

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

THOMAS P. AND KATHLEEN H. PUCCIO : DETERMINATION
DTA NO. 822476

for Redetermination of a Deficiency or for Refund of :
New York State and City Personal Income Taxes under
Article 22 of the Tax Law and the New York City :
Administrative Code for the Year 2003.

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Petitioners, Thomas P. and Kathleen H. Puccio, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2003.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on January 27, 2010, at 10:30 A.M., with all briefs to be submitted by July 9, 2010, which date commenced the six-month period for issuance of this determination. By a letter dated December 20, 2010, this six-month period was extended for an additional three-months (Tax Law § 2010[3]). Petitioners appeared by PricewaterhouseCoopers LLP (Gregory A. Lee, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioners have shown that they were not present in New York City for more than 183 days during 2003 and therefore not taxable as resident individuals for that year pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).¹

II. Whether, if it is determined that petitioners are residents of the State of New York, petitioners are entitled to claim a credit against their New York State personal income tax liability for the tax year 2003 based on income taxes they paid to another state.

FINDINGS OF FACT

1. Petitioners filed a joint New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) for the 2003 tax year. The return reported a New York State income tax liability of \$140,834.00 based on petitioners' reported status as nonresidents of New York State and City. On the Income Allocation and Itemized Deduction Attachment to Form IT-203 (Form IT-203-ATT), petitioner indicated he was in New York State for 115 days during the year. Prior to filing their return, petitioners had filed an Application for Automatic Extension of Time to File for Individuals (Form IT-370) and an Application for Additional Extension of Time to File for Individuals (Form IT-372), which requested an extension of time to file until October 15, 2004.

2. Throughout 2003, petitioners were domiciled in Connecticut, residing in Weston. For the tax year 2003, petitioners filed a resident income tax return (Form CT-1040) with the Connecticut Department of Revenue Services.

¹Petitioner Kathleen H. Puccio's name appears herein by virtue of having filed joint federal and New York State and City personal income tax returns with her husband, petitioner Thomas P. Puccio. Unless specified or required by context, references using the singular term petitioner shall mean petitioner Thomas P. Puccio.

3. During the year 2003, petitioners maintained a cooperative apartment in New York City at 10 East 81st Street. In addition, Mr. Puccio maintained law offices at 230 Park Avenue in New York City and in his home in Weston, Connecticut. The cooperative apartment is approximately two miles from the New York City office, while the Weston residence is approximately 56 miles from the New York City office.

4. By letter dated November 3, 2004, the Division of Taxation (Division) commenced an audit of petitioners' 2003 New York State income tax return. The audit focused on petitioners' filing status as nonresidents of New York State and City. Upon completion of the audit, the Division determined that petitioners were liable for additional New York State and City personal income taxes on the grounds that they were statutory residents of the State and City, i.e., petitioners maintained a permanent place of abode and spent more than 183 days in the State and City for the tax year in issue.

5. On June 25, 2007, the Division issued to petitioners, Thomas P. and Kathleen H. Puccio, a Notice of Deficiency asserting New York State and City personal income tax in the amount of \$271,382.00, plus penalty and interest.

6. Petitioners and the Division agreed that Mr. Puccio was physically present in New York State and City on 112 days and not physically present in New York State and City on 80 days during 2003. At the hearing, petitioner requested that a day (July 30) previously agreed to as a New York State and City day be considered as a day in dispute. Therefore, the analysis of petitioner's whereabouts begins with 111 days being New York State and City days and 174 days in dispute. The following is a list of such days and a summary of the relevant evidence in the record regarding petitioner's whereabouts on each such day:

Monday, January 13. There is a credit card charge for a restaurant in Westport, CT.

Petitioner testified that based on the charge record, he was in Connecticut this day.

Tuesday, January 14. Petitioner testified he had a meeting at the office of another attorney in Stamford, CT, who, during a recent conversation, reminded petitioner they had a meeting there on this day.

Wednesday, January 15. The credit card statement indicates a \$201.19 charge for a New York City restaurant. Petitioner testified that this does not necessarily mean he was there, as the restaurant is a club that bills its members an annual fee and a minimum quarterly amount for food charges whether or not actually incurred. An affidavit from the restaurant's general manager confirms this testimony and further states that a credit card of petitioner's is on file, and a charge for the restaurant does not necessarily indicate petitioner was there on that day.

Thursday, January 16. Petitioner testified that based on a docket of a case he was involved in, he was in Stamford, CT. The docket indicates the court issued a memorandum of decision, but does not mention an appearance by petitioner. There is a credit card charge for a restaurant in New York City.

Tuesday, January 21. There is a credit card charge for taxi service in Westport, CT. Petitioner testified that this service was used while he was having his car repaired, for which he would be in Connecticut.

Wednesday, January 22. There are two credit card charges for a restaurant in New York City and a charge for petitioner's mailing of a letter from a New York City location. There is also a charge for the same taxi service and a credit card charge for a pharmacy located in Weston, CT. Petitioner did not testify about this day.

Thursday, January 23. There are credit card charges for a restaurant and a gasoline station in Connecticut. Petitioner testified that based upon the two credit card charges, he was in Connecticut.

Friday, January 24. There are credit card charges for a restaurant and a pharmacy, each in Connecticut. An affidavit from the manager of the pharmacy states that petitioner had a prescription filled. Petitioner testified that he spent the entire day in Connecticut working on the same case first discussed regarding the evidence for January 16, and that the restaurant charge on this day was incurred at a restaurant located across the street from the office of the attorney whose name does appear on the docket and who was petitioner's co-counsel (see Finding of Fact 6: Tuesday, January 14 and Thursday, January 16). Petitioner also testified regarding his transaction at the pharmacy in Connecticut.

Monday, January 27. Petitioner testified that based on his appearance on the same case in Superior Court, Danbury, CT, he was in Connecticut. The docket report offered by petitioner indicates a motion was filed, but there is no indication of petitioner's presence in court. An affidavit from the manager of the pharmacy states that petitioner had a prescription filled.

Wednesday, January 29. Petitioner testified that because he does not use cash and there were no credit card charges in New York, he was in Connecticut. There are two FedEx charges on the credit card statement for letters mailed from New York. It is noted that petitioner previously agreed he was in New York on January 28, 30 and 31. The record also reflects several other instances where petitioner would admit to being in New York for several continuous days with the exception of one day within the range which he disputed.

Tuesday, February 4. The credit card statement indicates a FedEx charge for a shipment from petitioner's New York law office to his Connecticut law office.

Wednesday, February 5. There are credit card charges for a furniture and carpet store and for a restaurant in New York City.

Thursday, February 6. There is a credit card charge for a restaurant in New York City.

Friday, February 7. There are credit card charges for a furniture and carpet store, a restaurant and a wine store in New York City. There is also a charge for a limousine service in Long Island City, New York.

Saturday, February 8. There are credit card charges for a restaurant and a bookstore in New York City.

Sunday, February 9. There is a credit card charge for a restaurant in New York City.

Monday, February 10. An affidavit from the manager of a hardware store located in Westport, CT, states that petitioner visited the store.

Tuesday, February 11. Petitioner's credit card statement reflects a FedEx charge for a letter mailed from the New York City law office. No testimony was offered into the record.

It is noted that petitioner did not testify with regard to the days February 4 through February 11 and that he previously agreed he was in New York City February 12 through February 15.

Sunday, February 16. There is a credit card charge for office supplies in New York City. According to petitioner's testimony, the order and charge for office supplies would have been made by his law office assistant, Mr. Joseph Medina, in the New York office.

Monday, February 17. Petitioner testified that he had "no reason to believe" he was in New York.

Tuesday, February 18. There are credit card charges for a restaurant and a delivery fee from Bloomingdale's, both located in New York City. Petitioner made "an assumption" that his

wife had ordered something over the telephone. As to the restaurant, petitioner testified that it was utilized to deliver food and beverages for people working at the cooperative apartment, such as cleaning personnel or his law office assistant.

Petitioner testified he left Connecticut for Chicago to represent a client in court and provided a printout of the case docket report. The docket indicates petitioner to be one of two representatives of the defendant, and contains an entry for a "Minute Order" of the judge setting preliminary bail, following the defendant's indictment earlier in the day. There is no mention of petitioner being present.

Wednesday, February 19. The docket report of the criminal case in Chicago indicates that the arraignment and plea in the case were set for a future date. Again, there is no specific mention of petitioner being present. Petitioner testified he was also representing a second client in Chicago but provided no other evidence in support of this testimony. No credit card charges originating in Chicago are available for either February 18 or 19.

Thursday, February 20. Petitioner testified that "there's no reason to believe, there's no charges in New York for restaurants, whether I was in New York that day." Petitioner's credit card statement supports this testimony.

Friday, February 21. There are credit card charges for a restaurant and a salon in New York City. There are also three FedEx charges for letters from petitioner's New York law office.

Saturday, February 22. Petitioner testified he was in New York based upon a credit card charge for a restaurant.

Monday, February 24 through Friday, February 28. Petitioner testified that following dinner in New York on Saturday, he returned to Connecticut. The parties agreed that on Sunday, February 23, petitioners were in Connecticut. Petitioner testified that he would have been in

Connecticut on Monday, on Tuesday he went to Chicago for an appearance in a case there, leaving and returning to Connecticut the same day, and on Wednesday, he went to Washington, D.C., via Amtrak, leaving from Stamford, CT. Petitioner further testified that he returned via Amtrak from Washington, D.C., to Penn Station on Thursday and had dinner at a New York City restaurant that evening.

There is a credit card charge dated February 24 for a round-trip airline ticket from New York City to Chicago, departing on February 25. There is also a receipt from the travel agency indicating petitioner left New York at 9:36 A.M. on February 25 and returned to New York at 7:18 P.M. the same day. There is also a charge on February 25 at a Chicago airport restaurant. The credit card statement indicates an Amtrak advance ticket purchase on February 26 to Washington, D.C., and a second Amtrak charge on February 27 indicating an arrival at Penn Station. On February 27, there are two restaurant credit card charges in New York City. There are three credit card charges on February 28 in New York City: one for dry cleaning and two for the same restaurant.

Tuesday, March 4 and Wednesday, March 5. Petitioner testified that he was not in New York City on March 4 and left for Houston, Texas, on March 5, leaving from his Connecticut home to go to the airport.

There are two credit card charges totaling over \$6,600.00 at a furniture and carpet store in New York City on March 4. On March 5, the credit card statement indicates charges for round-trip airline tickets for petitioners to Houston, Texas, via a New York airport. There is also a March 5 credit card charge for a restaurant in New York City. A receipt from a travel agency indicates flights and hotel for petitioners from New York City to Houston, Texas, departing on March 5 and returning on March 9.

Monday, March 10. Petitioner testified that after returning from Houston, Texas, on Sunday, he departed for Washington, D.C., on March 10 via Amtrak from Stamford, CT, and returned the next day.

The credit card statement indicates an advanced payment for Amtrak service to Washington, D.C., on March 10. There is an affidavit from the manager of the hardware store in Westport, CT, that states petitioner was there on March 10.

Tuesday, March 11. There are two credit card charges for FedEx shipments from petitioner's New York law office. Petitioner testified that he had "no reason to believe" he was in New York that day.

Wednesday, March 12 through Friday, March 14. There is a New York State E-ZPass statement that indicates two March 12 toll charges for a New York City bridge. For March 13, there is a credit card charge for a FedEx mailing listing petitioner's New York City office as the sender. There is a letter to petitioner from an attorney in Chicago with an attached docket for a criminal proceeding. The docket indicates that the attorney in Chicago appeared on behalf of the defendant on March 14. There are also four credit card charges for March 14 for FedEx mailings listing petitioner's New York office as the sender.

Petitioner testified regarding the E-ZPass statement that it was his driver who went to New York City on March 12 and that as far as he knew he was in Connecticut. Petitioner also testified he was in Connecticut on March 13 and based on the criminal docket, was in Chicago on March 14.

Monday, March 17 through Friday, March 21. There are three credit card charges for March 17 and one for March 18 showing FedEx mailings from petitioner's New York City law office. There is a credit card charge for \$743.24 at a wine and liquor store in New York City, on

March 19. There are also two FedEx charges for shipments from petitioner's law office in New York City, including one to his law office in Connecticut on March 19. On March 20, there are three E-ZPass toll charges for bridges in New York City and a plaza on the New York State Thruway. The credit card statement contains two charges, one for a gasoline station and one for a restaurant, both in Connecticut on March 20 and one charge for an office supply store in Montgomery, New York. There is an affidavit from the owner of a wine and liquor store in Connecticut that states petitioner visited there on March 20. On March 21, there is a credit card charge for a pharmacy in Westport, CT, and an affidavit from the manager of the pharmacy that petitioner had a prescription filled that day. Petitioner also provided a printed e-mail correspondence dated March 21 in which a technology company's representative advises petitioner that "tech will be out there today" to service a fax machine at petitioner's Connecticut address.

Petitioner testified that he believed he was in Connecticut on March 17 and assumed he was in Connecticut on March 18. He testified that the wine and liquor charge of March 19 was made by his housekeeper in New York and that the FedEx charge on that day meant he was in Connecticut and the mailing was done by his assistant in New York. Petitioner noted that the two credit card charges on March 20 and the charge on March 21 as well as the repair of his fax machine indicate he was in Connecticut.

Monday, March 24 through Friday, March 28. There is a docket of a divorce case in Danbury, CT, that indicates the court issued a memorandum of decision on March 26. Petitioner is not mentioned on the docket.

Petitioner testified there was no reason to believe he was not in Connecticut on March 24 and 25, and was in Danbury on March 26 because of the divorce case. He assumed he was in Connecticut because there were no credit card charges in New York on March 27 and 28.

Monday, March 31 and Tuesday, April 1. There are credit card charges for gasoline on March 31 and a restaurant and limousine services on April 1, all in Connecticut. There is also a charge for the purchase of train tickets, made in New York, on April 1. Petitioner testified that based upon the gasoline and restaurant charges, he was in Connecticut on March 31. Petitioner proceeds with his testimony by noting that the April 1 limousine charge is not indicative of him actually being in Connecticut on April 1.

Friday, April 4. There is a receipt for petitioner's airline ticket flights round trip from Newark Airport to Atlanta, returning at 7:19 P.M. the same day. There are also credit card charges for an office supply store in Montgomery, New York, a limousine service in Long Island City, New York and the mailing of two shipments from petitioner's New York office.

Wednesday, April 9. The docket of the criminal case in Chicago indicates that the judge issued a minute order following an oral motion by the prosecutor. There is no indication of an appearance by petitioner.

Saturday, April 12. There is a \$508.75 credit card charge at an audio/video store in New York City. For this day, petitioner offered an e-mailed order confirmation, dated April 11, for the sale of a notebook computer totaling \$2,649.99. April 11 was not among the disputed days. Petitioner testified that he specifically recalls ordering a computer from his office in Connecticut but does not acknowledge that two separate transactions occurred nor that the computer was actually ordered on the previous day.

The parties had previously agreed that petitioner was in New York on April 10, 11 and April 13.

Monday, April 14. There is a credit card charge for an Amtrak counter sale for tickets from Wilmington, Delaware, to New York City. There are also two charges for FedEx mailings from petitioner's New York law office.

The parties agreed that petitioner was in New York on April 15.

Wednesday, April 16 and Tuesday April 22. There is a receipt from a resort in California that states petitioners arrived on April 16 and departed on April 22. Petitioner testified he and his wife left on April 16 from Connecticut and upon their return went directly to Connecticut.

Wednesday, April 23 and Thursday, April 24. There are credit card charges each day for a pizzeria in New York City. There is also a FedEx shipping charge for a mailing from petitioner's New York law office. Petitioner testified that he had no reason to believe he was in New York City on April 23 and assumed he was in Connecticut on April 24.

Friday, April 25 and Monday, April 28. There is a credit card charge for a restaurant in Connecticut on April 25, as well as two FedEx charges for mailings sent from petitioner's New York law office. There is a credit card charge for a pharmacy in Connecticut on April 28, an affidavit from the pharmacy's manager stating that petitioner had filled a prescription and an e-mail from petitioner indicating that he was not in Manhattan on this day. Petitioner testified that he was in Connecticut on April 28, and not in Manhattan. In addition, the parties agreed petitioner was not in New York City April 26 and 27.

Tuesday, April 29 and Wednesday, April 30. There is a credit card charge for a restaurant in New York City on April 29. Petitioner testified he had no reason to believe he was in New York on April 30, but did not testify as to his whereabouts on April 29.

The parties agreed petitioner was in New York May 1, 2 and 3.

Sunday, May 4 through Tuesday, May 6. Petitioner testified he had no reason to believe he was in New York on May 4. There is a credit card charge for a restaurant in New York City on May 5. Petitioner testified he was in Connecticut on May 6 based upon the affidavit of the owner of the wine and liquor store located in Weston, CT, that states petitioner visited the store on May 6.

Thursday, May 15 and Friday, May 16. Petitioner testified that because there were no credit charges in New York on either day, he had no reason to believe he was there, and that he was in Connecticut both days.

Monday, May 19 through Saturday, May 24. There is a credit card restaurant charge on May 20 in New York City. There are airline ticket receipts indicating petitioner flew on May 21 to Chicago from New York City and returned the same day. On May 20 and 21, there are four FedEx charges for shipments from petitioner's New York law office to his Connecticut law office. On May 22, there are credit card charges for a restaurant and for a plumber in New York City, and four charges for FedEx shipments from the New York office. There is a credit card charge on May 23 for a restaurant in New York City. On May 24, there is a credit card charge for a restaurant in New York City.

Petitioner testified he was in Connecticut on May 19. He testified that the charge on May 20 for the restaurant did not mean he was there. He explained the restaurant has his credit card on file and he has sent people there to use his membership and card. He testified he had no reason to believe he was in New York on May 20. Petitioner further testified that he was in Chicago on May 21, as indicated by the airline tickets and FedEx shipment to his Connecticut office. Petitioner testified that on May 22, there were plumbers working at the apartment in New

York City, but he was not there, and the housekeeper or his law office assistant ordered from the restaurant. Petitioner testified that the restaurant charge on May 23 did not necessarily mean he was there, that he could have been there, but was not positive in light of the fact he was definitely in New York City on May 24.

The parties previously agreed petitioner was in New York on Sunday, May 25 through Wednesday, May 28.

Thursday, May 29 through Saturday, May 31. There are credit card charges in New York City for a restaurant on May 29, and an electronic store in New York City and White Plains, New York on May 30 and 31. Petitioner testified he believed he was in Connecticut on May 29, and did not believe he was in New York on May 30 and 31.

Monday, June 2 and Tuesday, June 3. There is a limousine credit card charge in Connecticut on June 2, and petitioner testified he was in Connecticut. On June 3, there is a pharmacy credit card charge and an affidavit from the pharmacy's manager stating that petitioner visited the pharmacy. However, on June 3, there are also charges for a New York City restaurant, limousine service and four FedEx shipments from petitioner's New York law office.

Friday, June 6. There is a credit card charge for limousine service in Long Island City, New York, as well as a charge for FedEx shipping from petitioner's New York law office.

Wednesday, June 11. There is an e-mail that states petitioner was in Connecticut and a credit card charge for automobile repairs in Connecticut. An affidavit from a Connecticut hardware store manager attests to petitioner visiting the store this day. There is also a credit card charge for a courier service in New York City. Nonetheless, petitioner testified to being in Connecticut this day.

Saturday, June 14. There is a credit card charge for parking in New York City and petitioner's New York State E-ZPass statement indicating two charges for toll fees in New York.

Tuesday, June 17. Petitioner testified he was in Connecticut.

Friday, June 20. There are credit card charges for a restaurant and a pharmacy, both in Connecticut, and an e-mail indicating petitioner's presence in Connecticut.

Wednesday, June 25. Petitioner testified he had no reason to believe he was anywhere but Connecticut. Petitioner's credit card statement reflects a FedEx shipment from his New York law office.

Friday, June 27. There are credit card charges for a gasoline service station and a restaurant, both in Connecticut.

Friday, July 4. Petitioner testified that every year he and his wife have a barbecue at their house in Connecticut. Petitioner's credit card statement indicates a charge for a Montgomery, New York office supply store on this day.

Monday, July 7 through Friday, July 11. There is an e-mail indicating petitioner was in Connecticut until the afternoon of July 7. There are three restaurant credit card charges on July 8: one charge in Connecticut and two charges at different restaurants in New York City. On July 9, there is a credit card charge for gasoline in Connecticut. There is also a July 9 FedEx charge for a letter mailed from petitioner's New York office. There are three restaurant credit card charges, one in Connecticut and two in New York City, on July 10. There are also two charges for FedEx shipments from petitioner's New York law office and a courier service in New York City. On July 11, there is a conference call receipt indicating the telephone call was initiated in Connecticut and a FedEx charge for a shipment originating at petitioner's New York law office. Petitioner testified he was in Connecticut July 7, 8, 9 and 11. He explained that the restaurant

charge on July 8 did not necessarily indicate he was there. He offered no testimony as to his whereabouts on July 10.

Monday, July 14 and Tuesday, July 15. On July 14, there are New York E-ZPass toll charges for three bridges in the New York City area. There is a credit card charge for parking in New York City and a FedEx charge for a shipment from another individual in New York City to the law office in Connecticut. On July 15, there is an E-ZPass toll charge at 3:35 P.M. for a bridge in the New York City area, credit card charges for two FedEx shipments from petitioner's New York office, including one to his Connecticut office, and an e-mail of July 10 indicating petitioner would be in Connecticut on July 15 for an 11:30 A.M. meeting.

Petitioner testified he was in Connecticut both days, attending meetings on July 15 in Stamford, CT. He explained the E-ZPass charges as possibly either his former partner or his driver delivering boxes for his meetings or driving his wife to New York City.

Saturday, July 19. There are credit card charges for parking and office supplies in New York and charges for a restaurant and a pharmacy in Connecticut. There is an affidavit from the manager of the pharmacy in Connecticut indicating petitioner had a prescription filled. There is an E-ZPass toll charge for a New York City bridge. Petitioner testified he was in Connecticut.

Wednesday, July 30. Petitioner testified that he appeared as defense counsel in the United States District Court, Eastern District of Pennsylvania, on July 28, arriving on July 27 in Philadelphia, through July 31. The criminal docket of the case indicates trial proceedings July 28 through July 31. The docket report provided by petitioner indicates him to be one of two attorneys representing the defendant. However, there is no specific notation of petitioner's presence in the court on any days. There is a credit card charge for a New York City restaurant on this day.

Monday, August 4 and Tuesday, August 5. For August 4, there is an e-mail that states that petitioner was in Connecticut all day and an E-ZPass toll charge for a New York City bridge at 11:20 P.M. There were also four FedEx shipments from petitioner's New York law office and a New York City courier service reflected on petitioner's credit card statement for August 5.

Friday, August 8. There is a credit card charge from a retail store in New York City. Mr. Puccio testified it was for the placement of wheels on a large litigation bag. He further testified that his law office assistant had brought the bag to the store and picked it up. Petitioner believed he was in Connecticut.

Sunday, August 10 through Tuesday, August 12. On August 10, there is a credit card charge for parking in New York City and an E-ZPass toll charge for a New York City bridge. Petitioner testified that the parking was in a client's building that had his credit card on file and was used by his driver. On August 11, there is a credit card charge in Connecticut, an e-mail confirming a conference call that was to take place at 4:00 P.M., and the affidavit from the manager of a hardware store in Connecticut stating petitioner visited the store this day. On August, 12, there is a credit card charge for an automobile dealership service in Connecticut.

Wednesday, August 13. There are credit card charges for a New York City restaurant in the amount of \$50.00, and a restaurant and a pharmacy, both in Connecticut. There is an Amtrak confirmation for travel between Stamford, CT, and Philadelphia, PA, and the docket for the criminal proceedings in Philadelphia indicating the court's announcement of its decision in the case. There are also affidavits from the manager of a pharmacy in Connecticut stating petitioner visited this day and the general manager of the New York City restaurant explaining that petitioner's credit card charges from the restaurant do not necessarily mean that he visited the restaurant the day of the charge.

Thursday, August 14. There is an E-ZPass toll charge for a New York City bridge and a credit card charge for a FedEx shipment from petitioner's New York law office.

Friday, August 15 and Saturday, August 16. On August 15, there are credit card charges for restaurants and a food store, both in Connecticut. On August 16, there are credit card charges for a restaurant in Bethel, CT, and a retail store in Westport, CT. Petitioner also provided the affidavit of a Connecticut wine store's manager attesting to petitioner having visited the store on this day. There is also a lodging charge in New York City for \$39.10. Mr. Puccio testified that on Saturdays, petitioners often go to the cinema located in Bethel CT, and eat at the restaurant indicated on the credit card statement.

Thursday, August 21 and Friday, August 22. On August 21, there is a credit card charge for a restaurant in Connecticut and two FedEx shipping charges for letters sent from petitioner's New York law office, including one sent to his Connecticut law office. On August 22, there are credit card charges for a restaurant and service station in Connecticut and for theater tickets in New York City.

Monday August 25 through Saturday, August 30. On August 25, there are four FedEx shipping charges on petitioner's credit card statement originating in New York City. Two of the shipments were shipped to petitioner's Connecticut law office. On August 26, there is a FedEx charge for a shipment from the New York law office to the Connecticut law office and also a restaurant charge in New York City. On August 27, there are four FedEx charges for letters mailed from New York, three of which were sent to petitioner's Connecticut law office. There is also a credit card charge for a pharmacy in Connecticut accompanied by an affidavit from the pharmacy's manager attesting to petitioner's visit on this day. On August 28, there are five charges for FedEx shipments from petitioner's New York law office to his Connecticut law

office and a charge for a Connecticut restaurant. There is also a printed e-mail correspondence sent by petitioner dated August 25, in which he states that he will not be in Connecticut until late afternoon on this day. There are also five E-ZPass toll charges for New York toll plazas. On August 29, there are two credit card charges for FedEx shipments from petitioner's law office in New York to his law office in Connecticut, a credit card charge for a carwash in Connecticut, a charge for an office supply store in Montgomery, New York and e-mails that indicate petitioner was to attend a meeting in Connecticut. On August 30, there is a credit card charge for a pharmacy in Connecticut, a FedEx charge for a shipment from petitioner's New York office to his Connecticut office and four E-ZPass charges for toll plazas in New York and New Jersey.

Petitioner testified that the FedEx charges indicated that he was not in New York on either the days the shipment shipped or the following day of receipt in Connecticut, because if he was in New York, there would be no reason to FedEx the documents to Connecticut. He also testified that on August 30, he attended the funeral of his client's father-in-law that was held in New Jersey which was the reason for that day's toll charges.

Monday, September 1 through Thursday, September 4. On September 1, there is an E-ZPass toll charge for a New York City bridge. There are also credit card charges for a restaurant and limousine service, both in Connecticut. For September 2, there are credit card charges for two restaurants in New York City. On September 3, there is a credit card charge for a home furnishings store in Connecticut, three charges for a Montgomery, New York office supply store and a charge for a restaurant in New York City. There is also an August 21 e-mail in which petitioner states that he will be in Minneapolis, Minnesota on this day. On September 4 there are four credit card charges for FedEx shipments from petitioner's New York law office.

Petitioner testified it was his driver picking up and returning a client to Connecticut resulting in the E-ZPass charge on September 1, and he could not reconcile the September 2 restaurant charges with his assertion that he was in Connecticut that day. Petitioner testified he was in Minnesota on September 3 and attributes the home furnishing charge to his wife.

Petitioner testified he had no reason to believe he was in New York on September 4, and he believed he was in Connecticut on this day.

Monday, September 8 through Friday, September 12. On September 8, there are credit card charges for parking and office supplies in New York City and three charges for FedEx shipments sent from petitioner's New York law office. There is also a charge for a clothing store in New Jersey and another charge for a restaurant in Connecticut. An affidavit from the owner of the office supply store states that this and all of petitioner's other payments of invoices during 2003 were paid "through the means of a telephone charge on his credit card which we have on file." There are E-ZPass charges for New York toll plazas. On September 9, there is an itinerary receipt for a round-trip airline flight from New York to Minneapolis, Minnesota, returning on the same day. On September 11, there is a lodging charge in New York City and petitioner's e-mail dated September 11 stating he would be in Washington, D.C., all day. On September 12, there is an e-mail from petitioner to his law office assistant requesting a fax be sent to petitioner in Connecticut.

Petitioner testified he was at the restaurant in Connecticut on September 8, but not in the New Jersey store. He also testified that he was in Minnesota on September 9, in Washington, D.C., on September 11, and in Connecticut on September 12, which is his birthday and his wife took him out to dinner.

Tuesday, September 16 through Thursday, September 18. On September 16, there are credit card charges for three FedEx shipments from the New York law office. On September 17, there is a credit card charge for a pharmacy in Connecticut (further corroborated by an affidavit) and a receipt for a conference call hosted by petitioner in Connecticut. There are also four charges for FedEx shipments from petitioner's New York office including one to his Connecticut office. On September 18, there are credit card charges for office supplies and gasoline in Connecticut, and five charges for FedEx shipments from petitioner's New York office and e-mails indicating petitioner attended meetings in Connecticut. There is also an e-mail, dated September 18, sent by petitioner in which he requests faxes be sent to a Connecticut address.

Monday, September 22 through Friday, September 26. On September 22, there are credit card charges for gasoline in Connecticut, a FedEx shipment from petitioner's New York office, airline tickets from New York to Washington, D.C., returning the same day, and for a restaurant in Washington, D.C. On September 23, there is a credit card charge for parking in New York City, three FedEx charges for shipments from petitioner's New York law office, including one sent to his Connecticut law office, and E-ZPass charges for New York toll plazas. On September 24, there are two credit card charges for FedEx shipments from the New York law office. On September 25, there is a credit card charge for train tickets, purchased in New York, and an e-mail indicating petitioner would be in Connecticut at 2:00 P.M. On September 26, there are credit card charges for a wine and liquor store in Connecticut, office supplies in New York City and two FedEx shipments sent from the New York law office.

Petitioner testified he was in Washington, D.C., on September 22 and in Connecticut for the remainder of the week. He based this on the FedEx shipments being mailed to him from his law office assistant in New York. As to the train tickets, he explained that he often purchased

tickets in Westport, CT, for future use, so as to avoid having to buy them if he was running late for the train.

Monday, September 29. There is a credit card charge for a restaurant in New York City and an E-ZPass toll charge for a New York City bridge.

Wednesday, October 1 through Friday, October 3. On October 1, there is a travel itinerary for airline flights from Westchester County Airport to Chicago, Illinois, returning the same day. There is a credit card charge in Chicago for a restaurant and another for limousine service in Connecticut. On October 2 and 3, there are credit card charges for round-trip airline tickets to and from New York and Washington, D.C., a lodging charge in Washington, D.C., a gas station in Connecticut, a limousine service in Long Island City, New York, and a FedEx letter mailed from petitioner's New York law office. On October 2, there are two E-ZPass charges for the same New York City bridge, and on October 3, two charges for the same bridge again as well as one charge for a New York toll plaza. There are various e-mails indicating petitioner was in Chicago on October 1 and Washington, D.C., on October 2 and 3. Petitioner testified that he was in Chicago October 1, Connecticut and Washington, D.C., on October 2 and 3 and was in New York these two days only at the airport.

Monday, October 6. There is a credit card charge for a restaurant in Connecticut. There are e-mails in which petitioner instructs his law office assistant to send faxes to petitioner in Connecticut. Petitioner testified that he was not in New York on this day.

Thursday, October 9. There are credit card charges for petitioners round-trip flights from New York to Nantucket, MA. There are also charges for a Nantucket hotel, an office supply store in Montgomery, New York, an electronics store in Flushing, New York, as well as four FedEx shipments from petitioner's New York law office, including one sent to petitioner's

Connecticut office. Petitioner testified that he was driven from Connecticut to the airport in New York where he departed for Nantucket, MA.

Monday, October 13. There are credit card charges for a restaurant and for gasoline, both in Connecticut. Petitioner testified that he returned from Nantucket, MA, directly to Connecticut.

Tuesday, October 14. There are two credit card charges for parking in New York City and a charge for a restaurant in Stamford, CT. There are four FedEx charges for shipments from petitioner's New York law office. There are three E-ZPass charges for New York toll plazas.

Petitioner testified that he was in Stamford, CT, with co-counsel preparing for a court appearance in Hartford, CT, on October 15 and 16.

Wednesday, October 15 and Thursday, October 16. Documents from a criminal proceeding in Hartford, CT, indicate petitioner's appearance on both days. There is also an e-mail, dated October 15, sent to petitioner to advise him of items shipped to him in Connecticut via overnight mail. A second e-mail, dated October 9, references petitioner's anticipated attendance at the proceedings both days.

Friday, October 17 and Saturday, October 18. On October 17, there is a credit card charge for a restaurant in New York City, two charges for an office supply store in New York, a FedEx charge for a package sent from petitioner's New York office to his Connecticut office, and an E-ZPass charge for a New York City bridge. On October 18, there are two E-ZPass charges for New York tolls and credit card charges for gasoline and a restaurant in Connecticut, and parking in New York City. Petitioner testified to being in Connecticut both days.

Monday, October 20 and Tuesday, October 21. On October 20, there are credit card charges for a restaurant and a liquor store, both in Connecticut, and an e-mail indicating

petitioner's presence at a meeting in Connecticut. On October 21, there is a credit card charge for office supplies in Connecticut and two charges for FedEx letters sent from petitioner in New York. There is an affidavit from the manager of a Connecticut pharmacy attesting to petitioner's visit on October 21. Petitioner testified he was in Connecticut both days.

Thursday, October 30. Petitioner testified that he did not know where he was, but that he must have been in Connecticut because there were no credit card charges elsewhere. There is a charge at a Montgomery, New York office supply store.

Saturday, November 1. There are credit card charges for gasoline and a restaurant in Connecticut and parking in New York City. There are E-ZPass charges for two New York tolls. Petitioner testified that he was "virtually certain" that the E-ZPass charges resulted from when his driver picked up a witness flown in from Chicago and drove him to Connecticut.

Monday, November 3 and Tuesday, November 4. On November 3, there are credit card charges for limousine service and a restaurant in Connecticut, for parking in New York City and for five FedEx shipments from petitioner's New York law office. There are three E-ZPass charges for New York tolls. On November 4, there are three credit card charges for a pharmacy in Connecticut (accompanied by an affidavit in support of the visit), a credit card charge for limousine service in Long Island City, New York and a FedEx charge for a letter sent from petitioner's New York office. There is an e-mail indicating petitioner's presence at a meeting in Connecticut. There is also an affidavit attesting to petitioner's visit to a Connecticut spirit shop.

Petitioner testified that he was in Connecticut on both days, specifically referring to the restaurant charge on Monday and the e-mail on Tuesday.

Friday, November 7. There are credit card charges for a restaurant in Fairfield, CT, parking and clothing, both in New York City and a FedEx charge from the petitioner's law office

in New York City to his office in Connecticut. There are two E-ZPass charges for New York tolls. There is a docket for a court proceeding in Danbury, CT, that indicates petitioner's client filed a petition for certification. Petitioner testified he was in Danbury, CT, during the day and in Fairfield, CT, at night and that he rarely goes to the clothing store where the charge originated because most of his orders are made via telephone.

Monday, November 10. There are credit card charges for shoes, clothing and parking, each in New York City, and for a restaurant in Connecticut. There are three E-ZPass charges for New York tolls. There is an e-mail, dated November 9, in which petitioner tells a colleague that he will be attending a hearing on November 10 and 11. Petitioner testified that based on this email, he was in court in Hartford, CT, on November 10.

Tuesday, November 11 and Wednesday, November 12. There is a transcript from a criminal court proceeding in Hartford, CT, indicating petitioner's presence there on both days. There is also a credit card charge for a restaurant in Connecticut on November 11.

Friday, November 14. There are credit card charges for a restaurant and parking, both in New York City, and three FedEx shipments from petitioner's New York City office, sent to his office in Connecticut. There are two E-ZPass charges for New York toll plazas.

Friday, November 21. There are two FedEx credit card charges for shipments from the law office in New York City, one sent to petitioner's office in Connecticut. Petitioner testified that based on the FedEx charge, he was in Connecticut.

Saturday, November 22. There are credit card charges for a restaurant, gasoline and two charges for parking, all in New York City. There are credit card charges for a restaurant and two for clothing, all in Connecticut. There is an E-ZPass charge for a New York City bridge.

Monday, November 24 through Wednesday, November 26. Petitioner testified he was in Connecticut throughout this period, as it was the week of Thanksgiving. He stated that on Wednesday, November 26, petitioners left Connecticut for a hotel located in Lenox, MA, where they stayed until November 30. There is a credit card charge for gasoline in Connecticut on November 24. There is a credit card charge for parking in New York City on November 25, a FedEx charge for shipping from petitioner's New York office as well as two E-ZPass charges for a New York City bridge. The invoice from the hotel in Lenox, MA, indicates petitioners' arrival on November 26. Also on November 26, two FedEx charges show letters were mailed from petitioner's New York office.

Monday, December 1 and Tuesday, December 2. On December 1, there are credit card charges for a limousine service and a restaurant, both in Connecticut and office supplies in New York. There is an e-mail from petitioner that instructs the recipient that petitioner can be contacted at a Connecticut number on December 1. On December 2, there is a credit card charge for a restaurant in Connecticut.

Wednesday, December 3. Petitioner's credit card statement reflects two charges for parking and one restaurant in New York City. There are also two E-ZPass toll charges for New York City bridges. Petitioner testified he was in New York City.

Thursday, December 4. There is a credit card charge for clothing in New York City and one for a pharmacy in Connecticut (accompanied by an affidavit by the pharmacy's manager in support of petitioner having filled a prescription this day). Petitioner testified that he purchases shirts from the clothing store, which has his measurements, so the ordering is done by telephone.

Friday, December 5. There is a credit card charge for a restaurant in Connecticut and five charges for FedEx mailings from petitioner's New York office. Petitioner testified he was in Connecticut.

Monday, December 8. There are credit card charges for gasoline and a restaurant in Connecticut, a limousine service in Long Island City, New York and a restaurant in New York City. There are two E-ZPass charges for a New York City bridge, one in the afternoon, and one in the evening. An affidavit from the manager of the hardware store in Westport, CT, states that petitioner visited there. Petitioner testified he was in Connecticut.

Tuesday, December 9. There is a credit card charge for seven FedEx shipments sent from New York City, and an affidavit from the owner of a liquor store in Weston, CT, stating that petitioner visited there. Petitioner testified he was in Connecticut working on a case, and provided the docket report for the case that does not show any activity on this day.

Wednesday, December 10. There is a credit card charge for a pharmacy in Connecticut, accompanied by a supporting affidavit from the pharmacy's manager, and a charge for a FedEx shipment from New York City. There are E-ZPass toll charges for two New York City bridges and a New York toll plaza. There is an e-mail from petitioner indicating he would be in Connecticut in the late morning. Petitioner also provided the affidavit of a liquor store owner, stating petitioner had visited his store on this day. Petitioner testified he was in court in Hartford, CT, all day and then stated he was in other places in Connecticut as well.

Thursday, December 11. There is a credit card charge for a New York clothing store. Petitioner testified he was in Connecticut.

Friday, December 12. There are credit card charges for a pharmacy and a restaurant, both in Connecticut. There are also two charges for FedEx shipments mailed from petitioner's New

York City office. Petitioner testified that he was in Connecticut, and not in New York, on this day.

Tuesday, December 16 and Wednesday, December 17. Two e-mails offered by petitioner indicate that he would be in court in Hartford, CT, on both days. The docket report for the criminal proceeding held in United States District Court, New Haven, CT, shows motion hearings held on both days. Petitioner's credit card statement also reflects charges for a New York clothing store, a train ticket purchased in New York and a FedEx shipment sent from petitioner's New York office to his Connecticut office on December 16. On December 17, petitioner's statement shows charges for the same New York clothing store, a New York courier service and a FedEx shipment from petitioner's New York office.

Friday, December 19. E-mails indicate petitioner attended a funeral in New Jersey. An affidavit from a Connecticut wine store manager states petitioner visited the store. The docket from a proceeding held in the United States District Court of Connecticut shows a telephone conference was held. Petitioner testified he was in New Jersey and Connecticut this day.

Monday, December 22. There is a credit card charge for gasoline in Connecticut and two charges for FedEx mailings from petitioner's New York office. Petitioner testified he was in Connecticut..

Tuesday, December 23. There are credit card charges for a restaurant in Connecticut and parking in New York City. There are also four FedEx charges, sent from New York, one of which is from the New York law office to the Connecticut law office. There are two E-ZPass toll charges for New York City bridges at approximately 8:00 A.M. and 4:00 P.M. Petitioner testified that he was in Connecticut and that his assistant sent the FedEx to him there.

Monday, December 29. No documentation or testimony was offered.

Wednesday, December 31. Petitioner testified that he was in Connecticut on this day, New Years Eve.

7. The E-ZPass statements contain four different tag number/plate designations.

8. The affidavit from the general manager of the restaurant which is part of a club in New York City states that members are billed an annual fee and minimum quarterly amounts for food charges whether or not the charges are actually incurred. Periodic invoices are paid by a credit card, which is on file. According to the affidavit, payments made by credit card on a particular date do not necessarily mean that petitioner was at the restaurant on that day.

The affidavit from the pharmacy in Weston, CT, states that petitioner had his prescriptions filled on particular days.

The affidavits from the manager of the hardware store in Westport, CT, and the owner of a wine and liquor store in Weston, CT, state that petitioner visited on particular days.

The affidavit from the co-owner of an audio/video store in New York City stated that to the best of his recollection, petitioner never made payments at the store, but they were made over the telephone on a credit card on file.

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.”

Pursuant to Tax Law § 605(b)(1), a resident individual means, in pertinent part, an individual:

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

Administrative Code § 11-1705(b)(1)(A) and (B) contains an identical definition of resident individual to those given above, except for the substitution of the term “city” for “state.”

The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources (*Matter of Donavan*, Tax Appeals Tribunal, February 24, 2004).

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State and City. Since the parties agree that petitioners are domiciliaries of Connecticut and not New York State, this matter involves only the second, or “statutory resident,” basis upon which New York State and City resident tax status may apply pursuant to Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B), with their dual predicates for such tax status being (1) the maintenance of a permanent place of abode in the state (city) and (2) physical presence in the state (city) on more than 183 days during the year in issue (2003). Further narrowing the issue in this case, petitioners admitted that they maintained a permanent place of abode, the cooperative apartment, in New York City during the year in issue. Thus, the sole matter in question here is the second prong upon which statutory resident status is premised, namely whether petitioner Thomas P. Puccio was physically present in New York City on more than 183 days in the year 2003.

C. Tax Law § 697(a) allows the Commissioner of the Division of Taxation to promulgate rules and regulations necessary to enforce the provisions of Tax Law Article 22. The relevant

regulation addressing the question of whether an individual spent more than 183 days in the particular jurisdiction, applicable to both New York State and New York City, is 20 NYCRR 105.20(c), which prescribes the following day-counting rule:

In counting the number of days spent within and without New York State [or City], presence within New York State [or City] for any part of a calendar day constitutes a day spent within New York State [or City], except that such presence within New York State [or City] may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State [or City], or while traveling through New York State [or City] to a destination outside New York State [or City]. (20 NYCRR 105.20[c]; 20 NYCRR 295.2[a], 295.3[a].)

D. In order to overcome the deficiency asserted in this case, petitioner has the burden of proving by clear and convincing evidence that he was not present in New York City for more than 183 days during the year 2003 (*see Matter of Kornblum v. Tax Appeals Trib. of State of N.Y.*, 194 AD2d 882, 599 NYS2d 158 [3d Dept 1993]; *Matter of Smith v. State Tax Commn.*, 68 AD2d 993, 414 NYS2d 803 [3d Dept 1979]; *Matter of Holt*, Tax Appeals Tribunal, July 17, 2008). Specifically, as indicated by the Division's regulations, an individual like petitioner, who claims a domicile outside the city, "must keep and have available for examination . . . adequate records to substantiate the fact that such person did not spend more than 183 days . . . within [the City]" (20 NYCRR 105.20[c]). Although petitioner did not keep a contemporaneously maintained diary or calendar as to his whereabouts, he may meet his burden of proof through testimonial evidence, documentary evidence, or a combination of the two (*see Matter of Armel*, Tax Appeals Tribunal, August 17, 1995; *Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994, *rearg. denied*, Tax Appeals Tribunal, January 25, 1995; *Matter of Moss*, Tax Appeals Tribunal, November 25, 1992). A clearly established "pattern of conduct" from which a taxpayer's location may be determined for a particular day suffices to meet the burden of proof

with regard to that day (*see Matter of Kern*, Tax Appeals Tribunal, November 9, 1995, *confirmed* 240 AD2d 969, 659 NYS2d 140 [3d Dept 1997]), and further that general testimony regarding the “patterns and habits of life” when coupled with supporting documentary evidence, is sufficient to meet the burden of proof (*see Matter of Armel*). In *Matter of Holt*, the Tribunal stated that “[s]tatutory residence cases . . . are very fact intensive and require specific evidence through substantiating contemporaneous records to show a taxpayer’s whereabouts on a day-to-day basis during each year in question. Such records could include not only day calendars but airline tickets, restaurant and hotel receipts and credit card statements.”

The record does establish that, in general, petitioner’s pattern of conduct was to stay in Connecticut on the weekends. However, due to the proximity of petitioner’s office and home in Connecticut to petitioner’s New York City cooperative apartment and office, and after reviewing the documents in the record, it does not appear to be unusual for petitioner to be in Connecticut for one part of a day and New York City for another part. Therefore, credit card charges in Connecticut do not necessarily mean that petitioner could not have also been in New York City the same day.

E. The parties have introduced into the record evidence such as testimony, credit card statements, New York State E-ZPass statements, documents from cases petitioner worked on, e-mails, travel invoices and itineraries and affidavits in an effort to establish petitioner’s whereabouts during the year at issue. The affidavits from the manager of a hardware store in Westport, CT, the manager of a wine store in Norwalk, CT and the owner of another wine and liquor store in Weston, CT, each state that petitioner visited their retail stores on particular dates. Some of these dates match the credit card statements, some do not. More importantly, the affiants do not provide the basis for these conclusory statements, and therefore their contents

were given little weight in making this determination. The manager of the pharmacy in Westport, CT, stated that petitioner had prescriptions filled on particular dates. Here, the affiant provides the basis for his conclusion as to the date prescriptions were filled. Some of these dates match the credit card statements, some do not. The filling of a prescription on a particular date does not necessarily signify that petitioner was present in the pharmacy on a particular date, given the ease by which prescriptions may be telephoned into a pharmacy and coupled with the absence of credit card charges for the pharmacy for some dates that the affiant lists. Therefore, unless a date that a prescription was filled was also a date matching a pharmacy charge on petitioner's credit card statement, the affidavit was given little weight in making this determination. The affidavit from the co-owner of an audio/video store in New York City states that to the "best of my recollection," petitioner never made payments at the store, but that payments were made over the telephone using a credit card on file with the store. This qualification certainly reduces the weight given to the statements in the affidavit, although it was still considered in this determination. The affidavit from the owner of a New York City technology service provider stated that petitioner, a client of the affiant's during the year in issue, "never made any payments to us at our place of business." Affiant stated that petitioner's invoices, for which credit card charges were reflected on petitioner's statement, were made "through the means of a telephone charge on his credit card which we have on file." Finally, the affidavit from the general manager of a private New York City club which included a restaurant stated that members were charged annual fees and a minimum quarterly amount for food charges, and that periodic invoices were paid by an on-file credit card and that these payments made did not necessarily indicate that petitioner was present at the restaurant on the dates when charges appear on the credit card statements. Unfortunately, no information was provided as to when these annual fees and

minimum food costs were charged or the amounts of the fees or minimum food charges, and the amounts of the charges appearing on the credit card statements vary greatly. Without such information, it was impossible to determine the reason for the charges on the credit card statements, and therefore, this affidavit was given little weight in this determination.

F. The determination of whether testimony is credible rests with the trier of fact, “who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony” (*Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992). A determination of testimonial credibility rests on the two components of “competency,” which is the “[o]portunity and capacity to perceive combined with capacity to recollect and communicate[,]” and “veracity,” which is the “truthfulness of the witness” (*Matter of Impath, Inc.*, Tax Appeals Tribunal, January 8, 2004). Furthermore, as the Tax Appeals Tribunal stated in *Matter of Robertson* (September 23, 2010):

Any additional evidence relied on in support of specific testimony given, referenced to refresh the recall of a witness, or otherwise augmenting the testimony given concerning a claim of event, date, time and place, can itself offer insight as to whether the witness’s recall is credible and correct and supports the result as to the “place conclusion” desired by the taxpayer. So too, careful and objective review of such evidence and of any accompanying testimony or other evidence may reveal significant inconsistencies weighing against the likelihood that the testimony, though honestly given, might through the fallibility of human memory, simply be incorrect or not clear and convincing evidence. It is against this background that the evidence in this case, including the testimonial evidence, concerning petitioner’s whereabouts on the disputed days must be evaluated.

G. Petitioner’s testimony as to his whereabouts was based almost exclusively on the credit card statements, and to a lesser extent on the E-ZPass statements. Where there existed a credit card charge in Connecticut, petitioner testified that he was therefore in Connecticut. Petitioner attempted to explain away certain credit card charges for restaurants in New York City by testifying that either his housekeeper or law office assistant would use the particular food

establishment for takeout when he was in Connecticut. Petitioner testified that certain restaurants, the audio/video store and a clothing store had his credit card on file, and other individuals had the ability to charge items without his presence. No information was provided as to whether any of the retail establishments in Connecticut had petitioner's credit card on file. Petitioner also testified that whenever a FedEx charge appeared for shipments between his law offices in New York City and Connecticut, it signified he was not in New York City, and that his law office assistant was doing the mailing. Certain E-ZPass charges were attributed by petitioner to his driver or former partner. Unfortunately, no testimony or affidavits were submitted in support of these allegations, except for the affidavits from the co-owner of the New York City audio/video store and the technology service provider. Certainly, testimony or an affidavit from petitioner's housekeeper, driver, former partner or law office assistant would have added weight to petitioner's testimony. It appears that the testimony or an affidavit from petitioner's law office assistant was possible to obtain, as the affidavits of the general manager of the New York City restaurant, the co-owner of the audio/video store and the New York City technology service provider were notarized by the assistant, Mr. Medina, on April 22, 2008, and the affidavits from the manager of the pharmacy, manager of the hardware store, owner of the wine and liquor store and manager of the other wine store were notarized by Mr. Medina on January 14, 2010, 13 days prior to the hearing date. Petitioner had the opportunity to present Mr. Medina as a witness or, at the minimum, provide an affidavit in support of his own testimony, but chose not to do so.

Under the circumstances, it is reasonable to take the strongest possible negative inference from petitioner's failure to provide supporting evidence (*see Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997). These factors, along with the proximity of petitioner's Connecticut home to the cooperative apartment and law office in New York City and the frequent travel between his

Connecticut residence and New York City, diminish the weight to be given to petitioner's testimony, especially where it contrasts with the documentary evidence. Furthermore, given the passage of time from the year at issue to the hearing, it is determined that petitioner's testimony is insufficient to overcome documentary evidence showing New York City activity. It is further noted that the documentary evidence, which in the main forms the basis of the determination on the statutory residence issue, is not without its flaws. Obviously, either petitioner could have made the New York City credit card charges or driven into New York City. On the contrary, either petitioner could have made the credit card charges in Connecticut. However, such flaws notwithstanding, the documentary evidence, which includes the credit card statements and E-ZPass statements, is the most credible evidence in the record on the issue of statutory residency.

H. It is noted that the E-ZPass statements for the year at issue contain four different tag number/plate designations. No explanation was provided as to the reasons for the different designations, to which automobile they applied or the driver of such automobiles. Therefore, in determining petitioner's whereabouts on the disputed days, it is concluded that petitioner was the driver or was present in the vehicle in each instance where a charge appears on the E-ZPass statements indicating travel to and from New York City.

I. Based on the above, and upon review of the evidence in the record with respect to the 174 days now remaining in dispute, the following conclusions are reached:

Monday, January 13. Credit card records and the absence of any evidence of other activity establish this as a non-New York City day.

Tuesday, January 14. Petitioner's testimony and absence of any evidence of other activity establish this as a non-New York City day.

Wednesday, January 15. A credit card record showing a restaurant charge establishes this as a New York City day.

Thursday, January 16. A credit card charge in New York City and absence of any mention of petitioner on the court docket, establish this as a New York City day.

Tuesday, January 21. A credit card charge in Connecticut and absence of any evidence of other activity establish this as a non-New York City day.

Wednesday, January 22. Credit card charges in New York City and lack of testimony establish this as a New York City day.

Thursday, January 23 and Friday, January 24. Credit card charges in Connecticut and absence of any evidence of other activity establish these as non-New York City days.

Monday, January 27. The court docket making no mention of petitioner's presence and lack of credit card charge at the pharmacy in Connecticut compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Wednesday, January 29. Petitioner's vague testimony based upon lack of a credit card charge in New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day. In addition, the parties had previously agreed petitioner was in New York City January 28, 30 and 31.

Tuesday, February 4. Petitioner's testimony concerning FedEx shipments and the absence of any evidence of other New York activity establish this as a non-New York City day.

Wednesday, February 5 through Tuesday, February 11. Credit card charges in New York City, one in Long Island City and the lack of any testimony establish these as New York City days. Another factor in this determination is petitioner's concession that he was in New York City Wednesday, February 12 through Saturday, February 15.

Sunday, February 16. A credit card charge in New York City and absence of corroborating evidence of petitioner's claims to the contrary establish this as a New York City day.

Monday, February 17. Petitioner's vague testimony and absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Tuesday, February 18. Credit card charges in New York City, petitioner's "assumption" concerning one such charge and the criminal docket's failure to place petitioner in Chicago establish this as a New York City day.

Wednesday, February 19 and Thursday, February 20. Absence of any evidence placing petitioner outside New York City compels the conclusion that petitioner did not meet his burden for these dates and thus establish these as New York City days.

Friday, February 21. Credit card charges in New York City establish this as a New York City day.

Saturday, February 22. A credit card charge in New York City and petitioner's admission establish this as a New York City day.

Monday, February 24 through Friday, February 28 The parties agreed petitioner was not in New York City on Sunday, February 23. Petitioner's testimony and the airline tickets, indicating a flight to Chicago, establish that February 24 was a non-New York City day. Airline tickets indicating a return to New York City on February 25, along with the Amtrak tickets to Washington, D.C., on February 26 and returning to New York City on February 27 and credit card charges in New York City on February 27 and 28 establish that February 25 through February 28 are New York City days.

Tuesday, March 4 and Wednesday, March 5. Credit card charges in New York City establish these as New York City days.

Monday, March 10. Affidavit, testimony and absence of any evidence of other activity establish this as a non-New York City day.

Tuesday, March 11. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Wednesday, March 12 through Friday, March 14. E-ZPass statement establishes Wednesday, March 12 as a New York City day. It is also noted that the criminal docket indicates that co-counsel appeared on behalf of the defendant on March 14. Lack of documentation compels the conclusion that petitioner did not meet his burden for Thursday, March 13 and Friday, March 14 and thus establishes these as New York City days.

Monday, March 17 and Tuesday, March 18. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Wednesday, March 19 and Thursday, March 20. Credit card charges in New York City and the E-ZPass statement establish these as New York City days.

Thursday, March 21. Credit card charge in Connecticut, an e-mail and absence of any evidence placing petitioner in New York City establish this as a non-New York City day.

Monday, March 24 through Friday, March 28. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for these dates and thus establishes these as a New York City days.

Monday, March 31. Credit card charges in Connecticut and absence of any evidence placing petitioner in New York City establishes this as a non-New York City day.

Tuesday, April 1. A credit card charge in New York City for purchase of train tickets and absence of any evidence placing him outside New York City establish this as a New York City day.

Friday, April 4. Airline tickets, credit card charges in New York, lack of testimony and agreement that petitioner was in New York City on April 2, 3, 5, 6, 7 and 8 compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Wednesday, April 9. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Saturday, April 12. Credit card charge in New York City and absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day. It is also noted that the parties previously agreed petitioner was in New York City on April 10, 11 and 13.

Monday, April 14. Credit card charges, lack of testimony and petitioner's agreement he was in New York City on April 13 and 15 establish this as a New York City day.

Wednesday, April 16 and Tuesday April 22. Invoice from a California hotel and absence of any evidence placing petitioner in New York City establish these as non-New York City days.

Wednesday, April 23 and Thursday, April 24. Credit card charges in New York City establish these as New York City days.

Friday, April 25 and Monday, April 28. Credit card charges in Connecticut and absence of any evidence placing petitioner in New York City establish these as non-New York City days. It is also noted that the parties agreed petitioner was not in New York City on April 26 and April 27.

Tuesday, April 29 and Wednesday, April 30. A credit card charge in New York City establishes April 29 as a New York City day. Absence of any evidence placing him outside New York City on April 30 compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day. It is noted that the parties previously agreed petitioner was in New York May 1, 2 and 3.

Sunday, May 4 through Tuesday, May 6. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for May 4 and thus establishes this as a New York City day. A credit card charge in New York City establishes May 5 as a New York City day. The affidavit, petitioner's testimony and lack of evidence placing petitioner in New York City are sufficient to meet petitioner's burden of establishing May 6 as a non-New York City day.

Thursday, May 15 and Friday, May 16. Absence of any evidence placing him outside of New York City compels the conclusion that petitioner did not meet his burden for these dates and thus establish these as New York City days.

Monday, May 19 through Saturday, May 24. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for May 19 and thus establishes this as a New York City day. Credit card charges in New York City establish May 20, 22 and 23 as New York City days. Petitioner's presence in New York City on May 19, 20, 22, 23 and 24, his return to New York City from a trip to Chicago on May 21 and

absence of any evidence placing him in Connecticut compels the conclusion that petitioner did not meet his burden for May 21 and thus establishes this as a New York City day. It is noted that petitioner admitted he was in New York City on May 24, and the parties previously agreed petitioner was in New York City on Sunday, May 25 through Wednesday, May 28.

Thursday, May 29 through Saturday May 31. Credit card charges in New York City establish these as New York City days.

Monday, June 2. Credit card charges in Connecticut and absence of any evidence placing petitioner in New York City establish this as a non-New York City day.

Tuesday, June 3. A credit card charge for a New York City restaurant establishes this as a New York City day.

Friday, June 6. A credit card charge for a Long Island City limousine service establishes this as a New York City day.

Wednesday, June 11. An e-mail placing petitioner in Connecticut and a credit card charge for automobile repairs in Connecticut establish this as a non-New York City day.

Saturday, June 14. An E-ZPass statement and credit card charge for parking in New York City establish this as a New York City day. It is noted that petitioner did not testify as to his whereabouts.

Tuesday, June 17. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Friday, June 20. An e-mail placing petitioner in Connecticut, two credit card charges in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Wednesday, June 25. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Friday, June 27. Credit card charges in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Friday, July 4. Petitioner's testimony concerning a barbecue at his house in Connecticut each July 4 is sufficient to meet his burden of establishing this date as a non-New York City day.

Monday, July 7 through Friday, July 11. An e-mail placing petitioner in Connecticut and lack of evidence placing petitioner in New York City establish July 7 and 9 as non-New York City days. Credit card charges in New York City establish July 8 and 10 as New York City days. Conference call receipt establishes July 11 as a non-New York City day.

Monday, July 14 and Tuesday, July, 15. An E-ZPass statement and credit card charge for parking in New York City on July 15 establish these as New York City days.

Saturday, July 19. A credit card charge for parking in New York City establishes this as a New York City day.

Wednesday, July 30. This was originally agreed to be a New York City day. A credit card charge for a New York City restaurant and absence of any evidence placing him outside New York City compels the conclusion that this is a New York City day.

Monday, August 4 and Tuesday, August 5. An E-ZPass statement establishes August 4 as a New York City day. Absence of any evidence placing him outside New York City coupled with New York City charges on August 5 establish this as a New York City day.

Friday, August 8. A credit card charge in New York City establishes this as a New York City day.

Sunday, August 10. An E-ZPass statement and credit card charge for parking in New York City establish this as a New York City day.

Monday, August 11 through Wednesday, August 13. An E-mail and affidavit placing petitioner in Connecticut on August 11, credit card charges in Connecticut on August 11, 12 and 13, Amtrak receipt for August 13 and lack of evidence placing petitioner in New York City establish these days as non-New York City days. A New York City restaurant credit card charge for \$50.00 is determined to be for minimum food charge or annual fee.

Thursday, August 14. An E-ZPass statement establishes this as a New York City day.

Friday, August 15, Saturday, August 16 and Thursday, August 21. Credit card charges in Connecticut and lack of evidence placing petitioner in New York City establish these as non-New York City days.

Friday, August 22. A credit card charge for purchase of New York City theater tickets establish this as a New York City day.

Monday August 25. FedEx charges for shipments from New York City to Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Tuesday, August 26. A credit card charge in New York City establishes this as a New York City day.

Wednesday, August 27. Credit card charges in Connecticut, FedEx charges from New York City to Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Thursday, August 28. An E-ZPass statement and an e-mail establish this as a New York City day.

Friday, August 29 and Saturday, August 30. Credit card charges in Connecticut, lack of evidence placing petitioner in New York City and petitioner's testimony concerning funeral in New Jersey, which is supported by E-ZPass statement, establish these as non-New York City days.

Monday, September 1 through Thursday, September 4. An E-ZPass charge on September 1 and credit card charges in New York City on September 1, 2 and 3 establish these as New York City days.

Monday, September 8. Credit card and E-ZPass statements establish this as a New York City day.

Tuesday, September 9. Airline tickets indicating flight to Minnesota and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Wednesday, September 10. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for this day and thus establishes this as a New York City day.

Thursday, September 11. Credit card charges in New York City establish this as a New York City day.

Friday, September 12. An e-mail placing petitioner in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Tuesday, September 16 through Thursday, September 18. FedEx charges on September 16, credit card charges in Connecticut on September 17 and 18, a conference call receipt and an affidavit for September 17, an e-mail placing petitioner in Connecticut on September 18 and lack of evidence placing petitioner in New York City establish these as non-New York City days.

Monday, September 22. An airline ticket receipt showing a flight to Washington, D.C., credit card charge in Washington, D.C., and credit card charges in Connecticut establish this as a non-New York City day.

Tuesday, September 23. An E-ZPass statement and credit card charge for parking in New York City establish this date as a New York City day.

Wednesday, September 24. A FedEx charge and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Thursday, September 25 and Friday, September 26. A credit card statement establishes these as New York City days.

Monday, September 29. E-ZPass and credit card charges in the City establish this as a New York City day.

Wednesday, October 1. Travel itineraries, credit card statements, hotel receipt and e-mails establish this as a non-New York City day.

Monday, October 6. Credit card statement, e-mails and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Thursday, October 9. Credit card statement showing charges for office supply and electronic stores in New York establish this as a New York City day.

Monday, October 13. Credit card statement, petitioner's testimony and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Tuesday, October 14. An E-ZPass statement and credit card charge for parking in New York City establish this as a New York City day.

Wednesday, October 15 and Thursday, October 16. Documents from Connecticut criminal proceeding and e-mails establish these dates as non-New York City days.

Friday, October 17 and Saturday, October 18. E-ZPass and credit card statements establish these dates as New York City days.

Monday, October 20 and Tuesday, October 21. A credit card statement, affidavit and e-mail placing petitioner in Connecticut, and lack of evidence placing petitioner in New York City, establish these dates as non-New York City days.

Thursday, October 30. Absence of any evidence placing him outside New York compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

Saturday, November 1. An E-ZPass statement and charge for New York City parking establish this as a New York City day.

Monday, November 3. A credit card statement and E-ZPass statement establish this as a New York City day.

Tuesday, November 4. A credit card statement showing a charge for a Long Island City limousine service establishes this as a New York City day.

Friday, November 7. Credit card charges in New York City and E-ZPass statement establish this as a New York City day.

Monday, November 10. Credit card charges in the city and E-ZPass statement establish this as a New York City day.

Tuesday, November 11 and Wednesday, November 12. Transcript of criminal proceeding, a credit card charge in Connecticut and lack of evidence placing petitioner in New York City establish these dates as non-New York City days.

Friday, November 14. Credit card charges in New York City and E-ZPass statement establish this as a New York City day.

Friday, November 21. FedEx charges and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Saturday, November 22. Credit card charges in New York City and E-ZPass statement establish this as a New York City day.

Monday, November 24. A credit card statement and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Tuesday, November 25. A credit card charge for parking in New York City and E-ZPass statement establish this as a New York City day.

Wednesday, November 26. Invoice from a hotel in Massachusetts and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Monday, December 1 and Tuesday, December 2. Credit card charges in Connecticut on both days and an e-mail indicating petitioner's presence in Connecticut on December 1 establish these dates as non-New York City days.

Wednesday, December 3. Petitioner's credit card charges, E-ZPass statement and testimony establish this as a New York City day.

Thursday, December 4. A credit card charge in New York City establishes this as a New York City day.

Friday, December 5. A credit card charge in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Monday, December 8. Credit card and E-ZPass statements establish this as a New York City day.

Tuesday, December 9. A credit card charge in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Wednesday, December 10. An E-ZPass statement, e-mail indicating petitioner's presence in Connecticut only in the late morning and lack of entry in criminal proceeding docket establish this as a New York City day.

Thursday, December 11. Absence of any evidence placing him outside New York City and a credit card charge for New York City clothing store establish this as a New York City day.

Friday, December 12. Credit card charges in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Tuesday, December 16 and Wednesday, December 17. Credit card charges for New York City clothing store and for train tickets purchased in New York establish December 16 as a New York City day. Credit card charge for New York City courier service establishes December 17 as a New York City day.

Friday, December 19. E-mails indicating petitioner attended a funeral in New Jersey, an affidavit placing petitioner in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Monday, December 22. A credit card charge for gasoline in Connecticut and lack of evidence placing petitioner in New York City establish this as a non-New York City day.

Tuesday, December 23. An E-ZPass statement and credit card charge for parking in New York City establish this as a New York City day.

Monday, December 29 and Wednesday, December 31. Absence of any evidence placing him outside New York City compels the conclusion that petitioner did not meet his burden for these dates and thus establishes these as New York City days.

J. Pursuant to the foregoing, petitioner has failed to show that he was not present in New York City and State on 109 of the 174 days remaining in dispute. Adding these days to the 111

days in which petitioner has conceded he was present in New York City results in 220 New York City days for petitioner in 2003. Petitioner was therefore a statutory resident of New York State and City in 2003.

K. The next question presented here is whether petitioners, as residents of New York State for the year at issue, were entitled to a credit, pursuant to Tax Law § 620(a), against their New York personal income tax liability based on taxes they claimed to have paid to the State of Connecticut.

L. Tax Law § 620(a) provides, in pertinent part, that:

A resident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States . . . upon income both derived therefrom and subject to tax under this article.

M. In *Matter of Mallinckrodt*, decided November 12, 1992, the Tax Appeals Tribunal explained that in order to receive a credit for tax paid to another state, a taxpayer must prove three separate elements, as follows:

- (a) that another state of the United States imposed a tax on the subject income;
- (b) that the income was derived from another state of the United States; and
- (c) that the income was subject to tax under Article 22 of the Tax Law.

N. The third part of the three-part test described above, i.e., that the income was subject to tax under Article 22 of the Tax Law, has admittedly been met. However, petitioners have failed to establish that the first and second parts of such test have been met.

There is nothing in the record to establish that Connecticut imposed a tax on the subject income. The only fact that petitioners point to with regard to this issue is the fact that petitioners filed a Connecticut Resident Income Tax Return. This fact alone is insufficient to establish the

requirement that Connecticut imposed a tax on the income sought to be taxed by New York State.

The second part of the three-part test raises the question of whether the income received by petitioners in 2003 was derived from Connecticut within the meaning of Tax Law § 620(a). 20 NYCRR 120.4(d) provides that:

[t]he term *income derived from sources within* another state, . . . is construed so as to accord with the definition of the term *derived from or connected with New York State sources*, as set forth in section 631 of the Tax Law in relation to the New York source income of a nonresident individual. Thus, the resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon . . . income from a business, trade or profession carried on in the other jurisdiction . . .

Petitioner carried on his legal profession in both New York State and Connecticut. There is nothing in the record to indicate the amount of income earned in each jurisdiction. Under such circumstances, the amount of income derived from petitioner's activities in Connecticut cannot be determined.

O. In light of the foregoing, petitioners are not entitled to a resident tax credit for the year 2003 as they have failed to establish that Connecticut imposed a tax on the subject income and failed to establish the amount of income, if any, that was derived from petitioner's profession carried on in Connecticut.

P. The petition of Thomas P. And Kathleen H. Puccio is denied and the Notice of Deficiency dated June 25, 2007 is sustained

DATED: Troy, New York
January 27, 2011

/s/ Thomas C. Saccá
ADMINISTRATIVE LAW JUDGE