STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARL RUDERMAN	:	DETERMINATION 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 a petition 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.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on September 29, 2015, at 10:30 A.M., with all briefs to be submitted by January 28, 2016, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Marks Paneth, LLP (Alan M. Blecher, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

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).

FINDINGS OF FACT

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
05/13/07	1
09/05/07 - 09/30/07	26

[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).

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 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 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).

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1)(A) and (B) and New York City Administrative Code § 11-

1705(b)(1)(A) and (B) set forth the definition of a New York State and New York City resident individual for income tax purposes 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."

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.

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 or City. Since the parties agree that petitioner was a domiciliary of Florida, this matter involves only the second, or "statutory resident," basis upon which New York State or City resident tax status may apply, with its dual predicates for such tax status being (1) the maintenance of a permanent place of abode in the state or city and (2) physical presence in the state or city on more than 183 days during a given taxable year. Further narrowing the issue in this case, petitioner admitted that he maintained a permanent place of abode 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 was physically present in New

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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]). Since one who is present in New York City on a given day is obviously present in New York State on that same day, reference here may be made in some instances only to presence in New York City, but shall be equally applicable to presence in New York State.

York State or City on more than 183 days in the year 2007.

C. Tax Law § 697(a) allows the Commissioner 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 either New York State or 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 the 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 bears the burden to "come forward with clear and convincing evidence proving . . . that . . . he did not spend in the aggregate more than 183 days" in New York City in 2007 (***Matter of Holt***, Tax Appeals Tribunal, July 17, 2008). Petitioner may meet this burden of proof through testimonial evidence, documentary evidence, or a combination of the two (***see Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994; ***Matter of Armel***, Tax Appeals Tribunal, August 17, 1995; ***Matter of Moss***, Tax Appeals Tribunal, November 25, 1992). The Tribunal has 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 (***see Matter of Kern***, Tax Appeals Tribunal, November 9, 1995, ***confirmed*** 240 AD2d 969, 971 [3d Dept 1997]), and further that general testimony regarding the "patterns and habits of life," when coupled with supporting documentary evidence, can be sufficient to meet the burden of proof (***see Matter of***

Armel). The Tribunal has also held that where a taxpayer presents a contemporaneously maintained diary or calendar accompanied by consistent and supporting testimony, the same will be sufficient to meet the burden of proof as to the day count, absent other evidence which is inconsistent therewith or indicates that the diary or calendar is in some other manner unreliable. (***see Matter of Moss***; ***Matter of Reid***, Tax Appeals Tribunal, October 5, 1995.) Finally, even where taxpayers did not produce a diary or refused to produce a diary, the Tribunal has determined nonetheless that the taxpayers met the burden of proving they were not present in the state on more than 183 days in a given year based upon their testimony and affidavits regarding their habits and pattern of conduct during the last month of the year in issue (***Matter of Armel***), based upon the testimony of the taxpayer's secretary regarding entries in the diary the taxpayer refused to submit (***Matter of Avildsen***), and based upon affidavits and additional evidence concerning the taxpayers' whereabouts (***Matter of Golub***, Tax Appeals Tribunal, March 24, 1994).

E. 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 taxpayer's proof in ***Holt*** included no evidence of any patterns, routines or habits of life, but did include conflicting day counts based ultimately on poorly photocopied calendars submitted post-hearing, which were in some instances illegible, reflected cryptic, written over or scratched out and changed location information, and with respect to which the taxpayer provided vague testimony and essentially no corroborating or supporting records. Given the inadequacies in the proof, the taxpayer in ***Holt*** was unable to meet the burden of proof

and, consequently, did not prevail. By contrast, in ***Matter of Moss***, the taxpayer submitted business diaries that included both contemporaneously and noncontemporaneously made entries, which the taxpayer reasonably explained as part of his overall credible testimony concerning his routines and his best recollection of events during the years in issue. This evidence, taken in light of the taxpayer's awareness of the New York City day count rule and its tax implications, and coupled with the balance of additional evidence, which was consistent with the taxpayer's diaries, sufficed to establish that the taxpayer was not present in New York City on more than 183 days (***see also Matter of Reid***). It is possible to argue that the language in ***Holt*** concerning "specific evidence through substantiating contemporaneous records" could be read in isolation to require, as a matter of law, the production of documentary proof positive of one's out-of-state (or city) whereabouts on at least 184 days in any given year in order to meet the burden of establishing that one was not present in the state or city and was present in some other extra-jurisdictional locale. However, in light of the well-developed case law, including that set forth above, this is not the applicable standard of proof (***see Matter of Avildsen***; ***Matter of Moss***)

F. As here, where there is no definitive document establishing or locking down one's whereabouts on a given date, the evidence of date, time, place and event often becomes a combination of testimony or testimonies to be evaluated in light of each other, in light of the surrounding events, which aid the person or persons testifying in recalling the event, date, time and place concerning which the testimony is given, and in light of any additional evidence relied upon by a witness in conjunction with providing his testimony, so as to accrue ultimately in a determination of whether such testimony, as a whole, constitutes credible testimony. 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, must be evaluated.

G. This case presents no new or novel concepts of statutory or caselaw interpretation. Ultimately, the testimony provided by petitioner, and by the various noted affiants, speaks mainly in general terms, concerns blocks of time rather than specific dates and events, and does not constitute evidence sufficient to establish petitioner's whereabouts on each of the days in issue. For example, the Cohen affidavit does not specify any particular dates on which petitioner received services at Ms. Cohen's business. The Radchouk and Fuentes affidavits place petitioner in Florida during the entire time periods spanning May 1 through May 13, and September 1 through November 25. These affidavits provide no detail as to any specific days or events during the broad spans of time they cover. In fact, and contrary to these affidavits, petitioner admits to having been in New York, and not in Florida, on May 10 and 11 in connection with a business matter (the Milus launch event). The Mendes and Padilla affidavits place petitioner in Florida during the broad block of time spanning September 1 through the end of November 2007, but likewise provide only generic information as to events that transpired during that time period. The Henry affidavit encompasses a broader period of time than any of the other affidavits, stating that petitioner was in Florida from April through November of 2007. Its accuracy and value is undermined, however, by the fact that petitioner was admittedly in New York for some 17 days

during the month of May 2007. This affidavit, like the others, details no particular days or events during its noted time span beyond a general recall of assisting petitioner in moving artwork during the second week of October. In sum, while all of the affidavits indicate that petitioner was present in Florida for the entire period spanning September 1 through November 25, 2007, with some stating additional days present in Florida (i.e., May 1 through May 13, 2007), such affidavits present very limited detail in support of their indication of petitioner's uninterrupted presence in Florida during the claimed blocks of time. Coupling the essentially repetitive tenor of the affidavits with the generality of their claims, and noting the instances where the general statements in the affidavits are incorrect, as above, serves to diminish the overall reliability of the affidavits.

H. Petitioner attempts to explain away the credit card charges in New York as having been made by his spouse (during the period September 8 through October 7). Indeed, Mrs. Ruderman's affidavit states that she was in possession of, and made charges using, petitioner's American Express Centurion credit card. While petitioner states that only one card was issued for this account, the accuracy of this statement appears questionable by the additional admission that petitioner allows others, including his children and his housekeeper, to use his credit *cards*. Ultimately, the record shows a variety of credit card charges in a variety of locales, with no evidence, explanation or reconciliation establishing any of the charges as those made by petitioner's children or others, as opposed to charges made by petitioner himself. Against this background, and without more detail, the explanation offered for the credit card charges in New York is not particularly persuasive as support for the claim that none of the charges were made by petitioner. In similar fashion, petitioner maintains that the telephone calls made from his New York premises on over 200 days during the year at issue were made by other persons when he

was not at the premises. Unfortunately, the record includes no evidence from which one might more readily discern who, from among the many possible telephone users, including petitioner, may have made any of the calls.

I. While petitioner's testimony was forthright and honestly given, the same was largely general in nature and the level of detail provided was scant. For instance, petitioner stated that the credit card charges "could be" charges made by his children, and that he was in Florida "a lot." Petitioner's travel by air between New York and Florida was made by both commercial flights, and by private or chartered jet where there was more urgency to the travel, and there is no clear or regular pattern of travel that is readily discernible from the flight information in the record. It is also noted that petitioner arrived from England at Teterboro Airport in New Jersey on November 14 and left from New York to fly to France on November 19, with no detail as to petitioner's whereabouts during the six intervening days claimed to have been days spent outside of New York. Finally, petitioner stated his belief that his personal assistant, Valentina Radchouk, maintained a diary of petitioner's whereabouts. However, there is no mention of the same in the Radchouk affidavit, no business or personal diary was produced at the time of audit or thereafter, and none was provided in evidence at hearing.

J. The foregoing review bears out that the evidence in this case fails 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. Accordingly, petitioner has not met the burden of establishing by clear and convincing evidence that he was not present in New York City on more than 183 days in the year 2007 within the contemplation of Tax Law § 605(b)(1)(B), Administrative Code § 11-1705(b)(1)(B) and 20 NYCRR 105.20(c). Thus, petitioner was properly subject to tax as a resident of New York State and City for the year 2007.

K. There is no dispute that petitioner's return for the year 2007 was not timely filed. No explanation was furnished concerning the same and, when filed, a penalty for such admitted late filing was reflected thereon (***see*** Finding of Fact 3). Accordingly, the penalty calculated and imposed by the Division for late filing is hereby sustained.

L. The petition of Carl Ruderman is hereby denied and the Notice of Deficiency dated March 28, 2013 is sustained.

DATED: Albany, New York
July 14, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE