STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHARLES W. AND MARJORIE W. MURRAY	:	DECISION DTA No. 811730
for Redetermination of a Deficiency or for Refund of New York City Income Taxes under the New York City Administrative Code for the Years 1986 and 1987.	:	
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Petitioners Charles W. and Marjorie W. Murray, P.O. Box 2174, Dogwood Street, Montauk, New York 11954, filed an exception to the determination of the Administrative Law Judge issued on January 6, 1995. Petitioners appeared by Hodgson, Russ, Andrews, Woods & Goodyear (Sharon M. Kelly, Esq., of counsel) and Dlugash & Kevelson (Alan J. Dlugash, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Craig Gallagher, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief which was received on June 16, 1995, and began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs. Commissioner Dugan concurs in part and dissents in part in a separate opinion.

ISSUES

I. Whether petitioners were domiciliaries of New York City for the years 1986 and 1987 and were, thus, taxable as resident individuals.

II. Whether petitioners have shown reasonable cause for abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "5" and "8" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioners submitted 20 proposed findings of fact for consideration by the Administrative Law Judge. Findings of fact 1 through 6, 8 and 10 through 20 are accepted and incorporated into the Findings of Fact set forthbelow. Findings of fact 7 and 9, though incorporated in pertinent part within the Findings of Fact set forth below, have been modified to more fully reflect the record. The Division of Taxation ("Division") submitted six proposed findings of fact, all of which have been accepted and incorporated into the findings below.

Charles Murray, born in 1926, moved to Massapequa, Long Island when he was approximately a year and a half old and continued to live on Long Island throughout his young adult life. He later married and he and his first wife raised three children on Long Island. In 1962, he married his current wife, Marjorie Murray, and lived in Muttontown, Long Island until 1979.

Marjorie Murray was raised in Great Neck, Long Island and lived on Long Island until she and Mr. Murray sold their Muttontown home in 1979. Mrs. Murray's four young children lived with her and Mr. Murray in Muttontown and attended schools in nearby Hicksville. Petitioners were members of the Nassau Country Club at that time and Mrs. Murray and her children were active in the Trinity Lutheran Church.

With respect to his professional life, Mr. Murray was a municipal bond broker who worked between professional companies such as Smith Barney and Merrill Lynch. In 1952, he and two other men formed the firm of Clifford Drake and Company. The firm was located in New York City and Mr. Murray commuted from Muttontown, where he and his wife resided, to New York City on a daily basis. Mr. Murray testified that in the late 1970's when the children were grown and commuting had become more difficult, petitioners decided they would move to

New York City until Mr. Murray retired. Mr. Murray testified that at the time he decided to move into New York City to alleviate the commuting pressure, he intended to live there permanently and, at the time, was not concerned imminently with his retirement. Petitioners spent one summer in the City and decided they would rent homes in Montauk for succeeding summers. From 1979 to 1985 petitioners rented homes during the summer in or around the Montauk area.

In 1979, petitioners bought an apartment at 75 East End Avenue in New York City. At the time they bought this apartment, the Murrays intended to live in New York City until Mr. Murray retired from Clifford Drake.[1] Mr. Murray testified: "I love Long Island and always have. We planned that we would stay in New York until I retired." Mrs. Murray testified: "Charles said, 'I am getting too old to do this commuting. I would like to, for the interim period until I retire, I would like to go in and get an apartment in the city and we will think about where we want to locate permanently'" (tr., p. 56). She added that, after Clifford Drake was sold, "we wanted definitely to get out and get back to the island where we had our roots" (tr., p. 57).

Mr. Murray described the apartment located at 75 East End Avenue as a "very big apartment" at 4,800 square feet. It was a five-bedroom, five and a half-bathroom apartment, with a living room, library, dining room and kitchen. In 1983, Security Pacific Corporation purchased Mr. Murray's firm, Clifford Drake and Company. In part, as a result of the firm having been bought, the Murrays decided to scale down their living quarters, anticipating that Mr. Murray would be retiring in years soon to come. Thus, in 1983, petitioners sold 75 East End Avenue and purchased 60 East End Avenue, a three-bedroom apartment of approximately 2,800 or 2,900 square feet.

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[1]Petitioners proposed a finding of fact which included a characterization that petitioners intended to remain in the City only "temporarily". This portion of the proposed finding of fact was not incorporated into the determination since, at the time of the purchase in 1979, the record does not establish that the term or the time during which petitioners would remain in New York City was temporary in nature.

We modify finding of fact "5" of the Administrative Law Judge's determination as follows:

> As previously stated, the Murrays rented homes in the Montauk area for summers between 1979 and 1985 and did so with the idea of eventually wanting to find the right home in which to live their retirement years. Mr. Murray testified that "while we were renting them each year we would be looking for homes out there" (tr., p. 17). The house on Dogwood Road was the house that the Murrays rented during the summer of 1985 with an option to buy. By the end of December 1985, the Murrays owned that home, a 3,000 square foot home with four bedrooms, three bathrooms, a living room, dining room, family room, kitchen, two-car garage and a pool on one acre of property. The Montauk residence was purchased for $309,000.00. After its purchase, petitioners added a poolhouse, a generator and other such renovated improvements. They redecorated the home and purchased new furniture, installed a cedar closet and safe, all of which was accomplished in the early part of 1986. Little or none of the furniture from the New York City apartment was transferred to their new Montauk home. Rather, over a period of time from 1987 to 1988, petitioners gave the furniture from their New York City apartment to their children. Mrs. Murray testified that, upon completion of such projects, approximately in the spring of 1986, she transferred some personal belongings to the Montauk home such as flatware, china, glassware, linens and other such personal items.[2]

Petitioners testified that at the time petitioners purchased their home in Montauk, they did not intend it to be a weekend or vacation home. They intended it to be their future home. Mr. Murray stated that "we had a different outlook after the firm was sold because I was getting where I didn't want any part of the firm any more or the City any more, to tell you the truth" (tr., p.18). He stated that they continued to own 60 East End Avenue for some period because, at first, an attempt to sell the apartment revealed to them that they could not command a certain price and, secondly, there was no mortgage on this apartment and the cost of the maintenance was less than what he would have paid to rent an apartment bearing similar characteristics.

Petitioners testified as to their habit of life and days spent in and out of New York City. Mr. Murray's work pattern in 1986 and 1987 was essentially a three and a half or four-day work week, extending generally between Monday and Thursday, with a return to Montauk on

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[2] We modified the seventh sentence of finding of fact "5" by changing the word "furnishings" to "furniture" and by adding the eighth sentence to more fully reflect the record.

Thursday, remaining there until the following Monday. Sometimes he would leave New York City for Montauk on Wednesday and not return again until Monday.

Mrs. Murray often left New York City before Mr. Murray so she could play golf at Nassau Country Club and then proceed on to Montauk. During the summer, she generally stayed in Montauk with her visiting children and grandchildren. The Murrays spent Thanksgiving with their son in other states during both the tax years in issue and Christmas with their daughter in New Jersey. They spent New Years Eve, Easter and Independence Day in Montauk.

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

> Prior to the purchase of Clifford Drake by Security Pacific Corporation in 1983, Mr. Murray was a principal shareholder in the company. After the purchase, he became an employee of Security Pacific Corporation. Subsequently, Clifford Drake was purchased by J. J. Kenny and, at the time of his retirement in 1989, Mr. Murray was working for Kenny Drake. Mr. Murray negotiated a consulting arrangement with Kenny Drake until his retirement in 1989.[3]

During 1986 and 1987, Mr. Murray received mail at his 60 East End Avenue address as well as at his business address in the City. He believes both his credit card statements and bank statements were being mailed to his New York City apartment in 1986 and 1987. Newspaper delivery continued regularly to the New York City apartment until approximately April or May 1986.

After the Murrays purchased the Montauk residence, Mr. Murray made some attempt to sell the New York City apartment. He claims to have consulted with a few real estate people in order to get a feel for the market. However, he characterized his efforts with respect to selling the apartment as "half-hearted". He did not enter into a listing agreement or formally place the property on the market.

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[3] The second sentence of finding of fact "8" read as follows: "Although he became an employee of Security Pacific Corporation, Mr. Murray's employment was full time through 1986." We modified this sentence to more fully reflect the record.

In 1986 and 1987, only one of the Murrays' seven (adult) children lived in New York City and none of their grandchildren resided there. Three of their children lived on Long Island and various members of the family frequently visited them in Montauk. Holidays were either spent in Montauk or at their children's homes in New Jersey or Colorado.

The Murrays' social life consisted of boating near their Montauk home, membership and golfing in the Nassau Country Club, and involvement in other Montauk community affairs.

Mr. Murray's employment arrangements with Security Pacific Corporation resulted in the elimination of his day-to-day responsibilities as he previously had with Clifford Drake. His position became that of a liaison between the former employees of Clifford Drake and the new bank executives and employees. His contract instead provided for responsibilities that were of a general, supervisory nature. Although he was expected to work several days per week, Security Pacific anticipated long vacations on his part. In return for his arrangement, he was to receive an annual salary in an amount substantially lower than the full-time company executives employed by Security Pacific received at the time.

In 1986, Mr. Murray began to explore the potential for establishing a taxi/limousine service on Long Island. He eventually invested approximately $300,000.00 in a business which began operations in 1989, but would eventually prove unsuccessful.

In 1989, the Murrays sold 60 East End Avenue.

Petitioners, Charles W. and Marjorie W. Murray, filed a New York State Resident Income Tax Return (IT-201) for the year 1986. On this return, petitioners listed their address as Dogwood Street, Montauk, New York 11954. In conjunction with their return, petitioners filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) which reported that petitioners did not maintain an apartment or other living quarters in the City of New York during any part of the tax year. Both Mr. Murray and his accountant, Alan Dlugash, personally signed at the bottom of Form IT-203 on April 15, 1987. Mr. Murray's wage income as a bond broker was stated on the return in the amount of $230,923.00. The allocation of wage and

salary income shows Mr. Murray as having reported 151 days as worked in the City of New York.

Petitioners filed a New York State Resident Income Tax Return (Form IT-201) for the year 1987 also listing their address as Dogwood Street, Montauk, New York. In conjunction with their return for 1987, petitioners filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) which reported that petitioners did not maintain an apartment or other living quarters in the City of New York during any part of the tax year. Petitioner Charles Murray and his accountant, Alan Dlugash, signed at the bottom of NYC-203 on June 29 and 21, 1988, respectively. In addition, the allocation of wage and salary income indicated the number of days Mr. Murray worked in the City of New York was 153. Mr. Murray's wage income reported on the 1987 return was in the amount of $428,838.00.

Petitioners filed both a U.S. Individual Income Tax Return (Form 1040) and a New York State Resident Income Tax Return (Form IT-201) for the year 1989 with the same address. On petitioners' Form 1040, specifically on Form 2119, entitled "Sale of Your Home", petitioners indicated that they used the home they sold in 1989 as their main home for a total of at least three years of the five-year period before the sale. As such, petitioners took a one-time exclusion of the gain on the sale of the residence they sold. In conjunction with their return for 1989, petitioners also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) which reported that petitioners did not maintain an apartment or other living quarters in the City of New York during any part of the tax year. Petitioners' accountant, Alan Dlugash, initialed the bottom of Form NYC-203 on May 8, 1990. The allocation of wage and salary income on page 2 of the form indicated that the number of days Mr. Murray worked in the City of New York was 365. His wage income reported on the 1989 return was in the amount of $222,044.00.

On or about November 17, 1989, the Division commenced an audit of petitioners' tax returns for the years 1986 and 1987. On November 21, 1989, Karen Vickers of the New York City Audit Group, Income Tax Section, issued correspondence to petitioners indicating an

appointment scheduled for December 6, 1989 for the purpose of commencing an audit. The information document request which accompanied the letter specified as its subject personal income tax for the years 1986 and 1987. It additionally requested copies of leases and/or purchase agreements for two addresses: (a) 60 East End Avenue, New York City, and (b) Dogwood Street, P.O. Box 2174. Additional information requested included backup documentation to support the number of working days allocated to New York, such as corporate calendars, airline receipts, credit card receipts and other third-party verification for the two tax years in question, and copies of bank statements, cancelled checks and credit card statements for the years in issue.

The auditor's log contained an entry on April 23, 1990 referencing information that was reviewed by the auditor. The log entry reported the following:

> "Attended audit conference @ reps office:
>
> - examined all cancelled checks for Republic Natl Bank. (86-87)
> - examined credit card statements & utility bills (86-87)
>
> "Taxpayers seem to be domiciled on Long Island. However, need more imp. cancelled checks for many L.I. social, religious & political associations. Also cancelled checks for support payments to several L.I. community organizations (i.e., fire dept., PBA, PAL, Montauk Historical Society). Tps have a boat docked near their L.I. home & have extensive payments for landscaping & garbage disposal. Utility & tel. exp. on LI are consistently higher on LI than in NYC."

At the time of the hearing, the auditor was no longer employed by the Division, and therefore the auditor did not testify at the hearing. Petitioners' accountant testified that his office had sent the Murrays' original documentation to the auditor without retention of any copies and that it had not been returned to his office or to the Murrays. This missing documentation is the subject of some controversy.

Maintaining the position that Montauk had become their domicile in 1985, petitioners introduced into evidence several items of correspondence from personal and business acquaintances on Long Island who indicate their belief that the Murrays' intention was to make their Montauk relocation permanent in nature. Included with such correspondence was a letter from John Keeshan, owner of John Keeshan, Inc., a real estate firm in Montauk. He states:

> "This will acknowledge that in October, 1985 my firm, John Keeshan, Inc., was instrumental in selling a home located on Dogwood Street in Montauk, N.Y. to Mr. and Mrs. Charles Murray. The Murrays purchased this home to relocate permanently in the Village of Montauk.
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> * * *
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> "Incidentally, after the purchase of his home here in Montauk, Mr. Murray requested my assistance in selling his apartment in New York. Though I was able to make suggestions, I know because of Market conditions, he was unsuccessful in the selling of his apartment for several years."

The permanency of the Murrays' residency in Montauk from 1985 on, active participation in community affairs and social acquaintances were also described in letters from Perry Duryea, Jr., chairman of the board of the Long Island Commercial Bank, Harold Herbert of Herb's Montauk Market, and Reverend Raymond Nugent of the St. Therese of Lisieux Roman Catholic Church in Montauk.

The Murrays introduced their Montauk voter registration documents which listed the registration date for both petitioners as October 11, 1986. Petitioners did not vote in 1986 or 1987 because they did not feel sufficiently knowledgeable about the candidates in the local elections. They did vote in the 1988 election and in subsequent years.

The Murrays registered and insured their cars in Montauk beginning in 1986, they patronized numerous local stores and businesses, they received their personal mail in Montauk and purchased cable television service there.

With respect to the locations where petitioners lived during the years in question, the parties stipulated to the following facts:

(a) Petitioners bought a cooperative apartment at 60 East End Avenue, New York City on September 13, 1983; and

(b) Petitioners bought a house in Montauk, New York in December 1985 and invested considerable amounts in renovations.

With respect to days spent in and outside New York City during 1986 and 1987, the parties stipulated to the following:

	1986	1987
NYC work days	151	153
NYC non-work days	6	1
	157	154
Non-NYC work days	29	28
Non-NYC work days	14	35[4]
Non-NYC days	50	51
	93	114

The remaining days in each year are the subject of controversy. Petitioners did not submit documentation for the remaining 115 days in 1986 or the remaining 97 days in 1987.

During the audit, Mr. Murray and an associate of petitioners' accountant, a woman by the name of Rhonda Cohen, prepared schedules showing Mr. Murray's location on each day of 1986 and 1987 which were made part of the record and introduced into evidence with the audit file. The schedules were based on information extracted from credit card statements, cancelled checks, travel and expense reports, Mr. Murray's business diaries, and utility and telephone bills. The schedules showed that Mr. Murray had spent 158 days in New York City in 1986 (one day different from the actual stipulation) and 154 days in New York City in 1987. Her schedules also show that Mr. Murray had verified 43 days outside New York City in 1986 and 63 days outside New York City in 1987. Prior to the hearing and incorporated as part of the stipulated facts (see, Finding of Fact "24"), the Division agreed to an additional 50 documented days outside New York City in 1986 and an additional 51 documented days outside New York City in 1987.

A Statement of Personal Income Tax Audit Changes dated October 4, 1990 was issued to petitioners indicating that "taxpayers status is changed to reflect NYC residence for income income [sic] tax purposes." Accordingly, an adjustment was made resulting in additional New York City income tax due for 1986 in the amount of $96,225.00 and $9,062.00 with respect to 1987. The statement reflected interest to date. Although the statement did not contain an

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[4] Although the stipulation indicates that "the following 35 dates in 1987 were non-New York City work days", it appears when a comparison is made to other documents in the record that the parties intended this to reference non-work days as opposed to work days.

explanation of the penalties asserted, it set forth the Tax Law sections pursuant to which the penalties were asserted as follows:

> "685(b)(1) - negligence
> 685(b)(2) - additional negligence
> 685(p) - substantial understatement"

Petitioners executed a consent extending the period of limitations for assessment for personal income taxes with respect to this matter such that personal income tax due for the year 1986 could be determined at any time on or before December 31, 1990.

The Division issued to petitioners, Charles W. and Marjorie W. Murray, a Notice of Deficiency dated November 16, 1990 asserting additional income tax for the years 1986 and 1987 in the amounts of $96,225.00 and $9,062.00, respectively, plus interest and penalty amounts, which resulted in current balances due for each of the respective years of $156,984.24 and $13,801.83.

OPINION

The Administrative Code of the City of New York, § 11-1705(b)(1) provides the criteria for determining whether a taxpayer is a City resident:

> "A city resident individual means an individual:
>
> "(A) who is domiciled in this city, unless: (1) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or . . .
>
> "(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States."

The foregoing section of the Administrative Code of the City of New York corresponds with Tax Law § 605(b)(1). Domicile, though not defined in the Tax Law, is addressed in the Division's regulations:

> "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.

> "(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 undue 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.
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> * * *
>
> "(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere" (20 NYCRR 102.2[d]).

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). As stated by the Court of Appeals in Matter of Newcomb (192 NY 238):

> "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 . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile . . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under

> consideration . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or 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 . . . . 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. The animus manendi must be actual with no animo revertendi . . ." (emphasis added).

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, citing Beale, Conflict of Laws, Vol. 1, pp. 124, 127). In reviewing the actions of a taxpayer alleging a change in domicile, formal declarations have been held to be "less persuasive than the informal acts of an individual's 'general habit of life'" (Matter of Silverman, Tax Appeals Tribunal, June 8, 1989, citing Matter of Trowbridge, 266 NY 283, 289).

The issues before the Administrative Law Judge in this matter concerned whether petitioners were taxable as residents of the City of New York during 1986 and 1987 either because they were domiciled in that City or because they maintained a permanent place of abode in New York City and spent more than 183 days there in each of the years at issue. In her determination, the Administrative Law Judge concluded that petitioners were domiciled in New York City during 1986 and 1987 but that they did not spend more than 183 days in New York City during either of the years at issue. Therefore, if petitioners are properly taxable as residents of the City of New York for 1986 and 1987, it is because they were domiciled there during those years.

Petitioners have taken exception to specific findings of fact:

(a) they do not agree that petitioners intended to live in New York City permanently (finding of fact "2");

(b) they do not agree that the record does not establish that the term or time during which the Murrays would remain in New York City was temporary in nature (footnote 1 to finding of fact "3");

(c) they argue that the statement that little or none of petitioners' furnishings from their New York City apartment were transferred to their Montauk home creates an impression that is opposite to the facts in the record (finding of fact "5"); and

(d) they do not agree that Mr. Murray's employment was full time through 1986 (finding of fact "8").

Petitioners also argue that the Administrative Law Judge's determination "that the Murrays were domiciled in New York City in 1986 and 1987 is based solely on her conclusion that the Murrays had not sufficiently severed their ties to New York City in those years" (Petitioners' brief, p. 5). They argue that the Administrative Law Judge failed to take into account the fact that the Murrays had very few ties with New York City to begin with, and consequently very few ties that they could sever. They argue that the Murrays are not prohibited from changing their domicile "merely because they did not physically abandon the New York City apartment or sever each and every tie to the City," relying on the Tax Appeals Tribunal decisions in Matter of Golub (Tax Appeals Tribunal, March 24, 1994); Matter of Doman (Tax Appeals Tribunal, April 9, 1992) and Matter of Sutton (Tax Appeals Tribunal, October 11, 1990).

Further, petitioners argue that a finding that they were domiciled in New York City during 1986 and 1987 presumes that they became New York City domiciliaries prior to 1985. Relying on this Tribunal's decision in Matter of Haney (Tax Appeals Tribunal, July 16, 1992), petitioners argue that they never changed their domicile from Long Island to New York City even though they sold their Muttontown home and moved to a cooperative apartment in 1979. They argue that since the Division has alleged a change in domicile from Long Island to New York City in 1979, the Division bears the burden of proof on this issue which it has not met. Finally, petitioners argue that the Division has shown no basis for the assessment of penalties

although, according to the Division's own audit guidelines, an auditor must justify the appropriateness of the penalty assessed. The Murrays relied on the advice of a professional tax preparer and they acted with ordinary care and prudence in preparing their tax returns. Any errors in these returns were inadvertent on the part of the Murrays and penalties should be abated, relying on this Tribunal's decision in Matter of Koether (Tax Appeals Tribunal, December 15, 1994).

The Division, in opposition, argues that the Administrative Law Judge correctly decided that the Murrays were domiciled in New York City from 1979 through the tax years 1986 and 1987. The Division argues that petitioners' claim that they were never domiciled in New York City is discredited by their own petition which states that by 1986, they had changed their domicile from New York City to Montauk. Further, the Division argues that the "issue of the petitioners' intent in this matter seems unclear" (Division's brief, p. 7). Assuming that it was the Murrays' intent to change their domicile to Long Island after Mr. Murray retired, the Division argues that it is significant that Mr. Murray did not retire until 1989; he sold his New York City co-op in 1989; and he began a taxi business on Long Island in that year as well. Further, there are discrepancies between the testimony of petitioners and the information provided on their 1986, 1987 and 1989 New York City Form 203 and on their 1989 Federal tax return, Form 2119. While acknowledging that the courts of this State and the Tax Appeals Tribunal have considered a variety of evidence as being persuasive on the issue of whether or not a change in domicile has occurred, the Division argues that "the petitioners have not come forward with evidence that clearly and convincingly shows the severing of long time ties with New York City and abandonment of a New York City domicile for a Long Island domicile" (Division's brief, p. 11). Finally, the Division argues that petitioners have not met their burden to show reasonable cause for the waiver of penalties and that they had no reasonable basis for filing their returns as nonresidents of New York City for the years at issue.

In relation to the first finding of fact excepted to, petitioners disagree with the following statement by the Administrative Law Judge in finding of fact "2":

> "Mr. Murray testified that in the late 1970's when the children were grown and commuting had become more difficult, petitioners decided they would move to New York City until Mr. Murray retired. Mr. Murray testified that at the time he decided to move into New York City to alleviate the commuting pressure, he intended to live there permanently and, at the time, was not concerned imminently with his retirement" (emphasis added).

They argue that their intention to live in New York City until Mr. Murray retired was not an intention to live there permanently. The record, however, discloses otherwise. At page 14 of the transcript, Mr. Murray testified on direct examination as follows:

> Q. "How long did you continue to live on Long Island?"
>
> A. "Until 19-- I can't tell you if it's '78 or '79. That's when we decided -- the kids were older and commuting was getting a little rough. I decided we would go in to New York until I retired."
>
> Q. "And did you intend at that point when you decided to move into New York City to live there permanently?"
>
> A. "That's what our intent was at the time. At that time we had not sold the firm. I wasn't really thinking about retirement . . ." (tr., pp. 14-15).

Likewise, the footnote to finding of fact "3" of the Administrative Law Judge's determination to which petitioners object is also supported by this same testimony in the record. That footnote reads as follows:

> "Petitioners proposed a finding of fact which included a characterization that petitioners intended to remain in the City only 'temporarily'. This portion of the proposed finding of fact was not incorporated into the determination since, at the time of the purchase in 1979, the record does not establish that the term or the time during which petitioners would remain in New York City was temporary in nature."

As to the exception to finding of fact "5" that it creates an impression that is opposite to the facts in the record because the Murrays transferred little or none of the furnishings from their New York City apartment to their Montauk home, we have modified finding of fact "5" to more accurately reflect the testimony of petitioners in this regard.

As to the exception to finding of fact "8" that Mr. Murray's employment was full time through 1986, we find that the Administrative Law Judge accurately characterized the nature of

Mr. Murray's employment during this period in finding of fact "7" when she stated: "Mr. Murray's work pattern in 1986 and 1987 was essentially a three and a half or four-day work week, extending generally between Monday and Thursday, with a return to Montauk on Thursday, remaining there until the following Monday." Therefore, we have modified finding of fact "8" by deleting reference to the nature of his employment as being full time through 1986.

a. Muttontown to New York City

Petitioners argue that since the Division has alleged that petitioners became domiciled in New York City when they moved from Muttontown, Long Island in 1979, the Division bears the burden of proof on this issue which it has not met. Relying on this Tribunal's decision in Matter of Haney (supra), petitioners argue that they never changed their domicile from Long Island to New York City even though they sold their Muttontown home in 1979.

The burden of proof to demonstrate a change of domicile is on the party alleging it (Matter of Newcomb, supra; 20 NYCRR 105.20[d][2]). In her conclusion of law "G," the Administrative Law Judge found that: "the Division has established that petitioners' domicile was New York City during the years in issue . . . ." In conclusion of law "E," the Administrative Law Judge stated:

> "Petitioners' argument that they never became domiciled in New York City is rejected. In addition to the fact that to deny that such change took place is contradictory to evidence in the record, petitioners completely severed Muttontown ties which included, of course, the sale of their home in 1979. The move to New York City in 1979 may not have had the personal sentiment associated with it that the Murrays eventually established they have with Long Island, however in 1979 it was clear that retirement was not in the very near future and, in fact, Mr. Murray's formal retirement was not for another 10 years. There is no doubt that the Murrays did not intend to remain in New York City indefinitely. However, it is clear that the association the Murrays had with New York City during the years 1979 until their change in domicile to Montauk was a permanent one."

In Matter of Haney (supra), relied on by petitioners, the facts pertinent to our analysis in this case are as follows:

> "During 1984, petitioners owned a home in New York State (the address or community is not shown in the record). They lived in the

> home until March 9, 1984, when they left for Florida in a 34' motor home. The purpose of petitioners' departure was so that petitioner Walter G. Haney could fulfill a contract assignment with IBM Federal Systems in Florida. The assignment was temporary . . . . During 1985, petitioners resided in their motor home in Jacksonville Beach, Florida. They spent only two weeks in New York State in 1985 and that was while they were on vacation. They sold their New York home in June 1987. Mr. Haney apparently retired from his Florida position in October 1987 and petitioners subsequently moved to Texas" (Matter of Haney, supra).

This Tribunal sustained the conclusion of the Administrative Law Judge in Haney that the petitioners were taxable as residents of New York State during 1985:

> "The Administrative Law Judge found that petitioners were domiciled in New York for the tax year at issue because they did not establish a new domicile elsewhere during this period. The Administrative Law Judge further found that petitioners were resident individuals of New York, within the meaning of former section 605(a)(1) of the Tax Law, during the tax year at issue as they did maintain a permanent place of abode in New York in 1985" (Matter of Haney, supra).

The Murrays argue that they should be found to have maintained their domicile in Muttontown because, like the Haneys, they left there without intending to establish a new permanent home in New York City. We disagree. When the Murrays left Muttontown, they did not retain a residence there. There is no evidence in the record that, at that time, they ever intended to again reside in Muttontown nor did they ever do so. We also note that Mr. Murray testified that when petitioners decided to move into New York City in 1979, it was their intent to live there permanently. We agree with the Administrative Law Judge that, while "[t]here is no doubt that the Murrays did not intend to remain in New York City indefinitely . . . it is clear that the association that the Murrays had with New York City during the years 1979 until their change in domicile to Montauk was a permanent one" (Determination, conclusion of law "E").

Based on all the evidence produced at the hearing, we find that the Administrative Law Judge properly concluded that petitioners became domiciled in New York City in 1979.

b. New York City to Montauk

The Administrative Law Judge concluded that there was no doubt that when the Murrays purchased their home in Montauk in 1985, they intended to return to Long Island as a place for

retirement. She concluded, however, that since "[v]irtually no ties with New York City were severed in their entirety," the Murrays did not then accomplish a change in domicile.

> "When Mr. Murray's company was bought out in 1983, the winding down of his business affairs and a change in his status as owner of a company was part of a natural process. A transition of this kind is not something that takes place overnight, and his employment status continued to change throughout the six-year period from 1983 until his final retirement in 1989. During those years, he maintained much daily contact with New York City, including the maintenance of a permanent place of abode at 60 East End Avenue, as well as utilizing New York City for many of his daily services and professional contacts. Virtually no ties with New York City were severed in their entirety, but rather the Murrays began to establish contacts and continuity with Montauk associations during these two years. What they did not accomplish, however, was a change in domicile. It is not clear from the record what took place after 1987 as to the characterization of Mr. Murray's employment. The facts remain that Mr. Murray, especially, did not sever his business ties until 1989, did not sell their cooperative apartment until 1989 and did not begin his new business venture until 1989. What petitioners affirmatively did [on the purchase of their Montauk home in 1985] was begin a transitional period during which their change in domicile was taking place. As the court well established in Matter of Newcomb (supra), severing old ties is as equally important as the formulation of ties to a new location. While the Murrays were accomplishing the latter, the former did not take place until after 1987. Accordingly, petitioners' domicile was New York City during the tax years 1986 and 1987" (Determination, conclusion of law "F").

Petitioners argue that they had very few ties with New York City to begin with, and consequently very few ties that they could sever. Further, they are not prohibited from changing their domicile merely because they did not physically abandon the New York City apartment or sever each and every tie to the City, relying on the Tax Appeals Tribunal decisions in Matter of Sutton (supra), Matter of Golub (supra) and Matter of Doman (supra).

As set forth above, the burden of proof to demonstrate a change of domicile is on the party alleging it (Matter of Newcomb, supra; 20 NYCRR 105.20[d][2]). We conclude, as did the Administrative Law Judge, that the Murrays did not meet their burden of proof to show by clear and convincing evidence that they changed their domicile from New York City to Montauk by the beginning of 1986. We agree with the Administrative Law Judge that the Murrays did have significant ties with New York City during the period of their domicile there and they did not sufficiently sever their ties to New York City to demonstrate that they had changed their domicile to Montauk by 1986. The cases relied on by petitioners do not dictate a different conclusion.

In Matter of Sutton (supra), we affirmed the Administrative Law Judge's determination that, based on the weight of the evidence, the taxpayer had proven that he was domiciled in Florida although he continued to maintain a rent-controlled apartment, certain business interests and bank accounts in New York City. Citing Matter of Newcomb (supra), we stated that "[a] change [in 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 confirm the intention" (Matter of Sutton, supra). With respect to the evidence necessary to establish the intention, we relied on the statement of the Court of Appeals in Dupuy v. Wurtz (53 NY 556):

> "it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight.
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> * * *
>
> "The intention may be gathered both from acts and declarations" (Dupuy v. Wurtz, 53 NY 556, 562).

The Administrative Law Judge found that the taxpayer's New York business interests were "merely passive"; his bank accounts were either trusts for his son or long-term accounts related to the businesses; and the rent-controlled apartment was maintained to provide comparatively inexpensive accommodations when he visited New York, which was no more than 60 to 75

days per year. These New York ties are significantly less than those the Murrays maintained with New York City during 1986 and 1987.

The Tribunal distinguished its decision in Sutton from that in Matter of Feldman (Tax Appeals Tribunal, December 15, 1988). In Feldman, the taxpayer, "[m]otivated by failing health and thus a need to retire from the active practice of osteopathic medicine," purchased a home in Florida. However, he retained a residence in New York and continued to practice medicine at and live in his Brooklyn residence for several days each week from May to October when he was not in Florida. We upheld the Administrative Law Judge's determination that the petitioners in Feldman did not meet their burden of proof to establish Florida as their domicile. The ties maintained by the Murrays with New York City are more akin to those of the petitioners in Feldman than in Sutton.

In Matter of Golub (supra), the only issue before the Tribunal was whether the petitioners maintained a permanent place of abode and spent more than 183 days in the State of New York during the years at issue. The Administrative Law Judge's determination that the petitioners were domiciled in Florida was not excepted to by the Division. Therefore, that decision is of no relevance to the matter now under consideration.

In Matter of Doman (supra), the petitioners purchased a cooperative apartment in Manhattan in 1957 which they maintained was their domicile until the early 1970's. In 1963, the petitioners purchased a residential home and property in Shelter Island, which at that time was intended to be used as a vacation home. During the hearing, the petitioners demonstrated that during the early 1970's the center of their lives and activities increasingly shifted from Manhattan to Suffolk County where their Shelter Island home was located. Shelter Island became the center of their domestic, social and civil lives. The tax years at issue were 1982 and 1983. The Administrative Law Judge found that, based on the credible testimony of the petitioners and the weight of the evidence presented, the petitioners had demonstrated that they had changed their domicile to Shelter Island. We affirmed. Noting that a determination of

change in domicile is one of fact rather than law (Matter of Newcomb, supra), we concluded that:

> "[i]n the present case, petitioners only used the New York City co-op on an infrequent basis, and the record indicates that they had demonstrated a change in lifestyle which supported a finding that their domicile had changed" (Matter of Doman, supra).

To the contrary, in the case of the Murrays, the record indicates that during 1986 and 1987 the Murrays used their New York City apartment at least four days per week. Although they had begun "a transitional period during which their change in domicile was taking place" (Determination, conclusion of law "F"), the Administrative Law Judge did not find that they sufficiently severed their ties with New York City in order to accomplish a change in domicile until subsequent to 1987. We agree.

We conclude that the Administrative Law Judge properly weighed all the facts and evidence in this case and correctly applied the law to such evidence in concluding that petitioners did not change their domicile from New York City to Montauk until after 1987. We find no reason to disturb her determination.

c. Penalties

The Administrative Law Judge concluded that: "[a]lthough petitioners assert that the imposition of penalties in this case is inappropriate, petitioners have failed to establish reasonable cause for the waiver of such penalties. Accordingly, penalties are sustained" (Determination, conclusion of law "J").

Petitioners argue that the Division has shown no basis for the assessment of penalties pursuant to Tax Law §§ 685(b)(1), (2) or 685(p) although, according to the Division's own audit guidelines, an auditor must justify the appropriateness of the penalty assessed. The Murrays argue that they relied on the advice of a professional tax preparer in filing as nonresidents and they acted with ordinary care and prudence in preparing their tax returns. Any errors in these returns were inadvertent on their part, they argue.

Petitioners ignore, however, that the burden of proof is on them to show that the tax deficiency resulting from their actions was not due to negligence on their part or that there was substantial authority for the treatment of the tax items which resulted in their substantial understatement of tax (Tax Law § 689[e]). There is no evidence that the Murrays either relied on the advice of a professional tax preparer or acted with ordinary care and prudence in determining to file as nonresidents of the City of New York for the years at issue.

At the hearing, petitioners' tax preparer testified but did not mention the preparation of the returns for the years at issue. There was no explanation of the discrepancies between the testimony of petitioners and the information provided on their 1986, 1987 and 1989 New York City Form 203 and on their 1989 Federal tax return, Form 2119. The explanation offered in petitioners' exception, that the error on their 1986 and 1987 tax returns (indicating that they did not maintain an apartment or other living quarters in the City of New York during any part of the tax year) was the result of a default answer supplied by the accountant's computer program, is not supported by evidence in the record. Also unsupported is the explanation offered in petitioners' exception that the information they reported on Federal Form 2119 for 1989 (that they used their cooperative apartment as their main home for a total of at least three years of the five-year period before it was sold) resulted from an interpretation of the Internal Revenue Code made by petitioners' accountant. As a result, we affirm the determination of the Administrative Law Judge on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Charles W. and Marjorie W. Murray is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Charles W. and Marjorie W. Murray is denied; and

4. The Notice of Deficiency dated November 16, 1990 is sustained.

DATED: Troy, New York
December 14, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner

COMMISSIONER DUGAN concurring in part and dissenting in part:

I agree with that portion of the decision which finds that petitioners established a New York domicile in 1979. I respectfully dissent from that portion of the decision which affirms the determination of the Administrative Law Judge that petitioners did not change their New York domicile for the tax years 1986 and 1987.

The determination of the Administrative Law Judge is premised on her finding that "[v]irtually no ties with New York City were severed [by petitioners] in their entirety, but rather the Murrays began to establish contacts and continuity with Montauk associations during these two years" and "that Mr. Murray, especially, did not sever his business ties until 1989, did not sell their cooperative apartment until 1989 and did not begin his new business venture until 1989" (Determination, conclusion of law "F"). This conclusion is not supported by the facts in the case which show clearly that petitioners intended Montauk to be their domicile and took actions consistent with this intention to establish Montauk as their domicile.

First, the reliance by the Administrative Law Judge on Mr. Murray's employment by Security Pacific through 1989 is misplaced.

The fact of the matter is that Mr. Murray's business "ties" to New York City existed from 1952 through 1989. It did not prevent petitioners from establishing their domicile in Muttontown and was not a relevant factor in the determination that petitioners established a New York City domicile in 1979. Moreover, as the facts show, Mr. Murray's business "tie" was

altered significantly in 1983 when he sold his interest in his firm to Security Pacific and became a part-time employee.

Second, the reliance by the Administrative Law Judge on the fact that petitioners maintained an apartment in New York City through 1989 is also misplaced in light of petitioners' sale of the 75 East End Avenue apartment for a substantially smaller apartment in anticipation of retiring soon thereafter, the purchase in 1985 of their Montauk home (3,000 square feet, comprising four bedrooms, three bathrooms, a living room, dining room, family room, kitchen, two-car garage and a pool on one acre of property), the additions made to that home and the fact that the Murrays' social life consisted of boating near their Montauk home, and involvement in the Montauk community. Moreover, it does not take into account the fact that when petitioners bought their home in Montauk, they did not intend it to be a weekend or vacation home but intended it to be their future home. Nor does it take into account the fact that petitioners spent holidays either at Montauk or at their children's homes in New Jersey or Colorado.

Finally, I find nothing in the facts as found by the Administrative Law Judge which identifies other ties to New York City which Mr. Murray should have severed in order to establish their domicile in Montauk.

In reaching my decision to reverse the Administrative Law Judge, I want to make it clear that I am not overruling any finding by the Administrative Law Judge which is based on the credibility of the witnesses (see, Matter of Stamas, Tax Appeals Tribunal, May 19, 1994).

DATED: Troy, New York
December 14, 1995

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