STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MANOHAR AND ASHA KAKAR	:	SMALL CLAIMS DETERMINATION DTA NO. 820440
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2000 and 2001.	:	

Petitioners, Manohar and Asha Kakar, 1480 West Laurel Avenue, Gilbert, Arizona 85233-4128, 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 2000 and 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on November 22, 2005 at 10:45 A.M. Petitioners appeared by Scott Roper, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Susan Parker).

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

ISSUE

Whether petitioner Manohar Kakar, a nonresident of New York, has established that days worked at his home 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. Petitioners, Manohar and Asha Kakar, are husband and wife who, for the entire 2000 tax year and most of the 2001 tax year, resided in the State of New Jersey. On some undisclosed date in the latter part of 2001 petitioners moved from New Jersey to Gilbert, Arizona. While the exact date of petitioners' move to Arizona is not known, it would appear that the move occurred on or about October 9, 2001 since petitioners' Federal Schedule D, Capital Gains and Losses, for the 2001 tax year reveals that petitioners sold their personal residence in New Jersey on October 9, 2001.

2. From approximately 1997 to date, petitioner Manohar Kakar[1] has been employed on a full-time basis by RSG Systems, Inc. ("RSG"), a small computer consulting firm headquartered at 14 East 38th Street, New York, New York. Petitioner has no ownership interest in RSG and he has limited decision-making authority. During the two years at issue in this proceeding, petitioner performed services for RSG at its office located in New York City and also from an office maintained in his home in New Jersey and, after his move, from an office located in his personal residence in Arizona.

3. For the year 2000, petitioner filed a Form IT-203, Nonresident and Part-Year Resident Income Tax Return, on which he indicated that out of 235 days worked during the year, 103 days were worked outside the State, all of which were worked at his home in Ramsey, New Jersey. The balance, or 132 days, were days petitioner worked in New York. Petitioner, therefore, calculated that 56.17 percent (132 days worked in New York ÷ 235 total days worked during the year) of his wage income was properly allocated to New York.

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[1] Petitioner Asha Karkar is involved in this proceeding solely as the result of having filed joint income tax returns with her spouse. Accordingly, the use of the term petitioner shall, unless otherwise noted, refer to Manohar Karkar.

Petitioner also filed a Form IT-203, Nonresident and Part-Year Resident Income Tax Return, for 2001 whereon he claimed that he worked a total of 232 days during the year, 123 of which were worked outside the State and 109 shown as worked within the State. As was the case in 2000, all of the days worked outside New York in 2001 were days worked at petitioner's home in either Ramsey, New Jersey or in Gilbert, Arizona after his move. Accordingly, petitioner allocated 46.98 percent (109 days worked in New York ÷ 232 total days worked during the year) of his 2001 wage income to New York sources.

4. On March 4, 2004, the Division of Taxation ("Division") issued two notices of deficiency to petitioner, one for each year in dispute, asserting that $3,223.36 and $5,108.88 of additional New York State personal income tax was due for 2000 and 2001, respectively, plus interest. The notices of deficiency were based on two explanatory statements of proposed audit changes, each dated January 8, 2004, wherein the Division disallowed the days worked at home as days worked outside New York State. Accordingly, the Division determined that all of petitioner's wage income received from RSG in 2000 and 2001 was derived from New York State sources and was thus taxable in full to New York. 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.
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> Applying the above principles to the allocation formula, normal work days spent at home are considered days worked in New York. . . .

5. RSG has approximately 100 employees and, as noted previously, petitioner began his employment with RSG sometime in 1997. Petitioner's primary duties involved the preparation and analysis of RSG's confidential financial statements, including income statements and balance sheets (both budget and actual). In addition, petitioner also prepared and analyzed specialized reports, such as sales reports and employee compensation reports. The financial information which petitioner prepared and reviewed was highly confidential, and Mr. Mukesh Sehgal, RSG's majority shareholder (85%) and president and chief executive officer, did not want this information disseminated to other employees.

6. For the first couple of years of his employment with RSG, petitioner worked out of its New York City office; however, because of adverse business conditions in late 1999 or early 2000, RSG decided to reduce its workforce and also its workspace in the New York City office. RSG reconfigured its downsized New York City office to provide for a series of multipurpose rooms which were shared by certain employees. This shared work space did not provide the privacy needed by petitioner to keep the reports he prepared confidential. Accordingly, Mr. Sehgal directed petitioner set up a satellite office of RSG in petitioner's home in New Jersey and RSG agreed to pay for all expenses associated with setting up and maintaining this office. Pursuant to a letter dated October 27, 2004, Mr. Sehgal indicated that he "directed Mr. Karkar to work at the satellite office in New Jersey at all times when he was preparing and reviewing RSG's confidential financial statements. In my view, this was the only way that RSG could maintain the confidential nature of the financial statements."

7. After petitioner moved to Gilbert, Arizona, he remained employed by RSG and he continued to work out of an office he maintained in his home there, and he would also periodically travel to New York and work out of RSG's New York City office. As was the case

with petitioner's home office in New Jersey, RSG paid all expenses necessary to set up the home office in Gilbert, Arizona, and it also paid for the expenses needed to maintain the office.

SUMMARY OF PETITIONER'S POSITION

8. Petitioner asserts that there are two fundamental reasons why it was necessary for him to work out of a home office. First, after RSG downsized its New York City office, there was inadequate workspace in the revamped office to afford petitioner the privacy he needed to prepare and review RSG's confidential financial reports. Second, after the events of September 11, 2001, RSG had concerns regarding other terrorist events which might impact the New York metropolitan area and affect its operations, including the integrity of its financial records. RSG was concerned that petitioner's home in Ramsey, New Jersey was situated too close to its New York City office and that if some catastrophic event occurred, both sets of financial records could be destroyed. Petitioner maintains that he moved from his home in New Jersey at his employer's direction so as to increase the distance between his home office and RSG's New York City location.

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 two recent cases, ***Zelinsky v. Tax Appeals Tribunal*** (1 NY3d 85, 769 NYS2d 464, ***cert denied*** 541 US 1009, 158 L Ed 2d 619) and ***Huckaby v. Tax Appeals Tribunal*** (4 NY3d 427, 796 NYS 2d 312, ***cert denied*** 543 US ___, 126 S Ct 546), the Court of Appeals reexamined the validity of the "convenience of the employer" rule and upheld its application in both cases. The facts in ***Zelinsky*** and ***Huckaby*** are essentially indistinguishable from the facts presented in the instant matter, and therefore I see no reason to deviate from the Court's holdings in these two matters.

Petitioner admits that, with the exception of a private work space, the tools and systems necessary to preform his tasks were present in RSG's New York City office. The Court noted in ***Phillips, supra,*** that it was "not persuaded that Lehman's offices could not be reasonably adapted to serve petitioner's needs . . ." and it is equally true in the instant matter that, with but a minimum of ingenuity, arrangements could have been made to provide a secure work environment for petitioner to perform his tasks.

I am not persuaded that petitioner's move to Arizona was primarily prompted by his employer's desire to increase the distance between petitioner's home office and RSG's New York City office. As noted on petitioner's Federal Schedule D for 2001, his personal residence was sold on October 9, 2001, less than one month after the attacks of September 11, 2001. It seems unlikely that the decision to relocate was conceived and the actual move consummated in the relatively short 28-day period between September 11, 2001 and October 9, 2001. It appears more plausible that petitioner started the relocation process well before the events of September 11, 2001. Finally, the documentary evidence submitted from petitioner's employer addresses only petitioner's New Jersey office and offers no collaboration for the need for an office in Arizona.

D. The petition of Manohar and Asha Kakar is denied and the two notices of deficiency issued on March 4, 2004 are hereby sustained.

DATED: Troy, New York
February 16, 2006

/s/ James Hoefer
PRESIDING OFFICER