STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAMA KALIA	:	SMALL CLAIMS DETERMINATION DTA NO. 820682
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Year 2001.	:	

Petitioner, Rama Kalia, 6 Mosswood Terrace, Maplewood, New Jersey 07040, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the year 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York, on May 24, 2006 at 1:15 P.M. Petitioner appeared by Robert Upbin, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Mac Wyzomirski).

The final brief in this matter was due by October 6, 2006, and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether petitioner, although not domiciled in New York State and New York City, is nonetheless taxable as a resident individual on the basis that she maintained a permanent place of

abode in New York State and New York City and spent more than 183 days during the year in the State and City.

FINDINGS OF FACT

1. There is no dispute in the instant matter that petitioner, Rama Kalia, was not domiciled within the State and City of New York for all of 2001. There is also no dispute that petitioner maintained a place of abode in New York City for the entire 2001 tax year and that she spent more than 183 days during the year within the State and City of New York. The only issue to address in this proceeding is whether petitioner's place of abode constituted a permanent place of abode as contemplated in Tax Law § 605(b)(1)(B) and 20 NYCRR 105.20(e)(1).

2. Petitioner was born in the United Kingdom on May 15, 1967, and to this day she remains a citizen of the United Kingdom. Petitioner was educated in the United Kingdom, ultimately obtaining a Bachelor of Arts in Economics, in June 1989, and a Master of Science in Computer Based Information Systems, in October 1990, from Sunderland Polytechnic University.

3. After her graduation from Sunderland Polytechnic University in October 1990, petitioner, for the next five years, was employed in various positions in the United Kingdom until the end of 1995. In January 1996, petitioner started employment in the United States as a systems engineer with Sentari Technologies, Inc. ("Sentari"), a computer consulting firm located in Addison, Texas.

4. To work in the United States for Sentari it was necessary for petitioner to obtain an H-1B nonimmigrant worker visa. Petitioner's first H-1B visa was effective on January 6, 1996 and was valid for the standard three-year period, or until January 6, 1999. Petitioner subsequently applied for and was granted a three-year extension of her H1-B visa, which

extension expired on January 6, 2002. Sentari was the sponsoring employer on both of petitioner's H-1B visas.

5. Sentari provides detailed and highly technical computer consulting services to its various clients located throughout the Unites States. In a letter addressed to the U.S. Department of Labor, Sentari describes the position of a systems engineer in the following manner:

> The specific duties of an IEF and Composer by IEF Software Engineer revolve around all aspects of systems design, development, construction and client training. The IEF/Composer software engineering team may be likened to the architectural team on a major building project. Systems development follows a life-cycle of phases from initial requirements capture through planning, design modeling, physical design, construction, implementation and testing . . . .
>
> An understanding of the overall technical infrastructure and information systems design requires a detailed knowledge of mainframe programming and mainframe databases. For this reason, the IEF Software Engineer must also have experience with IBM mainframes. DB2 and DB2 data tables are the primary database used by the mainframe. CICS is the Customer Information Control System or transaction processing monitor. Through knowledge of DB2 and CICS, the Engineer can understand how information interacts with, is stored by and is retrieved from the mainframe.

A job posting notice issued by Sentari states "IEF SOFTWARE ENGINEER needed for full life-cycle systems development using IEF as primary tool in an IBM mainframe environment running CICS and DB2 . . . . Must be willing to relocate to various unanticipated work sites throughout USA every 4 to 10 months . . . ."

6. Typically, Sentari would enter into a consulting agreement for a defined time period, usually a six-month time frame, with one of its clients to provide on-site computer consulting services. Sentari would then enter into a Consultant Agreement with petitioner, which agreement ran for the same period as Sentari's agreement with the client. Petitioner's employment with Sentari commenced in January 1996 and ended in early May 2003 and the

following table provides pertinent details concerning the various projects that petitioner was assigned to while employed by Sentari:

PERIOD	*LENGTH*	*CLIENT*	*LOCATION*
1/1996 - 10/1996	10 Months	Merck & Co.	Whitehouse Stn, NJ
11/1996 - 8/1998	21 Months	Long Island Lighting Co.	Melville, NY
10/1998 - 1/1999	4 Months	Public Interest Breakthroughs	Albany, NY
3/1999 - 9/2000	18 Months	Software Performance Systems	Crystal City, VA
10/2000 - 5/2003	31 Months	New York Mercantile Exchange	New York, NY

7. For the year at issue herein, petitioner entered into a Consultant Agreement with Sentari dated September 6, 2000 which, as relevant to this proceeding, provided as follows:

> EMPLOYMENT
>
> As a Consultant of Company you will be assigned to Source of Future Technology, Inc.[1] (Client), located at 137 Varick Street, New York, NY 10013-1198, and are expected to perform in a highly professional manner both personally and technically. Your assignment will begin on October 16, 2000, with an expected initial duration of 6 months through April 16, 2001 (with possible extensions). (Underlining in original.)

8. Petitioner's Consultant Agreement with Sentari for her assignment with New York Mercantile Exchange was extended several times via letters of extension. Petitioner left the employ of Sentari in May 2003 when she started her own computer consulting firm; however, petitioner's only client was New York Mercantile Exchange. In January 2006 petitioner became a full-time employee of New York Mercantile Exchange.

9. As noted previously, petitioner entered the United States on a H-1B visa which was issued for the period January 6, 1996 to January 6, 1999. The visa was extended for a second

[1] Although the Consultant Agreement dated September 6, 2000 referred to the Client as "Source of Future Technology, Inc.," petitioner has consistently identified, and there appears to be no dispute between the parties, that this Client was actually New York Mercantile Exchange, Inc.

three-year period which expired on January 6, 2002. Generally, H-1B visas cannot be extended beyond the permitted six-year period, and therefore if a foreign worker intends, or even thinks that he or she might want to stay in the United States, such worker normally will have to apply for a permanent resident card (commonly known as a "green card"). The process to obtain a permanent resident card is lengthy and therefore foreign workers must initiate the application process early on or run the risk of having their H-1B visa expire before the permanent resident card is issued, thus requiring them to leave the United States. On June 24, 1997, approximately one and one-half years after petitioner began employment with Sentari, she started the process of obtaining her permanent resident card by filing an Application for Alien Employment Certification with the U.S. Department of Labor. By letter dated February 5, 1999, the U.S. Department of Labor indicated that petitioner's Application for Alien Employment Certification "has been certified." On Part B, question 10 of the Application for Alien Employment Certification petitioner checked the box indicating that "Alien is in the United States and will apply for adjustment of status to that of a lawful permanent resident in the office of the Immigration and Naturalization Service . . . ." Petitioner ultimately received her permanent resident card effective March 19, 2002 to April 1, 2012.

10. After petitioner accepted employment with Sentari it was necessary for her to determine where she was going to reside. Because petitioner's employment with Sentari required her to travel to various client sites for extended stays she could reside anywhere she liked. In 1996 petitioner knew two people who resided in the United States, one who lived in New York City and one who lived in Los Angeles. When petitioner came to the United States in January 1996 she stayed with the friend living in New York City for several months. In May 1996 petitioner leased a rent controlled apartment located at 615 East 14th Street, Apt. 3H, New

York, New York 10009. Petitioner continuously maintained this apartment as her residence from May 1996 until December 2005, when she purchased the house in Maplewood, New Jersey.

11. For the years 1996 through 2001, petitioner filed income tax returns as a nonresident of New York State and New York City. Petitioner appended a statement to her New York personal income tax returns indicating that she was "on temporary assignment in the United States" and that she was taxable as a nonresident because she was not domiciled in New York, and her place of abode in New York could not be deemed a permanent place of abode since it was maintained only during a temporary stay for the accomplishment of a particular purpose.

12. In August 2003, the Division of Taxation ("Division") commenced an audit of petitioner's 1999, 2000 and 2001 income tax returns requesting that petitioner submit evidence to establish that her residence in New York was temporary, for a fixed and limited period of time, and for the accomplishment of a particular purpose. Based on its review of the evidence provided by petitioner, the Division concluded that her place of abode in New York City for the years 1999, 2000 and 2001 was a permanent place of abode. Although the Division concluded that petitioner maintained a permanent place of abode in New York City for 1999, 2000 and 2001, it determined that petitioner was nonetheless taxable as a nonresident of New York for the 1999 and 2000 tax years because petitioner did not spend more than 183 days of each year in the State or City. However, for the 2001 tax year it is undisputed that petitioner spent more than 183 days of the year in the State and City, and the Division therefore found that she was taxable as a resident individual for both State and City income tax purposes.

13. On January 9, 2004, the Division issued a Statement of Proposed Audit Changes to petitioner which contained the following explanation for the assertion of New York State and City income tax due for the 2001 tax year:

> Section 105.20(e)(1) of the Regulations contemplates that the term "temporary" means a fixed and limited period as opposed to a stay of indefinite duration. An employee's stay in New York will be presumed to be temporary (i.e. the presence in New York is for a fixed and limited period) if the duration of the stay in New York is reasonably expected to last for three years or less, in the absence of facts and circumstances that would indicate otherwise. In the alternative, a stay is of indefinite duration if the stay is realistically expected to last for more than three years, even if it does not actually exceed three years.
>
> An individual cannot have multiple or consecutive fixed and limited periods nor multiple or consecutive particular purposes. Therefore, a change in assignments would indicate that the individual is no longer here for a fixed and limited period nor for the accomplishment of a particular purpose.
>
> Accordingly, your stay in New York is not considered temporary, and your place of abode in New York State/New York City constitutes a permanent place of abode
>
> Based on the above, your New York tax liability has been recomputed as a full year New York State and New York City resident.

14. On March 4, 2004, the Division issued a Notice of Deficiency to petitioner for 2001 asserting additional New York State tax due of $11.62 and additional New York City tax due of $3,118.24, for a total tax due of $3,129.86. The Notice of Deficiency also asserted that interest of $374.74 was due.

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. In the instant matter, there is no dispute that petitioner was not a domiciliary of New York for the 2001 tax year. There is also no question that petitioner maintained a place of abode in New York City during all of 2001 and that she spent more than 183 days during 2001 within the State and City of New York. As a result, in order to conclude that petitioner was taxable as a "resident individual" pursuant to Tax Law § 605(b)(1)(B), thus requiring her to pay New York personal income tax on income from all sources, the issue to resolve is whether petitioner maintained a *permanent* place of abode in New York City.

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) provide 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 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. Resolution of the controversy at issue herein hinges solely on the determination of whether petitioner's stay in New York was temporary for the accomplishment of a particular purpose as contemplated in 20 NYCRR 105.20(e)(1). If it is found that petitioner's stay was temporary for the accomplishment of a particular purpose, then her place of abode in New York was not permanent and she properly filed her 2001 tax return as a nonresident. Conversely, if it is determined that petitioner's stay in New York was not for a fixed or limited period to accomplish a particular purpose, then the Division correctly concluded that petitioner was taxable as a resident individual.

E. In ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840, 606 NYS2d 404), the Tribunal, in determining whether the petitioner therein maintained a permanent place of abode in New York, cited to a now 66-year old opinion of the Attorney General (1940 Op. Atty Gen. P. 246, March 28, 1940), which opinion provided as follows:

> 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. After a careful review of the facts of this case, I find that petitioner did not maintain her New York City apartment *only* during a *temporary* stay and for the accomplishment of a *particular* purpose. While it is true that petitioner's stay in New York was potentially limited to a definitive time period pursuant to the conditions set forth in her H-1B visa, this is but one factor to consider when determining if her stay in New York was temporary and for the accomplishment of a particular purpose. Petitioner's overall conduct supports a conclusion that her intention, during the year in question, was to remain in New York and that her place of abode in New York City was permanent and not intermittent or transitory.

It was petitioner's expectation that upon the completion of one assignment she would be reassigned by Sentari to another job site and her almost seven and one-half-year employment history with Sentari shows that is exactly what occurred. While some of petitioner's assignments may have been short-term, one must look to petitioner's overall employment arrangement with Sentari, and not each job that she may have worked on, to determine if her stay in New York was temporary and for the accomplishment of a particular purpose. There is simply no credible evidence in the record to support a finding that petitioner's employment at Sentari was temporary and for the accomplishment of a particular purpose. Moreover, petitioner started the process to obtain her permanent resident card in 1997 and certainly for the 2001 tax year her intention, as borne out by her actions, was to remain in New York on a permanent full-time basis. Accordingly, it is concluded that petitioner has failed to sustain her burden of proof (Tax Law § 689[e]) to show that her abode in New York City for the year 2001 was not a permanent place of abode (***see, Matter of El-Tersli v. Commr.,*** 14 AD3d 808, 787 NYS2d 526).

Since petitioner's abode in 2001 was a permanent place of abode within the meaning and intent of Tax Law § 605(b)(1)(B) and 20 NYCRR 105.20(e)(1) and since petitioner spent more than 183 days of the year in New York State and New York City, the Division properly taxed petitioner as a resident of both the State and City for said year.

G. The petition of Rama Kalia is denied and the Notice of Deficiency dated March 4, 2004 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Troy, New York
January 4, 2007

/s/ James Hoefer
PRESIDING OFFICER