STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **ANITA S. UNTERWEISER** | : | DECISION<br>DTA NO. 818462 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1997. | : | |

Petitioner Anita S. Unterweiser, 67 Whalen Court, Westwood, New Jersey 07675-3417, filed an exception to the determination of the Administrative Law Judge issued on June 13, 2002. Petitioner appeared by Victor Fusco, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was withdrawn.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## *ISSUE*

Whether days worked at home by petitioner can be allowed as days worked outside New York State for purposes of allocating wage income to sources within and without the State.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for finding of fact "5" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

During the year 1997, petitioner, Anita S. Unterweiser, was domiciled in Westwood, New Jersey and did not maintain a permanent place of abode in New York State.

Petitioner was an employee of SJS Entertainment ("SJS"), 116 East 27th Street, New York, New York. During the year 1997, petitioner had withholding taxes withheld by and received a Wage and Tax Statement, Form W-2, from SJS. SJS was a syndicator of radio programming, disseminating various audio and written "prep sheets" to radio stations throughout the United States and the world.

During the period January 1, 1997 through September 26, 1997, petitioner had two distinct capacities of employment with SJS. First, she held the title of Director of Creative Services, overseeing all the creative services offered by SJS, including audio and written advertising and production for the entire company. Petitioner considered this to be her "day job" and worked at the office, where she was provided with a cubicle, every day in her capacity as Director of Creative Services. The second job she held with SJS was as a prep sheet and feature writer. In this capacity, she created informational features that related specifically to the radio and music industries as well as show preps for various radio stations in a specific format. This second job was originally established using petitioner's own personal reference materials, such as books, recordings and her library of magazine articles. On September 26, 1997, SJS removed petitioner from the position of Director of Creative Services, changed her responsibilities to that of only a

prep sheet and feature writer, took away her keys to the office and reassigned her cubicle space. During the period September 27, 1997 through the end of the year, petitioner worked at home.

It was the policy of SJS that any material brought into the office by an employee became the property of SJS. In addition, there was no available space in petitioner's cubicle or in the office space in general of SJS where petitioner could store her personal resources, nor would SJS procure such resources. During the year at issue petitioner researched and wrote the following prep sheets for SJS: *The Daily Plan-It*, *MusicDay* and *Timeline*. For *MusicDay* and *Timeline,* petitioner was required to use recordings and cross references to articles she wrote for *The Daily Plan-It*. Petitioner provided actual audio from her personal recording collection to the radio stations in conjunction with the prep sheets *MusicDay* and *Timeline*.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> The material used by petitioner in creating the various prep sheets for SJS consisted of her own resources of encyclopedias, reference books, library of magazine articles, music books and recordings. Petitioner also maintained personal subscriptions to various internet services on her home computer. The magazine articles dated back to the 1970s and documented important events in the music industry, information which petitioner regularly used in creating the prep sheets. Petitioner's recordings consisted of albums, cassettes, CD's and sound files on her personal computer. Most of this material petitioner stored at her home in New Jersey, with some of the items stored at a friend's house and at her parents' home. Until September 26, 1997, petitioner had access to a computer at the offices of SJS but would have needed a second computer or a substantial increase in the computer's memory to have sufficient space to store all her research material. However, SJS was not willing to either upgrade her office computer or add another computer for her use in the office. There was insufficient space in her cubicle for all of her research material and, on at least

> one occasion, SJS ordered petitioner to take some of her research material home because her cubicle was becoming too cluttered.[1]

For the year at issue, petitioner filed with the State of New York a Nonresident and Part-Year Resident Income Tax Return, Form IT-203, in which petitioner claimed 170 days as days worked outside of New York State. Included in this amount were the Saturdays, Sundays and company holidays occurring before September 27, 1997 where the offices of SJS were closed and petitioner was working on the preparation of the prep sheets. In addition, the 170-day count included all working days occurring after September 26, 1997 when petitioner no longer had access to the offices of SJS.

On October 10, 2000, the Division of Taxation ("Division") issued to petitioner a Statement of Proposed Audit Changes which stated as follows:

> 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 employer's place of business.

The Division recomputed petitioner's allocation formula by disallowing the 170 days claimed as days worked at home.[2]

The Division issued to petitioner on December 7, 2000 a Notice of Deficiency for the year 1997 indicating New York State personal income tax due of $1,285.21, New York City personal income tax due of $110.00, plus interest. The additional tax due was based on the Division's

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[1]We modified finding of fact "5" to more accurately reflect the record.

[2]The disallowance of claimed out-of-state working days results in an increase to the number of in-state working days, thus increasing the ratio by which a nonresident's income from a New York State employer is subjected to New York State and City taxes.

disallowance of the 170 days claimed by petitioner as having been worked outside the State of New York.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted relevant statutory and regulatory provisions concerning the allocation of the income of a nonresident employee who performs services for his or her employer both within and without New York State. The Administrative Law Judge also observed that the allocation of compensation within and without New York State on the basis of days worked at petitioner's home in New Jersey turns on the "convenience of the employer" test. That test requires that an allowance for days worked outside of New York must be based upon the performance of services which out of necessity - as distinguished from convenience - obligated petitioner to out-of-state duties in the service of her employer.

The Administrative Law Judge rejected petitioner's argument that on the days she worked at her home in New Jersey, she did so out of necessity and with the permission and encouragement of her employer, rather than out of convenience. The Administrative Law Judge was unconvinced by petitioner's assertions that she could not bring her personal research material and resources into her employer's place of business due to a lack of storage space; that the policy of SJS was that personal material brought into the office became the property of the company; and that her employer, after September 26, 1997, denied her access to the New York office and provided her no office space there. The Administrative Law Judge concluded that "it appears that with a bit of effort and ingenuity petitioner's concern for her personal property could have been addressed and the need for storage and office space satisfied" (Determination, conclusion of law "H").

The Administrative Law Judge found that even though it may have been expedient for petitioner to work at home, that did not prove that her work at home was for the necessity of her employer. The Administrative Law Judge determined that there had been no showing that the services petitioner performed at home in New Jersey were services which of necessity had to be performed in New Jersey. As a result, the Administrative Law Judge concluded that petitioner was not entitled to treat her at-home working days as non-New York days for purposes of income allocation.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the facts as found by the Administrative Law Judge do not support the conclusion that petitioner's working in New Jersey was for her convenience and not for her employer's necessity. Petitioner points out that on September 26, 1997, she was removed from the position of Director of Creative Services, her responsibilities were changed to that of a prep sheet and feature writer, her office keys were taken away and her cubicle space was reassigned. Further, the Administrative Law Judge found that there was no space available at the premises of the employer for petitioner to store her personal resources. Petitioner argues that under ***Matter of Speno v. Gallman*** (35 NY2d 256, 360 NYS2d 855), the Court held that only services which could not have been performed at the employer's in-State offices qualify for the exclusion from New York taxable income. Petitioner also relies on ***Matter of Linsley v. Gallman*** (38 AD2d 367, 329 NYS2d 486, ***affd*** 33 NY2d 863, 352 NYS2d 199), in which the taxpayer was absolved of tax liability because he had no New York office and performed no work within New York State, like petitioner herein. Under ***Matter of Hayes v. State Tax Commn.*** (61 AD2d 62, 401 NYS 2d 876), the Court held that the convenience of the employer

test is only applied when some work is performed within New York Petitioner argues that at least subsequent to September 26, 1997, she performed no work in New York State.

Petitioner disagrees with the conclusions of the Administrative Law Judge that petitioner's work could have been performed at the employer's office and, therefore, it was not performed out-of-state for the necessity of the employer. Petitioner seeks to distinguish the cases relied upon by the Administrative Law Judge and argues that the issue is not whether the services could have been performed somewhere in New York State but whether they could have been performed at her employer's office. Petitioner asserts that a fair reading of ***Matter of Fass v. State Tax Commn.*** (68 AD2d 977, 414 NYS2d 780, ***affd*** 50 NY2d 932, 431 NYS2d 526), relied on by the Administrative Law Judge, establishes that the test of an employer's necessity is met whenever the services could not have been performed at the employer's office.

In opposition, the Division argues that the Administrative Law Judge correctly determined that the days petitioner worked outside New York were not for the necessity of the employer. The Division asserts that despite the fact that petitioner's employer did not provide her with an office to complete the writing aspect of her job, petitioner could have performed her work at her employer's office if the employer had chosen to make accommodations available for her. The Division maintains that there was no proof that the employer could not have set up an office for petitioner. Since the employer chose not to provide an office for petitioner, she worked at home for the convenience of her employer. It was based on an economic decision of the employer and not out of necessity.

## *OPINION*

Tax Law § 631 defines the New York source income of a nonresident individual, in pertinent part, as "[t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . derived from or connected with New York sources" (Tax Law § 631[a][1]). Furthermore, the statute further clarifies that income and deductions from New York sources include those items attributable to "a business, trade, profession or occupation carried on in this state" (Tax Law § 631[b][1][B]). The Commissioner's regulations at 20 NYCRR 132.18(a) address the convenience of the employer doctrine and provide, in pertinent part, that:

> [i]f 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. The items of gain, loss and deduction . . . of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.

The uncontroverted facts of this case demonstrate that until September 26, 1997, petitioner was a nonresident of New York State employed by a New York State employer who performed her job duties both within and without the State. Whether a portion of petitioner's income for 1997 may be considered as being derived from non-New York sources and allocated as such based on the number of days worked outside New York State depends on the application of the "convenience of the employer" test to the facts of this case.

The New York State Court of Appeals has held that:

> a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-State services are performed for the employee's convenience they generate New York State tax liability (***Matter of Speno v. Gallman***, ***supra***, 360 NYS2d, at 857-858).

Petitioner claims that she worked in her employer's place of business in New York during the period January 1, 1997 through September 26, 1997 except for weekends, holidays and days on which her employer's office was closed. On those days, petitioner claims that she worked at home. Despite petitioner's claim that her employer did not provide her with adequate workspace or resources to perform certain of her job duties at the employer's office in New York, petitioner's claim falls short of demonstrating that she worked at home during this period due to her employer's necessity rather than for her own convenience.

During this period of time, petitioner claimed that she had, in effect, two jobs for the same employer and only one of them could be performed at the employer's workplace. While petitioner has taken great care to explain the distinct requirements of each of her jobs, it is not clear that petitioner never performed any of the duties associated with preparing her prep sheets at the employer's workplace nor that she was required to perform such duties at home out of necessity in the service of her employer. Therefore, we agree with the Administrative Law Judge that petitioner did not meet her burden of proof to demonstrate that she worked at home instead of at her employer's place of business in New York for the necessity of the employer rather than for her own convenience or for the convenience of her employer.

The period January 1, 1997 through September 26, 1997 is distinguished from the period September 27, 1997 through December 31, 1997 because until September 26, 1997, petitioner performed some work in and some work out of New York. Subsequent thereto, however, petitioner continued to be employed by the same employer, had some of the same duties she had prior to September 26, 1997, but performed no work at all in New York.

It is well settled that a nonresident employed by a New York employer is not subject to the convenience of the employer test of 20 NYCRR 132.18(a) when she works outside of New York, performs no work within New York, and has no office or place of business in New York (i.e., where suitable facilities to carry out her employment duties are not maintained for or available to her in New York) (***Matter of Gleason v. State Tax Commn.***, 76 AD2d 1035, 429 NYS2d 314; ***Matter of Hayes v. State Tax Commn.***, ***supra; Matter of Linsley v. State Tax Commn.***, ***supra***). In these circumstances the so-called "place of performance doctrine" applies and the out-of-state locations where the employee's services are performed, rather than the location of the employer paying for such services, is determinative for income sourcing and taxation purposes (***Matter of Speno v. Gallman***, ***supra***; ***see***, 20 NYCRR 132.4[b]).

We find that the "convenience of the employer" doctrine controls the sourcing and taxation of petitioner's income for the period subsequent to September 26, 1997 rather than the "place of performance" doctrine. We view petitioner's situation sufficiently distinct from the situations in either ***Linsley*** or ***Hayes*** where nonresident taxpayers received income from their employers for services performed out-of-state but the nature of the services they rendered were significantly different from those they had rendered as employees in New York State. In this case, petitioner's services as an employee remained the same insofar as she continued to be

employed by SJS as a prep sheet and feature writer. As a result, we find that petitioner has failed to meet her burden to show that she worked at home during the period September 27, 1997 through December 31, 1997 due to her employer's necessity rather than for her own convenience.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anita S. Unterweiser is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Anita S. Unterweiser is denied; and

4. The Notice of Deficiency issued on December 7, 2002 is sustained.

DATED: Troy, New York
July 31, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner