STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SYLVESTER L. TUOHY	:	DETERMINATION DTA NO. 818430
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1994 and 1995.	:	

Petitioner, Sylvester L. Tuohy, 748 Midland Road, Oradell, New Jersey 07649, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1994 and 1995.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on January 18, 2002 at 10:30 A.M., with all briefs to be submitted by May 10, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

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

1. During the years 1994 and 1995, petitioner, Sylvester L. Tuohy, was domiciled in Oradell, New Jersey and did not maintain a permanent place of abode in New York State.

2. Petitioner was an employee of Pace University, its main campus being located at 1 Pace Plaza, New York, New York. He was employed as a professor in Pace's Computer Science Department and taught courses at its Pleasantville/Briarcliff Campus, located at 862 Bedford Road, Pleasantville, New York. Petitioner was also employed by Iona College, its main campus being located at 715 North Avenue, New Rochelle, New York, as an adjunct professor in the Computer Information Systems Department. He taught at Iona's Rockland Campus, located at One Dutch Hill Road, Orangeburg, New York. During the years at issue, petitioner had withholding taxes withheld by and received wage and tax statements, Form W-2, from Pace and Iona.

3. During the years at issue, petitioner taught classes at Pace University during the Spring, Fall and Summer sessions. The classes were generally held on Monday, Tuesday and Thursday, during both the day and evening. Pace provided an office with 6 desks and 1 bookcase for the 10 professors and adjunct faculty in the Computer Science Department. Petitioner employed this space mainly as a place to meet students, and preferred to do classroom preparation; paper, examination and homework correction; and the research and writing of papers in a classroom or at home. Petitioner also taught night classes at Iona College during these years, usually on Wednesdays. The Rockland Campus of Iona College was located in the Tappan Zee High School. Iona rented a classroom wing of the high school, provided no office space to its adjunct professors in the building and there was no access to the building for petitioner until after 4:30 P.M. each school day. Petitioner performed all tasks related to his Iona employment at his home in New Jersey. Petitioner taught at the Rockland County Campus of Iona College because of its close proximity to his home in New Jersey. Mr. Tuohy maintained his research material and a computer at his office located in his New Jersey home.

4. Pace University's faculty handbook provides that appointments, promotions and salary increases are based on various factors, including excellence in teaching, publishing research, articles and books, participating in professional programs and organizations, contributing to the university's welfare, assisting in departmental planning and programs, advising students and student organizations, cooperating in the admissions process and participating in activities designed to promote community interest in Pace.

5. For the years 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 44 days for each year as days worked outside of New York State.

6. On December 12, 1997, the Division of Taxation ("Division") issued to petitioner two statements 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.
>
> 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 44 days claimed as days worked at home have been disallowed.

The Division recomputed petitioner's allocation formula by disallowing the 44 days claimed as days worked at home.[1] The disallowance resulted in additional tax due of $1,096.53 for the year 1994 and $1,019.92 for the year 1995.

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[1]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.

7. On March 20, 1998, petitioner filed with the Division two claims for credit or refund of personal income tax, Form IT-113-X, for the years 1994 and 1995 seeking refunds of the additional tax determined to be due as a result of the disallowance of the days claimed as non-New York days. On August 7, 1998, the Division issued to petitioner a Notice of Disallowance denying the claims for refund for the years at issue.

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 the 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 part, as follows:

> [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 in effect during the years at issue provided as follows:

> [i]f the nonresident employee (including corporate officers, but excluding employees provided for in [former] 131.17 of this Part) performs services 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 (20 NYCRR former 131.18).

D. Petitioner argues that the portion of his compensation attributable to days when he did not work in New York State, including specifically days worked at his home in Oradell, New

Jersey, should not be subject to New York tax. Petitioner's position is that such work was not performed at home for his convenience, but rather was performed out of necessity and with the permission and encouragement of his employers, which failed to provide adequate office space for his use.

E. Petitioner's allocation of compensation within and without New York State, specifically on the basis of days worked at his home in Oradell, turns on whether such days were worked outside of his employers' New York offices of necessity in the service of his employers and not for his own convenience. This so-called "convenience of the employer" test is set forth at 20 NYCRR former 131.16, which provided, in relevant part, as follows:

> any allowance claimed for days worked outside of the State must be based upon the performance of services which of necessity - as distinguished from convenience - obligated the employee to out-of-state duties in the service of his employer.

F. The case law on this issue supports the convenience versus necessity test as valid (***Matter of Speno v. Gallman***, 35 NY2d 256, 360 NYS2d 855), and holds that services performed at an out-of-state home, which could have been performed at the employer's in-State office, are performed for the employee's convenience and not for the employer's necessity (***id., see, Matter of Fass v. State Tax Commn.***, 68 AD2d 877, 414 NYS2d 780, ***affd*** 50 NY2d 932, 431 NYS2d 526; ***Matter of Colleary v. Tully***, 69 AD2d 922, 415 NYS2d 266, ***Matter of Wheeler v. State Tax Commn.***, 72 AD2d 878, 421 NYS2d 942; ***Matter of Kitman v. State Tax Commn.***, 92 AD2d 1018, 461 NYS2d 448). Even though an office in the employee's home may be equipped by and intended for an employer's purposes, it must also be established that the employee's work was performed there of necessity for the employer (***Matter of Fischer v. State Tax Commn.***, 107 AD2d 918, 489 NYS2d 345).

G. In ***Matter of Kitman v. State Tax Commn.*** (***supra***), the Court observed that "[b]ecause of the obvious potential for abuse, where the home is the workplace in question, the [former State Tax Commission] has generally applied a strict standard of employer necessity in these cases, which, with rare exception, has been upheld by the courts [citations omitted]."[2] One such exception of note was ***Matter of Fass v. State Tax Commn.*** (***supra***), where the Court found the employee's out-of-State services at his home to be for the employer's necessity. The services at issue in ***Fass***, testing and investigating new products, did not involve an office *per se*, but rather required access to highly specialized facilities including ballistics equipment, a firing range, garages, stables, kennels, and sophisticated testing and evaluating equipment. This equipment was, concededly, not available at or near the employer's office. In later cases, such as ***Matter of Wheeler v. State Tax Commn.*** (***supra***), and ***Matter of Kitman v. State Tax Commn.*** (***supra***), the Court distinguished the type of services, and required facilities and equipment in ***Fass*** from the services, office equipment and circumstances of an expert in trading, selling and underwriting municipal bonds (***Wheeler***) and a television reviewer and critic (***Kitman***).

In ***Wheeler,*** the claim of necessity was premised on the arguments that petitioner had to work on weekends performing various analyses in order to be prepared for the next week's bond market activity, and that the employer's New York office was unavailable to accommodate petitioner because an alarm system was activated on weekends and because the mail at the office was not sorted. In ***Kitman***, the claimed at-home necessity was based on petitioner's need for specialized equipment (four television sets and a video tape recorder) not installed at the

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[2]The "potential for abuse" noted in ***Kitman*** arises from the possibility of a nonresident taxpayer simply choosing to work at home (essentially determining his work location by choice based on convenience) and thereby gaining the tax benefit of income allocation not available to his identically situated in-state fellow employee (***Matter of Speno v. Gallman, supra; Matter of Colleary v. Tully, supra).***

employer's New York office, the potential disruptive effect of this equipment on other employees in the New York office, the long hours worked by petitioner (6:00 A.M.. to midnight) monitoring several television channels at once on multiple televisions, and the specialized style of writing requiring input from petitioner's family who would not be available at the New York office.

In both cases the Court rejected the claim that performing the services at home was required as an absolute necessity from the viewpoint of the employer. In ***Wheeler,*** the Court concluded that "[w]ith the exercise of but a minimum of ingenuity and effort, the office could have been available to petitioner." In ***Kitman***, the Court, relying on ***Wheeler***, noted "there is no evidence showing that the office could not be set up in such a way as to *insulate petitioner* from the other workers [citation omitted]." (Emphasis added). The Court further observed, with respect to the claim of need for access to his family for input, that "again, with the exercise of a little ingenuity, some means, (possibly a special telephone line) could be devised for him to get input from them [citation omitted]."

H. Petitioner argues that his employers failed to provide adequate office space in which he could complete his required duties. Despite his claims to the contrary, it appears that with a bit of effort and ingenuity petitioner's concern for a quieter work environment could have been addressed by each institution at their respective campuses (***Matter of Evans v. Tax Commn. of the State of New York***, 82 AD2d 1010, 442 NYS2d 174, ***lv denied***, 54 NY2d 606, 443 NYS2d 1029; ***Matter of Kitman v. State Tax Commn.***, ***supra***). The only evidence introduced into the record as to why more adequate office space could not have been provided was speculation by petitioner that it was a financial decision. It appears that each employer merely acquiesced to petitioner's spending certain days working at home. The fact that this situation may have been

expedient for all parties does not mean that petitioner's employers' acquiescence constituted necessity. Instead, the fact that petitioner worked at home on certain days ultimately resulted from his choice to do so and not from some necessity imposed by his employers (***see Phillips v. New York State Dept. of Taxation and Finance***, 267 AD2d 927, 700 NYS2d 566, ***lv denied***, 94 NY2d 763, 708 NYS2d 52).

I. It seems self-evident that it was, on some level, more convenient for petitioner to work at home instead of at Pace University or Iona College. The decision to not provide office space or adequate office space appears to have been a business decision on the part of each educational institution. Petitioner's services were not of such a specialized nature that they could not have been performed at his employers' locations, including the main campus of each institution, with but a minimum of accommodation. A quiet office in which to work does not approach the highly specialized facilities and testing equipment, including ballistics equipment, firing ranges, stables, garages and kennels, at issue in ***Matter of Fass v. State Tax Commn. (supra)*** which were not available at or near the employer's office. The fact that petitioner's employers did not provide accommodations or adequate accommodations but rather simply allowed petitioner to work at home does not constitute necessity or requirement. There has 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. To the contrary it appears that petitioner worked at home as a matter of convenience and not of necessity. While recognizing the importance petitioner assigned to his research material and computer located in his home office, the resulting choice to work at home was, ultimately, a choice made by petitioner and not a necessary out-of-state assignment imposed by his employers. In the final analysis, there was no employer requirement for petitioner to

perform services at his home. As a result, petitioner is not entitled to treat such at-home working days as non-New York days for purposes of income allocation (20 NYCRR former 131.16).

J. The petition of Sylvester L. Tuohy is hereby denied and the notice of disallowance dated August 7, 1998 is sustained.

DATED: Troy, New York
June 13, 2002

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE