STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GEORGE A.P. AND JOAN H. WALLACE	:	DETERMINATION DTA NO. 817182
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1994 and 1995.	:	

Petitioners, George A. P. and Joan H. Wallace, 101 Chestnut Street, Apt. C, Boston, Massachusetts 02108, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1994 and 1995.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on March 6, 2000 at 10:30 A.M., with all briefs to be submitted by July 1, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared by Becker & Company LLC (Alan M. Blecher, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly allocated to New York wage income earned by petitioner George A.P. Wallace, a nonresident of New York, for services performed at his Portland, Maine residence on the basis that such services were performed at petitioner's residence for his convenience rather than out of necessity for his employer.

FINDINGS OF FACT

1. For each of the years 1994 and 1995, George A.P. Wallace and Joan H. Wallace filed joint nonresident New York State personal income tax returns.[1] On the 1994 return, petitioner claimed that out of 221 days worked for the year, 195 days had been worked outside New York. On the 1995 return, petitioner claimed that 193 days (out of a total number of days worked of 216) had been worked outside New York. During a subsequent audit of petitioner's returns conducted by the Division of Taxation ("Division"), petitioner indicated on forms AU-262.5 (Questionnaire - Allocation of Personal Service Compensation) that 160 out of the 195 days worked outside New York in 1994 and 166 days out of the 193 days worked outside New York in 1995 had been worked at his home in Portland, Maine.

2. As a result of the audit conducted by the Division which commenced in June 1997, the Division, on January 27, 1998, issued a Statement of Personal Income Tax Audit Changes to petitioners which asserted additional New York State personal income tax due in the amount of $20,308.80, plus interest, for 1994 and additional New York State personal income tax in the amount of $33,278.42, plus interest, for 1995. An explanation attached to the Statement of Personal Income Tax Audit Changes stated in pertinent part as follows:

> Regarding days worked at home, Regulation Section 132.18 states that 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. Services performed at an out-of-state home which could have been performed at the employer's New York office is work performed for the employee's convenience and not for the employer's necessity. The fact that the employer also benefits from the arrangement or even requests the services be performed at home does not

[1] Since the issue in the present matter relates to allocation of wage income earned by George A.P. Wallace for services performed at his Portland, Maine residence, all references to "petitioner" shall refer solely to Mr. Wallace.

> establish necessity as opposed to convenience. Consequently, days worked at home have been disallowed per regulation section 132.18(a).

3. On March 2, 1998, the Division issued a Notice of Deficiency to petitioners asserting additional New York State personal income tax in the amounts of $20,308.80, plus interest, for the year 1994 and $33,278.42, plus interest, for the year 1995.

4. Petitioner is employed by Wallace Eannace Associates, Inc. ("WEA") which was incorporated in the State of New York and which maintains its principal office at 50 Newtown Road, Plainview (Nassau County), New York. WEA is also licensed to do business in New Jersey and maintains a warehouse facility in Franklin Lakes, New Jersey. Since the inception of the business in about 1970, petitioner has acted as its president.

Petitioner is a graduate of the Engineering School of Cornell University and is a licensed professional engineer in New York State. He also studied advanced marketing management at Harvard University.

Prior to 1990, WEA maintained a small office in New York City where petitioner, then a New York City resident, worked. In 1990, after WEA closed this office, petitioner worked out of his New York City home. In July 1993, petitioners sold their co-op apartment in New York City and moved to a newly-purchased residence in Portland, Maine where they have resided continuously since that time. After July 1993, petitioners maintained no residence in New York State. Beginning with the calendar year 1994, petitioners have filed nonresident New York State income tax returns.

5. WEA is a sales/marketing and distribution company operating as the exclusive representative for a number of companies manufacturing technological equipment for fluid handling and motor control. One of WEA's major suppliers is ITT Fluid Handling ("ITT"), a

division of ITT Corp. In 1975, WEA and ITT entered into an agreement whereby WEA became an independent representative of ITT. Pursuant to its terms, the agreement may be terminated by written notice whenever both petitioner and Samuel Eannace cease to be active as principals in WEA. Samuel Eannace died in 1988 leaving petitioner as the sole principal of WEA to deal with ITT.

The ITT territory of WEA consists of Northern New Jersey, the five boroughs of New York City, Long Island, Westchester County and other New York State counties up to Orange and Ulster.

6. In 1988, WEA implemented a business succession plan whereby petitioner would be relieved of the day-to-day management and other personnel would be developed as managers, thereby enabling petitioner to focus on other business areas. Petitioner became chiefly responsible for WEA's strategic planning. As previously noted, petitioner has, since 1990, maintained an office in his home (first in New York City and, since 1993, in Portland, Maine) to perform services on behalf of WEA. In his Portland, Maine home, petitioner has maintained two dedicated telephone lines for business calls and faxes which are separate from his residence telephone lines. WEA pays for leased telephone answering equipment and also purchased a fax machine and miscellaneous supplies for petitioner's office in Portland, Maine.

7. A major function of petitioner's job is to preserve WEA's relationship with ITT which represents more than 90 percent of WEA's business. Petitioner's contacts and visibility in the industry, including attendance at industry shows and conventions, are necessary for the ongoing WEA supply relationships.

8. During the years at issue, petitioner did, on occasion, work in New York. At the hearing, the parties stipulated that petitioner worked for WEA in New York on 26 days in 1994 and on 23 days in 1995.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioners assert the following:

a. This case is factually distinguishable from many of the cases which have held that nonresident taxpayers working at home for New York-based employers are required to treat such days as days worked in New York because most of those cases involve nonresident commuters, i.e, taxpayers who live within reasonable commuting distance from their New York offices from which they are based. Petitioner's Portland, Maine residence is not within commuting distance of WEA's Plainview, New York office and, accordingly, he came into New York for a limited amount of days during the years at issue;

b. Petitioner cites to an Advisory Opinion rendered by the Division on June 30, 1999 (TSB-A-99[4]I) which involved a stockbroker who sold his New York residence, moved to Wyoming and worked out of his home, communicating with the New York office and his customers by telephone and fax. In that case, it must be noted that the stockbroker, unlike petitioner in the present matter, was not planning to return to New York at all after his move and would not perform services for his employer within New York State. The Technical Services Bureau of the Division's Taxpayer Services Division, citing ***Matter of Linsley v. Gallman*** (38 AD2d 367, 329 NYS2d 486, ***affd*** 33 NY2d 863, 352 NYS2d 199), held that the stockbroker's income would not constitute income from New York sources; and

c. Petitioner maintains that WEA desired to have petitioner focus on strategic planning, which purpose would be defeated if he was involved in the day-to-day operations of the company. Therefore, it was desired that he be off premises to avoid this day-to-day contact with many of the other employees. In light of the realities of the modern workplace, i.e., fax machines, telephones and computers, a more modern approach is needed when considering whether working at home was for the convenience of the employee versus the necessity of the employer.

10. In response, the Division asserts that the fact that Portland, Maine is not within commuting distance from Plainview, New York is irrelevant since it was petitioner's choice to move to Maine. Petitioner has made no showing that the work performed at his home in Portland, Maine could not have been performed at WEA's Plainview, New York office. Therefore, petitioner's work was performed for his convenience rather than for the employer's necessity.

CONCLUSIONS OF LAW

A. Tax Law § 631 (a) provides that 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 (Tax Law § 631[b][1]).

B. Tax Law § 631(c) provides, in part, that:

> [i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

C. 20 NYCRR 131.4(b) states:

> The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State . . . . Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 131.16 through 131.18 of this Part.

D. 20 NYCRR 132.18 (a) provides:

> If 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. . . . 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. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay.

E. It is well settled that a nonresident employed by a New York employer is not subject to the convenience of the employer test (as set forth in 20 NYCRR 132.18[a]) when he works outside of New York, performs no work in New York and has no office or place of business in New York (***Matter of Linsley v. Gallman, supra***; ***Matter of Hayes v. State Tax Commn***., 61 AD2d 62, 401 NYS2d 876). In Matter of Hayes (***supra***, 401 NYS 2d at 877), the Court, while noting that compensation for personal services rendered by a nonresident wholly without the State is not included in his New York adjusted gross income regardless of the fact that payment may be made from a point within the State, stated that "[o]nly when some work is performed

within New York may some or all of the income be taxed in New York, and only then should respondent determine if work was performed for the employer's necessity."

Interestingly, the Advisory Opinion to which petitioner refers in his brief (***see***, Finding of Fact "9[b]"), cites to ***Matter of Linsley v. Gallman (supra)***. In ***Matter of Hayes v. State Tax Commn. (supra***, 401 NYS 2d at 877***),*** the Court noted that "the petitioner in *Linsley* was properly absolved of tax liability because he had no office in New York and performed no work here." Yet, petitioner in the present matter seeks to have the holding in ***Matter of Linsley v. Gallman*** made applicable to his case even though he, admittedly, performed work in New York during the years at issue. Accordingly, it must be found that because petitioner did perform work in New York, it is proper to apply the "convenience of the employer test" as set forth in 20 NYCRR 132.18(a).

F. The policy justification for the "convenience of the employer" test is that since a New York State resident is not entitled to special tax benefits for work done at home, a nonresident who maintains an office or performs services in New York State should not be either (***Matter of Speno v. Gallman,*** 35 NY2d 256, 259, 360 NYS2d 855). Because of the obvious potential for abuse where the home is the workplace at issue, a strict standard of employer necessity has been employed by the Division which, with rare exception, has been upheld by the courts (***Matter of Kitman v. State Tax Commn.***, 92 AD2d 1018, 461 NYS2d 448).

In the present matter, petitioner did not appear at the hearing and, accordingly, did not testify as to the actual duties and functions which he asserts could not have been performed at WEA's Plainview, New York office. In his brief, it is alleged that maintaining relations with all of WEA's suppliers and most notably with ITT, its most important supplier, is vital to WEA. The brief goes on to state that "Wallace does this by maintaining visibility in the industry, which

by definition requires that he work other than at WEA's Plainview, New York location." The brief states that petitioner spends a considerable amount of time at industry trade shows and conventions, followed up with visits, correspondence and phone calls. Assuming the truthfulness of these statements, there has been no showing by petitioner why the correspondence or phone calls could not originate from WEA's home office in New York State.

Petitioner's brief further states that petitioner is chiefly responsible for WEA's strategic planning and that, as part of the business succession plan, WEA requires that he perform this strategic planning function off premises. A memorandum of Richard M. Rosenberg, Esq., counsel for WEA, states that the purpose of having petitioner focus on strategic planning would be defeated if he was to be involved in WEA's day-to-day operations and, therefore, it was desirable and required that he be off premises to avoid day-to-day contact with the employees who had become accustomed to dealing with him on large and small business matters. Mr. Rosenberg's memorandum also states that this business succession plan commenced in 1988. However, it must be noted that petitioner worked in WEA's New York City office until 1990, at which time this office was closed and petitioner began working from his New York City residence. Later, in 1993, he moved to Portland, Maine and continued to work out of his home. In summary, the evidence produced by petitioner fails to adequately substantiate his allegations that his working out of his home in Portland, Maine was for the necessity of WEA and not for his own convenience. Perhaps petitioner's own memorandum, which was introduced into evidence at the hearing, contains the most accurate summary of the facts in this matter when it stated: "In my strategic planning position with Wallace Eannace Associates, Inc. & with today's advanced communications there is no need for me to work daily at my employer's office to function effectively." While there may be no need for petitioner to work daily at WEA's Plainview, New

York office, it is his burden to prove that there is a need for him to work out of his Portland, Maine residence. Petitioner has failed to sustain this burden.

G. The petition of George A.P. Wallace and Joan H. Wallace is denied and the Notice of Deficiency issued to petitioners on March 2, 1998 is sustained.

DATED: Troy, New York
December 21, 2000

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE