STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
C. GREGORY DEVERS	:	DETERMINATION DTA NO. 819751
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 New York City Administrative Code for the Year 1999.	:	
	:	

Petitioner, C. Gregory Devers, 5 Harbor Court, North Kingstown, Rhode Island 02852, 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 New York City Administrative Code for the year 1999.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 19, 2004 at 10:30 A.M., with all briefs to be submitted by December 17, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se.* The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether petitioner, a nonresident of New York, has established that certain days worked in Connecticut should properly be allowed as days worked outside New York for purposes of allocating wage income to sources within and without the State.

FINDINGS OF FACT

1. On November 18, 2002, the Division of Taxation ("Division") issued a Notice of Deficiency to C. Gregory Devers ("petitioner") which asserted a deficiency of New York State personal income tax in the amount of $9,469.62, plus interest of $1,835.43, and a deficiency of New York City personal income tax in the amount of $656.12, plus interest of $127.17, for a total amount due of $12,088.34 for the year 1999.

The Notice of Deficiency also asserted a deficiency of New York State personal income tax in the amount of $4,681.58, plus interest of $479.86 and penalty of $1,170.40, for a total due of $6,331.84 for the year 2000. After a conciliation conference was held in this matter, the Division agreed to cancel the deficiency for 2000. Accordingly, only the deficiencies for the year 1999 remain at issue.

2. For the year 1999, petitioner filed a form IT-203, Nonresident and Part-Year Resident Income Tax Return, and a form NYC-203, City of New York Nonresident Earnings Tax Return, on which he indicated that out of 236 days worked during the year, 69 days were worked outside the State, 63 of which were worked at his home in New Canaan, Connecticut. The balance, or 167 days, was allocated to New York. Petitioner, therefore, calculated that 70.76 percent (167 days worked in New York ÷ 236 total days worked during the year) of his wage income was properly allocated to New York. Petitioner also attached an explanation to the return which stated, in pertinent part, as follows:

> Effective September 30, 1999, my employer changed my physical working arrangement to that of tele-commuter. With this change, my physical work location changed from 685 Third Avenue, New York, NY to a home office at 258 Wahackme Road, New Canaan, CT. Unfortunately, the payroll department did not pick up on that change, and the state and local taxes that were withheld were sent to New York rather than Connecticut.

3. Toward the end of 1998, petitioner became employed by Winstar Wireless, Inc. ("Winstar"), a telecommunications company. Petitioner joined the broadband division which was in the data section (the other section was "voice"). Petitioner was running several offices around the United States which provided technical services as a supplement to the data products which were offered by Winstar. At the beginning of 1999, all functions of Winstar were located in New York City. Later in 1999, company operations moved to Virginia[1] where the majority of its employees were located. During 1999, the broadband division of Winstar was dissolved. Petitioner's boss, Howard Taylor, left the company and "the data people were absorbed by the voice people." There was an aggressive attempt by Winstar to save rent costs.

During the second quarter of 1999, petitioner was working primarily at coordinating transitions. He was then brought into the technical side of the business, i.e., the technical enhancements to the communication products that were being offered by Winstar. He developed telecommuting so that the employees of Winstar's customers could operate in this way.

During the third quarter of 1999, petitioner was telecommuting to Virginia. However, he had an office at 685 Third Avenue in New York City. Petitioner began developing technical products that could differentiate Winstar's offerings. The first product he worked on was a packaged set of software, integrating teleconferencing, instant messaging, voice mail and email designed to support field personnel. Petitioner began using these products himself in the course of his telecommuting from New York to technical staff in Virginia.

On September 30, 1999, he was "changed officially from line to staff" and he worked on technology development for the company. He was forced to take a cut in pay to keep his job and

[1] The 1999 form W-2, Wage and Tax Statement, issued by Winstar to petitioner indicated that the address of the company was 1577 Spring Hill Road, 6th Floor, Vienna, Virginia 22182.

was directed to move to Virginia or, in the alternative, to work out of his home in Connecticut. Petitioner was assigned to work out of Tysons Corner, Virginia, but Winstar would not pay for the move. Since, in 1999, he was 63 years old, he felt that he had no choice but to accept the new terms of employment if he was to remain with Winstar. As of September 30, 1999, petitioner became a formal member of the Virginia technical group and was transferred to its payroll. His pay stub changed and his location code changed as well.

4. At the beginning of 1999, Winstar had 11 office locations in New York City. By the end of the year, all that was left in New York City was upper management, consisting of marketing, legal, finance and real estate divisions. No technical personnel were working out of New York City; all were relocated to Virginia.

5. After his official change on September 30, 1999, petitioner did not come into New York for any business purpose. Petitioner's building pass for the office at 685 Third Avenue was rescinded, and petitioner was informed that no office space would thereafter be available to him at the Third Avenue location or at any other location in New York. On the day after he left the Third Avenue office, an employee of the marketing division was occupying his desk. Petitioner did not speak to anyone in New York City concerning his job functions with the company after September 30, 1999. Petitioner was paid by Winstar out of Virginia.

6. Petitioner introduced into evidence a letter from Donald S. Schneider, Winstar's senior vice president for human resources, who held that position during the period in which petitioner was employed by Winstar. In such capacity, Mr. Schneider monitored the placement and relocation of Winstar employees throughout the corporation. Mr. Schneider's letter stated, in relevant part, as follows: " To the best of my knowledge Mr. Devers was relocated from 685 3rd

Avenue, New York, New York, to an office in his Connecticut home. This relocation was not done for the convenience of the employee but as an efficiency and cost containment measure."

7. Due to an administrative oversight, Winstar continued to pay withholding taxes for petitioner to the State of New York during the last quarter of 1999. Petitioner was later informed by Winstar that such withholding taxes should have been paid to the State of Connecticut. He was instructed by Winstar to pay income tax to New York for wages earned through September 30, 1999 and to pay tax to Connecticut thereafter. For the last quarter of 1999, petitioner paid income tax to Connecticut on the wages earned for this period. Beginning in 2000, withholding taxes on behalf of petitioner were paid by Winstar to Connecticut.

8. Winstar was liquidated at the end of 2001 and petitioner's employment with the company was terminated. As a result of the bankruptcy and subsequent liquidation of Winstar, petitioner has been unable to obtain any company records. Petitioner maintained no travel records for the last quarter of 1999 because in his new position, no travel was required.

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. In upholding the validity of the "convenience of he employer" rule, the Court of Appeals, in ***Zelinsky v. Tax Appeals Tribunal*** (1 NY3d 85, 769 NYS2d 464, ***cert denied*** 158 L Ed 2d 619), noted that the taxpayer benefitted directly from an employment opportunity and an office in New York and from a salary which he was able to earn entirely within the State if he chose to do so. This is precisely where the present matter is distinguishable from ***Zelinsky***.

The credible testimony of petitioner, as well as the letter from Winstar's senior vice president for human resources, established that petitioner's relocation from his office in New York City was done out of the employer's necessity, i.e., the need to minimize Winstar's rent costs. Immediately upon his relocation, petitioner's building pass at the New York City office was rescinded, and petitioner was informed by the employer that no office space would thereafter be available to him at that location or at any other location within the City or State of New York. After September 30, 1999, petitioner no longer traveled to New York to conduct his business, and he did not even speak to anyone in New York concerning his job duties. Petitioner's paycheck originated from Winstar's Virginia offices.

Clearly, petitioner's services could not have been undertaken at his employer's office in New York, and accordingly, it must be found that the relocation to his home in Connecticut was not for petitioner's convenience but was, instead, out of his employer's necessity. Had he not accepted the relocation, petitioner would have been forced to move to Virginia (and pay all expenses associated therewith) or lose his employment altogether. Petitioner's allocation, as set forth on his 1999 nonresident return, was, therefore, proper.

D. The petition of C. Gregory Devers is granted and the Notice of Deficiency issued on November 18, 2002 is hereby canceled.

DATED: Troy, New York
May 5, 2005

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE