STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMITRA RAZDAN	:	SMALL CLAIMS DETERMINATION DTA NO. 820983
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 2001, 2002 and 2003.	:	

Petitioner, Amitra Razdan, 330 East 83rd Street, Apt. # 5M, New York, New York 10028, 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 2001, 2002 and 2003.

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 October 19, 2006 at 11:30 A.M. Petitioner appeared by Robert Upbin, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Joly Verghese).

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, Amitra Razdan, 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 2001, 2002 and 2003 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 was born in India on April 23, 1972, and to this day she remains a citizen of India. Petitioner was educated in India, ultimately obtaining a bachelor's degree in commerce from the University of Delhi.

3. Prior to being employed in the United States, petitioner held jobs in both India and Hong Kong. Effective on or about December 9, 1998, petitioner began employment in the United States with Professional Access Ltd. ("PAL"), a company located and incorporated in New York which specializes in the field of information technology professional services, including such things as consulting and technical support, systems engineering, design and integration, database development, networking and associated support services.

4. Petitioner was employed by PAL as a Sales/Marketing Manager with a base salary of $30,000.00 and a sales commission of 7.5% of the gross margin of sales she generated. As relevant to this proceeding, the Employment Contract between petitioner and PAL, dated December 9, 1998, contained the following terms:

DURATION

2. Employment under this Agreement is dependent upon the Employee being in possession of proper documentation indicating authorization for employment in the United States and employment shall commence as soon as the Employee reports to the Employer and shall continue in full force and effect until termination as set forth herein. . . .

DUTIES OF EMPLOYEE

7. The Employee shall perform such duties including, but not limited to sales and marketing, business development and such other duties as are reasonably requested of the Employee in the capacity as Sales/Marketing Manager.

TERMINATION

22. The Employer may terminate this Agreement at any time upon three (3) weeks' prior written notice to the Employee for any reason, and the Employee may terminate this Agreement at any time upon three months' prior written notice to the Employer.

5. Petitioner left the employ of PAL in either July or September 2001 when she accepted a position with ORBIS International ("ORBIS"), a nonprofit humanitarian organization dedicated to restoring sight and eliminating avoidable blindness worldwide. Pursuant to a letter agreement dated June 21, 2001, ORBIS offered petitioner employment as its Development Coordinator of Corporate Relations at an annual salary of $35,000.00. In an unsigned document dated October 15, 2004, petitioner described her duties at ORBIS in the following manner:

> My current assignment is to manage a smooth flow of Executive and Board of Directors' functions in New York, to ensure that all departments stationed globally, including fundraising, program and operations, are supported adequately and strongly in the accomplishment of every mission undertaken by ORBIS. . . . My support in the area of Executive and Board of Directors affairs includes crafting high level global communications; planning, coordinating and organizing meetigs of high level officers; drafting executive reports, documents and correspondence; and promoting ORBIS's mission globally in all aspects of my work as relates to fundraising, operations and program.

> My previous assignment at ORBIS centered around corporate relations, including cultivation of new and prospective donors, preparing and monitoring budgets, preparing marketing and fundraising materials and research reports, and maintaining donor relationships.

6. To work in the United States for PAL and ORBIS it was necessary for petitioner to obtain an H1-B nonimmigrant worker visa. PAL was the sponsoring employer for petitioner's first H1-B visa, which was valid for the three-year period October 21, 1998 through October 20, 2001. When petitioner accepted employment with ORBIS, she was required to obtain a new H1-B visa with ORBIS as the sponsoring employer. This new H1-B visa was valid for the period September 21, 2001 through July 15, 2004. Petitioner's H1-B visa was subsequently extended, again with ORBIS as the sponsoring employer, and this extension expired on July 15, 2005. On some undisclosed date in either 2004 or 2005 petitioner started the process to obtain her permanent resident card.

7. During the years in question petitioner maintained an apartment located at 160 Hall Street, Brooklyn, New York 11205. Petitioner has continuously maintained this apartment, located within the City of New York, as her residence until some undisclosed date in 2004 or 2005, when she moved to her current address at 330 East 83rd Street, Apt. # 5M, New York, New York.

8. For the years 1998, 2000, 2001, 2002 and 2003 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 for said years 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. For the 1999 tax year, the transcript of petitioner's 1999 income tax return, as submitted in evidence by the Division of Taxation ("Division"), reveals that petitioner filed said return as a full-year resident of both the State and City of New York. Petitioner's income tax return for the 2004 tax year was filed showing she was a resident of both the State and City of New York from July 15, 2004 to December 31, 2004.

9. In September 2004, the Division commenced an audit of petitioner's 2001, 2002 and 2003 income tax returns requesting that she 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 2001, 2002 and 2003 was a permanent place of abode. Since it is undisputed that petitioner spent more than 183 days of each year in question within the State and City, the Division concluded that she was taxable as a resident individual for both State and City income tax purposes.

10. On November 15, 2004, the Division issued to petitioner three separate statements of proposed audit changes, one for each year in question, asserting that additional New York State and City income tax was due for the 2001, 2002 and 2003 tax years. Each Statement of Proposed Audit Changes contained the following explanation for the assertion that additional New York State and City taxes were due:

> In order for a place of abode not to be considered as permanent, two conditions must be met:
>
> First, the stay in New York must be temporary for a fixed and limited period as opposed to a stay of indefinite duration. The Department has defined a fixed and limited period to be a period of three years or less. Your employment contract does not specify the term of your work assignment in New York. Therefore, your stay in New York was not for a

> fixed and limited period has [sic] required by New York State Regulations.
>
> Visas are routinely changed and renewed, therefore they are not definitive in determining fixed and limited periods under this New York State Regulation.
>
> Second, the Regulations require that your work assignment be for the accomplishment of a particular purpose. The Department has defnined [sic] 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 expertise or specialized skill. The description of your assignment shows that you were employed to perform multiple tasks with generalized goals. Therefore, your stay in New York was not 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.

11. On January 10, 2005, the Division issued three notices of deficiency to petitioner asserting that she owed additional New York State and New York City taxes of $1,506.50 for 2001, $1,110.50 for 2002 and $1,254.50 for 2003. Each Notice of Deficiency also asserted that interest 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 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 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. 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 income tax returns for 2001, 2002 and 2003 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. 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. The Employment Contract petitioner executed with PAL and the letter agreement petitioner had with ORBIS do not support that these jobs were temporary and for the accomplishment of a particular purpose. To the contrary, these agreements contained no limitations as to duration of employment, and the duties that petitioner was hired to perform were general in nature and were clearly not for the accomplishment of a specific 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 H1-B 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 that her intention, during the years 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.

For petitioner to prevail in this matter, it would have to be found that her employment with PAL was temporary and for the accomplishment of a particular purpose and that she left this employment to accept another job, this one with ORBIS, which was also temporary and for the accomplishment of a particular purpose. The only evidence that might support that petitioner's presence in New York was temporary was the time limitation placed on her stay in the United States by virtue of her H1-B visa status. However, as noted previously, this is but one factor to consider, and its importance is diminished by the fact that a nonresident alien often proceeds from H1-B visa status to permanent resident status without any change in his or her employment and this is exactly the course that petitioner is on. Petitioner has resided in New York State and

City since 1998 and, having availed herself of the infrastructure and services provided by both the State and City, it is not unreasonable to expect her to pay taxes as a resident individual given the facts of this case. Since petitioner's abode in 2001, 2002 and 2003 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 each year in the New York State and New York City, the Division properly taxed petitioner as a resident of both the State and City for said years.

G. The petition of Amitra Razdan is denied and the notices of deficiency dated January 10, 2005 are sustained, together with such additional interest as may be lawfully due and owing.

DATED: Troy, New York
January 18, 2007

/s/ James Hoefer
PRESIDING OFFICER