STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ALDO AND VIRGINIA DALSASS** for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1997 and 1998.	DETERMINATION DTA NO. 818932

Petitioners, Aldo and Virginia Dalsass, 210 Park Ridge Drive, Easton, Pennsylvania 18040, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1997 and 1998.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on May 8, 2003 at 10:45 A.M. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Susan Parker).

Since neither party elected to reserve time to submit briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether days worked at home by petitioner Aldo Dalsass can be allowed as days worked outside New York State for purposes of allocating wage income to sources within and without the State.

FINDINGS OF FACT

1. Petitioners[1] herein, Aldo and Virginia Dalsass, filed timely joint New York State nonresident personal income tax returns for the years 1997 and 1998. Petitioner's address as reflected on said returns was 25 Glen Gray Road, Oakland, New Jersey. For the 1997 tax year, petitioner earned wages of $205,216.00 from his employment with Prodigy Services Co. ("Prodigy"), a firm located in White Plains, New York. For the 1998 tax year, petitioner received wage income of $73,882.00 from Ans Co-Re Systems, Inc. ("Ans Co-Re"), a company located in Clinton, Mississippi.

2. Petitioner allocated the wages he received from Prodigy and Ans Co-Re to New York State sources based on a percentage determined by dividing the number of days claimed to have been worked within New York State by the total days worked in the year. For the 1997 tax year, petitioner's return reported 206 total days worked in the year, of which 47 days were claimed to have been worked outside the State and the remaining 159 days shown as worked in New York. Petitioner's 1998 tax return reflected 240 total working days, of which 48 days were claimed as worked outside New York and the remaining 192 days reported as worked in the State. In determining the number of days worked outside New York State, petitioner considered the 31 days in 1997 and 32 days in 1998 that he worked at his home in New Jersey as days worked outside New York State.

3. On January 2, 2001, the Division of Taxation ("Division") issued two notices of deficiency to petitioner, one for each year in dispute, asserting that $2,010.39 and $592.82 of additional New York State personal income tax was due for 1997 and 1998, respectively, plus interest. The notices of deficiency were based on two explanatory statements of proposed audit

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[1]Petitioner Virginia Dalsass's involvement in this matter is limited to having filed joint tax returns with her husband. Accordingly, references to the term "petitioner" shall be understood to mean Aldo Dalsass.

changes, each dated September 21, 2000, wherein the Division disallowed the days worked at home as days worked outside New York State. As relevant to this proceeding, the statements of proposed audit changes contained the following explanation for the disallowance of the days worked at home:

> Days worked at home do not form a proper basis for allocation of income by a nonresident. Any allowance claimed for days worked outside New York State must be based upon 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. Such duties are those which, by their very nature, cannot be performed at the employer's place of business.
>
> Applying the above principles to the allocation formula, normal work days spent at home are considered days worked in New York. . . .

4. Petitioner was employed by both Prodigy and Ans Co-Re as a network analyst and infrastructure engineer working mostly with international clients. Both companies maintained offices in New York State and petitioner worked primarily out of the New York office space provided at each employer. However, when it was necessary for petitioner to interact with international clients he would occasionally work at home due to time zone differences. Petitioner worked at home because it was more convenient, productive and practical, especially when dealing with clients in Hong Kong and Australia where there were substantial time zone differences. Petitioner maintains that his employer benefitted from the activities he performed at home and that it was in all parties' interest for him to work at home when interacting with international clients.

SUMMARY OF PETITIONERS' POSITION

5. Petitioner asserts that it was practical and efficient for him to work at home on those days that he had to interact with international clients and that the services he performed at home were of the employer's necessity. Petitioner also asserts that if days worked at home cannot be

claimed as days worked outside New York State, it should not take the Division several years to issue a Notice of Deficiency. It is petitioner's position that the Division's undue delay in the issuance of the notices of deficiency resulted in the accrual of excessive interest charges. Finally, petitioner maintains that the Division's tax return, specifically Form IT-201-ATT, Schedule A, Allocation of wage and salary income to New York State, is misleading in that there is an implication that working out of state, either at home or in an office, is treated equally.

CONCLUSIONS OF LAW

A. Tax Law § 631(a)(1) provides that the New York source income of a nonresident individual shall include, among other items, the sum of "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. . . ." A nonresident individual's items of income, gain, loss and deduction derived from or connected with New York State sources are items, in part, attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[b][1][B]). Tax Law § 631(c) provides that when a business, trade, profession or occupation is carried on both within and without the State "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." The regulations pertaining to activities carried on in New York State additionally 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 131.16 through 131.18 of this Part (20 NYCRR 131.4[b]).

The regulation set forth at 20 NYCRR 131.18(a) states, in pertinent part, as follows:

> 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. The items of gain, loss and deduction . . . of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. 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. . . .

B. It is well settled that an employee's out-of-state services are not performed for an employer's necessity where the services could have been performed at his employer's office (***Matter of Burke v. Bragalini,*** 10 AD2d 654, 196 NYS2d 391). Further, the courts have held that where there was no evidence that services performed at the taxpayer's out-of-state home could not have been undertaken at the employer's office in New York, the services were performed out of state for the employee's convenience, not the employer's necessity (***Matter of Page v. State Tax Commission,*** 46 AD2d 341, 362 NYS2d 599; ***Matter of Simms v. Procaccino,*** 47 AD2d 149, 365 NYS2d 73).

The rationale behind the "convenience of the employer" rule is well established. "Since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services . . . in New York State." (***Matter of Speno v. Gallman,*** 35 NY2d 256, 259, 360 NYS2d 855, 858.)

C. Applying the above-cited principles to the facts present in the instant matter, it must be concluded that the days petitioner worked at home cannot be considered as days worked outside New York State for purposes of allocating wages to sources within and without the State. It is clear that the services petitioner performed at home were not services which of necessity, as

distinguished from convenience, were required to be performed outside the State. While it may have been more efficient and practical for petitioner to work at home on days he needed to interact with international clients, there is no dispute that the services which he performed at home could just as easily have been performed at the employers' offices in New York. It must be noted that there exists a substantial body of case law developed over several decades which establishes that days worked at home by a nonresident cannot, in most cases, be considered as days worked outside New York State for purposes of allocating wage income to sources within and without the State, and the Tax Appeals Tribunal has consistently followed these cases (***see***, ***Matter of Zelinsky,*** Tax Appeals Tribunal, November 21, 2001, ***confirmed Matter of Zelinsky v. Tax Appeals Tribunal,*** 301 AD2d 42, 753 NYS2d 144; ***Matter of Huckaby,*** Tax Appeals Tribunal, May 30, 2002.)

D. Turning next to petitioner's argument that the Division should have notified him in a more timely fashion that he owed additional taxes for 1997 and 1998, it is observed that Tax Law § 683(a) provides for a general three-year statute of limitations for assessment. There is no dispute in the instant matter that the notices of deficiency were in fact issued within the applicable time frame. Tax Law § 687(a) generally allows a taxpayer the same three-year period to file a claim for refund, and therefore I see no inequity in the current statutory scheme which provides for identical time frames for the Division to issue assessments or for taxpayers to file a claim for refund.

E. With respect to petitioner's argument regarding the imposition of interest, it is noted that Tax Law § 684, entitled "Interest on underpayment," provides that "If any amount of income tax is not paid on or before the last date prescribed in this article for payment (in this

case April 15, 1998 for the 1997 tax year and April 15, 1999 for the 1998 tax year), interest on such amount . . . shall be paid for the period from such last date to the date paid. . . ."

Petitioner's request for the abatement or reduction of interest charges cannot be granted. As previously noted, the Division properly issued the notices of deficiency within the time period allowed by statute and there is no evidence in the record before me to support petitioner's contention that the Division intentionally delayed the issuance of the notices. Furthermore, petitioner's argument ignores the basic principle that it is his responsibility to file correct and accurate tax returns and to remit the proper tax due in a timely manner and this he did not do. By requesting that interest charges be abated or reduced, petitioner, in essence, seeks an interest-free loan from the State of New York. As noted by the Tribunal in ***Matter of Rizzo*** (Tax Appeals Tribunal, May 13, 1993):

> Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. . . . It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds. . . .

F. Finally, petitioner's assertion that the format of the nonresident tax return is misleading must be rejected. The instructions booklet, which accompanies the tax return, informs a taxpayer that "normal work days spent at home are considered days worked in New York" and thus the Division has clearly articulated its position as it relates to days worked at home by nonresident taxpayers.

G. The petition of Aldo and Virginia Dalsass is denied and the two notices of deficiency dated January 2, 2001 are hereby sustained, together with such additional interest as may be lawfully due and owing.

DATED: Troy, New York
July 17, 2003

/s/ Brian L. Friedman
PRESIDING OFFICER