STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PHILIP TERRANOVA	:	DECISION DTA NO. 822699
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2001 and 2002.	:	

Petitioner, Philip Terranova, filed an exception to the determination of the Administrative Law Judge issued on October 27, 2011. Petitioner appeared by Jaeckle Fleischmann & Mugel, LLP (Nicole R. Tzetzo, Esq. and Paul A. Battaglia, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether petitioner has shown that he was not a domiciliary of New York State during the years 2001 and 2002 and, therefore, not taxable as a resident individual pursuant to Tax Law § 605 (b) (1) (A).

II. If petitioner established that he is not a domiciliary of New York State during the years in question, whether petitioner was a New York State resident liable for personal income taxes

for 2001 and 2002 because he maintained a permanent place of abode in Buffalo, New York, and spent over 183 days in New York State during these years.

III. If petitioner was a resident of New York State for the year 2001, whether the Schedule K-1 income petitioner received from Oak Leaf Confections of North America, Inc., a Delaware corporation with a federal S corporation election, should be subtracted from petitioner's New York State adjusted gross income because Oak Leaf Confections of North America, Inc., was subject to corporation franchise tax under Article 9-A of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "25." The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On October 1, 2007, following a field audit, the Division of Taxation (Division) issued to petitioner, Philip Terranova, a Notice of Deficiency asserting additional New York State personal income tax due for the years 2001 and 2002 in the aggregate amount of $309,226.00, plus interest.[1] The deficiency resulted from the Division's conclusion that petitioner was properly subject to tax as a resident of New York State for the years 2001 and 2002.

For each of the years 2001 and 2002, petitioner filed New York nonresident and part-year resident tax returns (Form IT-203) claiming head of household filing status, and indicating his address as Glen Eden Drive, Naples, Florida. On each of these returns, the "No" box was checked in response to the question, "Did you or your spouse maintain living quarters in New York State in [the particular year in question, i.e., 2001 and 2002]?"

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[1] Petitioner's representative executed five consents extending the period of limitation for assessment of personal income tax for the years 2001 and 2002 until any time on or before October 31, 2007.

On his 2001 nonresident income tax return, petitioner reported the following items as part of his federal adjusted gross income of $3,469,023.00: wages of $151,778.00, taxable interest income of $148,225.00, dividend income of $272.00, other losses of $2,250 from the sales of business property reported on a Schedule K-1 received from 3500 Genesee Associates, Schedule E partnership and S corporation income of $3,188,792.00, other income from the rental of personal property in the amount of $23,333.00, and adjustments to income totaling $41,127.00, consisting of alimony paid of $14,300.00 and personal property rental depreciation and interest expenses of $14,883.00 and $11,944.00, respectively. The New York State amount reported consisted of wages in the amount of $151,778.00; taxable interest income of $59,457.00; other losses of $2,250.00; Schedule E partnership and S corporation income totaling $44,406.00, consisting of $25,798.00 in passive income from 3500 Genesee Associates and $18,608.00 in nonpassive income from Niagara Chocolates, Inc. (Niagara Chocolates); other income from the rental of personal property in the amount of $23,333.00; and adjustments to income of $27,954.00, consisting of alimony paid of $1,127.00 and personal property rental depreciation and interest expenses in the amount of $14,883.00 and $11,944.00, respectively. Petitioner added the pro rata share of S corporation income tax of $63.00 and arrived at New York adjusted gross income of $3,469,086.00. After claiming itemized deductions of $46,229.00 and a dependent exemption of $1,000.00, he determined his New York State taxable income to be $3,421,857.00, and the New York State tax due on that amount to be $234,397.00. Petitioner then multiplied the New York State income percentage of 7.17 percent[2] by the base New York State tax of $234,397.00 and determined his allocated New York State tax to be $16,806.00.

[2] Petitioner determined the New York State income percentage by dividing the adjusted gross income in the New York State column on line 30 of Form IT-203 in the amount of $248,833.00 by the adjusted gross income in the federal column on line 30 in the amount of $3,469,086.00.

After deducting an Investment Credit from the S corporation, Niagara Chocolates, in the amount of $75,498.00, consisting of $22,990.00 for the current year and a carryover of $52,508.00, from the allocated New York State tax, petitioner determined his New York State tax to be zero. On this return, petitioner claimed a refund in the amount of $4,313.00, for his share of Niagara Chocolates' refundable Industrial or Manufacturing Business (IMB) credit.

On Schedule B of the Revised Income Allocation and Itemized Deduction form (Form IT-203-ATT) attached to the 2001 nonresident tax return, petitioner did not list an address for any living quarters maintained in New York State, but reported spending 158 days in New York State during the year 2001. The Schedule A, Allocation of wage and salary income to New York State, of this Form IT-203-ATT was not completed.

On his 2002 nonresident income tax return, petitioner reported the following items as part of his federal adjusted gross income of $2,267,361.00: wages in the amount of $10,500.00, taxable interest income of $105,451.00, ordinary dividends of $364.00, Schedule E partnership and S corporation income of $2,165,346.00, and an adjustment to income in the amount of $14,300.00 for alimony paid. The New York State amount reported consisted of wages of $10,500.00, taxable interest income of $39,223.00, ordinary dividends of $364.00, a Schedule E partnership and S corporation loss of $85,730.00 and a loss of $233.00 for alimony paid that was reported as an adjustment to income. Because a loss of $35,338.00 was reported on line 22 of the New York State column of Form IT-203, petitioner reported allocated New York State tax of zero. On this return, petitioner reported a nonrefundable Investment Credit of $53,689.00, consisting of $3,528.00 for the current year and a carryover of $50,161.00, and a refundable IMB

credit in the amount of $4,638.0.[3] Petitioner requested a refund of $4,638.00 for the year 2002 on this return.

Petitioner reported a New York itemized deduction in the amount of $20,382.00 on Schedule C of the Income Allocation and Itemized Deduction form (Form IT-203-ATT) attached to his 2002 nonresident income tax return. No other section of this Form IT-203-ATT was completed, including the box included on Schedule B to record "the number of days spent in New York State in 2002."

For the year 2001, petitioner reported the following Schedule K-1 items of income or loss on his federal Schedule E: passive income in the amount of $25,798.00 from 3500 Genesee Associates, a limited partnership; nonpassive income in the amount of $18,068.00 from Niagara Chocolates; nonpassive income in the amount of $933,776.00 from Sherbrooke Management and Marketing, Inc. (Sherbrooke Management), an S corporation; nonpassive loss in the amount of $74,396.00 from Alaise, Inc., an S corporation; a section 179 deduction of $12,000.00 and nonpassive income in the amount of $63,027.00 from SweetWorks, a Florida S corporation; and nonpassive income in the amount of $2,233,979.00 from Oak Leaf Confections of North America, Inc., (Oak Leaf) an S corporation.

For the year 2002, petitioner reported the following Schedule K-1 items of income or loss on his federal Schedule E: passive income in the amount of $23,072.00 from 3500 Genesee Associates; nonpassive loss in the amount of $1,022,034.00 from Niagara Chocolates; nonpassive income in the amount of $284,267.00 from Sherbrooke Management; nonpassive loss in the amount of $71,228.00 from Alaise, Inc.; a nonpassive loss in the amount of $46,462.00

[3] Petitioner reported an Investment Credit from Niagara Chocolates and SweetWorks, Inc. (SweetWorks) of $50,161.00 and $575.00, respectively, and IMB credits for Niagara Chocolates and SweetWorks of $2,171.00 and $2,467.00, respectively.

from SweetWorks, the Florida S corporation; and a section 179 deduction of $16,800.00 and nonpassive income of $3,014,531.00 from SweetWorks (formerly Oak Leaf).

In the mid-1950s, petitioner's parents, John and Angela Terranova, started Niagara Candies, a business that manufactured and sold chocolates, in Buffalo, New York. Later, on November 23, 1982, the business was incorporated as a New York corporation under the name 3490 Genesse St. Thereafter, on some unknown date, the name of the corporation was changed to Niagara Candy, Inc. Subsequently, on May 7, 1996, the name of the corporation was changed to Niagara Chocolates. The corporation elected to be treated as a federal S corporation effective September 14, 1983. At all relevant times, Niagara Chocolates had a 98,000 sq. ft. manufacturing facility located at 3500 Genesee Street, Cheektowaga, New York.

Born in New York State in 1949, petitioner's involvement in the family business began when he was young. Eventually petitioner became President of Niagara Chocolates.[4] As President of Niagara Chocolates, he actively ran the corporation's operations, including its sales and marketing**.** On July 2, 2001, upon the transfer of his parents' 3,900 shares of the corporation to him, petitioner became the controlling shareholder of Niagara Chocolates. At that time, the corporation's other shareholders were petitioner's brothers, Joseph and Anthony. For the year 2001, petitioner received $151,777.96 in wage income from his employment with Niagara Chocolates. Although petitioner ceased being an employee of Niagara Chocolates at the end of 2001, he continued to be the corporation's President until June 30, 2002. Petitioner also continued to actively run Niagara Chocolates during that time.

During the years 2001 and 2002, petitioner had an office and an assistant at Niagara

[4] The exact date on which petitioner became President of the corporation is not part of the record.

Chocolates' Cheektowaga, New York, manufacturing facility.

On January 29, 1998, Oak Leaf was incorporated in Delaware. Petitioner was the President and 100% shareholder of Oak Leaf. At that time, Oak Leaf's wholly-owned Canadian subsidiary, Oak Leaf Confections Limited, purchased a 148,000 sq. ft. manufacturing facility, equipment and the associated bulk sale vending business located at Comstock Road, Scarborough, Ontario, Canada. At all relevant times, Oak Leaf manufactured chewing gum, gumballs for vending machines, jaw breakers, and other types of nonchocolate sugar candy at its Scarborough, Ontario, Canada, facility. Oak Leaf's principal office was located at Comstock Road, Scarborough, Ontario, Canada. On or about April 1, 2001, Oak Leaf reorganized, and elected to be treated as a federal S corporation effective January 1, 2001. Beginning in 1998 and continuing through June 30, 2002, Oak Leaf did not file New York State corporation franchise tax returns.

According to petitioner, after he acquired Oak Leaf in 1998, he began to spend time in Canada growing that business. Although Oak Leaf's sales were predominantly made in North America, he began to explore overseas export opportunities for that business. Petitioner also remained very active in the family business, Niagara Chocolates. To generate sales for both businesses, petitioner visited customers and attended trade shows. Petitioner also visited various companies that supplied equipment that he eventually purchased.

During the years 2001 and 2002, petitioner had an office and a secretary at Oak Leaf's Scarborough, Ontario, Canada, manufacturing facility.

On November 2, 2000, SweetWorks was incorporated in the State of Florida, with its office located at Coke Road, St. Augustine, Florida. Henry M. Whetstone, Jr., was the corporation's President and a 50% shareholder of SweetWorks. Petitioner owned the remaining

50% of SweetWorks. SweetWorks had a full sales and marketing staff that worked out of its St. Augustine, Florida, office. Beginning in 2001 and continuing through June 30, 2002, SweetWorks provided sales and marketing services to three companies, Niagara Chocolates, Oak Leaf, and Whetstone Candy, Inc. (Whetstone Candy).

Whetstone Candy, a Florida corporation owned by Mr. Whetstone and his sister, Virginia Whetstone, manufactured chocolates, including Chocolate Oranges and SeaShells at its Coke Road, St. Augustine, Florida, manufacturing facility. The corporation also had patents and the technology to manufacture a safe and legal chocolate and toy combination that had already received approval for sale in the United States.

When the start-up corporation SweetWorks was created, it was located at the Whetstone Candy facility. This corporation was created in contemplation of an eventual merger of petitioner's businesses with Mr. Whetstone's business. According to petitioner, he and Mr. Whetstone wanted to work together to develop a new product, i.e., the chocolate and toy combination, at the Whetstone Candy facility, that "was supposed to be a significant product with sales that would have dwarfed anything" that they were doing in combination at that time. Petitioner further explained that the thought was that "the whole center of gravity was going to move" from his "businesses, which were located in Toronto and Buffalo, to Florida."

On June 28, 2002, Niagara Chocolates, Whetstone Candy and SweetWorks merged with and into Oak Leaf. Contemporaneously with the merger, the surviving corporation's name, Oak Leaf, was changed to SweetWorks and its principal place of business was changed to Coke Road, St. Augustine, Florida. The effective date of this merger was July 1, 2002, the date the executed merger documents were filed with the secretaries of state of New York, Florida and Delaware. Upon the completion of the merger, petitioner owned 70% of the stock of the surviving

corporation, SweetWorks. The remaining 30% of the stock of SweetWorks was owned by Mr. Whetstone, who owned 20%, and Ms. Whetstone, who owned 10%. In addition, Mr. Whetstone was President of the surviving corporation. After the merger, SweetWorks had manufacturing facilities located in Cheektowaga, New York (Niagara Chocolates' former operations), Scarborough, Ontario, Canada (Oak Leaf's former operations), and St. Augustine, Florida (Whetstone's former operations). Petitioner continued to actively perform services for SweetWorks at the Cheektowaga, New York, and Scarborough, Ontario, Canada, manufacturing facilities.

On June 28, 2002, the three shareholders of SweetWorks, i.e., petitioner, Mr. Whetstone and Ms. Whetstone, entered into an Agreement of Shareholders. In that agreement, petitioner's address is listed as Glen Eden Drive, Naples, Florida. Only the first page of the agreement is part of the record.

In 1982, petitioner became a limited partner in 3500 Genesee Associates, L.P., a New York real estate investment limited partnership located at 3500 Genesee Street, Cheektowaga, New York. At all relevant times, petitioner owned 19.8% of the partnership interests as a limited partner. The 1% corporate general partner was solely owned by petitioner's mother, and his father owned the remaining 79.2% of the partnership interests as a limited partner.

At all relevant times, petitioner owned a 30% interest in Alaise, Inc., an S corporation, whose office was located at Coke Road, St. Augustine, Florida.

Beginning in 1999 and continuing through the period at issue, petitioner was President and sole shareholder of Sherbrooke Management, a business management company. In addition to providing administrative services, Sherbrooke Management received rental income from manufacturing equipment located in New York State.

Petitioner was married until February 1992 at which time he and his wife divorced. Thereafter, petitioner and his former wife shared joint custody of their only child, Natasha, born in 1984. However, under the terms of the Separation and Property Settlement Agreement, petitioner's former wife was the primary and residential parent. During the years in issue, Natasha lived in Buffalo with her mother and attended City Honors High School. In the fall of 2002, Natasha began attending the University of California in Santa Barbara, California. Subsequent to her graduation from college, Natasha moved to Portland, Oregon, where she continues to reside.

Petitioner is one of five children. His siblings are Florence, Joseph, Anthony and Anne-Marie. Prior to, during, and subsequent to the years at issue, Florence, Joseph and Anthony lived in the Buffalo area. Joseph Terranova passed away sometime in 2009. During the years at issue, Anne-Marie lived in Naples, Florida, and continues to reside there. Petitioner's parents lived somewhere in Buffalo, New York, but spent the winter months in Naples, Florida, during the years at issue. Their practice of spending the winter months in Florida began some years before the years at issue and continued beyond the years at issue. Petitioner's father passed away in April 2004.

We modify finding of fact "25" of the Administrative Law Judge's determination to read as follows:

Until its sale in September 1999, petitioner resided in a house at Cricket Lane, East Amherst, New York, a colonial consisting of 2,151 square feet, four bedrooms and two and a half bathrooms. Following the sale of his Cricket Lane home, petitioner moved into a two-story home owned by his parents located at Beard Avenue, Buffalo, New York. The Beard Avenue residence consists of 2,330 square feet, four bedrooms and one and a half bathrooms. Since moving into the Beard Avenue residence in 1999, in lieu of paying his parents rent, petitioner has repaired and maintained it. At the hearing petitioner referred to the Beard Avenue residence as his "home." According to petitioner, he put his "stuff" in storage in Buffalo when he sold the Cricket Lane house, and as of the date of the Administrative Law Judge hearing, those personal

items remained in storage in Buffalo.[5]

For the years 1999 and 2000, petitioner filed resident income tax returns claiming head of household filing status. On the 1999 resident income tax return, petitioner listed his address as Beard Avenue, Buffalo, New York. On the 2000 resident income tax return filed in October 2001, petitioner listed his address as St. Croix Lane, Naples, Florida.

Documents in the record indicate that petitioner checked into a Double Tree Hotel in Naples, Florida, on February 25, 2001 and checked out of that hotel on February 26, 2001. Sometime in early 2001, petitioner rented an apartment located at St. Croix Lane, Naples, Florida. The lease for such apartment is not part of the record.

On February 26, 2001, petitioner acquired a Florida driver's license and registered to vote in Collier County, Florida. The record does not include any evidence regarding petitioner's voting history in Collier County, Florida.

During 2001, petitioner had a one-story, 2,790 sq. ft., single family home built at Glen Eden Drive, Naples, Florida, at a cost of $448,177.50. Petitioner's address was listed as Beard Avenue, Buffalo, New York, on the mortgage settlement statement issued by Bank of America, N.A. (Bank of America) in connection with the October 11, 2001 closing on this house. Furnishings were purchased for this house.

Sometime in 2001, petitioner opened a checking account with Bank of America, listing his address as St. Croix Lane, Naples, Florida.

Petitioner filed a 2002 Florida Intangible Tax Return reporting and paying intangible tax in the amount of $2,190.00. The Glen Eden Drive, Naples, Florida, address was listed on this

[5] We modify this fact to accurately reflect the record as of the date of this decision.

intangible tax return. Petitioner stated on the 2002 Florida Intangible Tax Return that he established his Florida residency on January 1, 2001. He also checked the box that he did not reside outside of Florida during the year on this intangible tax return. Petitioner filed Florida intangible tax returns for the years 2003, 2004, 2005, and 2006, and paid intangible taxes in each of those years. On the Florida intangible tax return filed for the year 2003, petitioner's address was listed as Glen Eden Drive, Naples, Florida. On the Florida intangible tax returns filed for the years 2004, 2005, and 2006, petitioner's address was listed as 103rd St. N., Naples, Florida. All of these Florida intangible tax returns were prepared by Vincent J. Muffoletto, a Buffalo, New York, certified public accountant.

The record includes a conformed copy of petitioner's Last Will and Testament that indicates that he is a resident of Collier County in Florida. On August 19, 2003, petitioner executed this Last Will and Testament in front of two witnesses, each of whom had a New York address, in Erie County, New York.

The Division's audit of petitioner began with an examination of the 2001 tax year. Petitioner completed a nonresident audit questionnaire for the year 2001 pursuant to the Division's audit requests. On this nonresident questionnaire, dated July 17, 2003, petitioner claimed that he moved to Florida for business purposes in January 2001 and that he was present in New York State on 156 days, i.e., 131 work days and 25 nonworking days, in 2001. Petitioner, on this questionnaire, also indicated that when he was physically present in New York State, he stayed at the home of relatives. Subsequently, petitioner provided a statement, dated July 8, 2004, in which he claimed his 2001 domicile change from New York State to Florida was motivated by business considerations.

During the auditor's April 21, 2004 field visit to his office, petitioner's representative Mr.

Muffoletto, indicated that petitioner stayed at the Beard Avenue, Buffalo, New York, residence while in New York State during 2001. Mr. Muffoletto also indicated that in 2001, petitioner worked many days in Toronto, Canada, and if petitioner was present in the morning in Buffalo but traveled to Toronto, Canada, on the same day, Mr. Muffoletto counted that day as a Toronto day. In July 2004, the audit was expanded to include the 2002 tax year.

During the audit, the Division made written and oral requests for documentation to substantiate petitioner's whereabouts and day counts for the years 2001 and 2002. Specifically, the Division requested a listing of specific days spent in and out of New York State, expense reports, business and personal diaries, work logs, plane tickets, hotel bills, credit card receipts and monthly statements, moving bills, travel itineraries, and telephone records for the Florida residence.

In response to the Division's audit requests, petitioner provided an analysis summary of his working and nonworking days, inside and outside of New York State, for the year 2001, and numerous documents related to the years 2001 and 2002.

On the analysis summary for the year 2001 provided to the auditor, Denise Baczkiewicz, petitioner claimed that he was present in New York State a total of 156 days, i.e., 121 Buffalo working days, 10 New York City working days and 25 Buffalo nonworking days, and was outside New York State a total of 209 days, i.e., 167 working days and 42 nonworking days, of which 19 days, i.e., 13 working days and 6 nonworking days, were spent in Naples, Florida, 97 days, i.e., 91 working days and 6 nonworking days, were spent in Toronto, Canada, and the remaining days were spent in various cities located throughout the United States, Canada, the Caribbean, Europe and Asia.

Documentation provided to Ms. Baczkiewicz consisted of, among other things, American

Express Platinum Card account statements for Sherbrooke Management; HSBC Mastercard account statements for Niagara Chocolates; petitioner's personal American Express Card account statements bearing closing dates of May 5, 2001, September 4, 2001, October 5, 2001, November 4, 2001, December 5, 2001, March 6, 2002, June 4, 2002, July 5, 2002, November 4, 2002 and December 5, 2002; US Air Dividend Miles account statements; Carlson Wagonlit Travel itineraries; American Express Corporate Card account statements for Niagara Chocolates; TD Business Visa account statements for Oak Leaf; American Express Gold Corporate Card for Small Business account statements for SweetWorks; receipts for stays at the Toronto Crowne Plaza Hotel billed to Oak Leaf; SweetWorks expense reports; receipts for purchases made on various credit cards; and Sprint Telephone statements for the Florida home (the November 2002 and December 2002 statements were not provided).

After reviewing and analyzing the documentation provided, Ms. Baczkiewicz prepared detailed schedules of petitioner's days in and out of New York State for the years at issue, and related lists of document references. For the year 2001, Ms. Baczkiewicz determined that petitioner was present 202 days in New York State, 124 days outside of New York State and the remaining 39 days were unknown, i.e., undocumented. She also determined that petitioner spent 11 days in Florida in the year 2001, and mainly stayed in Florida hotels in that year. For the year 2002, Ms. Baczkiewicz determined that petitioner was present 270 days in New York State and 95 days outside of New York State. She also determined that petitioner spent nine days in Florida in the year 2002, and often stayed in Florida hotels in that year.

Notations in the Tax Field Audit Record (audit log) indicate that petitioner's other representative, Paul Battaglia, Esq., allowed Ms. Baczkiewicz to take most of the information provided back to her office, where it was photocopied and placed in the audit file. Thereafter, on

August 18, 2005, Ms. Baczkiewicz met with Mr. Battaglia at his office, and returned the original documentation. At that meeting, she gave Mr. Battaglia copies of the schedules of petitioner's days in and out of New York State for the years 2001 and 2002 and the related lists of document references. Ms. Baczkiewicz requested that Mr. Battaglia review the schedules provided and respond to Laura Lonie, the auditor to whom this matter was reassigned.

On April 28, 2006, a meeting took place at Mr. Battaglia's office. Present were Mr. Battaglia, Ms. Lonie, and her team leader, Denise Orszulak. During that meeting, domicile and statutory residence issues were discussed. With respect to domicile, Ms. Orszulak advised that provided documentation indicated that petitioner spent most of his time in Buffalo, New York, during the years at issue. She further advised that the documentation indicated that petitioner spent very little time in Florida during 2001, and when he was in Florida, he stayed in hotels. Mr. Battaglia advised that he would ascertain if petitioner had any additional documentation supporting his asserted change of domicile. With respect to statutory residency, Mr. Battaglia indicated that petitioner was "married to his job,"and therefore, he would have few items that were near and dear. He further indicated that petitioner traveled extensively. Mr. Battaglia requested additional time to submit documentation related to the domicile issue. Review of the audit log indicates that Mr. Battaglia never supplied additional documentation regarding petitioner's asserted change of domicile.

During the audit, petitioner did not provide his personal and business diaries for the years 2001 and 2002. He also did not provide any moving bills, or any specific information regarding the Glen Eden Drive, Naples, Florida, home.

Based upon her review of the documents submitted during the audit, the auditor concluded that petitioner was a New York domiciliary for the years 2001 and 2002 because he failed to

provide clear and convincing evidence that he changed his domicile from New York to Florida. Alternatively, the auditor concluded that petitioner was a statutory resident for the years 2001 and 2002 based upon the following. Petitioner maintained the Beard Avenue, Buffalo, New York, residence and spent in the aggregate more than 183 days in New York during the years 2001 and 2002.

The auditor recomputed petitioner's New York State tax liability for the year 2001 using a filing status of head of household. To the corrected federal adjusted gross income of $3,469,023.00,[6] the auditor added $63.00, the pro rata share of S corporation income tax reported on the return, and determined the corrected New York State adjusted gross income to be $3,469,086.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications in the amount of $46,229.00 and an allowable exemption of $1,000.00, and determined corrected New York State taxable income to be $3,421,857.00 and the recomputed New York State tax to be $234,397.00. After allowing credits of $75,498.00 for the nonrefundable New York State Investment Credit, the auditor determined the corrected New York State tax liability to be $158,899.00.

In computing the New York adjusted gross income reported on his nonresident income tax return for the year 2001, petitioner did not subtract the K-1 income in the amount of $2,233,979.00 received from Oak Leaf from the federal adjusted gross income reported on that return.

The auditor recomputed petitioner's New York State tax liability for the year 2002 using a filing status of head of household. To the corrected federal adjusted gross income of

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[6] The corrected federal adjusted gross income determined at audit for the year 2001 and the federal adjusted gross income reported on petitioner's nonresident income tax return for the year 2001 were the same amount.

$2,267,361.00, the auditor added $82.00, the pro rata share of S corporation income tax reported on the return, and determined the corrected New York State adjusted gross income to be $2,267,443.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications in the amount of $20,382.00 and an allowable exemption of $1,000.00, and determined corrected New York State taxable income to be $2,246,061.00 and the recomputed New York State tax to be $153,855.00. After allowing credits of $3,528.00 for the nonrefundable New York State Investment Credit, the auditor determined the corrected New York State tax liability to be $150,327.00.

Petitioner was issued a Statement of Personal Income Tax Audit Changes, dated October 10, 2006, which set forth additional New York State income tax for the years 2001 and 2002 in the sum of $309,226.00, plus interest of $98,396.00, for a total amount due of $407,622.00. The actual breakdown of additional tax due for each of the years in issue was $158,899.00 for the year 2001, and $150,327.00 for the year 2002.

The Statement of Personal Income Tax Audit Changes contained the following explanation of the audit adjustments for the years 2001 and 2002:

> "1. You have been deemed a domiciliary of New York State as you have not substantiated with clear and convincing evidence that you changed your domicile from New York to Florida.
>
> 2. Alternatively, if it is found that you did change your domicile out of New York State, you are deemed to be a statutory resident of New York State for both 2001 & 2002 pursuant to New York State Tax Law section 605(b)(1)(B) because:
>
> a. You are deemed to have maintained a permanent place of abode in NYS for both years, and
> b. You have not substantiated the number of days which you spent within New York State during either tax year."

During a February 6, 2007 meeting with Ms. Lonie, Ms. Orszulak and her team leader, Jorge Reyes, Mr. Battaglia claimed that the flow-through income petitioner received on his K-1

from Oak Leaf was not allocable to New York in 2001 because Oak Leaf was a foreign corporation subject to tax under Article 9-A of the Tax Law for that year. At the conclusion of that meeting, Mr. Reyes advised Mr. Battaglia that further research was necessary and that the auditor would get back to him.

In a letter to Mr. Battaglia dated February 15, 2007, Ms. Lonie stated, in pertinent, as follows:

> "It is our position that the flow through income the taxpayer received on his 2001 K-1 from Oak Leaf . . . is allocable to New York since Oak Leaf . . . is a foreign entity not subject to New York State Corporation Tax. We do not feel that Oak Leaf . . . meets the requirements of New York State Corporation Tax Regulation 1-3.2 which lists the conditions that would make a foreign corporation subject to New York State Corporation Tax. In addition, New York State Corporation Tax Regulation 1-3.3 lists activities deemed insufficient to subject a foreign corporation to tax. New York State Corporation Tax Regulation 1-3.3(a)(4) states:
>
> > 'The maintenance of an office in this state by one or more officers or directors of the corporation who are not employees of the corporation if the corporation is not otherwise doing business or employing capital in New York State and does not own or lease property in New York State.'
>
> Please submit in writing the specific evidence which indicates why you believe that Oak Leaf . . . would be subject to tax for the year 2001 under Article 9-A jurisdiction of the New York State Corporation Tax Law as a foreign corporation.
>
> Absent any further documentation, it remains our position that the taxpayer was a domiciliary and/or a statutory resident of New York State for the years 2001 and 2002."

During a June 26, 2007 meeting with the auditor, her team leader and section head, Mr. Battaglia claimed that Oak Leaf's activities in New York in 2001 would subject it to tax under Article 9-A of the Tax Law. At that time, he was advised to submit documentation of Oak Leaf's activities in 2001 that would qualify it to be taxable under Article 9-A of the Tax Law within 30 days, or the case would be closed and a Notice of Deficiency would be issued.

By letter dated September 10, 2007, Mr. Battaglia responded to Ms. Lonie's request for information in support of petitioner's position that Oak Leaf was a corporation subject to tax under Article 9-A of the Tax Law for the year 2001. In that letter, Mr. Battaglia stated, in pertinent part, that:

> "The contacts which Oak Leaf had with the Sate [*sic*] in 2001 were many and substantial. Oak Leaf had a broker who acted on its behalf in New York. Sales delivered to customers located in New York in that year amounted to $1,086,316.00. From time to time, Oak Leaf inventory was warehoused at the facilities of its sister company, Niagara Chocolates, Inc., in Cheektowaga, New York, where various sales and marketing activities on behalf of Oak Leaf were also conducted.
>
> We respectfully submit that the totality of the circumstances surrounding the 2001 operations of Oak Leaf clearly indicates that Oak Leaf was subject to the jurisdiction of New York State in that year. Accordingly, we further submit that the Oak Leaf income which was included in Mr. Terranova's 2001 federal income because of the federal S election in effect for that year must be excluded from his 2001 New York State income."

No supporting documentation was enclosed with this letter.

On September 19, 2007, Ms. Lonie discussed the case with Ms. Orszulak. On the same date, Ms. Orszulak left a telephone message for Mr. Battaglia, who did not return the call. Review of the audit log indicates that Mr. Battaglia never returned that telephone call.

The Division issued a Notice of Deficiency to petitioner asserting additional New York State personal income tax due for the years 2001 and 2002 in the aggregate amount of $309,226.00, plus interest, based upon the findings of its field audit and consistent with the Statement of Personal Income Tax Audit Changes described above.

By Conciliation Order (CMS No. 221970) dated September 19, 2008, the statutory notice was recomputed to $302,742.00 with interest computed at the applicable rate. This adjustment was made to allow IMB credits claimed on the tax returns filed by petitioner for the years 2001

and 2002 that were omitted from the audit redetermination of tax due for such years.[7]

Petitioner at the hearing acknowledged that the Glen Eden Drive, Naples, Florida, residence was located very far from the SweetWorks office located at Whetstone Candy's St. Augustine, Florida, manufacturing facility, and that it was not easy to travel from Naples, Florida, to St. Augustine, Florida, by car. According to petitioner, when he acquired the Glen Eden Drive, Naples, Florida, house, he was "thinking very long term, this is where" he "would eventually retire."

During 2001 and 2002, petitioner drove an automobile owned by and registered to Sherbrooke Management. Sometime in 2001, Sherbrooke Management registered and insured that automobile in Florida, using the St. Croix Lane, Naples, Florida, address. Petitioner usually drove that automobile when he traveled from Buffalo to Toronto and later made the return trip back to Buffalo. According to petitioner, it was approximately a 2-hour, 100 mile drive from Buffalo to Toronto.

Petitioner testified that he was in Toronto on a regular basis in the years 2001 and 2002. He explained that he typically left Buffalo early on Thursday mornings so that he could spend the day working in Toronto. According to petitioner, after checking out of the Toronto hotel on Saturday morning, he would work a full day in Toronto, and then return to Buffalo either late on Saturday night or on Sunday. He indicated that there were some instances where he arrived back in Buffalo either about 15 minutes before midnight or 15 minutes after midnight. Petitioner also indicated that he often spent Saturday evenings in Toronto at the home of a woman that he was dating at the time and then would return to Buffalo sometime on Sunday.

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[7] IMB credits in the amount of $4,313.00 and $2,171.00 were claimed for the years 2001 and 2002, respectively.

According to petitioner, when he traveled internationally on business during the years 2001 and 2002, he would primarily travel from Toronto rather than Buffalo because Toronto had more direct flights to foreign destinations, i.e., overseas, and he did not have to make a lot of connections.

Documents in the record indicate that most of petitioner's domestic flights originated from Buffalo, New York, and that the final return destination was Buffalo, New York, in the years 2001 and 2002. Whenever petitioner was in Buffalo he would stay at the Beard Avenue, Buffalo, New York, residence during the years at issue.

Petitioner acknowledged that he always started and ended his trips in Buffalo, New York, during the years 2001 and 2002. He testified that it was his understanding that days on which he either traveled from Buffalo or returned to Buffalo would not be considered New York days because he was traveling.

Petitioner admitted at the hearing that he "never really spent a significant amount of time in Florida" in the years 2001 and 2002.

In response to the Division's finding that he was a New York State resident in the year 2001 by reason of his physical presence in New York State in that year, petitioner submitted his own affidavit with attached exhibits. In that affidavit, petitioner claimed that he travels "significantly" in connection with his business interests, and as a matter of practice, he regularly maintains records of his travels and a log of his whereabouts from day to day. Petitioner alleged that an attached analysis, prepared from entries in his business records and business logs for the year 2001, showed that he was present in New York State on 153 days in 2001 and outside New York State on 212 days in that year. He further alleged, in that affidavit, that in 20 instances the Division found that he was in New York State on a particular day without any evidence cited for

that finding and in the face of evidence cited by the Division itself that he was outside New York State on that day. Petitioner asserted that the analysis prepared from his records and logs showed that he was outside New York State on the following dates: January 16, 2001 in Toronto, Ontario; January 24, 2001 in Toronto, Ontario; February 26, 2001 in Naples, Florida; March 1, 2001 in Toronto, Ontario; March 17, 2001 in Toronto, Ontario; March 24, 2001 in Toronto, Ontario; April 1, 2001 in Naples, Florida; April 11, 2001 in Toronto, Ontario; April 14, 2001 in Toronto, Ontario; April 28, 2001 in Toronto, Ontario; May 19, 2001 in Toronto, Ontario; June 15, 2001 in Toronto, Ontario; June 16, 2001 in Toronto, Ontario; June 17, 2001 in Naples, Florida; August 27, 2001 in Cleveland, Ohio; October 27, 2001 in Toronto, Ontario; November 10, 2001 in Toronto, Ontario; December 8, 2001 in Toronto, Ontario; December 16, 2001 in Toronto, Ontario; and December 28, 2001 in Toronto, Ontario. In the affidavit, petitioner also asserted that he was in Hong Kong on May 7, 2001 and that the Division incorrectly found that he was in New York State on that date, notwithstanding its own finding that he was in Hong Kong on May 6, 2001 and May 8 through 13, 2001, based upon an American Express "charge" at Radio Shack in New York entered on May 7, 2001. A twelve-month calendar analysis of petitioner's whereabouts in 2001 (calendar analysis for 2001), a summary of the 2001 analysis, and a photocopy of an American Express account statement summary page containing eight records of charge, bearing dates between May 1, 2001 and May 21, 2001, were attached to petitioner's affidavit.

Entries on the calendar analysis for the year 2001 contain limited information regarding petitioner's whereabouts on a given day. Almost all of the entries only contain the name of a city including, among others, Buffalo, Toronto, New York City, Cleveland and Naples, Florida. The word "off" appears after a city's name for a limited number of days during the year, and the word

"medical" occasionally appears after Cleveland. The source documentation used to prepare the month-to month calendar analysis for the year 2001 is not part of the record.

When testifying about his presence outside of New York State in the year 2001, petitioner used the calendar analysis for 2001 described above. During his testimony, petitioner claimed that the calendar analysis for 2001 might have understated the number of days that he spent in Toronto in the year 2001, but he could not state unequivocally.

Based upon the following documentation, the Division determined the following days were New York days in 2001:

a. *Tuesday, January 16, 2001*: a gas purchase in Canada charged on Niagara Chocolates' American Express Corporate Card account, and petitioner's check out from the Wyndham Hotel in Toronto, Canada, charged on Oak Leaf's TD Business Visa account. The Division concluded that petitioner left Toronto and returned to Buffalo on January 16, 2001. It is noted that the Division determined that January 17, 2001 was a New York day because of an Anchor Bar charge on Niagara Chocolates' American Express Corporate Card account.

b. *Wednesday, January 24, 2001*: a gas purchase in Canada and petitioner's check out from the Wyndham Hotel in Toronto, each of which were charged on Oak Leaf's TD Business Visa account. The Division concluded that petitioner left Toronto and returned to Buffalo on January 24, 2001. It is noted that the Division concluded that January 25, 2001 was a New York day based upon a Sunoco gas purchase in Buffalo, New York, which was charged on Niagara Chocolates' American Express Corporate Card account, and petitioner's check in at the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf.

c. *Monday, February 26, 2001*: a Circuit City purchase in Naples, Florida, charged on Niagara Chocolates' HSBC Mastercard Account, a Naples, Florida, restaurant charge on Niagara

Chocolates' American Express Corporate Card account, and petitioner's check out from the Double Tree Hotel in Naples, Florida, which was charged on Niagara Chocolates' American Express Corporate Card account. The Division concluded that petitioner left Naples, Florida, and returned to Buffalo on February 26, 2001. It is noted that the Division determined that February 27, 2001 was a New York day based upon a Mobil gas purchase in Orchard Park, New York, which was charged to Niagara Chocolates' American Express Corporate Card account.

d. *Thursday, March 1, 2001*: petitioner checked into the Four Seasons Hotel in Toronto, Canada, which was charged on Oak Leaf's TD Business Visa account. The Division concluded that petitioner went from Buffalo to Toronto on March 1, 2001.

e. *Saturday, March 17, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The Division concluded that petitioner left Toronto and returned to Buffalo on March 17, 2001. It is noted that the Division determined that March 18, 2001 was a New York day based on petitioner's US Airways flight from Buffalo to Jacksonville, Florida, on March 18, 2001.

f. *Saturday, March 24, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The Division concluded that petitioner left Toronto and returned to Buffalo on March 24, 2001.

g. *Sunday, April 1, 2001*: petitioner's check in at the Hampton Inn in Naples, Florida, which was charged on Niagara Chocolates' American Express Corporate Card account. The Division concluded that petitioner went from Buffalo to Naples, Florida, on April 1, 2001. The auditor noted that there were no flight details. However, there was a receipt dated April 2, 2011 for parking at the Buffalo airport, which amount was charged on Niagara Chocolates' American Express Corporate Card account.

h. *Wednesday, April 11, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The Division concluded that petitioner left Toronto and returned to Buffalo on April 11, 2001. It is noted that the Division concluded that April 12, 2001 was a New York day based upon a Studio Arena charge in Buffalo, New York, which was charged on Niagara Chocolates' Mastercard account.

i. *Saturday, April 14, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf, and a Toronto market charge on Oak Leaf's TD Business Visa account. The Division concluded that petitioner left Toronto and returned to Buffalo on April 14, 2001. It is noted that the Division concluded that April 15, 2001 was a New York day based upon, among other things, petitioner's US Airways flight from Buffalo to Jacksonville, Florida.

j. *Saturday, April 28, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The Division concluded that petitioner left Toronto and returned to Buffalo on April 28, 2001. It is noted that the Division concluded that April 29, 2001 was a New York day based upon a charge at CompUSA in Amherst, New York, which was charged on Sherbrooke Management's American Express Platinum Card account.

k. *Saturday, May 19, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The Division concluded that petitioner left Toronto and returned to Buffalo on May 19, 2001. It is noted that the Division concluded that May 20, 2001 was a New York day based upon, among other things, petitioner's US Airways flight from Buffalo to Fort Myers, Florida.

l. *Friday, June 15, 2001*: petitioner's check in at the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The Division concluded that petitioner went from Buffalo to Toronto on

June 15, 2001.

m. *Saturday, June 16, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf, and a Toronto restaurant charge on Oak Leaf's TD Business Visa account. The Division concluded that petitioner left Toronto and returned to Buffalo on June 16, 2001.

n. *Sunday, June 17, 2001*: petitioner's charges at a Florida restaurant and a Florida hotel arrival that were charged on Sherbrooke Management's American Express Platinum Card account, and a car rental in Fort Myers, Florida, charged to Niagara Chocolates' American Express Corporate Card account. The Division concluded petitioner went from Buffalo to Fort Myers, Florida, on June 17, 2001. It is noted that the Division concluded that June 18, 2001 was a New York day based upon, among other things, a receipt for leaving Buffalo airport parking at 7:20 P.M. on June 18, 2001.

o. *Monday, August 27, 2001*: petitioner's departure from a Cleveland hotel, which was charged on Sherbrooke Management's American Express Platinum Card account. The Division concluded that petitioner left Cleveland, Ohio, and returned to Buffalo on August 27, 2001. It is noted that the Division concluded that August 28, 2001 was a New York day based upon restaurant and Exxon gas purchases in New York charged on Niagara Chocolates' American Express Corporate Card account.

p. *Saturday, October 27, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The auditor concluded that petitioner left Toronto and returned to Buffalo on October 27, 2001. It is noted that the Division concluded that October 28, 2001 was a New York day based upon an airline itinerary and a Buffalo to Atlanta, Georgia, to Fort Myers, Florida, airline charge on Sherbrooke Management's American Express Platinum

Card account.

q. *Saturday, November 10, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The auditor concluded that petitioner left Toronto and returned to Buffalo on November 10, 2001. Review of the documents also indicates that there was a Buffalo, New York, restaurant credit card charge receipt dated November 10, 2001, which amount was charged on Niagara Chocolates' HSBC Mastercard account.

r. *Saturday, December 8, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf. The auditor concluded that petitioner left Toronto and returned to Buffalo on December 8, 2001.

s. *Sunday, December 16, 2001*: petitioner's check out from the Toronto Crowne Plaza Hotel, which was billed to Oak Leaf, and a gas purchase in Canada that was charged on Oak Leaf's TD Business Visa account. The auditor concluded that petitioner left Toronto and returned to Buffalo on December 16, 2001. It is noted that the Division treated December 17, 2001 as a New York day.

t. *Friday, December 28, 2001*: no evidence was cited for the Division's conclusion that December 28, 2001 was a New York day. It is noted that the Division treated December 29, 2001 as an outside New York day because a gas purchase in Canada was charged on Oak Leaf's TD Business Visa account.

A record of a credit return charge at Radio Shack, bearing a May 7, 2001 date, is one of the eight records of charge listed on the photocopy of the American Express account statement summary page attached to Mr. Terranova's affidavit. Review of the documentation in the record indicates that petitioner checked into a Hong Kong hotel on May 6, 2001 and checked out of that hotel on May 10, 2001. The documentation also indicates that petitioner made a number of

credit card purchases in Hong Kong on May 7, 2001.

A printout of petitioner's computerized business calendar for the year 2002 was submitted into the record. According to petitioner, this business calendar was printed from his laptop on March 8, 2010. Many days on this calendar are blank. Calendar entries on other dates consist of abbreviated names of locations or trade shows, names of individuals and corporations, and appointments with particular individuals or entities. Overlapping entries, signifying presence in different cities on the same day, appear on some dates on this calendar.

When testifying about his presence outside of New York State in the year 2002, petitioner relied upon the printout of the computerized business calendar for the year 2002 described above. On many of the days in 2002 where the calendar entry merely consisted of an abbreviated name of a trade show, an individual's name or the name of a corporation, petitioner was unable to identify his location. He was also unable to explain the overlapping entries that appeared on some dates in 2002**.** Based upon the entries in his computerized business calendar for the year 2002, and his vague testimony, petitioner claimed that he was outside of New York State on 229 days, and present in New York State on 136 days in that year. He also claimed that he was present in Florida on 26 days in the year 2002.

No supporting documentation was provided, either to the auditor or at the hearing, for the following 23 days on which petitioner testified that he was present outside of New York State in the year 2002: May 9th, 10th, 11th, 12th, 13th, and 14th; June 4th and 5th; July 4th, and 30th; August 3rd, 10th, 22nd, and 26th; September 3rd and 4th; November 4th and 27th; and December 11th, 25th, 26th, 27th and 28th. It is noted that the auditor treated all 23 days as days that petitioner was present in New York State in the year 2002.

Petitioner testified that he was present outside of New York State on the following 105

days in 2002: January 3rd, 5th, 10th, 12th, 17th, 19th, and 24th; February 2nd, 8th, 16th, 20th, 23rd, and 24th; March 7th, 10th, 13th, 16th, 17th, 18th, 24th, and 26th; April 2nd, 3rd, 8th, 9th, 10th, 11th, 14th, 16th, 17th, 18th, 20th, and 25th; May 8th, 15th, 16th, 18th, 22nd, and 30th; June 1st, 3rd, 6th, 8th, 12th, 20th, 22nd, 23rd, 24th, 28th, and 29th; July 5th, 7th, 12th, 13th, 14th, 15th, 18th, 19th, 28th, 29th, and 31st; August 15th, 16th, 17th, 19th, 20th, 23rd, 25th, 27th, 30th, and 31st; September 5th, 12th, 14th, 18th, 24th, 26th, and 28th; October 5th, 6th, 7th, 8th, 9th, 10th, 12th, 14th, 16th, 17th, and 31st; November 2nd, 3rd, 6th, 7th, 9th, 14th, 16th, 17th, 18th, and 19th; December 5th, 7th, 12th, 15th, 19th and 21st. Based upon documentation provided at audit, the Division determined that petitioner was present in New York State on all of these days. Review of the documentation in the record indicates that petitioner was present both inside and outside of New York State on most of these days in the year 2002, i.e., petitioner either traveled from Buffalo to a location outside of New York State, or returned to Buffalo from a location outside of New York State. Further review of the documentation in the record indicates that on the remaining days, petitioner was present in New York State.

As noted above, petitioner claimed that he was present in Florida on 26 days in 2002. Petitioner claimed he was present in Florida on the following days, on which he either flew out of Buffalo to a city in Florida or flew from a city in Florida back to Buffalo, February 20 and 23, 2002; March 7, 9, 13, 16, 24 and 26, 2002; June 28 and 29, 2002; and October 14 and 16, 2002. The record does not contain any source documentation supporting petitioner's testimony that he was present in Florida on September 3, 4 and 5, 2002, or December 25, 26, 27, and 28, 2002. Documentation in the record indicates that petitioner was present in Florida on the following 7 days in 2002, February 21 and 22, 2002; March 8, 14, 15 and 25, 2002; and October 15, 2002.

According to petitioner, his business calendars for the years at issue were maintained by his unnamed assistant. The record does not include petitioner's business or personal diaries, or

any work logs for the years 2001 and 2002. Petitioner's passport is also not part of the record. To establish his whereabouts in the years 2001 and 2002, petitioner indicated at the hearing that he was relying upon the source documentation previously supplied to the Division's auditor.

To describe the activities of Oak Leaf in New York State in the year 2001, petitioner submitted his own affidavit with an attached exhibit. In his affidavit, petitioner asserted that Oak Leaf is a manufacturer and distributor of candy products, with sales throughout the United States and abroad. Petitioner's affidavit further asserted that in 2001, the corporation was headquartered in Florida; that in 2001, Oak Leaf was an S corporation for federal income tax purposes, but the corporation did not make an election under Tax Law § 660 for that year; that the corporation's New York sales in 2001 amounted to $1,086,316.00, and were made through a broker acting on its behalf; that from time to time during 2001, Oak Leaf's inventory was warehoused at the facilities of its sister company, Niagara Chocolates, in Cheektowaga, New York; that attached as an exhibit are copies of invoices from Satya Int'l Transport, Inc., for the shipment of product to Niagara Chocolates in 2001, and approximately 230,000 pounds of product were included in these shipments; and that his 2001 federal adjusted gross income included $2,233,979.00 of income from Oak Leaf reportable on that return by reason of Internal Revenue Code § 1366. Copies of eight invoices issued by Satya Int'l Transport, Inc., were attached as the sole exhibit to petitioner's affidavit.

The eight invoices, bearing dates of July 31, 2001 (four invoices), August 10, 2001 (three invoices), and August 17, 2001(one invoice), were issued to Oak Leaf by Satya Int'l Transport, Inc., Brampton, Ontario, Canada. Each of these invoices listed the carrier's rate for shipping described as "OAKLEAF CONFECTION SCARB, ONT TO NIAGARA CHOCOLATE BUFFALO, NY," the fuel surcharge and the total amount due. It is noted that the rate amount

billed on each of the four invoices dated July 31, 2001 was $600.00, plus the fuel surcharge. The rate billed on the remaining four invoices was $475.00, plus the fuel surcharge. None of these invoices contain any details regarding what was shipped (i.e., inventory for sale, sold inventory in transit, or if it was inventory), who held title to the contents of the truck during or after delivery, the follow-up billing, or the value of the contents of the truck.

At the hearing, petitioner stated that Oak Leaf made sales in New York in 2001 and had some independent sales brokers in New York State in that year. However, he could not recall the exact number of independent brokers utilized by Oak Leaf in New York State in 2001, or most of their names. According to petitioner, he performed "substantial services" related to Oak Leaf business at his Cheektowaga, New York, office in 2001.

The record includes copies of Oak Leaf check requests, Oak Leaf processed invoice commission reports and checks drawn upon Oak Leaf's checking account in payment of commissions due to four independent brokers, PM Marketing Group, E.A. Berg & Sons (E.A. Berg), Panoply and LBM Sales, during the period August 21, 2000 through December 5, 2001. Although PM Marketing and E.A. Berg were located in New Jersey, both brokers were paid commissions on account of sales to New York customers and sales to customers outside of New York. A review of these documents indicates that the majority of commissions were paid to E.A. Berg, beginning in March 2001. Very few commission payments were made to the two independent brokers located in New York. The record does not include the contracts between these independent brokers and Oak Leaf.

At the hearing, petitioner stated that Niagara Chocolates acted as a third-party warehouse for a number of its customers in 2001. Under this third-party warehouse arrangement, Niagara Chocolates would store the third-party customer's products at the Cheektowaga, New York,

facility, and staff at that facility would distribute the stored products as directed by the third-party customer. It was asserted that charges were billed to the third-party customers for the third-party storage and distribution services performed by Niagara Chocolates for such customers.

At the hearing, petitioner claimed that Niagara Chocolates performed third-party warehouse storage and distribution services for Oak Leaf in the year 2001. According to petitioner, Oak Leaf would bill its customers for the products stored at Niagara Chocolates' facility, and send copies of the bill of lading to Niagara Chocolates for distribution of those products. Petitioner did not know whether Niagara Chocolates directly charged Oak Leaf for those third-party warehouse and distribution services in 2001, or whether those third-party warehouse storage and distribution charges were accumulated with the sales and marketing charges billed to Oak Leaf by SweetWorks for that year.

The record does not include the third-party agreement between Niagara Chocolates and Oak Leaf for the storage and distribution of Oak Leaf's products by Niagara Chocolates for 2001, or any invoices issued by Niagara Chocolates for warehouse storage and distribution services provided to Oak Leaf in the year 2001. It also does not include any receipts issued by Niagara Chocolates for the storage of Oak Leaf inventory at the Cheektowaga, New York, facility, or any bills of lading sent to Niagara Chocolates by Oak Leaf regarding the distribution of Oak Leaf product stored at Niagara Chocolates' facility in 2001.

Copies of seven invoices issued to Oak Leaf by SweetWorks, invoice nos. 00006, 00013, 00015, 00021, 00024, 00029 and 00036, for the period June 2001 through December 2001 are part of the record.[8] Each invoice listed the particular month's "commissions," the amount of

[8] Only the invoice date of October 31, 2001 on invoice number 00024 is readable, the dates on the other invoices are cut off and unreadable.

such commissions and the total amount due on the invoice. There was no further explanation on any of these invoices.

On July 3, 2003, petitioner sold the Glen Eden Drive, Naples, Florida, property. It is noted that there are two recording dates regarding the July 3, 2003 sale of this property, i.e., July 16, 2003 and April 14, 2004. According to petitioner, the Glen Eden Drive, Naples, Florida, house was sold because he was not happy with the house and he felt it was a costing him a great deal of money. Petitioner also indicated that he "wasn't spending a whole lot of time in Florida."

Sometime in 2004, SweetWorks shut down its St. Augustine, Florida, manufacturing facility. However, manufacturing continues to this day at the Cheektowaga, New York, and Scarborough, Ontario, Canada, facilities. Petitioner continues to have an office at both locations.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner had failed to persuasively establish that he had given up his New York State domiciliary status for the years at issue. In particular, the Administrative Law Judge noted that for the years at issue, petitioner kept significant ties to New York State and had a home in the State, among other considerations. In addition, the Administrative Law Judge determined that petitioner failed to adequately establish that Oak Leaf was in fact doing business and a taxable entity in New York State during 2001. Specifically, the Administrative Law Judge noted that the limited evidence provided by petitioner was not sufficient to meet petitioner's burden of proof. Finally, the Administrative Law Judge ruled that the issue of how many days petitioner spent in New York State had become moot since the Administrative Law Judge determined that petitioner was a domiciliary of the State.

ARGUMENTS ON EXCEPTION

In his exception, petitioner argues that: (i) he has provided clear and convincing evidence

that he abandoned his New York State domicile and acquired a Florida domicile during 2001 and 2002; (ii) he also proved by clear and convincing evidence that Oak Leaf employed capital, owned and leased property, maintained an office in New York State and was otherwise doing business in New York State during 2001; and, (iii) the Tax Appeals Tribunal should remand the case back to the Administrative Law Judge to determine whether petitioner was a resident of New York State during 2001 and 2002. Petitioner argues that the Administrative Law Judge incorrectly relied on evidence that was detrimental to petitioner's case and instead should have placed much more weight on certain evidence that may have supported petitioner's position.

The Division asserts that the Administrative Law Judge correctly determined that petitioner failed to carry the burden of proving that he had changed his domicile from New York to Florida and that Oak Leaf is a taxable entity in New York State.

OPINION

We affirm the determination of the Administrative Law Judge.

NEW YORK STATE RESIDENCY

Tax Law § § 605 (b) (1) (A) and (B) set forth the definition of a New York State resident individual for income tax purposes as follows:

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

The classification of resident versus nonresident is significant, since nonresidents are taxed

only on their New York State source income, whereas residents are taxed on their income from all sources.

As the Administrative Law Judge noted, the first question to be addressed is whether petitioner maintained a permanent place of abode in New York State in 2001 and 2002. "Permanent place of abode" is defined as a "dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse" (20 NYCRR 105.20 [e] [1]).

Maintenance of a permanent place of abode is not limited to any particular situation and thus applies to "a variety of circumstances" (***see Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed sub nom. Matter of Evans v Tax Appeals Trib. of State of N.Y.***, 199 AD2d 840 [1993]). One may maintain a permanent place of abode by "doing whatever is necessary to continue one's living arrangements in a particular dwelling place . . . includ[ing] making contributions to the household, in money or otherwise" (***id.; see also Matter of El-Tersli,*** Tax Appeals Tribunal, January 23, 2003, ***confirmed sub nom. Matter of El-Tersli v Commissioner of Taxation & Fin.***, 14 AD3d 808 [2005]).

After the September 1999 sale of his Cricket Lane, East Amherst, New York, residence, petitioner moved into the Beard Avenue, Buffalo, New York, residence owned by his parents. Petitioner's 1999 resident income tax return indicated that this had become his residence. At that time, in lieu of paying his parents a formal monthly rental for his personal use of the Beard Avenue residence, petitioner agreed to repair and maintain it; this constitutes a form of rent. During the years at issue, whenever petitioner was in Buffalo, he would stay at the Beard Avenue residence. Petitioner clearly maintained a permanent place of abode in New York State during 2001 and 2002 within the meaning of Tax Law § 605 (b) and 20 NYCRR 105.20 (e) (1). This

conclusion, which was found by the Administrative Law Judge, was not challenged by petitioner in his exception.

DOMICILE

The next question to be addressed is whether petitioner was domiciled in New York during the years at issue. The Division's regulations define "domicile," at 20 NYCRR 105.20 (d), in relevant part as follows:

> "(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.
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> * * *
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> (4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive."

An existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, the change in domicile (***see Matter of Bodfish v Gallman***, 50 AD2d 457 [1976]). Whether there has been a change of domicile is a question "of fact rather than law, and it frequently depends upon a variety of

circumstances which differ as widely as the peculiarities of individuals" (***Matter of Newcomb***, 192 NY 238, 250 [1908]). The test of intent with regard to a purported new domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (***Matter of Bourne***, 181 Misc 238, 246 [1943], ***affd*** 267 App Div 876 [1944], ***appeal denied*** 267 App Div 961 [1944], ***order affd*** 293 NY 785 [1944]; ***see also Matter of Bodfish v Gallman***, 50 AD2d 457 [1976]). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts that demonstrate an individual's "general habit of life" (***Matter of Silverman,*** Tax Appeals Tribunal, June 8, 1989, ***citing Matter of Trowbridge***, 266 NY 283, 289 [1935]).

The concept of intent was addressed by the Court of Appeals in ***Matter of Newcomb***:

> "'Residence' means living in a particular locality, but 'domicile' means living in that locality with intent to make it a fixed and permanent home. 'Residence' simply requires bodily presence as an inhabitant in a given place, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile.
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> In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence, although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile . . . . There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration . . ." (***Matter of Newcomb***, 192 NY 238, 250-251 [1908]).

In ***Matter of McKone v State Tax Commn. of State of N.Y.*** (111 AD2d 1051 [1985], ***affd sub nom. Matter of McKone v State Tax Commn.***, 68 NY2d 638 [1986]) the Court favorably

quoted the following treatise on the intent necessary to establish domicile:

> "'The intention necessary for acquisition of a domicile may not be an intention of living in the locality as a matter of temporary expediency. It must be an intention to live permanently or indefinitely in that place. But it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period.' (25 Am Jur 2d, Domicil, § 25, at 19 [1966].)" (***Id.*** at 1053).

While the standard is subjective, the Courts and the this Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. "The taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct" (***Matter of Simon***, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (***see e.g. Matter of Gray v Tax Appeals Trib. of State of N.Y.***, 235 AD2d 641 [1997], ***confirming Matter of Gray***, Tax Appeals Tribunal, May 25, 1995; ***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989); (2) the location of business activity (***Matter of Erdman***, Tax Appeals Tribunal, April 6, 1995; ***Matter of Angelico***, Tax Appeals Tribunal, March 31, 1994); (3) the location of family ties (***Matter of Buzzard***, Tax Appeals Tribunal, February 18, 1993, ***confirmed sub nom. Matter of Buzzard v Tax Appeals Trib. of State of N.Y.***, 205 AD2d 852 [1994]); (4) the location of social and community ties (***Matter of Getz***, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (***Matter of Trowbridge***, 266 NY 283, 289 [1935]; ***Matter of Gray v Tax Appeals Trib. of State of N.Y.***, 235 AD2d 641 [1997]; ***Matter of Getz***, Tax Appeals Tribunal, June 10, 1993).

Upon review of the entire record, we conclude that petitioner has not proven, by clear and convincing evidence, that he gave up his New York State domicile and acquired a domicile in Florida during the years at issue.

The record indicates that petitioner was a domiciliary of New York State before the years at issue and also retained substantial ties to Buffalo, New York, during the years at issue. Petitioner became involved with his family's Buffalo, New York based business, Niagara Chocolates, at a young age. Prior to 2001, petitioner was appointed President of the corporation. As President of Niagara Chocolates, he actively ran the corporation. For the year 2001, petitioner received substantial employee wage compensation for his employment with Niagara Chocolates. Although petitioner ceased being an employee of Niagara Chocolates at the end of 2001, he continued to be the corporation's President until June 30, 2002. The record indicates that petitioner continued to manage and actively run Niagara Chocolates, and its successor corporation throughout the period at issue.

During the period at issue, petitioner spent an extensive amount of time in Buffalo running the corporation's day-to-day operations. Even by petitioner's own calculations, he worked 121 days in Buffalo during 2001. During 2001 and 2002 petitioner maintained an office and had a personal assistant working for him at the Niagara Chocolates facility in New York. In July of 2001, petitioner became the controlling shareholder of Niagara Chocolates. Petitioner's tenure as President of Niagara Chocolates continued up until June 30, 2002, at which time, Niagara Chocolates, along with SweetWorks and Whetstone Candy, merged with and into Oak Leaf (which subsequently changed its name to SweetWorks). After the merger, petitioner owned 70% of the surviving company, SweetWorks. Petitioner continued to actively perform services for the surviving company at SweetWorks' Cheektowaga, New York location. The record also shows that petitioner worked a significant number of days in Buffalo during the year 2002. Although petitioner claims that his change of domicile to Florida was motivated by business considerations, the record shows that he worked very few days in Florida during 2001 and 2002,

especially as compared to the number of days he worked at the family business in Buffalo during those years. Active business ties have been considered an indication of a failure to abandon a New York domicile (***see Matter of Kartiganer v Koenig***, 194 AD2d 879 [1993]). Notably, in 2004, SweetWorks shut down its Florida, manufacturing facility.

After the September 1999 sale of his historic domicile located at Cricket Lane, East Amherst, New York, petitioner moved into the Beard Avenue, Buffalo, New York, residence owned by his parents. Beginning in September 1999, petitioner used and maintained the Beard Avenue residence as his domicile. Petitioner continued to use and maintain his Beard Avenue domicile throughout the period at issue. In his brief on exception, petitioner readily concedes that "[t]he record clearly shows that [p]etitioner resided at the Beard Avenue home of his parents because of its proximity to both the Niagara Chocolates and the [SweetWorks][9] businesses" (***see*** Brief on Exception at 8). Although petitioner rented an apartment in Naples, Florida sometime in early 2001, and on October 11, 2001, closed on the purchase of his Glen Eden Drive, Naples, Florida, residence (which he subsequently sold on July 3, 2003), petitioner failed to establish that he relinquished his New York State domicile. Whenever petitioner was in Buffalo, he stayed at his Beard Avenue residence. Telling is the fact that petitioner's Beard Avenue, Buffalo residence was listed as his official address on the mortgage settlement statement issued in connection with the 2001 purchase of his Glen Eden Drive, Naples, Florida, residence. The record shows that during the year 2002, when petitioner traveled to Florida for business, he most often stayed at hotels. Throughout 2001 and 2002, petitioner spent significantly more time in Buffalo than he did in Florida. Furthermore, petitioner acknowledged that the Glen Eden Drive, Naples, Florida,

[9] As discussed herein, after the 2002 merger of Niagara Chocolates and other entities into Oak Leaf, Oak Leaf changed its name to SweetWorks.

residence was located very far from his business office in Florida, and that it was not easy to travel by car from Naples, Florida, to his business office. The Division's regulations provide that where an individual has more than one home, the length of time customarily spent at each location is an important factor in determining domicile (***see*** 20 NYCRR 105.20 [d] [4]).

Further support for our conclusion is the fact that petitioner continued to have significant family ties to Buffalo, New York, during 2001 and 2002. During the years at issue, petitioner's minor daughter was finishing high school; petitioner shared joint custody over his daughter while she lived with his ex-wife in Buffalo. Petitioner's parents and three of his siblings also lived in the Buffalo area throughout the years at issue. During the years at issue, petitioner's personal items remained in storage in Buffalo. The record shows that whenever petitioner traveled, either for business or for pleasure, he would begin and end his travels in Buffalo, New York. The record also shows that petitioner spent very few days, either working or nonworking, in Florida during the years at issue. Indeed, petitioner admitted at the hearing that he "never really spent a significant amount of time in Florida" during 2001 and 2002. Furthermore, at the hearing, petitioner referred to the Beard Avenue residence as his "home."

In petitioner's brief on exception, petitioner stresses that he obtained a Florida driver's license; registered to vote in Florida; opened a bank account at a Florida bank branch; filed Florida intangible tax returns for the years 2002 and 2003 using a Florida address; and, listed himself as a resident of Florida in his Last Will and Testament. However, as noted previously, such formal declarations are less significant than informal acts demonstrating an individual's general habit of life (***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989). Moreover, as the Administrative Law Judge recognized, the significance of the 2001 voter registration is undermined by the lack of any evidence in the record regarding petitioner's subsequent voting

history. Additionally, petitioner's Florida intangible tax returns were prepared by his Buffalo, New York, accountant, and petitioner executed his above-referenced Last and Will and Testament, on August 19, 2003, in front of two witnesses, each of whom had a New York address.

In this case, petitioner has failed to carry his burden of proving by clear and convincing evidence that he intended to change his domicile from New York State to Florida. Although petitioner had a number of connections with Florida, a review of the entire record leads us to conclude that petitioner has not met his burden of proving that he changed his domicile during the years in question.

Having concluded that petitioner was properly subject to tax as a New York State domiciliary, we agree with the Administrative Law Judge that it is not necessary to address whether petitioner has met his burden of proving by clear and convincing evidence that he was not present in New York State for more than 183 days in either 2001 or 2002.

OAK LEAF DOING BUSINESS IN NEW YORK

On exception, petitioner also asserts that he proved by clear and convincing evidence that Oak Leaf employed capital, owned and leased property, maintained an office within the State, and was otherwise doing business in New York State during 2001.

Tax Law § 612 (a) defines the New York adjusted gross income of a resident individual as "his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section."

Section 612 (e) (2) provides, in pertinent part, that:

> "In the case of a shareholder of an S corporation which is a New York C corporation, the modifications under this section which relate to the corporation's items of income, loss and deduction shall not apply, except for the modifications

provided under paragraph nineteen of subsection (b) and paragraph twenty-two of subdivision (c) of this section."

Tax Law § 612 (c) provides, in relevant part, that there shall be subtracted from federal adjusted gross income:

"(22) In the case of a shareholder of an S corporation

(A) where the election provided for in subsection (a) of section six hundred sixty has not been made with respect to such corporation, any item of income of the corporation included in federal gross income pursuant to section thirteen hundred sixty-six of the internal revenue code . . . ."

The regulations regarding foreign corporations doing business in New York pursuant to Tax Law § 209 (1) (20 NYCRR 1-3.2) state, in pertinent part, as follows:

"(a) *General*. (1) The tax is imposed on every foreign corporation, not specifically exempt as provided in section 1-3.4 of this Subpart, whose activities include one or more of the following:

(i) doing business in New York State in a corporate or organized capacity or in a corporate form; or

(ii) employing capital in New York State in a corporate or organized capacity or in a corporate form; or

(iii) owning or leasing property in New York State in a corporate or organized capacity or in a corporate form; or

(iv) maintaining an office in New York State.

(2) A foreign corporation engaged in New York State in any one or more of the activities described in paragraph (1) of this subdivision is subject to tax even though its activities are wholly or partly in interstate or foreign commerce.

(3) Pursuant to Public Law 86-272 (15 U.S.C.A. sections 381-384), a foreign corporation is not subject to the tax imposed by article 9-A of the Tax Law if its activities are limited to those described in that law. That is, the solicitation of orders by the corporation's employees, representatives or independent contractors for sales of tangible personal property, which orders are sent outside New York State for approval or rejection, and, which if approved, are filled by shipment or delivery from a point outside New York State. For a description of corporations which are exempt from taxation under article 9-A of the Tax Law

pursuant to the provisions of Public Law 86-272, see section 1-3.4(b)(9) of this Subpart.

(4) A foreign corporation engaged in New York State in any one or more of the activities described in paragraph (1) of this subdivision is subject to tax regardless of whether it is authorized to do business in New York State."

Regulation 20 NYCRR 1-3.2 (b) provides a framework for determining whether a foreign corporation is "doing business" in New York.

"(1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.

(2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

(i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(ii) the purposes for which the corporation was organized;

(iii) the location of its offices and other places of business;

(iv) the employment in New York State of agents, officers and employees; and

(v) the location of the actual seat of management or control of the corporation."

20 NYCRR 1-3.3 (a) provides, in pertinent part, that:

"A foreign corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in New York State because of:

* * *

(4) the maintenance of an office in this state by one or more officers or directors of the corporation who are not employees of the corporation if the corporation is not otherwise doing business or employing capital in

> New York State and does not own or lease property in New York State;
>
> * * *
>
> (7) the participation in a trade show or shows, regardless of whether the corporation has employees or other staff present at such trade shows, provided the corporation's activity at the trade show is limited to displaying goods or promoting services, no sales are made, any orders received are sent outside New York State for acceptance or rejection and are filled from outside the state, and provided that such participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes; or
>
> (8) any combination of the foregoing activities."

Oak Leaf, a Delaware corporation, elected to be treated as a federal S corporation effective January 1, 2001. However, no election under Tax Law § 660 was in effect for the year 2001. Oak Leaf was never registered with the New York State Department of State to do business within the State for 2001. Moreover, Oak Leaf never filed a New York State corporation franchise tax return for 2001. Petitioner received Schedule K-1 income from Oak Leaf in the amount of $2,233,979.00 for the year 2001, which amount was included in his federal adjusted gross income for that year. However, petitioner now asserts that the income he received from Oak Leaf for the year 2001 should be subtracted from his federal adjusted gross income pursuant to Tax Law § 612 (c) (22) because Oak Leaf should be subject to corporation franchise tax under Article 9-A of the Tax Law for the year 2001. Petitioner asserts that Oak Leaf engaged in activities in New York State that would subject it to corporation franchise tax for the year 2001. Specifically, on exception, petitioner claims that: (i) Oak Leaf stored inventory at Niagara Chocolates' manufacturing facility located in Cheektowaga, New York; (ii) Oak Leaf maintained an office in Buffalo, New York at Niagara Chocolates; (iii) Oak Leaf had employees sent to Buffalo, New York; and (iv) Oak Leaf otherwise made substantial sales in New York State.

Petitioner testified that Niagara Chocolates acted as a third-party warehouse for some of

its customers in 2001, and charged those customers for the third-party storage and distribution services that it provided to them during that year. Although petitioner claimed that Niagara Chocolates provided storage and distribution services to Oak Leaf in 2001, the record is conspicuously absent of any storage and distribution agreement between Niagara Chocolates and Oak Leaf, any receipts issued by Niagara Chocolates for the alleged storage of Oak Leaf's inventory with it, or any invoices or other documentation issued by Niagara Chocolates for the alleged warehouse storage and distribution services provided to Oak Leaf in 2001. On exception, the only documentation referred to by petitioner in support of the claim that Oak Leaf stored inventory at Niagara Chocolates' New York facility are copies of eight freight billing invoices issued to Oak Leaf by a Brampton, Ontario, Canada, trucking/transportation company, Satya Int'l Transport, Inc.[10] As the Administrative Law Judge pointed out, this limited documentation is inadequate because the freight billing invoices are only for a very limited number of transactions and cover only a short period of time. Moreover, they are ambiguous, do not provide the specificity one would expect, and do not include other complementary evidence that would otherwise be expected. As the Administrative Law Judge noted, none of the invoices issued by Satyl Int'l Transport, Inc., contained any detail regarding what was shipped (i.e., inventory for sale, sold inventory in transit, or if it was inventory at all), who held title to the contents of the truck during and after delivery, or the value of the contents of the truck. Basically, the Satyl Int'l Transport, Inc., invoices merely note that the shipping company billed Oak Leaf for some type of a shipment that originated from Oak Leaf's Canada location and were shipped to Niagara

[10] On exception, petitioner no longer refers to the copies of seven invoices issued to Oak Leaf by SweetWorks as evidence of the assertion that Oak Leaf did business in New York State during 2001; therefore it appears that petitioner agrees with the Administrative Law Judge's analysis of these invoices and we need not duplicate such analysis herein.

Chocolates' Buffalo location.

Petitioner also claims that Oak Leaf maintained an office in Buffalo, New York at Niagara Chocolates. Other than general assertions, there is no corroborating documentary evidence supporting this claim (i.e., the proof of rental payments, lease agreement, proof of employees located in New York, etc. . .). Petitioner merely claims that he, as President of Oak Leaf, maintained an office at Niagara Chocolates during 2001. In support of this claim, petitioner testified that he performed "substantial services" related to Oak Leaf at Niagara Chocolates' Cheektowaga, New York, office. However, as noted above, during 2001, petitioner was a full-time employee and the President of Niagara Chocolates. Petitioner was not an employee of Oak Leaf during 2001. Although petitioner vaguely testified that he performed services related to Oak Leaf in New York State during 2001, the record clearly shows that he regularly traveled to and worked at an office maintained by Oak Leaf at its Scarborough, Ontario, Canada, manufacturing facility during that year. Moreover, the Cheektowaga, New York, office from which petitioner claims to have provided services for Oak Leaf, appears to have been fully paid for and maintained by Niagara Chocolates throughout 2001. As such, petitioner has failed to prove that Oak Leaf maintained an office in New York State during 2001.

Petitioner claims that Oak Leaf had several employees performing work in Buffalo, New York; however, there is no evidence in the record supporting this claim.

Finally, on exception, petitioner asserts that Oak Leaf made substantial sales in New York State. However, for proof of this assertion, petitioner merely cites to his testimony and no other support thereof.

Petitioner has failed to prove by clear and convincing evidence that Oak Leaf was doing business in New York State in the year 2001. Accordingly, Oak Leaf was not subject to

corporation franchise tax under Article 9-A of the Tax Law for the year 2001. The K-1 income petitioner received from Oak Leaf cannot be subtracted from his federal adjusted gross income pursuant to Tax Law § 612 (c) (22). As such, the Division's recomputation of petitioner's New York adjusted gross income for the year 2001 was proper (Tax Law § 612 [a]; [e] [1]; Tax Law § 617).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Philip Terranova is denied;

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

3. The petition of Philip Terranova is denied; and

4. The Notice of Deficiency dated October 1, 2007, as modified by Conciliation Order (CMS No. 221970), dated September 19, 2008, is sustained.

DATED: Albany, New York
September 20, 2012

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner