STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM M. & JUNKO G. DONOVAN	:	DECISION DTA NO. 818803
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1995.	:	

Petitioners William M. and Junko G. Donovan, 1130 Oenoke Ridge Road, New Cannan, Connecticut 06840, filed an exception to the determination of the Administrative Law Judge issued on June 19, 2003. Petitioners appeared by Robert W. Taylor, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition and petitioners filed a reply brief. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly determined that petitioner Junko Donovan maintained a permanent place of abode in New York City for the tax year 1995.

FINDINGS OF FACT

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

Petitioners, William M. and Junko G. Donovan, were married on October 13, 1993 and together purchased the premises located at 1130 Oenoke Ridge Road, New Cannan, Connecticut on December 3, 1993, for a purchase price of $830,000.00. The New Cannan home consisted of 2.761 acres and 14 rooms. Since December 1993, petitioners were residents and domiciliaries of the State of Connecticut.

Petitioners filed Form IT-203, a New York State Nonresident and Part-Year Resident Tax return for 1995. The return was filed under status married filing jointly, bearing the address of 1130 Oenoke Ridge, New Canaan, Connecticut 06840. Wages in the amount of $535,016.00 were reported as both Federal and New York State amounts and fully allocated to New York State and New York City, with computed income tax paid on reported amounts. The remaining income items and a New York subtraction were reported as Federal amounts only.

Connecticut Form CT-1040, Resident Tax Return, was duly filed by petitioners and the income reported, including the above-referenced wages earned by Junko Donovan, with a credit for taxes paid to another jurisdiction (New York State) computed and deducted from tax due to the State of Connecticut for tax year 1995.

William Donovan was the sole owner of a condo-apartment at 14 Horatio Street, Apt. 5C, New York City, which he purchased January 15, 1984, before his marriage to Junko Donovan. The apartment is an approximately 600-square-foot studio apartment with a bathroom and a kitchen. The condo-apartment was sold by Mr. Donovan on December 11, 1996, and his

personal effects were moved to Connecticut around the same time. Mrs. Donovan did not appear at the closing of such sale and signed none of the closing documents.

It was established that during 1995, the Horatio Street apartment was not under a rental arrangement or lease, and Junko Donovan, who possessed a key and had free use of the apartment, actually used the Horatio Street Apartment overnight on 28 days. Mr. Donovan, who testified in person on the issue of how often each of them stayed overnight in the apartment, indicated he spent about 40 nights in the Horatio Street apartment during 1995. Both William and Junko Donovan made payments from their separate accounts for the monthly maintenance fees and the Time Warner cable bills for 14 Horatio Street during 1995.

Pursuant to a Notice of Audit dated March 11, 1999, William and Junko Donovan were notified that New York State personal income tax returns for 1995, 1996 and 1997 were under review.

A Statement of Income Tax Audit Changes dated September 1999, was originally issued to petitioners indicating additional tax due for 1995 as follows:

Tax-NYS	$ 4,735.53
-NYC	22,608.77
	26,984.30
Penalties	7,929.69
Interest	7,764.11
Total	$42,678.10

A request for a breakdown of other and unearned income of petitioners, dated June 1, 2000, was returned by petitioners indicating the following income division:

WMD	$25,560.00
JGD	34,457.00
Total	$60,147.00

A corrected Statement of Income Tax Audit Changes for tax year 1995, dated June 12, 2000, was issued to Junko Donovan alone, as follows:

Tax-NYS	$ 2,424.69
-NYC	21,462.99
	23,887.68
Penalties	7,711.65
Interest	8,741.96
Total	$40,341.29

In the corrected Statement of Income Tax Audit Changes, other and unearned income of William Donovan in the amount $25,560.00 was eliminated in full.

A Statement of Income Tax Audit Changes for tax years 1995 through 1997 was received by William Donovan indicating no additional tax due for the three years under review. A Statement of Income Tax Audit Changes for tax years 1996 and 1997 was received by Junko Donovan, stating no additional income tax was due for those two years.

Mr. Donovan was unemployed from October 1994 until December 21, 1997. During his period of unemployment he was continually networking with contacts in and outside of New York City and with headhunters in several locations, much of which took place from his home in Connecticut. William Donovan was deemed to be a nonresident of New York State and New York City during tax years 1995 through 1997 by the Division of Taxation ("Division").

Junko Donovan was employed by Financial Products Co. in Japan from 1983 to December 1993. During 1993, Financial Products Co. merged with Credit Suisse First Boston. After her marriage to William Donovan in 1993, she moved to the United States when Credit Suisse First Boston transferred her to the company's office in New York City, located at 11 Madison Avenue, New York, New York. During the year in question, 1995, Junko Donovan was employed by Credit Suisse First Boston and worked 226 days in New York City, confirmed by her employment attendance records. The number of days Mrs. Donovan worked in New York City is not in dispute.

Petitioners executed a consent extending the period of limitation for which an assessment of personal income tax could be determined for tax years 1995 and 1996 until September 30, 2000.

The Division issued a Notice of Deficiency dated July 24, 2000, Assessment No. L-018293396, asserting additional tax due for tax year 1995, in the amount of $23,887.68, plus penalties and interest in the amounts of $7,797.68 and $8,914.04, respectively, for a total of $40,599.40. The basis for such assessment was a determination that Junko Donovan was a New York State and New York City statutory resident for tax year 1995, having worked in New York City for more than 183 days and having maintained a permanent place of abode in New York City at 14 Horatio Street, Apt. 5C., the condo-apartment owned by her husband.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge pointed out that Tax Law § 605(b)(1)(A) and (B) defines a New York State resident individual for income tax purposes as one:

> (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
>
> (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***, New York City Administrative Code § 11-1705[b][1][A], [B]). The classification of resident versus nonresident is significant, the Administrative Law Judge noted, 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.

While there are two bases upon which a taxpayer may potentially be subjected to tax as a resident of New York City, the only basis at issue in this proceeding is whether petitioner Junko Donovan met the test for "statutory residency" (***see***, New York City Administrative Code § 11-1705[b][1][B]). The Administrative Law Judge pointed out that the basis for taxation of an individual pursuant to the provisions of statutory residency requires: (1) the maintenance of a permanent place of abode in the City and (2) physical presence in the City on more than 183 days during a given taxable year.

With regard to the physical presence element, the parties stipulated to the fact that Junko Donovan spent 226 days working in New York City, satisfying this predicate. Thus, the only remaining element for the Administrative Law Judge to address was whether petitioner maintained a permanent place of abode in New York City.

In determining whether 14 Horatio Street, Apt. 5C, New York City, was a permanent place of abode, the Administrative Law Judge addressed the provision of 20 NYCRR 105.20(e)(l), which provides, in relevant part, that:

> [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. . . . Also, 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*. For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though 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. . . . However, if such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State (emphasis added).

Based on the above, the Administrative Law Judge concluded that the apartment at 14 Horatio Street was a permanent place of abode. It was a studio apartment consisting of facilities for cooking and bathing. It did not lack permanence as a result of being utilized during a temporary stay for the accomplishment of a particular purpose for a fixed and limited time period. The Administrative Law Judge next addressed whether the apartment constituted a permanent place of abode for petitioner, which she maintained, during the years in question.

The Administrative Law Judge noted that in ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed Matter of Evans v. Tax Appeals Tribunal***, 199 AD2d 840, 606 NYS2d 404), the Tax Appeals Tribunal was asked to decide the meaning of the phrase "maintains a permanent place of abode." The Tribunal noted that the term "maintain" is not defined in the pertinent statute or regulation and, accordingly, examined the legislative history of the statutory language, concluding:

> Given the various meanings of the word "maintain" and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the "variety of circumstances" inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise (***Matter of Evans, supra***).

The Administrative Law Judge found that the checks reviewed by the Division permitted the conclusion that petitioners together maintained the apartment, each contributing to the monthly maintenance fees and cable television bills. The Administrative Law Judge noted that there was no evidence or claim that Mrs. Donovan was in any manner precluded from access to or use of the apartment. In fact, her overnight use was conceded by petitioners and use of the 14 Horatio Street telephone by Mrs. Donovan during her overnight stays was confirmed by her husband and his review of phone records. The Administrative Law Judge rejected petitioners' characterization that the condo-apartment was used on a limited basis for a limited purpose. The Administrative Law Judge noted that this is not the same as a "temporary stay for the accomplishment of a particular purpose," since the temporary nature of the commitment to such location, such as New York City, is critical to its limited use. There is no evidence that Mrs.

Donovan's employment in New York City was a temporary assignment. Accordingly, the Administrative Law Judge concluded that petitioners failed to establish that the apartment was not a permanent place of abode maintained by them during the year in issue and denied the petition.

ARGUMENTS ON EXCEPTION

Petitioners, on exception, argue that Mrs. Donovan did not maintain a permanent place of abode in New York City during 1995. Petitioners claim that the apartment at 14 Horatio Street is not a permanent place of abode since its use was for a limited purpose.

Petitioners claim that the Administrative Law Judge misapplied the "184 Day Rule" because Mrs. Donovan only stayed overnight in New York City a total of 28 nights (Petitioners' brief in support, p. 3). Petitioners also urge that the mere fact that Mrs. Donovan paid some of the expenses for maintaining the New York City apartment, did not mean she was maintaining it as a permanent place of abode.

The Division contends that the 14 Horatio Street condo-apartment constitutes a permanent place of abode and, in fact, was maintained by petitioners and, specifically, Mrs. Donovan, during 1995.

OPINION

It is undisputed that Mrs. Donovan was present in New York for 226 days and this fact is confirmed by her employment attendance records. Petitioners claim that the Administrative Law Judge erred in applying the 183-day rule because Junko Donovan only stayed overnight in New York on 28 nights. However, petitioners are mistaken in their belief that to be counted as a day

in New York an overnight stay within New York City is required (***cf.***, ***Matter of Leach v. Chu***, 150 AD2d 842, 540 NYS2d 596, ***appeal dismissed*** 74 NY2d 839, 546 NYS2d 344).

We affirm the determination of the Administrative Law Judge for the reasons stated therein. We find that the Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioners. Petitioners have failed to present evidence below, or arguments on exception, that would justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William M. and Junko G. Donovan is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of William M. and Junko G. Donovan is denied; and

4. The Notice of Deficiency dated July 24, 2000 is sustained.

DATED: Troy, New York
February 26, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner