

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JACK AND HELEN ARMEL	:	DECISION
	:	DTA No. 811255
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Years	:	
1987 and 1988.	:	

Petitioners Jack and Helen Armel, 770 South Palm Avenue, Sarasota, Florida 34236, filed an exception to the determination of the Administrative Law Judge issued on May 26, 1994. Petitioners also except to the order of the Administrative Law Judge issued on November 17, 1994. Petitioners appeared by Richard V. D'Alessandro, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Craig Gallagher, Esq., of Counsel).

Petitioners filed a brief on exception. The Division filed a brief in opposition to petitioners' exception. Petitioners filed a reply brief which was received on March 20, 1995, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioners, Jack and Helen Armel, are taxable as residents of New York in 1988 under Tax Law § 605 because they maintained a permanent place of abode in New York and spent more than 183 days in New York.

II. Whether the Administrative Law Judge erred in denying petitioners' motion to reopen the record.

III. Whether the definition of "resident" under Tax Law § 605(b) violates the Due Process and Commerce Clauses of the United States Constitution.

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.

Petitioners, Jack and Helen Armel, filed a New York State Nonresident Income Tax Return for the year 1987. They listed their address as 770 South Palm Avenue, Sarasota, Florida 33577 and allocated a portion of their income to New York. Petitioners reported income from, among other things, the rental of a cottage in Saratoga Springs, New York and from a subchapter S corporation known as Knolls Spring Park, Inc.

Petitioners filed a New York State Nonresident and Part-Year Resident Income Tax Return for the year 1988. Petitioners listed their address as being at 770 South Palm Avenue, Sarasota, Florida 33577 and allocated a portion of their income to New York. On a supplemental income schedule, petitioners reported income from the rental of a cottage in Saratoga Springs, New York and from Knolls Spring Park, Inc.

On April 16, 1990, the Division of Taxation ("Division") assigned an auditor to the task of examining petitioners' returns. On September 21, 1990, the case was transferred to another auditor who completed the case.

In the course of its audit, the Division examined a series of documents in order to ascertain petitioners' residency and domicile. The Division found that petitioners' U.S. Individual Income Tax Return for the years 1987 and 1988 listed their address as 770 South Palm Avenue, Sarasota, Florida 33577. The returns for both years claimed Mrs. Armel's aunt as a dependent and reported that she lived in petitioners' home 12 months of the year. Petitioners' return for 1988 also claimed a grandchild as a dependent and reported that he lived in petitioners' home each month of the year.

The Division noted that petitioners executed a mortgage dated September 13, 1990 on property located at 23 Ruggles Road, Saratoga Springs, New York. The mortgage secured a

loan of \$200,000.00.

The Division examined the S corporation reports and returns filed by Knolls Spring Park, Inc. of Saratoga Springs, New York for the years 1987 through 1990. The report for the year 1987 states that petitioner Jack Armel is the owner of 40 shares out of a total of 100 shares. The returns for the years 1988 through 1990 state that petitioner owns 40 shares out of a total of 101 shares. The report for 1987 and the returns for the years 1988 through 1989 designate a particular shareholder, other than petitioners, as a nonresident of New York. The return for 1990 designates petitioners as nonresidents of New York.

Each of the returns or reports was accompanied by a schedule K-1 entitled Shareholder's Share of Income, Credit, Deduction, Etc. pertaining to petitioners. The schedule K-1's for the years 1987 through 1989 listed petitioners' address as RD #6, Ruggles Road, Saratoga Springs, New York. The schedule K-1 for the year 1990 listed petitioners' address as 770 South Palm Avenue, Sarasota, Florida 33577.

In order to determine the number of days spent in and out of New York, the Division reviewed Merrill Lynch Cash Management Account Monthly Statements which showed Visa charges and checks written. The Division also reviewed Florida telephone bills. The Division wanted to examine New York telephone bills; however, petitioners were unable to make these available.

As disclosed by its workpapers, the Division attributed the following days as days spent in New York:

<u>Period</u>	<u>1987</u> <u>Days in N.Y.</u>	<u>Period</u>	<u>1988</u> <u>Days in N.Y.</u>
1/1-1/5	5	5/6-5/31	26
4/2-4/8	7	6/1-6/30	30
4/28-4/30	3	7/1-7/31	31
5/1-5/13	13	8/1-8/31	31
5/18-5/31	14 ¹	9/1-9/30	30

1

The workpaper listed the period "5/28-5/31." It is assumed that this was a mistake since the Division concluded that petitioners spent 178 days in New York in 1987. It is noted that whether petitioners spent four days or fourteen days in New York on this occasion is irrelevant since, in either event, the total number of days in New

6/1-6/30	30	10/1-10/15	15
7/1-7/31	31	12/6-12/31	<u>26</u>
8/1-8/31	31		189
9/1-9/30	30		
10/1-10/14	<u>14</u>		
	178		

In several instances, the Division placed a question mark after the period. For the year 1988, the question mark was placed after the time period 12/6-12/31. It may be deduced from the available documents that the reason 26 days were attributable to New York for the period December 6, 1988 through December 31, 1988 was because a telephone bill for the period after December 7, 1988 was not made available.

On or about May 8, 1991, the Division prepared a list of contrasting factors which support a finding that petitioners were domiciled in either New York or Florida. In support of its position that petitioners were domiciled in New York, the Division listed the following factors:

- (a) Mr. Armel was raised in New York State.
- (b) The last year petitioners filed as year-long New York State residents was 1985.
- (c) The property at RD #6, Ruggles Road, Saratoga Springs, New York was deeded to petitioners on February 15, 1968.
- (d) Petitioners informally tried to sell the property on Ruggles Road in Saratoga Springs in 1986 for \$425,000.00. The property included 8½ acres of land. From July of 1987 to March of 1988, the property was formally listed with a realtor for \$369,000.00. From July of 1989 to November of 1989, it was listed with a different realtor for \$365,000.00. In 1990, petitioners changed realtors again and the property, which included 4½ acres, was listed for \$265,000.00.
- (e) According to the audit report, petitioners claimed two dependents on the 1987 and

1988 income tax returns.² Their grandson attends college in New York State and lives with petitioners wherever they are when he is on vacation. Mrs. Armel's aunt lives with petitioners at whatever location petitioners are residing at the time. At the time the Division prepared its list, the aunt was in a nursing home in Florida.

(f) There were deeds dated January 24, 1986, October 6, 1986, October 14, 1987 and July 26, 1989 which set forth Mr. Armel's address as being at RD #6, Ruggles Road, Saratoga Springs, New York.

(g) The Division reviewed a mortgage dated September 13, 1990 from National Savings Bank of Albany for \$200,000.00. The mortgage placed a lien on the property at 23 Ruggles Road, Saratoga Springs, New York.

(h) Petitioners have a checking account in New York at Norstar Bank.

(i) Petitioners are shareholders in a subchapter S corporation in Saratoga Springs, New York known as Knoll Spring Park, Inc. The Division noted that petitioners' representative stated that petitioners had little or no involvement in the corporation. The Division then pointed out that the 1987 and 1988 schedule K-1's list Mr. Armel's address in Saratoga Springs and, unlike another partner, do not list Mr. Armel as a nonresident partner.

(j) Petitioners have a cottage on the property at Saratoga Springs which is rented throughout the year.

(k) Petitioners hold mortgages on several New York properties.

(l) Petitioners' 1986 Florida tax bill was mailed to a New York address.

(m) Petitioners' 1987 Form 1099 for Social Security income was mailed to petitioners' New York address.

(n) Petitioners owned a car which was registered in New York State and kept in New

York State all year.

(o) Petitioners rented a safe deposit box from a New York bank.

(p) Mrs. Armel has a New York driver's license which was used to cash checks.

(q) Petitioners' representative stated that petitioners spend one-half of the year in New York and one-half of the year in Florida.

(r) Petitioners have a New York State accountant and lawyer.

(s) According to petitioners' representative, petitioners spent at least 173 days in New York State in 1987 and 165 days in New York State in 1988. According to the Division, it has not been substantiated that petitioners spent more than 183 days outside New York State during the years in issue.

In reaching the conclusion that petitioners were domiciliaries of New York, the Division considered the following factors which ostensibly support a Florida domicile:

(a) Mr. Armel explained that the first Florida condominium was acquired in 1984 for investment purposes. Petitioners traded four parcels in New York for the condominium in Florida which was worth \$125,000.00.

(b) In 1986, petitioners sold the condominium, which was purchased in 1984, and acquired two adjoining condominiums for \$265,000.00. Petitioners broke through the walls and made one large apartment. The renovations were completed in November 1988.

(c) In March 1987, petitioners' Merrill Lynch brokerage account was transferred to Florida.

(d) Mr. Armel has a Florida driver's license which was issued on February 6, 1987.

(e) Petitioners own a Rolls Royce which is registered in Florida.

(f) Petitioners acquired a 1987 Florida homestead tax exemption.

(g) Petitioners' wills state they are residents of Florida. The date of the wills was not provided.

(h) Petitioners bought new furnishings for the Florida apartment.

- (i) Petitioners obtained a checking account at a Florida bank.
- (j) Petitioners have no family in New York State.
- (k) Petitioners representative stated that petitioners' New York cable television is disconnected when they leave New York and reconnected when they return. This was not documented and therefore petitioners were not given the benefit of being away on certain dates.
- (l) Petitioners supplied a Florida certificate of registration to vote dated March 3, 1986.
- (m) Petitioners voted in Florida on November 4, 1986, November 8, 1988, March 14, 1989 and November 6, 1990.
- (n) Petitioners filed 1987 and 1988 Florida intangible tax returns.
- (o) Petitioners' representative claimed that Social Security is directly deposited to Florida banks. According to the Division, this has not been substantiated.
- (p) Petitioners rent a safe deposit box in a Florida bank.

On the basis of its field audit, the Division concluded that petitioners were domiciliaries of New York for each of the years in issue and were statutory residents of New York during the year 1988. Accordingly, the Division issued a Notice of Deficiency dated July 19, 1991 to petitioners, Jack and Helen Armel, which asserted a deficiency of personal income tax under Article 22 of the Tax Law as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance</u>
12/31/87	\$ 6,048.42	\$1,962.01	\$1,283.42	\$ 9,293.85
12/31/88	<u>7,646.85</u>	<u>1,761.62</u>	<u>1,263.15</u>	<u>10,671.62</u>
	\$13,695.27	\$3,723.63	\$2,546.57	\$19,965.47

Mr. Armel was born in a foreign country and arrived in the United States in 1934 when he was 12 years old. Most of Mr. Armel's early life was spent in New York State with the exception of the years he spent in the Armed Forces and the years he spent as a student in Paris, France.

Mr. Armel was employed as an engineer until 1975 when he retired. As an engineer,

Mr. Armel worked for a number of engineering companies. The last 10 years of Mr. Armel's professional life were spent as president and founder of Gama Processing Company ("Gama"). During its growth period, Gama had a laboratory in Chicago, Illinois and plants in Brooklyn and Malta, New York. Petitioners moved to Saratoga Springs in 1970 since the Malta plant was the most important facility. The house that was subsequently constructed was referred to as RD #6 or 23 Ruggles Road. The property also includes a guest cottage. The land on which the house was built was acquired in 1968.

Mr. Armel entered into an exclusive listing contract dated July 7, 1987 for the sale of the property located at 26 Ruggles Road in Saratoga. The house remained on the market during the period in issue.

Petitioners had difficulty selling their home in Saratoga Springs. In order to facilitate the sale, Mr. Armel retained the services of a surveyor who subdivided the property in 1989 into two parcels. Thereafter, one of the lots was subdivided again. However, no sale was ever consummated.

In or about 1989, a contract for the sale of the home in Saratoga Springs was signed but not performed. One of the problems was that the prospective purchasers wanted to acquire all of petitioners' furniture, antiques and paintings in the house.

Mr. Armel first purchased a condominium in Florida in 1984. The following year he traded in the old unit and obtained a pair of units which could be made into one. The renovation, which converted the two apartments into one unit, occurred in 1987. The work was performed during the winter and took a few weeks to complete. Petitioners remained at the new address during the years in issue.

Petitioners' condominium in Florida is simply furnished. The transporting of valuables from the home in Saratoga Springs to the condominium in Florida was a very gradual process.

Knolls Spring Park, Inc. ("Knolls Spring Park") was a subchapter S corporation which was organized for the purpose of purchasing a certain tract of land in the proximity of Ruggles Road in the City of Saratoga Springs, New York. The organizers of the corporation intended to

develop the parcel as a single-family subdivision. According to the individual who was the president of Knolls Spring Park from inception through January 4, 1991, Mr. Armel is a minority shareholder and, since prior to 1986, he has been inactive in any management matters. This individual further states that Mr. Armel has been neither an officer nor a director and, as a consequence of his spending the majority of the year outside New York State, he has taken virtually no part in corporate decisions.

Mr. Armel owns several parcels of land in New York. First, the land adjoining the house in Saratoga Springs was divided into three parcels. Petitioner also owns two lots, which he was unable to sell, in a nearby subdivision. The two lots in the subdivision arose from Mr. Armel's investment in Knolls Spring Park.

On December 17, 1985, petitioners executed a "Declaration of Domicile" declaring that they were domiciled in the State of Florida.

On February 6, 1987, the State of Florida issued a driver's license to Mr. Armel. The license expired on March 22, 1993. Mrs. Armel had a New York driver's license. However, she drove very little, if at all. Mrs. Armel's driver's license was used for cashing checks and for identification.

On January 10, 1991, the Supervisor of Elections of Sarasota County, Florida certified that petitioners registered to vote in Florida on March 3, 1986. Petitioners voted in Florida on November 4, 1986, November 8, 1988, March 14, 1989 and November 6, 1990.

According to the records of the Commissioner of Elections of Saratoga County, New York, the last time petitioners voted in Saratoga County was in 1984.

At the hearing, petitioners offered a document signed by six individuals on either October 22, 1990 or October 23, 1990 which stated as follows:

"TO WHOM IT MAY CONCERN:

"WE, THE UNDERSIGNED, MEMBERS OF THE LOU GREEN DOWNTOWN
POKER CLUB OF SARASOTA, FLORIDA, HEREBY TESTIFY AS FOLLOWS:

"OUR CLUB MEETS ONCE A WEEK, ON TUESDAY EVENING, SINCE ITS
FOUNDING IN 1984. MR. JACK ARMEL, A FOUNDING MEMBER

ATTENDS THESE MEETINGS EVERY TUESDAY NIGHT, FROM THE MIDDLE OF OCTOBER TO THE MIDDLE OF MAY EVERY YEAR SINCE THE FOUNDING OF THE CLUB."

Petitioners offered a series of two affidavits and an unsworn statement from acquaintances or neighbors which averred that petitioners left New York in October and returned in May every year since 1984. Two documents set forth specific dates as follows:

"LEAVE
SARATOGA

October 15, 1986
October 19, 1987
October 16, 1988
October 10, 1989

ARRIVE
SARATOGA

May 15, 1987
May 10, 1988
May 14, 1989
May 10, 1990"

On September 18, 1987, Classic Travel, Inc. prepared round-trip airline tickets for petitioners which scheduled departures from Albany, New York to Sarasota, Florida on October 15, 1987 and scheduled a return trip on May 2, 1988.

Mr. Armel received a tax levy for 1987 real estate taxes in Sarasota County, Florida. The taxes levied were reduced by a homestead exemption. According to Mr. Armel, this benefit was only given to "full fledged residents." The assessment was addressed to Mr. Armel in Sarasota, Florida.

The respective wills of Jack and Helen Armel, which are dated May 7, 1990, declare that petitioners are residents of and domiciled in Sarasota County, Florida.

Petitioners hold mortgages on several New York properties. They acquired the mortgages because, in prior years when Mr. Armel sold land, it seemed appropriate to accept a mortgage to help bring the sale to fruition. Mr. Armel used his New York address on the deed dated October 14, 1987 because the offer to buy the property was accepted in the summer and he was not paying attention to the address appearing on the deeds.

Beginning in 1985 and continuing through the years in issue, petitioners' Social Security checks were sent to Barnett Bank in Sarasota, Florida.

During the period in issue, petitioners kept a 1980 Ford automobile in New York because it was useful to have access to a car in order to go shopping during the summer. In Florida,

petitioners drove a Lincoln Continental or a Rolls Royce.

Petitioners maintained checking accounts with Norstar Bank of New York and Barnett Bank of Florida.

Petitioners rented a safe deposit box in Florida and in New York. The safe deposit boxes were used by Mrs. Armel to store jewelry.

Petitioners filed a tax return with the Florida Department of Revenue. The return imposed a tax on certain intangible assets and stated that it must be postmarked by June 30, 1987. On the return, petitioners answered "yes" to the question of whether they filed in prior years.

Mr. Armel manages the rental of a cottage in Saratoga, New York. This includes collecting the rent and calling people, as needed, to repair property.

When petitioners go to New York for the summer, they have the telephone calls which were directed to their Florida telephone forwarded to New York. The mail sent to Florida is forwarded to New York also.

In order to establish the number of days spent in and out of New York, petitioners presented a series of Merrill Lynch Cash Management Account Monthly Statements which reported transactions on a Visa account and a checking account. The portion of the monthly statement pertaining to the Visa account contained columns for transaction date, date cleared, description, location and amount. In general, the Visa account statements show that purchases which occurred between January 3, 1988 and May 5, 1988 took place in Florida or Texas. There is one transaction dated February 5, 1988 which is reported as occurring in Reading, Massachusetts.

The listing of Visa card transactions reports a transaction dated May 17, 1988 at an establishment called Paula Young in South Easton, Massachusetts and two transactions involving Carl's Drug Store, dated, respectively, April 17, 1988 and May 17, 1988. The statements report that the latter two transactions cleared on May 26, 1988 and that they both occurred in Rome, New York. A handwritten note appears next to the April 17, 1988 date

which states "date error." A second handwritten note states "charged both on 5/17."

The credit card statements also report transactions, occurring between September 29, 1988 and October 12, 1988, in either Ballston Spa or Saratoga Springs, New York. Transactions occurring between October 18, 1988 and November 10, 1988 are reported to have taken place in either Sarasota or Osprey, Florida. There are no credit card transactions reported after November 10, 1988.

The information pertaining to the checking account is not sufficiently detailed to draw any conclusions regarding petitioners' location during the year.

Mr. Armel offered a series of monthly telephone bills from GTE Communications Corporation for 1988. The telephone bills offered into evidence were copies of the same bills reviewed by the Division. The bills dated January 7, 1988 through May 7, 1988 were addressed to Mr. Armel in Sarasota. Similarly, the bills dated November 7, 1988 and December 7, 1988 were addressed to Mr. Armel in Sarasota. The bills dated June 7, 1988 through October 7, 1988 were addressed to Mr. Armel in Saratoga, New York. No billings were provided for the period after December 7, 1988.

We make the following additional finding of fact.

Petitioner Jack Armel testified that during the years at issue he was aware of the 183 day rule of statutory residency for New York State. Petitioner further testified that he was in New York only from May 15 to October 15, 1988. Petitioner also testified that he came to New York only in the summer months after moving to Florida in the end of 1984.

OPINION

The Administrative Law Judge determined that petitioners changed their domicile to Florida by 1987. The Administrative Law Judge based his conclusion on the credible testimony of Mr. Armel and documentary evidence presented by petitioners, all of which established that: 1) by 1987 petitioners' business interests were passive; 2) petitioners undertook substantial efforts to sell their Saratoga Springs home; 3) petitioners elected to maintain two relatively valuable automobiles in Florida while keeping a more modest vehicle in New York; and 4) petitioners also presented numerous objective criteria supporting a change of domicile to

Florida, e.g., receipt of a Florida driver's license by Mr. Armel, transfer of petitioners' Merrill Lynch brokerage account to Florida and the direct deposit of Social Security checks into a Florida bank.

The Administrative Law Judge further concluded that petitioners failed to establish that they spent less than 184 days in New York State in 1988. The Administrative Law Judge noted that petitioners conceded they were in New York from mid-May to mid-October and it was the remainder of the year which was at issue. The Administrative Law Judge accorded little weight to the letters submitted by friends and neighbors. The Administrative Law Judge also did not find the airline ticket receipts to be supportive of petitioners' position because the tickets did not show whether there were trips to New York between the scheduled departure and arrival.

With respect to petitioners' credit card statements and telephone bills, the Administrative Law Judge further stated:

"[g]enerally, a record of credit card purchases and telephone bills is not considered sufficiently precise to meet the requirements of 20 NYCRR former 102.2(c) (see, e.g., Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992). This is particularly true in this instance since petitioners have not presented any reason for concluding the Division's analysis was erroneous" (Determination, conclusion of law "Q").

The Administrative Law Judge denied a motion by petitioners to reopen the record to admit a document petitioners obtained only after the close of proceedings. The Administrative Law Judge, relying on Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151), determined that petitioners failed to show that the evidence could not readily and with due diligence have been offered at the time the record was open.

Petitioners, on exception, assert that the Administrative Law Judge applied the incorrect rule of law to conclude that petitioners were not statutory residents for 1988. Petitioners argue that the Administrative Law Judge's statement that records are required to substantiate presence outside of the State contradicts this Tribunal's decision in Matter of Avildsen (Tax Appeals Tribunal, May 19, 1994). Petitioners further contend that the Administrative Law Judge erred

by not re-opening the record. In the interests of justice and fairness, petitioners argue they should have been allowed to introduce the new evidence.

Petitioners contend that even if the new evidence is not considered, there is sufficient evidence in the record to establish that they were not statutory residents for the year 1988. Petitioners further contend that New York's definition of "resident" violates the Due Process and Commerce Clauses of the United States Constitution. Petitioners argue that New York's definition is inconsistent with the principles of Due Process set forth in Texas v. Florida (306 U.S. 398). Petitioners also argue that New York's definition does not comport with the "internal consistency" doctrine of the Commerce Clause.

The Division argues that the Administrative Law Judge correctly analyzed the issue of statutory residency and urges the affirmation of the determination with respect to this point.

We reverse the determination of the Administrative Law Judge.

Tax Law § 605(b) provides, in part, that a resident is one:

"(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

"(B) who is not domiciled in this 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" (Tax Law § 605[b]).

We begin by noting that petitioners are correct in asserting the Administrative Law Judge used an incorrect analysis in determining what constitutes sufficient evidence for the issue of statutory residency. The Administrative Law Judge recited 20 NYCRR former 102.2(c), emphasizing the final sentence of the regulation which addresses record keeping for persons domiciled outside the State.

20 NYCRR former 102.2(c) provided that:

"[i]n counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if it is solely for the purpose of

boarding a plane, ship, train or bus for travel to a destination outside New York State. Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State" (20 NYCRR 102.2[c], emphasis added).

In Matter of Avildsen (*supra*), we held a virtually identical regulation addressing New York City residency did not govern the production of evidence at a Division of Tax Appeals hearing. We stated in Avildsen that section 11-1705(b)(1)(B) of the Administrative Code of the City of New York³ does not define the type of proof required by a taxpayer to establish that he was not in New York City for more than 183 days. We further concluded that the regulation⁴ at issue in Avildsen did not require, as a matter of law, the production of records at a Division of Tax Appeals hearing. We noted that had the Division promulgated such a regulation, absent legislative direction, it would have exceeded the Division's authority. Consequently, we determined in Avildsen that credible testimony was sufficient to meet the taxpayer's burden. As a result, we conclude the Administrative Law Judge erred in focusing exclusively on 20 NYCRR former 102.2(c) in determining what was necessary to meet a taxpayer's burden at a Division of Tax Appeals hearing⁵ and in not considering the credible testimony of Mr. Armel.

Turning to the facts, petitioners, through their testimonial and documentary evidence, have clearly and convincingly proven that they were in New York for less than 184 days in 1988. The Administrative Law Judge relied in part on Mr. Armel's credible testimony in concluding that petitioners changed their domicile before 1987. We can see no basis to find Mr. Armel's testimony credible on the issue of domicile but to find it incredible on the

³Said section of the Administrative Code of the City of New York essentially mirrors Tax Law § 605(b) (then former [a]) save for the insertion of "city" for "state."

⁴20 NYCRR Appendix 20, § 1-2(c) contains the same language as 20 NYCRR former 102.2(c), except for the insertion of "city" for "state."

⁵Although our decision in Avildsen was issued one week before the Administrative Law Judge's determination in this case, it appears that the Administrative Law Judge was not aware of the Avildsen decision.

intertwined issue of statutory residency (see, Matter of Mobley v. Tax Appeals Tribunal, 177 AD2d 797, 576 NYS2d 412, appeal dismissed 79 NY2d 978, 583 NYS2d 195). Mr. Armel testified that during the period at issue he was mindful of the 183-day rule for statutory residency and that the only time he and his wife spent in New York in 1988 was between May 15th and October 15th. Mr. Armel further testified that their move to Florida began with the purchase of a condominium in late 1984 and since then they have traveled to New York only for the summer months.

The Division asserts that petitioners' testimony is not credible because Mr. Armel did not account for he and his wife's whereabouts on any specific day. We find it was unnecessary for petitioners to do so. The degree of specificity required of their testimony regarding days in and out of the State must be evaluated based on the factual issues raised (see, e.g., Matter of Avildsen, supra [frequent travel to and from New York and absence of supporting documentation required testimony providing a day-by-day accounting for the period at issue]; cf. Matter of Sutton, Tax Appeals Tribunal, October 11, 1990 [general testimony to the effect that the petitioner was in New York "certainly less than 100 days a year" corroborated by specific documentary evidence sufficient to meet the petitioner's burden]). In this case, it is important to stress that, according to the findings of fact, the only days in issue are the 26 days from December 7 through December 31, 1988. Second, the issue of petitioners' location on these days arises in the context of their claim that they spent the entire winter in Florida in 1988, as was their custom since 1984. Under these circumstances, petitioners can prevail by proving that they stayed in Florida for the entire winter of 1988. They need not establish their whereabouts each specific day.

Mr. Armel's credible testimony is corroborated by other evidence in the record. Affidavits and letters submitted by petitioners' friends and neighbors support a finding that petitioners were in Florida for the month of December.

Petitioners introduced into evidence a letter from Ms. Pat Griffen, a neighbor who watches petitioners' house in Saratoga Springs when petitioners are not in New York. Also in

evidence is an affidavit from two friends who reside across the street from petitioners' house in Saratoga Springs. Petitioners further submitted a letter from friends in Saratoga Springs who visit petitioners in Florida. Finally, a fourth signed statement was submitted by six members of a poker club Mr. Armel participates in every Tuesday while in Sarasota. The documents corroborate petitioners' position that they travel back to Florida every year from New York in mid-October and do not return to New York until the following May.

The Administrative Law Judge accorded the four documents little weight on the basis that it was unlikely that friends and neighbors would recall precisely the arrival and departure dates for the years at issue. While we agree with the Administrative Law Judge that such recollection is unlikely, we also find petitioners are correct to point out that "the precise recollection of the dates of arrival and departure should not have been the focus of his inquiry" (Petitioners' brief on exception, p. 20). Petitioners further note that, "[i]t is entirely credible for these witnesses to know and remember whether petitioners were present in New York during December, 1988, even assuming, arguendo, that they may not remember petitioners' precise departure date in October The question here is not whether petitioners left New York on some particular date in October 1988, rather the question is whether they were absent in December, 1988, more than a month later" (Petitioners' brief on exception, p. 21). We find the letters and affidavits to be probative for the limited purpose of supporting petitioners' position that they were not in New York during the month of December, 1988.

As a result of our conclusions above, the remaining issues are rendered moot.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jack and Helen Armel to the determination of the Administrative Law Judge is granted;
2. The exception of Jack and Helen Armel to the order of the Administrative Law Judge is denied;
3. The determination of the Administrative Law Judge is modified to the extent that petitioners were not statutory residents for the year 1988;

4. The order of the Administrative Law Judge is sustained;
5. The petition of Jack and Helen Armel is granted;
6. The motion of Jack and Helen Armel to reopen the record is denied; and
7. The Notice of Deficiency dated July 19, 1991 is cancelled.

DATED: Troy, New York
August 17, 1995

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Donald C. DeWitt

Donald C. DeWitt
Commissioner