STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ABDELAZIZ EL-TERSLI	:	DETERMINATION DTA NO. 818044
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 New York City Administrative Code for the Years 1990 through 1995.	:	

Petitioner, Abdelaziz El-Tersli, 210 Ege Avenue, Jersey City, New Jersey 07304, filed a petition 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 New York City Administrative Code for the years 1990 through 1995.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on July 19, 2001 at 10:30 A.M., with all briefs to be submitted by November 26, 2001, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Jonathon B. Altschuler, P.C. (Jonathon B. Altschuler, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation correctly held petitioner subject to New York State and City personal income tax as a resident individual pursuant to New York State Tax Law § 605(b)(1)(A) or (B) and New York City Administrative Code § 11-1705(b)(1)(A) or (B) for the years 1990 through 1995.

II. Whether the Division of Taxation properly determined that petitioner underreported his income by more than 25 percent during any of the years 1990 through 1995.

FINDINGS OF FACT

1. Petitioner, Abdelaziz El-Tersli, filed a New York State Resident Income Tax Return (Form IT-201) for each of the years 1990 and 1992. He filed a New York State Nonresident and Part-Year Resident Income Tax Return for each of the years 1991, 1993, 1994 and 1995.

2. In February 1997, the Division of Taxation ("Division") commenced a field audit of petitioner's income tax returns for the years 1990 through 1995.[1] Over the course of the following year, the Division's auditor conducted an analysis of petitioner's bank account deposits and withdrawals, based on bank statements supplied to the auditor by petitioner through his then-representative. Petitioner maintained some six checking accounts in 1990 through 1993 and five checking accounts in 1994 and 1995. The checks from these accounts listed either petitioner's name or, in some instances the name Abdel M. Ibrahim, and the address 145 West 85th Street, New York, New York. There are also checks listing the name A & Z Corp. with the address 635 West 46th Street, New York, New York. Notwithstanding the different names listed (preprinted) on the checks, petitioner has not disputed that all of the bank accounts were his accounts.

3. On April 20, 1998, the Division issued to petitioner a separate Statement of Personal Income Tax Audit Changes for each of the six years at issue. Each statement, consisting of three pages, is premised on the results of the Division's audit and each sets forth the Division's

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[1] The audit was commenced as the result of a referral from the Division's Tax Enforcement section following petitioner's guilty plea and incarceration on a one-year sentence based on two counts of substantial underreporting of income tax and three counts of offering a false instrument for filing in the first degree. The record does not identify the time periods covered by the guilty pleas to the specified counts, or the period of incarceration served by petitioner.

calculation of additional New York State and New York City personal income tax due for each of the years at issue. These statements set forth the amounts of income petitioner is alleged to have failed to report for each year, and each is premised on the assertion that petitioner was properly taxable as a resident of New York State and City. Review of these statements provides the following information:

ITEM	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**
INCOME PER RETURN	$1,965	$2,157	$2,759	$2,856	$5,238	$22,822
UNREPORTED RECEIPTS	352,103	221,058	161,101	280,849	835,972	48,381.25
UNREPORTED INTEREST	13,008	13,896	6,954	131	222	20
(SUBSTANTIATED EXPENSES)	0	(3,000)	(10,700)	(44,997)	(2,205)	0
CORRECTED INCOME	367,076	234,111	161,114	248,839	839,227	71,223.25
(STANDARD DEDUCTION)	(6,000)	(4,750)	(4,750)	(6,000)	(6,000)	(6,600)
TAXABLE INCOME	361,076	229,361	156,364	242,839	833,227	64,623.25
STATE TAX	28,075.99	18,062.18	12,313.67	19,123.57	65,616.63	4,617.11
CITY TAX	13,894.07	9,972.50	6,176.83	10,573.62	36,904.92	2,657.20
(PAYMENTS & CREDITS)	0	0	0	0	0	(1,038.00)
TOTAL TAX[2]	41,970.06	28,034.68	19,030.50	29,697.19	102,521.55	6,236.31

[2] The amounts shown as "total tax" are exclusive of penalty and interest amounts which were also imposed.

4. Each statement of audit changes indicates the imposition of interest, plus penalties for deficiency due to negligence (Tax Law § 685[b]), failure to pay estimated tax (Tax Law § 685[c]) and substantial understatement of liability (Tax Law § 685[p]). The statements for 1990 and 1992 include the following remarks concerning petitioner:

> The above taxpayer filed as a resident of NYS & NYC. He failed to submit adequate records for examination. He underreported his gross receipts and interest income by more than 25% of his reported income. Appropriate penalties were imposed.

The statements for 1991, 1993, 1994 and 1995 include the following remarks concerning petitioner:

> The taxpayer failed to submit adequate records for examination. He maintained a permanent place of adobe [sic] in NYC. He failed to submit clear and convincing evidence that he abandoned his NY domicile. Accordingly we held the taxpayer as a domiciliary of NYS & NYC. In the alternative we would hold the taxpayer as a statutory resident of NYS & NYC because he failed to establish that he spent less than 184 days in NYS. In addition, he underreported his gross receipts and interest income by more than 25% of his reported income. Appropriate penalties were imposed.

5. The Division's audit methodology in this case involved an analysis of petitioner's bank statements for his accounts over the years at issue herein.[3] Essentially, the Division treated all deposits to petitioner's accounts, and all interest earned on such accounts as income potentially subject to tax, unless there was some manner of establishing that such deposits or interest came from a nontaxable source. Thus, the Division reduced such deposit and interest amounts in instances where it was clear that the deposit represented a transfer from another of petitioner's accounts or from a certificate of deposit. Similarly, the Division's auditor reduced such deposit and interest amounts to account for returned (i.e., bounced) checks, and to account for interest

[3] Review of the Division's work papers reveals that bank statements for certain accounts were not furnished for a few periods in early 1990 and for several periods in 1995.

earned thereon as well as interest previously earned on certificates of deposit. By this methodology, the Division arrived at net unreported receipts and net unreported interest income for each of the years in issue. After reducing such amounts by reported adjusted gross income for each year, and by business expenses substantiated by petitioner during the course of the audit, the Division arrived at total underreported income subject to tax for each of the years in issue (***see*** Finding of Fact "3").

6. On June 22, 1998, the Division issued to petitioner a Notice of Deficiency asserting additional New York State and New York City personal income tax due for the years 1990 through 1995 in the aggregate amount of $227,490.29, plus penalties and interest. This notice was issued on the basis of the Division's audit and the calculations set forth in the statements of audit changes, as detailed above.[4]

7. Petitioner challenged the Notice of Deficiency by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation conference was held on May 5, 1999 and, by a subsequent Conciliation Order (CMS No. 170488) dated September 24, 1999, the Notice of Deficiency was sustained in full. Petitioner continued his challenge by filing a petition with the Division of Tax Appeals.

8. Petitioner challenges the Division's audit and its results on two fronts. First, petitioner maintains that he was a resident of New Jersey during the subject years and was not properly taxable as a resident of New York State or New York City either on the basis of domicile or as a statutory resident as defined. Second, petitioner alleges that adjustments to the Division's audit results should be made, in addition to those allowed by the auditor at the time of audit, in

[4] Petitioner executed two consent documents, one pertaining to 1990 and one pertaining to 1991 through 1994, pursuant to which a deficiency of additional tax, penalty and interest for such years could be asserted at any time on or before April 15, 1999.

reduction of the amount of income subject to tax. Specifically, petitioner seeks reduction adjustments for mortgage interest paid, real estate taxes paid, interaccount transfer deposits not offset by corresponding deductions from the transfer account, nontaxable source deposits from Egyptian bank accounts and from matured certificates of deposits, bank charges for maintaining the accounts, and additional deductions for business expenses paid by check. These additional requested adjustments and the resulting admitted amount of unreported taxable income, per petitioner, are summarized as follows:[5]

ITEM	1990	1991	1992	1993	1994	1995
INCOME PER AUDIT	$361,076	$229,361	$156,364	$242,839	$833,227	$ 64,623.25
MORTGAGE INTEREST	(18,970)	(20,074)	(20,092)	(14,623)	0	0
ACCOUNT TRANSFERS	(98,000)	(9,423)	(16,776)	(18,500)	(402,250)	0
BANK CHARGES	(600)	(600)	(600)	(600)	(600)	0
BUSINESS EXPENSES	(127,800)	(101,546)	(66,435)	(132,447)	(213,771)	0
RETURNED CHECKS	0	0	0	(30,796)	(31,929)	0
TAXABLE INCOME	$115,707	$ 97,718	$ 52,462	$ 64,473	$182,472	$ 64,623.25

9. At hearing, the Division conceded that petitioner is entitled to the claimed deduction for mortgage interest paid for the years 1990 through 1993, and admitted that petitioner, through

[5] As the chart shows, petitioner has raised no challenge to the auditor's calculations and seeks no additional reductions for the year 1995. In addition, while petitioner's documentary submission at hearing includes evidence of real estate taxes paid for certain years, his claim for adjustment based thereon was not specified until his post-hearing brief. Hence, such claim is not presented in the chart, but is set forth in Finding of Fact "18".

the presentation of bank mortgage interest statements, has substantiated the dollar amount of such interest paid. Accordingly, the Division agrees that petitioner's taxable income per audit may be reduced by the amount of mortgage interest paid as shown above (***see,*** Internal Revenue Code ["IRC"] § 163[a]), subject to the statutory income limitation percentage pertaining to itemized deductions (***see***, IRC § 68), if any, with respect to such deduction.

10. Neither petitioner, nor any other witnesses on his behalf, appeared or gave testimony at the hearing held in this matter. Rather, petitioner challenges the Division's notice based on statements made at hearing by his attorney, on affidavits made by petitioner and by his father, and on certain documents including canceled checks, real estate deeds and mortgage interest statements.

11. Petitioner operated a business as a food concessionaire, apparently through a number of hot dog carts, in Manhattan during the years in issue. As noted, petitioner maintained a number of different bank accounts and submitted at hearing, in two bound volumes, photocopies of several hundred checks from these accounts. As set forth in Finding of Fact "2", in addition to petitioner's name and the address 145 West 86th Street in the preprinted address section of the checks for one of the accounts, the name Abdel M. Ibrahim and the same address appear in the same area on the checks for another account. Further, the name A & Z, Inc. and the address 635 West 46th Street appear in the preprinted address section of the checks for another account. The relationship of these names to petitioner and to these accounts was not detailed in the record by petitioner.

12. It is undisputed that petitioner used his accounts to pay both business expenses and personal expenses, and review of the checks reveals many different payees. A number of checks are made payable to cash, while others are apparently in payment of rent, mortgage expense,

telephone expense and utility expense. These latter checks are payable to New York entities (e.g., Con. Edison, New York Telephone, etc.) and to New Jersey entities (New Jersey Bell, etc.). Many checks are made payable to individuals whose identity and relationship to petitioner, if any, is not discussed or disclosed in the record. Still other checks are made payable to what would appear to be various vendors, including Shofar Kosher Foods, M & T Pretzel, Coca Cola, Joyva, and Sage Enterprises. Finally, a large number of checks, as photocopied, are not legible at all, or are illegible as to payee or dollar amount.

13. Petitioner's claim for additional business expenses in reduction of income is based on the foregoing checks. On many of the checks there appears a jagged line or "squiggle." These lines were allegedly affixed by petitioner's wife, who allegedly served as the bookkeeper for petitioner's concessionaire business, upon her review of the checks in reconstructing petitioner's business versus personal expenditures in connection with the audit and ensuing proceedings. Petitioner's position is that those checks which include a squiggle line represent checks paid for business expenses, apparently including food purchases, business rent and utility expenses, licensing expenses, and the like, which should be allowed in reduction of the amount of additional income determined on audit. The record does not include any business books, including receipts or expense logs, or any invoices for any purchases by petitioner's business, and there is no claim that such books, invoices or other records with respect thereto exist.

14. Petitioner's claim for a reduction of income for bank charges in the amount of $600.00 per year represents petitioner's estimate of a "reasonable amount" for such expenses, accompanied by the assertion that the bank in fact charged petitioner much more than $600.00 per year for these accounts. The record does not include any specification of the actual amount of bank charges incurred nor, notwithstanding that the accounts were used for both personal and

business expenses, any showing of any allocation between business related charges and personal expenses.

15. Petitioner's claim for reduction based on interaccount transfers is premised on the assertion that certain deposits to his accounts resulted from withdrawals from other accounts, or represented deposits from bank accounts maintained by petitioner in Egypt, or were deposits of the proceeds of matured certificates of deposit. Petitioner submitted a number of "customer advice" slips listing transfers from one account to another. Review of the audit work papers reveals that in a number of instances the auditor clearly allowed credit for interaccount transfers. However, for the balance of the claimed transfers, the individual dollar amounts and the particular dates on the transfer slips do not match the dates and the dollar amounts listed on the audit work papers. That is, the audit work papers reflect aggregate deposits for the successive monthly periods covered by the bank statements rather than listing every deposit individually whether by transfer or otherwise. While in a few instances, there are deposits in dollar amounts which are within a few thousand dollars of the amounts shown on the transfer slips, there is no means by which the amounts can be reconciled with the evidence offered in the record by petitioner. That is, petitioner did not offer bank statements which might have identified the individual transfers and allowed for comparison of the customer advice slips thereto and to the deposits and reductions allowed by the Division on audit. In addition, there are no bank statements from Egyptian banks from which the alleged source of certain deposits to petitioner's accounts might be confirmed.

The same lack of any clear explanation or means of tying or confirming petitioner's claimed individual deposit amounts, other than those identified in the audit work papers, to the audit results occurs with respect to claimed deposits from matured certificates of deposit. As an

illustrative example, there is a one-page hand-written work paper submitted by petitioner entitled Certificates of Deposit on which is listed, *inter alia*, a certificate of deposit (No. 1614636) issued June 15, 1989. The work paper states that this certificate, in the amount of $24,000.00, was rolled over at six month intervals and was allegedly transferred on March 13, 1992 to account number 402933. In comparison, the auditor's work papers show cumulative deposits to account number 402933 for the period February 15, 1992 through March 13, 1992, in the aggregate amount of $32,221.92. The record contains neither a deposit slip confirming the $24,000.00 transfer and deposit, nor the bank statement for such period which would list the individual deposits including, presumably, the claimed $24,000.00 deposit.

16. There is no dispute that petitioner and his wife lived in an apartment at 145 West 85th Street in Manhattan until at least 1989. On June 27, 1989, petitioner purchased a house located at 228 Palisade Avenue, Jersey City, New Jersey. Invoices in the record reflect the purchase, on May 23, 1989, of furniture, including sofas, beds, mattresses and the like from Palmer Furniture Company, and the purchase, on May 26, 1989, of appliances, including a washer and dryer, a refrigerator, a television, and a VCR from Tops Appliance City, Inc. The purchase invoices indicate that delivery was to be made to 228 Palisades Avenue, Jersey City, New Jersey on May 23, 1989 (by Palmer Furniture) and on May 30, 1989 (by Tops Appliance).[6] Utility payments to PS & G, New Jersey Bell and Jersey City Cable TV, as well as mortgage payments on this property to the Washington Saving Bank are reflected among the canceled checks drawn on petitioner's various accounts and included in evidence. Similar payments to New York Bell,

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[6] The deed for this purchase is dated June 27, 1989. However, a September 17, 1992 Notice of Mortgage Adjustment from Washington Savings Bank indicates, with respect to the mortgaged property at 228 Palisade Avenue, Jersey City, New Jersey, that the mortgage/deed of trust for such property was dated October 28, 1987. The significance, if any, of such earlier mortgage/deed of trust date, and of the delivery of furniture and appliances to the premises prior to the June 27, 1989 purchase date, is not explained in the record.

Consolidated Edison, and the like are also reflected among the canceled checks drawn on petitioner's various accounts.

17. Petitioner sold the house at 228 Palisade Avenue to Christ Hospital on March 25, 1994. The deed and a release executed in connection with this transfer list petitioner's address as 120 Palisade Avenue, Jersey City, New Jersey. Petitioner claims his post-sale (and current) address as 210 Ege Avenue, Jersey City, New Jersey. Petitioner submitted multiple copies of certain tax returns in evidence. These documents indicate the following addresses for petitioner:

Year and Return	**Address**
1990-New York State	145 West 86th Street, NYC
1991-Federal	228 Palisade Ave., Jersey City
1991-New York State	228 Palisade Ave., Jersey City
1992-Federal	401 West 47th Street, NYC
1993-Federal	120 Palisade Ave., Jersey City
1993-New York State	120 Palisade Ave., Jersey City
1993-New Jersey	120 Palisade Ave., Jersey City
1994-Federal	210 Ege Avenue, Jersey City
1994-New Jersey	210 Ege Avenue, Jersey City

18. In addition to the mortgage interest deduction claimed by petitioner and agreed to by the Division at hearing (subject to the statutory income limitation percentage), petitioner also claimed, by brief, a deduction for real estate taxes he paid on the 228 Palisade Avenue premises. Washington Savings Bank annual escrow statements showing the amount of annual mortgage interest and real estate taxes paid, via escrow, indicate that petitioner paid real estate taxes in the amounts of $8,448.25 for 1990, $8,645.65 for 1991 and $9,160.30 for 1992. Petitioner's post-hearing brief lists an estimated $9,000.00 amount for 1993. No confirming bank escrow statement was submitted for 1993. No claim of real estate tax paid is made for either 1994 or 1995.

CONCLUSIONS OF LAW

A. New York State Tax Law § 605(b)(1)(A) and (B), sets forth the definition of a New York State resident individual for income tax purposes as follows:

> Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this state, unless (1) 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, unless such individual is in active service in the armed forces of the United States.

The definition of a New York City "resident" is identical to the State resident definition, except for the substitution of the term "city" for "state." (***See***, New York City Administrative Code § 11-1705[b][a][A], [B].) The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources.[7]

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State and City, and both are at issue in this proceeding. The first, or domicile basis, turns largely on the concept of an individual's "home." The second, or "statutory" resident basis, requires dual predicates for resident tax status, to wit: (1) the maintenance of a permanent place of abode in the State and City and (2) physical presence in the State and City on more than 183 days during a given taxable year.

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[7] In this case this distinction, at least in terms of the dollar amount of tax liability, may be less significant since the record contains no information from which to conclude that petitioner's unreported receipts were anything other than business income the source of which was his food concessionaire business in Manhattan.

C. Treated first is the issue of whether petitioner was a domiciliary of New York City.[8] Neither the Tax Law nor the New York City Administrative Code contain a definition of domicile, but a definition is provided in the regulations of the New York State Department of Taxation and Finance (***see***, 20 NYCRR 105.20[d]).[9] As relevant, it provides as follows:

> *Domicile*. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.
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> (2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation in some other place.
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> * * *
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> (4) A person can have only one domicile. *If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home*. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, 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 such person may be domiciled elsewhere. (Emphasis supplied.)

D. Petitioner has failed to establish that he changed his domicile from New York to New Jersey. It is true that petitioner purchased a house in Jersey City, New Jersey prior to the years

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[8] It follows, logically, that if petitioner was a domiciliary of New York City he also would be a domiciliary of New York State, and that if petitioner met the dual predicates for taxation as a statutory resident of New York City he would also be taxable as a statutory resident of New York State.

[9] The definition of "domicile" in the Division's current regulations cited above, effective January 29, 1992, is the same as the definition in the former income tax regulations.

in issue. However, petitioner has offered nothing more than his affidavit that he purchased this property and moved to New Jersey, and his father's affidavit that petitioner's apartment in New York City was thereafter occupied by petitioner's father and brother. The record provides no information concerning the New Jersey house, its size or amenities or, most critically, petitioner's intent with respect to its purchase and occupancy (***see,*** 20 NYCRR 105.20[d][2]). The evidence that petitioner purchased furniture and appliances for this house does not establish petitioner's intent to make it his permanent home, or establish that it was not a "second home" or, for that matter, that it was not rental property. There is no evidence of any personal "near and dear" items such as artwork, heirlooms, photographs, etc., moved from New York to New Jersey in connection with the purchase and occupancy of the house. Neither petitioner nor his wife appeared at hearing to provide testimony as to the facts and circumstances concerning these matters. Petitioner filed tax returns for 1990 and 1992 as a resident. These, as well as all of petitioner's returns for the years in issue, even by petitioner's own recalculation, vastly understated his income for each of such years (***compare*** Finding of Fact "3" with Finding of Fact "8"). Any claim that the 1990 and 1992 returns were simply erroneous in listing petitioner as a resident must be viewed as questionable.

The balance of the evidence on the issue of domicile and residence consists largely of various documents, including real estate tax bills, water bills, motor vehicle registrations, and the like which were addressed to petitioner in New Jersey. It is not surprising or unusual that tax and water bills would be sent to the property address to which they pertain, and automobile registrations are certainly not dispositive on the issue of domicile. In contrast, a number of other documents, including petitioner's checks, show the New York City address for petitioner, and indicate that numerous payments for utilities, telephone and the like were made to both New

York and New Jersey vendors. Further, it is undisputed that petitioner was domiciled at 145 West 86th Street in Manhattan before he purchased the house in New Jersey. There is no evidence that petitioner terminated any lease for this apartment nor any allegation that he ceased paying the expenses associated with this apartment. In fact, the checks in the record lead to the opposite conclusion. In essence, the evidence paints at best a confused picture, and there was no testimony or cross examination provided or available from which any questions could be resolved. It is of course possible that petitioner moved from New York to New Jersey with the requisite intent to make his permanent home in New Jersey. However, the evidence does not clearly establish that this was the case. Accordingly, petitioner has not established that he changed his domicile from New York City to New Jersey.

E. Turning next to the issue of statutory residence, there are two conditions which, if met, subject a nondomicilliary to tax as a resident. These conditions are maintenance of a permanent place of abode in the City and physical presence in the City on more than 183 days in any given year. With regard to the physical presence condition, the statute and relevant regulation neither quantify any requisite length of stay in the City, nor qualify any particular purpose for one's presence in New York City, save for specifically excepting from the statute's coverage those persons who are in the active service in the armed forces (***see,*** 20 NYCRR 105.20[c]). There is no evidence that petitioner was in the active service in the armed forces during the years in question.

F. In addressing the issue of whether 145 West 86th Street was a permanent place of abode, 20 NYCRR 105.20(e)(l) provides as follows:

> [a] permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacation, is

> not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities . . . for cooking, bathing, etc., will generally not be deemed a permanent place of abode. [10]

Clearly, the apartment at 145 West 86th Street was a permanent place of abode. It was not a camp or cottage suitable only for vacation and, in fact, it was admittedly petitioner's domicile prior to the years in question. The more particular question, however, is whether the apartment constituted a permanent place of abode for petitioner during the years in question.

G. In ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 340, 606 NYS2d 404), the Tribunal was asked to decide the meaning of the phrase "maintains a permanent place of abode." The Tribunal noted that the term "maintain" is not defined in the pertinent statute or regulation and, accordingly, examined the legislative history of the statutory language, concluding:

> 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. (***Matter of Evans, supra***).

A few years before its decision in ***Evans***, the Tribunal, in applying the phrase "permanently maintained" stated: "The operative words of the regulation are 'permanently maintained' which the petitioner does through his continued ownership of the house . . ." (***Matter of Feldman***, Tax Appeals Tribunal, December 15, 1988).

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[10] Prior to January 29, 1992, the applicable regulation was 20 NYCRR 102.2(e)(1) which contained the identical language as is cited herein.

H. As noted earlier, the checks in evidence point to a conclusion that petitioner maintained the apartment. It appears that he paid the bills associated with the premises, with no evidence or allegation of payment by anyone else including petitioner's father or brother. Further, there is no evidence or claim that petitioner was in any manner precluded from access to or use of the apartment. Given the lack of any testimony at hearing, the actual use of the apartment by petitioner is unknown. Neither the unsworn assertions made at hearing by petitioner's representative, nor the limited and conclusory statements in the affidavits made by petitioner and by his father, are sufficient to establish that the apartment was not a permanent place of abode maintained by petitioner during the years in issue.

I. Having concluded that 145 West 86th Street was a permanent place of abode maintained by petitioner leaves only the question of whether petitioner was present in New York City on more than 183 days in any of the years in issue. In this regard, 20 NYCRR 105.20(c), prescribes rules for determining days spent within and without New York State for purposes of 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. Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the [Division of Taxation] adequate records to substantiate that he did not spend more than 183 days of such taxable year with New York State. [11]

[11] 20 NYCRR Appendix 20, § 1-2(c) contains the same language as 20 NYCRR 105.20(c) except for the insertion of the word "city" for "state."

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).

J. Petitioner has offered no evidence, either in written form or via testimony, concerning the number of days spent in New York during the subject years. Clearly petitioner's business was conducted in New York. As the Division points out, assuming petitioner worked 5 days per week for 50 weeks per year leaves petitioner present in New York on 250 days per year. Petitioner, for his part, offers no claim on the subject of his presence in New York on any particular day. Petitioner's maintenance of a permanent place of abode in New York City, coupled with the lack of any evidence indicating that petitioner was not in New York on any given days, leaves petitioner unable to prevail on the issue of statutory residence.

K. As to the audit results, petitioner has asserted that several adjustments should be made in reduction of the amount of additional income determined upon audit. As noted, the Division agreed that petitioner is entitled to reduction, subject to the statutory income limitation percentage, for the mortgage interest he paid (***see***, Finding of Fact "9"). On the same basis, petitioner is entitled to reduction for the real estate taxes he paid (***see***, IRC § 164[a]), as substantiated in the amounts of $8,448.25 for 1990, $8,645.65 for 1991, and $9,160.30 for 1992 (***see***, Finding of Fact "18 "), again subject to the statutory income limitation percentage for itemized deductions, if any (***see*** IRC § 68). For 1993, petitioner estimated that he paid real estate taxes of $9,000.00. However, he provided no substantiation of real estate taxes paid in fact for

such year, or the amount thereof. Accordingly, petitioner is not entitled to any reduction for real estate taxes paid for such year.

L. Petitioner has not established that he is entitled to any reductions in addition to those afforded during the course of the audit, plus the adjustments for mortgage interest and real estate taxes discussed above. On this score, except for the canceled checks, no books or records of receipts and expenses of petitioner's business appear to have been maintained. There were no invoices for purchases of food and other items necessary for the operation of petitioner's business. With regard to the checks, the same were written out of a number of accounts and were mixed with personal expenses paid out of the same accounts. The only identification of purported business expenses comes from the "squiggle" lines placed on the checks, after the fact, in an apparent effort to reconstruct a record of business expenses which was presumably necessitated by the advent of the audit. The inherent lack of reliability of such accounting speaks for itself. In fact, petitioner's use of multiple accounts to pay both business and personal expenses, with multiple interaccount fund transfers, and deposits of presumably taxable business income commingled with allegedly nontaxable deposits from certificates of deposit and money from bank accounts in Egypt, leaves a tangled and largely indecipherable record of cash flow. Petitioner's choice to use this manner of "accounting," coupled with the lack of any books of account or invoices, leads ultimately to confusion which must weigh against petitioner. The Division's auditor allowed credit for some business expenses which apparently were in some manner substantiated, and offset certain bank deposits where he could clearly discern a related source which was either nontaxable or which was already accounted for as a taxable deposit in another account. Petitioner's presentation at hearing, consisting mainly of submitting the same

items provided to the auditor, affords no basis upon which to make any additional adjustments to the audit results.

M. Petitioner has offered no arguments or evidence in support of reduction or abatement of the penalties imposed and the same are, therefore, sustained. It is noteworthy on this issue that even if all of the adjustments sought by petitioner were accepted and allowed, there would remain, even by petitioner's calculations, a very large understatement of income and of tax liability in comparison to the amounts reported.

N. The petition of Abdelaziz El-Tersli is hereby granted to the extent indicated in Conclusion of Law "K" pertaining to reductions for mortgage interest and real estate taxes, and the Division is directed to recompute the amount of the deficiency in order to allow for such items. The petition is in all other respects denied, and the Division's Notice of Deficiency dated June 22, 1998, as recomputed in accordance herewith, together with penalties and interest, is sustained.

DATED: Troy, New York
May 9, 2002

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE