STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN J. AND LAURA BARKER	:	DETERMINATION DTA NO. 822324
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2002, 2003 and 2004.	:	

Petitioners, John J. and Laura Barker, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2002, 2003 and 2004.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 11, 2008 at 10:30 A.M., with all briefs submitted by May 22, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Hodgson Russ, LLP (Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether petitioners were New York State residents during the years in issue who maintained a permanent place of abode in this state and spent in the aggregate more than 183 days in this state in each of the taxable years in issue.

FINDINGS OF FACT

Petitioners filed 32 proposed findings of fact, which have been incorporated into the findings of fact below, except for findings 1, 3, 16, 26, 28, 29, 30 and 32 which were deemed to be irrelevant, in whole or in part; findings 7, 17, 18, 19 and 20 which did not accurately reflect the record; and finding 12, which merely repeated a portion of the stipulation of facts.

In addition, the parties entered into a one-page stipulation of facts which has been incorporated into the findings of fact below.

1. Petitioners were Connecticut domiciliaries during the years 2002, 2003 and 2004 (the years in issue or the audit period). Petitioner John Barker grew up in the Bronx, New York, and petitioner Laura Barker was raised on the North Shore of Long Island, New York. They married in 1993 and had three children who were 9, 6 and 3 years of age during the audit period.

2. Mr. Barker was an investment manager for Neuberger Berman in New York City, working five long days a week, leaving the house around 6:00 A.M. and returning at approximately 7:00 P.M. In addition to his work schedule, he volunteered at a children's hospital three or four nights a month. His evenings and weekends were primarily devoted to coaching soccer and basketball and serving as a commissioner of his son's basketball league. Mr. Barker spent more than 183 days in New York State during the years in issue, and only those days set forth in Finding of Fact 11 were spent in Napeague, New York, their vacation home.

3. Likewise, Mrs. Barker maintained a busy schedule as a homemaker, substantiated by her diary or planner entries, revolving around the children's active school and social lives, and centered around their home in New Canaan, Connecticut.

4. While seeking a summer rental in the area of the Hamptons on Long Island in 1997, petitioners were confronted with costly rentals with monthly commitments. Therefore, when

Mrs. Barker's mother informed petitioners of a property available in the nearby town of Napeague, New York, the option of purchasing was not dismissed out of hand. Ultimately, petitioners decided to purchase the property in Napeague for occasional family vacations.

5. Napeague is neither a township nor an official hamlet within a township, but is a low-lying strip of land stretching between the hamlets of Amagansett, six miles to the west, and Montauk, about ten miles to the east. This entire area is within the township of East Hampton. Napeague is isolated from the rest of the township by undeveloped park land on its east and west and by the Atlantic Ocean to its south and Napeague Harbor (part of Gardiner's Bay) to its north.

6. The only commercial area in Napeague is on Route 27, the Montauk Highway, and most of the businesses are seasonal, catering to summer residents and tourists. There are clam bars and seasonal hotels located on the highway. Grocery stores, drug stores and other businesses serving year-round residents are located in Amagansett and Montauk. The nearest hospital is located in Southampton, which can be an hour's drive in summer traffic. The residence has no mail delivery, town sewer or waste removal services.

7. The 2000 United States Census reflected that Napeague, New York, is a seasonal community, with a population of 223 and where about 105 of 624 housing units are occupied on a year-round basis. The census represented that approximately 82% of the housing units in Napeague were for seasonal, recreational or occasional use. By comparison, the 2000 Census provided that the town of East Hampton and the town of Southampton had 54% and 35% vacant housing units for seasonal use, respectively. In fact, many homes and businesses are boarded up and shut down for winter.

8. Petitioners' decision to purchase the Napeague property was influenced by Mrs. Barker's parents, Leonard and Fran Giarraputo, who brought the property to the attention of

petitioners. It had been owned by a business associate of Mr. and Mrs. Giarraputo, and petitioners understood at the time that the Giarraputos would be using the property.

9. The Napeague area conformed to petitioners' expectations for the property in that it would be used for brief beach vacations during the summer months. As a child, Mr. Barker had vacationed in nearby Montauk and knew that the area was a beach destination that was fairly desolate in the winter months. Mrs. Barker's visit to the house in 1997 during the winter confirmed this impression, noting that she had to use her imagination to visualize what it would be like in summer.

10. Petitioners purchased the property at on April 30, 1997 for $260,000.00, which petitioners considered a low price given its proximity to the ocean. Although the property had previously been a summer rental, petitioners made only minor improvements to the bathrooms and kitchen, while choosing to utilize the existing furniture, paneling, heating plant and windows.

11. During 2002, petitioners spent the following days at the Napeague dwelling: May 24-26; July 4-7; July 19-21; August 7-10; and August 28-September 1. In 2003, petitioners spent the following days at the Napeague house: June 20-22; July 3-6; July 18-20; August 9-10; August 28-30; and November 29. Finally, in 2004, petitioners spent the following days at the Napeague house: June 27-28 (Laura Barker only); July 1-4; July 23-25; August 31-September 4; and October 8-11. During the period in issue, petitioners did not spend any other full or partial days at the Napeague dwelling. Hence, petitioners' use of the home in Napeague was sporadic.

12. The insurance policy issued by New York Central Mutual Fire Insurance Company in effect for the years in issue indicates the dwelling was insured for a total value of $228,800.00 with insurance for personal property of $145,000.00. There was also flood insurance on the

property through Omaha Property and Casualty that provided total building coverage of $250,000.00. In addition, a renewal endorsement for the year April 2002 through April 2003 issued by the New York Property Insurance Underwriting Association, referenced as an "additional form" on page 2 of the New York Central Mutual policy for the same period, describes the property as "seasonal dwelling," even though this description is not used in any of the other policies submitted into evidence for the years in issue.

13. The Napeague dwelling was constructed in 1972 and contains approximately 1,122 square feet of living space and a 594 square foot wraparound wood deck. Although the dwelling appears to have three stories when viewed from street level, the ground level is a cinder block foundation, the interior of which serves as an unfinished basement. The remaining floors of the structure are a full first story and a loft-style second story. The first floor contains a small bathroom and a 10 by 11 foot bedroom with twin beds and used primarily by Laura Barker's parents. In addition, the first floor contains a living room with fireplace and a working, galley kitchen. The small dining table extends into the living area and can accommodate four people, making it more convenient in good weather to utilize the deck for larger gatherings. The loft area on the second floor contains two bedrooms, one for petitioners and one for their children, both of which are about the size of the one on the first floor. Separating the second floor bedrooms is a bathroom. The photographs of the residence indicate, and Mr. Barker confirmed, that the home had hardwood floors.

14. Petitioners permitted Laura Barker's parents, Mr. and Mrs. Giarraputo, to use this house during the years in issue and they utilized it several days a week during the summer months and on many weekends the remainder of the year. Mr. Giarraputo operated a small-scale fishing charter business which listed this house as its address and he maintained a post office box

in the area as well. He and Mrs. Giarraputo used the first floor bedroom when they stayed and sometimes arranged for repairs and improvements to the dwelling on behalf of petitioners. They installed cable for internet access as well. The Giarraputos had friends in the area and displayed beach and recycling permits on their car. In sum, the Giarraputos fully enjoyed their daughter's vacation home and took advantage of its proximity to their own home in Huntington, New York.

15. The Giarraputos' use of the home was so pervasive that petitioners called them before planning a stay in order to be sure there was no conflict with visits by other family members or friends. Although petitioners acknowledge their ultimate dominion and control over the use of the property, they chose to allow the Giarraputos to have liberal use of the premises.

16. The house had heat, electric and telephone service, hot water, cable television and internet service, making it very habitable and comfortable year round, as evidenced by the fact that Mr. Giarraputo stayed there on many weekends from November through the middle of May. Petitioners, while conceding that the house could be lived in year round, found it more desirable for short stays.

17. Petitioners' Connecticut home is approximately 138 miles from the home in Napeague, often taking four hours to reach in traffic and longer when transporting their young children due to the necessity of frequent stops. These considerations limited petitioners' use of the property.

18. In addition to the travel issues, petitioners' schedules also limited the time available to use the Napeague home. Mr. Barker had a full work schedule in New York City during the week and was fully involved with the children's soccer and basketball endeavors on most nights and weekends. Mrs. Barker coordinated the educational, social and athletic lives of herself and her three children, which proved to be a full-time job. The demands placed upon petitioners by their hectic schedules required them to be in New Canaan, Connecticut, most of the year.

As a result, petitioners were only able to get to the Napeague home for short vacations and the home reflected this. The refrigerator was generally empty when they arrived, necessitating a trip to the store for food. The beds were unmade and clothing was not stored there. If visiting in the winter, the outside shower would not be set up and the gas grill would be in the house.

19. Petitioners admitted that the Napeague home had all the amenities that would make it suitable for year round habitation, but lamented that, for their purposes and expectations, it was strictly suitable as a vacation home. The eating area was cramped for their family of five, and the frequent presence of the Giarraputos forced them to live in cramped quarters with their children on the second floor. Further, the open layout of the home and its lack of interior insulation permitted sound to travel easily thereby adversely affecting privacy.

20. The occupancy of the premises by the Giarraputos for most of the summer made it difficult for petitioners to use the property whenever they wished or for more than brief visits. In fact, it was petitioners' custom to call the Guarraputos to see if there was room for petitioners for any given period. Although petitioners conceded that they could insist on use of their home, they did not feel comfortable forcing themselves on the Giarraputos.

21. During the summer, Napeague is basically a vacation or beach community and petitioners took full advantage of the seasonal recreational offerings. They rode bikes, spent time at the beach, played miniature golf, cooked out and frequented the many clam shacks. When the weather was uncooperative, petitioners had little to do except stay home and watch television, since the Napeague area offers tourists and visitors many outdoor activities which are best enjoyed in nice weather.

22. Napeague lies in a low-lying strip of land between two bodies of water with little altitude to rebuff the effects of storms, wind and water. In fact, the area is in a designated flood

zone (hence the flood insurance mentioned above). Once, Mrs. Barker had weathered a particularly severe storm with the children, which rattled windows and caused water to enter the home, despite the fact that petitioners had the roof replaced.

23. The home is heated by oil and but lacks insulation between the interior walls (mentioned above with respect to noise). Its windows are single pane and are in need of some repair. However, the home was not shut down for winter because the Giarraputos used it from November to May.

24. For each of the three years in issue, petitioners filed timely New York State nonresident income tax returns, forms IT-203. On each of the returns they answered "NO" to the question, "Did you or your spouse maintain living quarters in New York State. . .?"

25. In March 2005, the Division of Taxation began an audit of petitioners for the years 2002 and 2003, which was subsequently extended to cover the year 2004. Although the audit had initially focused on issues of domicile and statutory residency, the auditor ultimately focused only on the number of days spent in New York by petitioners and their maintenance of a permanent place of abode in the state. As recited in the stipulation of facts executed by the parties and incorporated into Finding of Fact 2, Mr. Barker spent more than 183 days in New York State and City during each of the three years in issue.

26. Understanding that Mr. Barker had spent more than 183 days in New York State and City during the years in issue, the auditor's chief focus was on the home in Napeague, which he determined was a permanent place of abode. This conclusion was reached based on information he collected from various sources during the audit. He discovered that the home was used all year long by petitioners and their family members, and from his observation of photographs of the home it appeared to him to be suitable for year round habitation. Credit card statements,

utility and telephone bills, cable bills, and oil delivery charges further supported his conclusion that the home was suitable for year round living and was, in fact, utilized year round.

27. As a result of his findings and conclusions, the Division issued a consent to field audit adjustment, dated October 13, 2006, with respect to the years in issue. The additional tax determined to be due for each year was as follows:

Period Ended	Additional Tax	Penalties	Interest	Total
12/31/2002	$126,913.00	$36,712.00	$35,352.00	$198,977.00
12/31/2003	369,597.00	93,155.00	75,436.00	538,188.00
12/31/2004	111,650.00	40,766.00	14,908.00	167,324.00
				$904,489.00

The consent explained that the adjustments were made to petitioners' tax liability for the years in issue because they were statutory residents of New York during the period due to their maintenance of a permanent place of abode at in Amagansett, New York and their failure to show by clear and convincing evidence that they spent less than 183 days of the tax year within New York State.[1] The consent also explained that penalties were asserted pursuant to Tax Law § 685(b)(1), (2); (p) for negligence and substantial understatement of tax.

28. The Division of Taxation issued to petitioners a Notice of Deficiency, dated May 8, 2008, which asserted additional income tax due of $608,160.00, penalties of $221,086.01 and interest of $226,602.04, for a total due of $1,055,848.05.

[1]This statement predated petitioners' concession that Mr. Barker spent more than 183 days of the tax year in New York State for each of the years in issue.

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes New York state personal income tax on "resident individuals." In turn, Tax Law § 605(b)(1) defines "resident individual" as someone:

> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . , or
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> (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 . . . .

B. The parties agree that during the years at issue petitioners were domiciled in Connecticut. Further, petitioners have never denied that they owned and maintained a dwelling in Amagansett, New York, during the years at issue. Therefore, in order to conclude that petitioners were "resident individuals" required to pay New York personal income tax on their income from all sources and not merely on their New York source income, the issue is whether petitioners maintained a *permanent place of abode* by their ownership and maintenance of the Amagansett, New York, dwelling.

C. The Tax Law does not include a definition of the term "permanent place of abode." However, the regulation at 20 NYCRR former 105.20(e)(1), in effect during the years in issue and unchanged in the current regulation, provided, in part, the following interpretation of this term:

> *Permanent place of abode*. (1) A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode.

D. Although petitioners concede spending more than 183 days in New York in each of the taxable years in issue and that they own and maintain a home in the state, they contend that they are not residents because the home is not a permanent place of abode. The foundation beneath the reasoning for this contention is that they purchased the home for vacation use only, that it is only suitable to them as a vacation home and that since they purchased it in 1997, and specifically during the years in issue, they have used it exclusively for vacations. Since the regulation states that a mere camp or cottage, suitable and used only for vacations, is not a permanent place of abode, petitioners believe they do not meet one of the two requirements for statutory residency provided for in Tax Law § 605(b)(1)(B).

Petitioners described in great detail the pattern of their lives and how they were centered around their children and their Connecticut domicile. They described how the home in Napeague was inappropriate for permanent use by their family due to its distance from both Mr. Barker's place of work in New York City and the family home in New Canaan, Connecticut, and how their busy schedules made frequent trips to the Napeague home impossible. They described the cramped layout of the home and lamented the lack of space when visiting due to both square footage and the presence of Mrs. Barker's parents, who stayed at the home frequently throughout the year. Petitioners pointed out that the Napeague area is a beach community that offers little outside of beach and vacation activities and does not offer many off-season activities. Grocery and general shopping and medical services require travel by car. Finally, it was noted that the weather in Napeague could be extreme, including ocean storms, high winds, cold weather and flooding, for which petitioners' home was purportedly ill-equipped.

E. After a careful consideration of the applicable statute, regulation and case law and all the facts presented in this matter, it is determined that petitioners did maintain a permanent place

of abode in New York. Together with their concession that Mr. Barker spent in the aggregate more than 183 days in New York in each of the three years in issue, petitioners were residents during that period pursuant to Tax Law § 605(b)(1)(B).

Each of the parties has cited ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840, 606 NYS2d 404 [1993]) in support of its position. In ***Evans***, the Tribunal viewed a church rectory in Manhattan, where the taxpayer, a corporate attorney working in midtown, lived as a companion to the priest, as the taxpayer's permanent place of abode. The taxpayer made contributions to the rectory's household expenses and it was his dwelling place during his work week, despite the fact that Mr. Evans returned regularly to his country home and domicile in Pawling, New York, on weekends and vacations. The Tribunal, in supporting its finding of "permanence" as applied to the rectory in which Mr. Evans had no actual property right, said that the term permanence "must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place." Thus, of necessity, the Tribunal's analysis went beyond an examination of bricks and mortar to an inquiry into factors that indicated a permanence in his use of and relationship to the property, including sharing expenses; maintaining clothing, personal articles and furniture at the rectory; having a dedicated room within the home; and using it for daily attendance at his full-time job. However, the inquiry into Mr. Evans' relationship to the property was specifically tailored to establish that, even without a lease or deed - a property right - there could be a finding that petitioner Evans had maintained a permanent place of abode.

Petitioners' reliance on ***Evans*** is misplaced. There is no question about the permanency of their relationship with the Napeague property. They purchased it in 1997 and paid substantially all of the upkeep including the mortagage, maintenance costs, taxes and insurance throughout the

audit period. Hence, there is no reason to examine their relationship with the property as there was in ***Evans*** or, more recently, in ***Matter of Knight*** (Tax Appeals Tribunal, November 9, 2006). In ***Knight*** a New Jersey domiciliary, who occasionally used both a corporate apartment and his girlfriend's apartment in Manhattan while working in Manhattan, was deemed to be a nonresident because he did not maintain a permanent place of abode. The corporate apartment was used by clients and other corporate personnel, and his relationship to his girlfriend's apartment was found impermanent because none of the factors in ***Evans*** was present. Again, in the ***Knight*** case the inquiry into that petitioner's relationship to the places of abode was mandated by the fact that he had no clear property rights in either the corporate apartment or his girlfriend's apartment. That inquiry is simply not necessary here.

In ***Evans***, in an attempt to buttress its conclusion that "permanent" for purposes of the Tax Law meant something less than "the ultimate in the way of a residence established for all time to come," the Tribunal cited an Opinion of the Attorney General which concluded that Tax Law former § 350(7) (which defined a statutory "resident" as a person who maintains a permanent place of abode within the state and spends more than seven months of the taxable year there) did not intend that the word "permanent" be construed as establishing a residence forever, rather an abiding place having a fixed character as distinguished from a transitory one. (1940 Op Atty Gen No. 246, March 28, 1940.)

Not cited by the Tribunal was another Opinion of the Attorney General, issued a few weeks earlier on March 13, 1940, which was in response to a related inquiry about the residency status of military officers stationed in New York State, and which also remarked on Tax Law former § 350(7). In the earlier Opinion, the Attorney General stated that a permanent place of abode presents a question of fact to be determined in each particular case, but in general was "an

abiding place maintained by a person with such degree of continuity as to be considered permanent." (1940 Op Atty Gen No. 244, March 13, 1940.) Thus, the inquiry was focused on the continuity of maintenance of an abiding, or enduring, place or abode. As noted, that is not disputed in this matter.[2]

F. The regulation states that a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. (20 NYCRR former 105.20[e][1].) Petitioners contend that their home in Napeague was used by them only for vacations and that the home was suitable to them only for vacation use.

Petitioners correctly point out that one must abide by the canons of construction applicable to statutes when construing administrative rules (***Matter of Cortland-Clinton, Inc. v. NY Department of Health***, 59 AD2d 228, 231) and construe words of ordinary import according to their ordinary and popular significance, giving them their ordinary and usual meaning. (McKinney's Cons Laws of NY, Book 1, Statutes § 232.) They argue that they have demonstrated that the home was used by them for very short periods during the years in issue and that the home was only suitable for vacation use. While the record supports their claimed use of the home, it does not bolster the argument of the home's unsuitability for other than vacation use.

Petitioners believe that the word "suitability" must be loosely construed to mean something more than "survivability" to give the term its ordinary and usual meaning in accordance with the rules of statutory construction (***Id.***). The word "suitable" as used in the

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[2]Both of the opinions of the Attorney General were directed to military officers and various scenarios under which they might be living in New York State while serving. It is noted that the current Tax Law § 605(b)(B) exempts individuals in active service in the armed forces of the United States. Also, it is noted that the March 13, 1940 opinion cited ***Hutton v. Graves*** (256 App Div 1024), which concerned domicile and not statutory residency of an individual.

regulation, (suitable only for vacations) must be given its common dictionary definition of adapted to a use or purpose, satisfying propriety, or qualified. The common synonym is the word "fit." (Webster's Ninth New Collegiate Dictionary, 1180 [1990].)

An objective examination of petitioners' Napeague home reveals that it is certainly suitable or fit for full time habitation 12 months of the year, i.e., for other than vacations. It contains 1,122 square feet of interior living space and a 594 square foot wraparound deck. It contains three bedrooms, two full baths, a working kitchen, a living room with fireplace and hardwood floors. The home has heat fueled by oil, electric and telephone service, cable television and internet access. In fact, the house is used year round by Mrs. Barker's parents, who operate a fishing charter business from the address.

Petitioners maintain emphatically that they did not and would not use the house as anything other than a vacation home, while also conceding that it would be "survivable." The fact that petitioners may have used the Napeague home only for vacations does not alter the fact that it constitutes a permanent place of abode as contemplated by the statute and regulation.

In ***Matter of Stranahan v. New York State Tax Commission*** (68 AD2d 250, 416 NYS2d 836 [1979]) the Court found that time spent in a medical facility for the treatment of a serious illness should not be counted in determining if a nondomiciliary was a resident during such confinement. Even though the taxpayer was domiciled in Florida and owned an expensive home there, the Appellate Division found that she maintained a permanent place of abode in New York, to wit: a two and a half room apartment leased for $402.50 a month, used only occasionally for a few days at a time for shopping trips, layovers on trips to Europe and dances. The taxpayer maintained the apartment because she disliked staying in hotels. Petitioner had

argued that the apartment was similar to a vacation cottage under the Tax Law and did not constitute a permanent place of abode, but the Appellate Division rejected the contention saying:

> Considering the facts herein, decedent's apartment was a permanent place of abode within the State. This apartment was suitable for other uses than vacations, although it might be used by a person of considerable means only for activities which might be considered vacation purposes. There is, therefore, substantial evidence for the determination by the State Tax Commission that this apartment constituted a permanent place of abode. (***Id.,*** 416 NYS2d at 838)

The rationale in ***Stranahan***, when applied to the facts of the instant matter, provides a more compelling reason for reaching the same determination. Although petitioners attempted to paint a bleak picture of life in Napeague and their home's suitability for year round habitation, it was apparent that the home was suitable for uses other than vacations. Its structural integrity and substantial physical attributes are amply borne out by the facts, and the Giarraputos' frequent and year round use underscores its comfortable, year-round viability. The fact that shopping, hospitals, entertainment and trash facilities may be several miles distant, requiring travel by automobile, does not distinguish the home from any other rural residence in this state or make it less viable as a permanent place of abode. Petitioners' argument that the Napeague home is only suitable to them for vacation purposes is based on their financial ability to use it in that manner, like the taxpayer in ***Stranahan***. However, based on the evidence, the home was suitable for uses other than vacations.

G. The Division of Taxation imposed penalties pursuant to Tax Law § 685(b)(1), (2); (p). Tax Law § 685(b)(1), (2) provide for the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 of the Tax Law or the regulations promulgated thereunder and an addition based on the interest on the underpayment. Tax Law §

685(p) provides for the imposition of a penalty where there is a "substantial understatement" of the amount of income tax required to be shown on a return.

The penalties asserted were set forth and clearly delineated in the consent to field audit adjustment, dated October 13, 2006. Therefore, petitioners' contention that the auditor never explained the penalties or stated why they were imposed was in error. The provisions of the penalty sections are self-explanatory and their application to this matter was obvious when the determination was made that petitioners were New York statutory residents for the years in issue and had failed to timely remit the tax due on their income tax returns. Further, petitioners have not raised any argument for the abatement of the penalties asserted.

The issue of statutory residency involves a careful application of Tax Law § 605(b)(1)(B) and the regulation at 20 NYCRR former 105.20(e)(1) to the facts of the case as pertinent to petitioners' maintenance of a principal place of abode in New York. Petitioner's failure to pay the tax herein was due to their erroneous interpretation of the statute and regulation. The failure to pay tax when based on a different legal interpretation of a statute need not be considered reasonable cause. If it were so considered, the Division would rarely be entitled to levy such penalties (***Matter of Auerbach v. State Tax Commn***., Sup Ct, Albany County, March 27, 1987, Williams, J., ***affd*** 147 AD2d 390, 536 NYS2d 557; ***see also Matter of Erdman***).

In addition, petitioners' denial that they maintained living quarters in New York on their 2002, 2003 and 2004 nonresident income tax returns supports the imposition of the negligence penalties. They had owned the Napeague home since 1997 and to deny maintaining living quarters, regardless of suitability for a specific purpose, for each of the years in issue appears disingenuous at best and obfuscatory at worst. Petitioners' failure to establish that they were not statutory residents as determined by the Division on audit warranted the imposition of the

penalties asserted and their inability to demonstrate that their failure to pay the tax was due to reasonable cause justifies sustaining that imposition.

H. The petition of John J. and Laura Barker is denied and the Notice of Deficiency, dated May 8, 2008, is sustained.

DATED: Troy, New York
November 19, 2009

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE