STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ELLIOTT AND GHISLAINE SUTTON	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1981 and 1982.	:	

Petitioners, Elliott and Ghislaine Sutton, 19667 Turnberry Way TSGR, North Miami Beach, Florida 33180, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1981 and 1982 (File No. 802019).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 10, 1989 at 1:15 P.M., with all briefs to be submitted by August 17, 1989. Petitioners appeared by Levine, Furman and Davis, Esqs. (Leonard D. Furman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

ISSUE

Whether petitioners were subject to taxation as residents of the State and City of New York during the years 1981 and 1982.

FINDINGS OF FACT

On April 12, 1985, the Division of Taxation issued to petitioners, Elliott and Ghislaine Sutton, a Notice of Deficiency asserting additional personal income tax due for the year 1981 in the amount of $7,513.07, plus interest. On February 26, 1985, the Division of Taxation issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the year 1982 in the amount of $8,555.51, plus interest.

On November 8, 1984 and April 9, 1985, respectively, the Division of Taxation issued separate statements of audit changes to petitioners for each year in issue, explaining the Division's position that petitioner Elliott Sutton had not effected a change of domicile from New York toFlorida and that he was taxable as a New York State and City resident for both of

the years in question.[1] Each of these statements included computational explanations of the calculation of tax due both for New York State and New York City purposes. The parties are in agreement that the dollar amounts of tax asserted as due are not in question, and that the issue presented is whether or not petitioner effected a change of domicile from New York State to Florida prior to the years in question.

Petitioner, Elliott Sutton, was born and raised in Brooklyn, New York. He was married and purchased a home in Brooklyn, New York in January 1964 and resided there until being divorced from his first wife (Rochelle Sutton) in July 1974. Upon divorce, petitioner's former wife retained ownership and possession of the Brookyn home, while petitioner obtained a one-bedroom, rent-stabilized apartment at 300 East 40th Street (known as "the Churchill") in Manhattan. This apartment totalled approximately 700 square feet in area and rented for approximately $400.00 per month.

At or about the time of his divorce from Rochelle Sutton, petitioner started traveling to and spending time in Florida. On these trips, petitioner stayed at The Jockey Club in Miami Beach, which had rooms and apartments available for rent. From 1974 through 1977, petitioner spent most of the winter months in Florida, staying in such rented rooms or leased apartments.

In 1977 petitioner was involved in the purchase of a condominium at The Jockey Club, specifically unit 4-D located at 1111 Biscayne Boulevard. This condominium was, in fact, purchased by a corporation, Belford Equities, Inc., wholly-owned by petitioner and his brother, Irving Sutton.

On or about May 23, 1980, petitioner and his brother, Irving, entered into a contract for the purchase of a large condominium located at 19667 Turnberry Way, Miami, Florida. This condominium was a custom-built, luxury two-level duplex, consisting of some 6,500 square feet of living space including a top floor roof deck. This condominium had separate entrances and separate suites (living areas) for petitioner and his brother, but had common kitchen, living room and roof areas.

Petitioner described certain events occurring in New York which prompted him to purchase this large condominium, including the breakup of a long-term relationship, the death of his mother in January of 1980 and the subsequent death of his sister. Petitioner stated, in testimony, that he was "fed up with living in New York" and that he "was determined to make a new life and not live in New York anymore".

In or about late 1980, the condominium at The Jockey Club was sold by Belford Equities, Inc. (by petitioner and his brother), and thereafter petitioner lived in a developer's apartment at the same 19667 Turnberry Way address where the large condominium was being constructed until the condominium was finished. Petitioner and his brother closed title on the purchase of the condominium on April 27, 1981, taking ownership as joint tenants with the right of survivorship. Petitioner noted that both he and his brother were single and often bought real estate together. Petitioner testified that while he lived at the Florida condominium on essentially a full-time basis, his brother was there much less frequently, approximately only 15 to 20 days per year. Petitioner and his brother maintained separate telephone services in the condominium.

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[1]Ghislaine Sutton's name appears solely because a joint New York State Income Tax Nonresident Return was filed for 1982. All references herein to petitioner shall pertain only to Elliott Sutton.

On June 9, 1980, petitioner filed a declaration of domicile and also registered to vote in Dade County, Florida. Petitioner also filed certifications of Florida domicile on February 26, 1982 and February 17, 1983 (presumably relating to real property taxes). Petitioner also belonged to a number of social clubs in Florida including The Jockey Club, The Tennis Club and Regines. Among petitioner's active pursuits is the racing of power boats. Petitioner owns and races a power boat which remains located in Florida. In 1980 and thereafter, petitioner also insured his automobiles in Florida. Said vehicles were, however, registered in New Jersey from which state petitioner has held a driver's license since the age of 16. On March 31, 1983, petitioner executed a Last Will and Testament in which he listed the State of Florida as his domicile. It is noted that petitioner belonged to no clubs in New York State.

In or about late 1981 or early 1982, petitioner listed the aforementioned large condominium for sale. The listing price was $2,000,000.00. Petitioner was, at the time, considering selling the condominium and buying a large townhouse situated on the oceanfront at the same location as the condominium. However, due to a downturn in the real estate market in Florida at such time, the developers of the townhouse project delayed construction indefinitely and petitioner decided not to sell the condominium.

Petitioner had income during the years in question from certain businesses located in New York which were owned, either wholly or partially, by petitioner. These businesses consisted of a sole proprietorship known as Port Electronics, and two corporations known as Terminal Camera, Inc. and Hilton Electronics, Inc. These businesses were commenced approximately 20 years ago and operated in their respective locations under long-term leases negotiated by petitioner. These businesses were involved in retail sales of cameras and electronic equipment, and petitioner was essentially uninvolved in their ongoing operations. Each business was operated by an independent manager, who had been working for a long number of years at each location and who made all business decisions on a day-to-day basis, including purchasing, hiring and firing, and issuing of checks. Petitioner testified that he visits these businesses very infrequently and had no set frequency for calling and checking on the businesses. Petitioner described himself as a "silent partner". He testified that he does almost nothing with these businesses, and with respect thereto that "I don't enjoy [the businesses]" and "[the businesses] give me an income but that's about all".

Petitioner filed a New York State Nonresident Income Tax Return, including a City of New York Nonresident Earnings Tax Return (Form IT-203), for each of the years in question. On these returns, as well as on his U.S. Individual Income Tax Returns for the same years (and for 1980), petitioner's address was listed as 19667 Turnberry Way, Miami, Florida.

Commencing in or about 1980, petitioner undertook negotiations to obtain Florida franchise rights to the well-known P.J. Clark's restaurants. Petitioner's intent was to establish P.J. Clark's restaurants in the Aventura Mall in Miami, and to further develop such restaurants throughout the State of Florida. During 1980 and 1981, petitioner was involved in extensive negotiations with P.J. Clark's and others in furtherance of this aim. After approximately a year of negotiations and working out licensing agreements, which involved the expenditure of substantial amounts of time and money by petitioner, petitioner was ultimately unable to develop the P.J. Clark's restaurants in Florida. Petitioner, in turn, commenced litigation against P.J. Clark's, Macy's and other defendants alleging such defendants to have frustrated petitioner's ability to establish the restaurants. This litigation remains ongoing.

Petitioner has a son, Ralph, born of his first marriage, who was approximately eight or nine years old during the years in question. Petitioner's son visited petitioner in Florida on nearly every holiday during the years in question including Christmas, Easter, Thanksgiving, and the major Hebrew holidays, as well as extensively during the summers.

During the years in question, petitioner maintained bank accounts in both New York State and Florida. Petitioner's bank accounts in New York State were principally trust accounts maintained for the benefit of his son, Ralph, or were long-term accounts related to the businesses (see Finding of Fact "11").

Wage and tax statements attached to petitioner's Forms IT-203 for the years in question listed petitioner's address as the New York rent-stabilized apartment at the Churchill. Petitioner attributed this listing, as did his accountant via affidavit, to an error made by the typist in the accountant's office. Petitioner testified that he maintained the New York rent-stabilized apartment even after obtaining the Florida condominium because it provided a relatively inexpensive alternative to obtaining hotel accommodations when petitioner came back to New York. Petitioner testified that he was in New York "certainly less than 100 days per year" and more likely visited New York no more than 60 to 75 days per year.

In December 1985, petitioner was served with a notice of eviction (notice of landlord's refusal to renew lease) from the rent-stabilized apartment in New York. The basis for this notice was stated to be that petitioner was not occupying the apartment as his primary or principal place of residence. Petitioner initially challenged this notice, but later abandoned such challenge and voluntarily vacated the rent-stabilized apartment. Petitioner subsequently purchased a condominium located on 64th Street in Manhattan. Petitioner stated his reasons for purchasing the 64th Street condominium to have been the same as for maintaining the rent-stabilized apartment (i.e., to provide comparatively inexpensive accommodations), as well as in furtherance of his belief that the condominium would appreciate in value thereby being a wise investment.

Telephone bills in petitioner's name, as submitted in evidence, reveal that outgoing calls were placed from the Turnberry Way condominium on 164 different days over a period of 11 months in 1981, and on 187 different days over a period of 10½ months in 1982. Petitioner's Florida phone bills were sent to the Terminal Camera business address in New York. Petitioner utilized this procedure in order to ensure that all phone bills would be paid when due. Petitioner noted that he travels frequently and is not always able to ensure that such bills would be paid promptly. Petitioner utilized this system to ensure that telephone service would not be cut off at the Florida condominium.

Petitioner voted in Florida by absentee ballot during the years in question. He noted that it had been his practice for many years to vote by mail because of its relative ease. The absentee voter ballot sent to petitioner for one of the years in question was addressed to petitioner at his New York rent-stabilized apartment.

On November 3, 1982, petitioner was married to one Ghislaine Sutton. Petitioner was subsequently divorced from Ghislaine Sutton on July 27, 1983. It appears that the couple, in fact, separated in February of 1983.

SUMMARY OF PETITIONER'S POSITION

Petitioner asserts that he has considered Florida to be his home since at least 1980. Petitioner notes that he is involved in most of his activities there, including power boat racing, and spends approximately 70 percent of his time there. Petitioner assertedly spends the rest of his time traveling in many other places and is in New York no more than 60 to 70 days per year. Petitioner maintains that he performed no services of consequence for any of the New York businesses, that such businesses were essentially self-operating, and that he was not involved in their management or operation.

CONCLUSIONS OF LAW

A. Tax Law § 605 (former [a]), in effect for the years at issue, provided, in pertinent part, as follows:[2]

"Resident individual. A resident individual means an individual:

(1) who is domiciled in this state, unless (A) 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...

(2) 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."

B. While there is no definition of "domicile" in the Tax Law (compare, SCPA 1103[15]), the Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his 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 his 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, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined in the regulations at 20 NYCRR 102.2(e)(1) as:

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[2]The Personal Income Tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 AD2d 444, 445). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

"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.

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals.... 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.... [e]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention.... No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animo revertendi.... This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations in connection with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

D. The test of intent with respect to a purported new domicile has been stated as "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 Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713).

The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra), it stated, "No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and

convincing."

E. Petitioner clearly maintained a permanent place of abode, to wit, the rent-stabilized apartment at the Churchill, in New York during the years in question, and admittedly spent more than 30 days in New York during each of such years. Thus, if petitioner is a New York domiciliary, he is taxable under Tax Law § 605 former (1)(A). However, if petitioner is not a New York domiciliary, he may not be taxable as a resident unless he spent more than 183 days in New York during either of the years in question. Accordingly, the determinative issue is domicile.

F. Petitioner Elliott Sutton has established that he changed his domicile from New York to Florida prior to the years in question. Petitioner's credible testimony in this regard, coupled with the weight of the documentary evidence, established petitioner's intent to change his domicile and his actual change of domicile. He commenced a pattern of spending winters and other periods of time in Florida as early as 1974, and the periods of time spent in Florida have successively increased. Further, petitioner purchased a large condominium in Florida. It is clear that the place to which petitioner would intend to return as his home was the Turnberry Island condominium in Florida, and was not the New York apartment. Petitioner undoubtedly maintained some contacts with New York State and City, as witnessed by his having spent at least 60 to 70 days during each of the years in question in New York and also by having maintained a place of abode, albeit comparatively small, in New York. However, petitioner's active business interests, including specifically his unsuccessful P.J. Clarke's venture, as well as the clear majority of his personal and leisure interests and time during the years in question centered around his life in Florida, and there was little active connection between petitioner and the State of New York. Accordingly, as a non-domiciliary who spent less than 183 days in New York State and New York City during 1981 and 1982, petitioner was not subject to tax as a resident of New York State or City during such years.[3]

G. The petition of Elliott and Ghislaine Sutton is hereby granted and the notices of deficiency issued by the Division of Taxation are cancelled.

DATED: Troy, New York
November 9, 1989

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[3]It could be argued that petitioner, as a nonresident of New York who reported wage income from New York businesses, should be required to allocate such income on the basis of days worked in New York and days worked out of New York. However, such argument was not raised. In addition, since there is no evidence that petitioner performed any services in New York for the businesses, the "convenience versus necessity" test is not presented (see Matter of Gleason v. State Tax Commn., 76 AD2d 1035, 429 NYS2d 314). In any event, since no alternative argument was raised as to the need to allocate wage income, such issue is not further discussed herein.