STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BYRON A. HERO	:	DETERMINATION DTA NO. 817727
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1991 through 1994.	: : :	

Petitioner, Byron A. Hero, 420 East 54th Street, Apartment 22H, New York, New York 10022, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1991 through 1994.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 8, 2001 at 10:30 A.M. and continued to conclusion at the same offices on December 5, 2001 at 11:00 A.M., with all briefs to be submitted by April 11, 2002, which date commenced the six-month period for issuing this determination. Petitioner appeared by Dlugash & Kevelson (Alan J. Dlugash, CPA). The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner was a domiciliary of New York City for the years 1991 through 1994 or maintained a permanent place of abode within New York City and spent more than 183 days in New York City during each year in issue and was thus taxable as a resident individual.

II. Whether the Division of Taxation properly determined that the wage income earned by petitioner was allocable to New York State and New York City sources.

III. Whether petitioner was afforded a full and fair opportunity to present his case.

FINDINGS OF FACT

1. From 1984 through 1989, petitioner, Byron A. Hero, filed income tax returns as a resident of New York State. In 1990, he filed as a nonresident of New York State.

2. Petitioner and his wife filed New York State nonresident and part-year resident income tax returns during the years in issue, 1991 through 1994. On each return, they elected a filing status of married filing joint return. Further, in each year they checked the "No" box in response to the question of whether petitioner or his spouse maintained living quarters in New York State. Throughout the period in issue, petitioner allocated a portion of his wages from various corporations to New York State and New York City.

3. For the year 1991, petitioner reported that his address was 6354 Masters Boulevard, Orlando, Florida 32819. On his income tax return for 1992, petitioner reported that his address was 9643 McCormack Place, Windermere, Florida. He used the same address on his income tax return for 1993 as he used for 1992. Petitioner stated that his address was 4 Sutton Place, New York, New York on his income tax return for 1994.

4. In March 1995, the Division of Taxation ("Division") commenced a field audit of petitioner's personal income tax returns for the years 1991 through 1994. In the course of the

audit, the auditor noted that Mr. Hero was a native of New York who began renting an apartment on East 57th Street in New York City in the 1970s. In 1988, Mr. Hero married a professional water skier who resided in Florida. They had a son shortly after their marriage. Following a review of the documentation which petitioner supplied, the Division concluded that after their marriage petitioner continued to maintain his ties to New York while Mrs. Hero pursued her career in Florida. Eventually, their lives merged and they both resided in New York. In 1995, petitioner resumed filing as a resident of New York.

5. Among other things, the Division found that, during the audit period, petitioner maintained all of his business ties in New York. Although the names of the employers changed, the employers' identification numbers and addresses on the wage and tax statements, expense reports, letterheads and return addresses on the envelopes remained the same. During the audit period, petitioner owned a home in Southhampton, which was built in 1987 with the help of his parents, and he continued to maintain an apartment on East 57th Street in New York City. Petitioner maintained memberships at several clubs in New York and was affiliated with New York medical providers. The auditor's notes also show that Mr. Hero had memberships with two Florida associations and that his son attended preschool in Florida.

6. The Division ascertained that petitioner and his wife claimed substantial expenses for lodging away from home. The auditor asked for documentation to substantiate these deductions because she wanted to confirm the dollar amount claimed and where the costs were incurred. Through this procedure, the auditor hoped to gauge which location petitioner considered to be his home based upon the documents substantiating the deductions. However, this documentation was never supplied.

7. The auditor wanted to determine whether petitioner's employers required that he be in New York at any given time or whether he could work from an office outside of New York. Therefore, she requested that petitioner provide copies of his employment agreements and termination agreements. These documents were also not provided.

8. Following a review of those documents which were supplied, the auditor found that petitioner used the address at the apartment that he maintained in New York since the 1970s on credit card applications and rental agreements. With the exception of marrying and having a child, the Division concluded that everything in petitioner's life remained the same from the time prior to his marriage to the end of the audit period. As a result, the Division found that Mr. Hero did not change his domicile from New York to Florida.

Statutory Residency

9. The auditor prepared a summary of the days spent by petitioner in and out of New York in order to determine if he was liable for tax as a statutory resident of New York. In order to prepare the summary, the auditor requested that petitioner provide documents from third parties such as expense reports, frequent flier statements, passports, corporate charge cards and telephone statements from the Florida addresses and New York addresses. From the documents she received, the auditor compiled a list of the days she believed that petitioner was in New York, Florida and other locations. Thereafter, the list was submitted to petitioner for his review and petitioner indicated those days with which he had a disagreement. Under the impression that they were going to review each year, the auditor, in turn, reviewed those days which petitioner disagreed with and supplied documentation as to why she continued to disagree with petitioner. However, the auditor did not hear from petitioner regarding the disputed days. Shortly

thereafter, petitioner submitted an application for an offer in compromise and further audit work ceased.

10. On the basis of the information supplied, the auditor determined that petitioner worked the following number of days within and without New York State and New York City:

Year	Number of days worked in New York State other than New York City	Number of days worked in New York City	Number of days worked outside New York State
1991	28	188	65
1992	28	196	77
1993	47	185	70
1994	81	192	47

11. In determining petitioner's location on a particular day, the auditor took into consideration that other people were staying in the apartment on East 57th Street. As a result, she could not reach a conclusion on where Mr. Hero was situated simply on the basis of the origin of the telephone calls. In order to resolve this difficulty, she asked Mr. Hero to produce items such as frequent flier statements, passports or other documents which would isolate his activity. Thereafter, the auditor only relied upon those telephone billing statement entries which were consistent with other documentation in her possession in order to determine petitioner's location. One caveat to the foregoing is that the auditor proceeded on the assumption that Mr. Hero would have been the one to call his wife in Florida when he was in New York.

Wage Allocation

12. In 1991, Mr. Hero was the chief executive officer and a member of the board of directors of Esmark Apparel. He was also the president of Esmark Acquisition and Esmark Inc. Each of these firms had an address in New York City. In addition, Mr. Hero filed a Federal

schedule C regarding his activities as an investment banker. In 1991, Mr. Hero allocated $292,013.00 of his total wages of $766,534.00 from Esmark Apparel to New York. Mr. Hero completed his wage allocation schedule on the basis of 365 days and did not consider the days he worked for other entities as nonworking days. The Division found this practice objectionable because it takes the position that the days Mr. Hero worked for other entities should be considered nonworking days for the entity from which he received the wages.

13. In 1992, Mr. Hero received wages of approximately $3,200,000.00 from Esmark, Inc. and did not allocate any of this amount to New York. During the same period, Mr. Hero was the chief executive officer and a member of the board of directors of Danskin. In this capacity, he received wages of $463,712.00 of which $196,768.00 was allocated to New York. Mr. Hero was also the president of Danpen, Inc. and was chairman of the board of Esmark Marine. Petitioner did not allocate any of his wages from Esmark Inc. to New York. Further, Mr. Hero had investment banking activities which were reported on a Federal Schedule C. The Schedule C listed an address in Florida and reported a loss of $1,472,614.00. None of the loss was allocated to New York. The Division considered petitioner's wage allocation erroneous for the same reason it objected to his wage allocation for 1991. The Division also questioned whether some or all of the wages of Esmark should be allocated to New York. It did not resolve this issue because the audit stopped when Mr. Hero submitted the offer in compromise.

14. In 1993, Mr. Hero received wages of $3,331.00 as the president of Esmark. None of this amount was allocated to New York. He was the chief executive officer and a member of the board of directors of Danskin. Mr. Hero received wages of $467,280.00 from Danskin and allocated $208,994.00 to New York. He was also the president of Dan Pen, chairman of the board of Esmark Marine and also had Schedule C activity as an investment banker. The

Schedule C listed an address in Florida and reported a loss of $64,524.00, none of which was allocated to New York. As with prior years, the Division questions the allocation of income to New York.

15. In 1994, Mr. Hero was the president of Esmark. He was also the chief executive officer and on the board of directors of Danskin from which he received wages of $471,808.00, $209,914.00 of which was allocated to New York. During the same year, Mr. Hero was the president of Danpen Inc., chairman of the board of Esmark Marine and reported a loss from his investment banking activity on a Schedule C. The Schedule C reported a loss of $52,112.00, none of which was allocated to New York. As before, the Division was not satisfied that Mr. Hero's income was properly reported to New York.

16. In order to calculate the amount of tax due, the Division proceeded on the premise that 100 percent of the wages received by Mr. Hero were derived from New York sources because he did not provide any information which would support another conclusion. Although the Division made inquiries, the auditor was never told about any difference between the compensation Mr. Hero received from Esmark Inc. and the other corporations from which he received compensation.

17. On the basis of its audit, the Division issued a Notice of Deficiency, dated November 11, 1998, which asserted a deficiency of New York State and New York City personal income tax (Assessment number L-015759597) in the amount of $365,769.34 plus interest in the amount of $183,737.33 for a balance due of $549,506.67. The asserted deficiency was based upon the Division's position that Mr. Hero was taxable as a domiciliary and statutory resident of New York State and New York City during the years in issue and that he incorrectly calculated the allocation of his wages.

Proceedings following the issuance of the Notice of Deficiency

18. Mr. Hero requested a conciliation conference in the Bureau of Conciliation and Mediation Services ("BCMS"). On February 4, 2000, BCMS issued a Conciliation Order denying the request and sustaining the statutory notice. Thereafter, petitioner's representative filed a petition, dated May 3, 2000, with the Division of Tax Appeals.

19. The Division issued a Notice of Hearing scheduling a hearing on Wednesday, February 28, 2001. Without an objection by the Division, petitioner's request for an adjournment of the hearing was granted in order to allow him to pursue an alternative resolution through an offer in compromise.

20. Petitioner did not pursue the offer in compromise and, on July 2, 2001, the Division of Tax Appeals issued a Final Notice of Hearing which scheduled the hearing on August 8, 2001.

21. In a letter dated August 2, 2001, petitioner's representative, Alan J. Dlugash, CPA, requested an adjournment of the hearing scheduled on August 8, 2001 because he would be on vacation and might not be back in time to attend the hearing. Petitioner's representative requested that the hearing be scheduled for anytime after August 15, 2001.

22. In a letter dated August 3, 2001, petitioner's representative was advised by Assistant Chief Administrative Law Judge Daniel J. Ranalli that the request for an adjournment was denied because it was late and because he had not presented any basis for concluding that good cause existed for an adjournment. It was noted that petitioner's representative agreed to the new hearing date four months earlier.

23. In a letter dated August 6, 2001, petitioner's representative requested that Judge Ranalli reconsider his decision to deny petitioner's request for a postponement of the hearing scheduled for August 8, 2001. In support of his request, petitioner's representative stated that

petitioner was "substantially insolvent" and that his liabilities include more than $100,000.00 owed to his attorneys and his accounting firm. According to his representative, petitioner could no longer pay for the professional time required. As a solution, Mr. Dlugash proposed adjourning the hearing until after October 15, 2001 so that he could make an offer in compromise.

24. In a letter dated August 6, 2001, petitioner's request for an adjournment was again denied. Petitioner's representative was told that insolvency was not a basis for an adjournment. Further, it was noted that petitioner was given an adjournment in February in order to make an offer in compromise and that six months was more than enough time to file an offer. Lastly, petitioner was told that if Mr. Hero was unable to afford representation, he would have to appear on his own behalf.

25. On August 8, 2001, the parties met and the hearing was commenced. At the outset of the hearing, the Division presented documents and the direct testimony of the auditor in order to explain the basis for the asserted deficiency of New York State and New York City personal income tax. At the conclusion of the direct testimony, the hearing was continued, over the objection of the Division, because petitioner's representative was not prepared to proceed with the cross-examination of the auditor. The continued hearing was scheduled to commence on September 11, 2001.

26. In a letter dated August 14, 2001, the Division requested that the Administrative Law Judge instruct petitioner to supply the Division, two weeks prior to September 11, 2001, with any documentary evidence which he intended to present at the hearing. In response, the Administrative Law Judge asked petitioner's representative to comply with the request in order to facilitate the hearing process. In a letter dated September 5, 2001, the Division advised

petitioner's representative that, as of that date, it had not received any documents which petitioner might present at the hearing.

27. The tragic events that occurred in New York City on September 11, 2001 prevented the hearing from proceeding as scheduled.

28. The Division of Tax Appeals issued a Final Notice of Hearing, dated October 29, 2001, which scheduled the continued hearing to commence on Tuesday, December 4, 2001 and continue through Friday, December 7, 2001.

29. In a letter dated November 14, 2001, petitioner's representative requested a postponement of the hearing because petitioner, who was said to be in dire need of finding employment, had interviews and meetings scheduled throughout the period scheduled for the hearing.

30. In a letter dated November 19, 2001, petitioner's representative was advised that the request to adjourn the continued hearing was denied because, among other things, the completion of this matter had been delayed for nearly a year and there would not be any further delay. It was also noted that the Division of Tax Appeals has very limited space available to it to hold hearings in New York City and, as a result, it would be very difficult to reschedule the hearing for the number of days required for this matter. Lastly, petitioner's representative was informed that if he did not appear at the hearing, the record would be closed and a determination would be rendered on the basis of the existing record.

31. In order to accommodate a scheduling conflict experienced by the Division of Taxation, the Division of Tax Appeals issued a Revised Notice of Hearing, dated November 16, 2001, which scheduled the hearing for Wednesday, December 5, 2001 through Friday, December 7, 2001.

32. On December 5, 2001, petitioner's representative, Mr. Dlugash, appeared at the hearing room, without Mr. Hero, and stated that he was not prepared to proceed as a direct result of the events of September 11, 2001. Mr. Dlugash requested an adjournment on the basis of the argument set forth below and stated that the taxpayer would be prepared to proceed at a later date. After determining that neither party had additional evidence to offer, arguments were heard and the record was closed.

SUMMARY OF THE PARTIES' POSITIONS

33. At the hearing on December 5, 2001, Mr. Dlugash argued that the taxpayer's situation was severely impacted because his hope for a livelihood was dealt a "death blow" by the events of September 11, 2001, and he had spent every moment trying to find an alternative means of livelihood. It was submitted that the pronouncements of the State of New York made it clear that a taxpayer's requests for a postponement should have been granted. According to Mr. Dlugash, he provided services to one firm that was destroyed by the events of September 11, 2001 thereby requiring substantial work for the family of the deceased, setting up emergency foundations for the dependents. Further, the representative's firm was impacted by the events that happened to everybody such as lack of telephone and e-mail service. Mr. Dlugash states that he has a number of clients that are located in the afflicted area requiring special emergency work including applying for loans, relocation work, and preparation of financial statements in order to allow them to obtain additional loans. It was noted that in one of the tax cases Mr. Dlugash was involved in, the conferee was among the missing.

34. Mr. Dlugash maintains that this case had to be juggled with other cases in which entire files were destroyed and nervous taxpayers were trying to figure out what was going on.

Mr. Dlugash asserts that he was unable to complete the work that would have been necessary to properly prepare.

35. In response, the Division argued that petitioner and his representative had nearly six months to review the audit materials and evidence and should have been prepared to go forward. The Division notes that Mr. Dlugash's office is located in midtown Manhattan on Madison Avenue and was not affected by the tragedies of September 11th. Mr. Hero's apartment is also in midtown and there was no showing that he was affected by the events of September 11th. The Division asserts that petitioner had plenty of opportunity to meet with the Division and to prepare for this hearing which involved an audit which had gone on for nearly seven years.

36. In his brief, petitioner first argues that he was a domiciliary of Florida during the years in issue. Petitioner next argues that the Division erred in determining that he was a statutory resident of New York State and New York City and that it was error for the Division to reallocate the wages he earned. Lastly, petitioner argues that it was error to deny him an extension of time in order to present evidence that would have established that the Division erroneously determined that he was a domiciliary or statutory resident of New York State and New York City during the years in issue. Petitioner submits that he would have also shown that he correctly allocated his wages to New York.

37. The Division argues that petitioner's historic domicile was New York City and that the burden was on him to show that there was a change. On the basis of the information supplied by petitioner, the Division concluded that petitioner was a domiciliary of New York State and New York City. It is submitted that petitioner appeared at each of the scheduled hearings without the evidence to rebut the notice.

38. With respect to the issue of statutory residency, the Division maintains that petitioner has not sustained his burden of proof to show that he was not present in New York State or New York City for more than 183 days during the years in issue. The Division further contends that petitioner has not presented any evidence to show that the allocation of income was incorrect.

39. Lastly, the Division submits that petitioner had an opportunity to present his case and failed to do so. The Division contends that petitioner is not entitled to another opportunity to present his case.

CONCLUSIONS OF LAW

A. The first question to be addressed is whether petitioner was taxable as a resident of New York State and New York City for the years 1991 through 1994. Tax Law § 605(b)(1)[1] defines a "resident individual" to include an individual:

> (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 . . . .

B. While the Tax Law does not contain a definition of "domicile," the Division's regulations (20 NYCRR former 102.2[d]) provided, in pertinent part, that a "domicile," in general, is the place which an individual intends to be his permanent home. Further, once established, a domicile "continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there" (20 NYCRR former

[1] The definition of "resident for New York City income tax purposes, pursuant to New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes set forth above, except for substitution of the term "city" for "state."

102.2[d]). The burden of proof is upon any person asserting a change of domicile to show that the necessary intention existed. While a person can have only one domicile, he may have two or more homes. In this regard, 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 he may be domiciled elsewhere (***id***).

C. In this instance, the record shows that, historically, petitioner filed income tax returns as a resident of New York State. Throughout the audit period, petitioner maintained multiple residences in New York State and listed the New York City residence on applications for credit cards and rental agreements. The record also shows that throughout the period in issue, petitioner continued to earn substantial income from businesses which were located in New York City and spent a significant amount of time in New York City. Under these circumstances, there is ample evidence in the record to support the Division's conclusion that petitioner has not demonstrated by clear and convincing evidence that he moved from New York with the intention of making Florida his fixed and permanent home. Therefore, it is found that petitioner was a domiciliary of New York State and New York City during the years in issue.

D. The Division has also established that petitioner maintained a permanent place of abode in New York City and spent more than 183 days during each of the years in issue in New York City. Thus, regardless of whether he was domiciled in New York City, he is liable for New York State and New York City personal income tax as a statutory resident (Tax Law § 605[b][1][B]).

E. Although he was afforded multiple opportunities to present evidence refuting the foregoing analysis, petitioner has failed to present any evidence to challenge the Division's position that he was a domiciliary and statutory resident of New York City and New York State.

In his brief, petitioner's representative stated a number of facts to buttress his position that he was a domiciliary of Florida. However, the facts presented in the brief are not supported by the record and, as a result, they may not be considered. The lack of evidence to support petitioner's position necessitates the conclusion that he failed to carry his burden of proof in this case (***see, Matter of the Estate of Aldo Gucci*** (Tax Appeals Tribunal, July 10, 1997; ***Matter of Labow***, Tax Appeals Tribunal, March 20, 1997).

F. Petitioner asserts that the Division erred in reallocating the wages he earned. However, petitioner's objection on this issue is unclear. It is recognized that the concern over the allocation of petitioner's wages only arises if it is found that he was not taxable as a "resident individual" within the meaning of Tax Law § 605(b)(1). Since it has been determined that petitioner was taxable as a "resident individual," all of his wages were subject to tax and this issue is moot (***see***, 20 NYCRR 112.1). It is noted that if petitioner was not taxable as a resident individual, then the Division properly concluded that the salaries received from the different employers should have been separately allocated (20 NYCRR 132.18[c]).

G. Relying upon certain pronouncements by the Department of Taxation and Finance, petitioner argues that he should not have been denied an adjournment of the hearing which was scheduled on December 5, 2001. In his brief, petitioner states:

> Petitioner and Petitioner's representative were present at a hearing on September 11, 2001. The hearing was adjourned because of the terrorist attack on the World Trade Center in New York City on September 11, 2001 and the unavailability of a court stenographer. Had these events not occurred, the Petitioner and his representative were prepared to put evidence into the record at that time (including direct testimony by Petitioner that Petitioner estimated would have taken up to two days of time) which would have established that Petitioner was neither a domiciliary nor a statutory resident for the years 1991, 1992, 1993, and 1994 and that Petitioner had properly allocated his wages to New York City and New York State in those years . . . . Petitioner's request to adjourn the formal hearing to a later date was denied on the grounds that neither Petitioner nor his representative was directly affected by the terrorist attack of September 11, 2001.

> At the hearing, Petitioner's representative appeared for the sole purpose of protesting the denial of an extension of time in which to hold the hearing. In arguing for denial of an extension, the attorney for the Department actually maintained that neither Petitioner nor his representative were affected by the events of September 11, 2001 because they were located in Mid-town Manhattan! In point of fact, the Petitioner lost a job offer as a result of the events of September 11, 2001 and was frantically seeking new employment and petitioner's representative's practice was seriously disrupted. Clients of Petitioner's representative died in the attack, Petitioner's representative was involved with widows of victims, communications with clients and other practitioners were severely disrupted, and client records had to be reconstructed.
> (Petitioner's brief, p.2.)

On the basis of the foregoing, petitioner requests that the record be reopened so that he can prove that he was not a domiciliary or statutory resident of New York State or New York City during the years in issue and that he properly allocated his wages during the same period of time.

H. Petitioner's argument is completely without merit. First, petitioner could have presented his case on February 28, 2001 but declined to do so in order to make an offer in compromise, which was not forthcoming. Petitioner had a second opportunity to present his case at the hearing scheduled on August 8, 2001. However, the hearing was continued because he was not ready to conduct a cross-examination of the auditor. As the Division noted, petitioner should have been prepared to proceed with his case on September 11, 2001. If he was ready, the aftermath of the events of September 11, 2001 would have had no bearing on the matter because he would have already been prepared to proceed. Petitioner was given a third opportunity to present his case on December 5, 2001. However, he appeared solely for the purpose of requesting another adjournment. Under the circumstances, it is clear that petitioner had three opportunities to present his case and declined to do so. It is concluded that there is no merit to petitioner's contention that the record was closed prematurely.

I. The petition of Byron A. Hero is denied and the Notice of Deficiency, dated November 11, 1998, is sustained together with such interest as may be lawfully due.

DATED: Troy, New York
September 26, 2002

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE