STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN BOYD AND GAIL BOYD	:	DETERMINATION 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 a petition 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.

On July 30, 1992 and February 25, 1993, respectively, petitioners, appearing by Anita E. Manuel, E.A., and the Division of Taxation, appearing by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel), consented to have the controversy determined on submission without hearing. On February 26, 1993, the Division of Taxation submitted documentary evidence. Petitioners submitted a letter summarizing their position on June 1, 1993. Petitioners submitted no additional documentary evidence. The Division of Taxation was granted until July 1, 1993 to respond to petitioners' letter, but did not do so. After due consideration of the record, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners have shown that they were not statutory residents of New York State and City during the years at issue as definedunder section 605(b)(1)(B) of the Tax Law and section 11-1705(b)(1)(B) of the Administrative Code of the City of New York.

II. Whether the Division of Taxation's disallowance of certain claimed deductions was proper.

FINDINGS OF FACT

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 (Findings of Fact "9" and "14"), 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 (Finding of Fact "9"), 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).

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) provides, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

"(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

"(B) 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 . . . ."

B. Section 11-1705(b)(1) of the Administrative Code of the City of New York provides a virtually identical definition of a New York City resident individual for purposes of the City income tax.

C. Initially, it is noted that, notwithstanding the Division's general assertion in its answer that petitioners were resident individuals under Tax Law § 605(b)(1), the record herein indicates that the Division assessed petitioners solely on the theory that petitioners were residents of New York State and City under Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B) ("statutory residents"). The Division neither audited nor assessed petitioners on the issue of domicile. Accordingly, this determination shall consider only whether petitioners were properly assessed as statutory residents of New York State and City.[1]

D. Under Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B), a finding of residency requires a finding that the taxpayer spent more than 183 days in New York State and City and maintained a permanent place of abode in New York during the year in question.

For 1986, Mr. Boyd concedes that he spent 235 days in New York State and City. There is, therefore, no issue regarding days spent in New York

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[1]It may well be that the Division determined on audit that petitioners were not New York domiciliaries. The record is unclear on this point. It is noteworthy that much of the evidence in the record does tend to show that petitioners were not domiciled in New York.

for 1986. For 1987, Mr. Boyd concedes 171 days in New York. Since petitioners provided no evidence regarding Mr. Boyd's whereabouts on any given day during 1987, it must be concluded that petitioners have failed to prove that they were not present in New York for more than 183 days during that year (see, Tax Law § 689[e]).

E. The next issue to be addressed on the question of statutory residency is whether petitioners "maintained a permanent place of abode" in New York during the years at issue. This issue was addressed in Matter of Evans (Tax Appeals Tribunal, June 18, 1992), wherein the Tax Appeals Tribunal concluded:

> "Determinations of a taxpayer's status as a resident or nonresident individual for purposes of the personal income tax have long been based on the principle that the result 'frequently depends on a variety of circumstances which differ as widely as the peculiarities of individuals' (Matter of Newcomb, 192 NY 238, 84 NE 950 at 954). Given the various meanings of the word "maintain" and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the 'variety of circumstances' inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise.
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> * * *
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> "With regard to whether a place of abode is 'permanent' within the meaning of the statute, we do not agree with petitioner that the statute requires that the place of abode be owned, leased or otherwise based upon some legal right in order for it to be permanent . . . . In our view, the permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place. For example, it seems clear that an apartment leased by one individual and shared with other unrelated individuals may be the permanent place of abode of those who are not named on the lease, given other appropriate facts. The Division's regulations (which are applicable to the city personal income tax [see 20 NYCRR 290.2]) make it clear that the physical attributes of the abode as well as its use by the taxpayer are determining factors in defining whether it is permanent. Thus, a 'permanent place of abode' is defined generally as 'a dwelling place permanently maintained by the taxpayer, whether or not owned by him . . .' (20 NYCRR 102[6][e]). A 'mere camp or cottage, which is suitable and used only for vacations is not a permanent place of abode' (20 NYCRR 102[6][e]). Similarly, 'any construction which . . . does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode' (20 NYCRR 102[6][e]). Moreover, a place of abode, whether in New York or elsewhere, 'is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose' (20 NYCRR 102[6][e])."

F. Upon review of the record it is concluded that petitioners have failed to show that they did not maintain a permanent place of abode in New York State and City during the years at issue.

In her correspondence with the Division, petitioners' representative advised that petitioners provided for more than 50% of support for the upkeep of Mr. Boyd's mother's New York house. Additionally, petitioners claimed a dependent exemption for Ann Boyd on their Federal and New York State income tax returns for 1986 and 1987 and indicated on their Federal returns that they provided more than one-half of Mrs. Boyd's support during the years at issue. Such facts are indicative of the maintenance of a place of abode within the standard set forth in Matter of Evans (supra). Given the absence of evidence to the contrary, therefore, the Division's determination that petitioners did maintain a place of abode in New York during the years at issue must be sustained.

G. The record contains little evidence on the issue of "permanence". In correspondence with the Division, petitioners' representative stated that, while in New York, Mr. Boyd stayed with "family and friends". Other than this decidedly vague and inconclusive assertion, the record contains little evidence of the circumstances under which Mr. Boyd resided in New York. Given that petitioners provided more than 50% of the upkeep in Mr. Boyd's mother's home and given the time concededly spent in New York by Mr. Boyd during the years in question, it is not unreasonable for the Division to conclude that the circumstances under which Mr. Boyd resided in New York were "permanent" within the standard set forth in Matter of Evans (supra).

In sum, considering the absence of evidence to show that Mr. Boyd did not maintain a permanent place of abode in New York, it must be concluded that petitioners failed to meet their burden of proof under Tax Law § 689(e) and the Division's assertion of New York residency must be sustained.

H. Regarding the Division's disallowance of petitioners' claimed deductions, since petitioners maintained a permanent place of abode in New York, the disallowance of petitioners'

employee business expenses was proper (see, Matter of Helnarski, Tax Appeals Tribunal, October 11, 1990).

I. Regarding the other deductions disallowed for 1986, upon review of the record, petitioners have substantiated in full their claimed deductions for "continuing education" and "mandatory weight loss". The Division's disallowance of these items was therefore improper. Additionally, petitioners have substantiated $2,275.81 of their claimed deduction for "union dues". The Division is therefore directed to allow petitioners' union dues deduction to the extent of $2,275.81.

Regarding the miscellaneous deductions disallowed for 1987 other than employee business expenses, in the absence of any substantiation of these claimed deductions, their disallowance by the Division was proper.

J. Except to the extent indicated in Conclusion of Law "I", the petition of John Boyd and Gail Boyd is denied; the Division is directed to adjust the Notice of Deficiency, dated June 11, 1990, in accordance with Conclusion of Law "I"; as adjusted, the notice is sustained.

DATED: Troy, New York
November 4, 1993

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE