STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
CARL RUDERMAN	:	DECISION DTA NO. 826242
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2007.	:	

Petitioner, Carl Ruderman, filed an exception to the determination of the Administrative Law Judge issued on July 14, 2016. Petitioner appeared by Mark Paneth, LLP (Alan M. Blecher, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York, on January 12, 2017, which date began the six-month period for the issuance of this decision.

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

ISSUE

I. Whether petitioner was properly subject to New York State and New York City personal income taxes as a statutory resident individual for the year 2007 pursuant to Tax Law § 605 (b) (1) (B) and New York City Administrative Code § 11-1705 (b) (1) (B).

II. Whether petitioner is properly subject to a late filing penalty for tax year 2007.

FINDINGS OF FACT

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

1. Petitioner, Carl Ruderman, a Florida domiciliary during 2007 (the year in issue), is an executive in the magazine publishing industry. During 2007, it is undisputed that petitioner maintained a permanent place of abode located at 200 East 65th Street in New York City. He also had an office and was involved in ongoing business and related social activities in New York City. It is further undisputed that petitioner spent significant periods of time in both Florida and New York City in 2007.

2. Petitioner filed a New York State and New York City nonresident and part-year resident income tax return (form IT-203) for the year 2007. This return reported federal adjusted gross income of $2,980,887.00, with $10,316.00 reported as the New York State amount thereof. The foregoing federal adjusted gross income amount was reduced by allowable subtraction modifications totaling $14,959.00 (consisting of taxable social security benefits [$10,358.00] and interest income on U.S. government bonds [$4,601.00]), and by itemized deductions (totaling $400,241.00), to arrive at New York taxable income of $2,565,687.00. New York State tax was calculated thereon in the amount of $175,750.00. Petitioner calculated his (New York) income percentage as .0035, based on comparing his New York income amount ($10,316.00) to his federal adjusted gross income amount ($2,965,928.00). In turn, applying this income percentage to his New York State tax amount, computed as above ($175,750.00), resulted in an allocated New York State tax liability in the amount of $615.00. Petitioner's return reported total estimated tax payments of $1.00. Petitioner did not compute or report any liability for New York City personal income tax.

3. Petitioner's 2007 return was admittedly filed late on or about October 15, 2008. Statement 3 accompanying petitioner's return reported late payment interest in the amount of $20.00 (calculated as periodically accrued and due on the $615.00 amount of tax liability reported), and further reported an estimated tax penalty for late filing in the amount of $32.00. These amounts, totaling $52.00, were added to petitioner's reported liability of $615.00, and after allowing credit for petitioner's $1.00 estimated tax payment, a check for the resulting $666.00 amount so calculated accompanied the filing of petitioner's return. Finally, petitioner indicated "No" in response to the question at line 74 on his return asking: "Nonresidents: Did you or your spouse maintain living quarters in NYS in 2007?"

4. On or about April 28, 2010, the Division of Taxation (Division) commenced a general verification audit of petitioner's personal income tax returns including, as relevant herein, the year 2007. The auditor reviewed petitioner's credit card statements, telephone bills and air travel records to determine whether petitioner was properly subject to tax as a "statutory resident" of New York State and New York City, i.e., that petitioner maintained a permanent place of abode and spent in the aggregate more than 183 days of the year in New York State and New York City during 2007.

5. The Division's review revealed credit card charges in a variety of places, including New York City, on days when petitioner claims to have been elsewhere. Similarly, the Division's review of telephone records revealed calls being made from petitioner's New York City premises on a variety of dates, including dates when petitioner claims to have been outside of New York. Petitioner had four different telephone numbers at his New York premises. The Division's review indicated that calls were made to and from those numbers on over 200 days during the year 2007.

6. Based upon review of the foregoing documents, the Division determined that of the 365 days in 2007, petitioner was present in New York City on 190 days, conceded that petitioner was outside of New York City on 137 days, and could not determine petitioner's whereabouts on 38 days. These latter days were treated as New York State and City days, for lack of substantiation of petitioner's whereabouts elsewhere, thus resulting in the Division's position that petitioner was present in New York State and City on 228 days during 2007.

7. On March 28, 2013, the Division issued to petitioner a notice of deficiency asserting additional personal income tax due for the year 2007 in the amount of $986,220.00 (consisting of $643,337.00 [New York State tax] and $342,843.00 [New York City tax], plus interest, and penalty for late filing [Tax Law § 685 (a) (1)]).[1] The tax liability asserted by the notice of deficiency was premised solely upon the Division's conclusion that petitioner was a statutory resident of New York State and New York City.

8. A conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS) was requested and held, following which a conciliation order (CMS No. 258130) dated February 7, 2014 was issued sustaining the notice of deficiency in full. This proceeding ensued.

9. In addition to the 137 days on which petitioner was not present in New York, as conceded by the Division, petitioner specifically asserts that he was outside of New York for an additional 78 days, as follows:

Specific Dates	Number of Days
05/01/07 - 05/09/07	9

[1] The amount of New York State tax assessed reflects the Division's allowance of credit for the $615.00 of New York State tax reported and paid with the filing of petitioner's return (***see*** findings of fact 2 and 3).

05/13/07	1
09/05/07 - 09/30/07	26
10/01/07 - 10/ 07/07	7
10/13/07 - 10/31/07	19
11/01/07 - 11/10/07	10
11/14/07 - 11/19/07	6
Total	78

10. Petitioner testified at hearing, explaining that he has been married twice, and has three children from each marriage. His younger children, from his current marriage, live in Florida, while his older children live in or near New York City. Petitioner explained that he allows his older children, as well as his housekeeper in New York City, to use his credit cards as needed. Petitioner believes that this resulted in the Division's auditor being under the impression that petitioner was present in New York on certain days when he was in Florida, or elsewhere.

11. Petitioner stated that he spent a significant amount of time in Florida in 2007, attending to the needs of his mother, who was then in her nineties and in ill health. Petitioner admitted that he had business interests in New York (and elsewhere), but explained that his businesses were managed by others such that petitioner's presence on a day-to-day basis was not generally required.

12. Petitioner provided a letter from his Florida dentist, Tomas Frankel, DMD, dated November 11, 2013, stating that petitioner was under the care of Dr. Frankel for "extensive dental treatment" on the specific dates May 1, 4, 7 and 9, and October 23 through 28, 2007. The nature of the dental care was not further specified, although the letter notes that petitioner was advised "not to travel immediately after the dental procedures, as this could prove to be detrimental to [petitioner's] recovery." Although not stated in the letter, it is reasonable to accept

that the specified dates result from Dr. Frankel's review of his business records.

13. Petitioner also submitted seven affidavits in support of the claim that he spent the noted additional 78 days outside of New York, as follows:

Date of Affidavit	Affiant	Affiant's Relationship to Petitioner
01/21/2013	Mireille Cohen	Hairdresser
01/10/2013	Valentina Radchouk	Personal Assistant
01/21/2013	Nathan Fuentes	Head Concierge at Florida Residence
08/05/2013	Troy Henry	Concierge at Florida Residence
05/03/2013	Jose Luis Mendes	Concierge at Florida Residence
02/13/2013	Ruben Padilla	Handyman at Florida Residence
12/16/2013	Svetlana Ruderman	Petitioner's (second/current) Wife

14. Review of the foregoing affidavits reveals the following:

a) The Cohen affidavit states that petitioner had his hair cut by Ms. Cohen in early May 2007, and "every other week" in September, October and November; that when petitioner is at his home in Florida, he stops by the salon for a manicure and/or pedicure on weeks when he does not have his hair cut; and that he "frequently" drops in to say hello to Ms. Cohen and her daughter. This affidavit does not specify any particular appointment dates for haircuts or other salon services such as manicures or pedicures.

b) The Radchouk affidavit states that petitioner was at his Florida home from May 1, 2007 to May 13, 2007 and from September 1, 2007 through November 25, 2007. Ms. Radchouk lived at petitioner's Florida residence and served as his personal assistant. Her duties included arranging for dry cleaning service, calling for petitioner's car and driver, as needed, and preparing meals as requested.

c) The Fuentes affidavit states that petitioner was at his Florida home from May 1, 2007 to May 13, 2007, and from September 1, 2007 through November 25, 2007, and notes that Mr. Fuentes "frequently saw" petitioner in and around his home and "frequently" tended to petitioner's personal requests when he was at his home.

d) The Henry affidavit states that petitioner was at his Florida home from April 2007 through the end of November 2007, and notes that Mr. Henry recalls assisting petitioner during the second week of October 2007 by using his truck to pick up paintings and small furniture items at petitioner's sister's home in Boca Raton, Florida.

e) The Mendes affidavit states that petitioner was at his Florida home from September 1, 2007 through the end of November 2007, and notes that Mr. Mendes was especially busy during the period October 20 to 26, 2007 helping petitioner's "houseman" (presumably Mr. Padilla) hang paintings in petitioner's home.

f) The Padilla affidavit states that petitioner was at his Florida home, full-time, from September 1, 2007 through the end of November 2007, notes that Mr. Padilla was the senior valet at the building, drove petitioner to visit his mother during the period September 3rd through 15th, assisted petitioner or his housekeeper with outside furniture and plants, and often set up extra tables and chairs during the month of October 2007 in connection with preparing for dinner parties hosted by petitioner during that month.

g) The affidavit of Svetlana Ruderman [petitioner's wife] states that "I was in possession of petitioner's American Express Centurion credit card [number omitted] during the period September 8, 2007 through October 7, 2007 and subsequently, I was the individual using this credit card to make any and all purchases during this period."

15. Petitioner stated his belief that his personal assistant, Valentina Radchouk, kept a diary of petitioner's activities during the year in issue. No such diary was provided during the audit or thereafter, including at hearing. Petitioner also noted his belief that many of the telephone calls made from his New York premises could have been made by his housekeeper, or his children, or other persons. No further information or breakdown was provided during the audit, or thereafter, concerning the phone calls made from petitioner's New York premises. Finally, and in contrast to the statements in the Radchouk and Fuentes affidavits indicating petitioner was present in Florida from May 1 through May 13, petitioner clarified that he was present in New York City on May 10 and 11 in connection with a business matter involving the launch of a new magazine (known as Milus).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first set forth the relevant sections of the Tax Law and New York City Administrative Code governing residency. He then distinguished between the two bases on which a taxpayer may be subjected to tax as a resident of New York State or City, i.e.

situs of domicile and so-called "statutory residency." Noting that the parties agreed that domicile is not at issue in this matter, the Administrative Law Judge set forth the requirements for statutory residency under the statute: 1) maintaining a permanent place of abode in the state or city; and 2) physical presence in the state or city on greater than 183 days during a taxable year. Noting further that petitioner admitted to maintaining a permanent place of abode in New York City during the year in issue, the Administrative Law Judge distilled the remaining question in this matter, namely whether petitioner was physically present in New York State or City for more than 183 days in 2007.

The Administrative Law Judge next described the method for determining whether one is physically present for purposes of statutory residency. Under the regulations, any part of a day spent in New York State or City constitutes a day in New York State or City. The Administrative Law Judge then set forth the burden of proof, which in this case is allocated to petitioner, to show through clear and convincing evidence that he did not spend in the aggregate more than 183 days in New York City in 2007. He then described the evidence that could be presented to meet this burden of proof, stating that petitioner may meet his burden by offering testimonial evidence or documentary evidence or a combination of the two. He noted that patterns of conduct from which a taxpayer's location can be ascertained from habits of life, when coupled with documentary evidence or affidavits with additional evidence of a taxpayer's whereabouts, may suffice to meet a taxpayer's burden of proof.

The Administrative Law Judge contrasted these examples of clear and convincing evidence of a taxpayer's location on specific days with examples where the taxpayer failed to meet the burden of proof, citing instances of illegible documents, cryptic or altered calendar entries, vague testimony and lack of collaborative records as insufficient to meet this burden.

The Administrative Law Judge found that where there is no definitive document establishing a taxpayer's whereabouts on each day of the year at issue, available evidence of time, place, and event is often testimonial in nature and must be evaluated in its totality. He also stated that in such a situation, the credibility of a witness and any inconsistencies in witness testimony weighing against clarity or persuasiveness of the facts alleged must be evaluated as a whole.

Ultimately, the Administrative Law Judge found that the testimony given on behalf of petitioner speaks mainly in general terms and lacks the specificity required to clearly establish his location on each of the days at issue. He found that, overall, the affidavits petitioner provided in support of his argument did not provide the level of consistency and detail needed to meet his burden of proof. The Administrative Law Judge in particular found that the affidavits presented very little detail in support of petitioner's claim of uninterrupted presence in Florida from September to November 2007 and at least one affidavit was actually contradicted by other evidence. He concluded that the repetitive tenor and generality of the affiants' statements served to diminish their overall reliability.

The Administrative Law Judge also found that petitioner's spouse's testimony that she had sole custody of petitioner's credit card during September and October 2007 was undermined by petitioner's testimony that he allows his family to use more than one credit card issued to him. He found the explanation for the variety of charges that occurred in New York City and other places not persuasive as support for petitioner's claim that such charges were his family's rather than his own purchases. While the Administrative Law Judge deemed petitioner's testimony to be forthright and honestly given, it lacked the specificity and detail needed to meet his burden of proof as to his whereabouts on the days at issue.

The Administrative Law Judge concluded that petitioner did not meet his burden of proof

of showing by clear and convincing evidence that he was not present in New York City on the days in dispute and consequently concluded that he was a city resident under the Tax Law. He also found that petitioner offered no explanation for his late filing of his tax return and therefore sustained the penalty imposed by the Division. Accordingly, the Administrative Law Judge denied petitioner's petition and sustained the notice of deficiency.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Administrative Law Judge did not correctly evaluate the probative value of the affidavits offered at the hearing or petitioner's testimony regarding his whereabouts while considering the various motivations that petitioner would have had for spending more time in Florida than New York during 2007. He also argues that penalties in his case should be abated due to his belief that he was not present in New York for greater than 183 days in 2007.

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge. It posits that petitioner has not met his burden of proof in support of his position and offers no new arguments on exception. The Division further argues that as the trier of fact, the factual findings of the Administrative Law Judge are beyond reproach. It also argues that the lack of an explanation for petitioner's late filing of his return precludes abatement of penalties asserted in the notice of deficiency.

OPINION

As stated by the Administrative Law Judge, there are two bases of residency for tax purposes in New York State and City; namely domicile and statutory residency (***see*** Tax Law § 605 [b] [1] [A], [B]; New York City Administrative Code § 11-1705 [b] [1] [A], [B]). The

requirements under each basis are set forth as follows:[2]

> "Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this city, unless (i) [h]e maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or . . .
>
> (B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States" (***id.***).

As described by the Administrative Law Judge, this classification of resident versus nonresident has significant tax consequences, as 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.

In light of the Division's concession that Florida was petitioner's domicile in 2007 and petitioner's admission of having maintained a permanent place of abode in New York City in that year, we agree with the Administrative Law Judge that the sole remaining issue is determining whether petitioner sustained his burden of proof in showing he was not present in New York State or City on the days in dispute with the Division.

Under the regulations, any part of a day spent in New York State or City is deemed to be a day spent in New York State or City for purposes of statutory residency under Tax Law § 605 (b) (1) (B) (20 NYCRR 105.20 [c]; ***see*** 20 NYCRR 295.2 [a], 295.3 [a]). The regulations also provide that any New York non-domiciliary who maintains a permanent place of abode in New York and claims to be a nonresident must keep and have available for examination adequate

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[2] The definition of a New York City statutory resident is identical to the definition of a New York State statutory resident, except for substitution of the term "City" for "State" (***compare*** Administrative Code § 11-1705 [b] [1] [B] ***with*** Tax Law § 605 [b] [1] [B]; ***see*** 20 NYCRR 295.3). As noted by the Administrative Law Judge, one who is present in New York City on a given day is obviously present in New York State on that same day. References here to presence in New York City shall be equally applicable to presence in New York State.

records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York (20 NYCRR 105.20 [c]).

In cases where statutory residency is disputed, the petitioner bears the burden of showing by clear and convincing evidence that he was not present in New York for more than 183 days in aggregate during the tax year in question (***Matter of Holt***, Tax Appeals Tribunal, July 17, 2008; ***see also*** Tax Law § 689 [e]). In ***Holt***, we observed that statutory residency cases are very fact intensive and often require specific evidence through substantiating contemporaneous records to show a taxpayer's whereabouts on a day-to-day basis (***id.***). If a substantiating contemporaneous diary or calendar is not maintained, we have held that a taxpayer 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; ***Matter of Moss***, Tax Appeals Tribunal, November 25, 1992). We have also held that 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 (***Matter of Kern***, Tax Appeals Tribunal, November 9, 1995, ***confirmed*** 240 AD2d 969, 971 [3d Dept 1997]). Even general testimony regarding patterns and habits of life, when coupled with supporting documentary evidence, may be sufficient to meet the taxpayer's burden of proof (***Matter of Armel***). However, the standard does not require specific evidence through substantiating contemporaneous records as a minimal evidentiary requirement for taxpayers to meet their burden of proof (***see Matter of Avildsen***; ***Matter of Moss***).

It is appropriate to note that we have held that the credibility of a witness is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses firsthand and evaluate the relevance and truthfulness of their testimony

(***Matter of Moss***; ***Matter of Jericho Delicatessen***, Tax Appeals Tribunal, July 23, 1992; ***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992). While this Tribunal is not bound by an Administrative Law Judge's assessment of a witness' overall credibility and is free to make findings of fact that differ from those of the Administrative Law Judge and thereby make its own assessment, we will generally defer to the credibility determination of the Administrative Law Judge unless such determination is not substantially supported by the record (***see Matter of Stevens v Axelrod***, 162 AD2d 1025 [1990]; ***cf. Matter of Wachsman***, Tax Appeals Tribunal, November 30, 1995).

We agree with the Administrative Law Judge that petitioner did not meet his burden of showing by clear and convincing evidence that he was not present in New York City for more than 183 days in 2007. As noted by the Administrative Law Judge, where, as here, there is no definitive source from which to ascertain petitioner's whereabouts on each day of the year, the testimony given and affidavits submitted must be evaluated in light of each other, surrounding events, and any other additional evidence to determine their credibility. Carefully reviewing the testimony of petitioner and the various affidavits against each other informs the trier of fact of the accuracy and consistency of the evidence presented in support of a taxpayer's position and whether such evidence is clear and convincing.

We agree with the Administrative Law Judge that the testimony provided by petitioner and the affiants speaks mainly in general terms and lacks specificity with regard to dates and events. We do not think the Administrative Law Judge erred when he concluded that such evidence was insufficient to establish petitioner's whereabouts on each of the days in issue. The affidavits presented lacked the detail necessary to rise to the level of clearly convincing evidence. Even though the Administrative Law Judge found petitioner's testimony forthright and honestly given,

we agree that the evidence presented failed to provide the degree of specificity necessary to establish petitioner's whereabouts with certainty so as to conclude that he was present outside of New York State and City on the disputed days.

As petitioner did not meet the burden of establishing by clear and convincing evidence that he was not present in New York City on more than 183 days during 2007 as provided under Tax Law § 605 (b) (1) (B), Administrative Code § 11-1705 (b) (1) (B) and 20 NYCRR 105.20 (c), petitioner was properly subject to tax as a resident of New York State and City for the year 2007.

As to the question of the late filing penalty, we do not find petitioner's argument convincing. There is no dispute that petitioner's return for the year 2007 was not timely filed. No explanation was given, except that petitioner believed he was not present in New York City for more than 183 days in 2007. The Tax Law provides that a late filing penalty of up to 25% of the amount that should have been shown on the return in question shall be imposed on a taxpayer unless such omission was due to reasonable cause and not willful neglect (Tax Law § 685 [a] [1]). A taxpayer bears the burden of showing such reasonable cause by clear and convincing evidence (Tax Law § 689 [e]). Petitioner's bare assertion that he did not believe he was in New York City on more than 183 days in 2007 does not provide clear and convincing evidence as it does not provide any reasonable cause for his late filing of his personal income tax return. Accordingly, we sustain the penalty calculated and imposed by the Division for late filing of petitioner's 2007 New York personal income tax return.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Carl Ruderman is denied;

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

3. The petition of Carl Ruderman is denied; and

4. The notice of deficiency dated March 28, 2013 is sustained.

DATED: Albany, New York
June 15, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner