STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GARY TWEED	:	DECISION DTA No. 812469
for Revision of a Determination or for Refund of New York City Personal Income Tax under the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioner Gary Tweed, 7 Robertson Drive, North Haven, New York 11963, filed an exception to the determination of the Administrative Law Judge issued on July 13, 1995. Petitioner appeared by Michael Schlesinger, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Donna M. Gardiner, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Any reply by petitioner was due on December 18, 1995, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether, during 1986 and 1987, petitioner was a "City resident individual" of the City of New York as that term is defined in the New York City Administrative Code §§ 11-1705(b)(1) and was therefore subject to the City's personal income tax.

II. Whether the penalties imposed herein should be sustained.

III. Whether petitioner was deprived of his fundamental right to confront his accuser by the absence from the hearing of the individual who conducted the audit.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Prior to approximately Thanksgiving Day (i.e., November 27), 1986 petitioner, Gary Tweed, resided with his wife and two daughters at 35 Osborne Road, Garden City, New York. Petitioner and his wife had resided atthis location since approximately 1970. There is no dispute that prior to Thanksgiving 1986 petitioner was domiciled at his Garden City residence.

During the period at issue petitioner was an executive with Smith, Barney, Harris, Upham & Co., Inc. ("Smith Barney"). Petitioner's office was located at 1345 Avenue of the Americas in New York City.

Petitioner was involved in municipal bond trading at Smith Barney. In or about 1986 petitioner became an executive vice-president and head of the municipal bond operation at Smith Barney. This position involved, among other things, management of approximately 100 employees.

In his executive vice-president capacity at Smith Barney, petitioner hired Kenneth Spelman in or about April 1986 as a top assistant in the position of institutional sales manager for municipal bonds. At the time of his hiring Mr. Spelman resided in Minnesota. As part of the terms of his employment, Smith Barney agreed to subsidize, on Mr. Spelman's behalf, the rent on an apartment in New York City for a period of six months. Pursuant to this agreement, Smith Barney paid for Mr. Spelman's use of a one-bedroom apartment located at 30 Lincoln Plaza, 26th Floor, in New York City commencing in April 1986.

On October 29, 1986 Mr. Spelman entered into a two-year lease in a two bedroom apartment at 30 Lincoln Plaza, Apartment 24-K. The lease term commenced December 1, 1986.

Prior to entering into the lease Mr. Spelman had discussions with petitioner regarding Spelman's New York City living arrangements, inasmuch as the six-month period during which Smith Barney had subsidized Spelman's apartment was expiring.

As a result of these discussions between petitioner and Mr. Spelman petitioner agreed to share the expense of the two-bedroom apartment.

At the time of the discussions between petitioner and Mr. Spelman, petitioner was experiencing marital problems.

On or about Thanksgiving Day 1986 petitioner left his marital residence in Garden City.

The arrangement between petitioner and Mr. Spelman, dividing the cost of the two bedroom apartment, continued from December 1986 through February 1988. During this period petitioner paid Mr. Spelman one-half of the cost of the apartment. Such expenses included one-half of the rent and housekeeping services and petitioner's share of the telephone bill.

As noted, Apartment 24-K at 30 Lincoln Plaza had two bedrooms, one of which was understood to be petitioner's. The other was Mr. Spelman's. Petitioner's bedroom was small, it did not have room for a dresser. The apartment also had a small kitchenette, and a living room area. The apartment was furnished and had a television and telephone.

Petitioner used the Lincoln Plaza apartment as his mailing address. The record indicates that petitioner had mail order purchases from Lands' End Direct Merchants, Williams Sonoma and Browning shipped to the Lincoln Plaza address. Petitioner also wrote the Lincoln Plaza address on several credit card receipts.

The record indicates that the United States Postal Service was notified of a change of address for petitioner from the Garden City address to the Lincoln Plaza address. Specifically, the record contains photocopies of two envelopes which had been addressed to petitioner at the Garden City address. Affixed to these envelopes were preprinted labels, dated March 19, 1987 and September 9, 1987, respectively, listing petitioner's name and the Lincoln Plaza address along with the statement "Notify Sender of New Address".

Petitioner listed the Lincoln Plaza address on both his 1986 Federal and State income tax returns.

The 1987 NYNEX (or New York Telephone) Manhattan Telephone Directory contained a listing for "Tweed, Gary J" at "30 W. 63".[1] Petitioner wrote this telephone number on five of the credit card receipts in evidence herein.

Petitioner's access to the Lincoln Plaza apartment was unrestricted.

Petitioner testified that he used the apartment very rarely, perhaps six to ten times over the course of his arrangement with Mr. Spelman.

Mr. Spelman testified that he (Mr. Spelman) travelled frequently and that he used the apartment only a few nights per week and that he returned home to Minnesota on weekends. Mr. Spelman further testified that he was rarely present in the apartment at the same time as petitioner.

Petitioner also testified that the apartment was occasionally used for business meetings.

After he left his marital abode on Thanksgiving 1986, petitioner used his parents' home, located at 305 Hawthorne Road, Uniondale, New York, as a residence. The Uniondale home was approximately a five-minute drive from the Garden City home. Petitioner had resided in the Uniondale home from 1953 until his marriage in or about 1969.

The record does not establish that petitioner used the Uniondale home to the degree asserted by petitioner at hearing. That is, the record does not establish that petitioner returned to the Uniondale home every evening following work (except when he was traveling) and every weekend.

The record does establish that petitioner occasionally stayed at his parents' home during 1987.

At the time of their separation, petitioner and his wife also owned a home in Noyac, New York. Petitioner and his wife and daughters used this home as a weekend or vacation home. Although it was heated, petitioner closed this house down and did not use it from November through March.

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[1] 30 West 63rd Street is the same location as 30 Lincoln Plaza.

Petitioner's daughters were 8 and 12 years old, respectively, at the time of their parents' separation in 1986. During the years at issue they resided with their mother at 35 Osborne Road in Garden City. Petitioner had visitation rights with his daughters every Wednesday and on weekends. Petitioner regularly exercised his visitation rights and regularly saw his daughters at these times. Petitioner also regularly attended his daughters' school and extra-curricular activities such as athletic contests and concerts. Petitioner's visits with his daughters took place, almost exclusively, on Long Island. Petitioner's daughters were present in the Lincoln Plaza apartment on only one occasion. During his Wednesday visits with his daughters, petitioner often would have dinner with them either in a restaurant or at his parents' home. On weekends, petitioner often took his daughters to the Noyac home.

When he stayed at the Uniondale home petitioner commuted to work in New York City via the Long Island Railroad. The commute took approximately 40 to 55 minutes. Petitioner introduced no documentation or records of his commuting.

Petitioner owned a Ford Bronco truck, which he kept at the Uniondale house.

Petitioner's divorce became final in 1989. As part of the divorce settlement, petitioner's former wife took title to both the Garden City and Noyac homes.

When petitioner discontinued his arrangement with Mr. Spelman in February 1988, he no longer maintained any residence in New York City. Petitioner retired from Smith Barney in October 1988. He currently resides with his younger daughter in Sag Harbor, New York.

No evidence was presented as to whether petitioner kept photographs, mementos or other personal effects at his parent's Uniondale home. Petitioner testified that he kept no such items at the Lincoln Plaza apartment.

Petitioner did not establish whether or where he registered to vote during the years at issue, or what address was reflected on his driver's license during those years.

During the course of the audit herein, in response to a Division inquiry by letter dated June 13, 1990, petitioner's former representative stated by letter dated June 26, 1990 in relevant part as follows:

"WHEN I SPOKE TO GARY AND MAILED HIM YOUR LETTER THIS WAS HIS RESPONSE:
HE HAD LOANED FROM MR. SPELMAN APPROXIMATELY $15,000.00 FOR PERSONAL REASONS THAT BECAUSE OF HIS DIVORCE HE COULD NOT SHOW SINCE ALL HIS TRANSACTIONS WAS OPEN TO THE COURT HE PAID IT BACK AS RENT AND ALSO HAD HIS MAIL SENT THERE SINCE MR. SPELMAN WAS ONE OF HIS EMPLOYEES HE COULD BRING ALL MAIL IN WITH HIM TO WORK.

* * *

GARY SPENT ALL HIS WEEKENDS IN NYACK (sp.) WITH HIS CHILDREN AND ALSO HE HAD VISITATION RIGHTS EVERY WEDNESDAY EVENINGS.

GARY SPENT THE PERIOD OF TIME FROM THANKSGIVING 1986 WHEN HE LEFT HIS EXWIFE THRU 1987 LIVING WITH HIS PARENTS IN UNIONDALE (NASSAU COUNTY)."

The letter stated at bottom "Copy to Gary Tweed".

At hearing petitioner denied making the statements attributed to him in the above-referenced letter.

Petitioner also testified on direct and cross-examination that, except on one occasion, when he took his daughters to a performance of The Nutcracker Suite at Lincoln Center, he did not go into New York City on weekends during the period at issue. Petitioner stated that he "didn't think" he ever ate dinner in New York on weekends (tr., p. 73).

Credit card receipts in evidence indicate charges made by petitioner in New York City on the following weekend days during the period at issue.

Date	Day	Location of Purchase
1/10/87	Saturday	Panarella's
1/17/87	Saturday	Primavera Restaurant
1/18/87	Sunday	UTOG 2-Way Radio
3/14/87	Saturday	OJ Art Gallery
8/1/87	Saturday	O'Neals Restaurant
8/22/87	Saturday	Michael Max
8/22/87	Saturday	National Brands Outlet
8/22/87	Saturday	Mind Gabriele
12/19/87	Saturday	Manhattan Ocean Club
12/26/87	Saturday	Babyland on Fifth

When presented with the documentation of certain of the charges listed above petitioner did not dispute that the documentation was accurate or that he had in fact made the purchases indicated by the documentation.

Petitioner introduced into the record certain credit card statements related to the period at issue. Specifically, petitioner submitted certain "Gold Mastercard" statements listing purchases made during the approximate period of March 1987 through December 1987. Petitioner also submitted certain "Citibank Visa" statements related to purchases made during the approximate period of July 1987 through December 1987. Petitioner also submitted certain "First Card" (First Chicago Visa) statements related to purchases made from approximately August 1987 through December 1987.

Petitioner also submitted Noyac Golf and Country Club, Inc. statements dated October 31, September 29, September 5, July 30, June 30, and May 30, 1987. Petitioner was a member of this country club during 1986 and 1987. The country club statements indicated a charge for "lunch" on Sunday, June 7, 1987; a charge for "dinner" on Saturday, July 18, 1987; and charges for "luncheon", "greens fees" and "cart rental" on Monday, August 31, 1987. The country club statements list no other charges tending to indicate petitioner's presence at the club.

In this regard petitioner testified that there was no charge for playing golf at the club without cart rental and that he played golf about once a week during the period in question.

A review of credit card statements submitted indicate purchases made from businesses located on Long island on the following dates in 1987:

Date	Day	Date	Day
3/14	Sat.	6/5	Fri.
3/23	Mon.	6/6	Sat.
3/28	Sat.	6/13	Sat.
4/18	Sat.	6/19	Fri.
4/20	Mon.	6/20	Sat.
4/23	Thurs.	6/24	Wed.
5/2	Sat.	6/27	Sat.
5/6	Wed.	7/3	Fri.
5/11	Mon.	7/24	Fri.
5/16	Sat.	7/25	Sat.
5/22	Fri.	7/31	Fri.
5/23	Sat.	8/3	Mon.
5/25	Mon.	8/8	Sat.
5/30	Sat.	8/9	Sun.
5/31	Sun.	8/15	Sat.
8/19	Wed.	10/14	Wed.
8/23	Sun.	10/24	Sat.
8/28	Fri.	10/26	Mon.
8/29	Sat.	10/28	Wed.

9/2	Wed.	11/6	Fri.
9/3	Thurs.	11/7	Sat.
9/4	Fri.	11/8	Sun.
9/5	Sat.	11/13	Fri.
9/8	Tues.	11/14	Sat.
9/11	Fri.	11/15	Sun.
9/12	Sat.	11/20	Fri.
9/19	Sat.	11/21	Sat.
9/20	Sun.	11/25	Wed.
9/21	Mon.	11/28	Sat.
9/25	Fri.	12/4	Fri.
9/30	Wed.	12/5	Sat.
10/2	Fri.	12/6	Sun.
10/3	Sat.	12/12	Sat.
10/4	Sun.	12/13	Sun.
10/5	Mon.	12/19	Sat.
10/10	Sat.	12/31	Thurs.
10/11	Sun.		

The credit card statements also indicate via restaurant, rental car and other charges that petitioner was present in California from March 30 to April 1 and from July 7 to July 17, 1987.

Petitioner presented no credit card statements for the year 1986.

Petitioner testified that his job caused him to travel frequently. Petitioner presented no airline tickets or lodging receipts in connection with such travel. Moreover, petitioner's testimony regarding travel was general and did not specifically detail as to date any such trips.

It is noted that the credit card statements indicate certain purchases from various airlines. Assuming these items represent purchases of airline tickets, there is no indication in the record as to when or by whom such tickets were used.

Among the documentation submitted by the Division were photocopies of six American Express Card receipts. No other records of purchases made by petitioner with his American Express Card were entered into evidence.

Petitioner did not maintain a contemporaneous diary or calendar or similar documentation with respect to his day-to-day whereabouts during the period at issue.

Petitioner did testify as to his purported general pattern of activity, but did not testify as to his whereabouts on specific days during the period at issue.

Attached to the petition filed in this matter and in support thereof were several unsworn statements addressed "To Whom It May Concern". One such statement, dated April 26, 1993 made by William Heinzerling, provided, in part:

> "Both as a friend and employee, I have known Gary on a personal basis as well as professionally for ten years. I was aware that he was separated around Thanksgiving of 1986. I was also aware that he had moved back with his parents, who live in Uniondale, N.Y. on Long Island. We had spent many hours after work playing softball in Central Park and basketball at the NYAC. After such, we would share a cab to Penn Station where Gary would get on a train to Long Island and I would walk to catch a Path train at Herald Square. There were also some instances when Gary would come home with me to N.J. Gary subsidized an apartment with Ken Spellman [sic], at 30 Lincoln Plaza, which he frequented on a infrequent basis (maybe Monday's or Tuesday's to see his girlfriend which he could not bring home to his parent's). This apartment was viewed by Gary and I as a lockeroom."

Mr. Heinzerling testified at the hearing. On direct examination, Mr. Heinzerling stated that he did not know that petitioner had an apartment in the City; that he had never been to such an apartment; and that he knew nothing about any such apartment. Mr. Heinzerling further indicated in his testimony that he did not play basketball with petitioner, as indicated in the statement because petitioner did not play basketball.

Petitioner's mother, Anna Tweed, testified at hearing that petitioner stayed at the Uniondale home "maybe five days [per week], unless he was away, you know, different trips" (tr., p. 110).

Petitioner filed a joint 1986 New York State Personal Income Tax Return (Form IT-201) with his then-spouse. Said return listed the 30 Lincoln Plaza, Apartment 24-K as petitioner's mailing address and 35 Osborne Road, Garden City as his "permanent home address". Also filed with the return and attached thereto was a New York City nonresident earnings tax return (Form NYC-203) which indicated thereon that petitioner was not a New York City resident for any part of 1986 and that petitioner did not maintain an apartment in New York City during any part of 1986. The Form NYC-203 further indicated that petitioner worked 227 days during 1986 of which 153 were days worked in New York City.

Petitioner filed his 1987 Form IT-201 as a single individual. Said return listed 226 Hampton Road, Noyac, New York as petitioner's permanent address. A 1987 Form NYC-203

attached to this return indicated that petitioner was not a New York City resident during any part of 1987 and that petitioner did not maintain an apartment in New York City during any part of 1987. The Form NYC-203 also indicated that petitioner worked 227 days in 1987 of which 154 were days worked in the City.

Following its audit, the Division of Taxation determined that petitioner was a resident of the City of New York for purposes of the City's personal income tax for the entire period at issue. Accordingly, the Division determined that the entire amount of petitioner's 1986 and 1987 New York taxable income was subject to the City personal income tax. Pursuant to this determination, on December 2, 1991, the Division issued to petitioner two notices of deficiency which assessed additional City income tax due in the amount of $66,569.00 for 1986 and $195,887.00 for 1987, respectively, plus penalties and interest.

The notices of deficiency imposed penalties pursuant to Tax Law § 685(b) and (p).

The individual who conducted the audit of petitioner was not present at the hearing herein. Petitioner's representative did not inquire as to whether this original auditor was expected to testify at the formal hearing in this matter. Furthermore, the original auditor is no longer employed in the income tax section at the New York City Department of Finance. Lastly, petitioner's representative failed to subpoena the original auditor.

The Division of Taxation submitted proposed findings of fact numbered 1-11. Proposed findings of fact 1-6, 8 and 11 are, in substance, accepted and have been incorporated into the findings of fact herein. The first sentence of proposed finding of fact 7 has been accepted in substance, and incorporated herein as Finding of Fact "12". The balance of this proposed finding is rejected as speculative. Proposed findings of fact 9 and 10 are rejected. These proposed findings characterize testimony and evaluate credibility, and are therefore more in the nature of conclusions of law.

OPINION

The first issue in this case is whether petitioner was a resident of New York City during 1986 and 1987 so that he was subject to the tax imposed by section 11-1701 of the

Administrative Code of the City of New York. A New York City resident is defined by section 11-1705(b)(1) of the Administrative Code of the City of New York, in part, as an individual:

> "(A) who is domiciled in this city, unless: (i) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city . . .
>
> or
>
> "(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in the city."

The Administrative Law Judge concluded that petitioner proved that "he did not intend to acquire a New York City domicile and in fact did not acquire such a domicile at any time during the years at issue" (Determination, conclusion of law "F"). However, the Administrative Law Judge also concluded that petitioner failed to prove that he was not present in New York City for more than 183 days during each of the years at issue and, therefore, held that petitioner was a statutory resident under Administrative Code section 11-1705(b)(1)(B) during 1986 and 1987.

In his exception, with respect to 1986, petitioner points out that the Division's Nonresident Audit Guidelines, adopted in June of 1994 provide, at section .20, that "an individual who maintains a permanent place of abode in New York State must maintain such abode 'for substantially all the taxable year.' For this purpose, substantially all the taxable year means a period exceeding eleven months. For example, an individual who acquires a permanent place of abode on March 15 of the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year" (Petitioner's exception, p. 25, quoting Division's Nonresident Audit Guidelines). Because petitioner did not begin sharing the cost of the apartment in New York City with Mr. Spelman until December of 1986, petitioner contends that he did not maintain a permanent place of abode for substantially all of 1986 and cannot be considered a statutory resident for 1986. In response, the Division states that "the audit guidelines promulgated in 1994 have no bearing on this case which was concluded by the auditor in 1991" (Division's brief in opposition, p. 4).

While we would agree with the Division that the Audit Guidelines adopted after the audit was conducted could not be used as a basis to criticize the audit methodology (see, Matter of Veeder, Tax Appeals Tribunal, January 20, 1994), we do not agree that the Audit Guidelines are completely irrelevant to this case. Instead, the Guidelines are relevant for the limited purpose of guiding us in determining what the phrase "maintaining a permanent place of abode" means. The value of the Guidelines as an aid in interpretation is especially meaningful in this case because we have found no other authority which defines the duration of a permanent place of abode. The applicable regulations, former 20 NYCRR 102.2(e), incorporated by New York City pursuant to 20 NYCRR 290.1, are silent on the question of duration, except to say that a place of abode is not permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. Thus, relying on the Audit Guidelines simply as an aid in interpreting the statute, we conclude that the apartment maintained by petitioner for one month of the taxable year was not a permanent place of abode within the meaning of section 11-1705(b)(1) of the New York City Administrative Code and that petitioner was not a resident of New York City during 1986.

With respect to 1987, the Administrative Law Judge concluded that petitioner's evidence was inadequate to establish that petitioner was present in New York for less than 183 days. In reaching this conclusion, the Administrative Law Judge noted that petitioner conceded that he worked 154 days in New York during 1987 and therefore his "margin of error on this issue is quite thin" (Determination, conclusion of law "H"). In addition, the Administrative Law Judge pointed out that petitioner's evidence consisted of general, nonspecific testimony that was not supported by documentation and that documentation was especially important in this case because on any given day petitioner could easily have been present in the City and on Long Island. The Administrative Law Judge also stated that the weight of the testimony offered by petitioner was impaired by inconsistencies between this testimony and other information in the record which indicated that petitioner was present in the City more often than he claimed.

On exception, petitioner argues that he has "submitted adequate data by means of independent witnesses to substantiate his activities to prove that he is not a New York City resident during the audit period" (Petitioner's brief in support, p. 9).

We affirm the determination of the Administrative Law Judge with respect to 1987. The Administrative Law Judge found the testimony inadequate. Generally, we defer to the Administrative Law Judge's evaluation of the credibility of a witness because the Administrative Law Judge has the ability to observe the witness first hand (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). We see nothing in the record before us that would cause us to disagree with the Administrative Law Judge's evaluation in this matter. Therefore, we find that petitioner failed to prove that he was not a statutory resident of New York City for 1987.

Next, petitioner renews his contention that the Division's failure to call as a witness the auditor that performed the audit deprived petitioner of his constitutional right to confront his accuser. Relying on Matter of Mira Oil Co. v. Chu (114 AD2d 619, 494 NYS2d 458, lv denied 68 NY2d 602, 505 NYS2d 1026) and Matter of Anray Service (Tax Appeals Tribunal, December 1, 1988), the Administrative Law Judge stated that the Division was not required to produce the auditor that performed the audit. We affirm the determination of the Administrative Law Judge on this issue for the reasons stated in the determination.

Lastly, petitioner asserts that penalties should be abated because he relied on his accountant for advice in filing the return for 1987. Reliance upon advice from a professional does not in itself insulate a taxpayer from penalties (Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455); therefore, we affirm the determination of the Administrative Law Judge sustaining the penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gary Tweed is granted to the extent that the deficiency with respect to 1986 is cancelled, but the exception is in all other respects denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1," but is otherwise affirmed;

3. The petition of Gary Tweed is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The notice of deficiency for 1986 is cancelled and the notice of deficiency for 1987 is sustained.

DATED: Troy, New York
May 23, 1996

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner