STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALFONS HALIM	:	SMALL CLAIMS DETERMINATION
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 Year 2001.	:	DTA NO. 820656
	:	

Petitioner, Alfons Halim, 235 West 48th Street, Apt 22D, New York, New York 10036,[1] 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 year 2001.

A small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 4, 2006 at 3:00 P.M., with all additional documents due by November 30, 2006, which date began the three-month period for the issuance of this determination. Petitioner appeared by Robert Upbin, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Mac Wyszomirski).

ISSUE

Whether petitioner has established that his New York City place of abode during 2001 was not a permanent place of abode but rather was maintained only during a temporary stay for the

[1]Although petitioner's representative noted at the hearing that petitioner has moved from New York City to Hong Kong in either December 2005 or January 2006, a new mailing address has not been provided so that the above New York City address, which is the most up-to-date address in the files of the Division of Tax Appeals, has been used.

accomplishment of a particular purpose so that he is properly treated as a nonresident subject to tax by New York only on his New York source income and not on his income from all sources and was also not subject to New York City personal income tax.

FINDINGS OF FACT

1. Petitioner, Alfons Halim, filed a resident personal income tax return (form IT-201) for 2001, with the filing status of single, on which he listed the New York City address of 235 West 48th Street, Apt. 22D, New York, New York 10036. He claimed a refund of $313.00 based upon the difference between his reported total New York taxes of $8,246.00 (which included New York State tax of $5,418.00 and New York City tax of $2,828.00) and his total payments of $8,559.00, consisting of New York tax withheld of $8,496.00 (which included New York State tax withheld of $5,488.00 and New York City tax withheld of $3,008.00) plus a New York City school tax credit of $63.00.

2. Petitioner subsequently filed an amended nonresident personal income tax return (form IT-203) on which he claimed a refund of $3,183.00 based upon a New York income allocation percentage of 98.06%[2] and no New York City personal income tax liability. Petitioner included a statement with his amended return explaining the basis for his nonresident status:

> The taxpayer is on temporary assignment in the United States . . . . [T]he taxpayer claims that he is not domiciled in New York State . . . . [A]n individual who is not domiciled in New York State would be deemed to be a resident of the State of New York if he maintains a permanent place of abode in New York and spends more than 183 days of the taxable year in New York . . . . [A] dwelling would not be deemed a permanent place of abode if it is maintained only during a temporary stay for the accomplishment of a particular purpose, such as a fixed or limited period of time. Accordingly, nonresident status is being claimed and the individual is filing as a New York state nonresident.

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[2] Although petitioner treated his wages from J. P. Morgan as New York source income, he treated his taxable interest income of $1,793.00 as non-New York source income resulting in the income allocation percentage of less than 100%.

3. The Division of Taxation ("Division") issued a Notice of Disallowance dated June 15, 2004 to petitioner, disallowing his claim for refund as asserted in his amended tax return. The following explanation, in relevant part, was provided:

> [T]he Regulations require that your work assignment be for the accomplishment of a particular purpose. The Department has defined a particular purpose to be a specific assignment that has readily ascertainable and specific goals and conclusions. It is not in itself sufficient that you possess a particular skill or expertise.

4. The Division does not contest petitioner's claim that he is a domiciliary of North Sumatra, Indonesia, and that he has no permanent status in the United States and resided in this country pursuant to the granting of visas.

5. According to a visa application received by the United States Immigration and Naturalization Service on March 31, 2004, petitioner's date of birth was indicated as August 8, 1978. Consequently, when he received an offer by J.P. Morgan, pursuant to a letter dated February 17, 2000, petitioner was 21 years old.[3] J.P. Morgan offered petitioner "a position in Public Finance's Three-Year Analyst Program" at a base annualized salary of $45,000.00 plus a sign-on bonus of $6,000.00 and the eligibility "to participate in the Analyst Bonus Program" distributed in June of each year. This letter did not describe petitioner's specific duties, but rather noted that "this opportunity at J.P. Morgan will be both stimulating and challenging to you and we trust that your visit gave you a good understanding of our strategy as well as a sense of the dedication of our professionals." Although the offer was "expected to be an initial three-year assignment in Public Finance," the letter noted that the employment was "at will in that either

[3] This letter was directed to petitioner at an address in Boston: 1027 Commonwealth Avenue, Apartment 17. The factual record created at the hearing is extremely bare, and it is not known for certain whether petitioner at the time of his receipt of the job offer was a university student in Boston.

you or the Firm may terminate your employment at any time and for any or no reason." Further, the letter noted that "At the end of the assignment, we will evaluate whether there are continued employment opportunities for you at J.P. Morgan." Petitioner did not offer any additional evidence concerning his employment with J.P. Morgan, although his representative noted that as of the date of the hearing he was still employed by J.P. Morgan, but in their Hong Kong offices.

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
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> (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 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. Petitioner has argued that the Division acted improperly in "attributing the concept of permanent domicile to petitioner." This argument confuses the two distinct and separate bases for viewing a person as a "resident individual" for New York income tax purposes. As noted in Finding of Fact "4", the Division concedes that petitioner is a foreign domiciliary and is not domiciled in New York. Rather, it relies upon the second basis, denominated in subparagraph (B) of section 605(b)(1) cited in Conclusion of Law "A", for treating Mr. Halim as a "resident individual" for tax purposes. Since petitioner has not denied that he spent more than 183 days in

New York City during 2001 and maintained a Manhattan apartment during 2001, the issue to resolve is whether his Manhattan apartment represented a "permanent" place of abode.

C. The Tax Law does not include a definition of the term "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, 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).

D. 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 Opn Atty 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.

E. 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." 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, petitioner's Manhattan apartment clearly has "permanence." Nonetheless, as the Tribunal noted "the individual's relationship to the place" is also relevant in analyzing the "permanence" of an abode, and the regulations, which provide an exception for "a place of abode maintained only during *a temporary stay* for the accomplishment of *a particular purpose*" are in accord with the Tribunal's analysis (emphasis added).

F. Applying the regulatory 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 petitioner did not maintain his New York apartment 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.***, 39 TCM 1085, 1087; ***Peurifoy v. Commr.***, 358 US 59, 61, 58-2 US Tax Cas ¶ 9925). Petitioner has failed to shoulder his burden of proving that his abiding or dwelling in a New York apartment during the year at issue represented only a *temporary* stay in New

York for a *particular* purpose (***see, Matter of El-Tersli v. Commr. of Taxation and Finance***, 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"]). As noted in Finding of Fact "5", petitioner's employment with J.P. Morgan commenced as "an *initial three-year* assignment in Public Finance" (emphasis added). An *initial* three years is simply not a "limited" amount of time. Perhaps in certain circumstances, three years might be viewed as a "limited amount of time" but here where there is a clear possibility of continued employment, a three-year assignment is not a "temporary" position. Further, rather than employment for a particular purpose, petitioner's three-year assignment in public finance represented the establishment of a potential career path with J.P. Morgan, with duties best described as general in scope, rather than particular. In short, the facts at hand are very different from the example set forth in the regulations detailed in Conclusion of Law "D" of an individual domiciled outside New York who "may be assigned" to an "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." In sum, the Division's disallowance of petitioner's refund claim on the basis that his employment with J. P. Morgan did not represent a "specific assignment that has readily ascertainable and specific goals and conclusions" was reasonable.

F. The petition of Alfons Halim is denied, and the Notice of Disallowance dated June 15, 2004 is sustained.

DATED: Troy, New York
February 15, 2007

/s/ Frank W. Barrie
PRESIDING OFFICER