STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM M. & JUNKO G. DONOVAN	:	DETERMINATION 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 a petition 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.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 29, 2002 at 10:30 A.M., with all briefs to be submitted by January 13, 2003, which date began the six-month period for the issuance of this determination. Petitioners appeared by Robert W. Taylor, Esq. The Division of Taxation appeared by Barbara G. Billett, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT[1]

1. 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.

2. 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.

3. 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.

4. 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.

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[1] The parties stipulated to eighteen Findings of Fact, all of which are incorporated herein.

5. 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.

6. 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.

7. 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

8. 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

9. 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.

10. 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.

11. 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 through1997 by the Division of Taxation ("Division").

12. 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.

13. 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.

14. 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.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioners argue that Mrs. Donovan did not maintain a permanent place of abode in New York City during 1995. The basis of petitioners' argument is that the 14 Horatio Street apartment is not a permanent place of abode since it had limited usage and was used for a limited purpose.

16. 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.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1)(A) and (B), sets forth the definition of a New York State resident individual for income tax purposes as follows:

Resident individual. A resident individual means 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
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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, 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, 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.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State and City; however, what is termed "statutory residency" is the only disputed issue in this proceeding (Tax Law § 605[b][1][B]; Administrative Code § 11-1705[b][1][B]).[2] The second, or "statutory" resident basis, requires: (1) the maintenance of a permanent place of abode in the State and City and (2) physical presence in the State and City on more than 183 days during a given taxable year.

With regard to the physical presence condition, the parties stipulated to the fact that Junko Donovan spent 226 days working in New York City, satisfying this predicate. Thus, the only criterion to address is whether petitioner Junko Donovan maintained a permanent place of abode in New York City.

C. In addressing the issue of whether 14 Horatio Street, Apt. 5C, New York City, was a permanent place of abode, 20 NYCRR 105.20(e)(l) provides as follows:

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[2] It is conceded that petitioners were domiciled in Connecticut during 1995.

> [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. 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. Such individual will, of course, be taxable as a nonresident on such individual's income from New York State sources, including such individual's salary or other compensation for services performed in New York State. 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 supplied).

Clearly, the apartment at 14 Horatio Street was a permanent place of abode. It was not a camp or cottage suitable only for vacation. It was a studio apartment consisting of facilities for cooking and bathing, as one would expect. It did not lack permanence as a result of being utilized during a temporary stay for the accomplishment of a particular purpose, such as by virtue of an employer's assignment in a New York City work location for a fixed and limited time period, with a subsequent return to the employee's permanent work location. The more particular question, however, is whether the apartment constituted a permanent place of abode for petitioner, which she maintained, during the years in question.

D. In ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840, 606 NYS2d 404), the 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***).

E. As noted earlier, the checks reviewed by the Division permitted it to reach the conclusion that petitioners together maintained the apartment, each contributing to the monthly maintenance fees and cable television bills. There is 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. Petitioners' characterization that the condo-apartment was used on a limited basis for a limited purpose 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 even suggested Mrs. Donovan's employment in New York City was a temporary assignment. Thus, petitioners' argument is insufficient to establish that the apartment was not a permanent place of abode maintained by petitioners during the year in issue.

F. The petition of William M. and Junko G. Donovan is hereby denied and the Division's notice of deficiency dated July 24, 2000 is sustained.

DATED: Troy, New York
June 19, 2003

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE