STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANDREW WOODS	:	SMALL CLAIMS DETERMINATION DTA NO. 820751
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2000 and 2001.	:	

Petitioner, Andrew Woods, P.O. Box 3565, Stowe, Vermont 05672, filed a petition for redetermination of a deficiency 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 Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 29, 2006 at 9:15 A.M., with all briefs to be submitted by March 7, 2007, which commenced the three-month period for the issuance of this determination. Petitioner appeared by Maryanne Cunningham, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Susan Parker).

ISSUE

Whether days worked at home by petitioner, Andrew Woods, 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. Petitioner, Andrew Woods, and his wife filed a joint Form IT-203, Nonresident and Part-Year Resident Income Tax Return, for the year 2000. On this return, their address was listed as 127 South Beach Avenue, Old Greenwich, Connecticut. The return indicated that of the 231 days petitioner worked during the year, 192 days were worked in New York State and 39 days were worked outside of New York State, of which 18 were worked at his home in Connecticut. Petitioner therefore determined that 83.12 percent (192 days worked in New York divided by 231 days worked during the year) of his wage income was properly allocated to New York.

2. Petitioner and his wife also filed a joint Form IT-203, Nonresident and Part-Year Resident Income Tax Return, for the year 2001. On this return, their address was listed as P.O. Box 3565, Stowe, Vermont. According to the return, of the 233 days petitioner worked during the year, 148 days were worked outside of New York, of which 57 were days worked at his home. Accordingly, petitioner calculated that 36.48 percent (85 days worked in New York divided by 233 days worked during the year) of his wage income in 2001 was allocable to New York.

3. Each of the New York returns included a New York State copy of a wage and tax statement issued by Brecker & Merryman ("B & M"). According to the wage and tax statement, B & M was located at 228 East 45th Street, New York, New York 10017.

4. The Division of Taxation ("Division") issued statements of proposed audit changes, dated December 26, 2003, which explained that petitioner had a deficiency of personal income tax for the years 2000 and 2001. Each statement explained that the days claimed as worked at home had been disallowed as days worked outside of New York State. Accordingly, the

Division determined that all of petitioner's wage income received from B & M in 2000 and 2001 was derived from New York State sources and was thus taxable in full to New York.

5. On the basis of the statements of proposed audit changes, the Division issued notices of deficiency, dated April 5, 2004 and April 26, 2004, for the years 2000 and 2001, respectively, which asserted deficiencies of personal income tax as follows:

Assessment	Tax Period	Tax	Interest	Balance Due
L-023333279-8	2000	$5,723.30	$1,131.63	$6,854.93
L-023333522-9	2001	$6,462.87	$837.11	$7,299.98

6. Prior to the years in issue, petitioner and another individual started a firm which was located in the borough of Manhattan. During this period, petitioner allocated the days that he worked at home to New York State. During the first part of 2000, the company was sold and its name became B & M. Petitioner assumed the position of chairman of B & M and was in charge of all of its New York activities.

7. The Empire Group Ltd. ("TEGL") was a holding company for a group of management consulting firms which were located in 13 countries. The company was based at Buckingham Gate, London, England.

8. During the first six months of 2000, TEGL dealt with petitioner and four other executives in order to establish a new corporation. It was anticipated that the company headquarters would remain in London and that the executives would run the business from various places around the world. In June of 2000, B & M was acquired by TEGL. On July 1, 2000, petitioner assumed a position as an executive of TEGL and relinquished his position as chairman of B & M. Thereafter, petitioner provided services for TEGL on a global basis and

ceased providing any services for B & M. Petitioner no longer had any responsibilities for, or in, New York. Another individual was appointed as chairman of B & M.

9. After petitioner went to work for TEGL, he continued to receive payments through B & M. This practice was established as a convenience to TEGL. TEGL did not have any employees in the United States, other than petitioner, and it did not make any sense to TEGL to set up a separate payroll for petitioner when the B & M office was already established with the necessary information to make payments and withholdings. It also did not make any sense to TEGL to set up a United States payroll for petitioner alone in London. As a full-time employee of TEGL, the costs of petitioner's employment were charged monthly by B & M to TEGL which budgeted for and reimbursed all of petitioner's business related costs.

10. Petitioner entered into an addendum to his employment agreement with B & M, effective November 1, 2000, wherein petitioner agreed to serve TEGL "as a full-time employee in the capacity of Chief Operating Officer . . . ." The agreement directed that petitioner was to devote all of his business attention to the affairs of TEGL. In addition, the agreement stated that upon its execution, petitioner resigned as director, officer and chairman of B & M.

SUMMARY OF THE PARTIES' POSITIONS

11. It is petitioner's position that although his paycheck was issued by a New York employer, he was not working for a New York employer after July 1, 2000. Rather, he was working for a British company from his home which was outside of New York. Petitioner stresses that this arrangement was not entered into in order to avoid New York taxes. Rather, it was established because TEGL had become a global company.

12. The Division maintains that since petitioner was on the payroll of a New York employer, the days worked at petitioner's home were taxable by New York. It also argues that

the nonresident returns reported the wages as having a New York connection when he allocated a portion of them to New York State. According to the Division, the wage and tax statements list New York as the related state for the reported wages and withholding. The Division further notes that, while petitioner entered into an employment agreement effective November 1, 2000 to provide services to TEGL, the contract is with B & M and not TEGL. Lastly, the Division posits that since B & M is a subsidiary of TEGL, petitioner, as an officer of TEGL, should have access to B & M's New York office space.

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 State 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. . . .

B. The question presented is whether petitioner received income which was derived from or connected with New York sources after July 1, 2000 while he was working at his home (Tax Law § 631[a][1]). The clear weight of the evidence is that after July 1, 2000, petitioner did not receive such income. After this date, petitioner performed services on a global scale for an employer located in England. There is no evidence that he performed any services for a New York employer after this date. Therefore, these days may be allowed as days worked outside of New York State for purposes of allocating wage income.

C. The arguments raised by the Division do not warrant a different result. The Division has accurately noted that petitioner received a wage and tax statement from an employer located in New York. However, the issuance of the paychecks by B & M was merely an accommodation to the true employer which ultimately paid the wages. The accommodation did not make the income received by petitioner attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[b][1][B]). The Division has also correctly noted that the addendum to the employment agreement was with B & M and not TEGL. However, this also reflects the fact that the paychecks were being issued through B & M as an accommodation. The intent of the parties to the addendum was unmistakable in view of the provisions of the contract which stated that petitioner was to serve as a full-time employee of TEGL and that he was

resigning his positions with B & M. Contrary to the argument raised by the Division, TEGL and B & M were separate and distinct entities. There is no basis in this record to disregard their separate corporate forms.

D. It is noted that petitioner's reply brief, which was submitted after the time which was set aside for its filing, was disregarded.

E. The petition of Andrew Woods is granted and the notices of deficiency, dated April 5, 2004 and April 26, 2004, are cancelled.

DATED: Troy, New York
June 7, 2007

/s/ Arthur S. Bray
PRESIDING OFFICER