STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM AND ESTELLE GOLUB	:	DETERMINATION DTA NO. 810069
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1986 and 1987.	:	

Petitioners, William and Estelle Golub, 6930 West Country Club Drive North, Sarasota, Florida 34243-3501, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1986 and 1987.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 4, 1992 at 9:15 A.M., was continued on July 6, 1992 at 9:15 A.M. and was concluded on August 19, 1992 at 1:15 P.M., with all briefs to be submitted by December 22, 1992. Petitioners appeared by DeGraff, Foy, Holt-Harris & Mealey, Esqs. (James B. Ayers, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioners were domiciliaries of the State of New York for the years 1986 and 1987 and were, therefore, taxable as resident individuals for such years.

II. Whether, for the years 1986 and 1987, petitioners maintained a permanent place of abode and spent, in the aggregate, more than 183 days inthe State of New York and were, therefore, taxable as resident individuals for such years.

III. Whether the Division of Taxation properly determined that certain payments received by petitioner William Golub did not qualify for the pension and annuity exclusion under Tax Law § 612(c)(3-a) and that such payments, in their entirety, were taxable to petitioner for the years 1986 and 1987.

FINDINGS OF FACT

On February 13, 1990, the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes to William and Estelle Golub ("petitioners") asserting additional New York State personal income tax due in the amount of $19,002.53, plus interest, for a total amount due of $23,500.99 for the year 1986 and asserting additional New York State personal income tax due in the amount of $21,746.59, plus interest, for a total amount due of $25,290.31 for the year 1987. The Statement of Personal Income Tax Audit Changes stated that there was an enclosed letter, in addition to the computations, which contained an explanation; however, the letter was not attached at the time of its having been offered into evidence.

On March 16, 1990, the Division issued a Notice of Deficiency to petitioner William Golub in the amount of $19,082.92, plus interest, for a total amount due of $23,599.71 for the year 1986.

On March 19, 1990, the Division issued a Notice of Deficiency to both petitioners in the amount of $21,746.59, plus interest, for a total amount due of $25,415.31 for the year 1987.[1]

For many years prior to 1979, petitioners owned and resided in a home located at 1929 Union Street, Schenectady, New York. This home, which had cost the original owner in excess of $1,000,000.00 to build, had four floors, five bedrooms and an acre of landscaped grounds.

Petitioner William Golub was the Chief Executive Officer and, since 1972, was the Chairman of the Board of Directors of the Golub Corporation. This corporation was originally formed by petitioner, his brother and Joe Grossberg and was in the business of building markets and wholesaling food products. Mr. Golub was also president of the Central Operating Company which operated markets for the Golub Corporation. In addition, he had partnership and/or investment interests in McClellan Street Associates, Clark Trading Corporation and

[1]It should be noted that both petitioners are deceased. Estelle Golub died on August 10, 1990. William Golub testified at the hearing held on July 6, 1992; however, he died on October 19, 1992.

Golub Properties, Inc., all of which were connected to the Golub Corporation, i.e., they owned real property used in the Golub supermarket business.

In or about 1965, petitioners began going to Florida, for about a month at a time, during the winter. In anticipation of retirement (in the early 1970's), petitioners spent portions of the winter, for about five years, renting a furnished apartment in Fort Lauderdale, Florida to see how they liked living in Florida. Before making a final decision about a retirement destination, petitioners decided to explore five other locations,

spending two weeks each in Phoenix, Las Vegas, San Francisco, Palm Springs and Hawaii.

For several reasons, most notably the chance to be near their three children, petitioners chose Florida to be their retirement location. Their son (Paul) and daughter (Jill) lived in West Palm Beach, Florida on a full-time basis and their son, Neil, owned a winter residence in Florida.

On November 9, 1979, petitioners entered into a contract for the sale of the 1929 Union Street home (the selling price was $230,000.00). On December 26, 1979, petitioners purchased a two-bedroom condominium, bordering a golf course at the Palm Aire Country Club, located at 8422 West Country Club Drive North, Sarasota, Florida.[2] The purchase price for this condominium unit was $65,000.00 and, in addition, petitioners spent approximately $5,000.00 for certain improvements thereto.

The closing on the sale of their Schenectady home did not take place until April 23, 1980. The purchasers gave petitioners until July 1, 1980 to vacate the premises because they were attempting to find a place to rent in or about the Albany area of New York State.

In March 1980, William Golub flew to New York State in an attempt to find a place to rent when they came north during the months of very warm weather in Florida. Because of the amount of furniture and other belongings in their Schenectady home, a real estate agent

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[2]Petitioner William Golub testified that, due to additional construction in the area, the address was subsequently changed to 6930 West Country Club Drive North.

convinced Mr. Golub that he would have difficulty finding a suitable place to rent. She showed him a condominium in Loudonville and stated that the contractor could have it ready for occupancy by petitioners' July 1st deadline. On April 1, 1980, petitioners entered into a contract to purchase, for the price of $117,310.00, a condominium unit at 55 Loudonwood East, Albany, New York. The contract for the purchase of the Loudonville condominium was entered into without petitioner Estelle Golub ever having seen the condominium. William Golub testified that when they purchased the Sarasota condominium, Estelle was involved in the purchase and also designed an addition and various changes to it. The closing on the Loudonville condominium took place on June 20, 1980. Much of the furniture from petitioners' Schenectady home was donated to charity. Petitioners' 1980 Federal return contained an appraisal from an antique dealer indicating that articles of personal property valued at $32,526.50 had been donated to various charities in the Schenectady area. The rest of the furniture was used to furnish both the Sarasota and Loudonville condominiums.

In 1979, petitioner William Golub was 75 years old and was desirous of retiring from active participation in the Golub Corporation so he entered into negotiations with his son, Neil Golub, and his nephew, Lewis Golub, the culmination of which was an agreement dated March 10, 1981. Pursuant to the agreement, which terminated September 13, 1982, William Golub (who is referred to as the "Executive" in the agreement) was to continue in the limited employ of the Golub Corporation and was to serve as Chairman of the Board of Directors. However, paragraph 3(B) of the agreement provided as follows:

> "It is the intent of this agreement that the Executive gives full and clear recognition of the rights and authority of the President and Executive Vice President to operate and manage the business. Further, it is the intention of the Executive to remove himself from the daily conduct of the business and he agrees that he will not direct the acts of its executives or suppliers."

Paragraph 8 of the agreement stated:

> "EXPIRATION OF CONTRACT. This contract shall expire on September 13, 1982 (unless sooner terminated pursuant to Paragraph 5A), at which time Executive will resign his position as Chairman of the Board of Directors. He shall then become honorary chairman, but only if he serves the full term of this

> agreement as Chairman. As honorary chairman he shall be compensated as other outside directors are compensated at that time."

William Golub testified that the authority to manage and control the business was thereupon vested in the President (Lewis Golub) and the Executive Vice President (Neil Golub). An affidavit of Lewis Golub (Exhibit "24"), Chairman and Chief Executive Officer of the Golub Corporation, stated that William Golub performed no services for the Golub Corporation since his retirement on September 13, 1982. In addition, the affidavit states that Lewis Golub is the Managing Partner of 126th Street Associates and McClellan Street Associates as well as the Managing Executive of Clark Trading Corporation and Golub Properties, Inc. and that William Golub performed no services for any of these businesses since September 13, 1982.

In 1982, the Golub Corporation had a defined retirement plan. At that time, under a defined benefit plan, Internal Revenue Service regulations did not require coverage of employees over the age of 65. Petitioner William Golub was, therefore, not a participant in the company's plan and was not entitled to a pension upon his retirement. Paragraph 5(B) of the March 10, 1981 agreement provided as follows:

> "Deferred Compensation. Upon the termination of this agreement, either due to an event of termination as defined in Paragraph 5A or upon the expiration of the agreement, Executive shall be entitled to deferred compensation in the sum of Sixty Thousand ($60,000.00) Dollars per annum for life, whether or not Executive continues as director of the Company."

For each of the years at issue, the moneys paid to William Golub pursuant to paragraph 5(B) of the agreement were reported on a Wage and Tax Statement (W-2 Form).

In 1991, the Golub Corporation and the Internal Revenue Service entered into an Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Form 2504). The relevant issue (relevant to the present matter) was whether payments made by the Golub Corporation pursuant to an agreement with William Golub (see, Findings of Fact "5" and "6") in the amounts of $60,000.00 for the taxable years 1984 and 1985 were wages subject to the Federal Insurance Contribution Act (FICA). Pursuant to this settlement agreement, the Internal Revenue Service conceded that such payments were not wages subject to FICA, but were payments made on account of his retirement pursuant to Internal Revenue

Code § 3121(a)(3).

The Division deemed this income, reported by William Golub as pension income on his New York State nonresident returns for the years at issue (petitioner claimed a pension deduction of $20,000.00 for each year), as wage income and, accordingly, denied the aforesaid pension deductions.

The affidavit of Lewis Golub (Exhibit "24") states that the $60,000.00 per year paid by the Golub Corporation to William Golub was paid as retirement income and does not represent wages for services performed and was paid because William Golub was never a member of the corporation's qualified retirement plans.

For 1986, petitioner William Golub received, in addition to the $60,000.00 per the above agreement, $8,250.00 as Golub Corporation board fees, $2,750.00 as Golub Corporation director fees and $33,814.00 from McClellan Street Associates (Estelle Golub received $11,795.00 from this partnership).

For 1987, William Golub received $10,125.00 as Golub Corporation board fees and $29,455.00 from McClellan Street Associates (Estelle Golub received $10,275.00).

In furtherance of their stated desire to change their domicile from New York to Florida, petitioners did the following:

(a) Registered to vote in Broward County, Florida on December 17, 1979;

(b) Executed a Declaration of Domicile and Citizenship (declaring citizenship, actual legal residence and domicile in the State of Florida) on December 5, 1979;

(c) William Golub obtained a Florida driver's license shortly after 1979 and continued to renew this license through the early 1990's (Estelle Golub did not drive);

(d) Florida individual and fiduciary intangible tax returns were filed by petitioners for the years at issue;

(e) William Golub registered his automobile in Florida and also joined the Peninsula Motor Club (AAA);

(f) Received a homestead tax exemption for their condominium in Sarasota;

(g) Maintained a safe deposit box in Florida, first in Fort Lauderdale and, for the years at issue, at the Sun Bank in Sarasota;

(h) Listed Sarasota as their address on 1986 and 1987 Federal income tax returns;

(i) Subscribed to the Sarasota Herald Tribune during 1986 and 1987;

(j) Contributed to the Republican Party of Florida and to several Florida charities;

(k) Joined the Palm Aire Country Club (where their condominium was located);

(l) While in Florida, were attended by Florida doctors;

(m) Maintained Florida bank accounts; and

(n) Contributed to and participated in various Florida cultural activities (Sarasota Opera Association, Asolo Theatre, Florida Studio Theatre, Community Concert Series and Ringling Arts Museum).

In addition to ownership of the Loudonville condominium and receiving income from New York businesses (Golub Corporation, McClellan Street Associates, Clark Trading Corporation and Golub Properties, Inc.), petitioners, for the years at issue, maintained the following New York contacts:

(a) Maintained New York bank accounts;

(b) Subscribed to capital area (New York) newspapers;

(c) Maintained a social membership at Colonie County Club;

(d) Maintained membership in Senior Golfer's Association (New York);

(e) Made contributions to New York political campaigns (both local and state-wide);

(f) Maintained membership in Temple Gates of Heaven (Schenectady) and Sisterhood of Congregation Gates of Heaven;

(g) Received mail at Post Office Box 1074, Schenectady, New York;

(h) Maintained checking account with checks printed with Loudonville address;

(i) Maintained credit card in which statements were sent to Loudonville address;

(j) William Golub continued to possess a New York driver's license;

(k) Continued to see New York doctors;

(l) Estelle Golub's will was probated in the Surrogate's Court, County of Albany pursuant to a provision in the will and both the order admitting the will to probate and the letters testamentary indicated that Estelle Golub was "late of the City and County of Albany";[3]

(m) The Certificate of Death for Estelle Golub (date of death, August 10, 1990) indicated her residence to be 55 Loudonwood East, Loudonville, New York. Place of burial was Gates of Heaven Cemetery in Schenectady (the plot was purchased 30 to 40 years prior to death); and

(n) A certificate of incorporation of the charitable corporation known as The William and Estelle Golub Foundation, Inc. was filed in the State of Delaware on November 12, 1986. Petitioners' address, set forth thereon, was the Sarasota address. Form 8283, regarding property donated to the Foundation, listed the mailing address as 501 Duanesburg Road, Schenectady, New York.

At the hearing, the parties entered into a stipulation with respect to the wills (and codicils) of William Golub as follows:

	Executed	Address	Where Executed & Witnessed
Will	3/15/82	Florida	Florida
Codicil	10/6/83	Florida	New York
Codicil	10/21/83	Florida	New York
Will	1987	Florida	New York
Will	10/26/90	Florida	New York
Codicil	1992	Florida	New York

During the many years in which he resided in Schenectady, William Golub was on the board of directors of many charitable organizations, such as the Schenectady Community

[3]Albany Surrogate's Court documents pertaining to Estelle Golub's estate were introduced by the Division (Exhibit "X"). These documents reflected that she resided in the City and County of Albany. As Exhibit "29", petitioners introduced an Order of such court which stated that Estelle Golub was late of the County of Manatee, Florida. A Form ET-141, New York State Estate Tax Domicile Affidavit (Exhibit "30"), was filed by William Golub indicating that Estelle Golub was, at the time of her death, a domiciliary of Florida.

Foundation, Schenectady Chamber of Commerce, United Way and Temple Gates of Heaven. He testified that, after they moved to Florida, his active involvement with these organizations dropped off markedly. After moving to Florida, petitioners maintained their membership at Temple Gates of Heaven in nonresident membership status which allows for burial in the Temple cemetery. Petitioners did not join a temple or synagogue in Florida, but attended services, on occasion, at both a local temple and synagogue.

In 1990, William Golub was selected as the Schenectady Citizen of the Century for his civic and charitable contributions. In 1991, he was the recipient of the United Jewish Federation's Community Service Award. He previously received the State of Israel's highest civilian award and the B'nai B'rith's Man of the Year Award.

Prior to the years at issue, both petitioners came to have difficulty writing checks so they arranged for others to do it for them. Ed Lonczak, a Golub Corporation employee, prepared checks for William Golub. Some of petitioners' bills were sent directly to Mr. Lonczak, c/o P.O. Box 1074, Schenectady, New York 12301, which Post Office box was that of the Golub Corporation. The woman who cared for Estelle Golub often prepared checks on her behalf.

During the years at issue, petitioners employed housekeepers (Mary Parente and Etta Weilt) for their Loudonville condominium. The housekeepers came in once per week while petitioners were in Florida and five days per week while petitioners were living at the condominium. Petitioners' children also had access to the condominium. Their son, Paul, who resided in Wellington, Florida, spent considerable time at his parents' Loudonville condominium during 1986 and 1987. A letter of Paul Golub (Exhibit "28"), dated June 23, 1992, stated that he was staying at his parents' condominium in Loudonville for extended periods and that telephone bills of February 16, 1986, March 16, 1986, April 16, 1986 and May 16, 1986 contained telephone calls made almost exclusively by him. The letter stated that Paul Golub was there, in late May 1986, when his parents returned from Florida (they stayed until mid-November). Paul Golub's letter indicated that calls during the month of December 1986 were his. A telephone call appearing on the March 16, 1987 bill was apparently placed by

the maid on February 19, 1987 (this was the only long distance call appearing on the bill). A telephone call to Utah (April 9, 1987) appearing on the April 16, 1987 bill was not placed from the condominium phone (though charged to this number) and Paul Golub does not know who made the call. Calls placed on April 23 and 25, 1987 (on May 16, 1987 bill) were made by Paul Golub. Again, the letter stated that petitioners returned to New York in late May 1987 and left for Florida in mid-November (the last phone call appearing on the November 16, 1987 bill was made on November 13). William Golub testified that his son Paul's presence in the Loudonville condominium was the reason that telephone and utility bills were unusually high during portions of 1986 and 1987 when it is contended that petitioners were in Sarasota, Florida.

As indicated in Finding of Fact "8(k)", petitioners joined the Palm Aire Country Club which was adjacent to their Sarasota condominium. William Golub played golf at this country club. Petitioners also continued their membership at the Colonie Country Club (New York) where they had a social membership since, in later years, William Golub no longer played golf.

On the 1980 Federal income tax return, petitioners reported, on Schedule D thereof, a gain from the sale or exchange of a principal residence in the amount of $17,876.00. Petitioners' accountant, Ann Kenney of Coopers & Lybrand in Albany, New York, testified that the taxable gain resulted from deeming their Florida condominium as their new principal residence and that there would have been no gain had the Loudonville condominium been the new principal residence. In support of this testimony, petitioners introduced into evidence (Exhibit "46") two forms 2119 (Sale or Exchange of Principal Residence) showing the computation of taxable gain using the Florida condominium as the new principal residence (a $17,876.00 gain resulted) and using the Loudonville condominium as the new principal residence (which would have resulted in deferral of the $17,876.00 gain). It must be noted that the actual Form 2119, attached to petitioners' 1980 Federal income tax return (Exhibit "45"), did not contain a computation of the gain to be postponed and the adjusted basis of the new residence (Part II of Form 2119) as did the "dummy" forms (Exhibit "46"). As a result thereof, it can be inferred that petitioners chose not to defer their gain and adjust the basis of their new

residence and, accordingly, that petitioners did not deem the Loudonville condominium as their new principal residence. However, absent the computation on Part II of Form 2119, it cannot be affirmatively concluded that petitioners chose the Florida condominium as their new principal residence.

William Golub stated that he did not maintain day-by-day records of petitioners' whereabouts during the years at issue. He testified that tax savings (New York State personal income tax) was a consideration in petitioners' desire to change their domicile to Florida and, as a result thereof, he was aware of the 183-day requirement and made travel plans so as not to spend more than 183 days in New York during any year. Their accountant, Ms. Kenney, testified that the Division's auditor did not, prior to the initial hearing on May 4, 1992, contend that petitioners spent more than 183 days in the State of New York during 1986 and 1987. However, in response to the raising of this issue by the Division, she prepared an analysis of petitioners' whereabouts using credit card statements, New York and Florida checking account statements and cancelled checks and utility bills. This analysis indicated that petitioners spent 177 days in New York in 1986 and 179 days in New York in 1987. Ms. Kenney testified that she placed the greatest reliance on credit card bills because credit card charges indicate where the user was on the date the charge was incurred. On days where no credit card charges were incurred, she utilized other documents such as airplane tickets, ATM withdrawals and other miscellaneous records.

Ms. Kenney stated that the Golubs followed a regular routine each year, traveling to New York in May and returning to Florida in November. William Golub travelled to a convention (IPA Convention, which was the successor to the Daniel Webster Society for speech making) each August and to a Golub Corporation board meeting (held in New York) each April.

Specifically, for 1986 and 1987, Ms. Kenney's analysis revealed the following:

	1986		
	Florida	New York	Elsewhere
January	31		
February	28		
March	31		

April	27	3 (Bd. meeting 4/17)	
May	18	10 (Return 5/22)	3 (Chicago 5/3-5/7)
June		30	
July		28	3 (IPA Conv. 7/28-8/2)
August		30	1
September		30	
October		31	
November	15	15 (Leave 11/15)	
December	31		
Totals	181	177	7

1987

	Florida	New York	Elsewhere
January	28		3 (Calif. 1/16-20)
February	28		
March	31		
April	27	3 (Bd. meeting 4/23)	
May	14	14 (Return 5/18)	3 (Chicago 5/4-6)
June		28	2 (Parsippany, NJ)
July		31	
August		27	4 (IPA Conv. 8/1-6)
September		30	
October		31	
November	14	16 (Leave 11/15)	
December	31		
Totals	173	180	12

In support of her analysis of days spent within and outside New York, checks, credit card statements, telephone bills and other miscellaneous records were submitted (Exhibits "34" through "43").

In its brief, the Division specifically disputes the following days (deemed by Ms. Kenney to have been days spent outside New York) in 1986:

Day	Reason
3/25/86	Phone calls from Colonie & Schenectady billed to petitioners' Florida phone
4/15 & 4/19-5/21/86	No documentation that William Golub in NY only 4/16-18
5/18-5/21/86	No documentation as to date of arrival in NY
7/28/86	No documentation as to date of departure to IPA Convention
12/10/86	Phone call from Schenectady to Sarasota charged to petitioners' Florida phone
12/11/86	No documentation as to whereabouts

While the Division, after analysis of the records presented for 1987, does not object to any

specific days being deemed as having been spent outside New York, it asserts that, for both 1986 and 1987, petitioners failed to maintain adequate records to substantiate their whereabouts, noting that there existed gaps in the documentation.

With respect to the days in 1986 for which the Division contends that petitioners have produced insufficient proof of their absence from New York, the evidence presented reflects the following:

(a) March 25, 1986 - The letter of Paul Golub (Exhibit "28") indicates that he was at his parents' Loudonville condominium from March 17 through April 15. In addition, there was an ATM cash withdrawal from Sun Bank in Sarasota on March 24 (see, Exhibit "39") and another cash advance from Sun bank on March 26 (see, Exhibit "36").

(b) April 15, 19, 20, and 21, 1986 - Petitioners state that William Golub arrived on April 16, 1986 for a Golub Corporation board meeting to be held on April 17 and that he returned to Florida on the following day (April 18). The letter of Paul Golub (Exhibit "28") stated as follows:

> "3. Apr 16, 1986: I was there for the entire period of the bill 3/17-4/15. My father came in for two (2) nights. He came in for a Thursday Board meeting. He arrived Wednesday afternoon and departed Friday morning. Mother stayed in Florida."[4]

In paragraph 4 of the letter, Paul Golub also stated that he was at the Loudonville condominium from April 16 through May 7, 1986. There were no bank or credit card transactions other than a Visa charge on April 18, 1986 of $68.91 at Michelle's Restaurant in Schenectady, New York on April 18, 1986, a day which petitioners admit was spent in New York.

(c) May 18-21, 1986 - Petitioners allege that they arrived in New York on May 22, 1986. An affidavit of Edward R. Davis (see, Exhibit "49") states that he was retained by William Golub to drive his automobile from Sarasota to Albany in 1986. The affidavit

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[4] Official notice is taken that April 17, 1986 was a Thursday. Accordingly, a Wednesday arrival would have occurred on April 16 and a Friday departure would have occurred on April 18.

also states that Mr. Davis arrived in Albany on May 18, 1986 at which time he dropped the car off at the Golubs' Loudonville condominium, but the Golubs were not there. Mr. Davis received his check on May 22, 1986.

Petitioners' Visa statement (Exhibit "35") reflects a May 18, 1986 charge of $270.00 as "People Express Onboard, Newark, N.J." There was also a Gold Card charge (Exhibit "40") indicating a charge of $129.00 (People Express Airlines Newark, NJ) processed on May 22, 1986 (the bill does not indicate the date of the transaction).

(d) July 29, 1986 - Petitioner William Golub contends that he departed for an IPA Convention on July 28, 1986 (Ann Kenney testified to that fact). There are Visa charges (Exhibit "35") reflecting

charges in Washington, D.C. (the site of the convention) on July 29 and 30 as well as August 1.

(e) December 10 and 11, 1986 - The Division points out that the GTE bill (Exhibit "38") reflects a telephone call from Schenectady to Sarasota on December 10, 1986 which was charged to petitioners' Florida telephone number and also asserts that there is no documentation to prove petitioners' whereabouts on the following day (December 11) as well.

The letter of Paul Golub (Exhibit "28"), in paragraph 7 thereof, states that calls during the month of December 1986 were his, since he was at the Loudonville condominium and his parents were not.

In addition, there was a Visa charge of $501.00 at the Sport Shop in Sarasota on December 8, 1986 (Exhibit "34") and a Visa charge of $12.06 at a 7-11 Store in Sarasota on December 9, 1986 (Exhibit "35"). Checks dated December 12, 1986, drawn on William Golub's Sun Bank account, were written to Publix and Winn Dixie (both supermarkets) in the amounts of $50.76 and $31.50, respectively (Exhibit "21").

At the hearing, petitioners also produced letters from Milton F. Gipstein, M.D., and his wife, Evelyn M. Gipstein (sworn to on June 24, 1992), a letter from Edith O. Katz (unsworn)

and a letter from William L. Schiffman, M.D. (sworn to June 22, 1992) which state, in essence, that the above persons knew petitioners well, that petitioners were active in cultural and recreational activities in Florida and that petitioners had, on numerous occasions, referred to their home in Florida as their permanent home.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners' position may be summarized as follows:

(a) The steps taken by petitioners (see, Finding of Fact "8") were consistent with an intent to change their domicile from New York to Florida. In addition, other factors such as the failure to avail themselves of potential tax savings by declaring the Loudonville condominium as their new principal residence (see, Finding of Fact "15") and the fact that Estelle Golub took no part in the purchase of the Loudonville condominium are evidence that it was the Florida residence which they considered to be their primary residence and that they had chosen to be domiciliaries of Florida.

(b) Despite retaining some business interests in New York, William Golub was not an active participant in the management of the Golub Corporation and was merely a passive investor in certain other entities.

(c) Many of the factors relied on by the auditor were based upon erroneous information or, in some cases, a failure to ascertain all of the facts. Higher than normal telephone and utility bills at the Loudonville condominium during periods when petitioners were supposedly in Florida are explained by the fact that their children (most notably, Paul Golub) and the maids had access thereto. Forms and checks signed during periods when the Golubs contend that they were in Florida are explained by the fact that others prepared checks and paid bills on their behalf because of petitioners' inability to do so.

(d) Despite the fact that petitioners did not keep a diary or other records as to their day-to-day whereabouts, their accountant's summaries and analyses have few gaps. Where "gap" days do exist, petitioners contend that where surrounding days establish a

presence in either Florida or New York, based upon the regularity of their schedule and their advanced years, it can reasonably be inferred that such "gap" day was spent at the same location.

(e) Tax Law § 612(c)(3-a) provides that a pension exclusion is available if the annuity payments arise from contributions to a retirement plan which are deductible for Federal income tax purposes or (not and) which arise from an employer-employee relationship. The payments from the Golub Corporation per the agreement did arise from William Golub's employer-employee relationship and, therefore, $20,000.00 of each such payment must be excluded from adjusted gross income.

The Division's position may be summarized as follows:

(a) Petitioners' business connections, the value of the Loudonville condominium versus the value of the Florida condominium, regular receipt of mail in New York, unusually high telephone and utility bills at the Loudonville condominium during winter months, maintenance of bank accounts, driver's license and temple and country club membership along with certain other factors such as probate of Estelle Golub's estate in New York, involvement with and contributions to New York charities indicate that ties with New York were never severed and that petitioners did not, therefore, ever change their domicile from New York to Florida.

(b) The Division asserts that petitioners did not maintain and, therefore, have available adequate records to substantiate that they did not spend more than 183 days of each year at issue in New York, as required by 20 NYCRR 102.2(c). In addition to objecting to petitioners' analyses and summaries as to specific days being deemed as having been spent outside of New York, the Division objects to acceptance of petitioners' "gap" day theory.

(c) As to the pension exclusion, the Division contends that the amounts received were not referred to as a pension, but as deferred compensation. In addition, the income was reported on a Form W-2, not a Form W-2P, which is the form used to report pension

income. Therefore, this income was properly determined to be fully taxable and not entitled to the $20,000.00 exclusion.

CONCLUSIONS OF LAW

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

"Resident individual. A resident individual means an individual:

"(1) who is domiciled in this state, unless (A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. While there is no definition of "domicile" in the Tax Law, the Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

"(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined in the regulations at 20 NYCRR 102.2(e)(1) as:

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

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276).

In Matter of Newcomb (192 NY 238, 250-251, the Court of Appeals stated:

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.
>
> "The existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile . . . . There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under considera- tion . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention . . . . 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. The animus manendi must be actual with no animo revertendi. . . .
>
> "This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

D. The test of intent with respect to a purported new domicile has been stated to be "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). Moves to other states in which permanent residences are established do not

necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990).

In Matter of Silverman (Tax Appeals Tribunal, June 8, 1989), a case where, as in the present matter, the petitioners executed a Florida Declaration of Domicile, registered to vote in Florida and obtained a Florida driver's license, the Tribunal stated:

> "[C]ourts have recognized the 'self-serving nature of these formal declarations when used as evidence to affirmatively establish new domicile (Wilke v. Wilke, 73 AD2d 915, 917). These formal declarations are less persuasive than the informal acts of an individual's 'general habit of life' (Matter of Trowbridge, 266 NY 283, 289)."

A taxpayer may change his or her domicile without "severing all ties with New York State" (see, e.g., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990).

E. Prior to 1980, petitioners were domiciliaries and residents of New York. It is their contention that, in or about 1979 (when they entered into contracts to sell their Schenectady home and to purchase the Sarasota condominium, they abandoned their New York domicile and acquired a Florida domicile. A review of petitioners' Florida and New York contacts (see, Findings of Fact "8" and "9") clearly demonstrates the importance of attempting to ascertain their intent.

Undoubtedly, petitioners continued to maintain substantial ties to New York. They purchased a condominium in Loudonville, retained memberships in religious and social organizations, maintained bank accounts and business interests in New York and continued to be involved in certain charitable organizations in the State. In many cases, these factors and others set forth herein would weigh heavily against petitioners. However, each case is unique and it is, therefore, imperative to analyze the lifestyle of these petitioners both before and after the alleged change of domicile occurred.

Prior to September 13, 1982 (see, Finding of Fact "5"), William Golub was an active participant in the management of the Golub Corporation. But after such date, his role diminished significantly. His position became that of honorary chairman of the board and his sole involvement with the corporation was attendance at quarterly board meetings. He

continued to be involved in certain other New York business interests, but only as a passive investor (see, Matter of Sutton, supra).

While it is true that petitioners remained somewhat active in cultural and charitable organizations in and around the Capital District (New York) area, their patterns were somewhat different than most. The Golubs were extremely active in cultural and charitable efforts; William Golub received awards honoring him for his contributions (both time and money) in these areas. To require them to completely disassociate themselves from these organizations upon their retirement to Florida would be unrealistic, although William Golub testified that, after the move to Florida, petitioners' role in such organizations diminished greatly. Some of their actions (maintaining New York bank accounts, having bills sent to a New York address and maintaining certain memberships in organizations such as Temple Gates of Heaven) can be explained by their age and health. Mr. Golub also testified that he wanted to move out of New York State and become a permanent resident of Florida.

Although, by virtue of the number of days concededly spent in New York, substantial ties to the State were maintained, several factors indicate that petitioners intended to and did, in fact, consider Florida to be their primary home during (and before) the years at issue. Considerable effort was put into finding a retirement home. Petitioners visited several states before deciding on Florida. Both petitioners were active in the decision to purchase the condominium in Florida and to design improvements thereto. The Loudonville condominium was purchased without Estelle Golub even seeing it and the decision to purchase was made by William Golub only after he was convinced, by a real estate agent, that it would be extremely difficult to find a suitable place in the Capital District area to rent. The Loudonville condominium, while more costly than the Sarasota condominium, was also a major downsizing of petitioners' New York living quarters.

It must also be noted that petitioners took many steps which would substantiate their claim of a change of domicile. While some, such as executing a Florida Declaration of Domicile, registering to vote in Florida and obtaining a Florida driver's license, are merely

ministerial in nature, others, most notably their country club activities, maintaining bank accounts and cultural and social activities, corroborate the credible testimony of William Golub that petitioners desired to retire from their many business, cultural and charitable activities in New York State and to establish a new life and permanent home in Florida. There were other actions on the part of petitioners which evidence their intent, such as filing Florida tax returns, listing Florida as their address on Federal tax returns and not availing themselves of a potential tax savings which could have been achieved by deeming the Loudonville condominium as their new principal residence. Their actions to change their domicile from New York to Florida began and were completed several years prior to the years at issue. Therefore, for 1986 and 1987, it must be determined that petitioners were domiciliaries of Florida.

F. 20 NYCRR 102.2(e) defines "permanent place of abode" 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."

The Loudonville condominium was clearly a permanent place of abode maintained by petitioners in the State during 1986 and 1987. Therefore, in order to decide whether the Division properly held that petitioners were resident individuals for such years, it must be determined whether or not they spent, in the aggregate, more than 183 days in New York during either or both of these years.

20 NYCRR 102.2(c) provides, in part, as follows:

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

Admittedly, petitioners did not maintain diaries or other detailed records of their day-to-day whereabouts during 1986 and 1987. However, their accountant, Ann Kenney, did analyze checks, utility and telephone bills, bank statements, travel itineraries and credit card statements and, from these records, prepared summaries outlining petitioners' whereabouts for each day during 1986 and 1987. Petitioners concede that they spent 177 days in New York in 1986 and

180 days in New York in 1987. The Division, relying on the above provisions of 20 NYCRR 102.2(c) as well as the case of Matter of Smith v. State Tax Commn. (68 AD2d 993, 414 NYS2d 803), contends that petitioners failed to substantiate that they did not spend more than 183 days of each year at issue within the State of New York. In its brief, the Division specifically objected to certain days during 1986 being held to have been spent outside New York. The Division did not specifically object to any of the days during 1987 which petitioners asserted were spent outside New York, but made a general objection to petitioners' proof. The primary objection made by the Division relates to the existence of gaps in proof, i.e., that while documentation may exist to substantiate that petitioners were in Florida on the first and fourth days of a particular month, no proof was offered to substantiate their whereabouts on the second and third days of such month. In their briefs, both parties referred to such days as "gap" days.

As previously indicated, William Golub testified that he did not keep a diary listing his day-to-day whereabouts. He did state, however, that he was aware of the 183-day limit set forth in the New York Tax Law and, as a result thereof, petitioners' trips to New York and the amount of time spent in New York were planned according to schedules. Petitioners' accountant, Ann Kenney, testified that petitioners arrived in New York in the middle or latter portion of May and returned to Florida in the middle of November each year. She further stated that William Golub told her that, with the exception of one trip to New York each year to attend a Golub Corporation board meeting (usually a two or three-day stay in New York), no other trips to New York were made during the November to May period.

The specific days during 1986 which the Division contends that petitioners did not substantiate were spent outside New York were set forth in Findings of Fact "18" and "19". Of such days, five additional days (May 18, 19, 20, 21; July 29) must be found to have been spent in New York.

While the affidavit of Edward R. Davis (Exhibit "49") states that the Golubs were not at their Loudonville condominium on May 18, 1986 and that he received his check in payment for driving their car from Florida to New York, it does not indicate when the Golubs did, in fact,

arrive in New York. Moreover, the Visa statement (Exhibit "35") lists a charge of $270.00 as "People Express Onboard, Newark, N.J." which leads to an inference that petitioners left Florida on or before May 18, 1986, presumably to come to New York. Whether or not May 18 was a day spent in New York (or New Jersey) cannot be ascertained with certainty. However, absent evidence to the contrary, the four days of May 18 through 21, 1986 must be found to have been days spent in New York.

As for July 29, 1986, petitioners were unable to substantiate their contention that William Golub departed for the IPA Convention on July 28. Visa charges (Exhibit "35") reflect the dates July 29 through August 1. Therefore, absent airline tickets, travel itinerary or credit card charges showing Mr. Golub's presence in Washington, D.C. on July 28, it must be found that his departure occurred on July 29, thereby deeming such day as having been spent in New York.

With respect to the other days specifically objected to by the Division, the documentation (bank transactions, credit card charges and affidavit of Paul Golub) are hereby found to substantiate petitioners' contention that they were days spent outside of New York. Based upon the testimony of William Golub that no trips (other than to attend a corporate board meeting) were made to New York from mid-November to May of each year, the advanced age of petitioners and the fact that there is evidence that petitioners were in Florida both immediately before and after the day objected to by the Division, it is reasonable to assume that these days were also spent in Florida. Accordingly, by adding the five days to the number of days (177) which petitioners admit were spent in New York, it is hereby determined that, for 1986, petitioners spent 182 days in New York.

For 1987, the same type of documentation was provided by petitioners to support their contention that 180 days were spent in New York. The Division had the opportunity to review this documentation and, as it did for 1986, to make objections to specific days being deemed non-New York days. In its brief, no specific objections were made for 1987. While, clearly, the burden of proof is not on the Division in this matter, a review of the summaries and substantiating documentation for 1987 results in no changes to the 180 days which petitioners

contend were spent in New York.

Accordingly, while the days spent in New York during the years at issue are extremely close to the "more than one hundred eighty-three days" enumerated in Tax Law § 605(former [a]), it cannot be found herein that petitioners were properly taxable as resident individuals for 1986 and 1987.

G. Having deemed petitioners to have been nonresidents for the years at issue, the issue of the taxability of the payments received by petitioner William Golub must be addressed.

Tax Law former § 632, in effect for the years at issue, provided as follows:

> "New York adjusted gross income of a nonresident individual. -- (a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:
>
> "(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:
>
> "(A) his distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-seven, and
>
> "(B) where the election provided for in subsection (a) of section six hundred sixty is in effect, his pro rata share of S corporation income, loss and deduction, increased by reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, determined under section six hundred thirty-seven, and
>
> "(C) his share of estate or trust income, gain, loss and deduction, determined under section six hundred thirty-nine; and
>
> "(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner or shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty is in effect)."

Tax Law § 612(c)(3-a) provides, in pertinent part, that, in determining adjusted gross income, there shall be subtracted from Federal adjusted gross income:

> "Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, not otherwise excluded pursuant to paragraph three of this subsection, to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars, which are periodic payments attributable to personal services performed by such individual prior to his retirement from employment, which arise (i) from an employer-employee relationship or (ii) from contributions to a retirement plan which are deductible for federal income tax purposes."

20 NYCRR former 131.4(d) provided, in pertinent part, as follows:

"(d) Pensions and other retirement benefits constituting an annuity. (1) General. Where an individual formerly employed in New York State is retired from service and thereafter receives a pension or other retirement benefit attributable to his former services, the pension or retirement benefit is not taxable for New York State personal income tax purposes if the individual receiving it is a nonresident and if it constitutes an annuity as defined in paragraph (2) of this subdivision. Where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services and, if the individual receiving it is a nonresident, it is taxable for New York State personal income tax purposes to the extent that the services were performed in New York State. The term compensation for personal services as used in the foregoing sentence includes, but is not limited to, amounts received in connection with the termination of employment, amounts received upon early retirement in consideration of past services rendered, amounts received upon retirement for consultation services, and amounts received upon retirement under a covenant not to compete. For allocation rules, see section 131.20 of this Part.

"(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

"(i) It must be paid in money only, not in securities of the employer or other property.

"(ii) It must be payable at regular intervals, at least annually, for the life of the individual receiving it, or over a period not less than half of such individual's life expectancy as of the date payments begin. For payments which begin on or after July 1, 1987, an individual's life expectancy is the expected return multiple shown for the applicable age in the table entitled 'Table V. Ordinary Life Annuities -- One Life -- Expected Return Multiples,' promulgated under section 1.72-9 of the Federal Income Tax Regulations (for payments which began before July 1, 1987, an individual's life expectancy is the expected return multiple shown for the applicable age and sex in the table entitled 'Table I. Ordinary Life Annuities -- One Life -- Expected Return Multiples,' promulgated under section 1.72-9 of the Federal Income Tax Regulations).

"(iii) It must be payable:

"(a) at a rate which remains uniform during such life or period; or

"(b) at a rate which varies only with:

"(1) the fluctuation in the market value of the assets from which such benefits are payable;

"(2) the fluctuation in a specified and generally recognized cost-of-living index; or

"(3) the commencement of social security benefits; or

"(c) in such a manner that the total of the amounts payable is determinable at the annuity starting date either directly from the terms

> of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory. The term annuity starting date in the case of any contract or plan is the first day of the first period for which an amount is received as an annuity by the individual under the contract or plan.
>
> "(iv) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees." (Emphasis in original.)

An examination of the relevant portions of the agreement between the Golub Corporation and William Golub (Exhibit "T") reveals that the payments qualify as an annuity. It was to be paid in money only and at regular intervals, annually, for Mr. Golub's life. The rate ($60,000.00 per year) remained uniform and Mr. Golub's right to receive the payments was evidenced by a written instrument executed by his employer (Golub Corporation). The affidavit of Lewis Golub (Exhibit "24") states that the payments were made as retirement income and do not represent wages for services performed and were made because William Golub was never a member of the corporation's qualified retirement plans. It should also be noted that the Division's memorandum of law, at page 11 thereof, states:

> "The $60,000.00 deferred compensation provided to Mr. Golub under the terms of exhibit T meets the definition of an annuity as defined in 20 NYCRR § 131.4(d)(2)(i) and (ii), and accordingly is not personal service income subject to tax to a non resident [sic]."

Accordingly, by virtue of the foregoing and the apparent concession by the Division thereto, it must be determined that the payments (not in excess of $20,000.00 per year) should have been excluded from William Golub's New York adjusted gross income for 1986 and 1987.

H. The petition of William and Estelle Golub is granted and the notices of deficiency issued to petitioners on March 16, 1990 and March 19, 1990 are hereby cancelled.

DATED: Troy, New York
June 17, 1993

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE