STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FACUNDO VAZQUEZ	:	DETERMINATION DTA NO. 819810
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 Years 2000 and 2001.	:	

Petitioner, Facundo Vazquez, 211 West 56th Street, Apt. #34M, New York, New York 10019, 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 years 2000 and 2001.

On September 20, 2004 and October 4, 2004, respectively, petitioner by his representative, Curtis, Mallet-Provost, Colt & Mosle (Alejandro Garcia, Esq., of counsel) and the Division of Taxation by Christopher C. O'Brien, Esq. (Paul A. Lefebvre, Esq., and Barbara J. Russo, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by February 11, 2005 which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner maintained a permanent place of abode in New York State and New York City for the years 2000 and 2001 within the meaning of Tax Law § 605 (b)(1)(B) and Administrative Code of the City of New York § 1305(b).

FINDINGS OF FACT

1. Petitioner, Facundo Vazquez, is a citizen of the Republic of Argentina where he is registered to vote. He possesses an Argentinean driver's license and does not have a license to drive in the United States. Since 1998, he has owned a condominium in Buenos Aires where his most valuable possessions are located. Other than his wife, petitioners' closest relatives, consisting of his father, mother, two brothers and one sister, live in Argentina. He considers himself to be domiciled in Argentina because that is the place where he intends to return whenever he is absent.

2. In a letter dated January 7, 1998, petitioner was offered a position as an associate in the Project Finance unit with Santander Investment Securities, Inc. ("SIS"). The offer of employment simply stated that the employment with SIS would be at will. Mr. Vazquez began his employment with SIS on May 16, 1998. He continued with this employer during the years in issue.

3. Mr. Vazquez was originally hired to occupy the position of "Associate - Project Finance." Sometime between the date when he commenced his employment and 2002, he became the head of SIS's Mergers and Acquisitions Department.

4. In 1998, SIS submitted a form to the United States government in support of its petition to obtain H-1B1 visa status for petitioner. An H-1B1 visa was approved from March 31, 1998 to February 9, 2001. In or about January 2001, SIS submitted a second application which led to approval of H-1B1 visa status from February 9, 2001 until August 11, 2003.

5. During 2000 and 2001, petitioner was present in New York City more than 183 days and maintained a place of abode, i.e., a rented apartment, in New York City.

6. Petitioner filed a New York State Nonresident and Part-Year Resident Income Tax Return for the year 2000 on which he listed his address as 124 West 60th Street, New York, New York. On this return, petitioner allocated his income on the basis that, of the 240 days worked during the year, he worked 135 days in New York State. The return included a statement which provided that petitioner was a nonresident of New York State and that he was in the United States for a temporary period in order to accomplish a particular purpose as prescribed by his employment contract. According to the statement, petitioner intended to return to Argentina upon the termination of his service in the United States.

7. Petitioner also filed a New York State Nonresident and Part-Year Resident Income Tax Return for the year 2001 whereon he listed his address as 211 West 56th Street, New York, New York. On this return, petitioner similarly allocated his income on the basis that, of the 239 days worked in the year, he worked 126 days in New York State. This return included the same statement concerning petitioner's residency that was attached to the previous year's return.

8. On or about August 28, 2003, the Division of Taxation ("Division") mailed a letter asking petitioner to supply a statement regarding his work assignment with SIS, a copy of his employment agreement with SIS, and a statement regarding his visa status along with a copy of his visa. The Division explained that it needed the information in order to establish that petitioner's residence in New York was temporary, for a fixed and limited period of time and for the accomplishment of a particular purpose.

9. In response, petitioner provided, among other things, the following undated job description:

> Originate, coordinate and execute mergers, acquisitions, spin-off, divestitures, joint ventures, privatizations, concession and tender offers involving cross-border transaction between Latin America and Europe.

10. The Division issued statements of proposed audit changes, dated September 29, 2003, pertaining to the years 2000 and 2001. In each instance, the notices explained that petitioner's employment contract indicated that his assignment to New York was for general duties and not for the accomplishment of a particular purpose. Further, since his employment contract did not specify a definite period of time, the duration of his employment was presumed to be indefinite. For this reason, the Division found that petitioner's lodging in New York was a permanent place of abode and not a temporary residence. The Division then explained that it recomputed petitioner's returns on the basis of a full-year residency in New York State and New York City.

11. Petitioner objected to the Division's proposed action and, in response, the Division stated:

> A review of the information provided shows that you do not meet the conditions as defined in the New York State Personal Income Tax Regulations for temporary place of abode (Section 105.209[e][1]). In order for a place of abode not to be considered as permanent, two conditions must be met:
>
> First, the stay in New York must be temporary for a fixed and limited period as opposed to a stay of indefinite duration. The Department has defined "fixed and limited" to be a period of three years or less. Your employment letter/contract does not specify the term of your work assignment in New York. In fact, it states that your employment with Santander Investment Securities will be at will. Therefore, your stay in New York was not for a fixed and limited period as required by New York State Tax Regulations; and,
>
> Second, the Regulations require that your work assignment be for the accomplishment of a particular purpose. The Department has defined "particular purpose" to mean that the individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions. Your assignment to New York does not constitute a particular purpose since the position involves general duties with generalized goals. This is true even though your assignment to New York may have been related to a specialized skill or specialized attributes.

12. On the basis of the forgoing conclusions, the Division issued a Notice of Deficiency to petitioner (Assessment number L-023051591) dated December 1, 2003, which asserted a deficiency of New York State and New York City personal income tax for the year 2000 in the amount of $10,737.35, plus interest of $1,861.50, for a balance due of $12,598.85. The Division also issued a Notice of Deficiency to petitioner (Assessment number L-023051593) bearing the same date as the prior notice, which asserted a deficiency of New York State and New York City personal income tax for the year 2001 in the amount of $11,663.58, plus interest of $1,198.34, for a balance due of $12,861.92.

13. In a letter dated September 4, 2003, Edward W. Foley, Vice President Human Resources, of SIS stated:

> This letter will confirm that Facundo Vasquez [sic]. . . has been in our employ in the United States since May 16, 1998. Mr. Vasquez will be in our employ for a limited and temporary term until the earlier of the completion of his assignment or the expiration of his visa. His position is for a limited period of time and for a limited purpose.

14. Similarly, in a letter dated November 16, 2004, Mr. Foley stated:

> Mr. Vazquez was hired by Santander Investment Securities, Inc. to primarily focus on our Latin American practice particularly project finance team. Initially, we temporarily assigned him to the New York office to be trained as an investment banker by our specialized team in New York in the area of project finance. His assignment to New York was limited to the earlier of the completion of his training or the expiration of his visa. We expected that Mr. Vazquez [sic] training in our New York office would not exceed the expiration date of Mr. Vazquez [sic] visa.

15. In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. Petitioner's proposed findings of fact "4," "5" and "6" were amended because they contained legal conclusions. Petitioner's proposed finding of fact "7" was amended to reflect the record. The

Division's proposed findings of fact "12" and "13" were rejected as irrelevant. Additional findings of fact have also been made.

SUMMARY OF THE PARTIES' POSITIONS

16. In his brief, petitioner argues: that he was assigned to New York State for a fixed and limited period; that his assignment to New York State did not involve general duties; and that, even if his position at SIS involved general duties, it does not mean that his assignment to New York was not for the accomplishment of a particular purpose. Petitioner further argues that in order for a place of abode to be considered as a temporary place of abode, petitioner must meet only one of the following requirements: that the stay in New York was for a fixed or limited period *or* that petitioner's work assignment in New York was for the accomplishment of a particular purpose.

17. In response to the foregoing, the Division contends that in order to establish that he was a nonresident, petitioner must establish that his stay in New York was temporary and that his assignment in New York was for the accomplishment of a particular purpose. The Division further submits that both criteria must be satisfied in order for a place of abode to be considered a temporary place of abode and that here petitioner has not established that he maintained a place of abode in New York during a temporary stay or that he maintained the New York place of abode for the accomplishment of a particular purpose. The Division further notes that petitioner has relied on determinations of administrative law judges or advisory opinions neither of which are precedent or binding legal authority. Lastly, the Division submits that petitioner's visa status is not determinative of his residency status for tax purposes.

18. In a reply brief, petitioner argues that by not "raising the issue" in its proposed findings of fact, the Division has conceded that petitioner was employed for a fixed and limited period and that petitioner's assignment to New York did not involve general duties with general goals. Petitioner also contends that the Division has conceded that certain advisory opinions support his position by not discussing them in its brief. The brief then reiterates his legal argument that he must show that his stay in New York was for a fixed and limited period or that the stay was for the accomplishment of a particular purpose. Petitioner submits that both of these criteria were satisfied.

CONCLUSIONS OF LAW

A. The issue in this proceeding is whether petitioner is subject to tax as a resident of New York State and New York City. The classification is significant because nonresidents are taxed only on their New York State and New York City source income whereas residents are taxed on their income from all sources (Tax Law §§ 611, 631). To the extent pertinent to this matter, Tax Law § 605(b)(1)(B) defines a resident individual as one:[1]

> 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.

B. Here, the Division has not argued that petitioner was domiciled in New York City. Conversely, each of petitioner's nonresident income tax returns listed an address in New York City and he has not questioned the assertion that he maintained a place of abode in New York City. Further, petitioner has not presented any evidence that he was in New York City for fewer

[1] The definition of a New York City resident is identical to the New York State definition of a New York State resident except for substituting the word "City" for "State" (New York City Administrative Code § 11-1705[b][1][B]).

than 183 days during each of the years in issue. Consequently, the only issue remaining is whether petitioner maintained a *permanent* place of abode in New York City.

C. Contrary to petitioner's assertion, the Division has not conceded any facts which are determinative of the outcome of this case. The absence of an argument regarding a particular item does not mean that the item is being conceded. The briefs are not part of the pleadings and may not be treated as such.

D. The term permanent place of abode is not defined in the Tax Law. However, it is discussed in the regulations. The Commissioner's regulations at 20 NYCRR 102(6)(e) provide:

> *Permanent place of abode.* (1) 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 added.)

E. The issue presented is one of statutory construction. Previously, when construing this section of the regulations, the Tax Appeals Tribunal referred to the following rule set forth in ***Regan v. Heimbach*** (91 AD2d 71,458 NYS2d 286, 287, ***lv denied*** 58 NY2d 610, 462 NYS2d 1027): "In statutory construction, commonly used words must be given their usual and ordinary meaning, unless it is plain from the statute that a different meaning is intended (*citations omitted*)." (***Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed, Matter of Evans v. Tax Appeals Tribunal,*** 199 AD2d 840, 606 NYS2d 404).

F. The provision relied upon by petitioner states "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." Clearly, the provision relied upon by petitioner does not support his interpretation of the law. The regulation is not written in the disjunctive. In order for petitioner's interpretation to be accurate, the word "or" would have to precede the word "for" in the sentence which petitioner relies upon. Therefore, it is concluded that, if the place of abode is to be deemed not permanent, it must be maintained during a temporary stay *and* the stay must be for the accomplishment of a particular purpose.

G. Petitioner's argument that his employment was for a fixed and limited period relies upon letters from the Director of Human Resources and the offer of employment. Neither document is sufficient to satisfy petitioner's burden of proof. On its face, the fact that the Director of Human Resources was unable to state when the work assignment would be completed shows that the employment was not for a fixed and limited period. Similarly, without disputing the proposition that petitioner's visa status did not permit permanent residency in the United States, the fact that petitioner was able to renew his visa also evidences the fact that it

was not a fixed constraint on the length of the term of his employment. The only statement regarding the term of petitioner's employment in the offer of employment provides that "Your employment with SIS will be at will." Petitioner argues that the purpose of this statement was to make it clear that petitioner could be terminated without cause. Assuming, without agreeing, that petitioner's argument is correct, it still does not establish that petitioner's employment was for a fixed and limited period of time.

H. The Division is also correct that the record does not show that petitioner maintained his apartment in New York for the accomplishment of a particular purpose. Neither the offer of employment nor the job description contained in petitioner's resume describes a specific project, sets forth a job description which contains a time frame, or refers to a particular merger, acquisition or transaction that is to be accomplished. A general job description, such as the one presented here, does not constitute a "particular purpose" contemplated by 20 NYCRR 105.20(e).

I. Petitioner has relied upon a determination of an administrative law judge and advisory opinions to support a different result. However, the Division has accurately noted that determinations of administrative law judges may not be cited as precedent (Tax Law § 2010[5]; 20 NYCRR 3000.15[e][2]). Similarly, Tax Law § 171(24) expressly provides that advisory opinions are not binding on the Commissioner of Taxation.[2]

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[2] It is recognized that at least one of the advisory opinions would tend to support petitioner's argument that he was in New York for the accomplishment of a particular purpose. However, later advisory opinions interpret the regulation more strictly. An agency must be free to correct a prior erroneous interpretation of the law (***Matter of Charles A. Field Delivery Service***, 66 NY2d 516,498 NYS2d 111). In this instance, the reason for the change is self-evident. The earlier interpretation is inconsistent with the language of the regulation.

Petitioner has also cited ***Matter of Pernblad*** (State Tax Commission, September 21, 1984) in support of his argument that he did not maintain a permanent place of abode. Caution must be exercised in relying upon decisions of the State Tax Commission because it is well established that, although they are entitled to respectful consideration, the Division of Tax Appeals is not bound by the decisions of the State Tax Commission (***Matter of Nathel***, Tax Appeals Tribunal, August 31, 1995, ***confirmed, Matter of Nathel v. Commissioner of Taxation and Finance***, 232 AD2d 836, 649 NYS2d 196). In ***Pernblad,*** an individual who was a Swedish domiciliary was assigned to a facility operated by Volvo in New Jersey. The individual was directed to work at this facility as a technical support manager for a two-year period and then return to Sweden. While working in the United States, the petitioners, who were a married couple, resided in Suffern, New York. The State Tax Commission determined that the petitioners "came to New York for a temporary and definite period time for the accomplishment of a particular purpose." Consequently, they did not maintain a permanent place of abode in New York and were not subject to tax as residents.

Assuming without deciding that petitioner's duties may be analogized to that in ***Pernblad***, and that the decision should be followed,[3] it is clear that conformity with the holding therein would not result in a decision in petitioner's favor because Mr. Pernblad was clearly assigned to New York for a *temporary and definite* period of time. That did not happen in this matter.

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[3] One difficulty with relying upon the ***Pernblad*** decision is that there is no reasoning in the decision as to why the Commission considered the taxpayer's job to be a "particular purpose" within the meaning of 20 NYCRR 102.2(e). Further, as was the case with the Advisory Opinion discussed in footnote 2, a portion of the holding in ***Pernblad*** is inconsistent with the regulation.

J. The petition of Facundo Vazquez is denied and the notices of deficiency dated December 1, 2003 are sustained together with such interest as may be lawfully due.

DATED: Troy, New York
May 5, 2005

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE