STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NORMAN AND ENID SCHIBUK	:	DECISION DTA NO.815095
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1988.	:	

Petitioners Norman and Enid Schibuk, Route 100B, Moretown, Vermont 05660, filed an exception to the determination of the Administrative Law Judge issued on May 7, 1998. Petitioners appeared by Wichler & Gobetz, P.C. (Kenneth C. Gobetz, Esq. and Ranan J. Wichler, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument, at petitioners' request, was heard on November 12, 1998 in Troy, New York.

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

ISSUES

I. Whether petitioners were taxable as residents of New York State for the year 1988.

II. Whether the Division of Taxation properly determined that certain payments which petitioner Norman Schibuk received in 1989 and 1990 were installment payments which must be accrued to tax year 1988 pursuant to Tax Law former § 638(c).

III. Whether penalties imposed under Tax Law § 685(a) and (b) should be canceled.

FINDINGS OF FACT

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

Petitioner Norman Schibuk is a computer software consultant. Prior to 1981, he was a principal of Compensation Resources, Inc. ("CRI"), a New York software development company. CRI had expertise with MCG software, software applications systems used by the insurance industry. The Management Compensation Group, Incorporated ("MCG"), a Delaware corporation, was the proprietor of the MCG software.

In January 1981, MCG and CRI agreed that CRI would convert, enhance, improve and maintain the MCG software as if CRI's staff constituted the in-house staff of MCG. The agreement set forth mutual covenants and conditions, including the use of Norman Schibuk's services. The agreement also specified that computer equipment which both parties agreed to lease and purchase would be located in CRI's New York office. The agreement was executed by Norman Schibuk as CRI's president. In or about 1984, the parties evolved into partnerships, MCG into Management Partnership ("MP"), an Oregon partnership, and CRI into Compensation Resources Partners ("CRP"), a New York partnership.[1] CRP was one of MP's general partners, having a 10% ownership interest.

The record does not contain either a partnership or employment agreement between MP and CRP. Nor does it contain any employment agreements between Norman Schibuk and either

[1]Some documents in the record refer to this partnership as Compensation Resources Partners, while others refer to it as Compensation Resources Partnership.

MP or any of MP's other general partners. In addition, any employment or consulting agreement which Mr. Schibuk may have had with CRP is not part of the record.

On August 1, 1986, MP agreed to purchase CRP's partnership interest in MP. A copy of the handwritten memorandum agreement is part of the record. Pursuant to paragraph 1 of the agreement, MP agreed to purchase the 10% interest of MP owned by CRP for $4,000,000.00, of which $1,000,000.00 was to be paid for CRP's capital account with the remaining $3,000,000.00 to be paid as a guaranteed payment. Except for the stipulation that $100,000.00 was to be paid within 30 days of the execution of final documents, the payment terms, i.e., timing and interest rates, were not specifically set out in paragraph 1; rather, reference was made to the payment terms specified in a separate partnership agreement. It appears from paragraph 11 of the agreement, that CRP was also transferring its interest in CRI to MP. Norman Schibuk, as CRP's general partner, executed this agreement. This copy is of rather poor quality; the handwriting at times is illegible and at least one page, page 4, containing paragraphs 6, 7, and 8, is missing. In addition, financial statements and balance sheets referenced in various paragraphs of the agreement are missing.

MP made an Internal Revenue Code § 754 election on its 1986 U.S. Partnership Return of Income ("Form 1065"). On the Form 1065, Schedule L, Balance Sheets, at Line 12, "other assets" for the end of the tax year included a deferred expense of $3,000,000.00. According to the 1986 Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., issued by MP to CRP, CRP's distributive share of ordinary income was $715,682.00 and distributions in excess of basis were $1,018,277.00.

On its 1986 Form 1065, CRP treated all distributions it received from MP for 1986 as payments in liquidation of a partnership interest. On the Schedule K-1 issued to Norman Schibuk, CRP listed net long-term capital gain of $1,276,393.50.[2] Petitioners reported that amount on their 1986 Form 1040.

The 1988 Schedule K-1 issued by MP to CRP lists under the income section on line 5 guaranteed payments of $966,000.00. There are no other entries on this Schedule K-1. The address listed for CRP is "c/o Norman Schibuk, 8 Cole Drive, Armonk, New York 10504."

The 1988 Form 1065 for CRP lists, as its only source of income, ordinary income from other partnerships in the amount of $966,000.00. On this return, CRP's address is listed as "c/o Labyrinth Systems Inc., 30 Buxton Farm Road, Stamford, CT. O6905." CRP's tax matters partner was listed as Norman Schibuk, whose address was listed as in care of Labyrinth Systems.

CRP's 1989 Form 1065 lists, as its only source of income, ordinary income from other partnerships in the amount of $910,000.00. On this return, CRP's address is listed as "c/o Labyrinth, RR1 Box 435, Waitsfield, Vermont 05673."

CRP's 1990 Form 1065 lists as its sources of income ordinary income from other partnerships in the amount of $834,000.00 and an "other loss" of $350,000.00.

Prior to and including the years 1986 and 1987, petitioners filed New York State resident income tax returns listing their address as 8 Cole Drive, Armonk, New York.

On May 16, 1985, petitioners purchased a second home in Moretown, Vermont. The address of the property was Route 100B, Moretown Village, Moretown, Vermont. Petitioners obtained a mortgage from the Vermont Federal Bank in the amount of $68,800.00 for the

[2]At the end of 1986, Mr. Schibuk had a 75% ownership interest in CRP.

purchase of the property. Pursuant to the terms of the mortgage, petitioners warranted that they would not occupy the residence as their legal residence. The mortgage was paid in full and discharged on May 13, 1987. The record is silent as to the style and size of this home.

On August 28, 1987, petitioners placed the 8 Cole Drive home on the market with a real estate agent, offering it for sale at a price of $1,400,000.00. According to the real estate agent's residential fact sheet, the Cole Drive property was a contemporary style frame home, built in 1983, with a total of 13 rooms, including 5 bedrooms and 4.5 baths.

A contract of sale for the Cole Drive property was entered into on October 28, 1988, which resulted in a closing on December 23, 1988. The sale price was $1,075,000.00. Petitioners were not present at the closing; rather Jeffrey J. Kane, Esq., under valid powers of attorney, was present on their behalf.

Petitioners have three children, Liza, James and Daniel. During the period in issue, all three were school age. In early September of 1988, a Waitsfield, Vermont physician conducted the children's school physical examinations. In the fall of 1988, they began attending public school in Moretown, Vermont.

Petitioners submitted copies of various documents reflecting either a Moretown, Vermont post office box number or a Moretown street address of Route 100B. These documents consisted of, among others things, canceled checks drawn on petitioners' joint Citibank checking account, a notice of loan interest rate change from 1st National Bank of Vermont and amendment pages from some of petitioners' insurance policies reflecting an address change. The documents submitted bear dates commencing around June 30, 1988. The documentary evidence submitted by petitioners does not include any sworn documents.

On August 12, 1988, Norman Schibuk registered to vote in Vermont. His application for addition to the Moretown, Vermont "checklist" stated that his "principal dwelling place is at Route 100B Moretown VT 05660." A notary public administered the Freeman's Oath to him on the same date. Mr. Schibuk's name was added to the Moretown checklist on August 30, 1988.

Petitioners filed Federal personal income tax returns (Form 1040) for the years 1988 through 1990. However, they did not file any New York State tax returns for those years.

Petitioners' 1988 joint Form 1040 lists their address as "P.O. Box 484, Moretown, VT 05660." Petitioners claimed a total of five exemptions, three of which were for dependent children. Petitioners reported adjusted gross income of $646,022.00 consisting of: interest income of $4,331.00; dividend income of $1,154.00; taxable refunds of [New York] state and local income taxes of $7,877.00; Schedule C business income of $304,924.00; capital gain of $39,056.00 and, on line 18, partnership income of $288,680.00. The Schedule C Profit or Loss From Business or Profession (Sole Proprietorship) ("Schedule C"), attached to this return, listed the proprietor as Norman Schibuk, principal business activity and profession as computer consultant and the business name and address as Norman Schibuk, PO Box 484, Moretown, VT 05660. The Schedule E Supplemental Income Schedule (from rents, royalties, partnerships, estates, trusts, REMICS, etc.), attached to this return, reported partnership income of $337,928.00 from CRP and an allowable loss of $49,248.00 from the Poinciana-Regency Ltd Partnership. The Schedule D Capital Gains and Losses attached to the return reported long-term gain from sale or exchange of petitioners' Cole Drive home in the amount of $53,550.00, as well as a long-term capital loss carryover of $14,494.00. Form 2119 reported the sale of petitioners' former main home at Cole Drive on December 23, 1988, and listed a basis of $490,000.00, and a

selling price of $1,075,000.00. On this form, petitioners also reported that they had bought or built a new main home and moved into it on December 23, 1988. The cost of the new home was listed as $963,200.00.

Petitioners' 1989 Form 1040 lists their address as "P.O. Box 484, Moretown, VT 05660." On the Schedule E attached, partnership income from CRP is listed in the amount of $532,022.00, along with an allowable loss of $1,517.00 from the Florida Baseball Association.

Petitioners' 1990 Form 1040 lists the same Moretown, Vermont post office box address as was contained on both the 1988 and 1989 Forms 1040. According to the Schedule E attached to the Form 1040, petitioners had partnership income from CRP in the amount of $132,593.00; an allowable partnership loss of $46.00 from the Florida Baseball Association and income of $12,780.00 from Labyrinth Systems, Inc., an S corporation. The total partnership and S corporation income listed on line 18 of Form 1040 was $145,327.00.

Petitioners filed a Vermont Income Tax Return Resident - Nonresident- Part Year Resident (Form VT-3) for the year 1988 reporting an adjusted Vermont income tax due of $33,531.00. Petitioners determined this amount by multiplying the Form 1040 line 40 amount of $145,786.00 by 23%.

Petitioners employed Castro, Langtry & Co. of Rye Brook, New York to prepare their Federal personal income tax returns for tax years 1988, 1989 and 1990. This firm also prepared the Vermont income tax return, as well as CRP's Federal and state partnership returns.

On or about December 9, 1991, the Division commenced a field audit of petitioners' 1988, 1989 and 1990 returns. On December 12, 1991, a letter of audit was sent to petitioners at the Armonk, New York address. Subsequently this letter was returned to the Division because a

forwarding address was not found. Based on information received from the Armonk postmaster, the auditor sent a final notice letter, dated March 2, 1992, to petitioners, c/o Labyrinth System, 30 Buxton Farm Road, Stamford, CT 06095. The auditor did not receive a response to this letter. After reviewing petitioners' Federal returns for the years 1988 through 1990, the auditor sent another final notice, dated October 14, 1992, addressed to petitioners at P.O. Box 484, Moretown, Vermont. This final notice letter stated that the Division's records failed to show that petitioners filed New York State income tax returns for the period 1988 to 1990 and requested copies of those returns.

The audit report includes the contact sheets entitled "Tax Field Audit Record" and "Contacts and Comments of All Audit Actions" which reflected all of the auditor's contacts and comments concerning this audit. According to the contact sheet, on October 16, 1992, the auditor received a telephone call from Enid Schibuk. During the conversation, he requested various items related to the case. She promised to send them as soon as possible.

According to the auditor's notes and comments, he received a letter from Mrs. Schibuk, dated October 20, 1992, in which she stated that they "have not resided in NYS since June, 1988." She also stated that the place they "moved" into was a temporary place while construction for the permanent home was in progress. An entry dated April 28, 1993 states that the auditor called Mrs. Schibuk and "she confirmed that when they 'moved 6/88' they occupied a temporary home in Vermont. In 1990 they completed their present home." The auditor further noted that petitioners "claim that the present home which they call their primary home is a direct replacement of the N.Y. home" and therefore there was no capital gain on the sale.

The auditor's contact sheets indicate that he received information from and had conversations with petitioners' former representative, Thomas Langtry, regarding petitioners' 1988 New York State tax liability.

On November 16, 1993, Mr. Langtry sent a letter to the Division in which he stated that Mr. Schibuk strongly disagreed with the position taken by the Division with respect to his 1988 New York State tax liability. In this letter, Mr. Langtry stated that both he and Mr. Schibuk had been under the impression that the audit issue was "restricted to the timing of the receipt of income for 1988, i.e. before or after he permanently moved from New York." He further stated that both he and Mr. Schibuk felt that they had already shown that most of the 1988 income was received after the change of residence, and that the enclosed Form IT-203 for 1988 indicated "the resulting tax liability." With regard to the major issue of whether or not the 1988 income should be construed as New York source income, Mr. Langtry set forth the following facts, among others, in support of petitioners' position that none of Mr. Schibuk's business income or partnership-derived income stemmed from New York sources.

> At some point during 1986, CRP discontinued it's [sic] business activities. At that time, all business assets were liquidated. One of the assets owned by CRP, had been an ownership interest in another partnership, "MANAGEMENT PARTNERSHIP" OF PORTLAND, OREGON (hereinafter referred to as "MP"). In essence, there was a buyout agreement, wherein CRP agreed to sell it's [sic] partnership interest back to MP for a specified sum, to be paid over a 5 year period. For the following five years, MP made a lump sum payment to CRP at the end of each calendar year. Consequently, CRP each year received a Federal K-1 . . ., reporting the annual distributions as "guaranteed payments." In essence, they were deferred payments for the 1986 sale of a business interest in the State of Oregon.
>
> * * *

> CRP conducted no business in the State of New York during the five year payout from MP and only reported the annual distribution on a New York partnership return as a matter of continuity. In addition to no business being conducted in New York, the source of the income is the State of Oregon, not New York. Additionally, MR. SCHIBUK reported all of his MP-derived income to the State of Vermont, where he resided at the time of receipt of the income.

Mr. Langtry also requested a conference on behalf of petitioners and requested information about petitioners' appeal rights.

Attached to Mr. Langtry's November 16, 1993 letter was petitioners' 1988 Form IT-203 Nonresident and Part-Year Resident income tax return ("Form IT-203"). This return was received by the Division on November 24, 1993. Part C of Form IT-203 asks part-year residents to check the box which describes their situation on the last day of the tax year. Petitioners checked "(2) moved out of New York State and received income from New York State sources during your nonresident period." On the return, they listed the following items as New York source income: taxable interest income of $2,889.00; dividend income of $770.00; taxable refunds of state and local income taxes of $7,877.00; business income of $0.00; capital gain of $39,056.00; and a Schedule E partnership loss of $32,848.00. Petitioners subtracted the taxable refund of state and local income taxes of $7,877.00 and arrived at a New York adjusted gross income of $9,867.00. Petitioners claimed itemized deductions of $8,500.00 and New York dependent exemptions of $3,000.00. They determined their New York State taxable income to be a loss of $1,633.00, with zero tax due.

By letter dated February 8, 1994, the Division notified Mr. Langtry that under 20 NYCRR former 148.10(b)(1), when a resident individual changes his status from resident to nonresident and has an installment sale while a resident; he must accrue on the New York State personal

income tax return for the resident period the entire amount of the gain remaining unpaid from such installment obligations, regardless of the method of accounting he normally uses in reporting his transactions. Copies of the pertinent regulations were enclosed.

On February 16, 1994, the Division issued a Statement of Personal Income Tax Audit Changes, for the year 1988, which contained the following explanation under "Remarks":

> New york [sic] Tax Law provides that when a taxpayer changes from a resident to a nonresident of New York State, he/she must include on the final resident return any item of income, loss or deduction received or accrued up to the time the change occured [sic]. This includes the balance of income or gain to be received in the future years from an installment sale.
>
> Our audit revealed that you changed your domicile and residence on December 23, 1988 and spent over 30 days in New York State. Therefore you are being treated as a resident for the entire year.

The statement listed a corrected New York State tax liability, as computed in the attachment, of $105,010.50; penalties for failure to file of $26,252.63 and negligence penalties of $29,813.55, plus interest computed to February 6, 1994 of $49,126.05. The Schedule of Audit Adjustments to New York State Taxable Income contained the following computation:

N.Y. State Adjusted Gross Income per Return		
Audit Increases to N.Y. State Income		
Unreported Income plus Accruals From a 1986 Installment Sale	$1,323,371.00[3]	
Audit Decreases to N.Y. State Income	_____	
Net Adjustments to N.Y. State Income		1,323,371.00
Corrected Adjusted Gross Income		$1,323,371.00

[3]According to the Division's representative, the $1,323,371.00 figure consists of the 1988 Federal adjusted gross income of $646,022.00, plus the deferred payments of $532,022.00 received in 1989 and $145,327.00 received in 1990 from the sale of the MP partnership interest in 1986. It is noted that the Federal adjusted gross income figure of $646,022.00 included a taxable refund of New York State income tax in the amount of $7,877.00. However, the auditor did not make any adjustment to reflect that.

Itemized Deductions per Return		126,267.00
Audit Increases to Itemized Deductions		
Audit Decreases to Itemized Deductions		
Net Adjustments to Itemized Deductions		0.00
N.Y. Itemized Deduction Adjustment		25,253.40
Corrected Itemized Deductions After Modification		101,013.60
Number of Exemptions Allowed: 3 * Value of Each Exemption: 1000		3,000.00
Corrected N.Y. State Taxable Income		$1,219,357.40
Corrected Taxable Income or Base	$1,219,357.40	
Recomputed Tax Liability	101,249.68	
Credits Against Tax		
N.Y.S. Resident Credit (IT-112R)	15,827.00	
Total Credits Against Tax	15,827.00	
Other Taxes or Disallowed Credits		
Tax on Unearned Income	19,587.82[4]	
Total Additional Taxes or Disallowed Credits	19,587.82	
Corrected tax liability	$105,010.50	

The Division issued a Notice of Deficiency (Notice No. L-008602436-9), dated March 31, 1994, for personal income taxes due pursuant to Article 22 of the Tax Law for the year 1988 in the amount of $105,010.50, plus interest of $50,474.69 and penalties of $56,740.50. The computation section of the notice contained the following explanation "Field audit of your records disclosed additional tax due."

Petitioners timely requested a conciliation conference which was held on August 22, 1995. After the conciliation conference, the conferee issued a Conciliation Order (CMS No. 139742) dated March 15, 1996, sustaining the statutory notice.

[4]This additional tax was computed on unearned income of $979,391.00 ($1,323,371.00 less earned income of $304,924.00 and capital gain net income of $39,056.00).

On September 24, 1997, petitioners submitted various documents consisting of their children's medical and school records; voter registration application for Norman Schibuk; various insurance endorsements and policies; Citicorp bank statements and various Citicorp checks; a Chase Visa bill; Moretown, Vermont tax receipt; a bank deposit slip and a home security contract. These documents have been accepted into the record in this matter.

The Division submitted a brief on October 15, 1997. On November 10, 1997, petitioners submitted a reply letter with an attachment. The attachment consisted of a letter, dated November 1, 1997, written by petitioner Enid Schibuk to her representative. The attachment to the reply letter was rejected and not taken into account in the determination of this matter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge concluded that petitioners had presented sufficient evidence to demonstrate that they had changed their domicile from New York to Vermont in September of 1988. She rejected petitioners' argument that the evidence showed that they changed their domicile to Vermont in June 1988. Despite their change of domicile, however, the Administrative Law Judge concluded that petitioners were properly taxable as New York State residents in 1988 on all of their income for that year. Specifically, the Administrative Law Judge concluded that petitioners maintained a permanent place of abode in New York (their Armonk, New York home) through December 23, 1988 and failed to meet their burden to show by clear and convincing evidence that they did not spend, in the aggregate, more than 183 days in New York during 1988.

The Administrative Law Judge also concluded that for the year 1988, the Division properly accrued the deferred payments which petitioners received from CRP in 1989 and 1990. The

Administrative Law Judge rejected petitioners' argument that the amount they received each year from CRP represented their distributive share of CRP's income and was not a guaranteed payment from an installment sale. However, the Administrative Law Judge found that the amount of petitioners' share of the MP guaranteed payments accrued to 1988 was incorrect. The Division had incorrectly used the total partnership and S corporation income from petitioners' 1990 Schedule E rather than the amount which petitioners reported as partnership income from CRP on their Schedule E. In addition, the Administrative Law Judge concluded that the Division failed to subtract a taxable refund of New York State income tax from petitioners' 1988 Federal adjusted gross income.

The Administrative Law Judge concluded that since petitioners were New York State residents for tax purposes in 1988, the issue of whether certain income payments received in 1988 should be allocated to New York as New York source income was rendered moot.

The Administrative Law Judge concluded that although petitioners bore the burden of proving that their failure to file a tax return for the year 1988 with the State of New York was due to reasonable cause and not due to negligence, petitioners failed to submit any evidence in that regard. Thus, she concluded that the Division properly assessed penalties.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that on all relevant tax returns, CRP and petitioners treated the additional payments by MP as payment for services rendered by Norman Schibuk and petitioners even paid self-employment taxes on these sums. Petitioners argue that, contrary to the conclusion of the Administrative Law Judge, the "guaranteed payments" by MP were actually contingent upon the performance of services by Norman Schibuk. Since the payments received

by CRP after 1986 were contingent upon petitioner Norman Schibuk performing services, these amounts for services rendered in future years are not included in petitioners' 1988 New York income.

Petitioners claim that the Administrative Law Judge ignored relevant paragraphs of the Memorandum Agreement which provided for guaranteed payments in addition to the $1,000,000.00 paid for CRP's capital interest in MP. The remaining amount to be paid was a guaranteed payment contingent on the performance of services by petitioner Norman Schibuk. Petitioners argue that the term "guaranteed payment" is a term of art used in partnership taxation. Such payments are defined by Internal Revenue Code ("IRC") § 707(c) to distinguish non-deductible capital payments from deductible payments to partners and retiring partners. Here, petitioners argue, the term "guaranteed payment" was used to clarify that post-1986 payments by MP to CRP were to be deductible by MP and ordinary income to CRP.

Petitioners argue that the Administrative Law Judge's interpretation is incorrect because there is no need to distinguish between a contractually required payment and a payment that is guaranteed. Both are equally enforceable under contract law. Further, no "guarantee" by a third party was given to MP in this situation. Petitioners maintain that the treatment of the payments after 1986 by MP and CRP is consistent with their being compensation for services. CRP always characterized such payments as ordinary income and not capital gains. Further, petitioners always reported the CRP distributions as ordinary income and paid self-employment tax on these amounts. Petitioners stated that had these amounts been installments of the purchase price for the sale of a capital asset, no self-employment tax would have been due.

Petitioners assert that this argument is bolstered by the election of MP in 1986 to step up its basis in partnership assets by $1,000,000.00 pursuant to IRC § 743 by the amount of the purchase price paid to CRP to redeem its partnership interest. This was consistent with the market value of CRP's capital account in July 1986 of $1,000,000.00.

In the alternative, petitioners argue that if the Tribunal disagrees with this characterization of the payments to petitioners, then the issue of petitioners' domicile must be decided. In that regard, petitioners assert that they changed their domicile from Armonk, New York to Moretown, Vermont in June 1988 and not in September 1988, as concluded by the Administrative Law Judge. Petitioners argue that the Administrative Law Judge improperly excluded a letter submitted by petitioners with their reply brief from evidence. According to petitioners, this letter explained the facts surrounding their move to Vermont. Petitioners argue that this letter was a reply to factual assertions made by the Division in its brief and that it was improper for the Administrative Law Judge to close the record without notice to petitioners. Petitioners argue that they had an absolute right to respond to the factual allegations of the Division. Petitioners have included the same letter with their brief in support of their exception.

Petitioners assert that there is no evidence in the record to support the Administrative Law Judge's conclusion that petitioners changed their domicile to Vermont in September as opposed to June 1988. Rather, the excluded reply letter of petitioner establishes that such a change in domicile occurred in June and not in September.

Petitioners argue that the Administrative Law Judge never identified what evidence petitioners were to have provided to prove that they did not spend more than 183 days in New York during 1988. However, they state that since there is no evidence in the record to support a

finding that petitioners resided in New York after June 1988, the Administrative Law Judge's inference that they spent more than 183 days in New York is improper, arbitrary and capricious.

Petitioners also allege that they had a reasonable basis for concluding that the post-1986 payments received by CRP were compensation for the services of Norman Schibuk and that they were domiciliaries of Vermont after June 1988. Thus, the imposition of penalties was an abuse of discretion.

The Division, in opposition, argues that contrary to petitioners' arguments, the $3,000,000.00 payment made by MP to CRP over five years was a guaranteed payment for the sale of the partnership interest and not compensation for petitioners' services. Although the Memorandum Agreement refers to an employment agreement, petitioners did not provide either the employment agreement or a complete copy of the Memorandum Agreement. Rather, the portion of the Memorandum Agreement in evidence supports the Division's position that the $3,000,000.00 amount is a "guaranteed payment" to be accrued to the 1988 tax year of petitioners.

The Division states that the Administrative Law Judge correctly dealt with the issue of petitioners' change of domicile and that the letter contained with petitioners' reply brief was properly excluded from evidence. The Division argues that petitioners were aware that their 1988 residency was an issue since it was raised on audit and by the Division in its answer to the petition. Thus, the Division argues that petitioners' failure to satisfy their burden of proof that they were not present in New York for more than 183 days in 1988 was their fault and not that of the Division.

OPINION

We first address the question of whether or not petitioners were properly taxable as residents of New York State for 1988. Tax Law § 605(b)(1) defines a "resident individual" to include an individual:

> (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 . . . .

While the Tax Law does not contain a definition of "domicile," the Division's regulations (20 NYCRR former 102.2[d]) provided, in pertinent part, that a "domicile," in general, is the place which an individual intends to be his permanent home. Further, once established, a domicile "continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there" (20 NYCRR former 102.2[d]). The burden of proving this intention is upon any person asserting a change of domicile to show that the necessary intention existed. While a person can have only one domicile, he may have two or more homes. In this regard, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere.

In the present matter, there is no dispute that at least until June 1988, petitioners were domiciled in and residents of New York State. Based on the evidence presented, the Administrative Law Judge concluded that petitioners changed their domicile to Vermont in

September 1988. The Division has taken no exception to this conclusion and, therefore, we accept the conclusion of the Administrative Law Judge that a change in domicile took place.

Petitioners, however, argue that they changed their domicile in June 1988. Notably absent in support of petitioners' argument is testimonial evidence by petitioners or affidavits to explain the significance of the documentary evidence or how it demonstrates that petitioners intended to change their domicile in June 1988. Thus, the documents presented must speak for themselves. After reviewing these documents, we find nothing in the record before us that would cause us to modify the Administrative Law Judge's conclusion that petitioners changed their domicile in September 1988.

In this regard, we note that petitioners submitted a letter with their reply brief to the Administrative Law Judge which was intended to be made part of the evidentiary record in this proceeding. The Administrative Law Judge rejected this letter. Petitioners have resubmitted this letter with their exception herein and it is likewise rejected. It is clear to us from the correspondence sent to the parties by the Administrative Law Judge that each party was advised that they had a certain date by which to submit documentary evidence for consideration. While these dates were subsequently amended, there is no indication that the time for submission of documents was left open-ended by the Administrative Law Judge.

As we stated in ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991):

> In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the

> record. For these reasons, we must follow our policy of not allowing the submission of evidence after the closing of the record.

At the time petitioners submitted their reply brief to the Administrative Law Judge, the record in this matter was closed. Thus, we affirm the Administrative Law Judge's conclusion that this letter should not be included as part of the evidentiary record in this proceeding.

In any event, whether the change of domicile took place in June, as argued by petitioners, or in September, as concluded by the Administrative Law Judge, petitioners are still taxable as residents on their 1988 income. As the Administrative Law Judge pointed out, "[a]lthough it has been determined that petitioners changed their domicile from New York to Vermont, they would be properly assessed herein if they both maintained a permanent place of abode in New York and spent in the aggregate more than 183 days there during the year in issue (Tax Law § 605 [b][1][B])" (Determination, conclusion of law "G").

A "permanent place of abode" is defined at 20 NYCRR former 102.2(e)(1) as "a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse." Based on the date of sale of their Armonk, New York home on December 23, 1988, the Administrative Law Judge properly concluded that petitioners maintained a permanent place of abode in New York through that date. As the Administrative Law Judge also noted, petitioners submitted no evidence on the issue of whether or not they spent less than 183 days in the State of New York, a matter on which they clearly bore the burden of proof (***Matter of Kornblum v. Tax Appeals Tribunal***, 194 AD2d 882, 599 NYS2d 158; ***Matter of Smith v. State Tax Commn.***, 68 AD2d 993, 414 NYS2d 803; ***see also*** 20 NYCRR former 102.2[c]). Thus, irrespective of when petitioners changed their domicile

from New York to Vermont during 1988, petitioners were properly taxed as residents of New York State for 1988 pursuant to the alternative definition of a "resident individual" provided by Tax Law § 605(b)(1)(B).

Having decided that petitioners were properly taxable as residents of New York State for 1988, we must now decide whether petitioners were required to accrue the payments they received in 1989 and 1990 from CRP as part of their taxable income for the year 1988.

Tax Law former § 638(c) provided, for the period at issue, that:

> (1) If an individual changes his status from resident to nonresident he shall, regardless of his method of accounting, accrue to the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status, if not otherwise properly entering into his federal adjusted gross income for such portion of the taxable year or a prior taxable year under his method of accounting.
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> * * *
>
> (3) No item of income, gain, loss or deduction which is accrued under this subsection shall be taken into account in determining New York adjusted gross income or New York source income for any subsequent taxable period.

The regulations under 20 NYCRR former 148.10(a) stated, in pertinent part:

> Where the resident status of an individual . . . changes from resident to nonresident, such individual . . . must, regardless of the method of accounting normally employed, accrue and include, on the New York State income tax return and any schedule require [sic] to be filed with such return for the portion of the year prior to the change of resident status, any items of income, gain, loss or deduction (and any New York items of tax preference) accruing prior to the change of residence, if not otherwise properly includible or allowable for New York State income tax purposes or New York State minimum income tax purposes for such portion of the taxable year or for a prior taxable year. That is, in computing New York State taxable income, New York personal service

> taxable income and New York State minimum taxable income for the resident period, such individual . . . must include all items required to be included if a Federal income tax return were being filed for the same period on the accrual basis, together with any other accruals such as deferred gain on installment obligations which are not otherwise includible or deductible for Federal or New York State income tax purposes or for Federal or New York State minimum income tax purposes either for such resident period or for a prior taxable period . . . .

Pursuant to Tax Law former § 638(c), the Division accrued to 1988 the amounts received by petitioners from CRP in 1989 and 1990. Whether this accrual was appropriate depends on the nature of the payments made by MP to CRP. In this regard, we have only documentary evidence to rely on. The Memorandum Agreement provides, in paragraph "1" thereof, that CRP sells and MP purchases the 10% interest in MP owned by CRP. The purchase price is $4,000,000.00. Of this amount, $1,000,000.00 is allocated to CRP's capital account in MP and $3,000,000.00 "shall be paid [to CRP] as a guaranteed payment" with payment terms and conditions to be the same as specified in another agreement not in evidence herein.

Petitioners argue that "guaranteed payment" is a term of art relating to partnership taxation. Section 707 of the Internal Revenue Code, entitled "Transactions Between Partner and Partnership," provides, in paragraph (c) thereof, that "guaranteed payments" by a partnership to a partner for services or the use of capital shall be considered as made to one who is not a member of the partnership for purposes of section 61(a) and, subject to section 263, for purposes of IRC § 162(a). Thus, "guaranteed payments" are payments made to a partner not in his or her role as a partner. However, designating that a portion of the purchase price is to be paid as a guaranteed payment does not automatically qualify it as such.

Guaranteed payments under IRC § 707 are made by a partnership to a partner. Petitioners do not explain how MP could make guaranteed payments to an entity that had ceased to be a partner. Guaranteed payments are paid for services or the use of capital. The terms of any agreement for services to be rendered by petitioners to MP are not part of the record of this proceeding. Additionally, it appears that characterizing part of the purchase price as a guaranteed payment contradicts the provisions of IRC § 741. That section provides, generally, that gain or loss on the sale or exchange of a partnership interest shall be considered as the gain or loss from the sale or exchange of a capital asset. Guaranteed payments, however, are considered ordinary income to the partner receiving them (Reg. § 1.707-1[c]).

However, we cannot emphasize the importance of petitioners' failure to provide adequate, competent and clear evidence in support of their position on audit or before the Administrative Law Judge. Petitioners bore the burden of demonstrating that the Division's conclusion, that the 1986 sale price was $4,000,000.00 and not $1,000,000.00, was incorrect (Tax Law § 689[e]). Although paragraph "10" of the Memorandum Agreement specified that "80% of the deferred payments under this agreement shall be contingent on Norman Schibuk's compliance with the terms of the provisions of Articles (A)(3) and 7(B) of his employment agreement," that employment agreement was never made a part of the record. In fact, at least one page of this handwritten agreement was omitted. It was incumbent on petitioners to prove that $3,000,000.00 of the $4,000,000.00 purchase price was not consideration for the sale or exchange of CRP's partnership interest in MP. This they failed to do. Without further documentation concerning the 1986 sale by CRP to MP, we conclude that petitioners were required to accrue as part of their

New York State taxable income for 1988 the balance of their share of gain resulting from the 1986 sale by CRP of its interest in MP.

As for petitioners' argument that penalties were inappropriately imposed, we disagree. Petitioners were under an obligation to file a resident return for 1988. They did not do so. Tax Law § 685(a)(1)(A) states that:

> [i]n case of failure to file a tax return under this article on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate.

Tax Law § 685(b)(1) states that "[i]f any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the deficiency." Petitioners have been assessed penalties pursuant to Tax Law § 685(a)(1) for their failure to file a New York State tax return for 1988 and pursuant to Tax Law § 685(b) for negligence. We agree with the Administrative Law Judge that petitioners have failed to submit any evidence to establish reasonable cause for the waiver of penalties. We agree with the Administrative Law Judge that petitioners were properly assessed penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Norman and Enid Schibuk is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Norman and Enid Schibuk is denied; and

4. The Notice of Deficiency dated March 31, 1994, as modified in accordance with conclusion of law "K" of the Administrative Law Judge's determination, is sustained.

DATED: Troy, New York
May 6, 1999

/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