New York State

Department

Of

Taxation And Finance

Revised Manual for Nonresident Audits

District Office Audit Manual

September 5, 1997

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NONRESIDENT AUDITS INTRODUCTION

1 Introduction

The purpose of a nonresident audit is to "verify the correctness of the return filed." This is compatible with the Audit Division's "mission statement" which provides that "the purpose of the Division is to use its resources effectively and efficiently to perform quality audits and determine the correct tax liability."

Residency audits are conducted to determine if the taxpayer is a domiciliary of this or another state; if statutory residence is applicable; or if an allocation of income to New York State is required. The residency issue has generated much discussion during the past few years, much of which emanates from the fact that determining a person's intentions is a subjective inquiry. This leaves the auditor in the difficult position of having to determine whether the taxpayer intended to change domicile and if the taxpayer's actions supported that intention. This type of inquiry is not one which lends itself to a simple "yes, it's allowed" or "no, it's disallowed." Instead, the auditor must look at the relevant aspects of the domicile issue without any predisposition. The proper conduct of the audit requires the auditor to focus equally on New York and non-New York ties. The auditor must evaluate the primary factors (which are discussed in detail in this guideline) , and other factors if necessary, both WITHIN and WITHOUT New York, and decide if the tax return filed correctly reflects the taxpayer's resident status. This may require the auditor to request a substantial amount of personal information and/or documentation. In making requests for information, the auditor should exercise discretion and common sense.

A former New York resident may retain contacts with New York after a change in domicile. This point has been summarized as follows:

"The question is whether the taxpayer's overall conduct contradicts his or her declared intention of abandoning New York domicile and establishing a new domicile elsewhere. In making a determination of domicile, the decisive question is not whether the taxpayer continues to maintain some links to New York, but whether the remaining ties to New York demonstrate that New York is, in fact, the taxpayer's home."

The fact of the matter is individuals do not have to eliminate all of their contacts with New York to be determined to be nonresidents. Our audit activities should not discourage former New York domiciliaries from returning to New York for visits, shopping trips, etc. Our actions, as representatives of the State, should encourage taxpayers to invest in New York by keeping bank accounts open in the state and to seek expert advice from varied professionals located in New York. Auditors can reinforce this position with taxpayers and practitioners by focusing on the primary factors as discussed in this guideline. Auditors should not request documentation related to other than primary factors without having first established a basis for New York domicile based upon the primary factors or without at least having determined that weight of the primary factors is approximately equal both within or without New York.

This evaluation involves the weighing of one set of factors against another. It also encompasses more than a mere listing of factors on one side of the domicile issue, but denotes that the auditor has discussed the primary factors with the taxpayer and/or the representative and established use patterns, business involvements and the approximate time spent at the various locations. The auditor should not focus on the retention of New York ties but rather on the comparison of the remaining New York ties to previously established or newly acquired ties in the various locations. The auditor must not base a domicile decision merely on the existence of a residence. The pattern of use for the New York residence versus the patterns of use for the homes outside New York is the focal point. It must never appear that the auditor is only looking for residual New York presence to justify requesting additional information. The case must be established with solid evidence of the taxpayer's presence and involvement in New York. If the evidence supports a change in domicile, either prior to or during the audit period, then it is the auditor's responsibility to recognize the change. As a New York State auditor, you have accomplished your "mission" and established that the taxpayer has correctly filed his/her return as a nonresident.

In the conduct of nonresident audits it is important that taxpayers realize that they can have and maintain contacts with New York. We have seen instances where taxpayers have received misleading advice from friends, relatives and professionals. For example, the following comments have been made.

"If you have a single bank account left in New York after you change your domicile to Florida, you will be audited every year and held to be a New York State domiciliary."

"If you visit your children during the summer months, you will be considered a New York domiciliary and will never be able to convince the auditor otherwise."

Both of these statements are untrue. Auditors and supervisors must ensure in the conduct of their audits and in their everyday dealings with taxpayers and practitioners that people will be fairly treated and no undue burden will be placed on them for maintaining contacts with New York State. Perhaps the best evidence of this is the fact that almost half of the cases audited in this program result in acceptance of the returns as filed even though many of these taxpayers maintain a permanent place of abode in New York.

During the audit process, auditors and supervisors must be considerate of the individuals they are working with. In some cases, nonresident selection techniques may identify individuals who have never undergone a tax audit. Just receiving an inquiry from a taxing jurisdiction may cause unnecessary anxiety on the part of these individuals. It is our responsibility as auditors and supervisors to treat the taxpayer fairly, and communicate openly to reduce the anxiety of the taxpayer and to minimize the burden the production of documentation can impose. The appointment letters and the questionnaires have been designed to request a minimal amount of information from an individual during the initial review of a return. The answers to a few general questions may permit the auditor to determine whether an audit is actually necessary. If so, a more detailed questionnaire will follow with a request for specific documentation. This triage of the individual's response to the short questionnaire may narrow the scope of some audits, expand other audits, while eliminating still others from the necessity of an

audit altogether. If an audit is necessary or additional information is needed on a specific case, the auditor is encouraged to meet personally with the taxpayer and/or the representative during the early stages of the audit in order to discuss the many aspects of the audit. If a face-to-face meeting cannot be arranged, perhaps a telephone conference call could be established. This opening conference can be used to accomplish many tasks; lifestyle patterns can be discussed; business involvement explored; the scope of the audit can be explained; and any questionable areas could be clarified in order to further narrow the focus of the audit. Throughout the audit, and especially during this opening interview, the auditor must listen carefully and evaluate the statements and declarations made by the taxpayer.

Statements and declarations made by the taxpayer and determined to be credible must be weighed with the other evidence examined during the audit when a decision is made.

Consider the individual selected for audit. An individual who has not maintained a diary reflecting his/her physical presence on each day throughout the year should not be told "if you can't prove exactly where you were each day, I will hold it as a New York day." The auditor should apply common sense combined with a practical application of the audit process to complete the audit. This does not mean, however, that the degree of proof is routinely reduced for a person who does business in New York and should be expected to know the tax laws of the states he/she is doing business in. To do so would unfairly reward the individual who keeps no records as opposed to the individual who does keep records.

Although the law, regulations, and precedent-setting cases are indisputable in requiring "clear and convincing evidence," we must be practical in evaluating each circumstance. Take, for example, the individual who maintains a permanent place of abode in New York and is a domiciliary of New Jersey. If the individual works two or three days a week in New York and spends the rest of the time at home in New Jersey, what proof should the auditor expect? Think for a minute of the proof that you as an individual may have if you spent a weekend at home watching TV, doing gardening or some other activity without a paper trail.

On the other hand, if the documentation submitted by the individual contradicts the picture painted by that individual, the auditor should factor these instances where documentation establishes weekend days spent in New York into his/her evaluation.

Auditors need to evaluate the written and oral statements of taxpayers. These statements, when not contradicted by other evidence, should be accepted or tested by requesting certain limited documentation from taxpayers. This information will usually surface during an opening interview with the taxpayer. Auditors and supervisors are empowered to accept written or oral statements by taxpayers subject to evaluation based on all other information gathered during the audit. However, for situations in which it could be reasonably expected that the taxpayer should be able to provide some minimal level of corroborating documentation, proper auditor procedure would require a follow-up to obtain this documentation to support the written and oral statements of the taxpayer.

This guideline addresses certain areas through examples, policy statements, and common sense approaches. Statements made in the guideline concerning the nonresident audit reflect a compilation of the Law, Regulation, and decisions rendered by The Tax Appeals Tribunal and the courts concerning not only the New York State residency issue, but also the residency issue as it applies to the City of New York and Yonkers. Since the guideline is driven by the law, as policies change so will the guideline. Unfortunately, a guideline such as this cannot discuss all of the possible variations and nuances of a topic the magnitude of the nonresident issue. It is up to the supervisor and the auditor to work together and ensure that the spirit of the guideline is carried out when interacting with taxpayers and their representatives. It is also required that a common sense, practical approach be applied to auditing nonresident cases. Audit staff should balance the audit process to ensure that the revenues of New York State are protected and at the same time economic activity by nonresidents, in New York, is not discouraged and that the burdens placed on taxpayers are neither unfair nor unreasonable.

2 Overview

A New York State resident taxpayer is responsible for reporting and paying New York State personal income tax on income from all sources regardless of where the income is generated, or the nature of the income.

A nonresident taxpayer is given the opportunity to allocate income, reporting to New York State only that income actually generated in New York. In addition, the nonresident need only report to New York income from intangibles which is attributable to a business, trade or profession carried on in the State.

Thus, significant benefits may be derived from filing as a nonresident.

A. New York State Personal Income Tax Law

Section 605(b) of the Tax Law (Article 22) defines a resident individual, in pertinent part, as one who;

is domiciled in this state, unless

the individual maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state;

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

A nonresident individual means an individual who is not a resident or a part-year resident.

B. New York State Personal Income Tax Regulations

The regulations regarding section 605(b) contained in 20NYCRR at 105.20 and 105.21 describe a resident and nonresident individual at great length. These regulations can be summarized for purposes of these guidelines to provide:

(a) General. An individual may be a resident of New York State for income tax purposes, and taxable as a resident, even though s/he would not be deemed a resident for other purposes. As used in this Subchapter, the term resident individual includes:

(1) all persons domiciled in New York State, subject to the exceptions set forth in subdivision (b) of this section; and

(2) any individual (other than an individual in active service in the Armed Forces of the United States) who is not domiciled in New York State, but who maintains a permanent place of abode in New York and spends in the aggregate more than 183 days of the taxable year in New York State.

(b) Certain persons not deemed residents although domiciled in New York State. Any person domiciled in New York State is a resident for income tax purposes for a specific taxable year, unless for that year s/he satisfies all three of the requirements in paragraph (1) or all three requirements in paragraph (2) of this subdivision:

(1) For a specific taxable year all three of the following requirements are met:

(I) s/he maintains no permanent place of abode inside New York State during such year;

(ii) s/he maintains a permanent place of abode outside this State during such entire year; and

(iii) s/he spends in the aggregate not more than 30 days of the taxable year in this State; or

(2) all three of the following requirements are met:

(I) within any period of 548 consecutive days s/he is present in a foreign country or countries for at least 450 days;

(ii) during such period of 548 consecutive days s/he is not present in New York State for more than 90 days, does not maintain a permanent place of abode in this State at which his/her spouse (unless such spouse is legally separated) or minor children are present for more than 90 days; and

(iii) during any period of less than 12 months, which would be treated as a separate taxable period, and which is contained within such period of 548 consecutive days, s/he is present in New York State for a number of days which does not exceed an amount which bears the same ratio to 90 as the number of days contained in such period of less than 12 months bears to 548. [19] As long as an individual who is domiciled in New York State continues to meet the requirements of either paragraph (1) or paragraph (2)

of this subdivision, s/he will be considered a nonresident of New York State for income tax purposes.

For New York State personal income tax purposes, a nonresident individual is anyone who is not a resident as defined in section 105.20 of this Part. Except where this Subchapter specifically provides otherwise, all references to nonresidents are equally applicable to nonresident aliens.

3 Scope Of The Nonresident Audit

There are three separate and distinct areas to be examined during the audit of a nonresident individual. These areas are: The Domicile issue, the Statutory Resident issue and the Income Allocation issue. The specific circumstances will determine the depth and scope of the audit. For example, a non-domiciliary with no permanent place of abode in New York but working within the state might only be asked to verify the allocation of income to New York, while individuals who reside at several locations during the year and have a long established pattern of maintaining a "home" in New York would be questioned concerning their resident status. In any case, where the taxpayer and/or the representative has submitted information to assist the auditor in identifying the scope of the audit, the taxpayer and/or the representative is entitled to a prompt response (usually within 30 days) as to the relevance of the material submitted and whether additional information is required. Certainly for situations in which the auditor identifies that more than one of the three areas must be examined, s/he will attempt to identify and request all pertinent additional information to cover all areas of the examination rather than making these requests piecemeal. This will save the taxpayer time and effort in complying with a documentation request.

Generally the selection process of matching and analyzing computer files is designed to identify four categories of nonresident taxpayers.

(1) Taxpayers who have filed a New York State nonresident return in the current selection year, but who have filed a New York State resident return in a prior year. Taxpayers identified in this way are selected for domicile audits. These individuals would be asked to show that their domicile actually did change during the year. (2) Taxpayers who have filed a New York State nonresident return in the current selection year as well as in the prior year, but who have been identified as having a permanent place of abode located in New York State. Taxpayers identified in this way are selected for domicile and statutory residence audits. If it is shown that the taxpayer is a nondomiciliary, then the time spent in New York will be examined to determine if the taxpayer was present for more than 183 days, thus making him/her a statutory resident. (3) Taxpayers who have filed a New York State nonresident return in the current selection year as well as in prior years, have no evidence of a permanent place of abode within New York State but who allocate a portion of their income to New York State. Taxpayers identified in this way are selected for allocation audits. In these situations, the taxpayer will be asked to show that the allocation of income to New York reflects a correct allocation.

(4) Taxpayers who previously filed a resident or nonresident return, or who were identified as having some connection (business or personal) to New York in the current

year, who have not filed a return. Taxpayers identified in this way are asked to explain their reasons for not filing a return in the current year. The auditor will then determine the direction the audit will take. In some cases the domicile issue will be explored while in others, the days spent in New York will be reviewed to determine if the individual is a statutory resident. Still others will be reviewed to determine the correct allocation of income to New York. [23] Identifying a potential domicile case in category #1 has the greatest impact, not only for the years under audit, but also for subsequent filings. If the auditor determines that the taxpayer did not actually change his/her domicile, and remains a New York State resident, then residency has been established. The taxpayer will then have to demonstrate, with clear and convincing evidence, any future change of domicile.

The emphasis on category #2 is to determine if an individual, having a permanent place of abode within the State, is a statutory resident by the fact that the taxpayer has a presence in the State of more than 183 days during the taxable year.

If the auditor determines during the course of the audit that domicile or statutory residence are not at issue, the auditor should not overlook the possibility of an allocation issue. Quite often, the records requested to analyze the statutory residence issue will be beneficial in determining the correct allocation of income to New York State and/or City, including the City of Yonkers.

Category #3 represents those cases in which the taxpayer's allocation of income to New York State should be questioned. These cases are stratified and prioritized as to revenue potential and are handled in both the District and Central Office operation. Audits in this category are generally handled through telephone contact and correspondence; but, when appropriate, face-to-face meetings with the taxpayer or their representative should be held.

Generally a taxpayer with ties to New York who is identified in category #4 as a non-filer is contacted by telephone or correspondence to determine the correct filing status. Many times, a simple explanation will clarify the reasons for not filing a particular return. Many times a simple explanation or analysis of the taxpayer's federal return, requested by the auditor at the beginning of the audit, will clarify the reasons for not filing a particular return.

As in any audit, returns selected in the nonresident program may have other issues in which verification is appropriate. Documentation should be requested for items which appear to be unusual or suspicious. In addition, areas such as the New York State addition and subtraction modifications, taxability of nonresident pensions which do not qualify as an annuity, and the appropriateness of city taxes (New York City and Yonkers as well as the NYC earnings tax) are examples of secondary issues to review on the New York State Personal Income Tax return.

As mentioned above, the nonresident case encompasses three separate audit issues: Domicile, Statutory Residence and Income Allocation. The various aspects of a case however, are intermingled. For example, a similar aspect in both the potential domicile or statutory residence case is to determine if the taxpayer maintains a permanent place of abode in New York State. After this, however, the approach of the

two audits differ dramatically. The domicile audit continues to determine if the taxpayer has demonstrated with clear and convincing evidence that s/he has effected a genuine change of domicile or was never domiciled in New York State. The statutory resident audit explores the taxpayer's records to determine the total number of days "present" in New York State.

The nonresident audit could place a heavy burden on the taxpayer due to the subjective nature of the areas reviewed. Throughout this guideline, the Department recognizes and has attempted to reduce this burden. The auditor, team leader and section head should attempt to streamline the audit where possible, identifying the scope of the audit in the early stages and pinpointing the specific records needed to accomplish the task. As mentioned earlier in this section, timely responses to the taxpayer and/or the representative can relieve much of the burden placed on the taxpayer during a nonresident audit. Keeping the taxpayer and the representative informed as to the progress of the case, the importance of certain documentation, and the relationship of the data to the audit conclusions can move the case along for the benefit of both the taxpayer and the Department.

In the textual discussion of nonresident audit areas, various cases are cited to demonstrate a point or better explain a position on a particular issue. The reader should note that only cases resolved by the New York State Tax Tribunal or the New York State Courts establish precedent in an area. Any cite of an Administrative Law Judge (ALJ) determination, although thoroughly explaining an audit issue in a case at hand, does not establish precedent for future cases nor does it necessarily represent current Audit Division policy.

4 Audit Area - Domicile

A. Definition

The word "domicile" is derived from the Latin "domus" meaning a home or dwelling place. Throughout time, however, domicile has evolved in the legal sense to be the place where the taxpayer has his/her true, fixed, permanent home. The domicile is the principal establishment to which s/he intends to return whenever absent. The term domicile should not be limited to refer to a specific structure but rather a place/area to which the taxpayer expects to return.

The term "domicile" and "residence" are often used synonymously in our everyday discussions, but for New York State Income tax purposes, the two terms have distinctly different meanings. Residence in a strict legal sense means merely a "place of abode." An individual may have many residences, or physical dwellings in which s/he resides, but can have only one domicile, or that permanent residence to which s/he intends to return.

B. Continuation & Change

Once established, a domicile continues until the person in question abandons the old and moves to a new location with the bona fide intention of making their fixed and permanent home at the new location. To effect a change of domicile, there must be

not only an intent to make such change but also actual residence in the new location. No definite period of residence or specified length of time in a particular place is required to establish a domicile, but when coupled with the element of intent, any residence, however short, will be sufficient. On the other hand, residence without intention to remain does not effect a change of domicile no matter how long the residence is continued.

Throughout these guidelines, reference is made to a change of domicile scenario which involves a move out of New York State (New York City or Yonkers) to another state. The auditor should also be concerned with individuals moving into New York State (New York City or Yonkers) and those who have changed their domicile in the past to another state but elect to return to New York State. The domicile and change of domicile rules cited in the guidelines apply equally to any change of residence scenario.

C. Intention & Motive

Intention is a decisive factor in the determination whether any particular residence which a person may occupy is his/her domicile. Since a domicile continues until superseded by another, a change of residence without the intention of creating a new domicile leaves the last established domicile unaffected. Change of domicile may be made on a whim, or fancy, for business, health, or pleasure, to secure a change of climate, or for any other reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person confirm the intentions. The fact that a person is motivated by self-interest does not prevent a change of domicile. Nearly everyone who changes domicile does so because they believe it to be to their advantage in one way or another. Therefore, the fact that a change of domicile was motivated primarily by a desire to gain a tax advantage is immaterial, if the intention of the individual to acquire a new domicile is absolute and fixed and his/her acts confirm that intention. The point that an individual may desire to "avoid" New York taxes and carefully craft his or her affairs so as to accomplish this purpose was addressed in Matter of Newcomb, 192 NY 238, 251 (1908) wherein the Court states that the "motives" for one's change of domicile are "immaterial except to the extent that motives may show intention."

The conclusion as to whether or not one domicile has been replaced by another depends on an appraisal of the circumstances and conditions surrounding the person whose domicile is in question. The determination in each case must be decided upon the particular circumstances of each case. The auditor must draw his/her conclusion from all the circumstances with no single factor controlling.

D. Burden And Degree Of Proof

There are two essential elements to a change of domicile: physical presence at the new location, and an intent to make such new location a domicile. The burden of proof as to a change of domicile is upon the person asserting the change. The evidence to establish both a change of residence and the required intention to effect a change of domicile must be "clear and convincing" as noted in Bodfish vs. Gallman, 50 AD2d 457. The intent to change a domicile must be manifested by unequivocal acts. In some

instances, this is a very easy burden to support, while in others it is, in varying degrees, more difficult.

An individual who moves into New York is subject to the same rules concerning burden and "clear and convincing" evidence as someone moving out of New York. If the weight of the factors do not present a "clear and convincing" body of evidence that the taxpayer has changed his or her domicile to New York, for situations in which the taxpayer was previously a non-domiciliary of New York, then the individual is to be treated as a nonresident. For example, if an individual gradually increases involvement in New York and gradually decreases ties to another state, the change of domicile to New York will not take place until the weight of the activity and involvement in New York presents a "clear and convincing" argument for New York domicile.

E. Factors To Be Considered In Determining Domicile

The factors used to determine domicile are divided into two general categories, primary factors and other factors. An analysis of the five primary factors (Home, Active Business Involvement, Time, Items Near & Dear and Family Connections) must provide a basis for New York domicile before information concerning the "other" factors is requested from the taxpayer. However, because of the intrusiveness associated with the "Family Ties" primary factor, a review of this factor will only be done if review of the other four factors (home, active business involvement, time and items near and dear) is not conclusive in determining domicile. The analysis of the primary factors should look at the New York ties for the specific factor in relation to the ties for the factor that exist in other locations. For example, an analysis of the "Home" factor would look at all the residences the taxpayer resides in each year during the years under audit in relation to each other. A decision concerning domicile cannot be made by looking at only one side of the factor; nor can a decision be made by examining only one factor. It is very possible that the decisions reached concerning an individual's domicile in one year will not be the same as the conclusions reached in another.

1. Primary Factors

Webster's New World Dictionary defines Primary as: 1. first in line or order; 2. from which others are derived; fundamental; 3. first in importance. All three meanings describe the importance of the primary factors in determining domicile. The primary factors are fundamental and first in line toward developing a case for New York domicile. The auditor is advised that information concerning the "other" factors should only be requested when a basis for New York domicile, using the primary factors, is found to exist or where primary factors are at least equal in weight for New York and another location. In virtually all cases the review of primary factors will result in a decision on domicile. There will be very few cases in which the examination of the "other" factors is needed to reach a conclusion on domicile. The development of a domicile case involves more than a mere listing of the factors that exist in one location versus those in other locations; the analysis must demonstrate a positive link or bond to New York or the other locations. The auditor should remember that a taxpayer's domicile is the place "to which the individual intends to return whenever absent."

The auditor must analyze the factors to determine if each factor points toward a decision favoring New York domicile or domicile in another location. When conducting the analysis, the auditor should explore the New York ties in relationship to the taxpayer's connection to the other locations. The auditor needs to weigh each primary factor, individually and then collectively.

For example, the fact that a taxpayer maintains a "home" in New York State is a feature that is present in most domicile cases. The mere fact that the taxpayer maintains a New York "home" however, is not sufficient, in itself, to establish a case for domicile or that this particular primary factor points toward a New York domicile. The auditor must explore the characteristics of the New York residence in comparison to the characteristics of the homes maintained in other locations.

Without first establishing a basis, from an analysis of the primary factors, pointing toward a definite tie to New York, or where the primary factors are at least equal in weight for New York and another location, the auditor need not explore the other factors with relationship to domicile. The primary factors are as follows:

A. Home

* THE INDIVIDUAL'S USE AND MAINTENANCE OF A NEW YORK "RESIDENCE," COMPARED TO THE NATURE AND USE PATTERNS OF A NON NEW YORK RESIDENCE.

The first factor that an auditor usually will review and discuss with the taxpayer is the homes maintained and used by the individual during each of the years under audit. What does an individual consider to be his/her home? Is it the actual dwelling (the building) in which s/he lives, or is it the area (the community) that s/he considers home? For the purposes of determining an individual's domicile, home can be either, or both, depending upon the circumstances. It also matters little if the dwelling is owned or rented but must represent a "residence" in the eyes of the taxpayer. Therefore, "home" refers not only to that family residence, which over the years has been clearly established and accepted by everyone as "home" to the taxpayer and/or their immediate family but also the community to which the individual has established strong and endearing ties.

An individual may give up or dispose of his/her traditional family home (a building) for a variety of reasons. The change in a neighborhood configuration, zoning law changes, loss of a lease, the conversion of a building to another form of ownership, encroaching business or commercial areas, increase or decrease in family size, or simply the desire to change homes are examples of why an individual might give up one home and acquire a new residence. An individual, who is a long time resident of a particular area of New York, usually has developed a range of sentiment for that area as well as the dwelling in which s/he resides. Selling or disposing of that dwelling, for whatever reason, does not change the attraction the individual has for the area when a new residence is acquired within the area. The newly purchased or rented residence will carry with it that range of sentiment the individual has for his/her former "home."

For example, if a couple resides in a particular community while raising their children and sells their residence to purchase or rent a smaller residence in the same community after their children are grown, that new residence, regardless of the length of time spent there, takes on the full range of sentiment the couple has for the community in which they reside. Likewise, if an individual who is domiciled outside New York downsizes his/her residence for any reason, the new residence in that community will take on the range of sentiment the individual had for the prior residence at the location outside New York.

It must be emphasized that retention of a residence in New York is not, by itself, sufficient evidence to negate a change of domicile. The mere location of a home in New York does not establish a case for domicile. The New York residence must be compared with the residences located in other areas to determine if the circumstances support a determination of New York domicile. The individual needs to use the residence as their home and this use pattern must outweigh the patterns established at other locations.

i. Where "One Home" Is Maintained

When an individual has only one home, decisions concerning domicile are more straightforward than when an individual maintains two or more residences at various locations. When a taxpayer sells or ends the lease on his or her New York residence and acquires living space in another state, coincidental with each other, it is an important indicator that a change in domicile has occurred at the time of actual residence in the new location. The taxpayer, in giving up the only residence which is located in New York and acquiring another outside New York, is giving an important signal of intent to change domicile.

ii. Where "Two Or More Homes" Are Maintained

Attempting to sell:

In other cases a taxpayer may claim a change of domicile while attempting to sell his/her only residence in New York. The auditor must look at the facts and make a decision on the taxpayer's intent. The auditor should give appropriate weight to facts such as whether the taxpayer has sold or moved possessions from the location, contracted with a real estate firm to sell the property, etc. If the auditor determines that the taxpayer's intent was not to abandon the New York domicile and begin a new one outside New York, there should be some basis that the auditor can point to sustain that determination, e.g. the taxpayer may have listed the property at a price significantly above market value (see Matter of Jack and Frances Silverman , TSB-D-89(14) I) ; the taxpayer may not be "actively" trying to sell the property; the taxpayer has not moved family heirlooms, treasured possessions, etc, to the new location.

Acquire another home, or change homes during the audit period:

A much more difficult decision concerning an individual's intent occurs when the circumstances are such that s/he does not give up his/her New York residence. Such is the case when a taxpayer continues maintaining the New York property and acquires a

new permanent place of abode outside New York, or claims to change domicile to an existing residence outside New York State. Taxpayers can keep/maintain their original New York residence and change their domicile. Although this can happen, it is important for the auditor to keep in mind that the courts have consistently held that:

"In order to change domicile, both the intent to abandon the former domicile and to take up the new and an actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955,433 NYS2d 276) . The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138, 140, quoting Matter of Bourne, 181 Misc 238, 41 NYS2d 336, 343, affd 267 App Div 876, 47 NYS2d 134, lv denied 267AD 961, 48NYS2d 439) .

Requisite intent must be established by "clear and convincing evidence" (Matter of Newcomb, 192 NY 238, 251) , and the person asserting the change of domicile must show the necessary intention existed (see, 20NYCRR 105.20[d][2]) ."

The auditor needs to carefully examine the ingredients of the "Home" factor before making a decision concerning its relationship to domicile. The auditor must also keep in mind that the "Home" factor is only one of the primary factors to be considered when arriving at a decision concerning an individual's domicile. Some of the elements the auditor must consider in determining a taxpayer's intent are as follows:

iii. Size Of The Residence.

While size is an important item to be considered, it is not determinative in and of itself. A comparison of the size of the residences at the various locations must be made. This analysis should be as specific as possible, contrasting the size of one residence against another. For example, if an individual owns a residence along the New Jersey shore and an apartment in Manhattan, the auditor should request information which will describe the size of the two dwellings. Once this is done, the auditor can use this information along with other aspects of the "Home" factor to arrive at a determination as to which home reflects the taxpayers domicile. If all aspects of the "Home" factor are equal in weight, the residence that the taxpayer has historically maintained as their home may be of more import.

iv. Value Of The Residence

The value of the various residences owned or leased by the taxpayer during the audit period is as important as the size of the residences when analyzing information to determine domicile. When comparing the value of the various residences, the dwelling with the greatest value is not, by itself determinative. The information gathered must be weighed with other information concerning the "Home" factor to determine which home reflects the individual's domicile. The value of the various residences is more difficult to determine than the size of the dwellings. The difficulty arises out of the fact that equal size dwellings could have significantly different values based upon the location of the property and the dwelling. In some cases, comparable homes in a retirement community may be substantially different in value than a home located in New York.

Even within New York State, the value of a dwelling may differ dramatically depending upon the location. For example, the value of property, including a residence, may be considerably less in an upstate community where space is abundant while the value of property located in the New York City Metropolitan area would be notably higher because of the limited space available. The auditor should discuss the value of the residences with the taxpayer or the representative. In evaluating the "Home" factor, the value of the dwellings is one aspect of the decision.

v. Nature Of Use.

How a taxpayer views a particular dwelling is another aspect of the "Home" factor. Often, as an individual becomes more successful in his or her career, the need to dispose of one residence before acquiring another is diminished. Mere retention of the residence may be an insignificant indicator, especially where the taxpayer owns several properties.

An individual may prefer to use a former principal residence as a seasonal home or hotel substitute after moving from New York. Affluent nonresidents may have no economic need to sell a particular residence. Auditors should question the individual concerning the use of the residence and weigh this aspect as part of the factors which are used to determine the "Home" factor.

It matters little, when analyzing the "Home" factor, whether the individual owns or rents a particular dwelling. The type of lease however, could shed light on how an individual views a particular piece of property. For example, a taxpayer who rents a residence on a year-to-year basis may not show the same intent as a taxpayer who purchases or enters into a long-term lease. There are however, situations in which an individual signs a year to year lease because of the rental conditions of the unit in which s/he resides. When this rental takes place every year over a long period of time, the individual, in effect, is in a long term leasing situation. The auditor should review each residence to determine how the property is held (either rented or owned) as well as the length of time the property has been held.

vi. Other Aspects Of A Home.

There are other aspects of the "Home" factor which can be analyzed to assist in making a decision concerning domicile. Individuals selected for audit may have various employees associated with their different residences. For example, an individual may employ domestic help, groundskeepers, chauffeurs, etc. to help in the maintenance of the various dwellings or a particular lifestyle. In such instances, the auditor should question the taxpayer concerning the various employees and compare the number and types of employees at the different locations.

vii. Conclusion Of The "Home" Factor.

After gathering the data necessary for the analysis of the "Home" factor, the auditor must weigh the various aspects, size, value, nature, use, and other aspects concerning each of the residences owned or leased by the individual taxpayer. A determination must be made concerning this one factor as to whether the elements

tend to reflect a New York domicile or domicile at another location. The auditor must keep in mind that this "Home" factor represents only one of five primary factors. The same process of analyzing the aspects of the remaining factors must be applied in order to arrive at a conclusion.

vii. Tax Consequences For Some Changes In Domicile.

During an audit of an individual who historically maintains a home in New York, yet claims to be a resident of another state, the auditor may find that there are tax consequences of claiming an out-of-state residence. When a taxpayer spends several months visiting friends and family in New York, they may find it economically beneficial to maintain the New York property rather then rent or stay in a hotel during their visit. For taxpayers who fall into this category, there may be a tax effect of claiming a primary residence or domicile outside New York resulting in a taxable capital gain when the New York property is eventually sold.

For example, a husband & wife purchased a home in New York for $ 150,000 in 1965 and established New York as their domicile. In 1985 the taxpayers purchased a home in Florida and moved there. They now consider themselves nonresidents of New York, but did not dispose of their New York home. The New York residence is sold in 1990 for $ 500,000. Since the taxpayers changed domicile in 1985 and no longer used the New York home as their primary residence after 1985, they would not be permitted to defer the gain or take advantage of the $ 125,000 exclusion. The IRC states that a taxpayer may defer the gain as long as they purchase and live in a new home within the appropriate replacement period. The replacement period extends from two years prior to the sale to two years after the sale of a principal residence. In the example, the taxpayer indicated that they changed their domicile in 1985 which is prior to the replacement period. The New York property would not qualify for the postponement. This taxpayer would pay tax to New York on the full $ 350,000 gain in the year of the sale. (The $ 125,000 exclusion applies to a single individual or married couple. A married person filing separately is limited to $ 62,500.) In addition, the taxpayer may not exclude $ 125,000 from income because they did not live in the home during the five year period ending on the date of the sale.

The auditor should be aware that the sale of a primary residence does not always correspond to a change of domicile. For Federal purposes, a taxpayer is afforded the opportunity to defer or exclude gain on the sale of a primary or main residence. The IRS defines "main" home as the one you live in most of the time. It can be a house, houseboat, house trailer, cooperative apartment, condominium, etc. As you can see this differs dramatically from "domicile," which has intent as the key element.

B. Active Business Involvement

* THE INDIVIDUAL'S PATTERN OF EMPLOYMENT, AS IT RELATES TO COMPENSATION DERIVED BY THE TAXPAYER IN THE PARTICULAR YEAR BEING REVIEWED.

* BUSINESS INVOLVEMENT ALSO INCLUDES ACTIVE PARTICIPATION IN A NEW YORK TRADE, BUSINESS, OCCUPATION OR PROFESSION AND/OR

SUBSTANTIAL INVESTMENT IN, AND MANAGEMENT OF, ANY NEW YORK CLOSELY HELD BUSINESS SUCH AS A SOLE-PROPRIETORSHIP, PARTNERSHIP, LIMITED LIABILITY COMPANY AND CORPORATION.

The taxpayer's continued employment, or active participation in New York State sole-proprietorships and partnerships, or the substantial investment in, and management of New York corporations or Limited Liability Companies is a primary factor in determining domicile. If a taxpayer continues active involvement in New York business entities, by managing a New York corporation or actively participating in New York partnerships or sole proprietorships, such actions must be weighed against the individual's involvement in businesses at other locations when determining domicile. The degree of active involvement in New York businesses in comparison to involvement in businesses located outside New York is an essential element to be determined during the audit.

In today's world of electronic gadgetry and instant communications, involvement with New York businesses can takes place from afar or while physically present in New York State. The degree and dimension of a taxpayer's involvement in the day-to-day operation, or in a policy making position, must be analyzed during the audit.

An otherwise absent person whose primary factors other than Active Business Involvement point toward non-New York domiciliary status should not be treated as a New York domiciliary simply by reason of long distance contacts with business activities in New York. Likewise, a person present in New York should not be able to assert domicile-like contacts with another state based solely on long-distance business activities involving that other state. Put differently, even though operation of a New York business from outside New York may contribute to a finding of a Active Business Interest in New York, the fact that the taxpayer seldom comes to New York, maintains no home, family or objects near and dear in New York should generally assure that the individual will not be treated as a New York domiciliary.

The extent of an individual's control and supervision over his/her New York business interest was one factor, among others, that was discussed by the Appellate Division, in Matter of Herbert L. Kartiganer, 194 AD2d 879, 599 NYS2d 312, TSB-D-91-(23)-I, where it states:

"The record further indicates, however, that Kartiganer retained a significant proprietary interest in his engineering firm and continued to play an active role in its day-to-day operation.

Indeed, Kartiganer testified that he remained in constant communication with the Orange County office by telephone and courier service."

The Administrative Law Judge, in holding that petitioner did not satisfy the burden of proving a change in domicile from New York to Florida, stated that:

"Although the maintenance of significant business interests, which required the active involvement of Mr. Kartiganer, is the most persuasive indicia that the petitioners did not

change their domicile to Florida in 1982, there are many other factors that support the conclusion that the petitioners did not change their domicile to Florida."

Upon affirming the determination of the Administrative Law Judge, the Tribunal said:

"The record contains formal declarations that petitioners intended to make Florida their new domicile, but many factors indicate that they failed to abandon their New York domicile and sever their ties with New York. Significant factors include the ownership and regular use of a house in New York, and the petitioner's wage and tax statements showing that New York address . . ."

The most significant factor is the petitioner's constant supervision and review of his business interests in New York.

. . . The petitioner Herbert Kartiganer stated that they (the petitioners) maintained adequate internal controls over their proprietary interests in New York according to certain protocols and that these protocols required his approval of all proposals, his supervision of progress check points of on-going projects and his final review before submission to clients. The evidence in the record clearly shows that petitioner Herbert Kartiganer retained overall control of his New York business interests.

Passive investment in a New York business is not indicative of domicile whereas a taxpayer actively participating in the management of a business may be. Activities such as operating a business must be given greater weight than the mere investment in a business venture. The fact that funds are left on deposit with a New York bank must not enter into a determination on domicile.

Employment and business connections in New York must be closely scrutinized to determine the degree of involvement. Active participation in the day to day operation of a New York business, such as those referred to in the Kartiganer decision weigh heavily in deciding an individual's business involvement. Another good example of active business involvement was Richard E. Gray v. Tax Appeals Tribunal , (Appellate Division, Third Department by Memorandum and Judgement dated January 9, 1997) . The Court cited Mr. Gray as being the controlling shareholder and chairperson of the board of Gray- Syracuse Inc., a New York-based manufacturing corporation. In their review of the Tribunal decision, the Court used Mr. Gray's own words to document his New York business ties. Mr. Gray was quoted as being, "deeply, deeply involved" in the operation of Gray-Syracuse and felt his involvement was "vital to the health of the company."

The auditor must be aware that the "Active Business Involvement" factor, like the home factor, is only one factor leading to a decision concerning the individual's domicile. If the facts clearly show that the business is being run from an out-of-state location, the control that the individual asserts over the business is one factor in favor of a New York domicile while the individual's out-of-state presence is a factor in favor of domicile outside New York. The actual location of the business is one element to be examined during the audit. The degree of involvement by the individual in the day-by-day operation of the business is another. Each element of the "Active Business

Involvement" factor must be compared between New York involvement and involvement in businesses at other locations. A good example of where the taxpayer was determined not to be actively involved in the business is the Administrative Law Judge's determination, The Matter of Paul and Ellen Burke, DATA 810631 in which the ALJ noted:

"While it is reasonable to expect that Mr. Burke would take some interest in a business he had built and which supplied a stream of income in retirement the same does not, given all of the circumstances and credible testimony, compel a conclusion that Mr. Burke was actively involved in the business. Further, it is not implausible to accept and expect, after 30 years of full- scale construction and development with its attendant stress and long workdays, that the Burkes would be more than ready for a change to a hands-off, relaxed and recreation/social-oriented lifestyle. To this end, the Burkes configured their business to be managed by others, and made their home where people of like circumstances, aims and means were situated (i.e., in Florida)." The ALJ determination of Burke was affirmed by the Tribunal, see TSB- D-94(18)-I.

The adoption of the passive activity loss rules of the Tax Reform Act of 1986 increases the importance of analyzing the individual's business ties. For example, a taxpayer may have provided documentation, with his/her federal return, to substantiate that s/he materially participates in a New York activity. This material participation may permit the individual to exclude the loss from the passive activity loss limitations. However, this same activity can also be used to show that the taxpayer has significant New York business connections.

In a family owned business, if a parent passes the daily operation of the New York business to the children but remains active in the decision making process, this active involvement could demonstrate the taxpayer's continued connection to New York. As persons become older and accumulate wealth, they may choose to devote less time to the business and bring in younger individuals who will eventually succeed them, ever reducing their status and compensation. This alone does not demonstrate a change of domicile. This diminished involvement in a New York business is one element of the "Active Business Involvement" factor which becomes less important as the taxpayer phases out of the operation. In the end, the auditor must weigh this item against others, such as the individual's involvement in any business ventures located outside New York, before reaching a conclusion. The conclusion reached on the basis of the "Active Business Involvement" factor is only one component of the five primary factors.

When examining the primary factors, the auditor must concentrate on the analysis of the primary factors, of which Active Business Involvement is one. When analyzing the implication of a taxpayer's business contacts in determining domicile, the questioning must center around the underlying issue of domicile. For example, a taxpayer whose claimed domicile is some distance from the place at which he or she works and whose work patterns therefore entails frequent overnight stays in a more convenient place from which he or she commutes to work, presents a different picture from the suburban commuter who has a New York home, but regularly commutes to, and stays overnight in, the jurisdiction of claimed domicile. The taxpayer who comes into New York to pursue his or her main occupation has a different quality of

association with New York than a taxpayer who comes to New York to see a Broadway show.

C. Time

* AN ANALYSIS OF WHERE THE INDIVIDUAL SPENDS TIME DURING THE YEAR.

Another one of the primary factors is a quantitative analysis of where the individual spends his/her time during the tax year. The auditor should compare the time spent in New York in relationship to the time spent at the other locations. The "Time" factor is only one of the factors. A decision concerning domicile cannot be made based only upon the analysis of where the individual spends his/her time. The results of this comparison must be weighed with the results from the first three other primary factors to reach a decision.

A diary, appointment log, or calendar maintained by the individual can be used to support this analysis. Some of the individuals who are audited, however, do not keep extensive diaries or logs. It would not be expected that an individual who has retired from active employment would keep a detailed diary or log as to where s/he was every day of the year. A personal conversation with the taxpayer and the representative can usually help to clarify the situation and provide the auditor with the patterns of travel for the years under audit. The auditor should explain the importance of determining where the taxpayer actually spends his/her time and show the relationship to the audit conclusions.

During this analysis, the auditor should focus on the overall living pattern of the taxpayer, asking whether the patterns present strong evidence that the new location has become the taxpayer's domicile. For example, if an individual formerly lived and worked in New York during the entire year, but has retired and moved south, seasonal visits to New York, such as an annual summer visit, should not be viewed negatively. This visit to New York is entirely consistent with the taxpayer's new pattern of living and purported change of domicile. An illustration of this is the comments of the ALJ in The Matter of Henry and Betty Karlin, DATA No. 807996.

"It is clear that they (the Karlins) had significant and long- term as opposed to only recently acquired ties to Florida, and that by the years in question they had shifted their focus so as to make their permanent home (in retirement) and domicile in Florida. In sum, petitioners were "summering" in New York, but lived in Florida. Hence, petitioners were properly considered domiciliaries of Florida during the years 1986 and 1987."

By contrast, if the taxpayer merely changes from spending six months per year in the southern home to spending seven months per year, this minimal alteration, by itself, should not constitute strong evidence of a change of domicile.

At this point, if the audit is focused on domicile, the auditor need not account individually for every single day as long as patterns are established. The auditor should seek out credible testimony from the taxpayer and attempt to recreate the locations where the taxpayer spent time during the audit period. The information that the auditor receives as testimony or declarations from the taxpayer should be weighed along with

the other factors relating to any of the locations where the taxpayer resided during the audit period. If the individual provides diaries or logs, they should be randomly checked for their validity.

A good example of the taxpayers' credible testimony being accepted by the Tribunal is Petition of Armel, DATA 811255 (see Appendix C). The taxpayers were unable to provide documentation to substantiate their whereabouts during one month of the audit period that was vital in deciding their statutory residency. However, the Tribunal held that the taxpayers' credible testimony along with affidavits from their friends and associates was acceptable in lieu of documentation. Thus, because the affidavits corroborated the petitioners' position, the Tribunal accepted the testimony that the taxpayers were not in New York during the month in question.

To the contrary, in the Matter of Charles Hull Jr. and Mary Hull, TSB-D-94-(38I, the Tribunal affirmed the Department's position that the records submitted did not adequately corroborate the testimony provided by the taxpayer. For instance, the Tribunal cited the determination of the ALJ who "found that many of the organizations that the petitioners asserted that they resigned from upon changing their domicile to Florida in 1988 did, in fact show activity or membership well after that date. In addition, the petitioners did not surrender their New York drivers' licenses when they said they did; continued to register motor vehicles in New York State after their purported change of domicile and did not use their Florida checking account more than their New York checking account as they had asserted.

As you can see, a taxpayer does not necessarily need additional documentation, beyond his or her own statements, as to the amount of time spent in New York. Since it is normal for people to display certain predictable and repetitive migratory patterns, and it is abnormal for people to document their presence in a particular location on every day of the year, an auditor should measure the credibility of a personal account in the context of an audit.

The auditor should accept a taxpayer's credible and consistent account of routine travel.

In order to substantiate the entries in a diary, or if no diary exists, a taxpayer may be asked to provide other information such as: credit card receipts, utility usage patterns, ATM access records, or other information to identify where the taxpayer was during a specific period. For example, a taxpayer might be asked to submit expense accounts or credit card receipts to demonstrate a presence IN or OUT of New York. In addition, telephone bills may be requested to show the activity at a particular location. This activity could also be used to demonstrate a presence either in or out of New York. Testimony should also be sought from the taxpayer which would substantiate the entries in the diary or log. Random sampling and test checking of the entries in a diary and/or other testimony submitted by the taxpayer will reduce the burdens placed upon the taxpayer to produce records and documentation.

The auditor should use all of this information to determine the pattern of activity both in and out of New York State. The information provided by the taxpayer will usually represent time spent at the New York location as well as the location of the claimed

domicile. The auditor will analyze information pertaining to the time spent factor for the purpose of comparing time spent at the claimed domicile to the time spent in New York. Time spent in places other than these is not considered in this analysis. The auditor should review this material from both the New York perspective and that of the other location. The review of diaries and logs should be handled in an objective manner. The auditor should not concentrate only on conducting an exhaustive review of third party records focusing on NON-NEW YORK days but should equally review information submitted by the taxpayer concerning out-of-state documentation of what appears to be a New York day.

"False" indicators that can mistakenly turn a non-New York day into a New York day include credit card purchases in New York by children, phone calls by housekeepers, and children or relatives staying at the New York address as a guest of the taxpayer when s/he may not be in New York. The auditor should carefully examine this type of documentation. When appropriate, an affidavit from a third party individual may clarify the situation. In addition, auditors should be alert for the same "false indicators" which might be used to verify a day spent out of the state.

When analyzing the time spent at the various locations, the auditor can ease the burden placed upon the taxpayer by being reasonable in the determination of the undocumented days. For example, if an individual has provided documentation for a Friday and Monday that they were vacationing out west, it is logical to assume that the individual spent Saturday and Sunday there also. If the taxpayer cannot provide specific documentation for the Saturday and Sunday, the auditor should not consider these days as New York days without evidence that the individual returned to New York for the weekend.

D. Items "Near & Dear"

* THE LOCATION OF ITEMS WHICH THE INDIVIDUAL HOLDS "NEAR AND DEAR" TO HIS OR HER HEART, OR THOSE ITEMS WHICH HAVE SIGNIFICANT SENTIMENTAL VALUE, SUCH AS: FAMILY HEIRLOOMS, WORKS OF ART, COLLECTIONS OF BOOKS, STAMPS & COINS, AND THOSE PERSONAL ITEMS WHICH ENHANCE THE QUALITY OF LIFESTYLE.

Another primary factor is the location of pets, personal items or other sentimental possessions which the taxpayer holds "Near & Dear to their heart." These include specific items of value, such as a rare book, art or antique collection, or those of little monetary value such as a family photo album, which enhance and add quality to the individual's lifestyle. In some cases it may be appropriate to review insurance policies which could disclose the actual location of such items, particularly if moved to a new location. As part of the opening interview with the taxpayer the auditor should discuss the location of the items s/he places value on. This analysis of "Near and Dear" items can help to solidify the intent of the taxpayer concerning the location of his/her domicile. For example, a collector of rare books could show his intention to change domicile if a new residence is modified to accommodate the large collection and the collection is actually moved to the new location. However, if the same collector does not move the books, this, coupled with the results of the analysis of the other primary factors, may

indicate that the taxpayer is not showing intent to give up and abandon the former domicile.

The items "Near & Dear" at all locations must be reviewed and a comparison made. The mere location of items "Near & Dear" is not conclusive in determining the location of one's domicile, but is one factor which helps to give a picture of how the taxpayer views his/her domicile. The auditor must look, not only, at the items which remain in New York but must look at all items considered to be "Near & Dear" to the individual. The auditor should not ignore or dismiss the transfer of "Near & Dear" items to a non-New York location. Even though the transfer of these possessions to a non-New York location could be viewed by some as a mechanical or a self-serving act, consideration must be given for those items located outside New York. An example of this is included in the comments made by an Administrative Law Judge in The Matter of William and Marion Langfan, DTA No. 808823. The ALJ wrote:

"Although the Division contended that petitioners left many important personal items in their New York residence, like crystal and furniture, it was established that the Langfans moved valuable artwork and sculptures created by Mrs. Langfan's father and her jewelry, which was kept in a safety deposit box in Florida, to Florida in 1985. These valuables and sentimental items represent a clear emotional tie to New York which was severed by petitioners when they removed them from the State of New York to the State of Florida."

If an item is valuable, or has significant sentimental value to the individual, we would expect the item to be moved by a first rate carrier. For example, one would not expect an individual to move antique furniture in a U-haul, but rather by a bonded and insured professional carrier. This type of move might be documented with "bills of lading" or insurance statements.

In assessing the nature of "near and dear" items, auditors must be sensitive to the unique circumstances of the individual being audited. Obviously, that which is "near and dear" to any individual will sometimes be highly subjective. Individuals with several residences usually have items enhancing the quality of their lifestyle in every residence that they maintain. For example, when a taxpayer is maintaining more than one residence, furniture appropriate to each residence will also be maintained. Antique furniture may stay in the New York residence because it is geographically inappropriate for the Florida home, and not because the taxpayer remains domiciled in New York. Auditors should not assume that because a person has the wherewithal to be possessed of expensive possessions that such expensive items are "near and dear" to an individual in the sense of making a house a home. The appraised value of possessions, insurance bills, or the lack of moving bills therefore should not automatically lead to the conclusion that the taxpayer's domicile follows the location of such belongings. Auditors should consider the possibility that a taxpayer maintains such items in one location because they are not "near and dear" enough to move to the taxpayer's "home." Similarly, items with significant intrinsic value may be located in one location for reason of preservation or safe-keeping, in which case the locus of the item is more an investment decision than a reflection on domicile.

Lastly, when developing the "near and dear" factor, the auditor is reminded to recognize that sentimental significance is different from monetary value, and the mere fact that valuable possessions are in one location or the other (or both) may not, in some cases, shed light on domicile.

E. Family Connections

While analysis of the "time" factor presents us with the most quantitative factor in determining an individual's domicile, analysis of "family" is a much more subjective factor. Throughout the discussion of the primary factors it has been stressed that no single factor can be considered a "stand alone" indicator of domicile. This statement certainly holds true for the analysis of "family connections" as a factor in determining domicile.

Because of the intrusiveness associated with "Family Ties," a review of this primary factor will be done only if review of the other four factors (home, active business involvement, time and items near and dear) is not conclusive in determining domicile.

The Department recognizes that the analysis of an individual's familial connections could be intrusive into one's private and personal lifestyle. To minimize the invasive nature of any audit, an analysis of family connections should be limited to the taxpayer's immediate family when necessary to reach a decision on domicile. The basic question of what constitutes an individual's immediate family is an area that could vary from individual to individual. However, family, for the purposes of this analysis will consist of the individual, the spouse, and any minor children.

When minor children are part of the family unit, the circumstances surrounding the children's attendance in school should be reviewed to determine whether a persuasive argument can be made for domicile in one location versus another. For example, if minor children are attending a non-boarding school within reasonable commuting distance from the taxpayer's Connecticut resident, then it may be concluded, if supported by other factors, that the taxpayer intends this Connecticut residence to be his or her domicile. However, if minor children attend a boarding school located near a Connecticut residence, but rarely return to the Connecticut residence, and do return to New York on the weekends, this, if supported by other factors, could indicate that the individual is domiciled in New York.

If there is a need to question an individual concerning his or her immediate family because the evaluation of the first four factors is inconclusive, then the auditor must be discreet and non- invasive. Again, this inquiry should only be necessary in a very limited number of situations. In most cases, the review of the four other primary factors will result in a conclusion on domicile. The taxpayer is always afforded the opportunity to provide information on this factor.

As mentioned in the discussion of the time factor, the focus of the analysis should be on the living patterns established by the taxpayer. For example, if an individual formerly lived and worked in New York during the entire year, but has retired and moved south, seasonal visits to New York, such as an annual summer visit, should

not be viewed as indicative of domicile. This visit to New York is entirely consistent with the taxpayer's new pattern of living and purported changes of domicile.

The family connection can help determine the domicile of an individual when it is the bond that draws an individual back to a location whenever absent; and encompasses his/her habit of life.

2. Evaluation Of The Factors

After the primary factors are analyzed, and sufficient information is gathered upon which a conclusion can be based, the auditor, possibly in conjunction with his/her team leader, must look at the information and formulate an opinion as to the domicile of the individual. This determination of an individual's domicile can often be facilitated by applying the accounting principle of a "T" account to the factors. By aligning the factors favoring a New York domicile on one side of the account and the factors favoring a domicile outside New York on the other side, the auditor and the taxpayer are provided with a visual summary of the reasons for a specific determination.Several principles should be kept in mind during this decision making process. They are as follows:

No single primary factor is determinative. A decision must be based upon a review of all the first four primary factors affecting domicile, if possible. If that is not determinative, then the fifth factor should be added to the review.

When family connections are reviewed as a factor, the auditor should review with the taxpayer such family connections as where minor children attend school. The auditor should review the connections to family in other locations as well as those to family located in New York. The analysis of the individual's family connections at the various locations where s/he resides, should be weighed carefully to determine if the circumstances shed any light toward a decision concerning domicile. The auditor should be aware that the family connection is but one factor among five primary factors to be considered and may only be reviewed if an analysis of the other four factors is inconclusive in determining domicile.

Many of the individuals who have been audited have expressed a difficulty with the personal and invasive questions necessary for an analysis of this area. However the Courts and the Tax Appeals Tribunal have recognized the importance of this factor when determining domicile. In the Matter of Clay & Rita Buzzard TSB- D-93-(2)-I, the Tax Appeals Tribunal stated that:

". . . critical to our decision that there has been no change of domicile is the petitioners' relationship with their family, an intangible factor which permeates the record. . . . The petitioners have expressed their commitment to spending as much time as possible with their children and grandchildren, . . .returning to Buffalo to spend the warmer months and the Christmas holidays with them during the years at issue."

It is this, combined with other factors, including continued business ties to the Buffalo area, the continued use of a New York residence and the time spent in New York, that goes against the petitioner's assertion of a change of domicile.

Evaluate the primary factors objectively. Look at the patterns that are established by the individual. o Be open minded and fair in evaluating all factors in a balanced and reasonable manner. o Be cognizant of the fact that individuals go through evolutionary changes during their lifetime. [103] Each primary factor must be analyzed and a determination reached upon the conclusion of the analysis. In some instances, the analysis of the primary factors will present "clear and convincing" evidence relating to the individual's domicile. In other cases, the analysis of the primary factors may fail to provide convincing evidence, or point equally to a domicile in more than one location. In these situations, the auditor must examine the "other" factors in an attempt to clarify the individual's domicile. Particular attention should be drawn to the concluding comments of the Tax Appeals Tribunal determination in the Matter of Clay & Rita Buzzard TSB-D-93- (2)-I. In this decision the Tribunal analyzed each of the factors and reached a conclusion based upon the facts. The Tax Appeals Tribunal states that:

"It may be argued that petitioners' life did not continue to focus exclusively on the Buffalo area to the extent it had prior to 1981; indeed there is ample evidence that petitioner Clay Buzzard did move about extensively both for personal reasons as well as for the benefit of MAWDI. Further, it is acknowledged that petitioners also owned a home in Florida, belonged to two country clubs in Florida, developed social ties in there Florida neighborhood, demonstrated various formal connections to the State of Florida (e.g., driver's licenses, voter registration, etc) , and, because of Mr. Buzzard's health concerns, were constrained as to where they could spend the winter months.

However, critical to our decision that there has been no change of domicile is petitioners' relationship with their family, an intangible factor which permeates the records. . . .The petitioners have expressed their commitment tospending as much time as possible with their children and grandchildren, . . .returning to Buffalo to spend the warmer months and the Christmas holidays with them during the years at issue. This, combined with their continued business and social activity in Buffalo, goes against petitioners' assertion of a change in domicile. . . . It appears that but for Mr. Buzzard's medical condition petitioners would have spent an even greater amount of time in the Buffalo area. . . . We determine that petitioners have not shown, in a clear and convincing manner, an intent to change their domicile to Florida."

A major change in the patterns surrounding the primary factors can signal a change in domicile. The auditor should never trivialize steps taken in the new location (such as the purchase of a new home, community activity, or business involvement) while magnifying the importance of the remaining New York connections. A lack of balance would create a heavy burden of proof for taxpayers, one which they feel they may not be able to overcome simply with statements of intent, or the existence of certain ties in the new location. As a result, some individuals may be given wrong advice that they can only accomplish the change with the severance of almost all ties to New York.

The auditor should recognize differences in use, including the possible conversion of a full-time principal home into a vacation residence, used only during the summer or during periodic visits to the state. The auditor should determine whether the taxpayer has acquired a permanent place of abode in the new location and is actually living in the location. With respect to the retained New York property, the focus should

shift to the purported change of use, a change which converts the residence from a year-round home, the principal place of domicile, to a vacation property or hotel substitute. If the taxpayer says that s/he intended a permanent move to another state, the auditor should focus on the use of the former New York home to confirm or discredit the taxpayer's stated intent. A dramatic change in use of the New York living quarters, such as a change from full-time to seasonal use, or a change from full-time use to use (e.g., by a cross-border commuter) one or two nights per week would tend to confirm the stated intent. Mere retention of the residence may be an insignificant incident, especially where the taxpayer owns several properties in and out of New York.

The auditor must ask if the individual's business or work patterns have changed, and whether the individual has significantly altered their work habits by reducing their duties, or transferring day-to-day responsibilities to others. Occasional use of the New York office, and telephone, courier or fax communication with a New York business are not appropriately viewed as strong indicators of New York domicile if the individual's work pattern and responsibilities have significantly changed.

The auditor should concentrate on the overall living pattern, asking whether the pattern of time spent in various locations presents a body of evidence that supports the new location as the taxpayer's domicile. If the taxpayer formerly lived and worked in New York during the entire year, but has retired and moved to Florida, seasonal visits to New York, such as annual summer visits, should not be viewed negatively. They are entirely consistent with the taxpayer's new pattern of living and purported change of domicile. Occasionally, the occurrence of an event forces a drastic change in lifestyle. Retirement, loss of employment, the death of a spouse, a divorce and re-marriage, or even the growing up of one's children can trigger a desire to change a lifestyle. The awareness of the auditor to the circumstances surrounding a dramatic change could explain a move to another location and ease the burden placed upon the individual to produce documentation of the change. By contrast, if the taxpayer merely changes from spending six months per year in Florida to spending seven months per year, this minimal alteration, by itself, would not constitute strong evidence of a change in lifestyle when determining domicile.

When the evidence supports a significant change in lifestyle, the change of domicile must be recognized. In the case of an individual who retires and moves out of New York, if the patterns of residence, time and business activity support a change, the change should be recognized and the individual notified to that effect. Taxpayers who claim a change of residence during the audit period should provide information to support the change of lifestyle. If the taxpayer or representative is not forthcoming with the information, the auditor should request this information to support the alleged change. This supports the Department's position concerning the benefit of an opening interview or conversation with the taxpayer. Much of this information concerning changes in lifestyle can be determined through careful questioning of the taxpayer and/or the representative early in the audit process.

When the fact patterns do not present a change in lifestyle, a conclusion similar to that reached by the Tax Appeals Tribunal in the Matter of Colin & Delma Getz, TSB-D-93-(11) I, is appropriate. The Tribunal concluded:

"Although the petitioners made certain formal declarations that they changed their domicile (e.g., voter registration and car registrations) , such declarations are less persuasive than informal acts which demonstrate an individual's general habit of life. . . . Other informal conduct by the petitioners such as maintaining a checking account in Florida and a savings account in New York was, by itself, not sufficient to contradict the formal declarations of a change of domicile; however, given the aggregate of all these factors and the standard of proof that petitioners must sustain to show a change in domicile, it could not be concluded that the petitioners effected a permanent change in domicile from New York to Florida. Further, while the petitioners may have very well intended Florida to be their permanent domicile, their "general habit of life" indicated, at best, an equal commitment to both locations."

Thus the Tax Appeals Tribunal concluded that the petitioners had not established by "clear and convincing" evidence that they effected a change in domicile to Florida for the years in question.

3. "Other" Factors Affecting Domicile

Apart from the primary factors, there are other factors which can provide some insight into a domicile determination. These factors however, are subordinate to the primary factors. In virtually all cases it is usually not necessary to review the "other" factors as part of the decision making process on domicile. In order to underscore the ancillary nature of these factors, and to stress their lesser importance in a domicile decision, they have been grouped together as "other" factors.

An individual may continue to have ties to New York while being a nonresident. It is very possible that a nonresident could have many "other" factors linking them to New York but not have sufficient primary factors to conclude that the taxpayer is a resident. These "other" factors, by themselves, cannot be the basis for a residency determination. Thus individuals need not worry about maintaining these "other" ties with New York while taking full advantage of what New York offers in business, financial, cultural, medical treatment facilities, social, and entertainment avenues.

An auditor need not be concerned with these "other" factors without first establishing a basis for consideration of New York as the individual's domicile from an analysis of the primary factors or where the primary factors are at least equal in weight for New York and another location. Where the primary factors indicate a New York domicile, these other factors should be reviewed, but are not considered to carry the weight and significance of the primary factors. For situations in which it remains unclear as to the strength of a domicile determination by an analysis of the primary factors, an analysis of these "other" factors is warranted and takes on a greater significance.

The "Other" factors are:

* The address at which bank statements, bills, financial data and correspondence concerning other family business is primarily received.

* The physical location of the safe deposit boxes used for family records and valuables.

* Location of auto, boat, and airplane registrations as well as the individual's personal driver's or operator's license.

* Indication as to where the taxpayer is registered to vote and an analysis of the exercise of said privilege. The auditor should not limit the review to the general elections in November, but also question the taxpayer's participation in primary or other off- season elections, including school board and budget elections.

* Possession of a New York City Parking Tax exemption.

* An analysis of telephone services at each residence including the nature of the listing, the type of service features, and the activity at the location.

* The citation in wills, testaments and other legal documents that a particular location is to be considered the individual's place of domicile.

The above list of "other" factors, as we have indicated, are subordinate to the primary factors. The auditor's reliance on this information in determining domicile should be with the awareness that the individual has the ability to easily control and regulate many of these factors. For example, a taxpayer, because of varying residency rules, may be able to change his/her voter registration, auto registration, or driver's license to another state for convenience purposes, while never intending to change domicile. Other factors, not included on this list are considered incidental, with little bearing on determining one's domicile. All of the factors listed above may not be present in each situation. The existence of a factor when determining the domicile of an individual depends upon the specific circumstances of the situation.

After a review of the primary factors the auditor should determine if the factors point to a case of New York domicile. If the conclusion of the auditor, based on primary factors, is that there is not a case to support New York domicile, there is no need to review the "other" factors. Even the diligent auditor who has first developed a basis for New York domicile from an analysis of the five primary factors, and now needs to examine these "other" factors in relationship to domicile, may still encounter a situation where the individual has taken several secondary steps to demonstrate a change of domicile while doing little to change the primary factors which reflect significant ties to New York.

For example, John and Sarah were domiciled in New York when John retired in 1990. They have a large home in New York and a condominium in Florida. Prior to 1990, John and Sarah spend approximately 4 months in Florida and the remaining 8 months in New York State. John was president of a corporation when he retired and was retained as a consultant and Chief Executive Officer of the Corporate Board after retirement. They have many family and friends in both the New York and Florida area and are involved in the activities of the local country club, as well as other civic and service organizations at both locations. When John retired in 1990, he and his wife decided to spend more time in Florida, especially during the winter months. John & Sarah usually leave for Florida in the later part of October and return during the first part of April each year. During their first elongated stay in Florida, they transferred their

auto registrations to Florida, as well as acquiring new driver's licenses from Florida. They registered to vote in Florida and have voted there each year since retirement. They visit doctors and dentists in both locations as the need arises. They maintain bank accounts in both locations and have the mail sent to whichever location they are at. John & Sarah usually return to New York for the Thanksgiving and Christmas holidays and John returns about once a month to attend the corporate board meetings.

We can see that John & Sarah took many "other" factor steps in an effort to effectuate a change of domicile but did little to change the primary ties. The auditor must develop an analysis of the primary factors, those which were retained in New York and those that are in existence at the other location. This analysis is more than just a listing of the ties at one location versus the ties at another location. The analysis is a comparison of the activities associated with New York, versus the activities associated with the ties in the other location.

Other aspects of the taxpayer's lifestyle may emerge during the audit. If these aspects are not covered by the "primary factors" or the "other factors" mentioned in this guideline, they are irrelevant in determining one's domicile. The auditor should not request documentation concerning these "non-factors" nor should the auditor invest time in exploring their impact on the domicile issue. Should the taxpayer or the representative raise these factors during the course of the audit, the auditor should explain that these are "non-factors" regardless in supporting New York domicile or domicile at another location. These "non-factors" include but are not limited to: the place of internment; the location where the taxpayer's will is probated; passive interest in partnerships or small corporations; the mere location of bank accounts; contributions made to political candidates, or causes; and the location where the taxpayer's individual income tax returns are prepared and filed.

Two specific "non-factors" which are not part of any decision of domicile are charitable contributions and religious organization membership.

Charitable contributions in and of themselves are not considered in determining domicile. An Opinion of Counsel issued on 10/22/84 and published by the Department as TSB-M-84-(17)-I states:

"It is not now nor has it been the policy of this Department to hold a former resident to be a domiciliary of New York for income tax purposes because of contributions made to New York charities . . . it is the policy of this Department that the making of contributions to a New York State charity will not be taken into account in determining domicile under New York's personal income tax. Accordingly, former New York residents will be able to make contributions to New York State charities secure in the knowledge that such a contribution will not affect the contributor's income tax status."

A charitable contribution for the purposes of this section in the donation of property or money to an organization which qualifies for a federal deduction. As a non-factor, there is usually no need for auditors to review, transcribe, or in any way cite contributions as a factor in a domicile case. In cases where the taxpayer cites contributions as a factor, the auditor should advise the taxpayer or representative that

the Department's position is that charitable contributions are neither a factor to support residency nor to support nonresidency.

The status of charitable contributions was further clarified when Section 605 of the Tax Law was amended in 1994 by adding a new subsection (c) . This new subsection prohibits the use of charitable contributions in determining an individual's domicile. Subsection (c) does not distinguish between tax deductible and non-tax deductible charitable contributions.

Therefore, whether or not a charitable contribution is tax deductible makes no difference in domicile cases.

The definition of a charitable contribution contained in subsection (c) also includes the "volunteering, giving, or donation of uncompensated time." Since volunteer work could indicate an individual's physical presence, any days spent in New York can be counted in cases where an individual may be subject to tax as a statutory resident (see Tax Law Section 605(b) (1) (B)) .

Section 605(c) applies to contributions made in taxable years beginning on or after January 1, 1994.

In addition to the "non-factor" of charitable contributions, there is the "non-factor" of membership in a Church, Synagogue, Temple, Mosque or any other religious organization. Membership in any type of religious congregation is not to be considered active membership, nor is the weekly or regular attendance at services to be considered active participation regardless if located in New York or at another location. In regard to other not- for-profit organizations, contributions made to, or membership dues and fees paid to the organization are considered passive in nature and should not be considered as a factor either in favor of residency or nonresidency. The active involvement in an organization, particularly where physical presence is involved, is to be considered as one of the "other" factors when discussing domicile. As with any factor, this active involvement in New York should be weighed against the individual's active involvement in organizations at other locations. Active involvement includes actual participation in the organization's activities, the holding of office, regular attendance at meetings, and the volunteering of services which demonstrates an actual presence at the particular location. Time spent actively raising funds for a national, or even a New York based charity, while located outside New York is not to be considered as Active involvement when considering domicile.

However, regardless of whether the individual is actively involved in an organization, actual physical presence in New York State to attend religious services or to participate in the activities of an organization would constitute a day spent in this state for statutory residence purposes.

F.Tax Relief For A Domiciliary

The Regulations at section 105.20 (b) provide tax relief for "Certain persons not deemed residents although domiciled in New York State." Any person domiciled in New York State is a resident for personal income tax purposes for a specific taxable year or

period, unless for that year or period such person satisfies all three of the requirements in either of the following situations.

First: For the taxable year, the person (1) maintains no permanent place of abode in New York State during such year; (2) maintains a permanent place of abode outside New York State during such entire year; and (3) spends in the aggregate not more than 30 days of the taxable year in New York State. (30-day rule)

Second: (1) within any period of 548 consecutive days such person is present in a foreign country or countries for at least 450 days; (2) during such period of 548 consecutive days such person is not present in New York State for more than 90 days and does not maintain a permanent place of abode in New York State at which such person's spouse (unless such spouse is legally separated) or minor children are present for more than 90 days; and (3) during the nonresident portion of the taxable year with or within which such period of 548 consecutive days begins and the nonresident portion of the taxable year with or within which such period of 548 consecutive days ends, such person is present in New York State for a number of days which does not exceed an amount which bears the same ratio to 90 as the number of days contained in such portion of the taxable year bears to 548. (548-day rule)

As long as an individual who is domiciled in New York State continues to meet the requirements of either the 30-day rule or the 548-day rule, the individual will be considered a nonresident of New York State for personal income tax purposes. But if the individual fails to meet these conditions, the individual will be subject to New York State personal income tax as a resident.

Where an individual domiciled in New York State claims to be a nonresident for any taxable year, or portion thereof, the burden is upon the individual to show that they satisfy the requirements set forth in either the 30-day rule or the 548-day rule.

For example, a single individual who is domiciled in New York State was present in a foreign country or countries 463 days during the period July 2, 1988, through December 31, 1989. During this period, the individual was present in New York State a total of 50 days, 15 during the period July 2, 1988, through December 31, 1988, and 35 days during 1989. During this period of time, the individual did not maintain a permanent place of abode in this state at which his minor children were present for more than 90 days.

Since the individual was present in a foreign country for 463 days, s/he meets requirement number 1 of the 548-day rule. The individual also meets requirement number 2 because the total of 50 days present in this State during the 548 consecutive day period is less than the maximum of 90 days allowed.

To determine if the individual meets requirement number 3, the individual must determine if the number of days present in New York State during the period July 2, 1988, to December 31, 1988, (the short period) exceeds the maximum allowed for the nonresident portion of the taxable year within which the 548-day period began. The maximum number of days the individual may be present in New York State during the

period July 2 1988, through December 31, 1988, is 30, determined by making the following computation.

183 (days in short period) x 90 = 30 maximum number of days allowed in New York
548   during the short period. [133] Since the individual was present in New York State 15 days during the period July 2, 1988, through December 31, 1988, the individual did not exceed the maximum of 30 days allowed for the period. Therefore the individual also meets requirement number 3.

Based on the information contained in the example, this individual meets all the requirements of the 548-day rule and would be considered a nonresident of New York State for income tax purposes during the period July 2, 1988, through December 31, 1989. Therefore this individual would be required to file as a part-year resident of New York State for the taxable year 1988 and as a nonresident of New York State for the taxable year 1989.

Of particular interest to the auditor is the fact that the taxpayer may claim any period of 548 consecutive days in order to seek treatment as a nonresident under this rule. This election permits the taxpayer to have multiple periods as well as overlapping periods during the audit.

Since many of the individuals selected for audit are involved in international travel as well as being assigned to foreign offices for periods of time, the auditor should be aware of the possibility of nonresident treatment based upon the 548-day rule.

If confronted with a claim of treatment as a nonresident based upon the 548-day rule, the auditor must examine each of the three requirements and determine if the taxpayer meets all three conditions. Failure to meet any one of the conditions can prevent the taxpayer from being treated as a nonresident and therefore taxed as a resident. The one condition, where an individual is often vulnerable, is the third requirement which is used to determine the maximum number of days one may spend in New York State during the short periods. The location of the taxpayer should be carefully examined during these periods. Remember, when claiming this treatment, the burden rests with the taxpayer to show that they satisfy the requirements set forth in this regulation.

5 Audit Area - Statutory Resident

A. Definition

A statutory resident is an individual who "is not domiciled in this state but maintains a permanent place of abode in New York State and spends in the aggregate more than one hundred and eighty-three days of the taxable year in this state, unless such individual is in the active service of the armed forces of the United States," (Tax Law section 605(b) (1) (B)) . This provision is commonly known as the 183-day rule.

B. Permanent Place Of Abode

A permanent place of abode can be a house, co-op, apartment, condo, or other dwelling. New York State Income Tax Regulation Section 105.20(e) defines a permanent place of abode as a "dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse. However, a mere camp or cottage which is suitable and used only for vacations is not a permanent place of abode. A dwelling which only contains bachelor quarters and does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc, will generally not be deemed a permanent place of abode." These criteria for permanent place of abode apply to places both within and without New York State.

Two important aspects of the definition of a "Permanent Place of Abode" were examined in the Matter of Evans, TSB-D-(16)-I. In this decision, the Tax Appeals Tribunal discussed the meaning of the terms "maintains" and "permanent" in its decision. The Tax Appeals Tribunal stated, in part,

"Given the various meanings of the word "maintains" and the lack of definitional specificity on the part of the Legislature, we presume that the Legislatureintended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the "variety of circumstances" inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise.

We reject the petitioner's assertion that since he did not pay for many of the operating expenses of the dwelling (such as the utilities or major repairs, or any costs of ownership such as mortgage payments) , he was not "maintaining" the living quarters as required by the statute. We find no support for the conclusion that the Legislature intended to define a resident individual solely by the types of expenses incurred by the individual and to limit the definition only to individuals who incur the types of expenses suggested by the petitioner. As there can be many financial or other arrangements that determine how the costs of a dwelling are paid for (such as where expenses are shared or provided by another, or where an individual's contribution to the household is not in the form of money) , the nature of the expenses incurred in and of themselves cannot determine whether an individual is maintaining a place of abode in the city.

With regard to whether a place of abode is "permanent" within the meaning of the statute, we do not agree with petitioner that the statute requires that the place of abode be owned, leased, or otherwise based upon some legal right in order for it to be permanent. . . . In our view, the permanence of a dwelling place for purpose of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place. For example, it seems clear that an apartment leased by one individual and shared with other unrelated individuals may be the permanent place of abode of those who are not named on the lease, given the appropriate facts."

The Appellate Division of the State Supreme Court determined in The Matter of Evans v The Tax Appeals Tribunal, AD2d, 606 NYS2d 404, that the taxpayer maintained a permanent place of abode in New York. The Court stated that

"the permanence of a dwelling place . . . cannot be limited to circumstances which establish a property right in the dwelling place."

The court also held that the Tribunal was correct in concluding that Evans maintained a permanent place of abode in New York City.

A second home which contains all the amenities found in a primary residence does not constitute a mere camp or cottage even if it is located in a vacation area. Therefore, a second home that contains cooking and bathing facilities and is suitable for year- round living would constitute a permanent place of abode even if it is used primarily for vacations or on weekends. For example, the regular weekend use of a second home in a vacation area differs from the occasional use of a cottage which is not equipped to accommodate year-round use.

Generally, residential property (house, condo, apartment, etc.) will not be considered a permanent place of abode if the individual never uses the property as a residence. For example, if the taxpayer acquires residential property for investment purposes or as the result of an estate settlement or as part of a settlement in a divorce proceeding, etc, and never uses the property as a residence or as living quarters for himself or his family, the property will not be considered a permanent place of abode for the individual. The individual should be able to show through documentation or affidavit that the property has not been used as his/her personal residence. In addition, documentation such as a settlement agreement or report showing the distribution of an estate could be used to support the acquisition of the property.

A place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to his/her employer's New York State office for a fixed and limited period, after which s/he is to return to his permanent location. If such an individual takes an apartment in New York State during this period, he is not deemed a resident, even though s/he spends more than 183 days of the taxable year in New York State, because his/her place of abode is not permanent. S/He will, of course, be taxable as a nonresident on his/her income from New York sources, including salary and other compensation for services performed in New York State. However, if his/her assignment to his/her employer's New York State office is not for a fixed and limited period, his/her New York State apartment will be deemed a permanent place of abode and he will be a resident for New York State Personal Income Tax purposes if s/he spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State. Please refer to Section C below for an in-depth discussion on Temporary Place of Abode.

Living quarters suitable for permanent year-round use are permanent places of abode even if used only for shopping trips, visits, etc. These living quarters would include a house, apartment, co-op, or any other living quarters maintained or paid for by

the taxpayer or his/her spouse, or any New York State living quarters maintained for the taxpayer's primary use by another person, family member or employer.

For example, if a company were to lease an apartment for the use of the company's president or chief executive officer, and the dwelling was principally available to that individual, the individual would be considered as maintaining a permanent place of abode in New York even though others might use the apartment on an occasional basis.

A corporate apartment would not be considered a permanent place of abode for the taxpayer if the primary purpose and use of the corporate apartment is for reasons other than as living quarters for the taxpayer or the taxpayer's family.

For example, it is common for corporations to maintain a corporate apartment for the use of its top executives, salesmen, or important clients when they are visiting the corporate headquarters. In this situation, if the taxpayers use of the corporate apartment is determined on a first-come first-serve basis or other similar arrangement, or if other users of the apartment (such as important clients) have priority over the taxpayer's use of the apartment, and the taxpayer is but one of many people using the apartment, then the corporate apartment will not be treated as a permanent place of abode for the taxpayer.

1. Substantial Part Of The Year

For statutory resident purposes, an individual who maintains a permanent place of abode in New York State, must maintain such abode "for substantially all of the taxable year". For this purpose, substantially all the taxable year means a period exceeding 11 months. For example, an individual who acquires a permanent place of abode on March 15th of the taxable year and spends 184 days in New York State would not be a statutory resident since the permanent place of abode was not maintained for substantially the entire year. Similarly, if an individual maintains a permanent place of abode at the beginning of the year but disposes of it on October 30th of the tax year, s/he too, would not be a statutory resident despite spending over 183 days in New York. Since the individual in each of the above examples did not maintain their permanent place of abode in New York for more than 11 months, the individuals would not be considered residents of New York State for any part of the year. Audit Division policy considers the "substantial part of a year" rule to be a general rule rather than an absolute rule. For example, suppose a couple rents an apartment in New York year after year, but each year they sublet the apartment to their son for the month of December. Under the absolute rule, this couple would not be maintaining a permanent place of abode in New York since they do not maintain it for more than 11 months of any particular year. However, the Division's position is that this couple should properly be covered by the 183 day rule since they are maintaining the abode on a regular basis.

The issue of "substantial part of the year" applies only to statutory resident cases. However, as shown below, the test for statutory residency may apply even in a situation where an individual changes domicile during the tax year.

A. When Domicile Changes:

The statutory residence test is applied to a taxable year during which a taxpayer has changed domicile from or to New York State.

The statutory residence test requires that a permanent place of abode be maintained "for substantially all of the taxable year," which is interpreted to mean a period exceeding 11 months. This test is applied if the taxpayer spent more than 183 days in the State and maintained a permanent place of abode for more than 11 months. If the taxpayer is determined to be a statutory resident, he will be taxed for the entire year even though his domicile may have changed during the year.

In Smith v STC, 68 AD2d 993 (1979) , the taxpayers moved from New York to Florida in July of 1970, but were unable to sell their home until 1971 leaving their furniture there, maintaining the home, and continuing the telephone and utility service. In September 1970 the taxpayer sold a large amount of corporate stock. Initially, the stock was taxed on the grounds that there was no change of domicile in 1970 and, therefore, the taxpayers were New York residents for the entire year. After a hearing held on June 24, 1977, the Tax Commission held that although a change of domicile did occur in July, 1970, the taxpayers were taxable as residents for the entire year under Tax Law section 605(a) (2) since they maintained a permanent place of abode in New York for the entire year and spent more than 183 days in New York State. The Appellate affirmed the Commission decision stating: "Furthermore, a fair reading of section 605(a) (1) reveals that if the taxpayer could not establish domicile in Florida they would at least in part have to establish that they did not maintain a "permanent place of abode" in New York and did not spend more than 30 days of the taxable year here. On the other hand, if domicile was not in issue, then they would have had to show that no permanent place of abode was maintained in this State and no more than 183 days of the taxable year were spent here (Tax Law, section 605[a][2]) ". 2. Maintenance vs. Use

A residence that is maintained by one individual but used exclusively by another, should not be deemed a permanent place of abode for the individual who maintains it. This situation may arise where parents acquire and maintain a residence solely for use by a child who is attending college in New York. A similar application of this concept would be where spouses are divorced, or separated, even without a legal separation order, and one spouse is providing a permanent place of abode for the other spouse in New York and the spouse providing the residence did not have use of the residence.

C.Temporary Place Of Abode

The question of a temporary stay has been mentioned in Section 105.20(e) (1) of the Personal Income Tax Regulations, in pertinent part:

A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse . . . [A] place of abode is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be

assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State . . .

It is the Department's position that for a place of abode not to be permanent, both of the above regulatory conditions must be met. That is, (1) the stay in New York must be temporary (i.e., for a fixed and limited period) and (2) the stay must be for the accomplishment of a particular purpose.

Fixed and Limited Period

The term "fixed and limited period" is not defined in the regulations. However, it is clear that the regulation contemplates that the term applies to a temporary stay as opposed to a stay of indefinite duration. Accordingly, it is the Department's position that an employee will be presumed present in New York State for a fixed and limited period(i.e., the stay in New York is temporary) if the duration of the stay in New York is reasonably expected to last for three years of less, in the absence of facts and circumstances that would indicate otherwise. In the alternative, a stay is of indefinite duration if the stay is realistically expected to last for more than three years, even if it does not actually exceed three years. The employee must determine if the stay will be temporary or indefinite at the time the employee starts work in New York.

Particular Purpose

It is the Department's position that the term "particular purpose" means that the individual is present in New York State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general goals and conclusions. For example, an individual working in California is assigned to New York to install a piece of equipment. Once the equipment is installed, the individual returns to California. That assignment would be for a particular purpose.

In general, an assignment to New York for general duties, such as to be an executive of the company, a sales manager or a production line worker, would not constitute a particular purpose since these positions involve more generalized goals. This would be true even if the individual's assignment to New York were related to some specialized skill or attributes that the individual may possess.

For example, a salesman with years of experience in a particular product line of the company is assigned to New York as the sales manager because New York sales are weak with regard to that product. It is expected that the individual will devote substantial efforts towards improving those sales. However, work performed as a sales manager still constitutes general duties as opposed to a particular purpose, since it is the general goal of every company to sell its products.

An employer who may be assigning employees to what might be considered temporary duties in New York could supply the employee with written documentation

concerning the exact duties to be performed in New York and the duration of the stay. This documentation will be helpful to the employee should the department question the employee's resident status.

Situation 1

Employees for key positions such as the Deputy Manager, General Manager and Controller are sent to the New York office from an out of state office. It is important to the Employer that individuals in these positions understand the philosophy of the Employer and have the necessary contacts with the home office. These are rotational positions. The individuals who staff these jobs remain in New York for only a temporary period.

These employees might be present in New York for a fixed and limited period, provided their stay is reasonably expected to be for three years or less. However, even if that were the case, their presence here is not to accomplish a particular purpose. The duties of being a manager or controller, even in a rotational capacity, do not fit the definition of specific duties to accomplish a particular purpose as previously discussed. Therefore, these individuals will be maintaining a permanent pace of abode in New York.

Situation 2

Employer sends a systems person from the home office to implement the system in the New York office. The employee will return to the home office upon completion of the implementation project.

In this situation, the employee would be present in New York for a fixed and limited period if the stay in New York is reasonably expected to last three years or less. In addition, the person would be present for the accomplishment of a particular purpose since the implementation of a particular system would have a readily ascertainable and specific conclusion. Accordingly, if this person is deemed to be here for a fixed and limited period, the person would be maintaining a temporary place of abode in New York.

Situation 3

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.

Situation 4

The same facts as in Situation 3 except that after the employee learns a particular function he is requested to stay for an additional period of time to learn another function.

It is the Department's position that an individual cannot have multiple or consecutive fixed and limited periods nor multiple or consecutive particular purposes. Therefore, a change in duties would indicate that the individual is no longer here for a fixed and limited period nor for the accomplishment of a particular purpose. However, the fact that the person would be maintaining a permanent place of abode after the duty changes does not negate the fact that the person had a temporary place of abode for the initial duty period. Accordingly, in this situation, and assuming that the individual met the two conditions for the initial period, the individual would be maintaining a temporary place of abode up to the time the first function is completed, and would be maintaining a permanent place of abode from that point forward.

Situation 5

The parent corporation sends an employee to its subsidiary located in New York to develop a particular segment of the market. It is estimated that the employee will remain in New York for 15 months.

Since the employer realistically expects that the employee will be present in New York for three years or less, the employee would be here for a fixed and limited period. The question then becomes whether or not the nature of the employee's duties constitute a particular purpose. Whether or not the employee is here to accomplish a particular purpose would be dependent upon what is involved in developing the market. As previously related, sales and market development, even if it involves a specific area of the market, constitutes general duties which do not qualify as a particular purpose. However, if for example, development meant that the individual's duties would be limited to hiring and training the staff needed to develop the market segment, and after the completion of that phase the general duties of directing the sales effort would be left to others, then the hiring and training function would constitute a particular purpose. Accordingly, based upon the actual nature of the duties, the person in this situation may or may not be maintaining a permanent place of abode.

It should be pointed out that even where one of the preceding individuals is maintaining a permanent place of abode in New York, such abode pursuant to section 105.20(a) (2) of the personal income tax regulations must be maintained for substantially all the year for the person to be held a resident of New York State. The Department has interpreted substantially all the year to mean that the abode is maintained for more than 11 months of the tax year. Accordingly, a taxpayer who acquires an abode in New York on March 1 of the year and maintains that abode until the end of the tax year, even if the individual spent more than 183 days of the tax year in the state would not be a statutory resident of New York. Based on this provision, it is possible that the individuals who are held to be maintaining permanent places of abode in their particular situations would not be residents of New York for the years in which they enter or leave the state.

D. A Day Spent In New York

The description of a day in New York is not defined by statute. Section 105.20? of the New York Personal Income Tax regulations, however, states that "presence within New York State for any part of a calendar day constitutes a day spent within New York State." This regulation was challenged in Leach v Chu, 150 AD2d 842, 540 NYS2d 596 and upheld by the Appellate Division. Thus, any part of a day spent in New York State, for whatever reason (business or pleasure) , would count as a day toward the 183-day rule, even if the taxpayer comes into New York and leaves on the same day. The literal interpretation of "any part of a day" could mean stepping over the state line for one second; however, no audit is ever expected to be based on such a minimal amount of time spent in New York. Common sense must prevail. An individual who establishes a weekly or monthly pattern of time spent in New York, involved in business or personal activities, exhibits a greater presence in New York than the individual who by some unforeseen event is forced to stay in New York for part of a day.

The statutory residency rules do not require that the taxpayer utilize the New York place of abode on every day that New York presence is demonstrated. The 183-day rule and the permanent place of abode test are separate and distinct factors in determining statutory residence.

There are two instances where presence in New York state does not count as a day:

1. Travel

Presence in New York is disregarded if it is solely for: a. boarding a "plane, ship, train or bus for a destination outside New York State." For example, if a Connecticut resident travels to JFK airport to board a plane to Europe, the day is not counted toward presence in New York State. b. continuing travel, begun outside the state, by "automobile, plane or train" to a point outside the state. [177] In deciding what level of extraneous activity makes presence in New York not incidental to the travel, the relevant criteria are (1) whether the traveler's activity is incidental to his presence for travel purposes and (2) the degree of control the taxpayer exercises over his travel arrangements. For example, someone who arrives a day early for a cruise, in order to attend a business meeting, would be present for that day, whereas time spent by someone who visits a friend during an unavoidable delay or stopover would not count as a day present in New York.

Quite often, activity incidental to travel takes place on route to, or at a transportation terminal. Such activity as the purchase of meals or other items at a terminal, access to an automatic teller machine (ATM) , stopping for gas or a meal while driving through New York, stopping to pick up a traveling companion on route to the terminal, parking the car in New York in order to meet a limousine or other conveyance that takes the individual to the airport or terminal should not change the treatment of this day as a travel day for the purpose of the 183-day count.

2. Medical Recuperation

Stranahan v State Tax Commission, 68 AD2d 250,416 NYS2d 836 (3d Dept 1979) addresses the issue of time spent in New York by a non-domiciliary for medical treatment. Despite the court decision however, no clear rule was established by this case since there was no majority opinion among the justices.

Audit policy is that "A non-domiciliary seeking treatment for an illness is not considered present during time spent in a New York medical facility." Thus, confinement to a medical institution in New York does not constitute a day spent in New York. This would include situations where an incompetent person is placed in a facility in New York, situations where the individual suffers a medical emergency while present in the state for other purposes and the patient cannot realistically be removed from the state, or a situation where an individual is confined to an institution as a result of seeking treatment in New York. For example, if an individual suffers a heart attack while in the state on business and cannot be removed, the time spent confined to a New York medical institution would not count toward the 183-day rule.

E. Taxpayer Advisory

As soon as a it appears a case is heading toward holding the taxpayer a resident of New York based on domicile or statutory residence, the taxpayer and their representative should be advised to consider filing a protective claim with his/her claimed state of domicile before a statute expires, in order to recover any taxes s/he may be entitled to. This becomes necessary since the New York State waiver to extend the statute of limitation does not extend the period of limitation for returns filed in other states.

F. Auditor Advisory

The fact that a taxpayer states a certain number of New York days on a nonresident return for allocation purposes does not mean that the taxpayer was physically present in New York on those days. Different rules (e.g. employee convenience rule) apply for the purpose of computing days for allocation purposes. For example, a New Jersey resident who works at home for his/her own convenience 20 days during the tax year would be required to include these days in the allocation formula for employee compensation. These 20 days would not be counted in the 183-day computation unless the taxpayer was present in New York for another purpose.

6 Audit Area - Allocation Of Income

A. General

Only items of income, gain, loss and deduction entering into the Federal Adjusted Gross Income of nonresident individuals which are derived from or connected with New York State sources are included in New York Source Income. If a nonresident individual performed services partly within and partly without New York State, an allocation must be made in accordance with the provisions of 20 NYCRR 132.18.

B. Earnings Of Nonresident Employees And Officers

The allocation provided for in Section 132.18 of the New York Personal Income Tax Regulations is that proportion of total compensation for services rendered which the total number of days worked in New York State bears to the total number of days worked both within and without New York State.

1. Days Worked At Home

When an individual has his or her principal place of business in New York, regular working days spent at home for employee convenience rather than the necessity of the employer are generally considered New York State work days. Any allocation claimed for days worked outside New York State must be based upon the performance of services which, because of the necessity of the employer, obligate the employee to out-of-state duties in the service of the employer. Such duties are those, which by their very nature, cannot be performed in New York State.

Justification for the disallowance of days worked at home when not for the necessity of the employer lies in the fact that since a New York resident would not be entitled to a special tax benefit for work done at home, neither should a nonresident (Simms v Procaccino, 47 AD 2d 149; Speno v. Gallman 35 NY 2d 256, 259) .

2. More Than One Employer

If a nonresident employee or officer performs services for more than one employer, both within and without the State, the taxpayer must make a separate allocation for each employer (20 NYCRR 132.18(c)).

In the case where a nonresident employee or officer works for two or more employers simultaneously, any part of a day worked within New York State is considered a full day worked in New York if no work is performed out of New York State on that day.

For examples demonstrating this allocation method, please refer to Section 313 of the Income Tax Field Audit Guidelines regarding Nonresident Allocation.

C. Earnings Of Salespersons

If the compensation for services performed by a nonresident salesperson, agent or other employee depends directly on the volume of business transacted, allocation may be made based on the proportion that the volume of business transacted in New York State bears to the total volume of business transacted everywhere. (20 NYCRR 132.17) However, if the compensation is not based solely on the volume of sales, i.e. commission plus salary, the allocation shall be based on days worked within and without New York State.

D. Allocation Of Income From A Business

If a nonresident individual, or a partnership of which a nonresident individual is a member, carries on a business, trade, profession or occupation both within and without

New York State, an allocation to New York State must be made. This apportionment and allocation must be on a fair and equitable basis in accordance with approved methods of accounting.

If the books of the business are kept so that they disclose, to the satisfaction of the Department, the proper amount of income, gain, loss and deduction derived from New York sources, then the books must be used as the basis for the apportionment and allocation to New York State.

If the books do not disclose, to the satisfaction of the Department, the proper items of income, gain, loss and deduction attributable to business activities in New York State, such amounts must be determined by the three factor allocation formula, prescribed by Section 132.15 of the Regulations, consisting of a property percentage, payroll percentage and gross income percentage.

E. New York City Or City Of Yonkers Nonresident Earnings Tax

An individual who is a nonresident of the City of New York or the City of Yonkers and performs services in or has net earnings from self-employment from within the city may have to file a City of New York or City of Yonkers nonresident earnings tax return. The income to be reported by a nonresident of New York City or the City of Yonkers is wages and net earnings from self-employment. For a detailed description of wages and net earnings see Section 313 of the Income Tax Field Audit Guidelines.

Any income of a nonresident of New York City or the City of Yonkers would be allocated in the same manner as income allocable to New York State by a nonresident of the State.

F. Cross Reference

For a more detailed discussion of the various allocation methods, with the appropriate examples, as well as the applicable audit techniques, refer to Section 313 of the Income Tax Field Audit Guidelines regarding Nonresident Allocation.

7 The Impact Of A Prior Audit

The very nature of a nonresident case, especially one involving statutory residence, suggests that the taxpayer may be selected for audit more than once. With this in mind, the auditor needs to establish a "good trail" for other auditors (possibly in other Districts) to follow in subsequent years. Workpapers and appeal decisions should be consulted to determine the impact of a prior audit on the current audit. Situations change constantly, and all available information should be considered when a decision is made as to the scope of the audit.

If a previous audit determined that the taxpayers were domiciliairies of New York, since a domicile continues until specific actions of the taxpayer demonstrate clearly that the domicile changed, then subsequent audits should focus upon the evidence supporting the change. Rather than requesting information to support a continued

domicile in New York, the auditor should concentrate on the specific actions, the taxpayer has taken to change his/her domicile.

For statutory residence and the allocation of New York income, each year stands on its own, and the auditor should not be unduly influenced by prior audit results. Statutory residence and allocation issues, in particular, change from year to year and the days allocated to New York in one year may have little bearing on the allocation of days in a subsequent period. However, if the work pattern and/or lifestyle of the taxpayer is consistent with the results of the previous audit, then the auditor should exercise "good judgment" when determining the scope of the audit. For example, if the day count determined per an analysis of prior years on audit was determined to be substantially below the 183-day count and the work patterns and lifestyle of the individual remain consistent in the re- audit years, the auditor may decide to drop the statutory resident aspect of the audit and proceed with a review of the allocation of income to New York. The auditor must be aware of the heavy burden placed upon the taxpayer to produce documentation to substantiate a position and therefore should be practical when requesting these records. Changes in work patterns or employment responsibilities should be explored, rather than a verification of days or income.

For example, if a taxpayer has successfully verified days worked in New York for several years with a diary and supporting documentation, and the current year is consistent with the previous years, then the auditor could test check entries in the diary rather than requesting full substantiation. In another example, if a taxpayer changes employment responsibilities from that of an Outside Salesman covering several Northeast states to the District Sales Manager, with an office in Manhattan, then the auditor would be correct in requesting more detailed documentation or substantiation of the diary entries.

Even though an individual may have been audited in a prior period for income allocation to New York, this, in itself, is not necessarily the acceptance of the non-New York domicile by the previous auditor. It may be that the domicile and/or statutory resident issue was not questioned. This is especially true if the previous audit was handled by correspondence.

According to an Audit Division Memorandum (A-89-1) issued on January 18, 1989, when a case is selected for audit of current periods while an appeal of a prior audit is pending, the policy of the Audit Division will be to request extensions of the period of limitation for assessment and defer audit activity until the appeal is resolved.

The auditor is responsible for thoroughly explaining to the taxpayer the need for the extension of the period and the implications of consenting or failing to consent to the extension. The taxpayer should be advised that the audit may cover an extended period and that interest and appropriate penalty on the tax determined to be due will continue to accrue during the period while the extension is in effect. The auditor should also advise the taxpayer that all pertinent records must be maintained for the entire period until the audit is complete. If the taxpayer does not agree to extend the period or prefers to have the audit conducted without delay, the audit should proceed without regard to the pending appeal.

When audit action has been deferred pending the appeal of a prior audit, the current audit should commence promptly upon resolution of the appeal and be completed in an expeditious manner.

Holding the current case in abeyance during the appeal of a prior audit can have an impact on the scope of the current audit, especially where domicile is concerned. For example, if an appeals decision concludes that the individual is a domiciliary of New York State, the auditor would be concerned with identifying any change in status rather than establishing New York as the individual's domicile. For additional information on re-audit policy during the appeal of a prior audit please refer to Audit Division Memorandum A- 89-1.

8 Communicating With The Taxpayer

A. The Initial Appointment

The auditor is responsible for scheduling an initial appointment for a newly assigned case, and being at the appointed place on time. In order to efficiently utilize the available time and to reduce the inconvenience and disruption caused to the taxpayer's schedule, auditors are encouraged to maximize the use of block time appointments.

Auditors are encouraged to arrange their schedules with the taxpayer, or his/her representative, in such a manner as to spend a sufficient number of consecutive days at the audit site to complete the audit without having to make return visits. Additional information clarifying an issue or substantiating a diary entry can be sent through the mail, if necessary.

The letter exhibited in Appendix #A-1 and the short questionnaire provided in Appendix #B-1 have been designed to request a minimal amount of information from an individual during the initial review of the return. The answering of a few general questions may permit the auditor to determine whether an audit is actually necessary and/or to narrow the focus of the audit. This triage of the individual's response to the short questionnaire, though designed to reduce the burden on the taxpayer, should result in additional effort by the auditor to conduct a comprehensive pre-audit analysis and review of the questionnaire in order to correctly target any audit issues.

After the initial letter, it may be necessary to request that the individual complete the longer questionnaire and provide documentation to support the return filed. Subsequent requests of the individual should be modified and streamlined to fit the specific need of the case at hand. This modification will ease the heavy burden placed upon the taxpayer to produce records and documentation which are not essential to the audit. The Questionnaires provided in Appendix #B have been developed to enhance the gathering of information in order to facilitate the audit of a nonresident return.

The auditor must exercise judgment when selecting a letter and questionnaire to send to a taxpayer. The letter and questionnaire should be molded to the audit issues identified for the particular taxpayer. The taxpayer should not be asked to produce unnecessary documentation, nor should s/he be asked to answer irrelevant questions.

For example, a non-domiciliary who does not maintain a permanent place of abode in New York should not be asked to provide information concerning their domicile, nor should the taxpayer be sent the lengthy version of the questionnaire. The auditor should, however, question the allocation method selected as well as the actual computation.

Another approach currently in use involves a request that the taxpayer or his/her representative contact the auditor by phone immediately after the receipt of a general introductory letter. (See Appendix #A-3) . The auditor will request a minimal amount of information at that time, which will be used to focus the scope of the audit. It is anticipated that this "triage" of the case will reduce the burden placed on the taxpayers to provide records, as well as ease their concerns about the audit.

Samples of approved letters and two versions of the nonresident questionnaire appear in the appendix to this section. For additional information concerning the Initial Appointment, the auditor is referred to Section 105 of the Income Tax Field Audit Guidelines.

1. Timeliness Of The Appointment

Appointments should be arranged to ensure that the auditor, as well as the taxpayer, have sufficient lead time to adequately address the issues.In most cases, the first communication a taxpayer receives from the Department is a cover letter with the appropriate questionnaire requesting information on domicile and the number of days spent in New York. If after the commencement of the audit it appears that the audit cannot be completed before the statute of limitations expires, the auditor must request a waiver extending the statute.

This orderly procedure is to be followed in all cases. An audit is not to be commenced near the end of a statute of limitation period when an insufficient period of time remains to adequately address the issues of the audit. The first communication with the taxpayer should never be a request for voluminous documentation and a statement that the taxpayer will be assessed as a resident unless all the material is produced in an unreasonably short period of time or the taxpayer agrees to extend the statute. Such requests are unreasonable, and assessing additional taxes automatically unless the taxpayer agrees to extend the period is contrary to Audit Division policies and procedures.

The auditor, as well as the Team Leader and Section Head, must review the audit period on new cases in order to be sure to provide the taxpayer and the auditor with a reasonable period of time to conduct the audit. As a general rule, nonresident audits should not be started unless the auditor and the taxpayer have at least 120 days (without extending the assessment limitation period) to present and review material.

B. Continuing Communications

Developing and maintaining a dialogue with the taxpayer and the representative is essential for the successful conclusion of any case. The taxpayer and the representative must be given the opportunity to fully understand, review and discuss the

findings developed during this analysis of the records. A successful auditor is one who listens to the taxpayer and representative and evaluates the information presented. After this evaluation, the auditor should determine if this explanation affects his position, and re-state the position in light of the new information submitted by the taxpayer.

If a disagreement exists, or the taxpayer is uncomfortable with your explanation, a closing conference at the district level should be offered. At this conference, the auditor, with the oversight of the team leader, should be prepared to explain the findings and present hearing decisions which parallel the taxpayer's situation. In certain instances the section head may also participate in this conference. This airing of the issues has proven to result in the successful resolution of many nonresident cases.

For a listing of frequently referenced hearing decisions and the issues involved, refer to Appendix #C.

C. Explanation To The Taxpayer

The auditor must present the examination results to the taxpayer and/or the representative at the conclusion of the audit. During the concluding phase of the audit, the auditor should present to the taxpayer and the representatives copies of work papers and schedules, and explain the methodology of the audit as well as Department procedures in plain and simple, nontechnical terms. The findings can also include recommended changes in record keeping practices to correct accounting errors found during the audit, as well as an explanation of the proper interpretation of the tax law in areas where errors were made.

There are occasions, however, when the preliminary audit results should be communicated to the taxpayer and the representative as soon as it appears that a case is developing in a particular direction. One important example of this is in regard to Resident Credit and the residency issue. As soon as it appears that a case is heading toward holding the taxpayer a resident of New York by virtue of domicile or statutory resident rules, the taxpayer should be advised to consider filing a protective claim with his/her claimed state of domicile before a statute expires, in order to recover any credits s/he may be entitled to. For further information concerning "Resident Tax Credit" refer to Field Audit Guidelines Section 309.

Upon the conclusion of an audit, the taxpayer and the representative must be notified of the results of the audit, regardless of the outcome. If the audit results in the acceptance of the return filed, the taxpayer should be notified of that fact. If the taxpayer is being held a resident, either as a domiciliary or as a statutory resident, the taxpayer should be notified of that fact. This notification will protect the individual from subsequent audits covering the same issue for the same period and relieve the burden of producing documentation for a period for which a resolution was reached.

9 Audit Techniques

A. Pre-Audit Analysis

1. General

A comprehensive pre-audit analysis is an important aspect of the nonresident case. The auditor must review the information available and determine the scope of the audit. A thorough pre-audit analysis can provide the auditor with a strong foundation toward either a resolved case at the audit's conclusion or a case sustained through the appeals process. For additional information concerning the Pre-audit analysis, refer to the following, as well as section 104 of these Field Audit Guidelines.

2. Prior Audits

The auditor should review the file as well as all other available information during the pre-audit analysis to determine if a prior audit was conducted. The focus of the audit can be directly affected by the results of a prior audit. If a prior audit determined that the taxpayers are domiciliairies of New York, since domicile continues until specific actions of the taxpayer demonstrate clearly that the domicile changed, subsequent audits should focus upon the evidence supporting a change in domicile.

Conversely, if a prior audit determined a taxpayer was not domiciled in New York, than a subsequent audit should start with the fact that the taxpayer is a nondomiciliary, and the auditor should concentrate on those factors supporting a move back to New York, or the statutory resident issue.

3. New York Address

The auditor, should review the entire return paying particular attention to the New York addresses identified on the tax return. The IT-203 return (New York State Non-Resident Return) starting with the 1988 tax year, as well as the NYC-203 (New York City Non-Resident Earnings Tax return) , require the taxpayer to answer questions and identify any New York State and/or City addresses. The envelope attached to a return filed after April 15th may indicate a New York address in the return address area. The envelope may be postmarked from a New York State location. This can lead to the identification of a permanent place of abode in New York, especially if the returns are mailed from New York with a postmark different from that of the tax preparer. The "Wage and Tax Statement" (W-2/IT-2102) may reveal that the information return was sent to the taxpayer's New York address. The auditor should make note of any New York address identified during the pre-audit analysis and explore the taxpayer's connection to these addresses during the audit. The auditor should be aware of both the City of New York and Yonkers city income taxes which would be due as a result of either residency or earnings in these communities.

4. Non-New York Address

When reviewing the return, particular attention should be paid to a non street or an unusual address from a State other than New York. The c/o address, a PO box number, apartment # or slip number may indicate a temporary mailing address used by the taxpayer. A comparison of the information on the return should be made to identify discrepancies, such as a non-New York address while the envelope bears a New York postmark; the W-2 sent to a New York address while the address on the return

indicates another state; and, the return, as well as the information returns, using a c/o address in N.Y. while the taxpayer indicates he has no New York business connections.

5. Business Relationships

An analysis of the supporting schedules attached to the New York return (Schedule C, Schedule E, and the partnership or S Corporation K-1's) can provide an insight into the taxpayer's business involvement within New York. Significant active involvement with New York partnerships or other business entities will support a position that the taxpayer is domiciled in New York. In addition, the W-2, "Wage and Tax Statement," may reveal a relationship between the employer and the employee. The inclusion of the taxpayer's surname as part of the employer's name implies closely held ownership which may be found to include a degree of active participation which would have to be explored during the audit.

6. Capital Gains

Past audit experience has identified many taxpayers who have claimed a change in domicile immediately prior to the occurrence of a large capital gain. As a nonresident, a taxpayer generally avoids paying New York State Income tax on capital gains. Large capital gains are uncommon, and often the only change in lifestyle demonstrated by the individual is the fact that a substantial gain was realized in the year of, or immediately after, the alleged change of domicile.

B. Computer Information

1. General

The Department's use of the various computer files available from the Internal Revenue Service, other New York State Agencies, various City of New York Departments, and various states, in addition to the Department's internal files, has become a model for the successful use of computer data throughout the nation. The following represents the practical application of this accumulation of data.

2. Federal Data

The IRMF (Information Returns Master File) tape is made available by the Internal Revenue Service and includes all information returns (1099's, 1098's, K-1's and W-2's) sent by a New York payor or sent to a payee's New York address. The tape has proven very useful in identifying a New York "place of abode" when not revealed on the face of the return.

3. Computer Profile

Some cases that are sent to the Districts for audit include a "computer profile." This profile is compiled from various Department files including filing history dating to 1982, the Tax Exempt Bond Interest file, the Federal Individual Master file, and Withholding Tax files. The profile provides information on nonresidents who have

significant ties to New York. This information can be very useful to the auditor, but must be verified by the taxpayer's information and should be used within the proper context.

4. Other Information

The Department subscribes to several city telephone as well as Coles directories. These directories are available in the District Offices, Central Office and The Taxpayer Equity Division. They are accessed by address or phone # and can provide information into the length of time an individual has resided, or continues to reside at a given location. Wherever possible the auditor should verify the fact that a taxpayer has lived or continues to reside at a New York "permanent place of abode."

C. Accumulation & Analysis Of Data

1. Personal Interview

Using the pre-audit analysis and the questionnaire as a starting point (see section .8, Communicating With The Taxpayer, The Initial Appointment) the auditor should explore and develop through personal conversations with the taxpayer or his/her representative the various elements needed to determine the involvement in New York. This personal interview should concentrate on the primary factors of domicile. Where are the homes located? What business contacts does the taxpayer have here in New York?

Many of the above questions could be answered in the questionnaire. The auditor should be able to review the answers on the questionnaire and build upon them. The auditor must learn to develop his/her listening skills and nudge the conversation in the direction necessary to provide the information needed to make a decision. In many cases it may be beneficial to the prompt and accurate conclusion of the audit for the auditor to visit and, when appropriate, walk through the New York residence(s) . The auditor will need this information when comparing the New York location to any out-of-state residence(s). The auditor should suggest a visit as well as a walk through with the taxpayer and/or the representative. If a visit is not possible or denied, then the taxpayer and/or the representative should be asked about providing pictures or a videotape of the premises.

By actively listening and asking appropriate questions during the interview process auditors will prepare themselves for the documentation and positions presented by the taxpayers during the audit. The interview should also involve the taxpayer's typical pattern and general lifestyle, hobbies, how time is spent on weekends, etc.

During the interview and throughout the audit, the auditor must make a decision concerning the testimony and declarations made by the taxpayer. Credible testimony and declarations must be considered. For example, if during the interview, a taxpayer indicates that s/he does not fly to/from Florida but drives instead, the auditor should allow sufficient travel time in each direction unless other information disputes this position.

Also, when a taxpayer's typical pattern or lifestyle indicates that weekends and holidays are normally spent outside New York, the established pattern should be accepted unless other evidence contradicts this position.

The auditor should document the responses made by the taxpayer and/or the representative during a personal interview on the DO-220.5 (The Field Audit Record) . These notes may be used to refresh your memory at a later date as the case proceeds through the appeals process. The timely entry of notes and comments on the Field Audit Record also lends credibility to discussions which take place between you and the taxpayer and/or the representative. Auditors also need the interview process to sort out the additional documentation needed to reach a conclusion concerning the audit. The auditor can "test" the testimony by requiring certain limited documentation. Auditors may accept as evidence, with some weight, written and/or oral statements by the taxpayer. Where such testimony is not contradicted by other evidence, it should be accepted as truthful. Demanding third party, written verification of the whereabouts of the taxpayer for every day places a difficult burden on the individual. This approach often results in the taxpayer's becoming angry and uncooperative because they see the auditor's refusal to accept their word as an accusation of lying and abuse of the audit function. Conversely, it is expected that the taxpayer and/or representative will make every opportunity to provide the limited, pertinent documentation requested by the auditor in consideration of the need to test written and oral statements of the taxpayer.

2. Analysis Of The Federal Return

If the taxpayer has not attached the appropriate and required Federal Schedules to the State return, the auditor should request a copy of the complete Federal return. A close review of the schedules may provide information that will support your position.

Scrutiny of Schedule A (Itemized Deductions) can reveal information concerning the location of a New York residence from the real estate taxes claimed, the mortgage interest paid or a casualty loss suffered. Presence in New York can be documented by expenditures for New York medical practitioners, and business & educational involvement in New York can be verified by amounts deducted as Miscellaneous deductions. Travel and Entertainment expenses (Form 2106) which is also a component of the itemized deductions could be used to confirm days spent outside New York while in travel status.

Business involvement is identified on a variety of Federal Schedules. Schedule C is used to report income from a sole proprietorship while Schedule E reports an assortment of income items such as partnership income, S Corporation income, rental income and income from trusts and estates.

3. Analysis Of Records

When analyzing records, either business or personal, checking or other, the auditor must keep the audit's objective in mind. Unlike a substantiation audit, the objective of a residency case is not the verification of each deductible item on the tax return but the establishment of a pattern. An auditor may, however, request verification of items that appear to be excessive or unreasonable.

A. Bank Records.

The information that can be learned about a taxpayer from canceled checks, bank statements, etc. is important in the determination of domicile and may greatly assist the auditor who is pursuing the issue of statutory residence. The physical location of the banking institution and/or place where a signature card is kept on file is not significant. Some importance is to be placed on the address to which bank statements, financial information, or 1099 data is sent, as well as the location or locations of safe deposit boxes used for family records and valuables. Of much more importance and significance is the type of activity that can be disclosed from financial information such as where that activity has occurred and the frequency of such activity.

The auditor needs to focus on the activity reflected by bank accounts and the use patterns of such activity rather than the bank's physical location.

Current technology has significantly changed the concept of "neighborhood bank." In the past an individual would visit or mail a deposit to the local bank and would be hard pressed to find a bank in another town (no less state) that would cash a personal check. Now, wire transfers, ATM machines, credit cards, bank cards, PIN numbers, etc. are a way of life for many taxpayers.

Access to ATM machines should be reviewed because this information will usually disclose an exact location where a taxpayer is on a particular day. The regular or repeated use of an ATM machine located in New York places the taxpayer in New York at a specific time and place each time it is accessed. This information may be helpful in either verifying an entry in a log or diary or refuting the statements made by the taxpayer.

The auditor should be more interested in dates, locations of payee and the cancellation information on the back of the check than the actual dollar amount of the check. Canceled checks are scrutinized for such personal expenses as groceries, hairdressers, club dues, and entertainment, noting the date these checks were written. Dates, volume and type of business expenditure is an indication of the time the taxpayer spends in New York. The auditor must determine the usage patterns for the various locations where the taxpayer resides and eventually make a decision as to their domicile. Active involvement is demonstrated by the usage patterns established by the taxpayer. For example, analysis of credit card receipts may disclose attendance at a sporting event, a theatrical performance or dinner in New York which is significant in establishing a day's presence in New York.

In some cases, a taxpayer may keep a balance in New York banks for convenience on those occasional trips to New York. These circumstances would be insignificant in deciding the issue of domicile. Employing a financial institution located in New York, which provides activities such as handling insurance policies, stock transactions, managing the taxpayer's portfolio, and everyday expenditures, etc. is not, in itself, a controlling factor of domicile, especially if the taxpayer plays a passive role in these activities.

B. Business Records.

Business records including corporate board minutes and employment contracts should be examined to determine the degree of involvement in New York business entities. Income received from attending Board of Directors meetings can often be found on the tax return under "other" or "miscellaneous" income. In some instances the taxpayer might report directors' fees on Federal Schedule C (Business Income) rather than "other" or "miscellaneous" income. The auditor should look for evidence of active participation in the decision making process as well as involvement in the day to day operation of the business. Board minutes often establish a specific delegation of authority to the taxpayer and others as well as provide authorization for the use of a corporate apartment, auto or plane. Corporate board minutes and employment contracts often require the individual to represent the company by sitting on the Boards of other related or unrelated companies. This information would be useful in determining the allocation of income or the days in or out of New York.

C. Personal And Household Records.

The auditor should not overlook the traditional non- deductible expenses when reviewing personal records. The utility (electric & water) , telephone and cable TV statements are valuable records in determining usage patterns at more than one location. Cable companies often keep records of disconnect and re-connect notices which would give an indication as to when the taxpayer is present at a specific location. Insurance records and policies may also give the auditor some insight as to the assets present at the various locations. Works of art, collections of stamps, coins, and rare books are usually covered with separate riders to the policy, and the exact location of the collectible is usually identified. The use of this type of information may be useful in a domicile or statutory residence case where you are attempting to show the relation of the taxpayer's lifestyle to his presence in New York State. Keep in mind that these requests place a heavy burden on the taxpayer and the auditor should exercise some degree of common sense when requesting the documentation.

4. Personal Observations

The auditor should make every attempt to visit the New York place of abode. The location of the neighborhood, the facility itself, and the relationship to the lifestyle of the taxpayer is important to the establishment of residency in New York. This personal observation should include checking the names on the mailbox, checking the license numbers of any vehicles on the mailbox, checking the license numbers of any vehicles on the premises, and interviewing the doorman, building superintendent and mailman, if necessary.

5. Declarations

While declarations of the person whose domicile is disputed are useful to prove intent, the weight given is dependent upon the circumstances under which they were made. A declaration made after a controversy arises over domicile, or made at a time when the individual has a specific interest in obtaining evidence, is questionable as self-serving.

The declaration as to residence made in a will carries weight. However, a recitation of residence in a will is not conclusive as to domicile. The true domicile of a decedent is to be determined by his or her acts and conduct.

In determining the intent of an individual necessary to prove domicile, the total effect of numerous acts or declarations, which standing alone may be of slight importance, may create high evidence of intent when grouped together.

Declarations, while not necessarily persuasive, are expressive of intention and may become important when supported by the individual's acts. If the sworn declaration of an individual seeking a change of domicile are consistent with the other evidence and with their conduct, a change of domicile is established.

Intent is not a mere arbitrary declaration on the part of the individual, but is to be gathered from his conduct as evidenced by his/her daily life. Intent will be determined by the history, manner of life, activities, and interests of the person whose domicile is in question, rather than by his declarations, either written or oral. Where declarations are in conflict with the facts, the declarations are not controlling.

In considering the effect of the declarations of an individual, his/her motive in making such declarations, the circumstances under which they were made, and their consistency with other declarations, acts and general conduct will be scrutinized. The most important evidence of intention to acquire a domicile is the conduct of a person; and, in case of discrepancy between his declarations and his/her acts, his/her declared intention yields to the conclusion drawn from his acts. Also, mere oral and informal statements of intention are of little weight where they conflict with more formal declarations and the actions of the individual.

Throughout the audit, the auditor must make decisions concerning testimony and declarations made by the taxpayer. Testimony which is determined to be credible must be considered when making decisions concerning the intentions of the taxpayer. To determine if testimony is credible, the auditor should "test" the testimony by requesting certain limited documentation.

10 Concluding The Audit

A. General

The conclusion as to whether or not one domicile has been replaced by another depends on a composite appraisal of the unique circumstances and conditions surrounding the person whose domicile is in question. All the relevant acts, declarations, and conduct of a person, the manner of living, connections, associations, and interests must be considered and, from the overall picture, intention must be ascertained. Each case varies, and what may be of great weight in one may in another be so qualified as to be of little importance.

While a person may select a domicile by exercise of intention, the conduct of the person is indicative of the intention to make a particular residence his/her home.

Consideration must be given to the physical characteristics of the dwelling place, the time spent there, the things done there, who lives there with him or her, and what possessions are kept there, his or her mental attitude toward the place, the intention when absent to return there, and the attitude toward other places with which s/he has contact. The auditor must weigh the subtle ingredients that compose a person's relation to his or her various dwellings and determine from them which dwelling is his/her "home."

The fact that a person whose domicile is in question has lived a longer period in each of several years in one place more than in the other is without controlling effect. The manner of living and the actual intention and conduct of the person involved are essential elements which lead to a proper conclusion.

B. Making A Determination

After the auditor has accumulated sufficient information to reach a conclusion, s/he should prepare a summary of the facts developed during the audit and compare these facts with Department policy and established case law. The auditor should discuss the findings with the team leader and, if necessary, request assistance in interpreting case law. After reaching a preliminary decision, the auditor should determine if a secondary position exists. For example, if the preliminary decision holds the taxpayer to be a domiciliary of New York, is there sufficient information to hold the taxpayer as a statutory resident or does the wage allocation change if both positions are successfully defeated by the taxpayer. The auditor must cite not only the primary position, but also any alternative positions on the "Proposed Statement of Audit Changes" when prepared. Failure to do so could prevent these issues from being addressed during the appeals process. When all three issues have been addressed during the audit and changes are appropriate in each area, the following wording is suggested.

"As you have not established by clear and convincing evidence that you intended to change your domicile from New York to, you are considered New York State residents for income tax purposes. As residents you are subject to tax on all income regardless of the source.

Alternatively, if it is decided that you are not domiciled in New York State, you are being held as statutory residents of New York based upon the following:

1. You continue to maintain a permanent place of abode, located at .

2. You have not established through adequate records that you did not spend more than 183 days of the tax year within New York State.

Alternatively, if it is decided that you are not residents of New York State for income tax purposes, your allocation of wages and other compensation to New York, as originally reported, must be adjusted to reflect working days in New York."

Keep in mind that the above wording represents suggested phrasing. The actual wording on the "Statement of Audit Changes" should be modified to reflect the situation.

At the conclusion of the residency audit, the auditor should provide the taxpayer with written verification of certain conclusions reached during the audit even though, as in many cases, no additional tax liability is assessed. Such documentation could encompass the domicile issue, the existence of a permanent place of abode, or the number of days spent in New York. The purpose of such a written verification of the audit conclusions would be to clarify for the taxpayer the depth and results of the audit in order to simplify any subsequent audits, especially where the conditions remain the same. This would help prevent the taxpayer from unreasonable audit requests for the same issue in subsequent years provided the facts remain the same.

Auditors should attempt to be as accurate as possible in determining the date of a change in domicile. The taxpayer and the auditor may agree on a date part way through a year, so that the taxpayer would be taxable as a resident for part of that year and as a nonresident for the remainder of the year. If a date for a change of domicile is determined as a result of an audit, the date and specifics on the reasoning for the allowance for the change must be noted in the audit report. In addition, the taxpayer should be notified of this conclusion.

C. Penalty Considerations

The auditor and the team leader should review the case to determine the appropriateness of penalties. Particular attention should be paid to Negligence penalty, Section 685(b) , and the penalty for Substantial Understatement, Section 685(p) . The auditor, when asserting these penalties, must bear the burden in justifying the appropriateness of the penalty assessed. Entries concerning the imposition of penalty should appear in the DO-220.5 or be noted in a separate memorandum attached to the case outlining the reasons for imposing the penalty. The mere size of an assessment, or the lack of specific records, does not in itself constitute negligence or substantial understatement, but combined with other factors may warrant the imposition of one or both of these penalties.

For example, if an individual with a permanent place of abode in New York City, files an IT-203 (Nonresident return) with a NYC-203 (New York City Nonresident Earnings Tax return) attached and answers "NO" to the questions concerning "maintaining a permanent place of abode in either the State or the City," then the auditor might be justified in asserting a negligence penalty, especially if the taxpayer signed the returns knowingly answering the questions in the negative. A good example of this is the case of Corley R. Barnes, TSB-D-93-(21)-I who claimed that a computerized tax service had inadvertently checked the "NO" box in answer to the question on the NYC-203 about maintaining living quarters in New York City. The Administrative Law Judge upheld the imposition of the 685(B) penalty for negligence because

"the petitioner signed the return and must take responsibility for its contents, especially since the information on the return was obviously wrong and not technical in nature."

In the nonresident program, as with any case, when the taxpayer demonstrates a flagrant and intentional disregard for New York State Tax Law, consideration must be

made for the imposition of fraud penalties or referral to the Tax Enforcement Division for possible Criminal Prosecution. Team leaders need to keep a watchful eye for cases with fraud indicators. For these cases, referral for criminal action or civil fraud penalties may be appropriate.

In any event, documentation of incidents of negligence or fraud must be outlined in the audit file or in the log in order to support the penalty imposition. With respect to the "P" penalty, an important element to be addressed is the question of adequate disclosure. For further information on penalties you should refer to Section 303 of these guidelines as well as DOI 89-4 for an example of the application and computation of Section 685(p) penalty.

D. Communicating The Results

Once a decision is made, the auditor must communicate the results to the taxpayer and his/her representative. The proposed adjustment is prepared on the AU-251 "Statement of Audit Changes" and must adequately describe the adjustments. It is suggested that the auditor present the audit results to the taxpayer and his/her representative orally, explaining the adjustments and presenting pertinent case law to support the position. During this oral presentation, it is also appropriate for the auditor to explain to the taxpayer his/her rights to protest and the appeals process available to him/her.

The taxpayer should be given sufficient time to review the audit results and present additional information, if possible. The auditor must listen carefully to any additional explanations offered by the taxpayer and evaluate any new documentation submitted. During these personal conversations with the taxpayer (or at a closing conference) , the auditor should ask the taxpayer to explain the reasons for circumstances which still indicate a New York domicile. The taxpayer may have some good reasons for some of the issues which indicate practical reasons for not having severed New York ties.

If changes are warranted, the auditor should re-compute the additional tax and present a revised statement to the taxpayer as soon as possible. When mailing the AU-251 to the taxpayer or his representative, the Department recommends that the appropriate closing letter be used. Several letters are included in the 201 Comp. program, and one is appropriate for each of the various closing situations. Copies of these closing letters are attached at Appendix #D.

E. Concluding Conference

Developing and maintaining a good dialogue with the taxpayer and the representative is essential for the successful conclusion of the case. The taxpayer and the representative must be given the opportunity to fully understand and refute the findings developed during the audit without the necessity of a BCMS conference. A closing conference at the district level with the team leader and/or section head, who are prepared to explain the findings and present favorable hearing decisions which parallel the taxpayer's situation, could result in the successful resolution of the case. This is beneficial to both the taxpayer and the Department as well in that collections will

be enhanced and litigation costs kept to a minimum. If an issue can be resolved at the audit level, we should strive to do so. Even if the case remains disagreed, the auditor will be in a better position to defend the audit during the appeals process.

Upon the completion of an audit, the taxpayer and the representative must be notified of the results of he audit, regardless of the outcome. If the audit results in the acceptances of the return filed, the taxpayer should be notified of that fact. If the taxpayer is being held a resident, either as a domiciliary or as a statutory resident, the taxpayer should be notified of that fact. This notification will protect the individual from subsequent audits covering the same issue for the same period and relieves the burden of producing documentation for a period for which a resolution was reached.

F. Work Papers

Throughout the audit, the auditor should have prepared work papers which adequately support the conclusions drawn upon the completion of the audit. These work papers will become an integral part of the case file and will be used to resolve any questions the taxpayer has. The work papers take on a greater significance in a disagreed case, when the auditor or team leader will be called upon to defend the Department's position throughout the appeals process. For more information concerning work papers, refer to section 103 of these guidelines.

In developing the case, as part of the objective decision making process the auditor should develop the "T" account analysis as described earlier, to arrive at an informed conclusion. The analysis must reflect the factors favorable to a New York domicile as well as those factors which endorse a domicile outside New York. It is also recommended that the auditor prepare a clear and concise explanation of the factors considered in arriving at the decision. The analysis of the factors should be presented in the work paper summary. The comparison of the New York factors to those existing in other locations should be clearly outlined with the conclusion evident from the facts presented. This brief, or position paper should be prepared regardless of whether the case is agreed or disagreed. This work paper will provide the basis of the appeals presentation as well as establish the focus of any future audits.

G. The Income Tax Report

The "Income Tax Audit Report" AU-241.26 (see Appendix #E) was revised in November 1991 to accommodate an expanded narrative, particularly important in the nonresident program. The form was designed to provide additional space to explain the assertion of penalty, to explain the results of an informal closing conference and to identify specific areas of disagreement. The narrative should include a summary of the Department's position, a listing of areas of disagreement and finally a listing of any rebuttal evidence which will refute the taxpayer's position. The auditor should prepare this report, especially for disagreed cases, as if he were preparing a brief of his/her (the Department's) position. Very often, the Administrative Law Judge or the Department's attorney will use the Audit report in conjunction with the DO-220.5 for a picture of what occurred during the audit.

The auditor can enhance the defense of the case throughout the appeals process if reference is made to hearing decisions and court rulings which resemble or parallel the case at hand. Reference to these decisions should be cited in the audit report in order to illustrate their application to the case at hand. Appendix #C includes a synopsis of cases involving an aspect of the nonresident area. The cases identified in the appendix have been resolved by the New York State Tax Appeals Tribunal or the New York State Courts. The cases cited were restricted to those decided at this level due to the precedent setting nature of the decisions.

FORMS

Initial Contact with the taxpayer to be used In conjunction with Short Questionnaire

Name Street City, State, Zip

Re:Case No : Tax Year(s) :

Dear :

Your New York State Nonresident Personal Income Tax Return(s) for the year(s) indicated above have been assigned to this office for review.

In our review, we will be addressing your nonresident status and, if applicable, your allocation of income to New York State and/or City. To assist us in establishing your nonresident status along with the income allocation, please complete the enclosed abbreviated questionnaire. Copies of your federal tax return(s) with all attached schedules for the above referenced year(s) should also be submitted.

After this initial review, you may be asked to complete a more detailed questionnaire concerning your resident status, as well as provide pertinent documentation. Often a personal interview will facilitate the completion of an audit and, if necessary, you will be contacted in order to arrange a mutually convenient time and place.

Upon completion of this initial review, if no further audit activity is necessary, you will be notified thereof.

If you would like to discuss this matter with me prior to completion of the questionnaire, or have any comments or concerns about this review, you may call me or my supervisor at the phone number listed below.

If a representative will be contacting us on your behalf, a duly executed power of attorney must be submitted. Power of Attorney forms are enclosed for your convenience.

Your response is requested within 30 days. Thank you for your cooperation in this matter.

Sincerely, Name Tax Auditor I Phone Number

Date Enclosure

Subsequent contact with the Taxpayer to be used in conjunction with the Long Questionnaire and the establishment of a specific appointment

Name Street City, State, Zip

Re: Case No: Tax Year(s) :

Dear : Based upon information gathered from the tax returns filed, as well as, the questionnaire submitted, it has been determined that your New York State Nonresident Personal Income Tax return(s) for the year(s) indicated above will be audited by this office.

During this audit, we will be addressing your nonresident status including the possibility of New York domicile, treatment as a statutory resident and/or the portion of income allocated to New York State and/or City.

Please complete the enclosed detailed questionnaire and have available at the appointed time and place the following information in order to facilitate the audit process. The documents requested include:

The enclosed questionnaire and the request for documentation has been modified to eliminate any information that was previously submitted. Please have this information available on (date) at (time) at the following location, (location) .

If you would like to discuss this matter with me prior to the appointment or the completion of the questionnaire, or have any comments or concerns about this audit, you may call me or my supervisor at the phone number listed below.

If a representative will be contacting us on your behalf, a duly executed power of attorney must be submitted. Power of Attorney forms are enclosed for your convenience.

Thank you for your continued cooperation in this matter.

Sincerely, Name Tax Auditor I Phone Number

Date Enclosure

NEW YORK STATE Department of Taxation & Finance
District Office
Street Address
City, State, Zip

Taxpayer Street Address City, State, Zip

Re:Case No. : Tax Year(s) :

Your New York State Income Tax Returns for the year(s) shown have been selected for review. The primary issue to be addressed is your resident status and/or income allocation. Enclosed is a brief questionnaire relative to the audit.

In order to arrange a mutually agreeable date to review your records, please call me at the telephone number indicated within 20 days of the date of this letter. At that time, we will go over your questionnaire and any questions you may have about the audit.

If you prefer that I call you, please provide me with a telephone number so that I may contact you during normal business hours. If there is a particular time that you would like me to call, please let me know.

Thank You, Auditor Title District & Section Telephone Number

Audit Discontinuance Letter - to be used when audit activity is discontinued after a review of the short questionnaire and other data

Date

Name Case Number: Street Audit Period:
City, State, Zip Tax Type: Auditor: Telephone:

Based on our review to date, the audit activity for the tax period(s) and the tax type noted above has been discontinued. No further audit action for this period(s) is being considered at this time.

Thank you for the cooperation you extended to our staff during this review.

If you have any questions, please contact me at the telephone number listed above.

New York State Department of Taxation and Finance
District Office - Income Tax Section
Street
City, State, Zip

Nonresident Audit Questionnaire - Short Version

Name:

Tax Year(s) :

Case #:

Phone #:

1. When was a New York State Resident Personal Income Tax Return last filed by you?

2. If you were at any time a resident of New York, what was done to change your status from a resident to a nonresident? Please provide detailed information relative to your intentions.

3. For the years indicated, give your employer's name and address, or if self-employed, the name and address where you carry on your profession, business or trade.

Name Address City State Zip

4.Were/are you associated with any business activity conducted in New York (Partnerships, S Corp. etc) ?

Yes [] No []

Name Address City State Zip

Nature of the Activity:

Employer ID No.:

5. For the tax years indicated, did you own, rent, lease or otherwise maintain living quarters in New York State?

Yes [] No [] If yes, please supply the following:

Address City State Zip Telephone

6. Was the property under New York City rent control/rent stabilization?

Yes [] No [] Not Applicable [] If yes, give inclusive dates that such living quarters were maintained.

7. If you do not maintain living quarters in New York State, where do you regularly stay while in New York State?

8. For the tax years indicated, how many days or part days were you physically present in New York State for work purposes?

9. For the tax years indicated, how many days or part days were you physically present in New York State for non-working days such as weekends, vacations, holidays, illness and any other nonworking days during each year.

10. Any additional information you may wish to provide?

TAXPAYER - I DECLARE THAT THE ABOVE STATEMENTS ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

____________	________	____________
Your signature	Date	Date of Birth

To be used to gather additional information from an individual

Nonresident Audit Questionnaire - Long Version

Name:

Tax Year(s) :

Case #:

Phone #:

Please provide the following information, including a telephone number where you can be reached during the day. Please be specific in your answers.

1. Name (in full)

2. Address where residence is currently claimed:

Street: City State Zip

3. Did you live at this address at any time during the above tax year(s) ?

Yes [] No []Owned []Rented []

Have you disposed of a dwelling place located in New York State? If so, when was it disposed of?

How was it disposed of?

If sold, please submit a copy of the sales contract.

Address of all prior homes located in New York State:

Address Disposition Period Occupied

4. Was the property under New York City rent control/rent stabilization?

Yes [] No [] Not Applicable []

Give the inclusive dates that such living quarters were maintained.

5. Current New York State Address:

Street: City State Zip

6. When staying in New York indicate whether you are:

(a) occupying a house owned by self or others. []

(b) renting a house. []
(c) renting an apartment. []
(d) renting a room or rooms. []
(e) staying with friends or others. []
(f) staying at a hotel. []

If you do not maintain living quarters in New York State, where do you regularly stay while in New York State? Address:

7. State whether or not in the years in question you continue to maintain your place of abode in the State of New York while you are staying in the place of residence claimed.

8. Address where residence is claimed:

Street: City State Zip

9. Do you own or rent a dwelling place in the State where residence is now claimed?
Own [] Rent []

If so, when did you or your minor children first occupy this dwelling?

Are You living in this dwelling currently? Yes [] No []

10. When staying in the place where residence is claimed state whether you are:

(a) occupying a house owned by self or others. []
(b) renting a house. []
(c) renting an apartment. []
(d) renting a room or rooms. []
(e) staying with friends or others. []
(f) staying at a hotel. []

11. State whether the house, apartment, room or rooms located in New York State indicated in questions # 3 thru 6 are furnished with your own furniture.

12. Are any of your belongings or furniture still in New York State? Yes [] No []

If yes, which type of belongings are still located in New York?

If no, please give the date when you removed your furniture and belongings to your present residence.

13. Give the dates that you actually stayed in New York State during the past three years. Be specific and use the reverse side if necessary.

14. Give the dates that you actually stayed in a place where residence is claimed during the past three years. Be specific and use the reverse side if necessary.

15. What is your business, trade, profession or occupation?

16. Give the principal address at which you carry on your business, trade, profession, or occupation?

Street: City State Zip

17. If employed by another, give the name and address of employer and in what capacity you were employed.

Did your employer provide living quarters for you or your minor children use in the New York State at any time during the audit period?

Yes [] No [] Street:

Street: City State Zip

18. Since what date have you been carrying on your business, trade, profession, occupation or employment at the above address?

19. Were you actively associated with or have material participation in any business activity conducted in New York?

Yes [] No []

Name	Employer ID #	Nature of Activity
a.		
b.		
c.		
d.		
e.		

20. Were you passively associated with any business activity conducted in New York.
Yes [] No []

Name	Employer ID #	Nature of Activity
a.		
b.		
c.		
d.		
e.		

21. Since the year for which you first claim nonresidence, have you executed any bond or undertaking, or contract of lease, or of employment or agency, or any other character in which your residence was stated?

Yes [] No []

If yes, please indicate the type of instrument, date of such instrument and the place of residence set forth by you.

Type Date Place of Residence
a.

b.

c.

d.

22. Since the year for which you first claim nonresidence, have you executed a last Will & Testament?

Yes [] No [] I

f yes, please state your residence as therein given.

Street: City State Zip

23. In the years under audit, where did you actually vote?

24. If you have an auto, boat, or airplane where are they registered?

Type Physical Location Location Registered

25. If you had a drivers license, from which state are they issued?

26. When was a New York State Resident Personal Income Tax return last filed by you?

27. Are you required to file a Personal Income Tax return with another state?

Yes [] No [] Not Required []

If so, which state.

28. If you were at any time, a resident of New York State, give a complete statement relative to your intentions as to residence when you moved from New York State. Include here a statement relative to your intentions to establish a home or principal place of residence.

29. Any additional information you may wish to provide?

NOTE: Use the reverse side for additional statements or explanations numbering the items to which such statements apply.

______________ _________ ___________

Signature Date Date of Birth

CITATION OF CASES:

DOMICILE & RESIDENCY ISSUES

The cases listed below represent cases which have been resolved by the New York State Tax Tribunal or the New York State Courts. While Administrative Law Judge (ALJ) determinations occasionally are referred to in the guideline text, they are not included here due to the non-precedental nature of the determination.

Matter Of Samuel G. Allen, TSB-D-92-(26)-I

The Tax Appeals Tribunal determined that the petitioner had to prove that he was not a resident of New York, either domiciled or not domiciled. Petitioner had testified that he was domiciled in the State of Connecticut and therefore not a resident of New York. However he and his mother were co-tenants on a lease of a New York City apartment during one of the years in question. He also acknowledged that he spent more than thirty days in New York in 1982, eating and sleeping at his mother's apartment, and keeping clothing and other personal effects there; while not proving that he spent less than thirty days there during each of the other audit years. Petitioner testified that he occupied the apartment only to provide supervision for his mother, that it was never his intention to make New York his permanent home and that he was domiciled in the State of Connecticut during the years in question. The Tribunal stated that the "mere allegation that he never intended New York to be his permanent home" was inadequate and agreed that his only tie to Connecticut appeared to be his maintenance of a Connecticut post office box. In view of that, petitioner was deemed a resident of New York.

Matter of Andrews v. Graves, 263 AD 188 affd, 288 NY 660

While acknowledging that tax avoidance may be valid motivation for a change of domicile, the State Supreme Court asserted that "there must be a fixed intention to abandon one domicile and acquire another" which was clearly lacking in the taxpayer's alleged change of domicile to Bermuda. The taxpayer continued to divide time between her homes in New York and Bermuda. Although she sold the New York home, she retained the right to occupy it during her lifetime and similarly transferred title to her home in Bermuda. Moreover, she kept her American citizenship and never applied to become a citizen of Great Britain. Noting that there had been no change in the taxpayer's lifestyle, the court concluded that she had not demonstrated a "clear intent" to change her domicile.

Affirmed on appeal 288 NY 660.

Matter of Sebastian and Florence Angelico, DTA No. 807985

The Tax Appeals Tribunal found that: 1. the husband changed his domicile even though he maintained a home in New York, and; 2. the Division did not assert the issue of statutory residency in the Statement of Audit Changes.

In January, 1984 the taxpayer moved out of his New York home with the intention of obtaining a divorce in the future and permanently making his home in a New Jersey condominium, he owned. Although the taxpayer continued to maintain a home in New York for his family and there was no formal separation agreement, he stated that from January, 1984 to the middle of 1985 he did not enter the New York house. Under Title 20 of the former regulation section 102.2(d) a husband and wife who are separated "may each," "acquire their own separate domiciles, even though there be no judgement or decree of separation." The taxpayer proved that the separation was not merely temporary by submitting an affidavit from his attorney corroborating his plans to get a divorce.

As importantly, the Tribunal emphasized that the statutory residency issue was not clearly raised in the Statement of Audit Changes, which said that "Sebastian Angelico had not changed his domicile from New York to New Jersey during January 1, 1984 through June 30, 1985 and was a resident of New York." This gave the impression that the Division was asserting residency based on domicile alone and did not give petitioner sufficient notice that he had to prove he was not a statutory resident.

Matter of Petition of Jack and Helen Armel, TSB-D-95-(28)-I

This is an example of the credible testimony of the taxpayer being accepted. (See Hull for a Tribunal decision where the taxpayer's testimony was found to lack credibility) .

The ALJ determined that petitioners had changed there domicile to Florida by 1987 but sustained the deficiency based upon statutory residency. However, the Tribunal found that petitioners "through their testimonial and documentary evidence, have clearly and convincingly proven that they were in New York for less than 184 days in 1988." The Tribunal continued that, "in this case, it is important to stress that, according to the findings of fact, the only days in issue are the 25 days from December 7 through December 31, 1988." For this time period petitioners lacked both phone bills and Visa statements to substantiate their whereabouts. "Second, the issue of petitioners' location on these days arises in the context that they claimed they spent the entire winter in Florida in 1988, as was their custom since 1984." The Tribunal held that petitioners, "need not establish their whereabouts each specific day." The Tribunal stated that "Mr. Armel's credible testimony, corroborated by affidavits and letters submitted by petitioners' friends and neighbors support a finding that petitioners were in Florida for the month of December." Thus the Tribunal reversed the ALJ on the statutory residency issue.

Matter of Petition of John G. Aveldsen, TSB-D-94-(15)-I

The Tribunal reversed the determination of the ALJ in finding that petitioner was a resident of NYC by virtue of the petitioner maintaining a permanent place of abode and failing to substantiate that he spent less than 183 days in NYC. The Tribunal found that, "the ALJ erred in concluding that documentary evidence was required, as a matter of law, and that credible testimony was necessarily insufficient to satisfy petitioner's burden with respect to the 183 day issue.

The ALJ found petitioner's secretary's testimony credible because her testimony was based on her examination of diaries that she maintained with respect to petitioner's activities and the diaries were created at the time the activities were scheduled. The Tribunal concluded that had the secretary's testimony 'simply been a general statement that petitioner was not present in New York for more than 183 days each year and was based simply on her recollections of events occurring five years ago, rather than on records she had made of these events, it is doubtful that the ALJ would have found the testimony credible."

Matter of Peter C. Ausnit, TSB-D-93-(19)-I

The Tax Appeals Tribunal determined that the petitioner had failed to present sufficient evidence to prove that he had changed his domicile to Connecticut and that he had spent less than 184 days in New York in 1985. Petitioner, had filed personal income tax returns as a resident of New York City, in the years before and after 1985. However in 1985 he filed as a nonresident listing a newly purchased Connecticut house as his address on his tax returns. During that year, he continued to maintain strong ties to New York, including the presence of his former spouse and children, who were living in New York, six partnerships, rental properties, and an apartment, which he never proved he vacated. The Tax Appeals Tribunal found that the petitioner, having introduced only minimal documentary evidence and no testimonial evidence failed to prove that he had changed his domicile or that any of his New York residential properties were not a permanent place of abode.

Matter of Michael J. & Kathleen T. Blake, TSB-D-92-(11)-I

The Tax Appeals Tribunal sustained an assessment and the 685(b) penalty, based upon the taxpayers' failure to provide substantiation both at the audit and at the formal hearing. Mr. Blake, a New Jersey resident, worked in New York City for a New York corporation and allocated 37 days outside New York. He also allocated a major loss from a partnership, the location of which was not proven to be in New York. Without substantiation, the allocation and the loss were disallowed and the negligence penalty was upheld. Further the Tribunal emphasized a policy of "limiting the submission of evidence after the hearing is closed in order to maintain a fair and efficient hearing system."

Matter of Bodfish v. Gallman, 50 AD2d 457

Stating that the presumption against a foreign domicile is stronger than the general presumption against a change of domicile, the State Supreme Court rejected the taxpayer's claim that he changed domicile when he was relocated to Pakistan on business. Citing Matter of Newcomb, the Court said "less evidence is required to establish a change of domicile from one State to another than from one nation to another." The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person with the range of sentiment, feeling and permanent association with it."

Matter of Clay E. & Rita M. Buzzard, 205 AD2d 852 (June 9, 1994)

The Appellate Division confirmed the decision of the Tax Appeals Tribunal and held that petitioners, who retained substantial ties to the Buffalo area, did not provide clear and convincing evidence that they had intended to make their Florida residence a fixed and permanent home. Petitioners, upon retirement in 1981 bought a house in Florida and sold their only New York residence. However after renting residences during the summers of 1982 and 1983, they had a house constructed in the Buffalo area. "In addition, they continued to maintain their memberships in two Buffalo area country clubs, continued to maintain charge accounts in Buffalo stores and had their primary bank accounts in Buffalo banks. They also continued to engage the services of Buffalo attorneys and accountants. Further, their primary physician is located in Buffalo. Most significantly, in the years in question petitioners spent more time in New York than in Florida."

The Appellate Division continued that, "Although petitioners have established strong contacts with Florida, we are not at liberty to substitute our judgment for a reasonable determination by the Tribunal which is supported by substantial evidence merely because it is possible to reasonably reach a different conclusion . . . Therefore, we shall confirm the Tribunal's determination because, in view of the above-noted New York contacts, it is a reasonable determination supported by substantial evidence."

Matter of Chrisman, 43 AD2d 771 (1973).

The Appellate Division was asked to decide the domicile of a decedent in order to determine where his will would be probated. The taxpayer had lived with his wife in their New York home for many years until July 1967, when they sold it and rented an apartment elsewhere in the state. A year later they moved to Florida where they lived the rest of their lives, mostly in a friend's house. Despite these two moves, the taxpayer maintained ties to his original New York domicile. These ties included rental property, an active checking account, and the use of a New York post office box for his tax return and the mailing of dividend checks. The taxpayer had declared in his will, however, that he was a domiciliary of Cortland County, New York, where he lived briefly between the time he sold his New York home and moved to Florida. The court, in dismissing his subsequent moves to Cortland and Florida, declared that they "were merely changes of residence" and that the taxpayer "never had the intention necessary to acquire a new domicile." Citing prior Appellate Division decisions, the Court said that to effectuate a change of domicile there must not only be a change of residence but also "an intention to abandon the former domicile and to acquire another" (Matter of Ratkowsky v. Browne) , and that one without the other "leaves the last established domicile unaffected." (Clapp v. Clapp).

Matter of Clute v. Chu, 106 AD2d 841

Conceding that "there was substantial evidence which supported both the position of petitioner and that of the Tax Commission," the Appellate Division let stand as reasonable the latter's decision that the taxpayer remained a New York domiciliary. The taxpayer had claimed a change of domicile to Florida in October 1976 when he negotiated the sale of his family business which was completed by the end of the year. The State Tax Commission cited the retention of the New York home which the

taxpayer used more than his Florida residence and continuing business ties as director in two New York banks, as evidence that he had not abandoned his New York domicile.

Matter of Crawford, TSB-H-82-(7)-I

The taxpayer was not allowed to allocate his salary from his New York employer by including days he worked out of state on a Presidential Commission. The taxpayer contended that while working on the commission he was directly performing services for his primary employer, a major New York bank, by presenting and protecting the position of the saving bank industry. This argument was rejected at a small claims hearing since the taxpayer received a separate salary for his work on the commission which was omitted from New York income on his nonresident return.

Matter of Doman, TSB-D-92-(9)-I

The ALJ had determined that the taxpayers had changed domicile from New York City to Suffolk County during the years in question. At the same time, she denied a motion by the Tax Department to amend the pleading to include the issue of statutory residency since it was not specifically referred to on the Statement of Audit Changes or the Notice of Deficiency, having been raised for the first time at the hearing. While agreeing that the taxpayers had changed their domicile, the Tax Appeals Tribunal reversed the ALJ's denial of the motion to amend the proceedings and remanded the case back to the ALJ to consider the issue of statutory residency.

Matter of Matthew J. & Rachel R. Dombar, TSB-D-93-(5)-I

The Tax Appeals Tribunal determined that partnership income should be allocated to a nonresident partner, despite his assertion that the income was not taxable to New York. Petitioner is a partner of a New York law firm that participates in real estate ventures outside New York. Petitioner claimed that income from non- New York real estate partnerships was passive in nature and flowed to two non-New York corporations, whose offices were located in Pennsylvania. Upon examination, it was found that the Pennsylvania office was merely a phone line and that no business had ever been conducted there. Further, the partnership never kept a separate bank account for the corporations or records showing the source of corporate funds. The Tax Appeals Tribunal found that this made it impossible for the partnership to identify non-New York income for allocation purposes.

The Tax Appeals Tribunal emphasized that income and losses from real estate located outside New York is allocable it was a "business systematically conducted in a permanent and continuous manner in New York State."

The Matter of Martin Erdman, TSB-D-94(21)-I

The Tribunal affirmed the determination of the ALJ concerning Mr. Erdman's domicile. The Tribunal concluded that Mr. Erdman failed to demonstrate by clear and convincing evidence a change of domicile. In reaching this conclusion the Tribunal stressed the importance of Mr. Erdman's continued active business interests and substantial time spent in New York.

The Matter of John M. Evans, TSB-D-92-(16)-I

The Appellate Division upheld the decision of the Tax Appeals Tribunal concerning what constitutes maintenance of a permanent place of abode. Petitioner shared a Manhattan apartment with a friend during his work week and paid for his share of household expenses for approximately seven years prior to the years in issue. Petitioner typically stayed at the dwelling place from Sunday or Monday night to Friday. A separate bedroom, bath and furnishings were available for petitioner's use. Additionally, petitioner provided other furnishings for use in the entire household.

The petitioner defined maintaining a permanent place of abode as owning or leasing a dwelling, or occupying a dwelling to which the taxpayer has some legal right (such as a dwelling furnished as part of one's employment) . The petitioner argued that without such a clear and unambiguous standard, a taxpayer would not know how to determine when a temporary living arrangement, such as being a guest, rose to the level of permanency for which the filing of a resident return would be required. Petitioner asserted that his living quarters were neither "maintained" by him, nor were they "permanent."

The Appellate Division decided that one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money, or otherwise. It rejected the petitioner's assertion that since he did not pay for many of the operating expenses of the dwelling, he was not "maintaining" the living quarters as required by the statute. As there can be many financial or other arrangements that determine how the costs of a dwelling are paid for (such as where expenses are shared or provided by another, or where an individual's contribution to the household is not in the form of money) , the nature of the expenses incurred in and of themselves cannot determine whether an individual is maintaining a place of abode.

With regard to whether a place of abode is "permanent" within the meaning of the statute, the Appellate Division disagreed with the petitioner that the statute requires that the place of abode be owned, leased or otherwise based upon some legal right in order for it to be permanent and rejected petitioner's argument that he could have been asked to leave at anytime. In the Appellate Division's view, the permanence of a dwelling place for purpose of personal income tax depends on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place. It cited an opinion by the Attorney General (March 28, 1940) which states in summary that the word "permanent" when describing a place of abode is intended to mean an abiding place, having a fixed or established character as distinguished from intermittent or transitory.

Matter of Sol & Lillian Feldman, TSB-D-88-(25)-I

The Tax Appeals Tribunal found that the taxpayers were still domiciled in New York based on the retention of their two- family home which was used both as a residence and office for the husband's limited medical practice. The taxpayers alleged a

change of domicile in November 1979 with the purchase of a condominium in Florida despite maintaining two residences in New York, a two-family home in Brooklyn and a summer home upstate. The Tribunal agreed that the summer home was not a permanent place of abode within the meaning of Section 102.2(e) (1) of the regulations as it was not suitable for year-round use. The Tribunal likewise agreed, however, that the Brooklyn home was still being "permanently maintained" as a place of abode through continued ownership of the house and continued maintenance of the lower floor. The Tribunal also determined that the taxpayers were statutory residents. Citing the Matter of Smith, the Tribunal stated that it was the obligation of the taxpayers to keep adequate records of their days in and out of New York. Oral testimony was deemed insufficient to meet their burden of proof.

Matter of Colin W. & Delma K. Getz, TSB-D-93-(11)-I

The Tax Appeals Tribunal determined that "while the petitioners may have very well intended Florida to be their permanent domicile, their general habit of life indicated, at best, an equal commitment to both locations." Thus, they did not establish by clear and convincing evidence that there was a change in domicile to Florida. Further, the taxpayers failed to submit adequate documentation, such as credit card slips to support the claim that they did not spend more than 183 days in New York. Petitioners upon retirement continued to maintain their house and country club membership in New York after they purchased a Florida condominium. They also made numerous trips to New York in order for the petitioner to serve as a bank director and to spend time with their son.

Matter of Richard E. Gray v. Tax Appeals Tribunal, (651 NYS2d 740.)

The Appellate Division, Third Department, by Memorandum and Judgment dated January 9, 1997 unanimously confirmed the Tax Appeals Tribunal decision holding that petitioners were domiciled in New York until the sale of their Syracuse business in September, 1987. Mr. Gray was the controlling shareholder and chairman of the board of Gray-Syracuse Inc. and believed that his involvement was "vital to the health of the company". In the Court's view, "the evidence indicating that petitioners retained their New York domicile until Gray's primary business interest had been sold provided substantial evidence for the conclusion that petitioners had not abandoned their New York domicile until September 15, 1987." In addition, the Court also stated that, "Although petitioners were renting residential property in Florida, they continued to maintain their home . . . in [New York] and spent considerable time there."

Matter of James A. & Joyce Green, TSB-D-93-(3)-I

The Tax Appeals Tribunal determined that the petitioners had not changed their domicile and should be taxed as residents of New York until October, 1983. The petitioners claimed that they had permanently left the state and should only be taxed until April, 1983. At that time the petitioner lost his job and moved with his family to four other states to obtain employment, using his parents' address in Newburgh, New York, for mailing purposes. The last move to Indiana in October, 1983 resulted in permanent employment and the subsequent purchase of a home the following month. During 1983

the petitioners filed a New York State Resident Return (IT201) , but did not indicate the number of months they were in New York as part-year residents.

The Tax Appeals Tribunal affirms that the petitioners were residents of New York until October, 1983 because the temporary work assignments do not show a clear intent to permanently change domicile.

The Matter of Haney, TSB-D-92-(19)-I

The Tax Appeals Tribunal canceled a Notice and Demand on the grounds that it was invalid due to the fact that the Division failed to properly inquire about petitioners' claim that they were nonresidents prior to issuing a tax assessment. Petitioners' claim for refund of taxes withheld, however, was denied.

The Tribunal found that petitioners were domiciled in New York for the tax year at issue because they did not establish a new domicile elsewhere during this period and that they maintained a permanent place of abode in New York in 1985. The petitioners stated that they never intended to return to New York to live and, thus, were no longer domiciliaries of New York State. Petitioners had moved to Florida in 1984 on a temporary job assignment. They were not certain at that time whether they would return to New York or not.

They resided in a motor home in Florida and spent only two weeks in New York while on vacation. They sold their New York home in June, 1987. When Mr. Haney retired from his Florida position in October, 1987, the petitioners subsequently moved to Texas.

Matter of Howell, TSB-D-91-(26)-I

The Tax Appeals Tribunal rejected the arguments of a business professor attempting to allocate his salary to sources outside New York State. The taxpayer had maintained that he was required as a condition of employment to travel outside New York to maintain close contacts with the business community and performed, out of necessity, his school-related activities while on the road. These activities consisted of class preparation and grading of papers. While acknowledging that the professor was required to be out of state, the Tribunal found no connection between such travel and the performance of his school duties. Such duties were performed out of the taxpayer's personal convenience and not out of the employer's necessity, and were therefore required to be allocated 100% to New York.

Matter of Charles J. Hull, Jr. and Mary Hull, TSB-D-94-(38)-I

This decision is a good example of how third party information obtained by an auditor can be used to refute a taxpayer's testimony. The Tribunal found several inconsistencies in the petitioners' statements. They cited the determination of the ALJ, who "found that many of the organizations that the petitioners asserted they resigned from upon changing their domicile to Florida in 1988 did, in fact, show activity or membership well after that date." Among the other findings which the Tribunal cited in the determination of the ALJ was that petitioners did not surrender their New York

drivers' licenses when they said they did, continued to register motor vehicles in New York State after their purported change of domicile and did not use their Florida checking account more than their New York checking account as they had asserted.

This is also a good example of how the fact that taxpayers were "less than candid with the auditor's direct requests for information" can be used to refute alleged reasonable cause arguments for abatement of penalties.

Matter of Kartiganer, TSB-D-91-(23)-I

The Appellate Division determined that the petitioners had not proven a change of domicile from New York to Florida.

Although the Appellate Division gave consideration to the petitioners' "formal" Florida residence declarations such as voter registration, address on will, licenses, etc., petitioners' informal acts, namely, petitioner husband's active involvement in his New York engineering business and the maintenance of their New York home, contradicted their declarations. Many factors indicated that they failed to abandon their New York domicile and sever their ties to New York. The most significant factor was the petitioner's constant supervision and review of his business interest in New York. He testified that he reviewed contracts and gave advice on personal liability and past and future projects. Internal controls required his approval of all projects, his supervision of progress, check points of on-going projects and his final review before submission to clients. The evidence in the record clearly showed the petitioner retained overall control of his New York business interest.

Matter of Kornblum, TSB-D-92-(3)-I

The Appellate Division determined that the petitioners' ties to both New York and Florida were equally strong and the fact that the petitioners had not "clearly and convincingly proven a change of domicile" to Florida. Alternatively, petitioners failed to prove they spent less than 184 days in Ne York State.

Petitioners maintained a Brooklyn residence since 1949. Mr. Kornblum retired in July 1983 with a continued salary from his company, of which he was president of two subsidiaries, through December 1983. Petitioner closed title to a Florida condominium on October 29, 1983 and subsequently accomplished all indicators of Florida residence such as driver's license and voter registration. Bank accounts were maintained in both states with monthly statements mailed to Florida. Petitioners used their Florida residence from early October to early May returning to Brooklyn for the remainder of the year. The unoccupied residences were not rented out during the duration of the respective absences nor was any furniture moved from their Brooklyn residence.

At the hearing, the petitioners' representative submitted schedules prepared from utility bills, credit card summaries and conversations with the petitioners showing more than 183 days in Florida for each year under audit. The Audit Division presented audit worksheets which listed telephone bills provided for only part of the audit period. Although petitioner wife's testimony corroborated the schedule of days submitted by their representative, petitioner husband's did not.

The court upheld the Tribunal's modification that the petitioner's telephone use was generally consistent with testimony offered and the petitioners' schedule submitted. It went on to say that whether or not the bills submitted are generally consistent with the time schedules is rendered meaningless when the gaps between bills are sufficient to place the petitioners' ultimate claim in doubt. Even had there been no gaps between the telephone bills submitted, they were too imprecise in and of themselves to constitute clear and convincing evidence on the number of days spent in each state during the audit period. Additionally, even if the telephone bills were more precise and complete, they did not cure the fact that some bills did not corroborate petitioners' time schedules submitted nor did Mr. Kornblum's testimony.

Lastly, the court emphasized the point that petitioners' reliance on another Administrative Law Judge determination was improper. Administrative Law Judge determinations do not set precedent.

Matter of John A. & Deborah D. Laurino, TSB-D-93-(8)-I

The Tax Appeals Tribunal reversed the determination of the Administrative Law Judge and found a lump sum payment made to a nonresident who had a New York employer, to be taxable. The petitioner's claim was that the lump sum payment was for future services and that the employer then "bought out" the remaining term of employment. The Administrative Law Judge agreed citing Donahue v. Chu. However, the Tribunal found that the Administrative Law Judge erred because the Donahue case was based on an employer terminating a contract for a set period of future employment. When employment is for a future period, it is not taxable as New York source income. In this decision the Tribunal determined that the lump sum payment was according to the contract "arising out of or in connection with the petitioner's employment and termination." Thus the payment was for past services already earned in New York and fully taxable.

Leach, et. al. as Executors of Estate of Sigman v. Chu TSB-H-87- (100.2)-I

The Appellate Division reversed the decision of a lower court and upheld the determination of the State Tax Commission that the decedent was a statutory resident of New York State. In controversy was the Tax Commission's regulation interpreting the statute which defined a day for the purpose of calculating the 183 day requirement as "presence within New York State for any part of a calendar day."

The decedent had worked five days a week in New York City as a stockbroker from approximately 10:00 a.m. to 4:00 p.m. While he was domiciled in Connecticut and usually returned to his home after the work day, he also maintained a studio apartment in New York City. The apartment was used approximately one night per week except in the summer. On his tax returns, decedent stated that he worked 200, 192 and 192 days in New York for years 1979, 1980 and 1981 respectively.

Petitioners had argued that while the legislature could enact a statute defining a day to include a fraction of a 24-hour period, here it did not do so; and, therefore, the Tax Commission usurped the Legislature's power by expanding the term day to consist

of a period of time to less than 24 hours. The Appellate Division held, however, that the Tax Commission properly elaborated on the word "days" in the statute by defining a day as "any part" of a day and it cannot be said that its regulation was irrational or unreasonable.

Next, they turned to the issue of whether the decedent was entitled to a resident tax credit for taxes paid to other jurisdictions under Tax Law Section 620(a) which provides for a credit upon income both derived from another state and subject to tax under Article 22. In this case, the taxes paid to Connecticut were on income from intangibles in the form of dividends and gains from securities, none of which was employed in a business carried on in Connecticut.

The Court held that Section 620(a) specifically applies only to income not derived in New York and no proof was offered to controvert the Tax Commission's finding that the income was not derived in Connecticut. It also rejected petitioner's argument that the imposition of tax violates the privileges and immunities clause of the U.S. Constitution on the claim that New York domiciliaries are granted a credit for income tax paid to another state but nondomiciliaries are denied such a credit. The court held that the requirement of the income being derived in the other state applies equally to those in decedent's position as well as New York domiciliaries. The decedent was, therefore, not being denied any benefits granted to New York domiciliairies; and the tax did not violate decedent's equal protection rights since he was not being treated less favorably than others under similar circumstances.

Marx v. Goodrich et al. 286 AD 913

The Appellate Division rejected the taxpayer's argument that the Tax Commission is barred from holding her as a resident for later years after having previously determined that she was a nonresident for an earlier period. The court declared that each year stands on its own and "may be decided differently than previous years." This is because from one year to the next the taxpayer's status may change or because the tax officials obtain information which they did not have in prior years."

McKone v. State Tax Commission, 111 AD2d 1051, affd. 68 NY2d 638.

The Court of Appeals determined that petitioners were not domiciled in New York from 1973 to 1976. The Court agreed with the petitioners that they had changed their domicile from New York to Canada in 1973 and did not become New York domiciliairies again until returning in 1976.

The Court found that petitioners, who had originally moved to New York as a result of a corporate promotion, had changed his domicile when he moved to Canada as 1973 and did not become New York domiciliairies again until returning in 1976.

The Court found that petitioners, who had originally moved to New York as a result of a corporate promotion, had changed their domicile when they moved to Canada as the result of another corporate promotion. The fact that the petitioners had sold their New York home, severed all ties with New York and had no foreseeable plans

to return was proof of change of domicile. Petitioners entered Canada with permanent visas, enrolled their children in local schools and paid Canadian income taxes. Despite the usual foreign assignment being of a fixed temporary period, the petitioner's assignment to the position in Quebec was indefinite. It was this intention to remain for an indefinite period which was considered sufficient to prove change of domicile.

Two justices dissented and would have held the petitioner domiciled in New York. They cited Matter of Bodfish v. Gallman, "The presumption against a foreign domicile is stronger than the general presumption against a change of domicile." They also stated that the taxpayers' move to Canada was based on his employer's wishes and not on a true intent to change domicile.

Matter of Rhoda Miller, TSB-D-97-(9)-I

The Tribunal affirmed the finding of the ALJ that petitioner, while not a domiciliary of NY, was a statutory resident of NY state and city. Petitioner failed to meet her burden of proof in documenting that she spent fewer than 183 days in New York. The ALJ found that the testimony presented in support of this issue: "did not purport to establish petitioner's whereabouts on any specific days during the year at issue, but rather sought to establish a general pattern of activity. Given the lack of documentation in the record, as noted, the testimony presented is clearly insufficient to meet petitioner's burden of proof on this issue." The ALJ agreed with the Division that petitioner "never gave specific details on her presence in or out of NY." Although her accountant testified about his recollection of what he had seen in petitioner's social diary, it was never produced at the hearing, nor was any summary of it provided. The Tribunal stated that, "The ALJ herein properly found that general testimony about a diary, without more information, was not credible."

The Tribunal also held that the negligence penalty should be sustained because petitioner had indicated on her returns that neither she nor her husband maintained an apartment in New York City.

Matter of Minsky v. Tully, 78 AD2d 955

In order to create a change of domicile, both the intention to make a new location a fixed and permanent home and the actual residence at that location must be present. Thus, the Appellate Division said that the evidence was not clear and convincing that the taxpayer intended to change his domicile to Canada despite renting an apartment there. The Court noted that the taxpayer still returned to New York to tend to his substantial business interests and eventually returned there to live. Moreover, he testified that neither he nor his wife ever considered giving up their U.S. citizenship. While acknowledging that domicile is not dependent on citizenship, the Court stated that becoming a citizen of the new country "is relevant on the issue of intent."

Matter of Ronald J. Moss, TSB-D-92-(25)-I

The Tax Appeals Tribunal determined that the petitioner, whose employer maintained an apartment for him in Manhattan was not a domiciliary of New York. Although the apartment was considered a permanent place of abode, the petitioner

offered clear, convincing and credible evidence that he had changed his domicile from Manhattan to the Suffolk County Town of Quoque. To prove a change of domicile, the petitioner showed that he and one of his daughters kept their personal belongings, clothes and artwork in the Quoque house and retained the services of a live-in housekeeper. In addition, occasional business meetings were held in the house and there was evidence of extensive political and social ties to the town.

The Division of Taxation did not challenge that the petitioner was not a New York City domiciliary. Instead, it asserted that the taxpayer did not adequately substantiate being in the City less than 184 days. According to the Division, taxpayer's diaries were not clear as to the location of appointments, had entries that were made at the end of the year and lacked verifiable evidence. However the Tribunal found that the taxpayer was not a resident because his testimony and company travel reports were judged sufficient evidence of his days.

Matter of Nask, TSB-D-88-(19)-I

The Tax Appeals Tribunal had to decide whether leaving New York for work-related reasons constitutes a change of domicile. In this case, the taxpayer, a lifelong New York resident and domiciliary, signed a three-year employment contract in December 1982 to work in Pennsylvania. During 1983 the taxpayer was promoted and relocated from Pennsylvania where he rented a one-bedroom apartment, to Maryland where he purchased a condominium. His family remained in their New York home throughout 1983. Although the taxpayer never returned to New York to reside and in fact was subsequently divorced, the Tribunal found that he never intended to change his domicile from New York to either Pennsylvania or Maryland. Citing Minsky, the Tribunal declared that both intention and actual residence must be present to effect a change of domicile.

Matter of Newcomb, 192 NY 238, 251

The New York Court of Appeals enunciated basic concepts of residency which have been restated and refined in numerous cases ever since. Distinguishing between residency and domicile, the Court said that the former "means living in a particular locality" while the latter "means living in that locality with intent to make it a fixed and permanent home." Once established, domicile "continues until a new one is acquired" and that to change domicile "there must be a union of residence and intention." A temporary change of residence for the accomplishment of a particular purpose is not a change of domicile. The motives behind a change of domicile are irrelevant "except as they indicate intention " confirmed through acts of the individual.

Matter of Roth, TSB-D-89-(5)-I

In rejecting the taxpayer's alleged change of domicile, the Tax Appeals Tribunal declared that his home in Connecticut was never intended to be other than a "temporary gathering place" for the taxpayer and his children while his New York co-op was being renovated. Noting that the taxpayer resumed living at the New York co-op upon completion of the renovations, the Tribunal cited Matter of Newcomb for the proposition that "a temporary residence for a temporary purpose, with intent to return to

the old home when that purpose has been accomplished, leaves the domicile unchanged." The Tribunal also dismissed the issue of statutory residency in finding that the taxpayer's diaries were "illegible" and "meaningless" in determining the days in and out of the New York.

Matter of Shapiro, TSB-D-91-(15)-I

The Tax Appeals Tribunal determined that a New York residence was a place of abode within the meaning of Section 605 of the Tax Law. The taxpayers alleged a change of domicile with the purchase of a home in Pennsylvania, relegating the New York residence to an office and occasional place to stay overnight. While not specifically addressing the issue of domicile, the Tribunal nevertheless found that the taxpayers were residents as they maintained a permanent place of abode and could not prove that they spent less than 184 days in New York.

Matter of Silverman, TSB-D-89-(14)-I

The Tax Appeals Tribunal decided that the taxpayers were still domiciliaries of New York for 1978 through 1982. The taxpayers maintained their historical New York home as well as extensive business and social ties to New York throughout this period. Although efforts were made to sell the New York home, it was not clear how serious these efforts were, calling into question the taxpayers' intention to abandon their New York domicile.

Matter of Simon, TSB-D-89-(6)-I

In his appeal of an Administrative Law Judge's determination denying his change of domicile, the taxpayer raised an additional argument: that in his attempt to change domicile, he relied detrimentally on official New York State publications which failed to provide him with the necessary assistance. The taxpayer was a Buffalo native who came full circle: in September of 1978 he moved to Florida where he lived three years, then moved to Pennsylvania where he lived until January 1988 when he returned to Buffalo. The taxpayer maintained that he changed domicile first, when he moved to Florida and, then again, in September 1981 when he moved to Pennsylvania. The Tax Appeals Tribunal noted that throughout this period the taxpayer maintained his home in Buffalo where his wife and son lived. Moreover, he made frequent and extended visits to Buffalo and ultimately returned there to live. As for his reliance on New York State publications, the Tribunal stated that "change in domicile is not a form of chess where a given set of maneuvers, or themselves, will carry the day for a taxpayer claiming to have changed his domicile. Instead, the taxpayer must prove his subjective intent . . . displayed through his conduct.

Matter of Smith, 68 AD2d 993, 994.

The Appellate Division agreed with the decision of the Tax Commission that the taxpayer had not changed his domicile in mid-1970 when he put his New York residence on the market nor did he prove that he spent less than 184 days in the state during the year. Regarding the former, the court noted that the New York home was not actually sold until 1971 and was still being maintained, as evidenced by the continuation

of phone and utility services and the fact that the furniture remained. As for the latter, the court emphasized the taxpayer's "obligation to keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the State."

Stranahan v. State Tax Commission, 68 AD2d 250

The Appellate Division in a 3-2 decision annulled the State Tax Commission decision that the decedent was a statutory resident of New York City by virtue of the fact that more than 183 days were spent there during the year at issue. The taxpayer (deceased) maintained a two and one-half room apartment in the City which was normally used for brief shopping trips, as a stop over place on trips to Europe and to attend dances sponsored by a social group.

The taxpayer became ill during the year in issue and came to New York for treatment of her cancer and was immediately hospitalized. When discharged on a strict regimen of medication and treatment she was advised to remain in New York. She was readmitted two more times and ultimately died in the hospital. Consequently, a total of 215 days were spent in New York of which 148 days were spent in the hospital and 67 days were spent in her New York apartment.

The arguments made were that the apartment in New York was similar to a vacation cottage and should not be considered a permanent place of abode under the Tax Law. Further, it was asserted that the exemption for members of the armed forces living in New York and the exemption of a place of abode maintained only during a temporary stay for the accomplishment of a particular purpose evidences legislative and regulatory intent to avoid taxing foreign domiciliaries whose presence in New York is involuntary.

The court held that the concept of involuntary presence in the State, as distinguished from a voluntary presence, has no express statutory or regulatory basis. However, it noted that no rational basis existed for distinction between an employee domiciled elsewhere who comes in for a fixed and limited period for the accomplishment of a particular purpose and a foreign domiciliary who comes into the State for a limited purpose of obtaining medical treatment and is prevented from leaving the State before the expiration of 183 days by reason of physical condition and inability to leave. Therefore, the time spent in a medical facility for the treatment of that illness should not be counted in determining residency during such confinement.

The decedent's apartment was determined to be a permanent place of abode since it was suitable for other uses than vacations although it might be used by a person of considerable means only for activities which might be considered vacation purposes.

It should be noted that one of the judges concurred for annulment for the reason that the statute was never intended to extend to a non-domiciliary forced to remain within this jurisdiction. The essential difference seen was the fact that the petitioner was unable to remove herself from this jurisdiction following her release from the hospital despite her wish to do so.

Matter of Sutton, TSB-D-90-(33)-I.

The Tax Appeals Tribunal determined that the petitioner (husband) changed his domicile to Florida before the audit years, 1981 and 1982 and did not spend more than 183 days in New York during the years at issue.

Petitioner was born and raised in Brooklyn, New York and lived there until his divorce from his first wife in 1974. Upon divorce, petitioner's former wife retained ownership and possession of their Brooklyn home while petitioner obtained a one-bedroom rent- stabilized 700 square foot apartment in Manhattan. Shortly after the divorce, petitioner started spending time in Florida during most of the winter months, staying at the Jockey Club in Miami Beach from 1974 through 1977. In 1977, petitioner and his brother jointly purchased, through their corporation, a condominium in Miami which consisted of about 6500 square feet of living space which included two separate suites, and common living areas of the kitchen, living room and roof deck. The actual closing took place on April 27, 1981. Petitioner had filed a declaration of domicile and registered to vote in Florida on June 9, 1980.

Sometime during 1980, petitioner undertook negotiations to obtain Florida franchise rights to a well-known restaurant chain with the intent to establish the restaurants throughout Florida. This never materialized after a year of negotiations; however, litigation remained ongoing at least through 1989. Petitioner belonged to a number of social clubs and actively pursued the sport of racing power boats in Florida. Petitioner's minor son visited him in Florida nearly every holiday as well as extensively during the summers. Petitioner had New York income from businesses owned in New York for approximately 20 years. Petitioner was essentially uninvolved in their ongoing operations, each business being operated by an independent manager making all business decisions. Petitioner described himself as a "silent partner."

Petitioner testified that he maintained his New York rent- stabilized apartment because it provided relatively inexpensive accommodations when he came back to New York 60 to 75 days per year. In December 1985, petitioner was served with a notice of eviction from the apartment because he was not occupying it as his primary or principal place of residence. He subsequently purchased a condominium in Manhattan for use and investment purposes. Petitioner submitted telephone bills showing outgoing calls from his Florida home on 164 days during 11 months in 1981 and 187 days over 10 ? months in 1982.

The Tribunal found that the petitioner's testimony was credible coupled with the weight of documentary evidence submitted. The Tribunal found nothing in the record before them to support a different conclusion. It further found no reason in the record to overturn the ALJ's determination that petitioner's business interests in New York were merely passive and the rent-controlled apartment an inexpensive convenience.

Matter of Trowbridge, 266 NY 283, 289.

An individual's "general habit of life" is more indicative of his intention regarding domicile than formal declarations. Thus, in an estate tax proceeding involving the states

of Connecticut and New York, the New York Court of Appeals stressed that actions of the taxpayer prior to his death should be given more weight than declarations of domicile he made in his will and to tax authorities in both states. Deciding in favor of Connecticut where the taxpayer lived with his wife and son during his final several years, the Court concluded that "if at a given time a man exclusively makes his home with his family in a complete domestic establishment, intending so to occupy it for the rest of his days, the place of that habitation is then his domicile, no matter what he may say to the contrary." During the same period the New York residence was boarded up, telephone service discontinued and furnishings and silver transferred to Connecticut.

Matter of Harold M. and Pearl M. Veeder, DTA No. 809846

The Tax Appeals Tribunal determined that petitioners are residents by virtue of their maintaining a permanent place of abode in the state and not providing evidence that they did not spend more than 183 days in New York. The taxpayers had asserted that the majority of their days were spent in Florida but provided no substantiation of this. Instead they said the audit guidelines permit taxpayers to use secondary evidence where no diary is available. Their secondary evidence consisted of a log of days for the audit period which was referred to in testimony but never produced. The Tribunal stated that "if no diary or log is available, a taxpayer may be asked to provide credit card receipts, utility usage, an ATM access record, or other bank information to identify where the taxpayer was on a specific day." The taxpayers' records did not contain sufficient evidence that would demonstrate a presence in and out of New York. For this reason, the Tribunal found that they did not sustain their burden of proof with respect to their change of domicile.

The importance of this decision is that the Tribunal quoted the guidelines and deemed the conduct of the audit consistent with the guidelines.

Matter of Harvey and Kathryn Wachsman, TSB-D-95(31) I

The main issue facing the Tribunal was whether the ALJ erred in finding petitioner's testimony credible and adequate to establish that petitioners spent less than 184 days in New York.

The Tribunal reversed the determination of the ALJ and found that the ALJ erred in finding petitioners spent less than 184 days in New York. Petitioners had relied upon a diary to show their daily activities. The Tribunal found the diary to be unreliable largely because it was the source of three inconsistent accounts of petitioners' days in New York. The Tribunal then concluded that, "Dr. Wachsman's testimony is similarly unreliable and that the ALJ erred in finding the testimony credible."

Matter of Wechsler, TSB-D-91-(11)-I.

The Tax Appeals Tribunal emphasized the taxpayers' retention of their New York home and the husband's limited medical consulting as evidence that they were still domiciled in New York for 1985. The taxpayers had contended that they maintained their New York home until October 1985 at which time it became the principal residence of their son who was having martial problems. Noting the extensive use the taxpayers

made of their New York home during the first ten months of 1985, the Tribunal concluded that they had not established by clear and convincing evidence their intention to change their domicile in December of 1984.

Matter of Zapka, TSB-D-89-(16)-I.

The taxpayers had significant ties to both Florida and New York allowing for persuasive arguments to be made in support of either state as their domicile. This very fact, concluded the Tribunal, indicated that they had not clearly and convincingly evidenced an intent to change their New York domicile. The Tribunal compared the taxpayer's retention of their New York home where they spent three months compared with their leasing of a furnished condominium in Florida.

Matter of Zinn v. Tully, 54 NY 713, rev. 77 AD2d 725.

The New York Court of Appeals determined taxpayers to be domiciled in New York based upon the retention of their New York house and businesses. Their business interests were substantial and required frequent trips to New York to manage them.

To be used when presenting initial audit changes to the individual

Date

Name Case Number: Street Audit Period: City, State, Zip Auditor: Telephone: Enclosed are two copies of our audit report explaining the adjustments we propose to make to your reported tax liability. Please review this report and let us know whether you accept the audit findings or disagree with them.

If you accept the audit findings:

1. Sign the Consent to Findings section at the bottom of the report;

2. Return one copy of each signed consent with any payment to this office by .

3. Payment should be made to: New York State Income Tax in the amount of $.

- or - You will be billed for any balance of tax, penalty and/or interest due.

If you disagree with the audit findings:

We would like to offer you the opportunity to discuss the audit findings in detail. Please contact me or my supervisor, by for an appointment. You may also submit any additional information or documentation you would like us to consider before the conference date or date stated above, whichever is later.

If penalty is imposed and you believe that Reasonable Cause or other circumstances for abatement exists you must submit, in writing, documentation supporting your position.

Name Date If you prefer to limit the accruing of penalties and/or interest, you may remit a payment at this time which will be applied to your proposed additional tax liability. Payment should be made to: New York State Income Tax.

Note: This remittance will not be considered a concession to the audit report.

If we do not hear from you by close of business , we will close the matter for issuance of a Notice of Deficiency for the amount stated in the audit findings, plus accrued interest and appropriate penalty. You will then be notified of any further appeal rights you are entitled.

New York State Department of Taxation and Finance District Office - Income Tax Section Street Address City, State, Zip

To be used when findings are sustained after a conference

Date

Name Case Number: Street Audit Period: City, State, Zip Auditor: Telephone: Pursuant to your request, a conference was held on ,to discuss the specific adjustments to your reported New York tax liability as indicated in our audit report dated .

Attendees at the conference were as follows:

Based on the information provided, we find that no adjustments are required to our original report. Accordingly, the enclosed document should be considered a Final Audit Report and a reflection of your corrected New York tax liability, plus applicable penalties and/or interest, per audit.

If you accept the audit findings:

1. Sign the Consent to Findings section at the bottom of the report;

2. Return one copy of each signed consent with any payment to this office by .

3. Payment should be made to: New York State Income Tax in the amount of $.

- or - You will be billed for any balance of tax, penalty and/or interest due.

Name Date If you disagree with the audit findings:

1. Advise the auditor by in order to expeditiously proceed with your rights for a formal appeal.

2. If you prefer to limit the accruing of penalties and/or interest, you may remit a payment at this time which will be applied to your proposed additional tax liability. Payment should be made to: New York State Income Tax.

Note: This remittance will not be considered a concession to the audit report.

Thank you for your cooperation in this matter.

New York State Department of Taxation and Finance District Office - Income Tax Section Street City, State, Zip

To be used when findings are adjusted after conference

Date

Name Case Number: Street Audit Period: City, State, Zip Auditor: Telephone:

Pursuant to your request, a conference was held on to discuss the specific adjustments to your reported New York tax liability as indicated in our audit report dated .

Attendees at the conference were as follows:

Based on the information provided, we have adjusted the original document as follows:

The enclosed "revised" audit report reflects the adjustments enumerated above and should be considered a Final Audit Report and a reflection of your corrected New York tax liability, plus applicable penalties and/or interest, per audit.

If you accept the audit findings:

1. Sign the Consent to Findings section at the bottom of the report;

2. Return one copy of each signed consent with any payment to this office by .

3. Payment should be made to: New York State Income Tax in the amount of $.

- or -

Name Date You will be billed for any balance of tax, penalty and/or interest due.

If you disagree with the audit findings:

1. Advise the auditor by in order to expeditiously proceed with your rights for a formal appeal.

2. If you prefer to limit the accruing of penalties and/or interest, you may remit a payment at this time which will be applied to your proposed additional tax liability.

Payment should be made to : New York State Income Tax.

Note: This remittance will not be considered a concession to the audit report.

Thank you for your cooperation in this matter.

New York State Department of Taxation and Finance District Office - Income Tax Section Street City, State, Zip

To be used when findings are canceled after conference

Date

Name Case Number: Street Audit Period: City, State, Zip Auditor: Telephone: Pursuant to your request, a conference was held on to discuss the specific adjustments to your reported New York tax liability as indicated in our audit report dated .

Attendees of the conference were as follows:

Based on the information provided at the conference, we are proposing to cancel the adjustments enumerated on the original audit report in full.

Thank you for your cooperation in this matter.

New York State Department of Taxation and Finance District Office - Income Tax Section Street City, State, Zip

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MARCH 8, 1996 FRIDAY DEPARTMENT: State Administrative Regulations and Rulings (SRG)

CITE: 96 STN 47-48

LENGTH: 2114 words

HEADLINE: 96 STN 47-48 NEW YORK STATE DIVISION OF TAX APPEALS GRANTS PETITION IN BICKETT CASE. In the Matter of Duane C. Bickett (State Taxation) (DTA No. 813160) (Doc 96-4757 (7 pages))

CODE: State Taxation

SUMMARY: The New York State Division of Tax Appeals has granted a petition for refund of personal income tax in the Matter of Duane C. Bickett, DTA No. 813160 (Feb. 1, 1996).

AUTHOR: Wright, Nigel G. Division of Tax Appeals

GEOGRAPHIC: New York

INDEX: income tax, individuals refunds

REFERENCES: Subject Area: State and Local Taxes

TEXT:

Release date: 01 FEB 96

In the Matter of the Petition

of

DUANE C. BICKETT

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1988, 1989 and 1990. DTA NO. 813160

DETERMINATION

Petitioner, Duane C. Bickett, 4925 Fieldstone Trail, Indianapolis, Indiana 46254, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1988, 1989 and 1990.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 18, 1995 at 9:15 A.M. Petitioner filed a brief on July 12, 1995. The

Division of Taxation submitted its brief on August 10, 1995. A response was filed by petitioner on August 31, 1995. Petitioner appeared by Barnett & Associates, (Kevin R. Walters, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Esq., of counsel).

ISSUE Whether allocation of a nonresident football player's salary by working days ("duty" days) as prescribed by 20 NYCRR former 131.18(a) fails to allocate his income "in a fair and equitable manner" so as to justify the Division of Taxation's selection of an alternate method of allocation (games played), and whether such alternate method is itself "fair and equitable" under 20 NYCRR former 131.23. /1/

FINDINGS OF FACT 1. Petitioner, Duane C. Bickett, was a resident of Indianapolis, Indiana and a nonresident of New York.

2. Petitioner was a professional football player with the National Football League's ("NFL") Indianapolis Colts (the "Colts") during all relevant years.

3. On June 22, 1992, the Division of Taxation ("Division") issued a Notice of Deficiency to petitioner for personal income tax due of $ 12,286.90, plus penalty and interest, for the years 1988, 1989 and 1990. A statement of audit changes issued to petitioner previously indicated that the deficiency was based on the Division's allocation of wages to New York based on a ratio of games played in New York to total games played in the calendar year. Petitioner had allocated his wage income by a ratio of days worked, "duty days", in New York to total days worked in the year.

4. During each of the relevant years, the Colts played 16 regular season games and 4 pre-season games against other NFL teams.

5. Petitioner is paid, according to his contract, a yearly salary though he is paid in equal installments over the course of the regular season. He is restricted from engaging in other football-related or injury-prone work during the entire year. If he reports to a pre-season training camp, then 10% of his salary will be paid during that period and 90% over the course of the regular season. The contract is not guaranteed and if he does not make the team his salary ceases.

6. A normal work week for the Colts would consist of a Sunday game with mandatory practice meetings at the Colts' practice facility scheduled for Monday, Wednesday, Thursday, Friday and Saturday. An average practice day would begin at 8:30 A.M. and end at 4:30 or 5:00 P.M. Tuesday would be a day off.

7. During each of the relevant years, the Colts played one game in Buffalo, New York against the Buffalo Bills. These games were held on Sunday.

8. For a Sunday afternoon game with the Bills, petitioner would arrive in Buffalo on Saturday afternoon with the team after practice on Saturday morning, and would have no team obligations such as practice or meetings for the rest of the day.

9. (a) The Colts played 16 regular season games and 4 pre-season games in each year. They did not play any post-season games during the relevant years. In 1990 they,

along with the other teams, had a bye-week so the season for 16 games lasted 17 weeks.

(b) For football a typical player's allocation of income to New York State, based on games played, would be 5% (1 Colts game in New York divided by 20 games in total season). The allocation would be@#.7575% (1 Colts game/work day in New York divided by 132 total duty days) for allocation based on duty days. The use of the games played method as opposed to the duty days method yields an allocation percentage which is 560.07% higher.

10. (a) The major league professional baseball season consists of 162 games (including pre-season games) between early April and October.

(b) For baseball there are few if any practice days during the season and a typical player's allocation, based on games played, is 3.65% (7 games in New York divided by 192 total games) compared with 3.59% (7 games in New York divided by 195 duty days) for allocation based on duty days. The allocation percentage difference is thus 1.56% higher under the games played method. (This is based on the schedule for the Oakland A's in 1990.)

11. (a) The professional basketball season consists of 82 games (excluding pre-season and post-season games) played between November and April.

(b) For basketball, a typical player's allocation, based on games played is 3.26% (3 games in New York divided by 92 total games played) as compared with 2.72% (4 [3 games plus 1 practice in New York] divided by 147 duty days) for allocation based on duty days, a difference of 19.84%. (This is based on the schedule for the Golden State Warriors for 1989-1990.)

12. Petitioner's computation of his New York allocation (based on duty days) is not in evidence but it is clear from its results that for the three years that ratio was .5% for 1988, .85% for 1989 and .9% for 1990. The Division has not contested these computations.

13. The allocation proposed by the Division is based on games played including pre-season and playoff games. In this case, that is one game in New York divided by 20 games in total for a ratio of 5%.

CONCLUSION OF LAW A. Petitioner, a nonresident of New York taxable under Tax Law section 601(e) and section 631(c), allocated his income as a professional football player by "duty days" in and out of the State. Duty days are days on which petitioner is, under his contract, required to work. Those duty days included both game days and practice days. This is consistent with the "working days" method described in 20 NYCRR former 131.18. This regulation, along with others, is declared to be "designed to apportion and allocate to New York State, in a fair and equitable manner" a nonresident's income (20 NYCRR former 131.23). On this record there has not been a shred of evidence or argument that this method is not fair and equitable. In lieu of said evidence or argument, the Division of Taxation points to certain prior cases where the former State Tax Commission found that certain baseball and basketball players were

denied allocation based on working days. These cases were followed in a 1989 advisory opinion concerning a football player (Application of Moore, Advisory Opinion, February 14, 1989 [TSB-A-89(2)I]). However, even those authorities do not show how those taxpayers were in any different position from working people generally (including, I might say, itinerant lawyers and judges who might handle a public hearing in one location but prepare their case or write their decision at a home location). In fact the cases cited begin with the White case (Matter of White, State Tax Commn., February 14, 1979,@#[TSB-H-80(93)I]) where there was no issue with respect to whether a games played or duty days method was correct. Petitioner, a baseball player, agreed to a games-played allocation. He was claiming that games played should include exhibition games and on that issue he won. The result it must be noted, for baseball players, closely approximates a duty-days method and also provides for ease of computation. The cases that followed merely cite the White case as authority. All statements in those cases that the "days worked" allocation is not fair and equitable are completely conclusory. They are therefore of no help in the analysis of the case at hand.

B. The Division's proposed allocation by games played is itself not fair and equitable under 20 NYCRR former 131.23. Petitioner argues cogently in this case that the radically different results from the two methods of allocation (see, Finding of Fact "9[b]") means certainly that one of them is wrong. The attractiveness of the games-played method would appear to reflect the interests of the sports fan who pays to see games and not practice sessions. But in this case the Division is not taxing tickets (or the receipts of the team). It is taxing a player's income, and the efforts required to earn that income certainly include practice on practice days as required by the contract. /2/

C. The Division argues that the game-days allocation method is a "policy" followed by the Division in the several prior cases already referred to and that this is a general rule which for the sake of consistency should be followed here. This, however, would elevate the holdings in individual cases to the status of a regulation. As such, however, the "policy" would be invalid since such a regulation has not been filed with the Secretary of State as required by the New York State Constitution, Article IV, section 8 and Executive Law section 102[1]. Even aside from that infirmity, however, the Division's position that such a policy could be applied on an individual basis under the provision of 20 NYCRR former 131.23 -- the alternative allocation provision -- would call into question the validity of that provision itself. The statute, Tax Law section 631(c), authorizes allocation only by "regulation". That language would be completely nullified if ad hoc methods in individual cases were to be allowed.

D. The petition of Duane C. Bickett is granted and the Notice of Deficiency issued on June 22, 1992 is cancelled.

DATED: Troy, New York February 1, 1996

[signature] ADMINISTRATIVE LAW JUDGE

FOOTNOTES

/1/ Former regulations 131.18 and 131.23 are now renumbered 132.18 and 132.24, respectively.

/2/ I note that effective January 1, 1995 a new regulation, 20 NYCRR 132.22, was adopted with respect to professional athletes. This adopted a duty-days method of allocation and provided for details such as allowing disability days as days worked.

END OF FOOTNOTES

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NOVEMBER 29, 1995 WEDNESDAY DEPARTMENT: State Administrative Regulations and Rulings (SRG)

CITE: 95 STN 229-24

LENGTH: 1847 words

HEADLINE: 95 STN 229-24 NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE ADVISES PRO QUARTERBACK ON HOW TO CALCULATE NEW YORK SOURCE INCOME. (State Taxation) (TSB-A-95(6)I) (Doc 95-61961 (4 pages))

CODE: State Taxation

SUMMARY: The New York State Department of Taxation and Finance has ruled that Heath Shuler, a professional football player, may not calculate his 1994 New York source income by allocating his preseason and regular season football wages separately, basing each on the ratio of games played in New York to games played outside of New York.

Shuler is a resident of Tennessee and a member of the Washington Redskins. The Redskins played 4 preseason and 16 regular season games during the 1994 calendar year. One of the preseason games was played in Buffalo; however, none of the regular season games were played in New York State. Shuler stated that he was compensated separately for the preseason and the regular season. According to the NFL collective bargaining agreement, rookie players are to receive preseason compensation of $ 500 per week. According to Shuler, this represented his total compensation for the preseason. Shuler's regular season salary of $ 950,000 was paid over the course of the regular season, commencing with the first regular season game. Shuler also received a $ 2 million signing bonus and $ 214.29 for his participation in the Redskins May mini camp.

The department explained that nonresident professional athletes are required to allocate their income from the performance of services on the basis of games played within and without New York State, pursuant to section 131.23 of the regulations. The department noted that pursuant to Shuler's NFL contract, Shuler is compensated on a yearly basis. According to the department, his total compensation includes his regular season salary and his preseason compensation. Therefore, the portion of Shuler's total compensation that is derived from New York sources is determined on the basis of the total number of games played within and without New York State for the taxable year. In addition, the department determined that there are not enough facts to determine whether the signing bonus is includable in total compensation. Also, the court noted the amount received by Shuler for his participation in the mini camp was not paid pursuant to the contract, and is not considered compensation allocable as New York source income.

AUTHOR: Coburn, Paul B. Department of Taxation and Finance Taxpayer Services Division, Technical Services Bureau GEOGRAPHIC: New York

INDEX: income tax apportionment income, source rules

REFERENCES: Subject Area: State and Local Taxes Principal Cited Reference: Tax Law section 631(c)

TEXT:

Release date: 03 AUG 95

STATE OF NEW YORK COMMISSIONER OF TAXATION AND FINANCE PETITION NO. I950113A

ADVISORY OPINION On January 13, 1995, a Petition for Advisory Opinion was received from Heath Shuler, P.O. Box 10228, Knoxville, Tennessee 37939.

The issue raised by Petitioner, Heath Shuler, is whether, for purposes of Article 22 of the Tax Law, he can calculate his 1994 New York source income by allocating his pre-season and regular season football wages separately, basing each on the ratio of games played in New York to games played everywhere.

Petitioner is a nonresident of New York State. He is a resident of Tennessee. Petitioner is a rookie professional football player and is a member of the Washington Redskins. The Redskins played four pre-season and 16 regular season games during the 1994 calendar year. One of the pre-season games was played in Buffalo, New York. None of the regular season games were played in New York State.

Petitioner states that he was compensated separately for the pro-season and the regular season. According to the NFL Collective Bargaining Agreement (Article XXXVII. Section 3), rookie players are to receive pre-season compensation of $ 500 per week. Petitioner states that this represents his total compensation for the pre-season. Petitioner's regular season salary of $ 950,000 was paid over the course of the regular season, commencing with the first regular season game. Petitioner also received a $ 2,000,000 signing bonus. Petitioner also received $ 214.29 for his participation in the Washington Redskins May mini camp.

Pursuant to section 631(c) of the Tax Law, "[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [Commissioner of Taxation and Finance], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations." Section 132.18(a) of the Personal Income Tax Regulations ("Regulations") provides, in part, that:

[i]f a nonresident employee . . . performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State.

For the taxable year at issue, section 132.23 of the Regulations provides, in part, that:

[s]ections 132.15 through 132.22 of this Part are designed to apportion and allocate to New York state, in a fair and equitable manner, a nonresident's items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. Where the methods provided under those sections do not so allocate and apportion those items, the [Department] may require a taxpayer to apportion and allocate those items under such method as it prescribes, as long as the prescribed method results in a fair and equitable apportionment and allocation.

The allocation of income pursuant to section 132.18 of the Regulations, based on days worked within and without New York State during the year, does not result in a fair and equitable allocation of income earned by a professional football player for services rendered as such. Nathaniel and Patricia Moore, Adv Op Comm T & F, February 14, 1989, TSB-A-89(2)I.

In accordance with Nathaniel and Patricia Moore, supra, nonresident professional athletes are required to allocate their income from the performance of services on the basis of games played within and without New York State pursuant to section 131.23 of the Regulations. See, Matter of Roy H. and Linda White, Dec St Tax Comm, February 14, 1979, TSB-H-80(93)I; Matter of Kareem Abdul Jabbar, Dec St Tax Comm, April 9, 1982, TSB-H-82(76)I; Matter of Cleon Jones and Angela Jones, Dec St Tax Comm, February 6, 1985, TSB-H-85(33)I. For the taxable year at issue, the policy enunciated in such Advisory Opinion and New York State Tax Commission Decisions applies equally to all nonresident professional team athletes regardless of the sports in which they are engaged and regardless of whether their teams are based within New York or outside of New York.

Accordingly, for taxable year 1994, Petitioner's income from the performance of services derived from New York sources is determined on the basis of games played within and without New York State pursuant to section 631(c) of the Tax Law and section 131.23 of the Regulations.

Section one of Petitioner's NFL Player Contract provides that the term of the contract "covers 8 football seasons, and will begin on the date of execution or March 1, 1994, whichever is later, and end on February 28 or 29, 2001, unless extended, terminated, or renewed as specified elsewhere in this contract". Petitioner's NFL Player Contract was executed on August 3, 1994.

Section two of such contract provides that the "[c]lub employs Player as a skilled football player. Player accepts such employment . . . Player will report promptly for and participate fully in Club's official mandatory mini-camp(s), official preseason training camp, all club meetings and practice sessions, and all pre-season, regular season, and post-season football games scheduled for or by Club. . . ."

Section five of such contract provides that, as compensation "[f]or performance of Player's services and all other promises of Player, Club will pay Player a yearly salary as follows: $ 950,000 for the 1994 season . . . In addition, Club will pay Player . . . such

additional compensation, benefits, and reimbursement of expenses as may be called for in any collective bargaining agreement in existence during the term of this contract."

Section six of such contract provides that with respect to payment, "[u]nless this contract or any collective bargaining agreement in existence during the term of this contract specifically provides otherwise; Player will be paid 100% of his yearly salary under this contract in equal weekly or hi-weekly installments over the course of the applicable regular season period, commencing with the first regular season game played by Club in each season."

Accordingly, pursuant to Petitioner's NFL Player Contract, executed August 3, 1994, Petitioner is compensated on a yearly basis, and, pursuant to sections two and five of such contract, Petitioner's total compensation for the performance of services includes his regular season salary and his pre-season compensation that is determined under Article XXXVII, Section 3 of the NFL Collective Bargaining Agreement. The fact that, pursuant to section six of such contract, Petitioner's pre-season compensation is paid during the pre-season pursuant to Article XXXVII, Section 3 of the NFL Collective Bargaining Agreement and his regular season compensation is paid during the regular season is irrelevant.

Therefore, for purposes of section 631(c) of the Tax Law and section 131.23 of the Regulations, the portion of Petitioner's total compensation for the performance of services that is derived from New York sources is determined on the basis of the total number of games played within and without New York State for the taxable year.

With respect to Petitioner's $ 2,000,000 signing bonus, there are not enough facts herein to determine whether such signing bonus is includable in his total compensation for the performance of services allocable as New York source income. However, if the signing bonus was payable separately from the salary and any other compensation terms under Petitioner's contract; and if the signing bonus is nonrefundable; and if the payment of such signing bonus was not conditional upon Petitioner playing any games for the club or even making the team, such receipt of the signing bonus would not be connected with the subsequent performance of Petitioner's contract in New York State and is not considered to be allocable as New York source income under section 631(c) of the Tax Law. (See, Matter of Gordon Clark v NYS Tax Comm, 86 AD2d 691 (1982).)

With respect to the $ 214.29 Petitioner received for his participation in the Washington Redskins May mini camp, such compensation was not paid pursuant to his NFL Player Contract executed August 3, 1994 for services rendered under such contract and is not considered to be compensation allocable as New York source income under section 631(c) of the Tax Law.

It should be noted that section 132.23 (on and after January 1, 1995, renumbered as section 132.24) of the Regulations provide, in part, that:

[a] nonresident individual may submit an alternative method of apportionment and allocation with respect to items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. The proposed method must be fully explained in the taxpayer's New

York State nonresident personal income tax return. If the method proposed by the taxpayer is approved by the [Department], it may be used in lieu of the applicable method under sections 132.15 through 132.22 of Part.

However, the determination of whether an alternative method of apportionment and allocation of Petitioner's pre-season and regular season compensation would be permitted or required is a factual matter that is not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specific set of facts". Section 171. Twenty-fourth; 20 NYCRR 2376.1(a).

It should also be noted, that for taxable years beginning on or after January 1, 1995, a new section 132.22 of the Regulations sets forth new prescribed rules for allocation of compensation received by nonresident professional athletes.

DATED: August 3, 1995

PAUL B. COBURN Deputy Director Taxpayer Services Division NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.

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YOUR SEARCH REQUEST IS: PROFESSIONAL FOOTBALL AND INCOME TAX

NUMBER OF CASES FOUND WITH YOUR REQUEST THROUGH: LEVEL 1... 8

In the Matter of the Petition of CRAIG A. WOLFLEY for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1980.

STATE OF NEW YORK - DIVISION OF TAX APPEALS

1989 N.Y. Tax LEXIS 407

November 9, 1989 OPINIONBY: [*1]

GALLIHER

OPINION: DETERMINATION

Petitioner, Craig A. Wolfley, 1767 Robson Drive, Pittsburgh, Pennsylvania 15241, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1980 (File No. 801631).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 9, 1989 at 1:15 P.M., with all briefs to be submitted by August 4, 1989. Petitioner appeared by Anderson, Banks, Moore, Curran and Hollis, Esqs. (Gregory Keefe, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

ISSUES

I. Whether petitioner, Craig A. Wolfley, was taxable as a resident of New York State for all or any part of 1980.

II. Whether petitioner was properly subject to a penalty pursuant to Tax Law @ 685(a)(1).

FINDINGS OF FACT

1. Petitioner, Craig A. Wolfley, is and has been for the past ten years employed by the Pittsburgh Steelers (the "Steelers") as a professional football player. Mr. Wolfley grew up in the area near Orchard Park, New York, attended [*2] high school there and, later, attended Syracuse University from the fall of 1976 through the spring of 1980.

2. In or about late April of 1980, Mr. Wolfley was selected by the Steelers in the fifth round of the National Football League's annual player draft. On May 27, 1980, following a brief period of negotiation, Mr. Wolfley agreed to terms with the Steelers and signed a contract for personal services. Mr. Wolfley received a $ 20,000.00 signing bonus and, under the contract, agreed to a salary of $ 37,500.00.

3. Following the May 27, 1980 contract signing date, Mr. Wolfley spent one weekend in Pittsburgh for a Steeler orientation program and thereafter also participated in a brief work-out and training program in Pittsburgh ("minicamp"). The dates and duration of

minicamp were not further detailed. Thereafter, on or about July 13, 1980, the Steelers' annual training camp commenced. Training camp lasts approximately six weeks, is held at St. Vincent's College in Latrobe, Pennsylvania, and attendance there is mandatory for all players including veterans, draft choices and free agents. n1 A player who is drafted, such as petitioner, does not secure permanent employment until [*3] such time as he is selected to the team's final roster. This selection, in turn, occurs at the completion of training camp (in late August) after a successive series of roster reductions (known as "cuts") occur. Mr. Wolfley successfully completed training camp, was selected to remain with the team as a playing member on its final roster and, through the balance of the year 1980, played professional football for the Steelers.

n1 During training camp each participant receives a weekly "stipend" of $ 275.00, the nature of which was not further detailed.

4. During the period from the July 13, 1980 commencement of training camp through approximately the latter part of August 1980, Mr. Wolfley lived as required at the Steelers' training camp facility in Latrobe, Pennsylvania. Thereafter, for a period of approximately ten days running through the end of August 1980, Mr. Wolfley resided first in a Pittsburgh hotel and then at the home of a veteran member of the Steelers until Mr. Wolfley was able to secure a one-year lease on an apartment located at 6054 Springhouse Place, Bridgeville, Pennsylvania (a suburb near Pittsburgh).

5. Mr. Wolfley received his $ 20,000.00 signing bonus [*4] on or about the May 27, 1980 contract signing date. Thereafter, Mr. Wolfley commenced receiving his $ 37,500.00 contract salary during the first week of September 1980 (at the commencement of the Steelers' regular season of football games). During 1980, but prior to signing with the Steelers, petitioner had been a student at Syracuse University, was not employed and had earned no income.

6. Petitioner did not file a New York State personal income tax return for the year 1980. On March 26, 1984, the Division of Taxation issued to petitioner a Notice of Deficiency asserting additional personal income tax due for the year 1980 in the amount of $ 6,219.54, plus penalty (Tax Law @ 685[a][1] [failure to file a tax return]), and interest. A Statement of Audit Changes previously issued to petitioner on December 5, 1983 indicated that the personal income tax liability referred to above had been computed upon the basis of information obtained from the Internal Revenue Service in accordance with petitioner's Federal income tax return filed for the year 1980. Such statement reflects petitioner's reported total 1980 income to have been $ 57,861.00.

7. Petitioner appeared at the hearing [*5] and testified that he changed his status from a resident of New York to a nonresident (i.e. to a resident of Pennsylvania) in July of 1980. Petitioner explained that his intent at all times was to play football on a professional level somewhere in North America, that such had been his dream throughout his life, and that it was his intent, upon being drafted by the Steelers, to move to Pennsylvania in conjunction with his employment by the Steelers and establish permanent residence in Pennsylvania.

8. Petitioner testified to his recollection that he filed a Pennsylvania income tax return for the year 1980 on which he reported (and paid tax on) all of his 1980 income, to wit,

all income earned from the Steelers in connection with his employment as a professional football player. Petitioner attempted to obtain a copy of said return but was advised that actual copies of all Pennsylvania personal income tax returns filed for 1980 had been purged by the Pennsylvania Bureau of Individual Taxation. However, at hearing petitioner was afforded a period of time (subsequent to the hearing) to obtain and submit any additional information relative to the alleged filing of a return in Pennsylvania [*6] for 1980. Pursuant to such permission, petitioner submitted a computer listing (archives file) from the Pennsylvania Department of Revenue indicating that petitioner filed a return with Pennsylvania for 1980, reporting taxable income of $ 25,310.00. n2

n2 It is noted that "taxable" but not "total" income is reflected on the computer listing. Said listing also reflects petitioner's tax liability as $ 556.00 against $ 557.00 in tax withheld.

9. During 1980, petitioner's father was seriously ill with leukemia. Petitioner was able to spend some, though a very limited amount of time with his father in Orchard Park, New York in 1980. Petitioner testified the number of days spent in New York in 1980, subsequent to the commencement of Steeler's training camp, was at most 2 or 3 days. Petitioner explained that it would not have been possible to have lived in New York State and been employed as a professional football player by the Steelers due to the extended hours of training prior to the beginning of the football season, as well as the weekly hours of practice and weekend performances demanded of a professional football player during the regular season.

10. Petitioner purchased [*7] an automobile with the proceeds of his $ 20,000.00 signing bonus. During 1980, petitioner held a driver's license issued by New York State and believes that he initially registered and insured the car in New York State during 1980. Petitioner subsequently changed his driver's license, vehicle registration and insurance to Pennsylvania. The date of such changes was not specified. Petitioner's Federal income tax return for 1980 was prepared by an acquaintance of petitioner's father (to whom petitioner was directed by his father) in Orchard Park, New York. Petitioner believes the return was filed listing his parents' address in Orchard Park, New York as a matter of convenience. Petitioner had no experience in the preparation of tax returns. His undergraduate course work at Syracuse University was in the area of speech communications and petitioner did not take any courses in business, accounting, or taxation while a student at Syracuse. Petitioner has returned to the Orchard Park, New York area infrequently after 1980, essentially for the purpose of visiting friends and relatives.

11. Petitioner has been a member of the Steelers from 1980 through the present. After the one-year [*8] lease on the 6054 Springhouse Place apartment expired, petitioner purchased a condominium in a suburb near Pittsburgh. He was married shortly thereafter (petitioner's wife grew up in the Pittsburgh area). The Wolfley's resided in the condominium until approximately late 1983 when they purchased their present home located at 1767 Robson Drive, Pittsburgh, Pennsylvania.

12. Petitioner was 21 years old and a college student when he was drafted by the Steelers in 1980. He had no business investments or activities at such time, neither

owned nor leased any real property in New York or elsewhere, and had no particular employment opportunities in New York. During 1980, petitioner maintained checking accounts in both New York and in Pennsylvania. He noted that his best employment opportunity was in Pittsburgh, where he was drafted, and stated that he had no intent or reason to return to New York other than to visit friends and relatives living in and around Orchard Park.

13. Petitioner testified that there is no "job security" in professional football, that trades to teams located in diverse and distant cities are common and that, commonly, one serious injury ends a career.

SUMMARY [*9] OF THE PARTIES' POSITIONS

14. Petitioner admits that he was a resident of New York State at all times prior to July of 1980, but asserts that his full intent as of July 1980, as borne out by his actions, was to move to or near Pittsburgh, Pennsylvania and become a resident of Pennsylvania. Petitioner notes that his only real ties to New York State were the facts that he grew up in New York State, attended college in New York, and had parents and other relatives living in New York. Petitioner maintains that upon signing with the Steelers he moved to and became a domiciliary of the State of Pennsylvania. Finally, petitioner seeks, in any event, abatement of the penalty imposed. He maintains he reasonably believed himself to be a resident of Pennsylvania from the time he signed with the Steelers, and notes that all income he received in 1980 was related to his contract with the Steelers.

15. The Division of Taxation asserts, by contrast, that petitioner has failed to establish that during 1980 he changed his domicile from New York State to Pennsylvania. Thus, the Division of Taxation asserts that petitioner was a resident of New York State and was required to report and pay [*10] New York tax on all income derived from all sources during 1980.

CONCLUSIONS OF LAW

A. Tax Law @ 605 (former [a]), in effect for the years at issue, provided, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

(1) who is domiciled in this state . . . or

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

B. While there is no definition of "domicile" in the Tax Law (compare, SCPA 1103[15]), the Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is [*11] to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined [*12] in the regulations at 20 NYCRR 102.2(e)(1) as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 AD2d 444, 445). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact [*13] rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals. . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect. . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not

controlling, for unless combined with intention, it cannot effect a change of domicile. . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health [*14] or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention. . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animo revertendi. . . .

This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice." (Emphasis added.)

D. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne, 181 Misc 238, 246; see Matter of Bodfish v. Gallman, 50 AD2d 457). Moves to other states in which permanent residences are established [*15] do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Minsky v. Tully, supra.). The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra), it stated, "No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing."

E. In this case petitioner claims to have become a domiciliary and resident of Pennsylvania in early July of 1980, and does not dispute his status as a life-long domiciliary and resident of New York prior thereto. While the record clearly reveals that petitioner did at some point become a domiciliary and resident of Pennsylvania, the Division maintains this did not occur during 1980.

F. The facts in this case bear out that petitioner did not give up his domicile in New York State and acquire a new domicile in the Commonwealth of Pennsylvania prior to September of 1980. As discussed hereinafter, prior to his successfully completing Steeler's training camp and being selected for the team's final roster, petitioner could not have effected such a change of domicile to Pennsylvania. [*16] Among other things, petitioner had not, prior to September 1980, acquired any permanent place of abode in Pennsylvania. The training camp living quarters in Latrobe were referred to by petitioner as a "temporary residence" notwithstanding that the Steelers required all players to live there during training camp. Petitioner's activities in Pennsylvania prior to September of 1980 were, at best, evidence of petitioner's intent to secure permanent employment and locate in Pennsylvania. In light of the manner in which one first secures employment as a professional football player (i.e., completing training camp), petitioner was, from July through August 1980, in Pennsylvania essentially on a trial basis. As such, petitioner remained a domiciliary and resident of New York.

G. Petitioner did, however, change his domicile from New York to Pennsylvania as of September 1980, when he successfully completed training camp and leased his first apartment in Pennsylvania. Mr. Wolfley's commitment in 1980 was to play professional football. Had he not successfully completed the Steeler's training camp and made the team, he would have sought to secure employment as a professional football [*17] player wherever possible and would not have remained in Pennsylvania. The Division argues that this state of mind precluded petitioner from becoming a Pennsylvania resident in 1980. However, such argument on the facts of this case has been refuted. First, petitioner has established his bona fide intent to settle where he secured employment as a professional football player. Here, petitioner's first job was secured in Pennsylvania. Furthermore, the Division's argument carried to its logical end would preclude petitioner, as well as virtually any other professional athlete, from ever establishing a new domicile in a state where he becomes employed as a professional athlete due to the nature of such employment (i.e. the ever present danger of being injured, traded, released or demoted). Rather than accept such a standard, each case should turn on its particular facts and, in this case, petitioner's actions in 1980 (as well as his entire history subsequent to 1980) are consistent with a change of domicile to Pennsylvania. He did successfully complete Steeler's camp and secured a position of employment with the team. His actions from September of 1980 forward, including leasing [*18] his own apartment in September 1980, are all consistent with establishing his domicile in Pennsylvania. In fact, petitioner was a New York domiciliary largely, if not fully, due to having been born and raised and having attended school in New York. In 1980, petitioner was in the position of leaving college and starting his career, which was fulfilled on a permanent basis when he successfully completed training camp. Petitioner's only real tie to New York was the fact that his parents lived in Orchard Park, New York. As of September 1980, petitioner had acquired his first permanent employment together with a permanent place of abode in Pennsylvania and had focused his life there. Thus, petitioner effected a change of domicile to Pennsylvania as of September 1980.

H. In light of the foregoing, petitioner was a part-year resident of New York (January through August of 1980) and a part-year resident of Pennsylvania (September through the end of 1980 and thereafter). Accordingly, his earnings prior to September of 1980 were properly subject to tax by New York State, with all subsequent earnings (i.e. his $ 37,500.00 contract salary) not so subject (see Tax Law @@ 631, 654). [*19] n3 Thus the $ 20,361.00 difference between petitioner's total 1980 reported income ($ 57,861.00; see Finding of Fact "6") and his Steeler's regular season salary ($ 37,500.00; see Finding of Fact "5") is properly subject to tax by New York State.

n3 There is no evidence that the Steelers played any 1980 regular season games in New York State, nor any evidence that petitioner had any items of income, loss, gain or deduction derived from or connected to New York sources subsequent to September 1, 1980.

I. Tax Law @ 654(a) requires an individual who changes his status from a resident to a nonresident during a taxable year to file two (part year) returns, one covering the resident period and one covering the nonresident period. n4 Petitioner filed no New York State tax return for 1980, even though it is clear that he received his signing bonus

when he was a New York resident. Further, not only did petitioner fail to report his signing bonus to New York, but the fact that petitioner reported total income of $ 57,861.00 to the Internal Revenue Service but only reported taxable income of $ 25,310.00 to Pennsylvania, leads to a conclusion that his $ 20,000.00 signing bonus [*20] was not reported to Pennsylvania. The fact that the balance of his income was reported to Pennsylvania does not excuse the failure to file a New York return reporting income, including specifically such bonus, subject to taxation by New York State. The facts that such bonus as well as his contract salary was related to his employment with the Steelers and that petitioner was unsophisticated in tax matters (implying a claim of confusion and/or ignorance of the law) do not constitute reasonable cause warranting abatement of penalty.

n4 In light of footnote "3", petitioner was not required to file a New York return for the nonresident period.

J. The petition of Craig A. Wolfley is hereby granted to the extent indicated in Conclusion of Law "H", but is otherwise denied; the Division of Taxation is directed to recompute the Notice of Deficiency accordingly and said Notice of Deficiency, as recomputed, together with penalty and interest, is sustained.