STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT ROTH AND JUDITH ROTH	:	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 1980, 1981 and 1982.	:	

Petitioners, Robert Roth, 930 Park Avenue, New York, New York 10021, and Judith Roth, 370 East 76th Street, New York, New York 10021, filed an exception to the determination of the Administrative Law Judge issued on April 28, 1988 with respect to their petition 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 1980, 1981 and 1982 (File No. 802212).

Petitioners and the Division of Taxation filed briefs on exception. Oral argument was heard at the request of the petitioners on September 8, 1988. Petitioners appeared by Hancock & Estabrook, Esqs. (E. Parker Brown, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

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

ISSUE

Whether petitioner Robert Roth was a domiciliary of New York State and New York City for the years 1980, 1981 and 1982, or maintained a permanent place of abode within New York and spent more than 183 days in the State and was thus taxable as a resident individual.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are incorporated herein by this reference. We also find an additional fact as indicated below.

The facts found by the Administrative Law Judge may be summarized as follows. On July 7, 1981, petitioners, Robert Roth and Judith Roth, filed a joint New York State Income Tax Nonresident Return, together with a City of New York Nonresident Earnings Tax Return, for the year 1980. On said returns, wage income of $27,820.00 earned by Robert Roth from Exchange Media was allocated to New York State and City sources on the basis of a percentage determined by placing the number of days worked in the State and City (146) over the total number of working days (242).

On October 9, 1982 and September 12, 1983, respectively, petitioner Robert Roth filed a New York State Nonresident Income Tax Return, together with a City of New York Nonresident Earnings Tax Return, for each of the years 1981 and 1982, under the filing status "head of household". On said returns, Mr. Roth's wage income of $169,355.00 for 1981 and $209,128.00 for 1982 received from Exchange Media and RMR Advertising, Inc., was allocated to New York State and City sources on the same basis as indicated above as follows:

	1981	1982

Number of days worked in the State and City	141	133
Total number of working days	241	237

On March 7, 1985, the Division of Taxation issued statements of audit changes to petitioners[1] for the years 1980, 1981 and 1982 wherein total wage income earned by Robert Roth from all sources was held taxable to New York State and City on the basis that petitioners were statutory residents. On April 12, 1985, the Division issued a Notice of Deficiency to petitioners asserting additional New York State personal income tax for said years of $102,735.00, plus penalty of $5,137.00 and interest of $32,988.87, for a total amount due of $140,860.87. A separate Notice of Deficiency was issued for New York City personal income taxes of $47,809.00, plus penalty of $2,390.00 and interest of $14,647.90, for a total of $64,846.90.

In December 1986, petitioner Robert Roth paid $238,403.00 to the Department of Taxation and Finance representing the additional tax, penalty and interest accrued thereon.

Petitioners, Robert Roth and Judith Roth[2] , were married in 1961 and had three children. Through the 1960's and early 1970's they lived in several different locations in and near New York City and also in California. In 1974 they purchased a house in Brookville, Long Island.

In October 1976, petitioner formed RMR Advertising, Inc. ("RMR") and he was named president and chief executive officer. RMR is an advertising business involved in the buying and selling of television and radio advertising time. In addition, it produced commercials for television and radio. During 1976 petitioner frequently traveled to Florida on business to start

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[1]The Division conceded that petitioner Judith Roth is not liable for any tax for the years 1981 and 1982.

[2]Hereinafter Robert Roth will be termed "petitioner." Judith Roth will be referred to by name.

the new operation. During this period, petitioner and his wife were having marital difficulties. At Thanksgiving Judith and the children traveled to Florida to be with petitioner. Judith decided to stay in Florida with the children over the winter months. The Brookville house remained unoccupied. In February 1977 the water pipes froze causing extensive damage to the house. The house was under repair for about six months and then sold later in the year.

In May 1977, petitioner and his family returned to New York from Florida and subleased an apartment at 920 Park Avenue for the summer. In the fall of 1977, petitioner and his family moved temporarily to the Hotel Seville[3] until they could take possession of a cooperative apartment they were in the process of leasing on the 13th floor at 930 Park Avenue. On January 17, 1978, petitioner and Judith purchased the 13th floor apartment with the intent to divide the 13th floor into two apartments, selling one and retaining one. Petitioner and Judith assumed the lease from the former tenant and became shareholders of the cooperative. Petitioner and Judith continued to experience marital difficulties in the later months of 1977 and separated in January 1978. Following the separation, Judith and the children moved into the 13th floor of 930 Park Avenue, which was yet undivided. They continued with the plans to retain, divide and sell part of the 13th floor of 930 Park Avenue. In July 1978, petitioner and Judith entered into a contract for the sale of the south portion of the 13th floor of 930 Park Avenue. Judith and the children moved to an apartment located at 370 East 76th Street, New York in August 1978. The 13th floor was divided into the two apartments and the sale of the south portion was closed in October 1978. At the same time, petitioner and Judith entered into a new proprietary lease with the owner of 930 Park Avenue regarding the north portion of the 13th floor.

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[3]Petitioner was part owner of the Hotel Seville at this time.

After the separation from Judith, petitioner subleased an apartment at 2 Lincoln Square, 60 West 66th Street, New York. Petitioner also purchased the furnishings in the apartment and moved his personal effects into the apartment. Petitioner entered into a lease for the apartment when his sublease expired. The lease expired in 1982, but petitioner extended the lease and currently retains the apartment.

In December 1979, petitioner purchased a home in Torrington, Connecticut. It was a three-story home with a living room, dining room, kitchen, family room, four bedrooms and three bathrooms. Petitioner moved his personal effects to the Torrington home from the 66th Street apartment and then purchased new furnishings for the home. In addition, Judith loaned petitioner some family photographs and paintings. Petitioner did leave behind a change of clothes and a few toiletries at the apartment. Petitioner obtained a telephone listing in his name for the Torrington residence. Petitioner was dissatisfied with his relationship with the children after separation. As a result, he purchased the Torrington home to have a place to spend time with his children. Petitioner did not consider the 66th Street apartment a suitable place for this purpose. The children were ages 18, 17 and 5 years.

After petitioner purchased the Torrington home, the 66th Street apartment became a "corporate apartment"; that is, it was primarily used for business meetings of RMR and was available to clients of RMR for overnight stays. During the period 1980 to 1982, petitioner used the apartment on the average of one night per week, usually on those occasions when extended business matters or meetings kept him late into the evening. Petitioner did not change the name on the lease from his own to RMR for fear that the building management would not permit it.

The north portion of the 13th floor at 930 Park Avenue was uninhabitable from October 1978 to December 1982. The renovations were delayed because of difficulties with various contractors performing the work. Petitioner began to make occasional use of 930 Park Avenue immediately after the renovations were completed. During 1983 petitioner divided his time between 930 Park Avenue and Torrington. Thereafter, 930 Park Avenue admittedly became his permanent residence.

We also find, in addition to the facts found by the Administrative Law Judge, that petitioner's eldest son, Richard M. Roth, predominately visited petitioner at the 930 Park Avenue apartment during 1983.

During the years in issue, petitioner's business required him to travel. RMR had major clients in Trevose, Pennsylvania; Philadelphia, Pennsylvania; and Atlantic City, New Jersey. Petitioner also traveled frequently to the offices of RMR in Miami, Florida. Petitioner was still affiliated with businesses in California to which he made periodic business trips. While in Florida, petitioner stayed with his father at "Seacoast Towers", 5151 Collins Avenue, Miami Beach, and later in 1983 at 2000 Quayside Towers, North Miami Beach. These addresses were used by petitioner's accountant on Federal and New York State income tax returns filed for 1981 and 1982. The Torrington, Connecticut address was used for petitioner's 1980 tax returns.

When petitioner was working in the New York area, he returned to Torrington except for an occasional overnight stay at the 66th Street apartment. He commuted in his personal automobile. Torrington, Connecticut was approximately 70 plus miles from New York City and the driving time ranged from one hour and thirty minutes to two hours and thirty minutes depending on the time of day.

Petitioner submitted a listing of his whereabouts on a daily basis for the years 1980 to 1982. The listings were prepared from diaries maintained by petitioner and his recollection of the notations therein. The year-end summaries of days were as follows:

	1980	1981	1982
New York	177	159	149
Connecticut	57	142	156
Out of Town	32	63	47

The diaries were not kept for tax purposes and the notes for the most part were illegible and meaningless to anyone but petitioner.

Petitioner possessed driver's licenses for New York State and Florida. He did not obtain a Connecticut driver's license or maintain a personal bank account in Connecticut. Petitioner was not registered to vote in New York or Connecticut, and did not execute a will in either state or become a member of any church or civic organization in either state.

OPINION

The Administrative Law Judge determined that: (1) petitioners were domiciliaries of New York State in 1980, (2) petitioner was domiciled in New York State for the years 1981 and 1982, (3) petitioners did not negligently or intentionally disregard the Tax Law so that the Division's penalties imposed pursuant to section 685(b) of the Tax Law required cancellation, and (4) that the issue of whether Robert Roth maintained a permanent place of abode within New York State and spent more than 183 days in the State was rendered moot by the conclusion that petitioners were New York domiciliaries throughout the audit period. On appeal, petitioners assert that (1) Robert Roth was not domiciled in New York State in 1980, 1981 and 1982, (2) petitioner was domiciled in Connecticut during 1980, 1981 and 1982, and

(3) petitioner spent fewer than 183 days annually in New York State throughout the audit period.

We affirm the determination of the Administrative Law Judge.

For the period in issue former Section 605(a) of the Tax Law defined a resident individual as one:

> "(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 . . .
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> "(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."

Likewise, former section T46-105.0(a) of the Administrative Code of the City of New York[4] substituted the word "city" for "state" each time the term “state" is used in the above quoted passage from Tax Law section 605 (a) to otherwise, in part, identically define a "resident individual." Unless otherwise specified, all references to particular sections of Article 22 shall be deemed uncited references to section T46-105.0(a) of the City Code.

The Tax Law does not contain a definition of domicile (compare, Surrogate Court Procedure Act, §1103[15]). The Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part, as follows:

> "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.

[4]Section 11-1705 of the current Administrative Code of the City of New York similarly defines a "city resident."

> "(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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> "(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."

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 (Matter of Minsky v. Tully, 78 AD2d 955, emphasis added). The substance of the matter was stated long ago by the Court of Appeals in Matter of Newcomb (192 NY 238, 250):

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.
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> " 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 . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless

> combined with intention, it cannot effect a change of domicile...There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. . . . every human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention. . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animo revertendi.
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> "...This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

These basic principles have been restated and refined in numerous cases by a variety of courts in the years since they were laid down by the Court of Appeals (see, Matter of Bodfish v. Gallman, 50 AD2d 457; Matter of Zinn v. Tully, 54 NY 713, revg 77 AD2d 725; Matter of Brunner, 41 NY2d 917; Klein v. State Tax Commn., 55 AD2d 982; Matter of Babbin v. State Tax Commn., 67 AD2d 762).

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, supra) and is a mixed question of fact and law depending upon "a variety of circumstances which differ as widely as the peculiarities of individuals" (Matter of Brunner, supra at 918; Matter of Newcomb, 192 NY 238, 250).

Here, petitioner has failed to prove by clear and convincing evidence that he intended to change his domicile from New York City to Torrington, Connecticut. He argued that his "roots went into the ground in Torrington, Connecticut" through his purchase of a home to enjoy the

company of his children; a residence furnished with, inter alia, family paintings and portraits and to which the Administrative Law Judge found he regularly returned from work in New York City. He concedes that those roots "may not have reached the deepest subsoil (in Torrington)," but counters with the notion that "they never did anywhere". We disagree and conclude petitioner was a New York domiciliary throughout the audit period.

Petitioner has not demonstrated that the Torrington home was intended to be other than a temporary gathering place for petitioner and his children while the 930 Park Avenue apartment was being renovated. The record indicates that petitioner purchased the Torrington home solely to better visit with his children at a time when his 930 Park Avenue apartment, owing to lengthy renovations, was not available for that purpose. Supporting this conclusion are the facts that after the 930 Park Avenue apartment was refurbished, petitioner immediately used it as both an occasional residence and a place, as opposed to Torrington, at which his son, Richard, would predominately visit him. Also, the apartment became his permanent residence shortly thereafter. To these facts applies the rule that "a temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged" (Matter of Newcomb, 192 NY 238, 251; see also Matter of McKone v. State Tax Commn. 68 NY 2d 638, 640).

Petitioner correctly points out that his alleged intent to remain permanently in Connecticut need not be vitiated or diminished by his later return to New York. However, to the extent that petitioners return to New York City demonstrates the "range of sentiment, feeling and permanent association " (Matter of Bodfish v. Gallman. 50 AD2d 457, 458) he held for Torrington, it became an important factor in our review.

Additionally, the record indicates facts adverse to petitioner's claim of a Connecticut domicile. Petitioner never obtained a Connecticut driver's license, even though he apparently spent an much as four hours daily up to four days a week commuting by car to his home. Petitioner signed his Federal and New York State income tax returns for 1981 and 1982 using a Florida address and never registered to vote in Connecticut. Owing to courts recognizing "their self-serving nature" when used as evidence to affirmatively establish a new domicile (Wilke v. Wilke, 73 AD2d 915, 917), these formal declarations are admittedly less important than the informal acts of an individual's "general habit of life" (Matter of Trowbridge, 266 NY 283, 289). They are often disregarded in favor of the application of basic legal principles to his manifested acts (Matter of McKone v. State Tax Comm., 111 AD2d 1051, 1053 affd 68 NY 638). Whatever the weight of these factors, they clearly do not support petitioner's contention that he was domiciled in Connecticut. Petitioner's retention of title to real property in New York City (Matter of Chrisman, 43 AD2d 771), continued maintenance of a New York City apartment (Matter of Cooper, 82 AD2d 950), and considerable time spent as corporate president directing RMR in New York City (Matter of Clute v. Chu, 106 AD2d 841, 843) are other factors adverse to his attempt to establish himself as a Connecticut domiciliary.

Petitioner, as a New York domiciliary during the audit period, could avoid the Division's assessment if he were a nonresident domiciliary (formerTax Law § 605[a][1], § 605[b]; 20 NYCRR 102.2[b][1]). Petitioner, by his own admission, was present in New York State in excess of 30 days for each year for the tax years at issue and for this reason, at the very least, was at no time a nonresident domiciliary (Tax Law § 605[a][1]).

Even if we were to conclude that petitioner was not domiciled in New York during the audit period, he would be properly assessed herein if he both maintained a permanent place of abode within New York City and spent in the aggregate more than 183 days there each year during the audit period (Tax Law § 605[a][2]). We conclude petitioner has not proved that he did not spend at least this amount of time in New York City during each year of the audit period.

A "permanent place of abode" includes "a dwelling place permanently maintained by the taxpayer, whether or not owned by him" (20 NYCRR 102.2[e][1]). There is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it (see, Matter of Smith, 68 AD2d 993, 994). Here petitioner was the named lessee of the 66th Street apartment, one suitable for dwelling, throughout the audit period. We contend that the apartment was a "permanent place of abode" within the meaning of Tax Law section 605(a)(2).

The remaining issue then is whether petitioner spent in the aggregate more than 183 days of the taxable year in New York City. We conclude that petitioner has failed his burden to prove that he did not (20 NYCRR 3000.10[d][4]).

Petitioner was under the obligation to maintain "adequate records to substantiate the fact that he did not spend more than 183 days of (each taxable year during the audit period)..... within New York State"

(20 NYCRR 102.2[c]). After reviewing petitioner's diaries we have found them, as did the Administrative Law Judge, to be illegible for the most part and meaningless. We do not rely upon petitioner's summary, since we have no means of examining its accuracy in light of the records made available to us upon which that summary is allegedly based. We are thus unable

to determine how many days petitioner spent in New York City and New York State for each year within the audit period. Having failed to satisfy his burden on this issue, petitioner would thus be subject to the Division's assessment even if he were to have demonstrated his change of domicile to Torrington.

For these reasons, we affirm the Administrative Law Judge's determination.;

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Robert Roth and Judith Roth, is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Robert Roth and Judith Roth is granted to the extent

indicated in conclusion of law "E" of the Administrative Law Judge's determination and the Division of Taxation is directed to modify the notice of deficiency issued on April 12, 1985 accordingly but except as granted is in all other respects denied.

Dated: Albany, New York
MAR 02, 1989

John P. Dugan
President

Francis R. Koenig
Commissioner