STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALAIN KITTLER	:	DETERMINATION DTA NO. 818466
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1994 and 1995.	:	

Petitioner, Alain Kittler, Chalet Costi 1806, Rougemont, Switzerland, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1994 and 1995.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 11, 2001 at 10:30 A.M., with all briefs to be submitted by March 8, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by George A. Deely, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether wage income received by petitioner, Alain Kittler, a nonresident alien, from two New York State and City corporations, was for services performed outside of the United States and thus not properly subject to New York State and City personal income tax.

FINDINGS OF FACT

1. During the years at issue, petitioner, Alain Kittler, was a citizen of France and a resident of Switzerland, with no place of residence in the United States. He was a full-time officer of Elite Model Management-Switzerland, managing two departments for the Elite network of corporations: the international scouting or research department and the model movement department. Elite is a modeling agency operating domestically and internationally, with a network of agencies situated throughout the world. Petitioner had no office, telephone or place of business in the United States.

2. The scouting involved finding and developing model talent on a world-wide basis, which was done through Elite Model Look Contests conducted in more than 50 countries and through the large network of local agencies and scouts in these same countries. Petitioner was responsible for the coordination of the contests, agencies and scouts, including the training of scouts and negotiating contracts with the models. The model movement department was responsible for monitoring, supervising and guiding the models in the course of their careers, which often involved the models traveling to the various agencies throughout the world. Petitioner attempted to place each model in that part of the world where she would be most successful, and received compensation from the different Elite agencies for the international work he performed for that particular agency, be it model recruitment or the supervision of the model in the Elite network. The location where the model worked dictated which Elite corporation paid petitioner his scouting fees, which were negotiated amounts between petitioner and the different Elite agencies. Except for 21 days in 1994 and 14 days in 1995, petitioner performed his responsibilities and duties outside of the United States, and mainly in Europe.

3. Petitioner filed a U.S. Nonresident Alien Income Tax Return (Form 1040NR) for each of the years 1994 and 1995. The address on both returns was "c/o John Casablancas, 205 East 22nd Street, Apt. 7K, New York, New York 10010." On his 1994 return, petitioner reported wage income of $204,000.00, and on his 1995 return reported wage income of $284,000.00. Attached to each return was a statement which detailed the source and amount of the wage income as follows:

EMPLOYER	1994 WAGES	1995 WAGES
Elite Model Mgt.-Ill.	$20,000.00	$30,000.00
Elite Model Mgt.-NY	$164,000.00	$194,000.00
Elite Runway, Inc.	$20,000.00	$60,000.00
TOTALS	$204,000.00	$284,000.00

Elite Model Management-NY and Elite Runway, Inc. are New York corporations, while Elite Model Management-Ill. is located in Chicago, Illinois. On both the U.S. Nonresident Alien Income Tax Returns and the foreign income declaration of his French income tax return for the years at issue, petitioner claimed that the wage income described above was earned in the United States. This was done to reduce petitioner's French income tax by claiming that the wages paid by the United States entities were earned in the United States despite petitioner's limited presence in this country during the years at issue.

4. The United States Nonresident Alien Income Tax Returns of petitioner indicated that he was in the United States on business for 21 days in 1994 and 14 days in 1995. For the year 1994, petitioner's personal calendar indicates that he was in New York between April 10-16 and October 17-23, and in 1995 was in New York April 25-30. The calendar does not provide an explanation as to the purpose of these visits.

5. Petitioner filed a Nonresident and Part-Year Resident Income Tax Return, Form IT-203, for each of the years at issue. On the returns, petitioner excluded from New York State income the wages paid by the three United States corporations which had been considered Federal income on the Federal returns. Petitioner did include in New York income amounts earned by his various partnerships operating in New York.

6. Following an audit, the Division of Taxation ("Division") issued to petitioner a Notice of Deficiency, dated August 24, 1998, which asserted additional New York State and City income taxes of $14,251.39 and $828.00, respectively, for the year 1994 and additional New York State and City income taxes of $19,027.29 and $1,143.00, respectively, for the year 1995, plus penalty and interest for both years. Penalties were assessed for negligence (Tax Law § 685[b]) and for the substantial understatement of petitioner's tax liability (Tax Law § 685[p]). The basis of the deficiency was the allocation by the Division to New York State income the wages received from the two New York corporations, Elite Model Management-NY and Elite Runway, Inc., totaling $184,000.00 for 1994 and $254,000.00 for 1995.

7. On March 1, 1998, petitioner, through his representative, executed a Consent Extending the Period of Limitation for Assessment of Personal Income Taxes under Articles 22, 30, 30A and 30B of the Tax Law extending the period of limitation for assessment for the year 1994 to December 31, 1998.

CONCLUSIONS OF LAW

A. Tax Law § 601(e)(1) imposes New York personal income tax on the New York source income of nonresidents and part-year residents in an amount "equal to the tax base multiplied by the New York source fraction." The tax base is the computation of the nonresident or part-year resident's New York income tax computed as if such nonresident or part-year resident were a

resident (***see***, Tax Law § 601[e][2]). The New York source fraction equals the nonresident or part-year resident's "New York source income" (determined in accordance with Tax Law § 631) divided by such nonresident or part-year resident's "New York adjusted gross income," which is defined in Tax Law § 612(a) as Federal adjusted gross income with certain modifications (***see*** , Tax Law § 601[e][3]).

B. Federal adjusted gross income is gross income as defined in Internal Revenue Code ("IRC") § 61(a) minus certain deductions not at issue herein. Included within the general definition of gross income is compensation received for services, including fees and commissions. However, in the case of a nonresident alien individual, gross income includes only such income which is derived from sources within the United States (IRC § 872[a]). Compensation for labor or personal services performed outside the United States is treated as income from sources without the United States (IRC § 862[a][3]).

C. In the present matter, petitioner has established that a high percentage of the compensation he received was for services performed outside of the United States. Petitioner's responsibilities and duties kept him in Europe almost the entire years at issue, with short visits to the United States once or twice a year. It is clear that petitioner was primarily being compensated for services performed outside of the United States. Such compensation is properly considered as income earned from sources outside the United States, and since not included in Federal gross income (***Roerich v. Helvering***, 115 F2d 39, 40-2 US Tax Cas ¶ 9657 [compensation paid by United States government]), it is also properly excluded from New York State adjusted gross income. It is noted that the return filed by petitioner with the French government is inaccurate as it claims that the wages paid by the three United States corporations

were earned in the United States. The facts do not support this position and such income, less the amount allocated to the United States, is properly subject to French income tax.

D. Petitioner claims that his visits to the United States and New York were vacations, or involved business dealings not related to Elite Model Management-NY and Elite Runway, Inc. However, no evidence was introduced into the record supporting either of these allegations, and as petitioner was employed by and received wages from two New York corporations, such wages are properly allocable to New York. In determining an allocation formula, the regulations of the Internal Revenue Service provide that where personal services are performed partly within and partly without the United States, the amount that is to be included in gross income may be based on an apportionment on the time basis, that is, the amount to be included in gross income will be that amount which bears the same relation to the total compensation as the number of days of performance of the services within the United States bears to the total number of days of performance of services for which the payment is made (***Charron v. United States***, 200 F3d 785, 2000-1 USTaxCas ¶ 50,129; Treas Reg § 1.861-4[b][1]). Using the above regulation as guidance, the allocation formula is computed by subtracting from the total number of days per year (366 for 1994 and 365 for 1995), 102 nonworking days, to arrive at total working days of 204 for 1994 and 203 for 1995. The percentage of allocation is determined by the ratio of United States days to total working days, or 21/204 (10%) for 1994 and 14/203 (7%) for 1995. These percentages are then applied to New York wages of $184,000.00 for 1994 and $254,000.00 for 1995 to arrive at additional New York income of $18,400.00 for 1994 and $17,780.00 for 1995.

E. The petition of Alain Kittler is granted to the extent indicated in Conclusions of Law "C" and "D", the Division of Taxation is directed to recompute the Notice of Deficiency dated

August 24, 1998 consistent with the determination rendered herein; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
July 18, 2002

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE