

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOHN D. RADICE AND LEE S. SHEARER** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 827213  
New York State and City Income Taxes under Article 22 :  
of the Tax Law and the Administrative Code of the City :  
of New York for the Years 2011 and 2012. :  
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Petitioners, John D. Radice and Lee S. Shearer, 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 Administrative Code of the City of New York for the years 2011 and 2012.

On December 14 and 15, 2016, petitioners, appearing pro se, and on December 28, 2016, the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by May 1, 2017. The Division of Taxation filed a motion, dated April 4, 2017, seeking summary determination in its favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). In support of its motion, the Division of Taxation submitted the affidavit of Peter B. Ostwald, Esq. Petitioners did not respond to the motion by May 4, 2017, which date began the 90-day period for issuance of this determination. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioners are liable as statutory residents of New York City for the years 2011 and 2012.

***FINDINGS OF FACT***

1. On or about April 4, 2014, the Division of Taxation (Division) commenced an income tax audit of petitioners, John D. Radice and Lee S. Shearer, for the tax years 2011 through 2013 (audit period). Petitioners filed nonresident New York income tax returns, Forms IT-203, for the audit period and petitioners appeared to maintain properties in New York City and New Jersey.

2. Mr. Radice is an attorney who worked for a law firm in New York City until May 2012. Ms. Shearer was a doctor who was completing her residency during the audit period. Petitioners were domiciled in New Jersey during the audit period.

3. At the conclusion of the audit, a Notice of Deficiency, #L-043170822, dated June 17, 2015, was issued to petitioners asserting additional New York State and City income tax due plus interest in the amount of \$30,243.00 for the years 2011 and 2012. Petitioners were assessed based upon the Division's finding that they maintained a permanent place of abode and were present within New York City in excess of 183 days, which makes them liable as statutory residents for income tax purposes for the years 2011 and 2012. The Division concluded that no additional tax liability was warranted for the year 2013.

4. Petitioners paid the assessment in full. Petitioners sought a refund of the payment made on the assessment and timely filed a petition with the Division of Tax Appeals.

5. The parties waived a formal hearing and agreed to proceed by a submission of documents and briefs. Included in the documents submitted by the Division is a joint stipulation

of facts and exhibits executed by the parties. These facts have been incorporated herein to the extent relevant.

6. Beginning in June 2007, Ms. Shearer entered into a month-to-month license agreement with Royal Charter Properties, Inc., for the exclusive use of apartment #4-E located at 445 East 68<sup>th</sup> Street, New York City (the apartment). The license agreement states that it is for full-time employees of New York Presbyterian Hospital, among others.

7. Petitioners retained exclusive use of the apartment for over six years, until June 29, 2013. Later that year, the apartment building was demolished.

8. The license agreement states, in pertinent part, that: “You must occupy the apartment as Your [sic] primary residence and will not reside anywhere else other than the subject apartment.”

9. Petitioners continually and uninterruptedly maintained and resided at the apartment during 2011 and 2012.

10. Petitioners failed to submit any documents or briefs in support of their petition.

11. After petitioners’ deadline had passed for their submission of documents, the Division brought a motion for summary determination. Petitioners failed to respond to the motion.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination shall be granted:

“if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

B. Petitioners did not respond to the Division’s motion; they are therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227

[1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Moreover, although petitioners waived their right to a hearing in this matter, they did not avail themselves of the opportunity to submit either documents or argument in support of their petition.

C. 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.

A resident individual means an individual:

“(A) who is domiciled in this state [city], unless (i) [he] maintains no permanent place of abode in this state [city], maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state [city] . . . , or

(B) who is not domiciled in this state [city] but maintains a permanent place of abode in this state [city] and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state [city], unless such individual is in active service in the armed forces of the United States.”

D. 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, namely (A) the domicile basis or (B) the statutory residence basis, i.e., the maintenance of a permanent place of abode in the state or city and physical presence in the state or city on more than 183 days during a given taxable year.

E. As there is no dispute that petitioners were physically present within the City for more than 183 days, the sole issue in this case involves whether petitioners maintained a permanent place of abode in New York City during 2011 and 2012.

F. Permanent place of abode is defined in the Division’s regulations at 20 NYCRR 105.20(e)(1), in pertinent part, as:

“[a] *permanent place of abode* means a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will

generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. A dwelling place maintained by a full-time student enrolled at an institution of higher education, as defined in section 606(t)(3) of the Tax Law, in an undergraduate degree program leading to a baccalaureate degree, and occupied by the student while attending the institution is not a permanent place of abode with respect to that student (emphasis supplied)."

G. There is no dispute that petitioners' apartment was permanent in nature. Moreover, petitioners entered into a month-to-month leasing arrangement and had exclusive access to the apartment. However, petitioners argue that their presence within New York City was temporary in nature, because of Ms. Shearer's assignment to a New York City hospital for her residency and fellowship training program.

Petitioners' belief that their living arrangement was temporary, based upon Ms. Shearer's employment at New York Presbyterian Hospital, is misplaced. The regulation at 20 NYCRR 105.20(e)(1) was amended, effective December 24, 2008, which deleted the language referring to traveling to New York on a temporary basis to accomplish a particular purpose. Moreover, the current regulation, effective December 30, 2009, is clear that a dwelling place occupied only by an undergraduate, full-time student pursuing a baccalaureate degree will not be considered permanent, and for the student only. The facts in this case are undisputed that neither petitioner was a full-time undergraduate student. Thus, the apartment was a permanent place of abode.

Since petitioners maintained a permanent place of abode and were present within New York City for more than 183 days each of the years in question, petitioners are considered statutory residents of New York City for the years 2011 and 2012.

H. The Division of Taxation's motion for summary determination is granted and the petition of John D. Radice and Lee S. Shearer is denied.

DATED: Albany, New York  
July 20, 2017

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE