STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
GERARDO LEGORRETA AND MARIANA CAMPERO	:	DETERMINATION
	:	DTA NOS. 820536
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 New York City Administrative Code for the Years 1999 through 2001.	:	

Petitioners, Gerardo Legorreta and Mariana Campero, Avenida Reforma 2233, Edif. Cedros, Depto. 201, Col. Lomas de Chapultepec, Mexico, 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 New York City Administrative Code for the years 1999 through 2001.

On January 12, 2006, petitioners, by their representative, Carl E. Stoops, CPA, and on January 23, 2006, the Division of Taxation, by Mark F. Volk, Esq. (Michelle W. Milavec, Esq.) waived a hearing and agreed to submit this matter for determination. All documents and briefs were to be submitted by the parties by June 5, 2006, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners have established that their New York City places of abode during the years at issue were not permanent places of abode but rather were maintained only during a

temporary stay for the accomplishment of a particular purpose so that they are properly treated as nonresidents subject to tax by New York only on their New York source income and not on their income from all sources.

FINDINGS OF FACT

1. Petitioners filed a nonresident personal income tax return (form IT-203) for 1999, with the filing status of "married filing joint return," on which they listed their address as 165 East 66th Street, New York, New York. They claimed a refund in the amount of $54,895.00 after allocating only a portion of petitioner Gerardo Legorreta's wages as an investment banker and a portion of petitioner Mariana Campero's wages as a public relations professional to New York. Mr. Legorreta allocated 38.94% of his wages of $634,942.00 or $247,246.00 to New York based upon his claim that he worked 88 days in New York out of his total working days of 226. Ms. Campero allocated 57.08% of her wages of $59,667.00 or $34,058.00 to New York based upon her claim that she worked 129 days in New York out of her total working days of 226.

2. Petitioners also filed a nonresident personal income tax return (form IT-203) for 2000**,** with the filing status of "married filing joint return," on which they listed their address as 32 East 76th Street, New York, New York. They claimed a refund in the amount of $39,127.00 after allocating only a portion of petitioner Gerardo Legorreta's wages as an investment banker and a portion of petitioner Mariana Campero's wages as a public relations professional to New York. Mr. Legorreta allocated 48.80% of his wages of $448,030.00 or $218,639.00 to New York based upon his claim that he worked 122 days in New York out of his total working days of 250. Ms. Campero allocated 53.20% of her wages of $95,000.00 or $50,540.00 to New York based upon her claim that she worked 133 days in New York out of her total working days of 250.

3. Petitioners again filed a nonresident personal income tax return (form IT-203) for 2001, with the filing status of "married filing joint return," on which they listed their address as 32 East 76th Street, New York, New York. They claimed a refund in the amount of $68,843.00 after allocating only a portion of petitioner Gerardo Legorreta's wages as an investment banker and a portion of petitioner Mariana Campero's wages as a public relations professional to New York. Mr. Legorreta allocated 57.43% of his wages of $814,762.00 or $467,918.00 to New York based upon his claim that he worked 143 days in New York out of his total working days of 249. Ms. Campero allocated 55.47% of her wages of $170,000.00 or $94,299.00 to New York based upon her claim that she worked 152 days in New York out of her total working days of 274.

4. Petitioners also filed City of New York Nonresident Earnings Tax Returns for 1999 reporting their income allocated to New York State in the amount indicated in Finding of Fact "1" above of $247,246.00 as income subject to the New York City nonresident earnings tax since all of their New York working days were New York City working days. On their City of New York Nonresident Earning Tax Returns for 1999, they claimed that they were not residents of New York City although they noted that they maintained "an apartment or other living quarters" in New York City.

5. Each one of petitioners' nonresident income tax returns for the years at issue included the same "attached statement" which provided the following basis for their claim of "non-resident status":

> Although, [sic] the taxpayer maintains an abode in New York State, the Taxpayer are [sic] filing a New York State non-resident return for the following reasons:
> 1. The Taxpayers are citizens and a [sic] domiciliary of Mexico.

2. The Taxpayers are present in the United States for a temporary period to accomplish a particular purpose as prescribed in employment agreement.[1]
3. The Taxpayers have entered the united states [sic] on a non-immigrant Visa, and
4. The Taxpayers intends [sic] to return to their home country, Mexico, upon the termination of their assignment here in the United States.

6. The parties are in agreement that petitioners are domiciliaries of Mexico. Nonetheless, petitioners have had a substantial and fairly lengthy presence in New York City over a period of approximately seven years. Although they filed as nonresidents for the years at issue, as noted above, the auditor's review of the records of the Division of Taxation ("Division") disclosed that petitioners filed New York State *resident* income tax returns (forms IT-201) for tax years 1996, 1997, and 1998.

7. Petitioner Gerardo Legorreta, born in Mexico City in 1967, grew up in Cuernavaca, Mexico, except for a two year period between 1979 and 1981 when he attended a military academy located in Delafield, Wisconsin. In 1985, Mr. Legorreta moved to Mexico City to attend college and law school. After completing his legal studies, he joined the Mexico City law firm of Creel,[2] Garcia-Cuellar & Muggenburg.

8. In 1992, at the age of 25, Mr. Legorreta participated in a nine-month internship program with the New York City law firm, Skadden, Arps, Slate, Meagher & Flom. At the end of this internship, he returned to Mexico City and his position at the Mexico City law firm. At both law firms, petitioner Legorreta worked on transactions involving international investment

[1] A letter dated November 20, 2002 of Morella Carta and Bari Gordon, Executive Director and Associate Director, respectively, of UBS's Human Resources noted that petitioner Legorreta "does not have an employment contract." This discrepancy was not addressed by petitioners.

[2] Certain documents in the record disclose Mr. Legorreta's complete name as Gerardo Agustin Legorreta Creel. The record does not disclose his relationship, if any, to the Creel named in this Mexico City law firm.

banks or Latin American companies in connection with mergers and acquisitions and financings in the international capital markets.

9. Mr. Legorreta decided to obtain an academic foundation in finance "in order to gain a competitive edge over other Mexican lawyers," and in the spring of 1994 enrolled in the masters in finance program offered by the London Business School, which is associated with the University of London in the United Kingdom. In August 1995, after completing this course of study, Mr. Legorreta returned to Mexico City planning to rejoin his Mexico City law firm. However, in October 1995, he decided to accept a one year position with Oppenheimer & Co., Inc., a New York City based investment bank, in the bank's associate program, which offered on- the-job-training on equity financings for Latin American companies.

10. In November 1995, after obtaining the support of a few senior partners of his Mexico City law firm to enter the New York City investment bank's associate program, Mr. Legorreta moved to New York City with petitioner Mariana Campero, who he had married on December 22, 1995. Ms. Campero had lived and studied in Mexico City until her marriage to Mr. Legorreta when she moved to London while her husband completed his studies in finance. Ms. Campero had also experienced life in the United States during her adolescence when she attended a boarding school near Boston for one year.

11. In New York City, while Mr. Legorreta was employed by Oppenheimer & Co., Ms. Campero completed a one-year art history course at Christie's and a five month art course at Sotheby's in the city, and in the summer of 1996 applied and was accepted into Columbia University's Master in Art History program. Although he had intended to return to his position with his Mexico City law firm after the Oppenheimer & Co. associate program, in Mr.

Legorreta's words,[3] "the terms of my re-employment were disappointing, as the position I was expecting and pursuing in banking law was not offered to me." As a result, he decided to accept a position with UBS Securities, LLC ("UBS"), an investment bank based in New York City.[4] Petitioner Legorreta worked for Christian Gudefin, a vice president with the banking firm, who was involved in providing advice to certain Latin American governments interested in privatizing their airports. UBS had been awarded the mandate to act as financial advisor to the government of Argentina and was looking into other potential airport privatization assignments throughout Latin America.

12. For a six year period, from January 1997 until December 2002, Mr. Legorreta was employed by UBS and was involved, in his own words, in the following assignments: privatization of the Argentine airport system (1997-1998) which comprised 33 airports; privatization of the Mexican airport system (1998-2002) which comprised 34 airports; and the initial public offering of Grupo Aeroportuario del Sureste, S.A. de C.V., the airport operator of Cancun and several other airports in southeastern Mexico (2001). In January of 2003, petitioner Legorreta returned to Mexico City still employed by UBS but at that point based in its Mexico

---

[3] No hearing was held in this matter, and as a result there was no testimony by any witnesses. Instead, petitioners submitted a lengthy "taxpayer's statement" setting forth detailed facts concerning petitioners' lives and careers. These facts are not in dispute, and although the "taxpayer's statement" is not in affidavit form, it has been relied upon for purposes of this determination's findings of fact, which include certain facts in quotation marks, which are taken directly from this "taxpayer's statement."

[4] There is some confusion in the record concerning the name of the investment bank which employed Mr. Legorreta in New York during the years at issue. Although it is referred to by the above name in the "Taxpayer's Statement" marked into the record as Petitioners' Exhibit "1", Mr. Legorreta's W-2 for 1999 shows the name of his employer as Warburg Dillon Read LLC while his W-2 forms for 2000 and 2001 show his employer's name as UBS Warburg LLC. A letter dated October 4, 2001, with a letterhead of "UBS AG, Stamford Branch", to the U.S. Department of Justice, Immigration and Naturalization Service, seeking an extension of Mr. Legorreta's "H-1B Nonimmigrant Visa Classification", noted that: "UBS AG is a global, integrated investment services firm and the leading bank in Switzerland. UBS' business is managed through three main business groups and its Corporate Center. The business groups are UBS Switzerland, UBS Warburg and UBS Asset Management."

This letter dated October 4, 2001 further noted that "On November 3, 2000, UBS acquired Paine Webber Group Inc., one of the largest full-service securities firms in the U.S."

City offices. He reunited with his wife, Mariana Campero, who had returned to Mexico City in late November of 2002.

13. While Mr. Legorreta pursued his career with UBS, Ms. Campero was employed over a five year period with Zemi Communications, a public relations firm "offering advice in strategic communications." Ms. Campero worked on "specific assignments involving developing strategic communications strategies for the firm's Mexican clients." Her job title was described in a letter dated October 28, 1997 from the managing director of Zemi Communications to Immigration and Naturalization Service as "Latin America Marketing-Media Assistant."

14. Petitioners each were employed in New York City on the basis of H-1B temporary nonimmigrant visas, which over a multi-year period were renewed from time to time.[5] A letter dated October 4, 2001 of UBS in support of petitioner Gerardo Legorreta's visa petition described his position with the company as Director, Latin America Corporate Finance up to early fall of 2001 when he assumed the position of Executive Director. It detailed his job duties on behalf of the investment bank as follows:

> [D]eveloped and executed a variety of complex financial transactions including debt and equity offerings, mergers, acquisitions and privatization on behalf of Latin American corporate clients in the transport industry;

---

[5] Petitioner Gerardo Legorreta was granted a visa for his employment with UBS, which was issued on February 12, 1997 and expired August 11, 1997. He obtained subsequent visas for his employment with UBS as follows: visa issued August 15, 1997 with expiration date of August 14, 1998; visa issued August 21, 1998 with expiration date of August 19, 1999; visa issued August 31, 1999 with expiration date of December 15, 1999; visa issued December 14, 1999 with expiration date of December 13, 2001; and visa issued December 21, 2001 with expiration date of April 1, 2002. Mr. Legorreta obtained an Authorization for Parole of an Alien Into the United States issued March 11, 2002 with an expiration date of March 10, 2003 allowing him a temporary Employment Authorization Card. Petitioner Mariana Campero was granted a visa for her employment with Zemi Communication, which was issued on December 22, 1997 and expired December 21, 1999. She obtained subsequent visas for her employment with Zemi Communications as follows: visa issued December 3, 1999 with expiration date of October 14, 2000 and visa issued October 13, 2000 with expiration date of January 22, 2003. Ms. Campero obtained an Authorization for Parole of an Alien Into the United States issued March 11, 2002 with an expiration date of March 10, 2003.

> [S]tructured custom offerings to meet specific client requirements. . . manage all aspects of execution including due diligence, structuring, financial analysis and modeling, drafting of offering memoranda, development and presentation of roadshow marketing materials, sales and purchasing agreement;
>
> [C]onducted and supervised public market, comparable transaction and discounted cash flow valuations, feasibility studies and sensitivity analyses on Latin American businesses;
>
> [M]onitored economic, political and business developments in the region and travel extensively to Latin America to develop business relationships as well as identify opportunities for potential capital market transactions and financial advisory assignments; and
>
> [M]anage a staff of 10-12 Financial Associates and Analysts.

A letter dated October 28, 1997 from Zemi Communications to the U.S. Department of Justice Immigration and Naturalization Service in support of petitioner Campero's visa petition detailed her job duties on behalf of the media/public relations firm as follows:

> In the position of Latin America Marketing-Media Assistant, Ms. Campero will be responsible for developing marketing programs designed to provide for maximum exposure to new business. As such, she will utilize her knowledge and expertise in business and media relations to analyze overall market conditions, cost effectiveness, and potential sales of products and services to identify prospective consumer markets for our various international clients. . . . [S]he will act as primary interface with major media and the firms [sic] corporate, banking and governmental clientele to increase and maintain an effective communication strategy in concert with our marketing efforts. While Ms. Campero's corporate title will be that of Associate, she will function as Assistant to the Managing Director in facilitation of our Latin American marketing-media initiatives. Ms. Campero will report directly to the Managing Director and she will have direct authority over interfacing with our various clientele as well as with the media. In this position, she will also have personal responsibility for preparing presentations, press releases and other promotional literature.

15. The Division of Taxation ("Division") conducted an audit of petitioners' 1999, 2000 and 2001 nonresident income tax returns which resulted in the issuance of statements of proposed audit changes, all dated April 24, 2004, for each of the three years at issue. Each

statement included the following explanation for the assertion of New York State and City income tax due:

> You have been found to be residents of NYS and NYC for tax purposes. This is based on NY tax law Section 605(b)(1)(B)[6] and regulation Section 105.20(e)(1).[7]

Approximately six months prior to the issuance of the statements of proposed audit changes, the Division's auditor, Steve Nawrocki, in his letter dated October 16, 2003, provided a very clear explanation to petitioners' representative concerning the basis for his audit finding that petitioners should be treated as resident individuals for purposes of New York personal income tax. He explained, in part, as follows:

> We do not feel that the taxpayers were here temporarily. They have been in NY since 1995, and quite possibly as early as 1992, and they were still here as of June 2003. Having been here for over seven years in duration, the Department would not view this as temporary under the context of the regulations.
>
> Also, Ms. Campero's length of employment appears to be tied more to the duration of her Visa than to any activity.
>
> In addition, we do not feel that the taxpayers were here to accomplish a particular purpose . . . Upon coming to NY in 1995, Ms. Campero was not employed. In fact, she did not obtain employment with Zemi Communications until she was in NY for over a year. Then when first hired she was a Marketing Media Associate prior to becoming a Vice President.
>
> We would not view this as coming to NY temporarily for a particular purpose. She was here in NY already before she obtained the employment. In addition, her duties are viewed as more general than particular in nature. Her duties are to develop and implement communication strategies for Zemi's Latin American clients.

---

[6] Tax Law § 605(b)(1)(B) defines a resident individual as one:
"[W]ho 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 (emphasis added)."

[7] This regulation which defines "permanent place of abode" includes a provision providing 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."

> As far as Mr. Legoretta is concerned, it would also be our position that he was not in NY temporarily for a particular purpose as intended under the regulations. He came to NY under a training program with Oppenhimer [sic]. When that program was done he did not return to Mexico, instead he took a position with Warburg. So, he too was already in NY when he started this position.
>
> In addition, while we appreciate the focus a high level executive contributes to various projects, the duties Mr. Legoretta performed for Warburg are viewed as more general in nature given his title and position . . . .

16. The Statement of Personal Income Tax Audit Changes for 1999 asserted additional New York State personal income tax due of $27,789.93 plus interest and additional New York City personal income tax due of $25,072.08 plus interest. This assertion of additional tax due was based upon an increase of $413,305.00 to petitioners' adjusted gross income reported on their tax return of $293,548.00 based upon the Division's finding of residency.

17. The Statement of Personal Income Tax Audit Changes for 2000 asserted additional New York State personal income tax due of $18,322.96 plus interest and additional New York City personal income tax due of $20,444.05 plus interest. This assertion of additional tax due was based upon an increase of $273,851.00 to petitioners' adjusted gross income reported on their tax return of $285,820.00 based upon the Division's finding of residency.

18. The Statement of Personal Income Tax Audit Changes for 2001 asserted additional New York State personal income tax due of $28,498.37 plus interest and additional New York City personal income tax due of $34,780.40 plus interest. This assertion of additional tax due was based upon an increase of $422,545.00 to petitioners' adjusted gross income reported on their tax return of $572,261.00 based upon the Division's finding of residency.

19. The Division issued a Notice of Deficiency dated May 10, 2004 asserting total additional tax due for the three years at issue of $154,907.79, plus interest, allocating such amount to each of the three years at issue in the same amounts as set forth in the three statements

of personal income tax due detailed above. In a table format, these amounts asserted due are as follows:

Tax Year and Tax	Amount asserted due
1999 New York State personal income tax	$ 27,789.93
1999 New York City personal income tax	25,072.08
2000 New York State personal income tax	18,322.96
2000 New York City personal income tax	20,444.05
2001 New York State personal income tax	28,498.37
2001 New York City personal income tax	34,780.40
Total	$154,907.79

This additional tax asserted due of $154,907.79 is based upon an increase in petitioner's New York adjusted gross income on the basis of the Division's finding of residency, as detailed in the Finding of Facts "16", "17", and "18". In a table format, the Division's adjustments to petitioners' reported New York adjusted gross income were as follows:

	1999	2000	2001
New York adjusted gross income as reported	$ 293,548.00	$ 285,820.00	$ 572,261.00[8]
Net adjustment to New York adjusted gross income based on finding of residency	413,305.00	273,851.00	422,545.00
Corrected New York adjusted gross income	$ 706,853.00	$ 559,671.00	$ 994,806.00

[8] In a letter dated October 4, 2001 from Mr. Legorreta's employer in New York to the Immigration and Naturalization Service, seeking an extension of his "H-1B Nonimmigrant Visa Classification", the amount of Mr. Legorreta's compensation as noted therein appears to conflict with his actual compensation: "For his professional services, Mr. Legorreta will be compensated at *an annual salary of $140,000* with appropriate corporate benefits. His annual compensation is within the prevailing wage for similar positions and will not adversely affect the working conditions of similarly employed U.S. workers (emphasis added)."

Petitioners' Abodes In New York City

20. Petitioners described their Manhattan residences from 1995 until 2003 as follows:

> 104 West 70th Street, Apt. 7G: Rented from 1995 to 1997. Moved because rent increased significantly, when lease agreement expired.
>
> 165 East 66th Street, Apt. 18E: Rented from 1997 to 1999. Moved because rent increased and it became more affordable to buy a property. Rent increase to US $3,500 per month, while the mortgage payment on a 1 bedroom was approximately US $2,600 per month, part of which was interest, which we could deduct from taxable income.
>
> 32 East 76th Street, Apt. 1404: Purchased in 1999 and sold in 2001.[9] We purchased it because as mentioned above it became more affordable to own a property.
>
> 134 East 93rd Street, Apt. 12C: Purchased in 2001[10] and sold in 2003. We again compared the cost of owning a property versus renting and we came to the conclusion it was more affordable to buy. In addition, real estate prices were going up and we thought it was going to be a good investment, as it turned out to be the case.[11]

21. The Division submitted 38 proposed findings of fact which are accepted and incorporated into this determination.

SUMMARY OF THE PARTIES' POSITIONS

22. With their submission of documents for review, petitioners argue that their stay in New York State was "on a temporary basis for limited period of time for the purpose of accomplishing the tasks as set forth by their employers." In reply to the Division's brief, petitioners maintain that they "were not present in New York for [an] *indefinite* period of time

---

[9] This apartment was, in fact, sold on or about April 3, 2002.

[10] The record includes a "closing report" which shows that the closing on the purchase of this Manhattan apartment on 93rd Street took place on April 26, 2002 not in 2001.

[11] This apartment purchased by petitioners for $940,000.00 was sold a little over a year later for $1,025,000.00 at a closing on June 11, 2003.

and that their work assignmens [sic] had specific goals and were not *open-ended* (emphasis in original)."

23. The Division argues that petitioners failed to prove they maintained their New York place of abode only during a temporary stay and only for the accomplishment of a particular purpose. According to the Division, Mr. Legorreta was present in New York City for over seven years "during which time he continuously maintained an apartment in New York" (Division's brief, p. 19). He also "failed to prove that his employment in New York was for a fixed and limited period" (Division's brief, p. 21). Rather, his work history in New York "is suggestive of a career at [his investment bank employer]" (Division's brief, p. 21). The documentation in the record "indicates that [Mr. Legorreta's] employment was general in nature, involved a broad range of general job duties, and included multiple employers and job assignments" (Division's brief, p. 24). The Division points out that Mr. Legorreta did not submit an employment contract that stated "readily ascertainable and specific end goals and conclusions or an anticipated length of employment" (Division's brief, p. 22). Further, the Division emphasizes that petitioners "maintained [apartments] in New York City continuously from 1995 through 2003, during which time Mr. Legorreta had consecutive jobs with different employers in New York" and therefore were not "maintained only during a temporary stay for a fixed and limited period with specific parameters as to duration" (Division's brief, p. 23). In other words, according to the Division, petitioners "did not maintain an apartment for the accomplishment of one job with a single particular purpose" (Division's brief, p. 30).

With regard to Ms. Campero, the Division contends that she was present in New York for approximately seven years, rejecting petitioners' contention that she was assigned to New York for a fixed and limited period. According to the Division, petitioners failed to prove that Ms.

Campero's employment in New York was for a fixed and limited period. Rather, she was promoted from "Marketing Media Associate to Vice Present within Zemi Communications [which] is suggestive of a career at Zemi Communications" (Division's brief, p. 33). The Division emphasizes that Ms. Campero "was involved in various aspects of the business [of Zemi Communications] including development of marketing programs, business and media relations, analyzing market conditions, public media relations, functioning as assistant to the Managing Director and responsibility for preparing presentation, press releases, and promotional literature" (Division's brief, p. 39). The Division argues that this long list of duties "is the polar opposite of employment for the accomplishment of a particular purpose" (Division's brief, p. 39). In addition, the Division argues that Ms. Campero did not maintain her New York place of abode "only for the accomplishment of a particular purpose" but rather she spent time "taking art courses through Sotheby's, Christie's and Columbia University" and "had been living in New York since 1995 before she ever started looking for employment in New York" (Division's brief, pp. 35-36). Finally, the Division contends that petitioners' "temporary visa status is not determinative of an employee's length of employment" in light of their "multiple visas and visa extensions" (Division's brief, p. 41).

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes New York state personal income tax on "resident individuals." In turn, Tax Law § 605(b)(1) defines "resident individual" as someone:

> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . , or
>
> (B) 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 . . . .

The definition of "resident" for New York City income tax purposes, pursuant to the New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes except for the substitution of the term "city" for "state."

B. The parties agree that petitioners during the years at issue were domiciled in Mexico. Further, petitioners have never denied that they maintained a place of abode in New York City during each of the years at issue. In addition, petitioners submitted for review certain unidentified and unexplained schedules of days in and out of New York which show that they spent in the aggregate more than 183 days in New York City during each of the years at issue except for a 1999 schedule for Mr. Legorreta, which shows 185 days outside New York City based on time spent on Shelter Island in New York's Suffolk County.[12]

C. As a result of the above narrowing of issues, in order to conclude that petitioners were "resident individuals" required to pay New York personal income tax on their income from all sources and not merely on their New York source income, the issue to resolve is whether petitioners maintained a *permanent* place of abode in New York City.

D. The Tax Law does not include a definition of the term at issue "permanent place of abode." However, the Commissioner's regulations at 20 NYCRR 105.20(e)(1) provides the following interpretation of this term:

> *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,

---

[12] Nonetheless, petitioners have not claimed that Mr. Legorreta's 1999 income was not subject to New York City personal income tax on the basis that he was not in New York City for more than 183 days in such year and it is somewhat mystifying why petitioners submitted these schedules for review. In any event, these schedules have no evidentiary value given the lack of any testimony or any other documentary evidence to establish their validity or even to provide some background to their creation.

> 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 individuals'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).

E. The Tax Appeals Tribunal has applied the terminology of "a dwelling place permanently maintained by the taxpayer," which is at the heart of the regulatory definition of "a permanent place of abode" as detailed above, in an *expansive* fashion. The Tribunal viewed a church rectory in Manhattan, where the taxpayer (a corporate attorney working in midtown Manhattan) lived as a companion to the priest, as the taxpayer's permanent place of abode since he made contributions to the rectory's household expenses and it was his dwelling place during his work week:

> With regard to whether a place of abode is 'permanent' within the meaning of the statute, we do not agree with petitioner that the statute requires that the place of abode be owned, leased or otherwise based upon some legal right in order for it to be permanent. Petitioner argues that he was not maintaining a permanent place of abode in the living quarters of the rectory because he had no legal right to reside there and could have been asked to leave at any time by Father Ioppolo. In petitioner's view, his presence in the rectory was 'impermanent by its very nature' (Petitioner's brief to the Administrative Law Judge, p. 15). In our view, the permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must

> encompass the physical aspects of the dwelling place as well as the individual's relationship to the place (footnote omitted) (***Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840, 606 NYS2d 404).

The Tribunal reached its conclusion that the rectory was the taxpayer's permanent place of abode despite the fact that the taxpayer returned on a regular basis to his country home, which was his domicile, in Pawling (Dutchess County) on the weekends and for vacations. Further, in the course of its analysis, the Tribunal in a footnote, which is shown as omitted in the above quote from the decision in ***Matter of Evans, supra***, cited with approval the following, now 66 year old, opinion of the Attorney General (1940 Op. Att'y Gen. P. 246, March 28, 1940) which remains cogent and is remarkably pertinent to the matter at hand:

> If one were to give the fullest effect to the word "permanent," then a person maintaining a "permanent place of abode" in New York should be considered as a domiciliary. But, careful study of the language of section 350(7) of the Tax Law compels the conclusion that the Legislature did not intend that the word 'permanent' should be construed as meaning the ultimate in the way of a residence established for all time to come. Obviously, it intended rather an abiding place, established either by a domiciliary or a nondomiciliary, having a fixed or established character as distinguished from intermittent or transitory.

F. The Commissioner's regulations at 20 NYCRR 105.20(e)(1), detailed in Conclusion of Law "D," adopt a view of "permanent place of abode," which is in harmony with the cogent opinion of the Attorney General cited with approval by the Tax Appeals Tribunal in ***Matter of Evans, supra*** and the Tribunal's analysis of the terminology of "permanence." As noted by the Tribunal in ***Matter of Evans, supra***, this term "must encompass *the physical aspects of the dwelling place* as well as the individual's relationship to the place" (emphasis added). As the regulation at issue provides, a camp or cottage suitable only for vacations, barracks, or any construction without facilities for cooking, bathing "will generally not be deemed a permanent place of abode." Here, petitioners' Manhattan apartments including a million dollar apartment where they dwelled during the years at issue clearly have "permanence." Nonetheless, as the

Tribunal noted "the individual's relationship to the place" is also relevant in analyzing the "permanence" of an abode. Here, the regulations provide an exception for "a place of abode maintained only during *a temporary stay* for the accomplishment of *a particular purpose*" (emphasis added). This narrow exception is a reasonable interpretation of the statutory provision defining "resident individual" as set forth at Tax Law § 605(b)(1)(B), detailed in Conclusion of Law "A" in light of the Tribunal's analysis in ***Matter of Evans, supra***, as discussed above.

G. Applying the exception for a dwelling maintained only during a temporary stay and for the accomplishment of a particular purpose to the facts in this matter, it is concluded that petitioners did not maintain their New York apartments *only* during a *temporary* stay and for the accomplishment of a *particular* purpose. This conclusion is based upon a weighing of all relevant facts (***see, Matter of Helnarski***, Tax Appeals Tribunal, October 11, 1990 [wherein the Tribunal noted with approval the opinion of the Tax Court that resolution of the issue whether employment was either temporary or indefinite is based upon "the unique facts of each case" citing ***Trapp v. Commr.***, T.,C. Memo 1980-49, 39 TCM 1085, 1097; ***Peurifoy v. Commr***. 358 US 59, 61, 58-2 USTC ¶ 9925). The reasons provided by the Division in support of this position, as summarized in Paragraph "23", are meritorious and incorporated herein especially its contention that each of the petitioners was on a career path at their New York employers during the years at issue and was not simply employed to accomplish a *particular* purpose. In addition, the Division's point that petitioners' temporary visa status is not determinative of petitioners' length of employment is well-made in light of petitioners' multiple visas and visa extensions. The fact that petitioners filed as New York residents for the three earlier years of 1996 through 1998, as noted in Finding of Fact "6", also demonstrates that their stay in New York was not "temporary" in nature. Further, it is observed that petitioners continued to maintain their

Manhattan apartment at 134 East 93rd Street even after they moved back to Mexico City.[13] In sum, petitioners have failed to shoulder their burden of proving that their abiding or dwelling in New York apartments during the three years at issue represented only a *temporary* stay in New York for a *particular* purpose (***see, Matter of El-Tersli v. Commr.***, 14 AD3d 808, 787 NYS2d 526 [wherein the Court noted that "The burden of proof lies with the taxpayer, upon whom it is incumbent to establish that he or she neither maintained a permanent place of abode in this state nor spent more than 183 days in the state"]). In addition, their Manhattan apartment at 134 East 93rd Street was not maintained *only* during a temporary stay.

H. The petition of Gerardo Legorreta and Mariana Campero is denied, and the Notice of Deficiency dated May 10, 2004 is sustained.

DATED: Troy, New York
November 13, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE

[13] As noted in Finding of Fact "12", Ms. Campero returned home to Mexico City in late November of 2002 and Mr. Legorreta joined her in January of 2003. The apartment at 134 East 93rd Street was sold by petitioners approximately six months later on June 11, 2003 as noted in Footnote "11".