STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS L. HUCKABY	:	DETERMINATION 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 a petition 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.

On March 27, 2000 and March 31, 2000, respectively, petitioner by his representative, Peter L. Faber, Esq., and the Division of Taxation by Barbra 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 August 17, 2000, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

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

1. 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.

2. 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.

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

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

5. 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.

6. 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.

7. 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.

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

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

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

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

12. 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.

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

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

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

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

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

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

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

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

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

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

29. 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.

30. 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.

31. 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

32. 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.

33. 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.

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

35. In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. Additional findings of fact have also been made. Proposed finding of fact "35" was rejected because it was not supported by the record.

SUMMARY OF THE PARTIES' POSITIONS

36. Petitioner argues that the Tax Law does not permit the Division to tax a nonresident on compensation for services which are rendered out of state. He notes that three-quarters of his working days were spent out of state. According to petitioner, the Tax Law prohibits the taxation of income attributable to out-of-state services. Petitioner further submits that the convenience of the employer test was developed to prevent abuses by commuters and should not be applied to an individual who lives well beyond commuting range and whose principal place of business is outside of New York.

Petitioner maintains that applying the convenience of the employer test to him would result in taxing income out of all proportion to his contacts with, and benefits from, New York State in violation of the United States Constitution. As corollaries to the foregoing proposition, petitioner argues that applying the convenience of the employer test would result in taxing income that was not derived from New York State in violation of the Due Process Clause of the United States Constitution, that the convenience of the employer test violates the Equal Protection Clause of the United States Constitution by applying an irrational standard for distinguishing between taxpayers who can allocate income and those who cannot, and that the Division of Tax Appeals has the authority to declare the application of a valid statute to a particular taxpayer's factual situation to be unconstitutional. Lastly, petitioner maintains that he should be awarded administrative and litigation costs including attorney fees.

37. In response to the foregoing, the Division contends that Tax Law § 631 requires the Division to tax nonresident employees on income earned from a New York employer when the work is performed outside of New York for the convenience of the employee rather than the

necessity of the employer. It is also argued that the test in question has survived repeated constitutional challenges as to whether it has a rational basis and whether it requires sufficient contacts with New York. The Division maintains that the test is an appropriate apportionment scheme to ensure that resident and a nonresident employees are treated equally. According to the Division, the convenience of the employer test was developed to prevent abuse by those who work within and without New York. It is further submitted that the use of the word "attributable" in the statute demonstrates that the statute was intended to allow the Division to tax compensation earned by a nonresident employee. The Division posits that its interpretation is supported by judicial interpretation of the statute and the doctrine of *stare decisis*. Further, it is submitted that statutory construction justifies the current interpretation of the statute and its regulation.

Lastly, the Division argues that the request for administrative and litigation costs is premature and, if it is not premature, the request should be denied because there is substantial justification for the position of the Division. In regard to an argument raised by petitioner with respect to the awarding of costs and fees, the Division acknowledges that there may be some confusion regarding the topic of allocation in the income tax audit manual.

CONCLUSIONS OF LAW

A. Petitioner first argues that Tax Law § 631(b) does not permit the Division to tax a nonresident on income that is compensation for services that are in fact performed out of state. Relying upon an opinion of the Attorney General which was issued in 1919 (1919 Report of Atty Gen 301), petitioner submits that the source of income is dependent upon where the work is performed and not on where the person paying for the service is located. Petitioner maintains

that three-quarters of his working days were spent out of New York State and that the statutory language prohibits the taxation of income attributable to these out-of-state services.

Petitioner's argument is contrary to well-established judicial interpretation of Tax Law § 631. Subdivision (a) of section 631 provides, in part, that "[t]he New York source income of a nonresident individual shall be the sum of the following: (1) the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. . . ." To the extent pertinent, the Tax Law defines the phrase "[i]tems of income, gain, loss and deduction derived from or connected with New York sources" as those which are attributable to "a business, trade, or profession or occupation carried on in this state. . . ." (Tax Law § 631[b].) The Commissioner's regulations at 20 NYCRR 132.18(a) provide, in part, 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 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 working days employed both within and without New York State. . . . However, any allowance claimed for days worked outside of 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.

The decision of the Court of Appeals in ***Matter of Speno v. Gallman*** (35 NY2d 256, 360 NYS2d 855) is instructive on the points raised by petitioner. In ***Speno***, the taxpayers were residents of New Jersey who filed joint New York State nonresident income tax returns for the years in issue. Mr. Speno was the president of Frank Speno Railroad Ballast Cleaning Co. which had its principal office in Ithaca, New York and additional offices in Syracuse, New York and Geneva, Switzerland. On their income tax returns for each of the years in issue, the taxpayers

allocated a portion of their income to days worked at the taxpayers' home in New Jersey. The work consisted essentially of making phone calls. The Division recomputed the taxpayers' taxes by deeming the days worked in New Jersey in 1960 as nonworking days and included them as days worked in New York on the 1961 return.

After a hearing, the State Tax Commission applied the "convenience of the employer" test and recalculated the Spenos' tax liability to include the days worked in New Jersey. On the appeal which followed, the Speno's challenged the validity and application of the "convenience of the employer" test.

Initially, the Court noted that the meaning of the phrase "sources within the state" is the focal point and that the first interpretation was made in 1919 by the Attorney General who stated that the source of income relates to "'the work done, rather than the person paying for it' (1919 Report of Atty Gen 301). " (***Id.***, 360 NYS2d at 857.) This test resulted in the performance doctrine which was that compensation for services performed outside of the State would not be taxable. The Court then noted that because of the large number of nonresidents who avail themselves of employment within New York, the place of performance test was refined by the "convenience of the employer test." Under this doctrine, a nonresident who performs services in New York or has an office in New York is not subject to New York State tax liability on the services performed outside of New York State if they are performed of necessity in the service of the employer. The Court noted that the refinement of this legal doctrine had been consistently applied by the courts of the State of New York. The Court then pointed out that the cases relied on by the Spenos were inapplicable because the taxpayer either did not come into New York or was not required to come into New York. The Court concluded that since Mr. Speno performed

services within New York for his employer, the "convenience of the employer test" was properly applied. (***Id.,*** 360 NYS2d at 859.)

On the basis of ***Speno***, it is clear that petitioner's initial arguments are spurious. The place of performance doctrine is no longer the law of the State of New York. The salient facts are that NOITU's office was in Jamaica, New York and it operated two medical centers, one in Manhattan and one on Long Island. Petitioner, an employee of NOITU, worked outside of New York solely for his own personal reasons. His employer would not have objected if he had decided to perform his duties in New York. Further, petitioner worked a significant number of days in New York during each of the years in issue. NOITU did not require petitioner to perform his work in Nashville. It follows from the foregoing that the decision to do programming work in Nashville was not made because of necessity in the service of the employer. Thus, under the convenience of the employer test, the Division properly considered the days worked in petitioner's home in Tennessee as days worked in New York.

B. Petitioner argues that the convenience of the employer test was developed to prevent abuses by commuters. According to petitioner, it should not be applied to an individual who lives well beyond commuting range and whose principal place of business is outside of the State of New York.

This argument is also unconvincing. Petitioner is correct that the test 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 (***Matter of Colleary v. Tully***, 69 AD2d 922, 415 NYS2d 266, 268). However, the test also serves another purpose. Since New York residents do not gain a tax benefit from working at home, neither

should nonresidents who perform services or maintain an office in New York State (***see***, ***Matter of Speno v. Gallman***, ***supra***, at 259, 360 NYS2d at 858). The latter factor is particularly important in this instance because there has been no showing that the services provided by petitioner could not have been performed at one of the employer's New York offices.

In effect, petitioner has proposed a commuting distance from the employer test to determine whether the income from the New York employer is subject to tax. However, the commuting distance between a taxpayer's home and the location of the New York employer is of no consequence under either the Tax Law or the regulations. Further, as practical matter, such a test would be impossible to apply. For example, under the proposed test, the dividing line would presumably depend on the availability of public transportation and the time it would take to commute from the particular individuals home. Would one employ a subjective or objective test to determine what constitutes an acceptable commuting time or distance to work? In sum, there is no way of determining how many miles to use as the dividing line for determining when income would be subject to New York tax.

C. Petitioner argues that the convenience of the employer test does not comport with common sense. It is submitted that if petitioner had not spent any time working in New York, it would not have the power to tax any of his income. However, if petitioner worked just one day in New York and 300 days in Nashville, all of his income would be subject to New York State personal income tax.

The same point set forth above from ***Colleary*** also addresses the contention raised by petitioner. The result is mandated by the need to protect the integrity of the apportionment scheme. Presumably, an employee who does not come to New York at all is not working out of

state in order to reduce his New York State taxes. However, the same may not be concluded of the employee who is in New York for a limited period of time.

D. Petitioner contends that application of the convenience of the employer test is unconstitutional because it would result in taxing income out of all proportion to his contacts and benefits from New York State. This argument is also without merit. The source of an out-of-State employee's income is the New York State employer. The employment relationship establishes the necessary connection with New York to impose tax on the income which is in issue (***Matter of Colleary v. Tully***, ***supra***, at 922, 415 NYS2d at 268).

E. Petitioner further argues that the convenience of the employer test violates 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. Petitioner submits 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. It is submitted that there is no rational basis for this distinction.

First, contrary to petitioner's argument, the test is *not* whether an employee is *required* to work out of state by his employer. Rather, the test asks whether it is *necessary* to perform services out of state in the service of the employer (***see***, ***Matter of Speno v. Gallman***, ***supra***, at 256, 360 NYS2d at 857.) Second, as previously noted, the rational basis for the rule is that the test 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 (***Matter of Colleary v. Tully***, ***supra***, at 922, 415 NYS2d at 268).

F. Petitioner asks the Division of Tax Appeals to award petitioner reasonable administrative and litigation costs including, without limitation, attorneys' fees. This request is denied since, among other things, costs and fees are awarded only to a prevailing party (Tax Law § 3030[a]). In view of the foregoing, petitioner's argument regarding the audit guidelines is moot and will not be addressed.

G. The petition of Thomas L. Huckaby is denied, and the notices of deficiency issued April 6 and 27, 1998 are sustained.

DATED: Troy, New York
February 08, 2001

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE