STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN AND PATRICIA D. KLINGENSTEIN	:	DETERMINATION DTA NO. 815156
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1989 and 1990.	: :	

Petitioners, John and Patricia D. Klingenstein, 787 7th Avenue, New York, New York 10019-6018, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1989 and 1990.

On September 11, 1997, petitioners, by their duly appointed representatives Coopers and Lybrand, LLP (Ellen Kon Gursky, Esq., of counsel) and Fulbright and Jaworski, LLP (William Bush, Esq., of counsel), and the Division of Taxation by Steven U. Teitelbaum, Esq. (Craig Gallagher, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by February 7, 1998, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners were properly subject to New York State personal income tax as statutory resident individuals pursuant to Tax Law § 605(b) for either or both of the years 1989 or 1990.

II. Whether the application of Tax Law § 605(b) to petitioners as the basis for such "taxable as residents" status violates either the due process clause or the commerce clause of the United States Constitution.

III. Whether penalties imposed for negligence and substantial understatement of liability pursuant to Tax Law § 685(b) and (p) are justified and should be sustained.

FINDINGS OF FACT [1]

1. Petitioners, John and Patricia D. Klingenstein, filed a New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) under filing status "2" (Married filing joint return) for each of the years 1989 and 1990. Petitioner John Klingenstein also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of such years.

2. On their New York State return for 1989, petitioners reported and compared the New York State portion of their Federal adjusted gross income ($47,062.00) to their Federal adjusted gross income ($11,436,728.00), to arrive at a New York State income percentage of 0.0041, and a reported New York State tax liability of $2,944.00. For 1990, the New York State portion of petitioners' Federal adjusted gross income ($62,090.00) compared to their Federal adjusted gross income ($6,843,020.00) resulted in a New York State income percentage of 0.0091, and a reported New York State tax liability of $2,221.00. Petitioner John Klingenstein's New York

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[1] The parties submitted a Stipulation agreeing to certain facts relevant to this matter. These stipulated facts have been included in the Findings of Fact.

City Nonresident Earnings Tax liability totalled $214.00 for 1989, and $304.00 for 1990. Accordingly, petitioners' reported New York State and City tax liability totalled $2,944.00 for 1989 and $2,525.00 for 1990.

3. The Division of Taxation ("Division") audited petitioners' returns for 1989 and 1990. Following its audit, the Division issued to petitioners a Notice of Deficiency, dated March 28, 1996, asserting additional New York State personal income tax due for 1989 and 1990 in the aggregate amount of $957,082.14, plus penalty and interest. A Statement of Personal Income Tax Audit Changes, dated February 6, 1996, reveals the asserted deficiency to be based on the premise that petitioners maintained a permanent place of abode in New York State and failed to establish that they did not spend more than 183 days in New York State during either 1989 or 1990, and thus were properly taxable as statutory residents of New York State for each of such years. This statement also reflects the asserted tax due as $715,200.95 for 1989, based on reported New York State taxable income of $9,128,412.00, and $241,881.19 for 1990, based on reported New York State taxable income of $3,108,821.50. Finally, the statement reflects that penalties were imposed under Tax Law § 685(b) and (p), for negligence and substantial understatement of liability, respectively.

4. There is no dispute as to petitioner John Klingenstein's New York City Nonresident Earnings Tax liability as reported for either of the years in question, thus leaving only petitioners' New York State tax liability in question. In turn, resolution of this issue depends entirely on whether petitioners were taxable as statutory residents of New York State for either or both of the years in issue.

5. During 1989 and 1990, petitioners maintained their primary residence at 8 Fox Run Lane, Greenwich, Connecticut. Petitioners have lived in this Connecticut home for more than 35

consecutive years, and it is undisputed that petitioners were domicilliaries of Connecticut and were not domicilliaries of New York State during 1989 and 1990.

6. Petitioners' Connecticut home is located approximately two miles from the New York State/Connecticut border. Unless they were traveling or had specific engagements, petitioners spent weekends and holidays during 1989 and 1990 at their Connecticut home.

7. During 1989 and 1990, petitioner John Klingenstein was employed by Klingenstein, Fields & Co., L.P., an investment management firm located in Manhattan at 787 Seventh Avenue. During 1989 and 1990, petitioners owned a New York City apartment located at 10 East 70th Street in addition to their primary residence in Connecticut.

8. For statutory residence purposes the Division, upon audit, asserted the following day counts for petitioners for the 1989 and 1990 tax years:

1989 [2]	
New York State Days	203
Connecticut/Other Days	162
1990	
New York State Days	192
Connecticut/Other Days	173

9. During 1989 and 1990, petitioners dined at restaurants near their Connecticut home while staying at their Connecticut home. Some of these restaurants were located across the New York State/Conecticut border in New York State. In addition to dining days, there were days

[2] Although the auditor's workpapers indicate that Mr. Klingenstein was within New York State on June 24, 1989 based on a Harwyn Shoes charge, the American Express receipt for Harwyn Shoes indicates that the purchase was actually made in Connecticut. Accordingly, June 24, 1989 should be classified as a Connecticut day for statutory residency purposes, and the New York State day count should be reduced to 202 for 1989.

during 1989 and 1990 where petitioners made brief trips to New York stores solely for the purpose of shopping. Eleven such days have been counted as New York State days by the Division. With the exception of only one day in the two years at issue, the dining and shopping visits to New York State were either weekend days or national holidays.

10. Each of these dining or shopping visits occurred on different dates and such visits, numbering 21 in 1989 and 22 in 1990, have been included in the Division's count of the days spent in New York State by petitioners for purposes of determining petitioners' status as residents of New York State.[3]

11. Petitioners' visits to New York State for dining or shopping began from petitioners' Connecticut home and lasted only a short time, after which petitioners returned to their Connecticut home. During 1989 and 1990, petitioners frequently visited one restaurant, The Black Sheep, which was located in New York State only 2.5 miles from petitioners' Connecticut home.

12. All of the restaurants and stores involved in the foregoing visits to New York State are proximate to petitioners' Connecticut home, and are not proximate to petitioners' New York City apartment.

13. The restaurant charges were incurred solely by petitioners and, occasionally, friends, and are relatively small in amount. The meals petitioners had at New York State restaurants on the days which are at issue herein were purely personal and nonbusiness in nature, and no business was ever conducted during these meals.

14. The visits to New York State described above were entirely related to petitioners'

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[3] These visits consisted specifically of 3 shopping trips and 18 dining trips in 1989, and 8 shopping trips and 14 dining trips in 1990.

Connecticut home and not to Mr. Klingenstein's New York employment or New York apartment. No business deductions were ever taken for the above-described meals, or for the personal expenses from shopping visits described above. None of the expenses for the visits in issue were reimbursed by Mr. Klingenstein's employer. Mr. Klingenstein was not responsible for any business solicitation or entertaining while employed by Klingenstein, Fields & Co., L.P.

15. The Division admits that petitioners were not present in New York City more than 183 days during either 1989 or 1990.

16. The determination of whether petitioners were subject to tax during the 1989 and 1990 tax years as statutory residents of New York State is entirely dependent upon whether petitioners' brief entries into New York State for the limited purpose of dining or shopping constitute "days" spent in New York State.

17. Petitioners have a history of filing timely income tax returns and remitting payments on a timely basis. Petitioners were previously audited for the 1986 and 1987 tax years. There were no adjustments made to the 1987 tax year. Petitioners were assessed and paid additional tax and interest for the 1986 tax year. [4] Petitioners fully cooperated with the Division at the audit level and were responsive to all of the Division's requests.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1)(A) and (B) set forth the definition of a New York State resident individual for tax purposes. Specifically relevant to this matter is section 605(b)(1)(B), which defines the so-called "statutory" resident as an individual:

> who is not domiciled in this state but maintains a permanent place of abode in this

[4] The basis for the 1986 assessment is not disclosed or described in the parties' stipulation of facts or in the evidence in the record.

> state and spends in the aggregate more than one-hundred eighty-three days of the taxable year in this state, unless such individual is in the active service in the armed forces of the United States.

This classification of resident versus nonresident is significant since residents are taxed on their income from all sources (Tax Law § 612), whereas nonresidents are taxed only on their New York source income (Tax Law § 631).

B. It is undisputed that petitioners owned and maintained a permanent place of abode in New York City (and hence in New York State) during the years in question. However, it is also undisputed that petitioners were domicilliaries of Connecticut and were not domicilliaries of New York State during such years. While there is no claim that petitioners were New York City statutory residents during such years (i.e., that petitioners spent more than 183 days in New York City in either 1989 or 1990), the Division does claim that petitioners were New York State statutory residents (i.e., that petitioners did spend more than 183 days in New York State in both 1989 and 1990). Thus, resolution of this case turns on whether petitioners were properly held to have spent in the aggregate more than 183 days in New York State in either of the years in question. Even more specifically, the issue is whether certain days, during which the duration of petitioners' presence in New York State was for a relatively short period of time, should properly be included in the count of New York State days. If such days, denominated "border days" by petitioners and numbering about 20 in each of the years at issue, are included, then petitioners' New York State day count exceeds 183 days and petitioners fall within the taxable-as-residents terms of Tax Law § 605(b)(1)(B).

C. Tax Law § 605(b)(1)(B) sets only two conditions which, if met, require a nondomicilliary to be taxed as a resident. These conditions are maintenance of a permanent place of abode in New York State, and physical presence in New York State on more than 183

days in any year. With regard to the physical presence condition, the statute neither quantifies any requisite length of stay, nor qualifies any particular purpose for one's presence in New York State, save for specifically excepting from the statute's coverage those persons who are in the active service in the armed forces (Tax Law § 605[b][1][B]). Petitioners do not claim to be in the active service in the armed forces.

D. Tax Law § 697(a) allows the Commissioner of Taxation to make rules and regulations necessary to enforce the provisions of Tax Law Article 22. Regulations of the Commissioner of Taxation, at 20 NYCRR 105.20(c), prescribe rules for determining days spent within and without New York State for purposes of determining resident status, as follows:

> In counting the number of days spent within and without New York State, presence within New York State for any part of the calendar day constitutes a day spent within New York State, except that such presence may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State.

E. An interpretation or construction of a statute by an agency charged with its administration will be upheld if it is not irrational or unreasonable (***Matter of Lumpkin v. Dept. of Social Services***, 45 NY2d 351, 408 NYS2d 421, 423). In fact, the Appellate Division has upheld the general rule under 20 NYCRR 105.20(c) that a "day" for purposes of calculating the 183-day requirement includes a "presence within New York State for any part of a calendar day" (***Matter of Leach v. Chu***, 150 AD2d 842, 540 NYS2d 596). Therefore, unless petitioners can point to some exception in addition to the "in-transit" exception expressed in the regulation, the "days" in question here constitute presence within New York State for any part of a calendar day, and thus must be included in the overall day count for purposes of determining resident status under Tax Law § 605(b)(1)(B) and 20 NYCRR 105.20(c).

F. Case law has added only one exception in addition to the military exception in the statute and the in-transit exception in the regulation. In ***Stranahan v. New York State Tax Commn.*** (68 AD2d 250, 416 NYS2d 836), a divided court held that when a nondomicilliary seeks treatment in New York for a serious illness, the time spent in a medical facility for treatment of such illness should not be counted in determining whether the nondomicilliary was a resident for income tax purposes. In ***Stranahan***, the majority based its decision on an implied exception for hospital stays. The majority stated that:

> The concept of involuntary presence in the State as distinguished from a voluntary presence in the State has no express statutory or regulatory basis. There is, however, no rational basis for a distinction between an employee domiciled in another state and assigned to the employer's office for a fixed and limited period for the accomplishment of a particular purpose, which may be for more than 183 days, and an individual domiciled in another state who comes into the State for the limited purpose of obtaining medical treatment and is prevented from leaving the State before the expiration of 183 days *by reason of physical condition and her inablilty to return to Florida*. (Emphasis added.)

The concurring opinion in ***Stranahan*** placed specific emphasis on the fact that the taxpayer, after her release from the hospital, was unable to remove herself from New York State due to her illness, thus focusing on the involuntary or constructive nature of her presence in the jurisdiction.

In contrast, the dissenting opinion in ***Stranahan*** called for a strict adherence to the language of the statute and accompanying regulation, noting that neither the statute nor the regulation contained any exception from counting in-state days based on "involuntary presence" in the State (i.e., an inability to leave the jurisdiction due to medical circumstances after a volitional entry into the jurisdiction).

G. None of the foregoing exceptions recognized by the statute, regulation or case law fit the circumstances of this case or remove petitioners from falling within the terms of the statute and regulation. Petitioners argue for a "common sense" approach and seek application of a

"proximity test". Petitioners maintain that an exception should be recognized for trips of limited duration, such as the one or two hour visits petitioners made to New York State for dining or shopping. Petitioners assert that such trips were made from their non-New York State domicile into New York State for purposes (dining or shopping) which were "proximately related" to their non-New York State domicile as opposed to petitioners' New York State place of abode or to Mr. Klingenstein's business endeavors in New York State. Petitioners also maintain that their "common sense" approach is consistent with the Division's audit guidelines, which note that "[t]he literal interpretation of 'any part of a day' could mean stepping over the state line for one second; however, no audit is expected to be based on such a minimal amount of time spent in New York. Common sense must prevail."

The Division argues, by contrast, that to adopt such a test on a case-by-case basis would result in uncertainty as opposed to the current "bright line" standard provided by the statute and regulation.

H. The existing exceptions, as described, are premised on "military service" (under the statute); "pass-through" or "in-transit" presence (as in the case of travelers boarding a plane, train or bus, or traversing New York State en route to another destination under 20 NYCRR 105.20[c]); "involuntary presence" (as in ***Stranahan***); and "inadvertent presence" (as in the Division's audit guidelines which speak of stepping over the state line for one second). There is, unfortunately, no shopping or dining exception in the statute, regulation or caselaw. In fact, the recognized exceptions stand in contrast to purposeful presence in the State. Here, petitioners' presence in New York on the border days was not an in-transit presence, and was not unintended, unavoidable, unplanned, inadvertent or involuntary. Rather, petitioners' presence was purposeful and voluntary. That is, petitioners' purpose was not to travel through New York State to some

other jurisdiction, but rather was to come to New York State to dine or shop. To accept petitioners' common sense proximity test for exception would result in a plethora of scenarios each presenting its own set of equities and claim of common sense. A standard based on proximity or duration would inevitably lead to questions as to what is proximate, how proximate must one be, and what is the minimum duration of a stay in order to become a "day". Petitioners' trips into New York for dining or shopping are in essence no different from a nondomicilliary's trip from his Connecticut (or other border state) home to Syracuse for a child's college graduation, or to the Bronx to watch a sporting event, after which the nondomicilliary returns to his out-of-state home. There are any number of other possible similar purposes for entering New York State from a non-New York domicile for a limited time period and returning home thereafter. The reason for entering New York State in any such scenario may be unrelated to the taxpayer's permanent place of abode or employment in New York State. In fact, the only variable in any of these scenarios would be the distance from the nondomicilliary's out-of-state home, and hence the amount of time spent in New York. It cannot be said that petitioners' trips to New York for dining or shopping, although relatively closer to their home and relatively shorter in duration than a trip to Syracuse, or to the Bronx, or elsewhere, are somehow more entitled to be excepted from counting as a "day".

The statute calls for a permanent place of abode and presence in New York State. It does not require a connection between such presence and the abode, or that the presence be connected to employment or economic or any other particular kind of activity in New York as a predicate for resident status. The fact that the border day visits were not connected to petitioners' apartment or employment in New York does not negate the fact of petitioners' presence in New York. While every case presents its own equities, there remains the need for certainty for the

broader group of similarly situated taxpayers. While the equities in this case are at first blush appealing, the need for consistency provided by an easily defined and applied rule outweighs the equities. In short, the bright line afforded by the statute and regulation becomes blurred by accepting the premise advanced by petitioners.

I. Petitioners also argue that as applied to their circumstances, Tax Law 605(b)(1)(B) violates the Due Process and Commerce Clauses of the United States Constitution. The Division, in response, raises no challenge that petitioners are contesting the constitutionality of Tax Law § 605(b)(1)(B) on its face, or that there is any jurisdictional impediment to this issue being addressed in this forum. Indeed, as petitioners point out, the challenge here is directed at the Division's interpretation and application of the second prong of the statutory residence test (i.e., what is "presence" for purposes of counting as a "day"), and not at the facial validity of either of the two prongs of the test upon which taxing a nondomicilliary as a resident is premised. The Division does point out, and the Tax Appeals Tribunal has held, that a taxpayer bears the burden of proving that a statute, as applied, is unconstitutional. On this score, the Tribunal has held:

> [i]t is well established that the taxpayer has the burden to establish that a statute is unconstitutional on its face ***(see, Matter of Wiggins v. Town of Somers,*** 4 NY2d 215, 173 NYS2d 579; ***Matter of Maresca v. Cuomo,*** 64 NY2d 242, 485 NYS2d 724, ***appeal dismissed*** 474 US 802; ***Matter of Trump v. Chu,*** 65 NY2d 20, 489 NYS2d 555, ***appeal dismissed*** 474 US 915). We can see no reason why this rule does not apply with equal force when a taxpayer is challenging the constitutionality of a statute as applied." (***Matter of Ciccone,*** Tax Appeals Tribunal, January 23, 1997.)

J. The issue of whether a state scheme of taxation results in a prohibited deprivation of property under the Due Process Clause (US Const, 14th Amend) may be resolved by determining "whether the taxing power exerted by the state bears fiscal relation to the protections,

opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." ***(Wisconsin v. J.C. Penney, Co.***, 311 US 435.) In ***Quill Corp. V. North Dakota*** (504 US 298, 119 L Ed 2d 91), the Supreme Court stated the following:

> The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' ***Miller Bros. Co. V. Maryland***, 347 US 340, 344-345, 98 L Ed 744, 74 S Ct 535 (1954), and that the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State."' ***Moorman Mgf. Co. v. Bair***, 437 US 267, 273, 57 L Ed 2d 197, 98 S Ct 2340, (1978) ***(Quill Corp. V. North Dakota***, ***supra***, 119 L Ed 2d at 102).

K. Petitioners admit that a state may tax its residents on their worldwide income based on their status as residents, which itself provides the relationship and benefits to support such taxation. Petitioners argue, however, that in this case there is no such requisite relationship. Petitioners apparently maintain that the issue should be isolated to an examination of the border days only, and that on such days the state afforded petitioners no benefits for which return, in the form of taxes, may be asked. Specifically, petitioners allege that there is no connection between the border days and petitioners' permanent place of abode in New York State or Mr. Klingenstein's employment in New York State. Petitioners argument is that absent such a connection on the border days, there is an insufficient link between petitioners and New York and, further, that New York has not provided sufficient protections, opportunities and benefits to petitioners to result in a rational relationship between the income attributed to the state for tax purposes and the values connected with the state. In short, petitioners maintain that there is an inadequate relationship between the state and themselves to support taxation on the basis of resident status.

L. The due process inquiry should not be limited, as petitioners seem to suggest, to the 20 odd border days in isolation, but rather to the overall connection between petitioners and New York including the border days. In this case, petitioners clearly had significant overall contacts with the state. Petitioner John Klingenstein was employed full time in New York. In addition, petitioners maintained a permanent place of abode in New York State and were physically present in the state on 202 days in 1989 and 192 days in 1990, including therein presence on some 20 border days in each of such years. Even without the border days, petitioners were present in New York State on 182 days in 1989 and 172 days in 1990. The entire picture thus presents a significant New York presence for petitioners in both years.

On the border days, as well as on the other days, when petitioners purposefully entered the state, they could rightfully expect maintained roads, the benefits of a regulated system of commerce, police, fire and emergency services, and the like. Such services and benefits are provided notwithstanding the duration of one's stay in the State, and without regard to the purpose of the visit or the proximity of the visitor's state of domicile to New York. In the recently decided ***Matter of Tamagni v. Tax Appeals Tribunal*** (____NY2d_____, _____NYS2d_____, 1998 WL 242610 [May 14, 1998]), the Court of Appeals pointed out:

> by requiring both a permanent place of abode in this State, and presence for more than half of the year, New York's definition of 'resident' is far less expansive than some [other state's definitions]. For example, Iowa, Louisiana and Maryland define residents to include people who maintain a permanent place of abode within the State, regardless of the amount of time actually spent within the State [citations omitted]."

Petitioners here met the literal terms of Tax Law § 605(b)(1)(B), and thus were properly classified as residents. When viewed in the context of petitioners' overall presence in and contacts with New York State, and considering the substantial benefits and services provided or

available to petitioners, it becomes clear that petitioners' status as residents under the terms of the statute and the facts and circumstances of this case, and the tax result following therefrom, is not violative of the Due Process Clause of the United States Constitution. In sum, given petitioners' overall connections with New York State, there is nothing fundamentally unfair in the determination that petitioners were residents of New York State and taxable as such.

M. Petitioners also argue that Tax Law § 605(b)(1)(B), as applied to the circumstances of this case, runs afoul of the Commerce Clause of the United States Constitution (US Const, art I, § 8, cl 3). The Commerce Clause provides that Congress is vested with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." A state tax affecting interstate commercial activity violates the Commerce Clause unless it "is [1] applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State" (***Complete Auto Transit v. Brady***, 430 US 274, 279, 51 L Ed 2d 326, 331). Both the Commerce Clause and the Due Process Clause involve nexus considerations between the State seeking to impose tax and the person being taxed. However, while involving an examination of similar factual considerations, the standards are not the same because they are driven by different concerns. (***Quill Corp. v. North Dakota***, 504 US 298, 119 L Ed 2d 91.) The Supreme court, in ***Quill***, explained the difference as follows:

> Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefor, often identified 'notice' or 'fair warning' as the analytic touchstone of Due Process nexus analysis. In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. (***Id***.)

In sum, while due process is concerned with preventing unwarranted deprivations of property under concepts of fundamental fairness (the relationship of the state exacting tax to the benefits, opportunities and protections afforded by the state to the subject being taxed), the Commerce Clause is concerned with excessive regulation or unwarranted burdens disrupting or restricting the free flow of commerce and equal access to economic markets.

N. Petitioners admit that the Tax Appeals Tribunal has refused, in other cases, to find that Tax Law § 605(b)(1)(B) violates the Commerce Clause (***see, Matter of Ciccone***, Tax Appeals Tribunal, January 23, 1997; ***Matter of Tamagni***, Tax Appeals Tribunal, November 30, 1995). However, petitioners would distinguish those cases because, in each, the taxpayers were concededly present in New York State on more than 183 days in connection with their employment, thus providing sufficient nexus between the taxpayers and New York State for Commerce Clause purposes. In contrast, petitioners here claim that because their presence in New York State on the border days was not in connection with their permanent place of abode in New York, or with Mr. Klingenstein's employment in New York, or with any other long-term ties to New York, there is insufficient nexus with New York to subject petitioners to tax as residents (i.e., on all of their income). As articulated in their reply brief, petitioners focus on the "presence" prong of Tax Law § 605(b)(1)(B), and argue that the Division's treatment of petitioners' visits to New York on the border days as days "spent" in New York for purposes of this statutory presence requirement is overbroad and unfair. Petitioners argue that such visits to New York are insufficient to create a nexus with New York, and also violate the Commerce Clause requirement that the assertion of tax must be "fairly related to the services provided by the State."

The Division, in its brief, argues that the Tribunal in the ***Ciccone*** and ***Tamagni*** cases, and the Appellate Division in affirming the Tribunal in the ***Tamagni*** case (***Tamagni v. Tax Appeals Tribunal***, 230 AD2d 417, 659 NYS2d 515), have clearly held that Tax Law § 605(b)(1)(B) does not violate the Commerce Clause of the United States Constitution, and that petitioners have raised no basis or argument herein warranting departure from such holding.

O. As noted earlier, the Court of Appeals recently decided the ***Tamagni*** case. As petitioners point out, the taxpayers in ***Tamagni*** did not contest their status as residents under the Tax Law, having conceded that they maintained a permanent place of abode and spent in excess of 183 days in New York. Rather, the Tamagnis argued that they were involved in interstate commerce by virtue of Mr. Tamagni's cross border commute to work and by the numerous economic activities engaged in by Mr. Tamagni while in New York. The Tamagnis also pointed out that as New York residents they were subject to tax on their entire income including specifically investment income from intangible personal property. However, they claimed that because no credit was provided by New York for resident taxes paid on such investment income to other states (specifically their New Jersey state of domicile), the New York tax created the risk of multiple taxation of the same income by more than one jurisdiction and thus violated the standard of internal consistency under the Commerce Clause. (***see, Container Corp. of America v. Franchise Tax Board,*** 463 US 159, 169; ***Goldberg v. Sweet***, 488 US 252, 261)[5] The Court, however, over one dissent, rejected these arguments and held that Tax Law § 605(b)(1)(B) does not implicate, or violate, the Commerce Clause.

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[5] Petitioners raise no claim of multiple taxation in this case, and have offered no evidence of the same. In fact, the issue of internal consistency was not specifically raised by petitioners other than in passing reference to Commerce Clause standards in general. Rather, petitioners' arguments go to the "nexus" and "fairly related" components of the four prong Commerce Clause test articulated in ***Complete Auto Transit v. Brady***.

P. Petitioners correctly point out that their challenge, unlike those in ***Ciccone*** and ***Tamagni***, focuses on the nature of their visits on the border days. Petitioners maintain that their presence in New York on such days was of a quality insufficient under the Commerce Clause to support resident status for taxation based on a lack of nexus and because their tax status was not rationally or fairly related to the services provided by New York. However, the Court of Appeals decision in ***Tamagni*** concludes that the Commerce Clause is not implicated by the New York income tax. The Court specifically points out that the tax is simply premised on maintenance of a permanent place of abode coupled with presence in New York for a requisite period of time, without regard to the activities engaged in by the nondomicilliary while present in New York. The Court's language is telling in this regard, as follows:

> The New York income tax is based upon a taxpayer's resident status, *without regard* to any specific commercial or economic transaction or activity. While the dissent points to the fact that Mr. Tamagni is engaged in interstate commerce in that he commutes daily from New Jersey, works as an investment banker in New York, and is involved in numerous economic activities while in New York, the income tax is imposed without regard to his commute, *or the specific nature of his activities in this State. It is imposed solely based upon his presence and maintenance of a permanent place of abode in New York, without regard to any economic activities incidental to his presence here. . . .* Thus in our view, the interstate Commerce Clause in [sic] not implicated by the New York income tax. (***Tamagni v. Tax Appeals Tribunal, supra,*** slip opn at 8.)

Q. The Court of Appeals began its Commerce Clause analysis in ***Tamagni*** with the observation that New York's definition of "resident" is far less expansive than that of some other states. Furthermore, the Court stated as above that the tax is imposed based solely on resident status, and that such status is based on a taxpayer's contacts with the State, i.e., maintenance of a permanent place of abode and presence in New York *without regard* to the nature of the activities (i.e., the quantity or quality of the activities) engaged in while present in New York.

Even on the border days, in isolation, petitioners were more connected to the State than merely in-transit or inadvertently or involuntarily present here. Their presence was directed to New York State and was purposeful. The statute (Tax Law §605[b][1][B]) simply requires presence in New York State, with no specific requirement that such presence be tied to employment in New York State or to the permanent place of abode here. In sum, petitioners availed themselves of the benefits and amenities of New York State on the border days, as well as on the other days when they were in New York. There is thus no Commerce Clause impediment to including the border days in the day count for residence purposes. On this basis, and specifically noting the overall presence and contacts between petitioners and New York, it is concluded that there is sufficient nexus between petitioners and New York, and that the tax imposed against petitioners, as residents under Tax Law § 605(b)(1)(B), is fairly related to the services provided by the State. Accordingly, Tax Law § 605(b)(1)(B) as applied to petitioners' circumstances does not violate the Commerce Clause of the United States Constitution.

R. There remains, finally, the issue of penalties. Specifically, Tax Law § 685(b)(1) provides for the imposition of a five percent negligence penalty, plus a penalty equal to 50 percent of the interest owed on the portion of an underpayment of tax due to negligence, "if any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud). . . ." In addition, Tax Law § 685(p) provides that a "substantial understatement" penalty of ten percent will be imposed on the amount of the underpayment of tax where a taxpayer substantially understates his or her tax liability. A "substantial understatement" of liability is the greater of $2,000.00 or ten percent of the tax required to be shown on the return. Section 685(p) goes on to provide that the substantial understatement penalty may be waived where the taxpayer demonstrates that there was

reasonable cause for the understatement and that the taxpayer acted in good faith.

S. Petitioners' request for abatement of the penalties is premised, as set forth in their affidavit dated September 4, 1997, on the assertion that they reasonably believed they spent fewer than 183 "days" in New York during the years in question. Specifically, petitioners assert that they believed their presence in New York on the border days, being for relatively short periods in duration, and for the limited purposes of shopping or dining which purposes were not connected to their New York City apartment or to Mr. Klingenstein's employment in New York, should not be counted as New York days for residence purposes. Petitioners assert that the border day visits to New York were more connected to their Connecticut "home", in which they have resided for some 35 years and at which they spend all of their leisure time (including weekends, holidays and vacations when not traveling). Petitioners maintain that this was their belief when preparing their 1989 and 1990 New York State income tax returns, and assert that this belief was reasonable. Petitioners thus assert that they did not act negligently or with intentional disregard of the Tax Law, but rather that they acted as reasonable and ordinarily prudent people in filing as nonresidents for the years in question. Petitioners also claim a history of timely filing of income tax returns and remitting payments on a timely basis, which claim is not disputed by the Division. Finally, petitioners admit that their 1989 return did not list their New York City apartment, as required. However, petitioners maintain that this omission was caused by an error in computer inputting of data for their return, and point out that this error was recognized in the preparation of their return for 1990, and was corrected for such year.

T. In light of all of the facts and circumstances of this case, it is appropriate to abate penalties. While it is true that petitioners have not prevailed on the merits of their case, the fact remains that petitioners are nondomicilliaries whose most significant contacts with New York

State centered on a permanent place of abode and employment in New York City. Under such circumstances, petitioners could reasonably believe that comparatively short forays into New York State involving matters entirely unrelated to their New York City abode or employment, and more closely aligned to their Connecticut residence and activities, would not be considered "days" to be counted in determining New York State resident status. Petitioners apparently maintained comprehensive records from which, on audit, their whereabouts on given days could be determined, and those records were made available to the auditor. Petitioners were previously audited, for the immediately preceding years 1986 and 1987. While they were assessed and paid additional tax and interest for 1986, the record does not disclose the basis for such assessment, including specifically whether the question of the day count for resident status was involved. Moreover, there was no adjustment made to petitioners' 1987 return as filed. Given the entire set of circumstances, including their long-time domicile in Connecticut, it is reasonable to accept petitioners' stated belief that the shopping and dining trips over the border, taken on weekends and holidays and unconnected to their other New York presence, would not be considered "days spent in New York" for purposes of determining New York resident status. Accordingly, petitioners were not negligent and did not intentionally disregard the Tax Law in their manner of filing for 1989 and 1990, but rather took a reasonable and ordinarily prudent position, and it is appropriate to abate penalties.

U. The petition of John and Patricia D. Klingenstein is granted to the extent indicated in Conclusion of Law "T", but is otherwise denied and the Notice of Deficiency dated March 28, 1996, as modified in accordance herewith, is sustained.

DATED: Troy, New York
August 6, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE