STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
R. MICHAEL HOLT	:	DETERMINATION DTA NO. 821018
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 Years 1999, 2000 and 2001.	:	

Petitioner, R. Michael Holt, 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 years 1999, 2000 and 2001.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 7, 2006 at 11:00 A.M., with all briefs to be submitted by May 2, 2007, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner was a New York State and New York City resident liable for City and State personal income taxes for 2000 and 2001 because he maintained a permanent place of abode in New York City and spent over 183 days in New York City during these years.

II. Whether petitioner has shown that he properly allocated his income for the year 1999.

III. Whether, if petitioner was not a New York State and City resident individual for the years 2000 and 2001, he has shown that he properly allocated his income during these years.

IV. Whether the penalties imposed pursuant to Tax Law § 685(b) and (p) should be abated.

V. Whether interest should be abated.

FINDINGS OF FACT

1. Following a field audit, the Division of Taxation ("Division") issued to petitioner, R. Michael Holt, statements of personal income tax audit changes, which were based upon a determination that petitioner was a resident of the City and State of New York from July 1, 1999 through the year 2001.

2. For each of the years 1999 through 2001, petitioner and his wife, Gretchen K. Holt, jointly filed New York nonresident and part-year resident tax returns (Form IT-203), indicating their address as 10373 Quail Crown Drive, Naples, Florida. On each of these returns, the "Yes" box was checked in response to the question, "Did you or your spouse maintain living quarters in New York State in [the particular year in question, i.e., 1999, 2000, 2001]?"

3. For the 1999 tax year, petitioner earned wage income totaling $208,516.00 from his employment with KPMG LLP and William M. Mercer, Inc. Petitioner allocated the wages he received from KPMG LLP and William M. Mercer, Inc., to New York State sources based upon a percentage determined by dividing the number of days claimed to have been worked within New York State by the total days worked in the year. Petitioner's 1999 tax return reported 236 total days worked in the year of which 144 days were claimed to have been worked outside the State; none of these days were reported to have been worked at his home in Naples, Florida. The balance, or 92 days were reported as worked by petitioner in New York. Petitioner, therefore,

calculated that 38.98 percent (92 days worked in New York ÷ 236 total days worked during the year) of his wage income, or $81,280.00, was properly allocated to New York. After subtracting a Federal adjustment for moving expenses of $5,291.00 from the allocated New York wage income, petitioner reported New York adjusted gross income in the amount of $75,989.00 on the nonresident tax return for 1999 timely filed by petitioner and Mrs. Holt. On Schedule B of the Itemized Deduction, and Other Taxes and Tax Credits form (Form IT-203-ATT) attached to the 1999 New York nonresident tax return, petitioner reported maintaining living quarters at 150 East 49th Street, Apartment 2A, New York, New York, and spending 122 days in New York State during the year. Also attached to the 1999 New York nonresident tax return, was a City of New York Nonresident Earnings Tax Return (Form NYC-203) on which petitioner reported gross and taxable wage income of $109,514.00 and total nonresident earnings tax of $493.00. On this same form, petitioner reported maintaining living quarters in New York City at 150 East 49th Street, Apartment 2A, and spending 122 days in New York City during 1999.

4. For the 2000 tax year, petitioner earned wage income of $214,359.00 from his employment with William M. Mercer, Inc. Petitioner allocated the wages he received to New York sources based upon a percentage determined by dividing the number of days claimed to have been worked within New York State by the total days worked in the year. On the nonresident income tax return for 2000 filed by petitioner and Mrs. Holt, petitioner indicated that out of 245 days worked during the year, 149 days were worked outside the State, none of which were worked at his home in Naples, Florida.[1] The balance, or 96 days, were days petitioner worked in New York. Petitioner, therefore, calculated that 39.18 percent (96 days worked in

[1] No entry appeared on line 1j of Schedule A of the Form IT-203-ATT attached to the New York nonresident tax return for 2000 filed by petitioner and Mrs. Holt, the line on which the total number of days worked at home outside New York State is reported.

New York ÷ 245 total days worked during the year) of his wage income, or $83,994.00, was properly allocated to New York. No other income was allocated to New York and New York adjusted gross income in the amount of $83,994.00 was reported on the nonresident tax return for 2000 timely filed by petitioner and Mrs. Holt. Petitioner reported maintaining living quarters at 150 East 49th Street, Apartment 2A, New York, New York, and spending a total of 132 days in New York State during 2000 on Form IT-203-ATT attached to this same return.

5. For the 2001 tax year, petitioner earned wage income of $177,697.00 from his employment with William M. Mercer, Inc., which amount was fully allocated to New York. No other income was allocated to New York and New York adjusted gross income of $177,697.00 was reported on the nonresident tax return for 2001 filed by petitioner and Mrs. Holt on May 29, 2002. Attached to the 2001 nonresident income tax return was a Revised Income Allocation and Itemized Deduction form (Form IT-203-ATT) on which the maintenance of living quarters in New York State at 150 East 49th Street, Apartment 2A, New York, New York, during the year was reported on Schedule B. However, no entry appeared in the box included in Schedule B of Form IT-203-ATT to record "the number of days spent in New York State in 2001."

6. The statement "[a]ny part of a day spent in New York State is considered a day spent in New York State" appeared in Schedule B of Form IT-203-ATT attached to each of the nonresident tax returns filed by petitioner and Mrs. Holt for the years 1999, 2000 and 2001.

7. The Statement of Personal Income Tax Audit Changes issued to petitioner on June 4, 2004 for the year 1999 indicated corrected New York State taxable income of $125,831.00 and corrected New York State tax liability thereon of $8,557.00, and City tax of $4,596.00. Total tax liability was $13,153.00 for 1999. Of this amount, petitioner had paid $5,137.00, leaving an

outstanding tax liability of $8,016.00 for the tax year 1999. The Division also assessed penalties pursuant to Tax Law § 685(b) and (p) and interest.

The Division issued a second Statement of Personal Income Tax Audit Changes to petitioner on June 4, 2004 for the year 2000 that set forth corrected New York State taxable income of $254,819.00, which yielded a corrected tax liability of $17,455.00 for the State of New York and $9,415.00 for the City of New York, for a total tax liability of $26,870.00. Petitioner had paid $5,754.00 of this liability leaving an additional tax liability of $21,116.00 for the tax year 2000, plus penalties assessed pursuant to Tax Law § 685(b) and (p) and interest.

The Division issued a third Statement of Personal Income Tax Audit Changes to petitioner on June 4, 2004 for the year 2001, which set forth corrected New York State taxable income of $244,428.00, which yielded a corrected tax liability of $16,743.00 for the State of New York and $8,382.00 for the City of New York, for a total tax liability of $25,125.00. Petitioner had paid $10,881.00 of this liability leaving an additional tax liability of $14,244.00 for the tax year 2001, plus penalties assessed pursuant to Tax Law § 685(b) and (p) and interest.

8. The statements of personal income tax audit changes contained the following explanation:

> 1) The taxpayer is a New York domiciliary since July 1999. 2) In the alternative that taxpayer is deemed not to be domiciled in New York, then he is a statutory resident of New York for years 2000 and 2001 as he maintained a permanent place of abode and did not sustain his burden of proof that he spent less than 183 days in New York. 3) In case taxpayer is deemed neither a domiciliary nor a statutory resident, then the wages allocated to New York will increase proportionately by the days worked at home as well as the unsubstantiated days claimed to have been worked out of New York.

9. On February 17, 2003, petitioner executed a consent extending the period of limitation for assessment of personal income tax for the year 1999 until any time on or before April 15,

2004. On or before February 9, 2004, petitioner executed a second consent extending the period of limitation for assessment of personal income tax for the years 1999 and 2000 until any time on or before October 15, 2004.

10. On August 16, 2004, the Division issued a Notice of Deficiency, Notice Number L-024412924-3, to R. Michael Holt, asserting additional New York State and City personal income tax due for the years 1999, 2000 and 2001, in the aggregate amount of $43,376.00, plus penalty and interest, based upon the findings of its field audit and consistent with the statements of personal income tax audit changes described in Finding of Fact "1".

11. Based upon correspondence submitted by petitioner in lieu of appearing at a conciliation conference, the Division's Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order dated December 16, 2005, by which the Division recomputed the total deficiency for the years 1999 through 2001 to be $29,423.00 in additional taxes due, plus penalties and interest computed at the applicable rate.

For the year 1999, the Division reduced the deficiency to $916.00 in additional tax due, based upon its determination that petitioner was a nonresident of New York State and City for that year and an increase in the allocation of petitioner's wage income for additional days worked in New York. After determining that petitioner was a statutory resident of New York State and New York City for the years 2000 and 2001, the Division applied resident credits of $3,679.00 and $3,174.00 to the asserted New York State tax liabilities for 2000 and 2001, respectively, for tax paid to Minnesota in each of those years. As a result, the Division reduced the deficiencies to $17,437.00 and $11,070.00 in additional New York State and New York City tax due, for the years 2000 and 2001, respectively. The Division concluded that petitioner was a statutory resident of New York State and New York City for the years 2000 and 2001 because he

maintained a permanent place of abode in New York City and failed to sustain his burden to prove that he spent fewer than 184 days in New York during each year.

12. Petitioner and Mrs. Holt jointly filed New York State resident income tax returns for the years 1985 through 1993, indicating their address as 315 West 99th Street, Apartment 1D, New York, New York, an apartment they owned. Petitioner and Mrs. Holt continued to own this apartment until it was sold on June 3, 1996 for $300,000.00. For the years 1994 through 1998, petitioner and Mrs. Holt did not file any income tax returns with New York State.

13. At all times relevant herein, petitioner was a Florida domiciliary. Petitioner and his wife maintained their primary residence at 10373 Quail Crown Drive, Naples, Florida, which they purchased on November 24, 1998. During the years 1999 through 2001, Mrs. Holt received partnership income from her family's Minnesota partnerships, income from her late mother's trust and investment and dividend income.

14. Petitioner is a human resource compensation consultant who advises public and private organizations on employee compensation and performance matters. From October 1995 until October 1998, petitioner was employed by KPMG LLP in its Boston, Massachusetts compensation and employee benefits group. In or about October 1998, KPMG LLP sold the compensation segment of its compensation and employee benefits business unit to William M. Mercer, Inc., a human resource consulting company. Petitioner worked for William M. Mercer, Inc. at its Boston, Massachusetts offices ("William M. Mercer - Massachusetts") until he was transferred on May 1, 1999 to William M. Mercer, Inc.'s New York offices located at 1166 Avenue of the Americas, New York, New York ("William M. Mercer - New York"). At that time, William M. Mercer - New York provided petitioner with an office at its New York City

location. Neither petitioner's employment agreement with KPMG LLP nor his employment agreement with William M. Mercer - Massachusetts is part of the record.

15. From May 1, 1999 until at least June 2001, petitioner was employed by William M. Mercer - New York. During this period, petitioner provided human resource consulting services to William M. Mercer - New York's clients. The record does not include either petitioner's written employment agreement with William M. Mercer - New York or his written termination agreement with that company.

16. On or about April 20, 1999, petitioner sold his condominium in Boston, Massachusetts. On July 1, 1999, petitioner and Mrs. Holt purchased a cooperative apartment located at 150 East 49th Street, Apartment 2A, New York, New York ("East 49th Street, New York apartment"), for $280,000.00. From July 1, 1999 through the end of the period at issue, i.e., December 31, 2001, petitioner and Mrs. Holt owned the East 49th Street, New York apartment. They continued to own this apartment until June 2004, at which time it was sold for approximately $635,000.00.

17. Household furnishings located in the Boston condominium were shipped on April 19, 1999 to New York City and Naples, Florida, by a professional moving company. The furnishings shipped to New York City remained in storage until after the July 1, 1999 closing on the New York City apartment. While William M. Mercer - New York did reimburse petitioner for transportation and storage of household furnishings expenses in the amount of $9,709.00, petitioner also paid travel and transportation expenses in the amount of $5,291.00, which amount was claimed as a moving expense deduction (adjustment to income) on both the Federal and New York nonresident tax returns for the year 1999 filed by petitioner and Mrs. Holt.

18. As noted above, petitioner earned wage income totaling $208,516.00 during the year 1999. A Wage and Tax Statement, Form W-2 (W-2), issued by KPMG, LLP, to R. Michael Holt reported wage income in the amount of $30,000.00 and Massachusetts income tax withheld in the amount of $1,785.00 for the year 1999. A W-2 issued by William M. Mercer - Massachusetts to R. Michael Holt reported wage income in the amount of $69,001.88 and Massachusetts income tax withheld in the amount of $3,898.10 for the year 1999. A W-2 issued by William M. Mercer- New York, to R. Michael Holt reported wage income in the amount of $109,513.72 and the withholding of New York State income tax in the amount of $7,191.29 and New York City income tax in the amount of $4,186.36 for the year 1999.

19. For the year 2000, petitioner received wage income in the amount of $214,358.53 from William M. Mercer - New York, which issued a Wage and Tax Statement to R. Michael Holt. On this statement, William M. Mercer - New York also reported withholding New York State tax in the amount of $14,515.01 and New York City tax in the amount of $8,294.47 from petitioner's wage income for the year 2000.

20. For the year 2001, petitioner received wage income in the amount of $177,697.38 from William M. Mercer - New York, which issued a Wage and Tax Statement to R. Michael Holt. On this statement, William M. Mercer - New York also reported withholding New York State tax in the amount of $12,444.54 and New York City tax in the amount of $6,787.42 from petitioner's wage income for the year 2001.

21. The Division's audit of petitioner began with an examination of the 1999 tax year. In an audit appointment letter dated March 19, 2002, the auditor requested that petitioner complete a nonresident audit questionnaire and furnish the Division with the following records for 1999: a copy of the Federal tax return with all attached schedules (including all K-1's from partnerships

and S-corporations); detailed schedules for working days in and out of New York and detailed schedules of nonworking days (including holidays and weekends) in and out of New York. In response to the Division's request, petitioner provided a copy of the Federal income tax return for 1999 and documentation pertaining to his domicile in Florida. Petitioner also completed a nonresident audit questionnaire dated April 3, 2002 pursuant to the Division's request and reported on the questionnaire that he was present in New York on 122 days, i.e., 94 work days and 28 nonworking days, in 1999. On this same questionnaire, petitioner reported living quarters located in New York State at 150 East 49th Street, # 1A, New York, New York. He also submitted a handwritten summary schedule of working days in and out of New York for 1999.

22. After reviewing the submitted documentation, the Division made written requests on June 4, 2002, July 10, 2002 and August 28, 2002 for documentation pertaining to, among other things, petitioner's employment history with William M. Mercer, Inc., KPMG, LLP, and any other employers since 1993, and the full details of work and nonwork days spent outside of New York during the year 1999. In response to the Division's requests, petitioner sent an explanation letter via e-mail on September 16, 2002. In this letter, petitioner claimed to be self-employed until October 1995, at which time he began working in Boston, first for KPMG LLP and then for William M. Mercer, Inc., until May 1999. He further claimed to have been transferred to William M. Mercer, Inc.'s New York offices on May 1, 1999 and to have been employed by William M. Mercer - New York until May 31, 2001, on which date he claimed he was terminated because he refused to spend time in New York. In this letter, petitioner also claimed to have spent almost no time in New York prior to the purchase of the New York cooperative apartment on July 1, 1999. He further claimed to have spent most of his time either in Florida or traveling on business after July 1, 1999. Under separate cover, petitioner submitted documentation

concerning the purchase of the New York City cooperative apartment. Although petitioner claimed in the explanation letter to have a calendar on which his day-to-day whereabouts for the year 1999 were allegedly recorded, he never submitted this calendar to the Division during the audit.

23. After reviewing the explanation letter and the documentation submitted, the Division made oral requests for copies of the telephone and utilities bills for the New York apartment; a copy of petitioner's employment contract with William M. Mercer - New York; documentation concerning his employment in Boston in 1999; a schedule of the days worked at his Florida home and documentation from William M. Mercer, Inc., giving petitioner permission to work at his home in Florida. In response to these requests, petitioner submitted copies of his telephone and utilities (gas and electric) bills for the New York apartment for the period July 1999 through December 2000, a handwritten summary schedule of the payments made for cable, telephone, gas and electric services, mortgage and maintenance for the New York apartment for the period July 1999 through December 2000 and a handwritten summary schedule of amounts allegedly listed in petitioner's checkbook as expense reimbursement payments he received from William M. Mercer, Inc.- New York during the period August 1999 through November 2000. The audit was subsequently expanded to include the years 2000 and 2001

24. In a letter dated June 17, 2003, the Division requested that petitioner complete a nonresident audit questionnaire and furnish the Division with the following records for the years 2000 and 2001: copies of the Federal tax returns with all attached schedules (including all K-1's from partnerships and S-corporations); detailed schedules for days spent in and out of New York and substantiation of days worked outside of New York (employer expense reports, credit card

statements, checking account statements, telephone and utilities bills, airline tickets and photocopies of his passport).

25. Petitioner completed a nonresident audit questionnaire dated June 27, 2003 on which he reported that he was present in New York State on 96 days for work purposes and 26 nonworking days (a total of 122 days) in 2000, and 17 days through May 30, 2001 for work purposes, "then unemployed" and 108 nonworking days, "5 of these while employed through 5-30-01," (a total of 125 days) in 2001. Petitioner also reported owning living quarters in New York State located at 150 East 49th Street, # 2A, New York, New York, during 2000 and 2001. On this questionnaire, petitioner also claimed that, although he was on the William M. Mercer-New York payroll from January 1, 2000 to May 30, 2001, he "worked out of [his] office in Florida most of the time" and "only occasionally visited N.Y. on business."

26. During the audit, petitioner submitted a handwritten summary spread sheet of his alleged location on each day in 2000 and a handwritten summary of the number of days he claimed to have worked in New York (a total of 99 days) and in "other" by month (a total of 156 days) in 2000. He also submitted a handwritten summary spreadsheet of his alleged location on each day in 2001 and a handwritten summary analysis of his alleged New York work days and non-New York work days in 2001, which summaries were prepared as an update in July 2003. On this updated summary analysis of his alleged New York work days and non-New York work days in 2001, petitioner claimed to have worked a total of 17 days in New York and 85 days outside of New York in the months of January through May 2001 and a total of 66 days in New York and 69 days outside of New York in the months of June through December 2001.

27. During the audit, petitioner also submitted an account statement prepared by Con Edison summarizing the bill and payment amounts for electric and gas service at his East 49th

Street, New York, apartment from February 1, 2001 through March 5, 2003 and a copy of the Federal income tax return for 2001 filed by petitioner and Mrs. Holt.

28. During its audit, the Division requested that petitioner submit documentation to substantiate his claim that working from his home in Florida was for the necessity of William M. Mercer, Inc. - New York, his employer. Petitioner informed the Division during the audit that he was unable to supply the requested documentation.

29. Numerous requests were made to petitioner by the Division during the audit for documentation, including, among other things, corporate expense reports, hotel receipts, credit card statements and airline tickets, to substantiate his claimed days in and out of New York during the years 1999 through 2001. Petitioner informed the Division during the audit that he was unable to supply the requested documentation. Petitioner did not submit his calendars for the years 2000 and 2001 to the Division during the audit.

30. As noted in Finding of Fact "10," the Division issued a Notice of Deficiency to petitioner asserting additional New York State and City personal income tax due for the years 1999 through 2001. Notations in the Tax Field Audit Record indicate that documentation submitted to the conciliation conferee included the Federal tax returns for the years 1999 through 2001, bank statements and credit card statements. The record does not include the bank statements or credit card statements submitted to the conciliation conferee. The record also does not include the Federal income tax return for 2000 filed by petitioner and Mrs. Holt.

31. At the hearing, petitioner admitted that at times he flew into New York the night before a day he worked in New York during the years 1999, 2000 and 2001. He further admitted that the summary schedules for the years 1999, 2000 and 2001 submitted to the Division during the audit did not account for such days. At the hearing petitioner submitted a three-page

summary schedule of the days he was in New York by month during the years 1999, 2000 and 2001. This three-page summary was prepared by petitioner shortly before the hearing, based upon review of his calendars for the years 1999, 2000 and 2001 and his recollection of days on which he flew back to New York on the same day after working at a location outside New York during each of the years. On the summary schedule for the year 1999, petitioner claims to have been in New York a total of 138 days, i.e., 123 days based upon review of his 1999 calendar and 15 additional days based upon his recollection. On the summary schedule for the year 2000, petitioner claims to have been in New York a total of 152 days, i.e., 131 days based upon review of his 2000 calendar and 21 additional days based upon his recollection. On the summary schedule for the year 2001, petitioner claims to have been in New York a total of 136 days, i.e., 124 days based upon review of his calendar and 12 additional days based upon his recollection.

32. At the hearing petitioner also submitted a single-page summary by year of the number of days on which he claims to have been in New York while on the New York payroll of William M. Mercer, Inc. The summary was based upon review of his calendars for the years 1999, 2000 and 2001 and his recollection of days on which he flew back to New York after working at a location outside New York during each of the years.

33. During her testimony at the hearing, Mrs. Holt admitted that she occasionally came to New York during 1999, 2000 and 2001.

34. At the conclusion of the hearing, petitioner was granted additional time post-hearing for the submission of his original pocket calendars for the years 1999, 2000 and 2001 and a photocopy of the front and back of his William M. Mercer, Inc. - New York business card. The submitted calendars are photocopies of pages from bound books with brief handwritten entries. The quality of the photocopying of many of the pages of all three calendars is extremely poor.

Additionally, many of the handwritten entries are illegible for various dates on the pages of all three calendars.

35. The photocopied pages of the calendar for the years in issue contain references to business clients, business meetings, personal matters and a location (e.g., "FLA," "BOS," or "NY"). A number of days in each of these calendars contain a location entry only. Occasionally a telephone number or a partial address appears under the name of a business client. Airline flight arrival and departure information for travel is not noted in any of the entries in the calendars except for one in 2001. Location entries have been scratched out and changed on a number days in each calendar. In some instances on the calendar for the year 2001, a faintly written location entry has been written over with a different location noted. The location notation is darker than the balance of the handwritten entry on various days in the calendars for the years 2000 and 2001. In addition, all location entries appearing on the photocopied pages of the calendar for the year 1999 have been written over with fresh black ink.

36. Post-hearing, petitioner also submitted a photocopy of the front and back of his William M. Mercer - New York business card. The front of this card contained, among other things, petitioner's name, the company's name and New York office address, petitioner's New York corporate telephone and fax numbers and corporate email address. The back of this business card contained petitioner's name, his Naples, Florida home address and his Florida home telephone number, which was also his fax number.

37. During 2001, petitioner started a consulting business under the business name of Holt Private Equity Consultants. Petitioner reported Schedule C income from this business on the Federal income tax return which he and Mrs. Holt filed for the year 2001.

38. The record does not include any receipts for repairs or renovations allegedly made to the East 49th Street, New York apartment.

39. The record does not include any corporate or personal credit card statements for the years 1999 through 2001. The record also does not include corporate expense reports, travel reports or itineraries, airline tickets or hotel receipts for the years 1999 through 2001.

CONCLUSIONS OF LAW

A. Tax Law § 601 and New York City Administrative Code § 11-1701 impose, respectively, New York State and New York City personal income tax on State and City "resident individuals." An individual may fall within the definition of a resident as a domiciliary or as a "statutory resident," defined in Tax Law § 605(b)(1)(B) as someone:

> 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, unless such individual is in active service in the armed forces of the United States.

Administrative Code § 11-1705(b)(1)(B) contains an identical definition of statutory residency to that given above, except for the substitution of the term "city" for "state."

B. Permanent place of abode is defined in the regulations of the Commissioner of Taxation and Finance[2] at 20 NYCRR 105.20(e)(1) as:

> [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

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[2] The Division's regulations with respect to the New York State income tax imposed by Article 22 of the Tax Law are applicable in their entirety to the income taxes imposed by the City of New York pursuant to Article 30 of the Tax Law and the New York City Administrative Code and any reference in such regulations to "New York State domicile, resident and nonresident shall apply in like manner to City of New York domicile, resident and nonresident by substituting City of New York for New York State wherever applicable" (***see***, 20 NYCRR 290.2).

> for cooking, bathing, etc., will generally not be deemed a permanent place of abode.

C. In the instant matter the Division concedes that petitioner was, at all times relevant, domiciled in the State of Florida. Petitioner was therefore not a resident individual pursuant to Tax Law § 605(b)(1)(A) or Administrative Code § 11-1705(b)(1)(A). The Division asserts, however, that petitioner was a statutory resident of New York State and City pursuant to Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B) for the years 2000 and 2001.

As set forth above, statutory residency requires: (1) the maintenance of a permanent place of abode in the State and City and (2) physical presence in the State and City on more than 183 days during a given taxable year. Petitioner asserts that he and his wife did not maintain the East 49th Street, New York, apartment as a "permanent" place of abode during the years 2000 and 2001. Petitioner contends that he and his wife considered their July 1999 purchase of the apartment, which was badly in need of rehabilitation and renovation, as an investment. He further contends that extensive renovations were made to the East 49th Street, New York, apartment and that he had to avoid staying there during much of the construction. Therefore, petitioner argues that he was "at best" a temporary resident, not a statutory or permanent resident. Petitioner also asserts that he was in New York State and City only 132 days in 2000 and 125 days in 2001 and, therefore, is not a statutory resident of New York State and City for either year.

D. The first criterion to be addressed is whether petitioner maintained a permanent place of abode in the State and City during the years 2000 and 2001. The definition of a permanent place of abode is contained in Conclusion of Law "B." There is no requirement that petitioner dwell in the abode, but simply that he maintain it (***see Matter of Smith v. State Tax Commn.***, 68 AD2d 993, 414 NYS2d 803; ***Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed***

199 AD2d 840, 606 NYS2d 404). Petitioner and his wife purchased the East 49th Street, New York, cooperative apartment in July 1999 and continued to own it until June 2004. He paid the utilities, had unrestricted access to the dwelling place and maintained it. Petitioner clearly maintained a permanent place of abode in New York State and City during the years 2000 and 2001 within the meaning of Tax Law § 605(b), Administrative Code § 11-1705(b)(1)(B) and 20 NYCRR 105.20(e)(1).

E. The second criterion to be addressed is whether petitioner was present in New York State or City for more than 183 days during 2000 and 2001. Petitioner has the burden of proving by clear and convincing evidence that he was not present in New York State or City for more than 183 days during 2000 and 2001 (***see Matter of Kornblum v. Tax Appeals Tribunal***, 194 AD2d 882, 599 NYS2d 158; ***Matter of Smith v. State Tax Commn***., ***supra***). Specifically, pursuant to the Division's regulations, an individual, like petitioner, who claims a domicile outside New York but who maintains a permanent place of abode within New York, "must keep and have available for examination . . . adequate records to substantiate the fact that such person did not spend more than 183 days . . . within New York" (20 NYCRR 105.20[c]). Furthermore, for purposes of counting the number of days spent within and without New York, presence within New York for any part of a calendar day constitutes a day within New York (***see*** 20 NYCRR 105.20[c]; ***Matter of Leach v. Chu***, 150 AD2d 842, 540 NYS2d 596).

F. Petitioner contends that he was present in New York only 132 days in 2000 and 125 days in 2001. He asserts that his detailed pocket calendars support his New York day count for both years. Moreover, petitioner finds it incredible that an individual's presence in New York for a portion of a day constitutes a day for New York tax purposes. However, he maintains that even if additional days were added to his New York day counts for the years 2000 and 2001 because of

his presence in New York for a portion of such days, he was not present in New York anywhere near 183 days in either year.

After careful review of the testimony and all other evidence presented in this matter, I find that petitioner has failed to meet his burden to show that he was not present in New York State or New York City for more than 183 days during 2000 and 2001. Accordingly, the Division's determination that petitioner was subject to New York State and New York City income tax as a resident individual for the years 2000 and 2001 was proper.

Petitioner submitted photocopies of his pocket calendars for the years 2000 and 2001. The quality of the photocopying of many of the pages of both calendars is extremely poor. Additionally, many handwritten entries are illegible in both calendars. A number of days in both calendars contain a location entry only. With the exception of a calendar entry on August 14, 2001, no airline flight departure and arrival information for travel is noted on either calendar. Location entries have been scratched out and changed for various days on the calendars for both years. In some instances on the calendar for the year 2001, a faintly written location entry has been written over, with a different location noted. In addition, the location notation is darker than the balance of the handwritten entry on various days in the calendars for both years.

At the hearing, petitioner offered general vague testimony about his whereabouts during the years 2000 and 20001. While petitioner admitted that at times he flew into New York the evening preceding a day he worked in New York during the years 2000 and 2001, he failed to identify specific dates in either year. Absent from the record are any corroborating expense reports, travel records, hotel receipts and credit card statements which would support petitioner's calendar entries for both years.

Based upon the record before me, I am unable to determine how many days petitioner spent in New York State and City during the years 2000 and 2001. Petitioner has failed to meet his burden of proof on this issue (Tax Law § 689[e]).

G. As noted in Finding of Fact "11," the Conciliation Order modified the deficiency asserted for the year 1999, reducing the deficiency to $916.00 in additional tax due, based upon a determination that petitioner was a nonresident of New York State and City for that year and an increase in the allocation of petitioner's wage income for additional days worked in New York. Petitioner argues that the Division improperly allocated additional income to New York for the year 1999. He contends that between May 1, 1999 (the date of his transfer to the William M. Mercer - New York payroll) and July 1, 1999 (the date the East 49th Street, New York, apartment was purchased), he spent almost no time at his employer's New York offices. Rather, he claims to have worked at his Florida home office or traveled on business for his employer. He further contends that he continued to work from his Florida home office and travel on business for the company throughout the remainder of 1999, rarely visiting the New York offices of his employer. He claims that his calendar for 1999 documents his travel on behalf of William M. Mercer - New York and his work at his Florida home office for the company as well.

H. Tax Law § 631(a)(1) provides that the New York source income of a nonresident individual shall include, among other items, the sum of "[t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . . ." A nonresident individual's items of income, gain, loss and deduction derived from or connected with New York State sources are items, in part, attributable to a business, trade, profession or occupation carried on in New York State (Tax Law § 631[b][1][B]). Tax Law § 631(c) provides

that when a business, trade, profession or occupation is carried on both within and without the State "the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations." The regulations pertaining to activities carried on in New York State additionally provide as follows:

> The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State. . . . Where the personal services are performed within and without New York State, the portion of the compensation attributable to the services performed within New York State must be determined in accordance with sections 132.16 through 132.18 of this Part (20 NYCRR 132.4[b]).

The regulation set forth at 20 NYCRR 132.18(a) states, in pertinent part, as follows:

> If a nonresident employee . . . performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction . . . of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. . . .

I. It is well settled that an employee's out-of-state services are not performed for an employer's necessity where the services could have been performed at his employer's office (***see e.g. Matter of Phillips v. New York State Department of Taxation and Finance***, 267 AD2d 927, 700 NYS2d 566, ***lv denied*** 94 NY2d 763, 708 NYS2d 52). Further, the courts have held that where there was no evidence that services performed at the taxpayer's out-of-state home could not have been undertaken at the employer's office in New York, the services were performed out of state for the employee's convenience, not the employer's necessity (***Matter of Page v. State***

Tax Commission, 46 AD2d 341, 362 NYS2d 599; ***Matter of Simms v. Procaccino***, 47 AD2d 149, 365 NYS2d 73). The courts have generally upheld a strict standard of employer necessity where the residence is the workplace in question "because of the obvious potential for abuse" (***Matter of Kitman v. State Tax Commn***., 92 AD2d 1018, 461 NYS2d 448, 449).

The rationale behind the "convenience of the employer" rule is well established. "Since a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who performs services or maintains an office in New York State." (***Matter of Speno v. Gallman***, 35 NY2d 256, 259, 360 NYS2d 855, 858.)

J. In two recent cases, ***Matter of Zelinsky v. Tax Appeals Tribunal of State of New York*** (1 NY3d 85, 769 NYS2d 464, ***cert denied*** 541 US 1009, 158 L Ed 2d 619) and ***Matter of Huckaby v. New York State Division of Tax Appeals*** (4 NY3d 427, 796 NYS2d 312, ***cert denied*** 546 US 976, 126 S Ct 546, 163 L Ed 2d 459), the Court of Appeals reexamined the validity of the "convenience of the employer" rule and upheld its application in both cases. The facts in ***Zelinsky*** and ***Huckaby*** are essentially indistinguishable from the facts presented in the instant matter, and therefore I see no reason to deviate from the Court's holdings in these two matters.

Petitioner began his employment on William M. Mercer - New York's payroll in May 1999 and remained on its payroll until at least June 2001. During the entire tenure of petitioner's employment by William M. Mercer - New York, he maintained an office assigned to him at the company's Avenue of the Americas, New York City location. Petitioner's services as a human resources consultant to William M. Mercer - New York's clients were not of such a specialized nature that they could not have been performed at his employer's offices. Indeed, petitioner worked at the William M. Mercer - New York offices on frequent occasions in 1999. The record

does not include any documentation concerning petitioner's employment with William M. Mercer - New York. The fact that William M. Mercer - New York may simply have allowed petitioner to work at home in Florida does not constitute necessity or requirement. The resulting choice to work at home was a choice made by petitioner and not a necessary out-of-state assignment imposed by his employer. Since there was no employer requirement for petitioner to perform services at his Florida home, he is not entitled to treat such at-home working days as non-New York days for purposes of income allocation (20 NYCRR 132.18[a]). Accordingly, the Division's allocation of additional income petitioner received from William M. Mercer - New York in the year 1999 to sources within New York was proper.

K. The subject Notice of Deficiency asserts penalties pursuant to Tax Law § 685(b) and (p). Tax Law § 685(b) provides for the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 or the regulations promulgated thereunder. Tax Law § 685(p) provides for the imposition of a penalty where there is a "substantial understatement" of the amount of income tax required to be shown on a return. Such penalty may be waived upon a showing of reasonable cause for the understatement and that the taxpayer acted in good faith.

Petitioner asserts that he did not attempt to cheat or lie and he and his wife made a good faith effort to pay what they believed was the appropriate amount of taxes to New York for the years 1999, 2000 and 2001. Petitioner's contentions are rejected. "Good faith" does not constitute reasonable cause under the Division's regulations (***see***, 20 NYCRR 2392.1).

L. Petitioner is also seeking an abatement of the interest assessed on the tax as recomputed by the conferee. He does not allege any errors or delays by any of the Division's employees. Rather, he claims that it is inappropriate to assess interest on the additional tax determined to be

due for the years at issue. With regard to the interest assessed in this matter, it is noted that the Commissioner of Taxation and Finance has no authority to waive the interest imposed on personal income tax liabilities under Tax Law § 684 (***Matter of Chase*****,** State Tax Commission, August 12, 1987). The purpose of interest is not to penalize the taxpayer but to reimburse the State for the use of the money (***Matter of Framapac Delicatessen***, Tax Appeals Tribunal, July 17, 1993; ***Matter of Rizzo***, Tax Appeals Tribunal, May 13, 1993).

Essentially, failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due (***Matter of Rizzo***, ***supra***).

M. The petition of R. Michael Holt is denied and the Notice of Deficiency dated August 16, 2004, as modified by the Conciliation Order dated December 16, 2005, is sustained.

DATED: Troy, New York
November 1, 2007

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE