

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSEPH PILARO AND JOSEPH GORRIE** : DETERMINATION  
DTA NO. 829204  
for Redetermination of a Deficiency or for Refund of New :  
York State and City Personal Income Tax under Article 22 :  
of the Tax Law and the Administrative Code of the City :  
of New York for the Year 2014.

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Petitioners, Joseph Pilaro and Joseph Gorrie, 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 year 2014.

A hearing was held before Administrative Law Judge Jessica DiFiore, in Albany, New York, on October 7, 2020, with all briefs to be submitted by March 3, 2021, which date began the six-month period for issuance of this determination. Petitioners appeared by Rodney T. Doyle, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

***ISSUE***

Whether petitioner<sup>1</sup> Joseph Pilaro is liable for income tax as a statutory resident of New York State and City for the year 2014.

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<sup>1</sup> This proceeding relates to the residency status of Joseph Pilaro only. Joseph Gorrie was not a statutory resident of New York State or New York City during tax year 2014. References to petitioner will refer to Joseph Pilaro.

***FINDINGS OF FACT***

1. Petitioners, Joseph Pilaro and Joseph Gorrie, jointly filed form IT-203 (New York State nonresident and part-year resident income tax return) for 2014 as nonresidents. On form IT-203, petitioners marked the “no” box when asked “Did you or your spouse maintain living quarters in NYS in 2014?”

2. During 2014, petitioner was issued a form W-2 for wages of \$10,903.00 from his employment with the Los Angeles Community College District, where he taught English online through West Los Angeles College in Los Angeles, California. He was also issued a form W-2 for wages of \$76,294.00 from the Nassau County Comptroller’s Office for work as an assistant professor at Nassau Community College in Garden City, New York.

3. For 2014, petitioners also reported capital gains of \$581,957.00 from the sale of their multi-family home located in Venice, California, on March 25, 2014.

4. In 2013 and for most of 2014, petitioner’s position at Nassau Community College was temporary. This position became permanent at the end of 2014.

5. Petitioner testified at the hearing in this matter that from January 1, 2014 through November 1, 2014, when he was not in California with his husband, he rented an apartment located at 178 East 7th Street, Apartment 6C, New York City, New York (7th Street apartment) when working at the Nassau Community College. He testified that this apartment “was an office with a bed.” He described it as a place for him to do his schoolwork, such as grading papers, and sleep. He testified “[i]t had a small kitchenette and a really tiny bathroom.” He also stated “[i]t was a walk-up in the East Village.”

6. The Division sent petitioner a letter dated September 28, 2018, requesting additional information regarding this apartment, including the lease agreement and rental payments made. However, a lease agreement was not provided.

7. In their brief in support of the petition, petitioners concede they became domiciled in New York City on December 3, 2014, when they purchased an apartment located at 465 West 23rd Street, Apartment 8H, New York City, New York (West 23rd Street apartment). In its brief in opposition to the petition, the Division also conceded that petitioners were not domiciled in New York City until December 3, 2014. There is no dispute that this apartment was a permanent place of abode.

8. The Division requested information regarding where petitioner stayed after the lease of his 7th Street apartment ended until petitioner purchased the West 23rd Street apartment, but this information was not provided. At the hearing, petitioner testified that he stayed with friends but did not state where. He later testified that he had a friend in Harlem who had a three-bedroom apartment that allowed him to stay with him and he would take accommodations depending on what was available to him. It is not clear when he stayed with this person.

9. On September 30, 2015, the Division sent petitioners a letter advising them that their New York State tax return for tax year 2014 was selected for audit. Included with this letter was the first of several information document requests (IDR) requesting, among other things, the completion and return of a nonresident questionnaire, petitioner's form 1040, U.S. individual tax return, and petitioner's relationship with three New York addresses, including petitioner's 7th Street apartment and his West 23rd Street apartment.

10. In a subsequent IDR dated October 24, 2017, the Division asked petitioner for several more documents and more information, including a chronological history of his residence

and employment, credit card and bank statements, employment contracts, calendars for days claimed to be spent outside of New York, cellphone number, carrier and monthly bills or statements, and petitioner's closing statement for the purchase of the property in December of 2014. Petitioner responded to this request on November 27, 2017.

11. Petitioner submitted airline and train documents for 2014, which indicate petitioner's travel as follows:

Date	From	To
January 15, 2014	Los Angeles, CA	New York, NY – JFK
January 25, 2014	New York, NY – Penn Station	Washington, DC
January 27, 2014	Washington, DC	New York, NY – Penn Station
February 15, 2014	New York, NY– JFK	Los Angeles, CA
February 24, 2014	Los Angeles, CA	Newark, NJ
February 28, 2014	New York, NY – JFK	Washington, DC
March 3, 2014	Washington, DC	New York, NY – Penn Station
March 7, 2014	New York, NY– JFK	Los Angeles, CA
March 10, 2014	Los Angeles, CA	New York, NY – JFK
March 28, 2014	New York, NY – JFK	Los Angeles, CA
April 1, 2014	San Francisco, CA	New York, NY – JFK
April 13, 2014	New York, NY – JFK	Los Angeles, CA
April 20, 2014	Los Angeles, CA	Washington, DC
April 21, 2014	Washington, DC	New York, NY – JFK
May 7, 2014	New York, NY – JFK	Los Angeles, CA
May 12, 2014	Los Angeles, CA	New York, NY – JFK

May 22, 2014	New York, NY – LaGuardia	Los Angeles, CA
August 29, 2014	Los Angeles, CA	New York, NY – JFK
October 2, 2014	New York, NY – JFK	Los Angeles, CA
October 6, 2014	Los Angeles, CA	New York, NY – JFK
October 31, 2014	New York, NY – JFK	Washington, DC
November 2, 2014	Washington, DC	New York, NY – JFK
November 7, 2014	New York, NY – JFK	Los Angeles, CA
November 11, 2014	Los Angeles, CA	New York, NY – JFK
November 26, 2014	New York, NY – JFK	Los Angeles, CA
December 1, 2014	Los Angeles, CA	Newark, NJ
December 12, 2014	New York, NY – Penn Station	Washington, DC
December 14, 2014	Washington, DC	New York, NY – Penn Station
December 19, 2014	Newark, NJ	Los Angeles, CA

12. On February 24, 2014, as shown above, petitioner flew into Newark, New Jersey, at approximately 9:10 p.m. Thereafter, there was a charge for a cab or limo in New York City at 9:42 p.m.

13. Additionally, on October 10, 2014, petitioner drove from New York to Virginia. He drove back to New York on October 14, 2014.

14. On December 1, 2014, after arriving in Newark, New Jersey, petitioner used an ATM in New York, New York, at approximately 10:20 p.m. that evening.

15. On December 19, 2014, before leaving for Los Angeles, petitioner used an ATM in New York, New York, at approximately 9:48 a.m.

16. The Division determined that petitioner spent 202 days in New York City in 2014. In reaching this determination, the Division relied on bank statements from Citibank, plane and train e-tickets, email of flight itineraries, Chase credit card statements, and T-Mobile cell phone statements.

17. On August 20, 2018, the Division sent petitioner's representative a letter advising that an audit of petitioner's New York state tax returns for the tax year 2014 has resulted in an increase of tax liability in the amount of \$35,275.00.

18. On November 23, 2018, the Division issued petitioners a notice of deficiency with assessment ID L-049187917, asserting additional New York State personal income tax due for the year 2014 in the amount of \$22,352.00, plus interest and penalty. This notice was premised upon the assertion that petitioners were domiciled in New York State and City, were statutory residents of New York State and City, or, the correct amount of income was not allocated to New York State and/or New York City.

19. The Division also found that petitioners were entitled to a New York State resident credit of \$36,720.00 for taxes paid to California.

20. Petitioners filed New York State resident income tax returns, forms IT-201, for tax years 2015 and 2016.

21. At the hearing, the Division submitted the affidavit of Glenda Knox, sworn to on September 21, 2020. Ms. Knox was the tax auditor 1 that performed an audit of petitioners' return. In her affidavit, Ms. Knox stated that "[u]pon audit, it was determined that Petitioners maintained a permanent place of abode located at [the 7th Street apartment] from 1/1/2014 thru 11/1/2014." She also stated "[u]pon audit, it was determined that Petitioners purchased a residence located at [West 23rd Street] on 12/3/2014."

### **CONCLUSIONS OF LAW**

A. New York State imposes personal income taxes on resident and nonresident individuals (Tax Law § 601 [a] - [c], [e]). Residents are taxed on their income from all sources (Tax Law § 611 [a]). Nonresidents are taxed on their New York State source income (Tax Law § 631 [a]).

B. Tax Law § 605 (b) (1) (A), former § 605 (b) (1) (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:

“A resident individual means an individual:

(A) who is domiciled in this state [city], unless (i) the taxpayer 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.”

C. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State and City. Since it is uncontested that petitioners were domiciled in New York City beginning December 3, 2014 (*see* finding of fact 7), the sole question here is whether petitioner was a statutory resident of New York State and City for the remainder of 2014.

D. 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 in a given taxable year (*see* Tax Law § 605 [b] [1] [B]; Administrative Code of the City of New York § 11-1705 [b] [1] [B]). Petitioner asserts both that he did not maintain a permanent place of

abode in New York City during 2014 and that he was not physically present in New York State and City on more than 183 days in 2014.

E. It is petitioner's burden to establish that he did not maintain a permanent place of abode in New York City or that he did not spend more than 183 days in New York City during 2014 (*see* Tax Law § 689 [e]; *El-Tersli v Commr Taxation and Fin*, 14 AD3d 808, 810 [3d Dept 2005]). Petitioner bears the burden of showing by clear and convincing evidence that his stay at the 7th Street apartment did not qualify as maintaining a permanent place of abode within the meaning of Tax Law § 605 (b) (1) (B) and that he did not maintain a permanent place of abode after that time until purchasing the West 23rd Street apartment (*see Matter of Mays*, Tax Appeals Tribunal, December 21, 2017).

A permanent place of abode is defined under the Division's regulations as "a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer . . ." (20 NYCRR 105.20 [e] [1]). The first question when determining whether a taxpayer maintained a permanent place of abode is whether the dwelling exhibits the physical characteristics ordinarily found in a dwelling suitable for year-round habitation (*see id.*). If the dwelling is suitable for year-round habitation, the next inquiry is whether the taxpayer has a legal right to occupy that dwelling as a residence (*see id.*; *see also Matter of Mays*). If he has a right to occupy the dwelling, and he exercised that right by enjoying his residential interest in that dwelling, he has maintained a permanent place of abode within the meaning of Tax Law § 605 (b) (1) (B) (*see Matter of Mays*). Maintaining a place of abode involves doing whatever is necessary to continue one's living arrangements in a particular place (*see id.*).

Here, petitioner's testimony established that the 7th Street apartment was suitable for year-round habitation. As he stated, it had a bed, bathroom, allowed for him to do his



schoolwork, and it had a kitchenette. He also had exclusive access to the 7th Street apartment from January 1, 2014 through November 1, 2014. Petitioner has not submitted any evidence or even asserted that he was prevented from using the apartment at any time for the duration of the lease. Accordingly, petitioner maintained a permanent place of abode when staying in the 7th Street apartment.

F. Petitioner argues that his place of abode did not qualify as “permanent” because his stay was only temporary due to the temporary nature of his position at the time with Nassau County Community College. In support of this argument, petitioner relies on regulatory language that was deleted from the regulation in 2008 (*see* 20 NYCRR former 105.20 [e]; TSB-M-09[2]I). The change was effective for tax years beginning after December 31, 2008, and thus the temporary stay exception is not available to petitioner for tax year 2014 (*see Matter of Mays*).

G. The next question is whether petitioner maintained a permanent place of abode for substantially all of the year. A “resident individual” for purposes of Tax Law § 605 (b) (1) includes an individual who is not domiciled in New York State or City, but who maintains a permanent place of abode for substantially all of the taxable year and is present for more than 183 days of the taxable year in New York State and City (20 NYCRR 105.20 [a] [2]; 20 NYCRR 290.2). “Substantially all of the taxable year” is not defined under the Tax Law or regulations, but the Division has, as a matter of policy, interpreted this to mean a period in excess of eleven months (*see* 2014 Nonresident Audit Guidelines, State of New York – Department of Taxation and Finance, Income Franchise Field Audit Bureau [[https://www.tax.ny.gov/pdf/2014/misc/nonresident\\_audit\\_guidelines\\_2014.pdf](https://www.tax.ny.gov/pdf/2014/misc/nonresident_audit_guidelines_2014.pdf)]; *see also*

*Matter of Mays*). The Guidelines are instructive when determining the duration of a permanent place of abode (*see Matter of Tweed*, Tax Appeals Tribunal, May 23, 1996).

Here, as shown by the affidavit of Ms. Knox, petitioner's residency periods at his two apartments in New York City amount in the aggregate to 11 months exactly, not 11 months one day as asserted by the Division in its brief. However, petitioner has not submitted any evidence that he did not maintain a permanent place of abode for the time between his lease ending at the 7th Street apartment on November 1, 2014 and the purchase of his West 23rd Street apartment on December 3, 2014. The only evidence in the record specific to this time period is petitioner's travel information, including that petitioner arrived in New York City on November 2, 2014, left on November 7, 2014, returned on November 11, 2014, and left again on November 26, 2014. Despite admittedly being present in New York City during this time, petitioner has offered no evidence, testimony or otherwise, demonstrating he did not maintain a permanent place of abode. Accordingly, petitioner has failed meet his burden of showing that he did not maintain a permanent place of abode for substantially all of 2014.

H. Petitioner also bears the burden of proving that during the period at issue, he spent fewer than 184 days within New York (*see Matter of Ruderman*, Tax Appeals Tribunal, June 15, 2017 *confirmed*, *Ruderman v Tax Appeals Tribunal*, 170 AD3d 1442 [3d Dept 2019]; *Matter of Zanetti*, Tax Appeals Tribunal, February 13, 2014). Statutory residency cases are fact intensive and may require specific evidence through contemporaneous records to show where a taxpayer is at any day and time (*see id.*). A petitioner may also meet this burden of proof through testimonial evidence, documentary evidence or a combination of the two (*see id.*).

I. Petitioner did not meet his burden of showing by clear and convincing evidence that he was not present in New York City for more than 183 days in 2014. Petitioner asserts he was in

New York State and City well below the 183-day threshold and that the Division took an aggressive position in how it counted days he was present in New York State and City. However, petitioner did not provide any documents or testimony that support his position. Petitioner also asserts that the Division counted days where he spent more than 23 hours in a state other than New York, and that the Division should not be permitted to count the days in such an aggressive manner.

“Days” spent within New York is established in 20 NYCRR 105.20 (c) and applied to New York City pursuant to 20 NYCRR 295.2 (a) (*see Matter of Ruderman*). This regulation provides the following:

“In counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State . . .” (20 NYCRR 105.20 [c]).

The regulations also provide that any New York non-domiciliary who maintains a permanent place of abode in New York and claims to be a nonresident must keep and have available for examination adequate records to substantiate the fact that such person did not spend more than 183 days of such taxable year within New York (*see* 20 NYCRR 105.20 [c]).

Petitioner’s travel documents and bank statements make clear that he was present within New York State and City for 174 days excluding travel days in 2014 (*see* findings of fact 11, 16). For 28 additional days in 2014, petitioner was present in New York State and City where New York City was the destination or origin of travel (*see id.*). As petitioner’s New York City apartments located at 7th Street and then West 23rd Street served as either the point of origin or the destination from January 1, 2014 through November 1, 2014 and December 3, 2014 through

the end of the year, respectively, and petitioner has not provided any evidence regarding where he stayed in New York City or outside of New York City for the month of November and the first two days in December, the travel exception does not exempt any day at issue (*see Matter of Zanetti*, Tax Appeals Tribunal, February 13, 2014). Accordingly, based on this record, petitioner spent 202 days in New York State and City in 2014.

J. Petitioner argues that because he was domiciled in New York upon the purchase of the West 23rd Street apartment, he cannot also be a statutory resident because he cannot be a statutory resident in the same tax year that he is domiciled in New York. This argument is without merit (*see El Tersli v Commr of Taxation and Fin*, 14 AD3d at 810; *Matter of Varzar*, Tax Appeals Tribunal, April 2, 2015; Tax Law § 605 [b] [1] [A] and former § 605 [b] [1] [B]). Tax Law § 605 (b) (1) (A) and former § 605 (b) (1) (B) provide an “either/or” disjunctive definition of “resident.” Tax Law § 605 (b) defines a “resident” as relevant here, as someone who is domiciled in this state, or who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than 183 days of the taxable year in this state. As petitioner was only domiciled in New York State and City beginning December 3, 2014, he could, and did qualify as a resident of New York State and City for the remainder of the year as a statutory resident by maintaining a permanent place of abode and spending more than 183 days in New York State and City.

K. Petitioners also argue that they were never afforded the opportunity to determine their separate New York income and be taxed accordingly pursuant to Tax Law § 611 (b). Assuming petitioner was found to be a statutory resident for 2014, the regulations provide that if one spouse is a resident of New York State for the entire taxable year and the other is a nonresident or part-year resident during that year, they must each determine their New York taxable income on

separate returns unless they filed a joint federal income tax return and they elected to file a joint New York state personal income tax return determining their joint taxable income as if they were both residents of New York State for the entire taxable year (*see* 20 NYCRR 111.2 [d]; *see also* Tax Law § 651 [b] [4]). As it is undisputed that petitioners filed joint federal and New York State income tax returns for 2014, it was proper to tax their income jointly.

L. The petition of Joseph Pilaro and Joseph Gorrie is hereby denied and the notice of deficiency is sustained.

DATED: Albany, New York  
August 26, 2021

/s/ Jessica DiFiore  
ADMINISTRATIVE LAW JUDGE