STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BYRON A. HERO	:	DECISION DTA NO. 817727
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1991 through 1994.	:	

Petitioner Byron A. Hero, 420 East 54th Street, Apartment 22H, New York, New York 10022-3056, filed an exception to the determination of the Administrative Law Judge issued on September 26, 2002. Petitioner appeared by Marks Paneth & Shron, LLP (Alan J. Dlugash, CPA). The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on March 20, 2003 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner was a domiciliary of New York City for the years 1991 through 1994 or maintained a permanent place of abode within New York City and spent more than 183 days in New York City during each year in issue and, thus, was taxable as a resident individual.

II. Whether the Division of Taxation properly determined that the wage income earned by petitioner was allocable to New York State and New York City sources.

III. Whether petitioner was afforded a full and fair opportunity to present his case.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "25" and "32" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

From 1984 through 1989, petitioner, Byron A. Hero, filed income tax returns as a resident of New York State. In 1990, he filed as a nonresident of New York State.

Petitioner and his wife filed New York State nonresident and part-year resident income tax returns during the years in issue, 1991 through 1994. On each return, they elected a filing status of married filing joint return. Further, in each year they checked the "No" box in response to the question of whether petitioner or his spouse maintained living quarters in New York State. Throughout the period in issue, petitioner allocated a portion of his wages from various corporations to New York State and New York City.

For the year 1991, petitioner reported that his address was 6354 Masters Boulevard, Orlando, Florida 32819. On his income tax return for 1992, petitioner reported that his address

was 9643 McCormack Place, Windermere, Florida. He used the same address on his income tax return for 1993 as he used for 1992. Petitioner stated that his address was 4 Sutton Place, New York, New York on his income tax return for 1994.

In March 1995, the Division of Taxation ("Division") commenced a field audit of petitioner's personal income tax returns for the years 1991 through 1994. In the course of the audit, the auditor noted that Mr. Hero was a native of New York who began renting an apartment on East 57th Street in New York City in the 1970s. In 1988, Mr. Hero married a professional water skier who resided in Florida. They had a son shortly after their marriage. Following a review of the documentation which petitioner supplied, the Division concluded that after their marriage petitioner continued to maintain his ties to New York while Mrs. Hero pursued her career in Florida. Eventually, their lives merged and they both resided in New York. In 1995, petitioner resumed filing as a resident of New York.

Among other things, the Division found that, during the audit period, petitioner maintained all of his business ties in New York. Although the names of the employers changed, the employers' identification numbers and addresses on the wage and tax statements, expense reports, letterheads and return addresses on the envelopes remained the same. During the audit period, petitioner owned a home in Southhampton, which was built in 1987 with the help of his parents, and he continued to maintain an apartment on East 57th Street in New York City. Petitioner maintained memberships at several clubs in New York and was affiliated with New York medical providers. The auditor's notes also show that Mr. Hero had memberships with two Florida associations and that his son attended preschool in Florida.

The Division ascertained that petitioner and his wife claimed substantial expenses for lodging away from home. The auditor asked for documentation to substantiate these deductions because she wanted to confirm the dollar amount claimed and where the costs were incurred. Through this procedure, the auditor hoped to gauge which location petitioner considered to be his home based upon the documents substantiating the deductions. However, this documentation was never supplied.

The auditor wanted to determine whether petitioner's employers required that he be in New York at any given time or whether he could work from an office outside of New York. Therefore, she requested that petitioner provide copies of his employment agreements and termination agreements. These documents were also not provided.

Following a review of those documents which were supplied, the auditor found that petitioner used the address at the apartment that he maintained in New York since the 1970s on credit card applications and rental agreements. With the exception of marrying and having a child, the Division concluded that everything in petitioner's life remained the same from the time prior to his marriage to the end of the audit period. As a result, the Division found that Mr. Hero did not change his domicile from New York to Florida.

Statutory Residency

The auditor prepared a summary of the days spent by petitioner in and out of New York in order to determine if he was liable for tax as a statutory resident of New York. In order to prepare the summary, the auditor requested that petitioner provide documents from third parties such as expense reports, frequent flier statements, passports, corporate charge cards and telephone statements from the Florida addresses and New York addresses. From the documents

she received, the auditor compiled a list of the days she believed that petitioner was in New York, Florida and other locations. Thereafter, the list was submitted to petitioner for his review and petitioner indicated those days with which he had a disagreement. Under the impression that they were going to review each year, the auditor, in turn, reviewed those days which petitioner disagreed with and supplied documentation as to why she continued to disagree with petitioner. However, the auditor did not hear from petitioner regarding the disputed days. Shortly thereafter, petitioner submitted an application for an offer in compromise and further audit work ceased.

On the basis of the information supplied, the auditor determined that petitioner worked the following number of days within and without New York State and New York City:

Year	Number of days worked in New York State other than New York City	Number of days worked in New York City	Number of days worked outside New York State
1991	28	188	65
1992	28	196	77
1993	47	185	70
1994	81	192	47

In determining petitioner's location on a particular day, the auditor took into consideration that other people were staying in the apartment on East 57th Street. As a result, she could not reach a conclusion on where Mr. Hero was situated simply on the basis of the origin of the telephone calls. In order to resolve this difficulty, she asked Mr. Hero to produce items such as frequent flier statements, passports or other documents which would isolate his activity. Thereafter, the auditor only relied upon those telephone billing statement entries which were

consistent with other documentation in her possession in order to determine petitioner's location. One caveat to the foregoing is that the auditor proceeded on the assumption that Mr. Hero would have been the one to call his wife in Florida when he was in New York.

Wage Allocation

In 1991, Mr. Hero was the chief executive officer and a member of the board of directors of Esmark Apparel. He was also the president of Esmark Acquisition and Esmark Inc. Each of these firms had an address in New York City. In addition, Mr. Hero filed a Federal schedule C regarding his activities as an investment banker. In 1991, Mr. Hero allocated $292,013.00 of his total wages of $766,534.00 from Esmark Apparel to New York. Mr. Hero completed his wage allocation schedule on the basis of 365 days and did not consider the days he worked for other entities as nonworking days. The Division found this practice objectionable because it takes the position that the days Mr. Hero worked for other entities should be considered nonworking days for the entity from which he received the wages.

In 1992, Mr. Hero received wages of approximately $3,200,000.00 from Esmark, Inc. and did not allocate any of this amount to New York. During the same period, Mr. Hero was the chief executive officer and a member of the board of directors of Danskin. In this capacity, he received wages of $463,712.00 of which $196,768.00 was allocated to New York. Mr. Hero was also the president of Danpen, Inc. and was chairman of the board of Esmark Marine. Petitioner did not allocate any of his wages from Esmark Inc. to New York. Further, Mr. Hero had investment banking activities which were reported on a Federal Schedule C. The Schedule C listed an address in Florida and reported a loss of $1,472,614.00. None of the loss was allocated to New York. The Division considered petitioner's wage allocation erroneous for the same

reason it objected to his wage allocation for 1991. The Division also questioned whether some or all of the wages of Esmark should be allocated to New York. It did not resolve this issue because the audit stopped when Mr. Hero submitted the offer in compromise.

In 1993, Mr. Hero received wages of $3,331.00 as the president of Esmark. None of this amount was allocated to New York. He was the chief executive officer and a member of the board of directors of Danskin. Mr. Hero received wages of $467,280.00 from Danskin and allocated $208,994.00 to New York. He was also the president of Dan Pen, chairman of the board of Esmark Marine and also had Schedule C activity as an investment banker. The Schedule C listed an address in Florida and reported a loss of $64,524.00, none of which was allocated to New York. As with prior years, the Division questions the allocation of income to New York.

In 1994, Mr. Hero was the president of Esmark. He was also the chief executive officer and on the board of directors of Danskin from which he received wages of $471,808.00, $209,914.00 of which was allocated to New York. During the same year, Mr. Hero was the president of Danpen Inc., chairman of the board of Esmark Marine and reported a loss from his investment banking activity on a Schedule C. The Schedule C reported a loss of $52,112.00, none of which was allocated to New York. As before, the Division was not satisfied that Mr. Hero's income was properly reported to New York.

In order to calculate the amount of tax due, the Division proceeded on the premise that 100 percent of the wages received by Mr. Hero were derived from New York sources because he did not provide any information which would support another conclusion. Although the Division made inquiries, the auditor was never told about any difference between the compensation Mr.

Hero received from Esmark Inc. and the other corporations from which he received compensation.

On the basis of its audit, the Division issued a Notice of Deficiency, dated November 11, 1998, which asserted a deficiency of New York State and New York City personal income tax (Assessment number L-015759597) in the amount of $365,769.34 plus interest in the amount of $183,737.33 for a balance due of $549,506.67. The asserted deficiency was based upon the Division's position that Mr. Hero was taxable as a domiciliary and statutory resident of New York State and New York City during the years in issue and that he incorrectly calculated the allocation of his wages.

Proceedings following the issuance of the Notice of Deficiency

Mr. Hero requested a conciliation conference in the Bureau of Conciliation and Mediation Services ("BCMS"). On February 4, 2000, BCMS issued a Conciliation Order denying the request and sustaining the statutory notice. Thereafter, petitioner's representative filed a petition, dated May 3, 2000, with the Division of Tax Appeals.

The Division issued a Notice of Hearing scheduling a hearing on Wednesday, February 28, 2001. Without an objection by the Division, petitioner's request for an adjournment of the hearing was granted in order to allow him to pursue an alternative resolution through an offer in compromise.

Petitioner did not pursue the offer in compromise and, on July 2, 2001, the Division of Tax Appeals issued a Final Notice of Hearing which scheduled the hearing on August 8, 2001.

In a letter dated August 2, 2001, petitioner's representative, Alan J. Dlugash, CPA, requested an adjournment of the hearing scheduled on August 8, 2001 because he would be on

vacation and might not be back in time to attend the hearing. Petitioner's representative requested that the hearing be scheduled for anytime after August 15, 2001.

In a letter dated August 3, 2001, petitioner's representative was advised by Assistant Chief Administrative Law Judge Daniel J. Ranalli that the request for an adjournment was denied because it was late and because he had not presented any basis for concluding that good cause existed for an adjournment. It was noted that petitioner's representative agreed to the new hearing date four months earlier.

In a letter dated August 6, 2001, petitioner's representative requested that Judge Ranalli reconsider his decision to deny petitioner's request for a postponement of the hearing scheduled for August 8, 2001. In support of his request, petitioner's representative stated that petitioner was "substantially insolvent" and that his liabilities include more than $100,000.00 owed to his attorneys and his accounting firm. According to his representative, petitioner could no longer pay for the professional time required. As a solution, Mr. Dlugash proposed adjourning the hearing until after October 15, 2001 so that he could make an offer in compromise.

In a letter dated August 6, 2001, petitioner's request for an adjournment was again denied. Petitioner's representative was told that insolvency was not a basis for an adjournment. Further, it was noted that petitioner was given an adjournment in February in order to make an offer in compromise and that six months was more than enough time to file an offer. Lastly, petitioner was told that if Mr. Hero was unable to afford representation, he would have to appear on his own behalf.

We modify finding of fact "25" of the Administrative Law Judge's determination to read as follows:

> At 10:30 a.m. on August 8, 2001, the parties met and the hearing commenced. Petitioner was present. At the outset of the hearing, the Division presented documents and the direct testimony of the auditor in order to explain the basis for the asserted deficiency of New York State and New York City personal income tax. At the conclusion of the direct testimony, petitioner's representative began his cross-examination of the Division's auditor. However, the hearing was soon adjourned at petitioner's request and over the objection of the Division. Petitioner's representative claimed he needed more time to review the audit papers and was not prepared to proceed with the cross-examination of the auditor. Petitioner, who was present at the hearing, was not called to testify. Petitioner also did not offer any documentary evidence prior to the adjournment of the hearing on August 8, 2001. The hearing was scheduled to continue on September 11, 2001.[1]

In a letter dated August 14, 2001, the Division requested that the Administrative Law Judge instruct petitioner to supply the Division, two weeks prior to September 11, 2001, with any documentary evidence which he intended to present at the hearing. In response, the Administrative Law Judge asked petitioner's representative to comply with the request in order to facilitate the hearing process. In a letter dated September 5, 2001, the Division advised petitioner's representative that, as of that date, it had not received any documents which petitioner might present at the hearing.

The tragic events that occurred in New York City on September 11, 2001 prevented the hearing from proceeding as scheduled.

The Division of Tax Appeals issued a Final Notice of Hearing, dated October 29, 2001, which scheduled the continued hearing to commence on Tuesday, December 4, 2001 and continue through Friday, December 7, 2001.

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[1]We have modified finding of fact "25" to more accurately reflect the record.

In a letter dated November 14, 2001, petitioner's representative requested a postponement of the hearing because petitioner, who was said to be in dire need of finding employment, had interviews and meetings scheduled throughout the period scheduled for the hearing.

In a letter dated November 19, 2001, petitioner's representative was advised that the request to adjourn the continued hearing was denied because, among other things, the completion of this matter had been delayed for nearly a year and there would not be any further delay. It was also noted that the Division of Tax Appeals has very limited space available to it to hold hearings in New York City and, as a result, it would be very difficult to reschedule the hearing for the number of days required for this matter. Lastly, petitioner's representative was informed that if he did not appear at the hearing, the record would be closed and a determination would be rendered on the basis of the existing record.

We find the following additional finding of fact.

> In a letter dated November 26, 2001, Mr. Dlugash again requested the matter be postponed, and for the first time raised the events of September 11, 2001 as the basis for his request. This letter does not specify how his client was impacted by the events of September 11th other than that his case had to be adjourned. This request for adjournment was denied on November 27, 2001.

In order to accommodate a scheduling conflict experienced by the Division of Taxation, the Division of Tax Appeals issued a Revised Notice of Hearing, dated November 16, 2001, which scheduled the hearing for Wednesday, December 5, 2001 through Friday, December 7, 2001.

We modify finding of fact "32" of the Administrative Law Judge's determination to read as follows:

> On December 5, 2001, petitioner's representative, Mr. Dlugash, appeared at the hearing room, without Mr. Hero, and stated that he was not prepared to proceed as a direct result of the events of September 11, 2001. Mr. Dlugash offered no testimony or documentary evidence to establish how, or to what extent, his client, a resident of mid-town Manhattan, was affected by the events of September 11, 2001. Mr. Dlugash again requested an adjournment and stated that the taxpayer would be prepared to present evidence at some later date. Mr. Dlugash offered no documentary evidence or other evidence to support the merits of petitioner's case. There being no additional evidence from either party, final arguments were heard and the record was closed.[2]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division's regulations (20 NYCRR former 102.2[d]) provide, in pertinent part, that a "domicile" is the place which an individual intends to be his permanent home. Further, once established, a domicile "continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there" (20 NYCRR former 102.2[d]). The burden of proof is upon any person asserting a change of domicile to show that the necessary intention existed. The Administrative Law Judge pointed out that a person can own many homes, but can only have one domicile. In this regard, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere.

The record in this case, the Administrative Law Judge noted, reflects that, historically, petitioner filed income tax returns as a resident of New York State. Throughout the audit period, petitioner maintained multiple residences in New York State and listed the New York City

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[2]We have modified finding of fact "32" to more completely reflect the record.

residence on applications for credit cards and rental agreements. Further, throughout the audit period, petitioner continued to earn substantial income from New York City businesses and spent a significant amount of time in New York City. Based on these facts, the Administrative Law Judge found that petitioner had failed to demonstrate by clear and convincing evidence that he moved from New York with the intention of making Florida his fixed and permanent home. Accordingly, the Administrative Law Judge found that petitioner was, during the years in issue, a domiciliary of the City and State of New York.

The Administrative Law Judge also determined that the record established that petitioner maintained a permanent place of abode in New York City and spent more than 183 days during each of the years in issue in New York City. Thus, the Administrative Law Judge found that regardless of whether petitioner was domiciled in New York City during the subject years, he is also liable for New York State and New York City personal income tax as a statutory resident (***see***, Tax Law § 605[b][1][B]).

The Administrative Law Judge pointed out that although petitioner and his representative were afforded multiple opportunities to present evidence refuting the foregoing analysis, petitioner failed to present *any* evidence to challenge the Division's position that he was a domiciliary and statutory resident of New York City and New York State. The Administrative Law Judge noted that the brief proffered by petitioner's representative argued a number of facts to buttress petitioner's position, but none of these arguments were supported by facts in the record. Based on the lack of evidence to support petitioner's position, the Administrative Law Judge concluded that petitioner had failed to carry his burden of proof.

Petitioner also asserted that the Division erred in reallocating the wages he earned. However, the Administrative Law Judge pointed out, the allocation of petitioner's wages only arises as an issue if it is found that he was not taxable as a "resident individual" within the meaning of Tax Law § 605(b)(1). Since the Administrative Law Judge determined that petitioner was taxable as a resident individual, all of his wages were subject to tax and the Administrative Law Judge found this issue to be moot (***see***, 20 NYCRR 112.1). However, the Administrative Law Judge also found that even if petitioner was not taxable as a resident individual, then the Division properly concluded that the salaries received from the different employers should have been separately allocated (***see***, 20 NYCRR 132.18[c]).[3]

Next, relying upon certain pronouncements by the Department of Taxation and Finance relating to the events of September 11, 2001, petitioner argues that he should not have been denied an adjournment of the hearing which was scheduled on December 5, 2001 and he requested that the record be reopened in this matter.

The Administrative Law Judge rejected petitioner's arguments as completely without merit. First, the Administrative Law Judge noted, petitioner could have presented his case on February 28, 2001 but declined to do so in order to make an offer in compromise, which he never submitted. Petitioner had a second opportunity to present his case at the hearing scheduled on August 8, 2001. However, the hearing was continued because petitioner's representative was not ready to conduct cross-examination of the auditor. The Administrative Law Judge found that petitioner should have been prepared to proceed with his case on September 11, 2001. If petitioner and his representative were ready on that date, the Administrative Law Judge noted,

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[3]Petitioner did not take an exception with respect to this conclusion of law.

the aftermath of the events of September 11, 2001 would have had no bearing on the matter, because preparations for the hearing would have already been completed. Petitioner was given a third opportunity to present his case on December 5, 2001. This time petitioner's representative appeared, without petitioner, solely for the purpose of again requesting an adjournment. Based on these facts, the Administrative Law Judge found that petitioner had three opportunities to present his evidence and declined to do so. Therefore, the Administrative Law Judge denied petitioner's request as without merit.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to the conclusions that he was a domiciliary as well as a statutory resident of New York City.

Specifically, petitioner argues that the record contains ample evidence to support his claim that he is not a domiciliary or statutory resident of New York. According to petitioner, if the record does not contain sufficient evidence to support his claims, it is because the Administrative Law Judge prematurely closed the record. Petitioner's representative continues to argue that the events of September 11, 2001 precluded him and his client from appearing together and completing the presentation of their case on December 5, 2001. Indeed, in his exception, Mr. Dlugash alleges that petitioner did not appear at the December 5, 2001 adjourned date "as a direct result of 9/11/01 events" (Petitioner's exception, p. 3).

Mr. Dlugash argued that the taxpayer's situation was severely impacted because he lost a job opportunity because of the events of September 11, 2001. In addition, Mr. Dlugash claims his firm lost clients and was severely inconvenienced by the events of that tragic day. In particular, Mr. Dlugash's firm had its phone and e-mail service disrupted. It was noted that in

one of the tax cases Mr. Dlugash was involved in, the Division's tax conferee was among the missing. Based on these claims and certain pronouncements of the State of New York relating to people directly impacted by the events of September 11, 2001, petitioner urges that his requests for a postponement on December 5, 2001 should have been granted. Petitioner claims that failure to grant him another hearing date to present his evidence is a denial of his due process and equal protection rights.

The Division counters that petitioner and his representative had months between August 8, 2001 and December 5, 2001, to review the audit materials and evidence and should have been prepared to go forward. The Division notes that Mr. Dlugash's office is located in midtown Manhattan on Madison Avenue, some considerable distance from the World Trade Center. Mr. Hero's apartment is also in midtown and, the Division urges, there is no evidence presented at hearing to show that either was affected by the events of September 11th.

The Division argues that petitioner's historic domicile was New York City and that petitioner bore the burden to prove that there was a change in his domicile. On the basis of the information supplied by petitioner at audit, the Division argues that it properly concluded that petitioner was a domiciliary of the City and State of New York.

On the issue of statutory residency, the Division argues that petitioner has not sustained his burden to show that he was not present in New York State or New York City for more than 183 days during the years in issue.

Finally, the Division argues that petitioner had an opportunity to present his case and failed to do so.

At oral argument in this matter, petitioner's representative, Mr. Dlugash, stated that all the documentary evidence needed to prove his case was already in the record as exhibits submitted by the Division, and all that was necessary for him (Mr. Dlugash) to do on December 5, 2001 was to finish his cross-examination of the auditor and present the testimony of petitioner.

OPINION

The arguments of petitioner's representative are not a substitute for evidence. The hearing commenced at 10:30 a.m. on August 8, 2001. After the Division had put in its evidence, Mr. Dlugash began to cross-examine the auditor, the Division's only witness. After a few preliminary questions, Mr. Dlugash indicated he had no further questions of the auditor (***see***, Hearing Tr., p. 67). Soon thereafter, the Administrative Law Judge went off the record. When he returned to the record, he granted Mr. Dlugash a continuance, over the Division's objection, until September 11, 2001 to review the Division's exhibits and prepare for the completion of his cross-examination.[4] On its face, it might not seem unreasonable to grant a continuance for this purpose, assuming that Mr. Dlugash had not previously seen the audit file. However, once the Division had finished presenting its evidence, there was nothing to prevent Mr. Dlugash from beginning the presentation of his own case. As stated by Mr. Dlugash at oral argument, it was only after lunch time at that point. The fact that petitioner was holding his cross-examination of the auditor in abeyance, did not prevent him from proceeding with his own case on August 8, 2001. Petitioner's exhibits could have been offered in evidence, but none were offered. Petitioner was present and could have been called as a witness. However, without explanation,

[4]It is unclear why copies of the exhibits, especially the audit file, were not exchanged by the parties prior to the hearing date. It is highly desirable that the parties exchange copies of exhibits sufficiently in advance of hearing to permit their thorough review in preparation for hearing. Failure to exchange exhibits in this manner, results in otherwise unnecessary adjournments and a significant waste of State and private resources.

petitioner was not called to testify on August 8, 2001 (and did not appear in order to testify on December 5, 2001).

When petitioner's representative appeared at the scheduled continuance of the hearing on December 5, 2001, he did so for the sole purpose of again asking for an adjournment. Mr. Dlugash insisted he still could not proceed. On this occasion, he again proffered as a reason, the events of September 11, 2001.[5] We note that Mr. Dlugash's claims regarding September 11, 2001 are as lacking in evidence to support them as the remainder of his case. Mr. Dlugash offered no documentary evidence or testimony of any witness to show specifically, how, if or to what extent, he or his client was impacted by the events of September 11, 2001, such that they were rendered unable to prepare petitioner's case. Mr. Dlugash's letter and briefs to the Administrative Law Judge and this Tribunal *argue* that he and petitioner have been negatively impacted by the events of that day, but no evidence of such impact was submitted at hearing to form the basis for further continuance. In the alternative, no documentation *specifically* showing such negative impact and how it prevented the preparation for hearing was ever attached to petitioner's various letters requesting adjournments. We note that petitioner's loss of a job opportunity or the interruption of Mr. Dlugash's phone service in September (arising from the events of September 11, 2001) would not generally rise to the level of proof necessary to justify a further continuance in December.

Similarly, petitioner never offered any documentary evidence or testimony to prove that he was not a domiciliary or statutory resident of the City or State of New York. We again only have the *arguments* of petitioner's representative.

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[5]The events of September 11, 2001 were first alluded to by Mr. Dlugash as a reason for adjournment in his letter to the Administrative Law Judge on November 26, 2001.

As for petitioner's claim that he has been denied his due process and equal protection rights, we reject both contentions as being totally without merit. At a minimum, petitioner had at least two scheduled hearings where he could have appeared, testified, and presented whatever documentary evidence he might wish, i.e., August 8 and December 5, 2001. He did not testify on August 8th, and he did not even appear at hearing on December 5, 2001. Petitioner's representative had the opportunity to present any documents necessary to their case on either of these two dates, but failed to do so. Instead, petitioner's representative again claimed he needed more time to prepare. This record is replete with such claims.

Mr. Dlugash has been extended every courtesy in this matter and was granted more than sufficient time to prepare his case. But the repetitious requests for adjournments are not really about "more time," they are about "priorities."

It was actually Mr. Dlugash who put it best. After conceding that he could have been ready to proceed on December 5, 2001, Mr. Dlugash stated, "the fact is we had to make priorities . . . . There were priorities we had to decide and the taxpayer, too, had priorities" (Oral Argument Tr., p. 11). We conclude that the reason no evidence was presented by or on behalf of petitioner was that a hearing before the Division of Tax Appeals was not viewed as a priority. Petitioner and his representative are entitled to set their own priorities, but failing to present evidence and failing to appear at a hearing on one's own petition is not a denial of due process. This record shows that petitioner was offered ample opportunity to prepare and present his case, but the Administrative Law Judge could not force him or his representative to present it.

We note that during oral argument, Mr. Dlugash conceded that all the documentary evidence necessary to petitioner's case had already been introduced by the Division. All that

was needed, he said, was the testimony of petitioner. "That's what's missing in this case, the taxpayer's detailed analysis and personal sworn testimony as to what those records meant" (Oral Argument Tr., p. 4). If that is the case, then petitioner should have testified on August 8, 2001 or December 5, 2001. Any opportunity petitioner would have had to explain his view of those exhibits was lost when he failed to testify on August 8, 2001 or appear at the hearing on December 5, 2001. Mr. Dlugash's failure or inability to prepare or his misguided sense of priorities is a matter between him and petitioner. Based on this record, we conclude petitioner has failed to carry his burden of proof (***see***, ***Matter of the Estate of Aldo Gucci***, Tax Appeals Tribunal, July 10, 1997; ***Matter of Labow***, Tax Appeals Tribunal, March 20, 1997).

Finally, as to petitioner's equal protection claim, it is true that petitioner has a constitutional right to be treated on an equal footing with those similarly situated. But in the absence of a showing of unequal treatment, there is no equal protection violation (***see***, Trump ***v. Chu***, 65 NY2d 20, 489 NYS2d 455, ***appeal dismissed*** 474 US 915, 88 L Ed 2d 250). In this case, petitioner has offered no evidence that he has been treated differently from any other petitioner who fails to appear at a proceeding or fails to present evidence in support of his position.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Byron A. Hero is denied;

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

3. The petition of Byron A. Hero is denied; and

4. The Notice of Deficiency, dated November 11, 1998, is sustained.

DATED: Troy, New York
September 11, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner