STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CORLEY R. BARNES	:	DETERMINATION DTA NO. 809496
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and Title T of the New York City Administrative Code for the Year 1986.	:	

Petitioner, Corley R. Barnes, P.O. Box 102, Aspen, Colorado 81612, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and Title T of the New York City Administrative Code for the year 1986.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 15, 1992 at 1:15 P.M., with all briefs to be submitted by February 1, 1993. Petitioner filed a brief on December 18, 1992. The Division of Taxation filed a brief on January 19, 1993. No reply briefs were filed. Petitioner appeared by Thomas C. McEvoy, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether certain statements asserted in the petition must be deemed to be admitted by the Division of Taxation because the answer did not contain a specific admission or denial of each such statement.

II. Whether petitioner is entitled to a determination on default on the basis that the Division of Taxation failed to respond to petitioner's reply to the answer where petitioner alleged that the answer was defective.

III. Whether the Notice of Deficiency must be deemed null and void on the ground that it and

the statement of audit changes contain misleading and untrue statements.

IV. Whether the Division of Taxation bears the burden of proof to show that petitioner changed his domicile from Texas to New York prior to 1986.

V. Whether petitioner has proven that he was not domiciled in New York in 1986.

FINDINGS OF FACT

Petitioner Corley R. Barnes was born in Terrell, Texas in 1951. In 1980, petitioner purchased a cooperative apartment in New York City at 132 East 19th Street. Petitioner filed New York State and New York City resident income tax returns from 1980 through 1985.

Petitioner filed a timely New York nonresident income tax return for 1986 (form IT-203), reporting no New York source income for that year. He listed his mailing address as 4300 Windsor Parkway, Dallas, Texas 75205. Petitioner reported a capital gain for Federal purposes in the amount of $158,376.00. He attached a letter, dated March 27, 1987, to his return which stated, as pertinent here: "On January 1, 1986, I moved my residence and business to Texas, my state of birth and where I have continually maintained domicile." The letterhead bears petitioner's name and shows his home address as 132 East 19th Street, New York, New York.

In December 1989, the Division of Taxation ("Division") began an audit of petitioner's 1986 New York return to determine whether he was a New York State resident individual in 1986. In the course of that audit, petitioner completed a Division questionnaire which generally sought information regarding petitioner's resident status. On that questionnaire, he stated that he had no business activity in New York in 1986 and spent 182 days in New York State in 1986. He also stated that he maintained living quarters at 132 East 19th Street in New York City in 1986.

It appears from the audit report that the Division's audit initially focused on whether petitioner could substantiate that he was present in New York State for only 182 days in 1986. The auditor reviewed petitioner's 1986 and 1987 Federal income tax returns, two schedules C for 1986, petitioner's expense accounts, and petitioner's telephone bills for the New York address. She also met and spoke with petitioner's representative, Thomas McEvoy.

The auditor made certain factual conclusions as a result of her audit. She determined that petitioner was chairman of the board of KTI Corporation, a business that was sold on December 31, 1986, resulting in a capital gain to petitioner of $395,939.00. Based on evidence offered by petitioner, the auditor found that in 1986 petitioner resided in New York State, was present in New York on 179 days, and travelled to Texas, Alabama, Maine, Martinique, and Vancouver, British Columbia on the remainder of the days. Other documents reviewed by the auditor showed that petitioner belonged to the University Club in New York City, where he entertained for business purposes. The auditor discovered that petitioner filed a New York resident return in 1987 and listed his New York address on his Federal return for that year. The auditor reviewed telephone and electric bills for petitioner's New York apartment, showing uninterrupted service in 1986. Petitioner was listed in the New York City telephone book from 1980 through the time of the audit. Petitioner provided cancelled checks showing that he paid $200.00 per month to his mother, Martha C. Barnes, purportedly for rent. The auditor found no evidence that petitioner owned real property in Texas in 1986. Based on these facts, the auditor concluded that petitioner was a domiciliary of New York in 1986.

As a result of its audit, the Division issued to petitioner a Statement of Personal Income Tax Audit Changes, dated January 1, 1990, recalculating petitioner's New York State and City income and asserting deficiencies of 1986 New York State and City personal income taxes in the amount of $54,456.52, plus penalty and interest. The statement contains the following explanation:

> "Since you did not change your New York domicile, you are a New York State resident and must report all items of income, loss or deduction as a resident."

Penalties were asserted under Tax Law § 685(b)(1) and (2).

On his City of New York Nonresident Earnings Tax Return, petitioner checked the box "No" next to the question "Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year?" The Division's witness testified that penalties were asserted for two reasons: (1) because this box was checked "No" and (2) because nonresident tax returns were filed.

On April 9, 1990, the Division issued a Notice of Deficiency to petitioner asserting deficiencies of New York State and New York City personal income taxes in the amount of $54,456.52, plus penalty and interest. The computation section of the notice states:

> "Income amounts were carried over incorrectly from Form IT-360 [change of resident status] to your New York State return IT 201/203."

Petitioner never filed a Form IT-360.

Petitioner filed a timely petition with the Division of Tax Appeals protesting the Notice of Deficiency. The petition lists the following errors allegedly made by the Commissioner of Taxation and Finance:

> "1. The commissioner's allegation that at some time prior to 1986 Petitioner intended to, and did in fact, change his domicile from Texas to New York and was in fact domiciled in New York in 1986 and subject to tax as a New York resident.
>
> "2. The explanation of adjustments, contained in the Statement of Audit Change, to wit, 'Since you did not change your New York Domicile, you are a New York State resident and must report all items of income, loss or deduction as a resident.'
>
> "3. The attachment to the Notice of Deficiency stating the following as the basis for the computation of the alleged deficiency.
>
> 'Income amounts were carried over incorrectly from Form IT-360 to your New York State return IT 201/203'."

Petitioner made eight additional assertions which he alleged to be assertions of fact. Most of these were statements of law; however, several of the assertions are factual in nature. The assertions which might be deemed factual in nature are as follows:

> "(b) Petitioner never had any intention to change his domicile to New York nor did he have any motive to do so . . . .
>
> "(c) Petitioners [sic] conduct has always been consistent with his contention that before, during and after 1986 he maintained his Texas domicile.
>
> * * *
>
> "(2) The explanation of audit adjustments is misleading, prejudicial and untrue.
>
> "(3) The statement expressed as the basis for computation of the alleged deficiency is untrue."

The Division filed an answer to the petition in which it declined to admit or deny any statements made in the petition, stating:

"1. STATES that it is not possible for this Answer to comply with Section 3000.4(a) of the Tax Appeals Tribunal's Rules and Practice and Procedure which requires the Answer to contain a specific admission or denial of each material allegation of fact contained in the Petition, because the Petition contains no allegations of fact, material, or otherwise, as required by Section 3000.3(b) of said Rules. The petition contains only statements and conclusions of law and alleged errors of the Commissioner of Taxation and Finance (the 'Commissioner') not requiring a response under the rules of the Tax Appeals Tribunal.

"2. STATES that the Petitioner has failed to comply with Section 3000.3(b)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal that the Petition contain a statement of facts upon which the Petitioners [sic] rely to establish each error alleged to have been made to the Commissioner, and, therefore, the Petition fails to state a cause of action entitling the Petitioners [sic] to relief.

"3. STATES that the Petitioner has failed to comply with Section 3013 of the Civil Practice Law and Rules that statements in a pleading should be sufficiently particular to give notice of the transactions or occurrences intended to be proved and the material elements of each cause of action, and, therefore the Petition fails to state a cause of action entitling the Petitioner to relief."

In its answer, the Division affirmatively stated that petitioner was a domiciliary of New York in 1986 under former section 605(a)(1) of the Tax Law and former section T46-105.0(a)(1) of the New York City Administrative Code (Division's answer, ¶ 4). In addition, it stated that petitioner spent in the aggregate more than 183 days of the taxable year 1986 in New York State and City and was a New York resident individual under former section 605(a)(2) of the Tax Law and former section T46-105.0(a)(2) of the New York City Administrative Code (Division's answer, ¶5).

Petitioner filed a reply to the answer, dated July 24, 1991. Paragraph 9 of the Reply states:

"That as the DIVISION OF TAXATION has neither admitted or denied the allegations of fact contained in the Petition, under the provisions of Section 3000.4(3) they are deemed admitted, to wit, that

"(1) Petitioner was not domiciled in New York in 1986.

"(2) The explanation of audit adjustment is misleading, prejudicial and untrue.

"(3) The statement expressed as the basis for the deficiency is untrue."

The Division did not respond to the reply to the answer. At hearing, petitioner made a motion for a default determination on the ground that the Division's answer failed to conform to the regulations of the Tax Appeals Tribunal. The Division opposed this motion.

At hearing, petitioner asserted that the Notice of Deficiency must be deemed null and void because it contains an inaccurate statement. Also, petitioner took the position at hearing that since the Division did not explicitly deny the assertion that the Statement of Audit Changes is misleading, prejudicial and untrue, that assertion must be deemed admitted. He also objected to admission into the record of any evidence not directly related to statements made in the answer.

Through the statements of his representative, petitioner claimed that he was a domiciliary of Texas from his birth and that he never changed his domicile to New York, although he resided in New York City for approximately 10 years.

To establish that he was a domiciliary of Texas, petitioner submitted in evidence a birth certificate, showing his birth in Texas; his last will and testament executed in 1978 which declares his residence to be Dallas County, Texas; and a "Certificate of Current Status" issued to petitioner by the Texas Department of Public Safety. It states: "VALID ONLY IF PRESENTED WITH DRIVER LICENSE NO. 06118355." The purpose of the certificate as stated on the form is to "CONVERT TO CLASS C AND RENEW TO EXPIRE ON 08-05-90." Petitioner did not submit a copy of a driver's license, and nothing on this certificate would enable one to determine whether he held a valid Texas driver's license in 1986. Petitioner also submitted copies of eight cancelled checks from a Dallas, Texas bank, each one showing a $200.00 payment from petitioner to petitioner's mother Martha C. Barnes. The checks were dated in the months of May through December 1986 and each check contains a memo notation indicating that the check was intended as a rental payment. Petitioner did not appear or testify at hearing.

Petitioner's New York City nonresident earnings tax return (form NYC-203) was prepared by CCH Computax, Inc. Computax has its own forms which are completed by the taxpayer's representative (an accountant or other tax preparer). The information on the Computax forms are fed into a computer which then generates the completed Federal and State tax returns and schedules. According to a Computax representative, the question on the NYC-

203 regarding petitioner's maintenance of living quarters in New York most likely was answered "no" because of the way in which two Computax forms were completed. Computax generates a form NYC-203 if the tax preparer submits a Computax form 64 and completes a portion of that form related to New York City tax calculations (record 22-01, column 16). Since a NYC-203 return was generated for petitioner, it can be concluded that his tax preparer submitted a form 64 to Computax. The tax preparer then must have completed a Computax form 91, "CITY OF NEW YORK/YONKERS INDIVIDUAL TAX INFORMATION." Computax would answer "no" to the question regarding the maintenance of living quarters in New York City, if the entry on form 91 relating to nonresident living quarters was left blank. Since petitioner's NYC-203 return was answered "no", it can be assumed that his tax preparer did not provide his New York address to Computax. Petitioner's 1986 NYC-203 return was signed by petitioner and by his tax preparer.

CONCLUSIONS OF LAW

A. Section 3000.3(a)(5) of the Rules and Regulations of the Tax Appeals Tribunal (hereinafter "the rules of practice") states that a petition to the Division of Tax Appeals must contain:

> "separately numbered paragraphs stating, in clear and concise terms, each and every error which the petitioner alleges has been made by the division, bureau or unit (e.g., in issuing a notice of deficiency or in denying a refund application), together with a statement of the facts upon which the petitioner relies to establish each said error".

Paragraph six of the petition form prescribed by the Tax Appeals Tribunal provides as follows: "The petitioner alleges that the Commissioner of Taxation and Finance made the following errors and asserts the following facts:". Space is then provided for the petitioner to complete the pre-printed statement.

Section 3000.4(1) of the rules of practice requires the law bureau to serve an answer to the petition on the petitioner or his representative. Section 3000.4(a)(2) provides as follows:

> "The answer as drawn shall contain numbered paragraphs corresponding to the petition and shall fully and completely advise the petitioner and the division of tax appeals of the defense. It shall contain:
>
> "(i) a specific admission or denial of each material allegation of fact contained

in the petition" (emphasis added).

Subdivision (3) of section 3000.4(a) states:

> "Material allegations of fact set forth in the petition which are not expressly admitted or denied in the answer shall be deemed to be admitted."

In this case, the representatives of petitioner and the Division raise a maze of issues regarding the sufficiency of each other's pleadings. By its answer, the Division took the position that it was not required to admit or deny any numbered paragraphs of the petition because, according to the Division, the petition contained no allegations of fact, material or otherwise. In response, petitioner requests that three specific allegations be deemed admitted (see Findings of Fact "12" and "13"). In addition, he moves for a determination on default against the Division on several grounds. Petitioner claims that the Division should be defaulted because (1) its answer failed to respond to each of the numbered paragraphs of the petition; (2) the answer failed to set forth the Division's defense to the petition (Tr., p. 91); and (3) the Division failed to respond to the reply to the answer. In its opposing brief, the Division argues that under 20 NYCRR 3000.4(a)(4) a determination on default may be granted only where the answer is untimely and not on the ground advanced by petitioner.[1] The Division notes that there is no provision in the rules of practice for a response to the reply. The Division points out that if petitioner believed the answer to be defective, the proper route would have been to move for a corrective order under section 3000.5(a)(1) of the rules of practice. Such a motion must be made within 90 days after service of a pleading by an adverse party (20 NYCRR 3000.5[a][1]). Since the motion for default was not made until the date of the hearing, more than a year after the filing of the answer, the Division contends that the motion is untimely. The Division took

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[1]20 NYCRR 3000.4(a)(4) provides:

> "Where the Division of Taxation fails to answer within the prescribed time, the petitioner may make a motion to the tribunal on notice to the law bureau, for a determination on default. The administrative law judge designated by the tribunal to review the motion shall either grant that motion and issue a default determination, or shall determine such other appropriate relief that is warranted."

no position regarding petitioner's request that allegations made in the petition be deemed admitted, although it concedes that the explanation contained in the Notice of Deficiency is incorrect. The Division's answer alleges that the petition fails to comply with section 3013 of the Civil Practice Law and Rules and fails to state a cause of action entitling petitioner to relief, but it did not make a motion to dismiss the petition on that ground.[2]

The Division has not cited to any legal authority which would enable the Division to refuse to admit or deny statements made in the petition on the grounds set forth in the answer.

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[2]CPLR 3013 provides:

> "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense."

Section 3013 replaced former section 241 of the Civil Practice Act which required that every pleading contain a statement of the "material facts" on which the pleading party relied. The purpose of the change was to diminish "the considerable judicial effort formerly expended in distinguishing 'evidence' or 'conclusions' from 'facts'" (Foley v. D'Agostino, 21 AD2d 60, 248 NYS2d 121, 125, quoting 3 Weinstein-Korn-Miller, New York Civil Practice, ¶ 3013.01). While section 3013 still provides that the facts essential to give "notice" must be stated:

> "[n]onetheless, a party may supplement or round out his pleading by conclusory allegations or by 'stating legal theories explicitly' if the facts upon which the pleader relies are also stated" (id., quoting 1957 First Preliminary Report to Legislature, Advisory Committee's Notes, p. 63).

Thus, there is no absolute bar under the CPLR to pleading conclusions of law as petitioner did.

Section 3000.4(a)(2)(i) of the rules of practice of the Tax Appeals Tribunal adopts the language of former section 241 of the Civil Practice Act. Inasmuch as the intent of the rules of practice of the Tax Appeals Tribunal is "to afford the public both due process of law and the legal tools necessary to facilitate the rapid resolution of controversies while at the same time avoiding undue formality and complexity" (20 NYCRR 3000.0[a]), it would be ironic if the rules of practice in the Division of Tax Appeals were interpreted in conformity with rules of practice rejected as being unnecessarily technical and burdensome. This determination does not take that approach; rather, in resolving the procedural issues raised by the parties I have attempted to interpret the requirements of section 3000.4 in light of the stated intentions of the Tax Appeals Tribunal in section 3000.0(a).

My own research has failed to reveal any reported decisions where the defendant elected to proceed as the Division has proceeded here, by filing an answer which contains a general refusal to admit or deny. The rules of the Tax Appeals Tribunal do not allow for a blanket refusal to answer, and silence in response to a given allegation is deemed an admission (20 NYCRR 3000.4[a][3]). If the Division sincerely believed that the petition failed to give notice of petitioner's claims, several options were open to it. It might have demanded a bill of particulars (20 NYCRR 3000.6[a]), moved for any order appropriate under the CPLR (20 NYCRR 3000.5[a]) such as a motion for a more definite statement, or made a motion to dismiss on the ground that the petition failed to state a cause for relief (20 NYCRR 3000.5[b][1][vi]). Since it did none of these things, it must be determined whether petitioner alleged any material facts which must be deemed admitted under section 3000.4(a)(3).

The petition contains three factual statements which bear directly on the issue of domicile. In the first paragraph of the petition, petitioner asserts that the Commissioner erred in concluding that petitioner changed his domicile from Texas to New York sometime prior to 1986 and continued to be domiciled in New York in 1986. Petitioner asserted the following facts in support of this allegation of error: (1) "[p]etitioner never had any intention to change his domicile to New York nor did he have any motive to do so", and (2) "[p]etitioners [sic] conduct has always been consistent with his contention that before, during and after 1986 he maintained his Texas domicile." The Division did not explicitly deny these statements; however, it did make affirmative statements inconsistent with petitioner's assertions. It stated in its answer that petitioner was a domiciliary of New York in 1986 pursuant to Tax Law former § 605(a)(1) and the New York City Administrative Code former § T46-105.0(a)(1). Moreover, the Division affirmatively stated that petitioner has the burden of proof to establish that the asserted deficiency of tax is erroneous. These statements were sufficient to put petitioner on notice that the Division did not admit the truth of petitioner's allegations and intended to put petitioner to his proof. Consequently, petitioner's request that the statement "[p]etitioner was not domiciled in New York in 1986" be deemed admitted is denied.

The petition also asserts that the explanation contained in the Statement of Audit Changes is misleading, prejudicial and untrue. That explanation states:

> "Since you did not change your New York domicile, you are a New York State resident and must report all items of income, loss or deduction as a resident."[3]

Even though petitioner's assertion was found to be factual in nature, it cannot be found to be a "material" allegation of fact. The term "material allegation of fact" as it is used in the rules means the allegation of a fact which tends to prove or disprove a matter in issue, or one which would affect the outcome of the case. Absent a claim by petitioner that he was misled and prejudiced by the explanation (and petitioner makes no such claim), finding the explanation to be misleading, prejudicial or untrue would not affect the outcome of this case. As a factual matter, petitioner claims that the explanation is misleading, prejudicial and untrue. He offers no legal theory or claim that would warrant cancelling the Notice of Deficiency on that basis. Consequently, petitioner's assertion regarding the Statement of Audit Changes cannot be considered to be a "material allegation of fact", and his request that such assertion be deemed admitted is denied.

Petitioner also requests that his assertion that the explanation of the computation found on the Notice of Deficiency is untrue be deemed admitted. This assertion is material in that it alleges a fact which relates to a matter in issue, namely whether the Notice of Deficiency is defective. Since the assertion constitutes a material allegation of fact and the Division did not admit or deny it, the assertion is deemed admitted.

B. Petitioner's motion for a determination on default is denied. Essentially, that motion is based upon petitioner's claim that the answer is defective. As the Division noted in its brief, there is no provision in the rules of practice for defaulting the Division on that basis.

C. Petitioner claims that the Notice of Deficiency is null and void because it contains an

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[3] Petitioner claims that the explanation suggests that he was once domiciled in New York, a fact he disputes, and is misleading for that reason.

erroneous explanation of the computation of the deficiency in income tax. The explanation states: "Income amounts were carried over incorrectly from Form IT-360 to your New York State return IT-201/203." The inaccuracy of this statement has been deemed admitted, and the Division concedes that the statement is untrue. Petitioner did not file a form IT-360; therefore, the explanation appears to be meaningless. However, this error does not render the Notice of Deficiency a nullity.

An issue of a similar nature was raised by the petitioner in Matter of A & J Parking (Tax Appeals Tribunal, April 9, 1992). In that sales tax case, the petitioner argued that the notice of determination was jurisdictionally defective and invalid because it failed to conform to the requirements of section 1138(a)(2) of the Tax Law which requires a boldface statement advising the taxpayer that the tax assessed has been estimated where that is the case. In A & J Parking, the notice failed to include such a statement although the tax due had been determined by an estimating procedure. The Tribunal found that the omission of the statutorily required statement does not invalidate an otherwise proper notice, in the absence of proof that the taxpayer is actually prejudiced by the omission. In its decision, the Tribunal cited to a number of court decisions with similar holdings (see, Matter of Agosto v. State Tax Commn., 68 NY2d 891, 508 NYS2d 934 [the failure to mail the notice to the taxpayer's "last known address" as required by Tax Law § 681(a) did not invalidate the notice]; Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892 [a notice misstating the period for which tax was assessed was not invalid since taxpayer was not prejudiced by the error]; Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin., Sup Ct, Albany County, June 29, 1991, Keniry, J. [where the court upheld the validity of a notice under circumstances similar to those presented in A & J Parking]; see also, Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989 [two sales tax quarters incorrectly listed on the statutory notice did not render it invalid]). In short, the caselaw establishes that an omission or error in a statutory notice will not serve to invalidate the notice absent evidence that the taxpayer was actually prejudiced by the omission or error.

Petitioner has not shown any prejudice to his position. The Statement of Audit Changes adequately advised petitioner of the Division's computation of the tax deficiency; and it informed him that the Division considered him to be a New York domiciliary in 1986. The Division discussed petitioner's resident status with petitioner's representative during the course of the audit, and petitioner was well aware that the tax deficiency was based upon the Division's conclusion he was a New York domiciliary in 1986. There is no evidence that petitioner or his representative were at anytime confused by the explanation found on the Notice of Deficiency or ignorant of the Division's actual position. Since petitioner has not proven that he was prejudiced by the erroneous explanation, the Notice of Deficiency is deemed to be a valid notice.

D. Former section 605(a)(1) of the Tax Law defines a resident individual as follows:[4]

> "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."

As a result of its audit, the Division concluded that petitioner spent fewer than 183 days in New York State in 1986; consequently, the Division's assertion of a tax deficiency is based entirely on the premise that petitioner was a New York State and New York City domiciliary in 1986. Petitioner claims that he was a Texas domiciliary in 1986 and in prior years.

The Tax Law does not contain a definition of domicile. The Division's regulations (20 NYCRR 102.2[former (d)]) provide, in pertinent part, as follows:

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[4]The personal income tax imposed under Title T of the Administrative Code of the City of New York refers to article 22 of the Tax Law and contains essentially the same provisions. Accordingly, references in this determination to particular sections of article 22 shall be deemed references (though uncited) to the corresponding sections of Title T.

> "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 the 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 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).

Based upon the quoted regulation and the well-established principle that the burden of proof rests upon the party who alleges a change in domicile (see, e.g., Matter of Newcomb, 192 NY 238, 250), petitioner argues that it was incumbent upon the Division to prove that he changed his domicile from Texas to New York before 1986. There is no merit to this argument.

The Division reasonably concluded that petitioner was domiciled in New York in 1986 and in prior years. Petitioner purchased a cooperative apartment in New York City in 1980 and resided there continuously through 1986 and for years after. Petitioner filed New York State and City resident income tax returns in the years before and after the tax year in question. He belonged to a New York City club where he entertained on a regular basis. Telephone bills, electric bills and credit card receipts demonstrated a continued residence in New York throughout 1986. The Division's audit did not find that petitioner maintained a permanent place of abode anywhere other than in New York. Accordingly, the Division had a rational basis for concluding that petitioner was domiciled in New York in 1986. Moreover, a presumption of correctness attaches to a Notice of Deficiency timely issued under the authority of the Tax Law, and the burden is on the taxpayer to overcome the assessment (see, Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, 175; Tax Law § 689[e]). Petitioner cannot rely on the Division's purported lack of evidence of a change of domicile from Texas to New York to rebut the presumption of correctness of the notice.

E. Petitioner has not established that he was domiciled anywhere other than in New York

in 1986. Petitioner did not testify at hearing nor did anyone testify on his behalf. The documents offered in evidence were not sufficient to establish that he was domiciled in Texas in 1986. A birth certificate establishes that petitioner was born in Texas, but his Texas birth does not prove that petitioner was domiciled in Texas before or after moving to New York in 1980. The copies of cancelled checks showing payments to petitioner's mother have no probative value whatsoever. Although the checks indicate that they are payments of rent, there is no testimony or other evidence to show what was being rented. A factual finding that petitioner maintained a permanent place of abode in Texas must rest on something more than inference. Likewise, the document from the Texas Department of Public Safety does not establish that petitioner had a Texas driver's license in 1986. Petitioner's last will and testament, executed in January 1978, declares him to be a resident of Dallas County on that date. It is the only formal declaration of Texas residence in the record, and it is not enough to prove that petitioner was domiciled in Texas in 1986. Intention has long been recognized as an integral component in determining domicile (see, e.g., Matter of Newcomb, supra). However, the mere allegation made by petitioner in a letter to the Division and by petitioner's representative that petitioner intended Texas to be his permanent domicile is not a sufficient basis on which to find that petitioner was not domiciled in New York. This record contains little more than that allegation, and, as a consequence, petitioner failed to carry his burden of proof.

F. Penalties were imposed in this instance under the authority of Tax Law § 685(b) which provides, in pertinent part, as follows:

> "(b) Deficiency due to negligence. --
>
> "(1) If any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the deficiency.
>
> "(2) There shall be added to the tax (in addition to the amount determined under paragraph one of this subsection) an amount equal to fifty percent of the interest payable under section six hundred eighty four with respect to the portion of the underpayment . . . which is attributable to the negligence or intentional disregard."

Petitioner failed to establish that his failure to comply with article 22 of the Tax Law was not a result of negligence or intentional disregard of the Tax Law. The Division's witness stated

that the penalty was imposed for two reasons: because petitioner filed a nonresident rather than a resident tax return in 1986 and because he provided inaccurate information on his New York City nonresident earnings tax return by claiming that he did not maintain living quarters in New York City in 1986. In response, petitioner submitted evidence showing that the New York City return was prepared by Computax, a company that uses a computer to generate the return. The evidence submitted by petitioner shows that Computax received incomplete information which resulted in the "wrong" box being checked on the return. This evidence does not establish that the wrong box was checked inadvertently. Computax prepared the return based on information provided by petitioner's tax preparer. Petitioner signed the return and must take responsibility for its contents, especially since the information on the return was obviously wrong and not technical in nature. Petitioner has provided no reason for cancelling the penalties asserted.

G. The petition of Corley R. Barnes is denied, and the Notice of Deficiency issued on April 9, 1990 is sustained.

DATED: Troy, New York
April 8, 1993

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE