

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TANTIVY GUBELMANN BOSTWICK : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 820637
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Year 1999. :
:

Petitioner, Tantivy Gubelmann Bostwick, 71 East 77th Street, #9D, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1999.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 12, 2006 at 10:30 A.M., with all briefs to be submitted by October 16, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Roberts and Holland, LLP (Joseph Lipari, Esq., and Dennis Rimkunas, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Michele Milavec, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation has shown that petitioner changed her domicile from New Jersey to New York State and City effective June 1, 1999, and remained domiciled in New York State and City until December 31, 1999.

II. Whether the Division of Taxation properly imposed penalties pursuant to Tax Law § 685(p).

FINDINGS OF FACT

1. Petitioner, Tantivy Gubelmann Bostwick (formerly Tantivy A. Gubelmann), was born in 1977 and raised in Bernardsville, New Jersey, about an hour and twenty minutes from Manhattan, in northwest New Jersey. Her family had homes in Newport, Rhode Island, and Palm Beach, Florida, in addition to their home in New Jersey. Thanksgiving was always spent in Rhode Island, Christmas in New Jersey and other vacations, including spring breaks, in Palm Beach, Florida. Summers were spent in Newport, Rhode Island, since their home in New Jersey did not have a central air conditioning system. Petitioner has a twin sister, Phoebe Gubelmann, and a younger brother, James Gubelmann.

2. Petitioner attended high school at Deerfield Academy, a boarding school in Deerfield, Massachusetts, and graduated in 1995. During breaks from high school petitioner had internships and spent time in Newport, Rhode Island.

3. Petitioner attended Davidson College in Davidson, North Carolina, majoring in art history. During summers in college, petitioner had internships with Sotheby's in New York and the National Gallery in Washington, DC, took classes at the University of California at Berkeley and spent time in Rhode Island. She graduated from Davidson College on May 16, 1999 at age 22.

4. Petitioner spent the fall semester of her junior year abroad studying in Rome, Italy. When she returned, she was unable to resume living in the college dormitory, so petitioner rented an off-campus apartment. Upon graduation from Davidson, the furniture from the college apartment was transported to petitioner's home in New Jersey by caretakers.

5. During 1999, petitioner maintained a New Jersey driver's license and owned a car registered in New Jersey. Neither her driver's license nor car registration were changed to New York.

6. Petitioner did not recall where she was registered to vote in 1999.

7. Petitioner's plans for the summer of 1999 were to travel throughout the northeast with some of her college roommates, and then to Europe. She did not have a job in place and had no immediate career plans.

After their graduation from college on May 16, 1999, petitioner and her roommates drove to Pennsylvania, Rhode Island and Nantucket together. After their trip, from May 24, 1999 to June 11, 1999, with the exception of one day in New Jersey, petitioner spent time in New York. From June 11, 1999 until she left for Europe on June 22, 1999, petitioner spent time in Connecticut, Rhode Island, New Jersey, and New York. Petitioner traveled in Europe from June 22 until July 23, 1999. Upon returning from Europe, petitioner did not begin looking for a job but continued to travel and spend time with family and friends in Boston, New Mexico, Idaho, New York City and Long Island. It was on Long Island in early August 1999 that petitioner met Thomas Bostwick, the man who eventually would become her husband.

8. Financially petitioner could afford to travel and not make immediate career plans. Petitioner received an allowance from invested family trust funds during her college years in the amount of \$1,500.00 per month, which was raised to \$5,000.00 per month after petitioner graduated from college. These sums were not intended to cover petitioner's rent or other specified living expenses, but as a discretionary allowance. Petitioner's sister Phoebe also received an allowance of \$5,000.00 per month, and her portion of the rent was paid from a trust fund of her own which did not reduce her monthly allowance.

9. Petitioner's twin sister, Phoebe, since she was age 18, had been living in an apartment on 64th Street in Manhattan, where she was also working. Phoebe's lease was coming up for renewal in June 1999, and she had begun inquiring about other apartments. She located an apartment sublease of a friend of their mother at 155 East 93rd Street. It was a co-op and it required a sublease in two-year increments. Phoebe signed the sublease agreement with Janet Mavec for the premises located at 155 East 93rd Street, Apt. 7A, for \$42,000.00 annually, or \$3,500.00 monthly, for a period of rental commencing May 1, 1999 through May 31, 2001. Phoebe also signed petitioner's name to the lease without her knowledge at that time. The copy of the sublease introduced into evidence was undated. Attached to the sublease agreement is a rider addressing additional lease provisions, which refers to the "Sublease dated February 1999." The rider also bears two signatures, both of which were made by Phoebe. Sometime after February 1999, Phoebe asked Tantivy if she would be interested in signing a lease for an apartment in New York. Tantivy agreed to do so. The apartment was partially furnished and the rest of the furniture was provided by Phoebe's 64th Street apartment, some items given to them by their parents, and by purchases of some new items by petitioner. Having limited closet space, petitioner brought only the clothes she needed seasonally from New Jersey to the 93rd Street apartment. After an initial rent check for \$3,530.00 to the primary tenant, Janet Mavec, dated July 29, 1999, was late, petitioner's share of the rent was then set up to be paid by wire transfers on her behalf from a trust account for petitioner to the landlord. If petitioner had decided not to share the apartment expenses, Phoebe would have covered petitioner's share without it being burdensome to Phoebe, since she also had funds which covered her living expenses beyond her \$5,000.00 monthly allowance.

10. The records of the real estate management company, A.J. Clarke Real Estate Corp., indicate that petitioner and Phoebe moved into the New York City apartment in June 1999 and vacated it some time in the summer of 2001. However, petitioner actually left New York to move to California with Thomas Bostwick in February 2001.

11. Petitioner's bank records show payments indicating the purchase of a gym membership at the 92nd Street Y in New York City, located near the apartment on 93rd Street, after she returned from Europe at the end of July 1999. Thereafter, her records show October, November and December payments of \$59.00 to the 92nd Street Y.

12. Petitioner did not have plans for after college. She intended to take the summer off, and decide what she wanted to do. She spent a month in Europe, went to Sun Valley, Idaho with her family, to Boston for a wedding and spent time on Long Island with friends and her boyfriend, Thomas Bostwick, who was living on Long Island at that time. Petitioner started dating Thomas Bostwick in early August 1999. They had known each other since their teens, and they spent most of their time together on Long Island during August. When Thomas Bostwick returned to Georgetown University in Washington, DC, in late August 1999, petitioner was free to visit him there, and did so frequently. She had purchased a book of airline tickets that allowed her the flexibility to travel to Washington, DC, when she wanted and stay as long as she wanted. She spent the majority of her time with Thomas Bostwick in his DC apartment, in four- or five-day increments, until she took a short-term job with Sotheby's in mid-November 1999.

13. Petitioner unexpectedly encountered a friend from high school who was the daughter of the CEO of Sotheby's. The friend told petitioner they were launching Sotheby's.com and needed to hire people to help with the launch. Although petitioner had no resume and was still

not in search of employment, she applied for the job on November 9, 1999. Petitioner received an offer to begin employment as a trainee on November 15, 1999. The position lasted approximately four to six weeks.

14. Petitioner's next employment position was in February 2000 in a volunteer position at a girl's school on the Upper West Side of Manhattan. Petitioner continued to date Thomas Bostwick and travel between Washington, DC, and New York until he graduated from Georgetown in December 2000.

15. After graduation Thomas Bostwick had job offers with Credit Suisse First Boston in New York City and Bank of America in San Francisco. He accepted the California position with Bank of America, which was to begin June 25, 2001 and required a commitment of at least two years. Thomas Bostwick had sisters in California who had lived there for 20 years, and his mother is a fifth generation Californian. Thomas and petitioner had the intention of moving there for Thomas's new position and remaining there permanently. Petitioner traveled with Thomas Bostwick to Colorado, Arizona, Australia and the Dominican Republic from early February 2001 until the two arrived in California for Thomas to begin his new position.

16. Upon arriving in San Francisco, petitioner signed a lease for an apartment for them. She also obtained a teaching position at a school in San Francisco. Due to investment market difficulties in 2001, Thomas changed positions after six months, and at the end of December 2001, they moved back to New York. Petitioner and Thomas, who married in 2004, have lived in New York City since they moved back in 2001. Petitioner now teaches second grade at City and Country School, a private school in New York City.

17. On or about October 14, 1999, petitioner filed a New Jersey State Resident Income Tax Return (NJ-1040) for tax year 1998, stating as her address: Mt. Harmony Road, Bernardsville, New Jersey 07924.

18. In September 2000, petitioner filed her tax returns for tax year 1999, as follows:

a. Petitioner filed her U.S. Individual Income Tax Return for 1999, listing her home address as 155 East 93rd Street, Apt. 7A, New York, NY 10128. Petitioner's adjusted gross income as reported for 1999 was \$4,410,132.00, with a substantial portion of that income (\$4,029,072.00 attributed to 1999) having been derived from the July 1, 1999 sale by Rock Buster LLC (an LLC in which petitioner owned an interest, later known as Empyrean Capital Group LLC), of stock in Realty Industrial Corporation to First Atlantic Statutory Trust, and the sale of a partnership interest in Allied Investors Associates resulting in \$11,078.00 in net long-term capital gain.

b. Petitioner filed a Nonresident and Part-Year Resident New York State Income Tax Return, Form IT-203, for tax year 1999. The mailing address listed on the return was 155 East 93rd Street, Apartment 7A, New York, NY 10128. The Federal adjusted gross income reported on the return for 1999 was \$4,410,132.00. The New York State amount reported on the return was only the wage amount earned from Sotheby's.com for 1999 in the amount of \$3,608.00.

c. Petitioner filed as a resident of New Jersey for tax year 1999, claiming New Jersey as her 1999 domicile. The address listed on the return was 155 East 93rd Street, Apt. No. 7A, New York, NY 10128. All of petitioner's income from 1999, including the gain from the July 1, 1999 sales, was reported on that return. Petitioner's New Jersey return for 1999 computed a New Jersey resident income tax liability in the amount of \$285,838.00.

19. Petitioner filed a New York State Resident Income Tax Return, Form IT-201, for tax year 2000. The mailing address listed on the return was 155 East 93rd Street, Apartment 7A, New York, NY 10128. The Federal adjusted gross income reported on the return for 2000 was \$332,519.00.

20. In November 2002, the Division commenced an audit of petitioner for tax year 1999. Upon request, petitioner submitted bank statements, credit card statements, telephone bills and a schedule of her whereabouts during 1999. The Division requested that petitioner complete a Nonresident Audit Questionnaire concerning tax years 1999, 2000 and 2001. The questionnaire was completed by Julie Bedard, CPA, under power of attorney. Ms. Bedard is the Gubelmann family CPA, located in Florida, who had handled the family's financial affairs for many years.

Concerning principal residences during the tax years addressed, the following information was provided:

Ms. Gubelmann grew up and lived with her family in New Jersey (136 Mt. Harmony Road, Bernardsville, NJ). She attended college in North Carolina at Davidson College and graduated in May 1999. After graduation, Ms. Gubelmann moved back to Bernardsville. For the next several months she traveled to Europe, spent time with her family in their summer home in Rhode Island and visited her boyfriend in Washington DC. In September 1999, Ms. Gubelmann moved in with her sister at 155 East 93rd Street, Apt. 7A in New York. Ms. Gubelmann had co-signed the lease for the apartment with her sister in June 1999. Although she had not yet determined to stay in New York, she began spending more time in New York towards the end of the year when she worked on a temporary basis with Sotheby's.com for approximately one month beginning November 15, 1999. In February 2000, Ms. Gubelmann began student teaching and, aside from vacations, stayed in New York until August 2001 when she moved to San Francisco with her boyfriend.¹

¹ This fact was later clarified by the testimony of petitioner and Thomas Bostwick, with whom petitioner moved to California. The two left New York in February 2001 and traveled together to numerous locations until Mr. Bostwick reported to his new California place of employment in June 2001.

21. The questionnaire also reflected that petitioner filed a New York Nonresident Income Tax Return and a New Jersey Resident Income Tax Return for 1999; a New York State Resident Income Tax Return for 2000 (which was filed listing her mailing address as 155 East 93rd Street, New York, NY); and New York State part-year and California part-year resident income tax returns for 2001.

22. The Division submitted into evidence petitioner's available Chase Manhattan Bank statements for the period June 18, 1999 through August 24, 1999 and October 27, 1999 through January 26, 2000. During the period June 1 through December 31, 1999, petitioner made many credit card charges and ATM withdrawals in New York, many at ATM machines in close proximity to the 93rd Street apartment.

23. The Division submitted into evidence petitioner's First Union credit card statements covering transactions from June 21, 1999 through December 7, 1999.

24. The Division submitted into evidence petitioner's college express checking account statements with First Union National Bank, covering transactions from May 10, 1999 through the closing of this account on June 21, 1999.

25. The Division analyzed the information derived from the banking and credit card information listed in Findings of Fact "22," "23" and "24" and concluded that on the basis of such information, petitioner's physical location for the period in issue was as follows:

Month	No. of Days in New York	No. of Days in New Jersey
May	7	1
June	20	2
July	7	0
August	18	0

September*	30	0
October *	31	0
November	27	0
December	25	0
Total	165	3

* The Division, unable to review the bank statements for September and October, included all the days of the month based on its determination that petitioner had set forth an “inference of pattern” of days spent in New York. The Division was unable to reconstruct petitioner’s actual presence due to the missing Chase Manhattan Bank statements, which, despite efforts to obtain, petitioner could not acquire from the bank due to damaged microfiche on which the statements were stored at the bank.

26. Although petitioner’s specific steps in September and October 1999 cannot be precisely recreated, petitioner provided sufficient information that indicates during these months she spent time in New York, Rhode Island and Washington, DC. Petitioner also had a temporary position for a week at the end of September as director of sales at an international antiques and fine art fair for WM Brady and Co. in New York.

27. During the period June 1, 1999 through December 31, 1999, petitioner spent more days in New York than at any other single location.

28. The Division submitted into evidence Bell Atlantic telephone bills for phone service for a number identified as the phone number for the 155 East 93rd Street apartment. The bills were issued to: “Tantivy Gubelmann, Constellation LP, 1 North Clamatus, Suite 320, W Palm Beach, Fl 33401.” The bills covered phone service for the period June 10, 1999 through January 27, 2000. During the period June 1 through December 31, 1999, telephone calls were made from the 93rd Street apartment to a Washington, DC, telephone number on dates that petitioner was admittedly in New York.

29. The electric bills for 155 East 93rd Street were in petitioner’s name in 1999.

30. Upon review of petitioner's questionnaire and other documentation submitted, the Division made a determination that petitioner had changed her domicile to New York in June 1999 from New Jersey after her graduation from Davidson College in May 2006, and coinciding with the sublease of a New York City apartment at 155 East 93rd Street, New York, NY, with her sister Phoebe. The Division issued its Statement of Personal Income Tax Audit Changes computing additional New York State and City income taxes based on its determination that petitioner had moved into New York in June 1999. Income (58%) was allocated to New York for the period June 1, 1999 to December 31, 1999.

31. The Division issued a Notice of Deficiency dated June 21, 2004, asserting additional income tax liability for New York State and City for tax year 1999 in the amount of \$174,999.75 and \$97,960.00, respectively, for a total tax of \$272,959.75, plus penalty and interest. The Division also assessed a substantial understatement penalty in the amount of \$27,295.00.

32. Petitioner submitted 14 Proposed Findings of Fact. Proposed Findings 1-4, 6-9 and 11-14, are accepted and substantially incorporated into the Findings of Fact. Proposed Findings of Fact 5 and 10 are modified to reflect the facts as determined to be supported by the testimony and the evidence submitted in this matter.

The Division submitted 52 Proposed Findings of Fact. Proposed findings 1-26, 29-42, 44, and 46-52 are accepted and substantially incorporated into the Findings of Fact. Proposed findings of fact 27 and 46 are partially omitted as not relevant. Proposed findings of fact 28 and 45 are modified to reflect the facts as determined to be supported by the testimony and the evidence submitted in this matter. Proposed finding of fact 43 is omitted as a duplication of information.

SUMMARY OF THE PARTIES' POSITIONS

33. Petitioner asserts that the Division failed to prove by clear and convincing evidence that she changed her domicile from New Jersey to New York State and City in 1999. Alternatively, if the Division is able to carry its burden of proving petitioner changed her domicile toward the end of 1999, when she took a position with Sothebys.com, then none of the gain from the sale of the partnership interests on July 1, 1999 is allocable to New York State and New York City. Lastly, petitioner maintains that the substantial understatement penalties of Tax Law § 685(p) are unreasonable and should be abated.

34. The Division argues that it properly determined that petitioner acquired a new domicile in New York City in June 1999 when she made major life changes that centered around New York City. The Division focused on the leasing of the New York City apartment after she graduated from college, the amount of time spent in New York, petitioner's New York family ties, petitioner's social and community ties, employment in New York City and the location of near and dear items. Lastly, the Division maintains that it properly imposed the substantial understatement penalty against petitioner because no reasonable cause to abate such penalty has been established.

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes New York State personal income tax on "resident individuals." In turn, Tax Law § 605 defines resident individual, in pertinent part, as follows:

(1) Resident individual. A resident individual means an individual:

(A) who is domiciled in this state, unless (i) he 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, or . . .

(B) 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.

There is no contention by the Division that petitioner spent 183 days or more in New York from June 1 through December 31, 1999. Further, the Division concedes to petitioner's domicile as other than New York State and City in the first five months of 1999 and years preceding. The Division has asserted that effective June 1, 1999, petitioner changed her domicile to New York State and City. Since the Division is asserting the change in domicile, the Division must carry the burden of proof to show that petitioner in fact changed her domicile effective June 1, 1999.

The definition of a New York City "resident" is identical to the State resident definition, except for the substitution of the term "city" for "state" (*see*, Administrative Code of the City of New York § 11-1705[b][1][A], [B]; *see also* 20 NYCRR 295.3[a]; 20 NYCRR Appendix 20, § 1-2[c]). The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State source income, whereas residents are taxed on their income from all sources.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State and City; however, only the issue of petitioner's domicile is at issue in this proceeding. Neither the Tax Law nor the New York City Administrative Code contain a definition of domicile, but a definition is provided in the regulations of the Commissioner of Taxation and Finance (*see*, 20 NYCRR 105.20[d]). As relevant, they provide as follows:

Domicile. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

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

* * *

(4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of 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 such person may be domiciled elsewhere.

C. It is well established that an exiting domicile continues until a new one is acquired, and the burden of proof to show a change in domicile rests upon the party alleging the change, here the Division (*see, Matter of Newcomb's Estate*, 192 NY 238). In order for there to be 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 App Div 444, 445, 126 NYS 970; *Matter of Smith and Groh*, Tax Appeals Tribunal, July 23, 1998). 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, 433 NYS2d 276). The concept of intent was addressed long ago by the Court of Appeals in *Matter of Newcomb's Estate* (supra at 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 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 or pleasure, to secure a change of climate, or a 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*

D. Whether there has been a change in domicile is a question “of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals” (*Matter of Newcomb's Estate, supra* at 250). The test of intent with regard to a purported new domicile is “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, 41 NYS2d 336, 343 *affd* 267 App Div 876, 47 NYS2d 134, *affd* 293 NY 785); *see also, Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138). The Court of Appeals articulated the importance of establishing intent, when, in *Matter of Newcomb* (*supra* at 251) 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.” Performance declarations are less persuasive than informal acts which demonstrate an individual’s “general habit of life” (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, citing *Matter of Trowbridge*, 266 NY 283, 289; *Matter of Jay*, Tax Appeals Tribunal, September 9, 2004).

As evident from the cases cited, in determining an individual’s domicile, the facts and circumstances of the particular case are paramount. While certain declarations may evidence a change of domicile, such declarations are less persuasive than informal acts which demonstrate an individual’s “general habit of life” (*Matter of Silverman, supra*). A physical move to another place in which a permanent residence is established does not necessarily provide the clear and convincing evidence of an intent to change one’s domicile (*Matter of Zinn v. Tully, supra*). Only when coupled with the clear intent to change one’s domicile does the fact of a changed residence become a true changed domicile.

E. The Division asserts it has properly determined that petitioner acquired a new domicile in New York City in June 1999 when she made what it refers to as “major life changes that centered around New York City.” The Division relies primarily on the apartment petitioner subleased with her sister in New York City after her graduation from college as evidence that petitioner was beginning the next phase of her life in New York, and alleges it should be viewed as a prime factor demonstrating her intention to acquire a New York City domicile in 1999. Petitioner, then a 22-year old woman, graduated from college in May 1999 with no career plans or aspirations, and intended only to spend some time “finding herself and figuring out what she wanted to do.” She had the desire to travel and have fun, with the financial ability to do whatever she wanted funded by trust funds for living expenses in addition to a \$5,000.00 monthly discretionary allowance. Her sister had obligated them to the 93rd Street apartment by

signing a sublease without petitioner's knowledge prior to May 1999, though petitioner admits agreeing to the shared accommodations when asked by Phoebe. However, for Tantivy, it was merely a place to stop off between her trips to Rhode Island, New Jersey, New Mexico, Idaho, Washington, DC, and Europe, and be with her sister at the same time. The time spent by petitioner in New York was very erratic until early November. Petitioner spent about as much time in Rhode Island, Europe, New Mexico, Idaho, and Washington, DC, together as she spent in New York. Her life was going to be the same whether she sublet that apartment or not, and if she decided to leave it at anytime, her sister would assume petitioner's share, since both received wire transfers from family funds to pay their living expenses. She contributed to the sublease of the apartment, not to begin the next chapter in her life, but because she could. The next chapter was simply not yet beginning for her and, in this particular case, to attribute the sublease bearing her name with any different significance than the apartment she rented in North Carolina while at Davidson is assigning far too much importance to it.

F. The Division asserts that petitioner developed a "general habit of life" after June 1, 1999, which did not include returning to New Jersey. As to petitioner's "general habit of life" of spending time away from New Jersey, the Division correctly points out that throughout petitioner's high school years at boarding school in Massachusetts, college in North Carolina, and school breaks where she often spent time in Rhode Island and Palm Beach, petitioner spent little time in New Jersey. There is no assertion, however, that for any portion of those eight years petitioner became domiciled anywhere other than New Jersey. After she graduated from college, her "general habit of life" was consistent with the prior eight years of independent living, spending less time in New Jersey than other locations. Not all families have a primary residence and two second homes where they congregate, and the time spent in Rhode Island and

Palm Beach with her family did not in any way lessen her roots in New Jersey as the Division has suggested. Petitioner does not deny that she spent more time in New York than any other single location for the period from June to the end of December 1999. However, she spent as much time in numerous other locations as she spent in New York. She does not deny that she had family ties in New York with her sister also living there. She also spent a great deal of time among five or six other locations, including other family homes where her parents would have been. She became reacquainted with Thomas Bostwick on Long Island in August 1999 and spent much of August dating him on Long Island, until his return to Washington, DC.

G. The Division argues that petitioner moved her near and dear items to her apartment. Petitioner merely took as much clothing as she could fit in limited closet space. Clothing is not usually referred to as “near and dear” items, which are more akin to photos, personal decorations, such as art, or other personal items acquired in one’s life. If petitioner were making a permanent move, it is more likely she would have secured a storage facility for what she could not fit in the apartment in order to have her possessions near and accessible. There was no evidence of this. The Division inaccurately characterizes as permanent petitioner’s move of only seasonal clothes to the apartment.

Petitioner kept her New Jersey driver’s license, kept her car registered in New Jersey, opened Chase Manhattan bank accounts on June 18, 1999 with her New Jersey address, had her college furniture moved to New Jersey and kept much of her clothing and other personal items in New Jersey. These actions are also consistent with a finding that petitioner did not have the intention of changing her domicile to New York.

H. The Division also relies in part on the temporary employment positions assumed by petitioner between June and December 1999, which totaled not more than six or seven weeks,

both short-term in nature from their inception. Petitioner does not deny her brief stints of employment in New York City, though they were not indicative of any career path being pursued by her. Her first employment position, at the end of September, was for an art festival for a week. The second position was to assist in the launch of Sotheby's.com, also temporary in nature. In fact, although the position had the potential to last three months, it ended in four to six weeks. Any reliance upon the two temporary employment positions also overstates her connection to New York City. Petitioner simply did not have any idea what she wanted to do after college, and made no decisions in any particular direction.

I. Expressed clearly in petitioner's testimony, provided in a forthright and credible manner, was the lack of any intention to change her domicile or set up permanent residence in New York City. She was truly wandering from place to place at the time, trying to find herself, traveling and having fun in the meantime. It was clear from her testimony, confirmed by the testimony of Thomas Bostwick and Julie Bedard, that the Division's assessment that petitioner made "major life changes" in June 1999 was incorrect.

J. Petitioner's representative notes that the Division has spent much of its time arguing that actions by petitioner during the last few months of 1999 somehow prove a change of domicile on June 1, 1999. The only action by petitioner that took place before the alleged change in domicile was her acquiescence in subletting the 93rd Street apartment. It was a temporary sublease of a furnished apartment, far from the concept of a fixed and permanent home. Wealth permits individuals to live in a manner that is unlike the average person. Actions that may very well be indicative of a "life change" for the average person, do not necessarily result in the same conclusion in the case of individuals with significant wealth. That is not to say

the applicable rules are different, but rather the conclusions one may draw from actions are not necessarily the same. I believe that to be the case here.

Every one of petitioner's actions falls short of proving that she intended to change her domicile to New York. Even all of petitioner's actions taken together do not show petitioner's intent to make New York State and New York City her fixed and permanent home. The Division has failed to meet its burden of proof to show that petitioner changed her domicile to New York State and New York City in June 1999.

K. Many matters involving a change of domicile often involve a change to a location where, if the change is proven, some significant tax benefit will also result. This is not the case here. The capital gains which substantially comprised petitioner's income for 1999 were reported on her New Jersey resident return where she paid a tax liability in the amount of \$285,838.00 that year. The allocation of the items of capital gain to New York State and New York City for the portion of the year the Division claims petitioner was domiciled in New York would bear a cost of \$273,210.00. Thus, the overall tax liability as a full-year resident of New Jersey, as compared to liability which would have resulted from her part-year status in New York, had domicile been established, would have cost petitioner a potentially lower, or comparable, tax liability in the long run. Certainly, there was no tax benefit sought or attained by petitioner.

L. Regarding whether petitioner changed her domicile in November 1999 when petitioner unexpectedly took a position with Sotheby's.com, I find this to have been no more a commitment to New York than anything else she had done that year. She was still not searching for employment when that opportunity presented itself, and she had just spent two months flying back and forth to Washington, DC, to be with Thomas Bostwick. The position was temporary in

nature and not intended to last beyond three months. The position actually lasted only four to six weeks. Nothing in this choice lends support to the Division's argument that petitioner intended to change her domicile and make New York her fixed and permanent home. Thus, I do not find that petitioner changed her domicile to New York at any time during 1999.

M. Inasmuch as the domicile issue for tax year 1999 is decided in petitioner's favor, the issue of penalty is moot.

N. The petition of Tantivy Gubelmann Bostwick is hereby granted, and the Notice of Deficiency dated June 21, 2004 is canceled.

DATED: Troy, New York
April 12, 2007

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE