STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **DONALD T. STRUCKLE, JR.** 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.	:	DETERMINATION DTA NO. 830731

Petitioner, Donald T. Struckle, Jr., 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 2020.

A hearing was held by videoconference before Alexander Chu-Fong, Administrative Law Judge, on September 27, 2023, with all briefs due by February 15, 2024, which date began the six-month period for the issuance of this determination. Petitioner appeared by Werner & Co. Certified Public Accountants, PC (Kristofer M. DePaolo, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether petitioner established that the Division of Taxation improperly applied the convenience of the employer test, which subjected all of petitioner's wage income to New York personal income tax in tax year 2020.

FINDINGS OF FACT

1. Petitioner, Donald T. Struckle, Jr., filed a New York State nonresident and part-year resident income tax return, form IT-203, for 2020 (return) that reported a home address in Bethlehem, Pennsylvania, and claimed a refund in the amount of $9,013.00.

2. On his return, petitioner reported: (i) 66 days worked in New York; (ii) $178,637.00 of wage compensation from INVNT LLC, a New York employer with an address of 524 Broadway, 4th Floor, New York, New York; (iii) $11,464.00 in New York tax withholdings; (iv) an income allocation percentage of 25.19% to New York State; (v) total New York State taxes due in the amount of $2,451.00; and (vi) claimed a refund of $9,013.00.

3. The Division of Taxation (Division) selected petitioner's return for a desk audit review, assigning the review audit case ID number X-189535996.

4. On March 23, 2021, the Division sent petitioner a request for information (RFI) letter and included an income allocation questionnaire (IA questionnaire).

5. The IA questionnaire heading provides, in relevant part, the following: "In particular, days you telecommuted from a location outside New York State are considered days worked in the state, unless your employer has established a bona fide employer office at your telecommuting location." Below the location of working days section of the IA questionnaire, it stated the following:

> "You must be prepared to provide documentation substantiating the above day counts upon request.
>
> If you telecommuted from a location or locations outside New York State, please specify whether any such location constituted a bona fide employer office, and provide proof of actions taken by the employer, if any, to establish a bona fide employer office at that location. For more information on the factors used to determine whether a telecommuting location is a bona fide employer office, see *www.tax.ny.gov* (search: *telecommuting*)."

6. Petitioner responded to the RFI letter, which included a completed IA questionnaire. His responses indicated that he was employed for the full year by "Invent [sic] LLC" with the job title of producer, with $178,637.49 in wages. He provided the following day count data:

Total number of days in the employment period:	366
Total number of non-working days (weekends, holidays, vacation, sick leave, etc.):	104
Total number of working days:	262
Total days worked at home:	196

7. He also answered the location of working days information section of the IA questionnaire as follows:

Address	Type of work location (office, home client site, etc.)	Number of days worked at location	Nature of duties performed (in-person business meetings, telecommuting, client visit, etc.)
524 Broadway 4th Floor, NY	Office	66	In Person work
Bethlehem, PA[1]	Home Office	196	Remote work due to Pandemic

8. Petitioner included a letter, dated May 12, 2021, from the Director of Human Resources of his employer (INVNT letter) with his response, stating the following:

> "Please be advised that the INVNT Group NYC office was closed from March 2020-September 2020. The office reopened for two months from September through November and then closed again in December 2020. INVNT Group employees were granted permission to work from their home offices from March 2020-December 2020."

9. On May 6, 2021, the Division issued an account adjustment notice in this audit case. The "Explanation" section states, in part, that:

> "We reviewed the information you sent in response to our letter dated 03/23/2021.
>
> Your information does not establish your assigned primary work location outside of New York State or show you have met the factors to prove your employer had established a bona fide employer office at your telecommuting location.

[1] Petitioner's street address has been omitted.

> Therefore, you owe New York State income tax on income earned while telecommuting."

The Division recomputed petitioner's return by allocating the majority petitioner's income from INVNT, i.e., $178,637.00 of $178,650.00, to New York, which subjected that amount to personal income tax. This adjustment reduced petitioner's refund from $9,013.00 to $1,732.97.

10. On August 11, 2021, the Division issued a notice of disallowance (notice), which adopted the reasoning in the May 6, 2021, account adjustment notice. In this notice, the Division informed petitioner that it disallowed $7,280.03 of his claimed 2020 refund.

11. At the hearing, the Division presented the testimony of Tim Martuscello, a Tax Technician III with the Division's Income/Franchise Desk Audit Bureau, with over 29 years of experience working for the Division. During his testimony, Mr. Martuscello explained the Division's position, which flows from the convenience of the employer test:

> "[T]he idea of the convenience of the employer test is that the [taxpayer is] obligated to work outside the state based on necessity of the employer versus the convenience…. [A]ny days outside of the state are based on necessity. The taxpayer could work In--in [sic] locations other than the telecommuting, other than his home. It's based on necessity for various reasons."

12. Regarding this specific case, Mr. Martuscello stated that the COVID-19 pandemic impacted New York State businesses, including petitioner's employer. He testified that New York State did shut down for at least part of 2020 due to the COVID-19 pandemic. Referencing the INVNT letter, Mr. Martuscello conceded that if petitioner's employer's office's doors "were locked," then he could not report to his primary workplace. However, he testified that closure of the New York City office, alone, did prove that INVNT required petitioner to work at his Pennsylvania home. Mr. Martuscello went on to explain the Division's position:

> "[I]f the employer establishes that the taxpayer's home office is actually a bonafide office of the employer in much the same way as another office In--in

> [sic] another state, then those days worked at home would be considered days worked outside the state."

Mr. Martuscello testified that in this case, the Audit Bureau found that petitioner's proof did not substantiate that INVNT changed petitioner's assigned office away from New York City. In his words, "there was no evidence showing there was a change in [his] primary work location." Mr. Martuscello averred that the proof also did not establish that petitioner's home office served as a bona fide office of his employer. Therefore, the Division adjusted petitioner's return by allocating all 2020 work days to New York State.

13. Petitioner provided a copy of his 2020 Pennsylvania income tax return,[2] which included a "PA Schedule UE – 2020." In "Section IV – Office or Work Area Expenses," petitioner answered "yes" to the following questions:

> "D1. Does your employer require you to maintain a suitable work area away from the employer's premises?
> D2. Is this work area the principal place where you perform the duties of your employment?
> D3. Do you use this work area regularly and exclusively to perform the duties of your employment?"

Petitioner claimed $2,367.00 of "Total Office or Work Area Expenses" at line 17 of this schedule.

14. Petitioner did not testify at the hearing in this matter. However, at the hearing his representative indicated that petitioner would have reported to the INVNT New York office had it not been for the COVID-19 pandemic. His representative did not address the period of September to November 2020 when office had reopened.

[2] Petitioner filed a joint Pennsylvania income tax return with his spouse for tax year 2020.

15. Pursuant to State Administrative Procedure Act (SAPA) § 306 (4), the undersigned took official notice of the COVID-19 pandemic and its effects, including its impact on New York businesses and their employees.

16. Pursuant to SAPA § 307 (1), the Division proposed eight findings of fact. The record supports all the Division's proposed findings of fact and they have been substantially incorporated above.

STATEMENT OF THE PARTIES' POSITIONS

17. Petitioner argues that the Division unfairly applied the convenience of the employer test. He argues that in 2020, the COVID-19 pandemic forced his employer to close his office, which prevented him from reporting to his normal New York City workplace. Petitioner argues that given the exceptional circumstances, he fairly allocated his work days among New York and Pennsylvania. He contends that it is unfair to apportion all his wage income to New York given that his employer closed its in-state office. Therefore, petitioner requests that his petition be granted, his allocation, as reported, be accepted, and that the notice be cancelled.

18. The Division argues that it properly applied the convenience of the employer test. The Division notes that the New York courts have repeatedly upheld the validity of the convenience of the employer test and rejected constitutional challenges. Regarding this specific matter, it notes that petitioner did not establish either that he worked at his Pennsylvania home due to INVNT's necessity or that it established a bona fide office at that location. The Division, accordingly, requests that the notice be sustained, and the petition be denied.

CONCLUSIONS OF LAW

A. In proceedings before the Division of Tax Appeals, the taxpayer typically bears the burden of proof (***see*** Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; ***Matter of Gilmartin v Tax***

Appeals Trib., 31 AD3d 1008, 1010 [3d Dept 2006]). The burden rests with the taxpayer to demonstrate, by clear and convincing evidence, that the Division erred, here, in disallowing the refund claim (***see*** Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]; ***see also Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]).

B. Tax Law § 601 (e) (1) imposes a tax on "income which is derived from sources in this state of every nonresident." Tax Law 631 (a) (1) defines the "New York source income of a nonresident individual" as including "[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." Tax Law § 631 (b) (1), in turn, provides that "[i]tems of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to: . . . (B) a business, trade, profession or occupation carried on in this state."

C. Under Tax Law § 631, which defines New York source income of a nonresident individual, "[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, 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" (Tax Law § 631 [c]). The pertinent regulation for apportionment and allocation of non-New York resident earnings is set forth at 20 NYCRR 132.18 (a), which provides, in relevant part:

> "If a nonresident employee (including corporate officers, but excluding employees provided for in section 132.17 of this Part) 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. . . . 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."

The last sentence of the above-quoted regulation sets forth the so-called convenience of the employer test (***see Matter of Huckaby v New York State Div. of Tax Appeals***, 4 NY3d 427, 435 [2005], ***cert denied*** 546 US 976 [2005]; ***Matter of Zelinsky v Tax Appeals Trib.***, 1 NY3d 85, 90 [2003], ***cert denied*** 541 US 1009 [2004]; ***Matter of Speno v Gallman***, 35 NY2d 256 [1974]).

D. The convenience of the employer test would "more aptly be called the 'necessity of the employer' test" (***Zelinsky***, 1 NY3d at 90 n 3). This regulation provides that any allowance claimed for days worked outside New York State must be based on performance of services that necessarily obligate the employee to out-of-state duties in service of his employer (***id***). "The policy justification . . . [is] that 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" (***Speno***, 35 NY2d at 259). "[T]he burden remains upon the taxpayer to establish that the work being done by him at his home was also for his employer's necessity" (***Matter of Fischer v State Tax Commn.***, 107 AD2d 918, 919 [3d Dept 1985], ***appeal dismissed*** 65 NY2d 690 [1985]).

E. In ***Matter of Unterweiser*** (Tax Appeals Tribunal, July 31, 2003), the Tax Appeals Tribunal reviewed the relevant jurisprudence. It synthesized the exception to 20 NYCRR 132.18 [a] as follows:

> "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 she works outside of New York, performs no work within New York, and has no office or place of business in New York (i.e., where suitable facilities to carry out her employment duties are not maintained for or available to her in New York) (***Matter of Gleason v State Tax Commn.***, 76 AD2d 1035, 1036 [3d Dept 1980]; ***Matter of Hayes v State Tax Commn.*** 61 AD2d 62, 64 [3d Dept 1978]; ***Matter of Linsley v Gallman***, 38 AD2d 367, 369 [3d Dept 1972], ***affd*** 33 NY2d 863 [1973])."

Therefore, a nonresident must prove each of the foregoing factors to establish that income from a New York employer is not subject to New York taxation (***id.***). With this standard in mind, it is now appropriate to turn to the instant matter.

F. In 2020, petitioner performed his work duties for his New York employer at his Pennsylvania home for 196 days. However, INVNT maintained an office for him in-state, and he also worked in New York for a total of 66 days in 2020. The presence of these factors alone indicate that the convenience of the employer test applies to petitioner's income from INVNT.

The record further fails to establish that INVNT required petitioner to work at his Pennsylvania home. It is not disputed that the COVID-19 pandemic created extraordinary circumstances in 2020. This crisis certainly merited the closure of his employer's New York office. On that point, the INVNT letter provides: "INVNT Group employees were granted permission to work from their home offices from March 2020-December 2020." The language indicates that the employees' ability to work remotely was permitted, but not obligatory. This, admittedly, left petitioner in a situation where he did not have to work remotely, but also could not work at the New York office. Neither the INVNT letter, nor anything in the record, establishes that INVNT specifically needed petitioner to carry out his employment duties at his Pennsylvania home as opposed to any other location. As such, it must be concluded that petitioner did not work remotely out of his employer's necessity.

G. Tax Law § 689 (e) requires that petitioner establish that the Division clearly erred. In this instance, this required proving that he worked from his Pennsylvania home out of his employer's necessity (***see Fischer***, 107 AD2d at 919; ***Zelinsky***, 1 NY3d at 90). The record herein fails to do that. It must be concluded that petitioner did not establish that the Division misapplied the convenience of the employer test (***see*** 20 NYCRR 132.18 [a]). Therefore, it must

also be concluded that the Division properly adjusted petitioner's return and partially disallowed petitioner's claimed refund.

H. The petition of Donald T. Struckle, Jr. is denied, and the notice of disallowance, dated August 11, 2021, is sustained.

DATED: Albany, New York
August 8, 2024

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE