STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **SYLVESTER L. TUOHY** | : | DECISION<br>DTA NO. 818430 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1994 and 1995. | : | |

Petitioner Sylvester L. Tuohy, 748 Midland Road, Oradell, New Jersey 07649, filed an exception to the determination of the Administrative Law Judge issued on June 13, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed 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 days worked at home by petitioner can be allowed as days worked outside New York State for purposes of allocating wage income to sources within and without the State.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for finding of fact "6" which has been modified. The Administrative Law Judge's finding of fact and the modified finding of fact are set forth below.

During the years 1994 and 1995, petitioner, Sylvester L. Tuohy, was domiciled in Oradell, New Jersey and did not maintain a permanent place of abode in New York State.

Petitioner was an employee of Pace University, its main campus being located at 1 Pace Plaza, New York, New York. He was employed as a professor in Pace's Computer Science Department and taught courses at its Pleasantville/Briarcliff Campus, located at 862 Bedford Road, Pleasantville, New York. Petitioner was also employed by Iona College, its main campus being located at 715 North Avenue, New Rochelle, New York, as an adjunct professor in the Computer Information Systems Department. He taught at Iona's Rockland Campus, located at One Dutch Hill Road, Orangeburg, New York. During the years at issue, petitioner had withholding taxes withheld by and received wage and tax statements, Form W-2, from Pace and Iona.

During the years at issue, petitioner taught classes at Pace University during the Spring, Fall and Summer sessions. The classes were generally held on Monday, Tuesday and Thursday, during both the day and evening. Pace provided an office with 6 desks and 1 bookcase for the 10 professors and adjunct faculty in the Computer Science Department. Petitioner employed this space mainly as a place to meet students, and preferred to do classroom preparation; paper, examination and homework correction; and the research and writing of papers in a classroom or at home. Petitioner also taught night classes at Iona College during these years, usually on

Wednesdays. The Rockland Campus of Iona College was located in the Tappan Zee High School. Iona rented a classroom wing of the high school, provided no office space to its adjunct professors in the building and there was no access to the building for petitioner until after 4:30 P.M. each school day. Petitioner performed all tasks related to his Iona employment at his home in New Jersey. Petitioner taught at the Rockland County Campus of Iona College because of its close proximity to his home in New Jersey. Mr. Tuohy maintained his research material and a computer at his office located in his New Jersey home.

Pace University's faculty handbook provides that appointments, promotions and salary increases are based on various factors, including excellence in teaching, publishing research, articles and books, participating in professional programs and organizations, contributing to the university's welfare, assisting in departmental planning and programs, advising students and student organizations, cooperating in the admissions process and participating in activities designed to promote community interest in Pace.

For the years at issue, petitioner filed with the State of New York a Nonresident and Part-Year Resident Income Tax Return, Form IT-203, in which petitioner claimed 44 days for each year as days worked outside of New York State.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

On December 29, 1997, the Division of Taxation ("Division") issued to petitioner two statements of proposed audit changes which stated as follows:

> Days worked at home do not form a proper basis for allocation of income by a nonresident. Any allowance claimed for days worked outside New York State must be based upon 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. Such duties are those which, by their very nature, cannot be performed at the employer's place of business.
>
> Applying the above principles to the allocation formula, normal work days spent at home are considered days worked in New York, and days spent at home which are not normal work days are considered to be non-working days.[1]
>
> The 44 days claimed as days worked at home have been disallowed.

The Division recomputed petitioner's allocation formula by disallowing the 44 days claimed as days worked at home.[2] The disallowance resulted in additional tax due of $1,096.53 for the year 1994 and $1,019.92 for the year 1995.

On March 20, 1998, petitioner filed with the Division two claims for credit or refund of personal income tax, Form IT-113-X, for the years 1994 and 1995 seeking refunds of the additional tax determined to be due as a result of the disallowance of the days claimed as non-New York days. On August 7, 1998, the Division issued to petitioner a Notice of Disallowance denying the claims for refund for the years at issue.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The issue presented to the Administrative Law Judge was whether the days that petitioner worked at his home in New Jersey were properly allocated as days worked outside of New York State based upon necessity rather than convenience to the employer. Petitioner argued that any time he spent outside of the classroom working on class preparation, reviewing and correcting tests and conducting research were all tasks that were performed by him out of necessity in his

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[1]We have modified finding of fact "6" of the Administrative Law Judge's determination to accurately reflect the date that appears on the Statement of Proposed Audit Changes issued to petitioner.

[2]The disallowance of claimed out-of-state working days results in an increase to the number of in-state working days, thus increasing the ratio by which a nonresident's income from a New York State employer is subjected to New York State and City taxes.

home office due to the fact that neither Iona College or Pace University provided him with an office of any kind.

After an exhaustive analysis of case law and the applicable statutory provisions, the Administrative Law Judge determined that petitioner had not demonstrated that he worked at home out of necessity, but rather, it was a result of his choice to do so. Thus, the Administrative Law Judge held that the convenience of the employer doctrine was properly applied by the Division in this case and he sustained the Notice of Disallowance issued to petitioner herein.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that preparation for class, correcting tests and homework along with the performance of research are essential aspects of his teaching. Thus, petitioner claims that an office is needed for him to accomplish these activities and he does not have an office at either place of employment. Therefore, it is out of necessity that he performs his work in his office located in his home in New Jersey.

Additionally, petitioner maintains that the policy at Pace has been to provide laptops to faculty members when the need arises. Petitioner argues that since the university bears the expense of such equipment, the policy demonstrates that the university sanctions its employees to work at home.

The Division agrees with the determination of the Administrative Law Judge. The Division states that it was more convenient for petitioner to work at home, that petitioner required only minimum accommodations to provide him with adequate office space and, most importantly, the Division states that petitioner has failed to prove that it was out of necessity that his employer required him to perform his duties as a professor at his home in New Jersey.

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 clearly 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 focuses on the fact that he is not provided with an office in New York so that he may perform his outside the classroom duties such as class preparation, the review and correction of tests and homework and the conduct of research. However, 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. Petitioner derives his income from the performance of duties for his New York State employer (***see***, ***Matter of Colleary v. Tully***, 69 AD2d 922, 415 NYS2d 266 [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]).

The case law has confirmed that the convenience of the employer doctrine is the proper test to determine 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***, 35 NY2d 256, 360 NYS2d 855, 857-858).

Petitioner claims that it is out of necessity that he work at home since his employers do not provide him with the adequate space and accommodations that he needs to perform his job.[3] However, petitioner's claims fall short of demonstrating that it is out of the necessity of the *employer* that petitioner work at home, rather than any other location. Petitioner contends that Pace will lend laptops to professors to perform their duties. Clearly, such contention does not prove the proposition that petitioner was expected by Pace to work at home.

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[3]In fact, Pace did provide a bare bones office with six desks and one bookcase to its professors in the Computer Science Department.

We find the decision reached in ***Matter of Zelinsky v. Tax Appeals Tribunal*** (__ AD2d __ [Dec. 5, 2002]) to be instructive. In ***Zelinsky***, the petitioner was a professor at Cardozo Law School located in New York City. Mr. Zelinsky was a resident of Connecticut. His duties were similar to those of petitioner herein and included teaching classes, meeting with students, preparing and grading exams and conducting scholarly research and writing. The two academic semesters at Cardozo amounted to 28 weeks of the year. During these weeks, Mr. Zelinsky spent three days of each week in New York City. The remaining two days of the week and during all the time that classes were not in session, Mr. Zelinsky remained in Connecticut and performed his job duties. We determined that Mr. Zelinsky was properly taxed on all of his income received from Cardozo based upon the convenience of the employer doctrine (***see***, ***Matter of Zelinsky***, Tax Appeals Tribunal, November 21, 2001). The Appellate Division upheld our decision. The court stated that:

> [t]he Department's economic justification in taxing petitioner's income begins with the fact that the entire source of his disputed income is a law school located in New York . . . It is the existence of that law school – which receives the benefits and protections from New York every day of the year – that affords petitioner an employment opportunity and a salary. The work petitioner states he conducted in Connecticut was integrally intertwined with the law school (***Matter of Zelinsky v. Tax Appeals Tribunal***, ***supra***).

We find herein that it is both Iona College and Pace University which provide petitioner with his employment and his salary. In the absence of any proof demonstrating that these employers required petitioner to work at home, we find that the Division properly taxed petitioner herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sylvester L. Tuohy is denied;

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

3. The petition of Sylvester L. Tuohy is denied; and

4. The Notice of Disallowance dated August 7, 1998 is sustained.

DATED: Troy, New York
February 13, 2003

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

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