

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CHEEWEE CHEW** : DETERMINATION  
for Redetermination of a Deficiency or for Refund : DTA NO. 828103  
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 2012. :

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Petitioner, Cheewee Chew, 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 2012.

A hearing was held before James P. Connolly, Administrative Law Judge, in New York, New York, on April 1, 2019, at 11:00 a.m., with all briefs to be submitted by July 29, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Lane, 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 2012 pursuant to Tax Law § 605 (b) (1) (B) and New York City Administrative Code § 11-1705 (b) (1) (B).

***FINDINGS OF FACT***

1. Petitioner, Cheewee Chew, an executive in the investment management industry, was a New Jersey domiciliary during 2012, the year at issue. For the years 2010 through 2012, petitioner filed joint New York State and New York City nonresident and part-year resident income tax returns (form IT-203), with his wife, Yueh Lin Loo, a professor with Princeton University in New Jersey. On each of the returns, in response to the question whether petitioner or his spouse maintained “living quarters” in New York for the year in question, the “no” box was checked.

2. In July 2013, the Division of Taxation (Division) commenced an audit of petitioner’s income tax returns for 2010 through 2012. Responding to a request by the auditor, petitioner supplied the Division with several documents via an undated letter received by the Division on November 7, 2013, including a completed version of the nonresident audit questionnaire. The completed questionnaire stated that petitioner and his wife had acquired an apartment at 68 Laight Street in Manhattan in February 2010, which they maintained “primarily as a weekend/holiday home,” while their primary residence was in Princeton, New Jersey. According to that questionnaire, petitioner worked for BlackRock, Inc. (BlackRock) until September 2010, after which he worked for Lombard Odier Asset Management USA Corp. (Lombard Odier), while Ms. Loo worked for Princeton University for the entire audit period. On the questionnaire, petitioner asserted that he was present in New York for 179 days or parts of days in 2012, and fewer days in 2010 and 2011. Petitioner also provided a listing of his location for 2011 and 2012 in the form of a spreadsheet, consisting of five columns (original location spreadsheets). The first column specifies the day of the week and of the month. The

second column is untitled; it is sometimes blank, sometimes has “vacation,” and, more frequently, lists a city. The third column is entitled “State” and underneath that “Non-US,” while the fourth is entitled “Days NY” and the last “Non-work days NY.” Both the latter two columns are populated by “0” or “1,” with “1” indicating that the column applies, such that a day with a “1” in the “Days NY” column meant that petitioner was in New York for some part of the day.

3. Responding to a follow-up inquiry of the auditor, petitioner indicated, by an undated letter received by the Division on December 27, 2013, that the information on the original location spreadsheets for 2011 and 2012 was “based on a daily Excel spreadsheet maintained by [Ms. Loo].” The letter from petitioner also remitted his “United Mileage Plus” frequent flyer statements for 2012.

4. By letter dated June 23, 2014, petitioner provided to the auditor a letter, dated May 21, 2014, from Eves Bursier, chief operating officer and authorized signatory of Lombard Odier, stating, in pertinent part:

“While [petitioner] was working at the company, he was the global head of risk, IT and operations. In this role from time to time, [petitioner] had to work remotely from outside of the company’s office (we understand from his home in Princeton, New Jersey) with his team in Europe when European morning meetings were necessary and when audio conference was sufficient.”

5. The parties explored different ways to substantiate the information on the original location spreadsheets. By letter dated August 12, 2014, petitioner supplied the auditor with his 2012 E-ZPass statements, along with an “annotated” version of his original daily location spreadsheets (revised location spreadsheets), revised by the addition of three columns, one to track E-ZPass information for the day in question based on the enclosed records, another column

for “Chew comment,” and a third for “Loo comment.”<sup>1</sup> The Chew comment column generally contains information as to when and how petitioner changed his location when a New York City day is followed by a non-New York City day or vice versa. According to the letter, “[w]e believe that we have supporting E-ZPass transactions and also disentangled the activities of [petitioner, Ms. Loo,] and her graduate students.” There are differences between the locations shown on the original location spreadsheets and the revised location spreadsheets for 2012. Thus, the original location spreadsheets have April 22 as a non-work day in New York, but the revised location spreadsheets have that day as a New Jersey day, with the Chew comment column noting the change. The Chew comment column for June 6 through 9 indicated that the “State Non-US” column in the original location spreadsheets for those days should have shown “location in Tx, not NJ.” An entry in the Chew comment column for September 4 in the revised location spreadsheets indicated that the original location spreadsheets had been wrong in treating that day as a New York City day, as it should have been shown as a “NJ” day.

6. The auditor reviewed the new information sent with petitioner’s August 12, 2014 letter, along with petitioner’s E-ZPass statements for 2011, which she obtained via subpoena. By letter dated April 6, 2015, the auditor stated that those records did not adequately establish petitioner’s daily whereabouts:

“There are days that you have as worked in New York City, but there is no E-ZPass. And there are days you have as worked in NJ, but there is E-ZPass showing you in [New York City].

\* \* \*

I have reviewed this with my supervisors, and it’s necessary to have more complete documentation for your whereabouts to be able to conduct a complete audit.”

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<sup>1</sup> The E-ZPass column is inaccurate for March 18 and August 18, as it shows no E-ZPass activity on those days when in fact the E-ZPass statements showed petitioner’s car entering or exiting New York City on those days. Both were shown as non-New York City days on the revised location spreadsheets.

7. The parties also explored using petitioner's credit card records to establish his location. In a letter received by the Division on December 27, 2013, petitioner asserted that he and Ms. Loo had credit card transactions that supported the entries in the location spreadsheets, based on a credit card used solely by them, but noted that "the extraction of these credit card records are non-trivial," and "we wanted to inquire whether this form of backing is acceptable before proceeding." By letter dated March 12, 2014, the auditor replied that "[c]redit card statements will be helpful, however, if both of you use the same card, it will not be possible to tell which of you made the charge." Later in the audit, in a May 5, 2015 letter to the auditor, petitioner asserted that he was willing

"to give my family's records of our credit card and ATM cards to supplement the data you already have from us in the form of our EZPass and our daily Excel location diaries. The credit cards and ATM transactions, over the 2010 - 2012 period, will show a pattern of how and where [Ms. Loo] and myself are located."

In a July 2, 2015 letter to petitioner, the auditor noted that "per our phone conference," "[i]t is my understanding that you will attempt to obtain . . . credit card statements," as well as "BlackRock office swipe records for NYC and NJ [and] BlackRock office landline records." By letter dated May 6, 2016, petitioner informed the auditor that BlackRock no longer had the swipe turnstile information for its New Jersey office. The letter did not mention anything about petitioner's credit card statements, and review of the audit file does not indicate any further mention of those records.<sup>2</sup>

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<sup>2</sup> On audit, the parties also discussed using Verizon cell phone records to document petitioner's location, but petitioner explained that he used his Verizon cell phone mostly as "a mobile data hotspot," which he claimed caused it to not show location information, and that he used it "only sporadically" for voice calls. He explained further that he used employer-supplied cell phones for voice calls, but they were not Verizon phones. An attempt to use petitioner's work landline phones at BlackRock and Lombard Odier also failed because petitioner did not recall the telephone numbers associated with those accounts.

8. By letter dated April 13, 2016, the auditor informed petitioner that, inasmuch as allocation of wages was the only issue in 2010, and the Division accepted that petitioner worked at BlackRock's New Jersey office that year, it would accept petitioner's 2010 return as filed. For 2011 and 2012, however, the letter attached a consent to audit findings treating petitioner as a statutory resident for those years.

9. According to the field audit report, audit staff participated in a phone conference on July 15, 2016, with petitioner, Ms. Loo, and their accountant. In that phone conference, the Division staff informed petitioner that the Division had decided to accept petitioner's 2011 return as filed, accepting that petitioner had worked frequently at BlackRock's New Jersey office through September 2011. The Division staff further advised, however, that the Division was planning on treating petitioner as a statutory resident for 2012. Consistent with that phone conference, the auditor sent a letter, dated July 18, 2016, to petitioner, enclosing a new set of audit location spreadsheets showing him to have 200 New York City days (and an additional New York State day) and 159 undetermined days, as well as six non-New York City days. The letter pointed out that, according to petitioner's revised location spreadsheets, petitioner had 178 New York City days, but that, on four other days treated on those spreadsheets as non-New York City days, the comment columns for the day showed him to be in New York (June 6, November 4 and 26, and December 25).<sup>3</sup> Additionally, for two other days treated by the revised location spreadsheets as non-New York City days (Saturday, March 17 and Saturday, August 18) the E-

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<sup>3</sup> More specifically, regarding June 6, November 26, and December 25, the problem was that petitioner's comment column for the prior day had him overnighing at his New York City Laight Street apartment. In addition, with respect to December 25, his comment column has him taking New Jersey Transit to Princeton in the morning. The problem with respect to November 4 is that his comment column for that day has him in New York City.

ZPass statements showed petitioner to have been in New York. Specifically, regarding March 17, the Chew comment column stated that petitioner had driven to New York City for lunch and returned the same day. The auditor's letter noted that the E-ZPass statements did not show any such return trip on March 17, but those records did show a return trip to New Jersey on March 18, indicating that March 18 was a New York City day also. Finally, the letter attached an analysis of 22 other days in 2012 where the evidence was not sufficient, in the auditor's view, to establish that petitioner was not in New York on those days.

10. Petitioner responded by letter dated October 12, 2016, signed by both petitioner and Ms. Loo, in which petitioner conceded that March 17 and November 4 should have been treated as New York City days, was silent about March 18, and contested the remaining days discussed in the Division's July 18, 2016 letter. Regarding August 18, the letter explained that Ms. Loo "urgently drove in [to New York City] to pick up work-related documents that she had accidentally left in the apartment the prior Sunday" and that petitioner did not accompany her.

The letter also objected to three other days being treated as New York City days:

"(1) June 6<sup>th</sup>, 2012 - [Petitioner] had spent less than 5.5 hours out of 24 hours on June 6<sup>th</sup> in New York as he left for Newark Airport on the morning to travel to Austin, TX. While we can understand the simplifying effect of counting any moment in New York as a New York City day, we believe that, with current state of technology, where EZPass provides time resolution down to seconds, that this heuristic of rounding up to a full day no longer makes sense and is not equitable.

2) November 26<sup>th</sup>, 2012 - . . . Our records reveal that we had stayed in New York during the daytime hours of November 25<sup>th</sup> (Sunday) and had left Washington DC by train in the evening on the same day. As such November 26<sup>th</sup> should not be a New York City day.

3) December 25<sup>th</sup>, 2012 - We disagree that this day should be counted as a New York City day. Similar to (1) above, Cheewee was in New Jersey more than XX (sic) hours that day."

11. After the parties exchanged more letters without coming to any agreement regarding other days in 2012, the Division issued a notice of deficiency, dated December 1, 2018, to petitioner, asserting \$49,060.00 in additional tax for 2012, plus substantial understatement penalty, and interest.

12. Prior to the hearing in this matter, the parties entered into a joint stipulation of facts (joint stipulation) in which they agreed that for the year 2012:

- (i) petitioner maintained a permanent place of abode in the City of New York;
- (ii) petitioner was in the City of New York, within the meaning of Tax Law §§ 605 (b) (1) (B), and 1305 (a) (2), on 180 days;
- (iii) petitioner was not in the City of New York, within the meaning of Tax Law §§ 605 (b) (1) (B) and 1305 (a) (2) on 37 days; and
- (iv) petitioner's presence in the City of New York on the remaining 149 days of the year 2012 within the meaning of Tax Law §§ 605 (b) (1) (B) and 1305 (a) (2) is in dispute.

Attached to the joint stipulation were schedules A, B, and C, which showed the days in 2012 that fit into each of the above three categories. The days that continue to be in dispute according to the stipulation's schedule C are the following:

- (i) Sunday, January 1, 2012; Friday January 6 through January 8; Friday, January 13 through January 15; Friday, January 20 through January 21;
- (ii) Saturday, February 4 through February 6; Friday, February 10 through February 12; Saturday, February 18 through February 20;
- (iii) Tuesday, March 6; Tuesday, March 13; Thursday, March 15 through March 16; Sunday, March 18; Friday, March 23 through March 25; Friday, March 30;
- (iv) Sunday, April 1; Thursday, April 5 through April 6; Thursday, April 12 through April 15; Thursday, April 19; Sunday, April 22; Friday, April 27 through April 29;
- (v) Wednesday, May 2; Sunday, May 6; Saturday, May 12 through May 13; Friday, May 18 through May 20; Wednesday, May 23; Friday, May 25; Monday, May 28 through May 29;



(vi) Friday, June 1 through June 3; Sunday, June 10; Friday, June 15 through June 16, Thursday, June 21 and June 22; Thursday, June 28 and June 30;

(vii) Sunday, July 1; Tuesday, July 3 through July 6; Thursday, July 12 through July 16; Friday, July 20 through July 22; Thursday, July 26 through July 29;

(viii) Friday, August 3 through August 5; Wednesday, August 8; Friday, August 10 through August 11; Tuesday, August 14; Friday, August 17; Saturday, August 18 through August 19; Sunday, August 26; Thursday, August 30 through August 31;

(ix) Saturday, September 1 and 2, and September 4; Saturday, September 7 through September 8; Thursday, September 13 through September 16; Friday, September 21 through September 23; Friday, September 28 through September 30;

(x) Friday, October 5 through October 7; Friday, October 12; Sunday, October 14; Friday, October 19 through October 20; Friday, October 26 through October 30;

(xi) Thursday, November 1 through November 3; Friday, November 9 through November 13; Friday, November 16 through November 17; Thursday, November 22; Saturday, November 24; Wednesday, November 28; Friday, November 30;

(xii) Saturday, December 1; Thursday, December 6 through December 10; Thursday, December 13 through December 15; Friday, December 21 through December 22; Tuesday, December 25 through December 31.

13. At the hearing, Patricia Gibson, the team leader on the audit, testified on behalf of the Division because the auditor who performed the audit had retired. Ms. Gibson explained that, in her view, petitioner's contemporary records were not sufficient to prove his location outside New York for 2012 because they did not provide adequate detail about his activities for each day and because they were unsupported by third-party documentation. According to Ms. Gibson, the Division accepted petitioner's claim that he was not a statutory resident for 2011 because he concededly worked at BlackRock's New Jersey offices for some days that year, whereas, for 2012, Lombard Odier did not have a separate office in New Jersey, and because the E-ZPass statements showed petitioner as in New York on more than 183 days. For the purpose of the

hearing, Ms. Gibson prepared a memorandum, submitted into evidence at the hearing, which provided the information gathered on audit regarding 17 days still in dispute between the parties for which the E-ZPass statements showed petitioner's car traveling to or from New York City (E-ZPass days). Much of the testimony of each of the witnesses at the hearing focused on those days.

14. Petitioner testified that he began to keep track of his whereabouts for tax purposes when he moved from Texas to New Jersey in 2007. At that time he was employed by BlackRock, working at both its New York City and New Jersey offices. His accountant advised him and Ms. Loo to keep track of his location in order to allocate his income between New York and New Jersey. Moreover, both petitioner and his wife understood the importance of maintaining good contemporaneous records for statutory residency purposes. Petitioner and Ms. Loo both testified that she was the primary record keeper, using an Excel spreadsheet. Petitioner added that his role was to "enrich it when I need to fill in the details." Ms. Loo testified that she updated the spreadsheet every day or every other day and that, as a scientist, she was "compulsive" about data. At some point, she began to use the spreadsheet to keep track of her own travel and to track the need for dog sitters for her two dogs. Neither petitioner nor Ms. Loo was clear in their testimony as to what information their Excel spreadsheets contained, but it appears that the two "comment" columns were part of their regular Excel record keeping, because petitioner would have had little information to "enrich" if there were no "comment" columns, nor would Ms. Loo have had any place to keep information about her whereabouts and her dog sitters but in her comment column.

15. In general, petitioner and Ms. Loo relied heavily on the information they compiled in

their Excel spreadsheets, rather than their memory of particular days, in testifying about petitioner's location in 2012. Both testified as to certain living patterns the two had in 2012, which petitioner claimed supported his day count information for that year. To make those patterns clear, petitioner submitted into evidence another set of spreadsheets showing his location in 2012 (hearing location spreadsheets). According to petitioner, the hearing location spreadsheets took the information from the revised location spreadsheets and added three columns showing the information from schedules A, B, and C of the joint stipulation of facts, i.e., a column for days agreed to as New York City days, a column for days agreed to as non-New York City days, and a column for the days that remained in dispute.<sup>4</sup>

16. Petitioner testified that, as part of his duties at Lombard Odier, he supervised the company's European staff. To do so, he traveled to Europe frequently and also regularly conducting remote meetings with them from the United States. Towards that end, he had standing remote meetings with his European staff on Thursdays and Fridays in the "first quarters" of 2012. Because the meetings commenced at 3:00 to 4:00 a.m., it made sense for him to hold the remote meetings from his Princeton home, where he had an office and computer, rather than from Lombard Odier's New York City office. Later in the year, after he had decided to leave Lombard Odier to form his own company, he had a lot of transition work to do, which caused him, by the last quarter of the year, to also have early morning meetings with his European staff "earlier" in the week, so that he worked at home in Princeton "almost the whole week." Despite this testimony, review of the parties' joint stipulation shows that petitioner

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<sup>4</sup> Petitioner agreed that, because the hearing location spreadsheets were derived from the revised location spreadsheets, the latter should control in case of any discrepancy in the information between the two.

stipulated that he was in New York City:

- (i) for 10 out of 13 Thursdays and 5 out of 13 Fridays in the first quarter of 2012;
- (ii) for all 3 days of 7 of the 13 Monday through Wednesday periods in the fourth quarter of 2012; and
- (iii) for 9 out of 13 Tuesdays in the fourth quarter of 2012 (October 9, 16, and 23; November 6, 20 and 27; and December 4, 11, and 18).

17. Petitioner testified further that, as a Roman Catholic, it was very important to him to attend church every Sunday. In the first six months of 2012, he wanted to attend the church near his home in Princeton because he and his wife were in the process of adopting a baby boy from Taiwan and he thought that a letter of recommendation from the Monsignor at that church would be helpful in that process. Moreover, during the first quarter of 2012, petitioner did considerable traveling to Europe to meet with his European staff at Lombard Odier, so that he would want to rest at home and not travel into New York City on Sundays. Later in 2012, petitioner began to attend Mass more frequently at a church in New York City with his wife near their Laight Street apartment. According to the joint stipulation, petitioner agreed that he was in New York City on a total of 17 Sundays in 2012, including 4 Sundays in the first quarter of 2012, and 8 Sundays in the fourth quarter.

18. Petitioner produced evidence at hearing and post-hearing that he had incurred \$1,383.00 in credit card charges for the purchase of New Jersey transit tickets. According to petitioner, those purchases were for tickets to travel from his home in Princeton to New York City and back. That dollar amount of purchases, using the peak price rate of \$10.75, would have allowed him to purchase 128 one-way tickets. That number of one-way trips is consistent, according to petitioner, with the round trips that he took according to his revised location

spreadsheets, which he said was 70.<sup>5</sup> The difference between the 128 purchased tickets and the 140 tickets he needed for his 70 round trips was accounted for by the fact that, when traveling off peak, he would sometimes buy the tickets on the train because it was cheaper to do so than use a peak rate ticket. He used the peak rate price in his calculations because most of the time he purchased the tickets at the highest rate because he did not know when he would be returning from New York City to Princeton.

19. Petitioner and Ms. Loo testified that she frequently used petitioner's car to drive into New York City because his car was safer than hers, so that many of the trips back and forth between Princeton and New York City noted on the E-ZPass statements were attributable to her. This is especially true for the fourth quarter of 2012 when she interned at a financial firm in New York City, while on sabbatical leave from Princeton. Ms. Loo testified that she would also take New Jersey Transit to travel to New York City if it was more convenient for her.

20. Petitioner testified that he did not produce credit card information on audit because he and his wife shared the same credit card and the auditor would assert the impossibility of knowing who made the purchase using the credit card.

21. Petitioner also testified that he did not know why the box was not checked for having living quarters on his joint returns during the audit period (*see* finding of fact 1). He did not remember that the accountant ever asked him about that question.

### **The E-ZPass Days**

22. *Tuesday, March 13.* Petitioner testified that he arrived at Newark Airport on this

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<sup>5</sup> Review of the revised location spreadsheets reveals that petitioner made the round trip on New Jersey Transit between New York City and Princeton on 69 days in 2012, while also making one-way trips between New York City and Princeton on 16 days, for a total of 154 trips.

day, returning from a trip to Geneva, Switzerland. Instead of going home directly to New Jersey, petitioner drove from the airport to his 68 Laight Street apartment to retrieve a document that he had inadvertently left there. The E-ZPass statements show him reaching the Holland Tunnel toll booth at 12:24 p.m. and then reaching the Verrazano Narrows Bridge (VNB) at 2:35 p.m. for the trip to his Princeton home. To prove what time he must have left his apartment to reach the VNB at that time, petitioner used a Google maps function that allows the user to estimate the travel time between two points at a given time in the past. That function indicated that travel time between the 68 Laight Street apartment and the VNB, leaving the former address at 2:10 p.m., was “typically” 16 to 26 minutes via Interstate 278. Using that information, petitioner estimated that he must have left his apartment around 2:07 p.m. to reach the VNB toll at 2:35 p.m.<sup>6</sup>

23. *Sunday, March 18.* Petitioner’s revised location spreadsheets treat this day as a New Jersey day, with nothing in the two comment columns. According to those spreadsheets, petitioner traveled to New York City on March 17 and returned to Princeton in the afternoon. However, the E-ZPass statements have no evidence of petitioner returning to New Jersey until March 18. At hearing, petitioner conceded that the day should have been treated as a New York City day.

24. *Sunday, March 25.* The E-ZPass statements show petitioner’s car traveling to New York City in the mid-afternoon, but petitioner’s revised location spreadsheets treat the day as a New Jersey day. Petitioner testified that he knew he remained in New Jersey based on his living

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<sup>6</sup> He further estimated that he was only in the apartment for 10 minutes, based on his memory that on that particular day it had taken him around 45 minutes to find parking on the street, and giving himself 20 minutes to walk to the apartment from the parking spot and back.

patterns. Specifically, he liked to stay in Princeton to attend church on Sundays at that period in 2012. Moreover, he did not like to travel on weekends if he could help it because he was forced to do so much traveling for his job at Lombard Odier in 2012. Ms. Loo testified that it was she who drove petitioner's car into New York City on March 25. On direct examination, when asked why she made the trip, Ms. Loo testified that she drove into New York City on that day because she liked to "get to work early here." She clarified that the work she was referring to was her internship with NewWorld Capital. When it was pointed out to her that her internship did not begin until September 2012, Ms. Loo apologized and testified that she did not remember why she traveled to New York City on March 25, but that it may have been to have lunch or dinner with friends, possibly for networking purposes in her attempt to get an internship in the financial industry.

25. *Sunday, June 10.* Petitioner testified that he and his wife were returning from a trip to Texas on that day, arriving at Newark Airport and then traveling to their apartment, solely for the purpose of dropping off Texas barbecue to some elderly friends there. The E-ZPass statements show that the car reached the Holland Tunnel toll at 2:15 p.m. and the VNB at 4:01 p.m. Petitioner testified that he did no more than drop off the barbecue, use the lavatory, and resume his drive to his New Jersey home. Google Map's historical function, as shown on a printout submitted by petitioner, shows that on the day in question the trip from his apartment to the VNB typically took 14 to 26 minutes, which led petitioner to estimate that, to arrive at the VNB toll at 4:01 p.m., he must have left his 68 Laight Street apartment at 3:40 p.m.<sup>7</sup>

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<sup>7</sup> By estimating that it would have taken him 10 minutes to drive from the Holland Tunnel toll to 68 Laight Street, 20 minutes to find parking, 10 minutes to walk to 68 Laight Street and 10 minutes to walk back, petitioner calculated that he was at 68 Laight Street for around 35 minutes.

26. *Saturday, June 16.* The E-ZPass statements show petitioner's car traveling to New York City, reaching the Holland tunnel toll at 9:53 p.m. Petitioner's revised location spreadsheets indicate that he was in New Jersey that day, but that Ms. Loo drove into the New York City in the evening, and that he traveled to New York the next day via New Jersey Transit. Petitioner relied on the accuracy of his revised location spreadsheets and did not submit additional documentary evidence or testimony regarding this day.

27. *Wednesday, July 4.* The E-ZPass statements show petitioner's car traveling to New York City by means of the Holland Tunnel around 7 a.m. in the morning and returning to New Jersey around 2 p.m. Petitioner testified that he remained in New Jersey that day, but his wife traveled with the dogs to the City. Ms. Loo testified that Central Park is "off leash in the mornings" and she likes to take her dogs to run in Central Park to allow them to socialize with other dogs. In contrast, petitioner testified that traveling to New York City for such a purpose was not "a normal thing that I would like to do," while "it is something that [his wife] is obsessed with." His comment column for Sunday, August 12, however, indicates that he "rode with Loo for dog run at Central Park."

28. *Sunday, July 29.* The E-ZPass statements show petitioner's car entering the Lincoln Tunnel into New York City at 7:22 a.m. and taking Exit 14 C at 12:16 p.m., indicating a return to New Jersey. The revised location spreadsheets show petitioner as being in New Jersey, while the Loo comment column states that she "drove to New York City in the morning, return to Princeton in the afternoon - for dog run in Central Park." Petitioner testified that, similarly to Sunday, March 25, he would have stayed in New Jersey to attend his church in Princeton.

29. *Saturday, August 18.* The revised location spreadsheets treat the day as a New



Jersey day, with nothing in the comment columns for that day. The second column indicates that Tuesday, August 14 through Friday, August 17 were “vacation” days, and the third column lists “NV” as the “State.” The E-ZPass statements for August 18 show that petitioner’s car entered the New Jersey Turnpike at the Newark Airport exit and reached the Holland Tunnel toll at 6:15 a.m., indicating a trip to New York City. Petitioner appeared to testify from his memory that he and Ms. Loo had been in Las Vegas for vacation during the August 14 through August 17 period, but that he had flown back alone on Friday and driven from Newark Airport to Princeton, while his wife came back separately the next day. Petitioner’s United Mileage Plus statements showed that petitioner returned on Friday, August 17. Ms. Loo testified that, just getting back from a trip to Las Vegas, she had come into the City on August 18 in order to pick up her dogs, which were being taken care of by one of her neighbors on Laight Street. On cross-examination, it was pointed out to her that the October 12, 2016 letter to the auditor that she signed stated that the purpose of her trip into the City was to retrieve a document from the Laight Street apartment (*see* finding of fact 10). She was then asked if it was possible that her trip into New York City that day was for the additional purpose of picking up a document, and she agreed it was possible, but that “what I know is I did go pick up dogs.”

30. *Sunday, September 23.* The revised location spreadsheets treat this day as a New Jersey day, but the E-ZPass statements show petitioner’s car traveling to New York City at around 9 a.m. in the morning. Based on evidence from Ms. Loo’s work calendar that she had traveled to Newark Airport for her “global entry” interview and an entry on her credit card year end statement summary submitted, with the administrative law judge’s permission, post-hearing, the Division agreed that September 23 should be treated as a New Jersey day.

31. *Sunday, October 7.* The revised location spreadsheets treat both this day and the prior day as New Jersey days. The only comment for those days is one in the Loo column for October 7, indicating that Ms. Loo drove to New York City in the evening and stayed at 68 Laight Street. The E-ZPass statements show that petitioner's car reached the Holland Tunnel at 5:35 p.m. on October 7, indicating a trip to New York City. Petitioner testified that Ms. Loo was driving the car, while he remained in Princeton, and traveled to New York City the next day via New Jersey Transit. Petitioner pointed out that, having just returned from a trip to Geneva, Switzerland, in the prior week, he would have been tired and would have wanted to rest at home in Princeton, rather than travel to New York City on October 7. Review of the revised daily location spreadsheets reveals that of the five trips abroad that petitioner made in 2012 in which he returned home on a Friday, only on one did he claim to be in New York City on the following Sunday (the trip ending Friday, August 10).

32. *Friday, October 12 and Sunday, October 14.* The revised location spreadsheets show petitioner working in New York City on Thursday, October 11 and returning to Princeton in the evening, and treat Friday, October 12, as a New Jersey day. Those records also treat Saturday, October 13, as a New York City day for petitioner, with nothing in the comment column indicating how he got there, and Sunday, October 14, as a New Jersey day, again with nothing in petitioner's comment column. The Loo comment column indicates that she drove to New York City in the evening on Friday, October 12, drove back to Princeton on Saturday, October 13, and drove back to New York City on Sunday, October 14. The joint stipulation treats Saturday, October 13, consistent with the revised location spreadsheets, as a New York City day, but treats the other two days as disputed days. The parties agree that the E-ZPass

statements show petitioner's car traveling from New Jersey to New York City in the evening of Friday October 12, returning to New Jersey in the evening of Saturday, October 13, and then returning to New York City on Sunday evening at 10:20 p.m. (October 14). At the hearing, petitioner testified, based on his review of the revised location spreadsheets, that he had been wrong in treating Saturday, October 13, as a New York City day on the revised location spreadsheets and in the joint stipulation, and that he had remained in New Jersey on that day. He explained that it was the E-ZPass columns in the revised location spreadsheets that allowed him to see that, for the purposes of the joint stipulation, he should have treated the day as a disagreed day, rather than a New York City day. According to petitioner, it was Ms. Loo who traveled back and forth to New York City that weekend, while he remained in New Jersey after driving home in the evening of Thursday, October 11. Petitioner contended that their travel arrangements that weekend were consistent with their tendency to lead independent lives, and Ms. Loo's desire to start work early at NewWorld Capital on Monday, October 15, 2002. The Loo column is consistent with petitioner's claim that Ms. Loo was driving the car indicated on the E-ZPass statements for that weekend. Ms. Loo testified that the information on the revised location spreadsheets for those days was accurate to the best of her knowledge. She did not offer any testimony as to her activities in New York City that weekend. In his brief, petitioner argues that all these days should have been treated as non-New York City days for statutory residency purposes.

33. *Tuesday, November 13.* The E-ZPass statements show petitioner's car entering New York City in the evening of November 13. The revised location spreadsheets treat this day as a New Jersey day, with the comment in the Chew column stating that he worked in Princeton,

while the Loo comment column indicates that she drove to New York City in the evening. Consistent with that record, petitioner testified that he remained at home on November 13 because he had an early morning phone conference with his European team on the next morning, after which he traveled to New York City. When asked on cross-examination how he knew that he had a meeting scheduled for November 14, he answered that he was basing his testimony on his “established pattern” for travel in 2012’s fourth quarter (*see* finding of fact 16). Ms. Loo testified that her usual pattern in the Fall of 2012 was to work three or four days at NewWorld Capital, and be at Princeton for one to two days. Even though she was on sabbatical that semester, she liked to spend one or two days a week at Princeton University, providing mentorship and supervision to the graduate students on her research team.

34. *Friday, November 16.* The E-ZPass statements show petitioner’s car traveling from New York City to Princeton around 7 a.m. in the morning. The revised location spreadsheets indicate that petitioner returned from New York City the evening before via New Jersey Transit, and that he worked at home on this day, while the Loo comment column indicates that she drove from New York City to Princeton in the morning. Petitioner testified that he would have stayed at home in Princeton, for an early morning phone conference with his European staff. In fact, of the 12 Fridays in the fourth quarter of 2012, petitioner’s revised location schedule has him in New Jersey for 11.

For her part, Ms. Loo testified that she may have been returning to Princeton for a big meeting at Princeton University’s Andlinger Center, of which she was in charge, that occurred annually either in the second or third week of November. She thought that she could verify whether that was the reason for her returning to Princeton on November 16 by looking at her

email calendar, but petitioner submitted no further evidence on this issue.

35. *Monday, December 10.* Petitioner's revised location spreadsheets indicate that he worked in Princeton on this day and traveled to New York City to work via New Jersey Transit the next day. Those spreadsheets also include a comment for Ms. Loo that she drove to New York City in the evening and stayed at the Laight Street apartment. The E-ZPass statements show petitioner's car traveling to New York City via the Holland Tunnel around 6 p.m.

36. *Tuesday, December 25 and Wednesday, December 26.* The revised location spreadsheets treat December 24 as a New York City day, and the Chew column indicates that he stayed at the Laight Street apartment. Those spreadsheets treat December 25 and December 26 as non-New York City days. The Chew comment column for December 25 states "New Jersey Transit to Princeton in the morning." At the hearing, petitioner testified that he made an error on this day's entry in his Excel spreadsheets, as he should have put the entry for his departure from New York City to Princeton, on the prior day, December 24, to attend Christmas midnight Mass, instead of on December 25. When confronted with his letter to the auditor dated October 12, 2016 (*see* finding of fact 10), which implies that he was in New York for part of the day on December 25, and his comment column in the hearing location spreadsheets indicating that he traveled to Princeton on December 25, petitioner testified that he had been in New York City that day. When questioned about the day again by the administrative law judge, petitioner again affirmed that he left for Princeton, on December 25, because that is what his hearing location spreadsheets indicated. For her part, Ms. Loo testified that she recalled petitioner going back to Princeton for midnight Mass on December 24, but did not explain why she would have a memory of that day in particular.

37. Asked at the hearing about the disputed days other than the 17 E-ZPass days highlighted by the Division, petitioner asserted that he would rely on the records already in the audit file. Among such disputed days herein are the days in the December 27 through December 31 period. The revised location spreadsheets have no information about them, other than treating them as “NJ” days and noting “vacation” in the second column for each day. Petitioner presented no “living pattern” testimony about where he liked to spend his vacation and holidays when not traveling. Review of the revised location spreadsheets indicates that he admits to being in New York on 8 of 13 such days in 2012’s fourth quarter, including December 17 through December 20 and December 25.

### ***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:

“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.”<sup>8</sup>

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<sup>8</sup> 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.

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 worldwide income (*see Zanetti v New York State Tax Appeals Tribunal*, 128 AD3d 1131 [3d Dept 2015], citing Tax Law §§ 612, 631).

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 New Jersey, this matter involves only the second, or “statutory resident,” basis upon which New York State or City resident tax status may apply. To be a statutory resident, a taxpayer must (1) maintain a permanent place of abode in the state or city; and (2) be physically present in the state or city on more than 183 days during a given taxable year (*see* Tax Law § 605 [b] [1] [B]). Because petitioner concedes that he maintained a permanent place of abode in New York City during the year in issue, the sole issue here is the second prong upon which statutory resident status is premised, namely whether petitioner was physically present in New York State or City on more than 183 days in the year 2012.

C. 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; *see also* 20 NYCRR 105.20 [c] [providing that a taxpayer with a permanent place of abode in New York but claiming to be a nonresident must “keep and have available for examination adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York”]). 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, that contemporaneous record will suffice 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).

D. Here, pursuant to the joint stipulation, the parties identified 180 days in 2012 when petitioner was in New York for purposes of statutory residency day count, 37 days when he was not in New York, leaving 149 days in dispute. Petitioner, however, contended at hearing, and in his brief that October 13 should not be considered a New York City day even though, in the joint stipulation, he agreed that it so qualified. According to petitioner, he erred in treating it as a New York City day on his revised location spreadsheets, which caused him to erroneously agree to it in the stipulation. The Tax Appeals Tribunal’s Rules of Practice and Procedure provide that “[a] stipulation and the admissions therein shall be binding and have effect only in the pending proceeding.” Based on this language, the Tribunal has held that:



“Absent proof of fraud, malfeasance, misrepresentation of material fact or any other ground which would require this Tribunal, as a matter of justice, to permit the Division to modify the terms of the stipulation, petitioners are entitled to rely upon the representations of the Division as embodied in the stipulation” (*Matter of Amherst Cablevision*, Tax Appeals Tribunal, March 7, 1996).

Here, petitioner has not shown any basis for allowing him to repudiate a part of the parties’ joint stipulation. Accordingly, October 13 is found to be a New York City day. Even in the absence of the joint stipulation, this determination finds that October 13 is a New York City day, based on the fact that petitioner’s revised location spreadsheets treat the day as a New York City day and petitioner’s testimony to the contrary, in which he did not claim to have any specific memory of that day (*see* finding of fact 32), was not sufficient to constitute clear and convincing evidence that he was not in New York on that day.

E. Turning to the E-ZPass days, at the hearing petitioner conceded that March 18 should count as a New York City day, while the Division conceded, post-hearing, that September 23 should not be treated as a New York City day, based on proof that included an excerpt from petitioner’s and Ms. Loo’s credit card year-end summary. Those concessions leave the New York City day count at 181 days (including October 13) and the number of disputed days at 147. Thus, to meet his burden of proof here, petitioner must show that, of the remaining 147 disputed days, he was present in New York on no more than 2. Of the remaining 15 E-ZPass days, the Division’s hearing brief asserts that petitioner made significant concessions at hearing concerning his presence in New York on three days (March 13, June 10, and December 25) that require those days to be treated as New York City days. Below, this determination will analyze those days first, followed by the other E-ZPass days still in dispute, and then the remaining disputed days in 2012.

F. The Chew comment column in the revised location spreadsheets for December 24

states that he “Stayed at 68 Laight.” With regard to December 25, the Chew comment column indicates that petitioner took “the [New Jersey Transit] to Princeton in the morning.” At hearing, petitioner testified initially that he erred in putting the latter entry into his Excel spreadsheets for December 25, as he should have associated it with December 24. However, when confronted with his October 12, 2016 letter, in which he clearly implied that he was in New York City for some part of December 25, petitioner testified that he was present in New York City on that day. He confirmed that point when questioned again about that day by the administrative law judge. While in his brief petitioner contends again that December 25 should not be considered a New York City day, he does not explain why his testimony to the contrary should be disregarded. Ms. Loo’s testimony that she remembered petitioner leaving on December 24 for the Christmas midnight Mass is not sufficient to overcome petitioner’s testimony, as she did not provide any background as to why she remembered when petitioner left New York City on a day more than six years in the past. Moreover, her testimony contradicts petitioner’s entries on the revised location spreadsheets for December 24 and 25 and his October 12, 2016 letter to the auditor, which Ms. Loo also signed (*see* finding of fact 10). Accordingly, December 25 is found to be a New York City day.

G. On both March 13 and June 10, petitioner flew into Newark Airport from trips out-of-state and then drove through New York City on his way to his Princeton home. On both trips home, however, he made short detours to 68 Laight Street. On March 13, the purpose of the detour was to retrieve an important document that he had left in his apartment the previous weekend. He showed at the hearing that he was probably only in his apartment for around 10 minutes before resuming his drive home. On June 10, the purpose of the detour was to bring some Texas barbeque to elderly neighbors at 68 Laight Street. For that purpose, petitioner

showed he was at 68 Laight Street for about 35 minutes. Petitioner argues that those days therefore should not qualify as New York City days.

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] [emphasis added]).

The “any part of a calendar day” standard in the regulation has been recently upheld as rational by the Appellate Division (*see Zanetti*, 128 AD3d at 1132). Here, petitioner relies on the exception in the regulation for a person’s presence in New York if the presence in New York is part of a trip that started outside New York and ended outside New York. Petitioner would read that part of the exception to include interstate trips, in which petitioner stops in New York City to accomplish some purpose at best loosely connected with the trip. Petitioner cites no authority in support of such a reading of the regulation. In *Stranahan v New York State Tax Commn.* (68 AD2d 250 [3d Dept 1979]), a divided court held that when a nondomiciliary seeks treatment in New York for a serious illness, the time spent in a medical facility for treatment of the illness should not be counted in determining whether the nondomiciliary qualifies as a statutory resident for income tax purposes. In *Stranahan*, the majority based its decision on an implied exception

for hospital stays, while a concurring justice opined that the statutory residency statute was “never intended to extend to a nondomiciliary forced to remain within this jurisdiction” (*id.* at 254). Because petitioner’s purposeful deviation from his transit through New York on March 13 and June 10 is inconsistent with the requirement that the presence in New York be “solely for the purpose of . . . traveling through New York State [or City] to a destination outside New York State [or City]” and also does not come within the non-voluntary stay exception of *Stranahan*, petitioner’s argument is rejected. Accordingly, March 13 and June 10 are both determined to be New York City days for statutory residency purposes.

H. Given that petitioner’s New York City day count was at 181 prior to consideration of the E-ZPass days (*see* conclusion of law E), and March 13, June 10, and December 25 have been found to be New York City days, it follows that petitioner qualifies as a statutory resident of New York for 2012 (*see* Tax Law § 605 [b] [1] [B]). For the sake of completeness, petitioner’s proof as to whether he showed that he was not in New York City or elsewhere in New York for the other disputed days in 2012 is considered below.

I. Petitioner’s third-party documentary evidence bearing directly on his location in 2012 is scant: the letter from Mr. Bursier, and his frequent flyer account statements (*see* findings of fact 3 and 4). The Bursier letter is relevant to petitioner’s claim that he spent some work days in Princeton to host remote meetings with his European staff, but it does not pin down any specific day when that occurred or exclude the possibility that he traveled to New York City after his remote meetings. His frequent flyer account statements prove he was not in New York City on the days covered by his trips, except for the first and last days thereof, when he could have traveled to or from his New York City apartment or his Princeton home. Petitioner also submitted proof as to the number of New Jersey Transit tickets purchased with the credit card he

shared with Ms. Loo, which number is generally consistent with the number of New Jersey Transit trips petitioner claimed to take to New York City on the revised location spreadsheets. That evidence, however, is not entitled to significant weight because it does not prove where petitioner was on any given day in 2012 and because Ms. Loo also testified that she would use the train to go to New York City if it was more convenient than driving, and there is no proof that Ms. Loo did not use some of those train tickets.<sup>9</sup>

J. In the absence of sufficient third-party records to directly prove his location, petitioner's argument that he does not qualify as a statutory resident in 2012 relies heavily on his revised location spreadsheets, which he compiled based on the Excel spreadsheet that he and Ms. Loo maintained. A diary or other contemporary record kept by a petitioner to record his daily location can be a persuasive proof of his location outside New York in a statutory residence case (*see Matter of Robertson*, Tax Appeals Tribunal, September 23, 2010). The problem here is that the record makes clear that the revised location spreadsheets are simply not sufficiently reliable to prove petitioner's location on any given day.

The first problem detracting from the weight that the revised location spreadsheets can be given is that, while they note petitioner's location, as in a day listing, they provide no contextual detail, such as petitioner's activities during the day. Such activity detail might have allowed petitioner to verify the location information at hearing. Secondly, the record makes clear that petitioner's record keeping was simply not careful enough to inspire confidence in the accuracy

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<sup>9</sup> To a certain extent, this paucity of documentary evidence was due to factors outside petitioner's control, such as the fact that he had left the employment of Lombard Odier by the time of the audit and no longer had access to the email and calendaring records he would have had at that job. However, with regard to his credit card records, the situation is different because the auditor did request them and petitioner chose not to produce them on audit or at the hearing (*see* findings of fact 7 and 20).

of the data in the revised location spreadsheets. Petitioner changed two days (April 22 and September 4) from New York City days on the original location spreadsheets to New Jersey days on the revised location spreadsheets without explanation as to how the error occurred (*see* finding of fact 5). On audit, petitioner agreed, based on internal inconsistencies within the entries on the revised location spreadsheets or between those entries and the E-ZPass statements identified by the auditor, that two other days (March 17 and November 4) should be changed from non-New York City days to New York City days (*see* findings of fact 9 and 10). Petitioner agreed, in negotiating the joint stipulation, to treat November 26 as a New York City day, despite treating it as non-New York City day on the revised location spreadsheets and contending to the auditor that his records showed that petitioner and his wife left New York City for a two-day trip to Washington, D.C. on the prior day. The revised location spreadsheets treated March 18 as a New Jersey day, with the Chew comment column indicating that he had driven from Princeton to New York City and back again to Princeton the day before. At the hearing, however, when faced with the E-ZPass statements showing a trip between New York City and Princeton on March 18 and no such trip on March 17, petitioner conceded that March 18 was a New York City day. Finally, petitioner himself questioned the accuracy of the revised location spreadsheets regarding his location on two other days, October 12 and December 25.

Given the unreliability of petitioner's revised location spreadsheets as contemporary records of his location, and the paucity of third-party records showing his location, petitioner's testimonial proof becomes crucial as to his location in 2012. In their testimony, petitioner and Ms. Loo generally did not rely on their memory of their location in 2012, with a few exceptions, as noted (*see, e.g.*, findings of fact 29 and 36). This is understandable given that 2012 was more than six years in the past at the time of the hearing. Instead, most of their testimony focused on

their general living patterns in 2012. In his hearing brief, petitioner argues that such testimony should be sufficient to demonstrate that he was not in New York on the specified disputed days. The problem with this testimony is that the “patterns” asserted by petitioner and Ms. Loo are not sufficiently invariable so as to allow a determination of “his location on a particular day,” which is the burden he bears in this case (*see Matter of Kern*). For example, petitioner claimed that, especially in the first quarter of the year, he liked to stay at his Princeton home on Sundays, rather than travel into the City, because he wanted to attend Mass at his local Catholic church, and because he was tired from all the traveling he did for his job at Lombard Odier. Petitioner invoked this pattern in arguing that Sunday, March 25, and Sunday, July 29, should not be treated as New York City days. But review of the joint stipulation indicates that petitioner admits to being in New York on four Sundays in the first quarter in 2012 and on a total of 17 Sundays in all of 2012. Given that degree of variability in petitioner’s Sunday travel, it is simply impossible to know if petitioner chose to stay at home in New Jersey or travel to New York City on March 25 and July 29 (*compare Matter of Armel* [Tribunal determines that petitioner’s proof that since 1984 they had spent every December in Florida was sufficient to establish that petitioners were not in New York on specified dates in December 1988]; *Matter of Reid* [petitioner was able to prove that he was not in New York for year in question through evidence of a “general habit of life” revolving around his home in Connecticut that did not include travel into New York]).

Similarly, for Tuesday, November 13, and Monday, December 10, petitioner testified that he knew he was in New York because in the fourth quarter of 2012, he was having early morning meetings “almost the whole week.” Yet, in 7 of the 13 sets of Monday through Wednesday periods in that quarter, petitioner agreed in the joint stipulation that he was in New York for all

three days. It also bears mentioning that, according to the joint stipulation, petitioner admitted to being in New York City for 9 out of 13 Tuesdays in the fourth quarter of 2012. Again, petitioner's claimed pattern is not sufficiently invariable to exclude the possibility that petitioner was in New York City on Tuesday, November 13 or for December 10. For Friday, November 16, petitioner testified that his presence outside New York was shown by his pattern of working at home "almost the whole week" in the fourth quarter of 2012, given that he was leaving Lombard Odier and needed to host early morning meetings with his European staff to coordinate the transition. While this pattern of working at home on Fridays is consistent with petitioner's revised location spreadsheets (*see* finding of fact 34), it nevertheless is found not to be clear and convincing evidence of his non-presence in New York City because having an early morning meeting on Fridays would not preclude petitioner from traveling into New York City later in the day, which is what he testified to for Wednesday, November 14.

K. Petitioner is found not to have met his burden of showing he was not in New York City on June 16 and October 12 because of the insufficiency of the revised location spreadsheets and the lack of any compelling testimony or other documentary evidence. Petitioner is found to also not have met his burden of showing he was not in New York City on October 7. While the travel pattern he cited in support of his claim of not being in New York is consistent with the travel patterns shown on his revised location spreadsheets (*see* finding of fact 31), because there are only a handful of instances of that pattern in 2012, and those spreadsheets have been found to be unreliable, his claim of not being in New York on October 7 is rejected.

L. In sum, petitioner's testimony about his travel patterns, even if considered in conjunction with his revised location spreadsheets and other documentary evidence, is not sufficient to constitute clear and convincing evidence he was not in New York on the remainder



of the E-ZPass days. Petitioner's failure to meet his burden of proof is even more evident with regard to the 129 remaining days in dispute on which no E-ZPass data exists because petitioner offered no testimony with regard to those days, choosing to rely on the information collected on audit. For example, December 26 through 31 are disputed days. The revised location spreadsheets show all those days to be New Jersey days, but the comment columns were left completely blank for those days. Petitioner did not offer any testimony about those days or about his location on vacation days in general. Given the unreliability of the revised location spreadsheets, and the lack of any other evidence relating to those days, petitioner has not met his burden of showing he was not in New York on those days, especially because he described the 68 Laight Street apartment as a "weekend/holiday home" to the auditor and the fact that petitioner chose to spend four other December days there that are described as "vacation" days on the revised location spreadsheets.

M. The petition of Cheewee Chew is hereby denied and the notice of deficiency, dated December 1, 2018, is sustained.

DATED: Albany, New York  
January 23, 2020

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE