

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

CARMELO AND MARIANNA GIUFFRE : DETERMINATION
DTA NO. 826168

for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law
for the Year 2009. :

Petitioners, Carmelo and Marianna Giuffre, filed a petition for redetermination of a deficiency
or for refund of personal income tax under article 22 of the Tax Law for the year 2009.

On June 2, 2015, petitioners, appearing by Lowenstein Sandler LLP (Robert J. Kipnees, Esq.,
of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald,
Esq., of counsel), waived a hearing and submitted the matter for determination based on
documents and briefs to be submitted by October 13, 2015, which date began the six-month
period for issuance of this determination. After due consideration of the documents and
arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following
determination.

ISSUE

Whether the Division of Taxation properly determined petitioners' income tax liability for the
year 2009.

FINDINGS OF FACT

1. Petitioners, Carmelo and Marianna Giuffre, resided and were domiciled in Florida during 2009.
2. Mr. Giuffre is employed by Giuffre Management Consulting, LLC (GMC). GMC is a Florida limited liability company with its principal place of business located in Palm Beach, Florida. Prior to his employment by GMC, petitioner was the president of Bay Ridge Automotive Management Corporation (Bay Ridge) located in Brooklyn. Bay Ridge is a family-owned company that operates an automotive group comprised of dealerships and real property in New York and New Jersey. During 2009, Ignazio and John Giuffre, petitioners' sons, and John Iacono, petitioners' nephew, owned and operated the dealerships.
3. GMC is a consulting firm that provides management consulting for automotive and real estate businesses in Florida, New York, and elsewhere.
4. Mr. Giuffre, as an employee and sole member of GMC, provides consulting services for a number of automobile dealerships in New York and New Jersey from GMC's offices in Palm Beach.
5. By agreement dated November 1, 2008, by and between GMC and Bay Ridge, the management company for the New Jersey and New York dealerships, GMC agreed to perform consulting work for Bay Ridge for a ten-year term. The consulting agreement explicitly provides that the consulting services "shall be provided via telephone or electronically" and that it is not anticipated that the consulting services would require any GMC employee to travel to Bay Ridge or any of the dealerships.

6. Under the consulting agreement, GMC acted in an advisory role, and neither it nor Mr. Giuffre was involved in the day-to-day management or decision-making process of the individual dealerships or Bay Ridge. The consulting services were performed, and the business of GMC was conducted, from its Palm Beach office. Mr. Giuffre was paid an annual salary for his services by GMC.

7. Mr. Giuffre visited New York during 2009. The primary purpose of his visits were personal in nature. He visited family members who reside in the New York/New Jersey metropolitan area. Although Mr. Giuffre visited the dealerships owned by his sons and nephew, these visits were personal in nature. Mr. Giuffre did not maintain a desk or office in any of the dealerships. Mr. Giuffre was not involved in any daily operations of the dealerships in 2009.

8. On February 4, 2013, the Division of Taxation (Division) issued a Notice of Deficiency, No. L-039045092, to petitioners asserting personal income tax due for the year 2009 in the amount of \$69,318.00, plus penalties and interest. The Division assessed additional income tax based upon an allocation formula that used the number of Bay Ridge dealerships located in New York State divided by the total number of Bay Ridge dealerships to arrive at an allocation of 10/17, or 58.8235%. The Division then multiplied that percentage by the amount of Mr. Giuffre's salary received from GMC of \$1,320,000.00, for a net allocation of \$776,471.00 as New York income.

9. On July 16, 2013, a conciliation conference was conducted and, by order dated December 13, 2013, the Notice of Deficiency was sustained in full.

CONCLUSIONS OF LAW

A. New York imposes personal income tax on the income of nonresident individuals to the extent that their income is derived from or connected to New York sources (Tax Law

§ 601[e][1]). A nonresident individual's New York source income includes the net amount of items of income, gain, loss and deduction entering into the individual's federal adjusted gross income derived from or connected with New York sources, including income attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[a][1]; [b][1][B]).

B. The regulations provide that a business, trade, profession or occupation is carried on in New York by a nonresident when:

"such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity" (20 NYCRR 132.4[a][2]).

C. This case centers solely on whether Mr. Giuffre has income that was derived from or connected to New York sources. In other words, whether Mr. Giuffre was rendering consulting services within New York State during 2009. The facts in this case demonstrate that he was not.

Mr. Giuffre was employed by GMC. GMC's offices were located in Palm Beach, Florida. There is no evidence that he or the company maintained any office or place of business within New York. The numerous affidavits all attest to the fact that Mr. Giuffre did not have any office space at any of the dealerships.

The consulting agreement specifically states that the services provided by Mr. Giuffre would be rendered via telephone or electronically. The agreement does not mention any work space located in New York State nor does it contemplate petitioner providing any services within New York.

The Division relies on *Matter of Speno v. Gallman* (35 NY2d 256 [1974]) in support of its position. *Speno* involved nonresident individuals who were employed by a New York employer, yet for convenience, worked both within and without the state. The Court of Appeals held that: “a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-State services are performed for the employee’s convenience they generate New York State tax liability” (*Matter of Speno v. Gallman*, at 259).

However, *Speno* is distinguishable from this case. Primarily, Mr. Giuffre, a nonresident, works for a Florida company, not a New York employer. Moreover, Mr. Giuffre does not render services in New York and he does not have an office in New York. As such, the convenience of the employer analogy is inapplicable to the facts herein (*compare Matter of Huckaby*, Tax Appeals Tribunal, May 30, 2002 [wherein the employee, a resident of Tennessee, was found to be working within Tennessee as a convenience to his New York employer and, thus, the income derived from his work was taxable by New York State]).

D. Accordingly, the petition of Carmelo and Marianna Giuffre is granted and the Notice of Deficiency, No. L-039045092, dated February 4, 2013 is canceled.

DATED: Albany, New York
March 31, 2016

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE