STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH AND KATHLEEN SLAVIN	:	DETERMINATION DTA NO. 820744
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 1996, 1997 and 1998.	:	

Petitioners, Joseph and Kathleen Slavin, 13 Rivers Edge Drive, Rumson, New Jersey 07760, 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 1996, 1997 and 1998.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 15, 2006 at 10:30 A.M., with all briefs to be submitted by December 8, 2006, which date began the six-month period for the issuance of this determination. Petitioners appeared by Joseph Slavin, *pro se* and for his wife, Kathleen Slavin. The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that petitioners were subject to tax as residents of New York State and New York City for tax years 1996, 1997 and 1998, on the

basis that they maintained a permanent place of abode in New York State and New York City within the meaning of Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

FINDINGS OF FACT

1. Petitioners, Joseph and Kathleen Slavin, are residents of the State of New Jersey, were residents of New Jersey during the years in issue, 1996, 1997 and 1998, and have never lived in the State of New York. Mr. Slavin maintained employment in New York, and consequently petitioners filed as New York nonresidents as to his New York source income. During the years in issue, petitioners resided in Rumson, New Jersey, a resort area on the shore of the Atlantic Ocean, and also maintained a property in the Catskill Mountains, in Roxbury, New York.

2. In October 1999, petitioners were notified that the Division of Taxation ("Division") had selected their New York State nonresident income tax returns for the years 1996, 1997 and 1998 for audit, in order to review their nonresident status. Supporting documentation submitted to the Division during 2001, including utility bills on the Roxbury property indicating petitioners' usage, was destroyed in the September 11, 2001 terrorist attacks.

3. On or about March 28, 2002, petitioners were issued a Notice of Deficiency asserting a tax liability of $37,265.49 as a result of the Division's audit. An untimely request by petitioners for review by the Bureau of Conciliation and Mediation Services left petitioners without further protest rights without payment of the alleged liabilities. Thus, after no success with an informal protest, petitioners submitted payment of the liabilities in order to further protest the deficiencies by filing claims for refund for the years in issue.

4. On or about March 22, 2004 and March 24, 2004, petitioners filed forms IT-113-X, Claim for Credit or Refund of Personal Income Tax, for tax years 1996, 1997 and 1998. The

claims for refund assert that the Division erred in its determination that petitioners' vacation cottage located in Roxbury, New York was a permanent place of abode, suitable for year-round use, thereby subjecting petitioners to New York residency pursuant to Tax Law § 605(b)(1)(B).

5. The Division issued a Notice of Disallowance dated July 16, 2004 denying petitioners' claim for refund of $44,260.89 for tax years 1996 through 1998.

6. Petitioners purchased property with a dwelling on it in the Delaware County region of New York State in 1991, for approximately $50,000.00, and maintained it during the years in issue. It is located in Roxbury, New York, the high peaks region of the Catskill Mountains, 180 miles from petitioners' home in New Jersey and about 160 miles or an approximate 3-hour drive from Mr. Slavin's employer in New York City. The structure sits on about six acres, on the side of a mountain, and is accessible by a dirt trail. It has no town services, such as trash collection, no cable service and no television reception. It is a two-bedroom 1000-square foot framed structure, about 35 years old, with a cement foundation, and the basement consists of only a crawl space with a dirt floor. The property does not have a furnace, but has heat from electric baseboard heating units, hot water and indoor plumbing. The property is accessible only by an easement, which is not maintained in good condition, and is nearly impossible to access in the winter months. The easement is shared among other property owners, all of whom use the adjacent structures for vacation purposes. Petitioners did not use this property in the winter months during the years in issue. Photos of the dwelling confirm portions of Mr. Slavin's description as to its approximate size, mountainous venue and rustic appearance.

7. Petitioners submitted tax bills for both their principal residence in New Jersey and the Roxbury property, as some evidence of the disparity in value and amenities of the two properties. The assessed value of the Roxbury property in 1998 was $39,950, and the Property

Class designation of this property was "seasonal residence." The assessed value of the New Jersey home in 1998 was $480,000. A later 2002 appraisal of petitioners' New Jersey home, bearing exterior pictures and depicting its prime location, determined a market value of $2.3 million. Neither of the tax bills provided any information as to the basis of the assessed values or the assessed valuation process.

8. During the years in issue, Mr. Slavin was employed by Fahnestock, the predecessor of his current employer, Oppenheimer, as a securities trader. Holding the position of vice president of trading, Mr. Slavin was a high level executive. He traveled from his home in Rumson, New Jersey to New York City by high speed ferry for his employment. In order for Mr. Slavin to work away from his office in New York City, high speed cable access was necessary. He did not commute from Roxbury to New York City, nor was Roxbury suited for him to perform any of his work.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioners maintain that the Roxbury property is a cottage, suitable for and used only as vacation property, and thus should not be deemed a permanent place of abode under the New York regulations governing resident individuals.

10. The Division asserts that whether or not petitioners use the Roxbury property for year round use, it is suitable as such, and that fact qualifies it as a permanent place of abode. The Division admits, however, that the regulation does not describe the criteria in this manner, and does not indicate that the property cannot be used year round. The Division's position is that a dwelling that may meet the camp or cottage exception would not have a furnace, and may or may not have running water.

CONCLUSIONS OF LAW

A. The issue in this proceeding is whether petitioners are subject to tax as residents of New York State and New York City. The classification is significant because nonresidents of the State are taxed only on their New York State source income whereas residents of the State and City are taxed on their income from all sources (Tax Law §§ 611, 631). To the extent pertinent to this matter, Tax Law § 605(b)(1)(B) defines a resident individual as one:[1]

> 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.

B. Here, the Division has not argued that petitioners were domiciled in New York State or New York City. Petitioner Joseph Slavin works in New York City and has not presented any evidence that he was in New York City for fewer than 183 days during each of the years in issue. Consequently, the only issue remaining is whether petitioners maintained a *permanent place of abode* in New York State by maintaining the property in the mountains.

C. The term permanent place of abode is not defined in the Tax Law. However, it is discussed in the regulations. The Commissioner's regulations at 20 NYCRR 105.20(e)(1) provide:

> *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 (emphasis added).

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[1] The definition of New York City resident is identical to the New York State definition of a New York State resident except for substituting the word "City" for "State" (New York City Administrative Code § 11-1705[b][1][B]).

D. Resolution of the controversy at issue herein hinges solely on the determination of whether petitioners' Roxbury property meets the "camp or cottage" exception from permanent place of abode as set forth in the regulations (20 NYCRR 105.20[e][1]). The issue presented is one of regulatory construction. Previously, when construing this section of the regulations, the Tax Appeals Tribunal referred to the following rule set forth in ***Regan v. Heimbach*** (91 AD2d 71, 72, 458 NYS2d 286, 287, ***lv denied*** 58 NY2d 610, 462 NYS2d 1027): "In statutory construction, commonly used words must be given their usual and ordinary meaning, unless it is plain from the statute that a different meaning is intended (citations omitted)" (***Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed Matter of Evans v. Tax Appeals Tribunal,*** 199 AD2d 840, 606 NYS2d 404). Moreover, petitioners are required to prove that their interpretation of the statute is the only reasonable interpretation, or that the Division's interpretation is unreasonable (***Matter of Blue Spruce Farms v. State Tax Commission***, 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). These principles of statutory construction also apply to the interpretation of administrative regulations (***see***, ***Matter of Cortland-Clinton, Inc. v. New York State Department of Health***, 59 AD2d 228, 399 NYS2d 492). It is well settled that the construction of statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld (***Matter of Howard v. Wyman***, 28 NY2d 434, 438, 322 NYS2d 683, 685-686).

E. A reading of the regulation clearly indicates that a place of abode will be not be deemed a permanent place of abode if it is a mere camp or cottage, which is suitable and used only for vacations. The question raised is whether petitioners' property in the mountains fits the construction of such terms. The Division's interpretation of this regulation would ask us to read

further and make an assumption that the only cottage that might fit this exception would be one without a furnace or running water. Noteworthy is that this dwelling did not have a furnace, though it had a source of heat by electric baseboard. It did have running water and indoor plumbing. All of that said, the regulation does not make these distinctions.

F. Both parties rely in part on case law that provides little guidance in this case. Petitioner distinguishes his case, and his inability to get services such as high speed cable, from that of ***Matter of Stewart*** (Division of Tax Appeals, January 13, 2000) where the existence of an extensive television cable service was one of the factors discussed by the Administrative Law Judge in coming to his conclusion that petitioner therein maintained a permanent place of abode in New York State in her East Hampton residence, which had undergone a $1.3 million dollar renovation.

The Division relies upon ***Matter of Stranahan v. New York State Tax Commn.*** (68 AD2d 250, 416 NYS2d 836), for the premise that, although a property may only be used for activities that a person of means would consider to be vacation purposes, if a property is suitable for other uses, it will be considered a permanent place of abode. In ***Stranahan*** the property in issue was a two and one-half room apartment in New York City that was used occasionally for shopping trips and used as stop-over location on the way to Europe, or to attend New York social functions. Petitioner in ***Stranahan*** became ill, was confined to New York hospitals, and was in and out of the apartment in between hospital stays, by necessity. The Court determined, without any discussion about its characteristics, that the New York City apartment was a permanent place of abode, and did not meet the camp or cottage exception. However, the Court, in holding for petitioner therein, further found that when a nondomiciliary seeks treatment in New York for a serious illness, the time spent in New York would not be counted toward her 183 days in

determining her residency status. These facts could not be further from the facts of petitioners' case herein. Petitioners in this case did not argue that as persons of means they did not use the property for other than vacation property, but rather that the property was only suited as such. Thus, any reliance on ***Stranahan***, is completely misplaced.

G. The Division is unreasonably choosing to add distinctions that are not part of the regulation, despite the spirit of the regulation which is about a greater, more permanent connection to New York, and the use of the State's services as a result of such connection. Based on the characteristics of the property provided by credible testimony and photographs (see Finding of Fact "6"), I do not believe this property was suitable for more than a brief vacation, and predominantly seasonally. Accordingly, I find it falls within the camp or cottage exception of the regulation, and the Division erred in determining it was a permanent place of abode.

H. The petition of Joseph and Kathleen Slavin is granted and the claims for refund for tax years 1996, 1997 and 1998 are hereby granted.

DATED: Troy, New York
June 7, 2007

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE