STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES J. HULL, JR. AND MARY HULL	:	DETERMINATION DTA NO. 810833
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1988, 1989 and 1990.	:	

Petitioners, Charles J. Hull, Jr. and Mary Hull, 218 Edgemere Way South, Naples, Florida 33999, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1988, 1989 and 1990.

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 May 24, 1993 at 10:00 A.M., with all briefs filed by September 22, 1993. Petitioners appeared by Harris, Beach & Wilcox (Sherman F. Levey, Esq., and Paul Reichel, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donna Gardiner, Esq., of counsel).

ISSUES

I. Whether petitioners were residents of New York State as defined by Tax Law § 605(b)(1) as individuals domiciled in the State of New York, or individuals not domiciled in the State of New York but who maintained a permanent place of abode in the State of New York and spent in the aggregate more than 183 days of each of the taxable years at issue in the State of New York.

II. Whether the penalties asserted by the Division of Taxation pursuant to Tax Law § 685(a), (b), and (p) should be abated due to petitioners' demonstration that their failure to pay the tax or failure to file a return was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

Petitioners, Charles J. Hull, Jr. and Mary Hull, were life-long residents of Rochester,

New York. Up until tax year 1988, the Hulls filed New York State resident income tax returns in New York. In tax year 1988, the Hulls filed as part-year residents. Thereafter, considering themselves domiciled in the State of Florida, petitioners filed no further New York State returns.

Petitioners were married in August 1979, the second marriage for both Mr. and Mrs. Hull. Mrs. Hull had two stepsons from her prior marriage, one of whom resided in the State of California and the other in the State of New Hampshire. Mr. Hull had four children by his prior marriage, three daughters and one son. Two of his daughters resided in the State of Florida during the years in issue, while his son resided in the State of Pennsylvania and then in Florida during the years in issue. A fourth child, a daughter, is now deceased, but resided in Rochester, New York during the relevant period.

After initially building a large 3,000-square foot home in the Rochester area in 1980, petitioners sold that home and purchased a condominium located at 31 Tobey Brook in the Rochester suburb of Pittsford, New York in 1983. They maintained this residence throughout the audit period.

Mr. Hull retired from the Eastman Kodak Company in 1980 after 35 years of service. Mrs. Hull had not been employed since approximately 1956. Following Mr. Hull's retirement, petitioners were able to travel quite extensively, including visits to the State of Florida. Petitioners were frequently accompanied on these trips by Mrs. Hull's father. The frequency of Mrs. Hull's father's travels decreased after his entrance into an Episcopal Church Home in 1982. Although Mrs. Hull's father was permitted to travel, his declining health during the mid-1980's placed more and more restrictions on his travel plans. Additionally, her father could not be away from the Episcopal Church Home for more than 30 days without risking losing his bed at the home. These factors limited the amount of time petitioners could spend on their trips as well.

During 1986, Mrs. Hull's father purchased a club cottage at the "PGA National" in Palm Beach Gardens, Florida. It was a small cottage, approximately 1,300 square feet in area.

In 1987, petitioners purchased a townhouse at "PGA National" in Palm Beach Gardens which was approximately 1,600 square feet.

Petitioners discussed the feasibility of moving to the State of Florida, but never felt comfortable with that decision while Mrs. Hull's father was still living. Therefore, no decision was made prior to Mrs. Hull's father's death in February 1988.

On March 28, 1988, petitioners flew to Florida and, on Tuesday, March 29, 1988, petitioner Charles J. Hull, Jr. filed a Declaration of Domicile, formally declaring his domicile to be in the State of Florida and further alleging that he became a bona fide resident of the State of Florida on March 29, 1988. Mr. Hull listed his residence as 68 Balfour Road East, Palm Beach Gardens, Florida.

On April 13, 1988, petitioners returned to New York and remained until they flew to Florida again on June 1, 1988, returning to New York by way of Boston, Massachusetts, on Monday, June 6, 1988. Petitioners returned to Florida on Saturday, July 16, once again by air, and returned to New York on July 25. It was during this trip to Florida in July 1988 that petitioners purchased a single-family residence located at 16 Balfour Road West, Palm Beach Gardens, Florida, approximately 3,000 square feet in area and costing approximately $330,000.00. Petitioners did not return to Florida again until October 24, 1988, and remained there the rest of the year.

With regard to petitioners' condominium in Rochester, petitioners obtained several appraisals of the property in 1988, but were unhappy with the appraisal values in the relatively depressed Rochester market. Although petitioners' original purchase price for the property was approximately $230,000.00, and improvements had cost them approximately $40,000.00, the market value as established by the appraisals was only between $220,000.00 and $230,000.00.

Petitioners did not list the property for sale with a real estate agent or agency, but chose to market the property themselves when they were in Rochester (Pittsford). Additionally, petitioners realized that they spent a good amount of time in Rochester during the year and owned two dogs which made obtaining a rental more difficult. Therefore, they were in no rush

to sell their condominium in Rochester, New York. Although petitioners testified that they received some serious inquiries, none of them documented, the property did not sell until March 15, 1993.[1]

During their time away from their condominium in Rochester, petitioners maintained an alarm system and telephone service.

Besides filing a Certificate of Domicile, petitioners opened a bank account in Florida, obtained drivers licenses in the State of Florida, transferred their church affiliation card to an Episcopal church in Florida (although there was no documentation of this) and joined the PGA National Country Club in Palm Beach Gardens. They also registered to vote in Florida and voted in Florida in each of the years in issue. Petitioners retained memberships in social clubs in the Rochester area, particularly the Monroe Golf Club, because of their intent to return to Rochester every summer. Their original intent was to live in Florida between October 15 and May 15 of each year.

Petitioners each retained bank accounts in Rochester for various reasons. Mrs. Hull, the beneficiary of a trust from her first husband, retained a checking account at the Chase Lincoln First Bank where the trust fund was located for the purpose of making deposits and other transfers. Additionally, petitioners stated they retained a bank in Rochester for their convenience, since they spent so much time there during the summer months.

Although petitioners retained these accounts in Rochester, they moved their safe deposit box to the Barnett Bank in Florida, where bearer bonds and other valuables were kept during part of the years in issue. Mr. Hull testified that he had his retirement annuity directly deposited to a Florida bank.

Petitioners' checking account at the Barnett Bank in Palm Beach Gardens, Florida, and

[1]The record is not clear with respect to the exact period of time for which the condominium was offered for sale. No brokers were involved and no documentation was submitted. The record is not clear as to the degree of effort made to sell the house. Mrs. Hull testified they actively marketed it in the summer while they were in Rochester.

the checking account in Mrs. Hull's name alone at Chase Lincoln First Bank in Rochester, indicated cyclical activity evidencing the amount of time spent in the two locations by petitioners during the years in issue. The number of checks written from each of the two accounts is approximately equal throughout the audit period.

According to New York State Department of Motor Vehicle records, both petitioners surrendered their New York State drivers licenses to the State of Florida on January 19, 1989.

In 1988, Mrs. Hull reported a capital gain of $938,637.00 on the sale of stock in the Irving Trust Company. Mrs. Hull received this stock from her father over a period years during his lifetime and, after a tender offer during 1988, Mrs. Hull sold the stock on October 11 and 17, 1988.

After Mr. Hull's retirement from Eastman Kodak in 1988, the Hulls had no formal business ties with the State of New York other than retirement annuities and Mrs. Hull's trust account at the Chase Lincoln First Bank.

Mr. Hull has had a storied medical history. In 1983, he suffered an aortic aneurysm, requiring open-heart surgery. In 1985, he suffered a popliteal aneurysm, also requiring an operation. In 1986, he suffered from internal bleeding, resulting in the removal of part of his stomach and intestine and later that same year contracted Guilliam-Barre syndrome, a neuromuscular condition which caused paralysis. After suffering from this syndrome for two years, he was able to gain back approximately 90% of his physical strength and coordination. Mr. Hull testified that with the Guilliam-Barre syndrome, his body does not function well under 50 degrees.

Due to Mr. Hull's medical history, it was necessary for him to locate an internist in the State of Florida and he located, by referral, one Dr. Moskowitz. Mrs. Hull also utilized the services of a dermatologist and both utilized the services of a dentist while in Florida. It was noted that the couple never returned to Rochester for any medical procedure that could be done in Florida while they were in Florida. However, checks indicated that doctors were used in the Rochester area during the period in issue.

While in Florida, petitioners participated in Kiwanis Club activities, the Naples Council of World Affairs, the Round Table in Palm Beach, the Pundits in Palm Beach, as well as making their new Episcopal church affiliation in Palm Beach.

Petitioners consulted with attorneys concerning effecting a change in domicile prior to 1988 and relied upon their advice when trying to effect the change. They always hired a tax return preparer and assumed that the returns were prepared accurately and in a professional manner. The Hulls testified that they made a full disclosure of facts pertinent to the preparation of their Federal and State income tax returns to their paid preparer for all years in issue.

From the Department of Motor Vehicles records in evidence, the buttressing testimony of the auditor and the checking account analysis, it was determined that petitioners owned a 1983 Buick, the New York registration for which expired on February 1, 1989; a 1985 Chevrolet with a New York registration which expired June 4, 1989; a 1987 Buick with a New York registration that expired on November 15, 1989; a 1987 Chevrolet with a New York registration that expired on June 26, 1989; and a recreational vehicle with a New York registration that expired on June 29, 1990. The recreational vehicle, purchased in Rochester and registered in New York State, was used to transport personal items to Florida, including silver, a fur jacket, crystal, pots and pans and artwork. However, it was noted by Mrs. Hull, that petitioners were "blessed" with household items of three different families -- enough to furnish more than one residence.

On audit, petitioners were determined to have maintained certain memberships in Rochester during the years in issue at the Faculty Club of the University of Rochester, the Rochester Yacht Club, the Midtown Tennis Club, the Rochester Wellsley Club, the Genesee Figure Skating Club and the Retired Professionals Society of Rochester. The auditor confirmed her findings with regard to these memberships through third-party confirmation and checking account analysis. The auditor determined that petitioners maintained their "active" membership status at the Faculty Club through the end of 1990; at the Rochester Yacht Club through the end of 1989; at the Midtown Tennis Club through mid-1990; at the Rochester Wellsley Club

through April 1991; at the Genesee Figure Skating Club through October 1991; and at the Retired Professionals Society through July 1989. There was also evidence that petitioners had affiliation with the YMCA, Historic Pittsford, Rochester Museum and Science Center, the Automobile Club of Rochester and the Finger Lakes Chapter of the Family Motor Coach Association.

The auditor requested, on more than one occasion, a list of clubs, organizations and affiliates with which petitioners maintained an active status, but received no response.

Petitioners filed an audit questionnaire with regard to tax years 1988, 1989 and 1990 dated June 1991 in which they asserted that they had registered all of their motor vehicles in Florida and changed their drivers licenses to Florida as of March 1988; that they had switched various social memberships from Rochester, such as the Wellsley Club, the Kiwanis Club, the Moose, etc. They also stated that they had switched most of their banking relationships to the Barnett Bank in Florida, other than investment management and tax return preparation services which had previously been provided by the Central Trust Company of Rochester, New York and a checking account at the Chase Lincoln First Bank which they said was used only on their occasional visits to Rochester.

In the same questionnaire, petitioners stated that they had switched their membership from Christ Church in Pittsford, New York to Church of Bethesda-By-The-Sea as of March 1988. However, upon third-party source confirmation, the auditor found that petitioners had not been members of Christ Church in Pittsford for approximately seven years. No further documentation was provided to resolve this confusion.

Upon further investigation, the auditor determined that petitioners maintained regular membership status at the Monroe Golf Club, the Tennis Club of Rochester and the English Speaking Union.

Petitioners asserted that substantially all of their check-paying was administered through their Florida checking account. However, an analysis of the number of checks written from the Chase Lincoln First account in Rochester and the Barnett Bank in Florida indicated that usage

was evenly distributed.

On September 17, 1991, approximately three months after petitioners submitted their audit questionnaire, the auditor met with their representative at his Rochester office at which time a document listing days out of New York was presented to the auditor along with three appointment books, one for each of the years in issue, and checking account statements from the Barnett Bank and the Chase Lincoln First Bank. From the auditor's review of the account statements it became obvious that checks were drawn on the two accounts in cycles depending upon where petitioners were residing. At this meeting, the auditor was not presented with, although she requested, all cancelled checks, a list of all organizations, affiliations and clubs to which petitioners belonged in New York State during the years in issue and all credit card statements. Petitioners' representative was given until September 25, 1991 to produce these documents at the representative's office. On that date, petitioners' representative, Sherman Levey, Esq., submitted cancelled checks for the audit years, as well as charge account statements. He did not present a list of organizations and affiliations that petitioners belonged to during the period under audit. Mr. Levey stated that he would submit this list at the next meeting he had with the auditor. However, on October 10, 1991, the next meeting between the two, no such list of affiliations was produced. Yet another request for these affiliations with the various organizations, associations and memberships maintained by petitioners during the audit period was made on October 15, 1991 and petitioners' representative responded by telling the auditor that he would produce the requested information by October 23, but added that their wills would not be produced because of confidential material they contained. That meeting never took place, but a meeting did take place on November 13, 1991 between petitioners' representative, the auditor and her team leader. At that time, the audit findings, conclusions and determination to hold petitioners as New York domiciliaries and statutory residents were explained to the representative. No further substantiation of petitioners' affiliations with clubs, organizations, etc. was made.

With regard to the issue of statutory residence, it is critical that petitioners establish the

number of days they spent in the State of New York. Petitioners assert that they spent 187 days outside of New York State during the 1988, and supplied the following chart to substantiate their assertion:

1988

Days Out of State	Date	Location
19	January 5 - 23	Florida
11	February 14 - 25	Florida
16	March 4 - 14	Vail, Colorado
	March 19 - 23	Westminster, Maryland including trip home
17	March 28 - April 13	Florida
4	April 22 - April 25	New Hampshire
9	May 19 - May 27	Arizona
5	June 1 - June 5	Wellesley, Mass.
10	July 16 - July 25	Florida
3	August 19 - August 22	Pennsylvania
35	August 31 - October 4	N.H., Maine, Atlantic Province Canada
68	October 25 - December 31	Florida
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It is noted that petitioners erroneously counted days of departure from and arrival in New York as days out of state. Additionally, the Division did not accept certain dates reported by petitioners because they did not correspond with entries in the appointment books. Those dates will be discussed more fully below.

Petitioners were able to recreate the years 1988, 1989 and 1990 through the use of calendars referred to as "week at a glance" appointment books kept by Mrs. Hull for each of the years in issue.

The Division disagreed with petitioners' characterization of the appointment book records and determined that petitioners had spent 196 days in New York State during 1988. With regard to petitioners' trip to Florida, which they stated began on February 12, 1988 in Rochester and ended with their return to Rochester on February 23, 1988, the Division noted that the appointment book indicated February 14 as the departure date from Rochester, not February 12. Additionally, the Division found charges made on petitioners' Visa card with Chase Lincoln First in Pittsford, New York on February 21 and 22, 1988 indicating a presence

in New York on those dates.

It is noted that petitioners testified that they decided to leave two days earlier for Florida, on February 12, 1988, due to a party they wished to attend in Florida. However, no flight information exists under the February 12, 1988 entry as it does for February 14, 1988. Additionally, petitioners testified that all of their children were authorized and had access to use their Chase Lincoln First Visa card. However, no corroborating evidence was submitted of this fact.

As noted above, petitioners indicated that they had left Rochester on April 22, 1988 for a trip to New Hampshire from which they returned to New York State on April 27, 1988. The Division found Chase Lincoln First Visa charges on petitioners' account made in Rochester on April 25.

The auditor indicated that the Division did look at the diaries for the years 1989 and 1990, but they were unable, due to the information in the documents submitted, to confirm or disaffirm days in or out of the State for those years. Essentially, the Division conceded petitioners' records or appointment books for the years 1989 and 1990 which indicated that petitioners spent only 136 days in the State of New York during 1989 and 137 days in the State in 1990.

It is noted that on at least three occasions in the appointment books Mrs. Hull referred to returning to Rochester as "home", to wit: Tuesday, April 26, 1988 (erased, but legible); Saturday, April 29, 1989; and again on Saturday and Sunday, May 19 and 20, 1990, Mrs. Hull refers to returning to Rochester with the simple word "home".

By careful analysis of the checks written by petitioners during the audit period, the Division determined that petitioners continued to maintain relationships with New York State doctors, dentists, accountants, lawyers and other professionals. These same records indicated that petitioners utilized two trust accounts and investment management services in New York State and continued to maintain a major checking account in New York State despite their claims to the contrary. They continued to have their automobiles serviced and pet care provided in New York State.

At the conclusion of the audit, the auditor determined that petitioners were domiciliaries and statutory residents for the years 1988, 1989 and 1990. Additionally, the Division imposed Tax Law § 685(b) negligence penalty for the following reasons:

(a) Petitioners claim that they had not maintained certain club memberships, but third-party information disaffirmed these assertions.

(b) Petitioners claim that they had changed membership status to limited membership, but third-party information disaffirmed this assertion as well.

(c) The Division thought that petitioners' assertion of switching memberships to Florida was misleading and that petitioners never provided a list of all New York State memberships or statuses during the course of the audit.

(d) Although petitioners claim to have switched church membership, the information provided was misleading and disaffirmed by third-party information.

(e) Petitioners claim that almost substantially all of their check-paying was done from their Barnett Bank in Florida, but a check analysis disaffirmed this assertion as well.

(f) Although petitioners claimed to have surrendered their New York licenses upon alleged change of domicile, it was found that they did not do so until ten months after they declared Florida as their new domicile under Declaration of Domicile with the State of Florida.

(g) Although petitioners asserted that they had registered all of their motor vehicles in Florida upon changing their domicile, it was found that at least three registrations were made after the date of their declaration of intent to change domicile.

The Division imposed Tax Law § 685(a) penalty for the years 1989 and 1990 for failure to file income tax returns and also Tax Law § 685(p) penalty for the years 1988 and 1989 for substantial understatement of income tax liability.

On November 20, 1991, the Division issued to Charles J. Hull, Jr. and Mary Hull three statements of personal income tax audit changes for the years 1988, 1989 and 1990. For the year 1988, the statement indicated additional tax liability of $83,571.86, plus penalties and

interest, for a total amount due of $130,167.14. For the year 1989, the statement indicated additional tax liability of $2,668.83, plus penalties and interest, for a total amount due of $4,390.83. For the year 1990, the statement indicated additional tax liability of $1,420.09, plus penalties and interest, for a total amount due of $1,969.28.

On February 18, 1992, the Division issued to Charles J. Hull, Jr. and Mary Hull a Notice of Deficiency for personal income tax due for the years 1988, 1989 and 1990 indicating a total amount of additional tax due for all three years of $87,660.78, interest of $25,282.27 and penalty of $26,670.37, for a balance due of $139,613.42.

CONCLUSIONS OF LAW

A. Tax Law § 605(b) provides, in pertinent part, as follows:

"(1) Resident individual. A resident individual means an individual:

> "(A) who is domiciled in this state, unless (i) 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 . . .
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> * * *
>
> "(B) 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, 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.
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> * * *

"(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 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. . . .
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> "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) 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 and voter 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. Upon review of the record in this matter, it is determined that petitioners did not abandon their New York domicile during any of the years in issue. Petitioners' conduct, both formal and informal, is consistent with this conclusion.

Petitioners have not established by clear and convincing evidence that they intended to change their domicile during 1988, 1989 or 1990. Although they purchased progressively larger and more expensive dwellings in the State of Florida, a dwelling place is merely one of many factors that must be weighed. Petitioners had historically travelled extensively and frequently

visited Florida. Therefore, it was not an indication of a change of domicile when, in 1988, they purchased a larger home in Florida. They also bought and registered in New York a recreational vehicle which they took on a long trip to the Eastern Maritimes in the summer and fall of 1986 returning to their home in Rochester. This trip was a continuation of their pattern of travelling extensively and an investment and commitment to doing so in the future, but not an indication of a change of domicile.

Even before the death of Mrs. Hull's father in February 1988, petitioners had wintered in Florida, albeit to a lesser extent, so the trend of spending the winter months in Florida was not a great departure from past practice for petitioners. Petitioners exhibited the classic characteristics of "snowbirds", individuals who winter in the warm southern climates and summer in the cooler and less humid State of New York.

Petitioners maintained their Rochester, New York home for all of the years in issue. Although they placed the home on the market, no evidence of said marketing was introduced. Petitioners testified that the home was placed on the market (not with a broker) and that they received a few, albeit substantial, offers. The home was not on the market continuously, only when they returned for the summers, which conveniently coincided with their need for a residence in Rochester which accepted pets, during the summer months. Therefore, there was no urgency to sell the house especially in light of the fact that they would have had to rent at a premium as the owners of two dogs.

Petitioners continued to maintain many relationships in New York State, both social and professional. Although they testified at length about a Dr. Moskowitz in Florida, analysis of their checks indicated medical care providers in New York as well. Likewise, they continued to utilize attorneys and accountants in New York.

Although petitioners strenuously object to the Division's overzealous investigation and concurrent failure to portray the facts fairly, they have not demonstrated the level of their activity or membership in many social, charitable and religious organizations. Clearly, petitioners repeatedly had been asked to provide the information and had ample opportunities to

do so. Indeed, they chose not to explain the apparent discrepancies at hearing. It is undeniable that they continued very active participation with the Monroe Golf Club, and an undetermined level of participation in the Faculty Club of the University of Rochester, the Rochester Yacht Club, the Midtown Tennis Club, the Rochester Wellsley Club, the Genesee Figure Skating Club, the Retired Professional Society of Rochester, the YMCA, Historic Pittsford, Rochester Museum and Science Center, the Automobile Club of Rochester, the Finger Lakes Chapter of the Family Motor Coach Association, the Tennis Club of Rochester and the English Speaking Union.

Further, petitioners were less than candid with regard to the Division's request for information on these affiliations. They were not forthright concerning their church affiliation or, at best, negligent in the provision of this information. The church name given to the auditor proved to be a parish left by petitioners some seven years earlier. Surely, petitioners' charge that the Division did not adequately investigate, while simultaneously refusing to provide information, was tongue-in-cheek. The burden of proof is upon petitioners in these proceedings (Tax Law § 689[e]) and any failure to provide information on subject matters within their knowledge will be construed most strongly against petitioners.

There were several differences between petitioners' answers on the questionnaire filed in June of 1991 and the facts ultimately adduced on audit and at hearing, and many of the differences were never addressed. Petitioners' drivers licenses were not surrendered at the time of their declaration of Florida residency in March of 1988 as stated by petitioners, but in the following January. They registered vehicles in New York after their supposed change of domicile, contrary to their statements. They used their New York and Florida checking accounts equally despite a statement that the lion's share of the checks were drawn on the Florida bank.

In all, petitioners have not demonstrated a clear intent to change their domicile to Florida. Their pattern of life did not change substantially in 1988, 1989 or 1990. They continued to live an active retirement, rich in travel, always ultimately returning to their home in Pittsford.

Mrs. Hull's notations in her appointment book on April 26, 1988 (erased, but still legible), April 29, 1989, May 19, 1990 and May 20, 1990 referred to Rochester as "home" when indicating a return to that location. Although a seemingly innocuous entry, one must remember that in domicile matters informal acts can be persuasive in determining a person's general habit of life (Matter of Silverman, supra) and state of mind. This is why petitioners' registration to vote in Florida and filing declarations of domicile are of such limited value. They are generally not indicative of petitioners' general habit of life, as more fully demonstrated by the facts recited above (Matter of Silverman, supra; Matter of Trowbridge, supra).

The facts of this matter also lack the details of petitioners' alleged new domicile in Florida. There was no sense of a habit of life in Florida, so important in determining intent and a person's state of mind. Certainly, Mr. Hull's medical condition was a consideration, but having a New York domicile and wintering in Florida would have been consistent with said condition, and it was only prudent to seek out a competent local physician like Dr. Moskowitz.

For all of the reasons stated, it is determined that petitioners did not change their domicile.

F. Even though petitioners are deemed to have been domiciled in New York State during 1988, 1989 and 1990, it is also determined that they were not able to demonstrate that they did not spend more than 183 days in the State of New York during 1988. The majority of the dates were not in issue, and petitioners conceded 197 days outside New York State. However, this number shrinks to 171 when the days of departure and return are properly allocated as days in New York[2] and the return dates of February 22, May 26 and October 3, 1988 are adjusted in accordance with the auditor's valid analysis of the Visa statements from Chase Lincoln First and petitioners' contemporaneous journal entries. Although petitioners testified that their children had access to the credit card account, no

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[2]See, 20 NYCRR former 102.2(c) which stated that "presence within New York for any part of a calendar day constitutes a day spent in New York." The same regulation requires the taxpayer to keep adequate records of days spent in and out of New York.

corroborating evidence was introduced to sustain such a bare assertion. Petitioners should have submitted a statement from the bank to that effect or requested a copy of the charge slip with a signature on it. The burden of proof was upon petitioners and they failed to demonstrate by "clear and convincing evidence" that they spent 183 or less days in New York State during 1988.

For all of the reasons stated, petitioners, even if found not to be domiciled in Florida, were statutory residents within Tax Law § 605(b)(1)(B) for the year 1988.

G. Petitioners object to the imposition of penalties in this matter. They contend that they fully disclosed all pertinent information to their tax return preparers and sought the opinion of counsel in making their decision to change domicile. However, petitioners have been shown to have been less than candid with the auditor's direct requests for information concerning social, religious and charitable organizations, they did not produce their wills, and information concerning their drivers' licenses, vehicle registrations and bank accounts.

The pertinent case law with regard to the penalties is clear. Tax Law § 685(b)(1) states that:

> "[i]f any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the deficiency."

Tax Law § 685(a)(1)(A) states that:

> "[i]n case of failure to file a tax return under this article on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate."

Tax Law § 685(p) states, in pertinent part, that:

> "[i]f there is a substantial understatement of income tax for any taxable year, there shall be added to the tax an amount equal to ten percent of the amount of any underpayment attributable to such understatement. For purposes of this subsection, there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the greater of ten percent of the tax required to be shown on the return for the taxable year, or two thousand dollars."

Petitioners have not demonstrated reasonable cause for abatement of the penalties involved. Although they seem to be claiming that they merely followed the advice of counsel and return preparers in good faith, such does not constitute reasonable cause (Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990).

Further, petitioners' good faith in an incorrect legal interpretation does not amount to reasonable cause. It has been held:

> "the failure to pay a tax due to a different legal interpretation of a statute need not be considered 'reasonable cause'. In fact, if it were so considered, [the Commissioner] would rarely if ever 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).

The penalties under Tax Law § 685(a)(1)(A) and (p) are automatic in this matter since petitioners clearly did not file returns for 1989 and 1990 and the amounts found due in 1988 and 1989 were substantially understated. The same reasoning applicable to the penalty asserted under Tax Law § 685(b)(1) is applicable to Tax Law § 685(a)(1)(A) and (p).

H. The petition of Charles J. Hull, Jr. and Mary Hull is denied and the Notice of Deficiency, dated February 18, 1992, is sustained.

DATED: Troy, New York
March 17, 1994

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