STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN AND JANINE ZANETTI	:	DETERMINATION DTA NO. 824337
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 2005 and 2006.	:	

Petitioners, John and Janine Zanetti, filed 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 2005 and 2006.

On August 12, 2012 and September 17, 2012, petitioners, appearing by Ronald Krieger, Esq., and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs submitted by December 28, 2012, which date commenced the six-month period for the issuance of this determination. After review of the documents and arguments submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners have shown that they were not present in New York State for more than 183 days during 2006 and therefore not taxable as resident individuals for that year pursuant to Tax Law § 605(b)(1)(B).

II. Whether petitioners have shown that penalties imposed herein pursuant to Tax Law § 685(b) should be abated.

FINDINGS OF FACT [1]

1. Petitioners, John and Janine Zanetti, filed joint New York State nonresident income tax returns (Form IT-203) for the 2005 and 2006 tax years.[2] Both returns indicated petitioners' residence as Delray Beach, Florida, where they maintained a permanent place of abode. During these years, petitioners also maintained a permanent place of abode in Manhasset, New York. Nevertheless, petitioners denied on their 2006 New York State return that they maintained living quarters in New York State.

2. On June 11, 2010, following an audit, the Division of Taxation (Division) issued to petitioners Notice of Deficiency number L-034104598, which asserted additional New York State personal income tax due of $95,002.00 for the year 2005 and $134,640.00 for the year 2006. The Division determined that petitioners were liable for the additional tax as they maintained a permanent place of abode and spent in excess of 183 days in New York State in each of 2005 and 2006 and, therefore, were statutory residents pursuant to Tax Law § 605(b)(1)(B). The Notice of Deficiency also asserted interest and penalties for negligence pursuant to Tax Law § 685(b) for each tax year.

3. Pursuant to a Conciliation Order dated February 11, 2011 and issued by the Division's Bureau of Conciliation and Mediation Services, petitioner's 2005 New York State income tax

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[1]On October 10, 2008, the parties entered into a written stipulation of facts, the relevant portions of which have been incorporated into the following Findings of Fact.

[2]Petitioner Janine Zanetti's name appears herein by virtue of having filed joint federal and New York State personal income tax returns with her husband, petitioner John Zanetti. Unless specified or required by context, references using the singular term "petitioner" shall mean petitioner John Zanetti.

deficiency was canceled. The statutory notice, including penalties, however, was sustained with regard to the deficiency for 2006.

4. The parties agree that petitioner spent 172 complete days outside of New York State in 2006. They also agree that petitioner was in New York State for 167 days.

5. There are 26 other days in 2006 that are in dispute in this matter. They are January 2 and 15; February 4, 17, and 22; March 1, 10, 17, and 26; April 7 and 16; May 2 and 14; June 1, 10, 14, and 18; July 1 and 16; September 24; October 6 and 18; November 2 and 19; and, December 3 and 10. The parties agree that on each of the 26 days, petitioner either arrived in or departed from New York State by private jet. The arrival and departure times varied throughout the period. They further agree that when petitioner arrived in New York State, he stayed at his Manhasset residence, and on those days that he departed New York State, he left from his Manhasset residence.

6. Based on the flight records from the private jet company, petitioner was out of New York State a total of 334.3 hours during the 26 days at issue.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioners assert that they were not statutory residents of New York State in 2006 because they spent more than 183 days out of New York. They maintain that a "calendar day" consists of 24 hours pursuant to section 19 of the General Construction Law and that the Appellate Division overlooked this statute when rendering its seminal decision in ***Matter of Leach v. Chu*** (150 AD2d 842, 540 NYS2d 596 [3d Dept 1989], ***appeal dismissed*** 74 NY2d 839, 546 NYS2d 344 [1989]). Thus, petitioners argue that each of the 26 days in issue must be considered outside New York as petitioner was not in New York for a 24-hour period on that particular day. Alternatively, petitioner argues that he was out of New York State a total of 334.3

hours during the 26 days at issue, or 13.929 days, which when combined with the previously agreed upon 172 non-New York days, placed him out of state for more than 183 days during 2006.

8. On the other hand, the Division maintains that petitioners were statutory residents during 2006 as they maintained a permanent place of abode and spent more than 183 days in New York State under the applicable case law. Moreover, the Division asserts petitioners failed to demonstrate reasonable cause for abatement of penalties.

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes New York State personal income tax on "resident individuals." An individual may fall within the definition of a resident as a domiciliary or as a "statutory resident," defined in Tax Law § 605(b)(1)(B) as someone:

> 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. 20 NYCRR 105.20[c] defines a day spent in New York State as follows:

> [i]n counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State . . . .

Tax Law § 697(a) empowers the Commissioner of Taxation and Finance to make such rules and regulations he may deem necessary to enforce the provisions of Article 22 and an interpretation or construction of a statute by an agency charged with its administration will be upheld if it is not irrational or unreasonable (***Matter of Lumpkin v. Dept. of Social Services***, 45 NY2d 351, 408 NYS2d 421, 423 [1978], ***appeal dismissed*** 439 US 1040, 58 L Ed 2d 700

[1978]). The definition of a day spent within New York State, as found in 20 NYCRR 105.20[c], was upheld by the Appellate Division in ***Matter of Leach v. Chu***, where the court specifically found that "it cannot be said that [the Division's] regulation was irrational or unreasonable."

C. In the instant matter the parties agree that petitioners maintained a permanent place of abode in New York State throughout 2006. Additionally, petitioners concede that they were present in New York State for 167 entire days and a portion of each of 26 more during that year. The issue in this case is whether each of the 26 partial days constitutes a day spent in New York State for purposes of Tax Law § 605(b)(1)(B). Under the relevant case law, they do.

D. On the question of statutory residency, it is petitioner's burden to prove by clear and convincing evidence that he was not present in New York State or City for more than 183 days during 2006 (***see Matter of Kornblum v. Tax Appeals Tribunal***, 194 AD2d 882, 599 NYS2d 158 [1993]; ***Matter of Smith v. State Tax Commn.***, 68 AD2d 993, 414 NYS2d 803 [1979]). In attempting to meet this burden, petitioner concedes that he was present in New York for part of each of the 26 days in issue, but that none should be considered a day spent in New York pursuant to section 19 of the General Construction Law. That statute states that "[a] calendar day includes the time from midnight to midnight." Petitioners contend that the Division's regulation defining a day spent within New York State is contrary to the aforementioned section of the General Construction Law and that the statute must control. Moreover, petitioners assert that when interpreting the regulation, the Appellate Division in ***Matter of Leach v. Chu*** simply did not address, and therefore must have overlooked, the General Construction Law.

Petitioners' contention is rejected. The issue in this case, i.e, whether mere presence in New York constitutes a day spent within New York for purposes of Tax Law § 605(b)(1)(B), was the exact issue considered by the Appellate Division in ***Matter of Leach v. Chu***. Although the court did not directly reference the General Construction Law in reaching its decision, it

addressed the same language found in that statute's definition of "calendar day" and pointed to by petitioners:

> [i]t has been noted that the definition of a day is commonly considered to be that period of time running from midnight to midnight [citation omitted]. However, a day is also defined to include "any part of [a] period of 24 hours from midnight to midnight" [citation omitted], as well as "the hours or the daily recurring period established by usage or law for work" [citation omitted]. In our view, in this case the Tax Commission properly elaborated on the word "days" in Tax Law § 605(b)(1)(B) by defining a day as "any part" of a day . . . .

Matter of Leach v. Chu is the controlling law on the issue herein, and has consistently been followed by the Tribunal on numerous occasions (***see Matter of Robertson***, Tax Appeals Tribunal, September 23, 2010; ***Matter of Holt***, Tax Appeals Tribunal, July 17, 2008; ***Matter of Rubin***, Tax Appeals Tribunal, November 10, 2004, ***confirmed*** 29 AD3d 1089 [2006]; ***Matter of Donovan***, Tax Appeals Tribunal, February 26, 2004; ***Matter of Kornblum***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 194 AD2d 882 [1993]). Given the foregoing precedent, the principle of stare decisis dictates that petitioners' argument must fail and all 26 days in issue be deemed days spent within New York (***see Matter of NewChannels Corp.***, Tax Appeals Tribunal, July 29, 1999). As a result, it is concluded that petitioners were New York State residents in 2006.

E. Petitioners' alternative argument for an additional 13.929 non-New York days based on an aggregation of the total hours spent out of New York State during the 26 days in issue, although creative, does not succeed for the same reason. Petitioner had a presence in New York State on each of the 26 days regardless of the total number of hours spent out of New York on those days.

F. It is also important to note that petitioner's time in New York State on the 26 days in issue was not subject to the exception for mere travel. That exception provides that the general

rule of any part of a day in New York counting as a New York day does not apply where presence in New York is "solely for the purpose of boarding a plane . . . for travel to a destination outside New York" (20 NYCRR 105.20[c]). Clearly, the exception does not apply where an individual leaves from or returns to his New York home, as is the case here.

G. In their brief, petitioners concede the imposition of penalties if the underlying tax is sustained. Furthermore, petitioners' nonresident tax return for the year at issue, which reports that they did not maintain living quarters in New York when in fact they did, supports the imposition of penalties. Accordingly, the penalties imposed herein are sustained.

H. The petition of John and Janine Zanetti is denied and the notice of deficiency dated June 11, 2010, as modified pursuant to the Conciliation Order dated February 11, 2011, is sustained.

DATED: Albany, New York
May 23, 2013

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE