STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KENNETH AND ROSEMARY PHILLIPS	:	DECISION DTA NO. 815489
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Nonresident Earnings Tax under the Administrative Code of the City of New York for the Years 1991, 1992 and 1993.	:	

Petitioners,[1] Kenneth and Rosemary Phillips, 10 Hillside Lane, New Hope, Pennsylvania 18938, filed an exception to the determination of the Administrative Law Judge issued on May 21, 1998. Petitioners appeared by Uncyk, Borenkind and Nadler, Esqs. (Eli Uncyk, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception and a reply brief in response to the Division of Taxation's brief in opposition. Oral argument, at petitioners' request, was heard on October 15, 1998 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

[1]Petitioners, Kenneth and Rosemary Phillips, filed joint tax returns and, therefore, both of their names appear in this proceeding. However, the issue in this proceeding centers on the proper tax treatment of income earned only by petitioner Kenneth Phillips. Accordingly, unless otherwise specified or required by context, references to petitioner or petitioners herein shall mean petitioner Kenneth Phillips.

ISSUES

I. Whether petitioner has established by clear and convincing evidence that the time spent working at an office in his Pennsylvania home was a necessity of his New York employer as opposed to a matter of his own convenience.

II. Whether petitioner has established by clear and convincing evidence that he was compensated by commissions based solely on the volume of business he transacted.

III. Whether petitioner has shown by clear and convincing evidence that all of his sales transactions occurred with customers located outside of New York State.

IV. Whether petitioner has shown the volume of his sales transactions, and commissions earned, within and without the State of New York.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "4," "8," "15" and "18" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> Petitioners, Kenneth and Rosemary Phillips, husband and wife, timely filed (under extension) a New York State Nonresident and Part Year Resident Income Tax Return (Form IT-203) under Filing Status "2" (Married filing joint return) for each of the years 1991, 1992 and 1993. Petitioner Kenneth Phillips also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of such years. On each of these returns, at Schedule "A" thereof, Mr. Phillips's reported wage and salary compensation from his New York employer, which was allocated within and without New York State and City on the basis of the number of

> days worked in New York versus the number of days worked outside of New York.[2]

Petitioners resided in New Hope, Pennsylvania during each of the years at issue, were not New York State or City domiciliaries, and did not maintain a place of abode in New York State or City during any of such years. It is undisputed that petitioners were therefore potentially subject to New York State and City tax only as nonresidents.

Following an audit, the Division of Taxation ("Division") issued to petitioners two notices of deficiency, each dated December 14, 1995, asserting additional New York State personal income tax and New York City nonresident earnings tax due. The first of such notices covered the years 1991 and 1992, and asserted tax due for such years in the respective amounts of $27,187.77 and $24,919.33, plus interest.[3] The second such notice covered the year 1993 and asserted tax due in the amount of $12,781.14, plus interest.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> Petitioners protested the above notices. In their petition, the taxpayers argued that the office in their Pennsylvania home was set up by, and for the necessity of, petitioner's employer, Lehman Brothers. At the commencement of the hearing, the parties agreed that an initially raised issue of the timeliness of petitioners' protest for 1993 had been resolved in petitioners' favor such that 1993 was included among the years at issue in these proceedings. In addition, the parties agreed that the petition could be amended, in

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[2]We have modified the last sentence of the Administrative Law Judge's finding of fact "1" to more clearly reflect the nature of petitioner's income as reported.

[3]The record includes a validated consent with respect to the period of limitations on assessment pursuant to which a notice of deficiency could be issued to petitioners for the year 1991 at any time on or before April 5, 1996. It is noted that petitioners' proposed finding of fact "2" lists the amount of additional tax asserted as due by the Division for 1991 as $27,919.33. Such listing represents an apparent typographical or addition error, with the correct amount being the (lesser) $27,187.77 figure listed above.

> light of the then-recently decided ***Matter of O'Connell*** (Tax Appeals Tribunal, March 6, 1997), to permit the alternative argument that petitioner's remuneration from Lehman Brothers constituted commission income, which should be allocated based on the locations of petitioner's customers. Finally, the parties agreed that petitioners could submit to the Division, subsequent to the hearing, documentation in support of a claim that petitioner worked certain days outside of New York State *and* outside of the office at his home in New Hope, Pennsylvania, such that these days would be treated as non-New York State working days for purposes of income allocation.[4]

Commencing in approximately May of 1988 and continuing through the years at issue and thereafter until late 1995, Kenneth Phillips was employed by Lehman Brothers (also known as Shearson, Lehman). Petitioner described himself as a bond trader and explained that he specialized in municipal bonds and in "hedging." Mr. Phillips described hedging, in general terms, as the attempt to predict or anticipate the future movement of markets and to take positions based thereon aimed at protecting (or enhancing) the value of customers' portfolios of bond investments. Petitioner's customers were large institutional investors, with bond investment portfolios in excess of one billion dollars, whose trades typically involved upwards of three hundred million dollars or more. Petitioner holds 11 copyrights on systems he developed expressly for the purpose of hedging on futures exchanges, including strategies related to timing and risk assessment aimed at defending the value of the bonds held by these very large institutional customers.

Petitioner's services to his customers included analysis and monitoring of markets and executing trading activities, potentially at all hours of the day or night, on exchanges located throughout the country and overseas. Petitioner was responsible for making a market for and

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[4]We have modified the Administrative Law Judge's finding of fact "4" to more clearly reflect the record.

trading for the accounts of customers as directed. Petitioner described this responsibility as executing a trade within minutes of a customer's direction to do so, including trades on international markets which were open during hours which did not coincide with petitioner's employer's New York City office hours. Petitioner explained that a time record is made confirming the execution of every order or trade. No such records, however, were included in evidence. Petitioner's services also included attending meetings at his employer's New York City office and providing informational seminars to other employees regarding market directions, his view of interest rate trends, hedging and the like. Petitioner's employment with Lehman Brothers ended in late 1995, and the records of petitioner's trades, according to petitioner, remained with Lehman Brothers.

Petitioner did not have a written employment agreement with Lehman Brothers, but rather described his employment as under a clear verbal agreement. While petitioner's brief and proposed findings of fact describe his employment as "at will" and therefore terminable immediately by either party, petitioner nonetheless noted his belief that, because his hedge strategies were complex and involved, there was an "ethical" obligation to his employer and customers which would have prevented such immediate termination.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> Petitioner asserted in testimony that his compensation was based on the commissions generated from the trades he made, noting that he was entitled to an annual draw against such commissions. However, according to petitioner, his actual compensation always exceeded the amount of his draw. Petitioner claimed that the commissions generated during the years at issue were all based on sales to customers who had offices located

> outside of New York State.[5] However, petitioner did not offer any evidence of specific transactions with specific out-of-state customers for any year in issue. Mr. Phillips also noted that he brought certain customer accounts with him when he commenced employment with Lehman Brothers, and that these accounts brought in more than petitioner's draw amount and, essentially, paid for all of petitioner's startup and ongoing costs at Lehman Brothers from the outset. Again, petitioner did not furnish any specific details or documentation with regard to his compensation, including the amount of his draw, the percentage of his commission or the method(s) under which his commissions were calculated or paid in any given year. Nor did Mr. Phillips offer any documents that would show whether he was compensated solely by a commission based on his sales transactions.[6]

Lehman Brothers had many offices throughout the country. Although Lehman Brothers was involved in municipal bond trading, it had not engaged in any business involving petitioner's hedging specialty and had no capability in that area until petitioner was hired. Petitioner explained that by being able to provide the type of bond portfolio protective or defensive strategies he had developed, Lehman Brothers hoped to, and according to petitioner did, increase the volume of municipal bond business it handled.

Petitioner's employer provided equipment, including computers, information systems, fax machines, and 25 telephone lines for an office in petitioners' home in New Hope, Pennsylvania (the "New Hope office"). The telephone listing for this office was "Shearson Institutional Capital Funding." Petitioner was told by his employer to use the New Hope, Pennsylvania office for whatever work was necessary. Petitioner performed essentially the same type of work at both the New York City and New Hope offices, except for the instructional seminars and meetings

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[5]Petitioner noted that after the years in question, there were relatively small numbers of trades involving New York customers Nippon Life Insurance Company and Oppenheimer.

[6]We have modified finding of fact "8" of the Administrative Law Judge's determination to more completely reflect the record.

which occurred in the New York office. With respect to out-of-state travel to customers' locations, petitioner testified that he visited clients "frequently" to go over various strategies on a "one-to-one basis." Petitioner noted, however, that there was no regular pattern to these visits, and that "[s]ometimes we did the trades from [the customer's] office. Like if I showed [the customer] a strategy, and the market was already moving in a direction that would facilitate that strategy, he might do something while I was there."

Lehman Brothers maintained office space in New York City at 200 Vesey Street. Petitioner's "office" with Lehman Brothers in New York City consisted of space in a large open bond trading room. This space, which was part of long rows of such spaces known as "tarts" (as opposed to individual desks), was equipped with information screens tracking the movement of the various markets, and with over 100 phone lines usually directly linked to other customers or trading areas. Petitioner explained that this design allowed interaction between the various traders in the room by yelling or other signals, and was utilized to facilitate such interaction and trading.

As designed, the New York City office space did not provide complete security or confidentiality for the individuals working there and the information they possessed, and afforded no "after hours" security regarding such information in the event an employee was allowed to remain in the trading room after other employees left. The New York City trading office was open from about 6:00 A.M. or 7:30 A.M. until about 6:00 P.M. Petitioner noted that no one was allowed in the offices unless a senior manager was also present, and he further explained that, for security reasons, no one was allowed to remain in the New York City bond trading offices after 6:00 P.M.

The commuting time from petitioner's home in New Hope, Pennsylvania to the New York office is approximately two hours, and petitioner explained that he would leave his home at approximately 5:30 A.M. when making the commute to work in the New York office. Petitioner presented a letter from his supervisor at Lehman Brothers during the years in issue. This letter, dated February 13, 1995, provides as follows:

> Our employee, Kenneth Phillips, is a hedger in the bond markets, hedging on world markets for our clients. His expertise, knowledge and constant monitoring around the clock of markets including those in Europe and Japan require Mr. Phillips to work unconventional hours, including times when our offices in New York are not open. This results in his working at his home, weekends, evenings, and some days for our benefit to service our clients dealing in these markets. Because of the unusual hours Mr. Phillips maintains and the service he provides, his presence in our office is not feasible or practical on a daily basis and his office at home has been provided with all of the required equipment (computers, multiple phone lines, real time market-monitoring and facsimile machines) to perform his duties.

Petitioner's hedging activities for customers were very sensitive and confidential. Because such activities involved attempting to predict the future movement of markets, and taking positions with respect thereto, his work needed to be kept confidential from other employees in the bond trading department. Petitioner noted that every position he took would have to be "unwound." In this regard, petitioner had to be very circumspect in the hedging activities undertaken at the New York City bond trading offices because of the inherent conflict that would be created if bond traders became aware of the specific hedging strategy of one of petitioner's clients. There is no evidence that petitioner's employer discussed or attempted to set up a separate or secure office enclosure for petitioner at its New York City offices. Petitioner testified that if he had been enclosed in some way, he "could not have participated in the

exchange that I was there to do" (presumably the yelling and interaction among the bond traders in the open room, as described above).

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

> In addition to his hedging and trading activities, petitioner also attended meetings and conducted informational presentations giving his opinions on interest rate directions to bond traders, and describing how hedging activities could help the employer generate additional business. Petitioner conducted this activity at his employer's New York City offices. It is unclear from the record how Mr. Phillips was compensated for these non-trading activities.[7]

Petitioner testified, in response to the question of what determined the days that he would come into New York rather than stay in Pennsylvania, as follows:

> The main thing was the markets. I mean, we mentioned a minute ago events can begin to transpire well before the New York market is open. And if we perceive things beginning to move, I would begin to contact the customers, or to run the systems. And if we were in the middle of decision-making, or decisions were being or movements were being considered, the customers did not want me out-of-pocket [sic] for the two hours it took to get from the Pennsylvania office to the New York office.
>
> So, the markets were, for the most part, what determined if I could move or not. Otherwise, I would choose to work from the Pennsylvania office, unless I was asked to come in, or there was an opportunity to present some special piece of information to either the salesman [sic] or the traders.

The returns filed for the years in question reflect (at Schedule "A") that petitioner worked in and out of New York State and City for the following number of working days:

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[7]We have modified finding of fact "15" of the Administrative Law Judge's determination by adding the last sentence.

YEAR	TOTAL DAYS WORKED	DAYS WORKED IN N.Y.	DAYS WORKED OUT OF N.Y.
1991	292	115	177
1992	293	122	172
1993	235	105	130
TOTAL	820	342	479

We modify finding of fact "18" of the Administrative Law Judge's determination to read as follows:

> Petitioner's brief below urged adoption of a proposed finding that the 479 days worked outside of New York included "231 days worked outside of New York State and not in the New Hope, Pennsylvania office. Petitioner has provided documentation to the Department of Taxation" (Petitioner's brief in support of petition, p. 8, ¶ 24). While it is unclear whether such documentation was provided to the Division, it was not offered at hearing and is not part of this record.
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> In its brief, the Division responded to petitioners' claim, noting, *inter alia*:
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> > [A] March 28, 1995 letter from petitioners' accountant and representative Howard Goldman states that "[v]irtually all of the days listed out of the office were worked in Pennsylvania at taxpayer's home office" (Division's brief in opposition to petition, p. 14).[8]

[8]We have modified the Administrative Law Judge's finding of fact "18" to more concisely state the facts.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge distinguished the case herein from our holding in ***Matter of O'Connell*** (***supra***) based on the evidence presented. The Administrative Law Judge noted that in order to allocate under the ***O'Connell*** method using 20 NYCRR former 131.17, petitioner was required to establish: 1) that he was compensated by commissions based solely on the volume of business transacted; and 2) the relative volume of such business, and hence commissions, transacted and earned at customer locations within and without New York State.

The Administrative Law Judge pointed out that, unlike ***O'Connell***, petitioner's proof on this issue consisted solely of his testimony. Petitioner claimed he was entitled to an annual draw, and that his commissions always exceeded such draw. However, petitioner could not recall the amount of the draw and, unlike the petitioner in ***O'Connell***, he did not provide any specific testimony or documents concerning his commissions, such as the percentage thereof or the method of calculation or payment. Furthermore, the Administrative Law Judge noted, O'Connell consistently used the described method of allocation on his returns using 20 NYCRR former 131.17. In contrast, petitioner's method of allocation was reported on his returns based on the days worked within and without New York State and City using 20 NYCRR former 131.18. The Administrative Law Judge also noted that in addition to the lack of detail from petitioner concerning his compensation, there was no corroborating information from petitioner's employer in support of his claims. The Administrative Law Judge concluded there was insufficient detailed evidence in this record to support petitioner's claim that he was compensated for all of the services he performed for his employer (including providing informational seminars for other bond traders) solely by commissions based on the volume of

business transacted (***citing, Matter of Dalenz v. State Tax Commn.***, 9 AD2d 599, 189 NYS2d 348).

Further, with regard to the issue of the location of petitioner's customers' offices where transactions were allegedly transacted, the Administrative Law Judge noted that petitioner again only offered his testimony that all of his customers were located outside of New York State and all business he transacted occurred outside of New York State with these customers. In contrast to the record here, the Administrative Law Judge pointed out that in ***O'Connell,*** the petitioner established through an extensive evidentiary presentation, the necessity of meeting specific out-of-state customers at their out-of-state locations. The Administrative Law Judge noted that, in this case, the record contains no documentary evidence of even one trade pertaining to a specific customer located outside of New York State (nor, for that matter, of any specific trades either inside or outside of New York State). No statements from petitioner's employer on this issue or from any of petitioner's customers were provided. The Administrative Law Judge did not find petitioner's testimony alone sufficient to support a conclusion that all of his customers were located outside of New York, or that all of his trades occurred outside of New York. Accordingly, the Administrative Law Judge concluded that petitioner failed to meet his burden of proving that he is entitled to allocate his compensation on the basis of the volume of business transacted within and without New York State under 20 NYCRR former 131.17 and ***Matter of O'Connell*** (***supra***).

Next, the Administrative Law Judge addressed petitioner's alternative claim, i.e., the issue of allocation based on the number of working days spent in and out of New York State (20 NYCRR former 131.18). Petitioner claimed that the allocation reported on his tax returns was

accurate and justified because his out-of-state work was required by his employer as part of his job. There are two elements to petitioner's argument: 1) the assertion that a total of 479 days were worked outside of New York during the years at issue and 2) the assertion that 231 days out of such 479 total days were worked outside of New York and *not* at the office in petitioner's home in New Hope.

The Administrative Law Judge noted that petitioner's allocation of compensation within and without New York State on the basis of days worked at the office in his Pennsylvania home turns on whether such days were worked outside of his employer's New York office due to his employer's necessity and not for petitioner's convenience. This so-called "convenience of the employer" test is set forth at 20 NYCRR former 131.16, which provided, in relevant part, as follows:

> any allowance claimed for days worked outside of the State must be based upon the performance of services which of necessity - as distinguished from convenience - obligated the employee to out-of-state duties in the service of his employer.

The Administrative Law Judge determined that the record in this case does not support the conclusion that petitioner's services could not have been performed at his employer's New York office, and that the services performed at the office in petitioner's residence in New Hope were performed there out of his employer's necessity.

Finally, the Administrative Law Judge addressed the issue of allocation of petitioner's income under 20 NYCRR former 131.18 based on his alleged non-New York State and non-New Hope working days. The Administrative Law Judge noted that the record contains no testimony or documentary evidence of any specific times, places and purposes of any claimed working

visits by petitioner to locations other than the New York office and the New Hope office. In the absence of such evidence, petitioner's argument was rejected.

ARGUMENTS ON EXCEPTION

Petitioner makes the same arguments on exception as were presented to the Administrative Law Judge.

Specifically, petitioner takes exception to the conclusion that he failed to meet his burden of proving that his work in the office of his Pennsylvania home was a necessity of his New York employer. In petitioner's view, the Administrative Law Judge ignored the facts and erred in his application of the case law. Further, petitioner argues that the Administrative Law Judge ignored the fact that when he went to the New York office, it was only for the purpose of conducting informational presentations (***see***, Petitioner's brief on exception, p. 18).

Petitioner also takes exception to the conclusion of the Administrative Law Judge that he failed to prove that he is entitled to allocate his compensation pursuant to ***Matter of O'Connell*** (***supra***). Petitioner states that the parties agreed to permit amendment of the petition based on the decision in ***O'Connell*** wherein it was held that a commission salesman could allocate sales commissions within and without New York State (using 20 NYCRR former 131.17) based on the office location of the particular customers where the transactions occurred (***Matter of O'Connell***, ***supra***). Petitioner disagrees with the Administrative Law Judge's conclusion that he failed to carry his burden of proving that: 1) he was compensated by commissions based solely on the volume of business transacted and 2) the relative volume of such business transacted (and commissions earned) within and without the State of New York. According to petitioner, once the Division agreed to permit the amendment to the petition based on the decision in ***O'Connell,***

there was no basis for denying petitioner's claims, because the Division of Taxation did not dispute petitioner's commission-based income

OPINION

The New York source income of a nonresident individual includes the net amount of income, gain, loss and deductions reported in the Federal adjusted gross income that are "derived from or connected with New York sources" (Tax Law § 631[a]). Included among the above mentioned is income attributable to a business, trade, profession or occupation carried on in this State (Tax Law § 631[b][1]).

If a business, trade, profession or occupation is carried on partly within and partly outside this state, the items of income, gain, loss and deduction "derived from or connected with New York sources" shall be determined by apportionment and allocation under regulations promulgated by the Commissioner of Taxation ("Commissioner") (Tax Law § 631[c]).

The regulations of the Commissioner in effect during the years at issue provided:

> [i]f the commissions for sales made or other compensation for services performed by a nonresident traveling salesman, agent or other employee depend directly upon the volume of business transacted by him, his items of income, gain, loss and deduction . . . derived from or connected with New York State sources include that proportion of the net amount of such items attributable to such business which the volume of business transacted by him within New York State bears to the total volume of business transacted by him within and without New York State (20 NYCRR former 131.17).
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> [i]f the nonresident employee (including corporate officers, but excluding employees provided for in [former] 131.17 of this Part) performs service for his employer both within and without New York State, his income derived from New York 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 (20 NYCRR former 131.18).

The question that must be answered with respect to each of the issues raised on this exception is whether petitioners have satisfied their burden of proof. The Administrative Law Judge concluded, in each instance, that they did not.

We first address the issue of whether petitioner has proven by clear and convincing evidence that he worked out of the office in his Pennsylvania home out of necessity to his employer. In support of that claim, petitioner argues that Lehman Brothers paid for installation of the equipment in the office of his Pennsylvania home. Even though an office in an employee's home may be equipped by and intended for an employer's purposes, the evidence must still establish that the employee's work was performed there of necessity for the employer (***see, Matter of Fischer v. State Tax Commn.,*** 107 AD2d 918, 484 NYS2d 345). The evidence on this issue is ambiguous.

There is no question that Lehman Brothers installed the equipment in petitioner's home that permitted him to work from that location. Petitioner urges that Lehman Brothers equipped his home office because his employer required that he work from his home. If so, the burden of proof was on petitioner (Tax Law § 689[e]), and the standard of proof is clear and convincing evidence (***Matter of Bello v. Tax Appeals Tribunal***, 213 AD2d 754, 623 NYS2d 363; ***Matter of Solomon***, Tax Appeals Tribunal, October 1, 1998). The letter from Lehman Brothers that was placed in evidence only states that Mr. Phillips had to "monitor" world markets around the clock. As a result, Mr. Phillips had to "work unconventional hours, including times when our offices in New York are not open" (Exhibit "1"). The letter goes on to state:

> Because of the unusual hours Mr. Phillips maintains and the service he provides, his presence in our office is not feasible or practical . . . (Exhibit "1").

This letter does not explicitly state that petitioner's presence in New York was not feasible or practical for his employer. Moreover, the letter does not describe what "services" petitioner performed at his home.

We agree with the Administrative Law Judge that the evidence submitted by petitioner does not meet the strict standard required for establishing employer necessity (***Matter of Kitman v. State Tax Commn.***, 92 AD2d 1018, 461 NYS2d 448, ***lv denied*** 59 NY2d 603, 463 NYS2d 1028). We also reject petitioner's claim, that the only reason he would go to the New York office was for the purpose of conducting informational presentations, as contrary to facts in the record (Tr., pp. 46-47).

We next address the alleged 231 working days over the three years in issue, where petitioner argues he was not in his New York office nor in his New Hope office, but rather, was working at his customers' non-New York locations. As the Administrative Law Judge noted, the record does not contain any evidence showing details of times, places and purposes of any working visits by petitioner to work locations, including the New York office and the New Hope office. Such evidence as is contained in the record consists of petitioner's testimony phrased in the most general terms. We agree with the Administrative Law Judge that given the lack of evidence on this issue there is no basis upon which to support a conclusion that petitioner is entitled to use such claimed days in an allocation of his compensation within and without New York State.

Petitioner also claims that he is entitled to allocate his compensation pursuant to 20 NYCRR former 131.17 and ***Matter of O'Connell*** (***supra***), on the basis of the volume of business transacted within and without New York State. In order to prevail on this issue, petitioner was required to show

that: 1) he was compensated by commissions based solely on the volume of business transacted and 2) the relative volume of such business transacted (and commissions earned) at customer locations within and without the State. In ***O'Connell,*** the petitioner established an extensive record showing: 1) the percentage of his commissions; 2) specific clients he sold bonds to; 3) specific out-of-state customers in transactions; and 4) affidavits by O'Connell's customers attesting to the locations where the bond transactions took place. In contrast, Mr. Phillips has failed to offer any similar detailed evidence to show the volume of his business transactions, the commissions earned, or what transactions took place within and without the State of New York. Without such information, there is no way for a proportionate allocation to be computed. Further, unlike O'Connell**,** petitioner has failed to prove by clear and convincing evidence that he was compensated by commissions based solely on the volume of business transacted. The record on this subject consists entirely of petitioner's general testimony that he worked on commission and that he was entitled to an annual draw. There is no specificity on the amount of the commission, the amount of the draw or how the commissions were earned. Presumably, to ensure that he was getting proper credit for his work, Mr. Phillips received some documentation from his employer to show, on a regular basis, his transactions and commissions earned and from what customers, but it was not presented as part of this record. We conclude that without some corroborating documentation, the evidence here does not rise to the level of clear and convincing.

Petitioner also urges an additional argument based on ***Matter of O'Connell*** (***supra***). According to petitioner, once the Division agreed to permit the amendment to the petition based on the ***O'Connell*** decision**,** there was no basis for denying petitioner's claims, because the Division did not dispute petitioner's commission based income. We must also reject this argument. Permitting

the amendment of a petition to allow petitioner's alternative argument on an issue does not relieve him from coming forward with evidence to support that argument. In any event, the commission issue is not the only element of ***O'Connell*** and 20 NYCRR former 131.17 that petitioner has failed to satisfy. Even if petitioner had proven that his income was from commissions based on the volume of the business he transacted, he has also failed to show *where* specific transactions occurred and commissions were earned. In the absence of such evidence, no allocation using the ***O'Connell*** rationale is possible. Petitioners bore the initial burden of going forward as well as the burden of proof (Tax Law § 689[e]), and it is a burden they failed to satisfy.

We affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kenneth and Rosemary Phillips is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Kenneth and Rosemary Phillips is denied; and

4. The notices of deficiency dated December 14, 1995 are sustained.

DATED: Troy, New York
April 15, 1999

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner