STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SETHURAMAN RAMACHANDRAN	:	SMALL CLAIMS DETERMINATION DTA NO. 821124
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, 2002 and 2003.	:	

Petitioner, Sethuraman Ramachandran, 60 Fairfield Way, Commack, New York 11725, 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, 2002 and 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York, on October 19, 2006 at 9:00 A.M. Petitioner appeared by Robert Upbin, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Hema Natarajan).

Since neither party elected to reserve time to submit post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

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, Sethuraman Ramachandran, was not domiciled within the State and City of New York for all three 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, 2002 and 2003 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 India on February 18, 1972, and to this day he remains a citizen of India. Petitioner was educated in India, ultimately obtaining a Bachelors Degree in Engineering, with a major in computer science, in July 1994 from Bangalore University.

3. Upon graduation from Bangalore University, petitioner was employed in India for a couple of years and then in the United Kingdom until January 1998. Effective January 30, 1998, petitioner began employment in the United States with IT Transfer International, Inc. ("ITTI"), a computer consulting firm located at 159 East 30th Street, New York, New York.

4. Petitioner's employment with ITTI was memorialized in a one-page Contractual Agreement and Offer of Employment dated July 9, 1997, which document contained the following terms:

> I am pleased to extend to you an offer of employment with IT Transfer International, Inc. (ITTI) for a temporary period of 3 years as Systems Consultant. Your assignment, starting upon approval of the visa petition, will be with our client, Lever Brothers, at their offices at 390 Park Avenue in New York City. You will initially be part [of] a project to develop and enhance Lever's "Global Distribution System," described to you in earlier

> discussions. The client would like you to start on or before the project start date in early September, 1997 or upon approval of your H1-B visa petition. Your projected initial employment status will be on the H1-B Visa of ITTI. Kindly make tentative plans accordingly.

5. To work in the United States for ITTI it was necessary for petitioner to obtain an H1-B nonimmigrant worker visa. Petitioner's first H1-B visa was valid for the period August 1, 1997 through February 28, 2000. Petitioner subsequently applied for and was granted a three-year extension of his H1-B visa, which extension expired on February 28, 2003. Petitioner's H1-B visa was extended two additional times, with expiration dates of January 30, 2004 and January 30, 2005. ITTI was the sponsoring employer for all four of the H1-B visas issued to petitioner.

6. On January 17, 2003, 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. By letter dated June 23, 2006, the U.S. Department of Labor indicated that petitioner's Application for Alien Employment Certification "has been certified." On Part B, question 10 of the Application for Alien Employment Certification, petitioner checked the box indicating that "Alien is in the United States and will apply for adjustment of status to that of a lawful permanent resident in the office of the Immigration and Naturalization Service . . . ." Petitioner has not yet, as of the date of the small claims hearing, received his permanent resident card.

7. In the Application for Alien Employment Certification dated January 17, 2003, ITTI described petitioner's duties as "analyze, design, reengineer, develop, customize, adapt, implement, provide, and test solutions and processes using JDE (an Enterprise Resource Planning software known also as J. D. Edwards) and EDI." It was stated in the application that petitioner would perform these duties at client sites in New York and other unanticipated places in the United States.

8. Typically, ITTI would enter into a consulting agreement for a defined time period, generally no longer than a one-year time frame, with one of its clients to provide on-site computer consulting services. As noted previously, petitioner's employment with ITTI commenced on January 30, 1998 and he has remained continuously employed with ITTI to the date of the hearing, a period in excess of eight and one-half years. The following table provides pertinent details concerning the various projects that petitioner was assigned to during his employment with ITTI in the United States:

PERIOD	***LENGTH***	***CLIENT***	***LOCATION***
01/30/98 - 02/28/98	1 Month	Toyota Tsusho	New York, NY
03/01/98 - 07/31/01	41 Months	Danone International Brands	Stanford, CT
08/01/01 - present	63 Months	Henry Schein Inc.	Melville, NY

9. Petitioner's Contractual Agreement and Offer of Employment with ITTI dated July 9, 1997, referred to in Finding of Fact "4", indicates that petitioner's employment was for a temporary period of three years and that petitioner was to be assigned to Lever Brothers, a client of ITTI located in New York City. As can be seen from the above table, petitioner was never assigned by ITTI to Lever Brothers. The record herein contains no employment contracts or other documents executed by petitioner and ITTI with respect to his assignments to Toyota Tsusho, Danone International Brands and Henry Schein Inc.

10. During the years in question petitioner maintained an apartment located at 57-02 Van Horn Street, Apt. 1F, Elmhurst, New York 10009. Petitioner has continuously maintained this apartment, located within the City of New York, as his residence until some undisclosed date in 2006, when he moved to his current address in Commack, New York, a location outside New York City.

11. For the six years 1998 through 2003, 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.

12. In September 2004, the Division of Taxation ("Division") commenced an audit of petitioner's 2001, 2002 and 2003 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, 2002 and 2003 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.

13. On December 6, 2004, the Division issued to petitioner three 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, 2002 and 2003 tax years. Each Statement of Proposed Audit Changes contained the following explanation:

> Section 105.20(e)(1) of the regulations contemplates that the phrase particular purpose means that the individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to an assignment with general goals and conclusions. An assignment to New York for general duties would not constitute a particular purpose even if the individual's assignment to New York were related to some specialized skill or attributes that the individual may possess.

> Section 105.20(e)(1) of the Regulations contemplates that the term temporary means a fixed and limited period as opposed to a stay of indefinite duration. An employee's stay in New York will be presumed to be temporary if the duration of the stay in New York is reasonably expected to last for three years or less, in the absence of facts and circumstances that would indicate otherwise. In the alternative, a stay is of indefinite duration if the stay is realistically expected to last for more than three years, even if it does not actually exceed three years.
>
> An individual cannot have multiple or consecutive fixed and limited periods nor multiple or consecutive particular purposes. Therefore, a change in assignments would indicate that the individual is no longer here for a fixed and limited period nor for the accomplishment of a particular purpose.
>
> Based on the above, your New York tax liability has been recomputed as a full year New York State and New York City resident.

14. On January 31, 2005, the Division issued three notices of deficiency to petitioner asserting that he owed additional New York State and New York City taxes of $8,005.70 for 2001, $3,494.35 for 2002 and $3,802.25 for 2003. 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 the 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 all three years 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 regulations 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 individuals'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, 2002 and 2003 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 Op. 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 record contains only one employment contract between petitioner and ITTI, which document references a client of ITTI that petitioner never performed services for. There are no

employment contracts or other written documents detailing the terms of petitioner's employment with the three clients of ITTI for whom he actually performed services. There is simply no credible evidence in the record to support that petitioner's employment at ITTI was temporary and for the accomplishment of a particular purpose. While it is true that petitioner's stay in the 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. 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.

Further militating against a finding that petitioner's stay in New York was temporary and for the accomplishment of a particular purpose is the fact that upon completion of one assignment petitioner was immediately reassigned by ITTI to another client at a different job site. Such course of action suggests that petitioner's employment was not temporary and for the accomplishment of a particular purpose. Moreover, the length of time spent by petitioner at Danone International Brands (almost three and one-half years) and at Henry Schein Inc. (more than five years) strongly supports that petitioner's stay in New York was not temporary and for the accomplishment of a particular purpose. The only evidence that might support that petitioner's presence in New York was temporary was the time limitation placed on his stay in the United States by virtue of his H1-B visa status. However, as noted previously, this is but one factor to consider, and its importance 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 employment and this is exactly the course that petitioner is on. 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, 2002 and 2003 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 Sethuraman Ramachandran is denied and the notices of deficiency dated January 31, 2005 are sustained, together with such additional interest as may be lawfully due and owing.

DATED: Troy, New York
January 18, 2007

/s/ James Hoefer
PRESIDING OFFICER