STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LESLIE MAYS	:	DETERMINATION DTA NO. 826546
for Redetermination of a Deficiency or for Refund of New York State and City Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2009 through 2011.	:	

Petitioner, Leslie Mays, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2009 through 2011.

A formal hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on October 23, 2015 at 11:00 a.m., with all briefs to be submitted by April 11, 2016, which date commenced the six-month period for issuance of this determination. Petitioner appeared by the Law Office of Larry Kars, PC (Larry Kars, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter Ostwald, Esq., of counsel).

ISSUE

Whether petitioner is liable as a statutory resident of New York City for the year 2011.

FINDINGS OF FACT

1. On or about April 5, 2013, the Division of Taxation (Division) commenced an income tax audit of petitioner, Leslie Mays, for the tax years 2008 through 2011.

2. By letter dated April 8, 2013, the auditor contacted petitioner informing her of the audit of her income tax returns for the years 2008 through 2011. Such letter also requested certain pertinent documentation, which included the Nonresident Questionnaire.

3. At the conclusion of the audit, a Notice of Deficiency, #L-040090512, was issued to petitioner dated September 12, 2013 asserting additional income tax due plus penalty and interest. Petitioner was assessed based upon the Division's finding that she was domiciled in New York City and, alternatively, maintained a permanent place of abode and was present within the city in excess of 183 days, which makes her liable as a statutory resident for income tax purposes for the years 2009 through 2011. The Division concluded that no additional tax liability was warranted for the year 2008.

4. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. By conciliation order CMS No. 260024, dated August 29, 2014, the Division canceled the assessment for the years 2009 and 2010, but sustained tax, penalty and interest for the tax year 2011.[1]

5. Petitioner filed a timely petition with respect to the remaining liability for the tax year 2011. The Division maintained that petitioner was liable as domiciliary and, alternatively, as a statutory resident for the year 2011. It is undisputed that petitioner was within New York City in excess of 183 days during the year 2011.

[1] The conciliation order incorrectly states that the tax due is $84,705.00, plus penalty and interest. The tax liability for 2011 listed on the notice is $83,876.00, plus penalty and interest. This tax amount is the correct number, as confirmed by the auditor in her affidavit (Exhibit I, ¶ 13).

6. A formal hearing was held and petitioner appeared and testified on her own behalf. The Division's cross-examination of petitioner focused on the living quarters she maintained within New York City throughout the year 2011.

7. In its brief in opposition to the petition, the Division has conceded that petitioner was not domiciled in New York City for 2011. Therefore, the sole remaining issue is whether petitioner was a statutory resident for the year 2011.

8. Petitioner worked for Pfizer in New York City during the tax year 2008. At some point during the year, her employment was eliminated.

9. On October 28, 2010, petitioner entered into an employment contract with Avon Products, Inc., with an anticipated start date of January 4, 2011. Petitioner's position with the company was Vice President, Diversity and Inclusion in the Global Human Resources Department of Avon Products, Inc. (Avon). This offer of employment was not for a defined, limited duration.

10. Petitioner participated in Avon's relocation program, which provided her suitable options for apartments in New York City. Ultimately, petitioner chose an apartment in the Marc, which is located at 260 West 54th Street, New York, New York. Apartment 16A was a fully-furnished apartment with one bedroom, bathroom, living/dining room and kitchen. No copy of a lease was provided. Petitioner testified that there was no lease. The original arrangement for the apartment was for 90 days, or approximately until the end of April 2011.

11. Petitioner had exclusive use of this apartment for the duration of her stay at the Marc. Petitioner testified that her stay at this apartment was temporary in nature until such time she could find suitable permanent housing either within or outside New York.

12. On April 6, 2011, Antonio D. Martin, petitioner's then fiancé, entered into a lease on a two-bedroom apartment located at 525 East 72nd Street, New York, New York. The lease term was from May 16, 2011 through May 31, 2012.

13. Petitioner contacted Pat Molitor, Relocation Service Manager, by email dated April 6, 2011, to inform her about the apartment located on 72nd Street. Petitioner inquired whether she might be able to give her 30-day notice to the Marc mid month, rather than at the end of April, since the lease for the 72nd Street apartment was effective beginning May 16, 2011. The relocation manager stated that she would extend petitioner's living arrangement at the Marc until the end of May. Petitioner moved into the apartment at 525 East 72nd Street on June 1, 2011. There is no dispute that this apartment was a permanent place of abode.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1)(A) and (B) and New York City Administrative Code § 11-1705(b)(1)(A) and (B) set forth the definition of a New York State and New York City resident individual for income tax purposes.

A resident individual means an individual:

> (A) who is domiciled in this state [city], unless (i) he maintains no permanent place of abode in this state [city], maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state [city] . . ., or
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> (B) who is not domiciled in this state [city] but maintains a permanent place of abode in this state [city] and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state [city], unless such individual is in active service in the armed forces of the United States.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State or city, namely (A) the domicile basis or (B) the statutory

residence basis, i.e., the maintenance of a permanent place of abode in the state or city and physical presence in the state or city on more than 183 days during a given taxable year.

C. As there is no dispute that petitioner was physically present within the city for more than 183 days, the sole issue in this case involves whether petitioner maintained a permanent place of abode in New York City during 2011.

D. Permanent place of abode is defined in the Division's regulations at 20 NYCRR 105.20(e)(1) as:

> [a] *permanent place of abode* means a dwelling place of a permanent nature 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 supplied).

In ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840 [1993]), the Tax Appeals Tribunal (Tribunal) reasoned that:

> Determinations of a taxpayer's status as a resident or nonresident indivisual for purposes of the personal income tax have long been based on the principle that the result "frequently depends on a variety of circumstances, which differ as widely as the peculiarities of individuals" (***Matter of Newcomb***, 192 NY 238, 250). Given the various meanings of the word "maintain" and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the "variety of circumstances" inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one"s living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise.
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> 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 required that the

> place of abode be owned, leased or otherwise based upon some legal right in order for it to be permanent. . . . 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 deleted]. For example, it seems clear that an apartment leased by one individual and shared with other unrelated individuals may be the permanent place of abode of those who are not named on the lease, given other appropriate facts.

E. There is no dispute that petitioner's apartment was permanent in nature. The apartment contained a bedroom, bathroom, living/dining room and a kitchen. Moreover, petitioner had exclusive access to this apartment from January 29, 2011 through the end of May 2011. Petitioner argues in her brief that, during the period January 29 through the end of May, she stayed at the Marc for only 79 days. This argument does not establish that anyone else stayed at the apartment when she was out of town or that, because she did not spend every day during this time period at the Marc, her use was not exclusive.

Petitioner argues that her living in the apartment was temporary in nature, since the duration of the rental was for a fixed time frame. Petitioner points to language in the correspondence between her and Avon wherein it was clearly stated that her living arrangement at the Marc was temporary.

A permanent place of abode means a dwelling place of a permanent nature (***see*** 20 NYCRR 105.20[e][1]). Clearly, the apartment at the Marc was permanent: bedroom, bathroom, living/dining room and kitchen. Petitioner's belief that her living arrangement was temporary based upon the agreement with Avon is misplaced. The regulation at 20 NYCRR 102(6)(e) provides that a place of abode "is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose." The regulation's use of the

word *temporary* does not apply to the intention of living in a certain, physical living space as temporary, but rather, a taxpayer who travels to New York for a temporary stay for the accomplishment of a particular purpose. Clearly, petitioner accepted employment in New York City and such employment did not have a certain, fixed duration. Therefore, her travel to New York City was not temporary within the meaning of the regulation, despite her intention to remain at the Marc for a limited time.

Petitioner also asserts that she did not maintain the apartment at the Marc. This argument is without merit. Petitioner had exclusive use of the apartment for the entire length of her stay. There was no suggestion that she was prohibited from using it at any time between January 29-May 31, 2011. In fact, at one point, after Mr. Martin secured the apartment located on West 72nd Street, petitioner inquired from Avon whether she could be released from the living arrangement at the Marc prior to the end of May. This indicates that her use was exclusive. Also, she kept her clothes and personal belongings there. No lease was offered into evidence, as petitioner stated the company did not create leases. However, as the Tribunal has held, a place of abode need not be owned, leased or otherwise based upon some legal right in order for it to be permanent (***Matter of Evans***).

F. Since it has been determined that petitioner maintained a permanent place of abode at the Marc and, subsequently, at the apartment located on 72nd Street, it needs to be determined whether petitioner maintained a permanent place of abode for substantially all of the tax year.

The regulation at 20 NYCRR 105.20 defines resident individual. Section 105.20(a)(2), as applicable to the facts herein, states:

> any individual (other than an individual in active service in the Armed Forces of the United States) who is not domiciled in New York State, but who maintains a

> permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.

Although the statute does not numerically define what constitutes *substantially all of the taxable year,* the Audit Guidelines indicate a length of time in excess of 11 months. In this case, petitioner maintained a permanent place of abode within New York City continuously from January 29 through December 31 which is 11 months and 3 days. It is concluded that this constitutes substantially all of the taxable year (***cf Matter of Tweed***, Tax Appeals Tribunal, May 23, 1996 [wherein the Tribunal determined maintenance of a permanent place of abode for one month is not substantially all of the tax year]). Petitioner accepted employment for Avon located in New York City. Such employment was not limited in duration. Petitioner initially lived at the Marc until she found suitable living arrangements. As such, it is determined that petitioner was liable as a statutory resident for the tax year 2011.

G. Although not addressed at the hearing or in her brief in support, petitioner argues in her reply brief that she should not be liable for negligence penalties imposed because she hired an accountant to file her returns. This argument is without merit. It is a well-settled principle that each taxpayer has a nondelegable duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause (***Matter of McGaughey***, Tax Appeals Tribunal, March 19, 1998, ***confirmed*** 268 AD2d 802 [2000]).

H. The petition of Leslie Mays is denied, and the Notice of Deficiency, #L-040090512, dated September 12, 2013 is modified, in accordance with the conciliation order, such that the

assessment is reduced to reflect additional income tax, penalty and interest for only the tax year 2011.

DATED: Albany, New York
October 6, 2016

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE