STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
GAYTON AND PAMELA CICCONE	:DETERMINATION DTA NO. 812607
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1989 and 1990.	:

Petitioners, Gayton and Pamela Ciccone, 2 Inlet Terrace, Belmar, New Jersey 07719, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1989 and 1990.

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 October 18, 1994 at 9:15 A.M. with all briefs filed by June 7, 1995, which date commenced the the six-month period for issuance of this determination pursuant to Tax Law § 2010(3). Petitioners appeared by Lawrence R. Schoenfeld, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Donna M. Gardiner, Esq., of counsel).

ISSUE

Whether petitioners were residents of the State and City of New York during the years 1989 and 1990 pursuant to Tax Law § 605(b) and § 1305(a) and the Administrative Code of the City of New York § 11-1705.

FINDINGS OF FACT

1. Petitioners, Gayton and Pamela Ciccone (hereinafter "Ciccone"), were issued a Statement of Personal Income Tax Audit Changes, dated October 28, 1992, which set forth total additional New York State and New York City income taxes for the years 1989 and 1990 in the sum of $19,947.00, plus interest of $3,637.00, for a total amount due of $23,584.00. The actual breakdown of additional tax due for each of the taxing jurisdictions for each of the years in issue is as follows:

	New York State	New York City
1989	$1,664.00	$6,924.00
1990	$2,086.00	$9,273.00

The Statement of Personal Income Tax Audit changes included an explanation for the assessment which stated as follows:

"Taxpayers are deemed to be resident individual [sic] of New York State & New York City in accordance with NY Tax Laws ch. 60, Art. 22, Sec. 605[,] NY Tax Laws ch. 60, Art. 30, Sec. 1305 [and] NYC Art. 11, ch. 17, Sec. 11-1705."

2. A Notice of Deficiency, dated December 3, 1992, was issued to petitioners for the years 1989 and 1990, setting forth

additional personal income taxes due for both New York State and New York City in the sum of $19,947.00 plus interest.

3. Petitioners protested the notice and a conference was held in the Bureau of Conciliation and Mediation Services on October 26, 1993, subsequent to which an order was issued, dated November 26, 1993, which sustained the notice in full.

4. Petitioners appealed the order of the conciliation conferee to the Division of Tax Appeals on the basis that the determination of the Division of Taxation that petitioners were residents of the State and City of New York was in violation of the Due Process Clause, the Privileges and Immunities Clause and/or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

5. During the years in issue, petitioners were domiciled in the State of New Jersey, residing at 2 Inlet Terrace, Belmar, New Jersey. In addition to owning this home, they also owned property at 321 Sea Spray Lane, Neptune, New Jersey and Mr. Ciccone had an interest with his mother in property located at 1628 Dumont Avenue, Wall, New Jersey.

Petitioners also leased an apartment in New York City at 353 East 83rd Street, which had two bedrooms and approximately 1500 square feet.

6. Mr. and Mrs. Ciccone filed jointly for purposes of their 1989 and 1990 New York State nonresident tax returns (IT-203) and New York City nonresident tax returns (NYC 203).

In his 1989 City of New York Nonresident Earning Tax Return, Mr. Ciccone stated that he worked 215 days in New York City in

1989 and Mrs. Ciccone stated that she worked 212 days in New York City in 1989.

In their 1990 City of New York Nonresident Earnings Tax Return, Mr. Ciccone stated that he worked 215 days in New York City during 1990 and Mrs. Ciccone stated that she worked 210 days in the City during 1990.

7. During the years in issue, Mr. Ciccone was a trader in government bonds for S G Warburg, 787 Seventh Avenue, New York City. Mrs. Ciccone was a sales person for Metro Magazines Inc., 1500 Walnut Street, Philadelphia, Pennsylvania, which also had an office in New York City, where Mrs. Ciccone worked on a daily basis. Petitioners worked five days per week roughly between the hours of 8 A.M. and 5 P.M.

8. Generally, Petitioners commuted to New York City from their New Jersey home and stayed overnight in their New York City apartment, returning to their New Jersey home on the weekends. The New York City apartment was used for entertaining as well, but petitioners did not elaborate upon the extent or substance of the entertaining activities. However, Petitioners did not maintain diaries or supply other documentation to establish how many nights were spent in the New York City apartment or exactly how many days they spent in the State of New York. Mr. Ciccone testified that he and his wife spent two or three nights per week at the apartment for the purpose of job-related entertaining and that it was easier than travelling all the way back to their New Jersey home, 45 miles away.

On their New York City nonresident earning tax returns for

1989 and 1990, petitioners stated that neither of them maintained an apartment or other living quarters in the City of New York during any part of the years in question. Further, even though the auditor asked for the same information, she was not provided any information and independently discovered the apartment at 353 East 83 Street through the address on Citibank bank statements. Even when the auditor had discovered the New York City apartment and confronted petitioners' representative with the information, she was provided with no further information.

9. Petitioners belonged to the Belmar Fishing Club in New Jersey and the New York Athletic Club in New York City. Petitioners used physicians in New York City and had their clothes cleaned there as well. However, the auditor noted in her memorandum to the audit file that her analysis of cancelled checks revealed that most of petitioners' activities occurred outside New York.

10. Although the auditor requested copies of all deeds and leases for all residences, address of garage space rented, a list of all banks petitioners had accounts with and information pertinent thereto, all cancelled checks and bank statements, all credit card statements and charge statements, telephone bills for all residences, utility bills and bills for dues, subscriptions to clubs, social and professional organizations, diaries or appointment books that would have established nonresidency for the audit period and a breakdown of petitioners' residency since 1975, petitioners did not provide

said documentation. The request was made by letter, dated January 23, 1992.

11. Both Mr. and Mrs. Ciccone travelled as part of their jobs during the years in issue, but it was not divulged in the record what the extent of the travel was. In any event, there was no evidence to dispute the number of days they worked in New York City as set forth in their tax returns for the years in issue.

12. The parties agreed that Mr. and Mrs. Ciccone were not domiciled in the State of New York during the years in issue.

SUMMARY OF PETITIONERS' POSITION

13. Petitioners contend that even though they spent in excess of 183 days and maintained a permanent place of abode in New York State and City during the years in issue, the definition of a resident within the State and City statutes is violative of the Due Process Clause of the United States Constitution. The rationale adopted by petitioners is that New York State and City do not deserve to tax unearned income and income earned out of New York State, given the proportion of property owned by petitioners out of New York State and time spent outside of New York. Since petitioners are domiciled in New Jersey, which provides them with basic and all-encompassing benefits, petitioners urge that it is only right that only the domicile State be able to tax all of the domiciliary's income.

14. In the alternative, petitioners argue that the definition of resident individual is violative of the Commerce Clause of the United States Constitution because the statute is

internally inconsistent and exposes petitioners to multiple taxation of the same income.

CONCLUSIONS OF LAW

A. As noted in Finding of Fact "12", the parties agreed that petitioners were not domiciled in the State of New York during the years in issue and, therefore, the only issue is one of residency, as that term is defined in the statutes and regulations.

Tax Law § 605(b)(1)(B) provides, in pertinent part, as follows:

"A resident individual means an individual:

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. . . ."

Tax Law § 1305(a) provides, in pertinent part, as follows:

(a) City resident individual. A city resident individual means an individual:

* * *

(2) who is not domiciled in such city but maintains a permanent place of abode in such city and spends in the aggregate more than one hundred eighty-three days of the taxable year in such city. . . .

The definition of "resident" for City income tax purposes, pursuant to the New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state". (See also, 20 NYCRR 105.20[a][2].)

B. Petitioners do not dispute that they maintain a permanent place of abode in the City and State of New York, i.e., the 1,500 square foot apartment at 353 East 83rd Street,

even though they failed to disclose its existence to the Division on the tax returns they filed for the years in issue and in response to the inquiries of the auditor.

In addition, petitioners did not present any credible testimonial or documentary evidence that they spent less than 183 days in the City and State of New York during the years in issue. They kept no diaries, calendars, journals or other documentation which could establish days spent in the City and State of New York and Mr. Ciccone's testimony was vague and inconclusive. In sum, petitioners did not meet their burden of proof pursuant to Tax Law § 689(e). Further, petitioners' admission on their New York City earnings tax returns for the years in issue that they worked in the City in excess of 200 days confirms that they spent more than 183 days in the City and State during the years in issue. They should have been aware that they were at risk of being held statutory "residents" of the City and State of New York given their apartment in Manhattan, and they should have taken the proper steps to document that they did not spend in excess of 183 days in the City and State.

It is noted that a day is defined in the regulations as any part of a day spent in New York City and State which is not solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside the City or State or for traveling through New York City or State to a destination outside New York City or State (see, 20 NYCRR 105.20[c]; 20 NYCRR Appendix 20, § 1-2 [c]; Matter of Leach v. Chu, 150 AD2d

842, 540 NYS2d 596, lv denied 74 NY2d 839, 546 NYS2d 344).

Given the definitions of "resident" and days spent in the State and City of New York, coupled with petitioners' failure to submit evidence to establish that they did not spend less than 183 days in the State and City, they failed to meet their burden of proof and the notice is sustained.

C. Petitioners argue that the provisions of Tax Law § 605(b)(1)(B) and § 1305(a)(2) and New York City Administrative Code § 11-1705(b)(1)(B) are violative of the Due Process and Equal Protection Clauses of the United States Constitution, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (US Const, 14th Amend, § 1.)

Petitioners' argument is clearly directed to the facial constitutionality of the statutes themselves as opposed to their application to petitioners. As enunciated in Matter of Brussel (Tax Appeals Tribunal, June 25, 1992):

> "The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass challenges to the constitutionality of a statute on its face (Matter of Wizard Corp., Tax Appeals Tribunal, January 12, 1989; Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988). At this level of review, we presume that statutes are constitutional."

In prior decisions, the State Tax Commission has considered whether the application of a valid statute to a particular set of facts violates the constitution (Matter of Aluminum Company

of America, State Tax Commn., September 15, 1986 [TSB-H-86(168)S]). This precedent has been followed consistently by the Tax Appeals Tribunal. The application of the statutes is not in issue herein.

For the purposes of this determination, it is presumed that the statutes pursuant to which petitioners were assessed are constitutional.

D. The petition of Gayton and Pamela Ciccone is denied and the Notice of Deficiency, dated December 3, 1992, is sustained in full.

DATED: Troy, New York
November 22, 1995

/s/ Joseph W. Pinto, Jr.

ADMINISTRATIVE LAW JUDGE