STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **PETER AND PATRICIA HANDAL** | : | DETERMINATION<br>DTA NO. 821996 |
| for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1999 and 2000. | : | |

Petitioners, Peter and Patricia Handal, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1999 and 2000.

A hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 25 and 26, 2008, with all briefs submitted by June 5, 2009, which date began the six-month period for the issuance of this determination. Petitioners appeared by Jack Trachtenberg, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Michelle M. Helm and Herbert M. Friedman, Esqs., of counsel).

## *ISSUES*

I. Whether the Notice of Deficiency should be cancelled on the grounds that it is barred by the statute of limitations.

II. Whether the Division of Taxation bears the burden of proof with respect to domicile.

III. Whether petitioners have shown that they were not domiciled in New York City during 1999 and therefore not subject to tax as resident individuals pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

IV. Whether the Division of Taxation's domicile determination lacks a rational basis.

V. Whether petitioners have shown that they were not present in New York City for more than 183 days during 1999 and therefore not taxable as resident individuals for that year pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

VI. Whether petitioners have shown that penalties imposed herein pursuant to Tax Law § 685(b) and (p) should be abated.

## *FINDINGS OF FACT*

1. On September 12, 2005, following an audit, the Division of Taxation (Division) issued to petitioners, Peter and Patricia Handal, a Notice of Deficiency which asserted additional New York City resident income tax due of $25,536.00 and $33,018.00 for the years 1999 and 2000, respectively. The Notice of Deficiency also asserted interest and penalties for negligence and substantial understatement of tax pursuant to Tax Law § 685(b) and (p) for each tax year.

2. Prior to the hearing in this matter, petitioners and the Division entered into a settlement agreement resolving the liabilities asserted by the Division with respect to the 2000 tax year. Consequently, the question of whether the Division properly determined petitioners to be residents of New York City for the 2000 tax year is not an issue in this determination.

3. Petitioner Patricia Handal is a petitioner in this matter solely because she filed a joint New York State resident income tax return with her spouse, Peter Handal, for the years 1999 and 2000. The liabilities asserted by the Division in this matter relate entirely to income received by

Peter Handal. Accordingly, unless otherwise indicated, all references to petitioner shall refer to Peter Handal.

4. Petitioners timely filed a joint New York State resident income tax return (Form IT-201) for the 1999 tax year. The return reported a New York state income tax liability of $40,040.00 based on petitioners' reported status as residents of East Hampton, New York. With respect to New York City, petitioners filed as nonresidents. Petitioners fully satisfied their New York State income tax obligations for 1999.

5. By letter dated June 12, 2002, the Division commenced an audit of petitioners' 1999 and 2000 New York State income tax returns. The audit focused on petitioners' filing status as nonresidents of New York City. Upon completion of the audit, the Division determined that petitioners were liable for additional New York City personal income tax on the grounds that they were residents of the City for the 1999 and 2000 tax years. The audit found that petitioners were domiciled in New York City and that they were statutory residents of the City, i.e., that they maintained a permanent place of abode and spent more than 183 days in the City for each tax year.

6. Petitioner Peter Handal was born in Brooklyn, New York, and lived there until he was in fifth grade, when he moved with his family to New Rochelle, New York. In 1966, he married his wife, Patricia Handal. Patricia was born and raised in Cleveland, Ohio.

7. After their marriage, petitioners moved to New York City. At first, they lived in rental apartments. The first was a one-bedroom apartment on East 49th Street. The second was a two-bedroom apartment on 65th Street. In 1975, petitioners purchased a cooperative apartment on East 72nd Street.

8. The East 72nd Street apartment was located in a large, prestigious building constructed in the 1920s. The East 72nd Street building's prestige results from the fact that it contains relatively few apartments as compared to other buildings its size. The apartments in the building are thus quite large. Petitioners' apartment was approximately 4,000 square feet in size and contained 14 rooms, including 5 bathrooms. Petitioner described the apartment as a "showcase."

9. In 1969, after a stint with Exxon, petitioner began working for his family's business, Victor B. Handal & Bro., Inc., which was founded by his father in 1936. When petitioner joined the business, it was a general trading company that imported items such as artificial flowers, radios, flannel shirts and slippers, mostly from Japan, Taiwan and Hong Kong. Over time, the business began importing from more countries and it opened up a manufacturing operation in Baltimore, Maryland. The main offices of the company were located at 277 5th Avenue, near Manhattan's Garment District.

10. Petitioner's father died in 1973. Petitioner's uncle then took over the company, which subsequently found itself in significant economic trouble. When the company's lenders (mostly banks) became aware of this trouble, they approached petitioner who, at the time, was in charge of the company's finances. With the support of the banks and the rest of his family, petitioner took over the business and became CEO in 1975. Under petitioner's leadership, the family business was transformed from a general trading company to an importer and manufacturer of children's apparel and accessories.

11. In 1984, petitioner formed a new company, called J4P Associates, for the purpose of investing in real estate located in Baltimore, Maryland. The property consisted of eight acres with two buildings and a parking lot. Initially, petitioner put the Baltimore property to use as a distribution and processing center for the family business. When it gradually became clear to

petitioner that this was not the "highest and best use" of the property, he responded to a request for proposal to construct a courthouse and lock-up for the State of Maryland. J4P was ultimately chosen for the project, the facility was built and J4P began renting the facility in 1988. J4P continues to own the courthouse and lock-up and leases it to Maryland for the state's use. By 1990, the distribution and processing center for the family business was moved elsewhere and the Baltimore property was used exclusively as commercial rental property.

12. During the time petitioner worked at the family business, petitioners considered themselves to be quintessential New Yorkers. Petitioner regularly reported to the company's main offices in Manhattan. He sometimes walked to work down 5th Avenue from his residence on East 72nd Street. Mrs. Handal worked as a teacher on 23rd Street and also in Harlem during that time. They also entertained frequently at their East 72nd Street apartment. This was done most often in connection with the family business because it was crucial to establish and maintain good relationships with customers, clients, suppliers, and bankers that provided loans to the company. Sometimes the events were simple, such as a cocktail and dinner party for a few couples. Other events were much larger. In one case, petitioners hosted a large dinner for participants in an international shoe show, which was attended by 186 people from the shoe industry. The large size and grandeur of the apartment made it particularly appropriate for such events, not only because the apartment could handle a large number of people, but also because impressing the guests with the beauty of the building and apartment was good for cultivating relationships.

13. In 1986, petitioners purchased a second home on Terbell Lane in East Hampton, New York. They bought the Terbell Lane home as a place to go on weekends to get away from the

City and the pressures of the family business. Petitioners had previously spent time in Montauk, which is east of East Hampton, and had rented places there when they visited.

14. The Terbell Lane residence was approximately 2,000 square feet in size. It was smaller and more basic than the East 72nd Street apartment. Petitioners soon "fell in love with the community" of East Hampton. In petitioner's words "it's a nice place. . . . [i]t's a really beautiful town . . . it's just one of those picture perfect kind of towns."

15. During his tenure as CEO of the family business, Mr. Handal regularly engaged in strategic planning for the company. Around 1989, these planning efforts led petitioner to become concerned about the long-term financial health and viability of the family business. Petitioner was of the opinion that the retail industry, the well-being of which was vital to the success of the business, was becoming excessively leveraged and overextended with too much retail space. Petitioner was also concerned that the economy was headed for a downturn and perhaps a recession, the result of which would likely be a high number of bankruptcies in the retail industry.

16. In light of these economic conditions, petitioner became concerned not only with the well-being of the family business, but also with his personal finances. At the time he was the personal guarantor for all of the business's debts, which ran in the tens of millions of dollars. His ownership interest, however, was only 21 percent of the stock. The other members of his family (his mother, two brothers and a sister) owned the rest. The risk of an economic downturn was, therefore, particularly troublesome to petitioner on a personal level. Consequently, he decided the time was right to make a change and leave the family business. In Mrs. Handal's words, petitioners together decided that their "lives should go in a different direction."

17. Petitioner and his family considered various options for the family business, the first of which was to sell. The only interested buyer, however, insisted that petitioner sign a five-year contract to stay with the company as CEO. This was unacceptable to petitioner. Another option was to have petitioner's younger brother run the business. This proposal was unacceptable to petitioner's other siblings.

18. With no viable means by which to continue the business (short of petitioner's remaining as CEO which, as noted, was unacceptable to him), petitioner decided to liquidate. The company was profitable at the time, so petitioner determined to wind it down in an orderly manner. Over a two-year period, the company sold its trading operations in Taiwan and its factories in Baltimore. The remainder of the company's assets were liquidated and sold to shareholders. The winding down process was completed by early 1992.

19. Petitioner's siblings were extremely upset and angry with his decision to leave the family business. At one point petitioner's siblings sued petitioners, accusing them of stealing funds from the company as travel and entertainment expenditures. Ultimately, the family fight over his departure from the business left petitioner completely estranged from his family. The rift was so deep that no one in his family told petitioner when his mother died in 2003. Instead, petitioner learned of it by reading the obituaries.

20. The recriminations that followed the decision to leave the family business took an emotional toll on petitioners and contributed significantly to a desire for change in their personal lives. Mrs. Handal developed a dislike for the East 72nd Street apartment which both petitioners associated with the family business. This desire for change, together with Mr. Handal's departure from the family business, led petitioners to look away from New York City for a place to live.

21. In 1992, petitioners significantly downsized their New York City residence. Specifically, on April 30, 1992 petitioners purchased a 900-square foot apartment in a residential hotel on Park Avenue. The purchase price was $105,000.00. The hotel consists of approximately 130 units. There is a restaurant in the building and maid service. At the time petitioners purchased their apartment, it had a refrigerator, but did not have a separate kitchen. Petitioners subsequently put in an oven.

22. Before purchasing the Park Avenue apartment, petitioners entered into a contract to sell their East 72nd Street apartment. The sale closed on May 21, 1992. The price was $2.35 million.

23. After Mr. Handal's departure from the family business by the beginning of 1992, petitioners considered moving to the Baltimore and Washington, D.C., areas as well as East Hampton. At that point, Mr. Handal had no active business in New York City. Petitioners ultimately chose East Hampton. They sold the Terbell Lane residence in September 1993 and on October 18, 1993 purchased a house on James Lane, East Hampton, New York.

24. Petitioners' James Lane residence is a large 8,600 square foot home that sits on nearly one acre of land. The purchase price was $950,000.00. It overlooks the town pond, is extremely private and is located in an historic district. Amenities include an in-ground pool, outdoor shed, garage, sauna and finished basement. It is close to the ocean and within walking distance to the village, which petitioners like because Mr. Handal enjoys running on the beach and both petitioners enjoy taking walks into town. Mrs. Handal enjoys ice-skating on the pond, which is reminiscent of a pond in the backyard of her childhood home.

25. Petitioners invested approximately $1 million to gut and renovate the James Lane residence immediately after it was purchased. The work was extensive and included renovations

and remodeling to the bathrooms, kitchen, living room, dining room, bedrooms and garage. A fully operational home office was built for Mr. Handal. Some of the house's support beams were replaced, a new roof was installed, the boiler was replaced, the house's exterior was redone and new windows and doors were installed. Petitioners also insulated the home to winterize it for year-round use. When asked why such extensive renovations were undertaken, petitioner explained: "It's a beautiful home and it was going to be the place that we were going to be living, it was going to be our home. We wanted to have it comfortable."

26. The economic impact of the James Lane renovations is reflected in the homeowners insurance policies for the periods immediately before and immediately after the renovations were completed. In January 1994, before the renovations were completed, petitioners obtained an amended policy from Allstate Insurance Company that covered the home based on a replacement cost of $505,639. Following the renovations, the home was revalued by Chubb Insurance. As a result, the replacement cost was increased to $1,508,000. The renovations also increased the appraised fair market value of the James Lane home, which was estimated to have grown to $7 to $7.5 million by February 2006.

27. The renovations to the James Lane home were completed around April 1994. Thereafter, petitioners moved almost all of their furniture and belongings from the East 72nd Street apartment into the James Lane home. Many of the items that were moved, including beds and furniture, were delivered from a storage facility located in Wainscott, New York, which is the town next to East Hampton. These items had been put in storage after petitioners had sold the East 72nd Street apartment in 1992 because there was no room for them in the Park Avenue apartment and because petitioners wanted these items to be at James Lane and not the apartment. According to Mrs. Handal, the Park Avenue apartment was a "hotel . . . not a home."

28. In addition to furniture and other household items, petitioners also brought with them to James Lane an abundance of their most valuable, prized and cherished possessions. Some of the items moved to James Lane include Mrs. Handal's engagement ring, charm bracelets, and other valuable jewelry; valuable silver, crystal stemware and china; an art collection of over 100 pieces, including works by famous artists such as Rauschenburg, Dubuffet, Nevelson, Youngerman, and Muybridge; antiques, including a collection of "whirligigs" by Jim Leonard (other of his pieces are in the Smithsonian); a collection of Japanese woodcuts and 19th century French caricatures; a large antique majolica collection, including a famous George Jones punch bowl and cheese dish; a set of 1810 antique American chairs, an antique American mirror (the twin of which is in the Metropolitan Museum of Art), an 18th century French mirror from the Rockefeller collection, two ancient Egyptian bronze pieces from 300 B.C. and several Chinese antique pieces.

29. Petitioners also moved family pictures and heirlooms to James Lane, including scrap books, year books, a silver centerpiece engraved by Mr. Handal's grandmother for his parents' 25th anniversary, two antique pieces of furniture from Mr. Handal's childhood home, a chess set collection once owned by Mr. Handal's father, and a collection of leather-bound books. Petitioner also decorated his new home office at James Lane with some valuable personal items. These included his graduation pictures, a framed copy of the article and picture that the Cleveland Plain Dealer ran of petitioners' wedding, and the sign that petitioner carried in the famous 1963 March on Washington. According to Mrs. Handal, petitioners brought these items to James Lane because it, and not the Park Avenue apartment, was home.

30. Petitioners' homeowners insurance policies, dating back to 1994 verify that they transferred their near and dear items to East Hampton after the renovations to the James Lane home were completed in April 1994. While the renovations were in progress, petitioners

maintained a homeowners policy for James Lane that did not have a rider covering their jewelry and fine arts. After moving into the house, petitioners obtained a policy through Chubb, effective July 26, 1994, that covered their jewelry and fine art.

31. The homeowners insurance policies for the 1999-2000 audit period demonstrate that petitioners have continued to keep their near and dear items in East Hampton since moving to James Lane. For the period July 26, 1999 through July 26, 2000, the James Lane residence was covered for home contents and liability, while the Park Avenue apartment was covered for liability only. The James Lane premium was $8,662, the Park Avenue premium was $37. The James Lane policy covered contents up to $913,500. There was no coverage for contents on the Park Avenue apartment policy. There was also a special rider for jewelry and fine art on the James Lane policy.

32. After moving into the James Lane home, petitioners became more active in the Most Holy Trinity Church, the church in East Hampton they joined after purchasing the Terbell Lane home in 1986. Petitioners were regular churchgoers and attended Sunday Mass at Most Holy Trinity Church on most Sundays in 1999. In October 1995, they began donating to the church on a monthly basis. Petitioners also made special contributions for Easter, Christmas and for some special causes (e.g., the Angel Fuel Fund). Since 1995, petitioners have donated over $72,000 to the church. Petitioners' other East Hampton donations include modest contributions to the Historical Society ($575 since November 1995) and the East Hampton Fire Department ($700 since June 1994).

33. Petitioners also became more actively involved in other aspects of East Hampton Village affairs after moving into their James Lane home. They occasionally participated in public forums regarding the Village Board's "Comprehensive Plan," went to Zoning Board of Appeals meetings, became members of The Village Preservation Society, and in October 1995

agreed to serve as members of the East Hampton Library Special Advisory Council. In addition, Mrs. Handal joined the Ladies Village Improvement Society and the East Hampton Historical Society.

34. Petitioners registered to vote in East Hampton after moving there in 1994. Since then they have voted in general and primary elections in East Hampton, beginning with the general election in November 1994. Since moving to East Hampton, petitioners have also obtained drivers licenses in East Hampton, registered their vehicles in East Hampton, changed their mailing address to their James Lane home, and obtained safe deposit boxes in nearby Bridgehampton and Southhampton. Petitioners were called for and served jury duty in Suffolk County beginning in June 1996. (East Hampton is in Suffolk County.) Petitioners also used Long Island doctors and the Southhampton hospital in connection with emergency medical situations.

35. Petitioners have also developed close and lasting friendships in East Hampton, some of which date back to 1986 when petitioners purchased their Terbell Lane home. Petitioners' closest friends consider them to be full-time residents of East Hampton. Their friends believe that petitioners view their James Lane home as their primary residence. Over the years, petitioners have, among other things, hosted their friends and Mrs. Handal's family at major holiday and family events in East Hampton. These have included Christmas parties, a four-day New Years party in 1999-2000 for the new millennium, a "Bowling in East Hampton" party and annual East Hampton bike rides. These events have all taken place at petitioners' James Lane home and other locations on the East End of Long Island. After selling their East 72nd Street apartment, petitioners stopped hosting similar types of events in New York City. Petitioners did

virtually no entertaining at the Beekman apartment because they had not prepared or equipped the apartment to do so.

36. Petitioners live in East Hampton on a year-round basis and have done so since moving to the James Lane home in 1994. Petitioners' usage of utilities has been consistent since that time. Petitioners spent approximately $5,400 on electricity and gas during the audit years. Petitioners spent $5,860 on heating oil during the audit years.

37. Petitioners have planted, maintained and grown elaborate and beautiful gardens at their James Lane home. As noted, the James Lane home is on an acre of land and the gardens are landscaped around the property. For Mrs. Handal, gardening is a passion and something she has done since she was a child. Gardening provided her with a great deal of solace as petitioners tried to cope with the stresses brought on by the family fight over the business. Petitioners have spent a great deal of time and money on their gardens. They began the gardens around May 1994 and have spent more than $470,000 on the project since that time.

38. After moving to East Hampton in 1994, and with the liquidation of the family business, Mr. Handal's active business involvement focused initially on J4P, the company that owned commercial real estate in Baltimore, Maryland. Petitioner began traveling to Baltimore "regularly, sometimes once a week, sometimes even twice a week" depending on the need. He worked on "all different levels" of the business, from new development projects to making sure that day-to-day repairs and maintenance were done. Petitioner did his work for J4P either in Baltimore or at his home office in East Hampton. To this day, J4P remains an active and profitable business.

39. In addition to the real estate business, petitioner also started a consulting business, which he operated through an entity called Cowi International Group. Cowi International was

formed in 1989, but did not become active until around 1994. Through Cowi International, petitioner consulted for and served on the boards of several companies. Some of his most active involvement was with Cole Nation Corp. (based in Cleveland, Ohio), Factory-2-U (based in San Diego, California), Tyco Toys (based in Camden, New Jersey), Buster Brown (based in Chattanooga, Tennessee), Joseph A. Banks (based in Baltimore, Maryland), Deni Cler (based in Warsaw, Poland), Fala (based in Gdansk, Poland), and W. Kruk (based in Poznan, Poland). Of its roughly 20 to 25 clients over the years, Cowi International has only had two New York City based clients.

40. Throughout its active existence Cowi International has maintained a small office at various locations in New York City. Cowi's first two such offices were provided at no charge as an accommodation to petitioner by business colleagues and friends. During the audit period, Cowi's office was located on Park Avenue and was approximately 10 feet by 10 feet in size, which was "much, much smaller" than petitioner's home office in East Hampton. Cowi maintained its New York City office to receive mail and for administrative and clerical purposes. Cowi paid a secretary to come to the office for a half-day, twice a week to do such things as open the mail, issue invoices, pay Cowi's credit card bills, and make travel arrangements for petitioner. Petitioner also felt it was important, from a business perspective, to have an address that was not East Hampton. Petitioner believed that an East Hampton address would send the message that "this is just a guy that's retired who is trying to find something to do." On the other hand, having a New York City address would present an image of prestige and help the business to grow.

41. Despite its small administrative office, petitioner testified that Cowi was not a New York City based business. Petitioner did not meet with clients in the New York City office and

he did not perform any of his substantive consulting work in the New York City office. Rather, in providing consulting services, petitioner would travel around the country and world to his clients and do on-site work, which would include such things as interviewing employees, touring facilities and talking to management. Petitioner would then review his notes, formulate his advice, and draft a report for his client's review. This work was done either on the road (e.g., at hotels) or at petitioner's home office in East Hampton.

42. Throughout the 1990s, including the audit period, Cowi was smaller in size and scope than the operations of J4P, located in Baltimore. Petitioners have generated the majority of their income and net worth from J4P. J4P also had more employees and office space than Cowi. According to petitioner, J4P is "a very, very major part of [his] business, [his] life, actually." Upon moving to East Hampton, the majority of petitioner's work-related time was spent outside of New York City, working on matters for J4P either in Baltimore or East Hampton. Petitioner's involvement with Cowi, including extensive travel and increased stopovers in New York City was not in full swing until the later 1990s.

43. Through Cowi, petitioner developed a strong relationship with one of his clients, Dale Carnegie & Associates. Petitioner was asked to join Dale Carnegie's board of directors in mid-1999. In November 1999, he became the chief operating officer of the company, and on January 1, 2000, he became CEO. During the audit years, Dale Carnegie's principal offices were in Garden City, New York, which is on Long Island. In early 2001, petitioner moved the offices of Dale Carnegie from Garden City to Hauppauge, New York, a location that is much closer to East Hampton.

44. Because of time pressures and his commitment to Dale Carnegie, petitioner ultimately had to scale back his consulting work. In November 2001, petitioner abandoned Cowi's Park

Avenue office in New York City. At that time, the contents of the office were moved to the Hauppauge office of Dale Carnegie. Petitioner regularly reported to the Hauppauge office, and also continued to travel extensively to perform his duties and responsibilities as CEO.

45. The distance between petitioner's Park Avenue apartment and his former Garden City office is approximately 23.2 miles, a distance that can take up to 1 hour and 30 minutes in traffic by car. The distance between petitioner's East Hampton home on James Lane and the Garden City office is approximately 84 miles, a commute that petitioner typically covered in roughly one and a half hours. The distance between the Park Avenue apartment and James Lane is about 104 miles. Petitioner routinely commuted from East Hampton to Garden City. He would also drive into the City when he had to stop over there to catch a flight for his business travel.

46. For statutory residency purposes, the parties stipulated to a certain number of days in and out of New York City during 1999, and the resolution of the remaining "disputed days" for statutory residency purposes centers solely upon the question of whether petitioner spent any part of any given day in New York City. Based on this standard the parties stipulated that petitioner spent at least some part of 173 days in New York City in 1999. Applying the same standard, the record shows that petitioner spent some part of approximately 163 days in East Hampton.

47. An analysis of the record, focusing not just on presence in New York City on any given day, but also on petitioner's whereabouts throughout the entirety of the day shows that many of petitioner's "New York City days" for statutory residency purposes are really "partial New York City days," with part of the day (the morning or evening) spent in East Hampton or part of the day spent traveling outside New York. The record shows that, when not traveling outside New York, petitioner was generally in East Hampton from Friday evening until Monday morning. Sometimes, his weekend in East Hampton began on Thursday evening and sometimes

it continued through Tuesday morning. Because petitioner's typical work week was defined by business travel, approximately 105 of petitioner's 173 stipulated New York statutory days involved either traveling to and from somewhere outside of New York City, including traveling to and from the East Hampton house. Based on the documentation submitted it appears that petitioner spent approximately 62 full days in New York City in 1999.

49. A small portion of petitioners' time in New York City during the audit period consisted of seeing doctors in Manhattan. These doctors were renowned in their respective fields and had been treating petitioners for specific conditions, including Mr. Handal's heart, for upwards of 20 years. Petitioners continued to use these doctors in order to ensure a continuity of care, and also because of concerns regarding the quality of similar care in East Hampton.

50. During the audit period, petitioners were members of the Metropolitan Club, a social club located at 5th Avenue and 60th Street in New York City. Mr. Handal joined the club as a lifetime member in the 1970s. He did not pay annual dues. He joined the club during the time he was involved in the family business and used it as a place to entertain clients. He has used it less since he sold the family business. During the audit period, he would occasionally go there for lunch or dinner.

51. Petitioners were also members of the Association of Knights and Ladies of the Holy Sepulchre, a Catholic charitable organization based in the city that supports a Catholic church in the Holy Land. Mrs. Handal was a member of the Cosmopolitan Club, a private club for women located in the city that she used occasionally for lunch or dinner. Petitioners were also members of the Metropolitan Museum of Art, located in the City. Their membership enabled them to visit the museum without paying an admission fee each time and to receive discounts at the museum store.

52. Petitioners used New York City dry cleaners and a New York City hair salon during the years under audit. Additionally, during the same 1999-2000 period, petitioners occasionally attended church in New York City. They would sometimes attend special masses, such as Christmas or Easter.

53. As noted previously, as compared to James Lane, petitioners did not consider their Park Avenue apartment as home. Mr. Handal described the Park Avenue apartment as a "hotel substitute" (although it literally was a hotel) to be used as a place to sleep when they were in the city to visit friends, go to museums, plays or the opera, or when petitioner needed to stopover in the city for business or business travel.

54. In 1999, petitioners added a 700-square foot downstairs unit to the Park Avenue apartment. This addition did not change the manner in which petitioners used the apartment. Mr. Handal was initially opposed to purchasing the additional unit because he did not see the need for it. He was convinced to buy the unit by Mrs. Handal who believed it would be a good investment and increase the value of the property. Petitioners purchased the downstairs unit for about $270,000. The two units combined are now worth about $4 million. Petitioners rarely used the downstairs unit. They did permit friends and family (e.g., Mrs. Handal's nephew) to use the downstairs unit.

55. Petitioners were asked to describe their intent and state of mind in deciding to purchase the James Lane home. Mr. Handal testified that they were "delighted to get out of New York and get out of 4 East 72nd Street" and that [t]he intent was to make the James Lane house our home." He also stated that they have no plans to leave James Lane because "it is home, it is home. You get a nice feeling when you get there. I mean you really feel like home." Mrs. Handal testified to a similar sentiment:

> [Y]ou know, you hear I'm living on Park Avenue, oh my gosh, I was living in a hotel. It was to keep, again, the story - the story was that, you know Peter had

> a business. Peter didn't have a business. You know, it was that we lived on Park Avenue. We didn't live on Park Avenue. It was a hotel for goodness sakes. Our heart, our mind, our home, our love, you know, our comfort was in East Hampton.

56. The parties stipulated that petitioner was physically present in New York City on 173 days in 1999 and that he was not physically present in New York City on 165 days in 1999. In their proposed findings of fact petitioners conceded that Mr. Handal was physically present in New York City on the following additional six days: August 16, October 22, November 2, 8, 9, and December 24. In its brief, the Division conceded that petitioner was not physically present in New York City on the following additional two days: June 12 and November 6. Accordingly, the parties do not dispute that petitioner was physically present in New York City on 179 days and that he was not physically present in New York City on 167 days. 19 days thus remain in dispute. The following is a list of such days and a summary of the relevant evidence in the record regarding petitioner's whereabouts on each such day:

*Monday, February 15*. This is Presidents' Day. Petitioners spent Saturday, February 13, and Sunday, February 14, in East Hampton. On Sunday, they visited with friends who left East Hampton in the afternoon. Phone records for Monday, February 15, indicate several calls from the East Hampton phone between 8:25 A.M. and 4:18 P.M. and New York City calls at 9:17 P.M. and 9:47 P.M. Petitioner's diary lists no appointments for this date. Petitioner was in New York City on Tuesday, February 16.

*Saturday, February 20*. Petitioner flew to Poland from JFK Airport at 5:55 P.M. Petitioner testified that he was unsure whether he departed for the airport from East Hampton or New York City. There are no records of any East Hampton calls. Phone records indicate New York City calls at 9:56 A.M. and 10:14 A.M. and calls from Queens at 4:49 P.M., 5:01 P.M. and 5:03 P.M. February 19 was a New York City day.

*Sunday, March 14.* Petitioner's diary indicates that friends visited at 3:00 P.M. Petitioner testified that this visit took place in East Hampton. Phone records show an 8:31 P.M. call from New York City. Phone records also show a New York City call at 9:02 A.M. the following morning.

*Monday, March 15.* Petitioner's diary shows a 9:00 A.M. conference call on this day. Petitioner testified that the diary was inconclusive as to the location of the conference call. Phone records show a 9:02 A.M. call from New York City as well as several other calls from New York City during this day. Petitioner departed on a trip to Tennessee from Laguardia Airport at 3:30 P.M. There was a Visa credit card purchase at a restaurant in New York City and ATM withdrawals from New York City bank locations.

*Sunday, March 28.* This is Palm Sunday. There are no records of any phone calls or any credit card charges. The diary is blank. Given the lack of any diary entries and the fact that it was Palm Sunday, petitioner testified that he did not do anything special on that day. Saturday, March 27 was an East Hampton day.

*Sunday, April 18.* Credit card records indicate a gasoline purchase in Roslyn, New York, at 4:56 P.M. Roslyn is in Nassau County and is situated between East Hampton and New York City. Petitioner's diary indicates that he was to pick up his sister-in-law at Laguardia Airport at 7:50 P.M. Credit card records show a purchase at a restaurant in New York City. An entry in the diary for this date reminds petitioner to "get SVF school #'s at 575," an apparent reference to the address of petitioners' New York City apartment, located at 575 Park Avenue. SVF refers to St. Vincent Ferrer school. Saturday, April 17, was a non-New York City day.

*Monday, July 5*. Both petitioners arrived in New York via JFK airport at 3:10 P.M. returning from an 11-day trip to Spain. Petitioner's diary indicates "nuns in EH [East Hampton]," meaning, according to petitioner, that petitioners were allowing some nun friends to

use their East Hampton residence "for a while." Therefore, petitioner surmised, he would have headed to the city apartment upon his return. Petitioner's diary does not list any appointments requiring his presence in the city. Credit card records show New York City credit card charges and phone records show New York City telephone calls at 7:38 P.M. and 9:49 P.M.

*Tuesday, July 6*. Phone records indicate nine New York City phone calls throughout the day. Additionally, credit card records show New York City charges for a dry cleaners, a grocery store and a restaurant. The diary does not list any appointments requiring petitioners' presence in the City.

*Friday, August 13.* Phone records show three New York City phone calls between 9:12 A.M. and 3:12 P.M. Credit card records show a New York City charge as well as a Wainscott, New York, charge. Wainscott is near East Hampton. Petitioner's diary is devoid of any appointments. Saturday, August 14 and Sunday, August 15 are non-New York City days.

*Saturday, September 25.* Petitioner's diary is blank for this date. American Express account records show a charge posted at Word of Mouth Café in New York City. According to petitioner's diary and testimony, on the evening of the 24th, petitioner attended a Dale Carnegie party in Jericho, New York. Petitioner's wife picked him up at the party and they returned to East Hampton.

*Sunday, September 26.* Credit card records show a New York City Visa charge. A receipt indicates a gasoline purchase in Roslyn, New York at 7:19 P.M. There are phone calls from Amagansett, New York, which is near East Hampton, at about 2:00 P.M. There is a New York City phone call at 9:21 A.M. on Monday, September 27. American Express records show a New York City charge and an East Hampton charge posted this date. Petitioner's diary is blank.

*Thursday, October 7*. Petitioner was in the city for dinner with friends scheduled for 6:30 P.M. on October 6. Petitioner could not tell from his diary if he returned to East Hampton

following the dinner. According to his diary, petitioner was in Roslyn for Dale Carnegie meetings beginning at 8:00 A.M. The meetings were held at the Claremont Hotel. Phone records show numerous calls from New York City and Roslyn throughout the day. Petitioner testified that he stayed at the Claremont Hotel.

*Friday, October 8*. Again petitioner's diary indicates an 8:00 A.M. Dale Carnegie meeting in Roslyn. Phone records show many calls from Roslyn throughout the day beginning at 7:09 A.M. Phone records also show New York City calls throughout the day until 6:24 P.M. Credit card records show a New York City Visa charge at Legs Beautiful. Following the Dale Carnegie meeting petitioner took a 7:00 P.M. Amtrak Metroliner from Penn Station to Washington, D.C., where he spent the night.

*Monday, October 11.* Petitioner's diary has no appointments. There is a Visa charge in New York City and numerous New York City phone calls throughout the day. For the previous day, the diary notes that petitioner returned from Washington via the Amtrak Metroliner in the afternoon and also notes an appointment that previous evening in New York City at 7:00 P.M.

*Wednesday, November 10*. Petitioner's diary indicates a 5:30 P.M. appointment with his barber, who is located in New York City. Bank statements show a deposit and withdrawal in New York City. Phone record show five New York City phone calls throughout the day and evening as well as numerous Garden City calls between about 1:00 P.M. and 3:00 P.M.

*Thursday, November 18.* Petitioner returned from a business trip in Ohio. The record does not indicate when petitioner returned. Phone records show a call from Ohio at 6:27 A.M. and New York City calls at 8:41 A.M., 12:24 P.M., 1:14 P.M., 1:38 P.M. and 3:42 P.M. Petitioner's diary indicates a dinner date with friends at 7:30 P.M. The friends live in Manhattan, but have met with petitioner in East Hampton. The diary does not say where petitioner had dinner on the

18th and petitioner did not say either. Credit card records show four New York City purchases. The next day, November 19, is a non-New York City day.

*Wednesday, December 22.* Petitioner's diary lists only a teleconference that could have been conducted from anywhere. Credit card records show a New York City Visa charge and bank statements show a New York City bank deposit and withdrawal. Phone records show several New York City phone calls throughout the day.

*Saturday, December 25*. Phone records show New York City telephone calls in the morning. Petitioners were in New York City for a party at their friends, the Weldons, on Christmas Eve and petitioner did not recall whether they returned to East Hampton following the party.

*Sunday, December 26.* The diary is blank. There are no records of any phone calls or credit card purchases.

57. During the audit the auditor obtained from petitioners' representatives three consents extending the period of limitations for assessment of personal income tax for the year 1999 (Form AU-1). Such forms are commonly referred to, and are referred to herein, as "waivers."

58. The first such waiver (Form AU-1 [6/00]) is dated January 9, 2003 and extends the limitations period to April 14, 2004. This waiver contains the signature of petitioners' former representative, Louis Borodinsky, dated January 22, 2003 and, for the Division, the signature of Kadria Elmarsafi, the auditor's supervisor and team leader, dated January 24, 2003.

59. The second waiver (Form AU-1 [6/00]) is dated December 9, 2003 and extends the limitations period to April 15, 2005. This waiver contains the undated signature of petitioners' former representative, Robert Bandman, and for the Division, the signature of Ms. Elmarsafi dated December 18, 2003. This waiver contains a date stamp indicating receipt by the Division on December 16, 2003 following Mr. Bandman's execution of the document.

60. The third waiver (Form AU-1 [3/03]) is dated November 15, 2004 and extends the period of limitations for assessment to April 15, 2006. This waiver contains the signature of petitioners' former representative, Joseph R. Bodan, dated December 20, 2004, and, for the Division, the signature of Ms. Elmarsafi dated December 22, 2004.

61. The auditor testified as to the proper procedure for obtaining waivers, in relevant part, as follows: An unsigned waiver is sent to the petitioner's representative with a cover letter requesting that all copies of the form be signed and returned to the Division. When the signed waiver is received back from the taxpayer, the signature and content are reviewed and the waiver is presented to the auditor's supervisor for signature and the affixation of the Division's raised seal. The seal is affixed to the waiver form in a box containing the instruction "Validate Below." One "validated" waiver is sent to the taxpayer, one is kept by the supervisor, and one is placed in the audit file. As this process is completed the Division's computer records are updated to reflect the extended deadline for assessment.

62. The originals of the three waivers which were received in evidence each contain the Division's raised seal in the appropriate place on the form.

63. On the first day of the hearing in this matter, the Division offered into evidence photocopies of the three waivers described above. The auditor identified the waivers as having been obtained during the course of the audit and specifically identified the signatures of her supervisor, Kadria Elmarsafi, and petitioners' former representatives. The raised seal of the Division was not visible on the photocopies of the waivers which were received in evidence without objection.

64. The auditor completed her testimony on the first day of the hearing in this matter and was not present for the afternoon of the second day. At that time, after all witnesses had testified, the Division offered in evidence an original of the waiver dated January 9, 2003, which, as noted,

bore a raised seal. Over petitioners' objection, the original of the January 9, 2003 waiver was received in evidence. The Division also requested that the record be kept open for the submission of originals of the December 9, 2003 and November 15, 2004 waivers. Over petitioners' objection the Division's request was granted. On December 2, 2008, the Division of Tax Appeals received from the Division originals of the December 9, 2003 and November 15, 2004 waivers. These original waivers were received in evidence.

65. Prior to hearing, petitioners' representative served a subpoena on the Division pursuant to CPLR 2302 demanding, among other documents, originals of the three waivers. Prior to hearing the Division provided only copies of the waivers.

66. Petitioners submitted proposed findings of fact numbered 1 through 111. The following proposed findings of fact are accepted and have been incorporated into the Findings of Fact herein: 1-3, 5-7, 9, 11-16, 19, 23-33, 35, 37-46, 48-50, 80, 82-84, 86-88. The following proposed findings of fact are unsupported by the record and are therefore rejected: 4, 8, 10, 17, 18, 20-22, 34, 36, 47, 81, 85, 89-94, 96-103, 105-107. The following proposed findings of fact are rejected as irrelevant: 51 through 79, 95, 104, 108. In ruling on petitioners' proposed findings of fact, if any part of a proposed finding is unsupported by the record or is irrelevant the proposed finding has been rejected in its entirety.

## *CONCLUSIONS OF LAW*

***Issue I***

A. Petitioners assert that the Notice of Deficiency was barred by the statute of limitations. In order to establish such a statue of limitations defense petitioners must "go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period" (***Matter of Kropf***, Tax Appeals Tribunal, March 21, 1991).

B. Generally, there is a three-year period of limitations for assessment of personal income tax (Tax Law § 683[a]). Here, petitioners' 1999 income tax return was filed on or before April 15, 2000 and the subject Notice of Deficiency was issued on September 12, 2005, well beyond the three-year period. As an exception to the general rule, however, Tax Law § 683(c)(2) provides for an extension of the limitations period by agreement as follows:

> Where, before the expiration of the time prescribed in this section for the assessment of tax, both the tax commission and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

C. Petitioners' statute of limitations defense rests on its claim that the originals of the consent forms which were received in evidence should be disregarded and the copies are insufficient to establish a proper extension under Tax Law § 683(c)(2). Petitioners' claim is without merit.

There is no question in the instant matter that the requirements for an extension under Tax Law § 683(c)(2) have been met. Specifically, each of the consents unambiguously provides for an agreement to extend the limitations period for the 1999 tax year to a specific date. Each of the waivers was signed by petitioners' then-authorized representatives and on the Division's behalf by Kadria Elmarsafi, the auditor's supervisor and team leader. There is no question that Kadria Elmarsafi was authorized to sign the waivers on behalf of the Division and there is no question as to the authenticity of her signature. Further, as indicated by the dates written thereon, each of the waivers was signed by the authorized representatives prior to the expiration of the relevant limitations period.[1] Additionally, as shown by the originals of the waivers, each bears the Division's raised seal affixed thereon in accordance with the Division's standard procedures.

---

[1] Although Mr. Bandman's signature is undated on the December 9, 2003 consent, considering that his signed consent was received by the Division on December 16, 2003 (and subsequently signed by Ms. Elmarsafi on December 18, 2003), it is clear that Mr. Bandman signed the consent prior to the expiration of the relevant period.

The parties thus mutually and timely agreed to the extension of the limitations period for assessment to April 15, 2006. The Notice of Deficiency issued on September 12, 2005 was therefore timely. Accordingly, petitioners have not established a prima facie case showing that the subject notice was issued after the expiration of the statutory period and their limitations defense fails.

D. Contrary to petitioners' contention, under the facts and circumstances of this case, the photocopies of the consents, on which the Division's seal was not visible, were sufficient to establish timely extensions of the limitations period pursuant to Tax Law § 683(c)(2).

Tax Law § 683(c)(2) contains similar language to and is thus modeled after Internal Revenue Code § 6501(c)(4)[2] and therefore Federal cases may properly be used for guidance (***Matter of Riehm***, Tax Appeals Tribunal, April 4, 1991, ***confirmed*** 179 AD2d 970, 579 NYS 2d 228 [3d Dept 1992], ***lv denied*** 79 NY2d 759, 584 NYS2d 447 [1992]).

The term agreement as used in Internal Revenue Code § 6501(c)(4) means "a manifestation of mutual assent" (***Piarulle v. Commr***., 80 TC 1035, 1042 [1980]). It is the objective manifestation of mutual assent as evidenced by the parties' acts that determines whether the parties have made an agreement (***Kronish v. Commr***., 90 TC 684, 693 [1988]).

Applying these principles to the instant matter, there is no doubt that petitioners and the Division reached an agreement in writing to extend the limitations period pursuant to Tax Law § 683(c)(2). The mutual assent of the parties to the agreements is manifested by the signatures of petitioners' former representatives and the signature of Kadria Elmarsafi. Given the clear intent of the parties to agree to extend the limitations period, Kadria Elmarsafi's undisputed status as an

---

[2] IRC § 6501(c)(4)(A) provides for extension by agreement of the limitations period for assessment of Federal income tax, in relevant part, as follows:

"Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, . . . the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

authorized signatory for the Division and the unchallenged authenticity of her signature, the affixation of the seal is not necessary to show the Division's assent to the waiver agreements and the lack of a seal is properly considered a technical defect in the consent form which does not render the consents ineffective. Indeed, to deem the consents ineffective under the present circumstances would run contrary to the well-established public policy that "favors full and uninhibited enforcement of the Tax Law" (***Matter of Turner Constr. Co. v. State Tax Commn***., 57 AD2d 201, 394 NYS2d 78, 80 [3d Dept 1977]; ***see also Matter of Goetz Energy Corp***., Tax Appeals Tribunal, November 18, 1999).

E. Petitioners contend that, under Tax Law §§ 172 and 175, any instrument that the Commissioner of Taxation is authorized or required to sign must contain the Commissioner's seal and signature. Pursuant to these sections, if the seal and signature are present, then no further acknowledgment of the execution of the document is necessary and the document "shall be received in evidence" in the same manner as a deed. As petitioners note in their brief, "a properly validated waiver is 'self-authenticating' for evidentiary purposes." Petitioners further contend that if a waiver lacks an authorized signature or seal, it should be deemed invalid.

This contention is rejected. While Tax Law §§ 172 and 175 direct the Commissioner to affix her signature and the official seal to documents, the statutes do not provide that the failure to affix the seal renders the document invalid. Indeed, it appears that the purpose of these provisions is to provide for the authentication of official documents. Affixation of the seal establishes authenticity. Failure to affix the seal does not, however, by itself render a document invalid. The critical question is the authenticity of the document. Where, as here, there is no question as to authenticity, then the absence of a seal should not override the parties' intent and the relevant public policy considerations (discussed previously) and render the waiver invalid.

It is noted that ***Matter of Republic New York Corp***. (Tax Appeals Tribunal, October 16, 1997), cited by petitioners in support of their position that affixation of the Division's seal is necessary for a waiver to be effective, has no relevance to the instant matter, as that decision does not address any issue regarding the effectiveness of a waiver. The Administrative Law Judge determination in that matter did address the issue of the effectiveness of a waiver, but such determinations are not precedential (Tax Law § 2010[5]). Even if it were precedential, the Administrative Law Judge determination did not address the issue presented in the instant matter, i.e., whether the seal, in addition to an authorized signature, is necessary for a waiver to be effective for purposes of Tax Law § 683(c)(2), and thus would lend little support to petitioners' position in any event.

F. Contrary to petitioners' contention, the best evidence rule did not bar the admission of the original waivers in evidence because that rule does not apply to administrative proceedings of the Division of Tax Appeals (***Matter of Sandrich Foods, Inc.***, Tax Appeals Tribunal, September 22, 1994; ***see also*** State Administrative Procedure Act § 306[1]; 20 NYCRR 3000.15[d]).

G. Petitioners also assert that due process requires that the original waivers be disregarded and that a default judgment be issued against the Division. Specifically, petitioners contend that the Division failed to comply with the terms of their subpoena issued pursuant to CPLR 2302 by providing copies and not originals of the waivers as of the start of the hearing. Petitioners note that one of the originals was submitted in evidence at the hearing, but after the auditor had been excused, and the other two originals were submitted after the hearing. Consequently, petitioners assert that they have "not even had the chance to inspect the documents."

With respect to these contentions, first, as discussed, under the facts herein, the original waivers have little evidentiary significance in this matter. Accordingly, there is no substantial prejudice to petitioners in respect of either the Division's failure to provide the originals at the

start of the hearing in accordance with the subpoena or the admission of the originals in evidence (***Matter of Rizzo***, Tax Appeals Tribunal, May 13, 1993). Second, as to the enforcement of the subpoena, petitioners did not, when presented with documents that failed to comply with their subpoena, make any effort to enforce the subpoena. It is noted that, as the subpoena was issued by petitioners' representative pursuant to CPLR 2302, the Division of Tax Appeals was without authority to enforce the subpoena. Petitioners did not request an adjournment or continuance to enforce its subpoena in Supreme Court. Third, the admission of the original waivers in this matter was consistent with State Administrative Procedure Act § 306(2) and was not a due process violation. Fourth, it is noted that petitioners were not precluded from examining the original waivers submitted after the hearing. Petitioners made no request to inspect the documents at the offices of Division of Tax Appeals. Finally, it is noted that petitioners attached to their brief copies of the original waivers which were provided to petitioners by Division's counsel post-hearing. By their submission of these copies petitioners seek to raise a question as to whether the seals were affixed to the originals after the fact. Inasmuch as these copies were submitted by petitioners following the close of the record and petitioners did not request and were not granted permission to reopen the record, the documents attached to the brief are not in evidence and have not been considered in making this determination.

***Issue II***

H. Petitioners' contention that the Division has the burden of proof in this matter on the issue of domicile is without merit. The Division's regulations place the burden of proving a change of domicile upon the person asserting a change (20 NYCRR 105.20[d][2]). Here, petitioners assert a change of domicile from New York City to East Hampton. They have not, at any time prior to this proceeding, established such a change of domicile. Accordingly,

petitioners bear the burden of proof on domicile (***see also*** Tax Law § 689(e); 20 NYCRR 3000.15[d][5]).

***Issue III***

I. Turning to the substantive issues presented in this matter, section 11-1701 of the New York City Administrative Code imposes a tax on the city taxable income of every "city resident individual." As relevant herein, section 11-1705(b)(1) of the New York City Administrative Code defines "city resident individual" as someone:

> (A) who is domiciled in this city, or . . .
>
> (B) 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, unless such individual is in active service in the armed forces of the United States.

J. Addressing the question of domicile first, the Division's regulations[3] define "domicile" in relevant part as follows:

> (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 person 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 indicated that such individual did this merely to escape taxation.

---

[3] The Division's regulations with respect to the New York State income tax imposed by Article 22 of the Tax Law are applicable in their entirety to the income taxes imposed by the City of New York pursuant to Article 30 of the Tax Law and the New York City Administrative Code, and any reference in such regulations to "New York State domicile, resident and nonresident shall apply in like manner to City of New York domicile, resident and nonresident by substituting City of New York for New York State wherever applicable" (***see*** 20 NYCRR 290.2).

* * *

> (4) A person can have only one domicile. If such 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.

K. It is well established that an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (***see Matter of Bodfish v. Gallman***, 50 AD2d 457, 378 NYS2d 138 [3d Dept 1976]). Whether there has been a change of 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***, 192 NY 238, 250 [1908]). 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 [1943], ***affd*** 267 App Div 876, 47 NYS2d 134 [2d Dept 1944], ***affd*** 293 NY 785 [1944]); ***see also Matter of Bodfish v. Gallman***). While certain declarations may evidence a change in domicile, such 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 [1935]).

L. In ***Matter of McKone v. State Tax Commission*** (111 AD2d 1051, 490 NYS2d 628 [3rd Dept 1985], ***affd*** 68 NY2d 638, 505 NYS2d 71 [1986]) the Court favorably quoted the following treatises on the intent necessary to establish domicile:

> The intention necessary for acquisition of a domicile may not be an intention of living in the locality as a matter of temporary expediency. It must be an intention to live permanently or indefinitely in that place. But it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period. (25 Am Jur 2d ***Domicile*** § 25, at 19 [1966].)
>
> When a person has actually removed to another place, which is his fixed present residence, with an intention of remaining there for an indefinite time, it becomes

> his place of domicile, notwithstanding he may have a floating intention to return to his former domicile at some future and indefinite time. (28 C J S ***Domicile*** § 11, at 19 [1941].)
>
> Though the idea of permanency is sometimes involved in the domicile concept, the term "domicile" is more safely defined in the negative rather than affirmative. A person's domicile is the place he is making his home not "with" a present intention to remain there forever, but "without" a present intention of leaving at some particular future time. (Siegel, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 58A, SCPA 103, p. 21.) (***Matter of McKone v. State Tax Commn.***, 490 NYS2d at 630.)

M. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. "The taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct" (***Matter of Simon***, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (***see e.g. Gray v. Tax Appeals Tribunal***, 235 AD2d 641, 651 NYS2d 740 [3d Dept. 1997] ***confirming Matter of Gray***, Tax Appeals Tribunal, May 25, 1995; ***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989); (2) the location of business activity (***Matter of Erdman***, Tax Appeals Tribunal, April 6, 1995; ***Matter of Angelico***, Tax Appeals Tribunal, March 31, 1994); (3) the location of family ties (***Matter of Gray***; ***Matter of Buzzard***, Tax Appeals Tribunal, February 18, 1993, ***confirmed*** 205 AD2d 852, 613 NYS2d 294 [3d Dept 1994]); (4) the location of social and community ties (***Matter of Getz,*** Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (***Matter of Trowbridge***; ***Matter of Gray; Matter of Getz***).

N. Upon review of the entire record and pursuant to the foregoing standards, it is concluded that petitioners have proven, by clear and convincing evidence, that they gave up their New York City domicile and acquired a domicile in East Hampton as of the year at issue.

Petitioners' change of residence during the 1992-1994 period and their subsequent development and use of their respective residences is the most significant factor supporting their claim of a change in domicile. Specifically, in 1992 petitioners downsized their New York City residence as they sold their "showcase" 4,000 square-foot apartment on East 72nd Street for $2.35 million and acquired a 900-square foot apartment for $105,000. The East 72nd Street apartment had been petitioners' domicile since 1975. Hence, although petitioners retained a residence in the City, it was not their historical domicile and it was a much smaller abode than their soon-to-be acquired residence in East Hampton. In 1993 petitioners purchased their 8,600 square foot James Lane residence in East Hampton for $950,000. In the months following the closing petitioners invested approximately $1 million to renovate their new home to suit their tastes and preferences. When they moved into the James Lane residence following the completion of the renovation work, petitioners brought with them their furniture and other belongings from the East 72nd Street apartment. Such belongings were extensive and valuable (***see*** findings of Fact 27-29). By contrast the Park Avenue apartment contained few if any personal or sentimental items. Additionally, petitioners have spent about $470,000 over the years to plant and maintain gardens on the property.

Petitioners' financial investment in the James Lane residence, including their considerable investment in the gardens, a particular passion of Mrs. Handal, along with the presence of their extensive and valuable near and dear items, supports a finding that James Lane was petitioners' "permanent home. . . with the range of sentiment, feeling and permanent association with it" (***Matter of Bourne***).

Petitioners' community involvement after moving into the James Lane residence also supports their assertion of a change in domicile. Petitioners joined and supported Holy Trinity Church and participated in village affairs (***see*** Findings of Fact 32 and 33). They also developed

friendships in East Hampton and entertained in their East Hampton home (***see*** Finding of Fact 35). These facts demonstrate that petitioners' "general habit of life" was centered in East Hampton during the years at issue (***see Matter of Silverman***, Tax Appeals Tribunal , June 8, 1989).

Additionally, although less persuasive than their "general habit of life," petitioners made certain "formal declarations" which support their claimed change of domicile. Specifically, they registered to vote, obtained driver's licenses, registered their vehicles and changed their mailing address to East Hampton. They also obtained local safe deposit boxes and served jury duty in Suffolk County. (***See*** Finding of Fact 34.)

Mr. Handal's change of employment and departure from the family business by early 1992 is consistent with petitioners' claim of a change in domicile. Specifically, the circumstances of petitioner's departure from the family business was a significant factor in petitioners' decision to look away from New York City for a place to live (***see*** Findings of Fact 19 and 20). Furthermore, petitioner's departure from the family business meant that his employment was no longer centered in New York City. By early 1992 petitioner had completed winding down the business and had turned his focus to J4P and Cowi International. J4P was a Baltimore operation and Cowi did not become active until about 1994. Additionally, while Cowi maintained a New York City office until 2001 for administrative purposes, the substantive work of the consulting business was not based in New York. Accordingly, although Cowi represents a continuing New York City business tie, the significance of this tie is diminished by the lack of substantive consulting work in the City and the fact that Cowi was secondary to J4P with respect to the income and wealth it generated for petitioner (***see*** Finding of Fact 42).

O. The Division notes several facts in the record showing continuing ties to New York City which tend to weigh against petitioners' claim of a change in domicile. It is well

established, however, that a taxpayer may change his or her domicile without severing all ties with their prior domicile (***Matter of Sutton***, Tax Appeals Tribunal, October 11, 1990). Accordingly, such continuing ties are insufficient to overcome the other evidence, discussed above, which establishes an East Hampton domicile.

Specifically, the Division notes petitioner's continuing business presence in New York, which continued from his employment at the family business which terminated in 1992, the start-up of Cowi in 1994 and through the year at issue. As discussed, such business presence, diminished significantly when petitioner left the family business and little substantive consulting work was done in New York City. Petitioner's time spent on business in New York only gradually increased from 1994 forward after petitioners moved to East Hampton.

The Division also notes the considerable number of days spent by petitioner in New York City in 1999. Where an individual has two homes, the length of time spent at each location is an important fact to be considered in determining domicile (***see*** 20 NYCRR 105.20[d][4]). The significance of the time factor however, is diminished where the time in the City is that of a suburban commuter (***see Matter of Knight***, Tax Appeals Tribunal, November 9, 2006). Here, petitioner's presence was largely related to business and business travel and is thus similar to a commuter. Accordingly, while important, the time spent in New York City is not dispositive.

Petitioners' social and community ties to New York are not a significant factor in determining domicile. Petitioners' club memberships appear to have been retained for convenience. Likewise, petitioners' consumer spending in New York City is properly viewed as a matter of convenience (***see Matter of Knight***). Additionally, under the circumstances, petitioners' use of New York City doctors also is not an indication of petitioners' domicile.

Finally, petitioners' purchase of a second unit on Park Avenue in 1999 was credibly explained by petitioner as an investment which did not change the nature of their use of the apartment (***see*** Finding of Fact 54). Accordingly, as the purchase was made some five years after the move to East Hampton, and considering that it did not result in any change in petitioners' lifestyle, it was not a significant factor on the question of domicile.

***Issue IV***

P. In light of the foregoing conclusions with respect to domicile, Issue IV is moot.

***Issue V***

Q. Turning to the second prong of the residency test (Administrative Code § 11-1705 [b][1][B]), so-called "statutory residency," petitioner had the burden of proving by clear and convincing evidence that he was not present in New York City for more than 183 days during the year remaining at issue (***see Matter of Kornblum v. Tax Appeals Tribunal***, 194 AD2d 882, 599 NYS2d 158 [3d Dept 1993]; ***Matter of Smith v. State Tax Commn.***, 68 AD2d 993, 414 NYS2d 803 [3d Dept 1979]). Specifically, pursuant to the Division's regulations, an individual, like petitioner, who claims a domicile outside the city but who maintains a permanent place of abode within the city, "must keep and have available for examination . . . adequate records to substantiate the fact that such person did not spend more than 183 days . . . within [the city]" (20 NYCRR 105.20[c]). Moreover, for purposes of counting the number of days, presence within the city for any part of a calendar day generally constitutes a day within the city (***see*** 20 NYCRR 105.20[c]; ***Matter of Leach v. Chu***, 150 AD2d 842, 540 NYS2d 596 [3d Dept 1989], ***appeal dismissed*** 74 NY2d 839, 546 NYS2d 344 [1989]).

R. In reaching the following conclusions on the question of statutory residency, I find that while petitioners did establish a general pattern of use with respect to the Park Avenue apartment and the East Hampton home (***see*** Finding of Fact 47), given the proximity between

the apartment and the home and petitioner's frequent travel between his two residences, the general pattern of Friday through Sunday in East Hampton is inadequate proof of petitioners' whereabouts where documentary evidence shows New York City activity. Furthermore, given the passage of time from the year at issue to the hearing, I find that petitioner's testimony is insufficient to overcome documentary evidence showing New York City activity. I further note that the documentary evidence, which forms the basis for my determination on the statutory residency issue is far from flawless. Obviously, either petitioner could make phone calls, credit card purchases or ATM withdrawals. However, such flaws notwithstanding, the documentary evidence, which includes petitioner's diary, is the most credible evidence in the record on the issue of statutory residency. Accordingly, upon review of the evidence in the record with respect to the 19 days remaining at issue (***see*** Finding of Fact 56 ), I reach the following conclusions:

*Monday, February 15.* Phone records of New York City calls establish this as a New York City day.

*Saturday, February 20.* Phone records of New York City calls and petitioner's testimony that he was unsure whether he departed for JFK airport from the City or East Hampton establish this as a New York City day.

*Sunday, March 14*. Phone records of New York City calls in the evening and in the morning of the following day establish this as a New York City day.

*Monday, March 15.* Phone records of New York City calls, petitioner's diary entry and testimony, records of a New York City credit card purchase and ATM withdrawals establish this as a New York City day.

*Sunday, March 28.* Petitioner's general pattern of activity, i.e., weekends in East Hampton, with the absence of any evidence of any other activity establish this as a non-New York City day.

*Sunday, April 18*. Credit card records and petitioner's diary entries establish this as a New York City day.

*Monday, July 5*. Petitioner's diary entry, credit card records and records of New York City telephone calls establish this as a New York City day.

*Tuesday, July 6*. Phone records of New York City calls and records of credit card purchases in the City establish this as a New York City day.

*Friday, August 13.* Phone records of New York City calls and records of a credit card purchase in the City establish this as a New York City day.

*Saturday, September 25.* Petitioner's general pattern of activity, i.e. weekends in East Hampton, with the absence of any evidence of any other activity establish this as a non-New York City day.

*Sunday, September 26.* Credit card records showing a New York City charge establish this as a New York City day.

*Thursday, October 7.* The diary entry showing presence in the City on the evening of October 6, and petitioner's admitted uncertainty as to whether he returned to East Hampton on the evening of the 6th compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

*Friday, October 8.* Petitioner did not establish his claim that he spent the night of October 7 at the Claremont Hotel in Roslyn. Together with records of New York City phone calls until 6:24 P.M., this compels the conclusion that petitioner did not meet his burden for this date and thus establishes this as a New York City day.

*Monday, October 11.* Phone records of New York City calls, records of a credit card purchase in the City and petitioner's diary entries for this date and October 10 establish this as a New York City day.

*Wednesday, November 10.* Petitioner's diary entry, phone records of New York City calls, and bank statements showing New York City activity establish this as a New York City day.

*Thursday, November 18*. Phone records showing afternoon New York City calls, credit card records showing New York City purchases, and a diary entry which shows a dinner date with friends which could have occurred in either the City or East Hampton is sufficient to establish this as a New York City day.

*Wednesday, December 22.* Phone records, credit card records and bank statements showing New York City activity establish this as a New York City day.

*Saturday, December 25*. Phone records of New York City calls in the morning and petitioner's presence in the City the previous evening establish this as a New York City day.

*Sunday, December 26.* Petitioner's general pattern of activity, i.e., weekends in East Hampton, with the absence of any evidence of any other activity establish this as a non-New York City day.

S. Pursuant to the foregoing, petitioner has failed to show that he was not present in New York City on 16 of the 19 days remaining in dispute. Adding these 16 days to the 179 days in which petitioner has conceded he was present in New York City results in 195 New York City days for petitioner in 1999. Petitioner was therefore a statutory resident of New York City in 1999.

***Issue VI***

T. Penalties asserted in the subject Notice of Deficiency pursuant to Tax Law § 685(b) and (p) are sustained. Petitioners had the burden of proof on the issue of penalty (Tax Law § 689[e]). While petitioners protested such penalties, they did not offer any argument in support of abatement.

U. The petition of Peter and Patricia Handal with respect to the tax year 1999 is denied and the Notice of Deficiency dated September 12, 2005 with respect to the tax year 1999 is sustained (***see*** Finding of Fact 2).

DATED: Troy, New York
November 25, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE