STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN BOYD AND GAIL BOYD	:	DECISION DTA No. 808599
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1986 and 1987.	:	

Petitioners John Boyd and Gail Boyd, 5965 Douglas Road, West Palm Beach, Florida 33415, filed an exception to the determination of the Administrative Law Judge issued on November 4, 1993. Petitioners appeared by Anita E. Manuel, E.A., of A. E. Manuel & Associates, Inc. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

The Division of Taxation filed a letter brief in opposition to the exception. Petitioners were allowed until February 24, 1994 to file a reply brief, which date began the six-month period for issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioners have shown by clear and convincing evidence that they filed their exception to the Division of Tax Appeals determination in a timely manner.

II. Whether petitioners were statutory residents of New York State and New York City, for income tax purposes, during 1986 and 1987.

III. Whether the Administrative Law Judge properly addressed the disallowance of petitioners' miscellaneous itemized deductions.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

Petitioners, John Boyd and Gail Boyd, filed joint New York State nonresident income tax returns (Form IT-203) and New York City nonresident earnings tax returns (Form NYC-203) for the years 1986 and 1987.

On June 11, 1990, following an audit, the Division of Taxation ("Division") issued to petitioners a Notice of Deficiency which asserted $11,800.01 in additional State and City income tax due, plus penalty and interest, for the years 1986 and 1987.

By statements of personal income tax audit changes dated April 10, 1990, the Division set forth its calculation of the deficiencies. With respect to 1986, the Division determined petitioners to be residents of New York and recomputed their New York adjusted gross income accordingly. Additionally, the Division disallowed Mr. Boyd's claimed employee business expenses of $13,731.00 and disallowed claimed itemized deductions for "union dues", "mandatory weight loss" and "continuing education" which totaled $2,568.00. With respect to 1987, the Division again determined petitioners to be New York residents and recomputed their New York adjusted gross income accordingly. The Division also increased petitioners income by $7,133.00 for what was listed on the statement of audit changes as "additional business income". A review of the tax return, however, indicates that the Division actually disallowed petitioners' claimed miscellaneous deductions (subject to 2% AGI limit), which consisted of unreimbursed employee business expenses and other miscellaneous deductions.

The statements of audit changes indicated that petitioners were deemed statutory residents of New York because they had spent more than 184 days in New York during each of the years at issue.

Petitioners purchased their home located at 5965 Douglas Road, West Palm Beach, Florida in or about 1976 and petitioners have resided in Florida since that time. Petitioners have one minor son, who attended school in Florida during the years at issue.

Petitioner John Boyd was employed in the construction business as an operating engineer. During the years at issue Mr. Boyd was employed by several New York contractors and worked in New York for these contractors.

Petitioner Gail Boyd was employed by USAir, Inc. during the years at issue. She did not work in New York.

Petitioners did not own or rent a house or apartment in New York during the years at issue.

The record herein indicates that, on audit, the Division requested from petitioners' representative information regarding petitioners' presence in New York. Petitioners' representative responded to questionnaires provided by the Division indicating that Mr. Boyd was physically present in New York State for work purposes on 235 days in 1986 and 171 days in 1987; that he was not present in New York on nonworking days; and that while in New York Mr. Boyd stayed with family and friends. The representative also provided a list of Mr. Boyd's employers during each of the years at issue. The questionnaires indicated that petitioners did not own, rent or otherwise maintain living quarters in New York and further stated:

> "Various New York employers require local addresses in case of emergency on job. Mr. Boyd has family and friends in NY and they agreed to his use of their addresses and to take messages."

The Division submitted into evidence its auditor's log, "Tax Field Audit Record" (Form DO-220.5). The entry dated March 7, 1990 states, in relevant part:

> "Rec. case from Grace Dunn.
> After reviewed [sic] all information deeming T/P statutory resident of NY 1986 & 1987. T/P claims he is in New York 1986 235 days, 1987 141 & weekends.
> Claims he stays with his mother at 45-45 166th Street, Flushing, N.Y. --- Claims he supports mother over 50%. Claims in addition gives her food, money."

A review of the correspondence between petitioners and the Division and the Division's auditor's log, "Tax Field Audit Record" (Form DO-220.5), indicates that the instant matter was

initially assigned to an auditor named Grace Dunn. As of approximately March 7, 1990, the matter was assigned to an auditor named Judith Glatt.

On their 1986 and 1987 income tax returns, petitioners claimed an exemption for Mr. Boyd's mother, Anne Boyd, as a dependent. In a letter to the Division dated November 29, 1989, petitioners' representative stated:

> "Mr. and Mrs. Boyd provide living quarters in their home for each of their mothers.
>
> * * *
>
> "Ann Boyd was widowed in approximately 1960 and lives part-time in Florida with Mr. & Mrs. Boyd and part-time in New York; she did not have enough income to file a return in 1986. Mr. & Mrs. Boyd provide for nore [sic] than 50% of the upkeep of the house and living expenses in NY and 100% of her quarters and living expense in Florida. In addition they provide her vehicle and vehicle insurance plus many extras."

Mr. Boyd's W-2 forms for 1986 listed petitioners' Florida address. Six of Mr. Boyd's eight 1987 W-2 forms listed 45-45 166th Street, Flushing, New York as his address. Two of Mr. Boyd's 1987 W-2's listed 45 Joyce Drive, Hauppauge, New York as his address.

In a letter to the Division dated March 15, 1990, petitioners' representative reiterated petitioners' contention that they were not New York residents and, with respect to Mr. Boyd's employment, stated:

> "Through the unions, Mr. Boyd gets job assignments, sometimes away from Florida, but always returns home upon completion and often times in between."

Other than the correspondence noted above, no evidence was submitted regarding Mr. Boyd's living arrangements while in New York. Additionally, other than the summary statement of the number of days present in New York (see above), no evidence was presented regarding Mr. Boyd's whereabouts on any given day or days during the years at issue. Additionally, it is noted that the record contains no evidence from petitioners themselves; that is, all evidence submitted on petitioners' behalf consisted of correspondence from petitioners' representative.

On audit the Division requested substantiation for the miscellaneous deductions disallowed for 1986 and 1987. In response, petitioners provided substantiation in the form of cancelled checks and union account statements with respect to the claimed miscellaneous deductions for 1986. This documentation substantiates petitioners' claimed deductions for "continuing education" and "mandatory weight loss" in full. The documentation substantiates petitioners' "union dues" deduction to the extent of $2,275.81. The record contains no substantiation for petitioners' miscellaneous deductions for 1987 (other than employee business expenses).

We find an additional finding of fact to read as follows:

> The Tax Appeals Tribunal received petitioners' exception to the Administrative Law Judge's determination on January 10, 1994, and said exception bore a United States postmark dated January 5, 1994.

OPINION

The Administrative Law Judge first addressed the issue of whether the Division properly classified petitioners as New York State and New York City "statutory residents." In order for the State or City to treat a taxpayer as a "statutory resident," the taxpayer must have spent greater than 183 days in either during the taxable year, and he must have maintained a "permanent place of abode" per Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B). The Administrative Law Judge noted that Mr. Boyd conceded that he spent 235 days in New York during 1986. Thus, no issue existed regarding whether he spent greater than 183 days in New York State and City during that year. Though petitioners claimed Mr. Boyd spent only 171 days in New York during 1987, the Administrative Law Judge denied their challenge to the Division's assertion that Mr. Boyd spent greater than 183 days in New York because petitioners did not carry their burden of proof as set forth in Tax Law § 689(e).

The Administrative Law Judge next addressed the issue of whether petitioners "maintained a permanent place of abode" in New York during 1986 and 1987. The Administrative Law Judge found that petitioners did maintain a "permanent place of abode" according to the requirements set forth in Matter of Evans (Tax Appeals Tribunal, June 18,

1992). The Administrative Law Judge found it noteworthy that petitioners provided greater than fifty percent of the funds needed to maintain Mr. Boyd's mother's household in Flushing, New York. Moreover, the Administrative Law Judge stated that this, coupled with the fact that petitioners claimed Mr. Boyd's mother as a dependent exemption on both their Federal and New York income tax returns in 1986 and 1987, indicates that they maintained a place of abode in New York during the years at issue.

The Administrative Law Judge went on to address the permanence issue with regard to the place of abode that petitioners maintained. Due to a lack of evidence, the Administrative Law Judge disregarded petitioners' assertion that they did not maintain a permanent place of abode. Though petitioners insisted that Mr. Boyd stayed with a variety of family and friends while in New York, they offered no supporting evidence to substantiate this claim. Since petitioners failed to carry their burden of proof per Tax Law § 689(e), the Administrative Law Judge sustained the Division's determination that petitioners maintained a permanent place of abode in New York during 1986 and 1987.

Due to the fact that petitioners failed to disprove the validity of the Division's assertions regarding their "statutory residency," the Administrative Law Judge held that the Division properly classified them as statutory residents.

The Administrative Law Judge next addressed the issue of whether the Division properly disallowed petitioners' business expense deductions. He held that because petitioners qualified as statutory residents of New York State and New York City during 1986 and 1987, the Division properly disallowed petitioners' employee business expenses (see, Matter of Helnarski, Tax Appeals Tribunal, October 11, 1990).

The Administrative Law Judge found for petitioners regarding the deductibility of certain miscellaneous expenses for the 1986 tax year. Specifically, he affirmed petitioners' deductions for "continuing education," "mandatory weight loss," as well as $2,275.81 of "union dues." The Administrative Law Judge sustained the disallowance of all other unsubstantiated deductions by the Division.

On exception, petitioners argue that: Mrs. Boyd did not spend greater than 183 days in New York in either 1986 or 1987; Mr. Boyd did not spend greater than 183 days in New York in 1987; and they did not maintain a permanent place of abode in New York. Accordingly, petitioners assert that the Administrative Law Judge incorrectly found for the Division regarding these issues. They challenge the Administrative Law Judge's decision that the Division properly disallowed certain miscellaneous deductions and business expenses. Petitioners assert that because they substantiated their miscellaneous deductions for 1986, "it is logically reasonable -- since they were in the same occupations -- they would have the same type and more or less the same amount of expense and could produce substantiation for these items" (Petitioners' exception, p. 6). Thus, petitioners contend that the Administrative Law Judge erred in upholding the Division's disallowance of the deductions not allowed during the tax years 1986 and 1987. In sum, petitioners argue that they were not residents of New York at any time during 1986 and 1987, they did not maintain a permanent place of abode there, and the Administrative Law Judge improperly upheld the Division's denial of certain of their miscellaneous deductions. Therefore, petitioners claim that the Administrative Law Judge incorrectly found for the Division except to the extent that he allowed petitioners' 1986 miscellaneous deductions for "continuing education," "mandatory weight loss," and $2,275.81 of "union dues."

On exception, the Division argues that petitioners did not file their exception in a timely manner. The Division also requests that any evidence submitted by petitioners on exception that was not part of the record below be disregarded. In the event the Tax Appeals Tribunal determines that petitioners have timely filed their exception, the Division urges the Tax Appeals Tribunal to affirm the Administrative Law Judge's determination.

We affirm the determination of the Administrative Law Judge.

First, we address whether petitioners filed their exception to the Administrative Law Judge's determination in a timely manner. Petitioners had until January 5, 1994, to file an exception. The Division asserted that since the Tax Appeals Tribunal did not receive

petitioners' exception until January 10, 1994, petitioners did not timely file the exception per the requirements set forth in 20 NYCRR 3000.16(a)(1). However, the Division misconstrued the regulation. 20 NYCRR 3000.16(a)(1) provides:

> "Date of filing. If any document required to be filed under this Part within a prescribed period or on or before a prescribed date . . . is, after such period or date, delivered by United States mail to the . . . Tax Appeals Tribunal . . . the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing."

In other words, even if the Tax Appeals Tribunal receives an exception after the expiration of the filing date, so long as the taxpayer sent the letter by United States mail, the Tax Appeals Tribunal deems the date of the letter's postmark as the date of filing. Moreover, related case law also fails to support the Division's position. Specifically, in Matter of Aardvark Sanitation (Tax Appeals Tribunal, June 6, 1991), the Tax Appeals Tribunal held that: "[a]n exception received by this Tribunal after the date it was due is deemed to be filed on the date of the United States postmark stamped on the envelope." Since the envelope petitioners filed their exception in carried a January 5, 1994, postmark, they timely filed the exception. Accordingly, the Division fails in its assertion that petitioners did not timely file their exception.

With regard to the Division's request that any evidence submitted by petitioners after the record in this matter was closed be disregarded, such request is granted pursuant to our long-standing policy on this issue (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Turning to the issues raised by petitioners, we reject their assertion that the Division improperly deemed them statutory residents for the years 1986 and 1987. Tax Law § 605(b)(1)(B) defines a resident individual as a person "who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state." Section 11-1705(b)(1)(B) of the New York City Administrative Code provides a virtually identical definition of persons constituting residents of New York City for tax purposes.

In Matter of Smith v. State Tax Commn. (68 AD2d 993, 414 NYS2d 803, 804), the court held that the taxpayer has the burden of proof to show he did not spend greater than 183 days in New York State in the tax year at issue. Since petitioners failed to furnish evidence supporting their assertion of nonresidency, they failed to meet their burden of proof regarding their alleged nonresident status. Therefore, the Administrative Law Judge properly held that they were New York residents.

Petitioners' argument that Mrs. Boyd was not a New York resident for income tax purposes also fails. In Matter of Tavolacci v. State Tax Commn. (77 AD2d 759, 431 NYS2d 174, 175), the Third Department held that the burden of proof to establish the incorrectness of a Notice of Deficiency falls on the taxpayer. Though petitioners maintained that Mrs. Boyd lived and worked in Florida during the years in controversy, they did not furnish evidence to support this assertion. Therefore, due to the lack of evidence contradicting the Division's position, petitioners fail to show the error in the Administrative Law Judge's determination regarding Mrs. Boyd's status as a New York resident.

Additionally, petitioners fail in their assertion that they did not maintain a permanent place of abode in New York during 1986 and 1987 per Tax Law § 605(b)(1)(B). In Matter of Evans v. Tax Appeals Tribunal (___ AD2d ___, 606 NYS2d 404, 405), the Third Department stated:

> "[w]e reject petitioner's claim that use . . . was . . . not 'permanent' because he did not own, lease or rent the premises. We agree with the Tribunal that 'permanence of a dwelling place . . . can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place.'"

The mere assertion by petitioners that Mr. Boyd did not live in his mother's house during his tenure in New York does not sufficiently establish their lack of a permanent place of abode in the State and City. Moreover, the fact they paid for greater than fifty percent of the expenses associated with Mr. Boyd's mother's house contradicts their assertion that they did not maintain a permanent place of abode (see, Matter of Evans v. Tax Appeals Tribunal, supra, 606 NYS2d

404). Thus, petitioners fail to carry their burden of proof that they did not maintain a permanent place of abode in New York during 1986 and 1987 (see, Tax Law § 689[e]).

Petitioners also fail in their assertion that the Administrative Law Judge improperly affirmed the Division's disallowance of certain miscellaneous deduction items. Since petitioners did not substantiate the deductions with corroborating evidence, they failed to prove that said expenses existed. Though petitioners urge the Tax Appeals Tribunal to reverse the Administrative Law Judge's determination except to the extent of the deductions he allowed, the overwhelming lack of evidence to substantiate petitioners' assertions proves fatal. Additionally, because they could not prove their nonresident status, petitioners' contention regarding the validity of their employee business expense deduction fails. In Matter of Helnarski, (supra), the Tax Appeals Tribunal stated that a taxpayer's permanent abode or residence is his home for purposes of the Internal Revenue Code § 162(a)(2).[1] Therefore, the Division properly disallowed Mr. Boyd's deductions for his "away from home" expenses because he was not away from his tax home for income tax purposes.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Boyd and Gail Boyd is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of John Boyd and Gail Boyd is granted to the extent indicated in conclusions of law "I" and "J" but is otherwise denied; and

[1]Tax Law § 615(a) incorporates the deduction provided by this section of the Internal Revenue Code into New York's income tax regime.

4. The Division of Taxation is directed to modify the Notice of Deficiency dated June 11, 1990, in accordance with paragraph "3" above, but such Notice is otherwise sustained.

DATED: Troy, New York
July 7, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner