STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAWRENCE GLEASON	:	DETERMINATION DTA NO. 823829
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 2006.	:	

Petitioner, Lawrence Gleason, 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 2006.

On January 5, 2012 and January 6, 2012, respectively, petitioner, appearing by Sean P. McNamee, CPA, and the Division of Taxation, by Mark F. Volk, Esq. (Marvis A. Warren, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs submitted by May 24, 2012, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether, under the facts and circumstances herein, the Division of Taxation properly determined that compensation received by petitioner, a nonresident, from the exercise of certain stock options was allocable to New York and thus subject to New York personal income tax.

FINDINGS OF FACT

1. At all times relevant herein, petitioner, Lawrence Gleason, was a resident of Connecticut.

2. Petitioner was employed by American Airlines, Inc., for many years until his retirement on April 30, 2005.

3. While so employed, petitioner performed services both within New York State and elsewhere.

4. American Airlines granted incentive nonstatutory stock options to petitioner on various dates during the years 1996 through 2001 and 2003.

5. As of the date of petitioner's retirement, the options at issue had a negative aggregate value.

6. Petitioner exercised and liquidated the subject options on various dates during 2006.

7. American Airlines issued a Wage and Tax Statement (Form W-2) to petitioner, reporting $465,752.72 in compensation for 2006. Of this total, $348,677.42 was attributable to petitioner's exercise of stock options and the balance, $117,075.30, was attributable to performance awards paid to petitioner in April 2006. Petitioner included his American Airlines compensation in his federal wage income as reported on his 2006 New York nonresident return. Petitioner did not allocate any of his American Airlines income to New York on his 2006 nonresident return.

8. By letter dated March 12, 2008, the Division of Taxation (Division) advised petitioner that his 2006 New York nonresident return was under review and requested that petitioner explain the computation of the New York wage allocation as reported on the return.

9. In response to the Division's request, petitioner advised that his federal income as reported on his 2006 nonresident return included income from the exercise of stock options and claimed that such income was not subject to New York income tax.

10. The Division subsequently issued to petitioner a Statement of Proposed Audit Changes dated October 16, 2008, by which the Division proposed to allocate a portion of petitioner's 2006 stock option income to New York as follows:

> We have allocated the stock option income using the wage allocation for the last full year we show you worked for the granting company.
>
> The last full year you worked for the granting company was tax year 2004.
>
> The allocation used in 2004 was .6033 % [*sic*].
>
> | | |
> |---|---|
> | Stock Options | $345,677.00[1] |
> | | x .6033 |
> | [NY] Taxable Income from Stock Options | $208,547.00 |
>
> The deferred compensation you received from American Airlines is taxable to New York State. We used the same allocation we used for your stock options.
>
> | | |
> |---|---|
> | Deferred Compensation[2] | $120,876.00[3] |
> | | x .6033 |
> | [NY] Taxable Income from Deferred Compensation | $72,442.00 |

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[1] As noted in Finding of Fact 7, petitioner received $348,677.42 in compensation attributable to the exercise of stock options. The 2006 W-2 specifically reports this amount as income from the exercise of nonstatutory stock options (identified in box 12 on the form by Code V [***see*** 2006 Instructions for Forms W-2 and W-3]), as do other documents in the record. The income amount for stock options on the Statement of Proposed Audit Changes may have been taken from petitioner's Summary of Federal Form W-2 Statements (Form IT-2), filed as part of petitioner's nonresident return, which reports $345,677.00 in box 12, also identified on that form by Code V.

[2] "Deferred compensation" is apparently the Division's characterization of income referenced as "performance award" on an American Airlines W-2 reconciliation statement provided by petitioner with his petition.

[3] The W-2 and the W-2 reconciliation statement, both indicate $117,075.30 as the amount of such "deferred compensation" or "performance award." The source of this $120,876.00 amount is not in the record.

11. As a consequence of these changes, the statement proposed an increase to petitioner's New York taxable income of $280,989.00 (that is, $208,547.00 + $72,442.00) and a resulting New York State income tax deficiency of $18,956.84, plus interest, for the year 2006.

12. On March 9, 2009, the Division issued a Notice of Deficiency to petitioner asserting $18,956.84 in tax due, plus interest, for the year 2006.

13. In its letter-brief filed in this matter, the Division advised that, using option grant and exercise date information provided in the petition (and as set out below), it had reallocated petitioner's 2006 income attributable to the subject options using a date of grant to date of termination (retirement) allocation period and had revised the asserted deficiency accordingly. A review of the Division's calculations indicates that, for the options granted in 1996 through 2001, the Division multiplied the compensation at exercise by workday fractions, the numerator of which was total New York work days from year of grant through (and including) tax year 2001 and the denominator of which was total work days from year of grant to date of retirement. The workday fractions for the 1996-2001 options as so calculated range from 31.09 percent to 12.06 percent. For the options granted in 2003, the Division multiplied the compensation at exercise by total New York workdays from 2003 to date of retirement divided by total work days from 2003 to retirement. The workday fraction for the 2003 options as so calculated is 66.12 percent. The Division's revised calculations resulted in an increase of $99,468.67 to petitioner's New York taxable income attributable to the stock options and ultimately reduced the asserted deficiency herein to $15,316.34, plus interest. The Division made no changes to the portion of the subject deficiency attributable to "deferred compensation" or "performance award" (***see*** footnote 2) in its calculation of this revised deficiency.

14. The grant and exercise dates and W-2 compensation at exercise of the stock options at issue are as follows:

Grant Date	Exercise Date	W-2 Compensation at Exercise[4]
10/03/1996	05/01/2006	$ 9,344.23
10/07/1997	11/27/2006	81,784.20
10/12/1998	11/27/2006	5,770.83
10/12/1999	11/27/2006	66,433.07
01/24/2000	11/27/2006	45,397.63
12/05/2001	11/28/2006	88,032.00
07/21/2003	01/30/2006	33,064.80
07/21/2003	10/09/2006	18,850.66

CONCLUSIONS OF LAW

A. The New York source income of a nonresident individual, like 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 included in the nonresident individual's 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 (Tax Law § 631[b][1][B]). Where a nonresident carries on a business, trade, profession or occupation partly within New York and partly elsewhere, apportionment and allocation of income derived from or connected with New York sources is determined pursuant

[4] The W-2 compensation at exercise as listed in the table totals $348,677.42 and is consistent with the W-2 (***see*** Finding of Fact 7). In its recomputation the Division continued to use $345,677.00 as petitioner's total W-2 compensation from the options. In its calculation of the revised deficiency the Division appears to account for this difference by using $9,294.95 as the W-2 compensation from the 1996 options and $48,964.32 for the combined total of W-2 compensation for the 2003 options.

to the Division's regulations (Tax Law § 631[c]). For nonresident employees, such regulations generally define the New York source income as total compensation for services rendered multiplied by a fraction, the numerator of which is total working days employed within New York and the denominator of which is total working days employed everywhere (20 NYCRR 132.18[a]).

B. Regarding New York's income tax treatment of stock options granted to nonresidents, Tax Law § 631(g) provides the following:

> A nonresident taxpayer who has been granted statutory stock options, restricted stock, nonstatutory stock options or stock appreciation rights and who, during such grant period, performs services within New York for, or is employed within New York by, the corporation granting such option, stock or right, shall compute his or her New York source income as determined under rules and regulations prescribed by the commissioner.

Tax Law § 631(g) became effective on April 28, 2006 and is applicable for tax years commencing January 1, 2006 (***see*** L 2006, ch 62, Part N, § 4).

C. Tax Law § 631(g) thus grants authority to the Division to enact regulations regarding the computation of a nonresident taxpayer's New York source income from stock option compensation. Regulations issued under such a grant of authority have the force and effect of law (***see Molina v. Games Mgt. Servs.***, 58 NY2d 523, 462 NYS2d 615 [1983]). The enabling legislation provides more specific direction and authority as follows:

> The commissioner of taxation and finance shall propose the rules and regulations referenced in subsection (g) of section 631 . . . . Such rules and regulations may apply to taxable years beginning on or after January 1, 2006 and shall be controlling for such taxable years notwithstanding any tax appeals tribunal decision to the contrary (L 2006, ch 62, Part N, § 3).

D. Pursuant to this grant of authority the Division issued regulations regarding the computation of New York source income from stock options (***see*** 20 NYCRR 132.24). Such regulations, which became effective December 27, 2006 and are applicable to tax years

commencing January 1, 2006, provide, generally, that a "nonresident individual has New York source income from compensation received from stock options . . . if *at any time during the allocation period* the nonresident individual performed services in New York State for the corporation granting such options. . ." (20 NYCRR 132.24[a]; emphasis added). Insofar as relevant herein, "allocation period" means either the period from the date of option grant to the date of option vesting or, commencing with tax year 2006 and if elected by the taxpayer, the period from the date of grant to the earliest of the date of exercise, date of termination or date the compensation is recognized for federal income tax purposes (***see*** 20 NYCRR 132.24[c][3][i]). The allocation period may span multiple years (***see*** 20 NYCRR 132.24[c][3]). Such stock option compensation is reportable to New York in the tax year that the income is included in the individual's federal adjusted gross income (20 NYCRR 132.24[a]).

E. Turning to the asserted liability at issue, pursuant to Tax Law § 681(a), where the Division examines a return and determines that there is a deficiency of income tax, it may issue a notice of deficiency to the taxpayer. Such a determination requires only a rational basis (***see e.g***. ***Matter of Estate of Gucci***, Tax Appeals Tribunal, July 10, 1997 citing ***Matter of Atlantic & Hudson***, Tax Appeals Tribunal, January 30, 1992). The taxpayer bears the burden of proving that the deficiency is erroneous (***see Matter of Gilmartin v. Tax Appeals Tribunal***, 31 AD3d 1008, 818 NYS2d 682 [3d Dept 2006]; Tax Law § 689[e]).

F. Here, in response to its inquiry, petitioner advised the Division that the income in question included stock option compensation. In response, given petitioner's work history in New York, the Division reasonably (and correctly) concluded that petitioner worked in New York during the allocation period, as defined in 20 NYCRR 132.24(c)(3)(i). The Division thus rationally concluded that petitioner's 2006 option income was allocable to New York in

accordance with 20 NYCRR 132.24. Additionally, the method of allocation reflected in the Notice of Deficiency, that is, petitioner's workday allocation for his last full year of employment at American Airlines, was reasonable under the circumstances. At that point, petitioner had not provided any option dates of grant, vesting or exercise to enable the Division to source the option income pursuant to any of the methods provided for in the regulations.

G. The sourcing method reflected in the revised deficiency (***see*** Finding of Fact 13) was also reasonable. Although the Division asserts that this was an alternative method under the regulations, this method is actually an approximation of the date of grant to date of termination method provided for in the regulations. The Division's use of a year-of-grant starting point for the allocation period (rather than date of grant) was reasonable because petitioner did not provide any information regarding specific New York or non-New York workdays during the allocation period. With respect to the options granted in 1996 through 2001, the Division's inclusion of New York workdays only through 2001 in the numerator of the workday fraction while using total workdays through April 30, 2005 (date of retirement) is an apparent error in petitioner's favor. Because petitioner worked for American Airlines in New York after 2001, this calculation understates petitioner's New York workdays during the allocation period and thus necessarily results in a smaller workday fraction than petitioner actually had during that period.

H. Petitioner took issue with the accuracy of the New York workdays as indicated on the workpaper reflecting the Division's revised calculation of the option income. As noted above, such calculations do indicate an error in the calculations, but an error in petitioner's favor. A review of the record shows no other errors in the count of workdays in the allocation period.[5]

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[5] With his reply brief petitioner submitted an "Analysis of Work Days," a summary sheet purportedly listing his total days worked for American Airlines in New York and total days worked for American Airlines everywhere for the years 1996 through 2005. As this document was submitted following the due date for petitioner's submission of documents and the Division of Taxation was not afforded an opportunity to respond to this document

I. Petitioner contends that the use of workdays only in the apportionment of the option income is improper, reasoning that since stocks appreciate on nonworkdays, New York's apportionment scheme should reflect this reality. As to this complaint, the regulations require the use of a *workday* fraction in determine the New York source income of stock options (20 NYCRR 132.24[b]). The apportionment of such income based on the ratio of days worked in New York to days worked in total is logical, since the option income is compensation from work performed both within and without New York.

J. Petitioner further contends that the option regulation (20 NYCRR 132.24) is an "it's all mine provision" that is unfair and unworkable for nonresidents. As noted, under the regulation, income from stock options is subject to New York income tax only where the nonresident works in New York during the allocation period. As also noted, such income is apportioned to New York based on the ratio of New York workdays to total workdays during the allocation period. The regulation thus subjects to New York income tax only that portion of option compensation attributable to New York employment. Stock option compensation is not subject to New York tax where the nonresident has no New York workdays during the allocation period. Contrary to petitioner's assertion, this regulation is neither unfair nor unworkable.

K. Although Tax Law § 631(g) and 20 NYCRR 132.24 are both expressly applicable to the tax year 2006, petitioner contends that these provisions were improperly applied retroactively

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under the submission schedule, this document and, indeed, all documents attached to petitioner's reply brief, are not received in evidence in this matter. Even if this document was considered, however, it is noted that, for the years 1996 through 2001, the information on petitioner's summary matches that used by the Division in its revised calculations. There is a difference between petitioner's summary and the Division's revised calculations with respect to New York workdays for 2003 through April 30, 2005, but petitioner offered no documentation in support of his summary sheet.

in the present matter. Petitioner contends that such retroactive application was arbitrary and capricious and thus denied petitioner his rights to due process.[6]

L. Preliminarily, it is noted that the Division of Tax Appeals has jurisdiction to determine whether the Division of Taxation's regulations are constitutionally valid, both facially and as applied (20 NYCRR 3000.17[e][3]; ***Matter of David Hazan, Inc.***, Tax Appeals Tribunal, April 21, 1988, ***confirmed*** 152 AD2d 765, 543 NYS2d 545 [3d Dept 1989], ***affd*** 75 NY2d 989, 557 NYS2d 306 [1990]).

M. Whether a tax statute or tax regulation may be validly applied retroactively depends on a consideration of several factors, including:

> the reasonableness of the taxpayer's reliance on the old law, the foreseeability that the law would be changed, the length of the retroactive period and the public purpose sought to be served by making the enactment retroactive (citations omitted) (***WL, LLC v. Department of Economic Development***, 97 AD3d 24, 943 NYS2d 661, 667 [3d Dept 2012]; ***see also Varrington Corp. v. City of New York Dept. of Finance***, 85 NY2d 28, 33, 623 NYS2d 534 [1995]).

N. To properly address the factors of petitioner's reliance on the law prior to the enactment of the regulation at issue and the foreseeability that such law would be changed, it is necessary to briefly review the recent history of New York's tax treatment of nonresident stock option income.

In 1986, in ***Matter of Michaelsen v. New York State Tax Commn.*** (67 NY2d 579, 505 NYS2d 585), the Court of Appeals held that the stock option income of a nonresident who worked in New York was not investment income (nontaxable to New York), but was compensation attributable to a business, trade, profession or occupation carried on in New York

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[6] The Division disputes that the regulations were applied retroactively. The record, however, shows that the dates on which petitioner exercised and liquidated the options at issue preceded the date of adoption of the regulations. The Division thus retroactively applied the regulations to the income realized on these transactions in its determination of tax due.

and thus subject to New York income tax. The ***Michaelsen*** decision, however, did not address the issue of how option income should be allocated to New York where the nonresident taxpayer worked both within New York and elsewhere.

In 1995, the Division addressed the allocation issue by issuing a technical memorandum, TSB-M-95(3)I (New York Tax Treatment of Stock Options, Restricted Stock and Stock Appreciation Rights Received by Nonresidents and Part-Year Residents), dated November 21, 1995, to provide guidance on the allocation methods to be used by nonresidents to determine the amount of stock option income includable in New York source income. The memorandum set out the Division's interpretation of the relevant regulations as applied to various circumstances and generally called for the use of a date of grant to date of exercise allocation method for options. However, where an employee exercised options following termination of employment with the employer who granted the option (like petitioner herein), the memorandum called for a date of grant to date of termination allocation period. Under either of these methods the allocation period could span multiple years.

TSB-M-95(3)I remained the Division's policy until superseded by the Tax Appeals Tribunal's decision in ***Matter of Stuckless*** (***Stuckless I***) on May 12, 2005. In that case, the petitioner was granted stock options while a New York resident and realized income from those options in subsequent years when he was no longer a New York resident and did not perform any work in New York. In ***Stuckless I***, the Tribunal found that the allocation methodology of TSB-M-95(3)I did not apply under the facts of that case. The Tribunal adopted an alternative allocation method, deemed authorized under 20 NYCRR former 132.24 (renum 132.25), by which option income realized upon exercise was allocated to New York based on the

appreciation in value of the underlying stock during the period the petitioner was a New York resident.

The Division of Taxation filed a motion for reargument of the ***Stuckless I*** decision on September 9, 2005 and the Tribunal granted such motion by order dated December 15, 2005 (***see Matter of Stuckless***, Tax Appeals Tribunal, December 15, 2005).

On April 28, 2006, Part N of the Laws of 2006 became effective (***see*** Conclusions of Law B and C). The Memorandum in Support of the bill made clear that this legislation represented a response to ***Suckless I***, stating, in part:

> The recent decision by the Tax Appeals Tribunal in the ***Matter of E. Randall Stuckless*** [***Stuckless I***] has raised significant confusion for both taxpayers and the Department of Taxation and Finance as to the proper allocation of New York source income from stock options, restricted stock, and stock appreciation rights . . . . This bill would require the Commissioner to develop clear guidelines for the allocation of income from stock options, restricted stock, and stock appreciation rights with input from taxpayers and practitioners pursuant to the State Administrative Procedure Act regulation process. (2006-2007 New York State Executive Budget, Revenue Article VII Legislation, Memorandum in Support, Part QQ.)

On August 17, 2006, following reargument, the Tribunal issued a second decision in ***Matter of Stuckless*** (***Stuckless II***) that withdrew its previous decision and determined that neither the allocation method adopted in the previous decision nor the allocation method set forth in TSB-M-95(3)I were authorized under the regulations. More specifically, the Tribunal determined that neither method utilized a single year allocation period as required under section 132.18 of the regulations (20 NYCRR 132.18). Additionally, the Tribunal found that, as "a set of rules of general application," the allocation methodology of TSB-M-95(3)I was not designed for "accommodating ad hoc situations" and, accordingly, was not an "alternative method of apportionment and allocation" authorized under former section 132.24 (renum 132.25). With respect to the TSB-M-95(3)I methodology, the Tribunal stated that "[i]f the Division wishes to . .

. create a separate set of new rules for identified special circumstances, we think such a change should be effected through legislation or adopted in regulations."

The present regulations, as proposed, were published in the New York State Register on October 25, 2005 and were adopted, as noted previously, on December 27, 2006.

O. As this history plainly shows, as of January 1, 2006, that is, before petitioner exercised any of the options at issue, it was clearly foreseeable that the recently established law applicable to an individual in petitioner's circumstances,[7] i.e., ***Stuckless I,*** would likely be changed. Specifically, by its issuance of the December 15, 2005 order granting the Division's motion for reargument, the Tribunal had placed the precedential value of that decision squarely in doubt. The purpose of reargument is to provide a party "an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (***Foley v. Roche***, 68 AD2d 558, 418 NYS2d 588, 593 [1st Dept 1979], ***lv denied*** 56 NY2d 507, 453 NYS2d 1025 [1982]). The Tribunal will grant such a motion "only in cases where a valid basis for doing so has been raised by the movant" (***Matter of Schulkin*** (Tax Appeals Tribunal, November 20, 1997). The granting of reargument thus indicated that the Tribunal itself was uncertain about the correctness of ***Stuckless I***. With the enactment of Laws of 2006 (ch 62, Part N) on April 28, 2006, the imminent demise of ***Stuckless I*** as precedent for the tax treatment of stock options for years commencing with 2006 was apparent, as the Legislature directed the Division to enact regulations addressing stock option income allocation and authorized the retroactive application of such regulations to January 1, 2006. The issuance of ***Stuckless II*** on August 17, 2006, did change the law regarding the allocation of option income, albeit clearly temporarily, given the pending issuance of regulations and the language in part N, § 3, perhaps in

[7] That is, a nonresident without any New York workdays in the year that option income is realized.

anticipation of ***Stuckless II***, that such regulations were to be controlling "notwithstanding any tax appeals tribunal decision to the contrary." The regulations that were ultimately adopted on December 27, 2006 effectively negated ***Stuckless II*** and, while generally creating a date of grant to date of vesting allocation period, also provided for a nonresident individual in petitioner's circumstances, that is, one who exercised options after retirement, the choice of allocating option income using the same date of grant to date of termination method as was provided for in TSB-M-95(3)I.

P. Given this high level of foreseeability that the law as in effect on January 1, 2006 would be changed, any reliance by petitioner on the tenuous precedent of either ***Stuckless I*** or ***II*** at any time during 2006 was unreasonable.

Q. As to the length of the retroactive period, a short period of retroactivity of a tax statute or regulation is commonly permitted (***see Matter of Varrington Corp. v. City of New York Dept. of Finance***, 85 NY2d 28, 33, 623 NYS2d 534 [1995]). The period of retroactivity relevant to the present matter, from the December 27, 2006 enactment of the regulations back to January 1 of that year, falls within the commonly permissible range (***see Matter of Replan Development, Inc. v. Department of Housing Preservation and Development***, 70 NY2d 451, 522 NYS2d 485 [1987]).

R. The retroactive enactment of the regulation also furthered a public purpose. By its enactment of Tax Law § 631(g) and its direction and authorization for regulations applicable to January 1, 2006, the legislature sought to respond to the "confusion" created by ***Stuckless I*** by establishing "clear guidelines" for the treatment of option income (***see*** Conclusion of Law N citing 2006-2007 New York State Executive Budget, Revenue Article VII Legislation, Memorandum in Support, Part QQ). Such a corrective action is in furtherance of a public

purpose (***see United States v. Carlton***, 512 US 26 [1994]). Additionally, in light of the ***Stuckless II*** holding requiring a single year allocation period for option income, and thus facing the potential loss of tax revenue from nonresident option income realized post-retirement, the retroactive application served the public purpose of raising revenue. As noted by Justice O'Connor in her concurring opinion in ***United States v. Carlton***, "Retroactive application of revenue measures is rationally related to the legitimate governmental purpose of raising revenue" (512 US at 37).

S. As each of the relevant factors to be considered under ***WL, LLC v. Department of Economic Development*** strongly militates against petitioner's position, the retroactive application of the subject regulation was valid and not in any way violative of petitioner's due process rights.

T. Petitioner contends that the enactment of Tax Law § 631(g) and the subsequent adoption of regulations effectively negating ***Stuckless II*** improperly usurped the Tribunal's authority. This claim is without merit. It is the Legislature's prerogative to amend the Tax Law as it sees fit. Here, the Legislature responded to the first ***Stuckless*** decision by amending the Tax Law to provide by regulation clear guidelines for the treatment of stock options. It is well within the Legislature's authority to take such action in furtherance of such a legitimate legislative purpose. Indeed, as previously noted, the Tribunal itself suggested that the Division adopt regulations addressing the treatment of stock options in ***Stuckless II***, stating "[i]f the Division wishes to . . create a separate set of new rules for identified special circumstances, we think such a change should be effected through legislation or adopted in regulations."

U. Turning to the portion of the subject deficiency referenced as "deferred compensation" on the Statement of Proposed Audit Changes and "performance award" on the American Airlines

W-2 Reconciliation Statement, petitioner asserts that deferred compensation "was not part of the audit . . . yet it is now somehow involved." This assertion is plainly at odds with the Statement of Proposed Audit Changes that clearly referenced "deferred compensation." Petitioner has offered no evidence to show that this income constitutes a nontaxable annuity (***see*** 20 NYCRR 132.4[d]) and has introduced no evidence to show that the allocation method employed by the Division with respect to this income was improper. Accordingly, except as adjusted pursuant to Conclusion of Law V, this portion of the deficiency is sustained (***see*** Tax Law § 689[e]).

V. Although the Division calculated the deficiency using $120,876.00 as the amount of deferred compensation or performance award income paid to petitioner in 2006, the record establishes that petitioner was actually paid $117,075.30 in deferred compensation or performance award income in 2006 as both the W-2 and American Airline's W-2 Reconciliation Statement reflect this amount. Accordingly, the Division is directed to recompute this portion of the deficiency using the correct $117,075.30 amount.

W. Except as indicated in Conclusion of Law V, the petition of Lawrence Gleason is denied, and the Notice of Deficiency dated March 9, 2009, modified as indicated in Finding of Fact 13 and as further modified pursuant to Conclusion of Law V, is sustained.

DATED: Albany, New York
October 25, 2012

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE