STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZORAYA AGUILAR	:	SMALL CLAIMS DETERMINATION DTA NO. 820811
for Redetermination of Deficiencies or for Refund of New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Years 2000 and 2001.	:	
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Petitioner, Zoraya Aguilar, 114 West 86th Street, Apt. 9B, New York, New York 10024, filed a petition for redetermination of deficiencies or for refund of New York City personal income tax pursuant to the Administrative Code of the City of New York for the years 2000 and 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on December 14, 2006 at 10:45 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Sirmlock, Esq. (Mac Wyszomirski).

The final brief in this matter was due by March 23, 2007, and it is this date that triggers the three-month period for the issuance of this determination.

ISSUE

Whether petitioner, although not domiciled in New York City, is nonetheless taxable as a resident individual on the basis that she maintained a permanent place of abode in New York City and spent more than 183 days during each year within the City.

FINDINGS OF FACT

1. There is no dispute in the instant matter that petitioner, Zoraya Aguilar, was not domiciled within the City of New York for the two years at issue in this proceeding. There is also no dispute that petitioner maintained a place of abode in New York City for the years 2000 and 2001 and that she spent more than 183 days during each year within the City of New York. The only issue to address herein is whether petitioner's place of abode was a permanent place of abode as contemplated by Administrative Code of the City of New York § 11-1705(b)(1)(B); Tax Law § 605(b)(1)(B); 20 NYCRR 295.3(a) and 20 NYCRR 105.20(e)(1).

2. Petitioner was born in the Republic of Panama on May 22, 1968, and to this day she remains a Panamanian citizen. Petitioner attended the University of Nebraska, and in December 1992 she graduated with a Bachelor of Science degree in business administration and accounting.

3. Upon completion of her studies at the University of Nebraska, petitioner returned to Panama where she accepted employment with Coopers & Lybrand effective February 1, 1993. The Coopers & Lybrand organization was a worldwide provider of professional services, including accounting and auditing, tax and consulting. The organization was comprised of national and international practice entities which were members of Coopers & Lybrand International, a limited liability association incorporated in Switzerland. Coopers & Lybrand in Panama and Coopers & Lybrand in the United States were both members of Coopers & Lybrand International. Petitioner was employed by Coopers & Lybrand in Panama from February 1, 1993 until on or about September 29, 1997.

4. In April 1997 petitioner applied for a temporary transfer to Coopers & Lybrand's New York City office pursuant to an "international personnel secondments program" offered by

Coopers & Lybrand. In an International Policy Statement dated April 27, 1994, Coopers & Lybrand described the objects of the international personnel secondments program as:

> (a) To mobilize effectively our human resources on a worldwide basis to provide the best people to our international clients and to meet our strategic needs.
>
> (b) To enhance the professional growth of our people by providing them with international experience.
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> (c) To make working for any Member Firm more attractive to the best people by offering international careers-in this respect, we should seek to match the best practices followed by our clients and by industry in general.
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> (d) To encourage Member Firms to assess whether we have the right skills, experience, and competencies in our various locations throughout the world and, if we do not, to develop plans to ensure that they are in place for the future.

5. Coopers & Lybrand had three types of international personnel secondments programs identified as "Business Need," "Sponsored Development" and "Personal Opportunity." Petitioner applied for a sponsored development secondment which is described in the April 27, 1994 International Policy Statement as "normally for managers and staff where international experience is important for career development or in situations where either the sending or receiving firm needs the transfer of knowledge."

6. Petitioner's transfer from Coopers & Lybrand's Panama office to the New York City office was memorialized in a six-page letter agreement prepared by its director of international human resources and dated August 6, 1997. The letter agreement, signed by petitioner and her supervisors in both Panama and New York City, states that, "The following will confirm arrangements for Zoraya Aguilar's 18-month sponsored developmental secondment program in

the New York office of the U.S. Firm (the 'Firm'). This program is scheduled to commence on or about September 29, 1997." The letter agreement also provided that petitioner undertook the sponsored developmental secondment not as an employee of the sending firm (the Panama office) but "as an individual performing work in accordance with this Firm's (the New York office) requirements, and under its direction." The letter agreement also contained a section entitled "At-Will Employment" which provided, in relevant part, the following:

> While this secondment arrangement is anticipated to be for 18 months, this letter and secondment arrangement do not constitute, and may not be construed as, a commitment by the Firm to employ Zoraya for any specific duration. Because she will be an "at-will employee," she may leave the Firm, or the Firm may require that she leave, at any time . . . . Should she choose to leave before her scheduled departure date under this secondment arrangement, she is expected to provide four weeks' notice to effect a transition of her responsibilities.

7. Petitioner's sponsored developmental secondment with Coopers & Lybrand's New York City office started on September 29, 1997 as scheduled. Petitioner entered the United States pursuant to an L-1 visa, a nonimmigrant visa which allows companies operating in the United States and abroad to transfer certain classes of employees from its foreign operations to its U.S. operations for a period of up to seven years. Petitioner's first L-1 visa was issued on September 4, 1997 and expired on September 14, 2000. Petitioner applied for and received a second L-1 visa which contained an expiration date of September 15, 2003.

8. After her arrival in New York City in September 1997, petitioner entered into an annual lease for apartment 9B located at 114 West 86th Street, New York, New York 10024. Petitioner has renewed the lease on a yearly basis, and she has continuously resided in this apartment to the date of this hearing.

9. On or about July 1, 1998, Coopers & Lybrand merged with Pricewaterhouse and the successor firm became known as PricewaterhouseCoopers LLP ("PwC"). After the merger, petitioner continued to work at an office maintained by PwC in New York City. Petitioner testified that after the merger she worked for PwC under the Coopers & Lybrand sponsored developmental secondment program and pursuant to the terms and conditions of the August 6, 1997 letter agreement until August 2002.

10. Petitioner attached to her petition an unsigned and undated document entitled "PricewaterhouseCoopers LLP Employment Agreement," which agreement petitioner testified was executed in August 2002. While the record herein was held open for the post hearing submission of an executed copy of the employment agreement, no such executed agreement was submitted.

11. In 2002, petitioner started the process to obtain her permanent residence card and she was granted resident status as of May 23, 2005. Petitioner's permanent residence card expires on July 13, 2015. In December 2002, petitioner married Bertrand P. Hure, a French national, who, like petitioner, was granted resident status as of May 23, 2005.

12. For the tax years 1997 through 2001, petitioner filed her New York State and City personal income tax returns as a nonresident of both the State and City of New York. For all tax years subsequent to 2001, petitioner and her husband have filed joint personal income tax returns as residents of both the State and City of New York. Attached to petitioner's 2000 New York return was a document entitled "Statement of New York Nonresidence" which contained the following statement:

> I am domiciled in Panama. Although I maintain a home in New York State, this abode was not permanent for the following reasons:

1. I am a resident of Panama and domiciled in Panama.

2. I am at present in the U.S. for a temporary period to accomplish a particular purpose as prescribed by my employment agreement; and

3. I intend to return to Panama upon termination of service here in the U.S.

4. I maintain a permanent residence in Panama[1]

Pursuant to New York State Regulation Section 105.20(e), I am properly deemed a nonresident of New York State. Accordingly, I am treated as a nonresident of New York City.

13. In December 2003, the Division of Taxation ("Division") commenced an audit of petitioner's personal income tax returns for the years 2000 and 2001. The Division ultimately concluded that for the years 2000 and 2001, petitioner's stay in New York was not temporary and for the accomplishment of a particular purpose. Accordingly, the Division considered petitioner's apartment in New York City as a permanent place of abode and, since she spent more than 183 days of each taxable year in the State and City, it deemed her to be taxable as resident of both the State and City of New York.

14. On April 5, 2004, the Division issued a Notice of Deficiency to petitioner for the 2000 tax year asserting that she owed New York City taxes of $1,976.50, plus interest. A second Notice of Deficiency was issued on May 10, 2004, asserting that petitioner was liable for 2001 New York City taxes of $1,980.50, plus interest.[2]

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[1] The Panamanian address listed on petitioner's tax return was that of her parents.

[2] No New York State personal income taxes were assessed for the years at issue since petitioner's State income tax liability computed on her nonresident returns for 2000 and 2001 was identical to the State liability computed as if she was a resident individual. Since New York City did not impose an income tax on nonresidents of the City for the years in question, the Division's determination that she was taxable as a resident individual resulted in additional City income taxes due for the 2000 and 2001 tax years.

SUMMARY OF PETITIONER'S POSITION

15. Petitioner asserts that her original contract with Coopers & Lyband, and the successor firm PwC, was for a temporary period to accomplish a specific purpose. Petitioner initially came to New York to strengthen her knowledge in the audit of banks, a skill she intended to use in Panama upon her return to her native country. Petitioner maintains that because of changes made to International Accounting Standards, most international banks in Panama moved their Central American operations from Panama to Miami, Florida. The business opportunities in Panama that initially supported petitioner's transfer to New York had, according to petitioner, disappeared and in 2002 she decided to stay in New York rather than return to Panama. Petitioner argues that her execution of a new at-will employment contract with PwC and her application for a permanent resident card, both events which occurred in 2002, support that her intentions to remain in New York changed in 2002 from temporary to indefinite.

CONCLUSIONS OF LAW

A. The definition of "resident" for New York City income tax purposes, pursuant to Administrative Code § 11-1705(b), is identical to that for State income tax purposes except for the substitution of the term "city" for "state." Regulation 20 NYCRR 295.3(a) provides that, "Whether an individual is a resident of the City of New York shall be determined using the same rules and definitions that apply in determining whether an individual is a resident of the State of New York." Accordingly, it is appropriate to refer to State Tax Law, regulations and case law to decide this matter.

B. 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 . . . .

C. In the instant matter, there is no dispute that petitioner was not a domiciliary of New York for the years at issue. There is also no question that petitioner maintained a place of abode in New York City during both years and that she spent more than 183 days during each year 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) and Administrative Code § 11-1705(b), thus requiring her to pay New York City personal income tax, the issue to resolve is whether petitioner maintained a *permanent* place of abode in New York City.

D. 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
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> 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).

E. 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 determined that she was a nonresident individual for the 2000 and 2001 tax years. 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.

F. 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 67-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.

G. Tax Law § 689(e) places the burden of proof on petitioner to show that her abode in New York City for the years in dispute was not a permanent place of abode (***see, Matter of El-Tersli v. Commr.,*** 14 AD3d 808, 787 NYS2d 526). Petitioner has failed to meet her burden of proof. Initially, it is noted that petitioner's August 6, 1997 letter agreement with Coopers & Lybrand confirmed her "18-month sponsored developmental secondment program in the New York office of the U. S. Firm . . . ." This document thus establishes that all parties to the agreement considered petitioner's transfer to be for a limited and specified duration, i.e., 18 months. In fact, it is clear from the August 6, 1997 letter agreement and other documents in the record that petitioner's stay in New York for this 18-month period was temporary and for the accomplishment of a particular purpose. The problem here is that petitioner remained employed by PwC in New York for an additional three years and four months, starting in April 1999, when her initial 18-month training program was scheduled to expire, and ending in August 2002, when she admits her intentions changed from temporary to indefinite.

Since the letter agreement dated August 6, 1997 set a defined time period of 18 months for petitioner's sponsored developmental secondment program, petitioner must show that this temporary training program was extended by her employer from the original 18 months to a period of almost 5 years (October 1997 to August 2002). Petitioner's testimony that the provisions of the August 6, 1997 letter agreement were routinely extended orally by PwC, as long as the sending office (Panama) and the receiving office (New York) agreed, is simply insufficient to meet her burden. It seems improbable to me that a large international accounting firm like PwC would simply continue to orally extend petitioner's training program in New York

City from the original 18-month period to a period of almost 5 years without some written documents being generated, especially when one considers how well the initial 18-month training program was documented, the fact that Coopers & Lybrand had issued a formal written International Policy Statement and had a policy where the International Services Groups, reporting to the International Executive Committee, would be responsible for setting and monitoring targets in the secondment program. Petitioner offered no documentary evidence as to her employment status for the period after the initial 18-month training program ended, nor has she submitted a letter from PwC confirming that it had orally extended her temporary training program in New York City to encompass a period of almost 5 years. The August 6, 1997 letter agreement clearly stated that the training program was to last for 18 months and there is simply no credible evidence in the record before me to prove that it was extended beyond this time frame.

H. While it is true that petitioner's stay in the New York was potentially limited to a definitive time period pursuant to the conditions set forth in her L-1 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 claimed and was allowed nonresident status for the years 1997, 1998 and 1999, a period well in excess of the 18 months set forth in the August 6, 1997 letter agreement. Having availed herself of the infrastructure and services provided by the City since 1997, it is not unreasonable to expect petitioner to pay taxes as a resident individual for the years at issue given the facts of this case. Since petitioner's abode in 2000 and 2001 was a permanent place of abode within the meaning and intent of Administrative Code § 11-1705(b); Tax Law § 605(b)(1)(B) and 20 NYCRR 105.20(e)(1) and since petitioner spent more than 183

days of each year in New York City, the Division properly taxed petitioner as a resident of the City for the 2000 and 2001 tax years.

I. The petition of Zoraya Aguilar is denied and the notices of deficiency dated April 5, 2004 and May 10, 2005 are sustained, together with such additional interest as may be lawfully due and owing.

DATED: Troy, New York
June 21, 2007

/s/ James Hoefer
PRESIDING OFFICER