STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CRAIG F. KNIGHT	:	DECISION DTA NO. 819485
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 Administrative Code of the City of New York for the Years 1996 and 1997.	: : :	

Petitioner Craig F. Knight, 38 Owenoke Park, Westport, Connecticut 06880, filed an exception to the determination of the Administrative Law Judge issued on June 9, 2005. Petitioner appeared by Kaye Scholer LLP (Sydney E. Unger, Michael A. Lynn and David A. Sausen, Esqs., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on May 15, 2006 in New York, New York.

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

ISSUE

I. Whether the Division properly determined that petitioner was domiciled in New York State and New York City for 1996 and 1997, and as such was taxable as a resident individual of

New York State and New York City pursuant to Tax Law § 605(b)(1)(A) and the Administrative Code of the City of New York § 11-1705(b)(1)(A).

II. Whether petitioner was a New York State and New York City resident liable for City and State personal income taxes for 1997 because he maintained a permanent place of abode in New York City and spent over 183 days in New York City during that year.

III. Whether petitioner was required to allocate $1,076,869.00 in Schedule C business income from Knight Financial Consulting to New York State and New York City as New York source income for 1996.

IV. Whether the penalties imposed pursuant to Tax Law § 685(b) and (p) should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "67," "72," "93," "98," "102" and "106" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. On February 18, 2003, following an audit, the Division of Taxation (the "Division") issued to petitioner, Craig F. Knight, a Notice of Deficiency, Notice Number L-022026963-7, asserting additional New York State and City personal income tax due for the years 1996 and 1997 in the aggregate amount of $545,076.91, plus penalty and interest. This deficiency resulted from the Division's conclusion that petitioner was properly subject to tax as a resident of New York State and City from April 1, 1996 through December 31, 1996 and for the year 1997. The penalties asserted were those for negligence and substantial understatement of tax, pursuant to Tax Law § 685(b) and (p).

2. Petitioner and Patricia M. Knight[1] timely filed a joint New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) and City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of the years 1996 and 1997. The mailing address shown on the returns is 444 Russell Avenue, Wyckoff, New Jersey 07481. On their 1996 IT-203 petitioner and Mrs. Knight responded "No" to the question posed of nonresidents in Item G: "Did you or your spouse maintain living quarters in New York State in 1996?" On their 1997 IT-203 petitioner and Mrs. Knight responded "No" to the same question as applied to 1997.

3. The Division selected the Knights' tax returns for audit because a tape match program with the Internal Revenue Service ("IRS") indicated that certain of petitioner's Federal tax documents, i.e., forms 1099, showed a New York address for him, yet petitioner failed to file a New York State resident tax return.

4. Petitioner was born in Paterson, New Jersey on September 1, 1955, attended primary and secondary school in New Jersey and graduated from Rutherford High School in 1974. In 1977, Mr. Knight received a Bachelor of Arts Degree in History from Catawba College in Salisbury, North Carolina. Sometime thereafter, he was admitted to Oxford University ("Oxford") in the United Kingdom where he studied law. Mr. Knight received a BA degree and an MA Degree in Law from Oxford in 1982. He then attended the graduate program at New York University ("NYU") School of Law from which he received an LL.M. in Corporate Law in 1983. Subsequently, petitioner was admitted to practice law in New York State.[2]

---

[1] Petitioner and Patricia Knight were divorced in or about June 2000. For purposes of this determination, Patricia Knight will be referred to as Mrs. Knight.

[2] The record is silent as to the year in which Mr. Knight gained admission to the New York State bar.

5. On September 26, 1981, petitioner married his first wife, Patricia. In 1983, petitioner and Mrs. Knight lived in Carlstadt, New Jersey. At some point, the Knights moved to Hackensack, New Jersey. Sometime in 1988, the Knights moved to 444 Russell Avenue, Wyckoff, New Jersey (the "Wyckoff property").[3] Subsequent to the years at issue, and as part of the matrimonial settlement agreement, Mrs. Knight received title to the Wyckoff residence and petitioner received a credit in the amount of $202,500.00, representing 50 percent of the May 2000 stipulated fair market value of this property. Two sons were born of petitioner's marriage to Patricia, namely, Garrett, born on March 23, 1988, and Connor, born on December 3, 1991.

6. Sometime prior to 1996, the Knights jointly acquired two vacation homes in Vermont. The first is a home located in North Hero, Vermont ("North Hero property"). The second is a townhouse condominium located at Smuggler's Notch in Jeffersonville, Vermont ("Smuggler's Notch property"). Subsequent to the years in issue and as part of the matrimonial settlement agreement, petitioner received title to the North Hero property and Mrs. Knight received title to the Smuggler's Notch property.

7. In 1996, petitioner owned three automobiles, two Volvo station wagons (1986 and 1994 model years) and a 1995 Porsche. Mrs. Knight also owned a Volvo station wagon. There is insufficient evidence in the record to establish where petitioner's automobiles were registered in either 1996 or 1997.

8. For many years prior to and through the years at issue, petitioner's parents, G.R. and Ruth Knight lived in a three-bedroom house located at 400 Carmita Avenue, in Rutherford, New

---

[3] The record does not contain any information concerning the purchase of the Wyckoff residence, including, among other things, the closing date, the purchase price and the size or amenities.

Jersey (the "Rutherford property"). In 1995, G.R. Knight was diagnosed with lung cancer. He passed away in April 1998. Sometime after her husband's death, Ruth Knight moved to Carlstadt, New Jersey.

9. Petitioner has one younger sibling, a brother Scott, who has lived in New Jersey all of his life. During 1996 and 1997, Scott, along with his wife and infant son, lived in a four-bedroom home located at 41 Montross Avenue, in Rutherford, New Jersey, about seven blocks from his parents' house. Subsequent to the audit period, Scott and his family moved to Franklin Lakes, New Jersey.

10. Petitioner informally separated from his wife, Patricia, on or about March 26 or 27, 1996, moved out of the Wyckoff property and moved into his childhood bedroom in the upstairs of his parents' home in Rutherford, New Jersey. Rutherford, New Jersey is 10 to 12 miles south of Wyckoff, New Jersey, about a 20-minute drive. The record does not specify either the size of petitioner's childhood bedroom or the size of his parents' home. His brother, Scott, described this bedroom as "a real throwback" that was furnished with a twin bed, a dresser, a black metal desk with some sort of Formica top and a green shag rug on the floor. According to petitioner, at the time of the informal separation, he and Mrs. Knight had been married about 15 years. However, the marriage had been disintegrating for the last five years or so.

11. Petitioner moved into his parents' home for a number of reasons. First, it was a matter of personal convenience. His parents' home was readily available to petitioner. Second, after his father had been diagnosed with cancer in 1995, petitioner, who was very close to his father, began spending two or three days a week with his father at his parents' home. Lastly, since petitioner had married the girl next door and his in-laws' home was right next to his parents'

home, he knew that when he had the children it would be a great convenience to keep the family together and give the children the opportunity to visit with both sets of grandparents.

12. Petitioner and Scott moved some of petitioner's personal belongings into their parents' home in New Jersey. Such personal belongings included golf clubs, tennis racquets, skis, a bike, some of petitioner's clothing, degrees and certificates. They did not move any furniture out of the Wyckoff property. The record indicates that, in July 1997, petitioner had a painting sent from a Rochester, New York art gallery to the Rutherford property.

13. In March 1996, some of petitioner's clothing, wine and a car were moved to Scott's house. During 1996 and 1997, petitioner occasionally assisted Scott with home improvements at Scott's home. While working on these projects with Scott, petitioner stayed overnight at Scott's house from time to time. When petitioner stayed overnight at his brother's house, he stayed in the spare bedroom.

14. During 1996 and 1997, petitioner remained active in his sons' lives and regularly brought them to stay at his parents' home in Rutherford, New Jersey and visit with their grandfather who was suffering from lung cancer. In 1996 and 1997, petitioner spent Thanksgiving and Christmas Eve with his children in New Jersey. During the audit period, he also took some vacations with his children in Vermont. During 1996 and 1997, petitioner served as head coach on Connor's T-ball team and as an assistant coach on Garrett's Little League team in New Jersey. In 1996 and 1997, petitioner's brother, Scott, his parents and petitioner's in-laws, attended several Little League games coached by petitioner and Little League opening day parades in which petitioner participated. Petitioner often refereed and coached soccer games in New Jersey during the audit period.

15. As noted above, petitioner and his wife informally separated in March 1996 and he moved out of the Wyckoff property. However, after March 1996, Mrs. Knight allowed him to stay in the Wyckoff residence overnight on some weekends to be with his children. In September 1996, Mrs. Knight informed petitioner that he no longer could stay in the Wyckoff residence overnight. In September 1996, petitioner and Mrs. Knight formally separated.

16. During 1996 and 1997, Garrett Knight attended the Saddle River Day School in Saddle River, New Jersey. The record is silent as to whether or not Connor had begun attending school and, if so, the name and location of such school.

17. After he informally separated from Mrs. Knight and moved out of the marital home in Wyckoff, New Jersey, petitioner continued to pay all expenses and repairs relating to that home. After the commencement of the formal separation in September 1996 and during 1997, petitioner continued to support his wife and children, including making payments for household expenses, utilities, a mortgage on the Smuggler's Notch property, a car and Garrett's tuition. During 1996 and 1997, Mrs. Knight did not work outside the home.

18. Upon graduating from NYU, Mr. Knight was employed as an associate at Chadbourne, Parke, Whiteside & Wolff in New York City for about a year and a half. He then worked for another New York City law firm, Winthrop, Stimson, Putnam & Roberts, as an associate for about a year and a half. Sometime in 1986, petitioner joined Prudential Bache Securities ("Prudential Securities") in the corporate finance area as an investment banker. In 1990, petitioner was a founding shareholder and finance director of Custom Expressions, Inc. which was subsequently sold to American Greetings Corporation. In 1991, he left Prudential Securities and joined a start-up leasing firm called Foltram International Partners. On or about

January 21, 1992, petitioner began working for Wachovia Corporate Services, Inc. ("Wachovia Corporate"), an affiliate of Wachovia Bank of Georgia, National Association ("Wachovia Bank"),[4] as a consultant. A Consulting Agreement dated January 21, 1992 ("consulting agreement") was entered into between petitioner and Wachovia Corporate. A copy of this consulting agreement is not part of the record.

19. Petitioner's consulting services for Wachovia Corporate involved the development of sophisticated financial products for Wachovia Corporate's clients, including leasing transactions, options and the Management Equity Investment Program, as well as the private placement of securities. According to petitioner, the leasing transactions that he developed for Wachovia Corporate were very similar to the tax benefit transfer leases that were executed in the early 1980s. Specifically, his leasing products were considered tax leases that would transfer the tax benefits of ownership of certain properties that could not be used by the current owner to an owner that could, in fact, use the tax benefits. Wachovia Corporate's role in these leasing transactions was initially as an advisor to clients and eventually Wachovia Corporate became an investor in these leasing transactions.

20. While working as a consultant for Wachovia Corporate, petitioner reported to Samuel V. Tallman, Jr. Mr. Tallman was the senior vice president and group executive in charge of Wachovia Corporate's corporate finance department, located in Atlanta, Georgia. In addition to offices in Atlanta, Georgia, Wachovia Corporate leased office space in New York City, among other places. At some point, Wachovia Corporate leased the 37th floor of 152 West 57th Street, New York, New York.

---

[4] Wachovia Bank was dually headquartered in Winston-Salem, North Carolina and Atlanta, Georgia.

21. In conjunction with his development of various products for Wachovia Corporate, petitioner traveled to Wachovia Corporate's clients and the foreign investment banks involved in the various transactions. As such, petitioner traveled to numerous cities throughout the United States and Europe. At some point, while working at Wachovia Corporate's Zurich office, petitioner met and worked with Pieter van Tol.

22. In 1995, petitioner developed a leveraged lease financing transaction for commuter rail cars owned by the Chicago Transit Authority (the "CTA transaction"). The CTA transaction closed in Amsterdam, The Netherlands, on or about September 27, 1995. The closing took place in Amsterdam because the lender in the transaction, ABN AMRO, was a foreign bank. Petitioner did not submit into the record any of the expense reimbursement invoices that he submitted to Wachovia Corporate in 1995.

23. On October 11, 1995, Steven W. McConnell sent a letter to the secretary of the Racquet and Tennis Club ("Racquet Club") proposing Mr. Knight for resident membership in the Racquet Club, a social club with dining facilities and game facilities, located at 370 Park Avenue, New York, New York.

24. Petitioner joined the Racquet Club upon his election as a member on December 14, 1995. The Racquet Club's rules state that anyone having an office within 50 miles of New York City is considered a resident member. According to the Racquet Club's records, petitioner paid dues of $1,970.00, plus sales tax for each of the years 1996, 1997 and 1998.

25. On or about December 1, 1995, petitioner joined The University Club, located at 1 West 54th Street, New York, New York. The University Club has dining facilities and game

facilities. His active membership in The University Club continued throughout the audit period and the subsequent years.

26. By letter dated October 9, 2002, Mr. Tallman responded to the Division's inquiries concerning petitioner's work schedule during 1996. In this letter, Mr. Tallman stated that "from January to April 1996, Mr. Knight was a contract consultant to Wachovia Corporate and worked out of Wachovia Corporate's offices at 152 West 57th Street, Suite 3700, New York, New York 10019." The record does not include petitioner's actual work schedule for the period January through March 1996.

27. In addition to working out of Wachovia Corporate's New York City offices, petitioner also worked out of the New York City offices of lawyers and investment bankers during 1995 and the period January through March 1996.

28. On March 27, 1996, the Articles of Organization of Knight, Tallman & van Tol Capital Partners, L.L.C. ("KTV"), a limited liability company under section 203 of the Limited Liability Company Law of the State of New York, were filed with the New York State Secretary of State by its organizer, Richard H. Kronthal, Esq., an attorney with Strook & Strook & Lavan, 7 Hanover Square, New York, New York. According to KTV's Articles of Organization, the county within New York State in which the office of the company was to be located is New York County and the management of the company would be vested in one or more of the members. Article Sixth of KTV's Articles of Organization provides that "[t]he Company has or may have classes or groups of members having such relative rights, powers, preferences and limitations as the Operating Agreement may from time to time provide."

29. On March 29, 1996, the Operating Agreement of Knight, Tallman & van Tol Capital Partners L.L.C. ("operating agreement") was entered into and adopted by Craig F. Knight, Samuel V. Tallman, Jr. and Temmes Capital Partners L.L.C. ("Temmes Capital").[5] A review of Article I , Section 1.3 of the operating agreement indicates that KTV's principal purposes are "to originate and structure leveraged leases, cross-border tax-effective financings and investment structures, cross-border private equity investment funds, Management Equity Investment ("MEIP") financings, to provide cross-border tax advisory services and foreign domiciliary services outside the United States."

30. A review of the operating agreement indicates that KTV had three "Members," i.e., Mr. Knight with a 40-percent ownership interest, Mr. Tallman with a 40-percent ownership interest and Temmes Capital with a 20-percent ownership interest. The operating agreement required the three Members and Mr. van Tol to devote all of their time to KTV business.

31. On March 29, 1996, petitioner and Wachovia Corporate entered into a written agreement terminating his January 21, 1992 consulting agreement with Wachovia Corporate (the "termination agreement"). According to this termination agreement, petitioner and Wachovia Corporate "mutually desire[d] to terminate" the consulting agreement because KTV and Wachovia Capital Markets, Inc., ("Wachovia Capital"),[6] an affiliate of Wachovia Corporate, planned on entering into a Services Agreement on March 29, 1996. This termination agreement settled "a disputed claim made by" petitioner against Wachovia Corporate for "internal fees"

---

[5] According to the Operating Agreement, Temmes Capital's address is in care of Mr. Cees van Tol, Wassenaareseweg 75b, 2223 LA Katwijik, The Netherlands. Review of the operating agreement indicates that Pieter van Tol is the beneficial owner of approximately 99% of the voting equity interests of Temmes Capital.

[6] Wachovia Capital is a subsidiary of Wachovia Corporation, a registered bank holding company that is also the parent of Wachovia Bank.

relating to the consulting agreement and implements the undisputed portion of his consulting agreement and the letter agreement dated September 26, 1995 ("letter agreement").

32. With respect to Mr. Knight's disputed claim, Wachovia Corporate agreed to make an aggregate payment of $2,443,833.00, of which $643,833.00 was to be paid in accordance with Section 1.1 of the termination agreement and $1,800,000.00 was to be paid pursuant to a deferral agreement. Section 1 of the termination sets forth the parties' agreement concerning "the aggregate compensation payable to Knight for services rendered pursuant to the Consulting Agreement" and the manner in which it was to be paid. Section 1.1 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $643,833.00 Section 1.3 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $128,863.00, "representing interest accruing on the principal amounts owed by" Wachovia Corporate to petitioner "pursuant to the Consulting Agreement." Section 1.4 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $1,627.00, "representing interest accruing on the principal amount of $100,000.00 owed by [Wachovia Corporate] to Knight pursuant to the Electrolux Agreement." Pursuant to Section 1 of the termination agreement, Wachovia Corporate paid petitioner a total of $774,323.00. Petitioner reported this amount as other income on his 1996 Schedule C.

33. A review of Section 4 of the termination agreement reveals that this agreement sets forth "the entire [a]greement and understanding between the parties and merges and supercedes all prior discussions, agreements, and understandings of every kind and nature between them concerning the subject matter thereof." Further review of the termination agreement reveals that

Section 7 provides that this agreement "shall be governed by the laws of the State of New York, without giving effect to the principles of conflicts of law."

34. It is noted that the termination agreement is addressed to petitioner at "444 Russell Avenue, Wychoff [sic], New Jersey 07481" and to Wachovia Corporate at "191 Peachtree Street, N.E., Atlanta, GA 30303." The termination agreement was executed by both parties in Atlanta, Georgia.

35. The record does not include many of the documents identified and referred to within the provisions of the termination agreement. Specifically, the record does not include, among other documents, the January 21, 1992 consulting agreement (as noted above), the letter agreement dated September 26, 1995, the deferral agreement dated March 29, 1996, the engagement letters between Wachovia Corporate and each of Electrolux and ED & F Mann, the Electrolux Agreement, the rabbi trust dated March 29, 1996 and the engagement letter between KTV and Wachovia Capital dated March 29, 1996. As for the disputed claim made by petitioner against Wachovia Corporate for "internal fees" relating to the consulting agreement that was settled by the termination agreement, petitioner has not submitted any documentary evidence regarding this disputed claim. At the hearing, petitioner admitted that the Electrolux agreement did not have anything to do with the CTA transaction.

36. Pursuant to Section 1 of the termination agreement, Wachovia Corporate paid Mr. Knight a total of $774,323.00.

37. A review of the Knights' matrimonial settlement agreement indicates that the trust created under an agreement dated March 29, 1996, by and between Wachovia Corporate and Morgan Guaranty Trust Company of New York as Trustee under the Wachovia Corporate

Services Inc. Deferred Compensation Agreement for Craig Knight, i.e., the JP Morgan Rabbi Trust, had been funded in accordance with the provisions of the termination agreement. Further review of this matrimonial settlement agreement indicates that the trust assets were held in a Morgan Guaranty Trust Company of New York account.

38. Shortly after the termination agreement was executed in Atlanta, Georgia on May 29, 1996, KTV and Wachovia Capital entered into a services contract entitled "SERVICES AGREEMENT" ("services agreement") dated March 29, 1996. Pursuant to the terms of this services agreement, KTV would provide certain services to Wachovia Capital in connection with Wachovia Capital's "engagement in the Subject Businesses" and KTV and Wachovia Capital "will provide each other respective rights of first refusal to participate in any transaction proposed by or to the other involving the Subject Businesses ('proposed transactions')."

39. According to the services agreement, in consideration for KTV's services and the right of first refusal to participate in "KTV-developed" proposed transactions, Wachovia Capital agreed to pay KTV a "contract fee" and the parties also agreed to allocate between them the revenues from any proposed transactions in which Wachovia Capital participates ("subject transactions"). For the first year of the services agreement, the contract fee is $200,000.00 per month for each month through March, 1997 and if the parties failed to otherwise reach an agreement "prior to the 30th calendar day preceding the commencement of each subsequent year" of the services agreement, the contract fee for each year is $854,000.00. Wachovia Capital also agreed to pay out-of-pocket expenses it expressly approved.

40. In the services agreement, the parties also agreed to distribute the fees and other benefits comprising the "allocated revenue" for each subject transaction entered into by KTV

and Wachovia Capital in accordance with Article III, Section 3.3. A review of this section indicates that the allocated revenue received during a calendar quarter would be distributed as follows. First, it would be distributed to Wachovia Capital, in an amount equal to the cumulative annual contract fees that have not been previously paid to Wachovia Capital pursuant to this first priority. Then the allocated revenue would be distributed to KTV, in an amount equal to the "priority revenue allocation" ($2,030,000.00, less all amounts previously paid to KTV as the priority revenue allocation). Lastly, any remaining allocated revenue would be paid 50 percent to Wachovia Capital and 50 percent to KTV.

41. Pursuant to Article VI, Section 6.14 of the services agreement, Wachovia Capital agreed to provide KTV with office space within the office space Wachovia Capital leased in Atlanta, Georgia and New York, New York and, "subject to any applicable federal bank or bank holding company regulation," Zurich, Switzerland. This section also requires KTV to "clearly mark and identify (by appropriate signs and other appropriate means of identification)," the space occupied by it and "otherwise comply with any Legal Requirement regarding such space occupancy arrangements."

42. At the time KTV was formed, Mr. Tallman was living in Atlanta, Georgia and Mr. van Tol was living in Zurich, Switzerland. Mr. Tallman was president of KTV and was based in KTV's Atlanta office. He was in charge of the general administration of KTV. In May 1996, KTV hired Michael Zuravel as a vice president of KTV. Mr. Zuravel, who lived in Atlanta, Georgia, was also based in KTV's Atlanta office. KTV's Atlanta office was wholly within the Atlanta offices of Wachovia Corporate.

43. Beginning in April 1996 and continuing through the remainder of the audit period, petitioner managed KTV's New York City office which was wholly within Wachovia Corporate's offices located on the 37th floor of 152 West 57th Street. The KTV office occupied approximately 4,000 square feet of space within Wachovia Corporate's offices and included the 36 ft. by 20 ft. office used by petitioner when he was a consultant to Wachovia Corporate. Mr. Knight continued to use this same office while working for KTV. KTV's New York City office was petitioner's primary work place from April 1, 1996 through the remainder of the audit period and continued to be his primary work place in subsequent years. The record does not include records pertaining to petitioner's actual work schedule for the period April 1996 through the year 1997. On or about May 1996, KTV hired two professionals to work with petitioner in New York City. Later in 1996, KTV also hired a secretary, Joyce North, to work in its New York City offices.

44. On April 15, 1996, petitioner, as senior managing director of KTV, executed a lease on behalf of KTV for apartment 8K, a two-bedroom apartment, located at 333 East 56th Street in New York City (the "East 56th Street apartment"). The address listed for KTV in this lease is "c/o Wachovia Corp. Services Inc., 152 W. 57th 37th Fl., New York, N.Y. 10022." The initial term of this lease covered the period May 1, 1996 through April 30, 1997 and provided for a monthly rent due in the amount of $3,125.00. Petitioner personally guaranteed the initial lease for the East 56th Street apartment. A review of his guaranty reveals that it remains in effect for any subsequent renewals of the lease for the East 56th Street apartment. Since KTV was a new company, the landlord required four months' rent ($12,500.00) as a security deposit. The first month's rent and the security deposit, a total of $15,625.00, was paid by a KTV check signed by

both petitioner and Mr. Tallman. It was KTV's unwritten policy that checks in amounts greater than $5,000.00 required the signatures of two Members. The only information supplied by petitioner concerning the apartment is that it has two bedrooms.

45. Included as part of the lease for the East 56th Street apartment is an agreement containing a clause that reads "Whereas, the tenant signed a lease for the above numbered apartment in the name of a Corporation, and AGREES that the sole occupant of said apartment during the term of this lease, and all extensions, if any, shall be Craig F. Knight, Sam Tallman and Michael Zuravel." Petitioner signed this agreement as senior managing director of KTV.

46. The landlord issued three keys for the East 56th Street apartment, a key for each of the occupants of this apartment, i.e., petitioner and Messrs. Tallman and Zuravel.

47. Petitioner personally arranged for electric and telephone service for the East 56th Street apartment. KTV reimbursed him for the NYNEX telephone installation charges. From May 1996 through the remainder of the audit period, both the Con-Ed electric and the NYNEX telephone services were billed to petitioner personally at the East 56th Street address. However, the electric and telephone bills for this apartment were paid for by KTV out of its bank account, on checks executed by Mr. Tallman.

48. Petitioner personally selected and purchased furniture, household items and supplies for the East 56th Street apartment. The record reveals that in May 1996 and September 1996, KTV reimbursed him for the purchase of, among other things, two queen size mattresses, box springs and bed frames, lights, art supplies, various electrical appliances, miscellaneous kitchen items, linens and towels and various supplies including food and cleaning products. Some of

petitioner's purchases for the East 56th Street apartment were made on weekends in New York City.

49. Mr. Tallman also purchased furniture for the East 56th Street apartment. KTV reimbursed him for his May 1996 Bloomingdale purchases of a table and four chairs and a wall unit.

50. In order to be reimbursed by KTV for expenses Members and employees incurred on its behalf, they had to submit a written expense report. A review of Expense Report # 3, dated May 15, 1996, submitted by petitioner for reimbursement by KTV, indicates that he requested reimbursement for parking fees in the total amount of $936.00 as well as other expenses, including, among other things, meals and taxi expenses. The itemization of these parking fees included an entry for May 7, 1996 in the amount of $716.00 along with the following explanation of this fee. "This fee is based on a $408.00 per month charge minus a $50.00 charge for a sports car. The amount includes a 1-month security deposit." Further review of this expense report also reveals requests for reimbursement of parking fees and taxi fares incurred on weekends in New York City.

51. Review of the checks issued by KTV in payment of the rent on the East 56th Street apartment during the initial term of the lease reveals that on October 2, 1996, petitioner signed a check payable to Glenwood Management Corp. in the amount of $3,125.00, for payment of the October 1996 rent for the East 56th Street apartment. On November 26, 1996, Mr. Tallman signed a check payable to Glenwood Management Corp. in the amount of $3,533.00, for payment of the December 1996 rent for the East 56th Street apartment. It is noted that nothing is written in the memo section of this check. On January 29, 1997, Mr. Tallman signed a check

payable to Glenwood Management Corp. in the amount of $3,447.00, for payment of the February 1997 rent for the East 56th Street apartment. The memo section of this check contains the handwritten notation “NY APT & Parking.” On February 26, 1997, Mr. Tallman signed a check payable to Glenwood Management Corp. in the amount of $3,490.00, for payment of the March 1997 rent for the East 56th Street apartment. The memo section of this check contains the handwritten notation “NY Apt & Parking.” On March 28, 1997, Mr. Tallman issued a check to Glenwood Management Corp. in the amount of $3,490.00, for payment of the April 1997 rent for the East 56th Street apartment. The memo section of this check contains the handwritten notation “NY Apt & Parking.”

52. During 1996 and 1997, Messrs. Tallman and Zuravel lived in Atlanta, Georgia and Mr. van Tol lived in Switzerland. When they were in New York City, Messrs. van Tol, Tallman and Zuravel would always arrive at the East 56th Street apartment by taxi or car service and would never drive their own automobiles. During 1996 and 1997, petitioner drove his personal automobile in New York City.

53. At the hearing, petitioner was asked about the parking fees included in the some of the checks paid to Glenwood Management Corp. for the rental of the East 56th Street apartment during the initial term of the lease. However, he was unable to explain these parking fees.

54. The lease for the East 56th Street apartment was subsequently renewed for an additional one-year term covering May 1, 1997 to April 30, 1998 and provided for a monthly rent due in the amount of $3,312.50. Mr. Tallman signed the lease renewal on behalf of KTV.

55. During 1996 and 1997, both Mr. Tallman and Mr. Zuravel made trips to New York City to perform work on matters related to KTV’s business. They often stayed at the East 56th

Street apartment during these trips. Mr. Tallman stayed at the East 56th Street apartment on 49 days during 1996, the vast majority of which were prior to October 1996, and on 33 days in 1997. Mr. Zuravel stayed at the East 56th Street apartment on approximately 53 days during 1996 and on approximately 45 days during 1997. Sometimes, Messrs. Tallman and Zuravel stayed at the East 56th Street apartment at the same time.

56. Petitioner could not recall if KTV maintained a tenant's insurance policy for the East 56th Street apartment in 1996 and 1997.

57. Both Mr. Tallman and Mr. Zuravel had keys to the East 56th Street apartment that they kept with them in Atlanta, Georgia. Mr. Knight kept his key at KTV's New York City offices.

58. There was no written agreement among the partners that restricted or even addressed the use of the East 56th Street apartment. KTV also did not maintain a log book to establish a business use for the East 56th Street apartment. Rather, petitioner's secretary, Joyce North, would confirm the availability of the East 56th Street apartment with petitioner when others called to use it.

59. During 1996 and 1997, petitioner received personal bank statements at the East 56th Street apartment address.

60. During 1996 and 1997, whenever he stayed overnight in New York City, petitioner stayed at either the East 56th Street apartment or a friend's New York City apartment.

61. On occasion, the East 56th Street apartment was used for business meetings during 1996 and 1997.

62. In 1996 and 1997, Wachovia Capital was KTV's primary client and provided about 80 percent of KTV's business in each year. KTV closed its New York City office around June 1999

because the services agreement was terminated by Wachovia Capital around that time. By the time the services agreement was terminated by Wachovia Capital, Branch Banking & Trust ("BB&T") was providing the majority of KTV's business. Sometime after the closing of KTV's New York City offices, it opened offices in Connecticut.

63. KTV terminated the lease on the East 56th Street apartment in June 1999.

64. A December 30, 1999 letter from the postmaster of the Franklin D. Roosevelt Post Office located on Third Avenue in New York City indicates that mail in the name of Craig or Patricia Knight was forwarded from 333 East 56th Street in New York City to Apt # 26G, 1365 York Avenue in New York City.

65. In the fall of 1994, petitioner met Teresa Lin, an investment banker. On January 16, 1995, Ms. Lin leased apartment 26G, a one-bedroom apartment, located at 1365 York Avenue in New York City (the "York Avenue apartment"). Petitioner began having a relationship with Ms. Lin in the summer of 1995. His relationship with Ms. Lin eventually led to petitioner's divorce from his first wife and remarriage to Ms. Lin. Petitioner would visit Ms. Lin early in the morning on his way into work and again at the end of the workday before returning home. Ms. Lin made arrangements for petitioner to be signed into her building on a permanent basis so that petitioner could enter or leave the building without signing in or being announced by the doorman.

66. When petitioner and Ms. Lin began their relationship, Ms. Lin lived in the York Avenue apartment and she continued to live in this apartment during the entire audit period. During 1996 and 1997, Ms. Lin's apartment had two locks on its front door. In June 1996, Ms. Lin provided petitioner with a key to only one of these locks. Ms. Lin generally kept both locks

on the door to her apartment engaged. On certain occasions, when she gave petitioner express permission to enter her apartment while she was not present, she would engage only the lock to which petitioner had a key. Petitioner could enter the York Avenue apartment only if he made pre-arranged announced visits. On other occasions, petitioner would have to wait for Ms. Lin to arrive before he could physically enter her apartment because both locks on the door to her apartment were engaged. In such situations, petitioner would typically sit on the floor in the hallway outside of Ms. Lin's apartment, or in a coffee shop across the street, waiting for her to arrive.

We modify finding of fact "67" of the Administrative Law Judge's determination to read as follows:

> 67. The Division's investigator reported that on June 5, 2000 a doorman at the York Avenue building stated that "the Knight's" had moved out two weeks before, but had lived in the York Avenue apartment on a daily basis since at least 1996.[7]

68. On June 15, 2000, R.P. Andrew McNee, Esq., vice president of the legal department of Glenwood Management Corporation, sent a letter to the auditor indicating that he had information that Mr. Knight was Ms. Lin's roommate. Mr. McNee further believed that Mr. Knight occupied apartment 8-K at 333 East 56th Street under a corporate lease with KTV.

69. Glenwood Management Corporation managed both the East 56th Street apartment and Ms. Lin's York Avenue apartment.

---

[7]We modified finding of fact "67" to better reflect the record.

70. The East 56th Street apartment is approximately one mile from Ms. Lin's York Avenue apartment, and approximately one mile from KTV's offices at 152 West 57th Street in New York City.

71. Ms. Lin's York Avenue apartment is less than 2 miles from KTV's offices at 152 West 57th Street in New York City.

We modify finding of fact "72" of the Administrative Law Judge's determination to read as follows:

> 72. During 1996 and 1997, petitioner occasionally stayed with Ms. Lin in her apartment.[8]

73. According to Scott Knight, he first met Ms. Lin at a birthday dinner for petitioner in September 1996.

74. In 1996 and 1997, Ms. Lin was employed as a senior vice president at Dillon Read & Co. ("Dillon Read") located at 535 Madison Avenue, New York, New York. Ms. Lin's W-2s for 1996 and 1997 reflect that she earned approximately $383,500.00 in 1996 and approximately $127,000.00 in 1997. The record indicates that Dillon Read was involved in many of KTV's leasing transactions during 1996.

75. The record includes only two expense reports prepared and signed by Mr. Knight seeking reimbursement of expenses incurred on behalf of KTV, i.e., a May 1996 Expense Report # 3 and a September 1996 Expense Report # 4. A review of these reports indicates that petitioner requested reimbursement for many business-related meals, drinks and entertainment during the period April 1996 through September 1996. As part of the itemization of these

---

[8]We modified finding of fact "72" to better reflect the record.

business-related expenses, petitioner included the names of the individuals entertained and the companies for which they worked and the business purpose of the meal or entertainment. A review of these meal and entertainment expenses indicates that, from April 1996 through September 1996, Ms. Lin was present at a substantial number of the New York City business meals as well as business meals that took place in, among other places, London, Boston and Rockport, Massachusetts. It is noted that some of these business meals took place on weekends.

76. There is no evidence in the Division's audit file with respect to petitioner indicating that he had access to Ms. Lin's apartment.

77. In or about June 2000, petitioner and Patricia Knight were divorced. Petitioner and Ms. Lin were married on July 29, 2000.

78. Petitioner submitted his New Jersey voter registration information to establish that he continued to vote in New Jersey during the audit period. On or about January 1, 1983, petitioner registered to vote somewhere within Bergen County, New Jersey. On August 23, 1988, his Bergen County voter registration was transferred to reflect the Russell Avenue, Wyckoff, New Jersey address. Review of the voting history maintained by Bergen County for petitioner indicates that he voted in the general elections held in the years 1988 through 1990 and the years 1992 through 1994 and failed to vote in either 1991 or 1995. His voting history also indicates that he voted in the general elections held in 1996 and 1997 and did not vote in either 1998 or 1999.

79. During 1996 and 1997, petitioner spent a great deal of time with his father while his father was sick and often visited his father in the hospital with his brother, Scott.

80. During 1996 and 1997, petitioner made substantial donations to Grace Church. The location (address) of this church is not part of the record. Petitioner submitted copies of checks payable to Grace Church and his Federal income tax returns for the years 1996 and 1997 to establish these donations. During the same period, petitioner also made substantial donations to the Star of Hope Ministry in Paterson, New Jersey. A review of the Knights' joint 1997 Federal income tax return indicates that a $3,500.00 donation was made to Grace Bible Church as well. The location (address) of Grace Bible Church is not part of the record.

81. During 1996 and 1997, petitioner occasionally volunteered at the Star of Hope Mission in Paterson, New Jersey.

82. Petitioner submitted his American Express Platinum Card year-end summaries for the years 1996 and 1997 in support of his claim that he continued to be domiciled in New Jersey during the audit period ("1996 Am Ex year-end summary" and "1997 Am Ex year-end summary," respectively). According to petitioner, the 1996 American Express year-end summary reflects all of his charges for that year.

83. The record indicates that the 1996 Am Ex year-end summary was addressed as follows, "CRAIG F. KNIGHT, WACHOVIA CORP SRVCS, 152 W. 57th ST, 37th FL, NEW YORK NY 10019-3310."

84. A review of the 1996 and 1997 American Express year-end summaries indicate that petitioner obtained health care as follows. He obtained medical care twice in January 1996, once in March 1996 and once in June 1996 at Whitney Medical located in East Rutherford, New Jersey. Petitioner consulted an eye care professional in Paramus, New Jersey in July 1996 and July 1997 and had his prescriptions filled at Pearle Vision located in Paramus, New Jersey.

85. The American Express year-end summaries indicate that petitioner utilized the services of a hair stylist in New York City in 1996 and 1997.

86. A review of the 1996 Am Ex year-end summary indicates that petitioner played tennis at Quest II in Mahwah, New Jersey on Thursday, September 12th. There are no other charges for Quest II in the 1996 Am Ex year-end summary. Further review of this year-end summary indicates that petitioner played tennis at the Roosevelt Island Racquet Club located on Roosevelt Island, New York on Sunday, October 20, 1996 and Saturday, November 10, 1996. A review of the charges posted in the Am Ex year-end summary for the services at the Roosevelt Island Racquet Club indicate that petitioner was a member. No charges for Quest II are reflected in the 1997 Am Ex year-end summary.

87. Review of the 1996 Am Ex year-end summary indicates that petitioner made many purchases at retail establishments and restaurants located in New York City. From April 1996 through December 31, 1996, many of these New York City purchases were made on the weekends. Further review of the 1996 year-end summary indicates that during the period October 1996 through December 1996, petitioner made, among other retail purchases, large purchases of electronic equipment and furniture in New York City on many weekends.

88. Review of the 1997 Am Ex year-end summary indicates that petitioner incurred a significantly greater number of charges for retail items, groceries and restaurants in New York City than he incurred in New Jersey during 1997. Many of these New York City charges were made on weekends.

89. Many of the charges reflected on petitioner's 1996 and 1997 Am Ex year-end statements were for purchases made at high-end retail establishments in New York City

including, among others, Hermes, Tiffany and Versace. In addition, both years' statements reflect numerous restaurant charges at many of New York City's fashionable, upscale restaurants.

90. Review of the matrimonial settlement agreement indicates that petitioner purchased approximately 40 paintings in 1996 and 1997 for approximately $275,000.00. Petitioner retained sole title to these paintings pursuant to this matrimonial settlement agreement.

91. At the hearing, petitioner estimated that during the audit period he owned approximately 25 pieces of art and about 23 of them were kept at his New York City office, i.e., KTV's offices in New York City. Petitioner did not insure these paintings. The record includes some invoices from art galleries, art dealers and artists located in Rochester, New York, Boston, Rockport, Dedham and Westwood, Massachusetts and Stowe, Vermont.

92. A review of the American Express year-end summaries indicate that, in 1996 and 1997, petitioner had his automobiles serviced by the New Jersey dealerships from which they had been purchased.

We modify finding of fact "93" of the Administrative Law Judge's determination to read as follows:

> 93. Review of the telephone bills for the East 56th Street apartment for the period May 1996 through December 31, 1997, as well as other documents in the record, indicate that numerous telephone calls were made to various locations in New Jersey, Vermont, Connecticut and Massachusetts on nights and weekends from that telephone.[9]

94. A review of the 1996 Am Ex year-end summary indicates that petitioner rented movies from a local Wyckoff, New Jersey video store on a few occasions during the first half of

---

[9]We modified finding of fact "93" to better reflect the record.

the year. A review of the 1997 Am Ex year-end summary indicates that petitioner rented movies and videos from both Blockbuster Video in New York City and a local Wyckoff, New Jersey video store. The year-end summaries for both 1996 and 1997 reflect charges for petitioner's purchase of tickets for numerous New York City theatrical and musical performances during both years. Furthermore, a review of the 1997 Am Ex year-end summary indicates that petitioner purchased dancing lessons from Arthur Murray's Dance Studio in New York City in April 1997.

95. Documents in the record indicate that KTV rented an apartment from Gables Corporate Apartment Homes for Mr. van Tol in Atlanta, Georgia for the months of January and February 1997. KTV did not have a tenant's insurance policy for this apartment.

96. In addition to offices in Atlanta, New York City and Zurich, KTV also had an office within Wachovia Corporate's London, England offices. Documents in the record indicate that KTV leased a two bedroom apartment at 41 Cadogan Square, in London, England on July 25, 1997 for a period of one year running from September 1, 1997 through August 31, 1998. The documents further indicate that Mr. Tallman and Mr. Zuravel were the residents of this apartment. Neither the partners nor KTV had a written policy concerning the use of this apartment. KTV also did not maintain a tenant's insurance policy for this apartment.

97. Petitioner's matrimonial settlement agreement with Mrs. Knight allows him "parenting time" with his children every Wednesday evening for three hours and every other weekend. The matrimonial settlement agreement also sets forth both parents' holiday and vacation time with the children.

We modify finding of fact “98” of the Administrative Law Judge’s determination to read as follows:

> 98. In February of 1998 petitioner entered into a contract to purchase a five-bedroom house in New Canaan, Connecticut. The purchase was completed in July of 1998. Petitioner’s father died in April of 1998.[10]

99. As noted in Finding of Fact “2,” for the year 1996, the Knights filed a New York State Nonresident and Part-Year Resident Income Tax Return (“state income tax return”). Included as an attachment to this state income tax return is a copy of the Knights’ 1996 joint Federal income tax return (Form 1040) and the supporting schedules. One of the schedules attached to their 1996 Federal income tax return is a Schedule C (“Profit or Loss From Business [Sole Proprietorship]”) for petitioner (the “1996 Schedule C”), whose business address is listed as 444 Russell Avenue, Wyckoff, New Jersey.

100. A review of petitioner’s 1996 Schedule C indicates a gross income of $1,076,869.00, consisting of gross receipts or sales in the amount of $302,546.00 and other income from “Wachovia” in the amount of $774,323.00, from Knight Financial Consulting, the sole proprietorship that petitioner operated during the first three months of 1996. On Line 28 of the Schedule C, petitioner reported $62,219.00 in total expenses. Of that amount, $38,152.00 is allocated to travel expenses. Review of Part V of petitioner’s 1996 Schedule C, entitled “Other Expenses” reveals that petitioner claimed an expense in the amount of $300.00 for the New York Bar annual fee. A tentative profit of $1,014,650.00 was reported on Line 29 of the 1996 Schedule C. Petitioner did not claim any expense for business use of his home on Line 30 of his Schedule C. Therefore, a net profit of $1,014,650.00 was reported on petitioner’s 1996 Schedule

[10]We modified finding of fact “98” to better reflect the record.

C and Line 12 of the Knights' Form 1040. None of the $1,014,650.00 in business income reported on Line 12 of the Knights' 1996 Form 1040 was allocated to New York State.

101. During the audit, the auditor requested supporting documentation for the expenses shown on petitioner's 1996 Schedule C. In response to that request, petitioner submitted documentation which consisted of a copy of a cover letter from his representative and a copy of a four-page invoice, dated March 25, 1996, in the total amount of $24,108.17, submitted by "Craig F. Knight, Esq., Financial Consultant" to Mr. Tallman at Wachovia Corporate requesting reimbursement for expenses incurred in connection with "NYC business, trips to Germany, UK, Steamboat, Boston, St. Louis and Chicago." A review of this invoice indicates travel expenses from January 11, 1996 through March 24, 1996 with the notation "CTA Deal" typewritten throughout the comment section of the pages of the invoice. The expenses listed on this invoice include, among other items, tolls and parking fees incurred while conducting New York City business for Wachovia Corporate. The documentation submitted to the auditor did not support all of the expenses actually reported on petitioner's 1996 Schedule C. During the audit, petitioner did not submit any expense reports for 1995 to establish that he worked on the CTA transaction for Wachovia Corporate in 1995.

We modify finding of fact "102" of the Administrative Law Judge's determination to read as follows:

> 102. Based on his review of the documents submitted during the audit, the auditor concluded that petitioner became a domiciliary of New York State and New York City on April 1, 1996 and was a domiciliary of New York State and New York City for the period April 1, 1996 through December 31, 1996. The basis of the auditor's conclusion included the following. The auditor found that during the relevant period petitioner spent a far greater number of days in New York than in New Jersey. Many of petitioner's weekends were spent in New York City and he also made credit card charges in New York City on the

weekends. During the relevant period, petitioner had strong business ties to New York.[11]

103. The auditor recomputed petitioner's New York State and New York City tax liability for the period April 1, 1996 through December 31, 1996 using the filing status married filing separately on separate forms. In his computation of petitioner's New York State adjusted gross income, the auditor included the entire $225,000.00 in wages or salary that petitioner received from KTV, $51,944.00 in interest income (75 percent of the interest income for the year), $8,241.00 in dividend income (75 percent the dividend income for the year) and $892,120.00 in Schedule E income consisting of $880,336.00 in partnership income from KTV and $11,784.00 in other S-corporation income (75 percent of the S-corporation income for the year) and determined the corrected New York State adjusted gross income to be $1,177,294.00. The corrected Federal adjusted gross income was determined to be $2,133,680.00. The auditor determined the corrected New York State itemized deductions after modifications to be $103,483.00. After deducting the corrected itemized deductions in the amount of $103,483.00 and exemptions totaling $2,000.00 (for two exemptions) from the corrected Federal adjusted gross income of $2,133,680.00, the auditor determined a corrected New York State taxable income in the amount of $2,028,197.00. After determining a base New York State tax on $2,028,197.00 to be $144,509.04, the auditor multiplied this base New York State tax by the New York State income percentage of 55.18 percent ($1,177,294.00/$2,133,680.00) and recomputed the tax liability to be $79,740.09. After allowing $17,168.00 in credits for taxes paid to the State of Georgia, the auditor determined the corrected New York State tax liability to

[11]We modified finding of fact "102" to better reflect the record.

be $62,572.09 and the corrected New York City tax liability to be $52,183.00. For the year 1996, petitioner had previously paid $9,006.00 in New York State tax and $790.00 in New York City tax. After subtracting these previously paid New York State and New York City tax amounts from the corrected New York State and corrected New York City tax liabilities computed above, the auditor determined an additional New York State tax liability in the amount of $53,566.09 and an additional New York City tax liability in the amount of $51,393.00.

104. On August 20, 2002, the Division issued a Statement of Personal Income Tax Audit Changes to petitioner reflecting the above-described proposed audit adjustments for the year 1996. This statement shows additional New York State tax due in the amount of $53,566.09 and additional New York City tax due in the amount of $51,393.00. Negligence and substantial understatement of tax penalties pursuant to Tax Law § 685(b)(1), (2) and (p) in the total amount of $37,162.25 plus interest were added to the additional tax asserted as due.

105. The auditor did not include any of the $1,076,869.00 in 1996 Schedule C business income from Knight Financial Consulting in the Statement of Personal Income Tax Audit Changes issued on August 20, 2002 for the year 1996.

We modify finding of fact "106" of the Administrative Law Judge's determination to read as follows:

> 106. For the year 1997, the auditor concluded that petitioner intended to change his domicile from New Jersey to New York and therefore petitioner was a New York State resident for income tax purposes. Accordingly, the auditor determined that petitioner was subject to tax on all of his income regardless of the source. Alternatively, the auditor concluded that petitioner was a statutory resident of New York because the auditor found that he maintained a permanent place of abode in New York City and failed to establish through adequate records

that he did not spend more than 183 days of the year 1997 within New York State.[12]

107. The auditor recomputed petitioner's New York State and New York City tax liability as a resident for the year 1997 using a filing status of married filing separately on separate forms. To the amount of the New York State adjusted gross income reported on petitioner's return, $1,889,501.00, the auditor added $3,332,634.00 as the residency adjustment and determined the corrected New York State adjusted gross income to be $5,222,135.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications in the amount of $232,462.00 and allowable exemptions (two) totaling $2,000.00 and determined the corrected New York State and New York City taxable income to be $4,987,673.00. The auditor determined the corrected New York State tax liability to be $341,655.60 and the corrected New York City tax liability to be $222,280.22. For the year 1997, petitioner had previously paid New York State taxes in the amount of $123,611.00 and New York City taxes in the amount of $75.00. After subtracting these previously paid New York State and New York City tax amounts from the corrected New York State and New York City tax liabilities computed above, the auditor determined an additional New York State tax liability in the amount of $218,044.60 and an additional New York City tax liability in the amount of $222,205.22.

108. On August 20, 2002, the Division issued a Statement of Personal Income Tax Audit Changes to petitioner reflecting the above-described audit adjustments for the year 1997. This statement shows additional New York State tax due in the amount of $218,044.60 and additional New York City tax due in the amount of $222,205.22. Negligence and substantial

[12]We modified finding of fact "106" to better reflect the record.

understatement of tax penalties pursuant to Tax Law § 685(b)(1), (2) and (p) in the total amount of $135,555.63 plus interest were added to the additional tax asserted as due.

109. The penalties were asserted as due on these statements of personal income tax audit changes because of petitioner's negligence in failing to properly file and the inadequate disclosure of his New York State residence on his 1996 and 1997 New York State tax returns.

110. As noted in Finding of Fact "1," on February 18, 2003, the Division issued a Notice of Deficiency asserting additional New York State and City personal income tax, interest and penalty in the aggregate total amount of $923,533.88 for the years 1996 and 1997.

111. On May 19, 2003, petitioner filed a petition challenging the Division's determination that petitioner was a resident of New York State and New York City for the years 1996 and 1997. Alternatively, the petition challenges the Division's determination that the allocation percentages reported on petitioner's originally filed returns do not accurately reflect days worked in New York for the years 1996 and 1997. The petition also challenges the imposition of penalties.

112. Neither the Notice of Deficiency issued on February 18, 2003 nor the Division's Answer, dated July 30, 2003, challenged petitioner's treatment of the $1,076,869.00 in business income from Knight Financial Consulting reported on the 1996 Schedule C or alleged a deficiency in tax for this income reported on the 1996 Schedule C attached to the Federal income tax return jointly filed by petitioner and Patricia M. Knight for 1996. The first allegation of a deficiency by the Division with respect to the $1,076,869.00 in business income was made in the Division's Hearing Memorandum, dated April 26, 2004. This allegation was also raised at the hearing.

113. Prior to the hearing in this matter, the original auditor who conducted the audit retired. Since the current supervisor assigned to the audit was unavailable to testify at the hearing, the Division assigned Jon Obert, a Tax Auditor 2, in the Division's Suffolk District Office to testify at the hearing. During his career with the Division, Mr. Obert has worked on hundreds of audit cases involving residency.

114. Prior to the hearing, Mr. Obert reviewed the entire audit file. After reviewing the documents in the file, he concluded that the original auditor erroneously failed to include the 1996 Schedule C income from Knight Financial Consulting in the Statement of Personal Income Tax Audit Changes issued for the year 1996. Mr. Obert based his conclusion on the fact that documentation submitted during the audit indicated that petitioner conducted business in New York during the period January 1, 1996 through March 31, 1996. This documentation included, among other documents, a copy of a four-page expense invoice, dated March 25, 1996 (originally submitted to Wachovia Corporate for reimbursement of expenses), submitted to the auditor to support the expenses that petitioner claimed on the 1996 Schedule C, a letter dated October 9, 2002 from Mr. Tallman, the executive to whom petitioner reported while working as a consultant to Wachovia Corporate, a January 29, 2002 letter with attachments from the general manager of the Racquet Club, documentation obtained from The University Club, the mailing address listed on petitioner's 1996 American Express year-end credit card summary and the credit card charges listed in the 1996 American Express year-end summary. Mr. Obert observed that the expenses listed on the four-page expense invoice indicated that petitioner conducted business in New York and at least a portion of the Schedule C income should have been allocated to New York.

115. An additional tax deficiency of $73,669.00 plus interest and penalties was asserted at the hearing via a document, prepared on May 1, 2004 by Mr. Obert, entitled "Summary: Allocation of Sch. C Income to non resident period 1/1/96 - 3/31/96" ("summary"). This summary includes a work paper that he used to determine the proper amount of income to include in the Federal and State columns as if petitioner was a nonresident and received this income during the short period January 1, 1996 through March 31, 1996 and the Statement of Personal Income Tax Audit Changes issued on May 1, 2004.

116. The auditor computed the Federal income for the short period by allocating 25 percent of the interest income, or $4,107.00, 25 percent of the dividend income, or $2,747.00 and 100% of the Schedule C income, or $1,014,650.00. After adding these three amounts together to arrive at a subtotal in the amount of $1,021,504.00 and subtracting a Federal adjustment related to petitioner's consulting agreement in the amount of $69,057.00, the auditor determined the Federal adjusted gross income to be $952,447.00. He also allocated 25 percent of the itemized deductions to the short period, or $68,989.00. The auditor determined petitioner's New York State income for the nonresident period to be $1,014,650.00, the entire amount reported on the 1996 Schedule C as the net profit from Knight Financial Consulting. The auditor also allocated 25 percent of the New York State tax previously paid, or $2,252.00 and 25 percent of the New York City tax previously paid, or $198.00 to the short period.

117. A Statement of Personal Income Tax Audit Changes for the period January 1, 1996 through March 31, 1996 was issued to petitioner on May 1, 2004 that reflected the allocation of the 1996 Schedule C income from Knight Financial Consulting to New York State during the nonresident period January 1, 1996 through March 31, 1996. In that Statement of Personal

Income Tax Audit Changes the following adjustments were made: the New York State amount of Federal gross income was increased by $1,014,650.00 to $1,014,650.00 and the New York itemized deductions were decreased by $34,495.00 to reflect a New York itemized deduction adjustment. As a result of the audit adjustments, the New York State taxable income for the short period was determined to be $915,953.00 and the base New York State tax on that amount was determined to be $65,262.00. The New York State income percentage of 106.53 percent ($1,014,650.00/$952,447.00) was multiplied by the base New York State tax of $65,262.00 and the recomputed New York State tax for the short period was determined to be $69,524.00. The corrected taxable income for New York City purposes was determined to be $1,014,650.00 and the additional New York City tax was determined to be $6,595.00. The statement shows a corrected tax liability for New York State for the period January 1, 1996 through March 31, 1996 in the amount of $69,524.00 and for New York City for the period January 1, 1996 through March 31, 1996 in the amount of $6,595.00. A credit for New York State and New York City taxes previously paid in the amount of $2,252.00 and $198.00, respectively, was allowed. The statement shows additional New York State tax due in the amount of $67,272.00 and New York City tax due in the $6,397.00. Negligence and substantial underpayment of tax penalties pursuant to Tax Law § 685(b)(1), (2) and (p) in the total amount of $35,073.00 plus interest were added to the additional tax asserted as due. The auditor imposed the penalties because none of the business income from Knight Financial Consulting was allocated to New York even though it appeared, based on the documentation submitted, that at least some of this income was earned in New York State and New York City.

118. At the hearing, petitioner stipulated that he spent in excess of 183 days in New York City in 1996.

119. At the hearing, petitioner stipulated that he spent in excess of 183 days in New York City in 1997.

120. At the hearing, the Division waived the issue of whether petitioner was a statutory resident of New York for 1996.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first addressed the question whether petitioner was a resident of New York State and New York City. She observed that Tax Law § 605(b)(1) provides two alternative definitions of resident–*viz.* one based on domicile in New York and the other based on the maintenance of a permanent place of abode in New York, subject to certain exceptions which are not applicable here because of the number of days petitioner spent in New York during the years at issue. Based on the facts set forth above, the Administrative Law Judge concluded (i) that petitioner changed his domicile from New Jersey to New York on October 1, 1996 and continued to be domiciled in New York during 1997 and (ii) that petitioner maintained a permanent place of abode in New York from May 1, 1996 through the year 1997. As noted above, the Division waived its assertion that petitioner was a resident during 1996 based on the maintenance of a place of abode. Accordingly, petitioner was subject to personal income tax as a resident of New York for the period October 1, 1996 through December 31, 1997.

The Administrative Law Judge also concluded that consulting income received by petitioner during the nonresident portion of 1996 and reported on his Federal Schedule C for 1996 was completely derived from or connected with New York and accordingly subject to tax.

Finally, the Administrative Law Judge sustained the imposition of penalties for negligence under Tax Law § 685(b) based on petitioner's denial that he maintained living quarters in New York on his 1996 nonresident return and the penalty for substantial understatement under Tax Law § 685(p) based on the absence of reasonable cause for petitioner's failure to pay tax due.

ARGUMENTS ON EXCEPTION

Petitioner asserts on exception that the facts clearly prove that petitioner's domicile had been and remained New Jersey throughout 1996 and 1997 and that petitioner did not maintain a permanent place of abode in New York at any time during 1997. With respect to the allocation of fee income reported on petitioner's Federal Schedule C for 1996, petitioner argues that since the Division did not raise this issue until its hearing memorandum dated April 26, 2004, the Division has the burden of proof on the issue pursuant to Tax Law § 689(e)(3) which so provides where an issue is raised by the Division after the notice of deficiency is issued and the petition is filed. Since the Division has offered no evidence regarding 1995, the year in which the income was earned, it has not carried that burden in the view of petitioner. Finally, petitioner asserts that penalties should be abated in light of the substantial evidence supporting petitioner's position and petitioner's reasonable belief that he was not a domiciliary of New York and did not maintain a permanent place of abode in New York.

The Division argues in opposition to petitioner's exception that petitioner demonstrated his intention to acquire a New York domicile by making "major life decisions that all centered around New York City." Among these were the formation of a new business located in New York and his relationship with Ms. Lin in New York. Relying in part on our prior decision in ***Matter of Evans*** (***infra***), the Division also asserts that the apartment rented by the business in

which petitioner worked and was a partial owner was a permanent place of abode maintained by petitioner for 1997. The Division also takes the position that the income received by petitioner as a contract consultant to Wachovia Corporate and reported on petitioner's 1996 Schedule C should be attributed to New York sources based on petitioner's use of Wachovia's offices in Manhattan. Finally, the Division contends that the Administrative Law Judge properly upheld the penalty imposed on petitioner in the absence of evidence of reasonable cause.

OPINION

We will address separately each of the four issues presented in this case–*viz.* domicile, permanent place of abode, allocation of income, and penalties.

1. *Domicile.* Tax Law § 605(b)(1)(A) and (B), sets forth the definition of a New York State resident individual for income tax purposes as follows:

> 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.

The definition of a New York City resident is *mutatis mutandis* the same (***see***, Administrative Code § 11-1705[b][1][A], [B]; ***see also***, 20 NYCRR 295.3[a]; 20 NYCRR Appendix 20, § 1-2[c]). Since petitioner concedes that he was present in New York for more than 183 days in each of the years under audit, the quoted exceptions are inapplicable.

Accordingly, if petitioner had a New York domicile, he will be taxable as a resident of New York.

The legal concept of domicile is well developed and the subject of a large body of law. 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 Silverman***, Tax Appeals Tribunal, June 8, 1989, citing ***Matter of Trowbridge***, 266 NY 283, 289; ***Matter of Jay***, Tax Appeals Tribunal, September 9, 2004).

In order to create a change of domicile, both the intention to make a new location a fixed and permanent home *and* actual residence at that location must be present (***see, e.g., Matter of Minsky v. Tully***, 78 AD2d 955, 433 NYS2d 276). Almost a century ago, the Court of Appeals stated the rule as follows in ***Matter of Newcomb*** (192 NY 238, 250-251):

> 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. . . . 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. *Uno solo die constituitur domicilium si de voluntate appareat*. 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. (*Dupuy v. Wurtz,* 53 N.Y. 556, 561; *The Venus,* 8 Cranch. 253, 278; *Carey's Appeal,* 75 Penn. St. 201, 205; Wharton's Conflict of Law [2d ed.], §§ 21, 56, 66.) 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.

These legal principles are restated in the regulations (20 NYCRR 105.20[d]) 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.
>
> * * *
>
> (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 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). Domicile persists regardless of an intention to end it unless and until a new domicile is established. For example, if a domiciliary of New York terminated his residence in New York with the intention of never returning and spent the following several years traveling among the

capitals of Europe, residing for a few months in each, and finally returned to the United States to make a home in Florida, he would remain a domiciliary of New York until his new home in Florida was established.

The presence of a suburban commuter at work or play in New York on most days, without more, does not create a New York domicile and the frequency of theater attendance or restaurant meals seems to have little probative value on the issue of whether his or her home continues to be in the suburbs. The number of days spent in New York might well be one of the factors to be considered in a case where the taxpayer had substantial residences in New York and a distant city and the issue was which of the two was the taxpayer's domicile. If other factors indicate that an individual is a mere sojourner whose home is elsewhere, that status will not be elevated to domicile by the frequency of visits.

Petitioner is a native of New Jersey and there is no suggestion that he was a domiciliary of any other place prior to the audit period in this case. For all relevant periods, it appears that petitioner's children, his parents, and his brother continued to live in New Jersey. Upon moving out of the New Jersey home that he maintained with his first wife, he took up residence nearby in the home of his parents. There he had a bedroom that he used as his own and was able to come and go as he pleased. He also spent occasional nights nearby at his brother's house. Although estranged from his first wife, the bonds of affection and habit that tied him to the other members of his family and the local community were apparently undisturbed. Following the death of his father in April of 1998, petitioner purchased a large house, not in New York, but in Connecticut.

When petitioner was not traveling away from the New York City metropolitan area during the audit period, it appears that he spent some nights at his parents' home in New Jersey, some

nights at the apartment of a paramour in Manhattan, and some nights at a Manhattan apartment maintained by the business in which he was a minority owner. In varying degrees, petitioner's ability to stay in these places was apparently subject to the sufferance of other people. The exercise we are now engaged in is not to choose among these three places based on the number of nights he stayed in each or the quality of the welcome that he would receive in each place. It is the burden of the Division to establish that petitioner had a place of residence in New York and that he intended to establish a new permanent home in New York displacing his New Jersey domicile. Overnight romantic encounters in the home of another person and occasional stays at a corporate apartment do not meet this standard.

Petitioner testified that during the audit period he stayed at the apartment of Theresa Lin perhaps once a week (***see,*** Hearing Tr., p. 99). At some point she gave him a key for one of the locks on her apartment door. According to petitioner, one of these locks had a pick resistant Medco cylinder and the other was a standard less secure lock. It was the less secure lock for which petitioner was given the key (***see***, Hearing Tr., pp. 96-98, 186-187; Petitioner's Exhibit 37). Ms. Lin was thus able to control when petitioner would be admitted to her residence. This behavior is clearly inconsistent with the idea that this apartment was petitioner's residence.

That the relationship of petitioner and Ms. Lin continued to develop after the audit period and that they were married on July 29, 2000 does not refute evidence that the relationship was of a more casual nature in 1996 and 1997. The only information in the record that may be inconsistent is a letter dated June 15, 2000 from a Vice President of Glenwood Management Corp. to the Division which states in pertinent part, "Please note that neither Craig nor Patricia Knight was a tenant of ours at the above referenced premises [Ms. Lin's building]. Building staff

advises me, however, that he was a roommate of a Ms. Teresa Lin who resided in apartment 26G until May 25, 2000 of this year"(***see,*** Division's Exhibit P). There is no information about the "building staff" member or members from whom the information was obtained, such as whether those persons had worked at the building for many years or for a few days or whether they worked shifts that would permit them to observe the comings and goings of petitioner. It is also unclear how the comment was intended. The letter was written in June of 2000 in response to a letter dated June 6, 2000 from the Division's auditor which asks for information about the occupancy of the "Knights" "from 1996 until the present," i.e., until June of 2000. Thus, the writer may have been describing circumstances that he and the "building staff" believed to exist at some point during the period from January 1, 1998 to May 25, 2000 rather than during the 1996-1997 audit period.

Similarly deficient is a half page report dated June 5, 2000 signed by Linda Caracappa, Investigator, concerning a visit to Ms. Lin's building on the same date (***see,*** Division's Exhibit O). It states, "According to the doorman the Knight's moved out approximately 2 weeks ago and lived there on a daily basis since at least 1996." Although the report is captioned "REPORT: Craig & Patricia Knight," it seems likely that "the Knight's" refers to petitioner and Ms. Lin who were married the following month, rather than petitioner and his first wife, Patricia. Of course, Ms. Lin, one of "the Knight's," did live there on a daily basis since 1996. The Division apparently wishes us to read the phrase "lived there on a daily basis since at least 1996" as also applicable to petitioner, the other one of "the Knight's." Whether this subtlety was actually part of the reported conversation between the investigator and the doorman seems highly speculative. In addition to the ambiguity of the report, the probative value of the statement is substantially

diminished by the fact that it was made by an unidentified person about facts occurring four years in the past. Moreover, it was transcribed by an employee of the Division who was hardly a disinterested observer and who was not called as a witness. We have concluded that in these circumstances the investigator's report should be given no weight. The Division has offered no significant evidence rebutting petitioner's credible testimony about his visits to Ms. Lin and her supporting affidavit. The record simply does not support the conclusion that her boudoir became petitioner's residence during the audit period.

The other apartment that the Division asserts to have been a residence of petitioner is the one that was maintained by the business in which he was a 40% owner. Petitioner testified that the principal use of the apartment was to provide an accommodation for clients and other persons from out of town, including the other owners of the business, who were in New York to work on the company's transactions. The other owners had their own keys and another key was kept by a secretary in the New York office who kept track of the availability of the apartment. Petitioner testified that he stayed in the apartment perhaps once a month and did not keep any clothing or other belongings there (***see,*** Hearing Tr., pp. 81, 86). Petitioner's testimony on this subject was supported by affidavits from out-of-town business associates who used the apartment when visiting petitioner's offices on business (***see,*** Petitioner's Exhibits 35, 36, 37, 38, 39 and 40). We conclude that petitioner's occasional stays in the apartment when it was not needed for other business purposes do not support the Division's argument that it became petitioner's residence.

In ***Aetna National Bank v. Kramer*** (142 App Div 444, 126 NYS 970), an individual left her home in New Jersey on April 3 and traveled to Brooklyn which she intended to be her new permanent home. She stayed temporarily at a place of abode in Brooklyn until her new home

was ready for occupancy and her furniture was moved there from New Jersey. The court held that the domicile of the individual changed on April 3 stating in part as follows:

> On the third of April the testatrix left her former domicile with the intention of abandoning it, and went to reside in Brooklyn with the intention of acquiring a domicile there. Thus, there was both a change of residence and an intention to acquire another domicile. While the house in which she expected to live was being furnished she remained temporarily in another house in the locality. But we do not consider that fact of any importance. When she abandoned her domicile in New Jersey, and went to reside in Brooklyn, with the intention of making that her permanent domicile, she acquired a domicile there, and the mere fact that her first residence was a temporary one is of no consequence in view of the fact that there was an actual change of residence with the necessary intention of effecting a change of domicile (***Aetna National Bank v. Kramer***, ***supra***, 126 NYS, at 971-972).

It could be argued that petitioner's use of Ms. Lin's apartment or the apartment of the business in which he worked are analogous to the temporary residence in the ***Aetna National Bank*** case and were a step in petitioner's change in domicile from New Jersey. We do not find this analysis persuasive. First, here there is no evidence that petitioner intended at any time to make New York his permanent home and to abandon his domicile in New Jersey except as may be inferred from the frequency of his activities in New York. There is also no evidence that he subsequently established a fixed place of abode in New York as might have occurred if he had moved in with Ms. Lin on a full time basis. On the contrary, it appears that petitioner purchased a large house in Connecticut in July of 1998 (***see,*** Hearing Tr., pp. 88-90), shortly after the end of the audit period and two years before marrying Ms. Lin. In ***Aetna National Bank***, it was clear that the individual effected a change in domicile from New Jersey to New York and the only issue was the date of the change. Second, the new residences in ***Aetna National Bank*** were both in New York. We do not read the holding of the case as extending to a situation where the temporary interim residence and the permanent residence are in different jurisdictions. The case

seems to stand for the proposition that the requirement of an intention to move to a new permanent home applies to the jurisdiction not a particular house. If, for example, petitioner intended to abandon his New Jersey domicile and to take up temporary residence in New York before making a new home in Connecticut, there would be no change of domicile until he actually took up residence in Connecticut.

2. *Permanent place of abode.* Having concluded that petitioner was not a domiciliary of New York during the audit period, we now address the question whether petitioner maintained a permanent place of abode in New York State and City. This is an issue on which petitioner has the burden of proof.

As noted above, the Tax Law provides that an individual who is not a domiciliary of New York will nevertheless be treated as a resident of New York if he or she is present in New York for more than 183 days during the taxable year and "maintains a permanent place of abode" in New York. Further detail is provided in the Division's regulations which provide, at 20 NYCRR 105.20(a)(2), that the term "resident individual" includes:

> [a]ny individual (other than an individual in active service in the Armed Forces of the United States) who is not domiciled in New York State, but who maintains a permanent place of abode *for substantially all of the taxable year* (generally, the entire taxable year disregarding small portions of such year) in New York State and spends in the aggregate more than 183 days of the taxable year in New York State (emphasis added).

The Division asserts that petitioner met this definition for 1997 but not for 1996, presumably because the asserted residence was for less than "substantially all of the [1996] taxable year." Petitioner has conceded that he was present in New York for more than 183 days in both 1996 and 1997. Accordingly, the only issue is whether he maintained a permanent place of abode in New York during 1997.

In addressing the issue of what constitutes a permanent place of abode, 20 NYCRR 105.20(e)(1) states as follows:

> A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacation, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. Also, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose.

The word "permanent" in the statute modifies "place of abode" not "maintained." Accordingly, it might be inferred that it is a quality of the place or the use of the place rather than the taxpayer's maintenance of it that must be "permanent." The regulations, however, state that the dwelling place must be "permanently maintained."

In ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992, ***confirmed Matter of Evans v. Tax Appeals Tribunal***, 199 AD2d 840, 606 NYS2d 404), we stated as follows:

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

In that case, we found that the petitioner had maintained a permanent place of abode in New York City where he occupied for his exclusive use a bedroom in a church rectory a few blocks from his corporate office during the work week and spent his weekends at a dwelling he

owned in Dutchess County. The Appellate Division confirming the decision in ***Evans*** stated in part as follows:

> Other than payment of a proportionate share of the monthly rental, which was unnecessary in view of the fact that the premises were provided to Ioppolo [the priest in charge of the church] free of charge, petitioner's occupation of the premises had all indicia of a shared rental. As previously indicated, petitioner and Ioppolo divided all actual living expenses, including the wages of a housekeeper. Petitioner also supplied many items of furniture for his own bedroom and common rooms in the rectory, and he possessed a key providing free and continuous access to the four-story brownstone and received visits from his son there. Further, petitioner's use of the rectory was not caused by a temporary condition or assignment. Rather, he maintained clothing and other personal articles for ongoing use at the rectory throughout a seven-year period prior to the tax years in question and used the premises to maintain convenient daily access to a full-time job in midtown Manhattan (***Matter of Evans v. Tax Appeals Tribunal***, ***supra***, 606 NYS2d, at 405-406).

The evidence in the present case with respect to Ms. Lin's apartment clearly indicates that the factors found significant by the Appellate Division in ***Evans*** were lacking. Petitioner did not share the expenses of the apartment (***see,*** Hearing Tr., p. 96). Petitioner did not maintain clothing, personal articles or furniture in the apartment (***see,*** Hearing Tr., p. 99). Petitioner did not have a dedicated room to which he had free and continuous access (***see,*** Hearing Tr., pp. 96-99) and did not use it for daily attendance at his full-time job (***see,*** Hearing Tr., p. 99). Accordingly, we conclude that petitioner did not maintain a permanent place of abode at Ms. Lin's apartment in 1997.

The foregoing factors were also not present in 1997 with respect to the apartment maintained by the business in which petitioner worked and was a 40% owner, except to the extent that he bore a proportionate share of the expenses by reason of being a part owner of the business. Petitioner did not maintain clothing, personal articles or furniture in the apartment (***see,*** Hearing Tr., p. 81). Petitioner did not have a dedicated room to which he had free and

continuous access (***see,*** Hearing Tr., pp. 80, 86) and did not use it for daily attendance at his full time job. In light of the bona fide and arm's-length nature of petitioner's relationship with the other owners of the business and the persuasive evidence that the apartment was maintained for the use of business visitors from out of town, we do not think that the maintenance of the apartment should be attributed to the owners of the business.

The Division's position also seems inconsistent with its audit guidelines on corporate apartments which state, in part, as follows:

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

The evidence presented in this case falls within this description. On oral argument, the Division asserted that these audit guidelines do not apply here because the business was organized as a closely held limited liability company rather than a publicly owned business corporation (***see,*** Oral Argument Tr., pp 21-22). We find no such limitation in the guidelines and do not think such a limitation is logically supportable. There is little reason to believe that the standards of governance applied in the boardrooms of public corporations are more rigorous than those in effect in closely held businesses, particularly when the business owners are unrelated and no single owner has a controlling interest. In addition, the tax characterization of a limited liability company as a partnership or a corporation has no apparent connection with the question of whether a "corporate" apartment is truly used for business rather than personal purposes.

Based on the foregoing, we have concluded that neither of the two Manhattan apartments in this case were maintained by petitioner as a permanent place of abode in 1997.

3. Allocation of income for 1996. Petitioner's 1996 Schedule C indicated gross income in the amount of $1,076,869.00 from Knight Financial Consulting, a sole proprietorship that petitioner operated during the first three months of 1996. Petitioner did not allocate to New York any portion of the $1,076,869.00 in gross income reported on his 1996 Schedule C. The Notice of Deficiency was issued on February 18, 2003 and petitioner filed his petition on May 19, 2003. The first assertion by the Division that the $1,076,869.00 in business income should be allocated to New York sources was made in the Division's Hearing Memorandum dated April 26, 2004.

Tax Law § 689(e) provides in part as follows:

> Burden of proof. In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:
>
> * * *
>
> (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed, unless such increase in deficiency is the result of a change or correction required to be reported under section six hundred fifty-nine, and of which change or correction the tax commission had no notice at the time it mailed the notice of deficiency. . . .

Since the asserted increase was first set forth in the Division's Hearing Memorandum, the Division has the burden of proof on this issue (***see,*** Oral Argument Tr., pp. 17-18).

Petitioner's consulting work for which this income was received was apparently conducted in several cities in the United States and abroad and related to the Chicago Transit Authority leveraged lease financing of commuter rail cars which closed in September of 1995. Normally,

one would expect that the source of income of this type would be allocated on the basis of the number of days worked in each place. It seems likely that some estimate of such an allocation could be made from credit card invoices and other bills for travel and telephone records during the periods involved. Nevertheless, the Division has not adduced any evidence of this type or made an estimate of the days that might be involved in such an allocation.

The Division asserts that it has carried its burden of proof on this issue based on the following evidence in the record (***see,*** Oral Argument Tr., pp. 18-19). First, one of the owners of the business in which petitioner worked during 1996 and 1997 and had previously been at Wachovia provided a letter to the Division's auditor which states in part, "From January to April, 1996, Mr. Knight was a contract consultant to Wachovia Corporate Services, Inc., and he worked out of Wachovia's offices at 152 W. 57th Street, Suite 3700, New York , NY 10019. . . . I do not have access to Mr. Knight's personal schedule" (Division's Exhibit H). The Division also relies on a letter dated October 11, 1995 from Steven W. McConnell to the secretary of the Racquet & Tennis Club proposing petitioner for membership (Division's Exhibit K). The letter includes the following paragraph:

> He is currently employed as an independent consultant to Wachovia Corporate Services Inc. where he has had the job of overseeing the development of their international investment banking effort. As such he has offices in New York, London and Atlanta.

It is not disputed that desk space was available to petitioner at the offices of Wachovia in New York if needed. These letters do not purport to say where petitioner actually worked. It is his position that all but a *de minimis* number of days of work that produced the income on his Schedule C was performed in other cities where the other parties to the transaction or their advisors were located or at his residence in New Jersey (***see***, Hearing Tr., pp. 40-44).

The record includes an expense report dated March 25, 1996 providing some detail of post-closing work on the Chicago Transit Authority transaction during January, February and March of 1996 including trips to Chicago, North Carolina, Denver and London. There is nothing in the documents that the Division relies on that indicates that petitioner performed work on this transaction in New York. In the absence of any evidence supporting the Division's assertions, or even a cogent argument based on the evidence otherwise present in the record, we conclude that the Division has failed to carry the burden imposed on it by Tax Law § 689(e).

The Division appears to argue that because petitioner did not "allocate one day to New York" on his nonresident return for 1996, the burden of proof has somehow shifted back to petitioner on this issue (***see,*** Oral Argument Tr., p. 19). We do not agree.

4. Penalties. Since we have concluded that petitioner is not liable for the asserted deficiencies, there is no need to discuss the subject of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Craig F. Knight is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Craig F. Knight is granted; and

4. The Notice of Deficiency dated February 18, 2003 is cancelled.

DATED: Troy, New York
November 9, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner