STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT M. CIPOLLA	:	DECISION DTA NO. 817175
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 Earnings Tax on Nonresidents under Chapter 19, Title 11 of the Administrative Code of the City of New York for the Years 1994 and 1995.	:	

Petitioner Robert M. Cipolla, 7 Handol Lane, New Fairfield, Connecticut 06812, filed an exception to the determination of the Administrative Law Judge issued on January 4, 2001. Petitioner appeared by Alan G. Merkin, Esq. and Eric Kurtzman, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 12, 2001.

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

ISSUE

Whether petitioner has established entitlement to allocate a portion of his wage income for each of the years 1994 and 1995 outside of New York as non-New York source income not subject to taxation by New York.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner is a resident of the State of Connecticut. He is employed by and is the vice-president of MUCIP, Inc. ("MUCIP") which, during the years in issue was located in College Point (Queens), New York. During the years in issue, petitioner held 50 percent of MUCIP's stock and had his office with MUCIP in College Point, New York. MUCIP installs cable television in residential homes and wires and rewires apartment buildings and complexes on a contract basis, and also performs maintenance services for various cable companies.

Petitioner filed timely New York State and City of New York nonresident income tax returns for the years 1994 and 1995. On each of such returns, petitioner apportioned his wage income from MUCIP between New York and Connecticut on the basis of the number of days claimed to have been worked in each of the two jurisdictions. More specifically, for 1994 petitioner claimed to have worked 232 days, with 70 days worked in Connecticut and 162 days worked in New York, while for 1995 petitioner claimed to have worked 226 days, with 68 days worked in Connecticut and 158 days worked in New York. Hence, petitioner included as New York source income subject to New York tax only the portion of his MUCIP wage income represented fractionally by the number of days claimed to have been worked in New York out of the total number of days worked in each of the respective years in issue.

In 1997, the Division of Taxation ("Division") conducted an audit of petitioner's returns for the years 1994 and 1995. It appears that this audit was prompted as a follow-up to an earlier audit concerning the same issue of petitioner's claimed apportionment and allocation of wage

income as described above. By a letter dated March 10, 1997, the Division's auditor requested, *inter alia*, documents specifying each day claimed as worked outside of New York State and/or New York City, the exact location where the services were performed and the nature of the services performed at each location.

In response to the Division's requests for documentation to substantiate that the days claimed as worked outside of New York were so worked of necessity rather than for petitioner's convenience, petitioner's representative submitted for each of the years in question a list of the days claimed as worked in Connecticut and a printout from a pocket electronic calendar appointment book. Subsequently, petitioner's representative submitted, in support of the claim that certain business meetings occurred in Connecticut, seven letters from individuals who have business dealings or relationships with MUCIP as well as one additional letter from MUCIP's accountants (who also represent petitioner in this proceeding) attesting to various meetings in Connecticut at the accountants' offices.

The Division's auditor reviewed petitioner's documents and concluded that they did not substantiate the apportionment of days claimed by petitioner due to a lack of detail concerning the location and duration of the claimed meetings as well as the purpose and necessity for performing services for MUCIP in Connecticut on the days claimed to have been spent working there. Accordingly, the auditor disallowed petitioner's claimed apportionment and allocation in full and determined that the wage income from MUCIP was New York source income taxable in its entirety by New York.

A Statement of Personal Income Tax Audit Changes dated October 21, 1997 was issued to petitioner reflecting the disallowance of the claimed apportionment and allocation, and showing

a recalculation of petitioner's New York tax liability, together with penalty and interest. This statement included the following explanation:

> Since adequate documentation has not been provided to support days claimed as worked out of New York, your allocation of wages has been disallowed. The following penalties have been imposed: 685(B) deficiency due to negligence & 685(P) substantial understatement.

By a Notice of Deficiency dated January 23, 1998, the Division asserted additional New York State personal income tax and New York City nonresident earnings tax against petitioner as follows:

YEAR	NEW YORK STATE	NEW YORK CITY
1994	$12,017.61	$ 706.00
1995	11,762.99	717.66
TOTAL	$23,780.60	$1,423.66

In addition to the foregoing amounts of State and City tax, the Division's Notice of Deficiency also asserted interest and the aforementioned penalties for negligence and substantial understatement.

MUCIP started its business in the mid to late 1970s in Danbury, Connecticut. Over the ensuing years, MUCIP's business grew such that by the late 1970s and early 1980's, MUCIP was installing coaxial cable in many different areas including Connecticut, Massachusetts, and Michigan. In the early 1980s, MUCIP focused its business on the New York City and Long Island area and moved its offices from Connecticut to College Point, New York, where it has been located since. MUCIP's only office during most of the years in issue was in College Point,

New York,[1] although in June 1995 MUCIP leased approximately 300 square feet of space, consisting of a small room with desks and tables, at 92 North Street in Danbury, Connecticut. According to the auditor's report, the office space at 92 North Street was a rented room in the Dolan Realty office, with no sign or other visible indication that MUCIP was present there. In October 1995, MUCIP leased space for executive offices and an operations facility in Fairfield, Connecticut. The date on which MUCIP actually commenced operations from the leased space in Fairfield is not specified in the record.

The premises in College Point, New York served as MUCIP's operations center during the years in issue. MUCIP's executives, including petitioner; its technicians; billing and payroll personnel; inventory and materials were located there. MUCIP's fleet of trucks and other equipment were housed and maintained at College Point, and its scheduling and other matters were conducted from such facilities. Commencing at or about the time of its move to College Point, MUCIP engaged various professionals to provide services and products concerning personnel, liability and business insurance, computer and technology matters, pension administration, and the like. A number of these professionals were located in the Danbury, Connecticut area and, according to petitioner's representative, the relationships between MUCIP and these professionals came about because of the long-term relationship between MUCIP and petitioner's accounting firm in Danbury, Connecticut, apparently on the basis of recommendations. MUCIP's relationships with the various professional persons, which

[1] MUCIP maintained an office for administrative matters in Armonk, Westchester County, New York. The record does not clearly specify the time frame during which MUCIP leased such office but it appears that such period was after the two years in question in this matter.

commenced when MUCIP moved to New York and "blossomed into a 15 or 16 million dollar per year business," continue to the present.

Petitioner did not appear at the hearing to provide testimony regarding his claim of entitlement to apportion and allocate. Petitioner's representative, whose firm has served as accountants for MUCIP and for petitioner for some 25 years, explained petitioner's position to be that MUCIP utilized the services of certain professionals, including his firm of accountants, various insurance agents, a banker, an individual specializing in computer and technology matters, and others, who were located in the greater Danbury, Connecticut area. He stated that petitioner attended various meetings with these persons, in Connecticut, to deal with MUCIP's needs in each of such areas. According to petitioner's representative, many of the meetings were held in his offices where space was always available for petitioner's use with respect to MUCIP matters as needed. Petitioner's representative admitted that the printout from the electronic appointment calendar does not detail the location of each of the appointments listed thereon, and contains very little information as to the purpose or other specifics concerning such appointments.

The auditor noted that the dates shown on the electronic appointment calendar printout precisely match those submitted for the president and other principal shareholder of MUCIP, one Paul Mucci, including identical jury duty days and doctor and dental appointments. According to petitioner's representative, the reason that the dates are virtually identical for MUCIP's two principals is that they conduct 99 percent of their meetings together. Petitioner's representative could not specifically recall all meetings that allegedly occurred or the specific purposes therefor, but stated that he personally knew many such meetings occurred and that he was

present at several, including those which involved accounting, financial and related matters and which occurred in his firm's offices. He noted that his recall of such meetings was assisted during his review of the electronic appointment calendar with petitioner. On this score, petitioner and his representative "sat down and figured out if a meeting took place in Connecticut" and, if so, noted this on the printout by hand printing the letters "CT" after certain dates.

The printout from the electronic appointment calendar shows, from left to right, a date, a time, and a reference. There is only one time listed, presumably indicating the starting time for a given meeting or other event. The reference area is very limited and cryptic, and contains in most instances no indication of the place of the meeting or event. In some instances, the reference area lists a name, usually in abbreviation form.

Petitioner submitted letters from seven individuals with whose businesses MUCIP had dealings. These letters indicate various dates on which the individuals met with petitioner on business matters concerning MUCIP, as follows:

NAME	TYPE OF BUSINESS/OFFICE LOCATION	MEETING DATES
Karl Rickel	Employee benefit insurances/Danbury, Ct.	5/19/94, 6/7/94, 10/14/94, 7/26/95, 8/25/95, 9/13/95, 10/20/95
Emil Curran	Commercial insurances/Danbury, Ct.	4/25/94, 5/31/94, 12/20/94, 4/27/95
Andrew Whelan	Pension administration/Boston, Ma.	11/29/94 7/26/95
George Ballas	Computer and Technology/Danbury, Ct.	1/6/94, 3/17/94, 5/6/94, 8/3/94, 9/23/94, 10/21/94, 4/11/95, 7/7/95, 9/21/95

Nancy Dolan	Banking and Real Estate/Danbury, Ct.	1/28/94 6/7/95, 10/31/95, 12/28/95
William Lavelle	Real Estate/Brookfield, Ct.	5/5/94 3/31/95, 8/16/95, 12/14/95
Joseph Galgano	Employee benefit insurances/New York City	2/15/94, 10/10/94

The first four letters do not specify where the meetings took place, the fifth and sixth state that the meetings occurred in Danbury, Connecticut and Brookfield, Connecticut, respectively, and the seventh states that the meetings occurred at MUCIP's accountants' offices in Danbury, Connecticut. The first and third letters state that the meetings "encompassed a significant part of an entire day," the fourth states that the meetings "typically lasted the entire day," and the balance of the letters do not state the duration of the meetings. The sixth letter states that some of the meetings included visits and walk-throughs of various available properties for the prospective business purposes of MUCIP.

In addition to the foregoing, petitioner's representative provided a letter claiming that his firm (MUCIP's accountants) provided full-day, one-on-one services for MUCIP on eleven days in 1994 and on eight days in 1995. The matters covered during such sessions are not detailed, but apparently such sessions covered financial, accounting and other MUCIP business matters. Although the letter makes reference to an attached schedule of days, the same was not attached to the letter provided in evidence at hearing or otherwise specifically identified.

It appears as though meetings with some, if not all of the individuals noted above, may have occurred at MUCIP's College Point, New York offices as well as at the accountants' offices and other locations in the Danbury, Connecticut area.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 631, the New York source income of a nonresident individual includes the net amount of items of income, gain, loss and deduction reported in the Federal adjusted gross income that are derived from or connected with New York sources. Included among these items are those attributable to a business, trade, profession or occupation carried on in this State. That section further provides for the apportionment or allocation of income from a business trade, profession or occupation which is carried on partly within and partly without New York. Regulations of the Commissioner (20 NYCRR 132.18 [a]) provide that if a nonresident employee performs services for his employer both within and without New York State, his income derived from New York State sources is based on the proportion of the total number of working days employed within New York State to the total number of working days employed both within and without New York State. However, any allowance for days worked outside New York State must be based on the performance of services which, of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of the employer.

The Administrative Law Judge cited applicable case law which has established that a non-resident 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. However, where a nonresident individual employed by a New York employer performs services both at the employer's New York facility and at an out-of-state location, under circumstances where the services could have been performed at the employer's in-state facilities, such services are performed out of state for the employee's convenience and not for the employer's necessity.

The Administrative Law Judge concluded that there were two issues presented herein: whether petitioner has established the fact that he performed services for his employer in Connecticut on certain specific days and, if so, whether such services were performed in Connecticut out of necessity rather than for petitioner's convenience. The Administrative Law Judge observed that petitioner did not appear at the hearing and there was no testimony as to actual days worked in Connecticut or whether the duties alleged to have been performed there could not have been performed at MUCIP's New York offices. The Administrative Law Judge found that the issue of convenience versus necessity with respect to petitioner's working in Connecticut was raised because petitioner lives in Connecticut. The Administrative Law Judge determined that the record did not substantiate the specific location, duration, work duties and necessity for petitioner's claimed allocation of days. The Administrative Law Judge thus concluded that petitioner failed to meet his burden of proof to show that he was entitled to apportion and allocate days outside of New York.

The Administrative Law Judge sustained the penalty imposed against petitioner due to the fact that he had been audited on a prior occasion on the issue of allocation of days within and without New York and there was no indication that petitioner had taken any steps to keep records that would substantiate his claimed allocation of days.

ARGUMENTS ON EXCEPTION

The sole argument presented by petitioner on exception is that this matter should be remanded to the Administrative Law Judge for the taking of petitioner's testimony. Petitioner argues that his testimony is essential in this matter in order for the Administrative Law Judge to make a fully informed decision. Petitioner argues that he is entitled to have a full and proper hearing as a matter of right and remand is, therefore, appropriate.

In opposition, the Division argues that petitioner's exception amounts to a motion to reopen the record or for reargument. Pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal, an Administrative Law Judge may, upon motion of a party, issue an order vacating his determination upon the grounds that: 1) there is newly discovered evidence which would probably have produced a different result and which could not have been discovered with reasonable diligence in time to have been offered into the record of the hearing, or 2) that there was fraud, misrepresentation or other misconduct of an opposing party (20 NYCRR 3000.16). The Division asserts that petitioner's motion to reopen or to reargue to the Tribunal is improper. Further, the Division maintains that there are no grounds on which such a motion could be granted, as petitioner has neither alleged nor demonstrated the grounds required for such a motion to be granted.

OPINION

Petitioner has presented a single issue on exception for our consideration: whether this matter should be remanded to the Administrative Law Judge for further proceedings. We find no reason that this matter should be remanded.

Pursuant to Tax Law § 2006(7), after review of a determination on exception, this Tribunal has the authority to "issue a decision either affirming, reversing or modifying [the Administrative Law Judge's] determination, or the tribunal may remand the case for additional proceedings before the administrative law judge." We have remanded cases to the Administrative Law Judge where there were unresolved issues of fact (***see***, ***Matter of Abramowitz***, Tax Appeals Tribunal, March 22, 1990) or where certain issues were not addressed by the Administrative Law Judge (***see***, ***Matter of United States Life Ins. Co. in the City of New York***, Tax Appeals Tribunal, March 24, 1994). We have also directed a remand to the

Administrative Law Judge for further proceedings so that additional evidence may be submitted and argument made

> [b]ecause we believe it is important for us to receive the full benefit of our two-stage hearing and exception process which "gives the Tribunal, and ultimately the courts, the benefit of the Administrative Law Judge's research and analysis as well as the parties' research and analysis in response to the Administrative Law Judge's determination" [citation omitted] (***Matter of Sam & Raj Appliance Discount Ctr.***, Tax Appeals Tribunal, August 14, 1997).

Here, however, petitioner was afforded a hearing on April 27, 2000. Although petitioner failed to appear in person and testify at that hearing, petitioner appeared at the hearing by his representative, Fiorita, Kornhaas & Van Houten, P.C. (Robert R. Van Houten, CPA). Despite his failure to testify, petitioner continued to bear the burden of proof in this matter to show that he performed services for his employer, MUCIP, outside New York on 70 days in 1994 and on 68 days in 1995, as claimed, thus demonstrating that the Notice of Deficiency issued to him by the Division was erroneous (***see***, Tax Law § 689[e], 20 NYCRR 3000.15[d][5]). Petitioner had the right to appear at the hearing to testify in order to meet his burden of proof. Petitioner failed to do so.

In ***Matter of Evans*** (Tax Appeals Tribunal, June 4, 1998), the taxpayer sought a remand on exception in order to allow him to introduce additional evidence to more fully develop the record, alleging that he was prevented from doing so by the Administrative Law Judge. We rejected his argument and stated: "[A]fter a thorough review of this record, we conclude that petitioner had his opportunity to present his case fully at the formal hearing in this matter. Therefore, we refuse to remand this matter to give petitioner a second opportunity to present his case" (***Matter of Evans, supra***). Here, petitioner's decision to not appear and testify at a formal hearing likewise does not allow him a second opportunity to present his case (***see also***, ***Matter of Mucci***, Tax Appeals Tribunal, December 20, 2001).

We affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Robert M. Cipolla is denied;

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

3. The petition of Robert M. Cipolla is denied; and

4. The Notice of Deficiency dated January 23, 1998, together with the penalties and interest, is sustained.

DATED: Troy, New York
February 28, 2002

/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