STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANITA S. UNTERWEISER	:	DETERMINATION 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, filed a petition 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.

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 November 9, 2001 at 10:30 A.M., with all briefs to be submitted by March 1, 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 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.

2. 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.

3. 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.

4. 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*.

5. 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. 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.

6. 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.

7. 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.[1]

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

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]).

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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.

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 her compensation attributable to days when she did not work in New York State, including specifically days worked at her home in Westwood, New Jersey, should not be subject to New York tax. Petitioner's position is that such work was not performed at home for her convenience, but rather was performed out of necessity and with the permission and encouragement of her employer.

E. Petitioner's allocation of compensation within and without New York State, specifically on the basis of days worked at her home in Westwood, turns on whether such days were worked outside of her employer's New York office of necessity in the service of her employer and not for her 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

[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).***

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*** (***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 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 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 she could not bring her personal research material and resources into her employer's place of business due to a lack of storage space, the policy of SJS 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. Despite her claims to the contrary, 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 (***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 fact that it was expedient for all parties to have petitioner work at home does not mean that petitioner's work at home in New Jersey was a necessity of by her employer.

I. It seems self-evident that it was, on some level, more convenient for petitioner to work at home instead of at the office. While concern about ownership of her material and security appears to have been as much or more of a factor than convenience in leading petitioner to the choice of working at home, it remains that such choice was made by petitioner and was not dictated by her employer. Petitioner's services were not of such a specialized nature that they could not have been performed at her employer's offices with but a minimum of accommodation. For instance, it would seem that contractual employment terms providing notice and a right to remove personal materials prior to termination and the provision of office space under the control of petitioner would have sufficed to satisfy petitioner's legitimate concerns. None of these possible measures 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 employer did not provide 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 maintaining absolute control of her research materials, and accepting that the same was the result of legitimate concern, the resulting choice to work at home was, ultimately, a choice made by petitioner and not a necessary out-of-state assignment imposed by her employer. In the final analysis, there was no employer requirement for petitioner to perform services at her home in New Jersey. 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 Anita S. Unterweiser is hereby denied and the Notice of Deficiency dated December 7, 2000 is sustained.

DATED: Troy, New York
June 13, 2002

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE