position. No such citations were provided.

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[2] This proposed assessment results from an allocation of income based on an erroneous computation of 24 days worked in New York and 26 total working days. In reclassifying the 36 days on paid leave of absence as nonworking days, the Division subtracted such days from the previously determined 50 days worked in New York and 52 total working days. The correct results of such subtraction operations are 14 days worked in New York and 16 total working days. This error is moot, however, given the subsequent cancellation of assessment L-014431075 and the modification of assessment L-014717270 by the June 29, 2001 Conciliation Order (***see,*** below).

On February 9, 1998, the Division issued to petitioner and Mr. Morgan a Notice of Deficiency under assessment identification number L-014431075 which asserted additional income tax due of $1,227.00, plus interest, for the year 1994.

Petitioner and Mr. Morgan filed a Request for Conciliation Conference dated February 22, 1998 in respect of Notice of Deficiency L-014431075. The Bureau of Conciliation and Mediation Services ("BCMS") received this request on February 25, 1998.

Also on February 25, 1998, the Division made an internal decision to cancel assessment identification number L-014431075. The Division did not advise petitioner or her spouse of such cancellation at that time.

On March 12, 1998, the Division issued to petitioner, Lois A. Morgan, a Notice of Deficiency bearing assessment identification number L-014717270, which asserted $1,300.34 in additional income tax due, plus interest, for the year 1994. The computation section of the notice indicated that the basis for this asserted deficiency was identical to that set forth in the Statement of Proposed Audit Changes dated November 21, 1997 (***see***, above).

By letter dated March 30, 1998, the Division advised petitioner and Mr. Morgan of the cancellation of assessment number L-014431075. The letter was issued by John Cross, Tax Technician I, and stated as follows:

> I have reviewed the income tax file and Request for Conciliation Conference received in this matter and agree with your position on the items at issue. Accordingly, the above assessment has been cancelled in full.
>
> In view of the above, there is no longer a need for a prehearing conference and I have notified the Bureau of Conciliation and Mediation Services to cancel the conference scheduled in this matter.
>
> Thank you for your cooperation in resolving this matter.

Following a conciliation conference on June 23, 1999 in respect of petitioner's protest of the March 12, 1998 Notice of Deficiency (L-014717270), BCMS issued a Conciliation Order, dated June 29, 2001, which recomputed the deficiency to $1,138.00 in additional tax due for the year at issue, plus interest. The Division calculated this revised deficiency by dividing petitioner's reported 14 days worked in New York by 16 total days worked during the year and multiplying the result by the $26,951.00 paid to her by Prudential to reach income allocable to New York of $23,582.13. This recalculation thus determined that the 36 days on leave were properly classified as nonworking days and that income paid in respect of such days is allocable to New York in the same proportion as petitioner's days worked in New York to total days worked during the year.

As noted previously, petitioner was employed by Prudential during the period at issue. Prudential is a New Jersey corporation and has been during the entire period of petitioner's employment with the company. In addition, Prudential's corporate headquarters was located in New Jersey during the entire period of petitioner's employment.

Petitioner commenced work at Prudential in Newark, New Jersey on June 28, 1976. From 1976 through 1988, petitioner did not work for Prudential in New York. Petitioner worked for Prudential in New York for a few months in 1988 (23.5 days), the year 1989 (210 days), and a few months in 1990 (72 days).

In 1992, petitioner became vice president of auditing for Prudential and was assigned to work in a New York office. She worked 108.5 days in New York in 1992. Petitioner continued her job as vice president of auditing in 1993 and worked 144 days in New York during that year.

On or about November 24, 1993, petitioner's supervisor advised her to begin to look for another job within Prudential because she would be out of her job as vice president of auditing within a relatively short period of time. This was a confidential conversation between petitioner and her supervisor. The employees that petitioner supervised continued to report to her and petitioner was not replaced at that time.

Prudential subsequently offered petitioner a separation package dated December 16, 1993. Prudential's offer was contingent on petitioner's execution of a waiver and release pursuant to which petitioner would agree not to pursue litigation arising from, or in any way attributable to, her employment with or separation from Prudential. By its terms, petitioner had 21 days to accept Prudential's offer.

In response to Prudential's offer, petitioner hired an attorney to negotiate a separation package with Prudential. Petitioner did not accept Prudential's December 16, 1993 offer. Her attorney continued to negotiate a settlement package. Prudential entered into such negotiations in an effort to preclude litigation.

On January 28, 1994, petitioner's supervisor announced that a part of petitioner's job responsibilities were being transferred to another employee. Upon hearing this announcement, petitioner contacted her attorney by telephone, who then negotiated for petitioner an immediate leave of absence with pay.

As of January 28, 1994, and continuing through March 18, 1994, petitioner did not provide any services to Prudential. During this period, petitioner did not have a desk in New York or anywhere; did not have any job responsibilities in New York or anywhere; and did not engage in

business activities in New York. The job responsibilities, office and desk previously assigned to petitioner were assigned to someone else.

Although it granted petitioner a paid leave of absence, Prudential did not have a formal paid leave of absence plan or policy.

During the period of her paid leave of absence, petitioner's attorney continued to negotiate with Prudential over a separation package for petitioner.

Petitioner did enter into an agreement of separation with Prudential which terminated her employment effective March 18, 1994. This agreement was not entered in evidence in this matter. Petitioner testified that a confidentiality provision in the agreement precluded the disclosure of any terms of the agreement in the instant administrative proceeding. A copy of the proposed separation package dated December 16, 1993 was entered in evidence herein. The terms of this proposed agreement were different from the terms of the agreement petitioner actually signed and which became effective March 18, 1994.

All of the income paid in respect of the leave of absence, was paid from a Prudential payroll account located in New Jersey into petitioner's bank account also located in New Jersey.

Petitioner's biweekly salary remained the same while on the leave of absence as when she was actively engaged as vice president of auditing.

At all times relevant herein petitioner was a New Jersey resident.

At no time did petitioner file a lawsuit against Prudential.

Petitioner and Mr. Morgan timely filed a joint Federal income tax return for the year at issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge rejected petitioner's argument that the Division's cancellation of assessment number L-014431075 was a final determination and that no amount of tax is due with respect to this income. The Administrative Law Judge found that the March 30, 1998 letter of John Cross was not a final determination with respect to the income at issue. Although it canceled assessment number L-014431075, the letter made no reference to assessment number L-014717270 and thus did not cancel the assessment bearing the number L-014717270.

The Administrative Law Judge found that issuing a second notice of deficiency for the same taxable year was not prohibited by the Tax Law in this case because no petition had been filed with the Division of Tax Appeals at the time Notice of Deficiency L-014717270 was issued.

The Administrative Law Judge rejected petitioner's argument that the Division is collaterally estopped from asserting liability against petitioner pursuant to the March 12, 1998 Notice of Deficiency because the Division had a full and fair opportunity to litigate the same issues under the February 9, 1998 Notice of Deficiency, which was canceled by the Division pursuant to the March 30, 1998 Cross letter.

The Administrative Law Judge discussed the requirements for the application of collateral estoppel and concluded that the issues presented in the instant matter were not litigated at all prior to this proceeding. Accordingly, the Administrative Law Judge concluded that there was no identity of issues between the present proceeding and the liability asserted against petitioner and her spouse under the first notice of deficiency. The Administrative Law Judge noted that a

proceeding is commenced in the Division of Tax Appeals by the filing of a petition (***see***, Tax Law § 2008). A conciliation proceeding is commenced by the filing of a request for a conciliation conference (***see***, Tax Law § 170[3-a][b]). The Administrative Law Judge concluded that the issuance of a notice of deficiency is not the commencement of a proceeding under the Tax Law and is not, therefore, a proceeding for purposes of determining the applicability of collateral estoppel.

Noting that petitioner had filed a request for a conciliation conference regarding the February 9, 1998 Notice of Deficiency prior to its cancellation by the Cross letter, the Administrative Law Judge stated that collateral estoppel would not apply to a BCMS proceeding because it is not quasi-judicial in nature and is not governed by procedures substantially similar to those used in a court of law. The Administrative Law Judge pointed out that a conciliation conference is not an "adjudicatory proceeding" as defined in Article 3 of the State Administrative Procedure Act ("SAPA"). Rather, he concluded that the conciliation conference process is, in essence, a settlement negotiation and collateral estoppel does not apply to such a proceeding.

The Administrative Law Judge found no basis to conclude that the Division waived its right to proceed under the March 12, 1998 Notice of Deficiency by its cancellation of the February 9, 1998 notice. The Administrative Law Judge found that petitioner failed to show a clear manifestation of intent by the Division to relinquish its right to assert income tax liability against petitioner for the year at issue.

The Administrative Law Judge also rejected petitioner's argument that judicial estoppel bars the Division from proceeding against petitioner under the March 12, 1998 Notice of

Deficiency. The Administrative Law Judge found that judicial estoppel must fail because there has been no prior proceeding in this matter and the Division's assertion of liability against petitioner jointly with her spouse under the first notice is not incompatible with the Division's assertion of liability solely against petitioner pursuant to the second notice. The Administrative Law Judge held that both notices asserted liability against petitioner with respect to the same income. Additionally, facts supporting the first notice would be consistent with facts supporting the second notice. Further, petitioner failed to file Form IT-203 with her return and the Division's assertion of liability against petitioner in the second notice reflects the fact that only petitioner, and not her spouse, had New York income during the year at issue. The Administrative Law Judge also noted that even if there had been a prior proceeding in connection with the first notice, the doctrine would not apply because, given the cancellation of the first notice, it cannot be said that the Division succeeded in maintaining its position in such prior proceeding. The Administrative Law Judge also rejected petitioner's position that the February 9, 1998 notice and the March 12, 1998 notice were merged as a matter of law since both were outstanding at the same time and, consequently, both were canceled by the Cross letter.

The Administrative Law Judge found that petitioner failed to show that the income in question was not secured or earned pursuant to activities connected with or derived from New York sources. The Administrative Law Judge determined that petitioner failed to show that the salary paid in respect of her leave of absence was part of the agreement of separation, which became effective March 18, 1994, the date petitioner's paid leave of absence concluded. Further, the Administrative Law Judge found that petitioner failed to prove that she had any right

to future employment and, therefore, had failed to establish that the compensation paid to her in connection with her leave of absence was in consideration of her relinquishment of future employment. Rather, the Administrative Law Judge concluded that she remained an employee of Prudential until the March 18, 1994 termination date and continued to be paid the same salary as when she was actively engaged as vice president of auditing.

The Administrative Law Judge determined that the Division properly allocated the income paid to petitioner by Prudential for her paid leave of absence pursuant to 20 NYCRR 132.18(a). The Administrative Law Judge stated that there was insufficient evidence in the record to accept petitioner's argument that an alternative method of allocation should have been used based on the ratio of days petitioner worked in New York to total days worked in prior years.

ARGUMENTS ON EXCEPTION

In her exception, petitioner argues that, since she and her husband filed a joint New York State nonresident income tax return for 1994, the Division cannot assess her individually. Petitioner maintains that the Division's cancellation of Notice of Deficiency L-014431075 also canceled petitioner's underlying tax liability. Petitioner asserts that this was a final determination of her tax liability. Further, petitioner urges that on the issuance of Notice of Deficiency L-014717270, the two notices merged because two individual assessments for the same tax against the same taxpayer cannot exist simultaneously. Petitioner argues that petitioner's asserted liability for additional tax is precluded by the doctrines of election of remedies, collateral estoppel, waiver and judicial estoppel. Petitioner maintains that her income in 1994 was paid as consideration for abstaining from filing a lawsuit against Prudential and relinquishing her opportunity to obtain future employment with Prudential. Petitioner disagrees

with the Administrative Law Judge's failure to adopt an alternative method of allocation of petitioner's income to New York based on the ratio of days worked in New York during the two years preceding 1994.

The Division, in opposition to petitioner's exception, asserts that the Administrative Law Judge correctly determined the issues in this matter and his determination should be affirmed.

OPINION

Petitioner has presented the same arguments on exception that were considered and rejected by the Administrative Law Judge. We find that the Administrative Law Judge fully and correctly addressed the issues presented to him and petitioner has presented no evidence below or argument on exception to cause us to modify the Administrative Law Judge's determination in any respect. Thus, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lois A. Morgan is denied;

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

3. The petition of Lois A. Morgan is denied; and

4. The Notice of Deficiency dated March 12, 1998, as modified by the Conciliation Order dated June 29, 2001, is sustained.

DATED: Troy, New York
February 19, 2004

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

/s/Carroll R. Jenkins
Carroll R. Jenkins

Commissioner