STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN G. AVILDSEN	:	DETERMINATION DTA NO. 809722
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioner, John G. Avildsen, Potato Road, Box 379, Wainscott, New York 11975, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the New York City Administrative Code for the years 1986 and 1987.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 27, 1992 at 10:15 A.M. and concluded at the same offices on April 21, 1992 at 10:00 A.M., with all briefs to be submitted by August 17, 1992. Petitioner filed his briefs on June 30, 1992 and August 19, 1992. The Division of Taxation filed its brief on July 30, 1992. Petitioner appeared by Breed, Abbott and Morgan (Edward H. Hein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioner was a domiciliary of New York City for the years 1986 and 1987 or maintained a permanent place of abode within New York City and spent more than 183 days in New York City and was thus taxable as a resident individual.

II. Whether the notice of deficiency has a rational basis.

III. Whether 20 NYCRR Appendix 20, § 1-2(c) creates a presumption against taxpayers who do not make certain records available upon request by an auditor.

IV. Whether, as applied to non-domiciliaries' worldwide income, the New York City personal income tax violates the United States Constitution.

FINDINGS OF FACT

Petitioner, John G. Avildsen, filed a New York State Resident Income Tax Return for the year 1986. On this return, petitioner listed his address as Potato Road, Box 379, Wainscott, New York. In conjunction with his return, petitioner filed a City of New York Nonresident Earnings Tax Return which reported that petitioner did not maintain an apartment or other living quarters in the City of New York during any part of the year.

Petitioner's income tax return included a series of wage and tax statements. One statement from Columbia University listed petitioner's address as 45 East 89th Street, New York, New York. Four wage and tax statements set forth petitioner's address as being on Potato Road and two wage and tax statements did not list an address for petitioner.

Petitioner filed a New York State Resident Income Tax Return for the year 1987 and reported that his address was Potato Road, Box 379, Wainscott, New York. In conjunction with his return, petitioner filed a City of New York Nonresident Earnings Tax Return which reported that petitioner did not maintain an apartment or other living quarters in the City of New York during any part of the year.

Six wage and tax statements were included with petitioner's 1987 return. Each of these wage and tax statements listed petitioner's address as being on Potato Road.

In or about late May 1989, an audit of petitioner was commenced. Petitioner was recommended for audit by the personal income tax unit of the City of New York, Department of Finance, as part of the "Millionaire's Project '91'". The audit was conducted by Samaan Wassif of the Personal Income Tax Unit of the Department of Finance of the City of New York. Initially, the Division sent letters addressed to petitioner at both the Post Office box address shown on petitioner's income tax returns and to 45 East 89th Street, New York, New York. The letter sent to the Potato Road address was returned without delivery by the Post Office.

The letter stated that petitioner's New York State income tax returns for the years 1986, 1987 and 1988 had been selected for examination and scheduled an audit appointment. The Information Document Request, which accompanied the letter, specified as its subject 1986,

1987 and 1988 personal income tax and requested, among other things, Federal income tax returns for the years 1986, 1987 and 1988 and the New York State personal income tax return for 1988.

At the hearing, the auditor acknowledged that when he sent the appointment letter and Information Document Request to petitioner, the New York State Department of Taxation and Finance had not selected the 1988 New York State income tax return for examination. Nevertheless, the auditor was authorized to send this letter because he was instructed to examine all years which were open for audit.

In response to the appointment letter, the auditor received a telephone call from petitioner's representative, Mr. Edward Hein. On July 6, 1987, a meeting, which lasted most of the day, was held with the auditor, petitioner's accountant and Mr. Hein at the latter's office. During this meeting, the auditor was provided with some utility bills and telephone bills pertaining to both addresses. Mr. Hein declined to provide bank statements or cancelled checks on the ground that they were personal. The auditor was also shown a lease dated May 20, 1986 for apartment 33E, 45 East 89th Street, New York, New York 10128. The lease was in petitioner's name for the period August 1, 1986 until July 31, 1990 for a monthly rental of $2,060.10.

Although requested, the auditor was not given a diary or appointment book. The diary was requested in order to analyze the number of days the taxpayer spent in and out of New York City.

The auditor asked for and received a copy of petitioner's automobile registration showing an address in Wainscott, New York. The auditor was not shown any voter registration.

Petitioner's representative declined to produce any credit card statements on the ground that they were personal. The credit card statements were asked for as proof of some days petitioner spent in New York City.

The auditor was told that petitioner maintained a bank account at Citibank on Madison Avenue in New York City and another bank in Beverly Hills, California.

The Division learned that petitioner was a stockholder in a corporation which manufactured films known as Don Don, Inc. The corporation was located at 200 East 90th Street, New York, New York. The tax return of Don Don, Inc. indicated that petitioner's compensation was $37,000.00 in 1986 and $1,000.00 in 1987.

During the audit, petitioner's representative presented the auditor with a schedule K-1 entitled "Shareholder's Share of Income, Credits, Deductions, etc." The corporation's name and address was listed as Daniels Lane Corp., Daniel's Lane, Wainscott, New York 11975. The form stated that petitioner owned 99% of the stock and listed petitioner's address as 45 East 89th Street, New York, New York.

The Division performed an analysis of telephone bills which were provided by Mr. Hein. This analysis shows that, during 1986, the average monthly telephone bill on apartment 33E, 45 East 89th Street, New York, New York was $958.78, while the average monthly telephone bill at the residence on Potato Road was $414.91. Similarly, during 1987, the average monthly telephone bill for apartment 33E was $690.86, while the average monthly telephone bill on the residence at Potato Road was $324.91.

The Division prepared an analysis of 1986 electric bills to compare usage at Potato Road and apartment 33E. The Division examined the amount of kilowatt usage at the respective locations rather than the amounts expended for electricity service because of a difference in the pricing of electricity. The Division's analysis found that, for 1986, the average monthly kilowatt hours used at apartment 33E was 516.75, while the average monthly kilowatt hours used at Potato Road was 76.08.

On August 4, 1989, petitioner's representative presented the Division with additional documentation including, among other things, telephone bills, electric bills and details of certain expenses. The Division was also given a biography and a list of petitioner's locations on each day during the years 1986, 1987 and 1988 which was prepared under Mr. Hein's supervision based on information from petitioner's secretary. After receipt of the lists, the auditor did not request, and petitioner did not provide, any further information or evidence

regarding petitioner's location during 1986 or 1987.

During the audit, petitioner's representative declined to provide information regarding petitioner's doctors and dentists on the ground that it was irrelevant. Petitioner's representative was also unable to provide any information regarding whether petitioner had garage space in New York City, had a safe deposit box or had a will.

The Division was advised by petitioner's representative that, for 1985, petitioner filed as a resident of New York City.

The Division examined petitioner's 1986 and 1987 New York State resident income tax returns which reported total New York adjusted gross income for the two-year period of close to $5,000,000.00 and New York itemized deductions in excess of $300,000.00. After the examination, the Division concluded that petitioner's itemized deductions, Federal adjustments, New York additions and subtractions, partnerships and capital gains and losses were all accurately reported. However, the Division also noted that the bad debts claimed as a capital loss on the 1986 tax return were disallowed by the Internal Revenue Service. Petitioner did not contest this adjustment because it resulted in no change in tax due.

The auditor never met or spoke to petitioner nor did he ever ask to meet or speak to petitioner. Further, the auditor never went to the Potato Road residence, nor has he ever been in any apartment or house owned, leased or occupied by petitioner. The auditor never asked to see an apartment or house owned, leased or occupied by petitioner.

On the basis of its audit, the Division concluded that petitioner was a domiciliary of New York City during the years in issue because petitioner was historically domiciled in New York City and he did not change his domicile. The Division did not make any findings regarding whether petitioner was a statutory resident for 1986 and 1987 because the Division did not receive any substantiation of the days that petitioner claimed to be out of New York City.

The Division prepared and mailed to petitioner's representative a Statement of Personal Income Tax Audit Changes which explained that petitioner was deemed to be taxable as a

domiciliary of New York City in accordance with section 1305(a)(1) of Article 30 of the Tax Law. The document also stated that petitioner was liable for penalties pursuant to Tax Law § 685(b)(1) and (2) because petitioner did not report that he had an apartment or dwelling in New York City during the years in issue. After the Statement of Personal Income Tax Audit Changes was mailed to petitioner's representative, the audit was reviewed by the auditor's supervisors. Upon review, it was concluded that the case should be returned to the auditor for the assertion of a penalty pursuant to Tax Law § 685(p). In accordance with this direction, the auditor mailed to petitioner's representative a revised Statement of Personal Income Tax Audit Changes which, in addition to the prior statement, asserted a penalty pursuant to Tax Law § 685(p).

The Division issued a Notice of Deficiency, dated February 22, 1990, which asserted a deficiency of personal income tax for the years 1986 and 1987 in the amount of $178,345.00, plus interest of $34,485.14 and penalty of $42,882.00, for a balance due of $255,712.14.

Petitioner was born in Oak Park, Illinois, on December 21, 1935, and attended school through the fifth grade in Illinois. Thereafter, petitioner's parents moved to New York City where petitioner completed his formal education. Prior to his first marriage in 1964, petitioner completed two years at New York University, served in the United States Army, worked in advertising in New York City and on films in New York, Massachusetts, Washington, D.C. and Florida.

Petitioner began working in the motion picture industry in 1961. He has worked as an assistant cameraman, production manager, soundman, cameraman, associate producer, assistant director and director. In 1972, petitioner directed his first motion picture for Paramount, "Save the Tiger" starring Jack Lemmon. In 1977 he received an Academy Award for directing "Rocky". Awards were also given for best picture and best editing.

Each picture is a separate project involving people who come together to make a particular picture. When the picture is finished, the participants go their separate ways. The location where the picture is shot is usually determined by the story. When his career was

beginning, location was not a significant factor in deciding whether or not to accept a particular job.

The first residence occupied by petitioner and his first wife, Melissa, was a one-bedroom apartment at 122 West 71st Street in New York City. The apartment was located on the fourth or fifth floor in a building that did not have an elevator.

Petitioner and his wife stayed at their first apartment for about two years and then moved to a rented two-bedroom apartment at 120 West 86th Street in anticipation of the birth of their first child, Anthony, who was born on March 11, 1967. Their second child, Jonathan, was born on July 11, 1969.

In the late 1960's, most of petitioner's work involved films which were shot in New York, including Long Island, Westchester and New York City.

Petitioner never considered the apartment at 122 West 71st Street or the apartment at 120 West 86th Street as his permanent home. In addition, it was never his intent to raise his children in New York City if it could be avoided.

In 1972, petitioner and his family lived in Los Angeles while working on the picture "Save The Tiger". During this period, petitioner and his wife kept the apartment in New York City on 86th Street.

When petitioner and his family returned from California in 1972, petitioner rented a house in the Sagaponack area of Long Island in accordance with petitioner's and his wife's desire to live permanently on Long Island.

During the years 1972 to 1974, petitioner's children were first enrolled in the Hampton Day School in Bridgehampton, New York.

In 1973, petitioner and his first wife started living separately. Thereafter, petitioner rented one house and then another in the vicinity of the house on Long Island where Melissa and the children lived.

In or about 1975, petitioner and his wife became legally separated and Melissa received custody of the children. Thereafter, Melissa and the children moved to an apartment on West

86th Street in New York City across the street from the prior apartment. Subsequently, they moved to Westchester.

During the summer of 1975, petitioner employed Robert Kobrin, then a 19-year old student at Long Island University with experience as a camp counselor. In this position Mr. Kobrin shopped, cooked, cleaned and took care of petitioner's two sons who spent a substantial portion of the summer with petitioner.

In August 1976, after working on the movie "Rocky", which was shot in Philadelphia and California, petitioner returned to Long Island. Thereafter, he rented a residence in Wainscott.

In early 1977, petitioner rented apartment 37A at 45 East 89th Street in New York City. It had a living room, kitchen, 1½ baths and two bedrooms. One of the bedrooms was used as an office.

Since 1977, petitioner had an office staff as opposed to people working on particular movies. Initially, the office staff used as an office the space which would have otherwise been the second bedroom in apartment 37A.

Apartment 37A did not have a bedroom for petitioner's children to sleep in. However, on at least one occasion, petitioner's children slept in the apartment.

In 1977, petitioner again employed Robert Kobrin as a father's helper in order to take care of petitioner's children on Long Island. Mr. Kobrin also worked as a production assistant on the movie "Slow Dancing in the Big City" which was filmed in New York and New Jersey.

After renting apartment 37A, petitioner rented a house in the Hamptons area. By 1978, petitioner began taking steps to purchase a home in that area.

While in Europe working on a movie during the winter of 1979-1980, petitioner both leased a house in Wainscott for the term May 1, 1980 through September 2, 1980 and approved the purchase of property on Potato Road in Sagaponack. The property which petitioner purchased was selected and recommended by his accountant as an investment for rental ("Potato Road property"). On May 1, 1980 petitioner purchased the Potato Road property for

$250,000.00. When petitioner returned from Europe in the spring of 1980 and saw the Potato Road property, he decided to build his home there.

At the time petitioner acquired the Potato Road property, it had a substantial house on it which was habitable but it was not what petitioner wanted as his home. By the end of July 1980, over the protest of the former owner who held a purchase money mortgage on the property, petitioner had commenced demolition of the house on the Potato Road property. By November 1980, only the base and brick chimney remained.

The architectural firm of Machinist Associates was retained to provide architectural services for construction of the new house on Potato Road. In or about October 1981, petitioner asked that time charges commencing July 1981 be detailed. The detailed bills which followed made periodic reference to meetings and discussions with petitioner.

By April 1981, the basic skeleton of the new house on the Potato Road property had been erected and by May 1982 the skylight on the tower had been installed.

During the construction of the house on the Potato Road property, petitioner leased other dwellings in Sagaponack and Bridgehampton.

By January 31, 1983, petitioner had spent approximately $767,500.00 on his new home. Including this amount as an asset, the excess of petitioner's total assets over his liabilities was approximately $1,108,000.00.

Completion of the new home on the Potato Road property, to the point where it was ready for petitioner's occupancy, was delayed until 1985. The delay was primarily due to a periodic lack of funds. Time was also consumed because petitioner would change his mind over a particular detail.

In April 1983, petitioner borrowed additional funds from Citibank, N.A. for the construction of his home. By May 1983, petitioner had paid several hundred thousand dollars to ELP Associates, Inc., the general contractor, for construction of his home.

In August 1983, petitioner contracted with Environmental Improvements, Inc. for various woodworking details on the Potato Road property at a price of $45,915.00, which was

subsequently increased by numerous additions and changes.

Between November 1983 and June 1985, petitioner incurred expenses of approximately $100,000.00 to L. W. Winslow Painting, Inc., a painting contractor, for work on his home on Potato Road.

In or about the end of 1985 or the beginning of 1986, there had been a destructive coastal storm in Sagaponack. As a result of this storm and to protect his home from the prospect of storm damage from future storms, petitioner spent approximately $38,000.00 for a rock revetment, which is a wall made with large boulders.

In or about August 1985, petitioner was charged $3,600.00 by an interior decorator, hired by petitioner, for curtains for the Potato Road property.

In the second half of 1985, panelling work on the Potato Road property was completed by Beres Construction, Inc. at a cost to petitioner of $32,000.00.

Between March 1985 and November 1985, planting and landscaping on the Potato Road property was completed at a cost of over $20,000.00.

On January 24, 1986, petitioner purchased additional real property adjacent to the Potato Road property. The idea was that if there ever was a storm, he would be able to move his home back from the sea on to that property.

In 1986, petitioner constructed a redesigned beach deck, detached from the house, which was described by the contractor in a progress billing as "one hell of a gorgeous clear redwood deck, seating and railing. Winner of the Riverhead Building Supplies drivers accolade for the most ambitious and detailed deck ever seen by those astute connoisseurs of the trade."

Petitioner took pains to recreate the exterior appearance of the older houses in the Sagaponack area, down to such details as the type of window, gutters and spacing of shingles.

The interior of petitioner's home on Potato Road shows extraordinary attention to detail. Petitioner personally designed an interior stained glass window which carries through a motif appearing in other places of his Potato Road home, including the hearth in the living room and the kitchen. Petitioner also designed and made special brass window hardware to conform to

the design of the Potato Road property.

The Potato Road property was the first and only residence petitioner ever had constructed.

In April 1978, petitioner leased apartment 33E at 45 East 89th Street in New York City for use as an office. The apartment contained six rooms, two and one-half baths and a kitchen. Mr. Kobrin coordinated adapting apartment 33E from a residential apartment to editing rooms and a production office for petitioner. This included knocking out a wall, removing shelves from a closet, soundproofing and installing permanent office furniture mounted to walls. After leasing apartment 33E, petitioner's office staff worked out of apartment 33E rather than apartment 37A.

On October 6, 1984, petitioner relinquished apartment 37A at 45 East 89th Street.

One of petitioner's companies, Don Don, Inc., leased, as the named tenant, office space at 200 East 90th Street, apartment 27D, New York, New York, for a two-year term commencing April 1, 1986. The lease provided that the apartment shall be used "for living purposes only" and, further, that "only [y]ou and members of your immediate family . . . and servants, if any, may live in the [a]partment." Upon executing the lease, the 90th Street apartment was used as petitioner's office. During the time that petitioner's office was on East 90th Street, he continued to use apartment 33E for office space and storing files. The telephones at apartment 27D and apartment 33E were inter-connected so that any incoming calls could be answered from either of the two apartments.

Before petitioner began using apartment 27D, he did not stay overnight at apartment 33E. However, when petitioner began using the new apartment, he stayed overnight at apartment 33E or at a hotel when he was in New York City.

Petitioner used the office at East 90th Street for a period of approximately two years. Thereafter, he resumed using apartment 33E as his New York office. Petitioner's office staff is now based in Beverly Hills, California.

Arnuthfonyus Films, Inc., a corporation which supplied petitioner's services for directing

and editing motion pictures, used as its address 45 East 89th Street, New York, New York.

On repeated occasions, petitioner rejected advice and suggestions that he purchase a cooperative or townhouse in New York City and expressed the view that he really did not want a home in New York City. Petitioner never intended to make his permanent home at 45 East 89th Street.

Beginning in 1979, petitioner, through one of his companies, employed Joyce Wilson Fetherolf first as petitioner's personal secretary and later as his executive assistant. During the years in issue, Ms. Fetherolf made petitioner's travel reservations, provided petitioner with daily schedules of his appointments, frequently made appointments for him, kept track of his expense reports and other financial affairs, and dealt with both personal and business matters for petitioner. On the basis of the information that she gained in working for petitioner, it is Ms. Fetherolf's opinion that Sagaponack was the place which petitioner intended to be his permanent home, the place he intended to return whenever he was absent during the years 1986 and 1987.

At the hearing, Ms. Fetherolf testified that from her personal knowledge and review of the source material, including desk diaries and calendars she kept, that the schedules furnished to the auditor on August 4, 1989 listing petitioner's location on each day of the years in question were accurate. She also testified that the source materials from which the schedules listing petitioner's location were derived set forth, among other things, information which, if disclosed, could jeopardize petitioner's continuing business projects. It would also disclose personal and medical information and information regarding meetings on legal matters.

Airline bills submitted in evidence lend some support to the schedules, which listed petitioner's location on each day during the years in question. Specifically, the invoices from Continental-American Travel, Inc. corroborate some of the departures and arrivals represented on the schedules. The invoices from East Hampton Aire, Inc. and East Coast Airways, Inc. confirm that there was travel on certain days shown on the schedules. However, the latter invoices use abbreviations rather than clear explanations of the destination of travel.

Furthermore, the invoices of East Hampton Air, Inc. include flights of individuals other than petitioner.[1]

From August 1985 to June 1, 1985, petitioner, through one of his companies, leased a furnished house in Los Angeles.

In the fall of 1986, petitioner taught a graduate course in film directing at Columbia University. It was petitioner's recollection that he met with his students once a week.

Petitioner was not a member of social organizations in either New York City or the Sagaponack area in 1986 or 1987. However, he was a member of a group that was concerned with the environment in the Sagaponack area.

By May 15, 1980, petitioner had a checking account at the Bridgehampton National Bank, Montauk Highway, Bridgehampton, New York. By September 28, 1980, the checks on said account bore petitioner's name and Potato Road address.

During the period in issue, petitioner maintained a checking account at Citibank, N.A., 91st Street at Madison Avenue, New York, New York. The checks also bore petitioner's name and Potato Road address.

On February 26, 1987, petitioner was remarried in Hawaii. The License and Certificate of Marriage which was signed under oath by petitioner and his bride listed petitioner's "usual residence" as Potato Road, Sagaponack.

The details of the March 1986 telephone bill for calls billed to apartment 33E were placed in evidence and disclose that of the $708.49 for

such period attributed in the auditor's analysis to apartment 33E, more than one-third were for calls originating in California and charged on petitioner's calling card. Many of the remaining calls were placed by petitioner's executive assistant.

The bills from the Long Island Lighting Company ("LILCO") for each month of 1986

---

[1]At the hearing Ms. Fetherolf explained that she was able to distinguish which flights were petitioner's using petitioner's diaries.

for Potato Road were submitted in evidence. The bills show that for 1986 the average monthly kilowatt hours used at Potato Road exceeded 3,000. Each bill states on its face, directly alongside the meter readings a "Meter Mult" of 40 and alongside the multiplier shows the energy used for the month in kilowatt hours. The term meter multiplier is explained on the back of each bill. Each LILCO bill, except for the one in July, also shows average daily use in KWH/day. In each case the average daily use exceeds the total kilowatt hours for the entire month computed in the auditor's analysis.

In accordance with New York State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. It is noted that certain of petitioner's proposed findings of fact have been modified. The proposed findings of fact have been rejected to the extent of said modifications. Proposed findings of fact "77", "87", "88" and "89" have been rejected in their entirety as unnecessary to the determination.

CONCLUSIONS OF LAW

A. Section 11-1705(b)(1) of the Administrative Code of the City of New York provides, in pertinent part, as follows:

"City resident individual. A city resident individual means an individual:

> "(A) who is domiciled in this city, unless (i) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or . . .
>
> "(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States."

B. Initially, petitioner maintains that he was a domiciliary of the Wainscott area during the years in issue.

C. The foregoing section of the Administrative Code of the City of New York corresponds with Tax Law § 605(b)(1). The Division's regulations promulgated pursuant to Tax Law § 605 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; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.
>
> * * *
>
> "(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere." (20 NYCRR former 102.2[d].)

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, 140, quoting Matter of Bourne, 181 Misc 238, 41 NYS2d 336, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785). The importance of establishing intent was articulated by the Court of Appeals when, in Matter of Newcomb (192 NY 238, 251) 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, upon all of the facts and circumstances presented, including the weight of the documentary evidence and the credible testimony, it is found that petitioner presented clear and convincing evidence that he was a domiciliary of Wainscott during the years in issue. This conclusion is supported by numerous factors. The record shows that petitioner's association with Long Island was established over a period of a number of years. Further, petitioner's extensive investment of money and time clearly evinces the sentiment and feeling associated with a permanent home. By comparison, apartment 33E had, at most, a back room where petitioner slept on occasion when he spent the night in New York City.

The pattern of petitioner's travel and commuting activities all show that the house on

Potato Road and not the New York City apartment, was the place to which he intended to return when he was away. Another indication of petitioner's intent is shown by his listing the Potato Road address as his residence on his marriage license.

F. The next question presented is whether petitioner maintained a permanent place of abode in New York City.

It is petitioner's position that he did not maintain a permanent place of abode in New York City during the years in issue. Petitioner submits that apartment 33E was not a place of abode but a commercial area. According to petitioner, in New York City, suites in commercial buildings, investment banking firms, law firms, large corporate headquarters, as well as City firehouses and police stations contain a stove, refrigerator and shower and/or tub. Petitioner argues that permanent places of abode do not include areas where living activities such as eating or sleeping are incidental to commercial activity.

In response to petitioner's argument, the Division submits that apartment 33E was a permanent place of abode and further, there is evidence in the record that apartments 37A and 27D also met the definition of permanent places of abode during parts of 1986 and 1987. The Division also argues that there is no requirement that the taxpayer actually reside in the premises in order to constitute a permanent place of abode. The Division also contends that the conduct of a business or profession within a dwelling is not inconsistent with a finding of a permanent place of abode.

G. During the years in issue, the regulations defined the term "permanent place of abode", in part, 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. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode" (20 NYCRR former 102.2[e]).

H. Here, the testimony of Ms. Fetherolf was that apartment 33E consisted of 9½ rooms, including a kitchen, 2½ bathrooms and no bedrooms. However, after petitioner rented office space at apartment 27D, apartment 33E was used for both residential and business purposes. Further, Ms. Fetherolf explained that whenever petitioner was in New York City, he stayed at

apartment 33E.[2]

I. On the basis of the foregoing, it is concluded that petitioner maintained a permanent place of abode at apartment 33E from April 1, 1986 through the balance of the period in issue. As noted by the Division, the fact that apartment 33E was also used for business does not preclude a finding that it also be considered a permanent place of abode (see, e.g., Matter of Shapiro, Tax Appeals Tribunal, July 3, 1991; Matter of Feldman, Tax Appeals Tribunal, December 15, 1988).

J. The Division also argues that apartments 37A and 27D met the definition of a permanent place of abode during parts of 1986 and 1987. In support of these arguments, the Division contends that the record shows that petitioner used apartment 37A as a place of abode until April 1986; that the lease for apartment 27D describes its intended use as residential; that the record does not exclude the possibility that petitioner resided at apartment 27D; and that there is no showing that New York City commercial rent tax returns were filed and tax paid.

K. The foregoing arguments are rejected. The record shows that petitioner relinquished and vacated apartment 37A on October 6, 1984. Since the years in issue are 1986 and 1987, it is clear that apartment 37A cannot be considered a permanent place of abode during those years.

L. The Division's argument with respect to apartment 27D is also unpersuasive. It is recognized that the lease states that the tenant shall use the apartment for living purposes only. However, the weight of the evidence rests with the testimony of petitioner and Ms. Fetherolf that apartment 27D was used as a business location. Further, Ms. Fetherolf clearly explained that once apartment 27D began being used, petitioner slept at apartment 33E when he stayed in New York City. Under these circumstances, there is no reason to conclude that apartment 27D was anything other than a commercial location. It is noted that the fact that the record is silent

---

[2]The testimony of Mr. Kobrin, that apartment 33E did not have a place to sleep, is not necessarily inconsistent with the testimony of Ms. Fetherolf since it is not clear from the record that Mr. Kobrin's testimony referred to the period beginning April 1, 1986.

with respect to the New York City commercial rent tax does not support the inference that apartment 27D was used for residential purposes.

M. The last question presented is whether petitioner substantiated the number of days spent in New York City.

N. 20 NYCRR Appendix 20, § 1-2(c) states that:

> "Rules for days within and without the City.--In counting the number of days spent within and without this City, presence within the City for any part of a calendar day constitutes a day spent within the City except that such presence within the City may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside of the City, or while traveling by motor, plane or train through the City to a destination outside the City. Any person domiciled outside the City who maintains a permanent place of abode within the City during any taxable year and claims to be a nonresident must keep and have available for examination by the Finance Administrator adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the City.

O. In this case, petitioner declined to make his business diaries available. In their place, petitioner presented a listing of his daily location and testimony to explain that the listing came from petitioner's business diaries. Petitioner also presented airline invoices to support the listing.

P. The evidence presented by petitioner is not sufficient to sustain his burden. There is no question that a business diary bolstered by credible testimony and other documents may be sufficient to substantiate the number of days spent in New York (see, Matter of Moss, Tax Appeals Tribunal, November 25, 1992). However, in this instance, in order to accept petitioner's argument, one is forced to accept testimony as to what those diaries show. Such testimony, although credible, is not sufficient to meet the "adequate records" requirement of 20 NYCRR Appendix 20, § 1-2(c) (see, Matter of Feldman, supra).[3] If petitioner's position were accepted, the Division would be in the untenable position of having to accept a taxpayer's uncorroborated statements on whether a tax return was properly filed. It is noted that the airline invoices are not an adequate substitute for a daily diary. For example, while the invoices from

---

[3]Contrary to the argument in petitioner's brief, the recordkeeping requirement has been considered reasonable (Matter of Feldman, supra).

Continental-American Travel, Inc. corroborate some of the departures and arrivals represented on the schedules, they do not show whether petitioner traveled to other destinations between the documented arrivals and departures. Further, the invoices from East Hampton Aire, Inc. and East Coast Airways, Inc. use abbreviations rather than clear explanations of the destination of the travel. Lastly, without the diaries, it is impossible to determine whether it was petitioner or another individual who was traveling.

Q. Petitioner next argues that the audit lacked a rational basis for the determination of tax due.

R. There is a presumption of correctness of a Notice of Deficiency which as been properly issued under the Tax Law (Matter of Leogrande v. Tax Appeals Tribunal, ___ AD2d ___, 589 NYS2d 383; Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174). A taxpayer who fails to present any evidence to show that the Notice of Deficiency is incorrect surrenders to this presumption (Matter of Tavolacci v. State Tax Commn., supra). In certain cases, however, there is an exception that requires the government to establish at the outset that the assessment has a rational basis before the presumption of correctness arises (see, Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990). In those instances where the exception applies and the government fails to show that the assessment has a rational basis, the assessment may be found to be arbitrary despite the taxpayer's failure to establish that the assessment is incorrect (Matter of Fortunato, supra).

S. In this case, there is ample evidence in the record to show that the Division had a rational basis for its audit. The facts which show that the audit had a rational basis include: the audit appointment letter sent to the Potato Road address was returned; the analysis of telephone usage and electricity usage; and the fact that petitioner received a wage and tax statement for the year 1986 which was addressed to him at 45 East 89th Street, New York, New York.

T. Petitioner's brief next cites 20 NYCRR Appendix 20, § 1-2(c) and argues that if said regulation were construed as creating a factual presumption of being a nondomiciliary against

taxpayers who do not make their diaries and cancelled checks available upon request, such result would constitute a search and seizure and would be offensive to the New York courts. In view of the fact that petitioner was found to be a domiciliary of Wainscott during the years in issue, this argument is academic.

U. Petitioner's last argument is that, as applied to nondomiciliaries' worldwide income, the New York City personal income tax violates the United States Constitution. Petitioner submits that the New York City personal income tax attempts to tax the entire worldwide income, both of persons domiciled outside but maintaining an abode and spending more than 183 days in New York City and persons domiciled inside New York City and maintaining an abode or spending more than 30 days within New York City. It is argued that in so doing, without any pretense of apportionment or alleviating credit mechanism, the tax fails the internal consistency test.

V. This argument constitutes a challenge to the constitutionality of the statute on its face. It has been recognized that the jurisdiction of the Tax Appeals Tribunal and the Division of Tax Appeals is prescribed by the enabling legislation (Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (see, e.g., Matter of Bucherer, Inc., Tax Appeals Tribunal, June 28, 1990). Therefore, petitioner's argument is rejected because it is presumed that the statute is constitutional.

W. The petition of John G. Avildsen is denied and the Notice of Deficiency, dated February 22, 1990, is sustained together with such penalty and interest as may be lawfully due.

DATED: Troy, New York
April 29, 1993

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE