STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARILYN CHAPLIN	:	DETERMINATION DTA NO. 817851
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1995.	:	

Petitioner, Marilyn Chaplin, 18 Clinton Lane, Scotch Plains, New Jersey 07076, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1995.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 16, 2001, at 10:30 A.M., with all briefs to be submitted by May 11, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by her husband, J. Richard Chaplin, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly subjected to New York taxation without apportionment all of the salary income paid by a New York employer to petitioner during a sabbatical leave from her New York employer.

FINDINGS OF FACT

1. Petitioner is a New Jersey resident who filed Form IT-203, New York State Nonresident Income Tax Return, for tax year 1995, having received income from the City of New York School District as a children's librarian at Public School 56 on Staten Island.

2. Petitioner requested a sabbatical from her position with her New York employer from September 1, 1995 to June 30, 1996. While on sabbatical during 1995 for 72 days, petitioner received a portion of her salary from her New York employer while attending a program at Fairleigh Dickerson University in Madison, New Jersey.

3. When petitioner filed her 1995 Form IT-203, the income attributed to the 72 days was excluded from her New York income. The allocation of wage and salary income was as follows:

Wages, salaries, tips, etc.		$47,855.00
Total days in year		365
Nonworking days:		
Saturdays & Sundays	104	
Holidays	12	
Sick leave & vacation	69	
Other nonworking days	0	
Total nonworking days		185
Total days worked in year		180
Total days worked outside New York State		72
Total days worked in New York State		108

Using the allocation schedule as set forth above, petitioner computed her New York State income as follows:

Days worked in New York State divided by total days worked in year multiplied by amount to be allocated equals NYS amount, or 108/180 x $47,855.00=$28,713.00

4. After review of petitioner's 1995 New York State nonresident return, the Division of Taxation ("Division") issued a Statement of Proposed Audit Changes, dated January 25, 1999, to petitioner asserting tax due in the amount of $1,176.99 ($1,086.64 attributed to New York State

tax and $90.35 to New York City tax), plus interest. It explains, in pertinent part, that an adjustment was made to petitioner's return 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.
>
> 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.
>
> The 72 days claimed as days worked at home have been disallowed.

Wages, salaries, tips etc		$47,855.00
Total days in year		365
Nonworking days:		
Saturdays & Sundays	104	
Holidays	12	
Sick leave & vacation	69	
Other nonworking days	0	
Total nonworking days		185
Total days worked in year		180
Total days worked outside New York State		0
Days worked in New York State		180

> Your allocation has been recomputed as follows:
>
> Days worked in New York State/ Total days worked in year x Amount to be allocated = NYS Amount
>
> 180/180 x $47,855.00 = $47, 855.00
>
> The adjustment results in a correction of the income percentage.

5. The Division issued a Notice of Deficiency, dated March 22, 1999, assessing additional tax due in the amount of $1,176.99, plus interest in the amount of $290.60, for a balance due of $1,467.59.

6. Petitioner responded in protest to the notice and received the following Response to Taxpayer Inquiry, in pertinent part:

> The assessment is considered correct for the following reasons:
>
> New York State Tax Regulation section 132.18 states, '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.'
>
> Sabbatical leave is considered nonworking days, for the purpose of wage allocation. Therefore, no wage allocation is required because your entire wages are considered N.Y. source income.

7. A conciliation conference was held to review this matter on December 14, 1999, and by Conciliation Order CMS No.175729, dated March 10, 2000, the conferee sustained the statutory notice.

8. A timely petition was filed on June 8, 2000, contesting the Order.

9. Petitioner introduced into evidence a map which showed that Fairleigh Dickerson University was located further from petitioner's New Jersey home than other universities in New Jersey such as Keane University.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner argues that, since she attended a New Jersey university while on sabbatical, at a location which does not represent the university closest to her home in New Jersey, she does not meet the convenience test. Petitioner relies on ***Matter of Gross*** (State Tax Commission, December 3, 1982 [TSB-H-82(337)-I]) to support her position that, if the convenience of the sabbatical activity outside New York is the focus for a determination as to whether to include the compensation in New York income, petitioner should prevail, since her choice of university is not the most convenient.

11. The Division takes the position that it properly included the income received by petitioner as New York source income for the period in 1995 for which she was on sabbatical because the sabbatical was taken at her election and not due to the necessity of or requirement by her employer. The Division maintains it is not relevant which university petitioner chose to attend.

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident individual 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]). Tax Law § 631(c) provides, in pertinent part, that:

> If a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, 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.

The regulations so designated for such guidance are contained in 20 NYCRR part 132.

B. Tax regulations 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. Compensation for personal services rendered by a nonresident individual wholly without New York State is not included in his New York adjusted gross income, regardless of the fact that payment may be made from a point within New York State or that the employer is a resident individual, partnership or corporation. *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* (emphasis added) (20 NYCRR 132.4[b]).

20 NYCRR 132.18(a) provides:

> 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. The items of gain, loss and deduction (other than deductions entering into the New York itemized 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. 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* (20 NYCRR 132.18[a]).

C. There is no dispute that the income received by petitioner while on sabbatical leave is New York source income, having been paid by petitioner's New York employer pursuant to her agreement with the City School District of the City of New York. Sabbatical leave is a privilege provided to teachers with certain seniority, but is not required by her employer.

Petitioner maintains that while her case is similar to ***Matter of Gross (supra)***, it is distinguishable, and should not be followed. In ***Gross***, petitioner, a New York nonresident and professor at Columbia University in New York, was granted sabbatical leave to perform research at Princeton University in New Jersey. Petitioner in that case contended that he was entitled to allocate his sabbatical leave compensation to outside New York, since the leave was considered part of his service to the University, the research performed at Princeton was required of professors and such work was performed outside New York. Simply, Professor Gross argued that the performance of his services was of necessity, as distinguished from convenience, and

obligated him to duties outside New York State. Although the Faculty Handbook contained language that encouraged this type of research, the State Tax Commission determined that the services rendered at Princeton were not performed out of necessity of his New York employer, and the compensation derived from the New York employer could not be allocated to sources without New York State. Petitioner in this case argues, mistakenly, that the focus of ***Gross*** was the convenience of the sabbatical location and that Professor Gross failed on that point. Clearly the emphasis of ***Gross*** was on the "convenience of the employer" test, but the focus was whether the services were performed outside New York of necessity in serving the employer. This is the test which Professor Gross failed to prove. The only distinguishable fact in this case is that Mrs. Chaplin chose to take her course work at a university not located close to her home in New Jersey. This is not what is emphasized by either 20 NYCRR 132.18(a) or the ***Gross*** case. Even if the employer necessity test had been met, 20 NYCRR 132.18(a) specifies that in making an allocation for services performed in and out of New York, no account is taken of nonworking days, including leave days with or without pay. Although this would alter the ratio of days worked in New York to total days worked, the result would be the same; 100% of the income would be considered New York income.

Given the near identical facts in ***Gross*** and application of the controlling regulations which support the ***Gross*** conclusion, the Division properly determined that petitioner's sabbatical compensation was New York source income not subject to allocation for days spent outside New York, since the services were not those which of necessity obligated petitioner to out-of-state duties.

D. The petition of Marilyn Chaplin is denied, and the Notice of Deficiency dated March 22, 1999 is hereby sustained.

DATED: Troy, New York
October 18, 2001

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE