STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:
of	:
SOL FELDMAN AND LILLIAN FELDMAN	:
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 through 1983.	: DECISION

Petitioners, Sol Feldman and Lillian Feldman, Cornwall East 2082, Boca Raton, Florida 33434, filed an exception to the determination of the Administrative Law Judge issued on March 31, 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 1981 through 1983 (File No. 802955). Petitioners appeared by Sherman, Feigen & Slivka (William Slivka, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioners filed a brief on exception. The Division filed a letter in opposition. Petitioners' request for oral argument was granted. Petitioners subsequently withdrew such request and oral argument was not heard.

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

ISSUE

Whether the petitioners, Sol and Lillian Feldman, were taxable as residents of New York under section 605 of the Tax Law because they remained domiciled in New York or, alternatively, because though not domiciled in New York, they maintained a permanent place of abode in New York and spent more than 183 days in the State.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference except that we modify finding of fact "7" as indicated below.

Based upon information received by the Division of Taxation to the effect that petitioner Sol Feldman had, for the years at issue, received income from a professional service corporation located in New York and had, for the years 1981 and 1983 (no return had been filed for 1982), filed nonresident income tax returns, an income tax field audit was commenced in January 1985. On February 8, 1985, petitioners executed a consent agreeing that personal income taxes for the year 1981 could be assessed at any time on or before April 15, 1986.

On November 20, 1985, the Division issued to petitioners a Statement of Personal Income Tax Audit Changes for each of the years 1981, 1982 and 1983 on which petitioners' New York State and City of New York personal income tax liabilities were recomputed based upon the Division's determination that, for the years at issue, petitioners were taxable as full-year resident individuals.

On January 29, 1986, the Division issued notices of deficiency to petitioners as follows:

	Tax Due	Penalty	Interest	Total	
1981	$1,019.00	$51.00	$ 481.09	$ 1,551.09	
1981	694.00	35.00	327.11	1,056.11	
1982	4,273.00	1,858.73	1,326.85	7,458.58	
1982	442.00	191.42	136.83	770.25	
1983	764.00	38.00	151.13	953.13	
1983	445.00	23.00	87.98	555.98	
	$7,637.00	$2,197.15	$2,510.99	$12,345.14	TOTALS[1]

For each of the years 1981 and 1983, petitioners timely filed a Form IT-203, New York State Nonresident Income Tax Return. Petitioners did not file their 1982 New York State Nonresident Income Tax Return until March 1985. Enclosed with the return was a check dated March 23, 1985 in the amount of $1,684.73 representing $1,504.22 total tax due and $180.51 interest. The amount of $1,684.73 should, therefore, be credited against the amounts asserted by the Division to be due from petitioners in the notices of deficiency issued for said year.

For many years prior to the years at issue, petitioners resided in a two-family house located at 5807 18th Avenue, Brooklyn, New York. Petitioner Sol Feldman conducted the practice of osteopathic medicine in offices located on the first floor of his Brooklyn home. Petitioners lived on the second floor.

For the years immediately prior to the audit period, petitioners' daughter, Barbara Fabricant, and her two children also resided with petitioners. In the latter part of 1978 or the early part of 1979, petitioner Sol Feldman decided to cut back his medical practice and, due to the failing health of both and at the urging of Lillian Feldman's family who resided in Florida,

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[1] It should be noted that, while the notices of deficiency were issued to both petitioners, the notices asserting the greater amounts due for each year represented the deficiencies of Sol Feldman and the lesser amounts represented the deficiencies of Lillian Feldman.

petitioners rented an apartment in Deerfield Beach, Florida for a period of six months to determine whether or not they wanted to establish a residence there. In November 1979, petitioners purchased a condominium from Century Village in Boca Raton, Florida. Throughout the audit period, however, petitioners continued to own the two-family house in Brooklyn. Petitioner Sol Feldman stated at the hearing held herein that he never thought of selling the two-family house in Brooklyn.

On January 23, 1980, petitioner Sol Feldman executed a Declaration of Domicile which was filed with the Clerk of the Circuit Court of Palm Beach County, Florida. On said Declaration of Domicile, Sol Feldman stated that he became a bona fide resident of the State of Florida on November 19, 1979. On January 22, 1980, Sol Feldman registered to vote in Palm Beach County, Florida. At or about the same time, he obtained a Florida driver's license and registered his automobile there. He also joined the Men's Club of Century Village in Florida. Except for a certificate of deposit in a New York bank, petitioners' bank accounts were with Florida banks. They did, however, keep an active checking account with Manufacturer's Hanover Bank in New York for use during their stay in the State.

We modify finding of fact '71 to read as follows:

> Upon moving to Florida, petitioners gave their apartment on the second floor of the two-family house in Brooklyn to their daughter, Barbara Fabricant, and her children. Petitioners reconditioned a bedroom in the downstairs office for their use whenever they returned to New York. The first floor also contained a bathroom and small kitchen.

Petitioner Sol Feldman received a letter from the New York State Osteopathic Medical Society, Inc., dated October 16, 1981, which informed petitioner that, on October 10, 1981, he was granted an inactive membership which does not require payment of dues and is accorded to

those who were in active practice in New York but are now retired. For each of the years at issue, however, Sol Feldman received wage income from his professional corporation, Sol Feldman, M.D., P.C.

Prior to and during the years at issue, petitioners owned a summer home on Sackett Lake, near Monticello, New York. The home was opened on or about Memorial Day weekend each year and remained in use until approximately mid-September. It was located on a dirt road and, due to its remote location, did not receive town services such as road maintenance and water. The house had no basement and was not insulated. There was baseboard heating in some of the rooms. When petitioners closed the house in mid-September, the electricity was turned off and all water was drained.

For each of the years at issue, petitioners left Florida in mid-May and stopped in Marlboro, New Jersey for approximately one week to visit with their daughter, Rhen Cohan. They then drove to Brooklyn to visit with their daughter, Barbara Fabricant, for a couple of days. Following their stay in Brooklyn, petitioners proceeded to their summer house in Sackett Lake where they stayed until mid-September. Approximately once per month, petitioners spent a weekend, from Thursday evening until Monday morning, with their daughter in New Jersey. Petitioners stayed at the office in Brooklyn from mid-September until mid-October at which time they left for Florida, again stopping to visit their daughter in New Jersey.

During the years at issue, petitioner Sol Feldman continued to practice osteopathic medicine. While in New York, he came to Brooklyn and opened the office for a couple of days per week, usually arriving from his summer home on Monday and returning to it on Wednesday of each week. A recorded message advised patients to leave a message and that Dr. Feldman

would return their call. While in Florida, the recorded telephone message advised patients to contact certain other doctors designated by Dr. Feldman. Most of Dr. Feldman's patients had no-fault insurance, Medicare or Medicaid claims which often required statements and/or testimony from him.

OPINION

The Administrative Law Judge determined that the actions of the petitioners, examined as a whole. did not indicate an intention to have a fixed and permanent home in Florida. It was also determined that the home on Sackett Lake was suitable for and used only for summer vacations, and, as a result, was not a permanent place of abode. The Administrative Law Judge also found that the petitioners did not spend, in the aggregate, more than 183 days of the taxable year in New York.

While it was determined that no change in domicile did occur, no negligence or intentional disregard by petitioners was shown and penalties imposed pursuant to Tax Law section 685(b) were cancelled by the Administrative Law Judge. Petitioners were credited with a payment of $1,684.73 against liabilities asserted to be due for the year 1982.

In contrast, petitioners allege that in November 1979, petitioners abandoned their domicile in the State of New York and established domicile in Boca Raton, Florida, which they intended to be and today contend to be their permanent home. Petitioners concur with the Administrative Law Judge's determination that the home on Sackett Lake was suitable for and used only for summer vacations and, as a result, was not a permanent place of abode. Petitioners also concur with the determination that they did not spend, in the aggregate, more than 183 days of the taxable year in the State.

We affirm the determination of the Administrative Law Judge, but modify the finding that the petitioners did not spend, in the aggregate, more than 183 days of the taxable year in New York State.

Former section 605(a) of the Tax Law in effect during the period at issue 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 . . .
>
> "(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, the Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part:

> "(d) 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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> * * *
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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."

Permanent place of abode is defined by section 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 him or his spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode.

The Administrative Law Judge determined that petitioners' actions, examined as a whole, did not indicate an intention to make a fixed and permanent home in Florida. We agree with this determination.

To effect a change in domicile, there must be an actual change in residence, coupled with an intention to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 AD2d 444, 445). The concept of intention was addressed by the Court of Appeals inmatter of Newcomb (192 NY 238, 251):

> "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."

Such an absolute and fixed intention to abandon one domicile and acquire another must, however, be provided by clear and convincing evidence (see, Matter of Zinn, 54 NY2d 713, revg 77 AD2d 725). Petitioners did not establish by clear and convincing evidence that they intended to change their domicile from New York to Florida.

Motivated by failing health and thus a need to retire from the active practice of osteopathic medicine, petitioners, in November 1979, purchased a condominium in Boca Raton, Florida. A

Declaration of Domicile was recorded in the Circuit Court, Palm Beach County, Florida on January 23, 1980, in which petitioner, Sol Feldman, declared (under penalty of perjury) that he became a bona fide resident of the State of Florida on November 19, 1979. Petitioner registered to vote in Palm Beach County, Florida on January 22, 1980 and on or about that time he obtained a Florida driver's license. Petitioner registered his automobile, joined a men's club in Century Village, Florida and maintained all but one bank account with Florida banks. Petitioner has neither maintained his New York driver's license nor has he voted in New York since 1980.

While courts have recognized the self-serving nature of so-called "formal declarations" of domicile such as voter registrations or motor vehicle registrations, greater recognition has been given to "informal declarations" and the acts of the person in resolving the question of domicile (see, Wilke v. Wilke, 73 AD2d 915). However, the actions of the petitioners, even when considered in conjunction with their intent to retire due to failing health, do not constitute clear and convincing evidence of petitioners' intent to change their domicile (see, Matter of Zinn v. Tully, supra).

The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra) 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." Petitioners have retained ownership of their home in Brooklyn, as well as control over the practice located therein. Although petitioner's involvement in the practice has diminished since his retirement, the practice continues to exist and, in fact, serves as a continual tie to the local community. Thus, petitioners fall short of establishing by clear and convincing evidence an intent to change domicile.

The Administrative Law Judge was correct in the determination that petitioners' home on Sackett Lake was not a permanent place of abode (see, 20 NYCRR 102.2[e](1]). Petitioners have not met their burden of proof in establishing Florida as their new domiciliary (see, Matter of Bodfish v, Gallman, 50 AD2d 457). The issues remaining are whether petitioners' home in Brooklyn can be considered a permanent place of abode and whether, during the years at issue, petitioners spent more than 183 days in the State in light of Tax Law section 605(2).

The Division's regulations (20 NYCRR 102.2[e][1]) provide, in pertinent part, as follows:

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

Petitioners own, and petitioners' daughter and grandchildren continue to occupy, the home at 5807 18th Avenue in Brooklyn, New York. The home consists of a lower floor that was and continues to be used as petitioner Sol Feldman's professional office, while the upper floor was and continues to be used as a residence. It must also be noted that the lower floor contains a bedroom, bathroom and a kitchen which petitioner, Sol Feldman, uses when he returns to Brooklyn to re-open his practice. Whether or not his practice consists of "unfinished business" concerning patients who have insurance or other similar claims, or that he comes into his office for a day or two a week to keep "active" has no beating on the Division's regulations concerning permanent place of abode (see, 20 NYCRR 102.2[e](1]). The language of the regulation is clear and does not demand explanations as to why the dwelling is permanently maintained by the taxpayer.

The aforementioned rationale also applies to petitioner's testimony that he has never entertained the thought of selling the home in Brooklyn. It makes no difference as to the reason why petitioner chooses not to sell his home. The operative words of the regulation are "permanently maintained" which the petitioner does through his continued ownership of the house, as well as his continued maintenance of the lower floor (see, 20 NYCRR 102.2[e][1]; Stranahan v. State Tax Commn., 68 AD2d 250, 255; Smith v. State Tax Commn., 68 AD2d 993, 994).

Section 102.2(c) of the regulations states in pertinent part:

> "Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year and claims to be a non-resident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State." (20 NYCRR 102.2[c].)

The Administrative Law Judge found that petitioners did not spend more than 183 days of the taxable year in New York State. We do not agree with this finding.

It is petitioner's obligation to keep and have available for examination adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the State (Smith v. State Tax Commn. , 68 AD2d 993, 994, citing 20 NYCRR 102.2[c]). The record indicates that petitioner did not provide the requisite documentary evidence to support such a finding.

In determining that petitioners did not spend more than 183 days in New York, the Administrative Law Judge relied on petitioner Sol Feldman's testimony that petitioners arrived in New York around mid-May and departed in mid-October. An account statement reflecting electric use for the home on Sackett Lake was also submitted by the petitioners. The statement

included the years at issue and displayed a pattern concerning electric use from the months of May to October. This statement, however, cannot be deemed conclusive and does not satisfy the reasonable mandate of the regulation discussed above.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Sol Feldman and Lillian Feldman, is denied;

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

3. The petition of Sol Feldman and Lillian Feldman is granted to the extent indicated in conclusion of law "F" of the Administrative Law Judge's determination and the Division of Taxation is directed to modify the notices of deficiency issued on January 29, 1986 but, except as so granted, is in all other respects denied.

Dated: Albany, New York
DEC 1 5 1988

John P. Dugan
President

Francis R. Koenig
Commissioner