STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RONALD J. MOSS	:	DECISION DTA No. 806280
for Redetermination of Deficiencies or for Refund of New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1982 through 1984	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 25, 1991 with respect to the petition of Ronald J. Moss, 166 Montauk Highway, Quogue, New York 11959 for redetermination of deficiencies or for refund of New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1982 through 1984.

Petitioner appeared by Weil, Gotshal & Manges, Esqs. (Kevin P. Hughes and Timothy R. Dodson, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. Oral argument, requested by the Division of Taxation, was heard on May 28, 1992.

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

ISSUE

Whether petitioner Ronald J. Moss has established that he did not spend more than 183 days in New York City during the tax years in question.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Ronald J. Moss, filed a New York State Resident Income Tax Return for the year 1982. On the return, petitioner listed his address as26 Shinnecock Road, "Quoque", New York.[1] In conjunction with his return, petitioner filed a City of New York Nonresident Earnings Tax Return which reported that petitioner did not maintain an apartment or other living quarters in the City of New York during any part of the year. He also reported that of the 282 days worked during the year, 83 of those days were worked in New York City. The tax return offered at the hearing did not contain a wage and tax statement.

Petitioner filed a New York State Resident Income Tax Return for the year 1983 and reported that his address was 26 Shinnecock Road, "Quoque", New York. In conjunction with his return, petitioner filed a City of New York Nonresident Earnings Tax Return which reported that he did not maintain an apartment or other living quarters in the City of New York during any part of the year. He also reported that of the 238 days worked during the year, 136 days were worked in New York City. Petitioner's New York State return was accompanied by two wage and tax statements. One wage and tax statement was from Kenyon & Eckhardt, Inc. ("K & E") and the other wage and tax statement was from K & E Holdings, Inc. Each of the employers was located at 200 Park Avenue, New York, New York. Both wage and tax statements listed petitioner's address as Quogue, New York.

Petitioner filed a New York State Resident Income Tax Return for the year 1984 which listed his address as 26 Shinnecock Road, "Quoque", New York. In conjunction with his return, petitioner filed a City of New York Nonresident Earnings Tax Return which reported that he did not maintain an apartment or other living quarters in the City of New York during any part of the year. He also reported that of the 239 days worked during the year, 103 days were worked in New York City. The wage and tax statement from K & E, which was attached to petitioner's return, listed petitioner's address as Quogue, New York.

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[1]The correct spelling is "Quogue, New York"; however, petitioner's accountant misspelled the name of the town on the returns.

On or about October 9, 1985, the Division of Taxation (hereinafter the "Division") assigned an auditor to conduct an audit of the income tax returns of Ronald Moss. The matter was recommended for an audit because of a survey wherein petitioner reported that he had a place of abode in New York City. Among other things, the Division found that petitioner maintained one bank account with Marine Midland Bank in New York City. According to the Division's audit report, petitioner's monthly statements were mailed to him at his office in New York City from December 1981 to September 1984. The report states that after the termination of his employment, the bank statements were mailed to his New York City apartment.

Based upon an analysis of petitioner's cancelled checks, the Division concluded that the cancelled checks indicated almost all transactions were to individuals, businesses or activities in New York City. The Division also found that petitioner used both his New York City apartment and the address of his employer for correspondence between himself and several financial institutions including: Chase Manhattan Bank, Marine Midland Bank, Prudential-Bache Securities, Chase-Visa and Marine Midland-Visa.

The Division conducted an analysis of petitioner's credit card statements. The statements indicated that a number of transactions took place in New York City. In response, petitioner claimed that he allowed his daughters to use his credit cards. However, despite two requests, petitioner was unable to produce any documents in which he had authorized his daughters to use his credit cards.

The Division compared the level of utility bills for petitioner's residence in Quogue with that of his apartment in New York City. On the basis of this review, the Division determined that the New York City apartment was consistently occupied even after the period petitioner's employment with K & E was terminated.

The Division analyzed the telephone bills from the New York City apartment and the residence in Quogue and found that the telephone bills for the New York City residence were higher than the telephone bills for the residence in Quogue.

The Division ascertained that petitioner's food purchases were made in a supermarket which is located in New York City known as Gristede Bros. In response, petitioner claimed that a branch of the same store was also located in Westhampton, New York. The Division concluded that food shopping was done in both New York City and Quogue.

The Division found that petitioner's doctors were located in New York City and that petitioner had a safety deposit box at a bank in New York City. On the other hand, the Division noted that petitioner presented a Suffolk County voter registration statement and claimed to have a safety deposit box in his home in Quogue. According to the audit report, petitioner submitted a list of art objects which were located at his residence in Quogue. Petitioner also claimed that he had a housekeeper at his home in Quogue.

In response to a request by the Division to document the number of days not worked in New York City during the period in issue, petitioner submitted a passport. Based upon this passport the Division ascertained that petitioner had been in foreign countries for six days in 1982, two days in 1983 and no days in 1984.

Lastly, the Division observed that petitioner drafted a check each month since 1980 to pay rent for space in a parking garage in New York City. The Division also determined that most of petitioner's contributions were to charities in New York City.

On the basis of the foregoing audit, the Division concluded that petitioner was subject to tax as a resident of New York City. In accordance with this finding, the Division prepared a series of three statements of personal income tax audit changes. It also prepared a series of three notices of deficiency, dated October 14, 1987, for the years 1982 through 1984. The notices of deficiency asserted that New York City personal income tax was due as follows:

Year	Tax	Penalty	Interest	Total
1982	$11,042.52	$ 552.12	$ 5,354.98	$16,949.62
1983	50,090.02	2,504.50	17,784.15	70,378.67
1984	14,029.94	701.49	3,172.35	17,903.78

In 1976, petitioner purchased a home at 26 Shinnecock Road, Quogue, New York. At the time of the purchase, Mr. Moss resided with his wife and two daughters at 145 Central Park West

in New York City. The Quogue residence was situated on 3.4 acres of land and consisted of a main house with approximately 21 or 22 rooms, a carriage house with approximately 7 to 8 rooms and a guest cottage containing 2 rooms.

At the time of the purchase of the Quogue residence, petitioner was Chairman of the Board and General Counsel of K & E. K & E was a firm which engaged in marketing and advertising with offices in 50 countries. In his position, petitioner was responsible for K & E's international and domestic subsidiaries. He also had responsibilities with respect to K & E's real estate, financial dealings and legal concerns.

In the summer of 1979, petitioner and his wife separated. At the time of the separation, they agreed that the house in Quogue would remain with Mr. Moss.

Early in 1980, petitioner began moving his possessions to the Quogue residence. Included in the possessions which petitioner moved were clothes, a bed and other furniture, two rifles, books and records. Petitioner also brought two paintings which he had acquired as a young man. Petitioner moved his possessions to Quogue for two reasons. First, petitioner had no other place to go. Second, this was the home in which he intended to live.

Petitioner has had a long association with the Quogue, New York area. In 1960, he started going to the Westhampton area as a visitor. In 1964, petitioner purchased a beach cottage in this area. In 1970, petitioner sold the beach cottage and purchased a home on Main Street in Quiogue, New York.[2] Petitioner lived in that house from 1970 to 1974. However, he continued to regard New York City as his domicile. In 1974, the house in Quiogue burnt to the ground. With the loss of the house, petitioner began looking for a new home to purchase. It was this search which led to the purchase of the home in Quogue.

In January 1980, petitioner began winterizing the carriage house. At this time he also began winterizing the main house which had previously been only partially winterized. As a result of the renovations, petitioner became embroiled in a dispute over his right to make the desired changes to the buildings. In the course of this dispute, upon which petitioner ultimately

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[2]Quiogue is located between Westhampton Beach and Quogue.

prevailed, he wrote a letter dated March 3, 1980 to a Mr. Baird, chairman of the town's board of trustees, which stated, in part:

> "I have begun the process of changing my residence so that I will be a permanent resident of Quogue and a voting member of the community in the future. I now realize how important it is to be involved in village affairs."

At about the time he wrote the foregoing letter, petitioner advised his family, friends and business associates that he considered Quogue to be his home. He also told them that he was giving up politics in New York City for politics in Quogue. About the time petitioner wrote the letter, he registered to vote in Quogue. In June 1980, petitioner voted in a municipal election in Quogue. Thereafter, petitioner continuously voted in Quogue.

In 1980, Mr. Moss began taking steps to increase his social ties to the Quogue area. On December 29, 1980, petitioner joined a health club known as the Hampton Tennis Academy. He also joined Westhampton Tennis and Sport. Petitioner joined The Quogue Association, Inc. in furtherance of his desire to be involved in the political activities of the community. This group provided its members with a newsletter of the current issues in the community.

On December 6, 1980, petitioner purchased a king-size bed from Alpert's Furniture, Inc. in Westhampton, Long Island. The bed was placed in the Quogue residence.

During the course of his career as a lawyer in New York City, and later with K & E, petitioner was active in the reform movement of the Democratic Party and had become a Democratic District Leader on the west side of Manhattan. In 1980, petitioner severed all connections with local politics in New York City. However, he remained active in New York State and national political parties.

At the end of February 1980, as part of the negotiations concerning a new employment contract, K & E offered petitioner a furnished apartment located in New York City at 220 East 65th Street, New York, New York. K & E installed a telephone system that was connected to his office telephone and installed an additional telephone for his children to use. The purpose of the apartment was as a convenience for petitioner when he was working in the New York office or entertaining late and could not get back to Quogue.

Petitioner signed the lease for the apartment because the owner of the building insisted that an individual rather than a corporation sign the lease. The lease limited the use of the apartment to the tenant's immediate family as a "strictly private dwelling apartment". K & E paid the rent on the apartment directly to the landlord. K & E also provided petitioner with a car and a parking space. Nonresident tax was paid on the parking space. In addition, K & E reimbursed petitioner for the utilities.

In August 1980, petitioner entered into a new employment agreement with K & E for a term of five years. The agreement did not alter the prior agreement reached with respect to the apartment.

During the period 1980 until 1983, petitioner conducted his business from a number of locations, including Quogue, the office in New York, and various offices around the country and in Europe.

The Quogue residence was used for business because K & E's chief executive officer and chief creative person lived in the same area and, along with petitioner, they were not in the habit of going into the office on Fridays and, occasionally, Mondays. Therefore, on these days, meetings would be held in Quogue.

Petitioner commuted from Quogue to the New York office a number of different ways. He traveled by car, airplane, seaplane, train or bus.

During the years 1980 through 1983, petitioner usually commuted to New York City twice a week. Occasionally, he would commute more or less frequently.

Several individuals possessed keys to petitioner's apartment in New York City. These individuals included petitioner's daughters, Hayley and Julie, a friend from the United Kingdom, Jonathan Kenworthy, a secretary and a personal friend. Mr. Kenworthy was an artist who used the New York City apartment whenever he was in the United States. This was approximately 50 to 60 days a year. Petitioner's secretary visited the apartment often in order to pick up mail and see if everything was acceptable while petitioner was away. Occasionally, individuals who had a business relationship with K & E were permitted to use the apartment.

In 1981, petitioner registered as a notary public. He registered as qualified in Suffolk County.

In 1982, K & E was suffering the effects of a trauma. The board of directors was concerned that K & E's largest client would go bankrupt and that, in turn, K & E would suffer the same fate. After a lengthy argument, petitioner was directed to find a buyer for K & E. In August 1983, K & E was sold to Lorimar. In September 1983, petitioner was informed that, as a result of the sale of K & E, there was no job for him in the new structure. As of this date, petitioner's duties were essentially ministerial and involved resigning from various committees and boards. Under the terms of petitioner's resignation, K & E continued to pay for the use of the apartment until April 1, 1984. The telephones in the apartment as well as the car and garage were to be paid for by K & E until October 31, 1984. In April 1984, petitioner started to pay the rent on the apartment out of his own funds.

During the years 1982 through 1984, petitioner augmented his art collection at his home in Quogue. The ultimate value of this art was approximately $150,000.00 to $200,000.00.

Petitioner insured the house as a non-seasonal dwelling.

After petitioner's termination from K & E, he continued to use the apartment about twice a week as a base while looking for a job. At the end of 1983 and early 1984, the value of everything in the New York City apartment was not more than $15,000.00. At this point in time, there were a couple of pictures from his office as well as furniture, a television set and clothes left in the apartment. The apartment also contained clothes owned by petitioner's daughters and clothes and books belonging to Mr. Kenworthy.

Usually, petitioner spent holidays with his mother and daughters at his home in Quogue and not at his apartment in New York City.

Throughout the period in issue, petitioner's registration as a lawyer with the New York State Office of Court Administration listed his home address as the Quogue residence.

In 1980, petitioner made contributions to New York City-based cultural organizations including the Museum of Modern Art, Metropolitan Museum of Art and the ballet. Petitioner

was instructed to make these contributions by K & E in order to promote good client relations. K & E reimbursed petitioner for these contributions.

The charity to which petitioner made his largest contributions after 1980 was the African Medical and Research Organization which is based in Nairobi, Kenya. Petitioner attended meetings of this group in New York City, London and Africa. Other organizations in which petitioner was active were UNICEF and the Women's Action Alliance. The meetings for UNICEF were held in New York City.

During the period in issue, petitioner made contributions to civic and charitable organizations in the Quogue area including the Quogue Fire Department and Police Department. He also contributed to a local wildlife society. In 1982 petitioner was active in raising funds to purchase an ambulance for use by a volunteer ambulance group. As a result of these latter efforts, petitioner received a commendation from the Westhampton War Memorial Ambulance Association, Inc. of Westhampton Beach on Long Island, New York. In 1984, petitioner contributed a 20-foot boat and outboard motor to the Marine Science Center at Southampton College in Southampton, New York.

Since 1980, petitioner's driver's license has listed his address as being the Quogue residence.

In May 1984, petitioner purchased a new car since he knew that he would lose the use of the car provided by K & E on October 31, 1984. The registration on the vehicle listed petitioner's Quogue residence. In the fall of 1984, petitioner purchased a used vehicle for the use of his housekeeper. The registration on this vehicle also listed the Quogue residence.

During the years 1982 through 1984, petitioner used the address of either K & E's offices or the New York City apartment for the receipt of information from his financial institutions because his bank balance and stock holdings were handled by his secretary. Credit card bills were sent to petitioner's office address since entertainment expenses were reimbursed by K & E.

Many of the credit card charges on petitioner's American Express card were from restaurants in New York City. The charges were incurred because of the need to entertain clients of K & E.

Eleven of the 15 Master Card charges and 10 of the 19 Visa Card charges reviewed by the Division were bills from businesses which were not located in New York. Thirteen of the 36 charges on petitioner's American Express credit card came from businesses not located in New York City. Most of the rest of the charges were for restaurants in New York City where petitioner entertained clients and out-of-town visitors of K & E.

The comparison of the Quogue and New York City utility bills by the auditor resulted in a misleading conclusion. First, LILCO, which provides power to Long Island, is on a bi-monthly billing cycle. In 1982, there were seven billing cycles, in 1983 there were five billing cycles and in 1984 there were seven billing cycles. After adjusting for the differences in billing cycles, a comparison of the LILCO and Con Edison bills shows that, for each of the years in issue, the LILCO bills were considerably higher. The Con Edison bills, which were for the New York City apartment, were unduly large because it was petitioner's practice to leave the lights and air conditioning on in the apartment whenever he was out and because petitioner's daughters and friends were permitted to use the apartment. Petitioner was not concerned about the cost because the Con Edison bills were reimbursed by K & E. In contrast, the house in Quogue did not need a lot of air conditioning.

In Quogue, the main house and the guest cottage had separate meters. Petitioner only paid the utilities on the guest cottage sporadically because he had guests who stayed in the cottage and they paid the bills. The pump for a well and swimming pool equipment were on the guest cottage service. If the bills for the guest cottage and the main house were added together, the LILCO bills would have been higher.

The house in Quogue was heated throughout the year as appropriate and was occupied throughout the years in issue.

The apartment in New York City had two telephone lines. One line was used by petitioner's children, his children's guests or petitioner's guests. The second telephone line was established by K & E. This line was intended solely for petitioner's use and gave petitioner direct access to his office. All calls on the K & E telephone were billed directly to K & E. Except for one occasion, petitioner never received the bills for the K & E telephone.[3] Therefore, these bills were never submitted to the Division and included in its analysis. If a client of K & E used the non-K & E telephone to make a long-distance telephone call at petitioner's apartment, the portion of the bill for that call would be reimbursed.

The Division's comparison of telephone usage was faulty inasmuch as petitioner did not make a practice of using the telephone in the New York City apartment upon which the comparison was made. Moreover, the amount of the telephone bill for the non-K & E telephone line was inflated by frequent calls to Ireland, where petitioner's daughter Julie had friends, and to France, where petitioner's daughter Hayley had friends.

The house in Quogue also had two telephone lines which were intended to be used in the same manner as the telephones in the New York City apartment. As with the New York City telephones, it was only on rare occasions that petitioner did not use the K & E telephone.

The apartment in New York City had two bedrooms, a living room, kitchen and a television/study room.

Petitioner did not keep many personal belongings at the apartment in New York City. He had some books, records, an occasional work of art and a few pieces of clothing.

Hayley kept personal belongings such as clothes and bedroom furniture at the New York City apartment. She had childhood belongings and clothes in her own bedroom at her home in Quogue.

During the years in issue, Hayley worked three or four days a week at a clothing store in New York City. The rest of the time was spent at either petitioner's apartment in New York City or at the Quogue residence. When she went to Quogue, she usually traveled by train.

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[3]After he was terminated, petitioner was presented with a list of long-distance telephone calls which his daughter Julie had surreptitiously made on the K & E telephone line.

Hayley resided at both the residence in Quogue and the apartment in New York City. She considered Quogue to be her home because she spent so much time there and her father was living there.

Petitioner did most of his food shopping at Gristedes in Westhampton Beach or other markets which were accessible to the Quogue residence such as an A & P or the Quogue Market. The auditor's conclusion that petitioner purchased food at Gristedes in New York City was erroneous.

The doctors whom petitioner patronized were all located in New York City. These doctors had treated petitioner for many years and petitioner had complete faith in their abilities.

Prior to and during the years in issue, petitioner made numerous improvements to the Quogue residence. In 1981, petitioner made the following improvements: renovation of the dining room of the main house; renovation of the living room and den; purchase of a Steinway grand piano; renovation of the upstairs second bathroom; installation of an alarm system; additional insulation; repair and replacement of columns in the front of the main house at a cost of over $2,000.00; exterior painting; repair of leaks in the roof; work in the carriage house to finish the kitchen; and installation of sconces in the main house.

In 1982, petitioner made the following improvements to his residence in Quogue: renovation and redecoration of the master bedroom and master bathroom; completion of the insulation process, finally costing over $10,000.00; repair of the driveway; reshingling of the south side of the main house; installation of a new well and a lawn sprinkler system at a cost of almost $9,000.00; reroofing the flat roofs; restoration of fireplaces in the living room and den; complete redecoration and painting of the small bathroom; installation of new pipes in the basement; and replacement of storm damaged trees.

In 1983, petitioner made the following improvements to his residence in Quogue: redecoration of his daughter's bedroom; upgrading of the alarm system; installation of additional new roofing, finally costing $20,000.00; additional repainting of the main house at a final cost of about $10,000.00; installation and stocking of a wine cellar; painting of the second floor of the

carriage house; and repair and replacement of parts of the heating system of the main house at a cost of over $3,500.00.

In 1984, petitioner made the following improvements to his home in Quogue: construction of a new garage at a cost of approximately $35,000.00; replacement of the old cesspool system at a cost of over $7,000.00; renovation of the second floor hallways; and fixing of the driveway.

In 1980, petitioner's house was cleaned once a week by a woman and six or seven associates. This arrangement continued until late 1983 or early 1984 when petitioner retained a housekeeper to live in the house. The housekeeper remained in this position for about a year. Petitioner then used the services of the original woman until a new housekeeper could be found.

Initially, petitioner did not have any maid service at the New York City apartment. At some juncture, petitioner hired a cleaning woman who came to the apartment every two or three weeks.

At the hearing, petitioner presented his diaries for 1982, 1983 and 1984. Petitioner's secretary noted petitioner's appointments in these diaries and petitioner relied on these diaries to keep track of his business affairs. For the benefit of his accountant, when it was necessary to prepare petitioner's tax returns, petitioner went through his diary and wrote "Quogue" on those days he recalled being in Quogue. These notations were based on contemporaneous entries, petitioner's memory and available documentation. Petitioner's accountant used these diaries to prepare the schedule of the days worked in and out of New York City on petitioner's income tax returns.

According to these diaries, petitioner spent 200 days outside of New York City during 1982, 195 days outside of New York City during 1983, and 219 days outside of New York City during 1984. At the hearing, petitioner could not account for the difference between his count of the days in New York City and that of his accountant's which was placed on the tax returns.

The question on petitioner's tax returns regarding whether petitioner maintained an apartment in New York City was checked "no" because the apartment was viewed as belonging to K & E.

During the years in issue, petitioner usually spent Sunday and/or Monday, Tuesday and Wednesday evenings at his apartment in New York City. Whenever possible, it was petitioner's practice to spend Fridays as well as the weekends in Quogue.

When petitioner was appointed the New York State Commissioner of Commerce in May 1985, the New York State Police conducted an examination concerning where petitioner resided. As a result, they concluded that petitioner lived in Quogue.

OPINION

The Administrative Law Judge determined that petitioner's apartment in New York City constituted a permanent place of abode. However, the Administrative Law Judge concluded that, based upon the facts and circumstances presented, including the weight of the documentary evidence and credible testimony, petitioner had produced clear and convincing evidence that he was a domiciliary of Quogue, New York during the years 1982-1984. Further, based on petitioner's business diaries and credible testimony, the Administrative Law Judge found that petitioner had demonstrated that he had not been present in New York City for more than 183 days for each of the years at issue.

On exception, the Division asserts that petitioner's diaries fail to satisfy the regulatory requirement that a taxpayer "keep and have available . . . adequate records to substantiate" that not more than 183 days of every taxable year were spent in New York City (20 NYCRR former 102.2[c]). The Division's argument is two-fold: (1) many of the entries in petitioner's diaries are informal and incomplete, failing to identify the location of the recorded event; and (2) petitioner concedes that nearly all of the diary entries which identify petitioner's location as being in Quogue were not made contemporaneously. Rather, the Quogue entries were made in the subsequent year at the request of petitioner's accountant, and were based on petitioner's best recollection, factors which lead the Division to question whether the term "diary" is an accurate description of the records offered.

In response, petitioner states that the proof offered to demonstrate Mr. Moss' presence in and out of New York City for the years at issue is sufficient. Petitioner states that the basic

entries in the diary - - those reflecting business and personal appointments during the year - - are contemporaneous, complete, and reliable when reviewed in conjunction with petitioner's testimony. Further, petitioner asserts that the bulk of the entries referring to Quogue, while admittedly made after the fact, are likewise reliable because they were based on: (1) petitioner's best recollection, which was often aided by existing contemporaneous entries concerning events which occurred prior to, during, or subsequent to the day in question; and, further, were based on (2) petitioner's weekly routine of spending weekends in Quogue, as well as Fridays and sometimes Mondays. Therefore, petitioner contends that he has met the recordkeeping requirements of 20 NYCRR former 102.2(c).

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

The Administrative Code of the City of New York former § T46-105.0(a) provides the criteria for determining whether a taxpayer is a city resident:

> "(a) A city resident individual means an individual:
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> "(1) who is domiciled in this city, unless (A) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or . . .
>
> "(2) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States."

The Administrative Law Judge concluded that petitioner had maintained a permanent place of abode in New York City during the years at issue, but that petitioner was not a domiciliary of New York City during those years. The Division did not except to these determinations. Therefore, we will forego a discussion of "domicile" and "permanent place of abode," and will proceed directly to a consideration of the 183 days issue.[4]

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[4]In his brief on exception, petitioner challenges the Administrative Law Judge's conclusion that he had maintained a permanent place of abode in New York City for the years at issue (Petitioner's brief on exception, p. 11, footnote 12). The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that an exception to the determination of the Administrative Law Judge may be filed within 30 days of the issuance of the determination

20 NYCRR former 102.2(c) states that:

> "[i]n counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while travelling by motor, plane or train through New York state to a destination outside New York State. 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 nonresident, 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" (emphasis added).

This regulation is applicable to the resolution of both New York State and New York City statutory residence issues (see, 20 NYCRR 290.2[b]).

The records in this case include travel reports (Exhibits "41," "44," and "46") and business diaries (Exhibits "40," "43," and "45"). The travel reports are, for the most part, consistent with the business trips recorded in the diaries. One exception is the lack of a report for a trip to California on June 6-7, 1983. Petitioner attributed the lack of records for this trip to an effort by K & S to conceal the movements of its executives so as to reduce the chance that the public would become aware of ongoing negotiations to sell K & S to a California firm (Hearing Tr., pp. 270-271).

The business diaries were maintained at Mr. Moss' New York City office during the year to which they applied (Hearing Tr., pp. 250, 265-266, 272-273). The diaries contain sketchy entries of both a contemporaneous and non-contemporaneous nature, said entries having been made by either Mr. Moss or his secretary (Hearing Tr., pp. 249-254, 257-259, 265-269, 272-275, 297-298, 300-304, 381-383). The entries are legible, but a substantial number of them do not include a description of the location of the appointment, i.e., New York City, Quogue, or elsewhere. Thus,

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(20 NYCRR 3000.11[a][i]). After the expiration of the 30-day period, any party not having filed an exception is deemed to have waived its right to raise issues before the Tribunal (Matter of Auriemma, Tax Appeals Tribunal, September 17, 1992; Matter of Caleri, Tax Appeals Tribunal, August 11, 1988; Matter of Klein's Bailey Foods, Tax Appeals Tribunal, August 4, 1988). As petitioner has failed to file an exception within the time period provided, we find that the Tribunal is not required to consider the points raised in petitioner's brief which go beyond the issues raised by the Division in its exception (although the Tribunal does have the authority to do so on its own motion, where circumstances merit) (Tax Law § 2006[7]; 20 NYCRR 3000.11[e]).

it is possible to read the entries in the diary, but it is not possible to determine the location of Mr. Moss on any given day based solely on the diaries.

However, the lack of specificity of the diaries is supplemented by the testimony of Mr. Moss. At the hearing, Mr. Moss testified at length concerning the diaries. As to the contemporaneous entries, Mr. Moss testified that those appointments were entered in the diary by either himself or his secretary at the time they were made, and that they were subsequently modified or deleted as circumstances changed (Hearing Tr., pp. 249-250, 265-266, 272-273). Mr. Moss also stated that he considered his diaries an accurate document upon which he relied (Hearing Tr., pp. 250, 265-266, 272-273).

As to the non-contemporaneous entries, Mr. Moss testified that, at the request of his accountant, he would take time at the end of each tax year to go through that year's diary and fill in his location on the days where no contemporaneous entries had been made (Hearing Tr., pp. 251-254, 257-259, 265-267, 269, 273, 275, 297-298, 300-301, 303-304, 381-383). Mr. Moss stated that he determined his whereabouts through a reconstruction of events based on the contemporaneous entries, available documentation, his general routine of taking long weekends in Quogue, and his best recollection (Hearing Tr., pp. 254-255, 259, 265-267, 269, 273, 275, 297-298, 300-301, 304, 315, 381-383). Mr. Moss stated he was aware of the test for determining if a day was attributable to being in New York City, i.e., physical presence for any reason other than making a travel connection (Hearing Tr., pp. 259, 269-270, 276). Based on all of these factors, Mr. Moss went through each diary at the end of the respective taxable year and made entries describing his whereabouts on the days lacking contemporaneous recordings (Hearing Tr., pp. 251-254, 257-259, 265-267, 269, 273, 275, 297-298, 300-301, 303-304, 381-383).

Regarding his regular routine, Mr. Moss stated that his practice was to spend holidays and weekends in Quogue (Hearing Tr., pp. 110, 146, 300, 304, 315, 382-383, 387-388). Further, he had an understanding with his employer that he would not work in the office on Fridays (Hearing Tr., pp. 382-383, 387) and that, based on this agreement, it was often his practice to return to Quogue on Thursdays in the evening (Hearing Tr., pp. 284, 352-353, 383-384, 387). Finally, Mr.

Moss stated that it was not uncommon for him to remain in Quogue on Mondays to work; several other key employees of K & E, who lived in or near Quogue, would also remain out on Long Island, and they would meet at a common location rather than traveling to New York City (Hearing Tr., p. 110).

The Administrative Law Judge found Mr. Moss to be a credible witness. As we stated in Matter of American Express Co. & Am. Express Intl. Banking Corp. (Tax Appeals Tribunal, April 23, 1992):

> "the credibility of witnesses is a determination within the domain of the trier of facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony" (see, Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992; Matter of Spallina, Tax Appeals Tribunal, February 27, 1992; see also, Matter of Berenhaus v. Ward, 70 NY2d 436, 522 NYS2d 478).

While the Tribunal is not bound by an Administrative Law Judge's assessment (Tax Law § 2006[7]; 20 NYCRR 3000.11[e][1]; Matter of Jericho Delicatessen, supra; Matter of Spallina, supra; Matter of Small, Tax Appeals Tribunal, August 11, 1988; see, Matter of Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809), we find nothing in the record which would cause us to alter the Administrative Law Judge's finding that Mr. Moss was a credible witness. This credibility determination serves to bolster the diaries because Mr. Moss testified in detail as to the manner in which the diary entries were made. Further, we find no inconsistencies between the pattern of the recordings in the diaries and Mr. Moss' general routine of traveling to and from New York City. Additionally, the contemporaneous entries which address business trips taken by Mr. Moss are supported by the travel reports submitted into evidence.

The point which seems to disturb the Division is the substantial number of non-contemporaneous Quogue entries made in the diary, and the effect that these entries have on the items identified as "diaries" (Hearing Tr., pp. 255-256, 267, 273; Oral Arg., pp. 5-6, 9, 11).

We disagree with the Division's challenge. Petitioner does not dispute that some entries were not made contemporaneously (Hearing Tr., pp. 251-254, 257-259, 265-267, 269, 273, 275, 297-298, 300-301, 303-304, 381-383). While we do not condone the practice of making entries

after the fact, in this case, based on the weight of the evidence presented, we conclude that petitioner has successfully demonstrated in a clear and convincing manner that he did not spend more than 183 days in New York City for each of the tax years at issue (Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992; see, 20 NYCRR former 102.2[c]).

The present case is distinguishable from prior Tribunal decisions addressing the question of what constitutes adequate evidence to demonstrate that a taxpayer has not spent more than 183 days in the taxing jurisdiction (see, Matter of Kornblum, supra; Matter of Roth, Tax Appeals Tribunal, March 2, 1989; Matter of Feldman, Tax Appeals Tribunal, December 15, 1988). Specifically, in Feldman, the Tribunal concluded that utility bills and testimony as to approximate dates of arrival in and departure from New York State were insufficient to satisfy the regulatory requirements.

In Roth, the Tribunal found the petitioner's diaries to be illegible and, therefore, meaningless, and held the petitioner's summary of the diaries unreliable given the illegibility of the diaries upon which it was based. The diaries were not accompanied by credible, detailed testimony explaining their creation and meaning.

In Kornblum, the petitioners offered: telephone bills; a schedule of their whereabouts prepared by their accountant based on Florida and New York utility bills, credit card summaries, and discussions with the petitioners; and their testimony at the hearing. The Tribunal held that this evidence was insufficient, finding the utility bills too imprecise to identify with certainty the petitioners' location on any specific day and, further, finding that these bills were inconsistent with the schedule submitted. Additionally, Mr. Kornblum's testimony was determined to be inconsistent with the schedules.

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 petitioner Ronald J. Moss is granted; and

4. The notices of deficiency dated October 14, 1987 are cancelled.

DATED: Troy, New York
November 25, 1992

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

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

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