STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARTHUR GRAY, JR., AND BETTY J. GRAY	:	DETERMINATION DTA NO. 819457
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1997 and 1998.	:	

Petitioners, Arthur Gray, Jr., and Betty J. Gray, 7 Allen Street, Suite 302, Hanover, New Hampshire 03755, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1997 and 1998.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 9, 2004 at 10:00 A.M., with all briefs to be submitted by September 1, 2004, which date began the six-month period for the issuance of this determination. Petitioner Arthur Gray, Jr. appeared *pro se* and for his spouse, Betty J. Gray. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether nonresident-petitioner Arthur Gray, Jr., has established that certain days worked in New Hampshire 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. On May 11, 2001, following an audit, the Division of Taxation ("Division") issued to petitioners, Arthur Gray, Jr., and Betty J. Gray,[1] a Notice of Deficiency which asserted $36,623.64 in additional New York State and City income tax due, plus interest, for the years 1997 and 1998.

2. Petitioner Arthur Gray, Jr., has worked as an investment counselor with various New York City investment firms since 1945. Over the years he developed a strong client base and, at the time of the hearing, had about $150 million under his management.

3. Petitioner and his wife, Betty J. Gray, have owned and maintained a residence at 88 School Street, Haverhill, New Hampshire since 1976. Petitioner's residence is a 200-year old former tavern, known as Bliss Tavern, located at the intersection of Court and School Streets in Haverhill. A barn is located on the property behind the residence.

4. From 1976 through 1996, petitioner worked in New York City where he had an office and where he and his wife maintained an apartment. At various times during those 20 years, depending on the requirements of his job, he commuted to New York from New Hampshire every other week or stayed in New York from Monday to Thursday and returned to New Hampshire on weekends.

5. Prior to 1997, petitioner filed New York resident income tax returns.

6. In 1996, petitioner was employed as a managing director by Cowen & Co. ("Cowen"), with an office in New York City. Late in 1996, Cowen management advised him that he would have to vacate his office in New York. Cowen management then suggested that petitioner open

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[1] Betty J. Gray is a petitioner herein because she jointly filed New York returns with her husband for the years at issue. As this matter involves the proper tax treatment of income earned only by Arthur Gray, Jr., all references to "petitioner" in this determination (unless otherwise indicated) shall refer to Arthur Gray, Jr.

a Cowen office in New Hampshire, which he agreed to do. Petitioner's former office in New York would henceforth be available to managing directors assigned to Cowen offices throughout the United States when they came to New York. This was part of a Cowen business strategy for managing directors, such as petitioner, to work out of their local addresses rather than the New York office.

7. Also late in 1996, after learning of the impending loss of his New York office and agreeing to open a New Hampshire office, petitioner and his wife sold their New York City apartment. They did not maintain a permanent place of abode in New York during the years at issue.

8. Early in 1997, Cowen registered with the New York Stock Exchange and the State of New Hampshire an office located at Court and School Streets, Haverhill, New Hampshire (i.e., petitioner's residence). Petitioner was named managing director of the office and Stephen Bartholow was named vice president. Mr. Bartholow is petitioner's son-in-law. At about the same time, the barn on petitioner's Haverhill property became an office for petitioner's and Mr. Bartholow's use. A high-speed computer line and additional phone lines were installed. The office was listed in the telephone directory as a Cowen office. A New York Stock Exchange certificate indicating that Cowen & Company was a member of the exchange was displayed in the office as required under the rules of the exchange. Additionally, petitioner and Mr. Bartholow began using stationery with Cowen letterhead listing both the New York and Haverhill addresses and phone numbers.

9. During the years at issue, petitioner's job consisted of servicing his existing clients, who were located in New York, California, London, Switzerland, and the Czech Republic, among other places. At that point in his career, he was not interested or involved in acquiring

new clients. All of petitioner's clients' portfolios, stock market information, news, and any other information necessary to conduct his business were accessible through his laptop computer. Petitioner could thus perform his job virtually anywhere in the world.

10. In 1997 petitioner worked 88 days for Cowen in New York and 107 days for Cowen in New Hampshire. In 1998, petitioner worked 87 days for Cowen in New York and 134 days for Cowen in New Hampshire.

11. When petitioner went to New York on business during the years at issue, he met with clients and used the office for visiting managing directors at Cowen. Petitioner stayed at a hotel while in New York.

12. In 1999, petitioner and Mr. Bartholow left Cowen (by that time known as "SG Cowen") and moved to Carret and Company LLC ("Carret"). Carret asked petitioner and Mr. Bartholow to expand their business and they moved from the barn in Haverhill to their current, larger office in Hanover, New Hampshire.

13. Petitioner filed nonresident returns for the years at issue. For 1997, he reported 88 days worked in New York out of 219 days worked in the year. For 1998, he reported 87 days worked in New York out of 226 days worked in the year. On audit, the Division included days worked for Cowen in New Hampshire (***see***, Finding of Fact "10") as days worked in New York for income allocation purposes and recomputed petitioner's New York tax liability accordingly.

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 "[t]he 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 132.16 through 132.18 of this Part (20 NYCRR 132.4[b]).

The regulation set forth at 20 NYCRR 132.18(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*. . . . (Emphasis added.)

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 (***see***, ***e.g.***, ***Matter of Phillips v. New York State Department of Taxation and Finance***, 267

AD2d 927, 700 NYS2d 566, ***lv denied*** 94 NY2d 763, 708 NYS2d 52). 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 employee'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 courts have generally upheld a strict standard of employer necessity where the residence is the workplace in question "because of the obvious potential for abuse" (***Matter of Kitman v. State Tax Commn.,*** 92 AD2d 1018, 461 NYS2d 448, 449).

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 or maintains an office in New York State." (***Matter of Speno v. Gallman,*** 35 NY2d 256, 259, 360 NYS2d 855, 858.)

C. Pursuant to the above principles it is clear that the days petitioner worked in New Hampshire during the years at issue cannot be considered as days worked outside New York State for purposes of allocating wages to sources within and without the State. Certainly, it was not necessary for petitioner to be in Haverhill, New Hampshire to perform his duties as an investment counselor. Petitioner had performed the same job in New York for many years and there is no indication that the job had changed. Indeed, petitioner testified that with his laptop computer he could do his job virtually anywhere in the world. Furthermore, although petitioner no longer had his own office in New York, Cowen did have space available for his use and petitioner made regular use of such space during the years at issue (***see***, Findings of Fact "10" and "11"). Additionally, the record does not establish that Cowen required petitioner to work in

Haverhill. Rather, the record shows that Cowen encouraged petitioner to open an office at his residence as part of a strategy of moving its managing directors to their local addresses. There is no evidence that Cowen had any particular interest in opening an office in the Haverhill area. In the absence of any such evidence, it must be concluded that this location was selected as a convenience to petitioner.

Finally, it is noted that even though an office in an employee's home may be equipped by and intended for an employer's purposes, it must also be established that the employee's work was performed there of necessity for the employer (***Matter of Fischer v. State Tax Commn.,*** 107 AD2d 918, 484 NYS2d 345). Thus, it is not dispositive that a high-speed computer line and additional phone lines were installed in petitioner's office; that the office was listed in the telephone directory as a Cowen office; that petitioner used Cowen stationery listing the Haverhill address and phone number; or that the office displayed Cowen's New York Stock Exchange certificate as required under the rules of the exchange.

D. The petition of Arthur Gray, Jr. and Betty J. Gray is denied and the Notice of Deficiency dated May 11, 2001 is sustained.

DATED: Troy, New York
February 24, 2005

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE