STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **MARK R. WELDON** | : | SMALL CLAIMS DETERMINATION DTA NO. 820254 |
| for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2000 and 2001. | : | |

Petitioner, Mark R. Weldon, c/o Carl Stoops, Stoops & Company, 225 East 95th Street, Suite 29K, New York, New York 10128, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2000 and 2001.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 15, 2005 at 10:30 A.M., which date began the three-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. (Susan Parker).

***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, Mark R. Weldon, is a citizen of New Zealand.

2. In 1995, petitioner came to the United States on an F-1 student visa to attend Columbia University Law School in New York, New York.

3. In 1995, while attending Columbia Law School petitioner worked part time for Columbia University and for Reliance Insurance Co.

4. In 1996, also while attending law school, petitioner began working for Skadden, Arps, Slate, Meagher & Flom, LLP. Petitioner worked part time for Skadden Arps in 1996 and 1997, earning approximately $23,000.00 and $33,000.00, respectively, in wages for those years. Petitioner worked full time for Skadden Arps in 1998 and earned wages of about $112,000.00. He continued to work full time for Skadden Arps through the early part of 1999, earning about $25,000.00 in wages.

5. In 1999, petitioner commenced full-time employment with McKinsey and Company ("McKinsey"), a New York management consulting firm, under an H-1B visa effective May 28, 1999 through February 1, 2002.

6. In February 2002, petitioner's H-1B visa was extended to March 1, 2004 by the United States Department of Justice Immigration and Naturalization Service.

7. In or about mid-May 2002, petitioner left the employ of McKinsey and returned to New Zealand soon thereafter. He became chief executive officer of the New Zealand Stock Exchange.

8. Petitioner was employed "at will" by McKinsey. He did not have an employment contract.

9. Petitioner maintained a residence in New York City from the time he arrived in 1995 as a student through the time of his departure in 2002.

10. Petitioner filed New York nonresident income tax returns for the years at issue.

11. On or about July 30, 2003, the Division of Taxation ("Division") mailed a letter advising petitioner that his New York State and City tax returns for the years 2000 and 2001 were under review. The letter asked petitioner to supply a statement detailing his work assignment with McKinsey, a copy of his employment agreement with McKinsey, 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.

12. In response, petitioner provided, among other things, a letter dated September 17, 2003 which contained the following statement regarding his employment in New York in 2000 and 2001:

> I was employed by McKinsey and Company, on East 52nd Street in New York City in the role of Engagement Manager in what McKinsey terms as its "Wholesale Banking" practice, with specific responsibility for leading work in the US and in Europe-based stock exchanges.
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> In particular, I did a lot of work with the New York Stock Exchange (NYSE), which totaled over 12 months of the 24 months in question. I also worked for a German company that wanted a feasibility assessment of starting a new stock exchange in Europe; worked for a group of stock exchanges that wanted advice on whether it was feasible to establish a single global stock exchange, or at least one that was linked in the three main time zones; worked for a Canadian exchange that wanted a strategy for entering the US; and for a Californian trading platform that wanted to make formal legal applications to the UEC to become a registered exchange (for mainly regulatory reasons, it was not).
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> It is obvious from the above that I was employed as a specialist in the stock exchange area. This came out of my background, which was unique for the

capital markets and made me the right person for this job. I have a post graduate degree in economics, with a focus on stock exchanges and capital markets. I have undergraduate degrees in finance and in game theory. I also have a law degree that focused on corporate law, securities law and international law with a specific emphasis on the Exchange Act in the US and the FSA in the UK, which regulate stock exchanges. My previous job experience was also useful. As an adjunct professor of economics I focused on areas relating to stock exchanges and capital markets. In law I focused on international securities and stock exchanges. I was thus the best person for McKinsey to hire as it went through a very specific period in time (2-3 years) where everything was changing in the exchange landscape, and there was a specific need for expert advice from someone who understood both the legal environment and the economic environment.

It was never my intention to remain at McKinsey in New York, for more than 3 years. I always had a very strong intention to return to my family in New Zealand. Moreover, the work I was employed to do had a specific time frame.

Like a lot of New York firms . . . McKinsey does not give its employees an employment contract. Instead, you are an employee at will. While I did not consider this a risk at the time . . . it did mean that I could leave at any time. McKinsey was well aware of my intention to do so, and that fitted nicely with their short term need for some expertise in the stock exchange area. McKinsey is a management consulting firm, and is employed on a short term basis by clients to help them solve strategic problems. Given my desire to return to New Zealand, the short term focus of McKinsey fitted me perfectly.

While McKinsey were willing to employ me over this period, it was an engagement with a specific end in sight - as was proved by my leaving. There was a specific and foreseeable demand for work over a 2-3 year period relating to stock exchanges and possible global integration. The fact of this type of engagement is borne out by the time I spent out of New York, in fact, more particularly, in Europe, working on these issues. . .

My H1B visa was renewed to finish a particular engagement for McKinsey with the NYSE. This engagement was finished in mid-May 2002, after which I left McKinsey. There was no scope for any other type of short term visa for me at this time, and a H1B was deemed the easiest to receive.

13. Following a review of the information provided by petitioner, the Division concluded that petitioner's stay in New York was not "temporary" within the meaning of the relevant statutes and regulations. The Division thus found that petitioner's residence in New York during

the years at issue constituted a permanent place of abode. Accordingly, the Division determined that petitioner was properly subject to tax as a resident of the City and State of New York.

14. On the basis of the foregoing conclusions, the Division issued two notices of deficiency to petitioner dated January 12, 2004 which asserted additional New York State and New York City personal income tax due for the years 2000 and 2001 in the respective amounts of $10,328.11 and $12,502.31, plus interest.

15. The parties agree that petitioner was not domiciled in New York during the years at issue. The parties further agree that petitioner was present in New York State and City for more than 183 days during each of the years at issue.

## *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 parties agree that petitioner was not domiciled in New York during the years at issue. The parties further agree that petitioner was present in New York State and City for more than 183 days during each of the years at issue. Also there is no question that petitioner

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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]).

maintained a place of abode in New York City during the years at issue. Consequently, the only issue remaining 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. However, it is discussed in the regulations. As to the question of permanency, the Commissioner's 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 102[6][e]). Accordingly, if a place of abode is to be deemed not permanent, as petitioner contends, it must be maintained during a temporary stay *and* the stay must be for the accomplishment of a particular purpose.

C. Petitioner has failed to meet his burden of proof imposed under Tax Law § 689(e) to show that his stay in New York City was temporary and for the accomplishment of a particular purpose. Accordingly, the notices of deficiency must be sustained.

D. Changes in the purpose of petitioner's stay in New York and changes in his employment strongly suggest that his stay in New York was indefinite and not for a particular purpose. Specifically, petitioner came to New York in 1995 to attend Columbia University Law School. He remained in New York after law school to work for a law firm.[2] He then worked as a management consultant for McKinsey during the years at issue. Petitioner's at will employment status at McKinsey 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 undertaken by petitioner at McKinsey as outlined

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2 Petitioner's representative asserted that petitioner worked at the law firm part time while attending law school. Based on his wages of $112,000.00 (***see***, Finding of Fact "4"), and in the absence of any evidence to the contrary, it is concluded that petitioner worked full time at Skadden Arps in 1998 and early 1999.

in his September 17, 2003 letter support a finding that his New York employment was not for a particular purpose.

D. Petitioner's letter contends that there was "a specific and foreseeable demand for work over a 2-3 year period relating to stock exchanges and possible global integration," i.e., his area of expertise. Petitioner, however, offered no testimony, affidavits or other evidence in support of this claim. Accordingly, this contention is not accepted as fact herein.

E. At hearing, petitioner's representative noted petitioner's high level of education and expertise in a highly specialized area in support of petitioner's position. While apparently necessary to qualify for an H-1B visa (***see***, 8 Code of Federal Regulations ["CFR"] 214.2[h][1][ii][B]), petitioner's education and undisputed expertise are insufficient to establish temporary status under the Division's regulations.

F. 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 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.

G. The petition of Mark R. Weldon is denied and the notices of deficiency dated January 12, 2004 are sustained, together with such interest as may be lawfully due.

DATED: Troy, New York
November 23, 2005

/s/ Timothy J. Alston
PRESIDING OFFICER