STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GUILHERME DO VALLE	:	DETERMINATION DTA NO. 820509
for Redetermination of a Deficiency 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, Guilherme Do Valle, 525 East 72nd Street, Apartment 32B, New York, New York 10021, filed a petition for redetermination of a deficiency 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 hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 15, 2005 at 10:30 A.M. The final brief in this matter was due by January 31, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Benson Motechin, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

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, Guilherme Do Valle, a Brazilian citizen, came to the United States in 1997 under authority of an H-1B visa to work for Garantia, Inc. in New York City. Petitioner's visa was issued June 18, 1997 and had an expiration date of June 16, 1999.

2. In a letter dated May 20, 1997 submitted in support of petitioner's application for an H-1B visa, Georg A. Ehrensperger, the chief executive officer of Garantia stated:

> It is anticipated that Mr. Valle's temporary assignment in the United States will be approximately three years in duration and that, upon conclusion of his temporary assignment in the United States, he will be reassigned abroad.

3. Petitioner began his career with Garantia in 1993 in Brazil. He started as an economic researcher and later became an economic analyst. In 1996, he was promoted to Garantia's institutional fixed-income sales and trading desk where he handled international clients' accounts.

4. Petitioner's job with Garantia in New York is described in the record as a "financial analyst/portfolio analyst" and a "hedge fund analyst." His duties included the evaluation, research and creation of various global investment strategies. He also conducted feasibility studies on the application and integration of global investment strategies in Brazil.

5. Petitioner was employed by Garantia in New York from July 1997 until November 1998.

6. In November 1998, petitioner joined BEA Associates in New York as Vice President (Fund of Funds). BEA subsequently changed its name to Credit Suisse Asset Management ("CSAM"). Petitioner's employment by BEA and CSAM resulted from an acquisition of Garantia in 1998. Petitioner was employed by CSAM until July 2002.

7. In response to a Division of Taxation ("Division") request for a statement detailing his work assignment during the years at issue, petitioner submitted the following list of his duties and responsibilities at CSAM in 2000 and 2001:

- Follow the global financial markets; equities, fixed income, commodities.
- Monitor the Hedge Fund Industry.
- Meet and Evaluate Hedge Fund Managers around the world.
- Write up reports with Investment Recommendations.
- Participate in Investment Allocation meetings.
- Constantly monitor the firm's Hedge Fund investments, on a quantitative and qualitative basis.
- Work with the leading Prime-Brokers to extract portfolio information from multiple hedge funds.
- Write investment review letters.
- Frequent interaction with international investors.
- Present in conferences and seminars.
- Responsible for the oversight of the group's investment process.
- Active in the development of the group's investment system.
- Key role in interviewing, hiring and training new team members.

8. Also in response to the Division's request, petitioner submitted letters dated May 25, 2001 and July 30, 2003 from Joseph Pavone, CSAM's vice president, describing petitioner's job during the years at issue. Such descriptions are substantially similar to petitioner's own description of his job as set forth above.

9. Petitioner's H-1B visa status was extended twice by the United States Department of Justice Immigration and Naturalization Service during his employment with CSAM. The first such extension was issued July 15, 1999 and had an expiration date of July 14, 2001. The second extension was issued on August 24, 2001 with an expiration date of July 1, 2003.

10. In his letter dated May 25, 2001, which was written in support of the extension or continuation of petitioner's H-1B status, Mr. Pavone, the vice president of CSAM, stated that it was the intent of CSAM to employ petitioner "on a temporary basis."

11. In July 2002, petitioner resigned his position at CSAM and became employed by ABS Investment Management LLC as chief operational officer and hedge fund analyst. Petitioner was involved in starting up ABS Investment Management and has continued his employment there through the date of the hearing.

12. In June 2003, petitioner filed a petition with the appropriate Federal authorities seeking O-1 visa status as "an alien of extraordinary ability." Petitioner was granted such status effective July 7, 2003 with an expiration date of October 2, 2003.

13. There is no evidence in the record regarding petitioner's visa status after October 2, 2003.

14. At all times relevant herein petitioner was employed "at will." At no time did he have an employment contract.

15. Petitioner maintained a residence in New York City at 525 East 72nd Street, Apartment 32B, from the time he arrived in New York in 1997 through the time of the hearing herein in 2005.

16. Petitioner filed New York nonresident income tax returns for the years at issue. Petitioner attached a "Statement of New York Nonresidency" to each such return which provided:

> The taxpayer is domiciled in Brazil and is on temporary assignment in the U.S. for a temporary period to accomplish a specific purpose. He does not maintain a permanent place of abode in New York State. Therefore, in accordance with New York State Tax Law Section 605, the taxpayer is a nonresident of New York State.

17. Following a review of the information provided by petitioner on audit, 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.

18. On the basis of the foregoing conclusions, the Division issued two notices of deficiency to petitioner dated November 17, 2003 asserting additional New York State and New York City personal income tax due for the years 2000 and 2001 in the respective amounts of $17,963.16 and $49,693.70, plus interest.

19. 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 183 days during each of the years at issue.

20. The Division submitted proposed findings of fact numbered "1" through "18" which are accepted and have been incorporated, in substance, herein.

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 of the State 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). 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.

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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]).

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 183 days during each of the years at issue. Also, there is no question that petitioner 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.

The description of petitioner's myriad duties and responsibilities at CSAM in 2000 and 2001 as set forth in his response to the Division's request for information (***see***, Finding of Fact "7") is, frankly, the antithesis of employment for the accomplishment of a particular purpose. Such a broad range of responsibilities surely suggests that petitioner's job entailed general duties and was thus not for the accomplishment of a particular purpose. Petitioner's at-will employment status also suggests that his stay in New York was of infinite duration and was neither temporary nor for the accomplishment of a particular purpose. Additionally, petitioner's apparent decision to remain in New York and to start up a new business following the years at

issue also supports a finding that his stay was not temporary. Finally, it is noted that the record in this matter lacks any testimony, affidavit or any statement whatsoever from petitioner himself expressly stating an intent to stay in New York temporarily.

D. Petitioner's representative noted the letter of Mr. Pavone, CSAM's vice president, stating that petitioner's employment in New York was expected to be temporary (***see***, Finding of Fact "10"). At the time of Mr. Pavone's letter, petitioner had already been employed at Garantia and CSAM in New York for approximately four years and there is no evidence in the record to suggest that CSAM had any plan to terminate petitioner's New York employment at any specific time in the future. This evidence is thus insufficient to establish petitioner's contention that his stay in New York was temporary. Indeed, the probative value of the Pavone letter is undermined by the Ehrensperger letter (***see***, Finding of Fact "2"), written some four years earlier, similarly stating an intent that petitioner's assignment in New York would be temporary.

E. Petitioner's representative also noted petitioner's high level of expertise in the area of hedge funds and alternative investment management. While apparently necessary to qualify for an H-1B visa (***see***, 8 CFR 214.2[h][1][ii][B]), petitioner's undisputed expertise is insufficient to establish temporary status under the Division's regulations.

F. Petitioner's representative also cited certain Division advisory opinions in support of his position herein (***Jones***, Advisory Opinion, November 4, 1997, TSB-A-97[8]I; ***Cukras***, Advisory Opinion, January 5, 1995, TSB-A-94[15]I; ***Harper***, Advisory Opinion, February 7, 1994, TSB-A-94[3]I). It is noted that such opinions are not precedential and are not in any way binding herein (***see***, Tax Law § 171; 20 NYCRR 2376.4). In discussing such opinions, petitioner's representative correctly noted that neither the Tax Law nor the regulations define "permanent place of abode" in terms of years (***see***, Conclusion of Law "B"). Thus, as indicated

by the advisory opinions, a taxpayer could be in New York temporarily for a period of more than three years. The crucial point in any case, however, is that the taxpayer must provide sufficient credible evidence to establish that his stay in New York, of whatever duration, was temporary. Here, as discussed, petitioner has failed to provide such evidence.

G. The petition of Guilherme Do Valle is denied and the notices of deficiency dated November 17, 2003 are sustained, together with such interest as may be lawfully due.

DATED: Troy, New York
June 29, 2006

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE