New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (10) I
Income Tax
December 26, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I951222B

On December 22, 1995, a Petition for Advisory Opinion was received from Mark F. Annitto, 56 William Drive, East Hampton, Connecticut 06424.

The issue raised by Petitioner, Mark F. Annitto, is whether he is allowed to allocate outside New York State a portion of his 1996 wage and salary income for the days that he works at his Connecticut home.

Petitioner submits the following facts as the basis of this Advisory Opinion.

Petitioner is a resident of Connecticut, and is employed as an environmental specialist (report reviewer) by Citicorp. Petitioner's office is at 599 Lexington Avenue in New York City.

Commencing in early 1996, Petitioner was one of 11 participants chosen to trial an Alternative Workplace Strategy Program. Early in January 1996, Petitioner's permanent office moved from 599 Lexington Avenue to smaller quarters at 425 Park Avenue for the purpose of reducing corporate office rental cost. In return, Citicorp is providing Petitioner and the 10 other individuals with the following: complete computer set-up at home, installation of a dedicated phone line, telephone, furniture, and fax/modem/copier/printer.

Petitioner states that he will work at his Connecticut home office four days a week and report to the New York City "hotel" office one day a week. Petitioner's private office at Lexington Avenue will not be replaced at the Park Avenue office. Petitioner will have to reserve a cubicle for that one day a week that he works in the New York City office because there will not be sufficient room at the new location for all of the people to work at the same time.

As part of the program, Petitioner is to use his home as his office. He is not allowed to rent any space. Petitioner will not be reimbursed for electricity, air conditioning or heat.

Section 132.4(b) of the Personal Income Tax Regulations provides that:

> [t]he New York [source] income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into [the individual's] Federal adjusted gross income, but only if, and to the extent that, [the individual's] 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.

Section 132.18 of the Personal Income Tax Regulations provides for the allocation of earnings of nonresident employees and officers, and section 132.18(a) states that:

> [i]f a nonresident employee ... performs services for [the individual's] employer both within and without New York State, [the individual's] income derived from New York State sources includes that proportion of [the individual's] 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 (other than deductions entering into the New York itemized deduction) of the employee attributable to [the individual's] 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 [the individual's] employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay ....

In Matter of Burke v Murphy, 33 AD2d 581, the petitioner was an attorney in the legal department of an international oil company with his office in New York City. He was responsible for legal problems affecting the company's Middle East interests and spent 75 days working in or en route to London. He claimed that he worked 17 days at home because "his work load was too heavy to complete during regular work hours and that working overtime in the corporation offices would entail additional expense for the employer for heat, transportation and meal charges." The Court held that "[a]n employee who performs work outside of New York for his own convenience and without necessity, rather than at his employer's New York offices, as here, may not treat the income derived therefrom as nonresident income, despite a possible benefit to the employer."

In Matter of Speno v Gallman, 35 NY2d 256 affg 42 AD2d 627, the petitioner was president of a company with offices in New York State and Switzerland. His duties were not executive in nature, but rather entailed public relations, entertainment and attendance at railroad meetings to promote the services of the company. He spent very little time in the office and traveled a great deal making contacts with customers. In 1960, he claimed 236 days of work outside New York of which 106 were worked at his home in New Jersey. In 1961, he claimed 252 days of work outside New York of which 174 were worked at his home. His work performed at home consisted essentially of making phone calls. He did not receive any business calls on the unlisted New Jersey number, and he did not entertain any business contacts in New Jersey. His duties did not necessitate his residing in New Jersey, but he lived there primarily to facilitate his traveling to the major railroad centers where the important customers were located. The petitioner's New York tax liability was reassessed to include the days worked at home. The Court found that:

> [t]he meaning of the phrase "sources within the state" is the focal point in this case. Apparently, the first interpretation was made in 1919 by the Attorney-General who stated that the source of income

> relates to "the work done, rather than the person paying for it" (1919 Report of Atty. Gen. 301). This resulted in the place of performance doctrine, i.e., that personal services performed outside the State would not be taxable.
>
> In view of the large number of nonresidents who avail themselves of employment within New York State, the place of performance doctrine was refined by virtue of the "convenience of the employer" test. Under this refinement, a nonresident who performs services in New York or has an office in New York is allowed to avoid New York State tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-State services are performed for the employee's convenience they generate New York State tax liability.
>
> ... The policy justification for the "convenience of the employer" test lies in the fact that 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 ....

In Matter of Page v State Tax Commn., 46 AD2d 341, the petitioner was employed as a staff writer for a company that acted as an advisor for fundraising drives conducted by churches and educational institutions. The employer's office was in New York City. The petitioner's work consisted of the preparation of brochures for publication and other material for the fund-raising drives. No file or work space was provided at the office for staff writers as their work, according to testimony at the hearing, is considered to be creative and not easily performed in the atmosphere of a business office during normal business hours. The petitioner claimed 227 days of work outside of New York, including 120 days worked at his home in Connecticut. The petitioner maintained a workshop and library in his home which contained reference material and other material used by him in his writing. His normal routine during the course of a campaign was to visit the client at the client's location, consult with the employer's officers in New York City, and do his writing at home. The Court found that:

> there is no evidence to establish that an office could not have been set up in such a manner as to make adequate space available for petitioner's work and files, and to insulate him from interruptions which might interfere with a proper atmosphere...
>
> In conclusion, it has not been shown that petitioner's work was of a type required to be performed away from the employer's office -- excepting, of course, trips to visit out-of-State clients. His desire to work at home where he felt he might work more comfortably and where all materials would be available around the clock could be found by the Tax Commission to serve the employee's convenience rather than the employer's necessity.

In Matter of Gross v State Tax Commn., 62 AD2d 1117, the petitioner worked as a management consultant for a firm with offices in New York. The firm allowed petitioner to perform his paper work at home, in New Jersey, where he worked 194 of 247 working days. The petitioner argued that his employer required him to work at home to allow him more working time and increase his productivity. The Court held that the petitioner:

> misconstrues the concept of work required to be performed outside the State. Work is so required if it could not be performed within the State [(Speno, supra)]. In the case at bar, petitioner could just as easily have performed his work at his office in New York, but found it more convenient to work at home. That his employer prefers him to work at home to allow for more efficient use of time is irrelevant to the issue of whether the work could have been performed in New York [(Page, supra)].

In Matter of Fass v State Tax Commn., 68 AD2d 977 affd 50 NY2d 932, the petitioner edited and published several magazines dealing with a wide variety of special areas, including sports cars, motorcycles, firearms, home improvements, dogs and horses. As part of his duties, he tested, analyzed and investigated new products in these areas and reported on them in articles prepared for the various magazines. To perform these duties for his employers, petitioner required access to a firing range with ballistics equipment and storage facilities; a garage to store automobiles and motorcycles for testing and evaluation; and a stable and kennel to house the horses and dogs he analyzed and photographed. These specialized facilities were established and located at the petitioner's farm and residence in New Jersey. Petitioner testified without contradiction that they were not available at or near his employers' New York City offices. The Appellate Division found that:

> [t]he Tax Commission has apparently taken the position that since the specialized facilities herein could have been set up somewhere in New York State, then the New Jersey situs was chosen merely for petitioner's convenience. In our view, however, a taxpayer should not be denied the right to allocate his income merely because his out-of-State activities could have been performed somewhere in New York State. The cases in this area do not stand for the proposition that out-of-State services are not for an employer's necessity where they could have been performed somewhere in New York State. Rather, they hold 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... The manifest rationale of [Burke v Bragalini (10 AD2d 654); Morehouse v Murphy (10 AD2d 764, app dsmd 8 NY2d 932); Churchill v Gallman (38 AD2d 631); Burke v Murphy, supra; Page, supra; Simms v Procaccino (47 AD2d 149); Speno, supra; Gross, supra; and Tuohy v Procaccino (51 AD2d 630)] is that work performed at an out-of-State home which just as easily could have been performed at the employer's New York office is work performed for the employee's convenience and not for the employer's necessity. In the case at bar, however, the work petitioner performed at the New Jersey locations concededly could not have been performed at his employers' New York City office. Moreover, the record discloses that petitioner's out-of-State activities were engaged in for his employers' necessity. Petitioner has thus qualified for an allocation of his income. As a matter of law, we reject the position that an allocation of income should be disallowed merely because the specialized facilities herein could have been set up somewhere in New York State.

In Matter of Wheeler v State Tax Commn.,72 AD2d 878, the petitioner was an expert in the field of trading, selling and underwriting municipal bonds. He had an office in New York City where he worked as an employee for several investment firms. The nature of his work required him, over the weekend, to analyze the bond market so he would be prepared for the next week's trading. He performed

this work in an office in his New Jersey home. Each Saturday morning the Blue Lists, which contain indispensable information for bond market analysis, were sent to his home by special delivery. It was held that the income that was generated by his weekend work was taxable. The Court cited Speno, supra; Fass, supra; and Burke v Bragalini, supra and found that:

> [n]umerous cases involving similar and almost identical factual situations have in recent years found their way to this court and the Court of Appeals... The manifest rationale of all of these cases is that work performed at an out-of-State home which could just as easily have been performed at the employer's New York office is work performed for the employee's convenience and not for the employer's necessity [Fass, supra]. Contrary to the petitioners' contention, [Fass, supra] did not change or alter that rationale and affords no support for their position here, for there we were not involved with an office, but rather with highly specialized facilities, including ballistics equipment, firing ranges, garages, stables and kennels, together with sophisticated testing and evaluating equipment and, concededly, these facilities were not available at or near the employer's office. This is all in sharp contrast to the situation here where the offices were "generally unavailable" over the weekend merely because mail was not sorted and a burglar alarm was activated. With the exercise of but a minimum of ingenuity and effort, the office could have been available to the petitioner.

In Matter of Kitman, 92 AD2d 1018, the petitioner was a television critic for Newsday, writing five columns each week. Although Newsday's offices were in New York, petitioner worked at his New Jersey home, where Newsday had provided him with four television sets, a special antenna to improve reception, a video tape recorder, and a machine to transmit his columns to Newsday on the telephone. Petitioner was expected to cover all aspects of television programming, from 6:00 AM past midnight, and stated that he frequently monitored several channels at once on his multiple television sets. Newsday did not maintain an office for him at its New York bureaus. Petitioner contended that he worked at home out of his employer's necessity because of the specialized equipment he used; the disruptive effect his four televisions would have had on others in the employer's New York offices; the long hours that he worked; and his specialized style of writing involving input from his family, who would not have been present at the New York offices. The Court distinguished this case from Fass, supra, where the petitioner worked out-of-State for his employer's necessity because his work required access to a firing range, a garage, a stable, and a dog kennel, which were "not available at or near his employers' New York City offices." The Court found that:

> [i]n terms of availability of equipment ... nothing in the record ... establishes that vast renovation would be required to install four televisions and a video tape recorder at Newsday's New York offices. This situation appears analogous to [Wheeler, supra] ... [Page, supra]. As far as disruption to the other workers from the televisions, there is also no evidence showing that the office could not be set up in such a way as to insulate petitioner from the other workers [Page, supra]. Similarly, for petitioner to spend his television viewing hours, though long at times, at the employer's office is not much more of a hardship than for the petitioner in [Wheeler, supra] ... Finally, concerning petitioner's need to have access to his family because of his particular style of writing, again, with the exercise of a little ingenuity, some means (possibly

> a special telephone line) could be devised for him to get input from them... In summary, while it would perhaps be more feasible for petitioner to work at home, it clearly is his choice to do so and not an absolute necessity from the employer's standpoint.

In Matter of Fischer v State Tax Commn., 107 AD2d 918, the petitioner was a licensed engineer and a principal in a firm which provided structural engineering services on a consultant basis. The firm had an office in New York City and also maintained an office in New Jersey at petitioner's home. The firm was required to maintain the New Jersey office, as its New Jersey clients desired local firms to avoid certain inconveniences of retaining a firm with only a New York City office. It was also established that due to the nature of the firm's work, the petitioner's presence at job sites in New Jersey was often required. The petitioner claimed that he worked in New Jersey on 128 days and in New York 111 days. Of the 128 days in New Jersey, he spent 13 days at construction sites or clients' offices, 51 days partly at construction sites and partly at the New Jersey office in his home and 64 days solely at the New Jersey office. The Tax Commission allowed the 13 days worked at the construction sites, but did not consider the other 115 days as days worked outside New York State. The Court stated that:

> [i]mplicit in the Tax Commission's determination herein is its conclusion that although the office maintained at the taxpayer's out-of-State home may be for the employer's necessity, the burden remains upon the taxpayer to establish that the work being done by him at his home was also for his employer's necessity, using the general rule set forth [in Fass, supra and Wheeler, supra]. We see nothing irrational in this conclusion (see [Speno, supra and Kitman, supra]).
>
> Turning to the proof concerning the 64 days spent solely at his office in his New Jersey home, it is noteworthy that petitioner made no attempt to connect the paperwork and design work he did there with the purpose of acquiring and servicing New Jersey clients, which is the basis for the claim that the out-of-State office was being maintained for the employer's necessity. Instead, petitioner explained that the secretarial help at the New York office was inadequate and that the secretary at the New Jersey office, his wife, was the most efficient at getting the work done. We find nothing irrational in the Tax Commission's conclusion that such proof failed to sustain the taxpayer's burden of establishing that his work at home was for his employer's necessity (see [Kitman, supra and Wheeler, supra]).

In Matter of Howell, Tax App Trib Dec, October 31, 1991, TSB-D-91(26)I, the petitioner was a clinical professor at New York University ("NYU"). The petitioner had a large personal library of books, articles and corporate data that he maintained at his home office in Connecticut. The petitioner worked 106 days in New York State, while he worked 145 days outside of New York State in 1985 and 1986. A letter from NYU stated that it expected petitioner to have extensive contact with the business community via field-based research, involvement in professional societies and through his own consulting activities. NYU expected him to be away from the school a considerable amount of the time that he was not teaching. NYU expected that activities such as research, course and class development, and grading would be performed while petitioner is traveling, on weekends, and away from the University so that petitioner could fulfill his teaching responsibilities while at the same time maintain his high

level of contact with the business community. The Administrative Law Judge held that an essential aspect of petitioner's role as a clinical professor was that he continue to maintain his close contacts with the business community. The Tribunal held that:

> this aspect of petitioner's employment clearly required him to cultivate these contacts away from his NYU office. However, this satisfies only the first requirement which must be met before income may be allocated by petitioner. In accordance with Fisher,[supra,] petitioner must also prove that the out-of-state employment duties for which he seeks an allocation (i.e., grading, course development, etc) were related to his out-of-state duties and, thus, were performed away from his NYU office due to the necessity of his employer [Fisher, supra]. Petitioner has failed to sustain this burden. The fact that it may have been inconvenient for petitioner to perform these duties at NYU, rather than in the course of his outside activities, is of no consequence. In light of petitioner's failure to make such a showing, we conclude that his entire salary was properly included in his New York State gross income.

Section 132.18 of the Personal Income Tax Regulations provides that any allowance claimed for days worked at home must be performed of necessity in the service of the employer. An analysis of the cases cited above shows that regardless of whether certain functions of employment take a taxpayer outside New York, the work sought to be allocated must be performed away from the employer's New York office due to the necessity of the employer. Under these cases, it is not sufficient that the employer does not accommodate the employee's work at the employer's office. See, Kitman, supra. Instead, the nature of the services performed must be of a type that could not be performed at the employer's office. See, Fass, supra, and Fischer, supra. Work performed at an out-of-state home which could have been performed at the employer's New York office, if accommodations were available, is work performed for the employee's convenience and not for the employer's necessity. The fact that the employer also benefits from the arrangement does not establish its necessity.

In this case, the nature of the services performed by Petitioner for Citicorp at his home in Connecticut, under the Alternative Workplace Strategy Program, are services that could have been performed at Citicorp's New York City office. The nature of the services do not require that they be performed outside of the New York City office. In fact, prior to 1996 Petitioner did perform all of his duties in the New York City office of Citicorp. Accordingly, Petitioner may not allocate the days he works at his Connecticut home office as days worked outside New York State for purposes of section 132.18 of the Personal Income Tax Regulations.

DATED: December 27, 1996

s/John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.