STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of	:	
PABLO GOLDBERG	:	DETERMINATION DTA NO. 820248
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 Years 2000 and 2001.	:	

Petitioner, Pablo Goldberg, 127 Riverside Drive, Apartment 41, New York, New York 10024, filed a petition 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 years 2000 and 2001.

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 July 1, 2005 at 10:30 A.M., with all briefs to be submitted by October 17, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Carl E. Stoops, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Pablo Goldberg, is a citizen of Argentina, where he resided prior to accepting employment in the United States. He attended the University of Buenos Aires where he received a degree in economics. During the first and second quarters of 1997, petitioner was employed by I.D.E.A., Inc. Petitioner was subsequently employed by Solomon Smith Barney, Inc. and received wages from this company for the second, third and fourth quarters of tax year 1997 and the first quarter of tax year 1998. For tax years 1997 and 1998, petitioner filed a New York State Resident Income Tax Return, Form IT-201, using the address 127 Riverside Drive, Apartment 41, New York, New York 10024.

2. Petitioner was next employed by ABM AMRO, Inc. and received wages from this company for the remainder of the year 1998, the year 1999 and the first and second quarters of 2000. Petitioner was hired by Tulio Vera, an employee of ABN AMRO, Inc. In a letter dated September 10, 2003, Mr. Vera, then Managing Director, International Emerging Markets Division, Fixed Income and Economic Research, with Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"), stated that petitioner was initially hired in New York to help set up the research effort, tune up the trading, sales and investment banking teams and build a solid relationship with the investor community comprised by the largest mutual, pension and hedge funds.

3. Petitioner obtained an H-1B visa valid from November 20, 1998 through January 1, 2001, sponsored by his employer, ABN AMRO, Inc.

4. During the year 2000, Mr. Vera accepted employment as the Managing Director, International Emerging Markets Division, of Merrill Lynch and brought petitioner along with him. As both ABN AMRO, Inc. and Merrill Lynch are global firms and given the regional

knowledge and information that petitioner's position would require, it was the plan to relocate petitioner to South America, most likely Argentina, to run a regionally based research effort. The research effort would focus on conducting sovereign credit analysis for Latin America with the particular objective of bringing up to date information of economic and political developments in the region to investors around the globe.

5. During his tenure with Merrill Lynch, petitioner's duties and responsibilities included the collection, interpretation and processing of macroeconomic and financial data from various Latin American countries; the design, development and production of research publications on the topics of Latin American fixed income investments and economics; the education of Merrill Lynch's sales and trading forces on the developments in Latin America through informational daily morning meetings and periodic tutorials; the initiation of strong business relationships between Merrill Lynch and portfolio managers at the largest mutual, pension and hedge funds around the United States, Europe and South America, and the building of strong relationships between Merrill Lynch and officials at various South American governments, central banks and the private sector.

6. Petitioner obtained an H-1B visa valid from April 21, 2000 through November 1, 2002, sponsored by his employer, Merrill Lynch.

7. Following a devaluation and debt default in Argentina and a cost cutting policy undertaken by Merrill Lynch, the international bank plans were altered. Merrill Lynch decided to cut to a minimum its presence in South America, closing its offices in Chile, and closing its trading desk and dramatically reducing its presence in Argentina. Merrill Lynch decided to concentrate its research efforts for Latin America in its headquarters in New York. As a result, a new immigration status was filed for petitioner in the year 2002.

8. For the years 2000 and 2001, petitioner filed New York State nonresident and part-year resident income tax returns, Form IT-203, with an address of 127 Riverside Drive, Apartment 41, 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 wage and tax statements attached to the returns from ABN AMRO, Inc. and Merrill Lynch for the years at issue indicate the same address. During each of the tax years at issue, petitioner was present in New York for more than 183 days.

9. The Division of Taxation's Wage Reporting System is an electronic database wherein information required to be submitted by New York State employers pursuant to the requirements of Tax Law § 171-a is maintained and stored. The Wage Reporting System provides the name, social security number and gross wages paid to each employee who resides or is employed in New York State. The employer is identified by its employer identification number ("EIN").

10. A review of the Wage Reporting System cross-referenced against the social security number of petitioner for 1997, 1998, 1999, 2000 and 2001 revealed the following: in 1997, two employers reported paying wages to petitioner from which New York State personal income tax was withheld; in 1998, two employers reported paying wages to petitioner from which New York State personal income tax was withheld, with one of the employers being ABN AMRO, Inc.; in 1999, ABN AMRO, Inc. reported paying wages to petitioner and withheld New York State personal income tax; in 2000, ABN AMRO, Inc. and Merrill Lynch reported paying wages to petitioner and withholding New York State personal income tax; and, in 2001, Merrill Lynch and Merrill Lynch Trust Company Federal Savings Bank reported paying wages to petitioner and withholding New York State personal income tax.

11. During the course of the audit, the Division requested that petitioner provide a statement detailing the nature of his work assignment with ABN AMRO, Inc. and Merrill Lynch along with a copy of any employment contracts with the two business entities. In response to the Division's request, petitioner provided correspondence dated September 12, 2003, correspondence from Tulio Vera dated September 10, 2003, copies of his H-1B visa and passport and a copy of the Immigration and Naturalization Service Notice of Action dated April 21, 2000.

12. Following a review of the documents supplied by petitioner and its own Wage Reporting System, the Division issued to petitioner statements of proposed audit changes, dated October 30, 2003, pertaining to the years 2000 and 2001. The statements explained that a review of its own records and the documents supplied by petitioner indicated that petitioner's employment in New York State was for general duties and not for the accomplishment of a particular purpose. The Division also determined that since the beginning of petitioner's stay in New York State, he had been employed by more than one employer and that a stay involving varied, consecutive assignments would not qualify for the permanent place of abode exemption pursuant to 20 NYCRR 105.20(e)(1). In addition, petitioner did not supply an employment contract and the absence of such indicated that the duration of petitioner's assignment was indefinite. For these reasons, the Division concluded that petitioner's apartment in New York City was a permanent place of abode.

13. On December 26, 2003, the Division issued to petitioner two notices of deficiency for the years 2000 and 2001 assessing tax due of $23,454.73 and $18,045.94, respectively, plus interest.

14. The Division submitted 21 proposed findings of fact, all of which have been incorporated herein, except where irrelevant to this determination.

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 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 105.20(e)(1) 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

---

[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]).

> 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.)

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.) Moreover, petitioner is required to prove that his interpretation of the statute is the only reasonable interpretation, or that the Division's interpretation is unreasonable (***Matter of Blue Spruce Farms v. State Tax Commission***, 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). These principles of statutory construction also apply to the interpretation of administrative regulations (***see***, ***Matter of Cortland-Clinton, Inc. v. New York State Department of Health***, 59 AD2d 228,

399 NYS2d 492). It is well settled that the construction of statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld (***Matter of Howard v. Wyman***, 28 NY2d 434, 322 NYS2d 683).

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 an 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 years 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 more than one occasion indicates that it was not a fixed constraint on the length of the term of his employment. On at least two occasions, the period of petitioner's stay in the United States pursuant to his H-1B visa was extended or changed by an additional petition. Petitioner was employed by numerous employers over the period of his stay in the United States. Under such circumstances, it cannot be held that petitioner's length of

employment was fixed or limited as the result of his presence in the United States due to 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 letter written by Mr. Vera does not describe a specific project, does not 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). Changes in petitioner's employment strongly suggest that his stay in New York was indefinite and not for a particular purpose. Specifically, at the time petitioner commenced employment with Merrill Lynch in 2000 he had already been living and working in New York City for more than three years. Petitioner's at will employment status at four employers (I.D.E.A., Inc., Solomon Smith Barney, Inc., ABN ARMO, Inc. and Merrill Lynch) also suggests that his stay in New York was of an indefinite duration and was neither temporary nor for the accomplishment of a particular purpose. Additionally, the broad range of assignments given to petitioner as listed in Mr. Vera's letter indicates that petitioner's job entailed general duties and that his New York employment was not for a particular purpose.

H. Petitioner's representative also noted that H-1B visa status is for workers "temporarily in the United States" (8 CFR 214.2[h][1][ii][B]). Petitioner's representative submitted information obtained from the United States Department of State website indicating that an H-1B visa holder may remain in the United States for up to six years. At that point the alien must remain outside the United States for one year before another H-1B visa can be approved. An H- 1B visa holder, like petitioner, may also apply for and be granted permanent resident status.

While these immigration rules and regulations may support petitioner's claim that his stay in New York was temporary, they clearly are not dispositive. In this case, the evidence in the record indicating that petitioner's stay was indefinite and not for the accomplishment of a particular purpose compels the conclusion that petitioner failed to meet his burden of proof. Moreover, even assuming that petitioner's stay was temporary, in order to establish that he was taxable as a nonresident, as noted previously, petitioner also had to show that his stay was for the accomplishment of a particular purpose. As discussed above, petitioner has failed to make such a showing.

I. The petition of Pablo Goldberg is denied and the notices of deficiency, dated December 26, 2003, are sustained.

DATED: Troy, New York
February 2, 2006

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE