STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
MARVIN ROTHENBERG	:	
for Redetermination of Deficiencies or for Refund of Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1998 and 1999.	:	DECISION DTA NOS. 819008 AND 819164

Petitioner Marvin Rothenberg, 73-27 Byron Avenue #3, Miami Beach, Florida 33141, filed an exception to the determination of the Administrative Law Judge issued on August 7, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

Neither party filed a brief on exception and oral argument was not requested.

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

ISSUES

I. Whether petitioner was domiciled in New York City during the years 1998 and 1999 and, therefore, was taxable as a New York State and City resident individual for the years at issue.

II. Whether petitioner maintained a permanent place of abode and spent more than 183 days in New York City during the years at issue and, therefore, was taxable as a New York State and City resident individual.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On August 6, 2001, the Division of Taxation ("Division") issued to petitioner, Marvin Rothenberg, a Notice of Deficiency asserting total New York State and City personal income tax due of $1,108.00, plus interest, for the tax year 1998.

On June 4, 2001, the Division had issued a Statement of Proposed Audit Changes to petitioner which explained the reasons for the adjustments made. The statement indicated as follows:

> Interest income on obligations from any state other than New York State or any political subdivision of another state, though exempt from federal income tax, is taxable to New York [sections 612(b)(1) and 1303 of the New York State Tax Law]. Such income should have been reported on line 19 of the 1998 Form IT-201.
>
> All or part of the income that was credited to your account or which you received from the mutual fund(s) shown below was derived from non-New York State and local obligations. Because you did not make the proper line 19 modification on your New York State return, we have adjusted your New York taxable income for the portion of non-New York interest income included in your distribution(s) from the mutual fund(s).
>
> The information we have concerning the amount of state and local bond interest that you earned was obtained from your payer. Payers are required to report this data under section 658 of the New York State Tax Law. If you cannot reconcile this information with what was reported to you by your payer(s) or broker(s) on your 1998 year-end statements, you must contact your broker(s) for an explanation. We cannot adjust our billing without a statement from your payer(s) identifying the amount, the fund, account number, cusip number and the percentage of each fund's portfolio that represents non-New York bond interest.

The statement indicated additional bond interest of $9,854.00 which the Division added to petitioner's Federal adjusted gross income to increase petitioner's New York adjusted gross

income. The increase resulted in the additional New York State and City personal income tax due as shown on the notice of deficiency issued for 1998.

On September 16, 2002, the Division issued to petitioner, Marvin Rothenberg, a Notice of Deficiency assessing total New York State and City personal income tax due of $1,247.00, plus interest, for the tax year 1999.

On July 22, 2002, the Division had issued a Statement of Proposed Audit Changes to petitioner which explained the reasons for the adjustments made for the year 1999. The explanation was similar to that provided by the Division for the year 1998. The statement indicated additional bond interest of $11,753.00 which was added to petitioner's Federal adjusted gross income to increase petitioner's New York adjusted gross income. The increase resulted in the additional New York State and City personal income tax due as shown on the notice of deficiency issued for 1999.

For the two years at issue, petitioner filed a timely New York State Resident Income Tax Return, Form IT-201, on which he indicated his address to be 3701 Shore Parkway, Brooklyn, New York. The address is a condominium owned by Mr. Rothenberg. This address was used by petitioner in correspondence dated November 11, 2002 with the Division of Tax Appeals. In a letter dated January 23, 2003 to the Division of Tax Appeals, petitioner indicated that he wished all future correspondence to be addressed to 73-27 Byron Avenue #3, Miami Beach, Florida.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that, pursuant to Tax Law § 605(b)(1), an individual is a "resident" for New York State tax purposes if he is, with certain exceptions, either domiciled in this State or he maintains a permanent place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State. The

Administrative Law Judge observed that the definition of a New York City "resident" for tax purposes is identical to the State definition, except for the substitution of the term "city" for "state." The Administrative Law Judge pointed out that residents are taxed on their income from all sources while nonresidents are taxed only on their New York State or City (as relevant) source income.

In order to determine petitioner's tax status as a resident or nonresident for the years at issue, the Administrative Law Judge relied on the definition of "domicile" provided by the regulations of the New York State Department of Taxation and Finance (***see***, 20 NYCRR 105.20[d]) as well as relevant case law concerning the test for determining the intent of an individual with respect to a purported new domicile. The Administrative Law Judge also noted that a properly issued Notice of Deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment. Accordingly, the Administrative Law Judge concluded that it was necessary to ascertain whether petitioner had sustained his burden of proof in showing that he was not domiciled in New York City and did not maintain a permanent place of abode in New York City or spend in the aggregate more than 183 days in New York City during each of the years at issue.

The Administrative Law Judge considered the evidence presented by petitioner, consisting of an affidavit from an acquaintance who claimed that petitioner resided in Florida on a regular basis except for family visits to New Jersey, and a summary of electric usage during the years at issue for the condominium owned by petitioner in Brooklyn. The Administrative Law Judge found that the affidavit was contradicted by petitioner's use of the Brooklyn address on both his tax returns and in correspondence to the Division of Tax Appeals, as well as by the summary of electric usage which indicated that the condominium was being used during the years at issue.

The Administrative Law Judge found no clear indication in the record that petitioner intended to sever his New York ties, or that he possessed the requisite intent to make Florida his fixed and permanent home. Therefore, the Administrative Law Judge concluded that petitioner was a domiciliary of New York State and City during the years at issue.

Additionally, the Administrative Law Judge found that petitioner presented no evidence to attempt to meet his burden of establishing that he did not maintain a permanent place of abode in New York City or that he was in New York State and City less than 183 days during each of the years at issue. Accordingly, petitioner was properly subject to tax as a "statutory" resident of New York in each of the years at issue.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge failed to give proper weight to the affidavit submitted by petitioner concerning his residence in Miami Beach, Florida for the years at issue. Further, petitioner asserts that his New York utility bills demonstrate that he did not reside at his Brooklyn condominium, as the bills only show minimal utility usage. Petitioner also maintains that he has demonstrated his intent that Florida has taken the place of New York as his home.

OPINION

Petitioner has offered no evidence below, and no argument on exception, which demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Marvin Rothenberg is denied;

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

3. The petitions of Marvin Rothenberg are dismissed; and

4. The notices of deficiency dated August 6, 2001 and September 16, 2002 are sustained.

DATED: Troy, New York
January 15, 2004

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

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