STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **LAURA KALTENBACHER-ROSS**	:	DETERMINATION DTA NO. 818499
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under the New York City Administrative Code for the Years 1994, 1995 and 1996.	:	

Petitioner, Laura Kaltenbacher-Ross, 120 East 87th Street, Apt. 22A, New York, New York 10128, 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 and New York City personal income tax under the New York City Administrative Code for the years 1994, 1995 and 1996.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 12, 2002 at 10:30 A.M., with all briefs to be submitted by December 6, 2002, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, LLP (Michel P. Cassier, Esq. and Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

This matter was reassigned to Dennis M. Galliher, Administrative Law Judge, on February 12, 2003, who renders the following determination.

ISSUES

I. Whether a Notice of Deficiency asserting additional tax, interest and penalty against petitioner should be dismissed for lack of proof of its proper issuance in accordance with Tax Law § 681(a).

II. Whether the Division of Taxation correctly held petitioner subject to New York State and New York City personal income tax as a resident individual pursuant to New York State Tax Law § 605(b)(1)(A) or (B) and New York City Administrative Code § 11-1705(b)(1)(A) or (B) for any of the years 1994, 1995 or 1996.

III. Whether the Division of Taxation should be sanctioned for refusing to admit that petitioner was not a New York State or City domiciliary for the entire year 1993 and thereafter for the period spanning January 1, 1994 through June 30, 1994.

IV. Whether, assuming petitioner was properly subject to tax as a resident of New York State and City, either on the basis of domicile or "statutory" resident status, penalties imposed by the Division should nonetheless be abated.

FINDINGS OF FACT [1]

1. Petitioner, Laura Kaltenbacher-Ross, was born in Newark, New Jersey. Her family members are long-time New Jersey residents. Petitioner grew up in suburban New Jersey, living approximately 45 to 50 minutes commuting distance from New York City. Petitioner graduated from Pingry High School in Short Hills, New Jersey, and thereafter attended Yale University in

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1 Petitioner submitted with her brief proposed findings of fact numbered "1" through "44". Such proposed findings of fact have been accepted and are incorporated within the following Findings of Fact, with the exception that references in proposed finding of fact "1" to political involvement and activities undertaken by petitioner and her family have been eliminated as irrelevant.

New Haven, Connecticut. Petitioner lived in the dormitories at Yale, where she majored in psychology and biology and earned a Bachelor of Arts degree in 1986.

2. Following her graduation from Yale, petitioner worked in a premedical school research position with a cardiologist at Newark, New Jersey's Beth Israel Hospital. Thereafter, she held a three-month health care policy internship position in Senator Bill Bradley's Washington, D.C. office, followed by several months of work at a health care policy agency in Washington, D.C. During this time period, petitioner applied to a number of medical schools, including George Washington University in Washington, D.C., Yale University, The University of Medicine and Dentistry of New Jersey, and New York University ("NYU").

3. Petitioner was accepted at and chose to attend NYU and commenced her four years of medical school there in the fall of 1987. During medical school, petitioner lived in an apartment located on East 36th Street in Manhattan. Petitioner rented this apartment, although she had the economic means to purchase an apartment. On breaks from school, petitioner spent her time at her parents' home in New Jersey.

4. As she entered her final year of medical school, petitioner began consideration of possible areas of medical specialization. Upon completing the first year of a medical residency (known as an internship) and requisite examinations, petitioner would be licensed to practice medicine. However, petitioner explained that in practical terms, this would only entitle her to write prescriptions and work in a supervised hospital setting, and she would be unable to practice medicine on her own until completing the full course of a multiyear residency in a selected field of medicine. Petitioner hoped to specialize in obstetrics and gynecology ("OB/GYN"), with special emphasis on women's issues and reproductive problems. Petitioner applied to residency programs in OB/GYN at Cornell University, Columbia University, NYU, Beth Israel Hospital in

Boston, Massachusettes, and Mt. Sinai Hospital in New York City. Petitioner was accepted and chose to train in the OB/GYN residency program at Mt. Sinai.

5. All medical residency programs across the country run from July 1 through June 30 of each year. While in a residency program, the residents generally are allowed four weeks of time off per year, are on call for 36-hour time periods at one or more hospitals and, in the first years, must sleep at the hospitals every third night. The residents receive a comparatively modest salary during the period of their residency program.

6. The Mt. Sinai OB/GYN program was a four-year program. Petitioner graduated from NYU Medical School in 1991, commenced her residency at Mt. Sinai on July 1, 1991, and expected to complete her OB/GYN medical training in June 1995. Petitioner had not decided where she would establish her medical practice or where she would ultimately live when she completed her residency training at Mt. Sinai. Although she had the economic means to purchase an apartment, petitioner rented an apartment located near Mt. Sinai at 400 East 71st Street. The proximity of this apartment to Mt. Sinai was important since petitioner, as a resident, was on call on a regular and ongoing basis. During this time period of her residency at Mt. Sinai, petitioner continued to visit her family in New Jersey on breaks. She also continued to vote in New Jersey, and filed New Jersey income tax returns as a resident, paying New Jersey tax on all of her income. She continued to be treated by her New Jersey dentist. She also joined the Mountain Ridge Country Club in West Caldwell, New Jersey. Petitioner's will, dated June 24, 1987, lists her as residing in West Orange, New Jersey.

7. Petitioner successfully completed three of the four years of her OB/GYN residency at Mt. Sinai. However, during her third year, she realized that her OB/GYN training would not allow her to develop the type of practice she had initially envisioned when she completed

medical school. Specifically, she realized during her Mt. Sinai residency that her greatest strength was her ability to communicate with patients, and that a strictly OB/GYN practice involved more technical surgical requirements and less direct involvement with patients than petitioner desired. Petitioner wanted to ultimately develop a practice that would combine her interest in direct patient care with her background in women's health issues, and believed she could best do this as a psychiatrist specializing in women's issues, reproductive problems, and the like. Petitioner explained that it is not unusual for residents to change specialties in the middle of a particular residency program.

8. Petitioner completed the third year of her OB/GYN residency program at Mt. Sinai on June 30, 1994, but did not begin the fourth and final year of this program. Instead, petitioner obtained from the director of the program a three-month period, expiring October 1, 1994, during which her position in the program would be held open while she considered and explored other residency training options.

9. During the three-month period, petitioner looked into psychiatric residency programs at Cornell University and at NYU. She contacted the director of the NYU psychiatric residency program and inquired as to the possibility of obtaining a position in that four-year program. Petitioner was advised that, as a former NYU medical student, she would be a good candidate for the program, and that there was an open second-year slot in the program. Petitioner was assured that she would receive the position if she applied. In light of these circumstances, and with the assurance that she would be accepted into the program at NYU, petitioner decided not to complete the fourth and final year of her residency program at Mt. Sinai. Petitioner explained that she would not have allowed her position at Mt. Sinai to have lapsed if her admission to NYU was uncertain.

10. On September 23, 1994, i.e., within the three-month leave period, petitioner formally applied for admission into the NYU psychiatric residency program. She received a formal letter of acceptance into this program on October 31, 1994. Petitioner had hoped to begin her NYU residency program immediately after being accepted, but this was not allowed since medical residency programs run from July 1 through June 30 annually. However, petitioner sought and was granted early admission into the program, such that she was allowed to commence her psychiatric residency program at NYU on March 1, 1995 rather than July 1, 1995.

11. In lieu of serving her first year of residency at NYU, petitioner was allowed credit for her three years of OB/GYN training at Mt. Sinai, and thus she would have to complete a three-year residency rather than a four-year residency in psychiatry. Upon starting her NYU residency on March 1, 1995, petitioner remained uncertain about where she would ultimately establish her practice. Over the years, she had contact with doctors who lived and practiced in New Jersey, as well as with many who lived in New Jersey and practiced in New York, or in both New Jersey and New York. The type of practice petitioner hoped to establish was one which could essentially be set up anywhere.

12. On September 24, 1994, petitioner married David Ross. Mr. Ross was born and raised in a suburb of Cleveland, Ohio. He attended college in Virginia, and law school at NYU. Upon graduating from law school, Mr. Ross took employment with Cravath, Swain, et al, a large New York City law firm. In 1991, Mr. Ross left Cravath, Swain to pursue an LLM in mediation and alternative dispute resolution at Columbia University. Petitioner and Mr. Ross met through mutual friends in September of 1992. Mr. Ross completed his LLM in May 1993, and began work for a mediation company in New York City. He described the nature of his work as "portable," meaning that he could have run his practice from anywhere, with most of his work

carried out either at his home or at his clients' (or their attorneys') offices across the country. While the company for whom Mr. Ross works provides desk and office space, the same is minimal and is shared by two or three other mediators.

13. After their September 1994 wedding, petitioner and Mr. Ross lived for about three months at the rented apartment at 71st Street which had been occupied by petitioner during her three years of OB/GYN residency at Mt. Sinai. In December 1994, and anticipating the March 1, 1995 start of her psychiatry residency at NYU, petitioner and Mr. Ross moved to an apartment located at 205 East 22nd Street in Manhattan. As before, they possessed the economic means to purchase rather than rent an apartment, but did not do so.

14. At the time of their move to the East 22nd Street apartment, petitioner and her husband had not decided where they ultimately wanted to locate. Petitioner noted that having children was something that both she and her husband desired, but that they did not envision raising children in Manhattan. Both were raised in the suburbs, and they assumed they would return to a suburban area upon completion of petitioner's residency training. Petitioner noted that she contemplated having a New Jersey suburban practice, noting her strong family ties and her family's continued presence there. She also explained that the location of the apartment at 71st Street was distant from NYU, while the 22nd street apartment was within walking distance of all the hospitals in which petitioner would be working in connection with her residency at NYU. NYU allowed its third-year residents who had living quarters within ten minutes walking distance to the hospitals to sleep at home as opposed to sleeping at the hospitals on nights when the residents were on call.

15. In their September 20, 1994 prenuptial agreement, Mr. Ross listed New York as his residence, while petitioner listed New Jersey as her residence. During this time period,

petitioner continued to spend time with her family in New Jersey. She also continued to file New Jersey income tax returns and pay New Jersey tax on her income. During each of the years in question, petitioner was registered to vote and did vote in New Jersey.

16. The first of petitioner's three children was born on June 16, 1996. At this time, petitioner was still in the process of completing her psychiatric residency program at NYU, specifically in the third year of such program. As a result petitioner, who was on call for periods of 36 hours at a time, and her husband felt they did not have a choice to move out of New York, and thus they continued to live in the East 22nd Street apartment with their newborn. This apartment was described as a two-story split level with an exposed gangway and steep stairs, and was not the type of apartment that was well suited for young children.

17. Petitioner's on-call duty requiring her physical presence at the hospitals, or ten-minute proximity thereto, would end in 1997 when she entered the final year of her NYU residency program. In anticipation of this change, petitioner and her husband began to look for homes in suburban New Jersey. In December 1996, they toured available homes in Short Hills, New Jersey near the area where petitioner grew up. At the same time, petitioner and her husband continued to live with their six-month old daughter in the East 22nd Street apartment. While, as noted, that apartment was not considered well suited for raising children, petitioner and her husband began, over the course of living with their daughter in Manhattan and visiting friends in different parts of the City, to realize that it would be possible to find "child friendly" apartments and neighborhoods in New York City. Their previous apartments and living experiences in the City were not undertaken with the thought or frame of reference of living with young children.

18. Ultimately, petitioner and her husband decided that they would remain in New York City and raise their family there. In November 1997, they purchased an apartment at 120 East

87th Street. Although this apartment was not within walking distance of NYU, petitioner was in the final year of her residency, during which she was not required to be physically present "on call," but only had to be available by telephone.

19. Petitioner finished her residency program at NYU in June 1998.[2] She has since developed a very small private psychiatric practice in New York City focused on women's reproductive issues including pregnancy, postpartum and infertility issues. She also works as a psychopharmacologist in conjunction with social workers or psychologists who are not licensed to prescribe medications. She sees only a small number of patients on a regular basis. Her practice is the type that could have been developed essentially anywhere.

20. Petitioner's primary source of income during the years in issue came from investments and trusts. Her brokerage accounts were located in New Jersey, her family's automotive leather business known as Seton Company is located in New Jersey, and her financial affairs were managed out of New Jersey. All of petitioner's financial documents were sent in care of Seton Company. Petitioner was not and is not involved in the day-to-day operations of the family business or of managing the trusts and investments. In contrast, her sister and only sibling, with whom petitioner is very close, is much more directly involved in such matters.

21. In addition to filing New Jersey income tax returns during the years in issue, petitioner also filed a Form IT-203 (New York State Non-Resident & Part Year Resident Income Tax Return) for each of the years 1993 through 1996. These returns were filed in a timely manner, pursuant to extensions of time for filing obtained for each of the years, as follows:

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1 Petitioner had taken a maternity leave after the birth of her first child, hence moving her residency completion date to June 1998.

YEAR	DATE FILED
1993	October 15, 1994
1994	October 10, 1995
1995	October 10, 1996
1996	October 13, 1997

22. For all of the foregoing years except 1996, petitioner paid New York tax on the comparatively small salary income she received in connection with her medical residency programs in New York. Petitioner conceded that her failure to allocate such salary income to New York and pay New York tax thereon for 1996 was an oversight, and that such salary was properly subject to New York tax in any event. For 1996, petitioner had wage income from NYU in the amount of $40,177.52, against which Federal, State and local (New York City) income taxes were withheld in the respective amounts of $11,164.39, $2,193.83 and $1,341.81.

23. The Division of Taxation ("Division") commenced an audit of petitioner for the years 1993 through 1996, which focused primarily on whether petitioner was taxable as a resident of New York State and City. As a result of its audit, the Division concluded that petitioner changed her domicile to New York City on July 1, 1994, at the point in time when she did not continue with her OB/GYN residency program at Mt. Sinai, and that she remained a New York City, and hence New York State, domiciliary from that point forward. The Division's auditor concluded that petitioner's termination of her first residency program ended her temporary stay in New York to accomplish a specific assignment, reasoning that one cannot have multiple temporary stays. He also concluded that petitioner's marriage to a New York resident and the fact that she

remained in New York after her marriage bear out her change of domicile. No independent inquiry was made into Mr. Ross's domicile or residency.

24. The Division also concluded that petitioner was properly subject to New York tax as a "statutory" resident. In this regard, the Division concluded that the termination of petitioner's initial OB/GYN residency program meant, as above, that she was not in New York for a limited stay to accomplish a specific assignment after July 1, 1994, when she did not commence the final year of her OB/GYN residency program. Hence, the auditor concluded that her living quarters in New York became a permanent, as opposed to temporary, place of abode in New York on such date. In turn, the auditor concluded that since there was no evidence or claim that petitioner spent fewer than 183 days in New York in 1995 and 1996, she was properly subject to tax as a statutory resident of New York State and New York City for such years. The Division did not assert that petitioner was a statutory resident for the year 1994, noting that petitioner maintained a permanent place of abode in New York for only one-half of 1994.

25. The Division accepted petitioner's 1993 New York return, as filed, under the status of nonresident, concluding that petitioner was not a domiciliary of New York prior to 1994. Apparently, this conclusion was premised on the temporary nature of her presence here for the purpose of completing her medical residency in OB/GYN.

26. The Division also concluded that negligence penalties should be imposed on petitioner for the years 1995 and 1996 because:

> the position and policies of the Tax Department were well known in reference to the multiple assignment multiple purposes. In addition, the taxpayer failed to include the salary income [for 1996] in the New York column.

27. The auditor conducted approximately 19 hours of research into the issues relating to temporary assignments in New York, concluding that it was the policy of the Division, as set forth in its tax policy manual, that a taxpayer cannot have consecutive temporary assignments. The record contains no information (cases, rulings or other information) referencing such a prohibition against "multiple temporary assignments" theory. Similarly, the Division's tax policy manual concerning "Residency Audit Guidelines," as existing during the years in issue, makes no mention of the "consecutive assignments-temporary assignments" rule referenced by the auditor.

28. Statements of personal income tax audit changes were issued to petitioner on May 17, 1999, for the year 1996, and on May 26, 1999, for the years 1995 and 1994. These statements reflect the results of the Division's audit as described herein.

29. The record includes validated waivers with respect to the period of limitations on assessment, the latest of which allowed the Division to issue a Notice of Deficiency against petitioner for the years 1993 and 1994 at any time on or before October 15, 1999. In light of the extensions of time for filing tax returns obtained by petitioner (***see*** Finding of Fact "21"), timely notices of deficiency could be issued against petitioner on or before October 15, 1999, with respect to tax year 1995, and October 15, 2000, with respect to tax year 1996.

30. The record includes a copy of the Notice of Deficiency at issue in this matter. Such notice, dated July 1, 1999 and bearing Assessment ID number L-016656892, asserts additional New York State and New York City personal income tax due against petitioner for the years 1994, 1995 and 1996 as follows:

Tax Period Ended	Tax Amount Assessed	Interest Amount	Penalty Amount	Payments or Credits	Current Balance Due
12/31/94	45,652.11	17,264.52	0.00	0.00	62,916.63
12/31/94	27,207.28	10,289.13	0.00	0.00	37,496.41
12/31/95	73,413.29	19,875.19	13,608.26	0.00	106,896.74
12/31/95	48,807.99	13,213.80	9,047.29	0.00	71,069.08
12/31/96	82,618.22	14,498.39	11,380.10	0.00	108,496.71
12/31/96	58,216.28	10,216.18	8,018.90	0.00	76,451.36
Totals	335,915.17	85,357.21	42,054.55	0.00	463,326.93

31. At the hearing, petitioner objected to the introduction of the foregoing notice, alleging that the Division failed to provide any evidence to show that the notice was validly issued, i.e., that it was properly mailed or that it was received by petitioner.[3] The notice is addressed to:

Kaltenbacher-Laura, Ross
Seton
849 Broadway
Newark, New Jersey 07104-4300

32. Petitioner's 1997 New York State income tax return was the last return filed by her prior to the July 1, 1999 date listed on the notice. Petitioner's address on this return is as follows:

Ross, Laura K.
c/o Seton Company
849 Broadway
Newark, New Jersey 07104

3 It is noted that in response to a Freedom of Information Law request for materials, and later in response to a subpoena, the Division apparently furnished to petitioner a copy of the certified mailing record (mailing log) pertaining to the notice of deficiency at issue in this matter. Such document might have eliminated any question with respect to the issuance or validity of the notice. However, whether as the result of simple oversight or otherwise, the same is not included in the record herein, nor is any other evidence such as affidavits specific to the issuance (mailing) of the notice.

33. It is undisputed that on September 28, 1999, petitioner filed a Request for Conciliation Conference (Form DTF-936.30), challenging the Division's asserted deficiency for the years 1994, 1995 and 1996. Specifically, this form requests a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") with respect to Assessment ID number L-016656892. This Assessment Number appears on the face of the request in its own specifically identified Assessment ID section, and also appears directly above the preprinted address section at the upper left side of the request form where petitioner's name and address is listed exactly as it appears on the Notice of Deficiency. The request is signed and hand-dated September 28, 1999, and bears the receipt stamp of BCMS dated September 30, 1999. The request includes an attached power of attorney signed by petitioner appointing petitioner's representative (at the time), and identifies petitioner's name and address as "Laura Kaltenbacher-Ross, c/o Seton, Newark, NJ 07104." The request also includes an attached two-page statement setting forth the factual and legal basis for petitioner's challenge to Assessment ID L-016656892 and its assertion that petitioner was properly subject to tax as a New York State and City resident.

34. Prior to the hearing, petitioner served upon the Division a Notice to Admit seeking, among other things, admissions that, upon audit, the Division had determined petitioner was not domiciled in New York State or City for the entire year 1993 and for the period January 1, 1994 through June 30, 1994. The Division replied to the Notice to Admit by the statement that "the issue of domicile was not determined upon audit for the tax year 1993 and the time period January 1, 1994 through June 30, 1994." At hearing, the auditor testified that he concluded that petitioner was not domiciled in New York for the noted periods.

CONCLUSIONS OF LAW

A. Petitioner has raised an initial issue concerning the issuance and validity of the Notice of Deficiency. In this regard, petitioner argues that the Division has not presented evidence to establish that the notice was properly issued pursuant to Tax Law § 681(a) and §691(b), i.e., mailed by certified or registered mail to the petitioner at her last known address. As a result, petitioner asserts that the deficiency is a nullity and should be canceled.

B. Petitioner's challenge to the validity of the notice is rejected. It is well established that where the *timeliness* of a taxpayer's Request for a Conciliation Conference is at issue, carrying with it the potential that a taxpayer may be denied the opportunity to challenge the merits of an asserted deficiency, the Division is required to establish proper mailing of the notice such that the timeliness of petitioner's response thereto may be determined (***see, Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). Here, however, the timeliness of petitioner's protest against the asserted deficiency, i.e., the question of whether petitioner's request was filed within 90 days after issuance of the notice (Tax Law § 689[b]; § 170[3-a][a]), and with it the potential loss of the right to a hearing, has not been challenged by the Division and is not at issue. As a result, the ultimate question becomes whether petitioner, who clearly challenged the asserted deficiency, received actual notice of such asserted deficiency within the period of limitations on issuance of such a deficiency (***Riehm v. Tax Appeals Tribunal***, 179 AD2d 970, 228 NYS2d 228, ***lv denied*** 79 NY2d 759, 584 NYS2d 447, ***rearg denied***, 80 NY2d 893, 587 NYS2d 910).

C. In ***Agosto v. Tax Commission of the State of New York*** (68 NY2d 891, 508 NYS2d 934) and in ***Matter of Rosen*** (Tax Appeals Tribunal, July 19, 1990) requests for hearing were denied because the taxpayers had actually received the notices within the period of limitations on

assessment, notwithstanding address errors on the notices, but had not filed protests within the required 90-day period after actual receipt of such notices. In ***Riehm***, a hearing was granted because the notice was actually received by the taxpayer within the period of limitations on assessment, notwithstanding an address error on the notice, and the taxpayer in turn had filed a timely protest within 90 days after such actual receipt of notice. In ***Matter of Karolight, Ltd.*** (Tax Appeals Tribunal, July 30, 1992), although an erroneous zip code did not result in an erroneous address, it was conceded that the taxpayer had not in fact received the notice within 90 days after its mailing. In turn, since the taxpayer had filed a protest within 90 days of receipt of actual notice of the assessment, it was entitled to a hearing. Finally, in ***Matter of Combemale*** (Tax Appeals Tribunal, March 31, 1994), the notice was canceled as invalid where there was error in the address and no evidence or admission of receipt of actual notice of the assessment within the period of limitations on assessment. The rule emerging from these cases is that where there is an error in address, but the evidence bears out that the taxpayer has actually received notice of an assessment within time to protest, and where the taxpayer has protested within 90 days of such actual notice, the notice itself remains valid and the taxpayer is entitled to a hearing to contest the assessment.

D. In this case, the evidence clearly supports the conclusion that petitioner received actual notice of the deficiency asserted by the Notice of Deficiency dated July 1, 1999, that such actual notice was received within the period of limitations on assessment, and that petitioner in turn challenged the asserted deficiency within 90 days after receipt of such actual notice. It is undisputed that petitioner filed her Request for a Conciliation Conference challenging the deficiency in question on September 28, 1999. The date of such challenge, which identifies the notice by Assessment ID number, falls both within 90 days after the July 1, 1999 date on the face

of the notice, and well before the expiration of the period of limitations on issuance of such an assessment for the years in issue, to wit, October 15, 1999 for 1994 and 1995 and October 15, 2000 for 1996, respectively, (***see*** Finding of Fact "29"). The very filing of such a protest within the requisite time period as described evidences the issuance and actual receipt of notice of the asserted deficiency within time to protest the same (***Matter of Matson***, Tax Appeals Tribunal, March 10, 1988; ***Riehm v. Tax Appeals Tribunal, supra.***).

E. The circumstances of this case differ from ***Matter of Malpica (supra.)***. In ***Malpica***, the Division challenged the timeliness of petitioner's protest, thus carrying the potential for denial of a hearing. Furthermore, in ***Malpica***, evidence of issuance of the notice and, of equal importance, evidence of petitioner's actual receipt of notice of the assessment at issue were lacking. ***Malpica*** was an income tax matter, yet the petitions identified the notices protested as involving corporation tax matters, did not specifically refer to the notices, or include assessment numbers. Petitioner also misplaces reliance on ***Matter of Scharff*** (Tax Appeals Tribunal, October 14, 1990, ***revd on other grounds sub nom NYS Dept of Taxation and Finance v. Tax Appeals Tribunal***, 151 Misc 2d 326, 573 NYS2d 140). In ***Scharff***, the Division was unable to produce a copy of the Notice of Deficiency. Here, the record includes a copy of the notice and, unlike ***Malpica***, the information thereon ties directly to the information on petitioner's request. Accordingly, petitioner's claim that the asserted deficiency is a nullity is rejected. Finally, the argument that the differences between petitioner's address on her tax return versus her address on the Notice of Deficiency (***compare*** Findings of Fact "31" and "32") should serve to invalidate the notice is rejected. In this regard, any technical address irregularities were overcome by petitioner's actual receipt of notice of the asserted deficiency in sufficient time to file a protest,

as detailed above (***Riehm v. Tax Appeals Tribunal, supra.; Agosto v. Tax Commission of the State of New York, supra; compare Matter of Combemale, supra.***).

F. Petitioner has also asserted that the Division should be sanctioned for not admitting, in response to petitioner's Notice to Admit, that petitioner was not domiciled in New York for 1993 and for the period January 1, 1994 through June 30, 1994. This assertion is rejected. Petitioner did not object to the Division's response to the Notice to Admit or seek any specific change with respect thereto. In fact, the Division has acceded to the fact that petitioner was not domiciled in New York during the specified periods. Further, petitioner has not identified any specific damage or prejudice ensuing from the Division's manner of response, i.e., its refusal to admit, nor has petitioner identified any particular relief to which she is entitled, save for a nonspecific request for costs and attorney's fees relating to alleged additional trial preparation specific to the earlier period. To the extent petitioner requests costs and fees, the same is premature and would ultimately be dealt with pursuant to the terms of Tax Law § 3030.

G. Turning to the merits of petitioner's challenge, Tax Law § 605(b)(1)(A) and (B), sets forth the definition of a New York State resident individual for income tax purposes as follows:

> Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this state, unless (1) 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, unless such individual is in active service in the armed forces of the United States.

The definition of a New York City "resident" is identical to the State resident definition, except for the substitution of the term "city" for "state." (***see***, Administrative Code § 11-

1705[b][1][A], [B]); ***see also*** 20 NYCRR 295.3[a]; 20 NYCRR Appendix 20, § 1-2[c]). The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources.

H. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York, and both are at issue in this proceeding. The first, or domicile basis, for resident status turns largely on the concept of an individual's "home." The second, or "statutory" resident basis sets forth the dual predicates for resident tax status as (1) the maintenance of a permanent place of abode in the State and City and (2) physical presence in the State and City on more than 183 days during a given taxable year. The Division takes the position, based on its audit, that petitioner was domiciled in New York City and thus was subject to tax as a resident of the State and City. The Division also asserts that petitioner spent in excess of 183 days in New York City and maintained a permanent place of abode in the City and, thus even if not domiciled in New York City, remained subject to tax as a New York State and City statutory resident for the years 1995 and 1996.

I. As a starting point, the Division would concede that one who is in the State or City for a period of limited duration for a particular purpose or in order to accomplish a particular specific assignment is neither domiciled in New York nor maintaining a permanent place of abode in New York during such period. Thus, the Division would admit that petitioner's years of medical school at NYU, as well as her initial residency training at Mt. Sinai, were for a specific and limited period of duration for the accomplishment of a particular purpose, during the pendency of which petitioner would not be considered either a domiciliary of New York or a statutory resident. However, the Division concludes that when petitioner ceased her initial residency

training at Mt. Sinai, and remained in New York, she was no longer temporarily in New York for a specific period of duration to accomplish a particular purpose. The Division asserts that petitioner's actions, including most specifically her change of medical residency programs with an intervening, albeit short, break and her marriage during such break, together with her continued full-time presence in New York City, evidenced her choice at such point in time to make her domicile in New York City. In addition, since petitioner's continuing full-time presence in New York City followed the cessation of her initial program, her stay was no longer temporary, but rather became permanent and indefinite. Thus, the Division asserts that petitioner maintained her living quarters as a permanent place of abode and thus became, as a consequence, a statutory resident for the two full years 1995 and 1996.

J. Treated first is the issue of whether petitioner was a domiciliary of New York City.[4] Neither the Tax Law nor the New York City Administrative Code contain a definition of domicile, but a definition is provided in the regulations of the New York State Department of Taxation and Finance (***see***, 20 NYCRR 105.20[d]). As relevant, it provides as follows:

> *Domicile*. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. *No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time*; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they

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4 It follows, logically, that if petitioner was a domiciliary of New York City she would also be a domiciliary of New York State, and that if petitioner met the dual predicates for taxation as a statutory resident of New York City she would also be taxable as a statutory resident of New York State.

> will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation in some other place.
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> * * *
>
> (4) A person can have only one domicile. *If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home* . In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere. (Emphasis supplied.)

K. In this case, petitioner came to New York City in the Fall of 1987 to commence her medical school studies. Although she was in New York during the academic year, the evidence shows that her home continued to be New Jersey, where her family lived and where she spent her time off from school. Petitioner successfully completed her medical school studies and, after graduation, immediately embarked on a residency program in New York at Mt. Sinai. Petitioner lived in New York, of necessity, although her home continued to be in New Jersey. In fact, during this time period and indeed until the middle of 1994, the Division does not challenge petitioner's status as a domiciliary of New Jersey and a nonresident of New York. Critical in this regard is that for this entire period of time, petitioner was engaged in a program of study with specific parameters as to duration and purpose, namely to complete the training necessary to become credentialed in the medical specialty of her choosing so as to be able to establish and operate an independent, unsupervised medical practice in that specialty. Furthermore, it is worth noting that the tenor of the evidence in this case in no way indicates that petitioner had made any choice as to where she intended to establish her medical practice once she completed her residency training. There is no overriding sense that petitioner had established any marked

affinity for New York as her ultimate focus of "home," and the sense is actually to the contrary. In this regard, petitioner credibly testified that she did not envision New York as the place where she would live and raise the children she hoped to have.

L. Ultimately, resident status on the basis of domicile turns on presence coupled with intent, to wit, whether the person is present at a given location with the intent that such location is the permanent place which she intends to be her home. The evidence in this case does not convincingly bear out that petitioner had committed to making her home in New York City during the period in issue. In point of fact, and notwithstanding her actual presence in New York City, the first clear and objective evidence of her intent to remain in New York City is the November 1997 purchase of a home in New York City. In contrast, there is no clear objective evidence, either in word or deed, that such intent existed during the years at issue. Petitioner might best be described as considering her options and forming her intent as to where she would ultimately make her home and establish her practice during the years when she was in New York City for the primary purpose of completing her required medical training to become fully credentialed in her field of specialty. It is noteworthy that petitioner reported and paid taxes on her income to the State of New Jersey. Given the similarity of tax systems and rates between New York State and New Jersey, including credits for taxes paid to other states, there would appear to be little if any tax benefit inuring to petitioner at the State level by being a New Jersey versus a New York State resident. While the same is not true vis-a-vis New York City resident status, there is nonetheless no strong sense that petitioner actively sought to avoid such status. Rather, her tax status simply flows from the facts and circumstances of her primary purpose for being present in New York City during the years in question. In this respect, petitioner's actions during her medical residency training are consistent with the requirements of such training and

reflect the fact that completing such training was her primary purpose for being in New York. For example, each of her moves to different apartments, prior to the purchase of the apartment in November 1997, were made primarily to meet the imposed necessity of being physically proximate to the hospitals she was covering on call during her residency training programs. Further, she rented such apartments, including her initial marital abode, notwithstanding that she clearly possessed the financial wherewithal to purchase a home or apartment.

M. The crux of the Division's assertion that petitioner became a domiciliary of New York hinges, apparently, on two events in 1994. Most specifically, the Division asserts that petitioner's change in residency programs as described, from OB/GYN at Mt. Sinai to psychiatry at NYU, resulted in the end of her "temporary" status in New York for the specific purpose of accomplishing a particular project within a limited time frame. According to the Division this event, coupled with her continued presence in New York, evidenced her determination to make New York her home and thus her place of domicile. The Division apparently buttresses its conclusion with its assessment of the impact of petitioner's marriage in 1994, after which petitioner and her husband continued to live in New York. The Division's position is that while one can have a temporary assignment in New York, one cannot have consecutive temporary assignments, and that the termination of petitioner's initial temporary stay here for the purpose of accomplishing a particular purpose ended when she terminated her residency program at Mt. Sinai. There was clearly a break in time between petitioner's programs. According to the Division this break, coupled with her marriage, abrogated the temporary nature of her New York presence, and evidenced her then established intent to make her home in New York City.

N. It is not unreasonable to adopt a general premise that multiple consecutive assignments are inconsistent with the concept of a temporary stay in a particular locale to

accomplish a specific assignment.[5] This would seem especially true in the context of multiple ongoing work assignments, or where one enters a jurisdiction to pursue training for a particular profession or career path but thereafter, during such training, changes professions or careers entirely. However, under the unique facts of this case, petitioner changed only the specialty within her chosen profession when she switched her residency programs. She did not change the end goal being pursued since she first came to New York, to wit, becoming a physician fully trained and licensed to engage in practice. The evidence makes clear that petitioner's residency program at NYU was no less structured than was her program at Mt. Sinai. Each was for the accomplishment of a particular purpose and each had a defined period of duration. While there was a short break in time between the two, petitioner established the continuity therein by the fact that she obtained a three-month leave of absence from her Mt. Sinai program and received assurances that she would be accepted into the NYU program before she formally applied to such program and before she advised Mt. Sinai that she would not be completing her program there. Petitioner testified credibly that she would not have terminated her Mt. Sinai program without such assurances. In addition, petitioner commenced her NYU program earlier than would normally be allowed (March rather than July). All of this indicates that petitioner essentially continued the requisite formal training to obtain the necessary credentials to pursue her career in her chosen field of medical specialty without any significant break from such path.

O. Although petitioner's marriage in 1994 is not an insignificant factor, it does not necessarily follow that the same resulted in petitioner's adopting a domicile in New York. That

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5 Initially, while the record makes reference to specific audit guidelines concluding that multiple temporary assignments are not permissible in the context of not becoming a domiciliary, such specific guidelines have not been presented as in existence during the years in issue. More to the point, and assuming such a set of guidelines existed, the same are certainly not binding with respect to this forum.

is, both petitioner and her husband testified credibly that their respective professional fields of endeavor were those which could be operated from essentially any location. Petitioner and her spouse hoped to, and eventually did, have children, though neither envisioned raising children in metropolitan New York. Although frequently true, it is not always that case that the domicile of one spouse, in this case the husband, becomes the domicile of the other upon the advent of their marriage. While petitioner's spouse may have been a New York domiciliary (an assumption the parties do not appear to dispute), his domicile is not at issue in this proceeding. Rather, although she became married, neither petitioner's status as a person in New York for a specified duration in order to accomplish a particular purpose, nor any other aspect of the primary purpose for her presence in New York changed. Simply put, she was still engaged in and had to complete her medical residency program. Absent some other compelling evidence that petitioner had decided or committed to the fact that she would be living in New York at the end of her residency training program, it cannot be said that she was physically present in New York with the intent to remain here for the indefinite future. In sum, petitioner had not determined that New York would be her "home" at the conclusion of the accomplishment of her temporary stay here, and thus it cannot be concluded that at any point during the years in issue, she changed her domicile from her historical New Jersey domicile to New York. While petitioner admittedly decided to ultimately make New York her home, such decision did not occur until after the years in issue, and thus petitioner was not properly subject to tax as a resident under the domicile basis for such status set forth per Tax Law § 605(b)(1)(A) or Administrative Code § 11-1705(b)(1)(A).

P. Having concluded that petitioner was not domiciled in New York during the years in issue leaves the question of whether petitioner may be subjected to tax as a statutory resident for the years 1995 and 1996. Tax Law § 605(b)(1)(B) and New York City Administrative Code §

11-1705(b)(1)(B) set only two conditions which, if met, subject a nondomicilliary to tax as a resident. These conditions are maintenance of a permanent place of abode in the City and physical presence in the City on more than 183 days in any given year. There appears to be no contest that petitioner spent in the aggregate more than the requisite 183 days in New York during each of the years 1995 and 1996. Turning to the permanent place of abode condition, 20 NYCRR 105.20(e)(i) provides as follows:

> [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 . . . If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident, even thought 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.

Q. Much of the previous discussion concerning domicile is relevant under the facts of this case to the question of petitioner's potential status as a statutory resident. Clearly, the various apartments in which petitioner lived constituted places of abode maintained by petitioner (and later by petitioner and her husband) within the usual context of the regulation. Accordingly, absent other circumstances, petitioner would meet the two conditions subjecting a person to taxation as a statutory resident. However, in this case, it is critical to remember that petitioner was not held subject to tax as a statutory resident for years prior to 1995 and 1996, notwithstanding the fact that she met the literal terms of the relevant statutory sections, upon the sole reason that her presence in New York was deemed to be a temporary presence to accomplish a specific assignment as opposed to permanent presence. As a consequence, her place of abode in New York was not considered to be a permanent place of abode.

R. The only potential change to petitioner's temporary status occurred upon her switch from the OB/GYN residency program to the psychiatry residency program as described. This

change, which included a short break in petitioner's employment did not, under the particular circumstances of this case, serve to negate the temporary nature of her presence in New York. In fact, she continued in the specific, consistent and required process of becoming fully credentialed as a physician in her chosen area of specialty. Critical to this conclusion is the fact that petitioner not only made application to the psychiatry program prior to the expiration of her period of leave from Mt. Sinai, but that she would not have left the Mr. Sinai program in which she had completed three of the four required years but for the fact that she had received assurances that she would be accepted at NYU and could continue her training. Her actions thereafter are consistent, including the facts that she requested and was allowed to commence her psychiatry residency earlier than would normally be allowed, and that she took yet another rented apartment within the requisite proximity to NYU. Even the nature of her training in the two residency programs was consistent to a large degree in that each complemented the other by continuing the common thread of allowing petitioner to become credentialed in the field of providing medical services particularly focused on counseling and intervention regarding women's issues of fertility, reproduction, pregnancy, postpartum matters and menopause, thus combining aspects of both OB/GYN and psychiatry. While acknowledging the short time break between petitioner's resignation from her Mt. Sinai residency and the commencement of her NYU residency, the consistency of her actions overrides a conclusion that such break abrogated the temporary nature of her presence in New York for the primary purpose of accomplishing a specific purpose. In sum, petitioner's program was not completed and thereafter followed by the start of a new program, but rather her first and primary purpose was simply extended.

S. Further strengthening petitioner's position is her credible testimony concerning her ultimate goal of raising children out of New York once her medical training had been completed.

In this regard, petitioner and her husband searched for houses in the New Jersey suburbs as petitioner was nearing the completion of her residency program. In sum, petitioner's presence in New York throughout the years in issue was for the particular purpose of completing her required educational training as a physician in her field of specialty so as to enable her to establish a medical practice in the locale of her choosing. As in turned out, petitioner did choose to stay in New York upon the completion of her residency program. However, prior to such time petitioner was in the continuing process of completing a specific and required course of training of a defined and temporary duration, and was thus neither permanently in New York nor, as a consequence, maintaining a permanent place of abode in New York during such time frame. Therefore, she was not properly subject to tax as a statutory resident of the State or City in 1995 and 1996.

T. Notwithstanding the foregoing conclusions that petitioner was not subject to tax as a resident of New York State or City, she nonetheless admittedly erred by oversight in failing to include her 1996 wage income from NYU as New York source income properly subject to New York State and City tax. Petitioner conceded that such wage income is properly subject to New York tax, and the Division is therefore directed to revise the Notice of Deficiency accordingly.

U. Negligence penalties imposed against petitioner pursuant to Tax Law § 685(b) for the years 1995 and 1996 are essentially rendered moot as a result of the foregoing conclusions. Nonetheless, even if the deficiency were to be sustained, abatement of a penalty imposed upon the assertion that petitioner's tax filings were inappropriate because she "should have known of the Division's audit policy against multiple temporary assignments," would be correct especially given that the Division has not provided written evidence of such policy in some format clearly shown to have been made available to the public. There is no claim or evidence that petitioner

had access to or even knowledge of the Division's audit guidelines or its internal policies concerning domicile and statutory residence under circumstances such as the present. In fact, the Division's own audit guidelines did not articulate any position prohibiting multiple temporary assignments, at least not until 1997, which is after the years in issue. Moreover, as previously noted, such guidelines would not in any event be binding in this forum. Finally, to the extent the penalty was imposed because petitioner's 1996 wage income from NYU was not reported and included as subject to tax, the same is canceled. In this regard, petitioner reported and included the same source income as subject to tax for each of the immediately preceding years, and her failure to do the same in 1996 was credibly explained as the result of simple and inadvertent oversight.

V. The petition of Laura Kaltenbacher-Ross is hereby granted to the extent indicated in Conclusions of Law "O" and "S" (by which petitioner is held not subject to tax as a resident of New York State and City) and Conclusion of Law "U" (by which penalty is canceled), the Notice of Deficiency dated July 1, 1999 is to be recomputed and reduced in accordance with Conclusion of Law "T" (by which petitioner's wage income from NYU is to be included in petitioner's New York source income subject to tax [***see*** Finding of Fact "22"]), and as so recomputed and reduced the Notice of Deficiency is sustained.

DATED: Troy, New York
May 29, 2003

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE