STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS J. MARCINEK	:	DETERMINATION DTA NO. 821742
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2000 and 2001.	:	

Petitioner, Thomas J. Marcinek, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2000 and 2001.

On January 28, 2008 and February 1, 2008, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were scheduled to be submitted by May 21, 2008, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined additional personal income tax due from petitioner for the years 2000 and 2001.

FINDINGS OF FACT

1. Following an audit of petitioner for the years 2000 and 2001 (the years in issue) by the Internal Revenue Service (IRS), information concerning petitioner's federal return was disclosed to the Division of Taxation (Division) in a report dated May 17, 2004, as authorized by IRC § 6103(d), including a New York City home address and sufficient income to require the filing of New York personal income tax returns. Petitioner's federal income tax returns for 2000 and 2001 each indicated that his home address was 104 Woolley Avenue, Staten Island, NY 10314.

2. The Division searched its records of personal income tax returns for the years 2000 and 2001 but found no returns for petitioner under his name or social security number.

3. Based upon the information received from the IRS, the Division determined unreported wage income for 2000 of $34,552.00, allowed for a standard deduction of $7,500.00 and found New York taxable income of $27,052.00. The New York State and City of New York income taxes due on this income were found to be $2,374.00. In addition to the tax, the Division asserted interest for late payment or underpayment of tax and penalties for failing to file a return within five months of its due date, negligence and intentional disregard of the Tax Law. This information was forwarded to petitioner in a Statement of Proposed Audit Changes, dated November 28, 2005. Petitioner responded on December 13, 2005, stating that employees of the IRS "illegally entered fraudulent data" in the computers of the Internal Revenue Service thus forming an invalid basis for any assessment by New York State.

4. The Division issued to petitioner a Notice of Deficiency for the tax year 2000, dated March 27, 2006, asserting additional tax of $2,374.00, interest of $874.77 and penalties of $1,149.58.

5. The information received from the IRS for 2001 revealed unreported wage income of $40,568.00, business income of $1,850.00, capital gain of $1,064.00 and a federal adjustment to income of $131.00, resulting in federal and New York adjusted gross income of $43,351.00. After allowing for a standard deduction of $7,500.00, the Division determined New York State income tax due of $2,060.00 and New York City tax due of $1,107.00, less a city school tax credit of $62.50. The Division also asserted interest for late payment or underpayment of tax and penalties for not filing a return within five months of its due date and underestimation of tax. For the tax year 2001, there were federal changes which were not reported to the State of New York, which were incorporated into the computation of the deficiency. The calculations and explanation were forwarded to petitioner in a Statement of Proposed Audit Changes, dated August 14, 2006.

6. The Division issued a Notice of Deficiency to petitioner, dated October 10, 2006, which asserted additional New York State and New York City personal income tax of $3,104.50, interest of $1,076.04 and penalties of $871.29.

7. Petitioner was issued a New Jersey driver's license on November 14, 2001 that listed his address as 17 Red Maple Drive, Brick, New Jersey. In his application for the license, dated October 31, 2001, petitioner stated that he had a valid driver license in another, unnamed state.

8. Petitioner registered to vote in Ocean County, New Jersey, on September 30, 2002. His voter registration card indicated that, as of September 30, 2002, his address was 17 Red Maple Drive, Brick, New Jersey.

9. Petitioner did not file a tax return with the State of New Jersey for the year 2000.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner argues that he had moved to New Jersey in the late 1990s to be closer to his son. While there, he claims he attended several churches at unspecified times. He also claims that he worked in New Jersey. Petitioner also averred that he did not work or earn any money in the State of New York during the years in issue.

11. Petitioner contends that he used the New York address he listed on his federal tax returns, 104 Woolley Avenue, Staten Island, New York, only to insure that he would receive certified mail sent to him by the Internal Revenue Service. Petitioner claims his parents live at the address and were always available to sign for letters from the IRS, thus preventing him from becoming a victim of IRS abuse. Petitioner further contends that he visited the Staten Island address only once or twice a month during the years in issue.

12. The Division argues that petitioner was a domiciliary or resident of New York during the years in issue and was required to file New York personal income tax returns. Without other information, the Division believes it was warranted in using the federal tax information at hand to calculate petitioner's New York personal income tax for the years in issue. Finally, the Division contends that petitioner has not met his burden of proving that the notices issued herein were erroneous.

CONCLUSIONS OF LAW

A. It is undisputed that petitioner did not file New York State personal income tax returns for the years 2000 and 2001. However, petitioner filed federal income tax returns for both years on which he listed his home address as 104 Woolley Avenue, Staten Island, New York, a factor which acted to trigger a series of events leading to an investigation of petitioner's tax status in New York State during the years in issue.

B. Tax Law § 612(a) provides, in pertinent part, as follows:

> The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year. . . .

In the matter at hand, the Division received information from the IRS concerning petitioner's federal adjusted gross income for both years in issue and used this information to calculate petitioner's New York personal income tax. This methodology, undisputed by petitioner, comported with the definition of New York adjusted gross income as stated in Tax Law § 612(a).

Although petitioner contended that employees of the Internal Revenue Service "illegally entered fraudulent data" in the IRS computers, thus forming an invalid basis for any assessment by New York State, he offered no evidence of such tampering and, therefore, has not met his burden of demonstrating that the information received by the Division pursuant to IRC § 6103(d) was in any way incorrect. (Tax Law § 689[e].)

C. Petitioner's primary defense to the Division's notices of deficiency for both years in issue is that he was not a resident or domiciliary of New York State and therefore was not required to file a personal income tax return for the years in issue. Petitioner's evidence of his residence and domicile was an affidavit which explained that he wished to be in New Jersey to be closer to his son, who attended secondary schools there. In addition, petitioner averred that he attended several churches in New Jersey and worked in New Jersey during the years in issue. He contended that he visited the Staten Island address, the same address he used as his home address for his federal returns, only once or twice monthly to visit his parents and only used that address to avoid becoming a victim of the IRS, which he believed was "notorious" for sending mail to "previously known addresses" which failed to reach the intended addressees. Petitioner reasoned

that, since his parents were available to receive and sign for the certified mail sent there by the IRS, it was prudent to list that address on his return.

However, petitioner's argument lacks credence. The federal forms 1040 filed by petitioner for the years in issue were signed under the penalty of perjury, insuring that the form and schedules were true, correct and complete, including the address supplied. The instructions for the form 1040 specifically provided that if the preprinted label was not correct it should be crossed out and corrected and any change of address reported to the IRS in writing. It seems unlikely that petitioner would devise a scheme that provided false information on his returns, contrary to the plain language of the instructions, to insure receipt of mail from the IRS because of an unfounded and unproven allegation that the IRS is "notorious" for sending articles of mail to incorrect addresses which never reach the addressees. By supplying a New York home address to the IRS, petitioner created a presumption that he was a domiciliary or resident of New York State and it was his burden to show that this presumption, rooted in his own statement made under penalty of perjury and justifiably and legally relied upon by the IRS and the Division, was incorrect.

D. Since petitioner bears the burden of proving he was not a New York domiciliary or resident during the years in issue, it is necessary to examine the Tax Law provisions with respect to those terms. Tax Law § 605(b) defines a resident individual as one who is domiciled in the State or who is not domiciled in the State but maintains a permanent place of abode in the state and spends more than 183 days of the taxable year in the State.

Initially, the Division has presented evidence that it reasonably relied on information legally obtained from the IRS pursuant to IRC § 6103(d) which indicated that petitioner had informed the IRS that his home address for the years 2000 and 2001 was 104 Woolley Avenue,

Staten Island, New York. In addition, those returns indicated that petitioner had received income sufficient to warrant the filing of a New York State personal income tax return. These factors were sufficient to form a rational basis for the issuance of a notice of deficiency. In ***Matter of Atlantic & Hudson Limited Partnership*** (Tax Appeals Tribunal, January 30, 1992), the Tribunal stated:

> Although a determination of tax must have a rational basis in order to be sustained upon review, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment. Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear: on the face of the audit as described by the Division through testimony or documentation; from factors underlying the audit which are developed by the petitioner at hearing; or in the inability of the Division to identify the bases of the audit methodology in response to questions posed at the hearing. However, where, as here, petitioner has failed to make any inquiry into the audit method or calculation, the presumption of correctness raised by the issuance of the assessment provides the rational basis for the assessment. To hold otherwise would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment and that the petitioner has a heavy burden to prove the assessment erroneous. (Citations omitted.)

As stated above, petitioner did not challenge the audit methodology or the calculation of tax and bears the heavy burden of demonstrating that the notices of deficiency were erroneous.

E. Petitioner did not rebut the presumption of correctness by merely asserting that he was neither a New York domiciliary nor resident during the years in issue. He was under a duty to establish that he was not a statutory resident or that he had established a new domicile. (***See Matter of El-Tersli v. Commissioner of Taxation and Finance***, 14 AD3d 808, 787 NYS2d 526 [2005]; ***Matter of Shibuck v. New York State Tax Appeals Tribunal***, 289 AD2d 718, 733 NYS2d 801 ***lv dismissed*** 98 NY2d 720, 748NYS2d 900 ***rearg denied*** 99 NY2d 554, 754 NYS2d 205 [2002]; ***Matter of Warnecke v. Tax Appeals Tribunal***, 252 AD2d 748, 676 NYS2d 286 [1998].)

A domicile has been defined as "the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent." (20 NYCRR 105.20[d].) The concept of intent was addressed by the Court of Appeals in ***Matter of Newcomb's Estate*** (192 NY 238, 250 - 251):

> Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

An existing domicile continues until a new one is acquired, and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (***see Matter of Bodfish v. Gallman***, 50 AD2d 457, 378 NYS2d 138 [1976]).

In this matter, petitioner has raised the issue of domicile but has submitted scant evidence to support his claim of being domiciled in New Jersey during the years in issue. He has submitted a driver's license application dated October 30, 2001, a driver's license issued November 14, 2001 and a voter registration card that lists a date of registration well beyond the years in issue. Although the documents indicate an address of 17 Red Maple Drive, Brick, New Jersey, at those times, none of the items demonstrates the intent necessary to prove the establishment of one's domicile. Other than vague references to working in New Jersey without any mention of an employer, attending various churches there and having a desire to be closer to his son, petitioner has not demonstrated that he was domiciled in New Jersey during the years in issue.

If one is not a domiciliary of New York State he may still be a resident if he maintains a permanent place of abode in New York and spends in the aggregate more than 183 days in the State. (Tax Law§ 605[b][1][B].) Petitioner raised the presumption of New York residency by

stating a New York home address on his federal tax returns for 2000 and 2001. Although he claims the address was "where his parents live," that does not demonstrate that he did not maintain it as his permanent abode. Further, petitioner has not offered any credible proof with respect to the issue of whether he spent more than 183 days in New York in 2000 or 2001. Although he stated in his affidavit that he worked and attended churches in New Jersey, such averments are too vague to constitute proof of his residence. The uncontroverted evidence indicated, that for the year 2000, he did not file an income tax return with the State of New Jersey, casting doubt on his employment. Likewise, the fact that he applied for and received a New Jersey driver's license in late 2001 does not establish that he was a resident there.[1] Although he may have maintained a residence at 17 Red Maple Drive in Brick, New Jersey, it does not necessarily follow that he was not a resident of New York. As succinctly stated by the Court in ***Matter of El-Tersli*** :

> The burden of proof lies with the taxpayer, upon whom it is incumbent to establish that he or she neither maintained a permanent place of abode in this state nor spent more than 183 days in the state during the tax year in dispute.

Petitioner's proof fell well short of that required by the statute and case law and he has not met his burden of proof.

F. The petition of Thomas Marcinek is denied and the notices of deficiency dated March 27, 2006 and October 10, 2006 are sustained.

DATED: Troy, New York
November 6, 2008

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

[1]As noted in the facts, petitioner disclosed on his New Jersey license application that he held a valid driver's license in another, unspecified jurisdiction.