STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL J. MUCCI	:	DETERMINATION 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 a petition 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.

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 to be submitted by October 13, 2000, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's allocation of a portion of his wage income for the years 1994 and 1995 as non-New York source income.

FINDINGS OF FACT

1. 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.

2. 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.

3. 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."

4. 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.

5. 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 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.

[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.

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.

6. As previously noted, petitioner's representative executed a waiver of hearing and consent to have the matter determined on submission on May 18, 2000. 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.

SUMMARY OF THE PARTIES' POSITIONS

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

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. In examining petitioner's proof that he performed services for his employer, MUCIP, outside New York on 70 days in 1994 and on 68 days in 1995, it must be found that petitioner failed to sustain his burden of proof (***see***, Tax Law § 689[e]).

The typewritten schedules for 1994 and 1995 do not indicate whether the alleged meetings and appointments were for the entire day and do not, standing alone, explain why they were held in Connecticut rather than in New York. There is no indication that it was not possible for the people with whom petitioner was meeting to come to his office in New York. Without testimony or affidavits to corroborate the schedules, they cannot, in and of themselves, prove that petitioner spent these days outside New York.

The computer calendar/diary does not indicate the location of the alleged appointments; in many cases, the initials "CT" were handwritten next to the calendar entries. However, what

renders this diary completely unreliable is the fact that the *identical* calendar/diary was offered by the vice president of MUCIP, Robert M. Cipolla, at a Division of Tax Appeals hearing which addressed the same issues, i.e., the allocation of wage income by Mr. Cipolla for the years 1994 and 1995. It is wholly unreasonable to believe that petitioner and Mr. Cipolla, despite being officers of MUCIP, 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. Accordingly, the calendar/dairy is rejected as not being credible evidence in this matter.

The letters from Ballas Associates, Inc., Karl F. Rickel, Emil J. Curran, and Andrew F. Whelan do not indicate the locations of the meetings set forth on the letters and, as noted previously, the calendar entries for these days contain notations of other meetings, appointments and engagements on the same day, thereby rendering these letters, when standing alone without additional evidence, insufficient to establish petitioner worked outside New York on the dates at issue.

Finally, the cellular/mobile telephone bills and the American Express bills establish only that there was activity in Connecticut on certain days in 1995 (there were no bills submitted for any portion of 1994). The telephone bills were those of MUCIP and not petitioner. There were several billing numbers within two area codes and therefore, it cannot be ascertained, whether petitioner made any or all of these calls. In addition, there are discrepancies between the telephone bills and the calendar/appointment book and there are instances where these telephone bills indicate that calls were made both from New York and from Connecticut on days claimed to have been worked in Connecticut. As for the American Express bills, they are incomplete (bills were submitted only for the months of January, July and September through November 1995). While they do indicate that some products and services were purchased in Connecticut

and Bermuda during 1995, there is no indication that any or all of these purchases were business related.

F. Even assuming, *arguendo*, that the evidence submitted by petitioner was sufficient to prove that he spent the 70 days in 1994 and the 68 days in 1995 working outside New York as claimed by petitioner, it is, nevertheless, necessary for petitioner to prove that the services were performed for MUCIP out of necessity of the employer rather than for his own convenience. 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, neither should a nonresident who maintains an office or performs services in New York (***Matter of Speno v. Gallman***, 35 NY2d 256, 259, 360 NYS2d 855).

In the present matter, petitioner has presented no evidence that MUCIP maintained an office in Connecticut. The audit file pertaining to the previous audit for the years 1991 through 1993 indicated that petitioner claimed to have worked at MUCIP's "satellite office" in Danbury, Connecticut and that the address for this "satellite office" was 146 Deer Hill Avenue, the same address as that of MUCIP's accountants (and petitioner's representative). A review of the documentation submitted by petitioner indicates that much of the activity claimed to have occurred in Connecticut originated from Danbury. Official notice is hereby taken that Danbury and Sherman (where petitioner resides) are both located within Fairfield County in Connecticut. While petitioner may not, in fact, have worked out of his home, an inference may be drawn that the relative proximity of this Danbury "satellite office" may well have been for the convenience of petitioner. Because of the obvious potential for abuse where the home or, as in this case, an office close to 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 (***see***, ***Matter of Kitman v. State Tax Commn.***, 92 AD2d 1018, 461 NYS2d 448).

No evidence has been presented in this matter 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. Without testimony or affidavits from petitioner or other MUCIP principals or from those with whom petitioner was meeting in Connecticut, it is hereby determined that petitioner has 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, petitioner is not entitled to allocate days outside New York for the years at issue.

G. The petition of Paul J. Mucci is denied and the Notice of Deficiency dated February 17, 1998, as modified by Conciliation Order CMS No. 168298, is hereby sustained.

DATED: Troy, New York
March 29, 2001

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE