STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LEON MOED	:	DECISION DTA No. 810997
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 1987 and 1988.	:	

Petitioner Leon Moed, 58 Indian Orchard Road, Lakeville, Connecticut 06029-1019, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on November 18, 1993. Petitioner appeared by Siller, Wilk & Mencher (Sheldon Eisenberger and Jack Wilk, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer and Mark Volk, Esqs., of counsel).

Petitioner filed a brief in support of his exception and in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioner's exception. Both parties also filed reply briefs. Oral argument, at both parties' request, was heard on July 21, 1994, which date began the six-month period for the issuance of this decision. On August 16, 1994, the Tax Appeals Tribunal received a motion for leave to appear as amicus curiae from Morrison & Foerster. On this date, the Tax Appeals Tribunal had five months and one week remaining for the issuance of this decision. On December 8, 1994, the Tax Appeals Tribunal issued an order and opinion denying the motion which began the five month and one week period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

I. Whether petitioner "maintained" a place of abode in New York City.

II. Whether the New York City place of abode was "permanent" within the meaning of Tax Law § 605(b)(1)(B).

III. Whether petitioner proved that he spent in the aggregate no more than 183 days in New York City for City income tax purposes.

IV. Whether petitioner's weekly shopping at a New York supermarket should be counted as a New York day for State income tax purposes.

V. Whether there is reasonable cause to waive the penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

After reviewing the 1987 and 1988 New York State nonresident income tax returns filed by petitioner, Leon Moed, an auditor from the Division of Taxation ("Division") sent a letter, dated January 25, 1990, to Mr. Moed requesting his response to certain questions with regard to his domicile. Correspondence ensued and petitioner responded to various requests for information and documentation.

Petitioner informed the Division that he was an architect and partner in the firm of Skidmore, Owings & Merrill, located in Manhattan with offices in Chicago, San Francisco, Los Angeles, Washington, D.C. and London. He claimed that his principal residence had been a 9-room home that he built and completed in 1983 and was located in Lakeville, Connecticut. Petitioner also indicated that when he stayed overnight in Manhattan he would stay at his wife's rented apartment on West 81st Street where he kept only clothing required for overnight stays.

Petitioner also provided the Division's auditor with an abstract of his diaries. This abstract consisted of monthly calendars for the years 1987 and 1988 whereon he marked the

days that he was not in New York State. Petitioner marked with circles the days spent in Lakeville, Connecticut and he marked with slashes the days he spent outside New York State for other purposes such as travel for work or vacation. From this abstract, petitioner claimed that he spent 170 days in New York State in 1987 and 163 days in New York State in 1988.

On August 1, 1990, the auditor requested the source documents that petitioner used to prepare the abstract of days outside New York State. The auditor thereafter reviewed certain diaries, telephone bills, business expenses, vouchers, and copies of Federal income tax returns. At hearing, the Division's auditor testified that the diaries he reviewed appeared to contain entries relating to client accounts. Based on his review, the auditor concluded that there was no verification for 53 of the days in 1987 and for 48 of the days in 1988 that petitioner claimed he spent outside New York State.

The auditor included Fridays as New York days even though petitioner indicated with circles in the abstract that he spent Fridays at his home in Lakeville. At hearing, the auditor testified that he included Fridays because the diaries he looked at contained entries on Fridays concerning hourly charges to client accounts and that such entries were no different from those entries on Mondays through Thursdays. Based on this conclusion, the auditor added 36 Fridays in 1987 and 40 Fridays in 1988 as New York days.

Based on a review of utility bills, business expense vouchers and other documents, the auditor included as New York days an additional 17 days in 1987 and 8 days in 1988. The auditor determined that February 16, 1987 should be considered a day spent in New York even though petitioner claimed the Monday holiday (Washington's birthday) as a day he spent in Lakeville. The auditor concluded that on February 16, 1987, petitioner placed a telephone call to Singapore from his wife's rented apartment in New York City. He based this conclusion on the fact that the cost of the call was reimbursed by the firm of Skidmore, Owings & Merrill.[1] The auditor also testified that the additional days (17 days in 1987 and 8 days in 1988) were considered New York days based on either phone bills or airline tickets indicating a presence in

[1]At hearing, Mr. Moed confirmed that he must have made the call based on those facts.

New York or based on the fact that such days were marked travel days by petitioner without substantiation as to whether he travelled through New York or to New York airports to reach his final destination.

The Division issued to petitioner a Statement of Personal Income Tax Audit Changes, dated November 21, 1990, indicating additional (1) State income tax due for 1987 in the amount of $30,758.06, (2) City income tax due for 1987 in the amount of $22,198.55, (3) State income tax due for 1988 in the amount of $45,384.58, and (4) City income tax due for 1988 in the amount of $24,818.86. The document stated that petitioner had not clearly and convincingly evidenced an intent to abandon his New York domicile and establish a new domicile in Connecticut. The Division also stated in the document that even if it found a domicile change, it still would have taxed petitioner as a statutory resident.

The Division issued to petitioner a Notice of Deficiency, dated February 8, 1991, for 1987 and 1988. In that notice, the Division asserted (1) a deficiency for 1987 State income tax in the amount of $30,758.06 plus a $5,706.64 penalty and $8,337.49 in interest; (2) a deficiency for 1987 City income tax in the amount of $22,198.55 plus a $4,118.56 penalty and $6,017.29 in interest; (3) a deficiency for 1988 State income tax in the amount of $45,384.58 plus a $6,372.88 penalty and $8,207.33 in interest; and (4) a deficiency for 1988 City income tax in the amount of $23,595.86 plus a $3,313.32 penalty and $4,267.07 in interest. The total amount due for the two years was $168,277.63.

After a conciliation conference, the conferee issued a Conciliation Order, dated April 17, 1992, sustaining the statutory notice.

Petitioner filed a petition, dated July 8, 1992, alleging that he was not liable for the tax, interest and penalty asserted; that he was not a New York State resident for the years in question; and that the amount asserted, including penalties, was incorrect.

The Division filed an answer, dated September 9, 1992, alleging, inter alia, that petitioner was domiciled in New York City and that even if he was not domiciled in New York, he was a resident of New York for the years in question for income tax purposes.

At the hearing on January 19, 1993, petitioner, Leon Moed, his wife, Marilyn Moed, and his son, Samuel Moed, testified as to the reasons for Leon and Marilyn Moed maintaining two separate residences after 1983.

Mrs. Moed testified concerning the reason for their separate living arrangement as follows:

> "we've been married close to 34 years. I have respect and I admire my husband. At the time that my husband wanted to build a home and move to Connecticut, I had reached a stage of life when my children were independent; I still had one child in college living with me. My daughter, my oldest daughter was married in 1981, and my son got married in 1984, and I felt this is my time to be me. And when Leon presented me with the idea of moving to Connecticut, I just did not want to do that. My interests were all in New York; my friends were all in New York. Now I had the time of life when I really wanted to do the things that meant something to me, and everything that I wanted to do was in New York." (Tr., p. 122.)

During 1987 and 1988, Mrs. Moed was the head of the volunteer association at the Jewish Museum in Manhattan and involved in other organizations. Mrs. Moed testified that her husband moved to Connecticut when the house was finished in 1983 or 1984; that she did not move to Connecticut with him but remained in the apartment on West 81st Street; that her husband took all his clothes and possessions from the apartment leaving only some toiletries and "maybe" a suit for the purpose of overnight stays at the apartment; that she maintained an individual savings and checking account, investment portfolio, and homeowner's insurance in her own name with the New York City address; and that she paid her own bills.[2] With respect to Mr. Moed's overnight stays at the apartment, Mrs. Moed stated that such overnights were never on a weekend but only during the work week when he might work late at the office; that such overnights averaged once a week or less; and that her husband had a key to the apartment but never arrived unannounced and would always call to ask to spend the night.

Mrs. Moed further described her relationship with her husband and their need to maintain separate living arrangements as follows:

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[2]Evidence was submitted into the record verifying that bank accounts, investment portfolio, and insurance policy were maintained in Mrs. Moed's name alone and that bills with respect to the apartment were addressed solely to Mrs. Moed. Petitioner testified that his wife had her own income but that he supplemented that income monthly based on an informal and amicable agreement.

> "I just stated he had worked in this very high-pressured career for many years. He's a very creative person and he thinks a lot, and I just think he needed space. I think he needed to remove himself from some of those tensions, and I think he felt that was when he had to do it.
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> * * *
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> "Let me explain this. I think my husband and I have a very mature relationship, very good understanding of each other and our mutual needs. And one of the things, we have always respected each other. I think when Leon felt this very strong need to have a relief valve, so to speak, and just get a different atmosphere, I think he understood that when I told him that is not where I'm at. I think he just very much respected that and understood. And so, I was very busy at the time; I still am. My demands were in New York; that is where I was. If I had some free time for a weekend or whatever, I would go up to the house with him. We have, I think, a great deal of respect and caring for each other. That's not the issue. I think the maturity, what we did is that we do have this deep feeling for each other that respects where we are now and where we were then and what each of us needed and we don't want to impose any -- he didn't want to impose his will on me, and likewise I didn't want that he should not do what he desperately needed to do, what he felt he needed to do." (Tr., pp. 136-37.)

According to Marilyn Moed's testimony, Jewish holidays were spent with her husband and children at the Manhattan apartment or at their children's homes.

Samuel Moed, the son of Leon and Marilyn Moed, testified that he lived in Englewood, New Jersey, with his wife and children and that on occasion his father would stay overnight at his Englewood home for various reasons including certain family holidays or when his father needed closer access to Newark Airport. Samuel Moed's testimony confirmed his parents' separate living arrangement. In describing his understanding of this arrangement, he testified as follows:

> "the reasons for it, I think, based on what she told me and also being their son, I think it had a lot to do with the personalities of them as individuals. My parents are very different people in terms of their personalities and philosophies. My father is more European, had a more detached, was more into himself, much less emotive, much less involved with the family, very ambitious, and very much kind of a self-motivated person. My mother, on the other hand, is much more social, much more involved with the family, had much more interaction with the children and grandchildren.
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> "I think at that point, once the children were grown up, the different personalities basically led them in two different directions. And I think, based on what my father's needs were at that point, to get away from 30 years of intense pressure in New York, a very intense job, as well as all the other demands of fatherhood, grandfatherhood, at that point basically he needed to change his life, get away, and just get some space for himself, to move and do what he needed to do at this point with his life which fit with who he is and what made him that

> particular person. My mother was very different; she needed to be in Manhattan for the way she wanted to live." (Tr., pp. 150-51.)

At hearing, petitioner Leon Moed testified that he designed and built the Connecticut home using his own funds, purchased new furnishings for the home and that the mortgage and property were recorded solely in his name. In 1984, he changed his voter registration, passport and driver's license to reflect his Connecticut address. The house contains four bedrooms, three bathrooms, kitchen, pantry, living room, study and library. The property also contains a tennis court and garage behind which is a small apartment unit. Since his move to the Connecticut home, petitioner became involved in a reconstruction project concerning the town hall in the Connecticut town in which he lived and participated in 1985 house tours of the Connecticut area opening up his home as part of the tour. At hearing, petitioner also produced various documents such as bank accounts, library card, Pratt alumni directory, his will, bills, the partnership business certificate, insurance policies all bearing petitioner's Connecticut address.

Petitioner testified that his habit, when not travelling for the firm, was to drive to work from Connecticut Monday through Thursday;[3] that on the average of once a week he would spend the night at his wife's two-bedroom apartment; and that at times he would also stay with friends in New York City or at his son's Englewood home. Petitioner further testified that he would not stay at his wife's apartment if she was not there and that when the car was readily available to him, he found it more convenient to spend the night at his son's Englewood home because it was only a 15-minute car ride from the office. Petitioner stated that he had a key to his wife's apartment and kept a change of clothes there only as a "fall back" in the event he unexpectedly stayed overnight. He explained the use of his wife's apartment as follows:

> "What I would generally have, to cover myself, was a toilet kit and clean shirt. On occasion I might have a suit there, but that is it. As I said before, the attitude to that apartment or any place else was in lieu of going to a hotel, having been precluded from going home by virtue of the lateness of the hour, or conversely by having to get up early for a flight." (Tr., p. 206.)

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[3]Petitioner drove his car into Manhattan to a garage rented by the firm on East 63rd Street where a driver would then be available to drive him to his office located at East 43rd Street.

Petitioner testified that his wife visited the Connecticut home twice a month on the average. Mrs. Moed also testified that she did not keep her clothes at the Connecticut home but instead brought a suitcase to Connecticut on such visits. With respect to vacations, petitioner testified that he and his wife vacation together but also take separate vacations.

At the hearing, petitioner submitted three diaries into the record. Two of the diaries were small pocket diaries, one for the period January 1987 through May 1988 and the second for the period May 1988 through June 1989. Petitioner testified that he carried these diaries with him in a pocket and used them as daily planners to indicate where he was or would be on any specific day. In these diaries, he noted the days he travelled for work-related projects, partnership meetings, vacations and the days he spent in Lakeville, Connecticut. The days spent in Lakeville were marked in the diaries with the notation "L" and an upside down "V" as an abbreviation for "Lakeville."

The third diary was a larger leather bound book for the year 1987 which, petitioner testified, was kept at his office or in his briefcase and was used for recordkeeping purposes to keep track of certain expenses and time charged to clients.[4] Petitioner testified that since 1985, he used Fridays to work privately at home. He described his Friday routine as follows:

A. "I sometimes work five or six days. Generally the routine, whether it's perceived or otherwise, is four days a week in the public eye, in the fish bowl, where my time is not mine, and so in a sense you're responding to people. And what I've done is I've carved out Friday to be my own,to reconstruct myself as a person and as a professional and hopefully as a leader as well."

Q. "When you say you carved out Fridays, what do you mean?"

A. "That means I go up to the house and pull myself together and do the work that I do best privately."

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[4]At the hearing, the Division's auditor testified that the entries in the smaller pocket diaries did not look familiar but that the entries in the leather-bound diary might have been the ones he reviewed during the audit.

Q. "Do you get home on Thursday evening?"

A. "Right."

Q. "And you don't leave until?"

A. "Monday morning."

Q. "Let me show you [the 1987 pocket diary]. Now, we have the LV with the little arrow. Let me ask you this: Were they entered, all these LV's, typically around Friday and Saturday? Were they entered contemporaneously or before the event?"

A. "They're generally entered before the event."

Q. "The LV's?"

A. "Yes. And the purpose is just to be able to see the week at a glance, enough not to trip myself up and forget it was Friday." (Tr., pp. 201-202.)

Petitioner also submitted into the record cancelled checks written out to Millerton Supermarket which, petitioner testified, was located in New York State, a four-minute drive from his Connecticut home. Petitioner stated that he shopped at that supermarket on the average of once a week, generally on a Friday.

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

> In its post-hearing brief, the Division conceded that petitioner was domiciled in Connecticut in 1987 and 1988, the years at issue.[5]

OPINION

The Administrative Law Judge determined that petitioner maintained a permanent place of abode in New York; that he was a resident of New York City for 1987 (i.e., he spent 186 days in the City) and was not a resident for 1988 (i.e., he spent 180 days in the City); that petitioner's "food shopping on Fridays and other weekend days" were not days spent in New York for State income tax purposes; and that petitioner showed the requisite reasonable cause for waiver of penalty for the year 1987.

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[5] The Administrative Law Judge found this as a fact in her summary of the parties' position, findings of fact "18" and "19." We repeat it as a fact and have eliminated the other statements as to the parties' positions at hearing.

On exception, petitioner asserts that the Administrative Law Judge erred in concluding that petitioner maintained a permanent place of abode in New York City and that the Administrative Law Judge also erred in determining which days were spent in New York City for the years at issue.

On exception, the Division asserts that the Administrative Law Judge erred in her treatment of petitioner's food shopping on Fridays and other weekend days.

In his reply brief, petitioner addresses the Division's assertions concerning the food shopping days as follows:

> "[t]he Division is simply incorrect about how the ALJ should have responded to Petitioner's Friday trips to the supermarket. Initially, the Division's brief in support of their Exception argued that the ALJ went beyond her powers in concluding that Petitioner's trips to the supermarket were not considered a day spent in New York. Petitioner responded that New York's own Audit Guidelines demonstrates that common sense should dictate when a taxpayer's presence in New York is to be deemed a New York day. In reply, the Division acknowledged that '[t]he purpose of the Audit Guidelines here would seem to be to direct the auditor to employ common sense to recognize and disregard similar examples of unavoidable or unintended New York presence.'
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> "Accordingly, Petitioner submits that the ALJ simply used the above mentioned common sense standard in concluding that Petitioner's four minute drive to the supermarket to buy groceries for consumption in Connecticut should not be counted as a New York day. Therefore, since the ALJ's decision has both a factual and legal basis to it, the ALJ should not be reversed on this issue" (Petitioner's reply brief, pp. 6-7).

We deal first with the issue of whether petitioner maintained a permanent place of abode in New York City.

Under Tax Law § 605(b)(1)(B), a taxpayer is considered a resident for New York State income tax purposes when the individual:

> "is not domiciled in the state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . . ."[6]

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[6] Administrative Code of the City of New York § 11-1705(b)(1)(B) contains the identical language as in section 605(b)(1)(B) to define a New York City resident for the purposes of imposing City income tax.

The Administrative Law Judge identified the first "two questions arising from this statutory definition of resident [as] (1) whether petitioner 'maintains' the apartment rented by Mrs. Moed and (2) whether petitioner's overnight arrangements at the apartment were within the statute's meaning of 'permanent' (see, Matter of Evans, Tax Appeals Tribunal, June 18, 1992)" (Determination, conclusion of law "A").

Using our decision in Evans for guidance,[7] the Administrative Law Judge concluded that:

> "[i]n this case, petitioner supplemented Mrs. Moed's separate income based on an informal and amicable agreement on a monthly basis. The amount or nature of the monthly payment was not revealed in the record but it can be inferred that such amount derived from their marital relationship which also provided the basis for his overnight stays. Petitioner and Mrs. Moed may have been separated 'in fact'; however, they nonetheless maintained a viable familial relationship.
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> "In Matter of Evans, the Tribunal found relevant that the taxpayer contributed in kind by furnishing the rectory. Inasmuch as the apartment served as petitioner's marital home prior to 1983, it can be presumed that he contributed to the furnishing of the apartment. Given the particular circumstances of this case, petitioner 'maintained' the rented apartment for income tax purposes notwithstanding Leon and Marilyn Moed's determination to maintain separate residences for personal reasons (including Mr. and Mrs. Moed's individual effort to separate certain funds in the payment of bills concerning their respective dwellings)" (Determination, conclusion of law "A").

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[7]Referring to our decision in Evans, the Administrative Law Judge noted that, there, we indicated:

> "the Legislature's use of the word 'maintain' in the statute was not limited to a particular usage but was intended to be interpreted in a practical way. Thus . . . a taxpayer's status as a resident depends 'on a variety of circumstances which differ as widely as the peculiarities of individuals.' The Evans Tribunal held that 'one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place' whether making contributions to the household in money or other contributions which are not in the form of money. As further noted by the Evans Tribunal, there can be many financial or other arrangements and the fact that certain expenses such as the utility costs, repairs or mortgage payments may not be shared is not, in itself, determinative of whether an individual is maintaining a place of abode" (Determination, conclusion of law "A").

As to whether the rented apartment should be considered petitioner's permanent place of abode, the Administrative Law Judge, using Evans as guidance,[8] concluded that there were several factors which indicated that Mrs. Moed's rented apartment constitutes petitioner's permanent place of abode, the most important of which is petitioner's ongoing, though changed, relationship with Marilyn Moed since 1983. The Administrative Law Judge determined that:

> "[a]lthough Mr. and Mrs. Moed may be separated 'in fact' for the purpose of establishing separate domiciles, it cannot be discerned from the facts in this case that petitioner was specifically limited in his access to the apartment. The testimony instead indicates that petitioner's prior phone calls to his wife before an overnight stay, and his overnight stays elsewhere, may have been a matter of choice and preference, or perhaps, a question of respect for his wife's privacy which he valued so highly for himself as well" (Determination, conclusion of law "A").

The Administrative Law Judge pointed out that, in her judgment, it is not the amount of time that is determinative but the regularity and certainty of the overnight arrangement that is essential in making a determination that the apartment served as a permanent place of abode for petitioner. There is nothing in the record to indicate that this regularity or certainty in the arrangement was at risk due to the marital relationship:

> "[i]n sum, the separate domiciles reflect Mr. and Mrs. Moed's respect for each other's privacy and individual needs but, given the total circumstances, did not effect the permanency of Mr. Moed's overnight arrangements at his wife's apartment, which also served as his marital

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[8]Referring to our decision in Evans, the Administrative Law Judge noted that there, we indicated:

> "'permanence' encompasses the physical aspects of the dwelling place (e.g., a dwelling without kitchen facilities or cottage suitable and used only for vacations are not permanent places of abode), as well as the individual's relationship to the place (e.g., an apartment leased by one individual but shared with an unrelated individual may be the permanent place of abode of the person not named in the lease). In Evans, the Tribunal found the taxpayer's stay at a rectory during the work week his permanent place of abode despite his claim that he had no lease or legal right to stay there. The Tribunal based its decision on a number of factors including the long-standing and regular nature of the living arrangement and on the fact that the taxpayer possessed a key to the rectory, was free to come and go, kept personal items and clothes there, and had unlimited access to other rooms in the rectory such as a kitchen, dining room and sitting room" (Determination, conclusion of law "A").

> home prior to his move to Connecticut. The fact that petitioner limited his access to the apartment to an average of once a week appears to have been a matter of personal choice and not one of limited access. Based on all these factors, petitioner maintains a permanent place of abode in New York City for income tax purposes" (Determination, conclusion of law "A").

In his exception, petitioner argues that:

> "[t]he evidence clearly and convincingly indicates an irregular and sporadic use of Mrs. Moed's New York apartment and, therefore, based on the totality of the circumstances, Petitioner does not maintain a permanent place of abode under Tax Law Section 605(b)(1)(B)" (Petitioner's exception, p. 2).

The core of petitioner's assertion concerning the maintenance of a permanent place of abode is that the Administrative Law Judge improperly relied upon the marital status of petitioner in weighting the evidence relevant to this issue.[9] Petitioner states that the Appellate Division, in affirming Evans, "emphasized the need for a connection between the petitioner's use of the New York residence and his furnishing of consideration" (Petitioner's brief, p. 10). Petitioner argues that, in this case:

> "there is no evidence indicating any connection between [Mr. Moed's] informal payment of money to Mrs. Moed during their separation, the purchase of furniture for the New York apartment during the years Petitioner and Mrs. Moed lived together,[10] and the Petitioner's utilization of Mrs. Moed's apartment as a late night substitute hotel during the tax years at issue. Both the payment of a
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> monthly amount of money to supplement Mrs. Moed's income and the transferring of the furniture to Mrs. Moed were simply part of the terms of the informal marital 'separation' settlement.
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> "There was no evidence that the Petitioner or Mrs. Moed viewed Petitioner's payment of money and transferring of the furniture as a quid pro quo for the utilization of the apartment. In addition, contrary to the

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[9] "The thrust of the . . . the ALJ decision is that due to the marital relationship, the Petitioner had unlimited access to the apartment. Also, because Petitioner stayed there on an average of once a week, his use of Mrs. Moed's apartment was sufficiently regular and certain to satisfy the requirements to be his permanent place of abode" (Petitioner's brief, p. 15).

[10] It was never established at the ALJ Hearing whether Petitioner's funds or Mrs. Moed's funds were used to purchase the New York furniture during the years they lived together.

> situation in Evans, there is no evidence of a 'shared rental' arrangement between the Petitioner and Mrs. Moed. Accordingly, the only possible rationale for the ALJ's decision is the continued existence of the marital or familial status of the Petitioner and Mrs. Moed. This conclusion is contrary to New York State law where, as in this case, the spouses are separated in fact" (Petitioner's brief, pp. 11-12).

We reverse the determination of the Administrative Law Judge on this issue and agree with petitioner that he did not maintain a permanent place of abode in New York City for the years at issue. We rely for guidance on Matter of Evans v. Tax Appeals Tribunal (199 AD2d 840, 606 NYS2d 404), decided after the determination of the Administrative Law Judge was issued, in which the Appellate Division affirmed our decision and:

> "reject[ed] petitioner's claim that his use of the rectory was not 'permanent' because he did not own, lease or rent the premises. We agree with the Tribunal that 'the permanence of a dwelling place * * * can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place'" (Matter of Evans v. Tax Appeals Tribunal, supra).[11]

Comparing the facts in Evans to the facts here, we conclude that the apartment was not maintained by petitioner as a permanent place of abode.

Here, as in Evans, petitioner had no property right in the apartment, i.e., he did not own, lease or rent the apartment, rather, his wife rented the apartment.

Unlike the situation in Evans, here there is no evidence of a shared rental. There is no evidence indicating any connection between petitioner's informal marital separation agreement

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[11] The Court went on to note that other than paying for a portion of the monthly rent, which was unnecessary since the rectory was provided free of charge, Mr. Evans':

> "occupation of the premises had all indicia of a shared rental. As previously indicated, petitioner and Ioppolo divided all actual living expenses, including the wages of a housekeeper. Petitioner also supplied many items of furniture for his own bedroom and common rooms in the rectory, and he possessed a key providing free and continuous access to the four-story brownstone and received visits from his son there. Further, petitioner's use of the rectory was not caused by a temporary condition or assignment. Rather, he maintained clothing and other personal articles for ongoing use at the rectory throughout a seven-year period prior to the tax years in question and used the premises to maintain convenient daily access to a full-time job in midtown Manhattan. In these circumstances, the Tribunal correctly concluded that petitioner 'maintain[ed] a permanent place of abode' in New York City during the 1985 and 1986 tax years" (Matter of Evans v. Tax Appeals Tribunal, supra, 606 NYS2d 404, 406).

to pay money to Mrs. Moed and petitioner's utilization of the apartment. In fact, as the Administrative Law Judge pointed out in her determination, the "amount or nature of the monthly payment was not revealed in the record" (Determination, conclusion of law "A"). There is no evidence linking the furniture purchased by the Moeds when married with petitioner's utilization of the apartment.

Next, contrary to Evans, petitioner did not have free and continuous access to the apartment. Implicit in the Administrative Law Judge's determination is that there is some supervening legal definition of access which negates the Moeds' self-imposed restrictions in this case. We cannot agree. The fact that restrictions on petitioner's access to the apartment were imposed by mutual agreement between him and his wife does not alter the fact that his access was limited.

Finally, the fact that petitioner and Mrs. Moed sought to maintain a "viable familial relationship" does not make any less serious their marital separation "in fact."[12] Stated simply, marital status is clearly a pertinent factor to be considered among the totality of factors in determining domicile and residency. However, once the marital status has been established, here the Moeds' separation "in fact," the nature of the continuing inter-personal relationship between the Moeds does not provide

sufficient basis for us to infer that petitioner's monthly payments were for shared rent or to presume that the furniture in the apartment was a contribution in kind as described in Evans or to doubt the self-imposed restrictions by the Moeds on petitioner's access to Mrs. Moed's apartment.

Since it is conceded that petitioner was domiciled in Connecticut for the years at issue, and since we have determined that petitioner did not maintain a permanent place of abode in New York State for the years at issue, we need not address either party's exception concerning the Administrative Law Judge's calculation of days in New York City or New York State.

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[12]In this regard, we note that, with respect to the subjective issue of domicile, if a husband and wife "are separated in fact, they may each . . . acquire their own separate domiciles even though there is no judgment or decree of separation" (20 NYCRR 105.20[d][5][i]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leon Moed is granted;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is reversed;

4. The petition of Leon Moed is granted; and

5. The Notice of Deficiency, dated February 8, 1991, is cancelled.

DATED: Troy, New York
January 26, 1995

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

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