

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**DIARMUID M. GLYNN**

DETERMINATION  
DTA NO. 830170

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 2017.

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Petitioner, Diarmuid M. Glynn, 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 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), brought a motion on July 13, 2022, seeking summary determination in its favor pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Matthews Panariello PC (Christopher LaBarbiera, CPA), had until August 12, 2022 to file his response to the Division of Taxation's motion, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affidavit and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation has established that there are no material and triable issues of fact such that, as a matter of law, summary determination can be made in its favor.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) brought a motion on July 13, 2022, seeking summary determination in its favor. The subject of the Division's motion is whether petitioner, Diarmuid M. Glynn, was a resident of New York City under Tax Law § 605 (b) (1) (B) and the Administrative Code of the City of New York § 11-1705 (b) (1) (B) for the year 2017.

2. The Division conducted a residency audit of petitioner for the tax year 2017. The sole issue is whether petitioner, who admittedly spent more than 183 days within New York City, maintained a permanent place of abode that resulted in him qualifying as a resident of New York City under the relevant statutes. There is no dispute that petitioner was domiciled outside of New York. The auditor determined that petitioner was liable for additional personal income taxes as both a New York State and City resident for 2017.

3. On October 4, 2019, the Division issued a notice of deficiency to petitioner, bearing assessment number L-050667967 (notice), for the tax year 2017.

4. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services in protest of the notice. By conciliation order, CMS No. 315870, dated October 30, 2020, such request was denied.

5. In protest of the conciliation order, petitioner timely filed a petition with the Division of Tax Appeals on December 7, 2020.

6. In support of its motion, the Division provided, along with an affirmation of Colleen M. McMahon, Esq., dated July 12, 2022, the following with its motion papers: an affidavit, dated

July 6, 2022, of Marilyn Young, Tax Auditor 1, in the Buffalo regional office of the New York State Department of Taxation and Finance and a Report of Audit/Buffalo District Office that consists of audit workpapers prepared by the auditor.

7. During 2017, petitioner was domiciled outside of the country.

8. Petitioner is a researcher and the CEO of Basecare Inc. Basecare Inc. had two offices during the years 2015 through 2017; one in New York, located on East 11th Street, and one in Berlin, Germany.

9. Petitioner worked in New York City beginning on May 15, 2015, and for the tax year 2015, petitioner filed a part-year New York State personal income tax return, form IT-203. For the tax year 2016, petitioner filed a resident New York State and City personal income tax return, form IT-201. For the tax year 2017, petitioner filed a nonresident and part-year resident New York State and City personal income tax return, form IT-203.

10. Petitioner was present in New York City for 274 days in 2017.

11. Petitioner leased an apartment on Spring Street in New York City. A copy of the lease reflects a lease term of one year that began on June 28, 2016 to June 30, 2017. Petitioner renewed his lease for one year, beginning July 1, 2017 through June 30, 2018. Under the lease, he was the sole occupant of the apartment. The apartment has water, sewer and heat that is included in the amount of rent paid monthly. Petitioner was responsible for paying for electricity, used to operate all appliances within the apartment, as well as costs for phone and cable. Petitioner was responsible for maintaining the apartment throughout the lease period.

12. Petitioner states that he was a nonresident for 2017 because he was in New York City solely for performance of a work assignment for a fixed and limited period of time. Petitioner

states that because of his temporary work assignment, his apartment does not qualify as permanent.

13. Petitioner's representative filed a two-page affirmation in opposition to the Division's motion. Petitioner did not submit any other documents in support of his argument.

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

A. As provided in section 3000.9 (b) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules), a motion for summary determination "shall be granted if, upon all the 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." "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]).

B. In this case, the Division has moved for summary determination, asserting that petitioner was properly deemed a city resident individual pursuant to Tax Law § 605 (b) (1) (B) and the Administrative Code of the City of New York § 11-1705 (b) (1) (B), based on the fact that petitioner, who is not domiciled in the City, maintained a permanent place of abode within the City and spent more than 183 days within the City for the year 2017. Petitioner does not

dispute that he spent in the aggregate more than 183 days within the City, however, he argues that the Division has not demonstrated that the apartment that he maintained was permanent.

C. Generally, the taxpayer bears the burden of proof in demonstrating that a notice of deficiency is erroneous or incorrect (Tax Law § 689 [e]). Thus, petitioner bears the burden of proof in showing by clear and convincing evidence that his stay at the apartment on Spring Street did not qualify as maintaining a permanent place of abode within the meaning of Tax Law § 605 (b) (1) (B) (*see Matter of Mays*, Tax Appeals Tribunal, December 21, 2017; *Matter of Schibuk*, Tax Appeals Tribunal, May 6, 1999, *confirmed Matter of Schibuk v New York State Tax Appeals Trib.*, 289 AD2d 718 [3d Dept 2001], *appeal dismissed* 98 NY2d 720 [2002], *rearg denied* 99 NY2d 554 [2002]).

D. In opposition to the Division's motion, petitioner submitted the affirmation of his representative, a certified public accountant. It is noted that pursuant to CPLR § 2106, only attorneys, physicians, osteopaths, dentists and individuals physically located outside the United States are authorized to submit affirmations. However, there are no material issues of fact, and in the absence of a showing of prejudice, Mr. LaBarbiera's affirmation may be accepted (*see Matter of Hulteen*, Tax Appeals Tribunal, September 29, 2022).

E. 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 threshold question when examining 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 (*id.*). It is undisputed that the apartment is suitable for year-round habitation. Therefore, the focus of the inquiry becomes whether petitioner had a legal right to occupy the apartment as a residence and

did he exercise that right by doing so (*see Matter of Mays; cf. Matter of Obus v New York State Tax Appeals Trib.*, 206 AD3d 1511 [3d Dept 2022] [Third Department determined that petitioners' Northville, New York residence was not a permanent place of abode since Mr. Obus spent in excess of 183 days of the year within New York City for work purposes and the Northville home was over three hours from his work office, petitioners did not utilize their Northville home more than three weeks out of the year, petitioners did not leave any personal effects at the home and they provided advance notice to a tenant of the home prior to arrival]).

There are no material facts in dispute. In this case, petitioner conceded that his apartment was used by him in excess of 183 days during the year 2017. His apartment is located in close proximity to his work location on East 11th Street. Petitioner had a legal right to occupy the apartment as his residence and he exercised that right by securing an initial one-year lease and then opted to renew it for another one-year term. Accordingly, it is determined that petitioner did, in fact, maintain a permanent place of abode during 2017 within New York City.

F. Petitioner's argument that his temporary work assignment necessitates a conclusion that his apartment was not a permanent place of abode is rejected. 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.

G. The Division of Taxation's motion for summary determination is granted, the petition of Diarmuid M. Glynn is denied, and the notice of deficiency, dated October 4, 2019, is sustained.

DATED: Albany, New York  
November 10, 2022

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE

