STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARTIN ERDMAN AND JOAN KEYLOUN	:	DECISION DTA No. 810741
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioners Martin Erdman and Joan Keyloun, 1801 South Flagler Drive, West Palm Beach, Florida 33401, filed an exception to the determination of the Administrative Law Judge issued on June 16, 1994. Petitioners appeared by Stanley Hagendorf, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Both petitioners and the Division of Taxation filed briefs. Petitioners filed a reply brief, received on October 7, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioners, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioners were domiciled in the State of New York during the years 1986 and 1987.

II. Whether the Division of Taxation's motion to conform the pleadings to the proof pursuant to 20 NYCRR 3000.4 should be granted and, if so, whether petitioners' income pursuant to an employment agreement with a New York corporation during the years in issue should be taxable to petitioners as nonresidents if it is found that petitioners were not domiciled in the State of New York during the years 1986 and 1987.

III. Whether petitioners have established reasonable cause sufficient to warrant abatement of penalty asserted under Tax Law § 685(g).

IV. Whether petitioners' request for rehearing should be granted.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "18," "21," "24," "30" and "32" which have beenmodified. 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.

Petitioners, Martin Erdman and Joan Keyloun (hereinafter "Mr. Erdman" and "Mrs. Erdman"), were married on August 26, 1986 at the Supreme Court Building in Mineola, New York. Both petitioners had previously been domiciled in the Town of Manhasset, County of Nassau, State of New York. The couple met in 1984 after the deaths of both their previous spouses in 1983, and were engaged in 1985.

Mrs. Erdman, through her affidavit, claimed to have been a Florida domiciliary since 1976, when she moved from Manhasset, New York to West Palm Beach, Florida for medical reasons. During the years 1986 and 1987, Mrs. Erdman had no physical assets in New York other than title to certain real property improved by a single-family residence in Manhasset which was occupied by her daughter and her family. During the years in issue, Mrs. Erdman had a checking account in Florida, a Florida driver's license obtained in 1976 and was registered to vote in the State of Florida since 1978.

Mr. Erdman claimed, through his affidavit, to have been a Florida domiciliary since 1985, the year in which he became engaged to the former Joan Keyloun. Mr. Erdman alleged that he made his decision to move to Florida with his new wife and physically removed his belongings to West Palm Beach in 1985.

Due to Mr. Erdman's current age of 78 and his affliction with hypertension (high blood pressure), and his doctor's admonition to avoid stress and "aggravation", Martin Erdman chose not to attend the hearing in this matter. Mrs. Erdman also chose not to appear on the basis that she was needed to care for her ailing husband. Immediately preceding the hearing, Mr. Erdman

was under the care of Dr. H. J. Roberts of West Palm Beach, Florida, who, by letter dated August 17, 1993, informed Mr. Erdman that although his high blood pressure had been reduced by anti-hypertensive drugs, he was advised to "remain on a salt-free diet, and to minimize stress and aggravation." Mrs. Erdman did not submit any documentation of her medical condition.

Therefore, the facts adduced at hearing were comprised of documentary evidence, the affidavits of petitioners and the testimony of the auditor, Mr. Steven Helfant.

Following an audit of petitioners for the years 1986 and 1987 for income tax purposes, the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes for the years 1986 and 1987 and determined petitioners to be residents of the State of New York and the City of New York and asserted additional tax for both years. For the year 1986, petitioners were found to have additional tax due of $61,414.07 for the State of New York and $315.00 for the City of New York. For the year 1987, petitioners were found to have additional tax due of $38,501.98 for the State of New York and $242.10 for the City of New York.

Following the issuance of the Statement of Personal Income Tax Audit Changes, there being no agreement thereto, the Division issued a Notice of Deficiency dated September 10, 1990 setting forth the same amounts of additional tax due to both the State and City of New York for the years 1986 and 1987, together with penalty and interest.

Petitioners filed a request for conciliation conference, which was held on November 21, 1991, following which a Conciliation Order was issued on February 28, 1992 sustaining the Notice of Deficiency. This appeal followed.

For purposes of the residency issue, the parties stipulated that neither petitioner spent in excess of 183 days in New York State during the years in issue. In the year 1986, Mr. Erdman spent 156 days in the State of New York, while Mrs. Erdman was present in the State for 161 days. In the year 1987, Mr. Erdman was present in the State for 139 days, while his wife spent 143 days in New York.

The Division began an audit of petitioners in August of 1989. On August 17, 1989, the

auditor mailed petitioners a residency questionnaire which was returned by Mr. Erdman on September 13, 1989. The questionnaire, completed by Mr. Erdman, stated that his residence was 1801 South Flagler Drive, West Palm Beach, Florida. Mr. Erdman conceded in the questionnaire that he owned a dwelling in New York at 1113 Cedar Drive, Manhasset Hills, New York, which he and his spouse occupied when living in the State of New York and maintained when not living in the State of New York.

Mr. Erdman stated that the house in Manhasset Hills was furnished and that the furnishings were owned by him and that he removed only his personal belongings in 1985. As of the date of the questionnaire, September 12, 1989, Mr. Erdman listed his occupation as retired and "consultant" and that he carried on said occupation at the South Flagler Drive address in West Palm Beach, Florida. Mr. Erdman listed Krisp-Pak Corp. of Hunts Point Terminal Market in Bronx, New York as his employer and stated that he had been carrying on said business since October 15, 1985 in the State of Florida.

Mr. Erdman stated that in the year 1985 he was in the State of New York between January and October; in 1986, between the months of May and September; and in 1987, between the months of June and September. Mr. Erdman stated, and this fact is corroborated by the agreement in evidence, that he entered into an employment agreement with Krisp-Pak Corp. during the year 1986, the first year in which he claims nonresidence, and that in said agreement his mailing address listed the South Flagler Drive, West Palm Beach, Florida address.

Mr. Erdman stated that since 1986 he has voted in the State of Florida.

Mr. Erdman stated that he was a member of the Knickerbocker Yacht Club of Port Washington, New York, where he maintained a sailboat year round, and that his membership was classified neither as a resident nor nonresident. Mr. Erdman stated that he possessed a Florida driver's license and owned an automobile which was registered in the State of Florida. Mr. Erdman claimed that Florida was his permanent residence where he devoted most of his time and that he had filed an affidavit of domicile in Palm Beach County.

Martin Erdman was born on October 18, 1915 and Mrs. Erdman was born on

February 20, 1929.

After receiving the questionnaire, the Division mailed petitioners a letter, dated September 26, 1989, which indicated that petitioners were being audited for the years 1986 and 1987 and that the auditor wanted certain documentation made available, to wit: bank statements and cancelled checks for the years in issue for all bank accounts; utility bills for New York and Florida residences; documentation to support all itemized deductions for the years 1986 and 1987; a copy of their 1986 and 1987 Federal income tax returns with all schedules; a sales contract for Mr. Erdman's business; and information with respect to what changes occurred in 1986 which caused petitioners to file as nonresidents in that year, along with a housing and work history covering the years 1970 through 1989.

On January 24, 1990, the Division sent a letter to Mr. Gerald Baylin, petitioners' representative at that time, requesting missing bank statements and cancelled checks from accounts at the National Westminster Bank for 1986 and 1987, Reliance Federal Bank for 1986, Prudential-Bache for 1986, Dean Witter for 1986; itemized deductions for 1987; and certain items for 1986. Additionally, apart from these items which had already been requested and not produced, the Division asked for a schedule of days spent outside of Florida for the years in issue, the address where Mrs. Erdman stayed when in New York, the date of the marriage ceremony to Mr. Erdman, as well as how long Mr. Erdman had occupied his residence at 1113 Cedar Drive, Manhasset Hills, New York. Finally, the Division requested information with regard to whether or not Mrs. Erdman maintained an office in New York at "Keyloun, Inc." and how many days during the years in issue she performed work relating to said corporation.

Petitioners filed a nonresident income tax return for the year 1986 with the State of New York indicating their South Flagler Drive, West Palm Beach, Florida address. The return was filed under the status "married filing joint return" and indicated total income of $367,277.00, of which $69,000.00 was derived from wages, tips and other compensation reported on a wage and tax statement from Krisp-Pak Sales to Martin Erdman at his West Palm Beach, Florida address.

Said wage and tax statement for 1986 indicated that it was a copy with a "corrected address". The 1986 nonresident income tax return was filed by petitioners on August 3, 1987 pursuant to a valid application for automatic extension of time to file. The 1986 return indicated the occupations of both petitioners as "consultant".

For the year 1987, petitioners filed a nonresident income tax return, once again under the filing status of "married filing joint return", and in which both claimed occupations as "consultant". Adjusted gross income was $347,410.00 and included wages, tips and other compensation in the sum of $53,800.00 as reported on a wage and tax statement from Krisp-Pak Sales to Martin Erdman at his "New Hyde Park"[1] address. This address had been crossed out and the South Flagler Drive, West Palm Beach, Florida address written in.

It is noted that for both 1986 and 1987 petitioners had State taxes withheld or prepaid. For the year 1986, petitioners withheld or prepaid $8,354.00 in State and City income taxes, while in 1987 petitioners withheld $4,368.00 in State and City income taxes.

In response to the January 24, 1990 letter from the Division, a schedule of days spent outside of Florida during 1986 and 1987 was provided as indicated by the stipulation between the parties.

The record does not indicate where Mrs. Erdman stayed when in New York prior to her marriage to Mr. Erdman. Also, it was never disclosed in the record how long Mr. Erdman had occupied his home at 1113 Cedar Drive, Manhasset Hills. Further, there was very little information in the record with regard to Mrs. Erdman's business activities as a "consultant" during the years 1986 and 1987. Although Mrs. Erdman denied any business interests or contacts in the State of New York for the years 1986 and 1987, her diaries and Federal tax returns raised serious doubts as to the veracity of that claim.

The U.S. individual income tax returns filed by petitioners for the years in issue shed a bit more light on the couple's circumstances during the years in issue. Once again, in 1986

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[1]New Hyde Park and Manhasset Hills are used interchangeably by petitioners. The street address, 1113 Cedar Drive West, was always the same. The Deed in Division's Exhibit "U" described the property as in the Town of North Hempstead, and also referred to as "New Hyde Park." The Florida declaration of domicile executed by Mr. Erdman on November 20, 1992 set forth his prior city of residence as Manhasset Hills, N.Y.

petitioners listed their occupations as "consultant" and a schedule C attached to said return indicated that Mrs. Erdman earned gross income of $39,500.00 in consulting fees.

The 1986 Federal income tax return also revealed the sale of 14 shares of Krisp-Pak Sales Corp., acquired in 1964 and sold on February 28, 1986 for $1,525,087.00, of which $535,651.00 was received during 1986. The sale was reported as an installment sale.

For the year 1987, petitioners once again filed a joint U.S. Individual Income Tax Return setting forth their occupations as "consultant" and, once again, Joan Erdman indicated other income of $32,695.00 on which she computed Social Security Self-Employment Tax. However, there was no separate schedule C for her consulting business included with the 1987 return in evidence.

Also on the 1987 return, the taxable part of the installment sale is reflected in schedule D, Capital Gains and Losses, on line 14.

Although petitioners maintained several checking accounts and brokerage accounts during the years in issue, the auditor was only able to analyze a passbook account from the Independent Bank, account number 4-806421-4, for the years 1986 and 1987. The auditor was able to locate two accounts with Dean Witter, both of which listed a New York account executive, i.e., Gerald B. Kitay, 919 Third Avenue, New York, New York. Both accounts listed petitioners as having a Florida address, but one account was in the name of Martin Erdman, as trustee, for the benefit of Martin Erdman.

The majority of checking activity took place on an account in a Florida bank, The Bank of Palm Beach and Trust Company, account number 260629100. The activity for the year 1986 indicated numerous checks written throughout the year to the Knickerbocker Yacht Club (Port Washington, New York) and also the North Hempstead Country Club. There were also substantial checks written to a contracting firm by the name of Goldberg and Rodler, which did landscaping work for Mr. Erdman at the Cedar Drive address in the sum of $23,200.00, and other boat-related charges, such as checks to "Seaman's Yacht Service".

For the year 1987, there were once again several checks written to the North Hempstead County Club, the Knickerbocker Yacht Club and the Poinciana Club, a Florida club to which petitioners belonged (one check). During the year 1987, Mr. Erdman undertook substantial repairs to his home in Manhasset Hills and therefore many checks are written to contractors with regard to that renovation. More details on that renovation are set forth below.

The auditor also analyzed telephone bills both from Southern Bell and New York Telephone. However, petitioners did not provide details of their New York Telephone bills since they only retained cover sheets. Therefore, activity could not be analyzed. The analysis of the Southern Bell bills demonstrated there were no long distance calls made between March 15 and March 25 and April 28 and May 14, 1986, and also during the months of June, July, August, September and October, with the next call being registered on November 4, 1986. The bill for December 1986 was missing.

In 1987, the Southern Bell telephone bills indicated no activity between March 5 and March 18, May 5 and May 14, May 15 and July 24, July 27 and August 11, and August 13 through October 5, 1987. The December 1987 bill was also missing.

From the bills presented, it was not possible to tell whether or not petitioners made telephone calls to their businesses in the New York area.

During the years in issue, petitioners belonged to the Knickerbocker Yacht Club which was utilized during the months of May through December 1986 and May through October 1987. During 1987, checks to Knickerbocker Yacht Club totalled $3,156.00, while in 1986 they totalled $1,893.00.

During the year 1987, petitioners issued checks to the North Hempstead Country Club in the sum of $1,496.00 and in 1986 checks in the sum of $2,892.00.

Two invoices from the Knickerbocker Yacht Club submitted in evidence for periods within the years in issue, February 1986 and February 1987, indicate an address in New Hyde Park for Mr. Erdman and state his dues as that of a "retired member". Dues for the year 1986 were set forth as $325.00, while dues for 1987 were set forth as $341.75.

A search of New York State Department of Motor Vehicles records indicated that Mr. Erdman held a type 5 license which expired on October 18, 1986.

We modify finding of fact "18" of the Administrative Law Judge's determination to read as follows:

> As stated above, Mr. Erdman maintained property at 1113 Cedar Drive West, New Hyde Park, New York which he shared with his wife, Bernice Erdman, until her death on October 23, 1983. Under the Last Will and Testament of Bernice Erdman, the home was placed in trust for the couple's two sons, William Erdman of Dallas, Texas, and Bruce Erdman of Cherry Hill, New Jersey. On March 28, 1984, Martin Erdman, as executor under the Last Will and Testament of Bernice Erdman, transferred the property to the two trustees of the trust created in the Last Will and Testament of Bernice Erdman, Martin and William Erdman.
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> Over the next several years, the premises underwent substantial repair and improvement, some of which was paid for by Martin Erdman. Mr. Erdman was advised by his former legal counsel that he should pay for such repairs given his responsibilities as trustee of the trust. The premises remained in the trust until 1991, when the property was sold. From the proceeds of the sale, Martin Erdman was reimbursed the funds he advanced for repairs on the home. The remainder of the proceeds was divided between Martin Erdman's two sons as beneficiaries under the trust. Martin Erdman and his new wife occupied the premises during their stays in New York.[2]

In a letter dated June 15, 1987 from attorneys, Maggin and Swan, to Mr. Leonard Lipton concerning the Bernice Erdman trust, Martin Erdman was referred to as a beneficiary under the trust created by his wife. However, there is no other credible evidence in the record to corroborate this fact. A copy of the Last Will and Testament of Bernice Erdman was not placed in evidence.

The renovations performed on the New Hyde Park property owned by the trust were personally managed and substantially paid for by Mr. Erdman.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

> During the years in issue, Mrs. Erdman owned premises at 75 Mayfair Lane, Manhasset, New York which were occupied by her daughter, Caryl Hughes, her husband and children. While Mrs. Erdman paid taxes on the

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[2] We modify finding of fact "18" of the Administrative Law Judge's determination by adding the second, fourth and fifth sentences to the second paragraph to reflect additional details in the record.

> home and took a deduction for said payments, her daughter and daughter's husband paid the household expenses, including utilities, phone bills and maintenance costs.[3]

As stated earlier, Mrs. Erdman had left New York in the mid-1970's for medical reasons, changing her residency to the State of Florida.

Mrs. Erdman received a letter from the Division concerning tax years 1976 and 1977 in which she was asked to answer 19 questions with regard to her residency and provide substantiating documentation with regard to her move.

Mrs. Erdman provided an intangible personal property tax return for the year 1978 filed with the State of Florida indicating her address at 1801 South Flagler Drive, West Palm Beach, and which set forth that she had moved to Florida in 1977.

We modify finding of fact "24" of the Administrative Law Judge's determination to read as follows:

> Mrs. Erdman also demonstrated that she had received title to the condominium at 1801 South Flagler Drive, West Palm Beach, as of September 9, 1985 after the death of her former husband, Elias Keyloun.
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> Mrs. Erdman also filed a declaration of domicile in the State of Florida on November 18, 1992 indicating that she became a bona fide resident of the State of Florida in January 1986.
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> Mrs. Erdman was a customer at the First Union National Bank of Florida, Palm Beach Branch, since June 1, 1976, and had voted somewhat sporadically in the State of Florida between the years of 1978 and 1990. The Supervisor of Elections for Palm Beach County generated a record of Joan
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> Erdman's voting record which indicated that between the years 1981 and 1987 petitioner did not vote at the polls. In fact, according to the record, Mrs. Erdman did not vote between 1981 and 1987 except for an absentee ballot recorded on November 6, 1984.
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> Mrs. Erdman received a Florida homestead exemption for the condominium in her name. She also joined a Florida automobile club and became a member of a Florida public library. Her only checking account was in Florida and the only club membership she maintained in New York was the one her former husband belonged to which kept her as a member

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[3] We modify finding of fact "21" of the Administrative Law Judge's determination by adding the last sentence to more accurately reflect the record.

after his death.[4]

Elias Keyloun, Joan Erdman's former husband, applied for a tax exemption for the premises at 1801 South Flagler Drive in West Palm Beach on February 14, 1977.

Martin Erdman filed a declaration of domicile with the State of Florida indicating that he became a bona fide resident of the State of Florida in January 1986 and that he resides at 1801 South Flagler Drive in West Palm Beach. The declaration was sworn to on November 20, 1992.

The record from the Supervisor of Elections does not indicate that Mr. Erdman voted in the State of Florida during the years in issue.

Mr. Erdman purchased a 1986 Honda Prelude in the State of Florida.

Mr. and Mrs. Erdman filed Florida intangible tax returns for the years 1986, 1987, 1988 and 1989. Although the 1986 return is not in evidence, the returns for 1987, 1988 and 1989 were submitted by petitioners and indicate that they had been prepared by the firm of Irving Topf Co. of Teaneck, New Jersey.

We modify finding of fact "30" of the Administrative Law Judge's determination to read as follows:

> On April 30, 1987, a Florida attorney prepared an estate plan for petitioners. Mrs. Erdman had her will revised and Mr. Erdman had a will executed. The documents were executed in accordance with Florida law and indicated petitioners were both Florida residents.[5]

During the years in issue, the real property tax due on the Erdman trust property referred to on the tax bill and in the deed description as "9 Herrick's" was addressed to Bruce and William Erdman, listing an address of 1603 South Bowling Green Drive, Cherry Hill, New

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[4] We modify finding of fact "24" of the Administrative Law Judge's determination by adding the last paragraph in order to more fully reflect the record.

[5] Finding of fact "30" of the Administrative Law Judge's determination read as follows:

> "Martin Erdman executed a will and trust document on April 30, 1987 which indicated that he was a resident of Palm Beach County, Florida."

Finding of Fact "30" was modified in order to accurately reflect details in the record.

Jersey.

We modify finding of fact "32" of the Administrative Law Judge's determination to read as follows:

> Martin Erdman opened an account with First Union National Bank of Florida, Palm Beach Branch, on October 15, 1985. He maintained telephone service with Southern Bell since October 22, 1985 at 1801 South Flagler Drive, West Palm Beach, and held a Florida driver's license since October 23, 1985. Mr. Erdman also obtained a Florida library membership.[6]

As mentioned above, Martin Erdman had been associated with Krisp-Pak Sales Corp. for many years prior to the years in issue. On May 1, 1986, Martin Erdman sold his shares of common stock in Krisp-Pak Sales Corp. to the corporation. Terms of the sale per the closing agreement were as follows:

1. Transfer of the stock, investment and brokerage account		$ 536,634.00
Less satisfaction of the claim of the Estate of Benjamin Koondel		169,698.85
Balance		$ 366,935.15
2. Balance of book value and Federal tax refund	91,855.00	
3. Monthly pay-out for stock		1,000,000.00
Total		$1,458,790.15

The book value pay-out is based on a monthly payment commencing June 1, 1986 in the amount of $1,524.85 and a similar payment on the first of each and every month thereafter up to and including May 1, 1993 which payment includes interest at a rate of 10% per annum as per schedule attached.

Principal		$ 91,855.00
Interest for seven years	$ 36,248.65	
Total		$128,103.65

The $1,000,000.00 pay-out will produce as per schedule attached.

Principal	$1,000,000.00

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[6] We modify finding of fact "32" of the Administrative Law Judge's determination by adding the last sentence in order to more accurately reflect the record.

Interest for seven years	$ 394,498.82
Total	$1,394,498.82
Total sales price including interest	$1,889.537.62

The 1986 Federal income tax return filed by petitioners indicated on schedule 6252, Computation of Installment Sale Income, a sale of 14 shares of Krisp-Pak Sales Corp. for the selling price, including mortgages and other indebtedness, of $1,525,087.00. The date of sale listed on said schedule was February 28, 1986.

The 1985 Corporation Franchise Tax Report, Form CT-3, filed with the State of New York on behalf of Krisp-Pak Sales Corp. indicated that Martin Erdman was the president, receiving salary and compensation in the sum of $104,000.00. John Garcia and Millie Garcia were listed as vice-president and treasurer, respectively, and were the ultimate purchasers of the business. The Federal income tax return filed on behalf of Krisp-Pak Sales Corp. indicated these same officers and compensation. The Federal return for the period ended February 28, 1987 indicates that Martin Erdman no longer devoted his full time to the business, only "part percent", and his compensation was listed as $61,000.00. The Federal return for the period ended February 29, 1988 indicated the same participation by Mr. Erdman as in 1987, but his compensation was listed as $52,000.00. For the period ended February 28, 1990, the Federal income tax return for Krisp-Pak Sales Corp. indicated that Mr. Erdman was still spending part of his time devoted to the business and earning a salary of $52,000.00.

On May 1, 1986, Mr. Erdman and Krisp-Pak Sales Corp. entered into an employment agreement whereby Mr. Erdman was employed by the corporation as its "president" for the period May 1, 1986 through April 30, 1993 with duties to be assigned by the board of directors from time to time. The compensation set forth in the agreement was $1,000.00 per week for a total of $364,000.00 and a final payment on April 30, 1993 of $7,113.00. The agreement further provided that in the event the corporation or its assets were liquidated or sold during the term of the agreement, Mr. Erdman or his representatives would be paid the balance of the salary up to and including the April 30, 1993 payment. The agreement was deemed not to be in lieu of any rights, benefits or privileges to which Mr. Erdman was entitled as an employee of the

corporation under any retirement, pension, profit sharing, insurance or any other plan he may have enjoyed. In addition to the compensation received, Mr. Erdman was to receive a new car to be replaced from time to time and also travel and entertainment expenses not to exceed $10,000.00 per year or 12-month period between May 1, 1986 and April 30, 1993. The agreement further provided that, in the event of Mr. Erdman's death or disability, the payments were required to be made by the corporation for the entire term of the employment agreement with payments to be made to Mr. Erdman's legal representatives.

The agreement further stated that Mr. Erdman could live in any of the 50 states of the United States and was not required as a condition of employment to conduct his business at the New York City Terminal Market in Bronx, New York. In fact, the agreement specifically deemed Mr. Erdman in compliance with the agreement if he conducted his business by mail or telephone. The notice provision contained in the employment agreement listed Mr. Erdman's address as 1801 South Flagler Drive, West Palm Beach, Florida 33401, subject to change upon written notice.

We find an additional finding of fact to read as follows:

> During the period at issue, petitioners' health plan was with a Florida provider.

We find an additional finding of fact to read as follows:

> On Friday, August 20, 1993, the Division's representative contacted petitioners' representative and informed him that the Division was going to make a motion to amend its answer to include a claim that if petitioners were found to be domiciled in Florida, then Mr. Erdman's wage income and Mrs. Erdman's Schedule "C" income should be sourced in New York. The Division's representative also sent correspondence via telecopier to petitioners' representative informing him of said amendment on the same date. On this Friday, petitioner's representative also informed Mrs. Erdman of the Division's intention. At hearing, petitioners' representative stated that he was informed by Mrs. Erdman that her income was derived from work

she performed as a consultant for her son's business at the business' plant in New Jersey.

OPINION

We turn first to the issue of whether petitioners were domiciled in the State of New York in 1986 and 1987.

The Administrative Law Judge concluded that petitioners' general habit of life did not support a determination that petitioners had changed their domicile. The Administrative Law Judge found the following facts militated against finding a Florida domicile for petitioners: 1) petitioners spent a considerable amount of time in New York during both 1986 and 1987; 2) petitioners spent a considerable amount of time vacationing out of the country and in states other than New York and Florida; 3) petitioners continued to reside in New York between approximately May and October of each year in a house where Martin Erdman had lived for many years prior to the years at issue; 4) petitioners maintained club memberships in New York and paid "substantial" dues; and 5) petitioners failed to clarify their business ties, if any, with the State of New York.

Petitioners, on exception, contend that Mrs. Erdman was deemed a domiciliary of the State of New York by virtue of her marriage to a New York resident. Petitioners argue the facts establish that the Division accepted Mrs. Erdman's Florida domicile since 1975. Petitioners point out that Mrs. Erdman was sent a letter by the Division concerning tax years 1976 and 1977 in which she was asked 19 questions about her residency and was requested to provide substantiating documentation regarding her relocation. Petitioners note the Division never challenged her responses.

Petitioners rely on Matter of Newcomb (192 NY 238, 250-251) for the proposition that "the burden of proof rests upon the party who alleges a change" of domicile. As a result, petitioners contend the Division bears the burden of proof and failed to establish Mrs. Erdman changed her domicile to New York.

Petitioners also argue that the Administrative Law Judge attached too much significance

to the club dues paid. They dispute the Administrative Law Judge's finding that such payments were "significant" considering the Erdmans' substantial wealth. With regard to the New York home, petitioners point out that Mr. Erdman did not own the home, nor was he a beneficiary of the trust which held title to the property. Petitioners also point out that when the house was sold, petitioners were reimbursed their cash outlay for repairs they had made. Petitioners note that after they returned from their honeymoon, they spent only two days in New York and then returned to Florida where they remained until the next summer. Petitioners also dispute the Administrative Law Judge's finding that Mr. Erdman failed to clarify his relationship with Krisp-Pak. Petitioners contend that they clearly stated that Mr. Feldman did no business with his former company and the purpose of the consulting agreement was merely to furnish security for the payment of the purchase price of the business.

For the period in issue, Tax Law § 605 (former [a]) provided in part:

"Resident individual. A resident individual means an individual:

"(1) who is domiciled in this state . . . ."

The Tax Law does not contain a definition of "domicile," but we find guidance in 20 NYCRR former 102.2(d) which provides:

> "(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home--the place to which he intends to return whenever he may be absent.
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> "(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place."

Creating a change of domicile requires both the intent to make a new location a fixed and permanent home and actual residence at that location (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). In deciding whether a change of domicile has been effectuated, we are

mindful of the following excerpt from Matter of Newcomb (supra):

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.
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> "The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . Motives are immaterial, except as they indicate intention. A change of domicile may be made . . . for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention [cite omitted]. No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing" (Matter of Newcomb, supra, at 250-251).

The measure of intent regarding a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne, 181 Misc 238, 41 NYS2d 336, 343, affd 267 AD 876, 47 NYS2d 134, affd 293 NY 785). We have in the past recognized that with regard to an alleged change of domicile, formal declarations have been held to be less persuasive than the informal acts of an individual's "general habit of life" (Matter of Doman, April 9, 1992 quoting Matter of Trowbridge, 266 NY 283, 289; Matter of Silverman, Tax Appeals Tribunal, June 8, 1989).

We first address the issue of domicile with respect to Mrs. Erdman.

We reverse the determination of the Administrative Law Judge on this issue.

The Administrative Law Judge erred by not giving sufficient consideration to the separate living circumstances of Mrs. Erdman prior to her marriage to Mr. Erdman in 1986. If Mrs. Erdman was domiciled in Florida prior to her marriage, then this domicile continued unless she established a new domicile in New York during the years in question (Matter of Newcomb, supra). Thus, the first issue we will examine is whether Mrs. Erdman was domiciled in Florida prior to the years at issue.

For the years from 1976 to 1985, the only connection the record indicates that

Mrs. Erdman had with New York State was the ownership of a single family residence occupied by her daughter and her daughter's family and the maintenance of a club membership that had been her former husband's. Other than this, the record does not indicate that Mrs. Erdman resided in New York, owned other assets in New York or had any other contacts with New York from 1976 to 1985. Instead, the record indicates that Mrs. Erdman's contacts were with Florida during this period, e.g., she resided there since 1976 for health reasons, she held title to a condominium in Florida, had a Florida bank account and she registered to vote in Florida. Further, the Division reviewed Mrs. Erdman's residency for the years 1976 and 1977 and accepted her claim of a change of residency to Florida. Based on the record before us, we can only conclude that Mrs. Erdman was domiciled in Florida prior to the years in issue.

Against this background, we do not find Mrs. Erdman's contacts with New York during 1986 and 1987 sufficient to establish that she changed her domicile from Florida to New York in either of these years. Mrs. Erdman spent 161 days in New York in 1986 and 143 days in 1987. During her stays in New York she resided in the house that had been owned by Mr. Erdman's first wife and which was now held in trust for the benefit of Mr. Erdman's sons.

The Administrative Law Judge found it significant that Mrs. Erdman did not clarify the source of her "consulting" income listed on the joint 1986 and 1987 Federal returns. We point out that while business interests may be an important factor in determining intent, it is merely "one factor to be considered within the totality of the circumstances" (Matter of Angelico, Tax Appeals Tribunal, March 31, 1994, [where the totality of the circumstances outweighed the fact the petitioner maintained a residence and business interests in New York State]). Here, the factor is not enough to show a change of domicile and we conclude the Administrative Law Judge erred in finding that Mrs. Erdman was domiciled in New York during the years in question.

We next decide whether Mr. Erdman has established a change of domicile.

The Administrative Law Judge, after considering the documentary evidence presented

and the testimony of the auditor, concluded that Mr. Erdman failed to demonstrate by clear and convincing evidence a change of domicile.

We affirm the determination of the Administrative Law Judge on this issue.

With respect to Mr. Erdman's business interests, as correctly pointed out by the Administrative Law Judge, Mr. Erdman has failed to clarify his relationship with his former company. Further, what evidence is in the record indicates a continued active relationship as a consultant. The Administrative Law Judge properly found:

> "[t]he documentation does not support any other conclusion but that Martin Erdman did not sell his shares in Krisp-Pak Sales Corp. until May of 1986 and then, in a separate document for separate consideration, accepted the position of president, his former position, which entailed consulting duties with the corporation throughout the years in issue. Although there is no credible evidence of his services or activities with regard to Krisp-Pak Sales Corp. during the years in issue after May 1, 1986, the absence of telephone records from New York and other circumstantial evidence other than unsupported assertions in affidavits, cannot be construed favorably towards a finding of a Florida domicile" (Determination, conclusion of law "E").

The Administrative Law Judge's conclusion is bolstered by other documentary evidence in the record. For example, in the questionnaire sent Mr. Erdman by the Department of Taxation and Finance, when asked what his business, trade, profession or occupation was, he responded, "retired consultant" (Division's exhibit "L"). Further, when asked by whom he was employed, he responded, "Krisp-Pak Corp., Hunts Point Terminal Market, Bronx, New York" (Division's exhibit "L"). The record also contains copies of petitioners' 1986 and 1987 nonresident income tax returns and Federal income tax returns which listed Mr. Erdman's occupation as "consultant." Further, the Federal returns for Krisp-Pak Sales Corp. for the periods ending February 28, 1987 and February 28, 1988 list Mr. Erdman as employed on a "part percent" basis and Krisp-Pak issued a wage and tax statement to Mr. Erdman for each of the years in issue.

The record also shows that Mr. Erdman spent 156 days in the State of New York in 1986 and 139 days in 1987. This substantial period of time, taken in conjunction with the evidence referenced above which indicates Mr. Erdman continued to remain active as a consultant with Krisp-Pak Corp., does not reflect favorably on petitioners' position.

Mr. Erdman, in his affidavit, argues that the employment agreement was drafted as a means of securing the future payments on the installment sale of the corporation. However, there is no other evidence in the record to support this proposition. To the contrary, as found by the Administrative Law Judge, the employment agreement appears to be for separate consideration to compensate Mr. Erdman for consulting services. With respect to the inclusion by Krisp-Pak Corp. of Mr. Erdman on its payroll as a part-time employee, Mr. Erdman argues the corporation did so in order to deduct the pay-outs to him as an employee salary. The record, however, supports a finding that he was, in fact, receiving a salary from the corporation as a consultant.

The record also shows that while in New York petitioners stayed in the house Mr. Erdman made his home for many years previous to his marriage to Joan Keyloun. The home during the years at issue remained furnished as it had been before the Erdman's marriage. While the house was held in trust for Mr. Erdman's sons during this period, this does not take away from the fact that petitioners made extensive use of this home from approximately May to September of the years in issue. Mr. Erdman also retained his membership at the Knickerbocker Yacht Club at which Mr. Erdman stored his sail boat.

Petitioners argue that Mr. Erdman's situation is very similar to that of the taxpayer in Matter of Sutton (Tax Appeals Tribunal, October 11, 1990). We disagree. The petitioner in Sutton, in contrast to Mr. Erdman, clearly established through credible testimony and supportive documentary evidence that his business interests in New York were passive and that he most likely visited New York no more than 60 to 75 days of the year. While in New York, the petitioner in Sutton stayed in a condominium he maintained there. The petitioner testified that he purchased the condominium because it was a good investment and it was less expensive than staying in a hotel.

In the matter before us, Mr. Erdman has not made as thorough and convincing a presentation as the petitioner in Matter of Sutton (supra). We do not dispute, however, that the facts show Mr. Erdman did establish ties to Florida during the period at issue. The record

reflects numerous formal declarations, e.g. he opened a Florida bank account, he obtained a Florida library membership, he registered to vote in Florida, he filed Florida intangible returns, he joined a social club, his will was drafted in Florida and was to be probated in accordance with the Laws of the State of Florida, he obtained a Florida driver's license and filed a Florida declaration of domicile. Absent from the record, however, are any substantive considerations, i.e. "general habits of life," to support Mr. Erdman's change of domicile. As a result, the facts cited herein are not sufficient to meet petitioners' heavy burden of clear and convincing evidence when the record not only shows Mr. Erdman retained substantial interests in New York, but is also unclear as to the relationship he maintained with his former business.

We now turn to petitioners' claim that they were prejudiced by the Administrative Law Judge granting the Division leave to amend its pleadings to conform to the proof pursuant to 20 NYCRR 3000.4(c).

The Administrative Law Judge found that the assertion that petitioners had New York source income was merely an alternative legal theory were petitioners found not to be domiciled in the State and by raising it prior to hearing the Division asserted it in a timely manner. As a result, the Administrative Law Judge allowed the Division to amend its answer in conformance with the proof.

Petitioners argue that the Administrative Law Judge erred in allowing the Division to raise the source of income issue. Petitioners contend they were prejudiced because they did not get to address this issue as they could not appear personally. Petitioners submit that there were facts they would have introduced had they known allocation was an issue.

With respect to the merits of the Division's argument, the Division argues that any income listed on petitioners' joint Federal returns as "wage income" earned by Mr. Erdman from Krisp-Pak must be allocated to New York. The Division also argues that any of Mrs. Erdman's Schedule C income from the receipt of consulting fees must also be sourced in New York.

We affirm the Administrative Law Judge on this issue.

Regulation 20 NYCRR 3000.4(c) provides in part:

> "[t]he administrative law judge . . . may permit pleadings to be amended before the hearing is concluded to conform them to the evidence, upon such terms as may be just . . . . No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading."

We find the Administrative Law Judge correctly determined that the Division may amend its answer to conform to the proof (20 NYCRR 3000.4[c]). We have, in the past, recognized in domicile cases that the Division may assert alternative legal theories for imposing tax at hearing so long as the petitioners are not prejudiced by the introduction (see, Matter of Delfino, Tax Appeals Tribunal, February 23, 1995; Matter of Doman, supra). We agree with the Administrative Law Judge that petitioners were not prejudiced by this amendment.

We note that the Division's representative discussed the proposed amendment with petitioners' counsel and also sent correspondence describing the amendment via telecopier on the Friday preceding the hearing held on Monday. Petitioners' counsel then apprised Mrs. Erdman of this issue. Consequently, petitioners were aware that this was an issue before the hearing. Nonetheless, petitioners chose not to address this issue through their affidavits or the other evidence submitted at the hearing. Neither did petitioners request permission to submit evidence on this point after the hearing. We also note, as pointed out by the Administrative Law Judge, the New York City tax was always asserted as a nonresident earnings tax under § 11-1902 of the Administrative Code of the City of New York. As a result, petitioners cannot claim surprise.

Next, we must determine what portions of petitioners' income is derived from New York sources.

Tax Law § 601(e) imposes a tax on the New York source income of a nonresident individual. New York source income of a nonresident individual is defined as "the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . derived from or connected with New York sources . . ." (Tax Law § 631[a]).

The burden remains with petitioners to establish their income is not properly sourced in New York (Tax Law § 689[e]). With respect to Mr. Erdman, even if he had established that he was not domiciled in New York, he did not prove that the income he received from Krisp-Pak listed as wages was not income sourced in New York.

With regard to Mrs. Erdman, the only evidence in the record with respect to where her consulting income was sourced was the unsworn statements made by petitioners' representative at hearing. The representative stated that Mrs. Erdman's income was derived from work she performed in the New Jersey plant of her son's business. Petitioners argue no work was performed in the New York showroom of the business. While hearsay testimony is properly admissible (Matter of Seguin, Tax Appeals Tribunal, October 22, 1992), we find the representative's unsworn, unsubstantiated statements are insufficient to meet petitioners' burden of proof. Consequently, we must conclude the whole of Mrs. Erdman's consulting income is also derived from New York sources (Matter of Stainless, Inc., Tax Appeals Tribunal, April 1, 1993).

The Administrative Law Judge further found that penalties were properly asserted. Relying on Matter of Auerbach v. State Tax Commn. (142 AD2d 390, 536 NYS2d 557), the Administrative Law Judge reasoned that if penalties could be abated where the taxpayer has a different legal interpretation than the Division, penalties could rarely be asserted.

Petitioners argue that the Administrative Law Judge treated the negligence penalty as virtually automatic in its imposition which is an error given that the statute allows for abatement upon a showing of reasonable cause.

Tax Law § 685(b) provides "[i]f any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder . . . there shall be added to the tax an amount equal to five percent of the deficiency." Petitioners have the burden of establishing that this penalty assessment was erroneous (Tax Law § 689[e]). We affirm the Administrative Law Judge.

The Erdmans have provided no substantive basis for abatement of the negligence penalty

imposed. Consequently, we must sustain the imposition of penalty.

As a final matter, we shall address petitioners' request for a remand for additional proceedings.

Petitioners' request is based upon the fact they were too ill to testify during the hearing and felt they were penalized by their submission of affidavits in lieu of personally appearing. Petitioners contend the Administrative Law Judge's evaluation of the affidavits was inconsistent with the Appellate Division's decision in Matter of Orvis Co. v. Tax Appeals Tribunal (204 AD2d 916, 612 NYS2d 503, lv granted 84 NY2d 805, 618 NYS2d 7). Further, petitioners argue that because they have been penalized, they are entitled to a rehearing.

We first note the Administrative Law Judge's evaluation of the affidavits was consistent with the Appellate Division's decision in Matter of Orvis Co. v. Tax Appeals Tribunal (supra). In Orvis, the Court found that it was arbitrary and capricious for the Tax Appeals Tribunal to give no weight to sworn affidavits in light of the Tribunal's acceptance of an unsworn letter from the same individual. In the matter before us, the Administrative Law Judge did not disregard petitioners' affidavits. Petitioners submitted affidavits which 20 NYCRR 3000.10(d)(1) allows to be used "for whatever value they may have." The Administrative Law Judge, as the finder of fact, weighed the affidavits in light of the other evidence in the record and found them to create more questions than they resolved. The Administrative Law Judge then correctly found that the affidavits were insufficient to meet petitioners' burden of clear and convincing evidence. Despite petitioners' argument to the contrary, petitioners' use of affidavits does not prompt the outcome in this matter; the result is reached because of the lack of a fully developed record clarifying Mr. Erdman's ties with the State of New York and the fact that some evidence was submitted which contradicts petitioners' position.

We have a well established policy of not reopening a record for further proceedings absent exceptional circumstances (see, Matter of Wyman, Tax Appeals Tribunal, December 31, 1992). Petitioners have not presented exceptional circumstances.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Martin Erdman and Joan Keyloun is granted to the extent that Joan Keyloun is not domiciled in New York, and is denied in all other respects;

2. The determination of the Administrative Law Judge is reversed to the extent that the Administrative Law Judge found Joan Keyloun a New York domiciliary;

3. The petition of Martin Erdman and Joan Keyloun is granted to the extent stated above and is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination dated October 27, 1987 in accordance with paragraph "1" above, but such notices are otherwise sustained.

DATED: Troy, New York
April 6, 1995

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

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