STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD S. MYERS AND ERIN LANGAN	:	DECISION DTA NO. 850197
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 2020.	:	

Petitioners, Richard S. Myers and Erin Langan, filed an exception to the determination of the Administrative Law Judge issued on January 8, 2025. Petitioners appeared by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel and Open W. Banks, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele Milavec, Esq., of counsel).

Petitioners filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was not requested.

After reviewing the entire record in the matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners have established that the Division of Taxation improperly allocated petitioner Richard S. Myer's wages from his New York employer in tax year 2020.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. The Division of Taxation (Division) issued a notice of disallowance to Richard S.

Myers and Erin Langan (petitioners), dated February 9, 2022, and bearing Case ID No. X-189621470 (the notice of disallowance) that disallowed $74,025.60 of the refund claimed by petitioners for tax year 2020.[1]

2. The notice of disallowance partially disallowed a refund claimed by petitioners for the 2020 tax year.

3. Petitioners, husband and wife, are longtime Pennsylvania residents who have never been residents of New York.

4. The refund claim at issue arises solely with respect to petitioner's income from employment.

5. At all times relevant to this matter, including the entire 2020 tax year, petitioner was employed by Bank of Montreal (BMO) as Managing Director and Head, Cross Asset Trading.

6. BMO is part of a financial group of companies operating in Canada and the United States. It provides a broad range of personal and commercial banking, wealth management, global markets and investment banking products and services.

7. In petitioner's role at BMO, he was responsible for managing traders within BMO's Cross Asset Solutions group, which issued equity and interest rate structured notes, issued exchange traded notes and traded corporate derivatives. Petitioner's role included managing the various trading desks located in New York, Chicago and Toronto.

8. From January 1, 2020 through March 13, 2020, petitioner worked in BMO's office in New York City located at 3 Times Square, 27th Floor, New York, New York 10036.

9. On January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern.

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[1] Unless otherwise indicated, all references to petitioner are to petitioner Richard S. Myers.

10. On January 31, 2020, the United States Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the entire United States in response to COVID-19.

11. Thereafter, travel-related and community contact transmission cases of COVID-19 were documented in New York State with more expected to occur.

12. In response, Governor Cuomo declared a state disaster emergency for the entire State of New York. Effective March 20, 2020, Governor Cuomo mandated that:

> "[a]ll businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize . . . . Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. This includes essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services; news media; *banks and related financial institutions*; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation and essential operations of or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public . . . . No later than 5 p.m. on March 19, 2020, Empire State Development Corporation shall issue guidance as to which businesses are determined to be essential" (*emphasis added*) (Executive Order [A. Cuomo] No. 202.6 [9 NYCRR 202.6]; ***see also*** Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 202.8] [amending Executive Order No. 202.6 to provide that, "[e]ach employer shall reduce the in-person workforce at any work location by 100% no later than March 22 at 8 p.m."]; Public Health Law § 12 [1] [prescribing a penalty for violating public health orders]) (Pause Act).

13. In response to the Pause Act, the New York State Department of Economic Development d/b/a Empire State Development issued ***Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders***, https://esd.ny.gov/guidance-executive-order-2026 (last updated October 23, 2020).

14. This Guidance provided: "**ESSENTIAL BUSINESSES OR ENTITIES** . . . are not subject to the in-person restriction [imposed under Executive Order 202.6]," and identifies essential businesses as including "Financial [i]nstitutions including banks or lending institution[s], insurance, payroll, accounting, [and] services related to financial markets, except debt collection[.]"

15. BMO was an essential business not subject to the in-person restrictions imposed by Governor Cuomo in Executive Order No. 202.6 (March 18, 2020) as it was a bank and/or related financial institution.

16. Commencing on March 16, 2020, BMO temporarily closed its New York City office.

17. Beginning on March 16, 2020, BMO required petitioner to find alternative working arrangements.

18. BMO did not offer petitioner an alternative office location in New York for conducting his work after the New York office temporarily closed on March 16, 2020.

19. Petitioner worked at BMO's disaster recovery site in Jersey City, New Jersey, on March 16, 2020 and March 17, 2020.

20. BMO provided petitioner with the equipment necessary to work remotely, including a computer, keyboard and monitors.

21. From March 18, 2020 through December 31, 2020, petitioner worked for BMO exclusively at his home in Pennsylvania and never physically came into New York to work.

22. BMO re-opened the New York City office location in September of 2021.

23. Petitioner had 242 total workdays for BMO during the 2020 tax year.

24. Petitioner had 49 workdays for BMO from January 1 through March 15, 2020, thus

20.25% of his workdays occurred during this period.

25. Petitioner had 193 workdays for BMO from March 16 through December 31, 2020, thus 79.75% of his 2020 workdays occurred during this period.

26. Petitioners timely filed a New York State nonresident and part-year resident income tax return, form IT-203, for the 2020 tax year (return) with the Division.

27. Line 1 of the return reported petitioner's wages of $1,378,389.00 in the federal amount column and $285,664.00 in the New York State amount column.

28. Petitioners' return claimed a refund of $104,182.00 on line 67.

29. The Division direct deposited $30,156.40 of the claimed refund into petitioners' bank account but did not otherwise grant the remainder of the refund claimed.

30. The return was selected for audit by the Division.

31. The Division sent petitioners a request for information (RFI), form DTF-948, dated May 26, 2021, for case ID No: X-189621470 to verify the income allocation reported on the return.

32. Petitioners responded to the Division's RFI, and included a completed income allocation questionnaire, form AU-262.55, signed by petitioners on July 8, 2021.

33. The Division issued an account adjustment notice (the adjustment notice) to petitioners, dated October 6, 2021, and bearing audit case ID No. X-189621470 that allowed a partial refund in the amount of $30,156.40 based on a recalculation of the return whereby the Division allocated $1,378,389.00 in wages from BMO to New York State for tax year 2020 based on the application of the convenience of the employer test as set forth in the Division's regulations at 20 NYCRR 132.18 (a) whereby all work days in 2020 were considered New York workdays.

34. The adjustment notice increased the total New York State taxes due on line 50 of the return from $19,347.00 to $93,372.60.

35. After applying petitioners' total payments and refundable credits of $123,529.00 against the increased amount on line 50, the adjustment notice computed an overpayment of $30,156.40, which was paid to petitioners.

36. On February 9, 2022, the Division issued the notice of disallowance, in the amount of $74,025.60, for the remainder of the refund originally requested, that is the subject of petitioners' protest, based on the application of the convenience of the employer test as set forth in the Division's regulations at 20 NYCRR 132.18 (a).

37. Petitioners now assert that the original reporting of the New York State amount on the return was understated because it did not properly reflect that, in 2020, petitioner received a deferred bonus in the amount of $442,191.00 that was based on work performed or deemed performed in New York prior to 2020 and should have been completely allocated to New York in 2020.

38. Petitioners now assert that line 1 of the return should have reported petitioner's wages of $1,378,389.00 in the federal amount column and $636,917.00. in the New York State amount column. Petitioners' computation is based on the following schedule:

Federal Amount	NYS Amount	Description
$67,151.00	$67,151.00	Wages for services performed 1/1-3/15/20
$442,191.00	$442,191.00	Deferred bonus for prior years, received in 2020
$630,000.00	$127,575.00	2020 bonus received in 2020
$239,047.00	$0.00	Wages for services performed 3/16-12/31/2020
$1,378,389.00	$636,917.00	TOTAL

39. Petitioners further assert that the total New York State taxes due on line 50 of the

return should have been increased from $19,347.00 to $43,144.00. After a recalculation based on the increase in the New York State amount on line 1 from $285,664.00 to $636,917.00 and the increased New York State tax amount on line 50 from $19,347.00 to $43,144.00, petitioners assert the amount of overpayment claimed on line 67 should have been reported as $80,385.00 instead of the original $104,182.00 claimed by petitioners on the return as a refund.

40. Petitioners now assert that they are entitled to a refund of $50,229.00, plus applicable interest, based on an alleged overpayment amount of $80,385.00 less a previously granted refund of $30,156.00, due to the asserted miscalculation and based on 193 days worked in New Jersey and Pennsylvania for BMO during tax year 2020.

41. The Division asserts that petitioners are not entitled to an additional refund beyond the $30,156.00 calculated in the adjustment notice and already paid as set forth in finding of fact 29, based on the Division's argument that petitioners should have allocated the entire amount of wages in the amount of $1,378,389.00 paid by BMO to petitioner in tax year 2020 to New York State, including the days worked in New Jersey and Pennsylvania as a nonresident employed by a New York employer, assigned to a primary work location in New York, for his convenience rather than necessity of the employer based on the application of the convenience of the employer test as set forth in the Division's regulations at 20 NYCRR 132.18 (a).

42. If petitioners prevail on their assertion that they are not required to allocate petitioner's wages to New York during the 193 days that petitioner worked in New Jersey and Pennsylvania, the Division agrees that the amount of the refund that would be due is $50,229.00, plus applicable interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that petitioners bear the burden of proving that a

notice of disallowance by the Division is erroneous, that nonresidents are taxed by the State of New York for income derived from New York sources, that they are taxed in the same way as residents with certain adjustments and credits applied and that the starting point is income as reported on federal returns. The Administrative Law Judge then applied the apportionment of income from work in and out of state pursuant to formulas and regulations published by the Division.

Noting that the "convenience of the employer test," "provides that any allowance claimed for days worked outside New York must be based on the performance of services that, of necessity, as distinguished from convenience, obligates the employee to out-of-state duties in the service of the employer," the Administrative Law Judge explained that to conclude that telecommuting is an employer's necessity requires establishing that the job cannot be effectively performed from the employer's New York premises due to factors such as specialized equipment needs or the nature of the work itself. The Administrative Law Judge found no support in the hearing record regarding such a necessity relating to petitioner's employer. The Administrative Law Judge further found that the record did not establish that petitioner's employment duties had been altered during the relevant period. Accordingly, the Administrative Law Judge held that petitioners had failed to establish that the Division improperly allocated petitioner's 2020 wages from his New York employer, denied the petition and sustained the notice of disallowance.

ARGUMENTS ON EXCEPTION

On exception, petitioners request the inclusion of additional findings of fact relating to why and when petitioner's employer closed its New York City office. They also seek to include an affidavit of petitioner Richard S. Myers as improperly disallowed by the Administrative Law Judge. Finally, petitioners assert that their circumstances are distinguished

from precedential cases cited by the Administrative Law Judge and further declare that the Administrative Law Judge misstated or misapplied the principles enunciated in those cases. Based on those proposed additional findings and their interpretation of legal precedents, petitioners seek to have the notice of disallowance reversed and their petition granted.

In opposing petitioners' position, the Division stated that, based upon a review of the record and applicable precedent, petitioners failed to establish that the Division's notice of disallowance was incorrect or improper. The Division also asserts that petitioners offered no new arguments on exception to demonstrate that the determination of the Administrative Law Judge is erroneous. The Division specified that the fact that an employer does not accommodate an employee's work at the employer's office is not by itself sufficient to meet the standards of the convenience of the employer test. The Division also asserts that if the work performed by the employee could have been performed in the New York office, had the office been available, it would fail to meet the convenience of the employer test on that basis as well. Noting that BMO, petitioner's employer, was not obligated under an executive order to close its New York office, and the record is silent as to the reason(s) BMO did not make an office available to petitioner, the Division asserts that the "strict standard for establishing employer necessity is lacking." Based upon that analysis, the Division requests that the determination of the Administrative Law Judge and the notice of disallowance be sustained and the petition denied.

OPINION

In reviewing petitioners' request for additional findings of facts, we find that the record accurately reflects both the stipulation of facts agreed to by the parties and the relevant additional findings proposed by each of the parties incorporated into the findings, which we adopt here.

We also find that the Administrative Law Judge properly excluded from evidence an affidavit petitioners sought to introduce. We note that the information therein is irrelevant or not supported by the record and that it was not offered in a timely fashion pursuant to our Rules of Practice and Procedure. Specifically, it was offered on May 8, 2024, not within the time frame outlined by the Administrative Law Judge and was, therefore, properly excluded (20 NYCRR 3000.12 [b] [2]). Accordingly, the requests for additional findings of fact and the inclusion of the affidavit are denied.

We now turn to the issue of whether the Division properly allocated income earned by petitioner Richard S. Myers from BMO, a New York employer, as taxable in New York. It is well established that the burden falls upon those challenging determinations by the Division to prove that those determinations are incorrect and without a rational basis (***see*** Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]); ***Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***see also Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842, 843 [3d Dept 1986]).

At the core of this dispute is the application of New York tax law and regulations regarding the taxation of non-resident income. Petitioner was employed by BMO, a New York-based bank and, until the COVID-19 emergency, that is where he reported to work, earned and reported his income. When the COVID-19 emergency struck, BMO elected to close its doors and allow its employees to work remotely (***see*** finding of fact 18). For just two days, petitioner worked from BMO's "disaster recovery site" in New Jersey (***see*** finding of fact 19). For the remainder of the period in issue, petitioner worked from home (***see*** finding of fact 21). The New York office of BMO remained closed throughout the entire period at issue. Consequently, petitioner claimed that the 2020 income derived from BMO should not be subject to New York

State income tax.

The personal income tax laws of New York State regarding nonresident taxpayers conform with federal constitutional constraints (***Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.***, 1 NY3d 85 [2003], ***cert denied*** 541 US 1009 [2004]). The basis of any income tax imposition in that circumstance is premised upon whether the employer determines that the employee's job functions must be located in or out of New York State and the decision by the employer to move job functions out of state must be one of employer necessity and is therefore not based upon the decision of the employee to do so. That is, the taxable income of nonresident individuals is that portion of income sourced, earned or otherwise derived from a New York employer (Tax Law § 631 [c]). An exception exists if the employment relationship or obligations necessitate the employee to perform their services outside of New York (20 NYCRR 132.18). This assures that nonresident and resident taxpayers are treated fairly.

While the examination of whether the exception is met has been long called the "convenience of the employer test," paraphrasing the courts of New York State, the examination may be more aptly described as being a measure of the *necessity* of the employer (***see e.g. Burke v Bragalini***, 10 AD2d 654 [3d Dept 1960]. Further, it has been established that the necessity aspect is focused on whether the New York employer requires the employee to actually perform their services in a location other than New York because some unique aspect of the employment requires it (***see Matter of Speno v Gallman***, 35 NY2d 256, 259 [1974]; ***see also Matter of Wheeler v State Tax Commn.***, 72 AD2d 878 [3d Dept 1979]; ***Matter of Kitman v State Tax Commn.***, 92 AD2d 1018 [3d Dept 1983], ***lv denied*** 59 NY2d 603 [1983]; ***Matter of Phillips v New York State Dept. of Taxation & Fin.***, 267 AD2d 927 [3d Dept 1999], ***lv denied*** 94 NY2d 763 [2000]; ***Matter of Tuohy***, Tax Appeals Tribunal, February 13, 2003; ***see also Matter of***

Unterweiser, Tax Appeals Tribunal, July 31, 2003.

New York tax law provides for the imposition of a tax on the income of every nonresident and part-year resident individual which is derived from sources in New York equal to the tax base multiplied by the New York source fraction (***see*** Tax Law § 601 [e] [1]). Tax Law § 631 (a) sets forth that "[t]he New York source income of a nonresident individual shall be the sum of the following: (1) [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 . . . ." Income from New York sources includes income arising from a "business, trade, profession or occupation carried on in this state" (Tax Law § 631 [b] [1] [B]). The Division's regulations regarding New York business activities provide that:

> "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 "convenience rule" appears at 20 NYCRR 132.18, and states that:
>
> "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 working days employed both within and without New York State . . . . *However, any allowance claimed for days worked outside of 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] [*emphasis added*]).

Against this controlling statutory and regulatory authority, we must examine circumstances where nonresidents were found to have met the convenience/necessity rule. Where employment requirements necessitated the use of specialized out of state facilities in which petitioner would perform required tasks, it was established that those duties could not have been carried out at the New York location of petitioner's employer or reasonably within New York State (***Matter of Fass v State Tax Commn.*** (68 AD2d 977 [3d Dept 1979], ***affd*** 50 NY2d 932 [1980]).

In contrast, in ***Matter of Wheeler v State Tax Commn.***, work performed at home on weekends was distinguished from the circumstance in ***Fass.*** Likewise, the fact that a taxpayer had to perform job duties outside normal office hours was not sufficient to justify a finding of employer necessity of working out-of-state (***Matter of Phillips v New York State Dept. of Taxation & Fin.***). The use of televisions installed at the home of an employee who was a television critic was determined not to constitute an exception based upon specialized equipment (***Matter of Kitman v State Tax Commn.***). This Tribunal has also rejected challenges where a taxpayer's work was performed out-of-state for the employee's convenience and not for the employer's necessity, even where the employee was not provided office space (***Matter of Tuohy***). Also, a taxpayer's work was held not to have been performed out-of-state for the necessity of the employer where the employee's services were substantially unchanged after her office at her New York-based employer became unavailable (***Matter of Unterweiser***).

Indeed, in our most recent examination of the issue, we rejected the taxpayer's assertion that the complete shutdown of their New York employer's premises due to the COVID-19 emergency and an executive order of the governor of New York State necessitated working from home (***Matter of Zelinsky***, Tax Appeals Tribunal, May 15, 2025). Similar to the instant case,

petitioners claimed that the temporary closure of the employer's New York workplace required them to work from home. Instead, we held that the employer permitting employees to work from home, does not constitute a necessity to have those job functions performed in those places. It is also noted that while petitioner Zelinsky's employer was subject to a COVID-19 executive order by then-Governor Andrew M. Cuomo and other guidance to close its premises to employees, here, petitioner's employer was specifically exempted from doing so and instead, chose to do so of their own volition (***see*** findings of fact 12-15). While it may have been sagacious to close the office, it was not, as in ***Zelinsky***, required by the executive order or any other guidance. That said, our decision in ***Zelinsky*** made clear once again that the closure of an employer's premises was not, itself, sufficient to meet the standard of necessity.

The convenience/necessity of the employer test has been refined to account for a very limited, specific set of circumstances where a New York employer finds it necessary to locate or relocate the services of their employee out of state due to factors such as specialized equipment, and/or needs or the nature of the work itself necessitating out of state performance (***see e.g. Matter of Fass***).

Here, the New York office of petitioner's employer was, prior to its temporary closure, used by petitioner to perform employment duties and its voluntary closure is not disputed by the parties. Further, it is important to note that the employer here holds itself out as a New York business and avails itself of the benefit of the New York market.

The record does not establish whether petitioner was prohibited from working from home prior to or after the COVID-19 emergency. However, the option to work from home is one carefully considered, as many businesses have the flexibility to offer such a benefit. The implications of ruling that the convenience/necessity of the employer rule would apply to exempt

nonresident taxpayers' income any time a New York business elects to temporarily close a physical location in New York for general business reasons would result in unfair treatment of resident taxpayers. It is evident that a New York business remains such when they temporarily close a physical New York location (***Matter of Zelinsky***). BMO did not shut down its New York operations. Instead, it elected to temporarily close its physical office. Nothing in the record reflects that petitioner was obligated to work from home due to the necessity of the employer. The test is a holistic approach and cannot be dissected simply to benefit certain employees who work for entities that temporarily close their physical New York locations, while still availing themselves of the New York market.

Though an entity which may have employees with duties that can be performed remotely from any location has the option to allow such work arrangements, nothing in the record reflects that the nature of the work here required petitioner to work from home. Any New York business that has the capacity to perform its functions remotely may decide to award its employees the benefit of remote work, notwithstanding whether they close their New York premises. This does not make the employee's derived income non-New York. It simply reflects a business decision to offer flexibility. While petitioner may not have had an option to work from the New York office while it was temporarily closed, the relevant fact here is the employer's choice to allow its employees the flexibility to work remotely for a period of time. Petitioner was not obligated by the employer to work from any particular location in or out of state as a requirement of performing his job functions, and nothing in the record reflects that petitioner's job duties were otherwise affected.

There are simple basic facts in this matter. Though not legally obligated to do so, petitioner's New York employer chose to temporarily close the New York office in which

petitioner, a non-resident, worked. There is nothing in the record to indicate that the employer mandated petitioner to work from home or any other specific location or that there was any specialized need for petitioner to work at his home that would, from BMO's perspective, make it necessary for him to work there. Except for two days at the employer's temporary location in New Jersey, petitioner freely chose to work from his home. Petitioners have thus failed to establish that the income for the period in issue was properly excludable from taxation by the State of New York or that the determination of the Administrative Law Judge is incorrect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard S. Myers and Erin Langan is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Richard S. Myers and Erin Langan is denied; and
4. The notice of disallowance dated February 9, 2022 is sustained.

DATED: Albany, New York
October 14, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner