STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KENNETH GRAHAM	:	SMALL CLAIMS DETERMINATION DTA NO. 820866
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law for the Year 2001.	:	

Petitioner, Kenneth Graham, 60 North Road, Berkeley Heights, New Jersey 07922, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2001.

A small claims hearing was held before Catherine M. Bennett, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 13, 2007 at 2:45 P.M. Since the parties did not request time to submit briefs, March 13, 2007 commenced the three-month period in which to render a determination in this matter. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Susan Parker).

ISSUE

Whether interest imposed on a deficiency of New York State personal income tax should be abated.

FINDINGS OF FACT

1. Petitioner, Kenneth Graham, a New Jersey resident, was terminated from his New York employment in 2000, and in 2001, after a lengthy negotiation process, petitioner received a

severance payment from his former employer from which there were deductions for New York State income taxes.

2. In preparing his New York State Nonresident Income Tax Return for 2001, petitioner diligently searched for rules pertaining to proper reporting of the severance payment he had received. He thoroughly read the instructions for the preparation of his tax return. He performed an on-line search of the Division of Taxation's ("Division") web site and a general on-line search in an attempt to locate some guidance on this issue, with no success. He also phoned the Division and received no assistance from the "help line." Thus, he calculated his 2001 New York nonresident personal income tax based upon the knowledge he had and as he had done in past years while working in New York.

3. Petitioner also filed a resident New Jersey Personal Income Tax Return for 2001.

4. After an audit of petitioner's return, the Division issued a Statement of Proposed Audit Changes dated December 27, 2004, indicating that an adjustment had been made to petitioner's New York State Nonresident Personal Income Tax Return for 2001, disallowing the 83 days petitioner claimed to have worked at home. The notice explained that:

> Days worked at home do not form a proper basis for allocation of income by a nonresident. Any allowance claimed 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 employers'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.

Additional tax was asserted due in the amount of $7,576.12, plus interest.

5. Petitioner responded by correspondence dated December 29, 2004, disagreeing with the Statement of Proposed Changes, and stated:

> I did NOT work in New York during the year 2001. The wages shown were severance payment from prior employer.
>
> While I believe that none of this should be taxable by New York, I calculated the New York amount *according to the instructions* 'If the severance payments are compensation for personal services that are attributable to past services rendered within and without New York State pursuant to section 132 4(d) of the Regulations, the portion of Petitioner's severance pay that is attributable to New York sources is determined based on the provisions of section 132.20 of the Regulations'
>
> Since I never worked in New York during the year while receiving this income, I calculated the appropriate days worked in the year and worked outside New York according to the instructions and then also entered the same number for days worked at home (emphasis supplied).

6. The Division further corresponded with the petitioner by a letter dated February 11, 2005, explaining the allocation of severance pay in these circumstances, and with such clarification, petitioner responded by correspondence dated February 17, 2005. In that letter he asserted that the Division's original assessment was incorrect and adjusted the computation of tax due to reflect an allocation based upon a portion of the taxable year prior to retirement and the three taxable years immediately preceding the retirement. Petitioner recalculated tax due to New York to be $5,288.00, and paid this sum.

7. The Division issued a Notice of Deficiency to petitioner dated March 14, 2005, asserting additional personal income tax due of $7,576.12, plus interest, less the $5,288.00 paid by petitioner.

8. Petitioner's recalculation of tax due was accepted by the Division as accurate in correspondence dated March 22, 2005, and the Division recalculated remaining interest due of $992.94 as of that date. The interest asserted by the Division is the only issue in dispute.

9. On March 29, 2005, petitioner filed a Request for Conciliation Conference with respect to the adjusted balance of interest due for 2001. With his request for onference, petitioner again disagreed with the Division's assertion of interest due.

10. The Division corresponded with petitioner on July 7, 2005, in a reaudit letter, acknowledging his request for a conciliation conference, and set forth its policies with regard to petitioner's situation. The Division admitted that its tax return instruction booklet cannot possibly contain the answer to every taxpayer situation, that it strives to notify taxpayers as soon as possible of additional tax due, but that the Tax Law allows New York up to three years from the due date (or filing date) of a return to do so, and that interest, required by Tax Law § 684(a), is adjusted or waived only if administrative errors were made by the Division, which is not applicable in this case.

11. The conciliation conference was held on October 6, 2005 and a Conciliation Order (CMS No. 208684), dated November 10, 2005 was issued by BCMS denying petitioner's request and sustaining the statutory notice. Petitioner timely petitioned for a hearing before the Division of Tax Appeals on December 9, 2005, electing to have a small claims proceeding.

12. Having understated his tax computation on his New York return, petitioner paid New Jersey the tax that was not paid to New York, and upon seeking a credit from New Jersey after learning of the New York error, petitioner was not paid interest from New Jersey.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner, believing he had been unfairly penalized by the assertion of interest due, alleged that "the situation was created by errors and omission on the part of New York for failing to provide proper and adequate instructions." In addition, petitioner believes it is unfair to penalize him because it took New York State nearly three years to notify him of a situation

which should easily have been identified when the initial return was submitted. In addition, petitioner maintains that he did not have use of the funds that were not paid initially with his 2001 New York return, since what was not reported to New York was reported to New Jersey, and thus he overstated his tax payment to New Jersey on which credit he is collecting no interest.

14. The Division maintains there is no basis upon which to abate or adjust interest on the amount of tax not originally submitted with petitioner's New York personal income tax return for 2001, and the interest, as adjusted in accordance with the recalculation of the tax assessment, remains due.

CONCLUSIONS OF LAW

A. Article 22 of the Tax Law generally requires the imposition of interest on any underpayment of tax. Tax Law § 684(a) provides that:

> If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount . . . *shall* be paid for the period from such last date to the date paid . . . . (Emphasis added.)

The Tax Appeals Tribunal explained the rationale for the requirement of the imposition of interest in ***Matter of Rizzo*** (Tax Appeals Tribunal, May 13, 1993):

> Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due.

B. Tax Law § 3008(a) does provide for the abatement of interest attributable to certain unreasonable errors or delays by the Division. The application of this provision is limited, however, to unreasonable errors or delays by Division employees in performing "ministerial or managerial" acts, and only if no significant aspect of the unreasonable error or delay can be attributed to the taxpayer involved. Although there are no regulations at the State level, it is appropriate to review Federal regulations and precedent since Tax Law former § 3008 is patterned

after Internal Revenue Code former § 6404(e)(1). Treasury Regulation § 301.6404-2(b)(2) defines "ministerial act" as:

> a procedural or mechanical act that does not involve the exercise of judgement or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

C. Petitioner's primary complaint in this matter is that the Division's instructions to Form IT-203 did not have any provision dealing with how to report severance payments. This simply is not true. In December 2004 correspondence with the Division about this matter, petitioner claimed that he followed the instructions as provided (***see***, Finding of Fact "5"). Had petitioner pursued the reference to the New York State regulations, he would have found that 20 NYCRR 132.20 provided the following, in pertinent part:

> If a pension or other retirement benefit does not qualify as an annuity under section 132.4(d) of this Part, and is attributable to services performed wholly in New York State, the entire amount included in the individual's Federal adjusted gross income is likewise includible in his New York adjusted gross income. If the pension or other retirement benefit is attributable to services performed wholly outside New York State, no part of the amount received is includible in the individual's New York adjusted gross income. *Where the employee's services were performed partly within and partly without New York State, the amount includible in the individual's New York adjusted gross income is the proportion of the amount included in the individual's Federal adjusted gross income which the total compensation, received from the employer for the services performed in New York State during a period consisting of the portion of the taxable year prior to retirement and the three taxable years immediately preceding the retirement, bears to the total compensation received from the employer during such period for services performed both within and without New York State.* For purposes of this section, the compensation for services performed within New York State must be determined separately for each taxable year or portion of a year in accordance with the applicable provisions of section 132.17, 132.18 or 132.19 of this Part (emphasis added).

I am not suggesting that such regulation is easy for a taxpayer to locate, and even if petitioner had located it, it is not a simple computation for the average taxpayer to read and comprehend. In any event, since the tax return instructions did refer petitioner to a regulation that would have given him the information he needed to properly report the severance payment, the Division had provided petitioner with sufficient notice and instruction that some rule needed to be applied to petitioner's situation. Petitioner chose to prepare returns on his own with somewhat complicated aspects from a state other than his residence. Unfortunately, he did not have all the knowledge or tools to do so correctly. However, the instructions were not absent direction as alleged by petitioner. Accordingly, this argument fails as a basis upon which to abate the interest on the additional tax due to New York.

Even if the instructions had not provided petitioner the guidance he needed, the creation of instructions involves the interpretation of tax statutes and regulations and is clearly not a "ministerial or managerial" act as those terms are defined in the relevant Federal regulations (***see***, Treas Reg § 301.6404-2[b], [c], example 12). Accordingly, the relief afforded by Tax Law § 3008(a) is unavailable to petitioner.

D. Petitioner's other complaint regarding the Division's delay in notifying him of his potential error in December 2004 is without merit. Once a return has been filed, the Division generally has a three-year period to issue a notice of deficiency to a taxpayer asserting that additional taxes are due (Tax Law § 683[a]). The Division issued a Statement of Proposed Audit Changes in December 2004, approximately 32 months after petitioner's return for 2001 was due, within its statutory authority. It is well established that there is no inequity in the current statutory scheme which holds a taxpayer to the same three-year period to file a claim for credit or refund. Although petitioner did not actually have use of the funds either, since he had paid

additional tax to New Jersey on the same error, it is the State of New Jersey that is unjustly enriched, having had use of money owed to New York, and this does not provide the basis for the abatement of interest by New York.

E. The petition of Kenneth Graham is denied and the remaining interest due on the Notice of Deficiency dated March 14, 2005, as adjusted (***see***, Finding of Fact "8"), is sustained.

DATED: Troy, New York
June 7, 2007

/s/ Catherine M. Bennett
PRESIDING OFFICER