STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LOIS A. MORGAN	:	DETERMINATION 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 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.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 25, 2002 at 10:30 A.M., with all briefs submitted by December 9, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by her spouse, Charles C. Morgan, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel).

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 from asserting liability against petitioner for the tax at issue herein.

III. Whether the Division waived its right to pursue this matter by its cancellation of a pre-existing 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

1. 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.

2. 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

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

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.

3. 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.

4. 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.

5. 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]

6. 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.

7. 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.

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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***, Findings of Fact "11" and "12").

8. 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.

9. 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.

10. 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***, Finding of Fact "3").

11. 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.

12. 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.

13. 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.

14. 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).

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

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

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

23. 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.

24. 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.

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

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

27. At no time did petitioner file a lawsuit against Prudential.

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

CONCLUSIONS OF LAW

A. Petitioner asserts that the cancellation of assessment number L-014431075 "constitutes a pre-existing final determination with respect to this income, constitutes a final determination that no amount of tax is due with respect to this income, and precludes this action."

This contention is rejected. The March 30, 1998 letter of John Cross is not and does not purport to be a final determination with respect to the income at issue. The letter refers to assessment number L-014431075 and states, in part, "the above assessment has been cancelled in

full." The letter makes no reference to assessment number L-014717270 and thus does not cancel L-014717270.

The record in this matter is clear, as petitioner notes, that assessment number L-014431075 predates assessment number L-014717270; that both notices of deficiency asserted tax due on the same income; and that the Division voluntarily canceled the preexisting assessment. Further, although the record shows that the Division made an internal decision to cancel L-014431075 at some point prior to the issuance of Notice of Deficiency L-014717270, the most reasonable date of cancellation of L-014431075 is, as petitioner contends, the March 30, 1998 date of the John Cross letter. These facts notwithstanding, the Cross letter makes no reference to, and thus does not cancel, Notice of Deficiency L-014717270.

Additionally, while the issuance of a second notice of deficiency for the same taxable year is generally prohibited if a taxpayer has filed a petition with the Division of Tax Appeals (***see***, Tax Law 689[d][4]), no such petition had been filed at the time Notice of Deficiency L-014717270 was issued in the instant matter. The issuance of the second notice was thus not prohibited under the Tax Law.

B. Petitioner asserts that the doctrine of collateral estoppel bars the Division 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 doctrine of collateral estoppel generally precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are

the same (***see, Staatsburg Water Co. v. Staatsburg Fire District***, 72 NY2d 147, 531 NYS2d 876). The doctrine is applicable to administrative proceedings, so long as the determination of the administrative agency was "rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law" (***Ryan v. New York Telephone Co.***, 62 NY2d 494, 499, 478 NYS2d 823, 826 [citations omitted]). In either type of proceeding, requirements for application of the doctrine are: (1) that the issue as to which preclusion is sought be identical with that in the prior proceeding; and (2) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding (***see, B. R. Dewitt, Inc. v. Hall***, 19 NY2d 141, 278 NYS2d 596). The burden to show the identity of issues is on the party seeking to assert the doctrine (***see, Kaufman v. Eli Lilly and Co.***, 65 NY2d 449, 456, 492 NYS2d 584, 588).

In order to satisfy the identity of issues requirement, the issue must have been actually litigated in a prior action (***id.***). That is, such issue must have been "properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding" (***Halyalkar v. Board of Regents***, 72 NY2d 261, 268, 532 NYS2d 85, 89). This requirement is not met if, for example there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation (***Kaufman v. Eli Lilly and Co.***, ***supra***, 65 NY2d 449, 457, 492 NYS2d 584, 589). This requirement is also not met by a consent order in an administrative proceeding which states, without elaboration, that the party being disciplined entered a plea of guilty (***Halyalkar v. Board of Regents***, 72 NY2d 261, 268, 532 NYS2d 85, 89).

The issues presented in the instant matter were not litigated at all prior to this proceeding. Accordingly, there can be no identity of issues between the present proceeding and the liability asserted against petitioner and her spouse under the first notice of deficiency (***see***, ***Kaufman v. Eli Lilly***, ***supra***). By references to the "first proceeding" and the "original assessment" in her brief, petitioner appears to take the erroneous position that the issuance of a notice of deficiency constitutes the commencement of a proceeding for purposes of determining the applicability of collateral estoppel. A "proceeding" is commenced in the Division of Tax Appeals by the filing of a petition (Tax Law § 2008). A conciliation proceeding is commenced by the filing of a request for a conciliation conference (Tax Law § 170[3-a][b]). 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. Additionally, although petitioner and her spouse had filed a request for conciliation conference at the time the February 9, 1998 Notice of Deficiency was canceled by the Cross letter, such notice was not canceled in the context of a conciliation conference proceeding, but was canceled by an administrative act. No conciliation conference was held in respect of petitioner's request and there is neither a consent nor a conciliation order in the record indicating the conclusion of a BCMS proceeding (***see***, 20 NYCRR 4000.5[c][3]). Clearly, then, the issues presented in the instant matter were not "actually determined in the prior proceeding" (***Halyalkar v. Board of Regents***, ***supra)***.

Even if the issues presented in the instant matter had been litigated in a prior proceeding, collateral estoppel still would not apply because the forum for the asserted prior proceeding, BCMS, is not quasi-judicial in nature and is not governed by "procedures substantially similar to those used in a court of law" (***Ryan v. New York Telephone Co.***, ***supra***). The conciliation

conference is not an "adjudicatory proceeding" as defined in Article 3 of the State Administrative Procedure Act ("SAPA"). Specifically, the conciliation conference process does not comply with record requirements for adjudicatory proceedings under SAPA § 302 (conferences are neither electronically nor stenographically recorded) and conciliation orders do not comply with requirements for decisions, determinations, and orders under SAPA § 307 (conciliation orders contain neither findings of fact nor conclusions of law). The conciliation conference process is, in essence, a settlement negotiation (***see***, 20 NYCRR 4000.5[c][1][i]). Collateral estoppel is not applicable to such a proceeding.

C. Petitioner also asserts 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 and that the Division had full knowledge of all relevant facts at the time of the cancellation of the February 9 notice. Specifically, petitioner notes that, notwithstanding the joint filing status and Mr. Morgan's signature on the return and the failure to file a Form IT-203-C with the return, the Division had full knowledge that all New York source income on the 1994 return was that of petitioner.

"Waiver is an intentional relinquishment of a known right and should not be lightly presumed [citations omitted]" (***Gilbert Frank Corp. v. Federal Insurance Co.***, 70 NY2d 966, 968, 525 NYS2d 793, 795). Here, petitioner has failed to show a "clear manifestation of intent" (***id.***) by the Division to relinquish its right to assert income tax liability against petitioner for the year at issue. As previously discussed, the Cross letter refers to assessment number L-014431075 and states, in part, "the above assessment has been cancelled in full." The letter makes no reference to the March 12, 1998 Notice of Deficiency (assessment number L-014717270) and thus does not purport to cancel that notice. More significantly, "no effect will

be given to a waiver which violates public policy" (***Caravaggio v. Retirement Board of the Teachers' Retirement System of the City of New York***, 36 NY2d 348, 354, 368 NYS2d 475, 482). "Public policy favors full and uninhibited enforcement of the Tax Law" (***Turner Construction Co. v. State Tax Comm.***, 57 AD2d 201, 394 NYS2d 78, 80). Furthermore, as a general rule, waiver may not be employed against the State (***see***, ***Matter of Jamestown Lodge 1681 Loyal Order of Moose [Catherwood]***, 31 AD2d 981, 297 NYS2d 775, 776). Accordingly, even if the evidence showed that the Division intended by the Cross letter to relinquish its rights to proceed against petitioner under the March 12, 1998 Notice of Deficiency, no effect should be given to such a waiver which would be in violation of public policy.

D. Petitioner also asserts the equitable doctrine of judicial estoppel as a bar to the notice at issue contending that petitioner's election to file a joint return created two methods of redress for New York, one being a joint assessment and the other being an individual assessment against petitioner. Petitioner asserts that the Division's decision to proceed with the joint assessment in the first notice of deficiency constituted a choice that now bars the instant assertion of liability solely against petitioner.

Judicial estoppel, also known as the doctrine of inconsistent positions, provides that "where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because its interests have changed" (***McIntosh Builders v. Hall***, 264 AD2d 869, 695 NYS2d 196, 198). The doctrine is generally applied "where a party to an action has secured a judgment in its favor by adopting a certain position and then seeks to take a contrary position in the same action or in another action arising from the judgment" (***Hinman, Straub, Pigors & Manning, P.C. v. Broder***, 124 AD2d 392, 507 NYS2d 761, 762).

Petitioner's assertion of judicial estoppel must fail because, first, as noted herein, there has been no prior proceeding in this matter. The first notice of deficiency was canceled by an administrative act of the Division, outside the context of the BCMS process. The BCMS process is not a quasi-judicial administrative hearing process. Second, 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. Both notices asserted liability against petitioner with respect to the same income. Moreover, facts supporting the first notice would be consistent with the facts supporting the second. Third, the Division's change in position, from joint to individual liability, was justified. The first notice was reasonable given petitioner's failure to file Form IT-203 with her return. The issuance of the second notice reflects that only petitioner, and not her spouse, had New York income during the year at issue. Finally, 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. Absent any such "success," the doctrine does not apply (***see***, ***McIntosh Builders v. Hall***, ***supra***).

E. Petitioner also asserts that the February 9, 1998 Notice of Deficiency 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. With respect to this assertion, as noted, the Cross letter did not reference the March 12 notice and therefore did not cancel the March 12 notice. Further, as also noted, "public policy favors full and uninhibited enforcement of the Tax Law" (***Turner Construction Co. v. State Tax Comm.***, ***supra***). This contention is therefore rejected.

F. Turning to the merits, the New York source income of a nonresident individual, such as petitioner, is subject to New York personal income tax (Tax Law § 601[e]). Such income includes the net amount of items of income, gain, loss and deduction reported in the Federal adjusted gross income that are "derived from or connected with New York sources" (Tax Law § 631[a]). Insofar as relevant herein, the phrase "derived from or connected with New York sources" means income attributable to a business, trade, profession or occupation carried on in New York or income from intangible personal property "only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on" in New York (Tax Law § 631[b][1][B]; [2]).

To prevail in the instant matter, petitioner must show that the income in question was not secured or earned pursuant to activities connected with or derived from New York sources ***(see***, ***Matter of Laurino***, Tax Appeals Tribunal, May 20, 1993). In making this determination, the controlling factor is the consideration given by petitioner in exchange for the right to the income at issue (***Matter of Laurino, supra, citing Matter of Halloran,*** Tax Appeals Tribunal, August 2, 1990). In other words, "it is necessary to examine what petitioner gave up in exchange for the right to the income at issue" (***Matter of Haas***, Tax Appeals Tribunal, April 17, 1997). Where the consideration has no connection to New York, the income will not be subject to tax by the state (***Matter of Donohue v. Chu***, 104 AD2d 523, 479 NYS2d 889).

G. Petitioner has failed to show that the income in question was not secured or earned pursuant to activities connected with or derived from New York sources (***Matter of Laurino***, ***supra***).

Petitioner contends that the income in question was received as consideration for her agreeing not to sue Prudential. According to petitioner, the agreement of separation contained a

provision wherein petitioner waived any and all claims against Prudential arising out of her employment. Petitioner has not shown, however, that the compensation at issue, the salary paid in respect of the leave of absence, was even part of the agreement of separation, which became effective March 18, 1994, the date petitioner's paid leave of absence concluded. The salary in question was thus secured or earned prior to petitioner's termination. The agreement of separation is not in the record (***see***, Finding of Fact "29"). Accordingly, it is uncertain whether the agreement included among its terms the salary paid to petitioner during her leave. Given petitioner's burden of proof, such uncertainty is fatal to this contention. In addition, petitioner's contention fails because the record does not specify the claim or claims petitioner assertedly had against Prudential. Petitioner has also failed to show whether the separation agreement accorded any payments made thereunder to any particular claim or claims. A standard or general release which lists a wide range of claims and does not accord a payment to a specific claim is in the nature of severance pay and not damages received in settlement of litigation (***see***, ***Matter of Delardi and DiFonzo***, Tax Appeals Tribunal, March 18, 1999). Again, the absence of the agreement of separation from the record weighs heavily against petitioner's position.

Petitioner also contends that the income in question was paid to her in consideration of her relinquishing any right to future employment with Prudential. Petitioner, however, has failed to prove that she had any right to future employment and has therefore 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. There is no evidence in the record to suggest that petitioner had a definite term of employment. New York law therefore presumes an employment at will (***see***, ***Murphy v. American Home Prods. Corp.***, 58 NY2d 293, 300, 461 NYS2d 232, 235; ***Matter of Laurino***, Tax Appeals Tribunal, May 20, 1993). Accordingly, Prudential had the right

to terminate petitioner at any time for any reason or for no reason (***see***, ***Murphy v. American Home Prods. Corp.***, ***supra***).

H. The record indicates that the compensation paid to petitioner during her paid leave of absence was attributable to her continuing employment relationship with Prudential and for her past services to Prudential. Although petitioner was on a leave of absence, her status as an employee had not been terminated. 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. In the language of ***Laurino*** and ***Halloran (supra)***, the consideration given by petitioner for the right to the income at issue was her consent to remain in an employment relationship with Prudential and her prior service to Prudential. Petitioner could have terminated that relationship at any time (***see***, ***Murphy v. American Home Prods. Corp.***, ***supra***).

I. Having concluded that the compensation at issue was attributable to petitioner's continuing employment with Prudential and was directly connected to past services, it must be determined whether any portion of such compensation was New York source income. During the year at issue, petitioner was a nonresident employee who performed services for her employer both within and without New York during the year at issue. Specifically, petitioner worked 14 days in New York out of 16 total working days. 20 NYCRR 132.18(a) prescribes, in relevant part, the following method of allocating the income of nonresident employees performing services both within and without New York:

> If a nonresident employee. . .performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. . . . In making the allocation provided for in this section, no

> account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay.

J. The Division properly allocated the income paid to petitioner by Prudential for her paid leave of absence in accordance with the above regulation. Inasmuch as the salary paid to petitioner while on paid leave was attributable to petitioner's continuing employment with Prudential and to petitioner's past services to Prudential, such salary was properly included, pursuant to the regulation, in petitioner's "total compensation for services rendered as an employee." Consistent with the regulation, the Division allocated petitioner's total compensation in the same proportion as petitioner's days worked in New York to total days worked to determine petitioner's New York source income for the year at issue.

K. Petitioner asserts that even if the income in question was for past services, such income cannot be considered New York source income because the vast majority of petitioner's past services occurred outside of New York. The Division's regulations do provide for other methods of allocation, provided that such other method "results in a fair and equitable apportionment and allocation" (***see***, 20 NYCRR 132.24). In the instant matter, since the allocation is based on a mere 16 days worked during the year at issue, an alternative allocation might be appropriate. There is insufficient evidence in the record, however, to make such an alternative allocation. Although petitioner presented evidence of days worked in New York during the two years immediately preceding the year at issue, petitioner did not submit evidence of her total days worked in those years. Without such evidence, it is impossible to make an allocation based on the ratio of days worked in New York to total days worked.

L. The petition of Lois A. Morgan is denied and the Notice of Deficiency dated March 12, 1998, as modified by the Conciliation Order dated June 29, 2001, is sustained.

DATED: Troy, New York
May 22, 2003

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE