

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition  | : |   |
| of   | : |   |
| <b>PATRICK GALLAGHER</b>   | : | SMALL CLAIMS<br>DETERMINATION<br>DTA NO. 820908 |
| for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Years 2001 and 2002. | : |   |

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Petitioner, Patrick Gallagher, 55 West 83<sup>rd</sup> Street, Apt. 1C, New York, New York 10024, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the years 2001 and 2002.

A small claims hearing was held before James Hoefler, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York, on October 19, 2006 at 10:15 A.M. Petitioner appeared by Robert Upbin, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Nazmul Quayyum).

The final brief in this matter was due by December 8, 2006, and it is this date that triggers the three-month period for the issuance of this determination.

***ISSUE***

Whether petitioner, although not domiciled in New York State and New York City, is nonetheless taxable as a resident individual on the basis that he maintained a permanent place of

abode in New York State and New York City and spent more than 183 days during each year within the State and City.

***FINDINGS OF FACT***

1. There is no dispute in the instant matter that petitioner, Patrick Gallagher, was not domiciled within the State and City of New York for the two years at issue in this proceeding. There is also no dispute that petitioner maintained a place of abode in New York City for the years 2001 and 2002 and that he spent more than 183 days during each year within the State and City of New York. The only issue to address in this proceeding is whether petitioner's place of abode constituted a permanent place of abode as contemplated in Tax Law § 605(b)(1)(B) and 20 NYCRR 105.20(e)(1).

2. Petitioner was born in Ireland on April 23, 1973, and to this day he remains a citizen of Ireland. Petitioner attended The Queens University of Belfast, ultimately obtaining a Bachelor's Degree in Engineering in 1997. In 1995 and 1996 petitioner also studied business and management for three semesters at Albertson College of Idaho in Caldwell, Idaho.

3. After graduating from The Queens University of Belfast, petitioner was employed in Ireland until May 1998, when he accepted employment in the United States with Credit Suisse First Boston Corp. ("CSFB"). CSFB is a worldwide financial services company headquartered in Zurich, Switzerland, which advises clients, primarily corporate and institutional clients and high-net-worth individuals, in all aspects of finance, focusing mainly on investment banking, private banking and asset management. Petitioner has been continuously employed by CSFB from May 1998 to date at its offices located in New York City.

4. To work in the United States for CSFB it was necessary for petitioner to obtain an H1-B nonimmigrant worker visa. Petitioner's first H1-B visa was dated May 8, 1998 and

expired on February 14, 2001. Petitioner subsequently applied for and was granted a three-year extension of his H1-B visa, which extension expired on February 15, 2004. Petitioner's H1-B visa was extended a third time to August 29, 2005. CSFB was the sponsoring employer on all three of the H1-B visas issued to petitioner. On some undisclosed date subsequent to the years in dispute, petitioner started the process to obtain his permanent resident card by filing an Application for Alien Employment Certification with the U.S. Department of Labor.

5. Although petitioner's employment with CSFB began in May 1998, the record herein contains no employment contract or other documentary evidence detailing the nature of his employment, duties to be performed or length of employment for the period May 1998 to June 22, 2001. Petitioner's employment with CSFB was memorialized in a two-page letter agreement dated June 22, 2001, which document contained the following relevant terms:

I am pleased to confirm our offer to you to become a member of the Associate class of 2001 upon the completion of your third-year Analyst position at Credit Suisse First Boston Corporation (the "Company") (expected to occur June 30, 2001), working for the Asset Backed Securities Group. As an entering Associate you will receive a 2001 compensation package comprised of an annual base salary . . . and a 2001 guaranteed minimum incentive performance bonus . . . . In addition, you will receive, within thirty (30) days of your becoming an Associate, a one time lump sum payment . . . . Should you resign, give notice of your intention to resign, or have been terminated for "Cause" prior to June 30, 2002, the full amount of the lump sum payment will become due and payable to the Company within thirty (30) days of your departure date.

\* \* \*

If you accept this offer of employment you will continue to be an employee at will and you or the Company may terminate the employment relationship between you and it at any time with or without cause or notice, except for any notice required hereunder or pursuant to the Company's written policies applicable to you. You will also be subject to all other rules and policies applicable to employees of the Company at your level or in your position, including, without limitation, those summarized on the "Principles of Employment for US Employees" attached as Exhibit A.

6. Petitioner first started working for CSFB on May 18, 1998 and, as previously noted, he has been continuously employed by this company to the date of this hearing. Over his career with CSFB petitioner has held several titles and performed various duties and the following is a brief summary of the dates, titles and duties petitioner has held and performed during his employment with CSFB:

A. 5/98 - 5/99 - Technical Associate - worked with the global Y2K status reporting team collecting data, testing and developing strategies pertinent to Y2K risk, remediation and compliance.

B. 5/99 - 1/2000 - Business Analyst - worked on team implementing Y2K contingency planning and participated in monitoring the rollover into the year 2000.

C. 1/2000 - 5/2000 - Business Analyst - worked on a project to design and build a new application for monitoring principal, interest and dividend payments to fixed income and equity securities.

D. 5/2000 - 12/2001 - Collateral Analyst - worked in CSFB's Asset Finance Group analyzing loan or collateral data that would be used to securitize loans into new asset backed security bond issues and also started to structure mortgage backed deals.

E. 12/2001 - 12/2003 - Structurer - worked full-time structuring prime, home equity and Australian mortgage deals.

F. 12/2003 - Present - Structurer - moved to the trading desk that procured adjustable rate mortgage loans and converted them into bond issues. Petitioner headed the structuring effort on the desk and assisted in the trading, syndication and sale of the securities. Petitioner was also involved in buying large whole loan pools.

7. From the commencement of his employment with CSFB to the current date, petitioner has continuously resided in an apartment he maintained within the City of New York.

8. For the five-year period 1998 through 2002, petitioner filed income tax returns as a nonresident of New York State and New York City. Petitioner appended a statement to his New York personal income tax returns indicating that he was "on temporary assignment in the United States" and that he was taxable as a nonresident because he was not domiciled in New

York and his place of abode in New York could not be deemed a permanent place of abode since it was maintained only during a temporary stay for the accomplishment of a particular purpose.

9. In September 2004, the Division of Taxation (“Division”) commenced an audit of petitioner’s 2001 and 2002 income tax returns requesting that he submit evidence to establish that his residence in New York was temporary, for a fixed and limited period of time, and for the accomplishment of a particular purpose. Based on its review of the evidence provided by petitioner, the Division concluded that his place of abode in New York City for the years 2001 and 2002 was a permanent place of abode. Since it is undisputed that petitioner spent more than 183 days of each year in question within the State and City, the Division concluded that he was taxable as a resident individual for both State and City income tax purposes.

10. On November 15, 2004, the Division issued to petitioner two statements of proposed audit changes, one for each year in question, asserting that additional New York State and City income tax was due for the 2001 and 2002 tax years. Each Statement of Proposed Audit Changes contained the following explanation:

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. Your employment letter does not specify the term of your work assignment in New York. Therefore, your stay in New York was not for a fixed and limited period as [sic] required by New York State Regulations.

Visas are routinely changed and renewed, therefore they are not definitive in determining fixed and limited periods under this New York State Tax Regulation.

Second, the Regulations require that your work assignment be for the accomplishment of a particular purpose. The Department has defined

[sic] a particular purpose to be a specific assignment that has readily ascertainable and specific goals and conclusions. It is not in itself sufficient that you possess a particular expertise or specialized skill. The description of your assignment shows that you were employed to perform multiple tasks with generalized goals. Therefore, your stay in New York was not for the accomplishment of a particular purpose.

Accordingly, your stay in New York is not considered temporary, and your place of abode in New York State/New York City constitutes a permanent place of abode.

11. On January 10, 2005, the Division issued two notices of deficiency to petitioner asserting that he owed additional New York State and New York City taxes of \$5,817.88 for 2001 and \$3,867.27 for 2002. Each Notice of Deficiency also asserted that interest was due.

### ***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. In the instant matter, there is no dispute that petitioner was not a domiciliary of New York for the years at issue. There is also no question that petitioner maintained a place of abode in New York City during 2001 and 2002 and that he spent more than 183 days during each year within the State and City of New York. As a result, in order to conclude that petitioner was

taxable as a “resident individual” pursuant to Tax Law § 605(b)(1)(B), thus requiring him to pay New York personal income tax on income from all sources, the issue to resolve is whether petitioner maintained a *permanent* place of abode in New York City.

C. The Tax Law does not include a definition of the term “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 an 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. Resolution of the controversy at issue herein hinges solely on the determination of whether petitioner’s stay in New York was temporary for the accomplishment of a particular purpose as contemplated in 20 NYCRR 105.20(e)(1). If it is found that petitioner’s stay was temporary for the accomplishment of a particular purpose, then his place of abode in New York

was not permanent and he properly filed his income tax returns for 2001 and 2002 as a nonresident. Conversely, if it is determined that petitioner's stay in New York was not for a fixed or limited period to accomplish a particular purpose, then the Division correctly concluded that petitioner was taxable as a resident individual.

E. In *Matter of Evans* (Tax Appeals Tribunal, June 18, 1992, *confirmed* 199 AD2d 840, 606 NYS2d 404), the Tribunal, in determining whether the petitioner therein maintained a permanent place of abode in New York, cited to a now 66-year-old opinion of the Attorney General (1940 Opn Atty Gen, p 246, March 28, 1940), which opinion provided as follows:

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. Tax Law § 689(e) places the burden of proof on petitioner to show that his abode in New York City for the years in dispute was not a permanent place of abode (*see, Matter of El-Tersli v. Commr.*, 14 AD3d 808, 787 NYS2d 526). Petitioner has failed to meet his burden of proof. The employment letter between petitioner and CSFB dated June 22, 2001 contains no language to support that petitioner's employment was for a fixed and limited period to accomplish a specific purpose. To the contrary, the employment letter shows that petitioner was an at-will employee with no defined period of employment. Furthermore, a review of petitioner's assignments and duties with CSFB reveals that, for the years in question, his duties were general in nature. In fact, it appears that petitioner is on a career track at CSFB, and there

is simply no credible evidence to support that his work at CSFB was temporary and for the accomplishment of a particular purpose.

While it is true that petitioner's stay in New York was potentially limited to a definitive time period pursuant to the conditions set forth in his H1-B visa, this is but one factor to consider when determining if his stay in New York was temporary and for the accomplishment of a particular purpose. The importance of the time limitation placed on petitioner's stay in the United States by virtue of his H1-B visa status is diminished by the fact that a nonresident alien often proceeds from H1-B visa status to permanent resident status without any change in his or her employment and this is exactly the course that petitioner is on. Petitioner's overall conduct supports that his intention, during the years in question, was to remain in New York and that his place of abode in New York City was permanent and not intermittent or transitory. Petitioner has resided in New York State and City since 1998 and, having availed himself of the infrastructure and services provided by both the State and City, it is not unreasonable to expect him to pay taxes as a resident individual given the facts of this case. Since petitioner's abode in 2001 and 2002 was a permanent place of abode within the meaning and intent of Tax Law § 605(b)(1)(B) and 20 NYCRR 105.20(e)(1) and since petitioner spent more than 183 days of each year in New York State and New York City, the Division properly taxed petitioner as a resident of both the State and City for said years.

G. The petition of Patrick Gallagher is denied and the notices of deficiency dated January 10, 2005 are sustained, together with such additional interest as may be lawfully due and owing.

DATED: Troy, New York  
February 22, 2007

/s/ James Hoefler  
PRESIDING OFFICER