STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN AND JANINE ZANETTI	:	DECISION DTA NO. 824337
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2005 and 2006.	:	

Petitioners, John and Janine Zanetti, filed an exception to the determination of the Administrative Law Judge issued on May 23, 2013. Petitioners appeared by Ronald Krieger, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Michelle Helm, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners filed a letter brief in lieu of a formal reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners have shown that they were not present within New York State for more than 183 days during 2006, and, therefore, were not taxable as resident individuals for that year pursuant to Tax Law § 605 (b) (1) (B).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, John and Janine Zanetti, filed joint New York State nonresident income tax returns (Form IT-203) for the 2005 and 2006 tax years.[1] Both returns indicated petitioners' residence as Delray Beach, Florida, where they maintained a permanent place of abode. During these years, petitioners also maintained a permanent place of abode in Manhasset, New York. Nevertheless, on their 2006 New York State return, petitioners denied that they maintained living quarters in New York State.

On June 11, 2010, following an audit, the Division of Taxation (Division) issued Notice of Deficiency number L-034104598 to petitioners, which asserted additional New York State personal income tax due of $95,002.00 for the year 2005 and $134,640.00 for the year 2006. The Division determined that petitioners were liable for the additional tax as they maintained a permanent place of abode and spent in excess of 183 days within New York State in each of 2005 and 2006 and, therefore, were statutory residents pursuant to Tax Law § 605 (b) (1) (B). The Notice of Deficiency also asserted interest and penalties for negligence pursuant to Tax Law § 685 (b) for each tax year.

Pursuant to a Conciliation Order, dated February 11, 2011, issued by the Division's Bureau of Conciliation and Mediation Services, petitioners' 2005 New York State income tax deficiency was canceled. The statutory notice, including penalties, however, was sustained with regard to the deficiency for 2006.

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[1] Petitioner Janine Zanetti's name appears herein by virtue of having filed joint federal and New York State personal income tax returns with her husband, petitioner John Zanetti. Unless specified or required by context, references using the singular term "petitioner" shall mean petitioner, John Zanetti.

The parties agree that petitioner spent 172 complete days outside of New York State in 2006. They also agree that petitioner was present within New York State for 167 days.

There are 26 other days in 2006 that are in dispute in this matter. They are January 2 and 15; February 4, 17, and 22; March 1, 10, 17, and 26; April 7 and 16; May 2 and 14; June 1, 10, 14, and 18; July 1 and 16; September 24; October 6 and 18; November 2 and 19; and, December 3 and 10. The parties agree that on each of the 26 days, petitioner either arrived in or departed from New York State by private jet. The arrival and departure times varied throughout the period. They further agree that when petitioner arrived in New York State, he stayed at his Manhasset residence, and on those days that he departed New York State, he left from his Manhasset residence.

Based on the flight records from the private jet company, petitioner was out of New York State for a total of 334.3 hours during the 26 days at issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed Tax Law § 605 (b) (1) (B), which provides that personal income tax is due from all resident individuals of New York State on their entire income. Additionally, the Administrative Law Judge reviewed the relevant regulation and case law regarding the definition of a day spent within New York, also called a "New York day."

Turning to the facts herein, the Administrative Law Judge found that the 26 days at issue constituted New York days for petitioners. The Administrative Law Judge found that petitioners introduced no evidence to the contrary. Moreover, the Administrative Law Judge determined that the travel exception, provided in 20 NYCRR 105.20 (c), was not available because petitioners' Manhasset residence served as either the point of origin or the destination for the 26 days at issue.

The Administrative Law Judge found that ***Matter of Leach v Chu*** (150 AD2d 842 [1989], ***lv dismissed*** 74 NY2d 839 [1989]) controlled in this matter. The Administrative Law Judge determined that in that case, the Appellate Division substantively addressed the definition submitted by petitioners, concluding that the regulation at 20 NYCRR 105.20 (c) defined "days" within New York State in a manner that was consistent with Tax Law § 605 (b) (1) (B). Therefore, under the principle of *stare decisis*, the Administrative Law found the regulation to be within the Division's power to interpret statutes for purposes of clarity and enforcement, and rejected the construction advanced by petitioners. The Administrative Law Judge determined penalties to be due because petitioners conceded this issue if they did not prevail on their residency argument.

Accordingly, the Administrative Law Judge sustained the Notice of Deficiency in its entirety.

ARGUMENTS ON EXCEPTION

On exception, petitioners challenge only certain conclusions of law. Initially, they contend that the Administrative Law Judge improperly determined that *stare decisis* applied in this matter. Petitioners submit that observing this doctrine is a "moral obligation" that may be set aside if the established rule is misunderstood, misapplied, or produces results that are contrary to reason. It is their contention that *stare decisis* should not be applied herein because the courts have never directly issued a ruling on the effect of General Construction Law § 19 on the Division's interpretation of "days" spent within New York in Tax Law § 605 (b) (1) (B).

Petitioners then argue that General Construction Law § 19 requires that a calendar day spent within New York be defined as the 24-hour period from midnight to midnight. As such, they raise the same point argued below, specifically, that in ***Matter of Leach v Chu***, the

Appellate Division did not cite to General Construction Law § 19, and that Black's Law Dictionary has since changed its definition of "day." Due to these factors, petitioners argue that the prior construction of Tax Law § 605 (b) (1) (B) must be reconsidered and changed.

Regarding the regulation, petitioners contend that the Division exceeded its authority under Tax Law § 697 because construing a day spent within New York to be "any part" of a calendar day expands the definition of a calendar day, as set forth in General Construction Law § 19. For the foregoing reasons, petitioners request that this Tribunal strike the Division's definition in 20 NYCRR 105.20 (c) as irrational and decide that under General Construction Law § 19, only entire calendar days may count as days spent within New York. They request a finding that the 26 days at issue do not count toward the 184-day requirement because John Zanetti proved that he was present in this state for only partial days, or for less than 24-hour periods on those days. As such, petitioners contend that they should not be liable for personal income tax for 2006.

Petitioners did not take exception to penalties.

The Division contends that the Administrative Law Judge properly applied *stare decisis* to the instant matter. It contends that the controlling law is ***Matter of Leach v Chu*** (150 AD2d 842 [1989], ***lv dismissed*** 74 NY2d 839 [1989]), which addressed the definition of a day spent within New York under Tax Law § 605 (b) (1) (B). The Division submits that petitioners fail to present a rational basis for the Tribunal to discard this case and the well-established definition of a day spent within New York.

The Division argues that, contrary to petitioners' contention, the decision in ***Matter of Leach v Chu*** substantively addressed the definition of a day found in General Construction Law § 19. It also contends that neither the absence of a citation in the decision, nor the change in

Black's Law Dictionary impacts either the rationale of ***Matter of Leach v Chu*** or its precedential and controlling value. As such, the Division requests that this Tribunal uphold the determination of the Administrative Law Judge and sustain the Notice of Deficiency.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons set forth in this opinion.

This matter presents no factual disputes. The parties agree that in 2006, petitioners owned a permanent place of abode in New York, specifically petitioners' Manhasset residence. They also agree that petitioner, John Zanetti, spent 172 complete days outside of this state and 167 complete days within New York State. On the remaining 26 days, petitioner traveled either to or from his Manhasset residence, making him present in this state for fewer than 24 hours on each of those days. While these facts are not at issue, the parties disagree on whether it is proper to count these partial days as New York days for the purposes of Tax Law § 605 (b) (1) (B).

Tax Law § 601 imposes tax on New York State resident individuals for income accrued both within and without the state (***see Matter of Tamagni v Tax Appeals Trib. of State of N.Y.***, 91 NY2d 530 [1998], ***cert denied*** 525 US 931 [1998]). Defined in Tax Law § 605, the term, "resident individual," includes the following:

> "[one] who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than [183] days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States" (Tax Law § 605 [b] [1] [B]).

In the instant matter, petitioners challenge their status as residents and, therefore, bear the burden of proving that during the period at issue, they spent fewer than 184 days within New York (***see e.g. Schibuk v New York State Tax Appeals Trib.***, 289 AD2d 718, 719 [2001], ***lv dismissed*** 98

NY2d 720 [2002]). Specifically, petitioners take issue with the 26 days included in the count, in which petitioner, John Zanetti, spent partial days within New York.

To resolve this matter, we apply the definition of "days" spent within New York, as found in 20 NYCRR 105.20 (c). This regulation provides the following:

> "In counting the number of days spent within and without New York State, *presence within New York State for any part of a calendar day constitutes a day spent within New York State*, except that such presence within New York State 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 while traveling through New York State to a destination outside New York State . . ." (emphasis added) (20 NYCRR 105.20 [c]).

On 167 days in 2006, petitioner was present within New York State for an entire 24-hour period. On 26 days in 2006, petitioner was present in New York State, but for less than a 24-hour period on each day. As petitioners' Manhasset residence served as either the point of origin or the destination, the travel exception does not exempt any day at issue. Thus, under the plain language of the regulation, petitioner spent 193 days in New York State in 2006.

Petitioners seek to invalidate the regulatory definition of "days" spent within New York. In reviewing their challenge, we note the following standards:

> "While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of . . . broad statutory terms by the agency charged with administering the statute, here, the Department . . . . Likewise, the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (***Matter of Xerox Corp. v New York State Tax Appeals Trib.***, 110 AD3d 1262, 1264-1265 [2013] [internal citation and quotations omitted]; ***see also Matter of Moran Towing & Transp. Co. v New York State Tax Commn.***, 72 NY2d 166 [1998])

Bearing these principles in mind, we now consider whether petitioners have met their burden of proving that 20 NYCRR 105.20 (c) irrationally or unreasonably defines "days" spent within

New York under Tax Law § 605 (b) (1) (B).

In support of their position, petitioners principally rely upon General Construction Law § 19. This statute defines a "calendar day" and provides as follows:

> "A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day."

Petitioners contend that the regulation at 20 NYCRR 105.20 (c) impermissibly expands the definition of a day to include "any part of a calendar day," thereby violating General Construction Law § 19, and exceeding the Division's authority under Tax Law § 697. As such, they contend that 20 NYCRR 105.20 (c) must be found unreasonable and that the only reasonable interpretation of a New York day is a calendar day.[2]

We do not find this challenge to be persuasive because it was previously rejected by the court. In ***Matter of Leach v Chu,*** (150 AD2d 842 [1989], ***lv dismissed*** 74 NY2d 839 [1989]), the Appellate Division addressed an appeal of an unpublished Supreme Court decision striking the same regulation at issue herein.[3] In that case, the Supreme Court found that the Division usurped legislative power by adopting the instant regulation because it impermissibly expanded the term "days" to include periods of less than 24 hours. The Appellate Division reversed, holding that the Division construed "day" within its plain meaning, and that this definition was in harmony with Tax Law § 605 (b) (1) (B).

The factors submitted by petitioners do not diminish the controlling effect of ***Matter of Leach v Chu***. As in that case, they argue that the Division commandeered legislative power by

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[2] As an example, petitioners' interpretation of Tax Law § 605 (b) (1) (B) would permit an individual to spend 23 hours and 59 minutes within New York, and not have that period count as a day spent within this state. This interpretation would substantially alter the well-settled meaning of a "day" in this area of law, including other portions of this section (***see*** Tax Law § 605 [b] [1] [A]).

[3] At the time, the instant regulation, 20 NYCRR 105.20 (c), was numbered 20 NYCRR 102.20 (c). It has remained substantively unchanged from ***Matter of Leach v Chu*** to the period at issue.

defining "days," in this context, to include periods of less than 24 hours. This is precisely the argument rejected by the Appellate Division:

> "It has been noted that the definition of a day is commonly considered to be that period of time running from midnight to midnight (***see, Schampier v Office of Gen. Servs.***, 73 AD2d 1011, 1012, ***affd*** 52 NY2d 746). However, a day is also defined to include "any part of [a] period of 24 hours from midnight to midnight" (Black's Law Dictionary 357 [5th ed 1979]), as well as 'the hours or the daily recurring period established by usage or law for work' (Webster's Third New International Dictionary 578 [unabridged 981]). In our view, in this case the Tax Commission properly elaborated on the word 'days' in Tax Law § 605 (b) (1) (B) by defining a day as 'any part' of a day (20 NYCRR 102.2 [c]), and it cannot be said that its regulation was irrational or unreasonable (***see, Dental Socy. v New York State Tax Commn.,*** 110 AD2d 988, 991, ***affd*** 66 NY2d 939)." (***Matter of Leach v Chu*** 150 AD2d at 844 [1989]).

It is well established that "legal questions, once resolved, should not be reexamined every time they are presented" (***Dufel v Green***, 198 AD2d 640 [1993], ***affd*** 84 NY2d 795 [1995]). While policy considerations may merit altering the established rule (***see e.g. People v Bing***, 76 NY2d 331 [1990]), the absence of a direct citation to the General Construction Law and a change in a Black's Law Dictionary definition do not indicate that the instant regulation has become either unworkable or out of harmony with the statutory purpose.

This specific interpretation of a day spent within New York under Tax Law § 605 (b) (1) (B) and 20 NYCRR 105.20 (c) trumps the general rule that petitioners attempt to construe in their favor. It is well-settled that a "prior general statute yields to a later specific or special statute" (***Matter of Dutchess County Dept. of Social Servs. v Day***, 96 NY2d 149, 153 [2001]). ***Matter of Leach v Chu*** identifies Tax Law § 605 (b) (1) (B) as a special statute that requires specific construction. This is true because the primary standard of General Construction Law § 19 contemplates a "calendar day" as a period of time for purposes of filing periods and deadlines (***see e.g. Schampier v Office of Gen Servs. Of State of N.Y.***, 73 AD2d 1011 [1980],

affd 52 NY2d 746 [1980]). Conversely, "days" spent within this state in Tax Law § 605 (b) (1) (B) does not correlate with that meaning, as much as it does with the duration of an individual's presence within New York State. In this manner, the regulation construes the term "days" both reasonably and consistently with the legislative intent, which is to enable the collection of personal income tax from individuals who "really and [for] all intents and purposes [are] residents of this state" (***Matter of Tamagni v Tax Appeals Trib. of State of NY***, 91 NY2d 530, 535 [1998], ***supra***).

We conclude that petitioners failed to meet their burden of proving that the regulatory definition of a day spent within New York State is irrational and that theirs in the only reasonable interpretation (***Matter of 427 W. 51st St. Owners Corp. v Division of Hous. & Community Renewal***, 3 NY3d 337 [2004]).

As such, we conclude that for the year 2006, petitioner, John Zanetti, spent 193 days within New York State and was properly determined to be a resident individual.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners, John and Janine Zanetti, is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of John and Janine Zanetti is denied; and,

4. The Notice of Deficiency, dated June 11, 2010, as modified by the Conciliation Order, dated February 11, 2011, is sustained.

DATED: Albany, New York
February 13, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner