STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **PATRICIA M. GASS** | : | DETERMINATION<br>DTA NO. 819722 |
| for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1999 and 2000. | : | |

Petitioner, Patricia M. Gass, 85 Chocolate Drop Mountain, Columbus, North Carolina 28722-9789, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1999 and 2000.

A small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 15, 2004 at 10:30 A.M., which date began the three-month period for the issuance of this determination since neither party elected to reserve time to file a post-hearing brief. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Jacob Tiwary).

## ***ISSUE***

Whether the Division of Taxation properly determined that petitioner was a New York State and City resident individual for income tax purposes despite her full-time employment in India during the years at issue and her presence in New York for fewer than 30 days in each year.

## *FINDINGS OF FACT*

1. Petitioner, Patricia M. Gass, has had a remarkable life and career. Born in Cleveland, Ohio, but raised in Mexico City as the daughter of missionaries, she and her husband, Eric A. Gass, lived and worked in India, as missionaries for the United Church of Christ. From 1960 to 1969, petitioner and her husband lived in Raipur, India. After she and her husband accepted responsibility as "missionaries at large" for the church's missions in India, Sri Lanka and Nepal, they relocated to Bombay, India, where they lived for 14 more years, from 1969 to 1983. In 1983, petitioner's husband accepted the position, within the United Church of Christ, of Executive Secretary for Southern Asia, which resulted in their relocation to New York City, the location of the church's world headquarters at that time.

2. Petitioner's two children were born and raised in India. After attending boarding school in India, the children came to the United States for their college education in the early 1980s, just before petitioner's own return to the United States in 1983.

3. Petitioner's educational background was in the area of literature and nursing, and upon her relocation to New York City, she obtained additional academic degrees, notably a PhD degree in public health from Columbia University. This educational achievement was built upon petitioner's 20 years of experience working in the area of public health in India. Dr. Gass became a faculty member at Columbia University's School of Public Health and was employed by the university's Center for Population and Family Health. From 1988 until 1995, she served as the director of the international public health internship program of Columbia University's School of Public Health. In 1995, she became the deputy director of the international wing of Planned Parenthood of New York City known as the Margaret Sanger Center International.

4. In 1998, deciding that she was working too hard, petitioner became a consultant for Columbia University on one project based in New York City related to her expertise. Nevertheless, in the spring of 1998, petitioner received and decided to accept a job offer from EngenderHealth which required her return to India. EngenderHealth, formerly known as AVSC International, functioned in India as a United States Cooperating Agency, through which a Family Planning Services project[1] was channeled. On October 1, 1998, petitioner left New York City for her new position as "Country Program Manager" of EngenderHealth's India office located in New Delhi, India, a temporary position which would last until early 2001 when she returned to New York City. In particular, petitioner was responsible for EngenderHealth's programs conducted in the area of family planning with doctors at so-called "district level hospitals." Petitioner received wages and other compensation of $113,773.00 and $98,623.00 in 1999 and 2000, respectively, from her employment in India. Since petitioner's salary, according to the written job offer from EngenderHealth, was "$3,000 semimonthly (equivalent to an annualized salary of $72,000)," these larger amounts as shown on her W-2 forms, included other items of compensation, notably a housing allowance which was paid directly by EngenderHealth to petitioner's landlord in India. Dr. Gass filed tax returns as a nonresident of New York during the years at issue on the basis of the so-called 548-day rule (as detailed in the Conclusions of Law) and reported none of her income as subject to New York State and City income taxes.

5. Upon her return to India in the fall of 1998, petitioner first lived in a hotel for approximately a month until her predecessor vacated the house which petitioner would take up as her own residence until the conclusion of her work assignment in India. Petitioner purchased

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[1] The project was governed by a grant agreement between India's Department of Economic Affairs and the United States Agency for International Development (USAID).

furniture and other household items for this house in addition to the china, flatware, glasses and other household items which she had shipped to India from New York along with all of her clothing. In fact, her personal and household effects, which petitioner shipped back to New York after her assignment in India was completed, amounted to 575 cubic feet of goods according to a shipping invoice in the record.

6. As noted above, from 1983 until 1998, petitioner lived in New York City. This 15 years of life in New York City, petitioner candidly admitted, resulted in New York City becoming her "place of the heart, really," and from 1983 onward, petitioner considered herself a New Yorker. Given her background, petitioner appreciated the city's cultural diversity. She also took enjoyment in its theater and music. Furthermore, she enjoyed life in the large, pre-war apartment in a building known as Concord Hall located at 468 Riverside Drive, with its views of the park and the Hudson River, which was provided to her husband, Rev. Eric Gass, as part of his employment with the United Church of Christ. Although the lease for the apartment was on a year-to-year renewable basis and conditioned upon Rev. Gass's continued employment by the United Church Board of World Ministries, petitioner and her husband had the good fortune of tenancy in this very desirable apartment for what turned out to be a lengthy period of time.

7. When petitioner returned to India in the fall of 1998, she knew then that this would be her last work assignment since she intended to retire at about the same time that her husband retired from his employment with the United Church of Christ. Furthermore, she was uncertain where she would be living after the completion of her work assignment in India since by such time her husband would, more than likely, be retired or very close to retirement, and with his

retirement,[2] petitioner and her husband would no longer be able to continue their tenancy on Riverside Drive. Mr. Gass did, in fact, retire in August of 2000.

8. During the years at issue, Rev. Gass paid all expenses to maintain the apartment at 468 Riverside Drive including rent and utilities. Petitioner returned to New York City for a brief period in the summer of each of the years at issue. She was in the United States for 28 days in 1999 and 23 days in 2000, and several days fewer in New York City in each year since she visited friends and family outside New York during her time in the United States. While in New York City, she stayed in the apartment on Riverside Drive.

9. As noted in Finding of Fact "3", petitioner filed tax returns as a nonresident of New York during the years at issue and reported none of her income as subject to New York State and City income taxes. In April of 2002, the Division of Taxation ("Division") commenced a preaudit analysis of her nonresident tax returns because petitioner, who used the married filing separate status, was, according to the auditor's log, "married to a New York resident who resided in their NYC home during Mrs. Gass's overseas employment." The auditor determined that petitioner did not qualify to file as a nonresident because she and her husband maintained a permanent place of abode in New York at which her husband was present for more than 90 days. Consequently, the Division issued two statements of personal income tax audit changes, each dated August 29, 2002, against petitioner asserting income tax due of $2,937.73 plus interest and $1,854.97 plus interest for 1999 and 2000, respectively. Shortly thereafter, the Division issued a Notice of Deficiency dated September 16, 2002 against petitioner asserting total tax due for the

[2] For a brief period of time while petitioner was in India, it appeared that Rev. Gass and petitioner might be able to purchase the apartment when it appeared the apartment building was going to be turned into a cooperative and Rev. Gass was to be given a right of first refusal. This dream evaporated when the landlord withdrew its offer. The landlord did permit Rev. Gass and petitioner, as his spouse, to remain in the apartment for an additional year despite the reverend's retirement in order for them to have some time to find other housing. In April of 2002, they retired to their current home in North Carolina.

two years at issue of $4,792.70 plus interest. Petitioner has paid the tax asserted due plus interest and is now seeking a refund of such remittance.

## *CONCLUSIONS OF LAW*

A. Tax Law § 601 imposes New York State personal income tax on "resident individuals." In turn, Tax Law § 605(b)(1) defines "resident individual" as someone:

> (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 (ii)(I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse . . . or minor children are present for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which such period of five hundred forty-eight consecutive days begins and the nonresident portion of the taxable year with or within which such period ends, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such portion of the taxable year bears to five hundred forty-eight, or
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> (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 . . . .

The definition of "resident" for New York City income tax purposes, pursuant to the New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state."

B. Initially, it is concluded that petitioner remained domiciled in New York City during the years at issue. As noted in Finding of Fact "5", petitioner candidly admitted that as a result of her 15 years of life in New York City, the great metropolis had become her "place of the heart" and that she had become a New Yorker. Since petitioner's place of abode in India, as noted in Finding of Fact "4", was temporary, lasting only as long as her work assignment in India, it was not a "permanent" place of abode (***see***, ***Matter of Green***, Tax Appeals Tribunal,

March 11, 1993 [wherein the Tribunal decided that temporary work assignments outside New York did not effect a change in the taxpayer's domicile despite the fact that the taxpayer did not have any abode of his own in New York]). Consequently, petitioner's residency in India during the years at issue did not effect a change in domicile, and petitioner retained New York as her domicile during the years at issue.

C. A person who is domiciled in New York, like petitioner during the years at issue, is treated presumptively as a resident individual for tax purposes unless she can show that she meets each one of the following three conditions: (1) she maintains no permanent place of abode in New York, (2) she maintains a permanent place of abode elsewhere, and (3) she spends in the aggregate not more than 30 days of the taxable year in New York *or* that the 548-day rule applies because she is present in a foreign country for at least 450 days of a 548-day period (which equates to a year and a half) and (1) she is not present in New York for more than 90 days during the 548-day period and (2) does not maintain a permanent place of abode in New York at which her spouse is present for more than 90 days.

D. Since petitioner did not maintain a *permanent* place of abode elsewhere, she did not meet the second condition noted above in the first definition of a "resident individual" contained in Tax Law § 605(b)(1)(A) for an individual "who is domiciled in this state."

E. However, petitioner has satisfied the conditions noted above in the second definition of a "resident individual" for an individual "who is domiciled in this state" in the statutory provision known as the 548-day rule.[3] Most important, it is concluded that petitioner has

[3] As noted in Finding of Fact "8", the basis for the Division's assertion of income tax against petitioner for the years at issue was the auditor's determination that Dr. Gass did not meet certain conditions of the 548-day rule, i.e., she maintained a permanent place of abode in New York at which her spouse was present for more than 90 days. Nonetheless, at the hearing this basis for the assertion of tax due was obscured, and much of the hearing focused on whether petitioner had effected a change in domicile.

established that *she* did not maintain a permanent place of abode in New York during the years at issue at which her spouse, Rev. Gass, was present for more than 90 days. The Riverside Drive apartment, as noted in the findings of fact, was maintained by Rev. Gass as his own place of abode. Petitioner, who was living in India and maintaining a residence there, paid no rent or expenses on the apartment and therefore did not "maintain" the apartment during the years at issue (***see***, ***Matter of Donovan***, Tax Appeals Tribunal, June 19, 2003 [wherein the Tribunal based its decision that a husband's condo-apartment in New York City constituted a permanent place of abode for his wife, who lived mostly in Connecticut, because *each* contributed to the monthly maintenance fees and bills, unlike the situation at hand where petitioner has established that she did not contribute to the monthly rent and expenses to maintain the Riverside Drive apartment]). Further, the situation at hand is much closer to the facts in ***Matter of Moed*** (Tax Appeals Tribunal, January 26, 1995) than ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840, 606 NYS2d 404), the matter relied upon by the Division. In ***Moed***, the Tribunal, in reversing the administrative law judge, determined that the taxpayer did not maintain a permanent place of abode in New York since his access to his wife's apartment in New York City was limited.

F. The petition of Patricia M. Gass is granted, the Notice of Deficiency dated September 16, 2002 is canceled, and petitioner's claim for refund of tax plus interest paid on such notice is granted.

DATED: Troy, New York
May 27, 2004

/s/ Frank W. Barrie
PRESIDING OFFICER