STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN M. EVANS	:	DECISION DTA No. 806515
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under Chapter 46, Title T of the New York City Administrative Code for the Years 1985 and 1986.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 25, 1991 with respect to the petition of John M. Evans, 3225 Gallows Road, Fairfax, Virginia 22037, for redetermination of a deficiency or for refund of New York City personal income tax under Chapter 46, Title T of the New York City Administrative Code for the years 1985 and 1986. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in reply. Oral argument, at the request of the Division of Taxation, was heard on October 10, 1991. Petitioner did not appear at oral argument; however, petitioner was permitted to submit a written reply to the oral argument made by the Division.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner was a New York City resident liable for City personal income tax because he maintained a permanent place of abode in New York City.

II. Whether penalties should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "14".[1] We also make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

Petitioner, John M. Evans, an attorney, was employed during the years at issue by Mobil Corporation in its midtown Manhattan offices as supervisory tax counsel in the office of tax counsel.

Petitioner timely filed City of New York nonresident earnings tax returns on Form NYC-203 and reported and paid earnings tax of $496.41 on gross wages and other employee compensation of $109,503.36 and earnings tax of $532.35 on gross wages and other employee compensation of $118,300.00 for 1985 and 1986, respectively. On both returns, petitioner checked off the box "No" in response to the query, "Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year?"

The Division of Taxation issued a revised Statement of Personal Income Tax Audit Changes dated August 25, 1988 showing additional tax due of $2,944.58 plus penalty and interest and of $3,297.06 plus penalty and interest for 1985 and 1986, respectively. The following explanation was provided:

> "Taxpayer is deemed to be New York City Statutory Resident in accordance with New York State Tax Law, Section 1305(a)(2)."

Therefore, according to the Division of Taxation, petitioner was liable for the higher New York City personal income tax and not the lower nonresident earnings tax.[2]

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[1]The Administrative Law Judge's finding of fact "14" has been deleted because the Administrative Law Judge's comments on petitioner's proposed findings of fact contained therein are unnecessary to this decision and the factual findings contained therein have been incorporated into the additional findings of fact.

[2]During the years at issue, the tax rate for New York City nonresident earnings tax on wages was .45% and for New York City nonresident earnings tax on net earnings from self-employment was .65%. (In 1985, petitioner reported a small amount of income, $560.00, which he had earned as a religious educator which was subject to the higher rate.) In contrast, the tax rate for New York City personal income tax was substantially higher, $675.00 plus 4.3% on excess over $25,000.00 for each of the years at issue.

The Division of Taxation then issued a Notice of Deficiency dated November 4, 1988 asserting tax due of $6,241.64 plus penalty and interest.

The auditor spent 25 hours on the audit, interviewing petitioner (whom he described as cooperative) two or three times in person and speaking with petitioner over the telephone many times. According to the auditor's report, petitioner maintained a permanent place of abode within New York City because he shared a Manhattan apartment with a friend and paid "different household expenses", and "[t]hese living arrangements have been in existence since he moved out from his rented apartment [in Manhattan] in 1978."

The Division of Taxation conceded that petitioner was domiciled in Pawling (Dutchess County), New York during the years at issue. At the hearing herein, the Division's representative withdrew the argument asserted in the answer that petitioner was domiciled in New York City during the years at issue. Nonetheless, petitioner introduced much evidence to establish that he changed his domicile to Pond Cottage, Quaker Hill Road, Pawling (Dutchess County), New York in the spring of 1978, and that this Pawling residence remained his domicile up to the date of the hearing.[3]

Petitioner purchased the Pawling residence in December 1976. However, it was not until the spring of 1978 that it became his domicile when he vacated his rental apartment in Manhattan. Nevertheless, petitioner continued to live in Manhattan during his workweek at the rectory of the Church of the Good Shepherd (hereinafter "Good Shepherd"), an Episcopalian church located at 236 East 31st Street.

In the spring of 1974, petitioner became acquainted with Father Vincent Alfred Ioppolo, who at the time was a Roman Catholic priest in the Philadelphia archdiocese. In January 1975, Father Ioppolo moved from Philadelphia to Manhattan intending to apply to the Episcopal Diocese of New York for acceptance into its priesthood. For about a year and a half, Father Ioppolo lived at petitioner's Manhattan apartment until he moved to the curate's apartment at St. Peter's Church in the Bronx where he was employed as an assistant priest. In March 1978

[3]Petitioner recently notified the Division of Tax Appeals that his business address has changed from Manhattan to Fairfax, Virginia, which is near Washington, D.C.

(after serving for a brief time as an assistant priest to the Church of the Ascension in Manhattan), Father Ioppolo was offered the position of rector at the Good Shepherd. In May 1978, he took up residence in the rectory of the Good Shepherd. At about the same time, petitioner took up residency during his workweek in the rectory at Father Ioppolo's invitation. This living arrangement continued for 12 years.

The rectory is a four-story brownstone building next to the church. The church office and rector's study is on the ground floor with a garden behind. The next floor has a kitchen, dining room, outer room, and sitting room. Five bedrooms are located on the top two floors. As rector of the Good Shepherd and as part of his compensation, Father Ioppolo was provided with the exclusive use of the living quarters in the rectory. The space in the rectory used as a church office had a separate entrance from the living quarters.

Petitioner occupied a bedroom on the top floor of the rectory which he described as follows:

> "There is a bath there. There are bookshelves for books. There is a desk. There is a bed. There are two lamps on either side, a sofa and a television."

Father Ioppolo testified that he handled household expenses "since it is my household." On a regular basis, mostly monthly or bimonthly, Father Ioppolo "would submit to petitioner the expenses and he would bear half of it." The shared expenses included expenditures at supermarkets for food, toiletries, and household cleaning products, and the expenses incurred in paying a housekeeper to clean the living quarters of the rectory on a regular basis. For 1985, petitioner and Father Ioppolo shared household expenses in the amount of $7,014.00, and for 1986, household expenses of $5,770.00 were divided up. (Some small portion of these amounts apparently also included petitioner's payment of personal telephone charges.)

Further, petitioner furnished the living quarters of the rectory with some of the furniture from his Manhattan apartment including a desk, a wing-back chair and a drop-leaf table. He also purchased furnishings for the rectory including, according to the testimony of Father Ioppolo, "a settee, mirror, two regency chairs, dining room furniture, a lot of things."

Consequently, it is reasonable to find that petitioner and Father Ioppolo shared a household.

Petitioner did not hold himself out as living at the rectory and did not use the rectory as his address. In fact, the Manhattan telephone directory for 1987 shows petitioner's Pawling address and phone number, and petitioner testified that this same information had been contained in the Manhattan directory since 1979.

Petitioner conceded that he spent in the aggregate more than 183 days of each of the years at issue in New York City.

We make the following additional findings of fact:

> There was no lease or other written agreement between Father Ioppolo and petitioner, or between petitioner and the Good Shepherd parish requiring petitioner to compensate either Father Ioppolo or the parish for his use of the rectory. The parish paid for the utilities for the rectory and for any major repairs.
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> Father Ioppolo testified that he invited petitioner to stay at the rectory with him because he was not used to being alone and he and petitioner got along "famously". Because of petitioner's interest in the church, Father Ioppolo thought petitioner's help and advice would be "invaluable". In addition, Father Ioppolo testified that since petitioner had previously provided him with a place to stay in petitioner's apartment, this was an opportunity for him to "return the favor".
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> Father Ioppolo testified that he "had a number of priests and laymen who were friends of mine come and stay and live for a time, the most recent being Father George Brant, who ... stayed with me for fifteen, sixteen months", and, that he "had a friend who lived in Rome, and he came and stayed for ... a year and a half or something like that." There was no testimony that these individuals contributed to the household expenses or supplied furnishings to the living quarters.

Petitioner typically stayed at the rectory from Sunday or Monday night to Friday. Weekends and vacations which were not spent traveling were typically spent at petitioner's home in Pawling.

Petitioner kept most of his business suits at the rectory.

Petitioner testified that his teenage son visited petitioner at the rectory "occasionally" and, that "As he's [the son] gotten older, he's more interested in being in the City than being in Pawling."

OPINION

The Administrative Law Judge held that petitioner was not subject to the personal income tax for the City of New York as a city resident individual because he did not maintain a permanent place of abode in the city as required by Tax Law § 1305(a)(2) and Administrative Code (former) T46-105.0.[4] The Administrative Law Judge found that the living quarters in the rectory were not a permanent place of abode maintained by petitioner because they were maintained by Father Ioppolo and petitioner was not contributing to Father Ioppolo's "general support."

On exception, the Division of Taxation (hereinafter "the Division") argues that petitioner's use of the living quarters in the rectory over a substantial period of time supports the conclusion that the living quarters were a permanent place of abode maintained by petitioner. The Division asserts that petitioner's regular payment of household expenses and purchases of furniture for the living quarters, and the presence in the living quarters of personal items and furniture from petitioner's former abode, all support the conclusion that petitioner maintained a place of abode at the rectory. The Division argues that the phrase "maintains a permanent place of abode" has a broader meaning than that ascribed to it by the Administrative Law Judge and would include petitioner's use and occupancy of the rectory here.

In response, petitioner asserts that the Administrative Law Judge's determination was not in error and that the Division is attempting to add an additional test to the requirements for

[4]Renumbered Administrative Code § 11-1705(b)(1)(B), effective September 1, 1986.

establishing residency by suggesting that the amount of time during the year and the number of years petitioner spent as a guest of Father Ioppolo converted petitioner's status into that of one maintaining a permanent place of abode. Petitioner argues that the requirements which must be met in order for a nondomiciliary to be taxed as a city resident are separate and distinct. Petitioner asserts that meeting the first requirement, being present in the city for more than 183 days during the taxable year, is irrelevant to determining whether the taxpayer has met the second requirement, maintaining a permanent place of abode in the city during the taxable year. Petitioner defines "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). Petitioner argues 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 asserts that his living quarters at the rectory were neither "maintained" by him, nor were they "permanent."

We reverse the determination of the Administrative Law Judge.

Pursuant to the authority of Article 30 of the Tax Law, the City of New York imposes a personal income tax on residents of New York City. Administrative Code (former) T46-105.0 contains the definition of resident individual applicable here:

> "[an individual] who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city...."

As petitioner has conceded that he spent more than 183 days in the city during the tax years at issue, we are concerned only with whether petitioner was maintaining a permanent place of abode in the city at the rectory of the Church of the Good Shepherd. To answer this question we must decide the meaning of the phrase "maintains a permanent place of abode" as it is used in Tax Law § 1305(a)(2) and Administrative Code (former) T46-105.0. Primarily we must determine what the Legislature meant by the word "maintains", and whether petitioner's living quarters at the rectory were "maintained" by him. However, we must also determine whether petitioner's living arrangements were within the statute's meaning of "permanent."

The term "maintains" is not defined in the statute or regulations. The previous decisions of this Tribunal cited by the Division involved dwellings which were either leased or owned by the petitioners (Matter of Roth, Tax Appeals Tribunal, March 2, 1989; Matter of Feldman, Tax Appeals Tribunal, December 15, 1988) which distinguishes them from the facts presented here. We have not found any cases defining the word "maintains" in the context of residency which conclusively resolve the issue presented here.[5]

The legislative history of this statutory language provides limited guidance. The statutory language at issue was not in the original personal income tax statute (Article 16) enacted in 1919 (L. 1919, ch. 677), but was added a few years later (L. 1922, ch. 425). When the current personal income tax statute (Article 22) was enacted in 1960 (L. 1960, ch. 563), the provision defining a resident individual was included without change. The Division notes that the Department of Taxation and Finance had consistently interpreted the Article 16 provision in the manner it urges us to adopt here (see "State of New York, Department of Taxation and Finance, Income Tax Bureau, Manual of Audit Policy", Article 503, August 25, 1958; Opinion of Deputy Commissioner and Counsel, July 24, 1941); however, there is nothing in the

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[5]The Division cites the former State Tax Commission's decision in Matter of Brazin (State Tax Commission, January 24, 1983) in support of its argument that "maintain" means "to keep effective." This Commission decision (even with its misstatement of the holding in Matter of Rothfield v. Graves [264 App Div 54, 34 NYS2d 895, affd 289 NY 583]) is consistent with the Division's position in the matter before us that an individual may have as his permanent place of abode, a dwelling supplied by and paid for by another, and that "maintain" means "to keep effective." The Division does not argue, however, that this decision is determinative of the matter before us.

The Administrative Law Judge cited MacKill v. Bates (278 App Div 724, 103 NYS2d 31) apparently for the proposition that the taxpayer's contribution must be in the form of "general support" in order for the taxpayer to be found as maintaining a permanent place of abode. In MacKill, the taxpayer-husband moved to Washington, D.C., while his wife continued to live in their New York City apartment. The taxpayer had access to the apartment and was contributing to the wife's "general support." Upon completion of his employment assignment in Washington, he returned to the New York City apartment. The Court found that:

> "The factual decision of the Commission that petitioner 'maintained' a permanent place 'of abode' in New York while he worked in Washington is not unreasonable in view of the arrangement by which the New York apartment was occupied by his wife; nor is the conclusion unreasonable that the living arrangements of petitioner in Washington did not constitute the maintenance of a permanent place of abode there. This is the extent of our inquiry into the determination of the Commission" (287 A.D. at 724, 103 NYS2d at 32).

The Administrative Law Judge concluded that since petitioner was not contributing to Father's Ioppolo's "general support," he was not maintaining a permanent place of abode at Father Ioppolo's residence. We do not agree that MacKill can be read as articulating a rule that contributions to "general support" (a phrase undefined in the Mackill opinion) are required for a finding that a permanent place of abode is maintained.

legislative history that would indicate that the Legislature reenacted this provision based upon these interpretations. The 1960 statute made major changes to the tax on personal incomes. While the bill was pending before the Legislature and while it was awaiting the Governor's signature, it was closely examined by many groups, i.e., the tax sections of various bar associations and business groups. Many comments were submitted, including technical suggestions which were incorporated into the final bill; however no one commented on this unchanged aspect of the law (Bill Jacket, L. 1960, ch 563).

The issue then is one of statutory construction and interpretation. "In statutory construction, commonly used words must be given their usual and ordinary meaning, unless it is plain from the statute that a different meaning is intended (citations omitted)" (Regan v. Heimbach, 91 AD2d 71, 458 NYS2d 286, 287, lv denied 58 NY2d 610, 462 NYS2d 1027; see also, Matter of Leisure Vue v. Commissioner of Taxation & Fin., 172 AD2d 872, 568 NYS2d 175, 176). However, in this case, lexicological scholarship does not provide us with one "usual and ordinary meaning" of the word "maintain." Petitioner and the Division have each found a meaning which fits the conclusion they urge us to reach.[6] In fact, among the fourteen different definitions of the word "maintain" found in The Oxford English Dictionary (1978), any of the following might be applied to the Legislature's use of the word in this statute:

> "To keep up, preserve, cause to continue in being (a state of things, a condition or activity, etc.); to keep vigorous, effective or unimpaired; to

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[6]Petitioner cites Hoeganaes Corp. v. Director of Division of Taxation (145 N.J. Super. 352, 367 A.2d 1182) in support of his definition of "maintain." This case was not about residency; the issue was whether for purposes of the apportionment provisions of the New Jersey corporate franchise tax, the taxpayer was maintaining a regular place of business outside the state within the meaning of the New Jersey Division of Taxation's regulation. Petitioner is correct that the court states in its opinion that "'[m]aintain' means 'to bear the expense of' the subject, i.e., pay rent," citing Webster's Third New International Dictionary (Hoeganaes, supra, 367 A.2d at 1186). However, given that the other dictionary definitions cited below convey a broader meaning to the word, we do not see how this court's reference to one particular meaning in the context of the regulation at issue in that case, requires us to conclude that "maintain" means only "to bear the expense of" in the case before us. We note further that the New Jersey court did not find that the home offices used part-time by taxpayer's employees were not regular places of business for the taxpayer solely because the taxpayer did not pay the rent. Rather, the court found that since a regulation must be general and cannot possibly anticipate every factual situation, there were many factors that might constitute the maintenance of an office for the purpose of allocation. The court found that the question depended entirely on the particular circumstances. As discussed below, we agree with this analysis.

> guard from loss or derogation. With concrete obj.: To preserve in existence.
>
> "To cause to continue in a specified state, relation, or position.
>
> "To support (one's state in life) by expenditure, etc.
>
> "To pay for the keeping up of, bear the expense of; to keep supplied or equipped (e.g. a ship, a garrison; to keep (a road, building) in repair."

Determinations of a taxpayer's status as a resident or nonresident individual for purposes of the personal income tax have long been based on the principle that the result "frequently depends on a variety of circumstances which differ as widely as the peculiarities of individuals" (Matter of Newcomb, 192 NY 238, 84 NE 950 at 954). Given the various meanings of the word "maintain" and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, 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, therefore, reject 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 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. Petitioner argues that he was not maintaining a permanent place of abode in the living quarters of the rectory because he had no legal right to reside there and could have been asked to leave at any time by Father Ioppolo. In petitioner's view, his presence in the rectory was "impermanent by its very nature" (Petitioner's brief to the Administrative Law Judge, p. 15). In our view, the permanence of a dwelling place for purposes 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.[7] 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 other appropriate facts. The Division's regulations (which are applicable to the city personal income tax [see 20 NYCRR 290.2]) make it clear that the physical attributes of the abode as well as its use by the taxpayer are determining factors in defining whether it is permanent. Thus, a "permanent place of abode" is defined generally as "a dwelling place permanently maintained by the taxpayer, whether or not owned by him ..." (20 NYCRR 102[6][e]). A "mere camp or cottage, which is suitable and used only for vacations is not a permanent place of abode" (20 NYCRR 102[6][e]). Similarly, "any construction which ... 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" (20 NYCRR 102[6][e]). Moreover, a place of abode, whether in New York or

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[7]As stated in an opinion by the Attorney General (1940 Op. Att'y Gen. p. 246, March 28, 1940):

> "If one were to give the fullest effect to the word 'permanent,' then a person maintaining a 'permanent place of abode' in New York should be considered as a domiciliary. But, careful study of the language of section 350 (7) of the Tax Law compels the conclusion that the Legislature did not intend that the word 'permanent' should be construed as meaning the ultimate in the way of a residence established for all time to come. Obviously, it intended rather an abiding place, established either by a domiciliary or a nondomiciliary, having a fixed or established character as distinguished from intermittent or transitory."

elsewhere, "is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose" (20 NYCRR 102[6][e]).

As previously noted, a determination of a taxpayer's status as a resident or nonresident individual for purposes of the personal income tax by its nature depends on the totality of the facts in a particular case. A review of the facts concerning petitioner's living arrangements supports the conclusion that petitioner maintained a permanent place of abode in New York City in the rectory living quarters.

Petitioner "maintained" the place of abode by making monetary contributions to the household, i.e., he paid one-half of the household expenses. Petitioner also made contributions in kind to the household. The rectory living quarters were furnished extensively with his furniture, either moved from his former apartment in the city or purchased specifically for the rectory living quarters. Moreover, it appears that petitioner was also receiving some return for providing housing to Father Ioppolo in prior years.

Petitioner treated the rectory as his permanent dwelling place in New York City during this period; nothing in petitioner's living arrangements suggests that they were temporary. Petitioner kept personal items in the rectory including his business suits and presumably the other clothes he wore to his employment during the week. His use of the rectory living quarters was unlimited; he had a key and was free to come and go at will; he used whatever areas of the living quarters he wished, i.e., the kitchen, dining room, sitting room, etc. He was apparently free to have his own guests visit him at the rectory as evidenced by the visits from his minor son.

Petitioner has stated that for the taxable years at issue and for many years prior to the years at issue, he lived during the week at the rectory, returning to his home in Pawling only on the weekends and for vacations. We agree with petitioner that the number of years his arrangement with Father Ioppolo continued and his presence in the city for more that 183 days in the taxable year do not by themselves support the conclusion that he was maintaining a place of abode in the city. However, we do not agree that these factors in combination with others cannot be evidence of the relative permanence of petitioner's living arrangements. The long-

standing (12 years) and regular nature of petitioner's arrangements are certainly evidence of what can reasonably be described as "permanence."

Petitioner argues that this determination results in uncertainty for a taxpayer who would not be able to know during the taxable year if his living arrangements were going to continue long enough to be considered permanent. While it may be true that during any particular taxable year, a taxpayer may not know with certainty what his living arrangements will be, nevertheless, by the end of the year, and certainly prior to the due date for filing a return, a taxpayer will always be able to evaluate the facts pertaining to his relationship to his place or places of abode during that year and make appropriate decisions concerning his status for tax purposes.

We find that reasonable cause exists for waiver of penalties in this matter. Petitioner's interpretation of the statute and regulations as applied to his circumstances, while in error, can be said to appear to a person of ordinary prudence and intelligence to be reasonable (20 NYCRR 102.7[c][4]). The facts here support the conclusion that petitioner's actions do not indicate willful neglect of his tax responsibilities.

Accordingly, it is ORDERED, ADJUDGED and DECREED that;

1. The exception of the Division of Taxation is granted except as stated in paragraph "4" below;

2. The determination of the Administrative Law Judge is reversed except as stated in paragraph "4" below;

3. The petition of John M. Evans is denied except as stated in paragraph "4" below; and

4. The Notice of Deficiency dated November 4, 1988 issued to petitioner John M. Evans is upheld except that the penalties assessed are abated.

DATED: Troy, New York
June 18, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner