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Guidance for Temporary Workers Under New York's "Temporary Stay" Exception

Peter Leonardis

New York

(212) 326-3770

The New York State Department of Taxation and Finance ("Department") has been heavily scrutinizing individuals who claim nonresidency status based upon New York's "Temporary Stay" exception. In the first six months of 2007 alone, there have been at least half a dozen Administrative Law Judge ("ALJ") decisions in this area, all finding in favor of the Department.¹ However, in the most recent case,² the Taxpayer was able to successfully support her claim of nonresident status under the Temporary Stay exception and obtained a rare victory.

Temporary Work Assignment in New York

The Taxpayer, Ms. Gontijo, was a Brazilian domiciliary working in New York City as a financial advisor during the years in question. She lived and worked in New York for a three-year period as authorized by an H-1B Visa. At the expiration of the 36-month period, the Taxpayer was to return to Brazil to work in Sao Paulo, where her employer intended to open an office.

Ms. Gontijo provided sophisticated financial advisory services to multi-national companies. She was hired as an associate in order to develop the skills necessary to provide these services upon her return to Brazil. Under the terms of her employment, if it was determined that she would not be invited to become a principal at any time during the 36 months, she would be terminated. The evidence submitted at the hearing included the Taxpayer's employment contract, a letter submitted to the U.S. Immigration and Naturalization Services, a statement to the American Consulate General in Sao Paulo, and Ms. Gontijo's testimony at the hearing.

¹ *Matter of Ji & Shiina*, New York State Division of Tax Appeals, DTA No. 820714 (March 29, 2007); *Matter of Einav*, New York State Division of Tax Appeals, DTA No. 820645 (March 1, 2007); *Matter of Gallagher*, New York State Division of Tax Appeals, DTA No. 820908 (February 22, 2007); *Matter of Halim*, New York State Division of Tax Appeals, DTA No. 820656 (February 15, 2007); *Matter of Ramachandran*, New York State Division of Tax Appeals, DTA No. 821124 (January 18, 2007); *Matter of Razdan*, New York State Division of Tax Appeals, DTA No. 820983 (January 18, 2007); *Matter of Kalia*, New York State Division of Tax Appeals, DTA No. 820682 (January 4, 2007).

² *Matter of Gontijo*, New York State Division of Tax Appeals, DTA Nos. 820829 and 820830 (June 14, 2007).

Temporary Worker In New York Over 183 Days May Overcome Statutory Resident Status

The issue in Ms. Gontijo's case was whether she maintained a "permanent" abode in New York State for purposes of imposition of state and city income taxes. In New York, an individual is considered a "resident" for personal income tax purposes where the individual is 1) present in New York for more than 183 days; and 2) maintains a permanent place of abode in the state.³ However, New York State Regulation Section 105.20(e)(1) provides that a permanent place of abode will not be deemed permanent "if it is maintained only during a *temporary* stay for the accomplishment of a *particular purpose*." (emphasis added).

The Department's Position on At-Will Employees

The Department took the position that the Taxpayer was an at-will employee. As such, the Department argued that the taxpayer's stay in New York was not temporary because it was not for a fixed and limited period of time. Under the Department's view, because Ms. Gontijo's employment contract was not for a fixed and determinable period, her presence in New York was not temporary within the meaning of the regulation. This position was soundly rejected by the ALJ. Even though the Taxpayer's contract specifically stated that her employment was "at-will" and contained "no specified term of employment," the ALJ appropriately relied on the Taxpayer's testimony and the documents submitted into evidence to find that Ms. Gontijo's stay was reasonably expected to be three years or less.

New York's Temporary Stay Exemption to Residence

The Department's Income Tax District Office Audit Manual for Nonresident Audits ("Audit Manual")⁴ provides guidance on what the Department considers "temporary" (*i.e.*, fixed and limited) and a "particular purpose" under the regulation. According to the Audit Manual, a stay that is reasonably expected to last for no more than three years is considered fixed and limited. Further, the particular purpose requirement is satisfied where there is "a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general goals and conclusions."

Although the ALJ in *Gontijo* did not specifically cite to the Audit Manual, the decision incorporated both the "three year" period and the "particular purpose" requirement to determine whether a stay is temporary. Apparently acknowledging the audit policy, the ALJ stated that the Department has "provided guidance to taxpayers."

³ N.Y.S. Tax Law § 605(b)(1); N.Y.C. Admin. Code § 11-1705(b).

⁴ State of New York Department of Taxation & Finance, Income Tax District Office Audit Manual, Technical and Procedural Guidelines, Nonresident Audits, November 26, 1997, .5(C).

As for whether the “particular purpose” requirement was satisfied, the ALJ summarized the Taxpayer’s purpose of working in New York as “to become trained in all the transactions in which the firm took a part as were necessary to offer the same services and run a similar office in Brazil.” The Department’s position that the Taxpayer’s duties were varied and numerous was rejected by the ALJ. The decision points out that an individual’s purpose may encompass multiple tasks. The ALJ also highlighted the fact that the Taxpayer’s “skill set was sophisticated and high level.”⁵

Audit Manual Provides Helpful Examples

It is notable that the ALJ did not refer to an example in the Audit Manual containing facts similar to Ms. Gontijo’s situation. “Situation 3” in the Audit Manual is as follows:

Employer sends an employee from an out of state office to learn the way the department functions in the New York office. Once the employee has successfully learned the necessary function he will return to the out of state office.

The person would be in New York for a fixed and limited period if the assignment was reasonably expected to last three years or less. In addition, the person would also be present for the accomplishment of a particular purpose if the learning function has a specific conclusion. That is, a measurable level of achievement would trigger the individual’s return to the former or new work location. Accordingly, assuming the two conditions have been met, the person would be maintaining a temporary place of abode in New York.⁶

As stated above, the ALJ did not specifically cite to the Audit Manual, because it is not persuasive authority in this context. It is the author’s experience that the Department will focus on the reference in Situation 3 above that there be a “measurable level of achievement” to conclude training type activities qualify as a temporary assignment. In *Gontijo*, however, there was no specifically identified “measurable level of achievement” signifying the return of the Taxpayer to Brazil. The targeted conclusion was simply based on a time period (*i.e.*, 36 months). The lack of any reference to a measurable level of achievement in the decision provides support for the argument that such a requirement is not necessary to qualify for the temporary stay exception.

Practice Pointer: The ALJ in *Gontijo* relied heavily on the contemporaneous documents submitted into evidence by the Taxpayer. In the vast majority of decisions where Taxpayers have lost in this area, contemporaneous evidence was lacking. It is highly recommended that care be taken in drafting employment contracts, visa

⁵ It is interesting to note that in *Matter of Ahmed*, New York State Division of Tax Appeals, DTA Nos. 820251 & 820260 (November 23, 2005), stated that the petitioner’s high level of education and expertise in a highly specialized area were insufficient to establish temporary status.

⁶ State of New York Department of Taxation & Finance, Income Tax District Office Audit Manual, Technical and Procedural Guidelines, Nonresident Audits, November 26, 1997, .5(C).

applications, and employer correspondence where a nonresident individual will be working on a temporary assignment in New York. Not surprisingly, ALJs will give greater weight to contemporaneous documentation than written statements or assertions acquired from current or former employers during the course of an audit.■



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