STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEVEN AND DAPHNE RUBEN	:	
For Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1996 and 1997.	:	DETERMINATION DTA NO. 818540

Petitioners, Steven and Daphne Ruben,[1] 4 Erin Court, Bridgewater, New Jersey 08807, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1996 and 1997.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, Veterans Memorial Highway, Hauppauge, New York, on June 11, 2002 at 2:45 P.M., with all evidence to be submitted by September 13, 2002, which date began the three-month period for the issuance of this determination. Petitioners appeared by David W. Wechsler, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Chris C. Georgiou and Lingjie Ge).

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1 Daphne Ruben is a party to this proceeding solely because she and Steven Ruben filed joint income tax returns for the years at issue. Accordingly, unless otherwise indicated, all references to "petitioner" herein shall refer to Steven Ruben.

ISSUE

Whether petitioner has established entitlement to allocate a portion of his wage income for each of the years 1996 and 1997 outside of New York as non-New York source income not subject to taxation by New York.

FINDINGS OF FACT

1. Petitioner, Steven Ruben, is a resident of the State of New Jersey. During the years at issue, he was employed as a regional sales manager in New Jersey by Dime Investment Services, a division of the Dime Savings Bank, located at 9 DeKalb Road, Brooklyn, New York.

2. Petitioner filed timely New York State and City of New York nonresident income tax returns for the years 1996 and 1997. On each of such returns, petitioner apportioned his wage income from Dime Investment Services between New York and New Jersey on the basis of the number of days claimed to have been worked in each of the two jurisdictions. More specifically, for 1996 petitioner claimed to have worked 251 days, with 176 days worked in New Jersey and 75 days worked in New York, while for 1997 petitioner claimed to have worked 252 days, with 176 days worked in New Jersey and 76 days worked in New York. Hence, petitioner included as New York source income subject to New York tax only the portion of his Dime Investment Services wage income represented fractionally by the number of days claimed to have been worked in New York out of the total number of days worked in each of the respective years in issue.

3. In 1999, the Division of Taxation ("Division") commenced an audit of petitioner's returns for the years 1996 and 1997. By letters dated June 30, 1999 and August 17, 1999, the Division's auditor requested, *inter alia*, documents specifying each day claimed as worked

outside of New York State and/or New York City, the exact location where the services were performed and the nature of the services performed at each location.

4. In response to the Division's requests for documentation to substantiate that the days claimed as worked outside of New York were so worked of necessity rather than for petitioner's convenience, petitioner's representative submitted for each of the years in issue a calendar with each page representing a month of the years at issue. There is typed on some of the days the branch names of the Dime Savings Bank where it is alleged petitioner was on the particular day in question. Petitioner's representative also submitted a list of the Dime's branches in New Jersey and their respective addresses. In addition, petitioner's representative submitted two letters in support of petitioner's position that he was required by his employer to work in New Jersey for part of the years in issue. The first letter was from petitioner's supervisor which stated that petitioner was responsible for and worked in the New Jersey branches during the years at issue. The second letter was from the president of Dime Securities, Inc. which stated that petitioner was the regional sales manager for Dime Investment Services in New Jersey, that petitioner was expected to stimulate sales and revenue growth in the State of New Jersey and that petitioner was responsible for 12 financial consultants and 40 customer representatives located at the New Jersey branches. The letter further stated that petitioner was expected to spend 80 percent of his time in various locations throughout New Jersey, with the remaining 20 percent of his time spent on general administrative duties at the Dime Investment Services' offices in Brooklyn.

5. The Division's auditor reviewed petitioner's documents and concluded that they did not substantiate the apportionment of days claimed by petitioner due to a lack of detail concerning the purpose and necessity for performing services for the Dime Savings in New Jersey on the

days claimed to have been spent working there. Accordingly, the auditor disallowed petitioner's claimed apportionment and allocation in full and determined that the wage income from the Dime Savings Bank was New York source income taxable in its entirety by New York.

6. Statements of Personal Income Tax Audit Changes dated December 16, 1999 were issued to petitioner reflecting the disallowance of the claimed apportionment and allocation, and showing a recalculation of petitioner's New York tax liability, together with penalty and interest. The statements included the following explanation:

> Since you have not provided adequate substantiation to verify the days worked outside New York State for 1996 and 1997, your wage allocation has been recomputed.

The statements further indicated that penalties pursuant to Tax Law § 685(p) had been imposed for the substantial understatement of petitioner's tax liability.

7. On January 30, 2000, petitioner executed a Consent Extending Period of Limitation for Assessment of Personal Income Tax under Articles 22 and 30 of the Tax Law which extended the period of assessment for the year 1996 to April 15, 2001.

8. By a Notice of Deficiency dated April 24, 2000, the Division asserted additional New York State personal income tax and New York City nonresident earnings tax against petitioner as follows:

YEAR	NEW YORK STATE	NEW YORK CITY
1996	$ 6,688.87	$ 489.97
1997	5,851.37	542.15
TOTAL	$12,540.24	$1,032.12

In addition to the foregoing amounts of State and City tax, the Division's Notice of Deficiency also asserted interest and the aforementioned penalty for substantial understatement.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner did not appear at the hearing to provide testimony regarding his claim of entitlement to apportion and allocate his wages from the Dime Savings Bank. Petitioner's representative explained petitioner's position to be that petitioner's responsibilities included visiting the various branches of the Dime in New Jersey and that 80 percent of his working days was spent in this way. The representative further explained that the Dime Savings Bank required petitioner to visit the New Jersey branches as part of his regular duties and responsibilities.

10. The auditors noted that the letter from the president of Dime Securities, Inc. merely stated that petitioner was expected to spend some of his work time in New Jersey, and that there was no direct evidence specifically relating to the claimed days spent in New Jersey.

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident individual (such as petitioner, Steven Ruben) includes the net amount of items of income, gain, loss and deduction reported in 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]).

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. Regulations of the Commissioner of Taxation pertaining to business activities carried on in New York State provide as follows:

> 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 132.16 through 132.18 of this Part (20 NYCRR 132.4[b]).

D. Regulations pertaining to and explaining the "Methods of Allocating Income and Deductions From Sources Within and Without New York State," as in effect during the years in question, provided as follows:

> §132.15 *Apportionment and allocation of income from business carried on partly within and partly without New York State.*
>
> (a) If a nonresident individual . . . carries on a business, trade, profession or occupation both within and without New York State, the items of income . . . attributable to such business, trade, profession or occupation must be apportioned and allocated to New York State on a fair and equitable basis in accordance with approved methods of accounting.
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> § 132.18 *Earnings of nonresident employees and officers.*
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> (a) if the nonresident employee . . . performs service for his employer both within and without New York State, his income derived from New York 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. (Emphasis added.)

It is the application of the highlighted portion of section 132.18(a) to petitioner's circumstances which causes the dispute in this case.

E. As a starting point, it is well settled that a nonresident employed by a New York employer is not subject to the convenience of the employer test of 20 NYCRR 132.18(a) when he works outside of New York, performs no work within New York, and has no office or place

of business in New York (i.e., where suitable facilities to carry out his employment duties are not maintained for or available to him in New York) (***Matter of Linsley v. State Tax Commn***., 38 AD2d 367, 329 NYS2d 486, ***affd*** 33 NY2d 863, 352 NYS2d 199; ***Matter of Gleason v. State Tax Commn***., 76 AD2d 1035, 429 NYS2d 314; ***Matter of Hayes v. State Tax Commn***., 61 AD2d 62, 401 NYS2d 876). In these circumstances the so-called "place of performance doctrine" applies and the out-of-state locations where the employee's services are performed, rather than the location of the employer paying for such services, is determinative for income sourcing and taxation purposes (***Matter of Speno v. Gallman***, 35 NY2d 256, 260, 360 NYS2d 855, 858; ***see*** 20 NYCRR 132.4[b]). In contrast, however, 20 NYCRR 132.18(a), and the many cases addressing and upholding the disputed portion of such regulation as valid, provide that where a nonresident individual employed by a New York employer performs services both at the employer's New York facility and at an out-of-state location, under circumstances where the services could have been performed at the employer's in-state facilities, such services are performed out of state for the employee's convenience and not for the employer's necessity (***Matter of Speno v. Gallman, supra; Matter of Phillips v. New York State Dept. of Taxation and Finance***, 267 AD2d 927, 700 NYS2d 566, ***lv denied*** 94 NY2d 763, 708 NYS2d 52). As a result, where a nonresident employee chooses to work out of state and is not obligated or compelled by some necessity to work for his New York employer at such out-of-state location, the compensation for the employee's services on such days is held to be New York source income properly subject to tax by New York (***id***).

F. The issue in this case turns on two questions, to wit, whether petitioner has established the fact of his presence performing services for his employer (Dime Savings Bank) in New Jersey on certain specific days and, if so, whether such services were performed in New Jersey

out of necessity rather than for petitioner's convenience. Unfortunately, petitioner did not appear at the hearing and, accordingly, did not testify as to the actual days, or the duties and functions performed during claimed days worked in New Jersey which, assertedly, could not have been performed at the Dime's Brooklyn, New York offices. With respect to the calendars, there is no testimony by anyone with firsthand knowledge to explain the entries thereon. Furthermore, there are no documents to establish clearly that a meeting or appointment not only occurred on a given date, but also to explain its purpose and duration and the necessity for the same to have been conducted in New Jersey as opposed to New York. In this respect, petitioner's representative was not in a position to recall specifics from the claimed meetings and dates, and petitioner, the person with firsthand knowledge who would presumably be in the best position to provide such information thereon, did not appear at the hearing (***compare, Matter of Moss,*** Tax Appeals Tribunal, November 25, 1992). In fact, the record is silent on the issue of petitioner's need to work on certain days in New Jersey, save for the general assertion by petitioner's representative that petitioner was required to perform such functions in New Jersey, and the letter from petitioner's employer stating he was expected to perform some of his duties in New Jersey. It is certainly possible that there were circumstances under which petitioner had to perform services for the Dime Savings Bank in New Jersey rather than New York. However, the lack of specifics and explanation from petitioner, coupled with the fact that some duties were performed in New York, falls short of establishing the necessity for petitioner to have worked in New Jersey on any given day and thus does not meet the burden of proving entitlement to apportion and allocate days outside of New York per 20 NYCRR 132.18(a) as claimed (***see, Matter of Feldman,*** Tax Appeals Tribunal, December 15, 1988). The fact that petitioner lives in New Jersey certainly raises the issue of convenience versus necessity with

respect to petitioner's working in New Jersey when possible. Absent petitioner's testimony or some other proof on this issue, petitioner simply fails to meet his burden of proving entitlement to allocate. In sum, the record fails to substantiate the specific location, duration, work duties and necessity for the claimed allocated days, and the Division's disallowance thereof is sustained.

G. With regard to the issue of penalties, petitioner did not appear and testify at hearing to provide additional evidence to explain either the lack of records or his entitlement to allocate as claimed. Accordingly, without more there is insufficient basis to warrant abatement of penalties imposed and the same are, therefore, sustained.

H. The petition of Steven Ruben is hereby denied, and the Notice of Deficiency dated April 24, 2000, together with penalties and interest, is sustained.

DATED: Troy, New York
November 21, 2002

/s/ Thomas C. Sacca
PRESIDING OFFICER