STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RENATA GONTIJO	:	SMALL CLAIMS DETERMINATION DTA NOS. 820829 AND 820830
for Redetermination of Deficiencies 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 Years 2000, 2001 and 2002.	:	

Petitioner, Renata Gontijo, 336 East 30th Street, #3A, New York, New York 10016, filed a petition for redetermination of deficiencies 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 years 2000, 2001 and 2002.

A small claims hearing was held before Catherine M. Bennett, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 14, 2007 at 10:45 A.M. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Susan Parker). Since neither party elected to reserve time to submit post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

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 each year within the State and City.

FINDINGS OF FACT

1. There is no dispute in the instant matter that petitioner, Renata Gontijo, was not domiciled within the State and City of New York for all three 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, 2001 and 2002 and that she spent more than 183 days during each 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 is a citizen of Brazil who received her International Masters of Business Administration degree in June 1999, by attending the University of Chicago. At that time, petitioner was present in the United States on a student visa. Prior to her attendance at the University of Chicago, petitioner had worked in her field in Brazil for nine years.

3. Later in 1999, Fredericks Michael and Company ("FM&Co.") offered petitioner a position, and in October 1999, the company filed for petitioner's initial H-1B Visa which was to cover the period from November 1999 through November 2002.

4. Petitioner's offer of employment was for full-time employment as an associate at FM&Co. The associate position was to entail the following responsibilities:

> Serving as the second (and sometimes as the third) most experienced member of an advisory team that renders financial advisory services to (primarily) multinational companies headquartered (primarily) in Europe and the Americas on (primarily) cross-border mergers, acquisitions, divestitures, joint ventures, restructuring, alliances and minority shareholder transactions.

* * *

> Assisting, Managing Directors ("MD") on established FM&Co. Country marketing programs - with the objective of you demonstrating (and further developing) your marketing skills to enable you to establish a country focus (and build a related revenue stream) under the leadership and supervision of a designated MD.

The contract additionally stated that:

> Each Principal [shareholder of the company] is responsible for developing and ultimately participating in a very significant way or leading FM&Co's efforts in one or more geographic markets. If at any time, during the thirty-six month period from your date of employment, it becomes evident to FM&Co's MD's that you will not be invited to be a Principal of the Firm, you will be requested to leave FM&Co's employ. As with all employees of FM&Co., your employment with the Firm is at will and there is no specified term of employment. As such, either the Firm or you may terminate your employment with the Firm, with or without cause at any time.

5. Consistent with the testimony of petitioner at the hearing, the letter submitted to Immigration and Naturalization Services by David Fredericks of FM&Co., dated October 29, 1999, in support of petitioner's application for the issuance of an H-1B Visa, outlines more specifically the professional capacity of Ms. Gontijo as an associate at FM&Co. for a temporary period of 36 months. Mr. Fredericks highlighted petitioner's credentials and explained the company's plan to have her first working in the company's New York office, and later from an office the company intended to open in Sao Paulo, Brazil. During the succeeding 36 months, she was to serve as part of an advisory team that rendered sophisticated financial advisory services to multinational companies on cross-border mergers, acquisitions, divestitures and other complex transactions, "with the particular purpose of being trained to perform these advisory services at her own from the platform that FM&Co. intends to launch in Sao Paulo by 2003."

6. According to a statement to the American Consulate General in Sao Paulo dated December 12, 2001, the managing director of FM&Co., David Fredericks, indicated that Renata Gontijo was hired for a temporary period of 36 months from 11/2/1999 to 11/1/2002, during

which time she was being trained on the job of cross border mergers and acquisitions execution with the intention of returning back to Brazil at the conclusion of that time as a possible principal of the office to be opened in Brazil, in accordance with the company's expansion plans in the Latin American region.

7. Petitioner filed Form IT-201, a New York Resident Income Tax Return, for tax year 2000. Pursuant to subsequent advice from a tax professional, petitioner amended her filing to Form IT-203-X, a New York nonresident tax return. The amended filing was to correct a previously filed return as a resident in error, and it was based upon petitioner's assertion that as a domiciliary of Brazil, she was taxable in New York as a nonresident, 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 assignment for the accomplishment of a particular purpose. Petitioner requested a refund in the amount of $3,366.00, which was denied by the Division of Taxation ("Division") in its Notice of Disallowance dated August 11, 2004. The notice, in pertinent part, stated:

> A review of the information provided shows that you do not meet the conditions as defined in the New York State Personal Income Tax Regulations for temporary place of abode [Section 105.20(e)(1)]. In order for a place of abode not to be considered as permanent, two conditions must be met:
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> First, the stay in New York must be temporary for a fixed and limited period as opposed to a stay of indefinite duration. Your employment letter/contract does not specify the term of your work assignment in New York. In fact, it states 'your employment with the firm is at will and there is no specified term of employment.' Therefore, your stay in New York was not for a fixed and limited period as required by New York State Tax Regulation. And;
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> Second, the Regulations require that your work assignment be for the accomplishment of a particular purpose. The description of your assignment is of general goals and multiple tasks.

8. Petitioner also filed Form IT-201, a New York Resident Income Tax Return, for tax year 2001. Pursuant to the same advice from a tax professional, petitioner amended her filing to

Form IT-203-X, a New York nonresident tax return, based upon her temporary position in the United States, requesting a refund, which was paid to her by the Division. The Division subsequently reviewed petitioner's filing and decided the refund should not have been issued, and sent petitioner a bill in the form of a Notice and Demand, dated August 23, 2004, in the amount of $3,153.50 plus interest.

9. Petitioner filed Form IT-203, a New York nonresident income tax return for tax year 2002, and received the refund requested by such filing. Thereafter, the Division subsequently reviewed petitioner's filing and decided the refund should not have been issued, and sent petitioner a bill in the form of a Notice and Demand dated August 23, 2004 in the amount of $4,063.94 plus interest for additional New York State and New York City taxes.

10. Petitioner paid the notices and demands for 2001 and 2002, $3,153.50 plus interest in the amount of $548.13, and $4,063.94 plus penalty and interest in the amount of $495.58, respectively, but continued to protest the Division's position. On or about March 11, 2005, petitioner filed a request for a conciliation conference. The conciliation conference covered petitioner's protest of all three years, and by Conciliation Order Nos. 208367 and 208368, the refund denial for 2000 was sustained and the notices and demands for 2001 and 2002 were sustained.

11. During the years in question petitioner maintained an apartment located at 336 E. 30th Street, #3A, New York, NY 10016. Petitioner has continuously maintained this apartment, located within the City of New York, as her residence until this hearing.

12. Petitioner's employer filed for an extension of petitioner's H-1B Visa with the US Dept. of Labor, Form ETA 9035, to cover the period of employment from November 2, 2002 to November 1, 2005, on or about August 5, 2002.

13. About a month after David Fredericks filed to renew petitioner's visa, he committed suicide. Petitioner said the events leading up to his death included a great deal of absence from the company and an overall change in the atmosphere of the company. In the months leading up to this tragedy, and once he died, the vision for petitioner to be in charge of an office in Brazil seemed out of focus. The person who assumed Mr. Fredericks's role in the company was not someone with whom petitioner had as close a rapport. In addition, the company's objectives took a different direction. Petitioner then evaluated her options for employment both in Brazil and the United States, which was a complete change in the direction that had been set for petitioner. There is no question in petitioner's mind that had Mr. Fredericks not died, petitioner would have returned to Brazil as planned and been running the mergers and acquisitions practice there.

14. In 2003, when petitioner took new employment in the United States, and thereafter, she began filing as a resident of New York.

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. 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 all three 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), 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 regulation 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. 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 amended income tax returns for 2000 and 2001, and her tax return for 2002 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. 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, i.e., that it was maintained only during a temporary stay for the accomplishment of a particular purpose. 20 NYCRR 105.20(e)(1) contemplates that the phrase particular purpose means that the individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to an assignment with general goals and conclusions. An assignment to New York for general duties would not constitute a particular purpose even if the individual's assignment to New York were related to some specialized skill or attributes that the individual may possess.

The Division in this case characterized petitioner's assignment as general because her duties were varied and numerous. However, petitioner's duties were in no way general. As was evidenced by petitioner's offer of employment and Mr. Fredericks's letter in support of petitioner's H-1B Visa, petitioner's skill set was sophisticated and high level in the area of financial transactions including multi-national cross-border mergers, acquisitions and divestitures. The specific assignment given to petitioner was to become trained in all the

transactions in which the firm took a part as were necessary to offer the same services and run a similar office in Brazil. Obviously this encompassed multiple tasks, criticized by the Division. The number of tasks that, when taken together, comprise the goal to be accomplished by petitioner, does not in any way change the particular purpose for which petitioner assumed her employment with FM&Co. An individual cannot have multiple or consecutive particular purposes in order to qualify as a nonresident. However, that was not the case here. A change in assignments might indicate that the individual is no longer in New York for the accomplishment of a particular purpose, but that also did not happen. In this case, petitioner had a particular purpose, and when that purpose did change, after the death of Mr. Fredericks, when petitioner was forced to seek other employment, petitioner also altered her tax reporting posture. Petitioner agreed to be trained by FM&Co. for a particular purpose and FM&Co. set out to have her accomplish the same. The Division clearly erred in finding that petitioner's job duties were too general to qualify for the accomplishment of a particular purpose.

20 NYCRR 105.20(e)(1) contemplates that the term temporary means a fixed and limited period as opposed to a stay of indefinite duration. The Division has often provided guidance to taxpayers that 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 this case petitioner's stay in the New York was limited to a definite time period pursuant to the conditions set forth in her initial H1-B Visa, with no intention to stay beyond the three-year period. Petitioner's offer of employment and the correspondence submitted by Mr. Fredericks in support of her H-1B Visa clearly defined the 36-month time frame during which petitioner would serve as part of an advisory team that rendered sophisticated financial advisory services. Similar to the particular purpose requirement, an

individual cannot have multiple or consecutive fixed and limited periods in order to meet the nonresident requirements. For example, an extension of a Visa might indicate that the individual is no longer here for a fixed and limited period. However, the entire set of facts must be considered. In this case the extension of petitioner's H-1B Visa was not only unanticipated but it was the result of some unexplained turmoil in the life of Mr. Fredericks. These changed circumstances and Mr. Fredericks's death came at the end of the three-year period and did not alter the temporary nature of petitioner's stay.

The Division points to the language in the offer of employment that referred to petitioner's employment as "at will" with "no specified term of employment." I believe the Division has improperly characterized the meaning of these phrases by not considering them in the context of the entire offer and the facts of this case. The offer by FM&Co. provided for a period of employment for up to 36 months, during which time petitioner would be evaluated to become a principal by the company (***see***, Finding of Fact "5"). The company left itself an opening to release petitioner from employment if it became obvious that she might not be invited to become a principal. To that extent, the offer, though bearing a discernable time frame of employment, supported by petitioner's visa limitation and credible testimony regarding the understanding she had with her employer as to her training duration, was defined by the employer to be "at will," perhaps in error. The New York Court of Appeals discussed these concepts in ***Rooney v. Tyson*** (91 NY2d 685, 674 NYS2d 616) stating the following:

> In New York, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party (citations omitted). The at-will presumption may be triggered when an employment agreement fails to state a 'definite period of employment,' 'fix[ ] employment of a definite duration,' 'establish [ ] a fixed duration' or is otherwise 'indefinite' (citations omitted).
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> * * *

> A sensible path to declare New York law starts with these two steps; (1) if the duration is definite, the at-will doctrine is inapplicable, on the other hand, (2) if the employment term is indefinite or undefined, the rebuttable at-will presumption is operative and other factors come into the equation.
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> [T]his Court has emphasized also that 'if the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable * * * 'at will' after the employee has begun or rendered some of the requested service or has given any other consideration (citations omitted).'

F. The employment offer attempted to address what is at the core of the at-will doctrine: the unfettered right held by parties to terminate an employment relationship at any time for any reason not otherwise prohibited by law or public policy (***id***). The language of the employment offer referencing a discernable time frame for employment along with at-will termination is not consistent under New York law. I am left to interpret the contract with the assistance of petitioner's testimony and other documents, as to what was meant. However, I do not believe that the term of employment was being defined or altered by the at-will termination arrangement, but the at-will language was merely an attempt to give each of the parties a means to end their relationship.

There is no doubt that the duration of petitioner's stay was reasonably expected to be three years or less, and this fact is well supported. As such, the guidance generally provided to taxpayers by the Division then gives them a presumption that the stay is temporary, that their presence is for a fixed and limited period. Inconsistent language of the employment offer should not be allowed to alter that. The fact that petitioner ultimately remained in the United States does not at all sway my decision under the facts of this case as to the temporary stay to accomplish a particular purpose for the years in issue. Considering all the facts of this case, the Division erred in its determination that petitioner's stay in New York was indefinite and not

temporary. Since petitioner's abode in 2001, 2002 and 2003 was not a permanent place of abode within the meaning and intent of Tax Law § 605(b)(1)(B) and 20 NYCRR 105.20(e)(1), the Division improperly imposed tax on petitioner as a resident of both the State and City for said years.

G. The petition of Renata M. Gontijo is granted. The Notice of Disallowance for tax year 2000 shall be cancelled and a refund for tax year 2000 shall be allowed, plus interest. The payments made by petitioner on the notices and demands for tax years 2001 and 2002 shall be refunded, plus interest.

DATED: Troy, New York
June 14, 2007

/s/ Catherine M. Bennett
PRESIDING OFFICER