STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition<br>of | : | |
| **LAURENT A. SEBAH** | : | DETERMINATION<br>DTA NO. 819888 |
| for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1999. | : | |

Petitioner, Laurent A. Sebah, c/o Robert Upbin, CPA, 225 West 34th Street, Suite 1403, New York 10122, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1999.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 15, 2004 at 10:30 A.M., with all briefs to be submitted by August 12, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Robert Upbin, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel).

## *ISSUE*

Whether petitioner maintained a permanent place of abode in New York State for the year 1999 within the meaning of Tax Law § 605(b)(1)(B).

## *FINDINGS OF FACT*

1. Petitioner, Laurent A. Sebah, is a citizen of France, where he resided prior to accepting employment in the United States. He entered the United States on May 18, 1997 pursuant to an H-1B visa issued by the Immigration and Naturalization Service. The visa was issued pursuant to an application of Donaldson, Lufkin & Jenette Securities, Inc. ("DLJ"). During the period at issue, DLJ was a Wall Street brokerage firm with its headquarters in New York City. It was involved in all aspects of the financial industry including investment and merchant banking, retail sales and trading and investment management. Initially, petitioner worked for DLJ and PC Financial Network ("PCFN"), a division of DLJ. On January 1, 1998, he transferred to Pershing Trading Company, L.P., a wholly-owned subsidiary of DLJ, where he stayed until his departure to France in 2003.

2. Pershing wished to hire petitioner as an investor services representative for an initial three-year period. Petitioner would specialize in high net worth individuals and middle market institutions with emphasis in the French market. Generally, he would be responsible for using his knowledge of the European stock markets to evaluate the investment needs of his clientele. Petitioner would be responsible for identifying and developing business opportunities in the European stock market; interfacing with trading desks to ensure that client investment strategies were able to be implemented; utilizing and reviewing the resources of Pershing to analyze investment opportunities and fit commercial products to a client's particular needs; and further developing an understanding of the securities industry in the United States.

3. Petitioner received a Bachelor's Degree in Economic Sciences from the University of Paris IX Dauphine and a Master's Degree in Management Sciences from the University of Paris IX. For the four-year period prior to his coming to the United States, he had been involved with

international stock exchanges. He was employed by SV International, located in Paris, France, as a European stock broker, responsible for various European stock markets as well as the United States market. While with SV International, he was trained in a variety of brokerage applications on the European stock exchange. Prior to beginning his employment with Pershing, petitioner had passed the Series 7 General Securities License test and the Series 63 Uniform Securities Agent License test, which were the licensing requirements for the position with Pershing.

4. In April 1997, DLJ submitted a form to the Immigration and Naturalization Service in support of its petition to obtain H-1B visa status for petitioner. An H-1B visa was approved from April 7, 1997 through March 1, 2000. In September 1997, PCFN submitted a petition to extend the stay of petitioner in the United States. An H-1B visa was approved for the period September 24, 1997 through August 1, 2000. In November 1997, Pershing submitted a petition to further extend petitioner's employment in the United States. Another H-1B visa was approved for the period January 9, 1998 through November 1, 2000. In October 2000, Pershing submitted a petition to extend petitioner's H-1B status with change of job duties to allow him to work as a trader assistant until April 17, 2003. An H-1B visa was approved until this date.

5. Petitioner began working for Pershing on January 1, 1998. He continued to be employed by Pershing until March 29, 2003, when he returned to France. His H-1B was extended through April 17, 2003, which was the date petitioner was required to leave the United States as such visas can only extend for a period not to exceed six years. While employed in the United States, petitioner initially rented an apartment located at 330 East 39th Street, New York, New York. He later rented an apartment at 19 East 80th Street, New York, New York, where he resided until his return to France. During the six years he resided in the United States, he would

on occasion visit his parents in France or Spain, where they maintained homes. He had a room in his parents' apartment located at 42 Avenue Paul Doumer, 75016 Paris, France, during the time he was residing in New York City.

6. For the year 1999, petitioner filed a New York State Resident Income Tax Return with an address of 330 East 39th Street, New York, New York. He subsequently filed a New York State Amended Nonresident Income Tax Return indicating zero New York State income and requesting a refund of the income tax previously paid. The address on the the amended return was 19 East 80th Street, Apt. 2C, New York, New York. On October 2, 2002, the Division issued a letter to petitioner denying the refund claim, and explained the basis of the denial as follows:

> On your amended return, you stated that you are a citizen of France with an H-1 visa. As a result, you stated that you are not subject to New York tax.
>
> Information furnished by the Internal Revenue Service, under authorization of Section 6103(d) of the Internal Revenue Code, indicates that you paid Federal income tax in the year 1999. According to our records, you filed your New York returns from 1998 to 2001 as a New York City resident using New York Resident Form IT-201.
>
> A person domiciled in New York State is a resident for income tax purposes for a specific tax year unless for that tax year, the person satisfies all three of the following conditions:
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> 1. You did not maintain a permanent place of abode in New York State during the entire tax year; and
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> 2. You maintained a permanent place of abode outside New York State during the entire tax year; and
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> 3. You spent 30 days or less in New York State during the tax year.
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> Based on the above, you are considered a New York State and New York City resident for tax purposes. Therefore, your request for refund in the amount of $3,269.00 is respectfully denied.

## *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, petitioner's resident and 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 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. 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,

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[1]The definition of 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]).

> 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.)

D. 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).

E. 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.

F. Petitioner's argument that his employment was for a fixed and limited period relies upon his possession of a H-1B visa, which is issued for temporary employment in the United States. According to petitioner, he was in the United States during a temporary stay for the accomplishment of a particular purpose, and therefore did not maintain a permanent place of abode in New York City during the year at issue. However, 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 on several occasions evidences the fact that it was not a fixed constraint on the length of the term of his employment. On at least three occasions, the period of petitioner's stay in the United States pursuant to his H-1B visa was extended or changed by additional petitions. Under such circumstances, it cannot be held that petitioner's length of employment was fixed or limited as the result of restrictions imposed by an H-1B visa.

G. The record does not show that petitioner maintained his apartment in New York for the accomplishment of a particular purpose. The job description contained in the letters written by Pershing in support of the H-1B visa application does not describe a specific project, set forth a job description which contains a time frame or refer to a particular 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). In addition, not only did the time period of his visa stays change, but his job description changed as well, from being hired as an investor services representative in 1998 to his extension in 2000 being based on his employment as a trader assistant.

H. Petitioner's argument that presence in New York State pursuant to a temporary work visa establishes nonresident status contravenes the Federal U.S. Tax Guide for Aliens, Publication 519. According to Publication 519, an alien, for tax purposes, is an individual who is not a United States citizen, and aliens are classified as nonresident and resident aliens. The publication explains that if a person meets the "substantial presence test" he or she will be considered a U.S. resident for tax purposes. An alien satisfies the "substantial presence test" if he or she is physically present in the United States on at least 1) 31 days during the current year, and 2) 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting: a) all the days the individual was present in the current year, and b) 1/3 of the days the individual was present in the first year before the current year, and c) 1/6 of the days the individual was present in the second year before the current year. Thus, under the guidelines of Publication 519, the terms of a visa have no bearing on the classification of an alien as nonresident or resident and on the taxability of income.[2]

I. The petition of Laurent A. Sebah is denied and the denial of petitioner's refund claim is sustained.

DATED: Troy, New York
September 22, 2005

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE

[2]There is no dispute that petitioner was present in New York for over 183 days during tax year 1999. As such, he would meet the substantial presence test and be considered a United States resident for tax purposes. For the year at issue, petitioner filed a U.S. Individual Income Tax Return, Form 1040, listing his New York City address.