STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ROBERT M. CIPOLLA** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Earnings Tax on Nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the Years 1994 and 1995.	DETERMINATION DTA NO. 817175

Petitioner, Robert M. Cipolla, 7 Handol Lane, New Fairfield, Connecticut 06812, 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 and New York City earnings tax on nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the years 1994 and 1995.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 27, 2000 at 10:30 A.M., with all briefs to be submitted by July 28, 2000, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Fiorita, Kornhaas and Van Houten, P.C. (Robert R. Van Houten, CPA). The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter T. Gumaer, Esq., of counsel).

ISSUE

Whether petitioner has established entitlement to allocate a portion of his wage income for each of the years 1994 and 1995 outside of New York as non-New York source income not subject to taxation by New York.

FINDINGS OF FACT

1. Petitioner is a resident of the State of Connecticut. He is employed by and is the vice-president of MUCIP, Inc. ("MUCIP") which, during the years in issue was located in College Point (Queens), New York. During the years in issue, petitioner held 50 percent of MUCIP's stock and had his office with MUCIP in College Point, New York. MUCIP installs cable television in residential homes and wires and rewires apartment buildings and complexes on a contract basis, and also performs maintenance services for various cable companies.

2. Petitioner filed timely New York State and City of New York nonresident income tax returns for the years 1994 and 1995. On each of such returns, petitioner apportioned his wage income from MUCIP between New York and Connecticut on the basis of the number of days claimed to have been worked in each of the two jurisdictions. More specifically, for 1994 petitioner claimed to have worked 232 days, with 70 days worked in Connecticut and 162 days worked in New York, while for 1995 petitioner claimed to have worked 226 days, with 68 days worked in Connecticut and 158 days worked in New York. Hence, petitioner included as New York source income subject to New York tax only the portion of his MUCIP wage income represented fractionally by the number of days claimed to have been worked in New York out of the total number of days worked in each of the respective years in issue.

3. In 1997, the Division of Taxation ("Division") conducted an audit of petitioner's returns for the years 1994 and 1995. It appears that this audit was prompted as a follow-up to an earlier audit concerning the same issue of petitioner's claimed apportionment and allocation of wage income as described above. By a letter dated March 10, 1997, the Division's auditor requested, *inter alia*, documents specifying each day claimed as worked outside of New York State and/or New York City, the exact location where the services were performed and the nature of the services performed at each location.

4. In response to the Division's requests for documentation to substantiate that the days claimed as worked outside of New York were so worked of necessity rather than for petitioner's convenience, petitioner's representative submitted for each of the years in question a list of the days claimed as worked in Connecticut and a printout from a pocket electronic calendar appointment book. Subsequently, petitioner's representative submitted, in support of the claim that certain business meetings occurred in Connecticut, seven letters from individuals who have business dealings or relationships with MUCIP as well as one additional letter from MUCIP's accountants (who also represent petitioner in this proceeding) attesting to various meetings in Connecticut at the accountants' offices.

5. The Division's auditor reviewed petitioner's documents and concluded that they did not substantiate the apportionment of days claimed by petitioner due to a lack of detail concerning the location and duration of the claimed meetings as well as the purpose and necessity for performing services for MUCIP in Connecticut on the days claimed to have been spent working there. Accordingly, the auditor disallowed petitioner's claimed apportionment and allocation in full and determined that the wage income from MUCIP was New York source income taxable in its entirety by New York.

6. A Statement of Personal Income Tax Audit Changes dated October 21, 1997 was issued to petitioner reflecting the disallowance of the claimed apportionment and allocation, and showing a recalculation of petitioner's New York tax liability, together with penalty and interest. This statement included the following explanation:

> Since adequate documentation has not been provided to support days claimed as worked out of New York, your allocation of wages has been disallowed. The following penalties have been imposed: 685(B) deficiency due to negligence & 685(P) substantial understatement.

7. By a Notice of Deficiency dated January 23, 1998, the Division asserted additional New York State personal income tax and New York City nonresident earnings tax against petitioner as follows:

YEAR	NEW YORK STATE	NEW YORK CITY
1994	$12,017.61	$ 706.00
1995	11,762.99	717.66
TOTAL	$23,780.60	$1,423.66

In addition to the foregoing amounts of State and City tax, the Division's Notice of Deficiency also asserted interest and the aforementioned penalties for negligence and substantial understatement.

8. MUCIP started its business in the mid to late 1970s in Danbury, Connecticut. Over the ensuing years, MUCIP's business grew such that by the late 1970s and early 1980's, MUCIP was installing coaxial cable in many different areas including Connecticut, Massachusetts, and Michigan. In the early 1980s, MUCIP focused its business on the New York City and Long Island area and moved its offices from Connecticut to College Point, New York, where it has been located since. MUCIP's only office during most of the years in issue was in College Point,

New York,[1] although in June 1995 MUCIP leased approximately 300 square feet of space, consisting of a small room with desks and tables, at 92 North Street in Danbury, Connecticut. According to the auditor's report, the office space at 92 North Street was a rented room in the Dolan Realty office, with no sign or other visible indication that MUCIP was present there. In October 1995, MUCIP leased space for executive offices and an operations facility in Fairfield, Connecticut. The date on which MUCIP actually commenced operations from the leased space in Fairfield is not specified in the record.

9. The premises in College Point, New York served as MUCIP's operations center during the years in issue. MUCIP's executives, including petitioner; its technicians; billing and payroll personnel; inventory and materials were located there. MUCIP's fleet of trucks and other equipment were housed and maintained at College Point, and its scheduling and other matters were conducted from such facilities. Commencing at or about the time of its move to College Point, MUCIP engaged various professionals to provide services and products concerning personnel, liability and business insurance, computer and technology matters, pension administration, and the like. A number of these professionals were located in the Danbury, Connecticut area and, according to petitioner's representative, the relationships between MUCIP and these professionals came about because of the long-term relationship between MUCIP and petitioner's accounting firm in Danbury, Connecticut, apparently on the basis of recommendations. MUCIP's relationships with the various professional persons, which commenced when MUCIP moved to New York and "blossomed into a 15 or 16 million dollar per year business," continue to the present.

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[1] MUCIP maintained an office for administrative matters in Armonk, Westchester County, New York. The record does not clearly specify the time frame during which MUCIP leased such office but it appears that such period was after the two years in question in this matter.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner did not appear at the hearing to provide testimony regarding his claim of entitlement to apportion and allocate. Petitioner's representative, whose firm has served as accountants for MUCIP and for petitioner for some 25 years, explained petitioner's position to be that MUCIP utilized the services of certain professionals, including his firm of accountants, various insurance agents, a banker, an individual specializing in computer and technology matters, and others, who were located in the greater Danbury, Connecticut area. He stated that petitioner attended various meetings with these persons, in Connecticut, to deal with MUCIP's needs in each of such areas. According to petitioner's representative, many of the meetings were held in his offices where space was always available for petitioner's use with respect to MUCIP matters as needed. Petitioner's representative admitted that the printout from the electronic appointment calendar does not detail the location of each of the appointments listed thereon, and contains very little information as to the purpose or other specifics concerning such appointments.

11. The auditor noted that the dates shown on the electronic appointment calendar printout precisely match those submitted for the president and other principal shareholder of MUCIP, one Paul Mucci, including identical jury duty days and doctor and dental appointments. According to petitioner's representative, the reason that the dates are virtually identical for MUCIP's two principals is that they conduct 99 percent of their meetings together. Petitioner's representative could not specifically recall all meetings that allegedly occurred or the specific purposes therefor, but stated that he personally knew many such meetings occurred and that he was present at several, including those which involved accounting, financial and related matters and which occurred in his firm's offices. He noted that his recall of such meetings was assisted

during his review of the electronic appointment calendar with petitioner. On this score, petitioner and his representative "sat down and figured out if a meeting took place in Connecticut" and, if so, noted this on the printout by hand printing the letters "CT" after certain dates.

12. The printout from the electronic appointment calendar shows, from left to right, a date, a time, and a reference. There is only one time listed, presumably indicating the starting time for a given meeting or other event. The reference area is very limited and cryptic, and contains in most instances no indication of the place of the meeting or event. In some instances, the reference area lists a name, usually in abbreviation form.

13. Petitioner submitted letters from seven individuals with whose businesses MUCIP had dealings. These letters indicate various dates on which the individuals met with petitioner on business matters concerning MUCIP, as follows:

NAME	TYPE OF BUSINESS/OFFICE LOCATION	MEETING DATES
Karl Rickel	Employee benefit insurances/Danbury, Ct.	5/19/94, 6/7/94, 10/14/94, 7/26/95, 8/25/95, 9/13/95, 10/20/95
Emil Curran	Commercial insurances/Danbury, Ct.	4/25/94, 5/31/94, 12/20/94, 4/27/95
Andrew Whelan	Pension administration/Boston, Ma.	11/29/94 7/26/95
George Ballas	Computer and Technology/Danbury, Ct.	1/6/94, 3/17/94, 5/6/94, 8/3/94, 9/23/94, 10/21/94, 4/11/95, 7/7/95, 9/21/95
Nancy Dolan	Banking and Real Estate/Danbury, Ct.	1/28/94 6/7/95, 10/31/95, 12/28/95
William Lavelle	Real Estate/Brookfield, Ct.	5/5/94 3/31/95, 8/16/95, 12/14/95
Joseph Galgano	Employee benefit insurances/New York City	2/15/94, 10/10/94

14. The first four letters do not specify where the meetings took place, the fifth and sixth state that the meetings occurred in Danbury, Connecticut and Brookfield, Connecticut, respectively, and the seventh states that the meetings occurred at MUCIP's accountants' offices in Danbury, Connecticut. The first and third letters state that the meetings "encompassed a significant part of an entire day," the fourth states that the meetings "typically lasted the entire day," and the balance of the letters do not state the duration of the meetings. The sixth letter states that some of the meetings included visits and walk-throughs of various available properties for the prospective business purposes of MUCIP.

15. In addition to the foregoing, petitioner's representative provided a letter claiming that his firm (MUCIP's accountants) provided full-day, one-on-one services for MUCIP on eleven days in 1994 and on eight days in 1995. The matters covered during such sessions are not detailed, but apparently such sessions covered financial, accounting and other MUCIP business matters. Although the letter makes reference to an attached schedule of days, the same was not attached to the letter provided in evidence at hearing or otherwise specifically identified.

16. It appears as though meetings with some, if not all of the individuals noted above, may have occurred at MUCIP's College Point, New York offices as well as at the accountants' offices and other locations in the Danbury, Connecticut area.

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident individual (such as petitioner, Robert M. Cipolla) includes the net amount of items of income, gain, loss and deduction reported in Federal adjusted gross income that are "derived from or connected with New York sources." Included among these items are those attributable to a business, trade, profession or occupation carried on in this State (Tax Law § 631[b][1][B]).

B. Tax Law § 631(c) provides, in part, that:

> [i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

C. Regulations of the Commissioner of Taxation pertaining to business activities carried on in New York State provide as follows:

> The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State . . . . Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 132.16 through 132.18 of this Part (20 NYCRR 132.4[b]).

D. Regulations pertaining to and explaining the "Methods of Allocating Income and Deductions From Sources Within and Without New York State," as in effect during the years in question, provided as follows:

> §132.15 *Apportionment and allocation of income from business carried on partly within and partly without New York State.*
>
> (a) If a nonresident individual . . . carries on a business, trade, profession or occupation both within and without New York State, the items of income . . . attributable to such business, trade, profession or occupation must be apportioned and allocated to New York State on a fair and equitable basis in accordance with approved methods of accounting.
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> § 132.18 *Earnings of nonresident employees and officers.*
>
> (a) if the nonresident employee . . . performs service for his employer both within and without New York State, his income derived from New York 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 . . . . *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.* 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. (Emphasis added.)

It is the application of the highlighted portion of section 132.18(a) to petitioner's circumstances which causes the dispute in this case.

E. As a starting point, 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 he 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 his employment duties are not maintained for or available to him in New York) (***Matter of Linsley v. State Tax Commn***., 38 AD2d 367, 329 NYS2d 486, ***affd*** 33 NY2d 863, 352 NYS2d 199; ***Matter of Gleason v. State Tax Commn***., 76 AD2d 1035, 429 NYS2d 314; ***Matter of Hayes v. State Tax Commn***., 61 AD2d 62, 401 NYS2d 876). 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***, 35 NY2d 256, 260, 360 NYS2d 855, 858; ***see*** 20 NYCRR 132.4[b]). In contrast, however, 20 NYCRR 132.18(a), and the many cases addressing and upholding the disputed portion of such regulation as valid, provide that where a nonresident individual employed by a New York employer performs services both at the employer's New York facility and at an out-of-state location, under circumstances where the services could have been performed at the employer's in-state facilities, such services are performed out of state for the employee's convenience and not for the employer's necessity (***Matter of Speno v. Gallman, supra; Matter of Phillips v. New York State Dept. of Taxation and Finance***, 267 AD2d 927, 700 NYS2d 566, ***lv denied*** 94 NY2d 763, 708 NYS2d 52). As a

result, where a nonresident employee chooses to work out of state and is not obligated or compelled by some necessity to work for his New York employer at such out-of-state location, the compensation for the employee's services on such days is held to be New York source income properly subject to tax by New York (***id***).

F. The issue in this case turns on two questions, to wit, whether petitioner has established the fact of his presence performing services for his employer (MUCIP) in Connecticut on certain specific days and, if so, whether such services were performed in Connecticut out of necessity rather than for petitioner's convenience. Unfortunately, petitioner did not appear at the hearing and, accordingly, did not testify as to the actual days, or the duties and functions performed during meetings in the Danbury, Connecticut area which, assertedly, could not have been performed at MUCIP's College Point, New York offices. With respect to the printout from the electronic appointment calendar, there is no testimony by anyone with firsthand knowledge to explain the cryptic entries thereon. Furthermore, there are no documents to establish clearly that a meeting or appointment not only occurred on a given date, but also to explain its purpose and duration and the necessity for the same to have been conducted in Connecticut as opposed to New York. In this respect, petitioner's representative admitted that he could not recall specifics from the claimed meetings and dates and petitioner, the person with firsthand knowledge who would presumably be in the best position to provide such information thereon, did not appear at the hearing (***compare, Matter of Moss,*** Tax Appeals Tribunal, November 25, 1992). In fact, the record is silent on the issue of petitioner's need to work on certain days in Connecticut, save for the general assertion by petitioner's representative that "[i]t is inconceivable that such function with these Connecticut professionals and associates could have been undertaken in the Queens, New York facility." It is certainly possible that there were circumstances under which petitioner

had to perform services for MUCIP in Connecticut rather than New York. However, the lack of specifics and explanation from petitioner, coupled with the fact that some meetings with at least some of the Connecticut professionals occurred at times in New York, falls short of establishing the necessity for petitioner to have worked in Connecticut on any given day and thus does not meet the burden of proving entitlement to apportion and allocate days outside of New York per 20 NYCRR 132.18(a) as claimed (***see, Matter of Feldman,*** Tax Appeals Tribunal, December 15, 1988). The fact that petitioner lives in Connecticut certainly raises the issue of convenience versus necessity with respect to petitioner's working in Connecticut when possible. Absent petitioner's testimony or some other proof on this issue, petitioner simply fails to meet his burden of proving entitlement to allocate. In sum, the record fails to substantiate the specific location, duration, work duties and necessity for the claimed allocated days, and the Division's disallowance thereof is sustained.

G. With regard to the issue of penalties, the auditor testified that petitioner was previously audited on the same issue of the allocation of days within and without New York. There is no indication that petitioner changed his method of record keeping or otherwise attempted to keep such records as would substantiate and support the allocation of days as claimed. Moreover, petitioner did not appear and testify at hearing to provide additional evidence to explain either the lack of records or his entitlement to allocate as claimed. Accordingly, without more there is insufficient basis to warrant abatement of penalties imposed and the same are, therefore, sustained.

H. The petition of Robert M. Cipolla is hereby denied, and the Notice of Deficiency dated January 23, 1998, together with penalties and interest, is sustained.

DATED: Troy, New York
January 04, 2001

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE