STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN ERDMAN AND JOAN KEYLOUN	:	DETERMINATION DTA NO. 810741
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioners, Martin Erdman and Joan Keyloun, 1801 South Flagler Drive, West Palm Beach, Florida 33401, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1986 and 1987.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 23, 1993 at 9:15 A.M., with all briefs filed by December 20, 1993. Petitioners appeared by Stanley Hagendorf, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioners were domiciled in the State of New York during the years 1986 and 1987.

II. Whether the Division of Taxation's motion to conform the pleadings to the proof pursuant to 20 NYCRR 3000.4 should be granted and, if so, whether petitioners' income pursuant to an employment agreement with a New York corporation during the years in issue should be taxable to petitionersas nonresidents if it is found that petitioners were not domiciled in the State of New York during the years 1986 and 1987.

FINDINGS OF FACT

Petitioners, Martin Erdman and Joan Keyloun (hereinafter "Mr. Erdman" and "Mrs. Erdman"), were married on August 26, 1986 at the Supreme Court Building in Mineola, New York. Both petitioners had previously been domiciled in the Town of Manhasset, County of Nassau, State of New York. The couple met in 1984 after the deaths of both their previous spouses in 1983, and were engaged in 1985.

Mrs. Erdman, through her affidavit, claimed to have been a Florida domiciliary since 1976, when she moved from Manhasset, New York to West Palm Beach, Florida for medical reasons. During the years 1986 and 1987, Mrs. Erdman had no physical assets in New York other than title to certain real property improved by a single-family residence in Manhasset which was occupied by her daughter and her family. During the years in issue, Mrs. Erdman had a checking account in Florida, a Florida driver's license obtained in 1976 and was registered to vote in the State of Florida since 1978.

Mr. Erdman claimed, through his affidavit, to have been a Florida domiciliary since 1985, the year in which he became engaged to the former Joan Keyloun. Mr. Erdman alleged that he made his decision to move to Florida with his new wife and physically removed his belongings to West Palm Beach in 1985.

Due to Mr. Erdman's current age of 78 and his affliction with hypertension (high blood pressure), and his doctor's admonition to avoid stress and "aggravation", Martin Erdman chose not to attend the hearing in this matter. Mrs. Erdman also chose not to appear on the basis that she was needed to care for her ailing husband. Immediately preceding the hearing, Mr. Erdman was under the care of Dr. H. J. Roberts of West Palm Beach, Florida, who, by letter dated August 17, 1993, informed Mr. Erdman that although his high blood pressure had been reduced by anti-hypertensive drugs, he was advised to "remain on a salt-free diet, and to minimize stress and aggravation." Mrs. Erdman did not submit any documentation of her medical condition.

Therefore, the facts adduced at hearing were comprised of documentary evidence, the affidavits of petitioners and the testimony of the auditor, Mr. Steven Helfant.

Following an audit of petitioners for the years 1986 and 1987 for income tax purposes,

the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes for the years 1986 and 1987 and determined petitioners to be residents of the State of New York and the City of New York and asserted additional tax for both years. For the year 1986, petitioners were found to have additional tax due of $61,414.07 for the State of New York and $315.00 for the City of New York. For the year 1987, petitioners were found to have additional tax due of $38,501.98 for the State of New York and $242.10 for the City of New York.

Following the issuance of the Statement of Personal Income Tax Audit Changes, there being no agreement thereto, the Division issued a Notice of Deficiency dated September 10, 1990 setting forth the same amounts of additional tax due to both the State and City of New York for the years 1986 and 1987, together with penalty and interest.

Petitioners filed a request for conciliation conference, which was held on November 21, 1991, following which a Conciliation Order was issued on February 28, 1992 sustaining the Notice of Deficiency. This appeal followed.

For purposes of the residency issue, the parties stipulated that neither petitioner spent in excess of 183 days in New York State during the years in issue. In the year 1986, Mr. Erdman spent 156 days in the State of New York, while Mrs. Erdman was present in the State for 161 days. In the year 1987, Mr. Erdman was present in the State for 139 days, while his wife spent 143 days in New York.

The Division began an audit of petitioners in August of 1989. On August 17, 1989, the auditor mailed petitioners a residency questionnaire which was returned by Mr. Erdman on September 13, 1989. The questionnaire, completed by Mr. Erdman, stated that his residence was 1801 South Flagler Drive, West Palm Beach, Florida. Mr. Erdman conceded in the questionnaire that he owned a dwelling in New York at 1113 Cedar Drive, Manhasset Hills, New York, which he and his spouse occupied when living in the State of New York and maintained when not living in the State of New York.

Mr. Erdman stated that the house in Manhasset Hills was furnished and that the

furnishings were owned by him and that he removed only his personal belongings in 1985. As of the date of the questionnaire, September 12, 1989, Mr. Erdman listed his occupation as retired and "consultant" and that he carried on said occupation at the South Flagler Drive address in West Palm Beach, Florida. Mr. Erdman listed Krisp-Pak Corp. of Hunts Point Terminal Market in Bronx, New York as his employer and stated that he had been carrying on said business since October 15, 1985 in the State of Florida.

Mr. Erdman stated that in the year 1985 he was in the State of New York between January and October; in 1986, between the months of May and September; and in 1987, between the months of June and September. Mr. Erdman stated, and this fact is corroborated by the agreement in evidence, that he entered into an employment agreement with Krisp-Pak Corp. during the year 1986, the first year in which he claims nonresidence, and that in said agreement his mailing address listed the South Flagler Drive, West Palm Beach, Florida address.

Mr. Erdman stated that since 1986 he has voted in the State of Florida.

Mr. Erdman stated that he was a member of the Knickerbocker Yacht Club of Port Washington, New York, where he maintained a sailboat year round, and that his membership was classified neither as a resident nor nonresident. Mr. Erdman stated that he possessed a Florida driver's license and owned an automobile which was registered in the State of Florida. Mr. Erdman claimed that Florida was his permanent residence where he devoted most of his time and that he had filed an affidavit of domicile in Palm Beach County.

Martin Erdman was born on October 18, 1915 and Mrs. Erdman was born on February 20, 1929.

After receiving the questionnaire, the Division mailed petitioners a letter, dated September 26, 1989, which indicated that petitioners were being audited for the years 1986 and 1987 and that the auditor wanted certain documentation made available, to wit: bank statements and cancelled checks for the years in issue for all bank accounts; utility bills for New York and Florida residences; documentation to support all itemized deductions for the years 1986 and 1987; a copy of their 1986 and 1987 Federal income tax returns with all schedules; a

sales contract for Mr. Erdman's business; and information with respect to what changes occurred in 1986 which caused petitioners to file as nonresidents in that year, along with a housing and work history covering the years 1970 through 1989.

On January 24, 1990, the Division sent a letter to Mr. Gerald Baylin, petitioners' representative at that time, requesting missing bank statements and cancelled checks from accounts at the National Westminster Bank for 1986 and 1987, Reliance Federal Bank for 1986, Prudential-Bache for 1986, Dean Witter for 1986; itemized deductions for 1987; and certain items for 1986. Additionally, apart from these items which had already been requested and not produced, the Division asked for a schedule of days spent outside of Florida for the years in issue, the address where Mrs. Erdman stayed when in New York, the date of the marriage ceremony to Mr. Erdman, as well as how long Mr. Erdman had occupied his residence at 1113 Cedar Drive, Manhasset Hills, New York. Finally, the Division requested information with regard to whether or not Mrs. Erdman maintained an office in New York at "Keyloun, Inc." and how many days during the years in issue she performed work relating to said corporation.

Petitioners filed a nonresident income tax return for the year 1986 with the State of New York indicating their South Flagler Drive, West Palm Beach, Florida address. The return was filed under the status "married filing joint return" and indicated total income of $367,277.00, of which $69,000.00 was derived from wages, tips and other compensation reported on a wage and tax statement from Krisp-Pak Sales to Martin Erdman at his West Palm Beach, Florida address. Said wage and tax statement for 1986 indicated that it was a copy with a "corrected address". The 1986 nonresident income tax return was filed by petitioners on August 3, 1987 pursuant to a valid application for automatic extension of time to file. The 1986 return indicated the occupations of both petitioners as "consultant".

For the year 1987, petitioners filed a nonresident income tax return, once again under the filing status of "married filing joint return", and in which both claimed occupations as "consultant". Adjusted gross income was $347,410.00 and included wages, tips and other

compensation in the sum of $53,800.00 as reported on a wage and tax statement from Krisp-Pak Sales to Martin Erdman at his "New Hyde Park"[1] address. This address had been crossed out and the South Flagler Drive, West Palm Beach, Florida address written in.

It is noted that for both 1986 and 1987 petitioners had State taxes withheld or prepaid. For the year 1986, petitioners withheld or prepaid $8,354.00 in State and City income taxes, while in 1987 petitioners withheld $4,368.00 in State and City income taxes.

In response to the January 24, 1990 letter from the Division, a schedule of days spent outside of Florida during 1986 and 1987 was provided as indicated by the stipulation between the parties.

The record does not indicate where Mrs. Erdman stayed when in New York prior to her marriage to Mr. Erdman. Also, it was never disclosed in the record how long Mr. Erdman had occupied his home at 1113 Cedar Drive, Manhasset Hills. Further, there was very little information in the record with regard to Mrs. Erdman's business activities as a "consultant" during the years 1986 and 1987. Although Mrs. Erdman denied any business interests or contacts in the State of New York for the years 1986 and 1987, her

diaries and Federal tax returns raised serious doubts as to the veracity of that claim.

The U.S. individual income tax returns filed by petitioners for the years in issue shed a bit more light on the couple's circumstances during the years in issue. Once again, in 1986 petitioners listed their occupations as "consultant" and a schedule C attached to said return indicated that Mrs. Erdman earned gross income of $39,500.00 in consulting fees.

The 1986 Federal income tax return also revealed the sale of 14 shares of Krisp-Pak Sales Corp., acquired in 1964 and sold on February 28, 1986 for $1,525,087.00, of which $535,651.00 was received during 1986. The sale was reported as an installment sale.

---

[1]New Hyde Park and Manhasset Hills are used interchangeably by petitioners. The street address, 1113 Cedar Drive West, was always the same. The Deed in Division's Exhibit "U" described the property as in the Town of North Hempstead, and also referred to as "New Hyde Park". The Florida declaration of domicile executed by Mr. Erdman on November 20, 1992 set forth his prior city of residence as Manhasset Hills, N.Y.

For the year 1987, petitioners once again filed a joint U.S. Individual Income Tax Return setting forth their occupations as "consultant" and, once again, Joan Erdman indicated other income of $32,695.00 on which she computed Social Security Self-Employment Tax. However, there was no separate schedule C for her consulting business included with the 1987 return in evidence.

Also on the 1987 return, the taxable part of the installment sale is reflected in schedule D, Capital Gains and Losses, on line 14.

Although petitioners maintained several checking accounts and brokerage accounts during the years in issue, the auditor was only able to analyze a passbook account from the Independent Bank, account number 4-806421-4, for the years 1986 and 1987. The auditor was able to locate two accounts with Dean Witter, both of which listed a New York account executive, i.e., Gerald B. Kitay, 919 Third Avenue, New York, New York. Both accounts listed petitioners as having a Florida address, but one account was in the name of Martin Erdman, as trustee, for the benefit of Martin Erdman.

The majority of checking activity took place on an account in a Florida bank, The Bank of Palm Beach and Trust Company, account number 260629100. The activity for the year 1986 indicated numerous checks written throughout the year to the Knickerbocker Yacht Club (Port Washington, New York) and also the North Hempstead Country Club. There were also substantial checks written to a contracting firm by the name of Goldberg and Rodler, which did landscaping work for Mr. Erdman at the Cedar Drive address in the sum of $23,200.00, and other boat-related charges, such as checks to "Seaman's Yacht Service".

For the year 1987, there were once again several checks written to the North Hempstead County Club, the Knickerbocker Yacht Club and the Poinciana Club, a Florida club to which petitioners belonged (one check). During the year 1987, Mr. Erdman undertook substantial repairs to his home in Manhasset Hills and therefore many checks are written to contractors with regard to that renovation. More details on that renovation are set forth below.

The auditor also analyzed telephone bills both from Southern Bell and New York

Telephone. However, petitioners did not provide details of their New York Telephone bills since they only retained cover sheets. Therefore, activity could not be analyzed. The analysis of the Southern Bell bills demonstrated there were no long distance calls made between March 15 and March 25 and April 28 and May 14, 1986, and also during the months of June, July, August, September and October, with the next call being registered on November 4, 1986. The bill for December 1986 was missing.

In 1987, the Southern Bell telephone bills indicated no activity between March 5 and March 18, May 5 and May 14, May 15 and July 24, July 27 and August 11, and August 13 through October 5, 1987. The December 1987 bill was also missing.

From the bills presented, it was not possible to tell whether or not petitioners made telephone calls to their businesses in the New York area.

During the years in issue, petitioners belonged to the Knickerbocker Yacht Club which was utilized during the months of May through December 1986 and May through October 1987. During 1987, checks to Knickerbocker Yacht Club totalled $3,156.00, while in 1986 they totalled $1,893.00.

During the year 1987, petitioners issued checks to the North Hempstead Country Club in the sum of $1,496.00 and in 1986 checks in the sum of $2,892.00.

Two invoices from the Knickerbocker Yacht Club submitted in evidence for periods within the years in issue, February 1986 and February 1987, indicate an address in New Hyde Park for Mr. Erdman and state his dues as that of a "retired member". Dues for the year 1986 were set forth as $325.00, while dues for 1987 were set forth as $341.75.

A search of New York State Department of Motor Vehicles records indicated that Mr. Erdman held a type 5 license which expired on October 18, 1986.

As stated above, Mr. Erdman maintained property at 1113 Cedar Drive West, New Hyde Park, New York which he shared with his wife, Bernice Erdman, until her death on October 23, 1983. Under the Last Will and Testament of Bernice Erdman, the home was placed in trust for the couple's two sons, William Erdman of Dallas, Texas, and Bruce Erdman of Cherry Hill,

New Jersey. On March 28, 1984, Martin Erdman, as executor under the Last Will and Testament of Bernice Erdman, transferred the property to the two trustees of the trust created in the Last Will and Testament of Bernice Erdman, Martin and William Erdman.

Over the next several years, the premises underwent substantial repair and improvement, some of which was paid for by Martin Erdman. The premises remained in the trust until 1991, when the property was sold. Martin Erdman and his new wife occupied the premises during their stays in New York.

In a letter dated June 15, 1987 from attorneys, Maggin and Swan, to Mr. Leonard Lipton concerning the Bernice Erdman trust, Martin Erdman was referred to as a beneficiary under the trust created by his wife. However, there is no other credible evidence in the record to corroborate this fact. A copy of the Last Will and Testament of Bernice Erdman was not placed in evidence.

The renovations performed on the New Hyde Park property owned by the trust were personally managed and substantially paid for by Mr. Erdman.

During the years in issue, Mrs. Erdman owned premises at 75 Mayfair Lane, Manhasset, New York which were occupied by her daughter, Caryl Hughes, her husband and children.

As stated earlier, Mrs. Erdman had left New York in the mid-1970's for medical reasons, changing her residency to the State of Florida.

Mrs. Erdman received a letter from the Division concerning tax years 1976 and 1977 in which she was asked to answer 19 questions with regard to her residency and provide substantiating documentation with regard to her move.

Mrs. Erdman provided an intangible personal property tax return for the year 1978 filed with the State of Florida indicating her address at 1801 South Flagler Drive, West Palm Beach, and which set forth that she had moved to Florida in 1977.

Mrs. Erdman also demonstrated that she had received title to the condominium at 1801 South Flagler Drive, West Palm Beach, as of September 9, 1985 after the death of her former husband, Elias Keyloun.

Mrs. Erdman also filed a declaration of domicile in the State of Florida on November 18, 1992 indicating that she became a bona fide resident of the State of Florida in January 1986.

Mrs. Erdman was a customer at the First Union National Bank of Florida, Palm Beach Branch, since June 1, 1976, and had voted somewhat sporadically in the State of Florida between the years of 1978 and 1990. The Supervisor of Elections for Palm Beach County generated a record of Joan Erdman's voting record which indicated that between the years 1981 and 1987 petitioner did not vote at the polls. In fact, according to the record, Mrs. Erdman did not vote between 1981 and 1987 except for an absentee ballot recorded on November 6, 1984.

Elias Keyloun, Joan Erdman's former husband, applied for a tax exemption for the premises at 1801 South Flagler Drive in West Palm Beach on February 14, 1977.

Martin Erdman filed a declaration of domicile with the State of Florida indicating that he became a bona fide resident of the State of Florida in January 1986 and that he resides at 1801 South Flagler Drive in West Palm Beach. The declaration was sworn to on November 20, 1992.

The record from the Supervisor of Elections does not indicate that Mr. Erdman voted in the State of Florida during the years in issue.

Mr. Erdman purchased a 1986 Honda Prelude in the State of Florida.

Mr. and Mrs. Erdman filed Florida intangible tax returns for the years 1986, 1987, 1988 and 1989. Although the 1986 return is not in evidence, the returns for 1987, 1988 and 1989 were submitted by petitioners and indicate that they had been prepared by the firm of Irving Topf Co. of Teaneck, New Jersey.

Martin Erdman executed a will and trust document on April 30, 1987 which indicated that he was a resident of Palm Beach County, Florida.

During the years in issue, the real property tax due on the Erdman trust property referred to on the tax bill and in the deed description as "9 Herrick's" was addressed to Bruce and William Erdman, listing an address of 1603 South Bowling Green Drive, Cherry Hill, New Jersey.

Martin Erdman opened an account with First Union National Bank of Florida, Palm Beach Branch, on October 15, 1985. He maintained telephone service with Southern Bell since October 22, 1985 at 1801 South Flagler Drive, West Palm Beach, and held a Florida driver's license since October 23, 1985.

As mentioned above, Martin Erdman had been associated with Krisp-Pak Sales Corp. for many years prior to the years in issue. On May 1, 1986, Martin Erdman sold his shares of common stock in Krisp-Pak Sales Corp. to the corporation. Terms of the sale per the closing agreement were as follows:

1. Transfer of the stock, investment and brokerage account		$ 536,634.00
Less satisfaction of the claim of the Estate of Benjamin Koondel		169,698.85
Balance		$ 366,935.15
2. Balance of book value and Federal tax refund	91,855.00	
3. Monthly pay-out for stock		1,000,000.00
Total		$1,458,790.15

The book value pay-out is based on a monthly payment commencing June 1, 1986 in the amount of $1,524.85 and a similar payment on the first of each and every month thereafter up to and including May 1, 1993 which payment includes interest at a rate of 10% per annum as per schedule attached.

Principal		$ 91,855.00
Interest for seven years	$ 36,248.65	
Total		$128,103.65

The $1,000,000.00 pay-out will produce as per schedule attached.

Principal		$1,000,000.00
Interest for seven years		$ 394,498.82
Total		$1,394,498.82
Total sales price including interest	$1,889.537.62	

The 1986 Federal income tax return filed by petitioners indicated on schedule 6252, Computation of Installment Sale Income, a sale of 14 shares of Krisp-Pak Sales Corp. for the selling price, including mortgages and other indebtedness, of $1,525,087.00. The date of sale

listed on said schedule was February 28, 1986.

The 1985 Corporation Franchise Tax Report, Form CT-3, filed with the State of New York on behalf of Krisp-Pak Sales Corp. indicated that Martin Erdman was the president, receiving salary and compensation in the sum of $104,000.00. John Garcia and Millie Garcia were listed as vice-president and treasurer, respectively, and were the ultimate purchasers of the business. The Federal income tax return filed on behalf of Krisp-Pak Sales Corp. indicated these same officers and compensation. The Federal return for the period ended February 28, 1987 indicates that Martin Erdman no longer devoted his full time to the business, only "part percent", and his compensation was listed as $61,000.00. The Federal return for the period ended February 29, 1988 indicated the same participation by Mr. Erdman as in 1987, but his compensation was listed as $52,000.00. For the period ended February 28, 1990, the Federal income tax return for Krisp-Pak Sales Corp. indicated that Mr. Erdman was still spending part of his time devoted to the business and earning a salary of $52,000.00.

On May 1, 1986, Mr. Erdman and Krisp-Pak Sales Corp. entered into an employment agreement whereby Mr. Erdman was employed by the corporation as its "president" for the period May 1, 1986 through April 30, 1993 with duties to be assigned by the board of directors from time to time. The compensation set forth in the agreement was $1,000.00 per week for a total of $364,000.00 and a final payment on April 30, 1993 of $7,113.00. The agreement further provided that in the event the corporation or its assets were liquidated or sold during the term of the agreement, Mr. Erdman or his representatives would be paid the balance of the salary up to and including the April 30, 1993 payment. The agreement was deemed not to be in lieu of any rights, benefits or privileges to which Mr. Erdman was entitled as an employee of the corporation under any retirement, pension, profit sharing, insurance or any other plan he may have enjoyed. In addition to the compensation received, Mr. Erdman was to receive a new car to be replaced from time to time and also travel and entertainment expenses not to exceed $10,000.00 per year or 12-month period between May 1, 1986 and April 30, 1993. The agreement further provided that, in the event of Mr. Erdman's death or disability, the payments

were required to be made by the corporation for the entire term of the employment agreement with payments to be made to Mr. Erdman's legal representatives.

The agreement further stated that Mr. Erdman could live in any of the 50 states of the United States and was not required as a condition of employment to conduct his business at the New York City Terminal Market in Bronx, New York. In fact, the agreement specifically deemed Mr. Erdman in compliance with the agreement if he conducted his business by mail or telephone. The notice provision contained in the employment agreement listed Mr. Erdman's address as 1801 South Flagler Drive, West Palm Beach, Florida 33401, subject to change upon written notice.

CONCLUSIONS OF LAW

A. Tax Law § 605 (former [a]),[2] in effect for the years at issue, provided, in pertinent part, 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 (compare, SCPA 103[15]), the Division's regulations (20 NYCRR former 102.2[d]) provide, in pertinent part:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard,

---

[2]Pursuant to Laws of 1987 (ch 28), said section was amended and renumbered Tax Law § 605(b).

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 former 102.2(e)(1) as:

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

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile . . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person

> whose status is under consideration . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a 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 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). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990). The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra at 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." While petitioners made certain formal declarations that they changed their domicile (e.g., Florida Declaration of Domicile, voter and car registration), such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (see, Matter of Silverman, Tax Appeals Tribunal, June 8, 1989, citing Matter of Trowbridge, 266 NY 283, 289). 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). The question is whether petitioners' overall conduct contradicted their formal declarations of a change of domicile to Florida.

E. As is evident from the cases cited above, in determining an individual's domicile the facts and circumstances of the case are paramount. As stated in Matter of Silverman (supra), while certain declarations may evidence a change of domicile, for example, a Florida

declaration of domicile, car registration, voter registration (neither Mr. nor Mrs. Erdman voted in Florida during the years in issue) or even a driver's license, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life." In the instant matter, that general habit of life does not support the proposition that petitioners were domiciliaries of Florida for the years at issue. The mere move to another state in which a permanent residence is established does not necessarily provide the clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, supra).

There were too many unanswered questions and contradictory facts in the record to support a determination that petitioners had changed their domicile. Petitioners spent a considerable amount of time in both 1986 and 1987 in the State of New York and during both years, as evidenced by the diaries, petitioners spent a considerable amount of time vacationing out of the country and in states other than New York and Florida. They also continued to reside in New York between approximately May and October of each year in a house where Martin Erdman had lived for many years prior to the years in issue. These facts do not imply a decisive move to the State of Florida in 1985 or in 1986 as contended by petitioners, nor do they convey a sense of allegiance to the State of Florida. The club dues paid to the Knickerbocker Yacht Club and the North Hempstead Country Club were substantial during the years 1986 and 1987 and those social ties appear stronger than any that were established in the State of Florida.

The documentation does not support any other conclusion but that Martin Erdman did not sell his shares in Krisp-Pak Sales Corp. until May of 1986 and then, in a separate document for separate consideration, accepted the position of president, his former position, which entailed consulting duties with the corporation throughout the years in issue. Although there is no credible evidence of his services or activities with regard to Krisp-Pak Sales Corp. during the years in issue after May 1, 1986, the absence of telephone records from New York and other circumstantial evidence other than unsupported assertions in affidavits, cannot be construed favorably towards a finding of a Florida domicile. Petitioners did not do enough to clarify Mr. Erdman's relationship with Krisp-Pak.

Although petitioners were married in August of 1986, an event which might have been the gateway to a new life in a new location, their marriage took place in Mineola, New York and their lives did not appreciably change from their lives prior to the marriage. They still maintained the same "general habit of life", returning to New York for substantial amounts of time during the summer months, and pursuing social interests at the Knickerbocker Yacht Club, where Mr. Erdman maintained a sailboat year round, and the North Hempstead Country Club.

Mr. Erdman's continued dominion and control over his residence in New Hyde Park during the years in issue adds further support for this conclusion. Although title to the property passed to a trust under which he may or may not have been a beneficiary, he certainly benefited as trustee in his liberal use of the premises and control over its renovation.

The record is not complete with regard to Mrs. Erdman's business activities in the New York City vicinity. The small amount of documentation raises more questions than it answers and, once again, underscores petitioners' inability to demonstrate by clear and convincing evidence that they had severed their ties with the State of New York and acquired a new domicile in the State of Florida.

F. In Matter of Sutton (supra), Mr. Sutton retained a rent-controlled apartment in New York City to provide inexpensive accommodations for him on visits to New York and also had "passive" business interests in three retail stores in New York. He derived his income from his businesses, but did not manage them day to day. It was clear in that case that Mr. Sutton was dependent on that income to live. The Tax Appeals Tribunal found Mr. Sutton to be domiciled in Florida, holding that the severance of his business ties to New York was so definite and pronounced that Florida was considered his true domicile. In Matter of Kartiganer (Tax Appeals Tribunal, October 17, 1991 confirmed 194 AD2d 879, 599 NYS2d 312), Mr. Kartiganer was not found to have relinquished his active business interests in New York and, in fact, spent a considerable amount of his time in New York overseeing contracts and giving advice on past and future projects. He was an active consultant in constant contact with his office by telephone and courier service and was available to his firm on an as-needed basis.

Mr. Kartiganer was found not to have relinquished his New York domicile.

The facts of the instant matter were not developed to an extent that either Sutton or Kartiganer can be found on point. The employment agreement Mr. Erdman signed with the corporation had the potential of creating a situation such as the one which appeared in Kartiganer, but facts were not adduced which would clearly distinguish him from that case and, therefore, he has once again failed to provide the clear and convincing evidence necessary to demonstrate a change in domicile.

G. Petitioners argued that there is no authority requiring them to testify, citing the Tribunal's regulation at 20 NYCRR 3000.8, which provides for submission of a controversy for determination without a hearing.

Further, it is undisputed that 20 NYCRR 3000.10(d)(1) provides that "affidavits as to relevant facts may be received, for whatever value they may have, in lieu of oral testimony of the persons making such affidavits." The Appellate Division has recently commented on the inferences which may be drawn from the submission of affidavits:

> "[I]t was arbitrary and capricious to penalize petitioner for using affidavits in lieu of oral testimony when the Department's regulations authorize such procedure" (Matter of Orvis Company v. Tax Appeals Tribunal, ___ AD2d ___ [3rd Dept, May 26, 1994]).

The standard of proof in domicile matters is clear and convincing evidence (Matter of Zinn v. Tully, supra). Petitioners submitted two affidavits and attachments, while the Division submitted 27 exhibits and the testimony of their auditor who performed the audit. They did not meet their burden. As noted in the discussion above, the record reflects several inconsistencies in the facts which were never resolved and prevent a conclusion that petitioners changed their domicile during the years in issue.

H. The Division made a motion pursuant to 20 NYCRR 3000.4(c) to amend the pleadings to conform to the proof. The regulation at 20 NYCRR 3000.4(c) provides, in pertinent part, as follows:

> "(c) Amended pleadings. Either party may amend a pleading once without leave, within 20 days after its service, or at any time before the period for responding to it expires, or within 20 days after service of a pleading responding to

> it. After such time, a pleading may be amended only by consent of the supervising administrative law judge or the administrative law judge or presiding officer assigned to the matter. Leave shall be freely given upon such terms as may be just, including the granting of continuances. The administrative law judge or presiding officer may permit pleadings to be amended before the hearing is concluded to conform them to the evidence upon such terms as may be just including the granting of continuances. No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading."

The Division is seeking to tax income included in petitioners' Federal adjusted gross income and reported on their New York State income tax returns for the years 1986 and 1987. The Division raised this theory at hearing in the event that petitioners are determined to be nonresidents of New York State. As set forth in the facts, each of the petitioners describe their occupation as "consultant" and reported earnings or wages earned in those occupations during the years in issue. Additionally, the W-2's for Mr. Erdman for those years indicate that State and local income taxes had been withheld.

Although the regulation at 20 NYCRR 3000.4(c) prohibits an amended pleading from reviving a point of controversy which has been barred by the time limitations of the Tax Law, said provision is inapplicable here. The Division merely asserted an alternative theory prior to hearing, thereby allowing petitioners to respond at hearing and in their briefs, upon which petitioners would owe additional tax on the same income subject to tax as residents for the same years, 1986 and 1987. (See, Matter of Clark, Tax Appeals Tribunal, September 14, 1992.) If petitioners were found not to be domiciled in the State of New York, then their New York earned income would still be subject to New York tax under Tax Law § 631, the Administrative Code of the City of New York §11-1902[3] and additional tax would be due and owing since petitioners paid no tax on their New York earned income during the years 1986 and 1987 (referring to the nonresident income tax returns filed by petitioners for those years where petitioners requested a refund of all taxes withheld and calculated no tax due). Also, the same

---

[3]Petitioners were assessed tax on the notice in issue as nonresidents. Therefore, the theory of assessment for New York City nonresident earnings tax has not changed and petitioners' claims of surprise or that the statute of limitations bars the amendment are without merit.

proof of New York earned income was needed under both theories, i.e., petitioners needed to demonstrate that their income from New York sources was not New York earned income. They did not carry this burden. The Division, by its motion to amend at hearing, has satisfied the first fundamental of the process (Matter of Murray v. Murphy, 24 NY2d 150, 299 NYS2d 175), and asserted the second ground for its action in a timely manner (see, Matter of Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988).

Petitioners have not been prejudiced by this amendment since they have placed in evidence Mr. Erdman's employment agreement with Krisp-Pak Sales Corp. and also Mrs. Erdman's schedule C with regard to her sole proprietorship. There is a clear implication that New York source income existed and was subject to taxation, regardless of whether or not they were

successful in proving their Florida domicile. In fact, the New York City tax was always asserted as a nonresident earnings tax.

The employment agreement raised many questions which were left unanswered by petitioners, one of which was exactly what services were performed by Mr. Erdman for the corporation during the years in issue, if any, and it was incumbent upon petitioners to carry their burden of demonstrating that he performed no services and that his compensation was not New York source income (20 NYCRR 3000.10[d][4]; Tax Law § 689[e]). The same problem of proof arose with respect to Mrs. Erdman's income. She clearly had schedule C income but the record has very few facts other than those revealed in the tax returns and intimated in her diaries.

Therefore, even though it is determined herein that petitioners were domiciled in the State of New York during the years 1986 and 1987, if they were found to be nonresidents during those years, they would have been liable for the tax on their New York earnings which would be items of New York source income to a nonresident (see, Tax Law § 631; 20 NYCRR former 131.18[a]). In this case, petitioners are liable for the New York City nonresident earnings tax

for their failure to prove that this earned income was not earned in New York City (Administrative Code of the City of New York § 11-1902).

I. Given the facts adduced herein, penalties were properly asserted pursuant to Tax Law § 685(b), wherein it is stated that if any part of a deficiency is due to negligence or intentional disregard of this article or rules and regulations hereunder, there shall be added to the tax an amount equal to 5% of the deficiency. The issue of domicile is a legal one, albeit driven by the facts of the case. Petitioners' failure to pay the tax herein was due to a different legal interpretation from that of the Division. The failure to pay tax due to a different legal interpretation of a statute need not be considered reasonable cause. If it were so considered, the Division would rarely be entitled to levy such penalties (Matter of Auerbach v. State Tax Commn., Sup Ct, Albany County, March 27, 1987, Williams, J., affd 147 AD2d 390, 536 NYS2d 557). Since petitioners did not prove that they had changed domicile, their legal interpretation was in error, and the negligence penalty imposed pursuant to Tax Law § 685(b) was proper.

J. The petition of Martin Erdman and Joan Keyloun is denied and the Notice of Deficiency, dated September 10, 1990, is sustained.

DATED: Troy, New York
June 16, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE