STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS L. HUCKABY	:	DECISION DTA NO. 817284
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1994 and 1995.	:	

Petitioner Thomas L. Huckaby, 124 Taggart Avenue, Nashville, Tennessee 37205-4427, filed an exception to the determination of the Administrative Law Judge issued on February 8, 2001. Petitioner appeared by McDermott, Will and Emery (Peter L. Faber, Esq., of counsel). 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. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 12, 2001 in New York, New York.

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

ISSUES

I. Whether Tax Law § 631(b) permits the Division of Taxation to tax a nonresident on compensation for services that are performed out of state.

II. Whether application of the convenience of the employer test results in the taxation of income out of all proportion to petitioner's contacts with, and benefits from, New York State in violation of the United States Constitution.

III. Whether the Division of Tax Appeals should award petitioner reasonable administrative and litigation costs, including attorney's fees.

FINDINGS OF FACT

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

Petitioner, Thomas L. Huckaby was domiciled in Nashville, Tennessee. He did not maintain a permanent place of abode in New York State nor did he spend more than 183 days in New York State in either of the years in issue. He was not a resident of New York State within the meaning of section 605(b) of the Tax Law.

Petitioner was an employee of Multi-User Computer Solutions ("MCS") of Nashville, Tennessee, from 1983 until July 1991. He lived and worked in Nashville during this period and was domiciled in Tennessee.

MCS was engaged in the business of developing and selling computer software.

Petitioner's duties for MCS consisted of developing and servicing computer programs and advising MCS's customers with respect to their use.

Petitioner has a Bachelor of Science degree with a major in accounting. Before his MCS employment, petitioner developed and implemented a Basic Language payroll program and a Medicare/insurance billing program while working as controller for a Tennessee home healthcare agency. While working for MCS he developed an expertise in computer

programming and transitioned from a single-user to a multi-user computer environment. Subsequent to petitioner's MCS employment, he received training in and developed computer applications using SQL, Oracle Forms 3.0, and Reportwriter 1.0.

The National Organization of Industrial Trade Unions ("NOITU") is an umbrella organization of which industrial trade unions are members. It provides various administrative services for its member unions. Among its services are to administer health claims payment, medical centers, and pension programs for members of its member unions.

NOITU invoices the employers of members of its member unions for welfare, dues, and pension fund contributions. Monies collected from the employers are used for the benefit of NOITU's member unions through the various fringe benefit programs that NOITU administers.

NOITU was a client of MCS before July 1991. MCS developed computer software that NOITU used in administering its fringe benefit programs.

Petitioner, as part of his duties for MCS, worked on matters for NOITU and dealt directly with NOITU's personnel.

In 1991, MCS underwent a business reorganization that resulted in the termination of petitioner's employment with MCS.

NOITU needed a programmer with petitioner's skills and, accordingly, it hired petitioner as an employee in 1991.

Petitioner and NOITU agreed that petitioner, who had served NOITU from Nashville in the past, would continue to be based in Nashville. His duties consisted of continuing to support the Basic Language programs that MCS had written for NOITU on a BTI computer; assisting the New York computer department manager in selecting a replacement computer, operating system,

and application programming language; writing interface programs that facilitated the transfer of data from the old BTI computer to a new IBM computer; rewriting the health claims payment program in the Oracle SQL computer language; writing new pension tracking and annual reporting programs; and supporting all other computer programming areas, including membership maintenance, employer billing, and medical center applications.

NOITU's office was in Jamaica, New York. It also operated two medical centers, one in Manhattan and one on Long Island.

Petitioner and NOITU agreed that petitioner would come to NOITU's New York office only when needed to gather guidelines for revision of existing or creation of new computer programs, and to instruct NOITU's New York personnel in their use. In May of 1995, petitioner spent 19 working days in New York to assist with the one-time conversion from the BTI to the IBM computer.

Working as an employee of NOITU was petitioner's only business activity during the years at issue. He did not work for any other person or organization, either as an employee or as an independent contractor.

Petitioner set up an office in his home in Nashville to perform duties for NOITU. NOITU arranged with MCI Telephone Company to install a long-distance data line from its Jamaica, New York office to petitioner's Nashville office. Petitioner had a dedicated voice telephone that he used solely for business purposes. He had another telephone line for personal calls. Petitioner's Nashville office consisted of one room in his home. In addition to the MCI communication equipment, the office included two computer terminals, which were later replaced with a personal computer and a printer. Petitioner had his own desk but NOITU paid

for a desk chair, a dry-mount wall board, and two 30" x 72" work tables. Office expenses, including a telephone and supplies, were reimbursed to petitioner by NOITU on a monthly basis.

Most of petitioner's computer programming work was done in Nashville. He traveled to New York for the purpose of instructing NOITU's New York personnel in the use of new or revised computer programs.

NOITU did not require petitioner to perform his work in Nashville. It would not have objected if he had performed it in New York. Petitioner's decision to do his programming work in Nashville rather than New York was made for personal reasons.

Petitioner's work for NOITU did not involve any administrative responsibilities for the New York office nor did he supervise New York personnel or have any involvement in the running and the management of the New York office. His work involved preparing and revising computer programs that were used by NOITU and instructing NOITU's personnel in their use. In the course of his work he was in daily contact with NOITU's New York office by telephone.

Petitioner was not an officer or member of the board of directors of NOITU. He owned no stock or any other equity interest in NOITU, nor did he lend any money to NOITU.

Nashville is 900 miles from New York City. Published airline schedules indicate that a flight from Nashville to New York takes about two hours.

In a typical week, petitioner spent approximately 45 hours working for NOITU. Most of his work was done at his office in Nashville.

During 1994, petitioner worked 187 days in Tennessee and 59 days in New York.

During 1995, petitioner worked 180 days in Tennessee and 62 days in New York.

When petitioner came to New York on NOITU business, he stayed in a hotel near NOITU's office.

In 1994, petitioner came to New York eight times. His average stay was eight work days and his longest stay was ten work days.

In 1995, petitioner came to New York eight times. His average stay was 8 work days and his longest stay was 19 work days.

Petitioner filed timely Federal income tax returns for 1994 and 1995.

Petitioner filed timely New York State personal income tax returns for 1994 and 1995. On each return, petitioner allocated his wage and salary income to New York on the basis of the total number of days worked in New York over the total number of days worked in the year.

On or about November 28, 1997, the Audit Division of the Division of Taxation ("Division") mailed to petitioner statements of proposed audit changes for 1994 and 1995 which explained that there were deficiencies of New York State and New York City personal income tax. For each of the years in issue, the Division explained, in part, that days worked at home do not form a proper basis for allocation of income by a nonresident. According to the Division, "any allowance claimed for days worked outside of New York must be based on the performance of services which, because of the necessity of the employer, obligate the employee to out-of-state duties in the service of his employer." Upon applying this principle, the Division allocated the total amount reported by petitioner as wages, salaries and tips from his New York employment to New York State and New York City.

On or about April 6, 1998 and April 27, 1998, the Division mailed to petitioner notices of deficiency which asserted deficiencies of New York State and New York City personal income taxes as follows:

Date of Notice	Jurisdiction	Year	Amount of Tax	Interest	Balance Due
April 6, 1998	N.Y.S.	1994	$2,204.91	$590.88	$2,795.79
	N.Y.C.	1994	$202.53	$54.28	$256.81
April 27, 1998	N.Y.S.	1995	$2,182.66	$378.18	$2,560.84
	N.Y.C.	1995	$202.94	$35.16	$238.10

A conciliation conference was held on this matter before the Department of Taxation and Finance's Bureau of Conciliation and Mediation Services on March 16, 1999. On or about June 4, 1999, the Bureau of Conciliation Services mailed to petitioner a Conciliation Order sustaining the deficiencies proposed in the notices of deficiency.

On or about August 26, 1999, petitioner mailed to the Division of Tax Appeals a petition disagreeing with the proposed deficiencies and requesting a formal hearing.

On or about October 7, 1999, the Division of Taxation mailed an answer to the petition to the Division of Tax Appeals.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge analyzed the facts of this case, which are not in dispute, with the statute, regulations and applicable case law and found that the Division properly taxed petitioner herein. The Administrative Law Judge first addressed petitioner's argument that the source of income was dependent upon where the work was performed and not on where the person paying for the service was located. The Administrative Law Judge, relying on ***Matter of***

Speno v. Gallman (35 NY2d 256, 360 NYS2d 855), dismissed this argument stating that the current law demands that the convenience of the employer test be employed to determine whether tax liability arises in a certain case. Here, the Administrative Law Judge noted that petitioner's employer, NOITU, had its office in New York State and it operated two medical centers which were located in New York State. Petitioner worked in Nashville for personal reasons and, in fact, his employer would not have objected to his working in New York. Moreover, petitioner concededly worked several days within New York for each of the years at issue. Thus, the Administrative Law Judge held that the convenience of the employer doctrine was properly applied by the Division in this case.

Petitioner further argued that the convenience of the employer test violated his due process rights. Petitioner claimed that not only was the test illogical, but, as applied to him, was unconstitutional because it resulted in taxing his income out of all proportion to his contacts and benefits from New York State. The Administrative Law Judge rejected this argument emphasizing that the source of petitioner's income was his New York State employer and, based upon the decision in ***Matter of Colleary v. Tully*** (69 AD2d 922, 415 NYS2d 266), that fact establishes the necessary connection with New York to impose tax on the income at issue herein.

Moreover, petitioner argued that the convenience of the employer test as applied to him violated the Equal Protection Clause of the United States Constitution by applying an irrational standard for distinguishing between taxpayers who can allocate income between New York State and elsewhere and taxpayers who cannot allocate. Petitioner asserted that the dividing line between people who can allocate their income and people who cannot is whether they are required to work out of state by their employer. The Administrative Law Judge rejected

petitioner's interpretation of the convenience of the employer test. The Administrative Law Judge noted that the test is not whether an employee is required to work out of state by his employer, but rather, whether it is necessary to perform services out of state in the service of the employer. Additionally, the Administrative Law Judge pointed out that the rational basis for the rule is that it protects the integrity of the apportionment scheme by including as taxable income receipts from services which are substantially connected to New York but which are performed outside of New York to effect a reduction in New York State taxes (***see***, ***Matter of Colleary v. Tully***, ***supra***).

Lastly, the Administrative Law Judge considered the issue of whether petitioner was entitled to recover reasonable administrative and litigation costs. The Administrative Law Judge denied such request by petitioner. The Administrative Law Judge reasoned that, pursuant to Tax Law § 3030(a), only a prevailing party is entitled to receive such costs and petitioner has failed to prove that he was a prevailing party in this proceeding. Accordingly, the Administrative Law Judge denied petitioner's petition in its entirety.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues the same issues that he presented to the Administrative Law Judge below. Petitioner states that New York can tax only that proportion of petitioner's income as it relates to the proportion of total working days that were spent within New York State. Petitioner claims that the taxing of 100% of his income, despite the fact that he spent only 25% of his working days within New York State, is in violation of both the Due Process Clause and the Equal Protection Clause of the United States Constitution. Additionally, petitioner argues that he is entitled to an award of reasonable administrative and litigation expenses since

the Division's position in this case flies in the face of not only the law, but its own audit guidelines.

The Division agrees with the determination of the Administrative Law Judge. The Division states that the convenience of the employer doctrine was properly applied to the facts of this case. The Division asserts that the wages of petitioner from a New York employer are taxable to New York since petitioner admits that he worked both within and without the state solely for his convenience. Furthermore, the Division emphasizes that the case law demonstrates that the convenience of the employer doctrine has been upheld as constitutional. Despite the assertions made by petitioner to the contrary, the Division claims that this case is clear cut due to its facts and that portraying the facts of this case as an issue of whether petitioner was within commuting distance from New York is inappropriate. Lastly, the Division states that petitioner's request for costs in this case is premature. Basically, since petitioner has not proven that he is a prevailing party, the Division argues that costs cannot be awarded to him. Therefore, the Division respectfully requests that the determination of the Administrative Law Judge be sustained.

OPINION

We affirm the determination of the Administrative Law Judge.

This case involves the doctrine of the convenience of the employer and whether such test was properly applied to the facts of this case. Tax Law § 631 defines the New York source income of a nonresident individual, in pertinent part, as "[t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . derived from or connected with New York sources" (Tax Law § 631[a][1]). Furthermore, the statute further

clarifies the phrase *Income and deductions from New York sources* to include those items attributable to "a business, trade, profession or occupation carried on in this state" (Tax Law § 631[b][1][B]). The Commissioner's regulations at 20 NYCRR 132.18(a) address the convenience of the employer doctrine and provide, in pertinent part, that:

> [i]f a nonresident employee . . . 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. The items of gain, loss and deduction . . . of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. 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.

Petitioner asks us to focus on the fact that the taxpayer's place of business is not in New York which he claims distinguishes his case from the clear precedent in this area of law. Petitioner misinterprets the statute. The analysis of this case focuses on the fact that petitioner, a nonresident of New York State, is employed by a New York State employer and performs his job duties both within and without the State. As the stipulated facts to this case indicate, petitioner resides in Nashville solely for his convenience and personal reasons. The fact that petitioner considered himself to be working principally in Tennessee is not dispositive in this case. The correct focus is that petitioner derives his income from the performance of duties for his New York State employer (***see***, ***Matter of Colleary v. Tully***, ***supra*** [wherein it was held that the income of an out-of-state self-employed person is taxable only through his intrastate activities

since these activities are the connection with the State, whereas, the source of an out-of-state employee's income is the employer within the State]).

As noted by the Administrative Law Judge below, the case law has confirmed that the convenience of the employer doctrine is the proper test to determine the tax liability of a nonresident individual who is employed by a New York employer yet, for one's own convenience, chooses to perform his job duties both within and without New York. The Court of Appeals has 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***, ***supra***, 360 NYS2d, at 857-858).

Therefore, we disagree with petitioner that the facts of his case are unusual. We view this case as a textbook situation where a nonresident works for a New York employer both within and without the State for his own convenience and, as such, was properly taxed on his income by the Division in this case.

Petitioner has tried to differentiate his case from the situation involving an individual who is within commuting distance to New York State and chooses to work at home rather than to travel into New York in an effort to avoid the resultant tax liability. Petitioner argues that since he is not a commuter, he should not be subject to the convenience of the employer doctrine. We reject this proposition.

Obviously, the statute does not address the issue as involving commuters. However, petitioner's assertion that since he resides 900 miles from New York and, thus, is not a person who is trying to avoid taxation by merely claiming to work at home rather than drive to work is not the focus of the statute or the case law. Clearly, the issue of how far away an individual lives from his New York State employer cannot control the outcome of this case. We are not at liberty to judge what is a commutable distance for employment for any particular individual and we will not interpret this rule as involving commuting. As stated above, the taxability at issue is resolved by a proper focus on whether petitioner was working in Nashville out of necessity to his employer or rather, as the facts herein establish, merely out of the convenience of the employee. For these reasons, we are not persuaded by petitioner's arguments and find that the Division properly taxed petitioner herein.

Petitioner continues to argue that the application of the convenience of the employer doctrine violates his due process rights by taxing his income out of all proportion to his contacts with and benefits from New York State. Petitioner states that:

> the Division conveniently ignores a basic Constitutional fact: that a state, while it can tax all of the income of a resident by reason of his residency, can tax the income of a nonresident only to the extent that the income is derived from business conducted within the state (Petitioner's brief in reply, p. 5).

Again, petitioner's argument is based upon a flawed interpretation of the statute. As we have reasoned above, it is the New York State employer from which petitioner derives his income that is the focus of the analysis. The fact that petitioner actually works in New York for a minority of his total working days is irrelevant when he is performing his duties both within and without the State for his New York State employer. As we have held, the convenience of the

employer doctrine was properly applied to the facts in this case and as such we do not find that there has been a violation of the Due Process Clause as applied to petitioner herein.

Similarly, we reject petitioner's claim that application of the convenience of the employer doctrine violates the Equal Protection Clause. Petitioner maintains that such doctrine has the result of allowing some nonresidents to allocate their income between New York State and their state of residence while not allowing other nonresidents to do so based upon whether they are required to work outside New York State by necessity of their employer or for the employee's convenience. Petitioner claims that there is no rational basis for this distinction. However, the convenience of the employer doctrine serves to protect the integrity of the apportionment scheme and such doctrine has been upheld as valid (***see***, ***Matter of Colleary v. Tully***, ***supra***; ***see also***, ***Matter of Speno v. Gallman***, ***supra***). Accordingly, we reject petitioner's contention that there was a violation of the Equal Protection Clause.

The last issue raised by petitioner herein is a request for costs. Tax Law § 3030(a) provides for a discretionary award of attorneys' fees to a prevailing party in a proceeding in which the Commissioner is a party and which involves the determination, collection or refund of any tax. Petitioner's request for costs is denied since he has not proven that he is a prevailing party. Therefore, he is not entitled to recover any costs arising from this litigation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas L. Huckaby is denied;

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

3. The petition of Thomas L. Huckaby is denied; and

4. The notices of deficiency dated April 6 and 27, 1998 are sustained.

DATED: Troy, New York
May 30, 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