STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **SCOTT AND ELIZABETH BRYANT** 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. 830818

Petitioners, Scott and Elizabeth Bryant, 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 January 30, 2024, with all briefs due by July 15, 2024, which date began the six-month period for the issuance of this determination. Petitioners appeared by Tax Law Inc. (Howard Chernoff, Esq., CPA, of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUES

I. Whether petitioners established that the Division of Taxation erroneously denied a portion of their refund claim on the basis that petitioners incorrectly reported petitioner Scott Bryant's amount of 2020 New York State tax withholdings.

II. Whether petitioners established that the Division of Taxation improperly applied the convenience of the employer test, which subjected all of petitioner Scott Bryant's 2020 income from his New York employer to New York State personal income tax.

FINDINGS OF FACT

1. Petitioners, Scott and Elizabeth Bryant, filed form IT-203, New York State nonresident and part-year resident income tax return, for the tax year 2020 (2020 return) that listed an address in New Jersey and claimed a refund in the amount of $54,044.00.

2. On the return, petitioners reported: (i) New York adjusted gross income of $587,201.00, a figure that represents the combined income of petitioner and his spouse; (ii) an income allocation of 11.59% to New York State; (iii) $58,471.00 in New York State tax withholdings; and (iv) total New York State taxes due in the amount of $4,427.00.

3. The Division of Taxation (Division) selected petitioners' return for a desk audit review and assigned the review audit case ID number X-189601727.

4. On May 18, 2021, the Division sent petitioners a request for information letter (RFI). The RFI requested copies of federal forms W-2, wage and tax statements, and included an income allocation questionnaire (IA questionnaire).

5. The IA questionnaire stated, in relevant part, the following:

> "If you are a nonresident or part-year resident whose assigned primary work location is in New York State, days you worked at a location outside New York State may be considered New York workdays. 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."

6. 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*)."

7. On June 16, 2021, petitioners responded to the RFI by submitting documents that included the RFI response page, Mr. Bryant's 2020 form W-2, and a partially completed IA questionnaire for Mr. Bryant. The RFI response contained the following response: "OFFICE LOCATION IN NYC WAS CLOSED[,] I WAS ORDERED NOT TO COME IN TO NYC[.]"

8. Mr. Bryant's 2020 form W-2 indicated that he was employed by "NN Investment Partners North America LLC" (NN Investment). This form detailed his compensation as $400,209.18, with $28,471.19 in New York State income tax withholdings.

9. On the IA questionnaire, petitioners' responses indicated that he was employed in 2020 by "NN INVESTMENT MANAGEMENT" and lists "2711 CENTERVILLE RD WILMINGTON DE" as his employer's address. Petitioners did not provide a response for "Job title." The form indicated that Mr. Bryant received compensation in the amount of "$400,209.00" for this undisclosed role. For the "[a]ssigned primary work location," petitioners indicated "NONE." The questionnaire was signed by both petitioners with the date of "6/15/21."

10. Petitioners completed the day count table as follows:

Total number of days in the employment period:	365
Total number of non-working days (weekends, holidays, vacation, sick leave, etc.):	115
Total number of working days:	250
Total days worked at home:	208

Of note, this table listed 365 days during the employment period, whereas 2020 had 366 calendar days.

11. Petitioners answered the location of the working days section 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.)
[Street Address], NJ [1]	HOME	208	

The answers did not disclose either the type of the duties that Mr. Bryant performed, where he was or what he did for 42 unaccounted workdays.

12. On October 1, 2021, the Division issued an account adjustment notice (AAN). The "Explanation" section states, in part, that:

> "Since you did not respond to our audit inquiry letter, dated June 18, 2021, regarding income sourced to New York, we have recalculated your return based on information available to us.
>
> If you would like to provide the information previously requested but need a copy of the original letter sent to you, call us at (518) 457-2255.
>
> We have adjusted the New York column of your return to include the wages from NN Investment Manage [sic].
>
> We have adjusted the New York State taxes withheld to $28,471.00.
>
> Our changes result in an adjusted refund."

13. The Division recomputed petitioners' return by allocating all of Mr. Bryant's income from NN Investment, i.e., $400,209.00, to New York State, which subjected that amount to personal income tax. Additionally, it adjusted Mr. Bryant's claimed New York State withholdings from $58,471.00 to $28,471.00, as reported on the 2020 form W-2. These adjustments reduced petitioners' claimed refund from $54,044.00 to $2,433.88, which the Division granted.

14. On October 4, 2021, petitioners responded to the AAN, by resubmitting documents, including another IA questionnaire. This new submission indicated that Mr. Bryant was

[1] This box listed petitioners' street address, which has been omitted. It did not list a town.

employed in 2020, for the full year, by "NN Investment Partners" and listed his employer's address as "230 Park Ave, New York, NY." The form indicated that Mr. Bryant's job title was "Vice President," with compensation in the amount of $400,209.18. For the "[a]ssigned primary work location," he indicated his home address in New Jersey. The questionnaire was signed by both petitioners with the date of "5/24/21."

15. On this IA questionnaire, petitioner provided the following day count table for his work:

Total number of days in the employment period:	366
Total number of non-working days (weekends, holidays, vacation, sick leave, etc.):	138
Total number of working days:	228
Total days worked at home:	188

As a point of emphasis, the IA questionnaire provided in response to the RFI and the IA questionnaire provided in response to the AAN present conflicting day counts.

16. On the newly submitted IA questionnaire, petitioners answered the location of working days section 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.)
230 Park Ave, New York, NY	Office	40	Investing
[Street Address, Town], NJ[2]	Remote Office	188	Investing

17. Along with the foregoing, petitioner provided the following statement:

> "My company closed their NY office during 2020, they provided a full home office equipment setup for full time remote work. I have not been into New York City since March 6th, a formal communication was sent out the following week, attached[.]"

[2] This box listed petitioners' street address and town, which have been omitted.

18. The record does not include the referenced "formal communication" or any similar document from NN Investment.

19. On October 29, 2021, the Division issued a notice of disallowance (notice), which stated, in part, the following:

> "We reviewed the information you sent in response to our letter.
>
> 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. Therefore, you owe New York State income tax on income earned while telecommuting."

In the notice, the Division stated that it disallowed $51,610.12 of the claimed refund amount.

20. The Division introduced an affidavit, sworn to on December 21, 2023, of Tim Martuscello, a Tax Technician III with the Division's Income/Franchise Desk Audit Bureau, with over 28 years of experience working for the Division. In his affidavit, Mr. Martuscello explained the Division's position in this matter:

> "The Division reviewed Petitioners' response to the RFI and determined that Petitioners failed to properly allocate the correct amount of income to New York in tax year 2020 for days worked in New Jersey as a nonresident employed by a New York employer, assigned to a primary work location in New York, for their 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). Further, the Division determined that Petitioners failed to show they met the factors set forth in TSB-M-06(5)I - New York Tax Treatment of Nonresidents and Part-Year Residents Application of the *Convenience of the Employer* Test to Telecommuters and Others, to prove their employer set up a bona fide employer office at their telecommuting location in New Jersey at their home. Additionally, the Division determined that the amount of New York State tax withheld by Petitioners' employer and remitted to the Division did not match what Petitioners reported to the Division on their 2020 Tax Return."

21. At the hearing, Mr. Bryant testified that NN Investment was an international investment fund, based in Luxembourg. Mr. Bryant elaborated on his "investing" work, averring that his primary field is energy analysis, which covers oil, gas, and renewable energy markets.

22. Mr. Bryant stated that, during the first few months of 2020, he worked in the NN Investment New York City office at 230 Park Avenue. He explained that employees stopped reporting to this office during 2020. He and his staff packed up their equipment and worked from remote locations, in his case, his home in New Jersey. Mr. Bryant testified that apart from a holiday party that year, the staff "never went back." He testified that the closure was due in part to COVID-19 but also due to the fact that NN no longer wanted to manage its own investments. Mr. Bryant explained that this office was permanently closed in December 2022 because the parent company sold NN Investment to Goldman Sachs.

23. Mr. Bryant presented himself as an individual knowledgeable about financial matters. He explained that he worked in New York City during 2020 and that any representations otherwise were in error. When asked about the discrepancy between the reported and actual New York State tax withholding amounts, Mr. Bryant stated that he was not aware of the error until the Division pointed it out at the hearing. Mr. Bryant asked his representative, who also prepared the return, about the error, and he also could not provide an explanation for the error. Mr. Bryant credibly testified that he tried to report everything properly on his returns, but that 2020 was fraught with confusion.

24. The record lacks documentary evidence corroborating the activities alleged in Mr. Bryant's testimony.

25. While Mr. Bryant was offering testimony, his representative moved to adjourn the hearing for personal reasons. The notice of hearing, issued by the Division of Tax Appeals on December 27, 2023, states the following:

> "**An adjournment may be requested but will be granted only for good cause and only if the request is received in <u>writing</u> by the Division of Tax Appeals at least 15 days prior to the hearing date.**"

This oral request to adjourn the hearing failed to meet these requirements and, therefore, the undersigned denied the request.

26. At the hearing, the Division requested that judicial notice be taken that mandatory workforce reductions, in response to the COVID-19 pandemic, did not apply to NN Investment because it was exempt as an essential business. Petitioners objected to this request. The undersigned left the record open for the parties to submit evidence on that topic and instructed them to address this point in their briefs.

27. On June 27, 2024, the Division submitted a document issued by the New York State Department of Economic Development d/b/a Empire State Development and entitled "Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction under Recent Executive Orders" (Guidance). This Guidance expounded on then-Governor Cuomo's 2020 Executive Order 202.6 (EO 202.6).

28. In EO 202.6, then-Governor Cuomo provided, in part, the following:

> "Effective on [March 20, 2020,] at 8 p.m.: All 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. Each employer shall reduce the in-person workforce at any work locations by 50% no later than [March 20, 2020,] at 8 p.m. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. This includes… banks and related financial institutions."

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

30. Petitioner did not avail himself of the opportunity to be heard on this issue.

31. Pursuant to State Administrative Procedure Act (SAPA) § 307 (1), the Division proposed 11 findings of fact. The record supports the Division's proposed findings of fact 1 through 10, which have been substantially incorporated above. Proposed finding of fact 11 calls for a conclusion and has been rejected.

STATEMENT OF THE PARTIES' POSITIONS

32. At the hearing, petitioners argued that the amounts reported on their 2020 return reflect the reality that NN Investment's New York City office was closed. Their representative argued that his employer was required to be closed as a result of the COVID-19 pandemic. Petitioners, therefore, argue that the reported allocation percentage was correct. Their representative also denied any error regarding the reported New York State tax withholdings. Petitioners did not avail themselves of the opportunity to respond to the judicial notice issue raised by the Division. The petition requests that the notice be cancelled, and the entirety of the claimed refund granted.

33. 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.

34. The Division clarified its request for judicial notice: it now asks that judicial notice be taken of the Guidance, which interprets EO 202.6. The Division still maintains that the mandatory workforce reductions imposed by EO 202.6 did not apply to NN Investments because Mr. Bryant's employer fell into an exempt category. It contends that notwithstanding the extraordinary nature of the COVID-19 pandemic, petitioners must still establish the elements necessary to meet the convenience of the employer test. The Division argues that, in this instance, petitioners did not establish either that Mr. Bryant worked at his New Jersey home due

to NN Investment's necessity or that the company established a bona fide office at that location. Accordingly, it requests that the notice be sustained, and the petition 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 in disallowing the refund claim (***see id.***; ***Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]).

B. The initial issue is whether petitioners correctly reported Mr. Bryant's New York State tax withholdings. Petitioners' 2020 return indicated that Mr. Bryant's employer withheld $58,471.00. Contrarily, Mr. Bryant's 2020 form W-2 from NN Investment indicated withholdings of $28,471.19. This is a clear error.

C. Tax Law § 689 (e) places the burden upon petitioners to establish that the Division was incorrect. The Division requested all W-2s. The W-2 that they provided only substantiated $28,471.19. At hearing, they could not explain the discrepancy and did not provide any other W-2s. In the absence of proof, petitioners' argument fails to meet their burden (***see*** Tax Law § 689 [e]). Accordingly, it is concluded that the Division properly adjusted petitioners' 2020 withholdings to the correct amount of $28,471.19.

D. The Division requested that judicial notice be taken of the Guidance that interprets EO 202.6. SAPA empowers administrative courts, such as the Division of Tax Appeals, to take official notice "of all facts of which judicial notice could be taken" (SAPA § 306 [4]). Judicial notice may only be taken of particular facts, if the items are of common knowledge or are

determinable by referring to a source of indisputable accuracy (***see Matter of Crater Club v Adirondack Park Agency***, 86 AD2d 714, 715 [3d Dept 1982], ***affd*** 57 NY2d 990 [1982]). Courts today will often judicially notice matters of public record (***see*** Fisch on New York Evidence, § 1063 at 600 [2d ed]).

E. The Division's request is granted because the Guidance constitutes a matter of public record. During the year at issue, this document was widely distributed. It was intended to assist businesses in determining whether they were subject to EO 202.6 workforce reductions, and how to operate during the COVID-19 pandemic. It is concluded that the mandatory workforce reductions did not apply to NN Investment because it constituted an essential business under EO 202.6 and the Guidance.

F. The remaining issue is whether petitioners established that the Division improperly allocated all of Mr. Bryant's income derived from his employment with NN Investment to New York State. 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 "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) 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."

G. This statute goes on to state, "[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], 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]). At 20 NYCRR 132.18 (a), the Division's regulate the apportionment and allocation of nonresident income, providing, 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 regulation has become known as the 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, 259 [1974]).

H. 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 (***see 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 v Gallman***, 35 NY2d at 256). "[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]).

I. In ***Matter of Unterweiser*** (Tax Appeals Tribunal, July 31, 2003), the Tax Appeals Tribunal 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 forgoing factors to establish that income from a New York employer is not subject to the convenience of the employer test (***id.***).

J. Herein, petitioners have failed to establish any of these factors because Mr. Bryant worked in New York City during the beginning of 2020. Accordingly, the convenience of the employer test applies to Mr. Bryant's income.

K. Petitioners did not avail themselves of the opportunity to adduce evidence proving their case. NN investment was under no *legal* mandate to close Mr. Bryant's New York office during the COVID-19 pandemic, but it could have ordered its employees to report from specific locations for its own necessity. Despite Mr. Bryant's testimony that such an order was given, the record contained no proof supporting these assertions. This proof would have been particularly useful in this matter, given the credibility issues that arise because of the inconsistencies between the IA questionnaires provided in response to the RFI and to the AAN. What remains is Mr. Bryant's testimony, which, standing alone, cannot carry the burden of proof (***see*** Tax Law § 689 [e]). Accordingly, it must be concluded that petitioners failed to establish that the Division improperly allocated all of Mr. Bryant's income from NN Investment to New York State.

L. The petition of Scott and Elizabeth Bryant is denied, and the notice of disallowance, dated October 29, 2021, is sustained.

DATED: Albany, New York
September 12, 2024

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE