STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN G. AVILDSEN	:	DECISION DTA No. 809722
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioner John G. Avildsen, c/o Harding Productions, Inc., 2423 Briarcrest Road, Beverly Hills, California 90210, filed an exception to the determination of the Administrative Law Judge issued on April 29, 1993. Petitioner appeared by Breed, Abbott and Morgan (Edward H. Hein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter in response, and petitioner filed a reply brief. Oral argument was heard on December 2, 1993, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Administrative Law Judge erred in concluding that credible testimony was insufficient as a matter of law to establish that petitioner did not spend more than 183 days in New York City in each of the years 1986 and 1987.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "8," "54," "71," "73" and "78" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Petitioner, John G. Avildsen, filed a New York State Resident Income Tax Return for the year 1986. On this return, petitioner listed his address as Potato Road, Box 379, Wainscott, New York. 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.

Petitioner's income tax return included a series of wage and tax statements. One statement from Columbia University listed petitioner's address as 45 East 89th Street, New York, New York. Four wage and tax statements set forth petitioner's address as being on Potato Road and two wage and tax statements did not list an address for petitioner.

Petitioner filed a New York State Resident Income Tax Return for the year 1987 and reported that his address was Potato Road, Box 379, Wainscott, New York. 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.

Six wage and tax statements were included with petitioner's 1987 return. Each of these wage and tax statements listed petitioner's address as being on Potato Road.

In or about late May 1989, an audit of petitioner was commenced. Petitioner was recommended for audit by the personal income tax unit of the City of New York, Department of Finance, as part of the "Millionaire's Project '91'". The audit was conducted by Samaan Wassif of the Personal Income Tax Unit of the Department of Finance of the City of New York. Initially, the Division of Taxation (hereinafter the "Division") sent letters addressed to petitioner at both the Post Office box address shown on petitioner's income tax returns and to 45 East 89th Street, New York, New York. The letter sent to the Potato Road address was returned without delivery by the Post Office.

The letter stated that petitioner's New York State income tax returns for the years 1986, 1987 and 1988 had been selected for examination and scheduled an audit appointment. The

Information Document Request, which accompanied the letter, specified as its subject 1986, 1987 and 1988 personal income tax and requested, among other things, Federal income tax returns for the years 1986, 1987 and 1988 and the New York State personal income tax return for 1988.

At the hearing, the auditor acknowledged that when he sent the appointment letter and Information Document Request to petitioner, the New York State Department of Taxation and Finance had not selected the 1988 New York State income tax return for examination. Nevertheless, the auditor was authorized to send this letter because he was instructed to examine all years which were open for audit.

We modify the Administrative Law Judge's finding of fact "8" to read as follows:

> In response to the appointment letter, the auditor received a telephone call from petitioner's representative, Mr. Edward Hein. On July 6, 1989, a meeting, which lasted most of the day, was held with the auditor, petitioner's accountant and Mr. Hein at the latter's office. During this meeting, the auditor was provided with some utility bills and telephone bills pertaining to both addresses. Except to the extent that the information was relevant to support items of deduction, gain, loss, credit or exemption claimed on petitioner's 1986 or 1987 returns, Mr. Hein declined to provide bank statements or cancelled checks on the ground that they were personal. The auditor was also shown a lease dated May 20, 1986 for apartment 33E, 45 East 89th Street, New York, New York 10128. The lease was in petitioner's name for the period August 1, 1986 until July 31, 1990 for a monthly rental of $2,060.10.[1]

Although requested, the auditor was not given a diary or appointment book. The diary was requested in order to analyze the number of days the taxpayer spent in and out of New York City.

The auditor asked for and received a copy of petitioner's automobile registration showing an address in Wainscott, New York. The auditor was not shown any voter registration.

Petitioner's representative declined to produce any credit card statements on the ground that they were personal. The credit card statements were asked for as proof of some days petitioner spent in New York City.

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[1] We modified the Administrative Law Judge's finding of fact "8" by changing July 6, 1987 to July 6, 1989 and by modifying the fourth sentence to more accurately reflect the record.

The auditor was told that petitioner maintained a bank account at Citibank on Madison Avenue in New York City and another bank in Beverly Hills, California.

The Division learned that petitioner was a stockholder in a corporation which manufactured films known as Don Don, Inc. The corporation was located at 200 East 90th Street, New York, New York. The tax return of Don Don, Inc. indicated that petitioner's compensation was $37,000.00 in 1986 and $1,000.00 in 1987.

During the audit, petitioner's representative presented the auditor with a schedule K-1 entitled "Shareholder's Share of Income, Credits, Deductions, etc." The corporation's name and address was listed as Daniels Lane Corp., Daniel's Lane, Wainscott, New York 11975. The form stated that petitioner owned 99% of the stock and listed petitioner's address as 45 East 89th Street, New York, New York.

The Division performed an analysis of telephone bills which were provided by Mr. Hein. This analysis shows that, during 1986, the average monthly telephone bill on apartment 33E, 45 East 89th Street, New York, New York was $958.78, while the average monthly telephone bill at the residence on Potato Road was $414.91. Similarly, during 1987, the average monthly telephone bill for apartment 33E was $690.86, while the average monthly telephone bill on the residence at Potato Road was $324.91.

The Division prepared an analysis of 1986 electric bills to compare usage at Potato Road and apartment 33E. The Division examined the amount of kilowatt usage at the respective locations rather than the amounts expended for electricity service because of a difference in the pricing of electricity. The Division's analysis found that, for 1986, the average monthly kilowatt hours used at apartment 33E was 516.75, while the average monthly kilowatt hours used at Potato Road was 76.08.

On August 4, 1989, petitioner's representative presented the Division with additional documentation including, among other things, telephone bills, electric bills and details of certain expenses. The Division was also given a biography and a list of petitioner's locations on each day during the years 1986, 1987 and 1988 which was prepared under Mr. Hein's

supervision based on information from petitioner's secretary. After receipt of the lists, the auditor did not request, and petitioner did not provide, any further information or evidence regarding petitioner's location during 1986 or 1987.

During the audit, petitioner's representative declined to provide information regarding petitioner's doctors and dentists on the ground that it was irrelevant. Petitioner's representative was also unable to provide any information regarding whether petitioner had garage space in New York City, had a safe deposit box or had a will.

The Division was advised by petitioner's representative that, for 1985, petitioner filed as a resident of New York City.

The Division examined petitioner's 1986 and 1987 New York State resident income tax returns which reported total New York adjusted gross income for the two-year period of close to $5,000,000.00 and New York itemized deductions in excess of $300,000.00. After the examination, the Division concluded that petitioner's itemized deductions, Federal adjustments, New York additions and subtractions, partnerships and capital gains and losses were all accurately reported. However, the Division also noted that the bad debts claimed as a capital loss on the 1986 tax return were disallowed by the Internal Revenue Service. Petitioner did not contest this adjustment because it resulted in no change in tax due.

The auditor never met or spoke to petitioner nor did he ever ask to meet or speak to petitioner. Further, the auditor never went to the Potato Road residence, nor has he ever been in any apartment or house owned, leased or occupied by petitioner. The auditor never asked to see an apartment or house owned, leased or occupied by petitioner.

On the basis of its audit, the Division concluded that petitioner was a domiciliary of New York City during the years in issue because petitioner was historically domiciled in New York City and he did not change his domicile. The Division did not make any findings regarding whether petitioner was a statutory resident for 1986 and 1987 because the Division did not receive any substantiation of the days that petitioner claimed to be out of New York City.

The Division prepared and mailed to petitioner's representative a Statement of Personal Income Tax Audit Changes which explained that petitioner was deemed to be taxable as a domiciliary of New York City in accordance with section 1305(a)(1) of Article 30 of the Tax Law. The document also stated that petitioner was liable for penalties pursuant to Tax Law § 685(b)(1) and (2) because petitioner did not report that he had an apartment or dwelling in New York City during the years in issue. After the Statement of Personal Income Tax Audit Changes was mailed to petitioner's representative, the audit was reviewed by the auditor's supervisors. Upon review, it was concluded that the case should be returned to the auditor for the assertion of a penalty pursuant to Tax Law § 685(p). In accordance with this direction, the auditor mailed to petitioner's representative a revised Statement of Personal Income Tax Audit Changes which, in addition to the prior statement, asserted a penalty pursuant to Tax Law § 685(p).

The Division issued a Notice of Deficiency, dated February 22, 1990, which asserted a deficiency of personal income tax for the years 1986 and 1987 in the amount of $178,345.00, plus interest of $34,485.14 and penalty of $42,882.00, for a balance due of $255,712.14.

Petitioner was born in Oak Park, Illinois, on December 21, 1935, and attended school through the fifth grade in Illinois. Thereafter, petitioner's parents moved to New York City where petitioner completed his formal education. Prior to his first marriage in 1964, petitioner completed two years at New York University, served in the United States Army, worked in advertising in New York City and on films in New York, Massachusetts, Washington, D.C. and Florida.

Petitioner began working in the motion picture industry in 1961. He has worked as an assistant cameraman, production manager, soundman, cameraman, associate producer, assistant director and director. In 1972, petitioner directed his first motion picture for Paramount, "Save the Tiger" starring Jack Lemmon. In 1977 he received an Academy Award for directing "Rocky". Awards were also given for best picture and best editing.

Each picture is a separate project involving people who come together to make a particular picture. When the picture is finished, the participants go their separate ways. The location where the picture is shot is usually determined by the story. When his career was beginning, location was not a significant factor in deciding whether or not to accept a particular job.

The first residence occupied by petitioner and his first wife, Melissa, was a one-bedroom apartment at 122 West 71st Street in New York City. The apartment was located on the fourth or fifth floor in a building that did not have an elevator.

Petitioner and his wife stayed at their first apartment for about two years and then moved to a rented two-bedroom apartment at 120 West 86th Street in anticipation of the birth of their first child, Anthony, who was born on March 11, 1967. Their second child, Jonathan, was born on July 11, 1969.

In the late 1960's, most of petitioner's work involved films which were shot in New York, including Long Island, Westchester and New York City.

Petitioner never considered the apartment at 122 West 71st Street or the apartment at 120 West 86th Street as his permanent home. In addition, it was never his intent to raise his children in New York City if it could be avoided.

In 1972, petitioner and his family lived in Los Angeles while working on the picture "Save The Tiger". During this period, petitioner and his wife kept the apartment in New York City on 86th Street.

When petitioner and his family returned from California in 1972, petitioner rented a house in the Sagaponack area of Long Island in accordance with petitioner's and his wife's desire to live permanently on Long Island.

During the years 1972 to 1974, petitioner's children were first enrolled in the Hampton Day School in Bridgehampton, New York.

In 1973, petitioner and his first wife started living separately. Thereafter, petitioner rented one house and then another in the vicinity of the house on Long Island where Melissa and the children lived.

In or about 1975, petitioner and his wife became legally separated and Melissa received custody of the children. Thereafter, Melissa and the children moved to an apartment on West 86th Street in New York City across the street from the prior apartment. Subsequently, they moved to Westchester.

During the summer of 1975, petitioner employed Robert Kobrin, then a 19-year old student at Long Island University with experience as a camp counselor. In this position Mr. Kobrin shopped, cooked, cleaned and took care of petitioner's two sons who spent a substantial portion of the summer with petitioner.

In August 1976, after working on the movie "Rocky", which was shot in Philadelphia and California, petitioner returned to Long Island. Thereafter, he rented a residence in Wainscott.

In early 1977, petitioner rented apartment 37A at 45 East 89th Street in New York City. It had a living room, kitchen, 1½ baths and two bedrooms. One of the bedrooms was used as an office.

Since 1977, petitioner had an office staff as opposed to people working on particular movies. Initially, the office staff used as an office the space which would have otherwise been the second bedroom in apartment 37A.

Apartment 37A did not have a bedroom for petitioner's children to sleep in. However, on at least one occasion, petitioner's children slept in the apartment.

In 1977, petitioner again employed Robert Kobrin as a father's helper in order to take care of petitioner's children on Long Island. Mr. Kobrin also worked as a production assistant on the movie "Slow Dancing in the Big City" which was filmed in New York and New Jersey.

After renting apartment 37A, petitioner rented a house in the Hamptons area. By 1978, petitioner began taking steps to purchase a home in that area.

While in Europe working on a movie during the winter of 1979-1980, petitioner both leased a house in Wainscott for the term May 1, 1980 through September 2, 1980 and approved the purchase of property on Potato Road in Sagaponack. The property which petitioner purchased was selected and recommended by his accountant as an investment for rental ("Potato Road property"). On May 1, 1980 petitioner purchased the Potato Road property for $250,000.00. When petitioner returned from Europe in the spring of 1980 and saw the Potato Road property, he decided to build his home there.

At the time petitioner acquired the Potato Road property, it had a substantial house on it which was habitable but it was not what petitioner wanted as his home. By the end of July 1980, over the protest of the former owner who held a purchase money mortgage on the property, petitioner had commenced demolition of the house on the Potato Road property. By November 1980, only the base and brick chimney remained.

The architectural firm of Machinist Associates was retained to provide architectural services for construction of the new house on Potato Road. In or about October 1981, petitioner asked that time charges commencing July 1981 be detailed. The detailed bills which followed made periodic reference to meetings and discussions with petitioner.

By April 1981, the basic skeleton of the new house on the Potato Road property had been erected and by May 1982 the skylight on the tower had been installed.

During the construction of the house on the Potato Road property, petitioner leased other dwellings in Sagaponack and Bridgehampton.

By January 31, 1983, petitioner had spent approximately $767,500.00 on his new home. Including this amount as an asset, the excess of petitioner's total assets over his liabilities was approximately $1,108,000.00.

Completion of the new home on the Potato Road property, to the point where it was ready for petitioner's occupancy, was delayed until 1985. The delay was primarily due to a

periodic lack of funds. Time was also consumed because petitioner would change his mind over a particular detail.

In April 1983, petitioner borrowed additional funds from Citibank, N.A. for the construction of his home. By May 1983, petitioner had paid several hundred thousand dollars to ELP Associates, Inc., the general contractor, for construction of his home.

In August 1983, petitioner contracted with Environmental Improvements, Inc. for various woodworking details on the Potato Road property at a price of $45,915.00, which was subsequently increased by numerous additions and changes.

Between November 1983 and June 1985, petitioner incurred expenses of approximately $100,000.00 to L. W. Winslow Painting, Inc., a painting contractor, for work on his home on Potato Road.

We modify the Administrative Law Judge's finding of fact "54" to read as follows:

> In or about the end of 1984 or the beginning of 1985, there had been a destructive coastal storm in Sagaponack. As a result of this storm and to protect his home from the prospect of storm damage from future storms, petitioner spent approximately $38,000.00 for a rock revetment, which is a wall made with large boulders.[2]

In or about August 1985, petitioner was charged $3,600.00 by an interior decorator, hired by petitioner, for curtains for the Potato Road property.

In the second half of 1985, panelling work on the Potato Road property was completed by Beres Construction, Inc. at a cost to petitioner of $32,000.00.

Between March 1985 and November 1985, planting and landscaping on the Potato Road property was completed at a cost of over $20,000.00.

On January 24, 1986, petitioner purchased additional real property adjacent to the Potato Road property. The idea was that if there ever was a storm, he would be able to move his home back from the sea on to that property.

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[2] We modified the Administrative Law Judge's finding of fact "54" by changing the years to 1984 and 1985 rather than 1985 and 1986 to accurately reflect the record.

In 1986, petitioner constructed a redesigned beach deck, detached from the house, which was described by the contractor in a progress billing as "one hell of a gorgeous clear redwood deck, seating and railing. Winner of the Riverhead Building Supplies drivers accolade for the most ambitious and detailed deck ever seen by those astute connoisseurs of the trade."

Petitioner took pains to recreate the exterior appearance of the older houses in the Sagaponack area, down to such details as the type of window, gutters and spacing of shingles.

The interior of petitioner's home on Potato Road shows extraordinary attention to detail. Petitioner personally designed an interior stained glass window which carries through a motif appearing in other places of his Potato Road home, including the hearth in the living room and the kitchen. Petitioner also designed and made special brass window hardware to conform to the design of the Potato Road property.

The Potato Road property was the first and only residence petitioner ever had constructed.

In April 1978, petitioner leased apartment 33E at 45 East 89th Street in New York City for use as an office. The apartment contained six rooms, two and one-half baths and a kitchen. Mr. Kobrin coordinated adapting apartment 33E from a residential apartment to editing rooms and a production office for petitioner. This included knocking out a wall, removing shelves from a closet, soundproofing and installing permanent office furniture mounted to walls. After leasing apartment 33E, petitioner's office staff worked out of apartment 33E rather than apartment 37A.

On October 6, 1984, petitioner relinquished apartment 37A at 45 East 89th Street.

One of petitioner's companies, Don Don, Inc., leased, as the named tenant, office space at 200 East 90th Street, apartment 27D, New York, New York, for a two-year term commencing April 1, 1986. The lease provided that the apartment shall be used "for living purposes only" and, further, that "only [y]ou and members of your immediate family . . . and servants, if any, may live in the [a]partment." Upon executing the lease, the 90th Street apartment was used as

petitioner's office. During the time that petitioner's office was on East 90th Street, he continued to use apartment 33E for office space and storing files. The telephones at apartment 27D and apartment 33E were inter-connected so that any incoming calls could be answered from either of the two apartments.

Before petitioner began using apartment 27D, he did not stay overnight at apartment 33E. However, when petitioner began using the new apartment, he stayed overnight at apartment 33E or at a hotel when he was in New York City.

Petitioner used the office at East 90th Street for a period of approximately two years. Thereafter, he resumed using apartment 33E as his New York office. Petitioner's office staff is now based in Beverly Hills, California.

Arnuthfonyus Films, Inc., a corporation which supplied petitioner's services for directing and editing motion pictures, used as its address 45 East 89th Street, New York, New York.

On repeated occasions, petitioner rejected advice and suggestions that he purchase a cooperative or townhouse in New York City and expressed the view that he really did not want a home in New York City. Petitioner never intended to make his permanent home at 45 East 89th Street.

Beginning in 1979, petitioner, through one of his companies, employed Joyce Wilson Fetherolf first as petitioner's personal secretary and later as his executive assistant. During the years in issue, Ms. Fetherolf made petitioner's travel reservations, provided petitioner with daily schedules of his appointments, frequently made appointments for him, kept track of his expense reports and other financial affairs, and dealt with both personal and business matters for petitioner. On the basis of the information that she gained in working for petitioner, it is Ms. Fetherolf's opinion that Sagaponack was the place which petitioner intended to be his permanent home, the place he intended to return whenever he was absent during the years 1986 and 1987.

We modify the Administrative Law Judge's finding of fact "71" to read as follows:

> At the hearing, Ms. Fetherolf testified that from her personal knowledge and review of the source material, including desk diaries

> and calendars she kept, that the schedules furnished to the auditor on August 4, 1989 listing petitioner's location on each day of the years in question were accurate. She also testified that the source materials from which the schedules listing petitioner's location were derived set forth, among other things, information which, if disclosed, could jeopardize petitioner's continuing business projects. It would also disclose personal and medical information and information regarding meetings on legal matters. The schedules disclose that petitioner spent less than 183 days in New York during each of the years 1986 and 1987.[3]

Airline bills submitted in evidence lend some support to the schedules, which listed petitioner's location on each day during the years in question. Specifically, the invoices from Continental-American Travel, Inc. corroborate some of the departures and arrivals represented on the schedules. The invoices from East Hampton Aire, Inc. and East Coast Airways, Inc. confirm that there was travel on certain days shown on the schedules. However, the latter invoices use abbreviations rather than clear explanations of the destination of travel. Furthermore, the invoices of East Hampton Air, Inc. include flights of individuals other than petitioner.[4]

We modify the Administrative Law Judge's finding of fact "73" to read as follows:

> From August 1985 to June 1, 1986, petitioner, through one of his companies, leased a furnished house in Los Angeles.[5]

In the fall of 1986, petitioner taught a graduate course in film directing at Columbia University. It was petitioner's recollection that he met with his students once a week.

Petitioner was not a member of social organizations in either New York City or the Sagaponack area in 1986 or 1987. However, he was a member of a group that was concerned with the environment in the Sagaponack area.

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[3] We modified the Administrative Law Judge's finding of fact "71" by adding the last sentence to disclose the contents of the schedules.

[4] At the hearing, Ms. Fetherolf explained that she was able to distinguish which flights were petitioner's using petitioner's diaries.

[5] We modified the Administrative Law Judge's finding of fact "73" by changing the date June 1, 1985 to June 1, 1986 to accurately reflect the record.

By May 15, 1980, petitioner had a checking account at the Bridgehampton National Bank, Montauk Highway, Bridgehampton, New York. By September 28, 1980, the checks on said account bore petitioner's name and Potato Road address.

During the period in issue, petitioner maintained a checking account at Citibank, N.A., 91st Street at Madison Avenue, New York, New York. The checks also bore petitioner's name and Potato Road address.

We modify the Administrative Law Judge's finding of fact "78" to read as follows:

> On February 27, 1987, petitioner was remarried in Hawaii. The License and Certificate of Marriage which was signed under oath by petitioner and his bride listed petitioner's "usual residence" as Potato Road, Sagaponack.[6]

The details of the March 1986 telephone bill for calls billed to apartment 33E were placed in evidence and disclose that of the $708.49 for such period attributed in the auditor's analysis to apartment 33E, more than one-third were for calls originating in California and charged on petitioner's calling card. Many of the remaining calls were placed by petitioner's executive assistant.

The bills from the Long Island Lighting Company ("LILCO") for each month of 1986 for Potato Road were submitted in evidence. The bills show that for 1986 the average monthly kilowatt hours used at Potato Road exceeded 3,000. Each bill states on its face, directly alongside the meter readings a "Meter Mult" of 40 and alongside the multiplier shows the energy used for the month in kilowatt hours. The term meter multiplier is explained on the back of each bill. Each LILCO bill, except for the one in July, also shows average daily use in KWH/day. In each case the average daily use exceeds the total kilowatt hours for the entire month computed in the auditor's analysis.

In accordance with New York State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. It is noted that certain of petitioner's proposed findings of fact have been modified. The proposed findings of

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[6] We modified the Administrative Law Judge's finding of fact "78" by changing the date February 26 to February 27 to accurately reflect the record.

fact have been rejected to the extent of said modifications. Proposed findings of fact "77", "87", "88" and "89" have been rejected in their entirety as unnecessary to the determination.

In addition to the facts found by the Administrative Law Judge, we find the following:

> Neither petitioner nor his representative were provided with copies of the audit workpapers at the time of the audit.
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> By letter dated March 7, 1990, petitioner made a Freedom of Information request for copies of "all records in any way pertaining to audit of the New York State Resident Income Tax Returns and New York City Non-resident Earnings Tax Returns for 1986, 1987 and 1988 of John G. Avildsen" (Exhibit "3").
>
> Petitioner received documents in response to this request, but the response did not include all of the documents in the Division's audit file. Among the items not provided to petitioner were the audit workpapers.
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> The Division served petitioner with a subpoena duces tecum on April 21, 1992, the first day of the hearing, seeking the production of petitioner's diary and other records relating to petitioner's daily activities. The subpoena was later withdrawn.

OPINION

The Administrative Law Judge determined that petitioner was not a domiciliary of New York City during the years 1986 and 1987. However, the Administrative Law Judge found that petitioner was a resident of New York City pursuant to section 11-1705(b)(1)(B) of the Administrative Code of the City of New York because apartment 33E at 45 East 89th Street was a permanent place of abode maintained in New York City and because petitioner failed to substantiate that he did not spend more than 183 days in New York City during each of the years at issue. The Administrative Law Judge held that the testimony of Ms. Fetherolf as to the contents of petitioner's business diaries was credible, but that credible testimony alone was insufficient to prove that petitioner did not spend more than 183 days in the City and that petitioner was required, by 20 NYCRR Appendix 20, section 1-2(c) (hereinafter "section 1-2[c]") to submit "adequate records" in order to prevail on this issue. The Administrative Law Judge also found that the audit had a rational basis. Finally, the Administrative Law Judge decided that the Division of Tax Appeals did not have jurisdiction to review petitioner's challenge that by taxing a non-domiciliary's worldwide income the New York City personal

income tax violated the United States Constitution. The Administrative Law Judge concluded that this was a challenge to the constitutionality of the statute on its face.

On exception, petitioner asserts that the interpretation and application given to section 1-2(c) by the Administrative Law Judge, requiring the production of a business diary, violates the constitutional right to privacy against unreasonable government intrusion. Petitioner also asserts that the requirement of corroborating documentary evidence is not required by the law nor stated in the regulation on its face. Further, petitioner argues that to give the regulation an interpretation that allows the Division of Taxation to prescribe what is required of a taxpayer to satisfy his burden of proof is inconsistent with the independence of the Division of Tax Appeals.

In response, the Division argues that the regulation is a reasonable rule and as such within the authority of the Commissioner to promulgate. The Division also argues that a similar record keeping regulation, former 20 NYCRR 102.2 has been upheld in Matter of Smith v. State Tax Commn. (68 AD2d 993, 414 NYS2d 803), Matter of Getz (Tax Appeals Tribunal, June 10, 1993), Matter of Shapiro (Tax Appeals Tribunal, July 3, 1991) and Matter of Feldman (Tax Appeals Tribunal, December 15, 1988). The Division states that "[t]he decisions requiring documentary corroboration appear to acknowledge that the limitations of the fact finding process are such that if nothing more than credible testimony was required in order to defeat an assessment than [sic] no assessment could be sustained at hearing. Credible, in the context of testimony given at a hearing, is taken to mean truthful in appearance rather than truthful in fact because the latter defies measurement by any objective standard" (Division's letter on exception, p. 2).

We agree with petitioner that the Administrative Law Judge erred in concluding that documentary evidence was required, as a matter of law, and that credible testimony was necessarily insufficient to satisfy petitioner's burden with respect to the 183 day issue.

The pertinent law, section 11-1705(b)(1)(B) of the Administrative Code of the City of New York, provides simply that a City resident individual includes an individual:

> "(B) 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 eight-three days of the taxable year in this city . . . ."

Petitioner correctly notes that the statute does not address the issue of the type of proof required by a taxpayer to prove that he was not in the City more than 183 days. The statute simply states the rule that an individual who spends more than 183 days in the City and maintains a permanent place of abode in the City is defined to be a resident of the City.

As petitioner also notes, when the Legislature intends to require corroborating evidence it is explicit in doing so. The grandfather exemption of Article 31-B exempts a transfer from the tax if it "is pursuant to a written contract entered into on or before the effective date of this article" (Tax Law § 1443[6]). With respect to the application of this exemption, the Legislature was not content to simply state the rule of exemption, it explicitly described the type of proof that would be required of a taxpayer to obtain the benefit of the exemption. Thus, section 1443(6) is limited to those transfers where the grandfathered contract is "confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the [tax commissioner]" (Tax Law § 1443[6]).

In Matter of Old Nut Co. v. New York State Tax Commn. (126 AD2d 869, 511 NYS2d 161, lv denied 69 NY2d 609, 516 NYS2d 1025), the Division contended that testimonial evidence could not satisfy the statutory requirement of independent evidence. In response, the Court stated that even this very explicit requirement of independent evidence could rationally be interpreted to be satisfied by testimonial evidence, but because it could "with at least equal rationality be construed, as did [the Division], to require objectively verifiable corroboration of the date of execution, independent of the testimony of the parties to the transaction . . ." the Court upheld the Division's interpretation (Matter of Old Nut Co. v. New York State Tax Commn., supra, 511 NYS2d 161, 162-163).

The regulation at issue also does not require the result reached by the Administrative Law Judge. The regulation[7] requires a taxpayer to maintain records to substantiate days spent outside of New York, but does not address the failure to produce such records at a Division of Tax Appeals hearing. We agree with the Division that a record keeping regulation like this (the Division's regulation is set forth at 20 NYCRR 105.20[c]) is within the Division's rule making authority under section 171 of the Tax Law.

If the Division had a regulation that attempted to define the consequences of failing to produce records at a hearing, we would conclude that it exceeded the Division's authority, absent a legislative direction like that in section 1443(6) of the Tax Law. The functions of the Division of Tax Appeals are independent of the Division (Tax Law, §§ 2000, 2002) and it is the Tax Appeals Tribunal who has the authority to prescribe the rules for the hearing process (Tax Law § 2004), not the Division.

An effort by the Division to absolutely require documentation to corroborate testimony in the hearing process would also be called into question by the fact that the Division does not place such restrictions on its own auditors during the audit process. The Division's Audit Manual on Nonresident Audits states:

> "[a]uditors need to evaluate the written and oral statements of taxpayers. These statements, when not contradicted by other evidence, can be accepted or be tested by requesting certain limited documentation from taxpayers. This information will usually surface during an opening interview with the taxpayer. Auditors and supervisors are empowered to accept written or oral statements by taxpayers subject to evaluation based on all other information gathered

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[7]20 NYCRR Appendix 20, § 1-2(c) provides that:

> "Rules for days within and without the City.--In counting the number of days spent within and without this City, presence within the City for any part of a calendar day constitutes a day spent within the City except that such presence within the City may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside of the City, or while traveling by motor, plane or train through the City to a destination outside the City. Any person domiciled outside the City who maintains a permanent place of abode within the City during any taxable year and claims to be a nonresident must keep and have available for examination by the Finance Administrator adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the City."

> during the audit" (District Office Audit Manual, Nonresident Audits, p. 3).

As stated above, we find no support in the statute or regulation for the Administrative Law Judge's conclusion that testimony alone was insufficient as a matter of law to prove that petitioner did not spend more than 183 days in New York. Nor does the decision in Matter of Smith v. State Tax Commn. (supra) support this conclusion, as this case did not address this issue. Finally, contrary to the statements of the Administrative Law Judge and the Division, we do not see the practical need for such a rule. By rejecting the principle that credible testimony is insufficient as a matter of law, we do not believe that we are paving the way to the result that no assessment will be sustained at a hearing. Obviously, any taxpayer who attempts to sustain his burden of proof solely on testimonial evidence runs a very great risk that he will not prevail at the hearing because the Administrative Law Judge will determine that the testimony is not credible to establish the necessary facts (see, e.g., Matter of Airport Indus. Park, Tax Appeals Tribunal, April 11, 1991).

Contrary to the contention of the Division, the Administrative Law Judge's responsibility in finding facts is not to determine whether the witness appears to be truthful. Instead, "[d]etermined by the trier of facts and rarely upset by appellate courts, credibility has two components: competency and veracity. Opportunity and capacity to perceive combined with capacity to recollect and communicate constitute the ingredients of competency. The truthfulness of the witness determines his veracity" (Fisch, New York Evidence, § 446 [2d ed 1977]). To prove that a taxpayer was not present in New York or New York City for more than 183 days through only testimony is a very significant task because the witness will have to convince the Administrative Law Judge that the witness was in a position to know the taxpayer's whereabouts on every day of a specific year or years, that the witness can accurately remember such details and, as well, that the witness is truthfully recounting these details. To portray such a standard as leading to the cancellation of all statutory resident assessments does not accurately describe the burden before the taxpayer.

In this case, it is obvious that the Administrative Law Judge found Ms. Fetherolf's testimony credible because: 1) the testimony was based on her examination and analysis of the diaries that she maintained with respect to petitioner's activities; 2) she specifically summarized these diaries in the schedule introduced into evidence (Exhibit "U"); 3) the diaries were created at the time the activities were scheduled and 4)petitioner offered a rational justification for not offering the diaries themselves. If Ms. Fetherolf's testimony had simply been a general statement that petitioner was not present in New York for more than 183 days each year and was based simply on her recollection of events occurring five years ago, rather than on records she had made of these events, it is doubtful that the Administrative Law Judge would have found the testimony credible. Further, in the unlikely event that an Administrative Law Judge would find such a general statement, based solely on recollection, credible, it is possible that we would find such general testimony insufficient to satisfy the petitioner's burden of proof (see, Matter of Dacs Trucking Corp., Tax Appeals Tribunal, March 21, 1991). Finally, if the taxpayer were unable to offer a valid justification for not producing business diaries, this in itself would seem to undermine any testimony about the contents of the diaries.

We do not believe that our conclusion here will mean that the Division will be "in the untenable position of having to accept a taxpayer's uncorroborated statements on whether a tax return was properly filed" (Determination, conclusion of law "P"). The Division always has the power to impeach the testimony of the witness through cross examination, i.e., to show that the witness was not in a position to know the facts or is not able to accurately remember them. Given the two components of credibility, the Division is not limited to challenging the truthfulness of the witness. Beyond challenges to the credibility of the witness, the Division can utilize information gathered during the audit process to controvert the facts as stated by the taxpayer. Finally, if the Division wishes to obtain documents in the possession of the taxpayer that the taxpayer refuses to introduce into evidence, the Division can use its subpoena power to obtain these documents (Matter of Capital Dist. Better TV v. Tax Appeals Tribunal, ___ AD2d ___, 606 NYS2d 930).

Because we find that the Administrative Law Judge erred in deciding that credible testimony was insufficient as a matter of law to satisfy petitioner's burden of proof, we conclude that the Administrative Law Judge's determination that Ms. Fetherolf credibly testified that petitioner was not present in New York City for more than 183 days in 1986 and 1987 requires our ultimate conclusion that petitioner has proved that he was not a resident of New York City for these years.

Although we have reversed the Administrative Law Judge's determination, we acknowledge that the Administrative Law Judge reasonably relied on our decision in Matter of Feldman (supra), to reach his conclusion. The precise issue raised in this case was not raised nor considered by us in Feldman. Now that we have had the opportunity to consider this specific issue, we conclude that to the extent that Feldman stands for the proposition that the Division's regulations require documentary evidence to corroborate credible testimony, the Feldman decision is in error and is overruled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John G. Avildsen is granted;

2. The determination of the Administrative Law Judge is reversed to the extent it found that petitioner spent more than 183 days in New York City in 1986 and 1987, but is in all other respects affirmed;

3. The petition of John G. Avildsen is granted; and

4. The Notice of Deficiency dated February 22, 1990 is cancelled.

DATED: Troy, New York
May 19, 1994

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

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