STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD S. MYERS AND ERIN LANGAN	:	DETERMINATION 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 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.

On March 11, 2024 and March 14, 2024, respectively, petitioners, appearing by Hodgson Russ LLP (Open Weaver Banks, Esq., and Timothy P. Noonan, Esq., of counsel), and the Division of Taxation appearing by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by July 12, 2024, which date commenced the six-month period for the issuance of this determination.

After review of the evidence and arguments presented, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners have established that the Division of Taxation improperly allocated petitioner Richard S. Myer's wages from his New York employer in 2020 pursuant to the "convenience of the employer test" set forth in 20 NYCRR 132.18 (a).

FINDINGS OF FACT

The parties executed a stipulation of facts in connection with this matter. Petitioners submitted 33 proposed findings of fact, all of which have been accepted, except for proposed finding of fact 21, which has been rejected as it is not supported by the record.[1] The Division of Taxation (Division) submitted 44 proposed findings of fact, all of which have been accepted. The stipulated findings of fact and proposed findings of fact are set forth below.

1. The 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.[2]

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.

---

[1] The factual basis upon which petitioners' proposed finding of fact 21 is predicated is from petitioner Richard S. Myers' affidavit submitted along with petitioners' brief in support on May 8, 2024. This affidavit has not been accepted because this matter was submitted to the administrative law judge for a determination based upon stipulated facts and exhibits. The affidavit was not part of the stipulated facts and exhibits.

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

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 (Executive Order [A. Cuomo] No. 202 [9 NYCRR 8.202]).

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 residences 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" (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. On or about July, 2021, 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.

CONCLUSIONS OF LAW

A. When the Division issues a notice of disallowance, petitioners bear the burden of proof in a case before the Division of Tax Appeals, except where that burden has been specifically allocated to the Division (***see*** Tax Law § 689 [e]; 20 NYCRR 3000.15 [d] [5]). The burden of proof is on the taxpayer to show by clear and convincing evidence that the notice of disallowance was erroneous (***see 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]).

B. Section 601 (e) (1) of the Tax Law imposes tax on nonresident individuals on income from New York sources. The tax imposed on the nonresident is equal to the tax imposed on a New York resident for the full year, reduced by certain credits, and then multiplied by the New York source fraction (***see*** Tax Law § 601 [e] [2], [3]). The New York source fraction, in turn, is equal to the individual's New York source income divided by the individual's New York adjusted gross income from all sources for the entire year (***see*** Tax Law § 601 [e] [3]). A nonresident individual's New York source income is defined by Tax Law § 631 (a) (1) and (2)

and consists of the sum of the items of income, gain, loss and deduction entering into Federal adjusted gross income derived from or connected with New York sources. The tax is determined by applying the appropriate graduated rate in Tax Law § 601 (a) through (c) to the taxpayer's total income from all sources less any statutory deductions, exemptions or credits (***see*** Tax Law §§ 606; 611 [a]). The taxpayer's total income is derived from "New York adjusted gross income" (Tax Law § 611 [a]), which is determined by reference to the taxpayer's "federal adjusted gross income as defined in the laws of the United States for the taxable year" (Tax Law § 612 [a]).

C. In the case of a nonresident individual who works partly within and partly without New York, Tax Law § 631 (c) provides that "[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."

D. As is relevant here, the Division's regulations at 20 NYCRR 132.18 (a) provides, in relevant part, that:

> "[i]f 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. The items of gain, loss and deduction (other than deductions entering into the New York itemized 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***."

The above highlighted language is commonly referred to as the convenience of the

employer test (***see Matter of Huckaby v New York State Div. of Tax Appeal***s, 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]), the application of which is at the center of the present dispute. The convenience of the employer test provides that any allowance claimed for days worked outside New York must be based on performance of services that, of necessity, as distinguished from convenience, obligates the employee to out-of-state duties in the service of the employer. This test has been applied to employees who were specifically requested by their employer to work at home (***see Matter of Phillips v New York State Dept. of Taxation and Fin.***, 267 AD2d 927 [3d Dept. 1999] ***lv denied*** 94 NY2d 763 [2000]). "The policy justification for the 'convenience of the employer' test lies in the fact 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" (***Matter of Speno v Gallman***, 35 NY2d at 259). "[W]ork performed at an out-of-State home which could just as easily have been performed at the employer's New York office is work performed for the employee's convenience and not for the employer's necessity" (***Matter of Wheeler v State Tax Commn.***, 72 AD2d 878 [3d Dept 1979], citing ***Matter of Fass v State Tax Commn.***, 68 AD2d 977 [3d Dept 1979], ***affd*** 50 NY2d 932 [1980]).

E. It is the Division's position, citing a long litany of cases (***see e.g. Matter of Wheeler v State Tax Commn.***; ***Matter of Fass v. State Tax Commn.***; ***Matter of Zelinsky v Tax Appeals Trib.***; ***Matter of Huckaby v New York State Div. of Tax Appeals***) that because BMO was exempt from the Pause Act, the convenience of the employer test applies to petitioner because the nature of his employment was such that it could have been performed at the employer's New York office if such accommodations had been made available. The Division alleges that it was

irrelevant that BMO temporarily closed its New York office and required petitioner to find alternative working arrangements because that requirement did not constitute necessity on BMO's part. Specifically, the Division asserts that although BMO temporarily chose to close its office and did not provide accommodation for petitioner, that does not constitute necessity on BMO's part because BMO, in its status as a bank and/or financial institution, was exempt from the Pause Act. Conversely, petitioner asserts that working from BMO's New York City office was an impossibility, therefore, he was required to work from home in Pennsylvania absent any other suitable location.

F. As noted, the Pause Act, required that all "non-essential" businesses in New York reduce their in-person workforce at all work locations by 100% no later than 8:00 p.m., on March 22, 2020. However, in its status as a financial institution, BMO was exempt from the Pause Act. Thus, BMO was not legally mandated to close its New York office and the record provides no evidence or explanation from BMO as to why it closed its offices. Contrary to petitioners' argument, although it may have been necessary for petitioner to find alternative working arrangements, what is lacking is evidence as to why it was necessary for BMO to close its offices. When an employer deems telecommuting a necessity, it means the job cannot be effectively performed from the employer's New York office due to factors such as specialized equipment needs or the nature of the work itself (***see e.g. Matter of Fass v State Tax Commn.***). The record is utterly silent as to BMO's necessity in this matter.

In ***Matter of Unterweiser*** (Tax Appeals Tribunal, July 31, 2003), the Tax Appeals Tribunal citing ***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), and ***Matter of Linsley v Gallman***, 38 AD2d 367, 370 (3d Dept 1972), ***affd*** 33 NY2d 863 (1973) held that "[i]t 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 (i.e., where suitable facilities to carry out [his] employment duties are not maintained for or available to [him] in New York)." In this case, similar to the petitioner in ***Matter of Unterweiser***, petitioner physically worked in New York until March 16, 2020 and there is no evidence to suggest that the nature of his job changed, only where it was performed. Based on this failure of proof, petitioners have not sustained their burden of proving that the Division improperly allocated petitioner's wages from BMO to New York State in 2020 pursuant to the convenience of the employer test.

G. The petition of Richard S. Myers and Erin Langan is denied, and the notice of disallowance, dated February 9, 2022, is sustained.

DATED: Albany, New York
January 08, 2025

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE