STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAANAN EINAV	:	SMALL CLAIMS DETERMINATION DTA NO. 820645
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 2000 and 2001.	:	

Petitioner, Raanan Einav, 339 West 84th Street- #7, New York, New York 10024-4426,[1] 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 2000 and 2001.

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 October 4, 2006 at 1:00 P.M. with all additional documents due by December 4, 2006, which date began the three-month period for the issuance of this determination. Petitioner appeared by Robert Upbin, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Mac Wyszomirski).

ISSUE

Whether petitioner has established that his New York City place of abode during 2000 and 2001 was not a permanent place of abode but rather was maintained only during a temporary

[1] Petitioner's representative noted at the hearing that he has been having difficulty locating the whereabouts of petitioner, who did not personally appear at the hearing. The above New York City address, which is the most up-to-date address in the files of the Division of Tax Appeals, has been used.

stay for the accomplishment of a particular purpose so that he is properly treated as a nonresident subject to tax by New York only on his New York source income and not on his income from all sources and was also not subject to New York City personal income tax.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Statement of Proposed Audit Changes dated February 13, 2004 to petitioner, asserting New York City income tax due of $4,682.07 and New York State income tax due of $309.59 plus interest for 2000. No penalties were imposed. The following explanation, in relevant part, was provided:

> A review of the information provided shows that you do not meet the conditions as defined in the New York State Personal Income Tax Regulations for temporary place of abode . . . . In order for a place of abode not to be considered as permanent, two conditions must be met:
>
> First, the stay in New York must be temporary for a fixed and limited period as opposed to a stay of indefinite duration. The Department has defined a fixed and limited period to be a period of three years or less. The information you provided shows that you have resided in New York since 1995. Therefore, your stay in New York was not for a fixed and limited period . . . .
>
> Second, the Regulations require that your work assignment be for the accomplishment of a particular purpose. The Department has defined a particular purpose to be a specific assignment that has readily ascertainable and specific goals and conclusions.
>
> A review of your reply indicates that your assignment to New York State was for general duties and not for the accomplishment of a particular purpose . . . .
>
> Further, you indicated that the employment contract states the duration is "at will," therefore, it would indicate that the duration of the assignment was indefinite.
>
> Accordingly, we have computed your tax as a full-year New York State and New York City resident.

The Division calculated that the above taxes were due for 2000 based upon an allocation of 100% of petitioner's income to New York instead of 96.43% and its determination that as a resident of New York City, petitioner owed New York City personal income tax.

2. The Division issued a second Statement of Proposed Audit Changes, also dated February 13, 2004, to petitioner, asserting New York City income tax due of $1,772.59 and New York State income tax due of $404.50 plus interest for 2001. Again, no penalties were imposed. This statement included the same explanation as provided by the statement for 2000, as detailed in Finding of Fact "1". The Division calculated that the above taxes were due for 2001 based upon an allocation of 100% of petitioner's income to New York instead of 89.10% and its determination that as a resident of New York City for the entire year, petitioner owed New York City personal income tax on his income for the year and not merely for the portion of the year during which he conceded he was a resident of New York City.[2]

3. The Division issued two notices of deficiency which conform to the two statements of proposed audit changes detailed above. One notice, dated April 5, 2004, asserted total income tax due for 2000 of $4,991.66, consisting of New York State income tax due of $309.59 and New York City income tax due of $4,682.07, plus interest with no imposition of penalties. The other notice, dated April 8, 2004, asserted total income tax due for 2001 of $2,177.09, consisting of New York State income tax due of $404.50 and New York City income tax due of $1,772.59, plus interest with no imposition of penalties.

[2] For 2001, petitioner filed a nonresident and part-year resident tax return (form IT-203) on which he reported he was a resident of New York City for eight months during 2001. Nonetheless, he did not allocate any of his 2001 wages to New York City in calculating tax due. This return also reported unemployment compensation of $1,620.00, all of which was allocated to New York City.

4. According to an application for Alien Employment Certification, with a date received by the U.S. Department of Labor of December 24, 1998, petitioner, an Israeli, started employment in June of 1994, when he was 31 years old, with "The A Consulting Team, Inc.," described as a software developer and consulting company located in Manhattan at 200 Park Avenue South. On this application, the "job to be performed," at a rate of pay of $85,000.00 per year, was described as follows: "Analyze, design, develop, test and implement financial software applications. Utilizing C/C++ and SYBASE on UNIX operating system." An employment agreement between petitioner and The A Consulting Team, Inc., dated January 27, 1997 by petitioner, provided that "This Agreement shall commence on the date hereof and shall remain in effect for an indefinite time until terminated by either party by giving the other party notice of termination at least ten (10) working days in advance." The record also includes photocopies of two approval notices by the Immigration and Naturalization Service concerning petitioner's nonimmigrant worker status. One approval notice was valid from January 15, 1996 to January 15, 1999, and the other for the period from January 19, 1999 through January 1, 2001. The record does not disclose petitioner's status with the Immigration and Naturalization Service during his employment with The A Consulting Team, Inc. in New York from June of 1994 until January of 1996.

5. Petitioner obtained a permanent resident card pursuant to a notice dated June 15, 2001, which shows "resident" status since May 5, 2001 with a card expiration date of June 15, 2011. Somewhat mysterious and unexplained is the termination of petitioner's employment with The A Consulting Team, Inc., upon his obtaining of this permanent resident card. On his New York resident tax returns subsequently filed for the years 2002, 2003 and 2004, petitioner reported no wage income at all: for 2002, New York adjusted gross income of $35,309.00 consisting mostly

of rental or royalty income; for 2003, New York adjusted gross income of $921.00; and for 2004, New York adjusted gross income of $1,091.65.

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

B. Petitioner has argued that the Division acted improperly in viewing his New York City apartment as a "permanent" place of abode during the years at issue, maintaining that individuals in the United States on work visas cannot be viewed as having a "permanent" place of abode until they obtain "green cards." Petitioner contends he may not be required to file New York resident income tax returns because "You can have only one place [of] domicile" and his domicile was in Israel until he obtained his permanent resident card (or green card). This argument confuses the two distinct and separate bases for viewing a person as a "resident individual" for New York income tax purposes. The Division does not contend that petitioner was domiciled in New York City during the years at issue but rather relies upon the second basis, denominated in subparagraph (B) cited in Conclusion of Law "A", for treating petitioner as a "resident individual" for tax purposes. Since petitioner has not denied that he spent more than

183 days in New York City and maintained a Manhattan apartment during 2000 and 2001, the issue to resolve is whether his Manhattan apartment represented a "permanent" place of abode.

C. The Tax Law does not include a definition of the term at issue, "permanent place of abode." However, the Commissioner's regulation at 20 NYCRR 105.20(e)(1) provides the following interpretation of this term:

> *Permanent place of abode*. (1) 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 vacations, is not a permanent place of abode. Furthermore, a barracks or 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. *Also, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose.* For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such an individual takes and apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State, because such individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on such individual's income from New York State sources, including such individual's salary or other compensation for services performed in New York State. However, if such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State (emphasis added).

D. The Tax Appeals Tribunal has applied the terminology of "a dwelling place permanently maintained by the taxpayer," which is at the heart of the regulatory definition of "a permanent place of abode" as detailed above, in an *expansive* fashion. The Tribunal viewed a church rectory in Manhattan, where the taxpayer (a corporate attorney working in midtown Manhattan) lived as a companion to the priest, as the taxpayer's permanent place of abode since

he made contributions to the rectory's household expenses and it was his dwelling place during his work week:

> 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. Petitioner argues that he was not maintaining a permanent place of abode in the living quarters of the rectory because he had no legal right to reside there and could have been asked to leave at any time by Father Ioppolo. In petitioner's view, his presence in the rectory was 'impermanent by its very nature' (Petitioner's brief to the Administrative Law Judge, p. 15). 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 (footnote omitted) (***Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840, 606 NYS2d 404).

The Tribunal reached its conclusion that the rectory was the taxpayer's permanent place of abode despite the fact that the taxpayer returned on a regular basis to his country home, which was his domicile, in Pawling (Dutchess County) on the weekends and for vacations. Further, in the course of its analysis, the Tribunal in a footnote, which is shown as omitted in the above quote from the decision in ***Matter of Evans (supra)***, cited with approval the following, now 66 year old, opinion of the Attorney General (1940 Opn Atty Gen, p 246, March 28, 1940) which remains cogent and is remarkably pertinent to the matter at hand:

> If one were to give the fullest effect to the word 'permanent,' then a person maintaining a 'permanent place of abode' in New York should be considered as a domiciliary. But, careful study of the language of section 350(7) of the Tax Law compels the conclusion that the Legislature did not intend that the word 'permanent' should be construed as meaning the ultimate in the way of a residence established for all time to come. Obviously, it intended rather an abiding place, established either by a domiciliary or a nondomiciliary, having a fixed or established character as distinguished from intermittent or transitory.

F. The Commissioner's regulations at 20 NYCRR 105.20(e)(1), detailed in Conclusion of Law "D," adopt a view of "permanent place of abode," which is in harmony with the cogent opinion of the Attorney General cited with approval by the Tax Appeals Tribunal in ***Matter of Evans (supra)*** and the Tribunal's analysis of the terminology of "permanence." As noted by the Tribunal in ***Matter of Evans (supra)***, this term "must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place." As the regulation at issue provides, a camp or cottage suitable only for vacations, barracks, or any construction without facilities for cooking, bathing "will generally not be deemed a permanent place of abode." Here, petitioner's Manhattan apartment clearly has "permanence." Nonetheless, as the Tribunal noted "the individual's relationship to the place" is also relevant in analyzing the "permanence" of an abode, and the regulations, which provide an exception for "a place of abode maintained only during *a temporary stay* for the accomplishment of *a particular purpose*" are in accord with the Tribunal's analysis (emphasis added).

G. Applying the regulatory exception for a dwelling maintained only during a temporary stay and for the accomplishment of a particular purpose to the facts in this matter, it is concluded that petitioner did not maintain his New York apartment during a *temporary* stay and for the accomplishment of a *particular* purpose. This conclusion is based upon a weighing of all relevant facts (***see, Matter of Helnarski***, Tax Appeals Tribunal, October 11, 1990 [wherein the Tribunal noted with approval the opinion of the Tax Court that resolution of the issue whether employment was either temporary or indefinite is based upon "the unique facts of each case" citing ***Trapp v. Commr.***, 39 TCM 1085, 1097; ***Peurifoy v. Commr.*** 358 US 59, 61, 58-2 US Tax Cas ¶ 9925). Petitioner has failed to shoulder his burden of proving that his abiding or dwelling in a New York apartment during the years at issue represented only a *temporary* stay in New

York for a *particular* purpose (***see, Matter of El-Tersli v. Commr.***, 14 AD3d 808, 810, 787 NYS2d 526 [wherein the Court noted that "The burden of proof lies with the taxpayer, upon whom it is incumbent to establish that he or she neither maintained a permanent place of abode in this state nor spent more than 183 days in the state"]). As noted in Finding of Fact "5", petitioner's employment with the Manhattan computer consulting firm commenced in the summer of 1994 and was not for a specified or a temporary period as noted in Finding of Fact "4." By 2000, the first year at issue, petitioner had been working for this firm for nearly six years. Consequently, rather than employment for a particular purpose, petitioner's duties for the computer consulting firm are best described as general in scope ranging over many projects and several years. In short, the facts at hand are very different from the example set forth in the regulations detailed in Conclusion of Law "D" of an individual domiciled outside New York who "may be assigned" to an "employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location." In sum, the Division's position that petitioner's employment with The A Consulting Team, Inc. during 2000 and 2001 did not represent a specific assignment that had readily ascertainable and specific goals and conclusions was reasonable.

F. The petition of Raanan Einav is denied, and the notices of deficiency dated April 5, 2004 and April 8, 2004 are sustained.

DATED: Troy, New York
March 1, 2007

/s/ Frank W. Barrie
PRESIDING OFFICER