STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **MARTIN S. DAVIS** | : | DETERMINATION<br>DTA NO. 816510 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1994. | : | |

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Petitioner, Martin S. Davis, 57 Weston Road, Westport, Connecticut 06880, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1994.

Petitioner, appearing by Milbank, Tweed, Hadley & McCloy (Robert A. Jacobs, Esq., of counsel), brought a motion for summary determination on the grounds that there are no facts at issue in this matter and petitioner is entitled to summary determination on the legal issue presented. Together with his Notice of Motion, petitioner submitted his own affidavit, the affidavits of Robert A. Jacobs, Esq. and Michael D. Fricklas, and a memorandum of law, all with attachments.

The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Michael J. Glannon , Esq., of counsel), submitted a response to the motion. Petitioner was granted time to file a reply which was received on October 28, 1998, which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings and the affidavits and other documents submitted in support of and in opposition to petitioner's motion, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

## *ISSUES*

I. Whether the arguments of the Division of Taxation in support of granting summary determination in its favor should be disregarded because the Division of Taxation did not file a motion or cross-motion pursuant to 20 NYCRR 3000.5.

II. Whether summary determination may be granted because no material and triable issue of fact is presented.

III. Whether certain payments received by petitioner, a nonresident of New York State, received in connection with the termination of his employment with a New York employer, constituted New York source income subject to personal income tax.

## *FINDINGS OF FACT*

### *Uncontested Facts*

1. Petitioner is a resident and domiciliary of Westport, Connecticut and has been since 1972. During 1994 petitioner did not have a permanent place of abode in the State of New York.

2. From at least October 1, 1985, until March 21, 1994, petitioner was the Chairman and Chief Executive Officer of Paramount Communications, Inc. ("Paramount"). Paramount's executive offices were located in New York City. During petitioner's employment with Paramount he worked both within and without New York State.

3. Petitioner had an employment agreement with Paramount which was dated October 1, 1985 and provided petitioner with a term of employment ending on February 22, 1993. This

agreement was amended and restated as of June 23, 1989 to provide, among other things, that petitioner's employment term would now terminate on February 22, 1997.

The Amended and Restated Agreement ("Employment Agreement") provided that "[t]he Company hereby agrees to employ the Executive, and the Executive hereby agrees to accept employment with the Company and agrees to serve, upon the terms and conditions herein contained, as the Company's Chairman and Chief Executive Officer." The Employment Agreement further provided for a base salary of $950,000.00 annually, effective July 1, 1989, together with provisions that allowed Paramount to increase the amount of base salary and provided to petitioner certain bonuses in addition to the base salary.

4. The Employment Agreement contained several provisions governing termination of petitioner's employment. Paramount was allowed to terminate petitioner's employment for "Cause"[1] pursuant to section seven of the Employment Agreement, in which case Paramount was under no obligation to make any further payments to petitioner. Section five of the agreement made provisions for petitioner's death or permanent disability.

Petitioner was allowed to terminate his employment for "Good Reason" pursuant to section six of the Employment Agreement. Nine specific circumstances that would amount to "Good Reason" were set forth including: changes or reductions in duties, a reduction in base salary or failure to increase salary under certain circumstances, changes in bonus plans, relocation of Paramount's executive offices or petitioner's position outside of New York City, changes in benefits or fringe benefits, failure of Paramount to obtain assumption of the Employment Agreement by its successor, any material breach by the company and any

[1]The circumstances which would amount to "Cause" for Paramount to terminate petitioner's employment are further defined in section seven of the Employment Agreement, but are not relevant to this matter.

"purported" termination of petitioner's employment that was not pursuant to the death or permanent disability provisions of section five of the agreement or the for cause provisions of section seven of the agreement.[2]

The combined effect of these provisions is that, other than for "Cause," or in the event of petitioner's death or permanent disability, Paramount did not have the right to terminate petitioner's employment prior to the conclusion of the term of the contract, or February 22, 1997.

5. Section four of the Employment Agreement governed the payments to be received by petitioner should his employment be terminated prior to the conclusion of the term of employment, as follows:

> In the event that the Executive's employment is terminated by the Company (other than for Cause as hereinafter defined) or the Executive terminates his employment for Good Reason, as hereinafter defined, prior to the end of the Employment Term, the Executive shall be entitled to receive compensation until February 22, 1997, in lieu of the salary and bonuses provided for herein, payable monthly at an annual rate equal to the sum of:
>
> (a) his then current base salary;
>
> (b) the average of the aggregate bonuses paid or accrued for the Executive for each of the three immediately preceding fiscal years of the Company; and
>
> (c) $200,000.
>
> Upon application of the Executive, the Compensation Committee of the Board of Directors of the Company may, in its sole discretion, irrevocably agree that the Company will make payment of the foregoing amounts to Executive in one lump sum equal to the present value of any amount remaining to be paid under this Section 4 as soon as practicable after termination of Executive's employment . . . .

6. In early March 1994 Viacom, Inc. acquired a majority interest in Paramount. Petitioner submitted his resignation as Chief Executive Officer by letter dated March 21, 1994. The

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[2]Any such "purported" termination would not be considered effective.

resignation was submitted together with a letter stating that petitioner was giving notice pursuant to section 6.1 of the Employment Agreement that he was terminating his employment for "Good Reason." Paramount acknowledged and agreed to the termination of petitioner's employment for "Good Reason." Petitioner submitted a resignation as of July 7, 1994 resigning as a director of Paramount and a member of any committees of the board of directors.[3] Petitioner did not however take an active role on the board after his March 21, 1994 resignation.

Petitioner did not render any services or in any way continue employment for Paramount after March 21, 1994, either within or without New York State.

7. After the termination of petitioner's employment, petitioner received monthly payments from Paramount pursuant to section four of the Employment Agreement. These monthly payments totaled $2,950,743.00 for the year 1994. Petitioner had the option pursuant to the same section of the Employment Agreement to make a request to the Compensation Committee of Paramount's Board of Directors to receive a lump sum payment equal to the present value of the all the payments. Petitioner did not exercise this option and continued receiving monthly payments until February of 1997.

8. Petitioner's total income as listed on line 22 of his Federal income tax return for 1994 was $99,036,600.00. Of this amount, $67,105,349.00 was received from Paramount. The remaining $31,931,251.00 was attributable to the following: $142,324.00 from a disqualified disposition of stock from an employee stock option plan, $1,043,976.00 taxable interest income, $385,013.00 dividend income, $249,046.00 state and local income tax refunds, $30,171,716.00 capital gains, $83,100.00 annuity income, $8,650.00 social security income, and $2,310.00 self-

[3]This also appears to be petitioner's formal resignation as Chairman since such position was not mentioned in petitioner's original resignation.

employment income derived from director fees petitioner received from corporations other than Paramount.[4]

9. Petitioner reported $52,904,555.00 on his 1994 New York State nonresident return[5] as the New York State amount of his New York adjusted gross income. Petitioner paid $4,305,113.00 in tax to New York State and New York City for his 1994 tax year.

Of the $52,904,555.00 petitioner reported as the New York amount of his New York adjusted gross income on his 1994 return, $53,047,091.00 was attributable to petitioner's 1994 Paramount compensation.[6] Petitioner calculated his New York income inclusion amount by multiplying his allocation percentage of 84.55% by $62,740,498.00, the total Paramount compensation (before allocation) subject to tax by New York State.[7] The Paramount compensation petitioner reported as taxable by the Federal government and the Paramount compensation petitioner reported as taxable by New York State is set forth below:

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[4]Also included in computing petitioner's adjusted gross income was a $154, 884.00 loss, principally attributable to petitioner's share of a Subchapter S corporation loss.

[5]New York City income and tax are calculated on the same form and New York City taxes are administered jointly with the New York State. For purposes of brevity, where New York or New York State are utilized in this determination, such terms also include references to New York City income and taxes.

[6]The remainder was attributable to taxable interest income of $1,133.00, franchise tax of $325.00, state and local tax refunds of $227,955.00 and petitioner's allocated share of a Subchapter S loss of $143,994.00.

[7]The $62,740,498.00 is derived from the $62,750,078.00 petitioner received as Paramount compensation subject to tax by New York State (before allocation) less $9,580.00 for petitioner's 401(k) and medical deductions.

| | Amounts Received From Paramount | Amounts Reported as Taxable (Federal) | Amounts Reported as Taxable by NYS of which 84.55% was attributable to NYS |
|---|---|---|---|
| **Regular Pay** | $218,630.00 | $218,630.00 | $218,630.00 |
| **Deferred Bonus** | $25,096,794.00 | $25,096,794.00 | $25,096,794.00 |
| **Contract Termination Payment** | $2,950,743.00 | $2,950,743.00 | $0.00 |
| **Stock Options** | $37,338,669.00 | $37,338,669.00 | $37,338,669.00 |
| **Supplemental Executive Retirement Plan (Annuity Payment)** | $1,414,108.00 | $1,414,108.00 | $0.00 |
| **Restricted Stock Dividend** | $80,000.00 | $80,000.00 | $80,000.00 |
| **Financial Counseling** | $10,000.00 | $10,000.00 | $10,000.00 |
| **Group Term Life** | $5,985.00 | $5,985.00 | $5,985.00 |
| **Totals** | $67,114,929.00 | $67,114,929.00 | $62,750,078.85 |

The 84.55% allocation percentage[8] utilized by petitioner in calculating his 1994 New York tax was an average of the allocation percentage utilized by petitioner to calculate his New York tax for the past 15 years.

The only Paramount sourced compensation petitioner did not allocate to New York sources was (i) the $1,414,108.00 received as nontaxable annuity payments under Paramount Supplemental Executive Retirement Plan and (ii) the $2,950,743.00 received pursuant to section four of the Employment Agreement.

10. On December 10, 1997 the Division of Taxation ("Division") sent petitioner an audit report based on his 1994 nonresident personal income tax return which proposed an adjustment increasing petitioner's tax liability by $360,489.29. The basis of the proposed adjustment was

[8]This allocation percentage is not at issue in these proceedings and appears to have been accepted by the Division of Taxation.

that: "The severance payment of $2,950, 743 is considered to be compensation taxable to New York state [sic] in the ratio of 84.55%, being the average ratio of wages allocated to New York for the 15 years prior to 1994." The taxability of the $2,950,743.00 in payments received by petitioner in 1994 pursuant to section four of the Employment Agreement is the only issue regarding petitioner's 1994 tax liability.

*Procedural History*

11. A Notice of Deficiency (notice number L-014809433) was issued to petitioner by the Division on April 13, 1998. The notice asserted New York State and New York City personal income tax due for the year 1994 in the amount of $290,505.63 and interest due of $78,082.20, for a total current balance due as of the date of the notice of $368,587.83. This represents the amount of tax due on the payments of $2,950,734.00 petitioner received in 1994 pursuant to section 4 of the Employment Agreement.

A petition protesting this notice and requesting a hearing with the Division of Tax Appeals was filed on May 12, 1998.

12. On August 14, 1998, the Division of Tax Appeals received petitioner's notice of motion requesting that summary determination be granted in favor of petitioner. In support of his motion petitioner submitted the following:

a). Affidavit of Robert A. Jacobs, petitioner's representative including Exhibit 1, the affidavit of petitioner, and Exhibit 2, a photocopy of the audit report and Notice of Deficiency;

b). Affidavit of petitioner including Exhibit 1, Employment Agreement, Exhibit 2, photocopy of petitioner's resignation including formal notice pursuant to the Employment Agreement, Exhibit 3, Supplemental Executive Retirement Plan, Exhibit 4, photocopy of petitioner's 1994 Federal income tax return or "1040", Exhibit 5, photocopy of petitioner's 1994

New York State nonresident income tax return or "IT-203", and Exhibit 6, photocopy of petitioner's resignation as a director;

c). Affidavit of Michael D. Fricklas, Senior Vice-President and Deputy General Counsel of Viacom, Inc., who during 1994 was Senior Vice-President of Paramount; and,

d). Memorandum of Law together with exhibits, the exhibits being the same documents as those submitted together with the notice of motion.

13. On October 14, 1998, the Division of Tax Appeals received the response of the Division, labeled by the Division as both an affidavit in opposition to petitioner's motion and a cross-motion for summary determination in favor of the Division. This response consisted of a seven-page affidavit executed by the representative of the Division, and a covering letter. The affidavit of the Division also mentions a cross-motion for summary determination in its favor. With regard to the Division's cross-motion, a notice of motion in accordance with 20 NYCRR 3000.5 was not received by either petitioner or the Division of Tax Appeals.

14. Petitioner requested an opportunity to file a reply which was granted by the Supervising Administrative Law Judge and petitioner's reply was received on October 28, 1998.

*Contested Facts*

15. The Division objects to the references by petitioner and Mr. Fricklas in their affidavits to the payments petitioner received pursuant to section four of the Employment Agreement as payments made for his relinquishment of future rights to employment.

16. The Division objects to the assertions in petitioner's submission that the payments petitioner received pursuant to section four of the Employment Agreement were not New York source income, nor guaranteed or severance payments. While not limiting its objection to specific

asserted facts, it is clear that the following paragraphs of petitioner's affidavit are covered by this objection:

> 17. The $2,950,743 Paramount paid me in 1994 was not paid to me for: (i) the termination of my employment (i.e., a severance payment) or (ii) for my past services upon early retirement or (iii) for my present or future consultation services or (iv) for my agreeing not to compete with Viacom or Paramount. The payment was simply for my rights under the Contract.
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> 15. The $2,950,743 I received from Paramount in 1994 was not an item of income 'derived from or connected with New York sources" within the meaning of Tax Law § 631. The $2,950,743 was not: (i) my distributive share of partnership income, or (ii) my pro rata share of a New York S corporation's income, or (iii) my share of a New York estate or a New York trust, or (iv) attributable to my ownership of any interest in real or tangible personal property located in New York State, or (v) income from a "business, trade, profession or occupation carried on" by me in New York State, or (vi) income from intangible personal property employed by me in a "business, trade, profession, or occupation carried on in" New York State.

17. The Division also specifically objected to paragraph six of Mr. Fricklas' affidavit which provides:

> 6. The $2,950,743 received by Davis from Paramount in 1994 pursuant to the termination provisions of Paragraph 4 of the Contract was not an amount received: (i) as a severance payment in recognition of past services, or (ii) for past services upon early retirement, or (iii) for consulting services, or (iv) in consideration of a covenant not to compete.

18. While an objection can be inferred from the language of Division's objections set forth in Findings of Fact "16" and "17", the Division does not specifically object to petitioner's characterization of the income in question as not being for consulting services or for not being a covenant not to compete. Furthermore, there is no evidence in the record to support a conclusion that the payments in question were for consulting services or a covenant not to compete. Petitioner did not perform any services for Paramount after his resignation in March of 1994 and there was no provision in the Employment Agreement granting petitioner any right to provide

consulting services in the event of the termination of his employment. Section 10 of the Employment Agreement provides that petitioner was not required to mitigate damages in the event of the termination of his employment by seeking employment elsewhere, nor were any payments he was to receive under the Employment Agreement to be reduced if he found other employment. Such a provision combined with the lack of any provision regarding a covenant not to compete in the Employment Agreement, precludes the possibility that the payments petitioner received were for a covenant not to compete. Therefore, the lump sum payment received by petitioner was not received for consulting services or for any covenant not to compete.

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

19. Petitioner asserts that summary determination is appropriate in this case because there are no material and triable issue of fact in dispute. Petitioner then asserts that since he was a nonresident of New York State during the time at issue, New York State may tax his income only to the extent that the income was derived from New York sources. Petitioner argues that the payments received pursuant to the Employment Agreement were in exchange for the relinquishment of his rights to future employment (rights originally secured by petitioner's promise to work in the future - consideration having no connection to New York), and therefore are not New York source income. Finally, petitioner states that there is no evidence in the record to support a finding that if petitioner had continued working, his work would have been within New York.

20. The Division objects to certain facts asserted by petitioner as conclusory in nature. It argues that the conclusions drawn in determining these facts are conclusions to be made by the Administrative Law Judge based on the language of the Employment Agreement. Therefore, the Division does not request that petitioner's motion be denied and the matter scheduled for

hearing, but that petitioner's motion be denied and summary determination be granted in favor of the Division.

The Division argues that the Notice of Deficiency issued is entitled to a presumption of correctness and that petitioner therefore bears the burden of proving by clear and convincing evidence that the payments at issue were not New York source income. The Division argues that it is necessary to look to the activity that earned the income in question to determine whether the income should be sourced to New York. In this case the Division argues that petitioner established his rights to the termination payments upon the execution of the Employment Agreement and that the payments were therefore earned by his services rendered from that time until his termination.

In response to petitioner's arguments, the Division argues that there is no reference in the Employment Agreement to petitioner's relinquishing his employment rights, implying that petitioner would receive payments from Paramount upon his termination without waiving his rights to future employment. Furthermore, unlike the cases cited by petitioner, petitioner in this case had no separate settlement agreement.

21. In his reply, petitioner first contends that the Division asserts in its responsive affidavit that a cross-motion for summary determination was filed. In light of the fact that neither the Division of Tax Appeals nor petitioner received such a motion, petitioner urges that the Division's arguments for granting it summary determination be stricken.

Petitioner then argues that the facts in its affidavits were based upon the personal knowledge of petitioner and Mr. Fricklas in their respective capacities with Paramount and Viacom, Inc. and that the Division cannot defeat the facts as set forth in these affidavits with mere allegations that the facts are not true. Petitioner asserts that the Division's contention that

petitioner would receive payments without relinquishing his employment rights is a matter of the interpretation of an unambiguous contract and is a question of law, not a question of fact. Therefore, petitioner urges that his motion for summary determination be granted since the Division in effect, has not challenged the facts as set forth in the motion papers.

Petitioner argues that the Division does not cite any authority, nor does any exist, that compels petitioner to have signed a separate agreement at the time of the termination of his employment. Petitioner states that the case cited by the Division in its response is distinguishable from petitioner's case because petitioner had a definite term of employment under the Employment Agreement. Petitioner argues that he would not have received any payments under section four of the Employment Agreement if his employment was not terminated, discrediting the Division's argument that he did not give up his right to future employment.

## *CONCLUSIONS OF LAW*

A. The first issue to be addressed is the procedural issue of whether the Division's arguments in favor of granting it summary determination should be stricken because of the Division's reference to a cross-motion for summary determination which was not received by either petitioner or the Division of Tax Appeals pursuant to 20 NYCRR 3000.5. The document submitted by the Division in response to petitioner's motion was in the form of an affidavit signed by the Division's representative. It is apparent that despite the references made by the Division, no cross-motion exists, and the affidavit submitted was in actuality the Division's response to petitioner's motion. In any event, 20 NYCRR 3000.9(b) regarding motions for summary determination provides: "Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination

without the necessity of a cross-motion." Therefore, while the incorrect usage of the term cross-motion by the Division was confusing, I see no reason to ignore the arguments of the Division in favor of granting summary determination in its favor merely because it mislabeled its responsive papers.

B. The second issue to be addressed is whether there exist any material and triable issues of fact that would prohibit the granting of summary determination. In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

> The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1], ***see also***, Tax Law § 2006 [6].)

The arguments made by both parties regarding whether there exist material and triable issues of fact in the present case are somewhat unusual. Petitioner contends that there are no facts in question. The Division agrees that there are no facts in question, and asks for summary determination to be granted in its favor. However, the Division makes several objections to the facts as presented by petitioner. The Division objects to references in petitioner's papers that the payments in question were made for petitioner's relinquishment of his rights to future employment and were not guaranteed or severance payments. This objection does not specify any particular document or section of a document. The Division specifically objects to a paragraph of Mr. Fricklas' affidavit, set forth in full in Finding of Fact "17". The basis for the Division's objections is that all of this material is conclusory in nature and addresses the substantive legal issue presented by this case which is to be decided by the Administrative Law Judge. Petitioner responds by stating that the Division cannot raise questions of fact sufficient

to prohibit the granting of summary determination by simply interpreting the Employment Agreement differently than petitioner since the interpretation of the Employment Agreement, where neither party claims the agreement is ambiguous, is a question of law for the Administrative Law Judge. Regarding paragraphs 14 and 15 of petitioner's affidavit and paragraph 6 of Mr. Fricklas' affidavit as set forth fully in Findings of Fact "16" and "17", petitioner contends that the affidavits are based on the personal knowledge of the affiants in their respective positions with Paramount and Viacom, Inc.

The substantive legal issue presented by the motion is whether the payments received by petitioner pursuant to section four of the Employment Agreement were New York source income properly taxable by New York. Crucial to that determination is the question of whether the payments petitioner received were in return for relinquishment of his future rights to employment or more in the nature of severance or guaranteed payments. Petitioner cannot simply make conclusory statements to such effect. (***See***, ***Matter of Lombard***, Tax Appeals Tribunal, March 6, 1997; ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996; ***Matter of Hugo Bosca Company***, Tax Appeals Tribunal, October 17, 1991). Therefore, while paragraphs 1 through 12 and 15 through 17 of petitioner's Statement of Facts are essentially set forth in the Uncontested and Procedural sections of the Findings of Fact, (***see***, Findings of Fact "1" through "14") with minor language changes or clarifications, any conclusory reference to the nature of the payments has been omitted or modified.[9] Paragraphs 13 and 14 of petitioner's Statement of Facts (based on paragraphs 14 and 15 of petitioner's affidavit and paragraph 6 of

[9]To the extent the Division did not respond to the facts as presented by petitioner in his moving papers, the Division is deemed to have conceded that the facts as presented by the affidavits submitted by the petitioner are correct (***see***, ***Kuehne & Nagel v. Baden***, 36 NY2d 539, 544, 369 NYS2d 667, 671; ***Whelan By Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173).

Mr. Fricklas' affidavit) have been omitted entirely as conclusory. Petitioner's assertions that the affidavits were based on the personal knowledge of the affiants does not change the conclusory nature of the affidavits. There is nothing in the affidavits that explains what facts the conclusions are based on, for example board of directors meetings, conversations, perhaps additional memoranda. Therefore, the conclusory statements are unsupported (***see***, ***Matter of Lombard***, ***supra***; ***Matter of Roland***, ***supra***; ***Matter of Hugo Bosca Company***, ***supra***).

Petitioner correctly contends that the Division must do more than allege that petitioner's facts are incorrect to defeat a motion for summary determination. However, having found that the facts the Division disagreed with were actually conclusory in nature and not strictly facts, it appears that the Division does not object to the remainder of the facts as presented by petitioner and therefore, there are no facts in issue.

There being no material and triable facts at issue, this matter is properly the subject of a motion for summary determination.

C. Tax Law § 631(a) defines the New York source income of a nonresident individual as follows:

> General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, *derived from or connected with New York sources* . . . (Tax Law § 631[a]; emphasis added).

As related to the present matter, the issue is whether the payments were New York source income because they were income "attributable to . . . a business, trade, profession or occupation carried on in this state" (Tax Law § 631[b][1][B]), or because:

> [i]ncome from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state. (Tax Law § 631[b][2].)

D. Petitioner cites ***Donahue v. Chu*** (104 AD2d 523, 479 NYS2d 889), and a line of Tax Appeals Tribunal decisions following ***Donahue***, in support of his position that the payments received were in return for his relinquishing his right to future employment, a right not connected with New York and therefore not taxable by New York. The Division cites to the same line of cases in support of its position that the payments petitioner received were guaranteed or severance payments where the consideration given by petitioner was his prior services performed in New York, and therefore the income is taxable. Petitioner argues that the facts in this case more closely resemble the facts in those cases where the petitioners prevailed, and the Division argues that the facts in this case more closely resemble those cases where the Division prevailed. Therefore, it would be helpful to begin with a discussion of the cases.

In ***Donahue*** the taxpayer entered into a five-year employment contract for a guaranteed salary that also provided that at the end of the five-year term the taxpayer would provide consulting services for an additional ten years at the rate of $20,000.00 per year. The company had its executive offices in New York City until March of 1975 when the offices were moved to Connecticut. In June of 1975 the taxpayer changed his residence to Connecticut. In September of 1975 the board of directors of the company and the taxpayer entered into an agreement to terminate the taxpayer's employment contract. Pursuant to the agreement the taxpayer received payments in return for giving up his right to receive a salary for the remainder of the employment term and his right to receive the payments for the 10 years of consulting services at the conclusion of the term. The court held that where all of this income was paid to the

taxpayer after both he and his company had moved to Connecticut, the Division must "produce substantial evidence that the money paid was for services performed in New York." (***Donahue v. Chu***, ***supra***, 479 NYS2d at 891.) The court concluded that the income resulted from an agreement to terminate the taxpayer's future right to employment under the contract and that the income was not taxable in New York State as income derived from a business or occupation carried on in this State because there was no evidence that the rights to future employment given up by the taxpayer would have been exercised in New York.

In ***Matter of Laurino*** (Tax Appeals Tribunal, May 20, 1993) the Tribunal set forth its interpretation of ***Donahue v. Chu*** (104 AD2d 523, 479 NYS2d 889). The Tribunal explained that when the taxpayer in ***Donahue*** first entered into his employment contract what he secured was a right to future employment and that his consideration for that right was a promise to work in the future and this consideration had no connection to New York.[10] The Tribunal then explained that the payment received for relinquishing such right to future employment is not taxable to New York.

The Tribunal distinguished the employment contract at issue in ***Donahue*** to that at issue in ***Laurino***. The contract in ***Laurino*** set forth such terms of employment as salary, bonuses, etc. It did not, however, provide for a definite term of employment. The particular provision of the contract at issue provided that if the company were taken over during the first two years of the taxpayer's employment, and the taxpayer's employment at his current salary was not extended for one year within 120 days of the takeover, the taxpayer was entitled to a payment equal to one year's salary. Other than the occurrence of this particular circumstance, the

[10]While not specifically mentioned by the Tribunal it appears that the Tribunal considered a promise to work in the future intangible personal property under Tax Law § 631(b)(2).

taxpayer in ***Laurino*** could have been terminated at any time. Thus when the taxpayer entered into the employment contract his promise to the company was not a mere promise to work in the future, but the act of working for the company up until the time the company was taken over. This act was not an intangible, but income attributable to a business or occupation carried on in New York, and therefore taxable to New York. Since the Tribunal did not find that an intangible right to future employment was given by the taxpayer in exchange for the payments in question, it did not reach the question of whether the future employment would have been carried on in New York.

In ***Matter of McSpadden*** (Tax Appeals Tribunal, September 15, 1994) the taxpayer entered into an employment contract of a definite duration, including a provision which provided that, should he be terminated other than voluntarily or for cause, he would be entitled to receive his regular salary until the end of the employment term. An agreement was reached prior to the end of the employment term to terminate the taxpayer's employment. A written agreement was executed whereby the taxpayer received a lump sum payment for his remaining rights under the employment agreement. The lump sum payment represented the present value of the amounts petitioner would have been entitled to under terms of the original agreement. The Tribunal again held that a mere promise to work in the future was what secured the taxpayer's original employment agreement and such a promise had no connection to New York. On that basis the Tribunal held that the lump sum payment received for giving up that right was not taxable in New York.

The Division pointed out that in ***McSpadden*** not only did the original agreement provide that the taxpayer would not be required to work outside New York, but also that the taxpayer admitted on cross-examination he would have continued to work in New York. Therefore, the

Division argued, it was clear that the future employment given up by the taxpayer would have occurred in New York. The Tribunal noted that the contract provision was a promise to the taxpayer from the company, and not the taxpayer's promise to the company. Furthermore, the contract provided the taxpayer could have consented to work outside New York. On this basis the Tribunal held that this evidence was speculative at best, and therefore the Division had not shown that the future employment would have occurred in New York.

In ***Matter of Brophy*** (Tax Appeals Tribunal, December 7, 1995) the Tribunal found the employment agreement at issue to have been secured by a mere promise to work in the future, and concluded payments received for relinquishing rights to future employment guaranteed by such an agreement were not New York source income. The Tribunal further noted that the facts that the original employment agreement was negotiated in New York and that the taxpayer worked in New York during his employment, did not change the fact that the taxpayer's original promise to work for the company in the future was not connected to New York.

In ***Hoffmann v. Commr.*** (228 AD2d 732, 643 NYS2d 701) the court held that the only evidence produced by the taxpayer that an employment agreement even existed, was an agreement concerning the termination of his employment, and a letter he had drafted outlining his employment with the company. Furthermore, not only did the termination agreement fail to mention relinquishment of future rights to employment, but contained a specific provision that the taxpayer waived "any claims arising out of or relating to [his] past employment with TWA." Since the taxpayer never proved that there was an employment agreement, much less that he relinquished rights to future employment in the termination agreement, the court held that he had not proven the Division's assessment erroneous. Therefore, the argument asserted by the

taxpayer, that there was no proof in the record that he would have performed the future services in question in New York, was never reached.

In ***Matter of Evans*** (Tax Appeals Tribunal, June 4, 1998) the Tribunal held the lump sum payment received by the petitioner was taxable by distinguishing ***McSpadden***. The Tribunal pointed out that in ***Evans***, unlike ***McSpadden***, the taxpayer had failed to prove the existence of the original employment contract. Having failed to prove the existence of an employment agreement, and having introduced a termination agreement that provided it was a "compromise of disputed claims" where all liability was expressly denied by both parties, the taxpayer could not prove that the payments he received from the company were for the relinquishment of a future right to employment. Again, the Tribunal did not reach the issue of whether the taxpayer's future employment would have occurred in New York.

The analysis utilized in all these cases consists of a series of several determinations. It must be determined whether the original employment agreement at issue secured for the taxpayer a right to future employment and whether the consideration given by the taxpayer to obtain that right was the mere promise to work in the future. If this is proven by the taxpayer, payments received for relinquishment of these rights by the taxpayer are not taxable to New York, unless a review of the evidence in the record proves that the future employment would have occurred in New York.

E. Petitioner has the burden of proving that the income he received pursuant to section four of the Employment Agreement was for the relinquishment of the right to future employment and that such right was originally secured by consideration of a promise to work in the future (***see***, Tax Law § 689[e]; ***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398). In reaching that determination

"it is necessary to identify the activity upon which the income was secured or earned. Thus in making this determination, the consideration given by petitioner in exchange for the right to the income at issue is the controlling factor." (***Matter of Laurino***, ***supra***.) In order to determine the nature of what petitioner relinquished in return for the payments he received pursuant to section four of the Employment Agreement, it is first necessary to determine the nature of the rights acquired by petitioner when he entered into the employment agreement and the consideration given by petitioner to secure those rights. (***Matter of Evans***, ***supra***; ***Matter of Brophy***, ***supra***; ***Matter of Laurino***, ***supra***.)

Petitioner's Employment Agreement provided for his employment with Paramount from June 23, 1989 until February 22, 1997. What petitioner acquired was the right to future employment with Paramount. While Paramount made numerous promises to petitioner in the Employment Agreement, the only consideration given by petitioner was to agree to accept employment with Paramount and to serve as its Chairman and Chief Executive Officer. This promise made in the original agreement is a promise to work for Paramount in the future. Having determined that the only consideration given by petitioner upon signing the original agreement was a promise to work for Paramount in the future, a promise unconnected to New York, a payment for relinquishment of that right cannot be taxable to New York (***Matter of Brophy***, ***supra***; ***Matter of McSpadden***, ***supra***; ***Matter of Laurino***, ***supra***; ***Donahue v. Chu, supra***).

The Division argues that since there was no separate termination agreement, petitioner acquired the rights to the payments under section four of the employment agreement at the time he signed the original agreement. Therefore, the Division argues that the activity that earned petitioner the payments was his employment until the time of his termination. I disagree. The

question of when petitioner acquired the rights to the payments is not relevant. The relevant question at the time of the signing of the agreement is whether petitioner acquired a right to future employment for a definitive term and whether petitioner provided merely a promise to work in the future in return for that right. The fact that other promises were made by Paramount to petitioner is not the issue (***see***, ***Matter of McSpadden***, ***supra***.) Furthermore, petitioner did not actually acquire the rights to the payments at the time of the signing of the original agreement. Paramount could not terminate petitioner during the term of his employment except for cause. Therefore, the only manner in which petitioner would receive the payments were if petitioner chose to terminate his employment, and that choice was allowed only if one of the circumstances in section six of the agreement were present. Therefore, petitioner had no right to the payments until he submitted his resignation for "Good Reason" together with the notice required pursuant to the agreement. Finally, I see no difference between the facts as presented in this matter and those in ***McSpadden***. The taxpayer in ***McSpadden*** also had provisions for termination payments in his original employment contract. His termination agreement simply provided that he receive a lump sum payment for the present value of the payments he was to receive. I do not believe the result in ***McSpadden*** would have been different if the taxpayer had simply terminated his employment pursuant to the original agreement as petitioner did here.

The Division also argues that there is no language in the agreement stating that petitioner is relinquishing his right to future employment in return for the payments pursuant to section four. Section four of the Employment Agreement provided that upon termination of petitioner's employment prior to the end of the term under certain circumstances, including by petitioner for "Good Reason," Paramount would make payments to petitioner including

monthly salary payments until the conclusion of the term. On March 24, 1994 petitioner submitted to Paramount a resignation for "Good Reason" which was accepted by Paramount. Petitioner then began receiving his monthly payments pursuant to the Employment Agreement. In order to obtain the payments petitioner had to provide notice of "Good Reason." By providing that notice to Paramount, petitioner relinquished his rights to future employment with Paramount. While the Division is correct that there is no language in the Employment Agreement or petitioner's resignation for "Good Reason" letter specifically stating that he is relinquishing his rights to future employment (***see***, ***Matter of McSpadden***, ***supra***), neither is there any language in the documents to the contrary (***see***, ***Hoffmann v. Commr.***, ***supra*** at 703) or that he is not giving up his right to future employment. Petitioner is correct that the obvious practical consequence of his resignation for "Good Reason" was that he had no more rights to future employment pursuant to the contract.

F. The only time income from relinquishment of an intangible right to future employment could be taxable to New York would be if it could be shown that the income was "from property employed in a business, trade, profession, or occupation carried on in this state" (Tax Law § 631[b][2][B]). The property in this matter is petitioner's right to future employment. It therefore must be clear from the record that such future employment would have occurred in New York. For the past 15 years petitioner worked in New York an average of 85% of the year. The Employment Agreement provided that if Paramount moved petitioner's work location out of New York he could terminate his employment for "Good Reason." While these facts appear to indicate that petitioner's employment might have continued in New York, a determination that the employment would have continued in New

York may not be based on such speculative facts (***see***, ***Matter of Brophy***, ***supra***; ***Matter of McSpadden***, ***supra***).

G. Petitioner's motion for summary determination is granted, the petition is granted and the Notice of Deficiency dated April 13, 1998 is canceled.

DATED: Troy, New York
January 14, 1999

/s/ Robert Moseley Nero
ADMINISTRATIVE LAW JUDGE