STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RHODA MILLER	:	DECISION DATA No. 812849
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1988 and 1989.	:	

Petitioner Rhoda Miller, 1370 South Ocean Boulevard, Pompano Beach, Florida 33062, filed an exception to the determination of the Administrative Law Judge issued on November 22, 1995. Petitioner appeared by Norman R. Berkowitz, Esq. 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 brief. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner has shown that she was not present in New York State and City for more than 183 days during each of the years at issue and, therefore, was not taxable as a resident individual pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

II. Whether petitioner has shown that penalties imposed pursuant to Tax Law § 685(b) and (p) should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except the name of petitioner's business partner, Mr. Philip Adelman, which has been changed to reflect the proper spelling. These facts are set forth below.

Petitioner, Rhoda Miller, was born in Brooklyn, New York. In 1989, petitioner was 65 years old. In 1939, petitioner married Robert Stanley and, in 1951, petitioner and Mr. Stanley jointly purchased a three-bedroom home located at 248 Hillspoint Road, Westport, Connecticut. This home was situated on a ½-acre lot and had 90 feet of private beachfront.

Petitioner was subsequently divorced from Mr. Stanley and married one Larry Wolf in 1965. Following their marriage, petitioner and Mr. Wolf resided in Nevada. Apparently, petitioner took sole title to the Westport, Connecticut home following the divorce, for she continued to own the Westport home during the time of her marriage to Mr. Wolf.

Mr. Wolf died in or about 1971. Following Mr. Wolf's death, petitioner sold the Nevada home and returned to her Westport, Connecticut home.

In or about 1972, petitioner married Dr. Richard Miller, a physician with a New York City medical practice. At the time of their marriage, Dr. Miller had a leased one-bedroom apartment located at 155 West 68th Street, New York, New York. Dr. Miller continued to lease the apartment through the years at issue.

During the years at issue, petitioner had a key and had access to the 68th Street apartment. The frequency of petitioner's use of the apartment is not established in the record. Petitioner also occasionally received mail at the 68th Street apartment.

At some point during their marriage, the house located at 248 Hillspoint Road became jointly owned by petitioner and Dr. Miller.

In 1993, petitioner and Dr. Miller sold this house and jointly purchased a larger, 11-room home located nearby at 268 Hillspoint Road, Westport, Connecticut.

From Mr. Wolf, petitioner inherited interests in two real estate S corporations, Valoc Enterprises, Inc. and Whitehorse Garage, Ltd., and a real estate partnership, Mildel Associates.

Valoc Enterprises ("Valoc") and Mildel Associates ("Mildel") shared an office located at 211 East 43rd Street, New York, New York. Mildel owned two parcels of commercial property located within New York City, both of which were net-leased to tenants. Valoc owned a long-term leasehold on an office building located in the Grand Central area of Manhattan. Petitioner's business partner and associate in both Mildel and Valoc was Mr. Philip Adelman. Mr. Adelman, a shareholder and officer of Valoc and a partner in Mildel, ran the operations and made all decisions for both entities, which, according to Mr. Adelman, consisted largely of collecting monthly rental checks and keeping records.

Petitioner was an officer of Valoc and a partner in Mildel but did not participate in the management of either entity.

With respect to petitioner's involvement in these real estate entities, Mr. Adelman testified that "[petitioner's] function is she gets her share" (tr., p. 63) and that "all she wants to get are her checks" (tr., p. 74).

Mr. Adelman also managed petitioner's personal finances, which were strictly separate from those of her husband, Dr. Miller. Pursuant to this responsibility, Mr. Adelman received and opened mail addressed to petitioner at 211 East 43rd Street.

Whitehorse Garage, Ltd. ("Whitehorse"), petitioner's other real estate business interest, had an address of 630 1st Avenue, New York, New York. Whitehorse owned a leasehold on a parking garage located in a New York City apartment building. Petitioner was not involved in the management of Whitehorse. Petitioner did not have an amicable relationship with the other principal of Whitehorse and did not spend any significant amount of time at the Whitehorse offices during the years at issue.

Petitioner timely filed New York State and New York City nonresident income tax returns (Form IT-203) and City of New York nonresident earnings tax returns (Form NYC-203) for both of the years at issue. Although married, petitioner filed separately from her husband.

On petitioner's 1988 NYC-203, on a page signed by both petitioner and her accountant, petitioner represented that neither she nor her husband maintained an apartment in the City of New York during any part of 1988.

On the first page of petitioner's 1989 IT-203 and on petitioner's 1989 NYC-203, petitioner checked boxes indicating that neither she nor her husband maintained living quarters in New York State or City in 1989.

As part of her 1988 nonresident return, petitioner claimed a resident tax credit (Form IT-112-R) of $29,383.00.

Petitioner filed 1988 State of Connecticut capital gains, dividends and interest income tax returns. The tax paid in connection with this return formed the basis of petitioner's 1988 claim for the New York resident tax credit noted above.

Petitioner listed 248 Hillspoint Road, Westport, Connecticut as her address on her 1988 and 1989 New York State and City income tax returns and on her 1988 Connecticut return.

Petitioner's New York returns with respect to the years at issue were prepared by her accountant, Martin S. Kaplan. Mr. Kaplan testified at hearing that he estimated that petitioner spent at most 130 days in New York State and City during each of the years at issue. Mr. Kaplan's estimate presumed that, except for the summer, petitioner spent three days per week in New York City during the years at issue (3 days x 39 weeks = 117 days), and that during the summer she spent one day per week in the City (1 day x 13 weeks = 13 days). Mr. Kaplan indicated that this estimate was based on a review of petitioner's social diary for those years.

Petitioner did not produce any such social diary on audit. Nor did petitioner produce any such diary at hearing. Petitioner presented no explanation for her failure to produce the diary and gave no indication that she had reviewed or relied on any such diary in her testimony. Furthermore, no testimony was presented as to the manner in which such a diary was maintained.

Mr. Adelman testified that he generally agreed with Mr. Kaplan's estimate and further testified that petitioner would come to the Mildel/Valoc office "one day, sometimes two days. Very rarely three times. In no event more than three days" (tr., p. 67). In reference to Mr. Kaplan's estimate of one New York City day per week during the summer, Mr. Adelman testified: "I would say that is about right . . . some weeks she wouldn't show up at all in the summertime" (tr., p. 67). Mr. Adelman estimated that he was in petitioner's presence at the Mildel/Valoc offices on approximately 60-70 days during each of the years at issue.

As noted previously, petitioner was an investor in Valoc and Mildel and was not involved in the management of these entities. That being the case, according to Mr. Adelman, petitioner's purpose in going to the office was to read her mail or to have lunch with Mr. Adelman.

Mr. Kaplan was actually in petitioner's physical presence on two days during each of the years at issue.

Mr. Adelman saw petitioner only when she was present in the Mildel/Valoc offices.

W-2 forms issued to petitioner by Whitehorse for both 1988 and 1989 listed petitioner's address as 155 West 68th Street.

W-2 forms issued to petitioner by Valoc for both 1988 and 1989 listed petitioner's address as 248 Hillspoint Road, Westport, Connecticut.

Petitioner received numerous 1099 forms during the years at issue. Computer records entered into evidence by the Division of Taxation ("Division") indicate that two such 1099's bore the 155 West 68th Street address; three bore the 248 Hillspoint Road address; and the remaining approximately 19 such forms bore the 211 East 43rd Street address.

Entered into the record herein was a lease renewal form, dated April 1, 1991, in respect of the apartment located at 155 West 68th Street. Said lease form lists Dr. Miller as the tenant. Attached to the lease form is a "Statement of Tenant", wherein the tenant, i.e., Dr. Miller, is directed to list the names of persons, other than the tenant, residing in the apartment. Petitioner is listed on the Statement of Tenant as such a person.

During the years at issue, petitioner had a Connecticut driver's license. In addition, she registered her car in Connecticut.

Petitioner also was registered to vote in Connecticut during the years at issue. She was never registered to vote in New York.

Petitioner was a member of a Westport, Connecticut country club.

Petitioner maintained all of her bank accounts in New York City. She and her husband also jointly maintained a safe deposit box in New York. Petitioner also held a New York State real estate broker's license during the years at issue which she had held for approximately 35 years. Petitioner did not use her broker's license during the years at issue and had not been engaged in any activity as a broker for many years.

Petitioner estimated that her residence in Westport, Connecticut was located about 50 miles from New York City and that this trip took about an hour by train.

On audit, petitioner provided to the Division copies of her 1988 and 1989 Federal and New York State and City nonresident returns; the lease renewal dated April 1, 1991 for the apartment located at 155 West 68th Street; copies of telephone bills for the 248 Hillspoint Road, Westport, Connecticut residence pertaining to the period December 1, 1990 through November 17, 1991; and copies of real estate tax bills for the 248 Hillspoint Road, Westport, Connecticut property for the years ended June 30, 1984, June 30, 1986 and June 30, 1992.

Upon review of the documentation submitted by petitioner, the Division concluded that petitioner had not established her claim of nonresidency. Accordingly, on December 17, 1992, the Division issued to petitioner a Notice of Deficiency which asserted additional New York State and City personal income taxes due for the years at issue as follows:

Year	Additional Tax Due	
1988	New York State	$ 35,799.83
1988	New York City	42,400.09
1989	New York State	8,933.03
1989	New York City	13,215.23
	Total Additional Tax Due per Notice of Deficiency	$100,348.18

The Notice of Deficiency herein also assessed interest and penalties under Tax Law § 685(b) and (p).

The Division's field audit report stated that penalties were imposed herein "because of the seemingly deliberate attempt to avoid providing information and avoiding payment of New York City resident taxes."

Petitioner introduced into the record an Income Tax District Office Audit Manual. This manual went into effect following the completion of the audit at issue herein.

The Division submitted proposed findings of fact numbered "1" through "13". Proposed findings of fact numbered "1" through "6" and "9" through "13" are accepted and have been incorporated, in substance, into the Findings of Fact herein. Proposed finding of fact "7" is unsupported by the record and is rejected. Proposed finding of fact "8", which references, perhaps erroneously, petitioner's 1980 Form 1040, being both unsupported by the record and irrelevant, is also rejected.

OPINION

The Administrative Law Judge determined that petitioner was not domiciled within New York State or City at any time during the years in issue. The Administrative Law Judge based this conclusion on the fact that petitioner had owned the Westport home for some 37 years, while she did not own or even lease the 68th Street apartment. Moreover, the difference in size between the two residences was an important factor in his finding. There were also a few secondary factors, such as driver's license, voter registration and filed tax returns which influenced his conclusion. As for petitioner's business ties to New York, the Administrative Law Judge found them to be merely passive in nature and, therefore, not providing any support for a finding of a New York domicile.

As to the issue of whether petitioner had demonstrated that she had not spent more than 183 days in the State and City during the years in issue, the Administrative Law Judge concluded that she had not met her burden of proof. Petitioner had limited her proof on this

issue solely to testimony. The Administrative Law Judge found that the testimony presented in support of this issue:

> "did not purport to establish petitioner's whereabouts on any specific days during the years at issue, but rather sought to establish a general pattern of activity. Given the lack of documentation in the record, as noted, the testimony presented is clearly insufficient to meet petitioner's burden of proof on this issue" (Determination, conclusion of law "F").

The Administrative Law Judge was also critical of petitioner's failure to produce the social diary relied upon by Mr. Kaplan in his testimony. He concluded that petitioner had not established the existence of the diary, she had given no reason for her failure to submit the diary in evidence and there was no evidence that petitioner had reviewed or relied on the diary in her testimony. The Administrative Law Judge also placed little credibility on the testimony of the business witnesses because they saw petitioner so few times during the year and neither of them had any knowledge of her personal life or where she spent her time when she was not in the office.

The Administrative Law Judge also refused to abate the penalties imposed on petitioner because her filing of returns during the years in issue claiming neither she nor her husband maintained an apartment in New York City constituted negligence, justifying imposition of the penalties. The fact that the auditor had not followed certain audit guidelines in imposing the penalties was not a factor because the guidelines were not in effect at the time of the audit and the auditor could not reasonably be expected to follow them.

The Administrative Law Judge also concluded that petitioner was not entitled to a resident credit for taxes paid to Connecticut. Petitioner has not taken exception to this conclusion.

On exception, petitioner argues that she has established by credible testimony a general pattern of conduct during the years in issue which demonstrates that she was in New York State and City fewer than 183 days in each year. Petitioner maintains that much of the testimonial evidence was uncontroverted and that the Administrative Law Judge erred in not finding it sufficiently credible to meet petitioner's burden of proof. Petitioner contends that testimony

alone can be sufficient to meet the burden of proving the number of days present or absent from New York and that it was not necessary to produce any documentary evidence, including the social diary alluded to in the testimony. Moreover, petitioner argues that there was no basis to find the testimony of petitioner and her witnesses credible on the issue of domicile but not credible on the issue of statutory residence.

Petitioner also argues that penalties should be abated. She maintains that there is reasonable cause to cancel the penalties because she relied on her accountant to prepare her tax returns which were quite complex. She also contends that it was reasonable for her to believe that she was a nonresident of New York because she had filed nonresident returns for a number of years without any challenges from the Division. Petitioner also argues that any failure on her part to cooperate during the audit was not cause for imposing penalties. Rather, the negligence must result from the preparation and filing of the returns.

The Division, on the other hand, argues that the determination was correct, that the two witnesses produced by petitioner lacked the personal knowledge necessary to meet petitioner's burden of proof, and that petitioner's testimony was not specific enough, in that she "never gave specific details on her presence in or out of New York. She never testified about a specific number of days spent in or out, nor did she even make the broad claim that she was out of New York for more than 183 days" (Division's brief, p. 7.)

As to the penalty issue, the Division agrees with petitioner that penalties should be imposed where the taxpayer is negligent in the preparation and filing of the tax returns. However, here, the Division argues, petitioner was negligent in filing returns for each of the years in issue indicating that neither she nor her husband maintained an apartment in New York City. Thus, it was proper to impose the negligence penalty.

We affirm the determination of the Administrative Law Judge.

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

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

> "(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . ." (Tax Law § 605[b]).

The definition of "resident" for City purposes is provided under the New York City Administrative Code § 11-1705(b), and is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state."

We will first address petitioner's argument that the number of days spent within and without New York can be proven by demonstrating a pattern of conduct established solely by testimony. It is true that we held in Matter of Avildsen (Tax Appeals Tribunal, May 19, 1994) that credible testimony was sufficient to meet the taxpayer's burden to establish that he was not in New York State and City for more than 183 days. We have also held that "[w]here a taxpayer can establish a 'pattern of conduct' from which his location may be determined for any particular day, the taxpayer need not specifically account for his whereabouts on every day of the subject period" (Matter of Kern, Tax Appeals Tribunal, November 9, 1995). However, in all the cases cited both above and in the briefs of the parties, there was other proof of the whereabouts of the petitioners for specific days. The testimony concerning the petitioners' pattern of conduct was used to fill in gaps between days where the specific location of the petitioners was known.

In Matter of Armel (Tax Appeals Tribunal, August 17, 1995), there were only 26 days in issue, the remainder having been conceded by the petitioners or else proven by documentary evidence and testimony. We found it logical to conclude that, since the petitioners had proven their location for the periods just prior to the 26-day period and just after the period, their testimony was enough to establish that their location for the 26-day period remained the same, i.e., outside of the State. In Matter of Reid (Tax Appeals Tribunal, October 5, 1995), there was an agreement between the auditor and the petitioners as to the number of working days in New York City, leaving only weekends in issue. Testimony was enough to establish a pattern of conduct for the weekends. There was also considerable corroborating documentation submitted.

Here, petitioner presented no proof of her location on any specific days. Her testimony consisted essentially of her statement that she spent only a few days a week in New York City during the years in issue. The Administrative Law Judge did not find this testimony credible and he set forth his reasons in detail for his conclusion. We see no reason to overturn his conclusion. As for petitioner's other witnesses, we must agree with the Administrative Law Judge that neither of them had sufficient personal knowledge of petitioner's activities to provide credible testimony. Mr. Adelman testified that he saw petitioner in his office 60 or 70 days a year, but had no knowledge of her activities or whereabouts for the remainder of the years in issue. The Administrative Law Judge properly discounted this testimony. Mr. Kaplan saw petitioner only two days a year. His testimony consisted primarily of his recollection of what he had seen in petitioner's social diary. The diary itself was never produced, and there was no information provided about the specific nature of the diary and its contents. This stands in marked contrast to the diary upon which the witness's testimony was based in Matter of Avildsen (supra). In Avildsen, an in-depth discussion of the diary was provided and a summary of the diary was placed in evidence. The Administrative Law Judge herein properly found that general testimony about a diary, without more information, was not credible.

Petitioner also argues that there is no basis to conclude that her witnesses' testimony was credible with respect to the question of domicile but not to the question of the number of days spent within and without New York. First, the Administrative Law Judge made clear in his determination that he relied on a number of factors in arriving at his conclusion that petitioner was not domiciled in New York. All of these factors were supported by documents in the hearing record as well as by testimony. We note that the testimony presented by petitioner with respect to her domicile was much more specific and detailed than her testimony concerning days in New York. Such details as the number of years lived in the Westport house, the size of the Westport house, the size of the New York City apartment and information on her driver's license, voter registration and tax returns all militate toward a finding of a Connecticut domicile, while having little relevance in determining a count of days spent in New York versus

Connecticut or elsewhere. The nature of the proof offered by petitioner on the two issues was different enough that the Administrative Law Judge could find that the domicile proof was credible while the day count proof was not.

On the issue of the abatement of penalties, the Administrative Law Judge correctly and adequately addressed this issue and we find no basis in the record before us for modifying the Administrative Law Judge's determination with respect to this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rhoda Miller is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Rhoda Miller is denied; and
4. The Notice of Deficiency issued to petitioner on December 17, 1992 is sustained.

DATED: Troy, New York
January 30, 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