STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BERNARD AND BARBARA KANE	:	DECISION DTA NO. 815424
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1989.	:	

Petitioners Bernard and Barbara Kane, 16930 Silver Oak Circle, Delray Beach, Florida 33445-7011, filed an exception to the determination of the Administrative Law Judge issued on May 14, 1998. Petitioners appeared by Stephen L. Packard, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel).

Petitioners filed a brief in support of their exception and a reply brief to the Division of Taxation's brief in opposition. Oral argument was not requested.

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

ISSUES

I. Whether the Division of Taxation timely and properly issued a Notice of Deficiency to petitioners pursuant to Tax Law § 681(a) and § 683.

II . Whether the Division of Taxation properly determined that petitioners were resident individuals pursuant to Tax Law § 605(b).

FINDINGS OF FACT

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

On June 8, 1993, the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes to Bernard and Barbara Kane ("petitioners") at 16930 Silver Oak Circle, Delray Beach, Florida 33445. This document advised petitioners that the Division was asserting a deficiency of New York State personal income tax in the amount of $45,561.84, plus penalties and interest, and a deficiency of City of New York personal income tax in the amount of $987.47, plus penalty and interest. The Statement of Personal Income Tax Audit Changes advised petitioners that the basis for these deficiencies was that for the year 1989, they had not established, by clear and convincing evidence, that they intended to change their domicile from New York to Florida and were, therefore, considered New York residents subject to tax on all income. Petitioners were further advised that they had not established, through adequate records, that they had spent fewer than 183 days within the State in 1989. Alternatively, their wage allocation for the year had not been substantiated.

The Statement of Audit Changes, in computing the deficiency which it asserts against petitioners, also included, as an adjustment to New York State income, the sum of $76,529.00 which represents interest income on state and local bonds. A letter from Benjamin W. Block, CPA, to Cleveland Best of the Division's Westchester District Office, dated June 3, 1993, provided a detailed list of tax exempt interest reported on line 8b of petitioners' Federal income tax return for 1989. Of the total amount of $116,378.00, $69,879.00 was State of Florida municipal bond interest income and $6,650.00 was State of Texas municipal bond interest

income, for a total of $76,529.00 (the balance, or $39,850.00, represented New York municipal bond interest income which is not subject to tax in New York). The Division's position is that if petitioners are found to be statutory residents of New York for 1989, this $76,529.00 in interest income is subject to New York personal income tax.

On November 18, 1993, the Division issued a Notice of Deficiency to petitioners (the notice was addressed to petitioners at 16930 Silver Oak Circle, Delray Beach, Florida 33445-7011) which asserted a tax deficiency of $46,549.31 ($45,561.84 in State tax and $987.47 in City tax), plus penalty and interest, for a total amount due of $76,151.82 for the year 1989.

Previously, petitioners by their then representative, Steven M. Romm, CPA, executed a consent extending the period of limitation for assessment of personal income tax whereby they agreed that taxes due for the year 1989 could be assessed at any time on or before April 15, 1994. Attached thereto was an individual power of attorney, signed by both petitioners, which appointed Mr. Romm as their representative for purposes of income tax for 1989. Both the consent and the power of attorney were dated November 16, 1992.

In support of its position that the Notice of Deficiency was timely and properly issued to petitioners, the Division submitted the affidavit of Geraldine Mahon, principal clerk of the Case and Resource Tracking System ("CARTS") control unit. By her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical section for mailing.

She explained how she received a computer printout entitled "Assessments Receivable, Certified Record for Non-Presort Mail" (hereinafter "certified mail record") and the corresponding statutory notices, each predated with the anticipated date of mailing and a certified

control number. The certified mail record for the notices issued November 18, 1993, including the notice issued to petitioners, consisted of 15 fan-folded pages which are connected when the document is delivered into the possession of the U.S. Postal Service.

Ms. Mahon examined the certified mail record issued by the Division on November 18, 1993. The certified control numbers ran consecutively and there were no deletions. Each of the pages consisted of 11 entries with the exception of page 15 which contained 7 entries.

Ms. Mahon explained that the original date printed on the certified mail record, "11/08/93" was manually changed to "11-18-93". She stated that the certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the notices so that there is sufficient time for the notices to be manually reviewed and then processed for postage by the Mechanical Section. The handwritten change of the date was made by personnel in the Division's mail room to conform to the actual date that the notices and certified mail record were delivered into the possession of the U.S. Postal Service.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a U.S. Postal Service representative who then affixes his or her initials or signature and a U.S. postmark to the certified mail record. In this case, the U.S. Postal Service representative signed page 15 of the certified mail record, affixed a postmark to each page of the certified mail record and circled the total number of pieces on the certified mail record. Page 15 indicates that a Notice of Deficiency (Notice No. L008253809) was sent to Bernard Kane, 16930 Silver Oak Cir, Delray Beach FL 33445-7011 by certified mail using control number P 911 203 854. The U.S. postmark on each page of the certified mail record confirms that the notice was sent on November 18, 1993.

Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail. She indicates that the procedures described in her affidavit were the normal and regular procedures of the CARTS Control Unit on November 18, 1993. Attached to the affidavit was a copy of the Notice of Deficiency bearing assessment identification number L 008253809 and certified control number P 911 203 854 which is the same certified control number that appears next to the entry of Bernard Kane on the certified mail record. Ms. Mahon states that the notice attached to her affidavit was a true and accurate copy of the Notice of Deficiency mailed to petitioner Bernard Kane.

The Division also submitted the affidavit of James Baisley, Chief Processing Clerk in the Division's Mail Processing Center. His duties include the overall supervision of the entire Mail Processing Center staff that delivers outgoing mail to branch offices of the United States Postal Service. As such, he states that he is fully familiar with the operations and procedures of the Mail Processing Center.

After a notice is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information on the certified mail record. A member of the staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York where the postal employee affixes his or her signature to the certified mail record to indicate receipt thereof. In this case, the postal employee affixed a postmark to every page of the certified mail record, circled the total number of pieces and signed

the certified mail record to indicate that this was the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee circled the total number of pieces for the purpose of indicating that 161 pieces were received at the post office is based on the fact that the Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total by writing the number of pieces received on the certified mail record. The certified mail record is the Division's record of receipt by the Roessleville Branch of the post office for pieces of certified mail.

Mr. Baisley states that in the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the certified mail record is picked up by a member of his staff the following day and is delivered to the originating office. He indicates that he reviewed the affidavit of Geraldine Mahon as well as the certified mail record and the copy of the Notice of Deficiency and that he can determine that on November 18, 1993, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Bernard Kane, 16930 Silver Oak Circle, Delray Beach, FL 33445-7011 to the Roessleville Branch of the United States Postal Service in Albany, New York in a sealed postpaid envelope for delivery by certified mail. He could also determine that a member of his staff obtained a copy of the certified mail record with the postmark delivered to and accepted by the post office on November 18, 1993 for the records of the Division's CARTS Control Unit. The affidavit of Mr. Baisley indicates that the procedures described are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and that these regular procedures were followed on November 18, 1993 in mailing the Notice of Deficiency at issue herein.

Petitioner Bernard Kane testified that the Notice of Deficiency which the Division claims to have sent by certified mail to petitioners on November 18, 1993 was never received by petitioners.

Jean C. Gannon, Tax Technician II, appeared at the hearing on behalf of the Division and testified that on March 11, 1994, she had a telephone conversation with Steven M. Romm, CPA, who was petitioners' representative at that time. Mr. Romm had called Ms. Gannon in response to a telephone call from petitioner Bernard Kane who stated that he had just received a tax bill from the Division concerning personal income tax liability for 1989. Mr. Romm testified that he was told by Ms. Gannon that the tax bill had been issued in error and that notices of deficiency had not been sent out. On March 11, 1994, Mr. Romm sent a letter to Ms. Gannon confirming his conversation with her in which he states that he was told that no notice had been mailed to petitioners. He stated that the first time that he received the Notice of Deficiency was in or about January 1995.

Ms. Gannon stated that during this conversation with Mr. Romm, she checked accounts receivable regarding this matter and it did not appear that a Notice of Deficiency had been sent to petitioners. She informed Mr. Romm that she would further check into the matter; a review of the Division's records revealed that the Notice of Deficiency had been mailed to the taxpayers' last known address on November 18, 1993, but was returned to the Division on December 15, 1993 "as undeliverable or unreceived [sic], or not accepted." Ms. Gannon also stated that while a copy of the notice is normally sent to a taxpayer's representative, no copy of this notice was sent to Mr. Romm despite the fact that a power of attorney was on file with the Division.

On or about May 15, 1980, Millar Elevator Industries, Inc. ("Millar") was sold to Runter Corporation, a subsidiary of Westinghouse Electric Corporation for a purchase price of $12,000,000.00. Petitioner Bernard Kane, as a 25 percent shareholder of Millar, received $3,000,000.00 as his share of the proceeds.

As a condition of the sale, each of the four shareholders consented to a covenant not to compete by which they agreed that for a period of five years from the date of the closing, they would not directly or indirectly engage in the business of installing, maintaining or modernizing elevators in the territory of Millar's business, i.e., the City of New York and Westchester, Rockland, Nassau, Suffolk, Bergen, Hudson, Essex, Morris, Middlesex, Somerset, Union and Fairfield counties in the States of New York, New Jersey and Connecticut.

From 1980 until 1983, petitioner Bernard Kane had an employment contract with Runter Corporation, the purchaser of Millar. In 1983, Jean Pierre St. Louis, Henry Schindler and Gabriel Uzzo (all former employees of Millar) formed two corporations, Computerized Elevator Control Corporation ("CEC") and New York Elevator Company, Inc. ("NY Elevator"). CEC's business was to manufacture computerized elevator controls while NY Elevator was a contractor which modernized, repaired and maintained elevators in the New York metropolitan area.

In November 1982, petitioner Bernard Kane incorporated Bernard Kane Enterprises, Inc. ("BKE"). Petitioners were its only officers and Mr. Kane was its sole director. Bernard Kane testified that the sole purpose of BKE was to get customers to purchase the SWIFT equipment (elevator control equipment designed for the modernization of existing buildings) manufactured

by CEC.[1] From 1983 through 1985 (when the covenant not to compete expired), BKE had an office at 315 Old Rogers Road, North Philadelphia, Pennsylvania. Bernard Kane stated that this location was selected because it was the closest to the New York City area without violating the covenant. His territory included 47 states excluding New York, New Jersey and Connecticut.

In 1985, Bernard Kane became a shareholder in CEC and in NY Elevator. At the same time, he became an employee of CEC in the areas of marketing and sales; he was not an employee of NY Elevator. CEC sold the elevator control equipment to contractors. It did not sell to NY Elevator. This was done automatically by means of an exclusive sale and purchase arrangement between the sister companies.

In 1967, petitioners built a home at 53 Eastern Avenue, Ardsley, New York at a cost of approximately $150,000.00. Petitioners have continuously owned this house in Ardsley; it has never been listed for sale.

From 1974 to 1976, petitioners owned a three-bedroom condominium in Lauderdale Lakes, Florida. From 1976 to 1978, they rented an apartment at Country Club Apartments in Tamarack, Florida. Petitioners rented a three-bedroom apartment at Woodmont Country Club in Tamarack, Florida from 1978 to 1980. In 1980 and the early part of 1981, they owned a three-bedroom waterfront home in Lighthouse, Florida. Thereafter, in 1981, they moved into their present home at 16930 Silver Oak Circle, Delray Beach, Florida which was purchased in 1980 for approximately $300,000.00.

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[1]While BKE was incorporated in 1982, CEC, the producer of the SWIFT equipment was not formed until 1983.

During 1989, Bernard Kane was employed in sales and marketing by CEC. Attached to petitioners' 1989 nonresident income tax return was a wage and tax statement (form W-2) from CEC of 636 11th Avenue, New York, New York to Bernard Kane which indicated that he had received wages and other compensation in the amount of $534,472.50 for 1989. During that year, Bernard Kane was the only person on CEC's sales staff outside of the New York area. In 1989, he was also an officer and a shareholder of CEC.

Mr. Kane stated that CEC did not require him to be in New York and, accordingly, most of his work for the company was performed out of his Florida home and on the road in various locations. At the hearing, when asked by his representative how often he was in New York in 1989, his response was that "[i]ts hard to say. I get back every three weeks, once a month." Asked how long he would stay in New York, Mr. Kane replied, "A day or two."

In 1989, Bernard Kane was the President of NY Elevator and owned one-third of its shares of stock. Both CEC and NY Elevator had offices in the same building in New York City.

In 1989, petitioners' son, Douglas Kane, lived in Randolph, New Jersey. His sister, Laurie, the other child of petitioners also lived in New Jersey in 1989. Douglas Kane had previously lived in Fort Lauderdale, Florida until 1982 when he moved to New Jersey to begin his employment with Nelkan Corporation ("Nelkan"), a distributor of industrial containers located in Jersey City, New Jersey. In 1990, he acquired 50 percent of the shares of Nelkan from his father, petitioner Bernard Kane. The remaining shares are owned by John Hyland.

In 1989, Bernard Kane was employed in a limited capacity by Nelkan. Douglas Kane stated that Bernard Kane consulted with him regarding marketing and finance, but was not

involved in the day-to-day operation of Nelkan. No income from Nelkan was reported on petitioners' 1989 New York return.

Douglas Kane testified that when his father "came up", he sometimes stayed at the Randolph, New Jersey home of Douglas and his family. On other occasions, he stayed in a hotel or at his home in Ardsley, New York. He stated that his mother, petitioner Barbara Kane, sometimes accompanied Bernard Kane when he came to visit.

Bernard Kane testified that in February 1980, on the advice of their accountants, petitioners filed a Declaration of Domicile and Citizenship in Broward County, Florida. The document was filed at or about the time Bernard Kane sold Millar Elevator and petitioners purchased their present home in Delray Beach, Florida. In 1980, the parents of both petitioners and their son, Douglas and his family, lived in Florida (during that year, Douglas's wife gave birth to twin boys). For 1980 and years thereafter, petitioners filed their New York State income tax returns as nonresidents.

On the nonresident return filed for 1989, petitioner Bernard Kane reported that he worked a total of 231 days during the year. Out of these 231 days, he indicated that 94 days were worked outside the State and 137 were worked in New York. During the performance of her audit of petitioners, Jean C. Gannon, Tax Technician II, requested documentation of the days in and days out reported on the return. Approximately 5 months after her initial request, she was provided with a 13-page computer printout consisting of a summary sheet and 12 pages representing the whereabouts of Bernard Kane for each day of 1989. This computer printout indicated that Mr. Kane spent 172 days in New York, 137 of which were workdays. Ms. Gannon requested backup

documentation such as tickets, travel information, hotel bills, credit card statements or receipts, business expense reports, etc., but no such documentation was ever provided.

When asked who prepared the summary of days in and out of New York for 1989, petitioner Bernard Kane stated that he believed that his accountant prepared the document after conversations with Mr. Kane. Asked how he was able to recall his exact whereabouts on a day-to-day basis, Mr. Kane stated that it was "the best of my recollection, just an attempt at it." He admitted that he kept no diary because he "was too busy just doing what I was doing to justify or record everything that was going on."

Jean Pierre St. Louis, who along with Gabriel Uzzo and Henry Schindler formed CEC and NY Elevator in 1983, testified that he did not know the exact whereabouts of petitioner Bernard Kane when he was not present in the New York office. He further stated that records were not kept by the corporations of Mr. Kane's business travel expenses. Expense vouchers were part of the corporate records, but no logs were maintained for trips to visit out-of-town customers.

Jean Pierre St. Louis, Gabriel Uzzo and Henry Schindler each testified that petitioner Bernard Kane was not involved in the day-to-day operation of CEC or NY Elevator but, instead, spent much of his time on the road selling CEC's products to contractors. Each also testified that Bernard Kane was present in the New York offices of the corporations on an infrequent basis.

Elaine Sullam, a first cousin of petitioner Barbara Kane, stated that the most the Kanes stayed up north was four to five and one-half months per year. Sometimes petitioners traveled together; sometimes they came separately. She stated that petitioners kept their house in Ardsley

because it was almost paid off, was cheap to carry and gave them an inexpensive place to stay when they came up north.

In 1989, the electric bills at petitioners' Delray Beach home were as follows:

Service From	***To***	***Amount of Bill***
Dec. 14, 1988	Jan. 13, 1989	$293.33
Jan. 13, 1989	Feb. 14, 1989	$411.43
Feb. 14, 1989	Mar. 16, 1989	$419.88
Mar. 16, 1989	Apr. 14, 1989	$364.19
Apr. 14, 1989	May 15, 1989	$375.04
May 15, 1989	June 14, 1989	$284.91
June 14, 1989	July 14, 1989	$285.57
July 14, 1989	Aug. 15, 1989	$345.28
Aug. 15, 1989	Sep. 14, 1989	$324.76
Sep. 14, 1989	Oct. 13, 1989	$255.09

In 1989, the telephone bills at petitioners's Delray Beach home were as follows:

Date of Bill	***Current Charge***
Jan. 16, 1989	$55.60
Feb. 16, 1989	$65.33
Mar. 16, 1989	$89.80
Apr. 16, 1989	$66.35
May 16, 1989	$72.97
June 16, 1989	$102.20
July 16, 1989	$52.47
Aug. 16, 1989	$52.76

Sep. 16, 1989	$56.02
Oct. 16, 1989	$53.35

Penalties for negligence (Tax Law § 685[b]) and for substantial underpayment of liabilities (Tax Law § 685[p]) were imposed on the deficiency. In their reply brief, petitioners maintain that since the Division has conceded that they were domiciliaries of Florida for 1989, they had reasonable cause to file as nonresidents for the year.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

To establish that a statutory notice was properly mailed by certified or registered mail, in compliance with Tax Law § 681(a), the Division must provide evidence as to its general mailing procedure for such notices and that this procedure was in fact followed when mailing the notice in question (***Matter of MacLean v. Procaccino***, 53 AD2d 965, 386 NYS2d 111; ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). A properly completed Postal Service Form 3877 constitutes direct documentary evidence of the date and fact of mailing (***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992).

The Administrative Law Judge concluded, in this case, that the affidavits of Geraldine Mahon and James Baisley describe the Division's routine procedures for processing and mailing statutory notices such as the Notice of Deficiency issued to these petitioners. The affidavits also attest to the veracity of the copies of the Notice of Deficiency and the certified mail record attached thereto.

The Division also established, the Administrative Law Judge concluded, that its routine procedure for issuing statutory notices was in fact followed on November 18, 1993 in the

generation and issuance of this notice. The Administrative Law Judge concluded that the certified mail record in this case was properly completed and, as such, is substantially the same as a properly completed Postal Form 3877 (***Matter of Montesanto***, Tax Appeals Tribunal, March 31, 1994). Since the certified mail record constitutes direct documentary evidence of the date and fact of mailing (***Matter of Air Flex Custom Furniture, supra***), the Administrative Law Judge concluded that the Notice of Deficiency was properly mailed by certified mail to petitioners at their last known address on November 18, 1993. Based on the consent executed by petitioners' representative extending the period of limitations to April 15, 1994, the Administrative Law Judge also concluded that the Notice of Deficiency was timely issued in accordance with the provisions of Tax Law § 683(b)(2). Moreover, since the Notice of Deficiency was properly sent by certified mail to petitioners at their last known address, the Administrative Law Judge concluded that it was unnecessary to determine whether there was actual receipt.

Petitioners also claimed that the Notice of Deficiency was not *properly* issued, because the Division did not mail a copy of the notice to petitioners' representative until well after the expiration of the statute of limitations. The Administrative Law Judge noted there is no statutory requirement that a copy of the notice be served upon a taxpayer's representative, and further, petitioners cited no authority for the proposition that failure to timely serve a taxpayer's representative is grounds for dismissal of the notice. In ***Matter of Multi Trucking*** (Tax Appeals Tribunal, October 6, 1988), we held that if a taxpayer's representative was, in fact, not served with a copy of the statutory notice, that would require a tolling of the 90-day period for the filing of a petition seeking administrative review of the notice. The Administrative Law Judge pointed

out that in this case, petitioners were afforded the opportunity to have an administrative hearing on all issues raised by them despite the failure of the Division to timely serve a copy of the Notice of Deficiency on petitioners' representative. Therefore, the Administrative Law Judge concluded the Notice of Deficiency issued to petitioners is not invalid or time barred based on the Division's failure to send a copy of the notice to petitioners' representative.

While the Division, in its brief, conceded that petitioners were not New York domiciliaries in 1989, Tax Law § 605(b)(1)(B) also defines a "resident individual" as one "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 the state." There was no dispute, the Administrative Law Judge noted, that petitioners' home in Ardsley, New York constitutes a permanent place of abode in the State.

Here, as evidence of days spent outside New York, petitioners submitted a computer printout, prepared by an accountant, based on conversations with Bernard Kane. No handwritten diary or day-to-day records were introduced. No backup documentation of any kind, e.g., travel records or receipts, tickets, hotel receipts, credit card invoices, etc. were submitted to substantiate Mr. Kane's testimony. While petitioners' witnesses testified that he was not involved in the day-to-day operation of the corporations and was, therefore, not present in the New York offices on a frequent basis, the Administrative Law Judge found that their testimony was extremely general and shed no light on petitioners' whereabouts on specific days in 1989.

The Administrative Law Judge acknowledged that credible testimony can be sufficient to meet a taxpayer's burden to establish that he was not present in New York for more than 183 days (***Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994), and that a taxpayer is not

required to specifically account for his whereabouts on every day of the period in question *if* he can establish a "pattern of conduct" from which his location may be determined for any particular day (***Matter of Kern***, Tax Appeals Tribunal, November 9, 1995, ***confirmed Matter of Kern v. Tax Appeals Tribunal***, 240 AD2d 969, 659 NYS2d 140). However, the Administrative Law Judge noted, we have distinguished these cases from those where testimony alone is offered as proof of whereabouts. In ***Matter of Miller*** (Tax Appeals Tribunal, January 30, 1997), we noted that in ***Avildsen*** and ***Kern***, "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 the gaps between days where the specific location of the petitioners was known."

A business diary bolstered by credible testimony and other documents may be sufficient to substantiate days in and out (***see***, ***Matter of Moss***, Tax Appeals Tribunal, November 25, 1992). Although the computer printout submitted by petitioners was (except for the summary sheet) entitled "Bernard Kane 1989 NYS Diary of Days In & Out of NYS," the Administrative Law Judge determined that the document was not, in fact, a diary which is defined as "a record of events, transactions, or observations *kept daily or at frequent intervals*" (***see***, Webster's Ninth New Collegiate Dictionary 351 [emphasis added]). The Administrative Law Judge pointed out that there is no indication as to when this document was prepared but, in any event, it was not kept by Bernard Kane *daily or at frequent intervals*. The Administrative Law Judge noted that Mr. Kane admitted that the document was "the best of my recollection, just an attempt at it." Absent corroborating documentary evidence, the Administrative Law Judge concluded that the testimony of Bernard Kane, his business associates (Messrs. St. Pierre, Schindler and Uzzo) and Ms. Sullam, standing alone, lacked sufficient specificity to sustain petitioners' burden of proof,

pursuant to Tax Law § 689(e), to show that they spent fewer than 183 days in New York during 1989. Accordingly, the Administrative Law Judge concluded that the Division properly determined that petitioners were resident individuals for personal income tax purposes for the year 1989.

Tax Law § 612(b)(1) provides that in computing New York adjusted gross income of a resident individual, there must be added to Federal adjusted gross income, interest income on obligations of any state other than New York. Accordingly, the Administrative Law Judge concluded that the Division correctly added $76,529.00 in municipal bond interest income from Florida and Texas to petitioners' New York income.

Finally, the Administrative Law Judge canceled all negligence penalties under Tax Law § 685(b), since he concluded petitioners' underpayment of tax was not due to negligence or willful disregard of the statute. The Administrative Law Judge also concluded that there was reasonable cause for abatement of penalties for substantial underpayment of tax under Tax Law § 685(p), but otherwise sustained the Notice of Deficiency issued to petitioners on November 18, 1993.

ARGUMENTS ON EXCEPTION

Petitioners take exception to the Administrative Law Judge's conclusion that the Notice of Deficiency was properly issued to petitioners. They also take exception to the Administrative Law Judge's conclusion that petitioners were resident individuals for personal income tax purposes for the year 1989. Petitioners urge that the Administrative Law Judge erred in concluding that there was no corroborating documentary evidence of the fact that they spent fewer than 183 days in New York during 1989.

Petitioners argue on exception, as they did below, that the Division's usual procedure is to mail a copy of a taxpayer's Notice of Deficiency to the taxpayer's representative. The Division admits that the notice in this case was not mailed to the taxpayer's representative. Therefore, petitioners argue, this establishes that the Division did not follow their usual mailing procedure in this case and, therefore, the Division did not establish proper mailing of the notice.

Petitioners also continue to argue that there is no explanation for the handwritten change in the date on the first page of the certified mail record attached to Ms. Mahon's affidavit. They argue further that there is no substantiation of the identity of the Postal Service employee who signed page 24 of the certified mail record. These defects, petitioners argue, render the affidavits of Mr. Baisley and Ms. Mahon of no significance.

Petitioners also argue that the weight of the evidence establishes that they are not statutory residents.

In opposition, the Division states that the Administrative Law Judge correctly concluded that the notice was properly issued to petitioners and that petitioners failed to establish that they spent fewer than 184 days within New York during 1989. Accordingly, the Division requests that the determination of the Administrative Law Judge be sustained in all respects.

OPINION

We find that the Administrative Law Judge fully and correctly addressed all of the issues raised by petitioners. While petitioners submitted documentary evidence in an attempt to corroborate the testimony of their witnesses, we agree with the Administrative Law Judge that the documentation submitted does not provide the necessary detail to demonstrate petitioners' whereabouts on specific dates in 1989 and, thus, is insufficient to carry petitioners' burden of

proof. After reviewing the entire record in this matter, we conclude that petitioners have not directed us to any authority which justifies modifying the determination below in any respect. We, therefore, affirm that determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Bernard and Barbara Kane is denied;

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

3. The petition of Bernard and Barbara Kane is granted to the extent of canceling the penalties imposed, but in all other respects is denied; and

4. The Notice of Deficiency issued to petitioners on November 18, 1993 is modified in accordance with paragraph "3" above, but is otherwise sustained.

DATED: Troy, New York
February 18, 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