

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JERROLD HILL	:	SMALL CLAIMS DETERMINATION DTA NO. 820629
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2000.	:	

Petitioner, Jerrold Hill, 109 South Whitehall Road, Jeffersonville, Pennsylvania 19403, 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 for the year 2000.

A small claims hearing was held before Winifred M. Maloney, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on July 26, 2006 at 11:05 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

Since neither party elected to reserve time to file a post hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether days worked at home by petitioner Jerrold Hill 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. Petitioner Jerrold Hill and his wife Margaret Hill filed a timely joint Form IT-203, Nonresident and Part-Year Resident Income Tax Return for the year 2000. On that return, their address was listed as 109 South Whitehall Road, Jeffersonville, Pennsylvania. On their Form IT-203, petitioner and Mrs. Hill reported the following items as their Federal Adjusted gross income:

	Federal Amount	New York State Amount
Wages, salaries, tips	\$155,062.00	\$16,659.00
Taxable interest income	1,502.00	
Taxable refunds, credits, or offsets of state and local income taxes	368.00	
Business income (Federal Schedule C)	0.00	
Federal adjusted gross income	\$156,932.00	\$16,659.00

The Hills subtracted the taxable refunds of state and local taxes of \$368.00 and arrived at a New York adjusted gross income of \$156,564.00. After claiming itemized deductions of \$20,981.00 and a dependent exemption of \$1,000.00, they determined their New York State taxable income to be \$134,583.00 and the New York State tax due on that amount to be \$9,219.00. After claiming a New York State Child and Dependent Care credit of \$61.00, they determined their base New York State tax to be \$9,158.00. Petitioner and Mrs. Hill then multiplied the New York State income percentage of 10.64 percent¹ by the base New York State tax of \$9,158.00 and determined their New York State tax to be \$974.00.

¹ The Hills determined the New York State income percentage by dividing the adjusted gross income in the New York State column on line 30 of Form IT-203 in the amount of \$16,659.00 by the adjusted gross income in the Federal column on line 30 in the amount of \$156,564.00.

2. For the year 2000, petitioner received wage income of \$69,996.67 from his employment with the Institute for the Study of Aging (the “Institute”), a private foundation located at 1414 Avenue of the Americas, Suite 1502, New York, New York.² Petitioner allocated the wages he received from the Institute to New York State sources based upon a percentage determined by dividing the number of days claimed to have worked within New York State by the total days worked in the year. On the nonresident income tax return for 2000 filed by petitioner and Mrs. Hill, petitioner indicated that out of 168 days worked during the year, 128 days were worked outside the State, all of which were worked at his home in Jeffersonville, Pennsylvania. The balance, or 40 days, were days petitioner worked in New York. Petitioner, therefore, calculated that 23.80 percent (40 days worked in New York ÷ 168 total days worked during the year) of his wage income, or \$16,659.00, was properly allocated to New York.

3. On February 19, 2004, the Division of Taxation (the “Division”) issued to petitioner a Notice of Deficiency for the year 2000 which asserted additional New York State personal income tax due of \$3,142.40, plus interest. The Notice of Deficiency was based upon a Statement of Proposed Audit Changes, dated December 26, 2003, in which the Division disallowed the days worked at home as days worked outside New York State. Accordingly, the Division determined that all of petitioner’s wage income received from the Institute in 2000, or, \$69,996.67, was derived from New York State sources and was thus taxable in full to New York. The Statement of Proposed Audit Changes contained the following explanation for the disallowance of the days worked at home:

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

² At that time, the Institute received its funding from a Lauder family charity. Petitioner’s Wage and Tax Statement for the year 2000 was issued by RSL Management Corp., Melville, 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. . . .

4. The Statement of Proposed Audit Changes also contained the following corrected tax computation:

Return Line Number and Description	Previous Amount	Adjustment Amount	Corrected Amount
018 Federal Adjusted Gross Income	\$159,958.00	\$ 0.00	\$159,958.00
030 NY Adjusted Gross Income Federal Amount	159,731.00	0.00	159,731.00
032 New York Deduction	21,341.00	0.00	21,341.00
034 Dependent Exemptions	1,000.00	0.00	1,000.00
035 New York Taxable Income	137,390.00	0.00	137,390.00
036 New York State Tax	9,411.22	0.00	9,411.22
042 Base Tax	9,411.22	0.00	9,411.22
043 Income percentage	4.08%	33.39%	37.47% ³
044 Allocated New York State Tax	383.98	3,142.40	3,526.38
048 Total New York State Tax	\$383.98	\$3,142.40	\$3,526.38

The statement showed a corrected tax liability for New York State in the amount of \$3,526.80 less tax previously stated of \$383.98 for an additional New York State tax due in the amount of \$3,142.40, plus interest.

³ In the computation section, the Division determined the corrected New York income percentage by dividing a corrected NY adjusted gross income New York amount (line 30) of \$59,848.00 by the NY adjusted gross income Federal amount (line 30) of \$159,731.00 (\$59,848.00 divided by 159,731.00 equals 37.47 percent).

5. The Institute for the Study of Aging's mission is to foster research and fund the discovery of new drugs to treat Alzheimer's Disease.

6. Petitioner's area of expertise is health economics. The focus of his research is on the health care issues and related treatment costs of the elderly population.

7. On March 13, 2000, petitioner was hired to serve as director of research at the Institute, for an initial one year term at a base salary of \$100,000.00. According to the terms of his employment contract, petitioner's duties included: completing the Institute's existing research projects, including the cost implications of comorbidities in Alzheimer's patients, the effectiveness of Aricept and the validation of a telephonic screening tool for memory loss; developing research proposals to secure funds for intramural research at the Institute and participating in national conferences and meetings where he would promote the Institute through presentation of outcomes research findings. As director of research, petitioner reported to Howard M. Fillet, M.D., the executive director of the Institute.

8. The terms of his employment contract required petitioner to maintain a business office in his Jeffersonville, Pennsylvania home and remain in contact with the Institute via telephone, fax and Internet e-mail communication. The contract also provided that office space at the Institute would be available to him one day a week. The contract further required petitioner to "travel to the Institute at least one day per week and at such times as are reasonably necessary for the performance" of his duties.

9. The Institute agreed to purchase the equipment, including but not limited to "a high end personal computer" and a fax machine, software and materials necessary for petitioner to work at home and to fulfill his obligations under the employment contract. It also agreed to pay directly or reimburse petitioner for all reasonable out-of-pocket work-related expenses incurred or paid

by him in connection with his responsibilities under the employment contract. However, petitioner would not be reimbursed for any expense exceeding \$200.00, unless he obtained prior written consent from the executive director to incur such expense.

10. Petitioner maintained a separate room in his home as his business office which contained a computer, telephone, and fax machine supplied by the Institute, in accordance with the employment contract, and a library of, *inter alia*, standard economics books and manuscripts. The Institute did not reimburse him for the utilities or the upkeep of business office.

11. On behalf of the Institute, petitioner conducted health economics research related to the health issues of the elderly population, primarily Alzheimer's Disease, at his Pennsylvania home office. As part of that research, petitioner used the computer to perform statistical analysis of information transferred to him in Pennsylvania via CDs and Internet files by the Institute's research partners and clients. Petitioner also wrote proposals to secure funds for Institute research projects.

12. Whenever he traveled to the Institute's New York City offices to provide the update required by his employment contract, he returned to his home in Pennsylvania that same day. It takes approximately two and one-half to three hours to travel from petitioner's home in Pennsylvania to the Institute's New York City office.

13. The conditions under which petitioner was hired by the Institute were clarified in a January 12, 2005 letter written by Sue Reynolds Foley, the Institute's chief operating officer. In that letter, Ms. Reynolds Foley explained that when petitioner was hired, the Institute did not have an office on its premises for him to conduct his research because it was sharing office space with several other charities and had limited office space at its disposal. Specifically, she

indicated that, at that time, the Institute had two professional offices in Suite 4200, one for the executive director and the other for the chief operating officer, and two cubicles, one for the scientific officer and the other for the administrative assistant. Ms. Reynolds Foley also indicated in her letter that “there was no space for Dr. Hill in either of the office configurations occupied in 2000 to enable him to conduct the research we expected him to do.” As to the office space made available to petitioner when he traveled to New York City to update the Institute as to the progress of his work, Ms. Reynolds Foley in her letter stated that petitioner was “given use of whatever free space was available at the time, usually a cubicle not occupied that day.”

14. Prior to the year 2000, petitioner and Dr. Fillet had been research colleagues on a number of projects.

15. By letter dated December 21, 2004, the Division acknowledged that a small adjustment of the deficiency proposed in the notice of deficiency was in order. The corrected allocated tax was determined to be \$4,095.00 less tax paid of \$974.00 for a balance of tax due of \$3,121.00, plus interest.

16. A conciliation conference was held on this matter before the Division’s Bureau of Conciliation and Mediation Services on January 13, 2005. A Conciliation Order, (CMS No. 203128) dated April 15, 2005, was issued sustaining the deficiency proposed in the notice of deficiency.

SUMMARY OF PETITIONER’S POSITION

17. Petitioner asserts that it was necessary and practical for him to work out of his Pennsylvania home office because it allowed him more time to conduct research for the Institute and write proposals to raise funds for the Institute’s research projects. He maintains that he would have been unable to perform all of his duties, especially raising the research funds

necessary to cover the expenses associated with his soft money position as director of research at the Institute, if he had traveled to the Institute's New York City offices each day (a six hour round trip). Petitioner further asserts that, given his longstanding professional relationship with Dr. Fillet as research colleagues, this particular collaboration with Dr. Fillet and the creation of the outcomes research program would not have taken place, if he had not been able to work out of his Pennsylvania business office.

CONCLUSIONS OF LAW

A. Tax Law § 631(a)(1) provides that the New York source income of a nonresident individual shall include, among other items, the sum of “[t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United State for the taxable year, derived from or connected with New York sources” A nonresident individual’s items of income, gain, loss and deduction derived from or connected with New York State sources are items, in part, attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[b][1][B]). Tax Law § 631(c) provides that when a business, trade, profession or occupation is carried on both within and without the State “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 pertaining to activities carried on in New York State additionally 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]).

The regulation set forth at 20 NYCRR 132.18(a) states, in pertinent part, as follows:

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 . . . 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. . . .

B. It is well settled that an employee's out-of-state services are not performed for an employer's necessity where the services could have been performed at his employer's office (*see, e.g., Matter of Phillips v. New York State Department of Taxation and Finance*, 267 AD2d 927, 700 NYS2d 566, *lv denied* 94 NY2d 763, 708 NYS2d 52). Further, the courts have held that where there was no evidence that services performed at the taxpayer's out-of-state home could not have been undertaken at the employer's office in New York, the services were performed out of state for the employee's convenience, not the employer's necessity (*Matter of Page v. State Tax Commission*, 46 AD2d 341, 362 NYS2d 599; *Matter of Simms v. Procaccino*, 47 AD2d 149, 365 NYS2d 73). The courts have generally upheld a strict standard of employer necessity where the residence is the workplace in question "because of the obvious potential for abuse" (*Matter of Kitman v. State Tax Commn.*, 92 AD2d 1018, 461 NYS2d 448, 449).

The rationale behind the "convenience of the employer" rule is well established. "Since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services or maintains an office in New York State." (*Matter of Speno v. Gallman*, 35 NY2d 256, 259, 360 NYS2d 855, 858).

C. In two recent cases, *Matter of Zelinsky v. Tax Appeals Tribunal of State of New York* (1 NY3d 85, 769 NYS2d 464, *cert denied* 541 US 1009, 158 L Ed 2d 619) and *Matter of Huckaby v. New York State Division of Tax Appeals* (4 NY3d 427, 796 NYS2d 312, *cert denied* 543 US ___, 126 S Ct 546, 163 L Ed 2d 459), the Court of Appeals reexamined the validity of the “convenience of the employer” rule and upheld its application in both cases. The facts in *Zelinsky* and *Huckaby* are essentially indistinguishable from the facts presented in the instant matter, and therefore I see no reason to deviate from the Court’s holdings in these two matters.

As part of his duties as director of research at the Institute, petitioner conducted health economics research related to the health issues of the elderly population at his Pennsylvania home. He used a computer, standard economics books and manuscripts to conduct that research and to write proposals to secure funds for Institute research projects. It is clear that the services petitioner performed at home were not services which of necessity, as distinguished from convenience, were required to be performed outside the State. While it may have been more convenient for petitioner to work at home rather than travel into New York City on a daily basis, clearly the services which he performed at home could have just as easily been performed at the Institute’s New York City offices. Accordingly, the Division properly allocated all of the wage income petitioner received from the Institute in the year 2000 to sources within New York State.

D. As noted in Finding of Fact “15,” in a letter dated December 21, 2004, the Division acknowledged that a small adjustment of the assessment is in order, to wit, the allocated tax should be \$4,095.00 less tax paid of \$974.00 for a balance of tax due of \$3,121.00, plus interest.

E. The petition of Jerrold Hill is granted to the extent indicated in Conclusion of Law “D”; the Division of Taxation is directed to modify the Notice of Deficiency accordingly, but in all other respects the petition is denied.

DATED: Troy, New York
October 26, 2006

/s/ Winifred M. Maloney
PRESIDING OFFICER