STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WESSEL OOSTHUIZEN	:	DETERMINATION DTA NO. 820164
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2000.	:	

Petitioner, Wessel Oosthuizen, c/o Robert Upbin CPA, 600 Old Country Road, Suite # 338, Garden City, New York 11530, filed a petition for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2000.

On August 31, 2005 and September 14, 2005, respectively, petitioner, appearing by Robert Upbin, CPA, and the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel), consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by February 3, 2006, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., 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 year 2000 within the meaning of Tax Law § 605(b)(1)(B) and Administrative Code of the City of New York § 11-1705(b)(1)(B).

FINDINGS OF FACT

The Division of Taxation submitted 18 proposed findings of fact, all of which have been substantially incorporated in the findings below.

1. Petitioner, Wessel Oosthuizen, maintained a place of abode in New York, New York during the tax year 2000, the year at issue herein, located at 235 East 95th Street, Apt. 25B. During the year 1999, petitioner maintained a place of abode at 234 East 81st Street, Apt. 1C, New York, New York.

2. Petitioner was present in New York State and City during the year 2000 for more than 183 days.

3. Petitioner entered the United States and New York State on September 1, 1998 pursuant to a B-1 tourist visa, issued on July 22, 1998 and specifying an expiration date of July 22, 2003.

4. Petitioner, a South African citizen who was a trained physiotherapist holding Bachelor of Science degrees in both physiotherapy and human movement sciences, came to New York to broaden his professional and travel horizons.

5. In a letter, dated November 20, 1998, the firm of Hands-On Physical Therapy, P.C. ("Hands-On") submitted a request to the United States Immigration and Naturalization Service ("INS") in which it asked that petitioner be granted an H-1B visa so that it might retain petitioner as a physical therapist in its New York City office. In the letter, the firm listed petitioner's duties and responsibilities as including, but not limited to, the following:

a. Evaluate patients' medical histories, test and measure their strength, range of motion, and ability to function, and then develop treatment plans;

b. Delegate specific procedures to physical therapy assistants and aides;

c. Increase patients' flexibility by stretching and manipulating stiff joints and unused muscles by using a technique known as passive exercise;

d. Encourage patients to use their own muscles to further increase flexibility and range of motion before finally advancing to weights and other exercises that improve strength, balance, coordination and endurance;

e. Use electrical stimulation, hot or cold compresses, traction or deep tissue massage and ultrasound to relieve pain, improve the condition of muscles or related tissues, reduce swelling and restore function;

f. Instruct patients to use crutches, prostheses, and wheelchairs to perform day-to-day activities that could then be done at home to expedite their recovery; and

g. Document progress, conduct periodic evaluations and modify treatments when necessary.

6. In the same letter of November 20, 1998, Hands-On stated that it required petitioner's services for a period of three years at an annual salary of $44,000.00.

7. A little over a month later, on December 30, 1998, petitioner entered into an employment agreement with Hands-On which specified his position as a full-time physical therapist and as the director of the firm's Manhattan 2 (93rd Street) practice. This agreement, with a printed date of January 1, 1999, stated an annual salary of $55,000.00 for a 40-hour workweek and 20 total days off for sick and vacation days. The agreement did not state a duration, but provided that either Hands-On or petitioner could terminate the agreement on four weeks' notice. Petitioner's duties under the contract included:

a. direct patient care;

b. patient evaluations and re-evaluations;

c. contacts with physicians, various referral sources and patients' families concerning patients;

d. handling of basic administrative issues including preparation of statistics, consulting on equipment, maintaining an open line of communication with the corporation and specific problem solving under the advisement of the president and vice-president of the corporation; and

e. other administrative duties as required.

8. On April 14, 1999, the INS issued an H-1B visa to petitioner which listed an expiration date of November 29, 2001.

9. Petitioner began work for Hands-On on or about January 1, 1999.

10. Petitioner terminated his employment with Hands-On on January 31, 2003.

11. On petitioner's 1999 New York State and City Resident Personal Tax Return he listed his address as 234 East 81st Street, #1C, New York, New York 10028.

12. On petitioner's 2000 New York State and City Resident Personal Tax Return he listed his address as 235 East 95th Street, #25B, New York, New York 10128.

13. In May 2002, petitioner filed a New York State and City Amended Nonresident and Part-Year Resident Income Tax Return for the year 2000, in which he claimed nonresident status for 2000 and requested a refund of $2,462.00. On page 3 of the amended return, petitioner made the following statement:

> THE AMENDED TAX RETURN IS BEING FILED TO REFLECT TAXPAYER'S STATUS AS A RESIDENT OF SOUTH AFRICA WORKING ON A TEMPORARY ASSIGNMENT ON AN H-1 B VISA AS A PHYSICAL THERAPIST. TAXPAYER IS FILING AMENDED TAX RETURN TO REFLECT NON-RESIDENT STATUS FOR BOTH NEW YORK STATE AND NEW YORK CITY. . . .

14. The Division of Taxation performed an audit of the Amended Nonresident and Part-Year Resident Income Tax Return for the year 2000. The audit began with a letter from the Income Tax Desk Audit Bureau in Albany, New York, dated December 30, 2002, requesting the date petitioner entered the country; a copy of his visa; a copy of his employment contract; a statement of his job duties and the date he planned to return to his homeland.

15. By letter, dated January 13, 2003, petitioner responded through the firm of Robert Upbin, CPA, P.C. In the letter, it was explained that petitioner had entered the country on September 1, 1998 pursuant to a B-1 tourist visa that was issued on July 22, 1998. According to the letter, this visa was endorsed in his passport to H-1B status, effective for work purposes, on April 14, 1999, effective January 1, 1999.

16. The same letter also stated that although the H-1B visa had an expiration date of November 27, 2001, petitioner had decided to remain in the United States indefinitely and become a resident and a citizen. Petitioner conceded that for the years 2001 and 2002 he was a resident of New York State. The letter set forth the following additional "pertinent" facts:

> The taxpayer, for the years in question (1999 and 2000), was on a *temporary assignment* in the United States. Accordingly, the taxpayer claims to be a nonresident of New York State. His permanent residence and citizenship is in South Africa.

17. After reviewing petitioner's response, including copies of his visas and employment contract, the Division of Taxation issued a Notice of Disallowance, dated February 14, 2003, denying petitioner's request for a refund for the year 2000 on the following basis:

> Since your position as a physical therapist is not considered temporary and for a specific purpose, your request for a refund is disallowed.

18. In response to the Notice of Disallowance, the firm of Robert Upbin, CPA, P.C. sent a letter to the Bureau of Conciliation and Mediation Services ("BCMS"), dated April 29, 2003, in

which it stated that as of February 2003, petitioner was no longer associated with Hands-On, was then traveling in Asia and that the Upbin firm no longer was certain of his plans for the future.

19. In an unsigned statement, dated September 13, 2003, petitioner explained that his motive for coming to the United States was to broaden his traveling and professional horizons. He mentioned that as of September 2003 he had been writing and developing unique training courses in manual therapy and indicated an address of 409 East 74th Street, Apt. 5D, New York, New York.

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioner argues that he was on temporary assignment in the United States during the year 2000 and therefore was a nonresident of New York State and New York City, with a permanent residence and citizenship in South Africa.

21. Petitioner contends that he is exempt from taxation as a New York State and City resident for the year 2000, defined in the Tax Law and regulations as a person who maintains a permanent place of abode and spends more than 183 days in New York during the tax year. He argues that he did not maintain a permanent residence because a "permanent place of abode" can not be established if it is maintained during a temporary stay for the accomplishment of a particular purpose.

22. The Division of Taxation argues that petitioner has misread the language of the regulation at 20 NYCRR 105.20(e)(1) which states that a place of abode will not be permanent if maintained only during a temporary stay for the accomplishment of a particular purpose. The Division contends that petitioner has not met his burden of showing that his abode was maintained for a temporary stay and for the accomplishment of a particular purpose and that the evidence indicates a contrary conclusion.

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 New York State nonresidents are taxed only on their New York State source income whereas residents of the State and City are taxed on their income from all sources (Tax Law §§ 611, 631). As pertinent to this matter, Tax Law § 605(b)(1)(B)[1] defines a resident individual as one

> 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. In the instant matter, petitioner was present in New York State and City for more than 183 days and maintained a place of abode in New York City during the year 2000. The issue that remains to be determined is whether petitioner maintained a *permanent* place of abode in New York City.

The term "permanent place of abode" is not defined in the Tax Law, but is discussed in the regulations. With respect to permanency, the regulations provide that "a place of abode . . . is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose." (20 NYCRR 105.20[e].) For a place of abode 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.

C. Although petitioner has tried to establish that his abode was maintained for a temporary stay which was for the accomplishment of a particular purpose, he has failed to meet

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[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]).

his burden of proof imposed under Tax Law § 689(e). Therefore, the Division's denial of his claim for refund must be sustained.

D. There is nothing in the record which suggests that petitioner's stay in New York was ever planned to be temporary let alone for the accomplishment of a particular purpose other than obtaining employment in his career field of physical therapy.

After arriving in the United States as a trained physical therapist in September 1998, petitioner established residency in New York City while pursuing employment. He negotiated and ultimately signed an employment contract with Hands-On Physical Therapy, P.C. on December 30, 1998, effective January 1, 1999. Since he had entered the country on a tourist visa, Hands-On requested that the INS grant petitioner an H-1B visa so that petitioner might remain in the country and work for it. In the letter it submitted on petitioner's behalf, dated November 20, 1998, Hands-On described the duties that petitioner would be discharging, setting forth routine tasks normally performed by a physical therapist, including the evaluation of patients and development of treatment plans; the manipulation of joints and muscles with passive exercise; the use of electrical stimulation, hot and cold compresses and ultrasound for pain relief; and providing instruction in the use of prostheses, crutches and wheelchairs. Hands-On represented to the INS that it required petitioner's services for a period of three years at a salary of $44,000.00.

In stark contrast was the contract entered into by petitioner and Hands-On shortly thereafter on December 30, 1998. Therein, petitioner's duties included more management responsibility in addition to his physical therapy duties and, most notably, it was silent as to the term of the contract, but did provide for termination by either party on four weeks' notice. The silence of the contract as to term and the "at-will" nature of the termination provision indicated

that neither petitioner nor Hands-On intended the contract to end with any specificity and strongly suggests that petitioner's stay in New York was of an indefinite duration and was neither temporary nor for the accomplishment of a particular purpose. Further, the broad range of management and therapeutic duties indicated that petitioner's job entailed general duties not directed towards a particular purpose.

E. In response to the request for an H-1B visa, the INS granted petitioner a visa which was issued on April 14, 1999 (effective January 1, 1999) and expired on November 29, 2001. As mentioned, petitioner remained at Hands-On until the end of January 2003. When the H-1B visa expired on November 29, 2001 petitioner decided to remain in the United States and seek citizenship, another strong indication his stay in New York and the United States was never intended to be temporary.

Petitioner argues that he must be given nonresident status for the year 2000 because he was present in New York pursuant to a temporary work visa, the H-1B visa, which by definition implies that the person holding the visa is only temporarily in the United States for the accomplishment of a specific employment purpose.

Clearly, petitioner possessed the requisite education, training, expertise and specialization to qualify for the issuance of an H-1B visa (***see***, 8 CFR 214.2[h][1][ii][B]), but his background alone is not sufficient to establish temporary status under the Division's regulations. As pointed out by petitioner's representative, the H-1B visa is issued to workers "temporarily in the United States" (8 CFR 214.2[h][1][ii][B])[2] for the fulfillment of a specific purpose. This, without more, is not conclusive as to the issue before this forum. In fact, the H-1B visa was issued by INS

[2]8 CFR 214.2(h)(1)(ii)(B) provides that the worker is coming temporarily to the United States to perform services in a specialty occupation described in the Act.

based upon the representation in the November 20, 1998 letter by Hands-On that petitioner was being employed for a specific period of three years only. Since petitioner was never employed under such provision in his contract, the issuance of the visa was based upon an erroneous statement of fact and petitioner's reliance upon it to prove that his stay was temporary was misplaced.

Petitioner submitted no credible testimonial or documentary evidence indicating that his stay in New York or the United States was temporary. His amended 2000 New York Personal income tax return merely restated his position; it did not constitute evidence that petitioner's stay was temporary. It was a self-serving statement that lacked a credible foundation. Further, in the letter of January 13, 2003, petitioner's representative conceded that petitioner was a New York resident in 2001 and 2002. Apparently this was due to the fact that petitioner's visa had expired in November 2001, and he believed that he could no longer claim nonresidence based on his H-1B visa, which, as noted above, was an erroneous assumption as well. For these reasons, it is concluded that petitioner has failed to meet his burden of proving that his stay was temporary or that he was here for the accomplishment of a particular purpose.

F. The petition of Wessel Oosthuizen is denied and the Division of Taxation's Notice of Disallowance, dated February 14, 2003, is sustained.

DATED: Troy, New York
July 13, 2006

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE