STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MANISH KUMAR	:	DETERMINATION DTA NO. 822747
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2004.	:	

Petitioner, Manish Kumar, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2004.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on October 7, 2009 at 10:30 A.M., with all briefs to be submitted by December 18, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether petitioner, a resident of New Jersey, had New York source income during the year at issue.

FINDINGS OF FACT

1. On May 21, 2007, the Division of Taxation (Division) issued a Notice of Deficiency to Manish Kumar (petitioner) which asserted a deficiency of New York State personal income tax for the year 2004 in the amount of $5,174.22, plus interest.

2. For the year 2004, petitioner filed a form IT-203, Nonresident and Part-Year Resident Income Tax Return, on which he indicated that none of the wages earned from his employer were earned in New York. Attached to petitioner's New York return was a New Jersey resident return, which indicated that petitioner paid New Jersey income tax on his total wages. Also attached was a wage and tax statement, form W-2, which showed petitioner's employer as "Kanbay Incorporated, 6400 Shafer Ct, Ste 100, Rosemont, IL 60018."

3. Kanbay Incorporated's main office was in Rosemont, Illinois. It had a small office in New York City that consisted of one room. Working in the room was a receptionist and business investment personnel, whose responsibilities included contacting potential clients. Prior to 2004, petitioner temporarily worked out of the New York office, but as his client base was the Princeton, New Jersey, area, Kanbay had Mr. Kumar work out of his home office in Jersey City, New Jersey. Kanbay considered Mr. Kumar's home office to be necessary because of its close proximity to its clients in New Jersey and as a cost-saving measure.

4. Petitioner is a software consultant and programmer with specific clients in the Princeton, New Jersey, area. He is able to log into his client's computer systems from his home office with a security code, using a laptop provided by his employer. Meetings with his clients are held either in New Jersey or by conference telephone call. During the year 2004, petitioner never went to Kanbay's New York office. When he met with Kanbay personnel from Illinois, the meetings were held in New Jersey because of the location of the clients and the reduced costs of hotels and meeting places.

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 States 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. 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 (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. 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 (***Matter of Linsley v. State Tax Commn***., 38 AD2d 367, 329 NYS2d 486 [1972], ***affd*** 33 NY2d 863, 352 NYS2d 199 [1973]; ***Matter of Gleason v. State Tax Commn***., 76 AD2d 1035, 429 NYS2d 314 [1980]; ***Matter of Hayes v. State Tax Commn***., 61 AD2d 62, 401 NYS2d 876 [1978]). 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 [1974]; ***see*** 20 NYCRR 132.4[b]).

C. During the year 2004, petitioner, a resident of New Jersey, worked solely in New Jersey from his home office. He was paid by his employer, Kanbay Incorporated, which was located in Rosemont, Illinois. Although Kanbay had a sales office in New York, petitioner never went to the office during 2004. Under these circumstances, petitioner's wage income received in 2004 was not derived from or connected to New York sources and therefore, should not be included in his New York adjusted gross income (Tax Law § 631[a][1]; 20 NYCRR 132.4[b]).

D. The petition of Manish Kumar is granted and the Notice of Deficiency issued on May 21, 2007 is hereby canceled.

DATED: Troy, New York
May 6, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE