STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PAUL J. MUCCI	:	DECISION DTA NO. 817271
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 Paul J. Mucci, 4 Sail Harbour Drive, Sherman, Connecticut 06784-2727, filed an exception to the determination of the Administrative Law Judge issued on March 29, 2001. Petitioner appeared by Eric C. Kurtzman, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether this matter should be remanded to the Administrative Law Judge for further proceedings.

FINDINGS OF FACT

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

During the years at issue, petitioner was a resident of the State of Connecticut, residing at 4 Sail Harbour Drive, Sherman, Connecticut. He was employed by, is a shareholder of and is the president of MUCIP, Inc. ("MUCIP") which is based in the State of New York. According to the audit file of the Division of Taxation ("Division") pertaining to this matter, petitioner's employer, MUCIP, maintained offices at 20-24 119th Street and at 3189 123rd Street in Flushing, New York and an office at 390 Riverdale Avenue, Yonkers, New York. MUCIP was engaged in installing cable television boxes and converters in residences as well as running cable television wires from poles to the residences.

For each of the years 1994 and 1995, petitioner filed timely New York State and City of New York nonresident returns on which he allocated his wage income earned from MUCIP between days worked in New York and days worked outside New York. In 1994, petitioner claimed to have worked 232 days, 162 of which were worked in New York and 70 of which were worked outside New York. In 1995, petitioner claimed to have worked 226 days, 158 of which were worked in New York and 68 of which were worked outside New York. As a result, petitioner included as New York source income (subject to tax by the State of New York) that portion of his wage income from MUCIP which resulted from the percentage of days claimed to have been worked in New York out of the total number of days worked in each of these years. For 1994, petitioner's wage income from MUCIP was $520,000.00; he calculated the New York

portion to be 162/232 x $520,000.00, or $363,106.00. For 1995, his wage income from MUCIP was $530,147.00; the New York portion was determined to be 158/226 x $530,147.00, or $370, 626.00.

The Division commenced the audit of petitioner in August 1997 at which time the auditor requested information from petitioner to substantiate his wage allocation for the years at issue. Since no information was provided despite several requests therefor, the Division, on November 5, 1997, issued a Statement of Personal Income Tax Audit Changes to petitioner for each of the years 1994 and 1995 which asserted additional tax due for 1994 in the amount of $12,760.50 ($12,054.50 in State tax and $706.00 in City of New York tax), plus penalties pursuant to Tax Law § 685(b) and(p) and interest, for a total amount due of $19,033.55 and additional tax due for 1995 in the amount of $12,470.89 ($11,753.23 in State tax and $717.66 in city tax), plus penalties pursuant to Tax Law § 685(b) and (p) and interest, for a total amount due of $16,802.92. Each Statement of Personal Income Tax Audit Changes stated as follows: "Since you failed to provide adequate documentation to support days claimed as worked out of New York, your allocation of wages has been disallowed. Wages are being taxed at 100%. Negligence penalty (Section 685[b]) and substantial understatement penalty (Section 685[p]) have been assessed."

On February 17, 1998, the Division issued a Notice of Deficiency to petitioner which asserted total tax due for the years 1994 and 1995 in the amount of $25,231.39, plus penalties and interest, for a total amount due of $36,832.19.

Apparently, petitioner then filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). By letter to petitioner's

representative dated March 24, 1999, the conciliation conferee, noting that petitioner's representative opted to handle the conference by correspondence rather than by appearing, advised that as of the date of the letter, no information had been received regarding petitioner’s allocation of days worked outside New York. The letter further indicated that the type of substantiation needed would include a diary, expense reports, credit card receipts with explanations and any other information which would substantiate the claimed days worked outside New York State. The conciliation conferee informed petitioner’s representative that a consent and, thereafter, a Conciliation Order would be issued if the information requested was not received within ten days from the date of the letter.

On March 29, 1999, petitioner’s representative requested additional time to submit the substantiation documentation. On May 19, 1999, petitioner’s representative submitted certain documents with a cover letter which described such documents as follows:

> Recap of Mr. Mucci’s days worked out of NYS with specific reference to nature of services performed, location and client purpose to such meetings out of New York. As previously advised, no such days were worked at home.
>
> Copies of Mr. Mucci’s contemporaneous computer calendar or diary in support of such dates. Although in somewhat disorganized format, such schedule should authenticate credibility of schedule recap as provided.
>
> Additional third party letters confirming appointments and purposes to respective out of state functions. Three additional letters are forthcoming from various parties and will be forwarded to you ASAP.
>
> Copies of cellular/mobile telephone bills which reflect significant activity while out of NYS office from April 1995 to January 1996.
>
> Copies of American Express bills in support of out of state meetings, luncheons, etc.

On August 6, 1999, BCMS issued a Conciliation Order (CMS No. 168298) which determined that, instead of deeming all days worked in the year (232 days worked in 1994; 226 days worked in 1995) to be days worked in New York, petitioner was entitled to allocate 3 days in 1994 and 7.5 days in 1995 as days worked outside New York.[1] Accordingly, petitioner's wage allocation percentage was recomputed from 100% for both years to 98.71% for 1994 and 96.68% for 1995. As a result, the deficiencies were revised as follows:

		1994			1995		TOTAL
	NYS		NYC	NYS		NYC	
Tax	$11,534.12		$675.74	$10,459.04		$638.49	$23,307.39
Penalty	3,955.40		164.16	3,021.70		120.61	7,261.87
Interest	4,450.57		260.74	2,905.69		177.38	7,794.38
Total	$19,940.09		$1,100.64	$16,386.43		$936.48	$38,363.64

The Conciliation Order canceled the substantial underpayment penalty (Tax Law § 685[p]) imposed upon the City of New York portion of the tax deficiencies for each of the years 1994 and 1995 and imposed the negligence penalty (Tax Law § 685[b]) and interest upon the State and City deficiencies at the applicable rates.

According to information contained in the Division's audit file, petitioner was previously audited for the years 1991 through 1993. The Income Tax Report of Audit (form AU-241.26) from the previous audit noted that MUCIP was based in College Point, New York. For the years 1991 and 1993, petitioner listed 102 and 70 days, respectively, as days worked outside New York, all but a few of which were claimed to have been worked at MUCIP's "satellite office" in

[1] It is unclear from the record what days the conciliation conferee deemed to have been spent outside the State of New York and the basis therefor.

Danbury, Connecticut (listed as 146 Deer Hill Avenue). This address was also the address of MUCIP's accountants, Fiorita, Kornhaas & Van Houten, P.C.; Robert R. Van Houten, CPA is petitioner's representative in the present matter.

The Income Tax Report of Audit for the audit of the years 1991 through 1993 stated, in part, as follows:

> Regarding allocation, the taxpayer's employer, which may be a related company, has a NY allocation percentage of 100%, indicating that it does not maintain an office outside NY. Although the CT address with telephone and fax numbers is on the company letterhead sent, since it is also the accountant's office it is unlikely it is used as a corporate business office where other employees work.
>
> * * *
>
> Therefore, since the taxpayer had not returned the waivers to extend the statute nor responded to show that the office is a corporate office or the necessity of working these days out of NY, the days worked at the 'satellite office' in Danbury were disallowed and his allocation of wages adjusted.

On May 18, 2000 and May 26, 2000, respectively, petitioner, by his representative, Fiorita, Kornhaas & Van Houten, P.C. (Robert R. Van Houten, CPA) and the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based on documents and briefs. Pursuant to a revised submission schedule dated June 28, 2000, petitioner was to submit his documents and brief on or before August 15, 2000 and his reply brief on or before October 13, 2000. Other than the documents submitted to the conciliation conferee on May 18, 1999, petitioner submitted no additional documentation or briefs.

For 1994 and 1995, petitioner submitted a typewritten schedule of days purportedly worked outside New York State. For 1994, the schedule sets forth dates, location where worked (each indicated a Danbury, Connecticut office) and the client and purpose of the work. For 1995, the schedule submitted was identical in its format; the locations set forth on the schedule were the Danbury, Connecticut office on 55 days, a Fairfield, Connecticut office on 9 days and Bermuda on 4 days. There is no indication as to whether these appointments or meetings lasted for the entire day and whether petitioner spent any part of the day in New York. In addition, the record does not disclose the reason why these client appointments or meetings were held in Connecticut rather than at MUCIP's New York offices.

The document which is referred to in the letter from petitioner's representative as "Mr. Mucci's contemporaneous computer calendar or diary" does not set forth the location of the meetings or appointments listed thereon. For example, on June 1, 1994, a meeting with Dave Rubin is indicated. This day was not claimed by petitioner to be a day worked outside New York. However, appointments with Dave Rubin on January 7, 1994 and on June 2, 1994 were claimed as days worked in Connecticut.

The identical calendar or diary was submitted by petitioner's representative as the contemporaneous calendar or diary of MUCIP's vice president, Robert M. Cipolla, at a Division of Tax Appeals hearing held before Administrative Law Judge, Dennis M. Galliher on April 27, 2000. This hearing involved the allocation of wage income by Mr. Cipolla for the same years, i.e., 1994 and 1995. At that hearing, the auditor, when asked to identify the document, indicated that it was a printout from what he was told was a pocket electronic calendar appointment book that was maintained by Mr. Cipolla. The auditor also indicated that the appointment book often

contained tentative appointments, i.e, it would say “tentative” or “call first” and it was, therefore, impossible to ascertain whether the appointment actually occurred. In addition, the auditor noted that “CT” was often handwritten next to an entry on the calendar whereas the entry did not disclose the location of the meeting or appointment. He indicated that both calendars included exactly the same meetings and appointments, including luncheon dates, dentist and doctor appointments, haircuts, vacations and jury duty.

Petitioner also submitted letters from the following businesses:

NAME	BUSINESS & LOCATION	DATES
Ballas Assoc., Inc.	Computer consulting services 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
Karl F. Rickel, CFP, CLU	Personal and business planning Danbury, CT & New York, NY	5/19/94, 6/7/94, 10/14/94, 7/26/95, 8/25/95, 9/13/95, 10/20/95
Emil J. Curran, CIC	Insurance Danbury, CT	4/25/94, 5/31/94, 12/20/94, 4/27/95
Andrew F. Whelan, CFS Harbour Financial Group	Pension and corp. investment Boston, MA & Phoenix, AZ	11/29/94, 7/26/95

None of these letters sets forth the location of these meetings. In some instances, the calendar/diary which petitioner submitted contains other meetings, appointments or engagements such as golf lessons and it is, therefore, unclear as to whether the entire day or some portion thereof was spent outside New York.

Petitioner submitted copies of cellular/mobile telephone bills for the period April through November 1995. While it is true that a significant number of telephone calls were made from

various locations within the State of Connecticut (most originated from Bridgeport, Connecticut), the telephone bills are those of MUCIP and not petitioner. Although the account number is the same on all of the bills (Account No. 000374047), the billing number varies considerably, i.e., some of the bills list the billing number as a 917 area code; others indicate a 718 area code. Moreover, the billing numbers within the same area code are for different telephone numbers. For example, under the 917 area code are the following telephone numbers: 882-4135; 846-2347; and 882-4161.

Additionally, a comparison between the telephone bills and the calendar/appointment book reveals discrepancies. For example, the calendar/appointment book indicates that petitioner was on vacation from August 7 through August 11, 1995. The telephone bill (billing number 718 344-3244) indicates a significant number of telephone calls originating from both New York and Connecticut during this period. There are also several instances where the telephone bills indicate that calls were made from New York on dates where letters were submitted to show that meetings were held in Connecticut, i.e., a letter from Emil J. Curran, CIC, states that a meeting with petitioner (and Robert Cipolla) was held on April 27, 1995 (***see,*** Finding of Fact "9") while a phone bill (Billing No. 718 344-3080) reveals that calls were made from both New York and Connecticut on that day.

Finally, petitioner submitted copies of American Express bills from various months in the year 1995. During the months of January, July, September, October and November of 1995, these bills indicate that products or services were purchased in Connecticut and New York. In September 1995, food, beverage and lodging charges were incurred in Bermuda.

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, for there to be an allowance for days worked outside New York State, the out-of-state duties must be performed of necessity, as distinguished from convenience, in the service of the employer.

The Administrative Law Judge considered petitioner's evidence and concluded that petitioner failed to sustain his burden of proof to show that he performed services for his employer, MUCIP, outside New York on 70 days in 1994 and on 68 days in 1995. The Administrative Law Judge found much of petitioner's evidence unreliable, especially a computer calendar/diary which was the identical calendar/diary offered by a different taxpayer at a Division of Tax Appeals hearing concerning the allocation of that taxpayer's wage income for the years 1994 and 1995. The Administrative Law Judge found it "wholly unreasonable" to believe that

although petitioner and the other taxpayer were officers of MUCIP, they attended the same meetings, had doctor and dentist appointments, went on vacation and even served on jury duty on the same days for two consecutive years.

The Administrative Law Judge also concluded that even if petitioner's evidence was sufficient to substantiate that he spent the 70 days in 1994 and the 68 days in 1995 working outside New York, petitioner had failed to prove that his out-of-state services were performed for MUCIP out of necessity of the employer rather than for his own convenience. Although petitioner maintained that MUCIP maintained an office in Connecticut, information obtained from the audit file pertaining to a previous audit for the years 1991 through 1993 indicated that MUCIP's "satellite office" in Danbury, Connecticut had the same address as that of MUCIP's accountants (and petitioner's representative). The Administrative Law Judge concluded that an inference may be drawn that the relative proximity of this Danbury "satellite office" and petitioner's home may well have been for the convenience of petitioner. Petitioner introduced no evidence to show that the meetings, appointments and other activities alleged to have been performed by petitioner in Connecticut during 1994 and 1995 could not have been performed in MUCIP's New York offices. The Administrative Law Judge determined that petitioner failed to meet his burden of proving that such meetings, appointments and other activities alleged to have taken place in Connecticut (or, in a few instances, other venues outside New York) were for the necessity of his employer rather than for his own convenience. Accordingly, the Administrative Law Judge concluded that petitioner was not entitled to allocate any days outside New York for the years at issue.

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 and the introduction of supplementary evidence. 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 there is no basis on which to remand this matter to the Administrative Law Judge. The Division points out that petitioner and the Division agreed in writing to submit this matter for a determination by an Administrative Law Judge without a hearing. Petitioner thus voluntarily waived his right to a hearing. The Division asserts that petitioner had the opportunity to present any support for his position, including testimony and it was his choice to proceed as he did. Based on his failure to meet his burden of proof, the Division maintains that the Administrative Law Judge correctly decided this matter.

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 has demonstrated no basis for remanding his case. As the record discloses, petitioner, by his representative, Fiorita, Kornhaas & Van Houten, P.C. (Robert R. Van Houten, CPA) waived his right to a hearing and agreed to submit the matter for determination by an Administrative Law Judge based on documents and briefs. Parties are accorded the right to have a controversy determined on submission without the need for appearance at a hearing (20 NYCRR 3000.12). Petitioner, however, 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, 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 submit evidence 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." Here, petitioner's decision to waive his right to a formal hearing likewise does not allow him a second opportunity to present his case.

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 Paul J. Mucci is denied;

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

3. The petition of Paul J. Mucci is denied; and

4. The Notice of Deficiency dated February 17, 1998, as modified by Conciliation Order CMS No. 168298, is sustained.

DATED: Troy, New York
December 20, 2001

/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