STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SEAN AND FABIANA LYNCH	:	DETERMINATION DTA NO. 830686
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 2015 through 2018.	:	

Petitioners, Sean and Fabiana Lynch, filed a petition for a redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for years 2015 through 2018.

A formal hearing by videoconference was held before Barbara J. Russo, Administrative Law Judge, on October 5, 2023, at 10:30 a.m., with the final brief to be submitted by January 25, 2024, which date began the six-month period for the issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether petitioners have met their burden of proving they qualify as nonresidents pursuant to Tax Law § 605 (b) (1) (A) (ii).

FINDINGS OF FACT

1. In November 2019, the Division of Taxation (Division) commenced a field audit of petitioners, Sean and Fabiana Lynch, for New York personal income tax for the years 2015

through 2018 (years at issue or audit years). At the time of the commencement of the audit, petitioners had not filed New York income tax returns for the years at issue.

2. During the course of the audit, petitioners filed returns for the years at issue as follows:

2015: On January 13, 2020, petitioners each filed nonresident and part-year resident income tax returns for the year 2015 as married filing separate returns. Mr. and Mrs. Lynch both reported their mailing address at their home in Warwick, New York. Mr. Lynch's return listed "NR" for New York State county of residence and school district. Mr. Lynch checked the box indicating he lived outside New York State and received no income from New York State sources during the nonresident period, and checked the box indicating that he or his spouse maintained living quarters in New York State in 2015. Mr. Lynch reported federal adjusted gross income of $1,618,282.00 in the federal amount column, and zero in the New York State column. He reported no New York taxable income and no New York State tax due.

Mrs. Lynch's return listed "Oran" and Warwick Valley for New York State county of residence and school district, respectively. Mrs. Lynch reported that she moved into New York State on November 1, 2015 and lived in New York State on the last day of the tax year.[1] The section of the return asking if she or her spouse maintained living quarters in New York State for 2015 was left blank. Mrs. Lynch reported federal and New York adjusted gross income of $5,238.00 in both the federal and New York State amount columns, claimed a standard deduction of $7,900.00, and reported no taxable income and no New York State tax due for 2015.

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[1] Although Mrs. Lynch reported on her 2015 return that she moved into New York State on November 1, 2015, Mr. Lynch testified that she moved back to New York on May 25, 2015 and began working in November of that year. Attached to Mrs. Lynch's 2015 – 2018 returns are forms W-2, wage and tax statements, reporting income from Pope John XXIII Regional High School in New Jersey.

2016: On January 13, 2020, Mr. Lynch filed a nonresident and part-year resident income tax return for the year 2016, reporting his filing status as married filing separate return. Mr. Lynch reported a mailing address in Warwick, New York. Mr. Lynch's return listed "NR" for New York State county of residence and school district. Mr. Lynch checked the box indicating he lived outside New York State and received no income from New York State sources during the nonresident period, and checked the box indicating that he or his spouse maintained living quarters in New York State in 2016. Mr. Lynch reported federal adjusted gross income of $1,508,706.00 in the federal amount column, and zero in the New York State column. He reported no New York taxable income and no New York State tax due.

On January 13, 2020, Mrs. Lynch filed a resident income tax return for the year 2016, reporting her filing status as married filing separate return. Mrs. Lynch reported a mailing address in Warwick, New York, and listed "Oran" and Warwick Valley for New York State county of residence and school district, respectively. Mrs. Lynch reported federal and New York adjusted gross income of $44,038.00, claimed a standard deduction of $7,950.00, reported taxable income of $36,088.00, and reported New York State tax of $1,020.00 for 2016.

2017: On June 22, 2020, Mr. Lynch filed a nonresident and part-year resident income tax return for the year 2017, reporting his filing status as married filing separate return. Mr. Lynch reported a mailing address in Warwick, New York. Mr. Lynch's return listed "NR" for New York State county of residence and school district. Mr. Lynch checked the box indicating he lived outside New York State and received no income from New York State sources during the nonresident period, and checked the box indicating that he or his spouse maintained living quarters in New York State in 2017. Mr. Lynch reported federal adjusted gross income of

$1,516,790.00 in the federal amount column, and zero in the New York State column. He reported no New York taxable income and no New York State tax due.

On June 22, 2020, Mrs. Lynch filed a resident income tax return for the year 2017, reporting her filing status as married filing separate return. Mrs. Lynch reported a mailing address in Warwick, New York, and listed "Oran" and Warwick Valley for New York State county of residence and school district, respectively. Mrs. Lynch reported federal and New York adjusted gross income of $25,572.00, claimed a standard deduction of $8,000.00, reported taxable income of $17,572.00, and reported New York State tax of $260.00 for 2017.

2018: On June 22, 2020, Mr. Lynch filed a nonresident and part-year resident income tax return for the year 2018, reporting his filing status as married filing separate return. Mr. Lynch reported a mailing address in Warwick, New York. Mr. Lynch's return listed "NR" for New York State county of residence and school district. On part G of the return, Mr. Lynch entered February 8, 2018, as the date he moved into or out of New York State. Mr. Lynch checked the box indicating that he or his spouse maintained living quarters in New York State in 2018. Mr. Lynch reported federal adjusted gross income of $1,122,411.00 in the federal amount column, and $238,759.00 in the New York State column. He reported New York taxable income of $1,114,411.00 and New York State tax of $16,237.00.

On June 22, 2020, Mrs. Lynch filed a resident income tax return for the year 2018, reporting her filing status as married filing separate return. Mrs. Lynch reported a mailing address in Warwick, New York, and listed "Oran" and Warwick Valley for New York State county of residence and school district, respectively. Mrs. Lynch reported federal and New York adjusted gross income of $34,483.00, claimed a standard deduction of $8,000.00, reported taxable income of $26,483.00, and reported New York State tax of $324.00 for 2018.

3. Prior to 2011, petitioners filed New York State resident income tax returns. For 2011, petitioners filed as part-year residents of New York and, for 2012 through 2014, they filed as nonresidents.

4. The Division conducted a prior audit of petitioners for the years 2012 and 2013. During that time, Mr. Lynch was abroad on a foreign assignment in London, United Kingdom, for SFM UK Management LLP (SFM UK) and the Division determined that petitioners qualified as part-year residents for 2011 and nonresidents for 2012 and 2013 pursuant to Tax Law § 605 (b) (1) (A) (ii).

5. Petitioners did not sell their home in Warwick, New York, during the time that Mr. Lynch worked in London and continuously maintained their home in Warwick, New York, during the years at issue.

6. Mrs. Lynch returned to New York on May 25, 2015, and did not return to the United Kingdom thereafter.

7. Mr. Lynch worked for SFM UK in London from July 2011 through December 2017. He worked for Key Square Capital Management in New York from March 2018 to April 2019.

8. Mr. Lynch completed a nonresident audit questionnaire during the audit for the years at issue, wherein he stated that he relocated to London July 2011 to December 2017 for work reasons with SFM UK, that Mrs. Lynch left London for New York on May 25, 2015 and did not return to London, that he owned living quarters in Warwick, New York, that he never worked in SFM UK's New York office, and that he was physically present in New York for 18 days in 2014, 22 days in 2015, 9 days in 2016, 36 days in 2017, and returned to New York from the United Kingdom on February 21, 2018.

9. Based on information obtained during the audit, the Division determined that petitioners qualified as nonresidents of New York pursuant to Tax Law § 605 (b) (1) (A) (ii) from January 1, 2015, through July 29, 2015, were part-year residents from July 30, 2015, through December 31, 2015, and were full year residents of New York State for 2016 through 2018. The Division determined that beginning July 30, 2015, petitioners no longer qualified as nonresidents pursuant to Tax Law § 605 (b) (1) (A) (ii) because Mrs. Lynch returned to the United States on May 25, 2015, and beginning on July 30, 2015, she was present in New York for more than 90 days.

10. The Division issued petitioners a notice of deficiency, assessment number L-052537719, dated December 14, 2020 (notice), asserting tax of $281,906.00 plus interest for the years 2015 through 2018. The notice applied a payment/credit of $5,122.00.

11. Petitioners filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) protesting the notice. By order dated July 23, 2021 (CMS No. 000326916), the conciliation conferee recomputed the amount of tax due to $263,960.00, plus interest.

12. Petitioners were not legally separated during the years at issue.

SUMMARY OF PETITIONERS' POSITION

Petitioners do not dispute the findings made by the Division during the audit and solely argue that Mr. Lynch should qualify as a nonresident under Tax Law § 605 (b) (1) (A) (ii). Petitioners contend that living 3,500 miles apart was a "separation by fact," which should be treated the same as a legal separation. Petitioners ask the Division of Tax Appeals to add the words "or proof of separation by fact" to expand the interpretation of the language of Tax Law § 605 (b) (1) (A) (ii) (II).

CONCLUSIONS OF LAW

A. The sole question at issue is whether a "separation by fact" should be treated the same as a legal separation for purposes of qualifying as a nonresident under the exclusion to the taxation of domiciliaries contained in Tax Law § 605 (b) (1) (A) (ii). Tax Law § 605 defines a resident individual, in relevant part, as:

> "an individual: (A) who is domiciled in this state, unless (i) the taxpayer 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 (ii) (I) within any period of five hundred forty-eight consecutive days the taxpayer is present in a foreign country or countries for at least four hundred fifty days, and (II) during the period of five hundred forty-eight consecutive days the taxpayer, the taxpayer's spouse **(unless the spouse is legally separated)** and the taxpayer's minor children are not present in this state for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which the period of five hundred forty-eight consecutive days begins and the nonresident portion of the taxable year with or within which the period ends, the taxpayer is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in that portion of the taxable year bears to five hundred forty-eight[.]" (Tax Law § 605 [b] [1] [emphasis added]).

Petitioners' historic domicile is New York and they maintained their home in Warwick, New York, during the years at issue. Petitioners do not contend that they changed their domicile from New York to London.[2] Rather, petitioners request that the statute be read as if the words "or proof of separation by fact" were included in the language of Tax Law § 605 (b) (1) (A) (ii) (II), such that Mr. Lynch would qualify as a nonresident after Mrs. Lynch returned to and was present in New York for more than ninety days, despite not being legally separated.

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[2] Petitioners did not raise the issue of a change of domicile, nor present evidence or arguments to that effect. Indeed, Mrs. Lynch's brief confirms that petitioners did not intend to change their domicile from New York to London, as she states that "[w]hen Sean decided to move to London, I asked him to promise that we would maintain our home in Warwick [New York]. I emphasized the importance of spending Thanksgiving and Christmas together in our home, surrounded by family including my mom who we always brought from Brazil and friends. The choice to keep our home while living in London . . . ."

B. Tax Law § 605 (b) (1) (A) (ii) provides an exclusion to taxation for New York domiciliaries, where taxpayers meet each of the enumerated requirements noted above. Specifically, at issue here, in order for a New York domiciliary to not be taxed as a resident, within any period of five hundred forty-eight consecutive days the taxpayer must be present in a foreign country or countries for at least four hundred fifty days, *and* during the period of five hundred forty-eight consecutive days the taxpayer, *the taxpayer's spouse (unless the spouse is legally separated)* and the taxpayer's minor children *are not present in this state for more than ninety days.*

Where, as in the present matter, "the question is whether taxation is negated by a statutory exclusion or exemption, . . . 'the presumption is in favor of the taxing power'" (***Matter of Wegman's Food Mkts. v Tax Appeals Trib.***, 33 NY3d 587, 592 [2019], quoting ***Matter of Mobil Oil Corp. v Finance Adm'r of City of N.Y.***, 58 NY2d 95, 99 [1983]). This means that any ambiguity or uncertainty in the meaning of the statute must be resolved against the taxpayer and that the taxpayer's interpretation of the statute must be not only plausible, but must be the only reasonable construction (***see Matter of Walt Disney Co.***, Tax Appeals Tribunal, August 6, 2020, ***confirmed*** 210 AD3d 86 [3d Dept 2022], ***affd*** -- NY3d --, 2024 WL 1724639 [Apr. 23, 2024]; ***Matter of Charter Dev. Co., L.L.C. v City of Buffalo***, 6 NY3d 578, 582 [2006]).

In matters of statutory construction, the fundamental rule is to effectuate the intent of the Legislature (***Matter of 1605 Book Ctr. v Tax Appeals Trib.***, 83 NY2d 240, 244 [1994], ***cert denied*** 513 US 811 [1994]). Where the statutory language is clear and unambiguous it should be construed so as to give effect to the plain meaning of the words used (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]; ***Patrolmen's Benevolent Assn. of City of N.Y.***, 41 NY2d 205, 208 [1976]). In this case, the language is unambiguous and the

statute clearly provides that for the 548 day exclusion to apply, a taxpayer's spouse may not be present in New York for more than ninety days unless "legally separated." Petitioners request that in the alternative to legal separation, the statute be read to also allow the 548 day exclusion to apply where taxpayers prove a "separation by fact." By requesting that additional words be read into the statutory language that are clearly absent from that language as written, petitioners are effectively asking that the words "legally separated" as written in the statute be ignored. Contrary to petitioners' argument, each word in the statute must be given effect and cannot be ignored (***see Matter of Helio, LLC***, Tax Appeals Tribunal, July 2, 2015). "It is a well-settled principle of statutory construction that every word in a statute is to be given effect and to be presumed to have some meaning" (***id.***). Had the Legislature intended for both legal and informal separations to satisfy the requirements of Tax Law § 605 (b) (1) (A) (ii) (II), it would have so stated. Petitioners' contention that a "separation in fact" should be treated the same as a legal separation ignores the plain meaning of the words in the statute and must be rejected.

C. The petition of Sean and Fabiana Lynch is denied and the notice of deficiency, dated December 14, 2020, as modified by the conciliation order, is sustained.

DATED: Albany, New York
June 27, 2024

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE