STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH AND KATHLEEN SLAVIN	:	
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1996, 1997 and 1998.	:	
		ORDER
		DTA NOS. 820744
In the Matter of the Petition	:	AND 821043
of	:	
JOSEPH AND KATHLEEN SLAVIN	:	
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2000, 2001 and 2002.	:	

Petitioners, Joseph and Kathleen Slavin, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax[1] under Article 22 of the Tax Law for the years 1996, 1997 and 1998, and a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2000, 2001 and 2002.

The Division of Tax Appeals, by Administrative Law Judge Catherine M. Bennett, issued a Determination dated June 7, 2007, which granted the petition in the first matter noted above for the earlier years at issue, 1996, 1997 and 1998 and allowed claims for refund for such years.

[1] The captions in these matters have been corrected to reflect the fact that New York City personal income tax is not at issue.

With regard to the petition in the second matter[2] noted above for the later years at issue, 2000, 2001 and 2002, the Division of Tax Appeals, by Administrative Law Judge Daniel J. Ranalli, issued an Order of Discontinuance dated July 27, 2007, pursuant to a Stipulation of Discontinuance dated June 30, 2007 by petitioners and July 11, 2007 by the Division of Taxation, and cancelled a deficiency asserting tax, plus penalty and interest due by Notice of Deficiency L-026483502 dated December 27, 2005.

On August 6, 2007, petitioners filed an application for costs pursuant to Tax Law § 3030 with the Division of Tax Appeals. The Division of Taxation filed a response in opposition on September 5, 2007, which date began the 90-day period for the issuance of this order.[3]

Based upon petitioners' application for costs and attached documentation and the Division of Taxation's response, and all pleadings and documents submitted in connection with these matters, Frank W. Barrie, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners are entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. The Division of Taxation (Division) sought to hold petitioners liable for New York State personal income tax as *statutory residents* of New York State. The Division did not contest petitioners' status as New Jersey domiciliaries, with a principal, fixed and permanent

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[2] This second matter was placed "on hold" by the Division as noted in the auditor's log, in an entry dated April 13, 2005, pending resolution of the matter pertaining to the earlier years. Nonetheless, to preserve their rights, petitioners filed a petition dated March 22, 2006 with regard to the later years at issue. After Judge Bennett granted the petition in DTA #820744 by her determination dated June 7, 2007, this second matter was resolved by a stipulation of discontinuation as noted above.

[3] Petitioners' reply to the Division's answering papers, received by the Division of Tax Appeals on October 17, 2007, was returned to petitioners because 20 NYCRR 3000.5, which governs petitioners' application for costs, only provides for (1) a motion and (2) a response from the adverse party within 30 days after the date of service of the motion.

home, near the New Jersey shore: their six-bedroom home in Rumson, New Jersey, with over 6,000 square feet of living space on a 1.3 acre plot and an appraised value in March of 2002 of $2,300,000.00. Rather, the Division contended that petitioners were *statutory residents* of New York, not because they were domiciliaries of New York, but on the basis that they maintained a permanent place of abode in the Catskill mountain town of Roxbury[4] (in Delaware County), and Mr. Slavin's presence in New York State for more than 183 days during each of the six years at issue. Although petitioners did not contest the Division's contention that Mr. Slavin was present in New York State more than 183 days of the year for each of the six years at issue, they vigorously contested the Division's position that they "maintained a permanent place of abode" in New York by their ownership of their rural, upstate New York two-bedroom dwelling purchased in 1991 for approximately $50,000.00 and consisting of 1,000 square feet. Petitioners argued that they used their Catskill mountain property during the years at issue only for vacations in nonwintry weather, and therefore it was not a "permanent place of abode" as a result of such modest usage as well as its resemblance to a "mere camp or cottage" or a "cabin in the woods."

2. During the years at issue, petitioner Joseph Slavin was employed on Wall Street by Fahnestock & Co., a predecessor to an entity now known as Oppenheimer, which explained his presence in New York for more than 183 days of the year. He commuted to his employment from his home in New Jersey and never used the dwelling upstate as a base to commute to his office in New York City.

3. For the six years at issue in these two matters, the Division issued notices of deficiency, which sought to hold petitioners liable as statutory New York residents for New York State

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[4] According to Mr. Slavin, for "911" purposes, the dwelling was assigned a new address of 478 Brook Road, Denver, New York.

income tax on 100% of their income rather than limiting their liability to their New York source income only, namely Mr. Slavin's income from his employment on Wall Street, as New York nonresidents. The Notice of Deficiency for the three earlier years at issue of 1996, 1997, and 1998, covered by DTA # 820744, was not included in the administrative record so that the specific amount of New York State income tax asserted due against petitioners for each of such years is unknown. Instead, included in the record with regard to these years, are petitioners' claims for refund of tax paid. These refund claims noted that petitioners were issued, on or about March 28, 2002, a Notice of Deficiency asserting a *total* tax liability of $37,265.49 for the three years at issue, which was satisfied by their payment on or about March 1, 2004 of $16,762.35 for 1996, $14,709.49 for 1997, and $12,789.05 for 1998. Since these three payments total $44,260.89, presumably they included payment of interest as well as tax.

4. With regard to the later years at issue of 2000, 2001 and 2002, covered by DTA # 821403, petitioners on June 30, 2007 and the Division on July 11, 2007 executed a Stipulation of Discontinuance resulting in the cancellation of the deficiency for such years by Judge Ranalli's Order of Discontinuance dated July 27, 2007. The Stipulation of Discontinuance executed by the parties included the following provision in *bold* type:

> Pursuant to section 3030 of the Tax Law, the Petitioners admit that they are not a prevailing party; the Division of Taxation also admits that it is not a prevailing party.

A Notice of Deficiency dated December 27, 2005 attached to the petition dated March 22, 2006 filed in DTA # 821403 shows the Division asserted tax due of $96,121.00, $8,403.00 and $6,666.00 for 2000, 2001 and 2002, respectively, plus penalty and interest for a "current balance due" as of December 27, 2005 of $215,743.45, which as noted above was cancelled by Judge Ranalli's order.

5. In her determination dated June 7, 2007, Judge Bennett granted the petition and petitioners' claims for refund for 1996, 1997 and 1998 on the basis that she did "not believe [the dwelling in the Catskills] was suitable for more than a brief vacation, and predominantly seasonally," and consequently she determined that "it falls within the camp or cottage exception of the regulation."

6. Nonetheless, a close review of the record, which includes six photographs introduced into evidence as Petitioner's Exhibit "1", shows that petitioners' rural dwelling, although dwarfed by their New Jersey abode, was a substantial and comfortable abode and not a "mere cottage" or "a cabin in the woods" as argued by petitioners. The first photograph shows a house with a large hearth or brick chimney and an outdoor deck running the complete length of the house. A large sedan, apparently of an American make, is shown parked near the house rather than a four-wheel drive, jeep-type vehicle or an all terrain vehicle.[5] The second photograph shows a modern-style kitchen area, with all major appliances (large refrigerator, dishwasher, stove and microwave), in a great room with a cathedral ceiling. This great room also contained a small dining room table and chairs, as well as a breakfast bar or nook and a sitting area with two sofas and a coffee table. In addition, this second photograph shows a loft area as well as skis hanging on the wall. The third photograph shows an indoor entry area commonly referred to as a mud room, which appears to have slate flooring. Snow shoes are hanging on the walls. The fourth photo is a side view of the dwelling which shows that access to the grounds is possible from the deck which runs the length of the house. The front of an automobile appears in the back of the house. In addition, this photograph does not show a steeply pitched driveway. The fifth

[5] Mr. Slavin had testified that he needed a four-wheel drive vehicle to access his Catskills property "pretty much all the time" pointing out that "the trails going up to the houses are the old cow trails."

photograph shows the front of the dwelling with a small extension to the main dwelling, which corresponds to the "mud room" or entry area noted above in the description of the third photograph. This photograph also clearly shows the substantial hearth or brick chimney and a utility pole with an electrical line running into the dwelling. The sixth photograph shows a stairway of approximately seven steps leading down to a basement or crawl space built out of cement blocks approximately seven blocks high. In the course of cross-examination, attorney Law's questioning of Mr. Slavin concerning these photos was left incomplete by a combative witness, who avoided responses to Mr. Law's questions by posing his own questions of the cross-examiner as well as arguing his case instead of answering questions.[6]

7. Petitioners' upstate dwelling is heated by electrical baseboard heating and has indoor plumbing and hot water provided by a hot water heater in the crawlspace or basement of the dwelling. There is no information in the administrative record concerning the dwelling's fireplace and whether it is equipped with a cast iron stove or if it is a wood burning fireplace. Given its rural nature, petitioners' upstate dwelling does not have municipal water, sewerage or garbage services, but presumably well water, a septic system and private arrangements for the disposal of garbage.

8. Petitioners seek payment from the Division of $15,980.00, consisting of the following expenses: (1) legal, $7,530.00; (2) travel expenses to hearings, $200.00; (3) mail, $250.00; (4) accounting, $3,000.00; and (5) other/miscellaneous, $5,000.00. Mr. Slavin explained "other/miscellaneous" expenses as follows:

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[6] A review of the transcript shows cross-examination of Mr. Slavin was begun on page 31 and ended at page 33, and the next 13 pages show an argumentative witness until cross-examination finally resumed at page 46 and was concluded on page 49. Mr. Slavin never actually answered the question whether the Catskill dwelling was used by petitioners during the winter when Mr. Law sought his explanation for why the photographs showed snow shoes and skis as noted above. Mr. Slavin also evaded answering whether the sedan shown in petitioners' own photographs had four-wheel drive.

> My own time away from employment in gathering documents, travel and conference was 50 hours . . . . This also includes office/copying expenses and travel to accountant and lawyer.

In support of the legal expenses shown above of $7,530.00, petitioners submitted a letter from Marc D. Marsico, a New Jersey lawyer, who itemized 35.3 hours of work performed "in connection with your New York State tax liabilities." The work performed commenced on February 6, 2004 with a telephone call to a New York State auditor and ended on March 21, 2006 with assistance in the preparation of "Pro Se NYS Appeals Petition" with regard to the later years at issue as noted in Footnote "2". At $200.00 per hour, attorney Marsico indicated that his total fee was $7,060.00. In addition, petitioners submitted an invoice dated July 4, 2007 from attorney Marsico "for professional services rendered" in the amount of $470.00. However, the specific professional services rendered are not specified on the invoice.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

> In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, *the prevailing party* may be awarded a judgment or settlement for:
>
> (1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and
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> (2) reasonable litigation costs incurred in connection with such court proceeding. (Emphasis added.)

B. Petitioners maintained administrative proceedings against the commissioner. With regard to the earlier years at issue, they first requested a conciliation conference where their request was denied, and the statutory notice disallowing their refund claims was *sustained* by the conferee. They then filed a petition to further contest the statutory notice, and as noted in the Findings of Fact, they prevailed with the issuance of a determination dated June 7, 2007. The

determination of Judge Bennett granted the refund claims with regard to the earlier years at issue, and petitioners were therefore clearly "the prevailing party" pursuant to Tax Law § 3030(c)(5)(A)(i) in the first matter, DTA #820744.

C. However, with regard to the later years at issue, as noted in Finding of Fact "4", petitioners executed a stipulation of discontinuance in DTA #821043 in which they admitted "that they are not a prevailing party." Under Tax Law § 171(18), "except upon a showing of fraud, malfeasance, or misrepresentation of a material fact," their admission shall not "be annulled, modified, set aside or disregarded." Petitioners clearly have not met the heavy burden of establishing "fraud, malfeasance, or misrepresentation of a material fact," the extraordinary grounds sufficient to permit the modifying of their stipulation of discontinuance where they admitted they were not a prevailing party (***see Matter of Barrier Oil Corp.***, Tax Appeals Tribunal, July 29, 1999).

D. Furthermore, any award of costs to petitioners is subject to the limitation of Tax Law § 3030(c)(5)(B)(i) which provides that a taxpayer may not be treated as a prevailing party, and thus may not be awarded costs, if the Division establishes that its position was "substantially justified." Tax Law § 3030 is modeled after Internal Revenue Code § 7430, and therefore Federal cases may properly be used for guidance (***Matter of Riehm***, Tax Appeals Tribunal, April 4, 1991).

E. A position is substantially justified if it has a reasonable basis in both fact and law (***see Information Resources, Inc. v. United States***, 996 F2d 780, 785; 93-2 US Tax Cas ¶ 50,519 [1993]), with such determination properly based "on all the facts and circumstances surrounding the case, not solely upon the final outcome" (***Heasley v. Commissioner***, 967 F2d 116, 120, 92 US Tax Cas ¶ 50,412 [1992]). Furthermore, this determination of "substantially justified" is

made in view of what the Division knew at the time the statutory notices were issued (Tax Law § 3030[c][8][B]).

F. With regard to the Notice of Deficiency issued on or about March 28, 2002 asserting New York State income tax due of $37,265.49, the Division's position was clearly substantially justified. As a result, the disallowance of petitioners' refund claims seeking a refund of their payment of this Notice of Deficiency was also substantially justified.

G. 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 . . . .

H. The parties agree that petitioners during the years at issue were domiciled in New Jersey. Further, petitioners have never denied that they owned and maintained a rural dwelling in the Catskill mountain town of Roxbury in upstate New York (Delaware County) during the years at issue. As a result, in order to conclude that petitioners were "resident individuals" required to pay New York personal income tax on their income from all sources and not merely on their New York source income, the issue in these matters was whether petitioners maintained a *permanent place of abode* by their ownership and maintenance of the rural, upstate New York dwelling.

I. The Tax Law does not include a definition of the term at issue "permanent place of abode." However, the Commissioner's regulations at 20 NYCRR 105.20(e)(1), in relevant part, 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.

J. 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 Op 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.

K. The Commissioner's regulations at 20 NYCRR 105.20(e)(1), detailed in Conclusion of Law "I," adopt a view of "permanent place of abode," which is in harmony with the opinion of the Attorney General cited with approval by the Tax Appeals Tribunal in ***Matter of Evans*** and the Tribunal's analysis of the terminology of "permanence." As noted by the Tribunal in ***Matter of Evans*** this term "must encompass *the physical aspects of the dwelling place* as well as the individual's relationship to the place" (emphasis added). As the regulation at issue provides, a mere 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." A careful review of the photos of their upstate New York dwelling, as detailed in Finding of Fact "6", establishes that petitioners' rural dwelling has "permanence." This attractive structure of some 1,000 square feet is simply not a "mere camp or cottage" or a "cabin in the woods" suitable only for nonwintry vacations, and it certainly does not have the requisite "physical aspects" of *impermanence* given its physical characteristics as detailed in Findings of Fact "6" and "7." In sum, petitioners' rural upstate New York dwelling does not display "transitory" or "intermittent" character, but rather has "permanance."

L. Nonetheless, as the Tribunal noted in ***Matter of Evans*** "the individual's relationship to the place" is also relevant in analyzing whether a dwelling represents a person's "permanent place of abode." Here, petitioners argued that they only used the upstate dwelling in nonwintry weather and for vacations limited in time which might lead to the conclusion that it was not an "abiding" place as the rectory was for Mr. Evans. However, as noted in Finding of Fact "6", rather than answer questions posed by attorney Law on his cross-examination, in particular relevant questions concerning winter sports equipment shown in the photos and the apparent access to the property by a vehicle other than a four-wheel drive vehicle, Mr. Slavin became combative and posed his own questions of Mr. Law and argued his case instead. Notably, Mr. Slavin refused to answer whether "anything changed with the house" from the earlier years at issue to the current time when petitioners apparently use the dwelling in the winter. This failure to provide a response to clearly relevant questioning raised serious questions concerning the merit of their petition, i.e., that their relationship to their upstate dwelling was so minimal that it was not an "abiding" place or a "permanent place of abode" (***see Matter of Bello v. Tax Appeals Tribunal***, 213 AD2d 754, 623 NYS2d 363 [1995]).

M. In sum, notwithstanding that the issue of statutory residence was ultimately resolved in favor of petitioners, a careful review of the administrative record discloses compelling evidence to support the Division's position that petitioners' Catskills dwelling was a permanent place of abode. Consequently, it is concluded that, at the least, the Division's position was "substantially justified."

N. Therefore, it is not necessary to review petitioners' proof of their "reasonable administrative costs" with regard to their challenge to the Notice of Deficiency dated March 28, 2002 at the heart of their refund claims in DTA # 820744. Nonetheless, it is noted that the

Division's complaint that "the majority of the billing entries [on the itemized statement from attorney Marsico] pertain to the audit" of the later years has merit. In addition, the Division is correct that petitioners may not seek reimbursement for expenses that are "lost opportunity costs" and do not represent actual expenses paid or incurred (***see*** Tax Law § 3030[c][2][B]).

O. Finally, the Division correctly points out that petitioners have failed to prove that their net worth was less than $2,000,000.00 as required by Tax Law § 3030(c)(5)(ii)(II).

P. Petitioner's application for costs and fees is denied.

DATED:Troy, New York
November 29, 2007

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE