

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM AND ESTELLE GOLUB	:	DECISION
for Redetermination of Deficiencies or for Refund of	:	DTA No. 810069
Personal Income Tax under Article 22 of the Tax Law for	:	
the Years 1986 and 1987.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 17, 1993 with respect to the petition of William and Estelle Golub, 6930 West Country Club Drive North, Sarasota, Florida 34243-3501. Petitioners appeared by DeGraff, Foy, Holt-Harris & Mealey, Esqs. (James B. Ayers, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition. The six-month period to issue this decision began on October 5, 1993, the date by which the Division of Taxation could have filed a reply brief.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether, for the years 1986 and 1987, petitioners maintained a permanent place of abode and spent, in the aggregate, more than 183 days in the State of New York and were, therefore, taxable as resident individuals for such years.

FINDINGS OF FACT

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

On February 13, 1990, the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes to William and Estelle Golub ("petitioners") asserting

additional New York State personal income tax due in the amount of \$19,002.53, plus interest, for a total amount due of \$23,500.99 for the year 1986 and asserting additional New York State personal income tax due in the amount of \$21,746.59, plus interest, for a total amount due of \$25,290.31 for the year 1987. The Statement of Personal Income Tax Audit Changes stated that there was an enclosed letter, in addition to the computations, which contained an explanation; however, the letter was not attached at the time of its having been offered into evidence.

On March 16, 1990, the Division issued a Notice of Deficiency to petitioner William Golub in the amount of \$19,082.92, plus interest, for a total amount due of \$23,599.71 for the year 1986.

On March 19, 1990, the Division issued a Notice of Deficiency to both petitioners in the amount of \$21,746.59, plus interest, for a total amount due of \$25,415.31 for the year 1987.¹

For many years prior to 1979, petitioners owned and resided in a home located at 1929 Union Street, Schenectady, New York. This home, which had cost the original owner in excess of \$1,000,000.00 to build, had four floors, five bedrooms and an acre of landscaped grounds.

Petitioner William Golub was the Chief Executive Officer and, since 1972, was the Chairman of the Board of Directors of the Golub Corporation. This corporation was originally formed by petitioner, his brother and Joe Grossberg and was in the business of building markets and wholesaling food products. Mr. Golub was also president of the Central Operating Company which operated markets for the Golub Corporation. In addition, he had partnership and/or investment interests in McClellan Street Associates, Clark Trading Corporation and Golub Properties, Inc., all of which were connected to the Golub Corporation, i.e., they owned real property used in the Golub supermarket business.

In or about 1965, petitioners began going to Florida, for about a month at a time, during

¹It should be noted that both petitioners are deceased. Estelle Golub died on August 10, 1990. William Golub testified at the hearing held on July 6, 1992; however, he died on October 19, 1992.

the winter. In anticipation of retirement (in the early 1970's), petitioners spent portions of the winter, for about five years, renting a furnished apartment in Fort Lauderdale, Florida to see how they liked living in Florida. Before making a final decision about a retirement destination, petitioners decided to explore five other locations, spending two weeks each in Phoenix, Las Vegas, San Francisco, Palm Springs and Hawaii.

For several reasons, most notably the chance to be near their three children, petitioners chose Florida to be their retirement location. Their son (Paul) and daughter (Jill) lived in West Palm Beach, Florida on a full-time basis and their son, Neil, owned a winter residence in Florida.

On November 9, 1979, petitioners entered into a contract for the sale of the 1929 Union Street home (the selling price was \$230,000.00). On December 26, 1979, petitioners purchased a two-bedroom condominium, bordering a golf course at the Palm Aire Country Club, located at 8422 West Country Club Drive North, Sarasota, Florida.² The purchase price for this condominium unit was \$65,000.00 and, in addition, petitioners spent approximately \$5,000.00 for certain improvements thereto.

The closing on the sale of their Schenectady home did not take place until April 23, 1980. The purchasers gave petitioners until July 1, 1980 to vacate the premises because they were attempting to find a place to rent in or about the Albany area of New York State.

In March 1980, William Golub flew to New York State in an attempt to find a place to rent when they came north during the months of very warm weather in Florida. Because of the amount of furniture and other belongings in their Schenectady home, a real estate agent convinced Mr. Golub that he would have difficulty finding a suitable place to rent. She showed him a condominium in Loudonville and stated that the contractor could have it ready for occupancy by petitioners' July 1st deadline. On April 1, 1980, petitioners entered into a contract to purchase, for the price of \$117,310.00, a condominium unit at 55 Loudonwood East, Albany, New York. The contract for the purchase of the Loudonville condominium was entered into

²Petitioner William Golub testified that, due to additional construction in the area, the address was subsequently changed to 6930 West Country Club Drive North.

without petitioner Estelle Golub ever having seen the condominium. William Golub testified that when they purchased the Sarasota condominium, Estelle was involved in the purchase and also designed an addition and various changes to it. The closing on the Loudonville condominium took place on June 20, 1980. Much of the furniture from petitioners' Schenectady home was donated to charity. Petitioners' 1980 Federal return contained an appraisal from an antique dealer indicating that articles of personal property valued at \$32,526.50 had been donated to various charities in the Schenectady area. The rest of the furniture was used to furnish both the Sarasota and Loudonville condominiums.

In 1979, petitioner William Golub was 75 years old and was desirous of retiring from active participation in the Golub Corporation so he entered into negotiations with his son, Neil Golub, and his nephew, Lewis Golub, the culmination of which was an agreement dated March 10, 1981. Pursuant to the agreement, which terminated September 13, 1982, William Golub (who is referred to as the "Executive" in the agreement) was to continue in the limited employ of the Golub Corporation and was to serve as Chairman of the Board of Directors. However, paragraph 3(B) of the agreement provided as follows:

"It is the intent of this agreement that the Executive gives full and clear recognition of the rights and authority of the President and Executive Vice President to operate and manage the business. Further, it is the intention of the Executive to remove himself from the daily conduct of the business and he agrees that he will not direct the acts of its executives or suppliers."

Paragraph 8 of the agreement stated:

"EXPIRATION OF CONTRACT. This contract shall expire on September 13, 1982 (unless sooner terminated pursuant to Paragraph 5A), at which time Executive will resign his position as Chairman of the Board of Directors. He shall then become honorary chairman, but only if he serves the full term of this agreement as Chairman. As honorary chairman he shall be compensated as other outside directors are compensated at that time."

William Golub testified that the authority to manage and control the business was thereupon vested in the President (Lewis Golub) and the Executive Vice President (Neil Golub). An affidavit of Lewis Golub (Exhibit "24"), Chairman and Chief Executive Officer of the Golub Corporation, stated that William Golub performed no services for the Golub Corporation since his retirement on September 13, 1982. In addition, the affidavit states that Lewis Golub is the

Managing Partner of 126th Street Associates and McClellan Street Associates as well as the Managing Executive of Clark Trading Corporation and Golub Properties, Inc. and that William Golub performed no services for any of these businesses since September 13, 1982.

In 1982, the Golub Corporation had a defined retirement plan. At that time, under a defined benefit plan, Internal Revenue Service regulations did not require coverage of employees over the age of 65. Petitioner William Golub was, therefore, not a participant in the company's plan and was not entitled to a pension upon his retirement. Paragraph 5(B) of the March 10, 1981 agreement provided as follows:

"Deferred Compensation. Upon the termination of this agreement, either due to an event of termination as defined in Paragraph 5A or upon the expiration of the agreement, Executive shall be entitled to deferred compensation in the sum of Sixty Thousand (\$60,000.00) Dollars per annum for life, whether or not Executive continues as director of the Company."

For each of the years at issue, the moneys paid to William Golub pursuant to paragraph 5(B) of the agreement were reported on a Wage and Tax Statement (W-2 Form).

In 1991, the Golub Corporation and the Internal Revenue Service entered into an Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Form 2504). The relevant issue (relevant to the present matter) was whether payments made by the Golub Corporation pursuant to an agreement with William Golub (see, above) in the amounts of \$60,000.00 for the taxable years 1984 and 1985 were wages subject to the Federal Insurance Contribution Act (FICA). Pursuant to this settlement agreement, the Internal Revenue Service conceded that such payments were not wages subject to FICA, but were payments made on account of his retirement pursuant to Internal Revenue Code § 3121(a)(3).

The Division deemed this income, reported by William Golub as pension income on his New York State nonresident returns for the years at issue (petitioner claimed a pension deduction of \$20,000.00 for each year), as wage income and, accordingly, denied the aforesaid pension deductions.

The affidavit of Lewis Golub (Exhibit "24") states that the \$60,000.00 per year paid by the Golub Corporation to William Golub was paid as retirement income and does not represent

wages for services performed and was paid because William Golub was never a member of the corporation's qualified retirement plans.

For 1986, petitioner William Golub received, in addition to the \$60,000.00 per the above agreement, \$8,250.00 as Golub Corporation board fees, \$2,750.00 as Golub Corporation director fees and \$33,814.00 from McClellan Street Associates (Estelle Golub received \$11,795.00 from this partnership).

For 1987, William Golub received \$10,125.00 as Golub Corporation board fees and \$29,455.00 from McClellan Street Associates (Estelle Golub received \$10,275.00).

In furtherance of their stated desire to change their domicile from New York to Florida, petitioners did the following:

- (a) Registered to vote in Broward County, Florida on December 17, 1979;
- (b) Executed a Declaration of Domicile and Citizenship (declaring citizenship, actual legal residence and domicile in the State of Florida) on December 5, 1979;
- (c) William Golub obtained a Florida driver's license shortly after 1979 and continued to renew this license through the early 1990's (Estelle Golub did not drive);
- (d) Florida individual and fiduciary intangible tax returns were filed by petitioners for the years at issue;
- (e) William Golub registered his automobile in Florida and also joined the Peninsula Motor Club (AAA);
- (f) Received a homestead tax exemption for their condominium in Sarasota;
- (g) Maintained a safe deposit box in Florida, first in Fort Lauderdale and, for the years at issue, at the Sun Bank in Sarasota;
- (h) Listed Sarasota as their address on 1986 and 1987 Federal income tax returns;
- (i) Subscribed to the Sarasota Herald Tribune during 1986 and 1987;
- (j) Contributed to the Republican Party of Florida and to several Florida charities;
- (k) Joined the Palm Aire Country Club (where their condominium was located);

- (l) While in Florida, were attended by Florida doctors;
- (m) Maintained Florida bank accounts; and
- (n) Contributed to and participated in various Florida cultural activities (Sarasota Opera Association, Asolo Theatre, Florida Studio Theatre, Community Concert Series and Ringling Arts Museum).

In addition to ownership of the Loudonville condominium and receiving income from New York businesses (Golub Corporation, McClellan Street Associates, Clark Trading Corporation and Golub Properties, Inc.), petitioners, for the years at issue, maintained the following New York contacts:

- (a) Maintained New York bank accounts;
- (b) Subscribed to capital area (New York) newspapers;
- (c) Maintained a social membership at Colonie County Club;
- (d) Maintained membership in Senior Golfer's Association (New York);
- (e) Made contributions to New York political campaigns (both local and state-wide);
- (f) Maintained membership in Temple Gates of Heaven (Schenectady) and Sisterhood of Congregation Gates of Heaven;
- (g) Received mail at Post Office Box 1074, Schenectady, New York;
- (h) Maintained checking account with checks printed with Loudonville address;
- (i) Maintained credit card in which statements were sent to Loudonville address;
- (j) William Golub continued to possess a New York driver's license;
- (k) Continued to see New York doctors;
- (l) Estelle Golub's will was probated in the Surrogate's Court, County of Albany pursuant to a provision in the will and both the order admitting the will to probate and the letters testamentary indicated that Estelle Golub was "late of the City and County of Albany";³

³Albany Surrogate's Court documents pertaining to Estelle Golub's estate were introduced by the Division (Exhibit "X"). These documents reflected that she resided in the City and County of Albany. As Exhibit "29," petitioners introduced an Order of such court which stated that Estelle Golub was late of the County of Manatee,

(m) The Certificate of Death for Estelle Golub (date of death, August 10, 1990) indicated her residence to be 55 Loudonwood East, Loudonville, New York. Place of burial was Gates of Heaven Cemetery in Schenectady (the plot was purchased 30 to 40 years prior to death); and

(n) A certificate of incorporation of the charitable corporation known as The William and Estelle Golub Foundation, Inc. was filed in the State of Delaware on November 12, 1986. Petitioners' address, set forth thereon, was the Sarasota address. Form 8283, regarding property donated to the Foundation, listed the mailing address as 501 Duanesburg Road, Schenectady, New York.

At the hearing, the parties entered into a stipulation with respect to the wills (and codicils) of William Golub as follows:

	<u>Executed</u>	<u>Address</u>	<u>Where Executed & Witnessed</u>
Will	3/15/82	Florida	Florida
Codicil	10/6/83	Florida	New York
Codicil	10/21/83	Florida	New York
Will	1987	Florida	New York
Will	10/26/90	Florida	New York
Codicil	1992	Florida	New York

During the many years in which he resided in Schenectady, William Golub was on the board of directors of many charitable organizations, such as the Schenectady Community Foundation, Schenectady Chamber of Commerce, United Way and Temple Gates of Heaven. He testified that, after they moved to Florida, his active involvement with these organizations dropped off markedly. After moving to Florida, petitioners maintained their membership at Temple Gates of Heaven in nonresident membership status which allows for burial in the Temple cemetery. Petitioners did not join a temple or synagogue in Florida, but attended services, on occasion, at both a local temple and synagogue.

In 1990, William Golub was selected as the Schenectady Citizen of the Century for his civic and charitable contributions. In 1991, he was the recipient of the United Jewish

Florida. A Form ET-141, New York State Estate Tax Domicile Affidavit (Exhibit "30"), was filed by William Golub indicating that Estelle Golub was, at the time of her death, a domiciliary of Florida.

Federation's Community Service Award. He previously received the State of Israel's highest civilian award and the B'nai B'rith's Man of the Year Award.

Prior to the years at issue, both petitioners came to have difficulty writing checks so they arranged for others to do it for them. Ed Lonczak, a Golub Corporation employee, prepared checks for William Golub. Some of petitioners' bills were sent directly to Mr. Lonczak, c/o P.O. Box 1074, Schenectady, New York 12301, which Post Office box was that of the Golub Corporation. The woman who cared for Estelle Golub often prepared checks on her behalf.

During the years at issue, petitioners employed housekeepers (Mary Parente and Etta Weilt) for their Loudonville condominium. The housekeepers came in once per week while petitioners were in Florida and five days per week while petitioners were living at the condominium. Petitioners' children also had access to the condominium. Their son, Paul, who resided in Wellington, Florida, spent considerable time at his parents' Loudonville condominium during 1986 and 1987. A letter of Paul Golub (Exhibit "28"), dated June 23, 1992, stated that he was staying at his parents' condominium in Loudonville for extended periods and that telephone bills of February 16, 1986, March 16, 1986, April 16, 1986 and May 16, 1986 contained telephone calls made almost exclusively by him. The letter stated that Paul Golub was there, in late May 1986, when his parents returned from Florida (they stayed until mid-November). Paul Golub's letter indicated that calls during the month of December 1986 were his. A telephone call appearing on the March 16, 1987 bill was apparently placed by the maid on February 19, 1987 (this was the only long distance call appearing on the bill). A telephone call to Utah (April 9, 1987) appearing on the April 16, 1987 bill was not placed from the condominium phone (though charged to this number) and Paul Golub does not know who made the call. Calls placed on April 23 and 25, 1987 (on May 16, 1987 bill) were made by Paul Golub. Again, the letter stated that petitioners returned to New York in late May 1987 and left for Florida in mid-November (the last phone call appearing on the November 16, 1987 bill was made on November 13). William Golub testified that his son Paul's presence in the Loudonville condominium was the reason that telephone and utility bills were unusually high during

portions of 1986 and 1987 when it is contended that petitioners were in Sarasota, Florida.

As indicated above, petitioners joined the Palm Aire Country Club which was adjacent to their Sarasota condominium. William Golub played golf at this country club. Petitioners also continued their membership at the Colonie Country Club (New York) where they had a social membership since, in later years, William Golub no longer played golf.

On the 1980 Federal income tax return, petitioners reported, on Schedule D thereof, a gain from the sale or exchange of a principal residence in the amount of \$17,876.00. Petitioners' accountant, Ann Kenney of Coopers & Lybrand in Albany, New York, testified that the taxable gain resulted from deeming their Florida condominium as their new principal residence and that there would have been no gain had the Loudonville condominium been the new principal residence. In support of this testimony, petitioners introduced into evidence (Exhibit "46") two forms 2119 (Sale or Exchange of Principal Residence) showing the computation of taxable gain using the Florida condominium as the new principal residence (a \$17,876.00 gain resulted) and using the Loudonville condominium as the new principal residence (which would have resulted in deferral of the \$17,876.00 gain). It must be noted that the actual Form 2119, attached to petitioners' 1980 Federal income tax return (Exhibit "45"), did not contain a computation of the gain to be postponed and the adjusted basis of the new residence (Part II of Form 2119) as did the "dummy" forms (Exhibit "46"). As a result thereof, it can be inferred that petitioners chose not to defer their gain and adjust the basis of their new residence and, accordingly, that petitioners did not deem the Loudonville condominium as their new principal residence. However, absent the computation on Part II of Form 2119, it cannot be affirmatively concluded that petitioners chose the Florida condominium as their new principal residence.

William Golub stated that he did not maintain day-by-day records of petitioners' whereabouts during the years at issue. He testified that tax savings (New York State personal income tax) was a consideration in petitioners' desire to change their domicile to Florida and, as a result thereof, he was aware of the 183-day requirement and made travel plans so as not to

spend more than 183 days in New York during any year. Their accountant, Ms. Kenney, testified that the Division's auditor did not, prior to the initial hearing on May 4, 1992, contend that petitioners spent more than 183 days in the State of New York during 1986 and 1987. However, in response to the raising of this issue by the Division, she prepared an analysis of petitioners' whereabouts using credit card statements, New York and Florida checking account statements and cancelled checks and utility bills. This analysis indicated that petitioners spent 177 days in New York in 1986 and 179 days in New York in 1987. Ms. Kenney testified that she placed the greatest reliance on credit card bills because credit card charges indicate where the user was on the date the charge was incurred. On days where no credit card charges were incurred, she utilized other documents such as airplane tickets, ATM withdrawals and other miscellaneous records.

Ms. Kenney stated that the Golubs followed a regular routine each year, traveling to New York in May and returning to Florida in November. William Golub travelled to a convention (IPA Convention, which was the successor to the Daniel Webster Society for speech making) each August and to a Golub Corporation board meeting (held in New York) each April.

Specifically, for 1986 and 1987, Ms. Kenney's analysis revealed the following:

	<u>1986</u>		
	<u>Florida</u>	<u>New York</u>	<u>Elsewhere</u>
January	31		
February	28		
March	31		
April	27	3 (Bd. meeting 4/17)	
May	18	10 (Return 5/22)	3 (Chicago 5/3-5/7)
June		30	
July		28	3 (IPA Conv. 7/28-8/2)
August		30	1
September		30	
October		31	
November	15	15 (Leave 11/15)	
December	<u>31</u>		
Totals	181	177	7

	<u>1987</u>		
	<u>Florida</u>	<u>New York</u>	<u>Elsewhere</u>
January	28		3 (Calif. 1/16-20)
February	28		

March	31		
April	27	3 (Bd. meeting 4/23)	
May	14	14 (Return 5/18)	3 (Chicago 5/4-6)
June		28	2 (Parsippany, NJ)
July		31	
August		27	4 (IPA Conv. 8/1-6)
September		30	
October		31	
November	14	16 (Leave 11/15)	
December	<u>31</u>		
Totals	173	<u>180</u>	<u>12</u>

In support of her analysis of days spent within and outside New York, checks, credit card statements, telephone bills and other miscellaneous records were submitted (Exhibits "34" through "43").

In its brief, the Division specifically disputes the following days (deemed by Ms. Kenney to have been days spent outside New York) in 1986:

<u>Day</u>	<u>Reason</u>
3/25/86	Phone calls from Colonie & Schenectady billed to petitioners' Florida phone
4/15 & 4/19-5/21/86	No documentation that William Golub in NY only 4/16-18
5/18-5/21/86	No documentation as to date of arrival in NY
7/28/86	No documentation as to date of departure to IPA Convention
12/10/86	Phone call from Schenectady to Sarasota charged to petitioners' Florida phone
12/11/86	No documentation as to whereabouts

While the Division, after analysis of the records presented for 1987, does not object to any specific days being deemed as having been spent outside New York, it asserts that, for both 1986 and 1987, petitioners failed to maintain adequate records to substantiate their whereabouts, noting that there existed gaps in the documentation.

With respect to the days in 1986 for which the Division contends that petitioners have produced insufficient proof of their absence from New York, the evidence presented reflects the following:

- (a) March 25, 1986 - The letter of Paul Golub (Exhibit "28") indicates that he was at his parents' Loudonville condominium from March 17 through April 15. In addition, there was an ATM cash withdrawal from Sun Bank in Sarasota on March 24 (see, Exhibit

"39") and another cash advance from Sun bank on March 26 (see, Exhibit "36").

(b) April 15, 19, 20, and 21, 1986 - Petitioners state that William Golub arrived on April 16, 1986 for a Golub Corporation board meeting to be held on April 17 and that he returned to Florida on the following day (April 18). The letter of Paul Golub (Exhibit "28") stated as follows:

"3. Apr 16, 1986: I was there for the entire period of the bill 3/17-4/15. My father came in for two (2) nights. He came in for a Thursday Board meeting. He arrived Wednesday afternoon and departed Friday morning. Mother stayed in Florida."⁴

In paragraph 4 of the letter, Paul Golub also stated that he was at the Loudonville condominium from April 16 through May 7, 1986. There were no bank or credit card transactions other than a Visa charge on April 18, 1986 of \$68.91 at Michelle's Restaurant in Schenectady, New York on April 18, 1986, a day which petitioners admit was spent in New York.

(c) May 18-21, 1986 - Petitioners allege that they arrived in New York on May 22, 1986. An affidavit of Edward R. Davis (see, Exhibit "49") states that he was retained by William Golub to drive his automobile from Sarasota to Albany in 1986. The affidavit also states that Mr. Davis arrived in Albany on May 18, 1986 at which time he dropped the car off at the Golubs' Loudonville condominium, but the Golubs were not there. Mr. Davis received his check on May 22, 1986.

Petitioners' Visa statement (Exhibit "35") reflects a May 18, 1986 charge of \$270.00 as "People Express Onboard, Newark, N.J." There was also a Gold Card charge (Exhibit "40") indicating a charge of \$129.00 (People Express Airlines Newark, NJ) processed on May 22, 1986 (the bill does not indicate the date of the transaction).

(d) July 29, 1986 - Petitioner William Golub contends that he departed for an IPA Convention on July 28, 1986 (Ann Kenney testified to that fact). There are Visa charges (Exhibit "35") reflecting charges in Washington, D.C. (the site of the convention) on

July 29 and 30 as well as August 1.

(e) December 10 and 11, 1986 - The Division points out that the GTE bill (Exhibit "38") reflects a telephone call from Schenectady to Sarasota on December 10, 1986 which was charged to petitioners' Florida telephone number and also asserts that there is no documentation to prove petitioners' whereabouts on the following day (December 11) as well.

The letter of Paul Golub (Exhibit "28"), in paragraph 7 thereof, states that calls during the month of December 1986 were his, since he was at the Loudonville condominium and his parents were not.

In addition, there was a Visa charge of \$501.00 at the Sport Shop in Sarasota on December 8, 1986 (Exhibit "34") and a Visa charge of \$12.06 at a 7-11 Store in Sarasota on December 9, 1986 (Exhibit "35"). Checks dated December 12, 1986, drawn on William Golub's Sun Bank account, were written to Publix and Winn Dixie (both supermarkets) in the amounts of \$50.76 and \$31.50, respectively (Exhibit "21").

At the hearing, petitioners also produced letters from Milton F. Gipstein, M.D., and his wife, Evelyn M. Gipstein (sworn to on June 24, 1992), a letter from Edith O. Katz (unsworn) and a letter from William L. Schiffman, M.D. (sworn to June 22, 1992) which state, in essence, that the above persons knew petitioners well, that petitioners were active in cultural and recreational activities in Florida and that petitioners had, on numerous occasions, referred to their home in Florida as their permanent home.

OPINION

The Administrative Law Judge found that for the years 1986 and 1987 petitioners were domiciliaries of Florida. The Administrative Law Judge further found that petitioners did not spend more than 183 days in New York State during each of the years 1986 and 1987 and, therefore, were not taxable as resident individuals for those years. In addition, the Administrative Law Judge determined that the payments received by petitioner William Golub qualified as an annuity and were not taxable to petitioner for the years 1986 and 1987.

On exception, the Division withdraws its argument that petitioners spent more than 183 days in New York during 1987 but continues to argue that petitioners spent more than 183 days in New York during 1986. The Division argues that petitioners failed to substantiate that the following days, which the Administrative Law Judge found to be non-New York days, were days not spent in New York: March 25, 1986, April 15, 1986, April 19, 1986, April 20, 1986, April 21, 1986, December 10, 1986 and December 11, 1986.

In its brief in support, the Division suggests that the Administrative Law Judge confused Ms. Kenney's testimony with William Golub's unsworn testimony when the Administrative Law Judge stated in conclusion of law "F" that "[b]ased upon the testimony of William Golub that no trips (other than to attend a corporate board meeting) were made to New York from mid-November to May of each year" (Determination, conclusion of law "F"). The Division asserts that this is the sworn testimony of Ms. Kenney relating what William Golub told her and that it is "insufficient to meet the inference of New York presence on March 25, 1986" (Division's brief, p. 5).

In response, petitioners ask that the determination of the Administrative Law Judge be sustained. Petitioners state that the credible testimony of the witnesses and the documentary evidence submitted by them indicate that they were not present in New York State for more than 183 days during 1986.

We affirm the determination of the Administrative Law Judge for the reasons stated in said determination. With respect to the Division's assertion that William Golub did not testify to the fact that only one trip was made to New York to attend a board meeting during the period from mid-November to May, we find that Ms. Kenney's testimony as to William Golub's actions provides a sufficient basis to support the Administrative Law Judge's conclusion.

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 William and Estelle Golub is granted; and
4. The Division of Taxation is directed to cancel the notices of deficiency issued to petitioners on March 16, 1990 and March 19, 1990.

DATED: Troy, New York
March 24, 1994

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

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