

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ESTATE OF ALDO GUCCI	:	DECISION
	:	DTA No. 812160
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Years 1977 through 1984.	:	

Petitioner Estate of Aldo Gucci, c/o Stuart A. Smith, Esq., Piper & Marbury, LLP, 1251 Avenue of the Americas, New York, New York 10020-1104, filed an exception to the determination of the Administrative Law Judge issued on September 14, 1995. Petitioner appeared by Piper & Marbury, LLP (Stuart A. Smith, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Craig Gallagher, Esq., of counsel).

Petitioner filed a brief on exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply. Oral argument, at petitioner's request, was heard on June 13, 1996.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner bears the burden of proof where the Department of Taxation and Finance has previously issued a Statement of Audit Changes for the same tax years and upon which the tax was paid.

II. Whether decedent was domiciled in New York City pursuant to Tax Law § 605(b)(1)(A)¹ during the years 1977 through 1984.

¹The New York City tax on personal income is imposed by the Administrative Code of the City of New York which contains essentially the same provisions as Article 22 of the Tax Law. All references to particular sections of Article 22 in this decision shall be deemed references (though uncited) to the corresponding sections of the Administrative Code.

III. Whether decedent was a resident of New York City pursuant to Tax Law § 605(b)(1)(B) during the years 1977 through 1984.

IV. Whether petitioner was properly precluded from submitting evidence with respect to the itemization of days spent within and without New York State and City for the years 1977 through 1984.

V. Whether petitioner's failure to pay the tax was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

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

Petitioner, Estate of Aldo Gucci, filed a petition with the Division of Tax Appeals on August 9, 1993, which requested a redetermination of a deficiency of New York State and New York City personal income taxes for the years 1977 through 1984 in the amount of \$6,695,678.55.²

The petition alleges that petitioner was neither domiciled in New York nor a statutory resident thereof during the years in question. Attached to the petition is a one-page statement which includes allegations of fact as well as arguments of law. The statement of facts does not comply with the regulatory requirement that the petition contain separately numbered paragraphs setting forth a statement of facts upon which petitioner relies to prove each alleged error of the Commissioner (see, 20 NYCRR 3000.3[b][5]). The statement does, however, set forth such facts in narrative fashion.

The petition alleges that the decedent was born in Italy in 1905 and maintained his Italian citizenship until his death in 1990, all the while keeping "extremely close ties" to Italy, and maintaining a permanent place of abode in Florence, Italy. In addition, the petition asserts

²Aldo Gucci died on January 19, 1990. Petitioners are listed as Angelo Rosato and Stuart A. Smith, Co-Executors, Estate of Aldo Gucci. The petition is signed only by Stuart A. Smith, Co-Executor.

that the decedent spent practically all of his final years (1988-1990) (years beyond the scope of the audit) in Italy, as that was his place of domicile, the place to which he always intended to return. The petition contends that the decedent, actively involved in directing the business affairs of the Gucci multinational business, with locations around the world, was constantly traveling between New York, Florida, California, the Far East and Europe. Although during the years in question the decedent concededly maintained a "convenience apartment" in New York City, located in close proximity to the decedent's New York office, the petition denies that the decedent ever spent in the aggregate more than 183 days of any of the taxable years at issue in New York. In addition, the petition claims that the decedent never voted in or obtained a driver's license from New York and, further, that there was never any indicia to suggest that the decedent was a domiciliary of New York. Based on these facts, the petition alleges that the decedent was not a resident individual of New York during the audit period and that the proposed adjustments in the amount of taxes owed by petitioner, the decedent's estate, are without foundation.

The Division of Taxation ("Division") served an answer, dated October 5, 1993, on petitioner. The Division, in its answer, denied petitioner's allegations and stated that: (1) a Notice of Deficiency was issued to decedent petitioner, Aldo Gucci, which determined his liability for New York State and City personal income tax for the years 1977 through 1984; (2) during the years 1977 through 1984, decedent petitioner was domiciled in the City and State of New York; (3) during the years 1977 through 1984, decedent petitioner was a "resident individual" and "city resident individual" as defined in Tax Law §§ 605(b) and 1305(a); and (4) petitioner is liable for payment of personal income tax and City personal income tax for the audit period pursuant to Tax Law §§ 601 and 1301. The answer also states that petitioner has the burden to prove that the determination "is erroneous and/or improper".

In late 1976, Aldo Gucci became a resident alien of the United States of America. During the years at issue, he was a resident alien.

The late Aldo Gucci filed Federal personal income tax returns (Form 1040) for the years 1977 through 1984. However, he did not file any New York State or City tax returns for those years. During the audit period, Mr. Gucci's Federal income tax returns were prepared by Altman, Eisenberg & Company, 570 7th Avenue, New York, New York.

On or about January 17, 1986, Aldo Gucci was charged in U.S. District Court, Southern District of New York, with conspiracy to defraud the United States government and Federal tax evasion. He was represented in that Federal criminal matter by Milton Gould, Esq., of the law firm Shea and Gould. On that date, a Waiver of Indictment and Information was filed on decedent petitioner's behalf.

Subsequently, in 1986, Aldo Gucci pleaded guilty to conspiracy to defraud the United States government and to two counts of Federal tax evasion. Specifically, he was convicted of conspiracy for failing to report \$11,800,000.00 of income from 1977 to 1982. In addition, he was convicted of Federal tax evasion for the years 1979 and 1980, during which years he evaded \$3,500,000.00.

On or about June 18, 1986, the City of New York, Department of Finance, Bureau of Tax Collection ("Department of Finance") commenced a field audit of decedent petitioner. Bertyl Andrews was the auditor assigned to conduct the audit.

During the hearing, the Division submitted as its Exhibit "N", Volume I of the audit workpapers. Included in the audit workpapers were contact sheets entitled "Contacts and Comments of All Audit Actions" and "Tax Field Audit Record" which contained all of the auditor's contacts and comments concerning this audit. According to the contact sheets, the auditor: (1) met with petitioner's representative on July 15, 1986 and discussed the issue of residency and nonfiling; (2) was notified by petitioner's representative on October 17, 1986 that the taxpayer was having problems with the Federal government and that he would get back to the auditor; (3) on April 27, 1987 sent a document request to petitioner's representative; (4) spoke with petitioner's representative on May 12, 1987 regarding the document request and was informed that petitioner's representative was still involved with the Federal government; and (5)

on January 25, 1988 spoke with petitioner's representative who informed him that "he was contacted by Charles Davies in Albany" and that he wanted to know which office was in charge. The notes indicate that the auditor promised to find out why petitioner's representative was contacted by Albany.

On September 29, 1987, Charles Davies, Audit Group Manager of the Division's Audit Division - Central Income Tax Section, sent a letter to Mr. Gucci.³ Mr. Davies wrote, in pertinent part:

"Under the provisions of Section 6103(d) of the Internal Revenue Code, we have been notified by the Internal Revenue Service that you filed amended United States Individual Income Tax Returns from 1977 through 1981 and original Personal Income Tax Returns for 1982 through 1984 with the Internal Revenue Service in the summer of 1986. Because you have not yet filed comparable returns with New York State, please either send me the necessary returns with a check for the tax and interest made out to 'New York State Income Tax' or contact me to explain your situation. I have enclosed the forms that I believe will be suitable."

Petitioner's representative responded by letter, addressed to Mr. Davies, dated October 21, 1987, in which he stated that:

"I am in receipt of your letter dated September 29, 1987, a copy of which is enclosed for your reference. Please be advised that Aldo Gucci has not spent sufficient time in New York State to require him to file New York State income tax returns for the periods set forth in your letter. I made this position clear to an auditor of the New York State Department of Finance more than a year ago."

In a letter to petitioner's representative dated November 10, 1987, Mr. Davies wrote, in pertinent part:

"Thank you for your letter of October 21, 1987, in which you said that Mr. Gucci had not spent sufficient time in New York State in 1977 through 1984 to require him to file New York State income tax returns, and that you had made this position clear to an auditor from our department more than a year ago.

"I have not been able to find a record of your dealing with this department on that issue, and since there is more involved with filing requirements than one's precense [sic] in the state, would you please answer the applicable questions below

"1. By whom was Mr. Gucci employed from 1977 to 1984 and in what capacity?

"2. Where did Mr. Gucci reside from 1977 to 1984?

"3. If your answer to question #2 indicates that Mr. Gucci resided outside of New

³The letter was addressed to "Dr. Aldo Gucci, c/o Mr. Stuart A. Smith, Esq., Shea and Gould, 111 Washington Avenue, Albany, New York 12210."

York State, please also answer the following:

"a. Did Mr. Gucci maintain an apartment or other place of abode in New York State in 1977-1984? If so, where and when?

"b. Where did Mr. Gucci regularly work from 1977 to 1984?

"c. If the answer to 'b' indicated that Mr. Gucci worked at his home, where was the office that he reported to from 1977 to 1984?

"d. How many days in each year from 1977 to 1984 did Mr. Gucci work in New York State and New York City?"

By letter dated November 24, 1987, petitioner's representative supplied the following answers to Mr. Davies' November 10, 1987 questions:

1. "From 1977 to 1984, Mr. Gucci was employed by each of the companies constituting the worldwide Gucci network. These companies include: Guccio Gucci, S.p.a. (Italy); Gucci Limited (England); Gucci Limited (Hong Kong); Gucci Parfums (Italy); and Gucci Shops, Inc. (New York). He was a director of each of these corporations."

2. "From 1977 to 1984, Mr. Gucci was domiciled in Palm Beach, Florida where he maintained his principal residence. He also maintained residences in Rome and in Florence, Italy. For convenience, he maintained an apartment in New York City."

3a. "Mr. Gucci maintained an apartment during the period of 1977 to 1984 at 25 West 54th Street, New York, New York 10019."

b. "There is no place that can be described as the place where Mr. Gucci regularly worked during the period 1977 to 1984. He was responsible for directing the activities of the worldwide network of Gucci companies and traveled continuously and extensively during this period."

c. "Not applicable."

d. "A review of Mr. Gucci's records during the period of 1977-1984 indicates that he worked no more than approximately 100 days in New York City in each year during this period."

Mr. Davies had additional questions which he posed in a letter to petitioner's representative dated January 5, 1988. The questions related to: Mr. Gucci's voter registration; his driver's license; the state in which his personal car was registered; his membership in civic organizations and their locations; his will and his address recited in the will; his ownership of his Florida residence and the execution of a "Florida Certificate of Residency". Mr. Davies also asked the following questions:

1. "In light of his filing status, does Mr. Gucci live with his wife? If he does, where did Mrs. Gucci stay most of the time from 1977 through 1984?"⁴
2. "What other aspects of Mr. Gucci's life support his domicile in Florida?"
3. "Do the Italian partnerships mentioned on the Schedule E's for Mr. Gucci's 1040's have any offices, stores or warehouses in New York State?"
4. "Where was Mr. Gucci domiciled before he moved to Florida?"

Included with Mr. Davies' letter was a schedule to apportion petitioner's income to New York State and City for tax purposes.⁵ Petitioner's representative was asked to prepare a schedule for each year from 1977 to 1984. Mr. Davies requested a reply within 60 days.

By letter dated April 5, 1988, petitioner's representative responded as follows:

"Mr. Gucci is a citizen of Italy and a resident alien of the United States. He is therefore not eligible to vote in the United States.

* * *

"Mr. Gucci does not have any driver's license issued by any State of the United States. Although he has an Italian driver's license, he has not, in fact, driven an automobile for several years because of his age.

* * *

"His personally owned car is registered in Florida.

* * *

4

For tax years 1977 through 1981, petitioner's filing status was "Head of Household" with one dependent child, Patricia Gucci, living with him. For tax years 1982 through 1984, his filing status was "Married filing separate return" and he claimed an exemption for his dependent child, Patricia Gucci, who lived with him.

⁵The schedule asked for the income to be apportioned for both New York State and City purposes (and an explanation if the wages shown on the Federal return were different), and an allocation of days in the year, as follows:

"Days in the Year
Less: Nonworking Days
Saturdays and Sundays
Holidays
Vacation Days
Sick Leave
Other Nonworking Days (explain)
Total Nonworking Days

Total Working Days
Less: Total Working Days Outside N.Y. State & N.Y. City
Total Working Days in N.Y. State and N.Y. City"

"Mr. Gucci has been active in Florida civic and charitable organizations for many years. His Florida activities include the Palm Beach Heart Association, the Miami Opera Guild, the Palm Beach Chapter of the American Cancer Association, the Northwood Institute, St. Mary's Hospital of Palm Beach and the Bal Harbour Chapter of the Humane Society. He is also a member of the Pointsiana Club and the Palm Beach Club, which are both located in Florida.

* * *

"Mr. Gucci owns his Florida residence.

* * *

"Mr. Gucci lives with his wife, who is an Italian citizen and who is a non-resident alien. During the period 1977-1984, Mrs. Gucci spent most of the time in Italy. They would spent time together in Italy, England and Florida.

* * *

"Mr. Gucci has a will. The address in his will is his residence in Rome, Italy.

* * *

"Mr. Gucci does not recall whether he has signed a Florida Certificate of Residency. He has, however, maintained a residence in Florida for more than 20 years.

* * *

"During the period 1977-1984, Mr. Gucci was actively involved in directing the affairs of his world-wide business. He traveled extensively and spent considerable amounts of time in Italy, England, Hong Kong, California, and Florida, and spent a minimal amount of time in New York City. In every sense of the word, Mr. Gucci was a citizen of the world and pursued his business activities throughout Europe and the Far East. To the extent he would return home to the United States, he would spend that time at his Florida residence.

* * *

"As indicated above, Mr. Gucci is a citizen of Italy and has considerable ties to the country of his birth. In 1977, he became a resident alien of the United States. More than ten years before that date, he purchased a residence in Florida. Prior to 1977 and thereafter, Mr. Gucci spent considerable amounts of time in Italy. As stated above, to the extent he returned to a home in the United States during 1977-1984, it was to his Florida residence."

There was a negative response to the question, "[d]o the Italian partnerships mentioned on the Schedule E's for Mr. Gucci's 1040's have any offices, stores or warehouses in New York State?"

Mr. Smith also included schedules of financial and personal data which contained the following information:

	<u>New York State</u>	<u>New York City</u>
Income to be Apportioned for years: 1977	\$ 30,400.00	\$ 30,400.00
1978	31,593.00	31,593.00
1979	75,596.00	75,596.00
1980	90,694.00	90,694.00
1981	90,480.00	90,480.00
1982	185,833.00	185,833.00
1983	320,000.00	320,000.00
1984	493,000.00	493,000.00

Each year 1977 through 1984, inclusive, contained 365 or 366 days, of which 279 were working days and 49 of those were working days in both New York State and City.

On May 19, 1988, the Division's Audit Division - Central Income Tax Section issued to petitioner four documents entitled "Statement of Audit Changes" ("statement") for the tax years 1977 through 1984, inclusive.

The statement issued for taxable years 1977 and 1978 contained the following:

"Explanation: Based on the information submitted on your behalf by your accountant, we have computed your New York State Income Tax liability for the tax years shown above.

"All income of a nonresident of New York State is taxable to New York State if it is attributable to an occupation carried on in the state (Section 632(b)(B) [sic] of the New York State Tax Law).

"All wages of a nonresident of New York City are taxable to New York City when earned within the city (Section U46-2.0(a)(1) of the New York City Administrative Code).

"We have allowed you the standard deduction because it exceeds your allowable itemized deduction.

"Late filing, late payment and negligence penalties are imposed for your failure to file your personal income tax returns for the years above (Sections 685(a)(1), 685(a)(2) and 685(b) of the State Tax Law and Sections T46-185.0(a)(1), T-46-185.0(a)(2) and T46-185.0(b) of the City Code).

"Your additional tax due, which is shown below, is computed in detail on the attached sheets:

	<u>1977</u>	<u>1978</u>	
"New York State Tax Due	\$113.16	\$105.80	
New York City Nonresident			
Earnings Tax	<u>10.53</u>	<u>11.47</u>	
TOTAL TAX DUE	\$123.69	\$117.27	\$240.96
LATE FILING PENALTY	27.83	26.39	54.22
LATE PAYMENT PENALTY	30.92	29.32	60.24
NEGLIGENCE PENALTY	6.18	5.86	12.04
		Interest	<u>297.79</u>
		TOTAL DUE	\$665.25"

Attached to the statement was an "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1977</u>	<u>1978</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1977: \$30,400 x 49/279	\$5,339.00	
1978: \$31,593 x 49/279		\$5,549.00
Less: Standard Deduction	(1,500.00)	(1,900.00)
Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1977: 3 x \$650 x \$5,339/\$1,003.258 [sic]	(10.00)	
1978: 3 x \$650 x \$5,549/\$2,383,509		<u>(4.00)</u>
Corrected New York Taxable Income	<u>\$3,829.00</u>	<u>\$3,645.00</u>
State Tax on the Above	\$ 113.16	\$ 105.80
Less: Maximum Tax Benefit	-0-	-0-
STATE TAX DUE	<u>\$ 113.16</u>	<u>\$ 105.80</u>
New York City Wages (from above)	\$5,339.00	\$5,549.00
Less: Exclusion	<u>3,000.00</u>	<u>3,000.00</u>
Taxable Amount	\$2,339.00	\$2,549.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings tax	<u>\$ 10.53</u>	<u>\$ 11.47"</u>

The statement issued for taxable years 1979 and 1980 contained the same narrative under

"Explanation" as was contained in the statement for the years 1977 and 1978 contained above.

The additional tax due was computed to be:

	<u>1979</u>	<u>1980</u>	
"New York State Tax Due	\$531.36	\$725.99	
New York City Nonresident Earnings Tax	<u>50.75</u>	<u>62.68</u>	
TOTAL TAX DUE	\$582.11	\$788.67	\$1,370.78
LATE FILING PENALTY	\$130.97	\$177.45	308.42
LATE PAYMENT PENALTY	145.53	197.17	342.70
NEGLIGENCE PENALTY	29.11	39.43	68.54
		Interest	<u>1330.99</u>
		TOTAL DUE	
	\$3421.43"		

The "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1979</u>	<u>1980</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1979: \$75,596 x 49/279	\$13,277.00	
1980: \$90,694 x 49/279		\$15,928.00
Less: Standard Deduction	(2,124.00)	(2,400.00)
Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1979: 3 x \$700 x \$13,277/\$2,650,821	(11.00)	
1980: 3 x \$750 x \$15,928/\$2,112.802 [sic]		(17.00)
Corrected New York Taxable Income	<u>\$11,142.00</u>	<u>\$13,511.00</u>
State Tax on the Above	\$ 531.36	\$ 725.99
Less: Maximum Tax Benefit	-0-	-0-
STATE TAX DUE	<u>\$ 531.36</u>	<u>\$ 725.99</u>
New York City Wages (from above)	\$13,277.00	\$15,928.00
Less: Exclusion	<u>2,000.00</u>	<u>2,000.00</u>
Taxable Amount	\$11,277.00	\$13,928.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings tax	<u>\$ 50.75</u>	<u>\$ 62.68"</u>

The statement issued for taxable years 1981 and 1982 contained the same narrative under "Explanation" as was contained in the statement for the years 1977 and 1978 contained above in Finding of Fact "17". The additional tax due was computed to be:

	<u>1981</u>	<u>1982</u>	
"New York State Tax Due	\$722.75	\$2,378.30	
New York City Nonresident Earnings Tax	<u>62.51</u>	<u>146.87</u>	
TOTAL TAX DUE	\$785.26	\$2,525.17	\$3,310.43
LATE FILING PENALTY	\$176.68	\$ 568.16	744.84
LATE PAYMENT PENALTY	196.32	631.29	827.61
NEGLIGENCE PENALTY	39.26	\$ 126.26	165.52
		Interest	<u>1,948.91</u>
		TOTAL DUE	\$6,997.31"

The "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1981</u>	<u>1982</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1981: \$90,480 x 49/279	\$15,891.00	
1982: \$185,833 x 49/279		\$32,637.00
Less: Standard Deduction	(2,400.00)	(2,400.00)

Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1981: 3 x \$750 x \$15,891/\$2,209,396	(16.00)	
1982: 3 x \$800 x \$32,637/\$1,450,557		(54.00)
	<hr/>	
Corrected New York Taxable Income	<u>\$13,475.00</u>	<u>\$30,183.00</u>
State Tax on the Above	\$ 722.75	\$ 2,785.62
Less: Maximum Tax Benefit	-0-	<u>407.32</u>
STATE TAX DUE	<u>\$ 722.75</u>	<u>\$ 2,378.30</u>
New York City Wages (from above)	\$15,891.00	\$32,637.00
Less: Exclusion	<u>2,000.00</u>	-0-
Taxable Amount	\$13,891.00	\$32,637.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings Tax	<u>\$ 62.51</u>	<u>\$ 146.87"</u>

The statement issued for taxable years 1983 and 1984 contained the following:

"Explanation: Based on the information submitted on your behalf by your accountant, we have computed your New York State Income Tax Liability for the tax years shown above.

"All income of a nonresident of New York State is taxable to New York State if it is attributable to an occupation carried on in the state (Section 632(b)(B) [sic] of the New York State Tax Law).

"All wages of a nonresident of New York City are taxable to New York City when earned within the city (Section U46-2.0(a)(1) of the New York City Administrative Code).

"Late filing, late payment and negligence penalties are imposed for your failure to file your personal income tax returns for the years above (Sections 685(a)(1), 685(a)(2) and 685(b) of the State Tax Law and Sections T46-185.0(a)(1), T-46-185.0(a)(2) and T46-185.0(b) of the City Code)."

The additional tax due was computed to be:

	<u>1983</u>	<u>1984</u>	
"New York State Tax Due	\$4,553.70	\$6,815.10	
New York City Nonresident Earnings Tax	<u>252.91</u>	<u>389.63</u>	
TOTAL TAX DUE	\$4,806.61	\$7,204.73	\$12,011.34
LATE FILING PENALTY	\$1,081.49	\$1,621.06	2,702.55
LATE PAYMENT PENALTY	\$1,201.66	\$1,368.90	2,570.56
NEGLIGENCE PENALTY	\$ 240.33	\$ 360.24	600.57
		Interest	<u>3,934.79</u>
		TOTAL DUE	\$21,819.81"

The "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1983</u>	<u>1984</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1983: \$320,000 x 49/279	\$56,201.00	
1984: \$493,000 x 49/279		\$86,584.00
Less: New York Deductions		
Federal Deduction x New York Income/Federal Income		
1983: \$107,788 x \$56,201/\$1,453,506	(4,171.00)	
1984: \$120,390 x \$86,584/\$883,745		(11,798.00)
Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1983: 3 x \$800 x \$56,201/\$1,453,506	(93.00)	
1984: 3 x \$800 x \$86,584/\$883,745		(235.00)
Corrected New York Taxable Income	<u>\$51,937.00</u>	<u>\$74,551.00</u>
State Tax on the Above	\$ 5,831.18	\$ 8,997.14
Less: Maximum Tax Benefit	<u>1,277.48</u>	<u>2,182.04</u>
STATE TAX DUE	<u>\$ 4,553.70</u>	<u>\$ 6,815.10</u>
New York City Wages (from above)	\$56,201.00	\$86,584.00
Less: Exclusion	-0-	-0-
Taxable Amount	\$56,201.00	\$86,584.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings tax	<u>\$ 252.91</u>	<u>\$ 389.63"</u>

On May 25, 1988, Aldo Gucci executed the "Consent to Findings" section of the two statements issued for tax years 1977/1978 and 1979/1980 and submitted two checks to the Division, dated May 25, 1988, in the amounts of \$665.25 and \$3,421.43, respectively.

Petitioner submitted to the Division two checks dated July 12, 1988 in the amounts of \$6,997.31 and \$21,819.81, respectively, for the tax years 1981/1982 and 1983/1984. He did not execute the "Consent to Findings" section on either the statement issued for tax years 1981 and 1982 or the statement issued for tax years 1983 and 1984.

According to the contact sheets, the Department of Finance auditor, Mr. Andrews, was unable to get any information from the Division's Albany office.

On April 26, 1988, the Department of Finance assigned the audit to Ann Marie Murray. Ms. Murray has been employed as an associate tax auditor with the Department of Finance for

seven years. Over that period of time she has performed approximately 150 income tax audits (tr., pp. 51-52).

Review of the contact sheets indicates that Ms. Murray sent her first appointment and document request to Aldo Gucci in care of his representative on June 6, 1988. The appointment was scheduled for July 12, 1988 at 9:30 A.M. Her notes indicate that petitioner's representative did not keep the appointment. The notes also reveal that a packet of documents was allegedly sent by petitioner's representative by certified mail to the auditor prior to the scheduled appointment date; however, she never received them. Petitioner's representative's office resent the packet and cover letter on July 12, 1988. The packet of documents included documentary evidence of petitioner's payment of New York State and City taxes for the years 1977 through 1980.

Subsequently, on July 18, 1988, petitioner's representative sent documentary evidence of petitioner's payment of New York State and City taxes for the years 1981 through 1984.

In a letter to Ms. Murray dated August 15, 1988, petitioner's representative stated that he regarded petitioner's matter as closed because of the Division's assessment of taxes for 1977 through 1981 which "were calculated on the basis of formal questionnaires" sent by the Division's Albany office and petitioner's payment of same.

Ms. Murray sent a letter to petitioner's representative dated September 21, 1988 in which she wrote:

"I have received the copies of the assessments and checks for payment which you sent me. I have also received the audit report from Albany. I realize that New York State issued an assessment and Mr. Gucci paid it. That, however, does not have any bearing on the residency audit being conducted by New York City.

"This case is still open and will remain open until you have provided sufficient documentation for us to reach a decision"

According to the audit workpapers for the New York City audit, the taxpayer was requested to provide the following information for 1977 through 1984 to substantiate residency and allocation:

- "1. Bank statements and cancelled checks for all U.S. bank accounts.
- "2. Monthly statements with receipts for all credit and charge cards.
- "3. Telephone and utility bills for all residences.
- "4. Diaries with backup documentation.
- "5. Any available travel tickets.
- "6. Proof of dependent child's residence, education, and employment.
- "7. Breakdown of directors fees and buying office bills income from Gucci Shops Inc./Gucci Parfums Ltd., with a list of office locations for each and proof of which office Taxpayer worked out of.
- "8. Copies of Florida tax returns and Florida declaration of domicile.
- "9. All passports, alien cards, and reentry visas for Mr. and Mrs. Gucci.
- "10. Affidavits from Mr. and Mrs. Gucci stating where they are domiciled, the date the domiciles were acquired, and what their previous domiciles were.
- "11. A list of all places of abode owned, leased, or used by Taxpayer since he came to the United States.
- "12. State what changed about Taxpayer's lifestyle and intentions to change his status from nonresident alien to resident alien."

At the hearing, Ms. Murray testified that although she had made six detailed requests that Mr. Gucci provide her with an affidavit as to his domicile for the years in question, he failed to do so. She further testified that she had made approximately 10 requests of Mr. Gucci for a day count analysis and supporting documents for the years in question and that he had failed to provide same (tr., pp. 54-55).

Ms. Murray was asked to approximate the number of times she had scheduled a meeting with the taxpayer or his representative and they had failed to show up or had failed to provide the documentation which she had requested. Her response was:

"They failed to show up six times. They failed to provide documents every time, which I think I made 11 requests (tr., p. 55).

As part of its Exhibit "P", the Division submitted part of an agreement, entered into on March 4, 1976, by and between Toby Armour Schneider and Jerome A. Manning, as Trustees under the Will of Rachel A. Doyle for the benefit of Leah Doyle, as Trustees under the Will of

Rachel A. Doyle for the benefit of Joshua Klein and Ruth A. Kamen, as sellers, and Gucci Parfums International, Ltd., Inc., a Florida corporation, having its principal office at 256 Worth Avenue, Palm Beach, Florida, as purchaser, and Aldo Gucci, of 689 Fifth Avenue, New York, New York, as guarantor, for the purchase and sale of the premises located at 683 Fifth Avenue, New York, New York.

During the audit period, petitioner was chairman of Gucci Shops, Inc., a New York corporation. During this same period, he conducted business in and maintained a business office with Gucci Shops, Inc. located at 685 Fifth Avenue, New York, New York.

Petitioner maintained a cooperative apartment in New York City during the years in question at 25 West 54th Street, Apartment 12E, New York, New York. Petitioner purchased this cooperative apartment in 1976.

Petitioner, during the years in question, received mail at both 25 West 54th Street, Apartment 12E, New York, New York, and at 685 Fifth Avenue, New York, New York.

As noted in Finding of Fact "8", petitioner pleaded guilty to conspiracy to defraud the United States government and to two counts of Federal tax evasion. Judge Vincent L. Broderick sentenced him to a term of imprisonment of one year and one day on the conspiracy count and imposed a fine of \$10,000.00; a similar sentence was imposed on each of counts two and three to run concurrently with each other, but suspended execution thereof and placed petitioner on probation for a period of five years to begin upon the expiration of the sentence imposed under count one. Judge Broderick imposed special conditions of probation under counts two and three, to wit, that Mr. Gucci was to make full restitution; that he would cooperate with the government in its continuing investigation with respect to corporate tax violations of Gucci Shops, Inc.; and that he would for the first year of his probation devote himself on a full-time basis to community service.

Shortly before petitioner was to surrender himself to Federal authorities to commence his sentence, his representative, Stuart A. Smith, filed a motion for an order under 8 USC § 1251(b) recommending that Mr. Gucci not be deported. On October 20, 1986, U.S. District

Court Judge Edward Weinfeld granted petitioner's motion and denied deportation. Judge Weinfeld, based on documents submitted to him including the presentence report, in his decision wrote, in pertinent part, that:⁶

"Defendant, who is 81 years of age, is to surrender tomorrow to commence service of his sentence. He is a member of a family that conducts a well known business in the sale of expensive leather goods which was founded by his father in Florence, Italy. Defendant and his brothers carried on a successful business in this city and in prestigious business districts in large cities of the United States and they issued franchises to others to sell under the name of Gucci.

"The defendant first entered the United States from his native country, Italy, and travelled back and forth in connection with family business interests. He became a legal and permanent resident of the United States on December 3, 1976, following which he filed his first tax returns.

"In November 1981, he went through a marriage ceremony with a woman with whom he had been living while married to but separated from his wife. The relationship between defendant and his paramour has been a good one and she maintains an apartment in this city, as well as in England and in Rome. A daughter was born of this marriage, with whom he has a good relationship. She is married and lives with her husband in New York City. The daughter has a child -- a granddaughter with whom the defendant not only has a good relationship but, according to the report, has been a mellowing influence in his life.

"The defendant has been a New York City resident for twenty-five years and has owned cooperative apartments in the city where he maintains his residence and offices. The defendant's business activities for approximately twenty-five years have been centered in this city and in other cities where the Gucci shops function" (United States v. Aldo Gucci, No. 86 Cr. 0058 [U.S. Dist. Ct., SDNY, October 20, 1986]).

On November 3, 1989, Aldo Gucci executed his United States Last Will and Testament in New York, New York. In his will, Mr. Gucci declared 1491 North Ocean Boulevard, Palm Beach, Florida as his residence.

Aldo Gucci died on January 19, 1990 in Rome, Italy.

The United States will executed on November 3, 1989 was presented for probate to the New York County Surrogate's Court on February 23, 1990. On March 12, 1991, the New York Surrogate's Court granted Letters Testamentary for the estate of Aldo Gucci late of New York County to Arcangelo C. Rosato and Stuart A. Smith.

On May 1, 1991, the Department of Finance issued four documents entitled "Statement

⁶A copy of this decision was submitted as part of the Division's Exhibit "P."

of Personal Income Tax Audit Changes" ("statement") to Arcangelo C. Rosato and Stuart A. Smith, Executors of the Estate of Aldo Gucci. The following appeared in the "Explanation" section of each statement:

"Taxpayer is deemed to be a resident of New York State & City in accordance with NY Tax Law Ch 60, Art 22, sec 605, NY Tax Law Art 30, sec 1305 & NYC Art 11, Ch 17, sec 11-1705."

The "Explanation" section also contained the following "NYS & NYC residency allocation" of income:

	<u>State</u>	<u>City</u>
1977	\$ 958,559.00	\$ 958,559.00
1978	2,329,053.00	2,329,053.00
1979	2,564,883.00	2,564,883.00
1980	2,026,006.00	2,026,006.00
1981	2,121,237.00	2,121,237.00
1982	1,344,741.00	1,344,741.00
1983	1,291,381.00	1,291,381.00
1984	686,404.00	686,404.00

According to the statements, the corrected taxable income for each of the audit years was determined to be:

	<u>State</u>	<u>City</u>
1977	\$ 962,388.00	\$ 962,388.00
1978	2,332,698.00	2,332,698.00
1979	2,576,025.00	2,576,025.00
1980	2,039,517.00	2,039,517.00
1981	2,134,712.00	2,134,712.00
1982	1,374,924.00	1,374,924.00
1983	1,343,318.00	1,343,318.00
1984	760,955.00	760,955.00

Each statement contained the computation of additional tax, interest and penalties due as follows:

(a) Statement for 1977 and 1978:

	<u>State</u> <u>1977</u>	<u>City</u> <u>1977</u>	<u>State</u> <u>1978</u>	<u>City</u> <u>1978</u>	<u>Total</u>
Tax on Corrected Taxable Income	\$142,668.20		\$314,879.96		
Add: New York City Tax		\$ 40,982.68		\$ 99,906.01	
Corrected Tax Due	\$142,668.20	\$ 40,982.68	\$314,879.96	\$ 99,906.01	
Tax Previously Computed	<u>113.16</u>	<u>10.53</u>	<u>105.80</u>	<u>11.47</u>	

Total Additional Tax Due	\$142,555.04	\$ 40,972.15	\$314,774.16	\$ 99,894.54	\$598,195.89
Penalties:					
685(a)(1) Nonfiling					
25% of tax	35,638.76	10,243.04	78,693.54	24,973.64	149,548.98
685(b) Negligence					
5% of tax	7,127.75	2,048.61	15,738.71	4,994.73	29,909.80
Interest to 5/31/91	<u>283,130.22</u>	<u>81,375.24</u>	<u>573,311.71</u>	<u>181,942.19</u>	<u>1,119,759.36</u>
TOTAL	\$468,451.77	\$134,639.04	\$982,518.12	\$311,805.10	\$1,897,414.03

(b) Statement for 1979 and 1980:

	<u>State</u> <u>1979</u>	<u>City</u> <u>1979</u>	<u>State</u> <u>1980</u>	<u>City</u> <u>1980</u>	<u>Total</u>
Tax on Corrected					
Taxable Income	\$ 352,760.36		\$272,993.13		
Add: New York City Tax		<u>\$110,369.08</u>		<u>\$ 87,299.23</u>	
Corrected Tax Due	<u>\$ 352,760.36</u>	<u>\$110,369.08</u>	<u>\$272,993.13</u>	<u>\$ 87,299.23</u>	
Tax Previously Computed	<u>531.36</u>	<u>50.75</u>	<u>725.99</u>	<u>62.68</u>	
Total Additional Tax Due	\$ 352,229.00	\$110,318.33	\$272,267.14	\$ 87,236.55	\$822,051.02
Penalties:					
685(a)(1) Nonfiling					
25% of tax	88,057.25	27,579.58	68,066.79	21,809.14	205,512.76
685(b) Negligence					
5% of tax	17,611.45	5,515.92	13,613.36	4,361.83	41,102.56
Interest to 5/31/91	<u>583,486.78</u>	<u>182,748.39</u>	<u>406,159.17</u>	<u>130,136.60</u>	<u>1,302,530.94</u>
TOTAL	\$1,041,384.48	\$326,162.22	\$760,106.46	\$243,544.12	\$2,371,197.28

(c) Statement for 1981 and 1982:

	<u>State</u> <u>1981</u>	<u>City</u> <u>1981</u>	<u>State</u> <u>1982</u>	<u>City</u> <u>1982</u>	<u>Total</u>
Tax on Corrected					
Taxable Income	\$272,736.16		\$168,635.16		
Add: New York City Tax		\$ 91,392.62		\$ 58,721.73	
NYC resident					
tax surcharge				<u>2,936.09</u>	
Corrected Tax Due	<u>\$272,739.76</u>	<u>\$ 91,392.62</u>	<u>\$168,635.16</u>	<u>\$ 61,657.82</u>	
Tax Previously Computed	<u>722.75</u>	<u>62.51</u>	<u>2,378.30</u>	<u>146.87</u>	
Total Additional Tax Due	\$272,017.01	\$ 91,330.11	\$166,256.86	\$ 61,510.95	\$591,114.93
Penalties:					
685(a)(1) Nonfiling					
25% of tax	68,004.25	22,832.53	41,564.22	15,377.74	147,778.74
685(b) Negligence					
5% of tax	13,600.85	4,566.51	8,312.84	3,075.55	29,555.75
Interest to 5/31/91	<u>341,749.45</u>	<u>114,742.89</u>	<u>167,149.93</u>	<u>61,841.36</u>	<u>685,483.63</u>
TOTAL	\$695,371.56	\$233,472.04	\$383,283.85	\$141,805.60	\$1,453,933.05

(d) Statement for 1983 and 1984:

<u>State</u> <u>1983</u>	<u>City</u> <u>1983</u>	<u>State</u> <u>1984</u>	<u>City</u> <u>1984</u>	<u>Total</u>
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Tax on Corrected Taxable Income	\$149,397.88		\$ 87,767.74		
Add: New York City Tax		\$ 57,362.67		\$32,321.07	
NYC resident tax surcharge		<u>5,736.27</u>		<u>1,616.05</u>	
Corrected Tax Due	\$149,397.88	\$ 63,098.94	\$ 87,767.74	\$33,937.12	
Tax Previously Computed	<u>4,553.70</u>	<u>252.91</u>	<u>6,815.10</u>	<u>389.63</u>	
Total Additional Tax Due	\$144,844.18	\$ 62,846.03	\$ 80,952.64	\$33,547.49	\$322,190.34
Penalties:					
685(a)(1) Nonfiling					
25% of tax	36,211.05	15,711.51	20,238.16	8,386.87	80,547.59
685(b) Negligence					
5% of tax	7,242.21	3,142.30	4,047.63	1,677.37	16,109.51
Interest to 5/31/91	<u>120,213.11</u>	<u>52,158.90</u>	<u>53,091.14</u>	<u>22,001.44</u>	<u>247,464.59</u>
TOTAL	\$308,510.55	\$133,858.74	\$158,329.57	\$65,613.17	\$666,312.03

The Division issued a Notice of Deficiency (Notice No. L-003038767-1) dated September 20, 1991 for personal income taxes due under Article 22 of the Tax Law for the years 1977 through 1984. The amount due was \$6,548,225.06. The computation section of the notice contained the following explanation: "Field audit of your records disclosed additional tax due."

The "Computation Summary Section" contained the following breakdown:

"Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Current Balance Due
12-31-77	\$ 142,555.04	\$ 295,058.65	\$ 42,766.50	\$ 480,380.19
12-31-77	40,972.15	84,803.65	12,291.60	138,067.40
12-31-78	314,774.16	598,191.80	94,432.20	1,007,398.16
12-31-78	99,894.54	189,837.99	29,968.32	319,700.85
12-31-79	352,229.00	609,701.56	105,668.70	1,067,599.26
12-31-79	110,318.33	190,958.89	33,095.46	334,372.68
12-31-80	272,267.14	425,166.14	81,680.10	779,113.38
12-31-80	87,236.55	136,226.60	26,170.92	249,634.07
12-31-81	272,017.01	358,940.77	81,605.10	712,562.88
12-31-81	91,330.11	120,514.89	27,399.00	239,244.00
12-31-82	166,256.86	176,490.24	49,877.04	392,624.14
12-31-82	61,510.95	65,297.05	18,453.24	145,261.24
12-31-83	144,844.18	127,636.91	43,453.20	315,934.29
12-31-83	62,846.03	55,380.02	18,853.80	137,079.85
12-31-84	80,952.64	56,845.33	24,285.78	162,083.75
12-31-84	<u>33,547.49</u>	<u>23,557.21</u>	<u>10,064.22</u>	<u>67,168.92</u>
TOTALS	\$2,333,552.18	\$3,514,607.70	\$700,065.18	\$6,548,225.06"

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 119647), dated May 21, 1993, sustaining the statutory notice.

As noted in Finding of Fact "1", the estate of Aldo Gucci timely filed its petition.

As noted in Finding of Fact "4", the Division served its answer, dated October 5, 1993, on petitioner. The Division's representative also served a demand for a bill of particulars, dated October 4, 1993, upon petitioner's representative.

On October 29, 1993, the Division granted petitioner an unlimited time extension, subject to 10 days' notice, to provide the bill of particulars.

By letter dated March 28, 1994, the Division requested petitioner to provide the bill of particulars on or before April 7, 1994.

Petitioner's representative requested and received a short adjournment until April 14, 1994 in which to provide the bill of particulars.

Petitioner did not provide the bill of particulars within the extension period.

On April 15, 1994, the Division brought a motion to the Division of Tax Appeals for an order precluding petitioner from giving evidence at hearing of items regarding which particulars were demanded and not delivered or, in the alternative, for a conditional order of preclusion requiring petitioner to serve a bill of particulars by a set date.

On April 28, 1994, petitioner served a bill of particulars on the Division.

Petitioner did not respond to the Division's motion to preclude.

Upon review of the Division's motion papers, an order, dated May 12, 1994, was issued by Assistant Chief Administrative Law Judge Daniel J. Ranalli. Pursuant to Judge Ranalli's order, petitioner was to produce a bill of particulars no later than May 16, 1994, or be precluded from giving evidence at the hearing of any items not particularized by that date.

Upon receipt of a facsimile copy of Judge Ranalli's conditional order of preclusion, petitioner's representative responded to Judge Ranalli by letter dated May 12, 1994. In this letter, Mr. Smith stated that he believed he had fully complied with the Division's request for a bill of particulars based on the fact that he had served the bill of particulars, dated April 28, 1994, on the Division. He also stated that it was his understanding that Mr. Gallagher would withdraw the motion once he had received the bill of particulars. Attached to this letter was a

copy of the bill of particulars.

The Division, by letter dated May 12, 1994, informed petitioner's representative of the deficiency in the proffered bill of particulars. Mr. Gallagher stated that the answer to item 1 of petitioner's bill of particulars was unresponsive and that he was entitled to an itemization of any days either in or out of New York for the period at issue.

On May 13, 1994, the Division informed Judge Ranalli of the omission in petitioner's bill of particulars and that petitioner had been advised that a portion of the bill of particulars was nonresponsive; he also enclosed a copy of his May 12, 1994 letter to Mr. Smith.

By letter dated May 13, 1994, Mr. Smith advised Mr. Gallagher that he was attempting to get an "itemization of days" and would, to the extent that he had records relating to the itemization of days, provide them to him by the May 16, 1994 deadline prescribed by the order.

On May 19, 1994, a hearing in the instant matter was held before Winifred M. Maloney, Administrative Law Judge.

The Division, as part of its evidence, submitted the bill of particulars (Exhibit "J"); the Order of Preclusion (Exhibit "K"); and the supplemental bill of particulars (Exhibit "M").

The supplemental bill of particulars was prepared by petitioner's representative in response to the Order of Preclusion. This supplemental bill of particulars contains a cover letter dated May 16, 1994 and six handwritten and typed pages which are captioned "Dr. Aldo Gucci Travel Analysis" for years 1984-1985 and 1988-1989. According to the supplemental bill of particulars, in 1984 Dr. Aldo Gucci was in New York 31 days out of 365 days -- 6 days in January; 5 days in March; 10 days in April; and 10 days in December.

At the beginning of petitioner's case, its representative requested that the record be held open and a continued hearing date be granted in order that a newly-discovered witness could testify as to the decedent's whereabouts during the audit period.⁷

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This newly-discovered witness, Ruby Hamra, was formerly Director of Public Relations and Advertising for the Gucci worldwide business. It appears from the record that Ms. Hamra's professional association ended with the Gucci organization around the same time the decedent left the business. The record is silent as to exactly when the

The Division's representative objected to petitioner's request on the basis that the Order of Preclusion "prohibits the introduction of any day count information after May 16, 1994" (tr., pp. 18-19). The Division's representative did concede that some day count information for the year 1984 was provided; however, he noted that nothing had been provided for 1977 through 1983. The Division's representative contended that this matter is precluded at hearing and that "there would be no purpose served in calling this witness as any of the documentation Mr. Smith referred to is inadmissible at this point" (tr., p. 19).

After listening to the arguments made by both petitioner's and the Division's representatives on the issues of whether the Order of Preclusion was in effect or whether the record should remain open to allow petitioner to present a newly-discovered witness's testimony and documents at a continued hearing, Administrative Law Judge Maloney ruled that Judge Ranalli's Order of Preclusion was in effect (tr., p. 30). Petitioner's representative was directed to make a motion to reargue the order based on newly-found evidence.⁸

During the hearing, the auditor, Ms. Murray, when asked what her audit conclusions were, testified that she "concluded that taxpayer was a domicile and statutory resident of New York City" (tr., p. 53).

Ms. Murray's written audit conclusions, included in the Division's Exhibit "N", state, in part, as follows:

"The law states that a domicile once established continues until the person in question moves to a new location with the bona fide intention of making it his fixed and permanent home. The burden of proof is upon the person asserting a change of domicile to show that the necessary intention existed. The evidence to establish the required intention to effect a change of domicile must be clear and convincing.

"The Taxpayer came to New York City in 1953 to establish his business. Since

decedent left the business.

During the hearing, Judge Maloney informed both parties' representatives that if the motion was filed, an order would be issued which would either lift the Order of Preclusion and allow a continued hearing for Ms. Hamra's testimony and the newly-discovered evidence or close the record (tr., p. 30).

then he has continued to maintain a residence in the city and continued to be active in the New York City business. He did not provide any evidence to show that he changed his domicile to Florida.

"The law also states that anyone not domiciled in New York City who maintains a permanent place of abode and spends in that [sic] aggregate more than 183 days in the city will be taxable as a resident. It is the responsibility of such person claiming nonresidency to keep adequate records to substantiate the fact that he did not spend more than 183 days of the taxable year in New York City. During the audit period, Taxpayer maintained a permanent place of abode in New York City and did not provide any evidence to show how much time he spent outside New York City."

Petitioner's representative asked the auditor whether she was aware of his April 5, 1988 letter to Mr. Davies concerning the day count information. In response, the auditor stated that the Department of Finance considered the day count information submitted in that letter to be an insufficient submission on behalf of the taxpayer. When asked how she determined how much of Mr. Gucci's income was to be included in taxable income for New York State and City purposes, she stated that she used the amounts from the Federal returns and that she took the position that all the amounts reported on his Federal returns were taxable as a New York State and City resident. She testified that petitioner's representative had failed to supply the information which would have allowed the Department of Finance to make a determination concerning the taxpayer's qualification as a New York State and City resident. Furthermore, she stated that the Department of Finance did not know how many days the taxpayer had spent in or out of New York State or City because the requested documents had not been provided (tr., pp. 56-58).

Petitioner's representative asked Ms. Murray what were the facts which led the Department of Finance to make the determination that the taxpayer was a resident of New York City during 1977 through 1984. Her response was:

"The taxpayer came to the United States in 1953 and opened his first shop in New York on Fifth Avenue in 1953. At that time he lived in the San Regis Hotel. He had a co-op apartment -- let me get the address -- at 25 West 54th Street. And that's how we determined --" (tr., pp. 58-59).

Petitioner's representative posed additional questions about the auditor's determination. Those questions and her responses follow:

Q. "And so on that basis you determined that the taxpayer was in New York

more than 183 days a year and was a domicile of New York, on those facts and those facts alone; is that correct?"

- A. "We determined that you didn't meet your burden of proof that he wasn't in New York 183 days."

* * *

- Q. "Ms. Murray, just yes or no. Did the department have any independent information as to the taxpayer's comings and goings during the audit period for the nature of his activities in and out of New York that provided it with the basis to make its domiciliary and day count determinations?"

- A. "Yes and no. We had no information regarding a specific day count, but we did have information to say that he was a Director of Gucci Shops, Incorporated and chairman of the board, and that company was located in New York City."

- Q. "So, in other words, is it the case that your determination that the taxpayer was a domicile of New York was made, was prompted by the fact and bottomed on the fact that the taxpayer was the chairman of the board of a company that had an office in New York City?"

- A. "No. The domicile issue was due to he came to New York before he went to Florida and he had a place of abode here, not because he just had the business."

- Q. "So, let me see if I understand this. You're saying that he was a domicile of New York and that that New York domiciliary status stuck with him and did not change; is that what you're saying?"

- A. "He didn't meet his burden of proof to show it changed" (tr., pp. 59-60).

Petitioner presented only one witness, Kathleen Campanile, who testified about her professional relationship with Aldo Gucci, which commenced in June 1988.⁹ She testified that she did not know the decedent petitioner prior to 1988.

Ms. Campanile testified that she prepared the documents described as the supplemental bill of particulars in 1991. She averred that she prepared the typewritten table which contained the years 1984, 1985, 1988 and 1989 and was the first page of the supplemental bill of particulars using pieces of paper attached as part of the Division's Exhibit "M" and records she found in the office. When asked if those records included airplane tickets and travel agency records, she responded in the affirmative. None of the supporting records were submitted into evidence.

⁹Ms. Campanile testified that her occupation for Mr. Gucci was as a bookkeeper and then as an office manager.

Ms. Campanile testified that during the period June 1988 until January 1990, the decedent petitioner spent on the average 15 to 20 percent of the time in New York City (tr., pp. 34-35).

Ms. Campanile testified that during the time she worked for Mr. Gucci, he maintained only the one office in New York City at the West 54th Street apartment and that that office had been maintained by Mr. Gucci prior to her working there. She further stated that he did not maintain an office in Florida (tr., pp. 45, 46, 48).

Ms. Campanile testified that the apartment contained two bedrooms, as well as the offices. She estimated that the apartment contained about 950 square feet (tr., pp. 48-49).

Ms. Campanile testified that she was present on occasion at the Palm Beach, Florida residence. She described the Palm Beach property as being right on the ocean, a Spanish style home with a guest house, as well as a caretaker's house on the property. She testified that she had stayed at the guest house, which she described as being like an efficiency apartment -- it had a sink, a stove, a table and a queen-size bed. When petitioner's representative asked her to describe Mr. Gucci's own residence, she responded that it "had three bedrooms, a couple of bathrooms, living room and dining room, kitchen, laundry room, garage. It was fully furnished" (tr., pp. 43-44). She testified that "the house in Palm Beach was at least maybe seven thousand square feet" (tr., p. 44).

The Division's Exhibit "O" is Volume II of the audit workpapers. Included in the workpapers is the 1977 Form 1040X -- the U.S. Individual Income Tax Return with attached schedules and forms. One of the attachments was the 1977 Form 957, United States Information Return by an Officer, Director or U.S. Shareholder of a Foreign Personal Holding Company, for Garpeg Ltd. The following information was supplied on the form: Garpeg Ltd. was incorporated on October 26, 1976 under the laws of Hong Kong; it was engaged in overseas management advisory services and property investments and was 100% beneficially owned by Dr. Aldo Gucci. A balance sheet for Garpeg Ltd. for the year 1977 was included. Listed under "Assets" was "Property (1491 N. Ocean Blvd., Palm Beach, Florida)" valued at

\$537,146.00. The acquisition date of this property by Garpeg Ltd. is not part of the record.

At the hearing, no documentary evidence was submitted on behalf of petitioner (tr., p. 14).

Petitioner's representative brought a Motion, on notice to the Division, for Reargument and/or Reconsideration of the Order of Preclusion, dated May 12, 1994, on the basis of newly-discovered evidence pursuant to CPLR 5015(a)(2). Petitioner submitted the affidavit of Stuart A. Smith, Esq., sworn to on June 8, 1994, together with exhibits annexed thereto, and the affidavit of Angelo Rosato, co-executor of the estate of Aldo Gucci, sworn to on June 9, 1994, in support of that motion. Petitioner also submitted a memorandum of law in support of its position, as well as a reply brief. The Division's representative appeared in opposition to that motion. Only a brief was submitted by the Division in opposition to the motion. After due consideration of the facts and documents contained in the motion record and the arguments made thereon, Administrative Law Judge Maloney issued an order dated September 1, 1994 which closed the record.

The Division submitted 11 proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into the Findings of Fact herein except: numbers 3, 4 and 9 which were modified to more accurately reflect the record; and the second sentence of number 6 which is conclusory in nature.

OPINION

In her determination below, the Administrative Law Judge concluded that petitioner did have the burden of proof in this case. The Administrative Law Judge reasoned that decedent failed to protest the four statements of audit changes issued to him and, subsequently, the Division issued the Notice of Deficiency in this case from which petitioner filed a petition with the Division of Tax Appeals. In interpreting Tax Law § 689(e) which addresses the issue of which party bears the burden of proof, the Administrative Law Judge stated that since the Notice of Deficiency was issued to decedent prior to the filing of a petition with the Division of

Tax Appeals, and since decedent did not file a petition contesting the original statements of audit changes, the burden of proof did not shift to the Division in this case.

Pursuant to the preclusion order issued to petitioner by Assistant Chief Administrative Law Judge Daniel J. Ranalli, the Administrative Law Judge precluded petitioner from introducing any evidence with respect to the issue of days spent within and without New York City and State for the years 1977 through 1984.

Turning to the merits of the case, the Administrative Law Judge determined that decedent was domiciled in New York City during the years 1977 through 1984 and petitioner failed to demonstrate that decedent changed his domicile from New York City during that period. Furthermore, the Administrative Law Judge also found that decedent maintained a permanent place of abode in New York City throughout the audit period and petitioner failed to demonstrate that the decedent did not spend less than 183 days within New York City during any of the years at issue. Thus, she determined, even if petitioner had demonstrated that decedent changed his domicile during the years in question, the Division properly assessed him as a resident pursuant to Tax Law § 605(b)(1)(B). Also, since petitioner did not establish that decedent's failure to pay the tax was due to reasonable cause and not due to willful neglect, the Administrative Law Judge sustained the penalties imposed.

On exception, petitioner disagrees with the Administrative Law Judge's determination of every issue. However, petitioner does not raise any specific objection to any of the facts as found by the Administrative Law Judge.

Petitioner asserts that the burden of proof is upon the Division because the Division had previously determined that the decedent was not a resident of New York for income tax purposes when it determined a deficiency which the decedent paid in full. We disagree.

In reviewing the audit workpapers in the record, it is apparent that a desk audit was performed by Charles Davies, Audit Group Manager in the Central Income Tax Section of the Audit Division, as a result of decedent filing amended Federal income tax returns for the years 1977 through 1981 as well as filing original Federal income tax returns for the years 1982

through 1984 in the summer of 1986. Decedent was contacted by the Audit Division due to the fact that he failed to report these Federal changes to New York State as is required under Tax Law § 659. Thereafter, the Audit Division issued four statements of audit changes to decedent that reflected an allocation of income to New York State and City based upon the submission of Mr. Smith's statement as to how many days were spent working by decedent both within and without New York. We do not find, as suggested by petitioner, that Mr. Davies determined that decedent was not a statutory resident (Petitioner's brief, p. 7). It is clear from the audit workpapers that Mr. Davies focused on working days within and without New York as a basis for issuing the statement of audit changes (see, exhibit "N"). Decedent paid the amounts set forth in the four statements of audit changes. Subsequently, the New York City Department of Finance began a residency field audit of decedent which resulted in a Notice of Deficiency being issued on September 20, 1991.

Tax Law § 682(d) provides for the issuance of a supplemental assessment, in pertinent part, as follows:

"[t]he tax commission may, at any time within the period prescribed for assessment, make a supplemental assessment, subject to the provisions of section six hundred eighty-one where applicable, whenever it is ascertained that any assessment is imperfect or incomplete in any material respect."

The Notice at issue is a result of a determination made by Ann Murray, Associate Tax Auditor from the New York City Department of Finance, that decedent failed to prove that he changed his domicile from New York City and that he failed to show that he was not a statutory resident of New York City during the years 1977 through 1984. Petitioner filed a petition with respect to this Notice which resulted in this proceeding. Petitioner states that the burden of proof has shifted to the Division since decedent had paid the original assessment in full.

We disagree with petitioner's contention. Tax Law § 689(e) states that the burden of proof shall be upon petitioner in all but four instances. Petitioner relies on subparagraph (3) which states as follows:

"whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was

mailed and a petition under this section filed, unless such increase in deficiency is the result of a change or correction required to be reported under section six hundred fifty-nine, and of which change or correction the tax commission had no notice at the time it mailed the notice of deficiency" (Tax Law § 689[e][3]).

There is no dispute that the four statements of audit changes were never petitioned by decedent. As the Division argues, Tax Law § 689(d) specifically allows the Division of Taxation to determine a greater deficiency after a petition protesting a deficiency is filed. Tax Law § 689(e) addresses the burden of proof in such situations. Since the Notice of Deficiency at issue herein was not issued pursuant to Tax Law § 689(d), Tax Law § 689(e) does not apply to the facts of this case. Therefore, the burden of proof is properly upon petitioner in this proceeding.

Petitioner continues its challenge that Tax Law § 689(e)(3) is unconstitutional. As noted by the Administrative Law Judge, we do not have jurisdiction to address the constitutionality of a statute on its face (see, Matter of Unger, Tax Appeals Tribunal, March 24, 1994; Matter of Toothaker, Tax Appeals Tribunal, September 9, 1993; Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988). As to the constitutional application of the statute, petitioner has provided no basis for concluding that taxpayers who concede the liability of an assessment are similarly situated to those who file a petition disputing an assessment. Therefore, we do not find that the application of Tax Law § 689(e) unconstitutionally deprives petitioner of equal protection.

Turning to the merits of this case, petitioner argues that the Administrative Law Judge erred in holding that decedent was a resident individual of New York City for tax purposes pursuant to Tax Law § 605(b)(1). Petitioner argues that "there is no cogent basis to conclude that the decedent had ever been a New York domiciliary" due to the fact that decedent never changed his domicile to New York City from Italy (Petitioner's brief, p. 12).

As set forth above, the burden of proof was properly upon petitioner to prove that the Notice of Deficiency was incorrect (Tax Law § 689[e]). The Notice was issued to petitioner on the basis that decedent was a resident individual of New York City. In an attempt to establish that this was incorrect, the burden was upon petitioner to demonstrate that decedent was

domiciled outside of New York. However, there was absolutely no evidence presented to demonstrate that decedent was domiciled outside New York during the years in question. Petitioner cites to the bill of particulars as proof of certain facts. However, the bill of particulars was prepared by Kathleen Campanile who testified that she did not know decedent during the audit period. Furthermore, petitioner failed to introduce any documents relied on by Ms. Campanile in her preparation of the bill of particulars. Accordingly, the statements contained therein are given little weight.

As we held in Matter of Atlantic & Hudson Ltd. Partnership (Tax Appeals Tribunal, January 30, 1992):

"[a]lthough a determination of tax must have a rational basis in order to be sustained upon review (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (see, Matter of Tavalacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174; Matter of Leogrande, Tax Appeals Tribunal, July 18, 1991, confirmed Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, lv denied 81 NY2d 704, 595 NYS2d 398)."

Where, as here, petitioner has filed to introduce any evidence to rebut the presumption of correctness, the issuance of the assessment provides the rational basis for the assessment. To hold otherwise would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment (see, Matter of A & J Gifts Shop v. Chu, 145 AD2d 877, 536 NYS2d 209, lv denied 74 NY2d 603, 542 NYS2d 518; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113) and that the petitioner has a heavy burden to prove the assessment erroneous (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692).

A critical factor in the determination of the issue of domicile was petitioner's failure to provide adequate or credible substantiation of decedent's change of domicile. In fact, petitioner did not introduce any documentation in this case and petitioner presented only one witness who

did not even know decedent during the tax years in question. The record reveals numerous requests for documentation which were never supplied and petitioner neither submitted documentation nor provided testimony concerning decedent's intent. In contrast to petitioner's position that decedent never changed his domicile from Italy, there is a letter from petitioner's representative, dated November 24, 1987, that unequivocally stated that "[f]rom 1977 to 1984, Mr. Gucci was domiciled in Palm Beach, Florida where he maintained his principal residence" (Exhibit "N," p. A59). Given the conflicting positions taken by petitioner's representative concerning decedent's domicile, we find that the lack of evidence regarding decedent's intentions necessitates the result that petitioner has failed to carry its burden of proof in this case (see, Matter of Labow, Tax Appeals Tribunal, March 20, 1997; see also, Matter of Bourne's Estate, 181 Misc 238, 41 NYS2d 336, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785; Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Accordingly, we affirm the Administrative Law Judge's determination that petitioner failed to establish that decedent was not domiciled in New York City during the years in question.

Although we find that decedent was domiciled in New York City, we will address the issue of statutory residency. Tax Law § 605(b)(1)(B) states that a resident individual is an individual defined as follows:

"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, unless such individual is in active service in the armed forces of the United States."

It is undisputed that decedent maintained a permanent place of abode in New York City during the years in question. Therefore, it is necessary to determine whether petitioner established that decedent spent more than 183 days outside of New York City during each of the years 1977 through 1984. Clearly, petitioner has failed to sustain its burden of proof on this issue.

Petitioner relies wholly upon the testimony of Kathleen Campanile to establish decedent's presence within New York City for much less than the 183 days required for him to be taxed as a resident. However, as discussed above, Ms. Campanile did not know decedent until the year

1988. Therefore, her testimony is unavailing on this issue. Moreover, it is noted that Ms. Campanile claims to have relied on her review of decedent's travel records for the years in question for her knowledge of his whereabouts, yet none of this documentation was provided to the auditor or submitted into evidence in support of petitioner's position. Thus, the Administrative Law Judge properly gave Ms. Campanile's testimony little weight and correctly determined that petitioner failed to carry its burden of proof on this issue.

Petitioner further argues that the Administrative Law Judge erred in refusing to lift the preclusion order issued against it. Petitioner sought permission at the hearing to keep the record open to receive evidence it characterized as newly-discovered. However, since Assistant Chief Administrative Law Judge Ranalli had issued a preclusion order against petitioner concerning the submission of evidence on the issue of days spent within and without New York City for the audit period, the Division opposed petitioner's request. Therefore, petitioner filed a motion after the hearing with the Administrative Law Judge requesting that the preclusion order be lifted on the basis that it has newly-discovered evidence which it sought to enter into the record in this proceeding.

Pursuant to CPLR 5015(a)(2), a court may grant relief to a party from an order issued by the court, in certain circumstances, as follows:

"newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404."

For evidence to be considered newly-discovered, it must have been in existence but undiscoverable with due diligence (see, Matter of Commercial Structures v. City of Syracuse, 97 AD2d 965, 468 NYS2d 957). The evidence which petitioner characterizes as newly-discovered is the testimony of Ms. Ruby Hamra who was allegedly employed by decedent as Director of Advertising and Public Relations for Gucci Shops during the audit period. We find that petitioner has failed to demonstrate that this evidence was newly-discovered.

To be characterized as newly-discovered evidence, it must be shown that the evidence was not discoverable with due diligence. Petitioner argues in its brief that its affidavit in

support of its motion clearly sets forth why decedent's executor was unable to think of Ms. Hamra earlier due to the fact that she allegedly left decedent's employ in 1986. After a review of the record, it is unfathomable that during this audit, which began in 1988, neither Mr. Smith, Mr. Rosato nor decedent sought out Ms. Hamra in an effort to determine decedent's whereabouts during the years in dispute. That Mr. Rosato in 1994 recollected that Ms. Hamra had probative documentation in her possession appears too convenient to be mere coincidence. As determined by the Administrative Law Judge and as indicated by Exhibit "N," the auditor in this case made no less than 11 requests for documents during her audit concerning the days spent within and without New York City and petitioner failed to come forward with any substantiation of decedent's whereabouts. We find that petitioner has failed to show that it exercised due diligence in discovering this evidence earlier and its motion was properly denied. Thus, we agree that the preclusion order prevents petitioner from introducing any documentation concerning the issue of days spent within and without New York City for the years in question.

We note that the evidence sought to be introduced by petitioner through Ms. Ruby Hamra is strictly on the issue of day count. However, decedent has been determined to be a New York City domiciliary during the years in question. Therefore, assuming arguendo, petitioner was able to demonstrate that decedent spent less than 183 days within New York City during each of the years in issue, he is still liable for the amount set forth in the Notice of Deficiency as a resident pursuant to Tax Law § 605(b)(1)(A). Thus, petitioner is unable to demonstrate that this newly-discovered evidence would result in any change to the outcome of this case.

With respect to the issue of penalties, petitioner did not present any evidence in support of its position, thus, penalties are sustained in full (see, Matter of Hull, Tax Appeals Tribunal, December 8, 1994; Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Estate of Aldo Gucci is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Estate of Aldo Gucci is denied; and
4. The Notice of Deficiency No. L-003038767-1 is sustained.

DATED: Troy, New York
July 10, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner