STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **TODD RICHTER** for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2020.	:	ORDER DTA NO. 850212

Petitioner, Todd Richter, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2020.

Petitioner, by his representative, Hodgson Russ LLP (Andrew Wright, Esq., of counsel), filed a motion on July 5, 2023, together with an affidavit, annexed exhibits, and a memorandum of law, seeking an order granting partial summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele Milavec, Esq., of counsel), filed an affirmation in opposition to petitioner's motion together with an affidavit with annexed exhibits and a memorandum of law. On August 10, 2023, petitioner filed a reply to the Division of Taxation's opposition to the motion, which date began the 90-day period for the issuance of this order.

Based upon the motion papers, affidavits, pleadings and documents submitted in connection with this matter, Alejandro Taylor, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to summary determination based upon the Division of Taxation's improper application of the convenience of the employer test, thereby subjecting all of petitioner's wage income to New York personal income tax in tax year 2020.

FINDINGS OF FACT

1. Petitioner, Todd Richter, filed a New York nonresident and part-year resident income tax return (form IT-203) for tax year 2020 on October 15, 2021, reporting part-year New York State residency ending on September 30, 2020, with no New York source income accruing during the nonresident period that followed. On his 2020 form IT-203, petitioner claimed a 78.57% New York income allocation percentage for 2020, and reported $1,420,140.00 in New York wages out of $1,893,520.00 in total wages. Petitioner also reported that he lived in New York City for 12 months during 2020, where he spent 274 days and maintained living quarters during 2020. Petitioner claimed a refund of $19,206.00 for tax year 2020.

2. The Division of Taxation (Division) reviewed petitioner's 2020 form IT-203 and sent a request for information (form DTF-948) dated October 27, 2021, requesting responses to an attached nonresident audit questionnaire (form AU-262.3) and income allocation questionnaire (form AU-262.55). Petitioner provided a response and supporting documentation to the request for information on or about February 24, 2022, but did not provide responses to the nonresident audit questionnaire or income allocation questionnaire.

3. The Division reviewed petitioner's response to the request for information and determined that he had established a change of domicile from New York to North Carolina as of September 30, 2020, but also determined that petitioner failed to properly allocate the correct amount of income to New York for days worked in North Carolina as a nonresident employed by

a New York employer. The Division applied the convenience of the employer test and concluded that petitioner worked in North Carolina from October 1, 2020, through December 31, 2020, for his own convenience rather than for the necessity of his employer.

4. The Division issued to petitioner a statement of proposed audit change (form DTF-960-E), dated March 22, 2022, advising petitioner that he did not establish an assigned primary work location outside New York State or otherwise demonstrate the factors indicating the establishment of a bona fide employer office at petitioner's telecommuting location for tax year 2020. The notice also informed petitioner that he failed to allocate the correct amount of income to New York and proposed additional tax due of $21,986.83 plus interest.

5. The Division issued to petitioner a notice of deficiency, dated May 9, 2022 and bearing assessment ID number L-055498334, asserting an assessment of the previously proposed $21,986.83 in additional tax plus interest.

6. On July 29, 2022, petitioner filed a petition with the Division of Tax Appeals, challenging the notice of deficiency dated May 9, 2022 and the effective denial of his refund claim for tax year 2020.

7. On October 18, 2022, petitioner filed a New York State nonresident and part-year resident income tax return (form IT-203) for tax year 2021, including form IT-203-B, reporting that he maintained living quarters in New York State, listing a Fifth Avenue, New York, New York, address and that he worked 56 days in New York during 2021.

8. During the entirety of 2020, petitioner was employed by Guggenheim Partners, a global investment and advisory services firm. Until early 2020, petitioner was assigned to and worked in Guggenheim Partners' office in New York City. On or about March 13, 2020, Guggenheim Partners closed its New York City office due to the COVID-19 pandemic.

9. On January 23, 2023, petitioner provided a letter from his employer to the Division. Terry Drugan, of Guggenheim Securities LLC's human resources department, confirmed petitioner's employment with the firm and stated that Guggenheim Securities LLC's offices were closed between March 13, 2020, and September 13, 2021. The letter also stated that petitioner's work location was his home in Asheville, North Carolina.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner asserts that following the closure of Guggenheim Partners' New York City office in March 2020, he relocated temporarily to Vermont, where he worked remotely, until ultimately establishing a new domicile in North Carolina on September 30, 2020. Petitioner argues that the Division erred in determining that his workdays falling between October 1, 2020, and December 31, 2020, should be allocated as New York workdays under the convenience of the employer test (***see*** 20 NYCRR 132.18 [a]). As it was impossible for him to work at his employer's New York offices during the last quarter of 2020, when his employer's offices were closed, petitioner argues that he is entitled to a determination that his workdays from October 1, 2020, through December 31, 2020, qualify for exclusion from the calculation of his New York workdays because his working from home was for not for his own convenience, but rather the necessity of his employer.

11. The Division does not dispute petitioner's change of domicile to North Carolina by September 30, 2020. However, in its amended answer, the Division asserts a deficiency of $43,192.00 in additional tax plus interest for 2020 pursuant to Tax Law § 689 (d) (1), an amount greater than the amount of additional tax asserted in the notice of deficiency, based on its determination that petitioner qualified both as a domiciliary of New York State and New York City from January 1, 2020, through September 30, 2020, pursuant to Tax Law § 605 (b) (1) (A),

and as a statutory resident of New York State and New York City from January 1, 2020 through December 31, 2020, according to the provisions of Tax Law § 605 (b) (1) (B) and Administrative Code of the City of New York § 11-1711. The Division argues that material questions of fact persist regarding petitioner's resident and nonresident periods and whether the workdays in North Carolina were performed there of necessity in service of his employer. Thus, the Division argues that partial summary determination regarding application of the convenience of the employer test should be denied.

CONCLUSIONS OF LAW

A. Petitioner brings this motion for partial summary determination under section 3000.9 (b) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). After issue has been joined, any party may move for summary determination (***see*** 20 NYCRR 3000.9 [b] [1]). The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (***id.***). The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (***id.***).

B. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a

triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572, 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***Gerard v Inglese***, 11 AD2d 381 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rest his claim'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992], citing ***Zuckerman***).

As detailed hereafter, there are material and triable issues of fact regarding petitioner's assigned work location during the period October 1, 2020, through December 31, 2020, and whether the services rendered in North Carolina were performed there out of his employer's necessity, rather than for petitioner's own convenience.

C. Tax Law § 601 (e) (1) imposes a tax on "income which is derived from sources in this state of every nonresident." Section 631 (a) (1) of the Tax Law 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) (B), 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."

D. 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" (20 NYCRR 132.18 [a]).

E. 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 NY 3d 427 [2005]; ***Matter of Zelinsky v Tax Appeals Trib.***, 1 NY3d 85 [2003], ***cert denied*** 541 US 1009 [2004]; ***Speno v Gallman***, 35 NY2d 256 [1974]). 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. The Court of Appeals has held that the "sources within the state" language contained in Tax Law § 631 must be interpreted to mean more than merely income arising from performance of services at a particular situs within New York, but rather "calls for a more complicated analysis that takes into consideration why work is performed out of state" (***Huckaby*** at 434; ***see also Speno*** at 259).

F. Here, petitioner has not alleged sufficient facts to bear his burden of showing that the Division improperly allocated workdays to New York for work performed at his home in North

Carolina. He alleges that the offices of his New York-based employer were closed for most of 2020, which is supported by the letter from his employer's human resources department, but does not offer evidence showing that he was obligated to perform his work duties from North Carolina out of his employer's necessity as opposed to any other place petitioner may have found convenient to live and work in during the COVID-19 pandemic.

G. Petitioner cites to two cases in support of his argument, ***Fischer v State Tax Commn.*** (107 AD2d 918 [3d Dept 1985]) and ***Fass v State Tax Commn.*** (68 AD2d 977 [3d Dept 1979], ***affd*** 50 NY2d 932 [1980]). In ***Fass***, the Court found that the specialized equipment and facilities available to the taxpayer at his New Jersey home could not be made available at his employer's New York location. ***Fischer***, meanwhile, stands for the proposition that the taxpayer bears the burden of establishing that the work being performed at his home was for his employer's necessity. Notably, the ***Fischer*** Court disallowed the workdays the taxpayer spent wholly at his home office and only allowed those workdays where the taxpayer made construction site visits for his employer to be excluded from New York workdays. Petitioner's situation differs, however, in that he alleges he was prevented from working at his assigned New York primary work location due to the office's closure. What is not clear, and for which there is no evidentiary basis in petitioner's submissions, is the extent to which petitioner's employer required him to work from a particular out-of-state location as opposed to anywhere else.

H. As observed by the Court of Appeals, the convenience of the employer test would "more aptly be called the 'necessity of the employer' test" (***Zelinsky*** at 90). In light of disputed facts regarding "why the work was performed out of state" (***see Huckaby*** at 434), petitioner has not proven his entitlement to summary determination that the Division improperly allocated his workdays from October 1, 2020, to December 31, 2020 to New York. Although petitioner's

inconsistent reporting positions regarding his residency status (number of days in New York and whether he had a permanent place of abode available for his use) raise more questions of fact, including whether such positions were mistakenly reported, these issues are not presented for summary determination here. A full hearing is clearly required to resolve the questions of fact regarding petitioner's employer's need for petitioner to work out of state. Consequently, the motion must be denied (***see Glick & Dolleck v Tri-Pac Export Corp.***; ***Gerard v Inglese***).

I. Petitioner's motion for partial summary determination regarding application of the convenience of the employer test to tax year 2020 is denied. This matter will be scheduled for a hearing in due course.

DATED: Albany, New York
November 2, 2023

/s/ Alejandro Taylor
ADMINISTRATIVE LAW JUDGE