STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
COLIN W. AND DELMA K. GETZ	:	AMENDED DETERMINATION DTA NO. 809134
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1986, 1987 and 1988.	:	

Petitioners, Colin W. and Delma K. Getz, 8459 S.E. Woodhaven Lane, Colonial I, Tequesta, Florida 33469, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1986, 1987 and 1988.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on June 10, 1991 at 9:15 A.M., with all briefs due on September 16, 1991. Petitioners submitted a brief on July 29, 1991. The Division of Taxation submitted a brief on August 26, 1991 and petitioners submitted a reply brief on September 12, 1991. Petitioners appeared by Rodney L. Burr, Enrolled Agent. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioners proved a change of domicile from New York to Florida for the years 1986 through 1988.

II. Whether petitioners spent more than 183 days in New York State during each of the years 1986 and 1988.

FINDINGS OF FACT

Petitioner Colin Getz[1] was born in 1922 in Montreal, Canada. That same year he and his parents moved to Buffalo, New York where he was raised. He attended the University of Buffalo for one year and then transferred to Michigan State from which he graduated. In December of 1941, he enlisted in the Navy for three and one-half years. In 1946 he was employed by the New York Telephone Company (NYT) located in Buffalo, New York and worked for NYT until his retirement in early 1983 as senior vice-president of customer services.

During Mr. Getz's employment with NYT he was transferred numerous times. After working for two years in Buffalo he was transferred to Monticello for two years, then to Buffalo for two years, followed by transfers for several years, respectively, to Syracuse, Albany, Syracuse, Long Island, Albany, New York City and White Plains. Finally, petitioner was transferred to Albany in 1972 and remained there until his retirement in 1983.

In 1972 petitioners purchased a five-bedroom house in Delmar, New York (a suburb of Albany) for approximately $85,000.00. He and his wife lived there during that time. They have three grown children one of whom is 45 years old. The ages of the other two children were not put into evidence and it is unclear whether all the children were raised in the Delmar home during this period of time.

Part of petitioner's reason for retirement in 1983 was due to his health. He suffered from an asthma condition which improved after spending some time renting a condominium in Florida in the winter of 1983. Mr. Getz testified at hearing that he and his wife discussed in great detail whether to become Florida residents upon retirement and decided, after the 1983 visit, to purchase a residence in Florida.

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[1]It appears that a Notice of Deficiency for the amount in controversy was addressed to Delma Getz as well as Colin Getz by virtue of the fact that a joint income tax was filed. At hearing only Colin Getz testified, therefore, unless otherwise indicated petitioner will refer to Colin Getz.

On September 30, 1983 petitioners purchased a two-bedroom condominium in Tequesta, Florida. Petitioners signed a declaration of domicile stating that they became bona fide residents of Florida on January 1, 1985. At that time petitioner also changed his voter's registration, driver's license and car registration from New York to Florida.[2]

In 1986, 1987 and 1988 petitioners generally resided in Florida during the winter months travelling to Delmar at the end of April or beginning of May and returning to Florida in late October. Petitioners also traveled to Albany at various times in the winter months at which time Mr. Getz would attend board meetings with respect to Norstar Bank. Petitioners would visit their daughter, who lived in Atlanta, Georgia, while enroute to New York in the spring. Mr. Getz testified that their date for departure for New York would depend on their daughter's schedule with respect to their visits with her.

The travel log for the respective years indicated the following:

1986
In Florida 1/1/86
Travel to Albany 3/17
Travel to Florida 3/19
In Florida 3/20 to 5/2
In Tefton, Georgia 5/2
In Atlanta, Georgia 5/3-5/4
In Williamsport, Pa. 5/5
In Albany 5/6-9/2
In Woodstock, Vermont 9/3-9/4
In Albany 9/5-10/27
In Williamsburg, Virginia 10/28-10/30
In Florida 10/31
Travel to Albany 12/15
Travel to Florida 12/30, In Florida 12/31

1987
In Florida 1/1/87 to 4/17
In Valdosta, Georgia 4/17

[2]Prior to this declaration, Mr. Getz consulted with his financial planners, The AYCO Corporation, seeking advice as to how to change his domicile from New York State to Florida. He also attempted to get advice from the Division of Taxation but was not successful. Mr. Getz testified that he also read case law on this issue and decided that the case law was "obtuse" as to the requirements for changing one's domicile.

In Atlanta, Georgia 4/18-4/19
In Williamsport, Pa. 4/20
In Albany 4/21
Skytop, Pa. 9/9/-9/10
Leave Albany for New Jersey 10/29
In Florida 11/4
Travel to Albany 12/14
Travel to Florida 12/29
In Florida 12/30-12/31

1988
In Florida 1/1
Travel to Albany 3/10
Return to Florida 3/16
In Florida 3/17
In Valdosta, Georgia 4/28
In Atlanta, Georgia 4/29-5/1
In Williamsport, Pa. 5/2
Norstar Meeting 5/3
Trip to England 5/25-6/12
Trip to Florida 8/26-31
Trip to Florida 10/30
In Florida 10/31
Travel to Albany 12/19
Travel to Florida 12/29
In Florida 12/30-31

Petitioners retained ownership of the Delmar house. Mr. Getz testified that the reason he and his wife did not sell the Delmar residence was because of the tax consequences of selling a house which was purchased in 1972 for $85,000 and was currently appraised at $335,000. He stated that because the Delmar home was no longer their primary residence they were not entitled to the $125,000 capital gains tax exclusion and that, in any event, he and his wife did not need the money from the sale of the Delmar home and have left their entire estate to their three children in their will which upon their deaths permits the house to have a stepped-up basis for the benefit of their children.

Mr. Getz further testified that retaining the Delmar residence provided he and his wife with a place to stay on their visits as well as a residence for his unmarried son, Doug, who was 45 years old. Petitioners allow their son to stay in the Delmar residence rent-free in return for upkeep and maintenance with respect to such items as lawn care and plumbing when petitioners are not in Delmar. Petitioners' son also pays for such services as cable TV but petitioners pay

for the major utilities such as gas and electricity on the house year round.[3] Mr. Getz testified that he had made offers to his other two children to help them with their living situations (see, Finding of Fact "9", infra). With respect to his son Doug who lives in petitioner's Delmar residence, Mr. Getz testified at hearing as follows:

> "It is an unusual situation. He works. He drives a truck at night and we could tell him to get out and live somewhere else, but he would be lonely and he doesn't have very many friends. It is a situation, kind of a family situation. We have done this to make his life happier. He has us to live with him for six months, has a couple of cats. As I said, we could tell him to sell the house, and he would not live in Hawaii or something like that
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> because he is not socially adapted. This house...it's my greatest problem, what to do with it...If he didn't live there, he would have to live somewhere else." (Tr. at 100-101.)

In 1980 petitioners bought a second house in Delmar for the purpose of renting it to their son Keith who was married with three children. In 1987 they sold it to their son and held the mortgage on his behalf. Mr. Getz testified that he made a similar offer to his daughter who lived in Atlanta, Georgia -- to purchase a house in Georgia and rent it to her. In his testimony, Mr. Getz stated:

> "They were both young and hard pressed for cash. I bought the house and rented it during that period, and since then, things got better for Keith, and my daughter is richer than I am, so she can take care of her own house."

Petitioners furnished the Florida residence with new furniture because they felt that the Delmar and Florida residences required an entirely different style of furnishings. During cross examination at hearing Mr. Getz was questioned whether there were any possessions such as family heirlooms which he considered "near and dear" to him. He responded that he did not have any valuables whatsoever in the Florida or Delmar residences because during his employment with NYT he was transferred to 12 different locations, bought five houses and cleaned out the basement of accumulated "junk" with each move.

Before Mr. Getz's retirement, his community activities in Albany were extensive. He

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[3]Mr. Getz testified that he does not receive a telephone bill because of his past employment with NYT. Petitioner Colin Getz was listed in the 1989 telephone book at the Delmar address.

served as a president and was a member of the Fort Orange Club, director of the Red Cross, chairperson of the United Fund Drive, director of Siena College and Hartwick College, and president of the 50 Club which was an organization of Capital District executives. He also served as the first chairperson of Siena College's College Capital Funds Drive and on the board of directors for the Norstar Bank in the Capital District. Prior to his retirement, Mr. Getz ended his affiliations with the United Fund and Hartwick College. In 1983 Mr. Getz resigned his memberships with the Fort Orange Club, 50 Club and Red Cross. With respect to the Red Cross, he served briefly as a temporary executive director in 1983 and thereafter served on the board but resigned because he could not attend the meetings. Mr. Getz testified as follows:

> "I told them I just couldn't serve on the board, because as you are probably aware, the Red Cross is having a terrible amount of trouble with the blood supply, and I didn't want to be on a board of an organization that I was not there to see what was going on, so I told them I resigned" (Tr. at 86).

With regard to Siena College, Mr. Getz testified that he did not renew his membership after his retirement but completed his term in office which ended sometime between 1983 and 1986. Mr. Getz continues to maintain his resident membership with the Albany Country Club[4] for the purpose of having the privilege of using its golf course when he returns to Delmar.

Mr. Getz also remained on the board of directors of Norstar Bank until approximately 1989. He testified with respect to his reason for maintaining his position with Norstar Bank as follows:

> "It was a relationship I had with this group. I thought the State Bank was a fine organization and I was very proud to be a part of it, and I thought as long as I could maintain a relationship with it, it kept me active, and it was an asset to Albany.... [Y]ou like to have a transition period because you find one day you are running a multimillion dollar business budget and the next day nobody speaks to you.... You do like to have other things that kind of smooth you away into retirement." (Tr. at 53-54.)

Mr. Getz received a fee for serving on the board in the amounts of $6,150, $5,200 and $6,700 in the respective years of 1986, 1987 and 1988. Mr. Getz

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[4]Mr. Getz testified that the country club does not offer a nonresident membership.

attended the capital district regional board meetings on the following dates for the respective years in question:

1986	1987	1988
March 18	May 19	March 15
May 20	June 16	May 17
June 17	July 21	June 14
July 15	August 18	July 19
August 19	September 15	August 16
September 16	October 20	October 18
October 14	December 15	December 20
December 16		

Mr. Getz also attended the executive committee meetings as follows:

1986	1987	1988
May 6	May 12	May 3
May 13	May 19	May 10
May 20	May 26	May 17
May 27	June 2	May 24
June 3	June 9	June 14
June 10	June 16	June 21
June 17	June 23	June 28
June 24	June 30	July 5
July 1	July 7	July 12
July 8	July 21	July 19
July 15	July 28	July 26
July 22	August 18	August 9
July 29		August 16
August 5		August 23
August 26		August 30
October 14		September 6
December 16		September 13
		September 27
		October 4
		October 11
		October 18
		October 25

The regional board meetings were scheduled monthly, whereas the executive meetings varied but were generally scheduled quarterly and then weekly for approximately one quarter of the year. With regard to the December meetings, petitioners' travel log indicated that for the years in question they left Florida the day before the meetings and returned to Florida, leaving Delmar on the 29th or 30th of December.

Mr. Getz was a member of the board of directors of the condominium association where he lived in Florida from 1985 until approximately 1990. He was president of the condominium

board for one year. Mr. Getz described his involvement on the board as a full-time and detailed job attending to 311 families including complaints about tax and condominium bills, maintenance of the premises, and the purchase of a golf course. After serving for a year as president, Mr. Getz resigned his board membership and testified that he told the association he was "tired of being harassed" and to "please get somebody else." In approximately 1990, petitioners became members of the Audubon Society in Florida and Mrs. Getz joined the Humane Society in Florida.

Petitioners maintained their major banking account in the Community Savings Bank in Tequesta, Florida. Mr. Getz's pension and social security checks are directly deposited into the Florida checking account. For the audit period in question, Mr. Getz also maintained a savings account at the Norstar Bank while he served as a director of the bank. When he no longer served as a bank director, Mr. Getz cancelled the Norstar account and then maintained a savings account with Home and City Savings Account which contained a couple of thousand dollars for the purpose of any emergencies that might arise when he was in Delmar. Petitioners also had two safe deposit boxes, one in Florida and one in Albany.

The utility bills and taxes for the Delmar residence are sent to petitioners' Florida address. In addition to his pension, Mr. Getz received two types of incentive awards from NYT that were paid on a deferred basis after retirement. The long-term award was paid annually for ten years and the short-term award was paid annually for five years. Mr. Getz testified that the reason the W-2 forms with regard to long- and short-term awards contained his Delmar address while the W-2 forms with regard to his basic pension contained his Florida address was due to the fact that these checks were issued by different departments within NYT and apparently he neglected to change his address with respect to the annual awards.

When petitioners travelled to Delmar in the spring they had their mail forwarded from Florida to the Delmar address and likewise, had mail forwarded from the Delmar address to the Florida address when they left Delmar for Florida in the autumn.

Petitioners had a Florida will drafted and executed by an Albany attorney when they

bought the Florida condominium. They had the will redrafted by a Florida attorney in 1989. Mr. Getz testified that the first Florida will was drafted by an Albany attorney because he had not yet found a Florida attorney with whom he was satisfied. Petitioners do not have burial plots in either New York or Florida. Instead, they have agreed to donate organs and to be cremated with the understanding that the surviving spouse will decide what to do with the remains after cremation.

The Division commenced an audit of petitioners' income tax for the years 1986-1988 by letter, dated December 7, 1989,[5] scheduling an appointment for January 26, 1990 and requesting certain information with regard to their change of residence and how much time they spent in New York State during 1986-1988, including a diary of daily activities and expense documentation proving time travelled.

In response to this request, the Division's auditor received a hand-written travel log for the years 1986-1988 and a letter dated January 5, 1990 to Mr. Getz from Norstar Bank documenting the days he attended regional board and executive committee meetings in the years 1986-1988. According to Mr. Getz's testimony, the travel log was prepared by him based on Mrs. Getz's memory of days travelled to New York State, the Norstar meetings and credit card statements.[6] No credit card statements were submitted to the auditor or at hearing to support the hand-written travel log. The auditor was told that no contemporaneous diaries were kept during the audit period.

By letter dated March 8, 1990, the Division's auditor issued a statement of personal income tax audit changes indicating that petitioners' filing status should be as residents rather

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[5]On January 4, 1990, petitioners signed a document consenting to extend the period of limitation for assessment of their 1986 income tax until December 31, 1990.

[6]Mrs. Getz did not attend the hearing and, therefore, did not testify with respect to her memory in reconstructing their travels to New York.

than as nonresidents. The auditor stated that a change of domicile must be clear and convincing and that this standard has been interpreted to mean "severing all ties with New York State." The auditor listed the following reasons for concluding that petitioners had not changed their domicile: W-2 and 1099 statements reflecting the Delmar address, maintaining a permanent place of abode in Delmar, continuing to own rental property in Delmar, maintaining community interests in the Albany area as well as a business relationship with Norstar Bank, maintaining a safe deposit box and bank accounts in New York, and

admitting to returning to the Delmar residence for a total of 173 days in 1986, 191 days in 1987 and 100 days in 1988.[7]

The Division issued to petitioners a Notice of Deficiency, dated July 16, 1990, asserting an income tax deficiency plus interest for the years 1986, 1987 and 1988 in the respective amounts of $8,418.73, $8,722.04 and $12,599.31 for a total amount of $29,740.08. No penalty was assessed on the tax deficiencies.

Petitioners requested a conciliation conference. The conciliation conferee sustained the statutory notice by conciliation order dated January 4, 1991.

Petitioners filed a petition dated January 10, 1991 protesting the finding that they were New York residents.

In response to the petition, the Division filed an answer, dated April 3, 1991, affirmatively stating, inter alia, that petitioners were resident individuals as defined in Tax Law § 605(b)(1)(A) for the years in question; that having spent more than 183 days in New York

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[7]At hearing the auditor testified that she miscalculated the number of days in 1986 and 1988 and that based on petitioners' own admissions in the travel log the number of days petitioners spent in New York in 1986 and 1988 were 177 days and 175 days, respectively, rather than the 173 and 100 days stated in her March 8 letter. The auditor testified that some of the additional days were the result of calculating those days where petitioners indicated travel to Florida as New York days because she assumed that part of the day was spent in New York and part in Florida or outside New York. Petitioners conceded that they spent over 183 days in New York State in 1987.

State in 1987, petitioners were resident individuals for 1987 even if they were not domiciliaries; and that petitioners failed to keep and have available for examination by the Division of Taxation adequate records to substantiate the

claim that they did not spend more than 183 days of each taxable year under consideration within New York State in accordance with 20 NYCRR 102.2(c).

SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue that the evidence in support of their case for a change in domicile is stronger than that in Matter of Sutton (Tax Appeals Tribunal, October 11, 1990) wherein the Tribunal found that the taxpayer proved a change of domicile to Florida. Similarly, petitioners argue that their evidence in support of their contention that they spent less than 183 days in New York State in 1986 and 1988 is as substantial as that described by the Tribunal in its decision in the taxpayer's favor in Matter of Sutton.

Distinguishing Matter of Sutton, supra, the Division argues that petitioners maintained strong emotional, social and business ties to New York which conflict with their efforts to demonstrate their intention to change their domicile to Florida. The Division contends that at the very least, the Delmar residence is no less their permanent home than their Florida residence and that it follows that no change in domicile has been effected. The Division furthermore contends that even if it were found that petitioners changed their domicile they have not met their burden of proving that they spent less than 183 days in each year in question within New York State. Thus, concludes the Division, petitioners are statutory residents pursuant to Tax Law § 605(b)(1)(B).

CONCLUSIONS OF LAW

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

> "Resident individual. A resident individual means an individual:
> (1) who is domiciled 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...."

The Tax Law does not contain a definition of "domicile," but the Division's regulations (20 NYCRR 102.2[d]) provide, 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.... 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." (Emphasis added.)

Whether there has been a change in 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). In Newcomb, the Court stated that the motives for a changing one's domicile are immaterial except as they indicate intention. As noted by the Newcomb court:

> "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" (id. at 250-251).

Here, petitioner testified that the reason for the change of domicile from New York to Florida was to retire to a climate more conducive to his health. While this reason is valid, the question remains whether petitioners actually intended to change their domicile to achieve this purpose. "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 Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276, 277, quoting Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Although petitioners made certain formal declarations that they changed their domicile (e.g., voter and car registration), such declarations are less persuasive than informal acts which

demonstrate an individual's "general habit of life" (see, Matter of Silverman, Tax Appeals Tribunal, June 8, 1989, citing Matter of Trowbridge, 266 NY 283, 289).

Contrary to the auditor's assertion, a taxpayer may change his or her domicile, however, without "severing all ties with New York State" (see, e.g., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990). The question is whether petitioners' overall conduct contradicted their formal declarations of a change of domicile to Florida.

The conduct most problematic but not conclusive was petitioners' maintenance of the New York house, regular returns to the New York house and Mr. Getz's ongoing relationship with Norstar Bank and the Albany Country Club. In Matter of Sutton, the Tribunal found that the taxpayer had changed his domicile to Florida despite the fact that he maintained a rent-stabilized apartment and, subsequently to the tax years in question, purchased a condominium in New York City. In that case, the taxpayer claimed that he maintained a New York address because it provided a relatively inexpensive alternative to obtaining hotel accommodations when he came back to New York. In the present case, petitioners' maintenance of the New York residence was multipurpose. It not only provided petitioners with a place to stay during their visits but also provided petitioners' son with a place to live. The fact that petitioners also owned a second New York home for the sole purpose of providing financial assistance to another son (see, Findings of Fact "8" and "9") and made a similar offer to a daughter living in Georgia supports petitioners' claim that the maintenance of the family home was for the convenience of their son as well as for themselves. In addition, petitioners' decision to maintain the New York residence apparently involved certain tax planning choices with respect to the disposition of their estate. In sum, petitioners have dispelled the notion that the New York home was maintained purely out of sentiment, feeling or any sense of permanent association. Mr. Getz testified that, in his course of employment with NYT, he had relocated his family on more than ten occasions and had owned five houses (see, Findings of Fact "2" and "10").

The Division argues that petitioners' strong emotional ties to New York conflicted with petitioners' attempts to change their domicile to Florida. The Division specifically relies on the

fact that both sons reside in Delmar, that petitioners had a long-term circle of friends in the Albany area and that "Mr. Getz appeared to acknowledge that because Douglas was a bachelor and had difficulty making friends, that it was important to Douglas that his parents spend that six months of each year living with him" (Div.'s Brf at 6). The Division concludes that, as a devoted parent, "living with Douglas for six months each year was a matter of priority to Mr. Getz" (id.). However, the fact that petitioners have two sons and three grandchildren in Delmar may explain why petitioners chose Delmar to spend their summer months and December holidays but is not conclusive as to petitioners' intent with respect to a change in domicile. Mr. Getz's references to his son Douglas (see, Finding of Fact "8") were made in response to questions concerning his son's caretaking and financial responsibilities with respect to the Delmar house and his decision to maintain the Delmar house, but do not imply, as does the Division's counsel, that it was a priority for Mr. Getz to live with his son Douglas for six months of each year.

Citing Matter of Sutton, supra, the Division also argues that the relative size of the respective residences in New York and Florida "does not support petitioner's claim of a change in domicile" (Div. Brf at 5). The Division notes that the Delmar house has five bedrooms whereas the Florida condominium has only two bedrooms. The decision to purchase a two-bedroom condominium instead of a five-bedroom residence has little significance other than to reflect petitioners' decision to effect a change in life-style upon retirement and the move to Florida. In sum, while the relative size of the respective New York and Florida residences may have been a relevant factor in the Sutton decision, the decision to purchase a two-bedroom condominium in the context of this case does not weigh in petitioners' disfavor. In conclusion, petitioners' conduct with respect to maintaining their Delmar house by itself does not necessarily contradict, in these circumstances, their formal declarations of a change of domicile.

These formal declarations also are not necessarily contradicted by petitioners' travel to New York during the summer months or during the December holidays. Such patterns of travel could be equally true for retired New York or Florida residents. The question is whether

petitioners' overall conduct provides clear and convincing evidence that they changed their domicile to Florida. In this regard, Mr. Getz's respective community ties in New York and Florida are relevant. First, it is clear that petitioner's membership in the Albany Country Club was solely for the purpose of maintaining golfing privileges during the months Mr. Getz was in New York. Mr. Getz testified that the Club did not offer a nonresident membership and indicated that he preferred the golf course over other golf courses in the area which did not require a membership. He also indicated that golfing facilities were available to him through his condominium association in Florida and that he participated in the purchase of a golf course on behalf of the condominium association.

The only other community tie Mr. Getz maintained in New York for the years at issue was as a board member of the Norstar Bank for which he was paid a fee. In 1986 he attended 8 regional board meetings and 17 executive meetings. In 1987 he attended 7 regional board meetings and 12 executive meetings and in 1988 he attended 7 regional board meetings and 22 executive meetings. All of the meetings he attended, with the exception of a March 16, 1986 and a March 15, 1988 regional board meeting, were scheduled during the months of May through October or dates near the December holidays. Mr. Getz testified that he did not attend meetings scheduled outside of those time frames, that the regional board meetings were scheduled monthly and executive meetings were generally scheduled quarterly and then weekly for approximately one quarter of the year (see, Finding of Fact "12"). Thus, it appears Mr. Getz attended two-thirds of the regional board meetings and probably most of the executive meetings during the periods of time that petitioners normally travelled to New York. Regardless of the number of meetings attended, it is unclear whether Mr. Getz took an active or passive role in the affairs of Norstar Bank. In Matter of Kartiganer (Tax Appeals Tribunal, October 17, 1991) the Tribunal contrasted the taxpayer's business interests in New York with those of the taxpayer in Matter of Sutton (supra). The Tribunal noted that in Sutton although the taxpayer's business interests provided a source of income, he was a "silent partner" who neither visited the businesses very frequently nor made decisions concerning the day-to-day operations, whereas in

Kartiganer the taxpayer maintained overall control of his New York business interests through constant supervision -- the overviewing of contracts and the giving of advice on past and future projects. Unlike both cases, however, Mr. Getz had no proprietary interest in Norstar Bank. His board membership does not involve the same level of commitment to the community as does a proprietary interest in a business or the ongoing practice of a profession within the community (cf., Matter of Feldman, Tax Appeals Tribunal, December 15, 1988). Accordingly, Mr. Getz's board membership has less significance than the business ties discussed in either Matter of Sutton or Matter of Kartiganer, notwithstanding the discussion of active versus passive roles of the respective taxpayers. To that extent petitioners are correct in noting that their ties to New York are significantly fewer than those found to be persuasive in the decision in Matter of Sutton. However, as noted above, the persuasiveness of certain facts depends on a variety of circumstances that differ as widely as the peculiarities of the individuals and their "general habit of life."

In Florida, Mr. Getz served on the board of directors of the condominium association from 1985 until approximately 1990 and was president of the board for one of those years; however, it is unclear whether his term as president occurred during the tax period in question. As noted in Finding of Fact "13", Mr. Getz testified that his board membership involved a full-time, detailed job attending to 311 families concerning complaints about tax and condominium bills, maintenance of the premises and the purchase of a golf course. Thus, from this testimony, it would appear that Mr. Getz was very involved on a condominium board making decisions that would affect his immediate living situation and personal real estate investment in Florida. In contrast, Mr. Getz's testimony with respect to the Norstar board did not indicate the same level of involvement. Moreover, his involvement as a Norstar board member did not concern decisions that would impact directly on the quality of his life. However, the fact that Mr. Getz was not in Florida for approximately six months out of the year casts some doubt over the extent of his influence in the decision-making process of the condominium board and seriously

undermines his testimony that his board membership involved a full-time, detailed job.[8]

The Division argues that during the audit period petitioners made numerous trips from Florida to New York for the purpose of fulfilling Mr. Getz's duties with respect to Norstar Bank but that there is nothing in the record indicating that they made such trips to Florida to attend board meetings with respect to the condominium association. The Division therefore implies that Mr. Getz's involvement with respect to Norstar Bank outweighed his involvement with respect to the condominium association thereby demonstrating that his community ties were greater in New York. From the record, it appears that petitioners travelled to New York specifically to attend Norstar board meetings in March of 1986 and March of 1988. The travel log indicated that petitioners travelled to Albany on March 17, 1986, that Mr. Getz attended a Norstar board meeting on March 18,

1986 and that they returned to Florida on March 19, 1986. In 1988, the travel log indicated that petitioners travelled to New York on March 10. Mr. Getz attended a Norstar board meeting on March 15, and then returned to Florida on March 16. With respect to the December meetings, the travel log indicated that petitioners travelled to New York the day before the December board meetings held respectively on December 16, 1986, December 15, 1987 and December 20, 1988. However, petitioners did not leave New York to return to Florida until the respective dates of December 30, 1986, December 29, 1987 and December 29, 1988. Thus, from this travel log, I conclude that the two March trips over the three-year period were made specifically to attend the Norstar board meetings. Absent further evidence, I cannot make the same conclusion with respect to the December meetings inasmuch as these December trips extended

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[8]The fact that Mr. Getz reduced his involvement from a multitude of organizations to one (Norstar board) after his move to Florida speaks more to his decision to retire rather than as further affirmation of his change of domicile; however, this fact does indicate that but for his move to Florida he may have continued his association with some organizations -- e.g., Red Cross (see Finding of Fact "11"). Moreover, Mr. and Mrs. Getz's membership in the Audubon Society and Mrs. Getz's membership in the Humane Society in Florida occurred outside the audit period and, therefore, are not given any weight in this decision.

over the Christmas holidays; however, it appears that the travel dates in December may have depended on the dates of the board meetings. Given that these trips occurred outside petitioners' normal six-month stay in New York, the Division's point is well taken that Mr. Getz's efforts to fulfill his duties as a director on the Norstar board militates against the notion that he changed his domicile to Florida.

Other informal conduct by petitioners does not necessarily contradict their formal actions to change their domicile to Florida.[9] Petitioners had all pension and social security checks directly deposited in their Florida checking account. The maintenance of one savings account in

New York for emergencies (Finding of Fact "14") during their New York visits does not indicate that petitioners intended New York to remain their permanent home. Nor does the fact that petitioners spend the summer months and a few weeks in December in New York by itself indicate that petitioners regard Delmar as their permanent home. Petitioners' retirement life-style permits them the flexibility to travel for extended periods to visit a more temperate climate during the summer months. In sum, any one of the factors discussed by itself is not sufficient to contradict the formal declarations of a change of domicile; however, given the aggregate of all these factors and the standard of proof that petitioners must sustain to show a change in domicile, it cannot be concluded from this record that petitioners' effected a permanent change in domicile from New York to Florida. Petitioners spent approximately six months in each of the years in question in both locations, owning a home in each location where they resided for the respective six-month periods. In addition, they made specific trips to New York outside this six-month period in order to permit Mr. Getz to attend Norstar board meetings for which he received a fee. While petitioners may have very well intended Florida to be their permanent

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[9]Little significance should be attached to the fact that the two annual incentive awards from NYT contained his Delmar address inasmuch as Mr. Getz explained that he neglected to change this address and these payments were issued annually by a department different from that which issued his monthly pension check (see, Finding of Fact "15").

domicile, their "general habit of life" indicated, at best, an equal commitment to both locations. Thus, petitioners have not established by "clear and convincing" evidence that they effected a change in domicile to Florida for the years in question (see, Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992).

B. Even if petitioners were found to be non-domiciliaries of New York, they nonetheless were statutory residents subject to tax under Tax Law § 605(a)(2) as persons who were not domiciled in New York but maintained a permanent place of abode and spent more than 183 days of the taxable year in the State. Here, there is no question that the Delmar home constitutes a permanent place of abode. The issue is whether petitioners met their burden of proving that they did not spend more than 183 days in New York during each taxable year. In support of their case, petitioners submitted a hand-written travel log prepared by Mr. Getz after the commencement of the audit based upon Mrs. Getz's memory and credit card slips. Based on this log, petitioners were in Florida for 177 days in 1986, 191 days in 1987 and 175 days in 1988. Petitioners concede that they owe income tax for the year 1987 (see, Finding of Fact "20" and footnote "7").

With respect to 1986 and 1988, they argue, however, that the "efficacy of this log was never questioned until the hearing," that the auditor accepted the travel log as accurate, and that "[t]he records kept by the petitioner and the journal created from those records were at least as substantial as those described in Sutton, where the Tribunal found that the records, combined with Sutton's testimony, were sufficient" (Pet. Brf. at p. 4). In response, the Division contends that petitioners have not met their burden of proof on this issue noting that the travel log was based in part on memory and in part by reference to credit card statements that were not part of the record.

The regulations provide at 20 NYCRR 102.2(c) that:

> "[a]ny 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."

Here, during the audit the auditor specifically requested documentation including any expense documents showing that petitioners did not spend more than 183 days in New York State during each taxable year. In response to that request, petitioners provided the auditor with only the hand-written travel log without any supporting documentation. Although the auditor in her statement of personal income tax audit changes based her decision on petitioners' failure to change their domicile, petitioners suffered no prejudice and were not without notice prior to the hearing that the issue of petitioners' residency for income tax purposes was in question (see, Matter of Smith v. State Tax Commission, 68 AD2d 993, 414 NYS2d 803, 804). In its answer to the petition, the Division affirmatively raised this issue stating that petitioners failed to keep and have available for examination adequate records to substantiate the claim that they did not spend more than 183 days of each taxable year within New York State (see, Finding of Fact "24").

Petitioners bear the burden of proving the assessment improper on this issue (Tax Law § 689[e]; see, Matter of Smith v. State Tax Commn, supra at 805). While petitioners claim that the travel log accurately reflects the number of days in New York State for 1986 and 1988, they submitted no documentation to substantiate this claim. According to Mr. Getz's testimony the travel log was based on Mrs. Getz's memory of their travel arrangements and credit card slips; however, these credit card slips were not presented into evidence and Mrs. Getz was not made available for testimony or cross-examination. Therefore, unlike the situation in Matter of Sutton, no evaluation of the credibility of the testimony could be made nor was there any documentation to support the travel log. By itself, the travel log, which was prepared after the fact, is insufficient to meet petitioners' burden of proof. Even if Mrs. Getz's testimony were found to be credible, the travel log, without supporting documentation, would nonetheless be inadequate (see, Matter of Kornblum, supra), particularly in this situation where the days claimed in New York State are 7 and 8 days short of the statutory 183 days. The possibility for inaccuracy is present even with the best of memories and the margin for error becomes more critical the closer the number of days claimed in New York approaches the statutory 183 days.

Based on the record, petitioners have not met their burden of proof on this issue.

C. The petition of Colin W. and Delma K. Getz is denied and the Notice of Deficiency dated July 16, 1990 is sustained.

DATED: Troy, New York
July 16, 1992

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE