STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **ELLIOTT AND GHISLAINE SUTTON** | : | DECISION |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1981 and 1982. | : | |

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 9, 1989 with respect to the petition of Elliott and Ghislaine Sutton, 19667 Turnberry Way TSGR, North Miami Beach, Florida 33180 for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1981 and 1982 (File No. 802019). Petitioners appeared by Levine, Furman and Davis, Esq. (Leonard D. Furman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Both the Division and petitioners filed briefs on the exception. At the request of the Division, oral argument was heard on May 16, 1990.

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

***ISSUE***

Whether petitioners were subject to taxation as residents of the State and City of New York during the years 1981 and 1982.

## *FINDINGS OF FACT*

We find the facts as stated by the Administrative Law Judge and such facts are restated below.

On April 12, 1985, the Division of Taxation issued to petitioners, Elliott and Ghislaine Sutton, a Notice of Deficiency asserting additional personal income tax due for the year 1981 in the amount of $7,513.07, plus interest. On February 26, 1985, the Division of Taxation issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the year 1982 in the amount of $8,555.51, plus interest.

On November 8, 1984 and April 9, 1985, respectively, the Division of Taxation issued separate statements of audit changes to petitioners for each year in issue, explaining the Division's position that petitioner Elliott Sutton had not effected a change of domicile from New York to Florida and that he was taxable as a New York State and City resident for both of the years in question.[1] Each of these statements included computational explanations of the calculation of tax due both for New York State and New York City purposes. The parties are in agreement that the dollar amounts of tax asserted as due are not in question, and that the issue presented is whether or not petitioner effected a change of domicile from New York State to Florida prior to the years in question.

Petitioner, Elliott Sutton, was born and raised in Brooklyn, New York. He was married and purchased a home in Brooklyn, New York in January 1964 and resided there until being divorced from his first wife (Rochelle Sutton) in July 1974. Upon divorce, petitioner's former wife retained ownership and possession of the Brookyn home, while petitioner obtained a one-bedroom, rent-stabilized apartment at 300 East 40th Street (known as "the Churchill") in Manhattan. This apartment totalled approximately 700 square feet in area and rented for approximately $400.00 per month.

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[1] Ghislaine Sutton's name appears solely because a joint New York State Income Tax Nonresident Return was filed for 1982. All references herein to petitioner shall pertain only to Elliott Sutton.

At or about the time of his divorce from Rochelle Sutton, petitioner started traveling to and spending time in Florida. On these trips, petitioner stayed at The Jockey Club in Miami Beach, which had rooms and apartments available for rent. From 1974 through 1977, petitioner spent most of the winter months in Florida, staying in such rented rooms or leased apartments.

In 1977 petitioner was involved in the purchase of a condominium at The Jockey Club, specifically unit 4-D located at 1111 Biscayne Boulevard. This condominium was, in fact, purchased by a corporation, Belford Equities, Inc., wholly-owned by petitioner and his brother, Irving Sutton.

On or about May 23, 1980, petitioner and his brother, Irving, entered into a contract for the purchase of a large condominium located at 19667 Turnberry Way, Miami, Florida. This condominium was a custom-built, luxury two-level duplex, consisting of some 6,500 square feet of living space including a top floor roof deck. This condominium had separate entrances and separate suites (living areas) for petitioner and his brother, but had common kitchen, living room and roof areas.

Petitioner described certain events occurring in New York which prompted him to purchase this large condominium, including the breakup of a long-term relationship, the death of his mother in January of 1980 and the subsequent death of his sister. Petitioner stated, in testimony, that he was "fed up with living in New York" and that he "was determined to make a new life and not live in New York anymore".

In or about late 1980, the condominium at The Jockey Club was sold by Belford Equities, Inc. (by petitioner and his brother), and thereafter petitioner lived in a developer's apartment at the same 19667 Turnberry Way address where the large condominium was being constructed until the condominium was finished. Petitioner and his brother closed title on the purchase of the condominium on April 27, 1981, taking ownership as joint tenants with the right of survivorship. Petitioner noted that both he and his brother were single and often bought real estate together. Petitioner testified that while he lived at the Florida condominium on essentially a full-time

basis, his brother was there much less frequently, approximately only 15 to 20 days per year. Petitioner and his brother maintained separate telephone services in the condominium.

On June 9, 1980, petitioner filed a declaration of domicile and also registered to vote in Dade County, Florida. Petitioner also filed certifications of Florida domicile on February 26, 1982 and February 17, 1983 (presumably relating to real property taxes). Petitioner also belonged to a number of social clubs in Florida including The Jockey Club, The Tennis Club and Regines. Among petitioner's active pursuits is the racing of power boats. Petitioner owns and races a power boat which remains located in Florida. In 1980 and thereafter, petitioner also insured his automobiles in Florida. Said vehicles were, however, registered in New Jersey from which state petitioner has held a driver's license since the age of 16. On March 31, 1983, petitioner executed a Last Will and Testament in which he listed the State of Florida as his domicile. It is noted that petitioner belonged to no clubs in New York State.

In or about late 1981 or early 1982, petitioner listed the aforementioned large condominium for sale. The listing price was $2,000,000.00. Petitioner was, at the time, considering selling the condominium and buying a large townhouse situated on the oceanfront at the same location as the condominium. However, due to a downturn in the real estate market in Florida at such time, the developers of the townhouse project delayed construction indefinitely and petitioner decided not to sell the condominium.

Petitioner had income during the years in question from certain businesses located in New York which were owned, either wholly or partially, by petitioner. These businesses consisted of a sole proprietorship known as Port Electronics, and two corporations known as Terminal Camera, Inc. and Hilton Electronics, Inc. These businesses were commenced approximately 20 years ago and operated in their respective locations under long-term leases negotiated by petitioner. These businesses were involved in retail sales of cameras and electronic equipment, and petitioner was essentially uninvolved in their ongoing operations. Each business was operated by an independent manager, who had been working for a long number of years at each location and who made all business decisions on a day-to-day basis, including purchasing, hiring

and firing, and issuing of checks. Petitioner testified that he visits these businesses very infrequently and had no set frequency for calling and checking on the businesses. Petitioner described himself as a "silent partner". He testified that he does almost nothing with these businesses, and with respect thereto that "I don't enjoy [the businesses]" and "[the businesses] give me an income but that's about all".

Petitioner filed a New York State Nonresident Income Tax Return, including a City of New York Nonresident Earnings Tax Return (Form IT-203), for each of the years in question. On these returns, as well as on his U.S. Individual Income Tax Returns for the same years (and for 1980), petitioner's address was listed as 19667 Turnberry Way, Miami, Florida.

Commencing in or about 1980, petitioner undertook negotiations to obtain Florida franchise rights to the well-known P.J. Clark's restaurants. Petitioner's intent was to establish P.J. Clark's restaurants in the Aventura Mall in Miami, and to further develop such restaurants throughout the State of Florida. During 1980 and 1981, petitioner was involved in extensive negotiations with P.J. Clark's and others in furtherance of this aim. After approximately a year of negotiations and working out licensing agreements, which involved the expenditure of substantial amounts of time and money by petitioner, petitioner was ultimately unable to develop the P.J. Clark's restaurants in Florida. Petitioner, in turn, commenced litigation against P.J. Clark's, Macy's and other defendants alleging such defendants to have frustrated petitioner's ability to establish the restaurants. This litigation remains ongoing.

Petitioner has a son, Ralph, born of his first marriage, who was approximately eight or nine years old during the years in question. Petitioner's son visited petitioner in Florida on nearly every holiday during the years in question including Christmas, Easter, Thanksgiving, and the major Hebrew holidays, as well as extensively during the summers.

During the years in question, petitioner maintained bank accounts in both New York State and Florida. Petitioner's bank accounts in New York State were principally trust accounts maintained for the benefit of his son, Ralph, or were long-term accounts related to the businesses.

Wage and tax statements attached to petitioner's Forms IT-203 for the years in question listed petitioner's address as the New York rent-stabilized apartment at the Churchill. Petitioner attributed this listing, as did his accountant via affidavit, to an error made by the typist in the accountant's office. Petitioner testified that he maintained the New York rent-stabilized apartment even after obtaining the Florida condominium because it provided a relatively inexpensive alternative to obtaining hotel accommodations when petitioner came back to New York. Petitioner testified that he was in New York "certainly less than 100 days per year" and more likely visited New York no more than 60 to 75 days per year.

In December 1985, petitioner was served with a notice of eviction (notice of landlord's refusal to renew lease) from the rent-stabilized apartment in New York. The basis for this notice was stated to be that petitioner was not occupying the apartment as his primary or principal place of residence. Petitioner initially challenged this notice, but later abandoned such challenge and voluntarily vacated the rent-stabilized apartment. Petitioner subsequently purchased a condominium located on 64th Street in Manhattan. Petitioner stated his reasons for purchasing the 64th Street condominium to have been the same as for maintaining the rent-stabilized apartment (i.e., to provide comparatively inexpensive accommodations), as well as in furtherance of his belief that the condominium would appreciate in value thereby being a wise investment.

Telephone bills in petitioner's name, as submitted in evidence, reveal that outgoing calls were placed from the Turnberry Way condominium on 164 different days over a period of 11 months in 1981, and on 187 different days over a period of 10½ months in 1982. Petitioner's Florida phone bills were sent to the Terminal Camera business address in New York. Petitioner utilized this procedure in order to ensure that all phone bills would be paid when due. Petitioner noted that he travels frequently and is not always able to ensure that such bills would be paid promptly. Petitioner utilized this system to ensure that telephone service would not be cut off at the Florida condominium.

Petitioner voted in Florida by absentee ballot during the years in question. He noted that it had been his practice for many years to vote by mail because of its relative ease. The absentee

voter ballot sent to petitioner for one of the years in question was addressed to petitioner at his New York rent-stabilized apartment.

On November 3, 1982, petitioner was married to one Ghislaine Sutton. Petitioner was subsequently divorced from Ghislaine Sutton on July 27, 1983. It appears that the couple, in fact, separated in February of 1983.

***OPINION***

Tax Law § 605 (former [a]), in effect for the years at issue, provided, in pertinent part, as follows:[2]

> "Resident individual. A resident individual means an individual:
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> (1) who is domiciled in this state, unless (A) 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 . . .
>
> (2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

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

> "Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

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[2] The Personal Income Tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

* * *

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

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

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

To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276).

The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138, 140 quoting Matter of Bourne's Estate, 181 Misc 238, 41 NYS2d 336). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (see, Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990).

The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb, it stated, "No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing" (Matter of Newcomb, 192 NY 238, 251).

The Administrative Law Judge, weighing all the facts in this case and evaluating the testimony of petitioner, determined that petitioner changed his domicile from New York to Florida. The Administrative Law Judge also determined that petitioner did not spend more than

183 days in New York during the years at issue. The basis of the Administrative Law Judge's determination was his finding that petitioner's testimony was credible, coupled with the weight of the documentary evidence.

On exception, the Division asserts that 1) the burden of proving a change of domicile is on petitioner; 2) the standard of proof is one of clear and convincing evidence of an intent to change domicile; 3) the Administrative Law Judge erred in the weight he accorded the evidence produced by petitioner; 4) petitioner did not sustain his burden of proof because notwithstanding his testimony that it was his intent to change his domicile, his conduct confirmed that he lacked an absolute and fixed intention to abandon his New York domicile and acquire a Florida domicile.

In particular, the Division argues: 1) that the Administrative Law Judge erred by treating petitioner's testimony as conclusive; 2) that formal acts of domicile, e.g., filing a declaration of domicile, registering to vote and obtaining a driver's license, are self-serving and, thus, less persuasive than the informal acts of an individual's general habit of life and 3) that petitioner's general habit of life, especially his failure to terminate certain business interests in New York and his failure to give up a rent controlled apartment in New York City, was so contrary to his declarations of intent as to preclude a finding by the Administrative Law Judge that petitioner, by clear and convincing evidence, proved that he changed his domicile.

The Division relies on the regulations of the Commissioner which provide, in part, that "[i]n determining an individual's intention . . . his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct" (20 NYCRR 102.2[d][2]).

In the alternative, the Division asks that if we affirm that petitioner was not domiciled in New York, we find that petitioner failed to keep records sufficient to show that he was not present in New York for greater than 183 days for each of the tax years at issue.

On exception, petitioner asserts that the determination of the Administrative Law Judge is correct and that petitioner sustained his burden of proving that he changed his domicile from New York to Florida. Petitioner points out that the determination of the Administrative Law

Judge relied on the credible testimony of petitioner coupled with the weight of the documentary evidence presented at the hearing.

We affirm the determination of the Administrative Law Judge.

We deal first with the Division's assertion that the Administrative Law Judge improperly weighted the evidence. We do not agree. The question of change of domicile is one of fact, not of law, and "frequently depends on a variety of circumstances which differ as widely as the peculiarities of individuals" (Matter of Newcomb, supra, at 250). A change may be made for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person confirm the intention (Matter of Newcomb, supra, at 251).

With respect to the evidence necessary to establish the intention:

> "it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight.
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> * * *
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> "The intention may be gathered both from acts and declarations" (Dupuy v. Wurtz, 53 NY 556, 562).

Generally, formal declarations have been considered less persuasive than informal acts which demonstrate an individual's "general habit of life" (see, Matter of Silverman, supra, citing Matter of Trowbridge, 266 NY 283).

In this case, the Administrative Law Judge reached his conclusion that petitioner established his intent to change his domicile and actually did change his domicile on what the Administrative Law Judge determined to be the credible testimony of petitioner coupled with the weight of the documentary evidence.

The determination by the Administrative Law Judge was made after the opportunity to observe petitioner testify under oath on direct and cross examination as to his intention to change his domicile to Florida and the general conduct of his life during the period at issue. We find nothing in the record before us to support the Division's assertion that the Administrative Law

Judge treated this testimony as conclusive. We find only that the Administrative Law Judge considered it to be competent and truthful, and weighed it appropriately in resolving the question of petitioner's domicile.

The Division argues that petitioner's formal acts (the filing of a declaration of domicile, registering to vote and obtaining a driver's license) were self-serving and should have been accorded little or no weight by the Administrative Law Judge. We do not agree that these actions by petitioner could not be found by the Administrative Law Judge to be credible evidence of intent. The Division's argument that these kinds of actions should be discounted as self-serving is an argument, in essence, that they are not, and can never be, credible. Carried to its logical end, this argument would have us create a rule of general application to disregard such actions in determining domicile. We cannot agree with this position. Each case must be taken in accord with the facts and circumstances in it. The significance of these formal acts in each case will depend upon the other relevant factors in the case and depending upon those factors may take on greater or lesser importance. Here, the Administrative Law Judge formed his conclusions based on all the facts of the case.

With regard to the two specific acts singled out by the Division as indicating a lack of intent by petitioner to establish a Florida domicile, the Administrative Law Judge determined that petitioner's business interests were merely passive and that the maintenance of the rent controlled apartment was to provide comparatively inexpensive accommodations on petitioner's visits to New York. The Administrative Law Judge concluded that these two actions of petitioner, taken with all the facts in the case, did not indicate a lack of intent to establish a Florida domicile. Put another way, the Administrative Law Judge concluded that they did not contradict petitioner's testimony and other acts as to his intent to change his domicile from New York to Florida. We find no reason in the record before us to decide otherwise. Similarly, we find no reason in the record to alter the Administrative Law Judge's conclusions that petitioner's New York bank accounts were trust accounts for the benefit of his son; or that petitioner sought to establish a "new" business in Florida, the P.J. Clark's restaurants.

We turn next to the Division's reliance on four recent decisions of this Tribunal, Matter of Zapka (Tax Appeals Tribunal, June 22, 1989), Matter of Silverman (supra), Matter of Roth (supra), and Matter of Feldman (supra), for support of its contention that it properly treated petitioner as a resident individual of New York during 1981 and 1982. Petitioner asserts that these cases are distinguishable from the matter at hand. We agree.

In Matter of Zapka (supra), the taxpayers rented a furnished apartment in Florida on a one-year renewable lease. They neither purchased nor furnished their Florida residence. There was also no evidence of any club memberships nor of any religious affiliations either in New York or Florida other than the Zapkas' membership, during the years at issue, in a Long Island country club.

In Matter of Roth (supra), the taxpayer was separated from his wife who resided with their three children in Manhattan. During the tax years at issue the taxpayer-husband leased an apartment in Manhattan at West 66th Street; had a second apartment renovated at 930 Park Avenue and purchased and lived in a home in Torrington, Connecticut which he considered a more suitable place to spend time with his children, who were all of school age (18, 17 and 5 years). The taxpayer travelled from Connecticut to Manhattan for business. He made 930 Park Avenue his permanent residence after completion of the renovations. Clearly, the petitioner, who acquired a temporary residence in Connecticut for a temporary purpose, with intent to return to a renovated residence in Manhattan, did not change domicile.

In Matter of Feldman (supra), the taxpayer was an osteopathic physician, who retained a residence in New York after moving to Florida, but in addition, and most significantly, continued to practice medicine at his old office in Brooklyn and lived in the Brooklyn residence for several days each week during the period from May to October when he was not in Florida.

In Matter of Silverman (supra), Mr. Silverman was semi-retired and continued to render services to what had been his family-run New York business. Mr. Silverman continued to be active as a member of the Board of Directors of the Long Island Jewish Hospital, and was active in United Jewish Appeal Federation in New York and in the alumni group of Boys' High School

in Brooklyn. The Silvermans spent considerable time in New York for the years at issue, 175, 176, 213, 144 and 155 days for the years 1978 through 1982, respectively during which they resided at their Woodmere, New York home. Moreover, the Silvermans, unlike petitioner here, did not testify at their hearing. (They were deceased by the date of the administrative hearing.)

We deal finally with the Division's alternative argument, i.e., that petitioner failed to keep sufficient records to show that he was not present in New York for greater than 183 days for each of the tax years at issue. We affirm the determination of the Administrative Law Judge. The testimony of petitioner was that he was in New York "certainly less than 100 days per year" and more likely visited New York no more than 60 to 75 days per year. Telephone bills in petitioner's name reveal that outgoing calls were placed from petitioner's Florida condominium on 164 different days over a period of 11 months in 1981, and on 187 different days over a period of 10½ months in 1982. The bills corroborate petitioner's testimony as to his time spent in Florida and together with this testimony form a sufficient basis to conclude that petitioner was not present in New York for greater than 183 days for each of the tax years at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Elliott and Ghislaine Sutton is granted; and

4. The Notices of Deficiency dated April 12, 1985 and February 26, 1985 are cancelled.

DATED: Troy, New York
October 11, 1990

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

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