STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
HARVEY AND KATHRYN WACHSMAN	:	DETERMINATION DTA NOS. 806930
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1983.	:	AND 806931

Petitioners, Harvey and Kathryn Wachsman, 55 Mill River Road, Upper Brookville, New York 11771, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 1983.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 10, 1994 at 9:15 A.M., with all briefs to be submitted by July 15, 1994. Petitioners appeared by Rhonda L. Meyer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUES

I. Whether petitioner Kathryn Wachsman timely filed a petition with the former Tax Appeals Bureau of the former State Tax Commission seeking administrative review of a personal income tax deficiency asserted, by the Division of Taxation, to be due from petitioner for the year at issue.

II. Whether the Division of Taxation properly determined that petitioners were taxable as residents pursuant to Tax Law former § 605(a).

III. If not, whether petitioners properly allocated income derived from New York sources pursuant to the provisions of Tax Law former § 632 and 20 NYCRR 131.18.

FINDINGS OF FACT

On May 12, 1994, petitioners submitted, along with their brief, 44 proposed findings of

fact, each of which has been incorporated into the following Findings of Fact, except for proposed findings of fact "30", "33" through "35", "39", "40" and "44" which are conclusory in nature.

On March 20, 1991, a hearing was held before Brian L. Friedman, Administrative Law Judge, in the matter of the petitions of Harvey and Kathryn Wachsman for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 1983. The issues to be decided were identical to those set forth hereinabove.

In a determination dated April 16, 1992, Issue I was determined in petitioner Kathryn Wachsman's favor, i.e., it was found that the petition of Kathryn Wachsman was timely filed with the former State Tax Commission and, therefore, that the Division of Tax Appeals had jurisdiction of the subject matter contained in the petition.

With respect to Issue II, the determination held that, for the year at issue, petitioners were domiciliaries of Connecticut; however, it was further found that petitioners were properly taxable as residents of the State of New York by virtue of having maintained a permanent place of abode in New York during 1983 and having failed to sustain their burden of proving that they did not spend, in the aggregate, more than 183 days in the State of New York during 1983.

By virtue of the holding relative to Issue II, Issue III was rendered moot.

Petitioners subsequently filed a Notice of Exception to the determination with the Tax Appeals Tribunal.

During the pendency of the exception, petitioners, by Notice of Motion dated January 25, 1993, sought an order, pursuant to CPLR 5015(a)(2), relieving petitioners from the determination issued April 16, 1992 and vacating and setting aside that determination and granting a new administrative hearing upon the ground of newly-discovered evidence which, if introduced at the prior hearing, would probably have produced a different result. By order dated March 25, 1993, petitioners' motion for an order relieving them from the aforesaid determination, vacating and setting aside that determination and granting a new administrative

hearing was granted.[1]

The Division of Taxation filed an exception to the order. The Tax Appeals Tribunal, by decision dated December 16, 1993, held that the Division of Taxation's exception was premature and that the matter should be returned for the rehearing ordered by the Administrative Law Judge. The Tribunal's decision further provided that if the Administrative Law Judge issued a determination on the rehearing which is unfavorable to the

Division, it would be entitled to file an exception to that determination and to the Administrative Law Judge's order granting the rehearing.

On April 7, 1986, the Division of Taxation ("Division") issued a Statement of Audit Changes to Harvey and Kathryn Wachsman ("petitioners") which, for the year 1983, asserted additional personal income tax due from Harvey Wachsman in the amount of $23,722.00 and additional personal income tax due from Kathryn Wachsman in the amount of $2,432.00, plus interest of $5,650.11 due on the combined deficiencies. The Statement of Audit Changes advised that:

> "[s]ince you have not replied to either of our letters dated July 10, 1985 and October 10, 1985, we have recomputed your tax liability as a full year resident."

On July 14, 1986, the Division issued a Notice of Deficiency to petitioner Harvey Wachsman asserting a personal income tax deficiency of $23,722.00, plus interest, for a total amount due of $29,465.03 for the year 1983. On the same date, a Notice of Deficiency was issued to petitioner Kathryn Wachsman in the amount of $2,432.00, plus interest, for a total amount due of $3,020.78 for the year 1983. To substantiate that the notices of deficiency were,

---

[1]By virtue of the fact that the order of March 25, 1993 vacated the prior determination (issued April 16, 1992), all of the issues previously addressed in the April 16, 1992 determination will again be considered herein. All of the evidence introduced and all of the testimony presented at the hearing held on March 20, 1991 will be considered and some of the Findings of Fact set forth in the prior determination (most notably, those which address the issue of the timeliness of the petition of Kathryn Wachsman and the domicile of both petitioners) will again be set forth in this determination since they were not specifically addressed at the hearing held on March 10, 1994.

in fact, mailed on July 14, 1986, the Division produced a certified mail record and an affidavit from Stanley K. DeVoe, Principal Clerk in the Manual Assessments Unit of the New York State Department of Taxation and Finance.

In order to be timely filed (within the 90-day period prescribed by Tax Law § 681[b]), petitions seeking administrative review of the aforesaid notices of deficiency issued July 14, 1986 had to have been filed on or before October 12, 1986. In 1986, October 12 was a Sunday and October 13 was the Federal and State observance of Columbus Day. Therefore, a timely petition had to have been filed on or before October 14, 1986.

The petition of Harvey Wachsman was received by the former Tax Appeals Bureau on October 14, 1986. The mailing envelope contained no United States postmark, but had a machine-metered postmark of October 11, 1986 from Merrick, New York. The Division of Taxation initially contended that this petition was untimely. However, in apparent reliance on the regulations of the Tax Appeals Tribunal (20 NYCRR 3000.16[b]) rather than on the fact that October 12, 1986 was a Sunday and October 13, 1986 was a holiday, the Division conceded that the petition of Harvey Wachsman was timely.

The petition of Kathryn Wachsman was received by the former Tax Appeals Bureau on October 16, 1986. As was the case with Harvey Wachsman's petition, the mailing envelope contained a machine-metered postmark of October 11, 1986 from Merrick, New York. However, the envelope also contained a United States postmark of October 14, 1986 from Poughkeepsie, New York.

Both petitions were apparently mailed by petitioners' then-accountants, Peat, Marwick, Mitchell & Co., who had offices in Jericho, New York. James F. Hanley of this accounting firm (who was formerly the accountant for the law firm of Pegalis & Wachsman, P.C. until discharged in 1988) testified as to his firm's mailing procedures. He stated that the envelopes containing the petitions bore consecutive certified mail numbers (which was the case), bore identical metered postmark dates and, based upon his knowledge of office mailing procedures, were both mailed on Saturday, October 11, 1986 in either Jericho or Merrick (Long Island),

New York. He could not explain why Kathryn Wachman's petition was postmarked in Poughkeepsie except to say that the petition could not have been mailed from that location.

For the year 1983, petitioners filed Form IT-203, Nonresident Income Tax Return, under the filing status "married filing separately on one return". The return was prepared and signed by James F. Hanley of Peat, Marwick, Mitchell & Co. Petitioners' address, as set forth on the return, was Great Quarter Road, Sandy Hook, Connecticut. Exclusive of New York additions and subtractions and Federal adjustments, petitioners' total income (Federal amount) consisted of interest income of $994.00, losses from rental property of $9,493.00 and wages of $360,833.00. Attached to the return were wage and tax statements (Forms W-2) from Pegalis and Wachsman of Great Neck, New York which indicated that, for 1983, wages of $320,833.36 were paid to Harvey Wachsman and wages of $39,999.96 were paid to Kathryn Wachsman. Both W-2 forms indicated that the address of Harvey and Kathryn Wachsman was 269-32V Grand Central Parkway, Floral Park, New York.

On Schedule A (Allocation of Wage and Salary Income to New York State), petitioners indicated that total days worked in 1983 were 303 (excluded were 52 Saturdays and Sundays and 10 vacation days), total days worked outside New York were 183 and days worked in New York were 120. The resulting allocation was, therefore, determined to be $142,904.00 (120/303 x $360,833.00).

On their petitions challenging the Division of Taxation's determination that they were taxable as New York residents, each petitioner attached an identical schedule which set forth his or her location for each day of 1983. Pursuant to these summaries, petitioners admitted that each had worked 140 days in New York. As a result thereof, petitioner Harvey Wachsman concedes that an additional $2,476.00 in personal income tax is due to New York State while petitioner Kathryn Wachsman concedes that an additional $243.00 in personal income tax is due to the State.

At the hearing held on March 20, 1991, petitioners' former accountant (James F. Hanley of Peat, Marwick, Mitchell & Co.) stated that his firm had been discharged by petitioners in the

spring of 1988. As a result, petitioners' files were put in storage (Time Storage of Hempstead). In December 1988 or January 1989, a water pipe burst at the storage facility and many of the records placed there were damaged. Time Storage was forced to move everything to a separate warehouse. Because of limited access to the files, Mr. Hanley's firm hired a new storage firm (Record Keepers in Farmingdale). Upon making a search for petitioners' records, Mr. Hanley was unable to locate them at the Record Keepers' facility. He was unsure whether the records were lost or destroyed.

Mr. Hanley also testified that, in preparing the schedules setting forth the days in and days out of New York (attached to each petition), he dealt with a secretary at the firm of Pegalis and Wachsman who prepared the schedules based upon petitioners' daily calendar. Mr. Hanley stated that the allocation of days in and out of New York, as set forth on the tax returns, was computed based upon discussions with petitioners. He further stated that the daily diary for 1983 would not have been placed with his firm's files.

At the hearing held on March 10, 1994, petitioner Harvey Wachsman testified as to the circumstances surrounding the discovery of the 1983 New York Lawyers Diary and Manual (which gave rise to the motion made on January 25, 1993 and which led to the issuance of the order of March 25, 1993).

Dr. Wachsman stated that, because of the extensive construction and renovation of the offices of Pegalis and Wachsman, P.C. in the late 1980's, books, records, papers and files were placed in storage. Prior to the 1991 hearing, petitioners searched their office and their home in an attempt to locate the diary, but were unable to do so. Dr. Wachsman stated that thousands of boxes (many with no labels on them) were sent to several storage facilities. While they were aware of the importance of the diary, they were unable to gain access to many of the boxes and were not even certain whether the diary was in any of them.

When the new building which housed the law firm of Pegalis and Wachsman, P.C. was opened, boxes were removed from storage, files were put into file cabinets and books were placed on shelves. Dr. Wachsman happened to walk into the office library, looked up onto a

shelf and noticed the 1983 diary. This occurred at a time subsequent to the issuance of the April 16, 1992 determination.

Petitioner Harvey Wachsman is a physician and an attorney. As of the March 1991 hearing, he was licensed to practice medicine in eight states and licensed to practice law in six states and in the District of Columbia. He was a full professor at Brooklyn Law School and the St. Johns University School of Law and was a professor at the State University of New York at Stony Brook, College of Medicine and Neurology.

After graduating from medical school, he did his internship in New York and then was a resident and chief resident in neurosurgery at Emory University in Atlanta, Georgia. Thereafter, he lived in Florida and later moved "out west" for a short time. In 1971, he moved to Connecticut and practiced neurosurgery there. In 1973, he rented a house on Great Quarter Road in Sandy Hook, Connecticut and, in 1975, he purchased this house. In 1976, he was married, in Connecticut, to petitioner Kathryn Wachsman and both petitioners resided in this home until it was sold in the latter part of 1986.

Petitioner Harvey Wachsman graduated from law school in 1976. In May 1976, Kathryn Wachsman (who was already an attorney and who had previously practiced in Kansas) opened a law office in Newtown, Connecticut. Harvey Wachsman worked as an assistant for his wife until his admission to the bar in October 1976. In 1978 or 1979, petitioners moved their law practice to their house on Great Quarter Road in Sandy Hook, Connecticut.

In 1975, a friend introduced Harvey Wachsman to Steven Pegalis. In March 1977, he joined Steven Pegalis in the practice of law in Great Neck, New York and became a partner in the firm of Pegalis and Wachsman. Because the Great Neck offices were so small, Harvey Wachsman often worked for the firm at his home or office in Connecticut. Because of the commute (approximately 1 hour and 45 minutes each way) from Great Neck to his home, he rented an apartment in Floral Park (Queens), New York beginning in 1979 (it is unclear for how long the apartment was rented, although it was rented through 1983). The apartment was within about a 15-minute drive from the Great Neck office. The apartment had 2 bedrooms and 1½

bathrooms. Initially, it was sparsely furnished (a card table, a lamp from a motel owned by a friend and a box-spring and mattress). Eventually, more elaborate furnishings were added. Harvey Wachsman stated that he used the apartment when he was too tired to travel back to Connecticut or when he had to work late in New York. Both petitioners stated that they rarely stayed at the New York apartment.

While residing in Connecticut, petitioner Harvey Wachsman was registered to vote in Connecticut and possessed a Connecticut driver's license, medical license, legal license and gun permit. In 1983, he belonged to the Fairfield County (Connecticut) Medical Society and the American Medical Association through the Connecticut State Medical Society. He was active in various organizations in Connecticut such as town committees, police commissions, etc. In the State of New York, his only affiliations were with the New York State and Nassau County Bar Associations and the New York State Trial Lawyers. For the year at issue, most of petitioners' bank statements, charge account bills and investments were addressed to their Great Quarter Road home.

In 1986, petitioners moved to the State of New York, purchasing a home at 55 Mill River Road, Upper Brookville, New York. At that time, Harvey Wachsman registered to vote in New York and changed all of his licenses to reflect his change in residence. Since their move to New York in 1986, petitioners have maintained a Connecticut law office, although they work with another attorney there, because Federal courts in Connecticut do not permit attorneys to practice without an open Connecticut office.

Prior to her marriage to Harvey Wachsman in 1976, petitioner Kathryn Wachsman resided in Johnson County, Kansas where she practiced law. She is licensed to practice law in Kansas, Connecticut, New York, Florida and Washington, D.C.

From 1976 through 1986, she was registered to vote in Connecticut, possessed a Connecticut driver's license and was a member of the Newtown (Connecticut) Bar Association. For all years from the date of her marriage until 1986, she resided with her husband at Great Quarter Road, Sandy Hook, Connecticut. She testified at the hearing that, whenever her

husband traveled, she accompanied him. When Harvey Wachsman stayed in the New York apartment, she (and their children) usually did as well. She stated that, in 1983, she and her husband saw clients in their home and had active cases in Connecticut courts.

The law firm of Pegalis and Wachsman was initially a partnership and, at some time prior to 1983, it became a professional corporation. Kathryn Wachsman joined the firm of Pegalis and Wachsman in 1978 and was associated with the firm during the year at issue (it is unclear whether or not she was a partner). The law firm of Wachsman and Wachsman was, at all times, a partnership. During 1983, petitioners (Wachsman and Wachsman) saw clients in their home at Great Quarter Road (Connecticut), utilizing a portion of their living room for this purpose. They (Wachsman and Wachsman) also had a Florida office located in Palm Beach (see, Petitioners' Exhibit "1"). Steven Pegalis was "of counsel" to the firm of Wachsman and Wachsman, but did not hold a partnership interest therein. Steven Pegalis was not licensed to practice law in Connecticut.

Kathryn Wachsman testified that time spent in Connecticut (work days) reflected work performed on Connecticut and other non-New York cases. Work performed on New York cases was done in New York. The work of Wachsman and Wachsman was performed in Connecticut; work for Pegalis and Wachsman was done in New York. She stated that the daily diary (from which the days-in and days-out allocation and schedules were prepared) was kept by Harvey Wachsman's secretary at Pegalis and Wachsman.

Harvey Wachsman testified that, in 1983, Pegalis and Wachsman required him to work outside of New York on a fairly regular basis. He saw clients, made court appearances, took depositions, attended meetings, made television and radio appearances, met with expert witnesses and lectured at various places around the country. He stated that all of these activities benefited Pegalis and Wachsman and were done outside New York out of necessity and not out of convenience. Petitioner Kathryn Wachsman also testified that all of petitioners' out-of-state activities were out of necessity and were done in furtherance of promoting Pegalis and Wachsman, P.C. to a position of national prominence. While the partnership of Wachsman and

Wachsman continued as an entity (it was needed in order to practice law in Connecticut), all of the cases of Wachsman and Wachsman were funded by and all proceeds inured to the benefit of Pegalis and Wachsman. Dr. Wachsman stated that attorneys and individuals from all over Connecticut referred cases to Wachsman and Wachsman.

Dr. Wachsman stated that, according to the manner in which the diary was maintained, if he was in New York on a particular day (or in any state other than Connecticut), the diary would state where he was and what he was doing. He testified that the entries were made contemporaneously with their activities in 1983 and that various secretaries made the entries during the year. On any date on which there was no entry (or an entry was crossed out), petitioners spent that day in Connecticut. On cross-examination, Dr. Wachsman was able to recall specific clients, meetings and cases which required his presence out of state. He stated that for most out-of-state trips, he (and Kathryn Wachsman) usually traveled to the particular destination on the night preceding the scheduled event. Both petitioners testified that it was their usual practice to travel together (Kathryn Wachsman acted as co-counsel for her husband).

After reviewing the 1983 diary together, petitioners prepared a summary (see, Exhibit "5") setting forth their whereabouts on each day of 1983 and a monthly summary which provided as follows:

Month	Total Days in New York	Total Days Worked in New York	Days Worked Outside New York
January	14	14	14
February	11	11	17
March	13	12	18
April	10	9	18
May	12	12	17
June	11	11	17
July	7	7	23
August	8	8	23
September	14	14	14

October	20	20	10
November	21	18	7
December	8	7	21
Total	149	143	199

Of the 199 days worked outside New York, 148 were spent in Connecticut and 51 in other states (Pennsylvania, Florida, Louisiana, Virginia, Washington, D.C., Ohio, New Jersey, Maryland, Massachusetts and Kansas). Kathryn Wachsman testified that, due to the fact that she gave birth to her second child in April 1983 (and was in a New York hospital), she spent one additional day in New York in 1983 (her total of days in New York was, therefore, 150).

Dr. Wachsman testified that he rarely took vacations or time off from work. When in Connecticut, he stated that petitioners saw clients (and potential clients) who had to be seen there. In 1983, they were well known but had not yet attained a national reputation so they needed to see clients at the clients' convenience. Because he worked so frequently, he was able to recall the days (certain holidays, wedding anniversary and Disneyworld trip) when he did not work.

Petitioner Harvey Wachsman testified that petitioners' accountants prepared their 1983 nonresident income tax return (Exhibit "J") and that petitioners did not review their day-to-day whereabouts with the accountants in preparing their Schedule A (allocation of wage and salary income to New York State). The schedule indicated that, out of total working days of 303 (Saturdays and Sundays 52 + vacation 10), 120 days were worked in New York and 183 were worked outside New York. Dr. Wachsman stated that the firm's bookkeeper (Maggie) furnished the records to and worked with Jim Hanley (see, Finding of Fact "6") in preparing the return.

Attached to each petitioner's petition (see, Exhibits "D" and "E") was a summary schedule setting forth the whereabouts of petitioners during 1983 (the petitions were signed by James F. Hanley on October 7, 1986). Pursuant to this schedule, days worked in New York State (not including weekends and vacation days) were calculated to be 140 and days worked out-of-state were 163 (Saturdays and Sundays 52; vacation days 10). At the March 1991 hearing, Dr. Wachsman testified that the summary of days in and days out attached to his petition

(Exhibit "D") was correct to the best of his recollection (see, Transcript of March 20, 1991 hearing, p. 58). At the March 1994 hearing, he stated that he never compared the 1983 diary with the schedules attached to the petitions prepared in 1986.

As indicated in Finding of Fact "15", petitioner Harvey Wachsman testified that the proceeds from all of the cases of Wachsman and Wachsman were paid to Pegalis and Wachsman which funded the cases of Wachsman and Wachsman as well. Petitioner Kathryn Wachsman testified (see, tr., pp. 112, 113) as follows:

> "But as Dr. Wachsman pointed out, certainly in 1983 all of the efforts that we continued as Wachsman and Wachsman in Connecticut inured to the benefit of Pegalis and Wachsman. We didn't charge for the people we saw, but inured to the benefit because any income we generated certainly in that year and years afterward inured to the benefit of Pegalis and Wachsman who funded the cases. We were paid by Pegalis and Wachsman, but our efforts, it was understood and agreed by no formal agreement but by Steve Pegalis this is what we were doing. He understood the reason for it. He concurred with the reason for it. We were developing a national practice. It was important to keep in place Wachsman and Wachsman because it was well known as Wachsman and Wachsman in Connecticut, not Pegalis and Wachsman.
>
> * * *
>
> "We would have to enter our own juris number on Connecticut cases. They were Wachsman and Wachsman cases that year, but the paperwork would be handled in New York."

CONCLUSIONS OF LAW

As to the issue concerning the timeliness of the petition of Kathryn Wachsman, no additional testimony or documentary evidence was produced, by either party, at the hearing held on March 10, 1994. Therefore, the Conclusions of Law relating to such issue from the determination issued April 16, 1992 (Conclusions of Law "A" through "C") shall be incorporated into this determination.

A. Tax Law § 681(b) provides that, after 90 days from the mailing of a Notice of Deficiency, such notice shall be an assessment of the amount of tax specified therein, unless the taxpayer has within the 90-day period filed a petition as provided in Tax Law § 689.

Since the notices of deficiency were issued and the petitions were filed with the former State Tax Commission prior to the creation of the Division of Tax Appeals, reference will, therefore, be made to the decisions of the former State Tax Commission with regard to the issue of timely filed petitions.

20 NYCRR former 601.3(c) provided as follows:

> "Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, N.Y. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope."

In Matter of Garofalo (State Tax Commn., September 28, 1983) and Matter of Mancuso (State Tax Commn., September 28, 1983) the State Tax Commission held the following:

> "That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period."

B. By virtue of the provisions of chapter 282 of the Laws of 1986, the Division of Tax Appeals was created and transitional provisions (applicable to pending petitions filed with the former State Tax Commission) were included therein which granted to the Division of Tax Appeals jurisdiction over such matters. Section 32 of chapter 282 of the Laws of 1986 provides, in pertinent part, as follows:

> "This act shall take effect September first, nineteen hundred eighty-seven and shall apply to all proceedings commenced in the division of tax appeals on or after such date and shall apply to all proceedings commenced prior to such date which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent that this act can be made applicable . . . ." (Emphasis added.)

Therefore, if it is determined that petitioner Kathryn Wachsman timely filed a petition with the former State Tax Commission, then the Division of Tax Appeals has jurisdiction over the subject matter of the petition.

C. General Construction Law § 25-a(1) provides, in pertinent part, as follows:

> "When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day . . . ."

As indicated in Finding of Fact "3", petitioner Kathryn Wachsman's petition, while not received until October 16, 1986, had affixed to the envelope containing such petition a United States postmark of October 14, 1986. While this date is two days after the expiration of the 90-day period for the filing of the petition, such petition is nonetheless timely since October 12, 1986 (the last day for timely filing) was a Sunday and October 13, 1986 was a holiday (Columbus Day). Therefore, the petition of Kathryn Wachsman was timely filed with the former State Tax Commission and the Division of Tax Appeals has jurisdiction of the subject matter contained therein.

D. Tax Law former § 605(a), in effect for the year at issue, defined a resident individual as one:

> "(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."

While the Tax Law contains no definition of "domicile", the regulations (20 NYCRR former 102.2[d]) of the Division provided, in pertinent part, as follows:

> "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."

Creating a change of domicile requires both the intent to make a new location a fixed and permanent home and actual residence at that location (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276).

The measure of intent regarding 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 Bourne, 181 Misc 238, 41 NYS2d 336, 343, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785, citing Beale, Conflict of Laws, Vol 1, pp. 124, 127). In reviewing the actions of a taxpayer alleging a change in domicile, formal declarations have been held to be "less persuasive than the informal acts of an individual's 'general habit of life'" (Matter of Silverman, Tax Appeals Tribunal, June 8, 1989, citing Matter of Trowbridge, 266 NY 283, 289).

In the present matter, there is no evidence, whatsoever, that petitioners intended to change their domicile from Connecticut to New York in 1983 or at any time prior thereto. For many years prior to 1983, petitioners owned a home in Connecticut, maintained a law practice there, were registered to vote in Connecticut, possessed Connecticut driver's licenses and were active in various organizations in Connecticut. Petitioner Harvey Wachsman had a Connecticut

medical license and gun permit and was a participant in Connecticut law enforcement activities. Other than having rented an apartment in New York (and this was done in 1979), there were no indications of a change in domicile. Petitioners' credible testimony with respect to the reasons for renting the apartment (see, Finding of Fact "11") clearly shows that there was no intent to give up their Connecticut home or to make their New York apartment their fixed and permanent home. Therefore, what must be examined is whether petitioners, despite being domiciled in Connecticut, could, nevertheless, be taxed as New York residents by virtue of having maintained a permanent place of abode (the apartment in Floral Park) and having spent, in the aggregate, more than 183 days in New York in 1983.

E. With respect to the issue of whether or not petitioners spent, in the aggregate, more than 183 days in the State during 1983, 20 NYCRR former 102.2(c) provided, in part, as follows:

> "Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State."

20 NYCRR former 102.2(e) provided, in pertinent part, as follows:

> "Permanent place of abode. (1) A permanent place of abode means 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 . . . . Also, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to his employer's New York State office for a fixed and limited period, after which he is to return to his permanent location. If such an individual takes an apartment in New York State during this period, he is not deemed a resident, even though he spends more than 183 days of the taxable year in New York State, because his place of abode is not permanent."

There is no indication that the Floral Park apartment, when rented by petitioners in 1979, was to be maintained for a temporary period for the accomplishment of a particular purpose. Therefore, the apartment is deemed to have been a permanent place of abode.

F. At the hearing held on March 20, 1991, petitioners testified concerning their whereabouts during 1983 with only the summaries attached to their petitions (Exhibits "D" and

"E") as documentary evidence to support their contentions. The source documents, i.e., the records used in preparation of the summaries, were not produced. While the Tribunal in Matter of Avildsen (Tax Appeals Tribunal, May 19, 1994) has held that documentary evidence is not strictly required at an administrative hearing in order to substantiate that more than 183 days were not spent in New York in a taxable year, this Administrative Law Judge, in the determination issued April 16, 1992 (prior to the decision in Avildsen), held that the lack of documentary evidence, together with certain inconsistencies, properly led to the conclusion that petitioners failed to sustain their burden of proof on this issue.

That is no longer true. While the Division correctly points out that many portions of the 1983 diary are illegible and, in some instances, completely blank, the credible testimony of petitioners as to the contents on specific days as well as the reasons for blank portions (see, Finding of Fact "15") have substantiated petitioners' assertion that they did not spend more than 183 days in New York in 1983.

As the Division has correctly asserted, there are clearly inconsistencies between the New York days as set forth first, on petitioners' 1983 return (see, Finding of Fact "7"), then on the summary schedule attached to each of their petitions (see, Finding of Fact "17") and, finally, on the summary prepared by petitioners from the 1983 diary (see, Finding of Fact "16"). Although petitioners did sign their return and did assert that, to the best of their recollection, the summaries attached to their petitions were a true depiction of their whereabouts in 1983, both were prepared not by petitioners themselves but by bookkeepers and/or accountants on their behalf. By virtue of the order of March 25, 1993, petitioners were, in essence, given a second chance to substantiate that they did not spend more than 183 days in New York in 1983. While it could be argued (and has been by the Division) that petitioners were not entitled to another opportunity, this Administrative Law Judge, in the aforesaid order, held that the circumstances did so warrant. Therefore, the credible testimony of petitioners (most notably, the ability of petitioner Harvey Wachsman to recall specific cases, clients and reasons for petitioners' whereabouts on days in question), taken together with the 1983 diary which was maintained by

petitioners' secretaries, substantiates that they did not spend more than 183 days in New York in 1983 and, accordingly, cannot be taxed as residents for such year.

G. Tax Law former § 632(a), as in effect during the year in issue, defines the New York source income of a nonresident individual. This section provided:

> "General. The New York adjusted gross income of a nonresident individual shall be the sum of . . . [t]he net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . ." (emphasis added).

Income which is "derived from or connected with New York sources" shall be attributable to "a business, trade, profession or occupation carried on in this state . . ." (Tax Law former § 632[b][1][B]).

20 NYCRR former 131.18(a) provided, in part, as follows:

> "If a nonresident employee (including corporate officers, but excluding employees provided for in section 131.17 of this Part) performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay."

Petitioners' testimony concerning the reasons for continuing the Wachsman and Wachsman partnership related primarily to the fact that they (along with Steven Pegalis) were attempting to develop a national law practice, that petitioners were well known in Connecticut (as Wachsman and Wachsman) and that the partnership received many referrals from lawyers and individuals. Such testimony establishes that the work performed at their home/office in Connecticut and in the courts of that state were out of necessity rather than for their own convenience. Accordingly, pursuant to 20 NYCRR former 131.18(a), they were entitled to an allocation such as the one performed on Schedule A of their return. By virtue of their testimony

and the summary prepared from the 1983 diary, however, the allocation must be revised as follows:

Days worked in year	342
Total days worked outside New York	199
Days worked in New York	143

New York State amount:

$$\frac{143}{342} \times \$360,833.00 = \$150,874.59$$

On their 1983 return (Exhibit "J", petitioners' allocation was:

$$\frac{120}{303} \times \$360,833.00 = \$142,904.00$$

In their reply brief, petitioners concede that the revised allocation (143/342 x $360,833.00 = $150,874.59) is correct. Additional personal income tax (to be recomputed by the Division in accordance with this new allocation formula) is, therefore, due from petitioners.

H. The petitions of Harvey and Kathryn Wachsman are granted to the extent indicated in Conclusion of Law "F"; the Division is directed to modify the notices of deficiency issued to each petitioner on July 14, 1986 in accordance with Conclusions of Law "F" and "G"; and, except as so granted, the petitions are in all other respects denied.

DATED: Troy, New York
January 12, 1995

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE