

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GEORGE AND DELORES BAKER</b>	:	DETERMINATION
	:	DTA NO. 816259
for Redetermination of a Deficiency or for Refund of New	:	
York City Personal Income Tax under the Administrative	:	
Code of the City of New York for the Years 1993 and	:	
1994.	:	

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Petitioners, George and Delores Baker, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the Administrative Code of the City of New York for the years 1993 and 1994.

On November 2, 1998 and November 17, 1998, respectively, petitioners, appearing by Binder & Binder LLP (Harry J. Binder, Esq., of counsel) and the Division of Taxation, appearing by Terrence M. Boyle, Esq. (Michael J. Glannon, Esq., and Justine Clarke Caplan, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by March 26, 1999, which date began the six-month period for issuance of this determination. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly determined that petitioners owed New York City personal income tax on lottery winnings for the years at issue.

***FINDINGS OF FACT***

1. At all times prior to March 27, 1992, George and Delores Baker (“petitioners”) were residents of the State and City of New York. On that date, they moved to their present home in Palm Coast, Florida. Their previous home (and sole New York real property) located in the County of Queens was sold on November 3, 1992. After the house was sold, petitioners maintained no residence and had no assets within the City of New York.<sup>1</sup>

2. On or about November 17, 1990, while a resident of New York City, petitioner Delores Baker became a part winner of a New York State Lottery drawing. Under the rules and regulations which were in effect at that time, winners of a New York State Lottery drawing were required to accept payments over a set period of time in annual installments. Accordingly, petitioner Delores Baker was not given an option of collecting the entire proceeds of her winnings in a lump sum payment.<sup>2</sup>

3. For each of the years 1993 and 1994, the Division of the Lottery issued a form W-2G, Statement for Certain Gambling Winnings, to petitioner Delores Baker at 22 Cheyenne Ct., Palm Coast, Florida 32137. Gross winnings on the W-2G’s were in the amount of \$222,225.00 for each year; Federal, State and City income taxes were withheld. The amount of City tax withheld was \$9,911.00 for each year.

For each of the years at issue, petitioners retained their present representative, Binder & Binder LLP, to prepare their New York State personal income tax returns. In both 1993 and

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<sup>1</sup> The contents of Finding of Fact “1” were set forth in petitioners’ brief; no other evidence was offered as substantiation. However, since there is no other evidence in the record to controvert these allegations by petitioners and they are irrelevant to the final determination, they shall be presumed to be true statements.

<sup>2</sup> No evidence was produced as to the total winnings or the number of payments which petitioner Delores Baker was to receive.

1994, petitioners filed a nonresident return (form IT-203) on which they claimed the \$222,225.00 lottery winnings as New York State income. However, on their City of New York Nonresident Earnings Tax Return (form NYC-203) filed with their New York State return for each of the years 1993 and 1994, petitioners indicated that they had no City taxable wages or earnings and, accordingly, that they owed no City income or nonresident earnings tax for either year.

On their 1993 return, petitioners claimed to have overpaid tax in the amount of \$14,583.00; on their 1994 return, they claimed to have overpaid in the amount of \$13,052.00. While the record does not so state, it is presumed that the Division of Taxation (“Division”) issued refunds in these amounts to petitioners.<sup>3</sup>

4. Petitioners did not file a bond or post any other type of security with the Division.

5. On September 9, 1996, the Division issued a Notice of Deficiency to petitioners which asserted a deficiency of New York City tax in the amount of \$6,206.00, plus interest, for 1993 and \$7,248.00, plus interest, for 1994.

6. Petitioners filed a timely request for a conciliation conference. Prior to the conference, which was held on August 21, 1997, the Division’s Audit Division, Income Tax Desk Audit, sent a letter dated April 22, 1997 to petitioners which stated, in part, as follows:

Lottery winnings are treated as special accruals and are covered under Section 638(c) of the New York State Tax Law. The law requires that a taxpayer who changes New York residence status from a resident to a non-resident must accrue to the year of change the balance of winnings to be received. However, the income may be reported as it is received, if acceptable security is posted. Withholding is considered to be acceptable security. The same applies to a change of New York City residence.

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<sup>3</sup>This presumption is based on the subsequent issuance by the Division of a Notice of Deficiency (*see*, Finding of Fact “5”).

***SUMMARY OF THE PARTIES' POSITIONS***

7. Petitioners contend that their change in resident status in 1992, from City residents to nonresidents, triggered the special accrual provisions of Administrative Code § 11-1754(c) which petitioners state made the entire unpaid portion of the lottery winnings subject to accrual in 1992, the year in which Ms. Baker changed her residence from New York City to Florida. They state that when petitioner Delores Baker won the lottery drawing in 1990, she was forced by Federal and State statutes to file the correct withholding forms as a condition to receiving payment of her winnings. They maintain that the filing of the withholding forms was not the act of filing a bond or other security and that in 1992, when her residency changed, she did nothing to elect the deferment of the reporting of taxable income.

Additionally, petitioners state that Administrative Code § 11-1754(c)(4) provides that the deferment of taxation of income is conditioned upon the inclusion of these amounts of income in City adjusted gross income for one or more taxable years as if the individual had not changed his or her residence. In fact, these petitioners claimed no New York City taxable income on their subsequent years' tax returns, i.e., the 1993 and 1994 returns. Without including City income on the returns for these subsequent years, petitioners contend that they are not able to avail themselves of the benefit of the deferment of recognition of taxable income. As a result, the income must be recognized in 1992 and cannot be subject to tax in 1993 or 1994.

8. The Division contends that petitioner Delores Baker chose to have the Division of the Lottery withhold the tax from each installment of her lottery prize. She continues to be liable for City income tax on the winnings even after becoming a nonresident of New York City because she was a resident when she won the lottery prize.

### ***CONCLUSIONS OF LAW***

A. When a taxpayer changes his or her resident status from being a New York City resident to a New York City nonresident, that taxpayer's final resident income tax return is subject to the special accrual provisions of the Administrative Code of the City of New York § 11-1754 which provides, in relevant part, as follows:

(a) General. If an individual changes his or her status during his or her taxable year from city resident to city nonresident . . . such individual shall file one return as a resident for the portion of the year during which he or she is a city resident, and a return under chapter nineteen of this title, for the portion of the year during which he or she is a city nonresident.

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(c) Special accruals. (1) If an individual changes his or her status from city resident to city nonresident, he or she shall, regardless of his or her method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status, if not otherwise properly includible (whether or not because of an election to report on an installment basis) or allowable for city income tax purposes for such portion of the taxable year or for a prior taxable year. The amounts of such accrued items shall be determined with the applicable modifications described in sections 11-1712 and 11-1715 as if such accrued items were includible or allowable for federal income tax purposes. (*See also*, Tax Law § 1307[a], [b], [f]; Tax Law former § 654[a], [c][1].)

B. Therefore, because of petitioners' move from New York City to Palm Coast, Florida in 1992, petitioner Delores Baker's lottery prize became subject to the special accrual provisions of Administrative Code § 11-1754(c)(1). However, Administrative Code § 11-1754(c)(4) provides:

The accruals under this subdivision shall not be required if the individual files with the tax commission a bond or other security acceptable to the tax commission, conditioned upon the inclusion of amounts accruable under this subdivision in city adjusted gross income for one or more subsequent taxable years as if the individual had not changed his or her resident status.

C. Administrative Code § 11-1771(b)(3)(B) allows taxpayers who are recipients of lottery

winnings to substitute withholding from their winnings in lieu of “a bond or other security” by providing as follows:

Withholding on lottery winnings upon change of residence. If a payee of lottery winnings . . . changes status from resident to nonresident, withholding . . . shall constitute other security acceptable to the commissioner of taxation and finance within the meaning of paragraph four of subdivision (c) of section 11-1754, *unless such payee elects*, in such manner as the commissioner of taxation and finance shall prescribe, *to apply the provisions of paragraph one of such subdivision (c) to the proceeds, in which case withholding under this subdivision shall no longer apply to such proceeds.* (Emphasis added.)

D. Petitioners argue that because they did not voluntarily elect to have income taxes withheld from Delores Baker’s lottery winnings (they claim that she was forced to file withholding forms by Federal and State statutes and that withholding was made a condition of her receiving payment) and because they did not include these winnings as City adjusted gross income for the years following the change in residence, they were unable to avail themselves of the benefits of deferring the lottery income to years subsequent to 1992, the year of their change in resident status as is provided in Administrative Code § 11-1754(c)(4). They claim that the entire unpaid portion of the lottery prize was subject to accrual in 1992 and the accrued amount should have been reported by petitioners on the New York City resident portion of their 1992 tax return. Accordingly, they assert that there was no income to be reported and no income tax due for the 1993 and 1994 tax years, the years which are at issue in this proceeding.

While a novel approach, petitioners’ argument is highly flawed. It seems that the motivation for such an argument might well be that if petitioners are correct and that the entire unpaid portion of the lottery prize was subject to accrual in 1992, the Division might well be barred, by the statute of limitations, from assessing petitioners for that year (*see*, Administrative Code § 11-1783). However, as will be shown, petitioners’ argument is without merit.

It is quite unusual for a taxpayer to intentionally trigger the special accrual provisions of the Administrative Code (or Tax Law) in an installment payment situation since doing so requires a substantial tax payment based upon the total of the installment payments. However, if, in fact, petitioners did not wish to continue to have taxes withheld from the lottery winnings and desired, instead, to have the special accrual provisions of Administrative Code § 11-1754(c)(1) apply, they needed to *elect* that option (*see*, Administrative Code § 11-1771[b][3][B]). There is no evidence in this record to show that these petitioners made any such election; income taxes (Federal, State and City) continued to be withheld from the lottery winnings in 1993 and 1994 (*see*, Finding of Fact “3”). When petitioners reported no New York City taxable earnings for the years 1993 and 1994, the Division properly asserted deficiencies of New York City personal income tax for each of the years.

E. The petition of George and Delores Baker is denied and the Notice of Deficiency issued to these petitioners by the Division of Taxation on September 9, 1996 is sustained.

DATED: Troy, New York  
September 9, 1999

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE