STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER C. AUSNIT	:	DETERMINATION DTA NO. 808144
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 the Administrative Code of the City of New York for the Year 1985.	:	

Petitioner Peter C. Ausnit, c/o Murray Appleman, Esq., 225 Broadway, 39th Floor, New York, New York, 10007 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 the Administrative Code of the City of New York for the year 1985.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 4, 1991 at 1:15 P.M. The Division of Taxation filed a letter in lieu of a brief on March 16, 1992. Petitioner appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioner was a domiciliary of New York State and New York City for the year 1985 or maintained a permanent place of abode within New York State and City and spent more than 183 days in the State and City and was thus taxable as a resident individual.

FINDINGS OF FACT

On August 8, 1988, the Division of Taxation ("Division") issued a Statement of Audit Changes to petitioner, Peter C. Ausnit, for the year 1985 wherein total income earned by petitioner from all sources was held taxable to New York State and City on the basis that petitioner was a domiciliary of New York State and City and was therefore taxable as a resident individual. On November 15, 1988, the Division issued a Notice of Deficiency to petitioner for the year 1985 asserting additional New York State personal income tax of $753,981.74 and additional New York City personal income tax of $269,627.63, plus interest, for a total amount of tax due of $1,023,609.37.

For the year 1984, petitioner filed a New York State Resident Income Tax Return, Form IT-201. The resident return listed petitioner's address as "29 Round Hill Club Road, Greenwich, CT 06830", showed the preparer's address as "150 Great Neck Road, Great Neck, New York 11021", and bore a New York postmark. Among the properties which the return indicated were owned by petitioner during 1984 was a building located at 112 East 61st Street in New York City. The return was filed on June 17, 1985.

For the year at issue, petitioner filed a New York State Nonresident Income Tax Return, Form IT-203. The nonresident return listed petitioner's address as "29 Round Hill Club, Greenwich, CT 06830", showed the preparer's address as "150 Great Neck Road, Great Neck, New York", listed rental loss from property located at 112, 114 and 118 East 61st Street, New York, New York and listed income and losses from six New York partnerships. The return was filed on October 15, 1986.

For the year 1986, petitioner filed, on December 28, 1987, a New York State Resident Income Tax Return, Form IT-201. The return listed petitioner's address as "112 East 61st Street, New York, New York." For the years 1988 and 1989, petitioner filed Resident Income Tax Returns, Form IT-201. The returns listed petitioner's address as "112 East 61st Street, New York, New York" and showed the preparer's address as "150 Great Neck Road, Great Neck, New York 11021".

Petitioner was a real estate investor and principal shareholder of 525 Park Avenue Corporation, which owned the building located at 525 Park Avenue.

Petitioner and his wife were long-time domiciliaries of New York City and the State of New York prior to the year at issue. Petitioner, his wife and two children resided in the penthouse of 525 Park Avenue until 1982, when petitioner and his wife separated. Pursuant to a separation agreement dated April 1, 1982, petitioner's wife and children were to remain in the penthouse while petitioner was to reside in apartment 6C.

In May 1984, petitioner and the corporation sold the buildings located at 110 East 61st Street and 525 Park Avenue. It is unclear from the record whether petitioner vacated apartment 6C. Petitioner also owned at this time apartment buildings located at 895 Park Avenue, 112 East 61st Street, 114 East 61st Street and a commercial building located at 202 West 34th Street. All of these buildings are located in New York, New York.

On April 1, 1985, petitioner contracted to purchase a house at 29 Round Hill Club Road, Greenwich, Connecticut for $1,200,000.00. In September 1985, petitioner purchased another home located at 15 Benedict Court, Greenwich, Connecticut. The utilities in the 29 Round Hill Club Road house were turned off in October 1985, and the house was sold in April 1986. Petitioner voted in Connecticut in 1985, applying for voting registration on April 4, 1985.

During 1985, petitioner wrote numerous checks to various businesses and organizations located in New York City and State, including the New York City Ballet, the Auto Club of New York, the New York City Parking Violations Bureau, several large department stores, a number of doctors and a garage located at 220 East 39th Street, New York, New York. In addition, petitioner wrote checks to Con Edison, New York Telephone and Manhattan Cable TV. For the 112 East 61st Street building, petitioner made payments for heating oil, electricity, repairs and maintenance.

During 1985, petitioner continued to list telephone numbers for himself at 525 Park Avenue, 895 Park Avenue and 112 East 61st Street in the Manhattan telephone book. Petitioner had a New York State driver's license, which was valid through October 11, 1986, and which

contained the 525 Park Avenue address. In addition, his automobile was registered in New York State.

In December 1985, petitioner was diagnosed as suffering from an acute manic depressive disorder. He returned to New York City for psychiatric treatment at the end of 1985.

Petitioner introduced a minimal amount of documentary evidence and no testimonial evidence into the record of this matter.

CONCLUSIONS OF LAW

A. Tax Law § 605 (former [a]), in effect for the years at issue, provided, in pertinent part, as follows:[1]

> "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 103[15]), the Division's regulations (20 NYCRR former 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

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[1]The personal income tax imposed by 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 the Article 22 shall be deemed references (though uncited) to the corresponding sections of the Administrative Code of the City of New York (§ 11-1705[b]).

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 former 102.2(e)(1) as:

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

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 App Div 444, 445, 126 NYS 970). 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, 433 NYS2d 276). 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....
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> "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 connected with acts, but is 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, 442, NYS2d 990).

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. In this case, there appears to be no dispute as to petitioner's status as a domiciliary and resident of New York, at least until 1984. Petitioner claims to be a non-domiciliary of New York properly taxable as a nonresident as of January 1, 1985. However, since petitioner has not produced any probative evidence in support of his position, it must be concluded that petitioner has not established that he changed his domicile from New York to Connecticut. Persuasive evidence against a change in domicile is demonstrated by the facts that petitioner retained title to real property in New York (Matter of Chrisman, 43 AD2d 771, 350 NYS2d 468; Matter of Roth, Tax Appeals Tribunal, March 2, 1989), continued maintenance of a New York residence (Matter of Cooper v. State Tax Commn., 82 AD2d 950, 441 NYS2d 30; Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992; Matter of Simon, Tax Appeals Tribunal, March 2, 1989), and spent considerable time in New York during the year at issue (Matter of Clute v. Chu, 106 AD2d 841, 484 NYS2d 239; Matter of Kornblum, supra; Matter of Simon, supra). Finally, it is important to note that petitioner, after the year at issue, again considered himself a

domiciliary of New York with his primary residence being the apartment at 112 East 61st Street. Although his alleged intent to remain permanently in Connecticut need not be diminished by his later return to New York, to the extent that petitioner's return demonstrates the "range of sentiment, feeling and permanent association" (Matter of Bodfish v. Gallman, supra) he held for Connecticut, it is an important factor to be considered. Therefore, it is concluded that petitioner was a domiciliary of New York State and City during the year at issue.

F. Even if it were to be concluded that petitioner was not domiciled in New York during the audit period, he would be properly assessed herein if he maintained a permanent place of abode within New York and spent in the aggregate more than 183 days there during the year 1985 (Tax Law § 605 [former (a)(2)]). It is concluded that petitioner has not proved that he did not spend at least this amount of time in New York during the audit period.

A "permanent place of abode" includes "a dwelling place permanently maintained by the taxpayer, whether or not owned by him" (20 NYCRR 102.2[e][1]). There is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it (see, Matter of Smith v. State Tax Commn., 68 AD2d 993, 994, 414 NYS2d 803). Here, petitioner owned and maintained several buildings in New York City, including 112 East 61st Street and 895 Park Avenue, throughout the audit period. In addition, there is no evidence that petitioner vacated apartment 6C, located in the 525 Park Avenue building. Petitioner had a telephone listing during 1985 in each of the three buildings. Furthermore, it is uncontradicted that petitioner resided at the 112 East 61st Street building in 1986 and thereafter. Therefore, these apartments and buildings constituted "permanent places of abode" within the meaning of Tax Law § 605 (former [a][2]).

The remaining issue then is whether petitioner spent in the aggregate more than 183 days of the taxable year in New York. It is concluded that petitioner has failed in his burden to prove that he did not (Tax Law § 689[e]; 20 NYCRR 3000.10[d][4]), since no evidence was produced on this issue.

G. Petitioner was under an obligation to maintain adequate records to substantiate the

fact that he did not spend more than 183 days of such taxable year within the State (Smith v. State Tax Commission, supra, citing 20 NYCRR former 102.2[c]). In that petitioner offered no evidence as to his whereabouts during the year in issue, it cannot be determined how many days petitioner spent in New York during 1985. Having failed to satisfy his burden on this issue, petitioner would be subject to the Division's assessment even if he were to have demonstrated a change of domicile to Connecticut.

H. Petitioner's representative stated at the hearing that petitioner's due process rights were violated because the hearing in this matter was held in Troy, New York rather than in New York, New York. The representative cited no regulatory, statutory or case law authority for this position.

If a taxpayer is afforded notice of the imposition of a tax and an opportunity to challenge the tax at any stage before it is finally fixed, even before an administrative agency, he has not been denied due process (Turner v. Wade, 254 US 64, 65 L Ed 134). The right to a hearing imports the requirement that a taxpayer entitled to it shall have the right to support his allegations by argument, however brief, and, if necessary, proof, however informal (Londoner v. Denver, 210 US 373, 52 L Ed 1103). Therefore, it is concluded that petitioner was not denied due process, as he was afforded a hearing in which he had the oppurtunity to present both legal argument and evidence in support of his position.

I. The petition of Peter C. Ausnit is hereby denied and the Notice of Deficiency dated November 15, 1989 is sustained.

DATED: Troy, New York
November 5, 1992

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE