STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEON MOED	:	DETERMINATION DTA NO. 810997
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 1987 and 1988.	:	

Petitioner, Leon Moed, 58 Indian Orchard Road, Lakeville, Connecticut 06029-1019, 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 1987 and 1988.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on January 19, 1993 at 9:30 A.M., with all briefs due by June 8, 1993. The Division of Taxation, represented by William F. Collins, Esq. (Gary Palmer, Esq., of counsel), submitted its initial brief on January 28, 1993. Petitioner, represented by Sheldon Eisenberger, Esq., submitted a brief on March 26, 1993. The Division of Taxation submitted a brief on May 18, 1993 and petitioner submitted a reply brief on June 7, 1993.

ISSUES

I. Whether petitioner "maintained" a place of abode in New York City.

II. Whether the New York City place of abode was "permanent" within the meaning of Tax Law § 605(b)(1)(B).

III. Whether petitioner proved that he spent in the aggregate no more than 183 days in New York City for City income tax purposes.

IV. Whether petitioner's weekly shopping at a New York supermarket should be counted as a

New York day for State income tax purposes.

V. Whether there is reasonable cause to waive the penalties.

FINDINGS OF FACT

After reviewing the 1987 and 1988 New York State nonresident income tax returns filed by petitioner, Leon Moed, an auditor from the Division of Taxation ("Division") sent a letter, dated January 25, 1990, to Mr. Moed requesting his response to certain questions with regard to his domicile. Correspondence ensued and petitioner responded to various requests for information and documentation.

Petitioner informed the Division that he was an architect and partner in the firm of Skidmore, Owings & Merrill, located in Manhattan with offices in Chicago, San Francisco, Los Angeles, Washington, D.C. and London. He claimed that his principal residence had been a 9-room home that he built and completed in 1983 and was located in Lakeville, Connecticut. Petitioner also indicated that when he stayed overnight in Manhattan he would stay at his wife's rented apartment on West 81st Street where he kept only clothing required for overnight stays.

Petitioner also provided the Division's auditor with an abstract of his diaries. This abstract consisted of monthly calendars for the years 1987 and 1988 whereon he marked the days that he was not in New York State. Petitioner marked with circles the days spent in Lakeville, Connecticut and he marked with slashes the days he spent outside New York State for other purposes such as travel for work or vacation. From this abstract, petitioner claimed that he spent 170 days in New York State in 1987 and 163 days in New York State in 1988.

On August 1, 1990, the auditor requested the source documents that petitioner used to prepare the abstract of days outside New York State. The auditor thereafter reviewed certain diaries, telephone bills, business expenses, vouchers, and copies of Federal income tax returns. At hearing, the Division's auditor testified that the diaries he reviewed appeared to contain entries relating to client accounts. Based on his review, the auditor concluded that there was no verification for 53 of the days in 1987 and for 48 of the days in 1988 that petitioner claimed he spent outside New York State.

The auditor included Fridays as New York days even though petitioner indicated with circles in the abstract that he spent Fridays at his home in Lakeville. At hearing, the auditor testified that he included Fridays because the diaries he looked at contained entries on Fridays concerning hourly charges to client accounts and that such entries were no different from those entries on Mondays through Thursdays. Based on this conclusion, the auditor added 36 Fridays in 1987 and 40 Fridays in 1988 as New York days.

Based on a review of utility bills, business expense vouchers and other documents, the auditor included as New York days an additional 17 days in 1987 and 8 days in 1988. The auditor determined that February 16, 1987 should be considered a day spent in New York even though petitioner claimed the Monday holiday (Washington's birthday) as a day he spent in Lakeville. The auditor concluded that on February 16, 1987, petitioner placed a telephone call to Singapore from his wife's rented apartment in New York City. He based this conclusion on the fact that the cost of the call was reimbursed by the firm of Skidmore, Owings & Merrill.[1] The auditor also testified that the additional days (17 days in 1987 and 8 days in 1988) were considered New York days based on either phone bills or airline tickets indicating a presence in New York or based on the fact that such days were marked travel days by petitioner without substantiation as to whether he travelled through New York or to New York airports to reach his final destination.

The Division issued to petitioner a Statement of Personal Income Tax Audit Changes, dated November 21, 1990, indicating additional (1) State income tax due for 1987 in the amount of $30,758.06, (2) City income tax due for 1987 in the amount of $22,198.55, (3) State income tax due for 1988 in the amount of $45,384.58, and (4) City income tax due for 1988 in the amount of $24,818.86. The document stated that petitioner had not clearly and convincingly evidenced an intent to abandon his New York domicile and establish a new domicile in Connecticut. The Division also stated in the document that even if it found a domicile change, it still would have taxed petitioner as a statutory resident.

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[1]At hearing, Mr. Moed confirmed that he must have made the call based on those facts.

The Division issued to petitioner a Notice of Deficiency, dated February 8, 1991, for 1987 and 1988. In that notice, the Division asserted (1) a deficiency for 1987 State income tax in the amount of $30,758.06 plus a $5,706.64 penalty and $8,337.49 in interest; (2) a deficiency for 1987 City income tax in the amount of $22,198.55 plus a $4,118.56 penalty and $6,017.29 in interest; (3) a deficiency for 1988 State income tax in the amount of $45,384.58 plus a $6,372.88 penalty and $8,207.33 in interest; and (4) a deficiency for 1988 City income tax in the amount of $23,595.86 plus a $3,313.32 penalty and $4,267.07 in interest. The total amount due for the two years was $168,277.63.

After a conciliation conference, the conferee issued a Conciliation Order, dated April 17, 1992, sustaining the statutory notice.

Petitioner filed a petition, dated July 8, 1992, alleging that he was not liable for the tax, interest and penalty asserted; that he was not a New York State resident for the years in question; and that the amount asserted, including penalties, was incorrect.

The Division filed an answer, dated September 9, 1992, alleging, inter alia, that petitioner was domiciled in New York City and that even if he was not domiciled in New York, he was a resident of New York for the years in question for income tax purposes.

At the hearing on January 19, 1993, petitioner, Leon Moed, his wife, Marilyn Moed, and his son, Samuel Moed, testified as to the reasons for Leon and Marilyn Moed maintaining two separate residences after 1983.

Mrs. Moed testified concerning the reason for their separate living arrangement as follows:

> "we've been married close to 34 years. I have respect and I admire my husband. At the time that my husband wanted to build a home and move to Connecticut, I had reached a stage of life when my children were independent; I still had one child in college living with me. My daughter, my oldest daughter was married in 1981, and my son got married in 1984, and I felt this is my time to be me. And when Leon presented me with the idea of moving to Connecticut, I just did not want to do that. My interests were all in New York; my friends were all in New York. Now I had the time of life when I really wanted to do the things that meant something to me, and everything that I wanted to do was in New York." (Tr., p. 122.)

During 1987 and 1988, Mrs. Moed was the head of the volunteer association at the Jewish Museum in Manhattan and involved in other organizations. Mrs. Moed testified that her husband moved to Connecticut when the house was finished in 1983 or 1984; that she did not move to Connecticut with him but remained in the apartment on West 81st Street; that her husband took all his clothes and possessions from the apartment leaving only some toiletries and "maybe" a suit for the purpose of overnight stays at the apartment; that she maintained an individual savings and checking account, investment portfolio, and homeowner's insurance in her own name with the New York City address; and that she paid her own bills.[2] With respect to Mr. Moed's overnight stays at the apartment, Mrs. Moed stated that such overnights were never on a weekend but only during the work week when he might work late at the office; that such overnights averaged once a week or less; and that her husband had a key to the apartment but never arrived unannounced and would always call to ask to spend the night.

Mrs. Moed further described her relationship with her husband and their need to maintain separate living arrangements as follows:

> "I just stated he had worked in this very high-pressured career for many years. He's a very creative person and he thinks a lot, and I just think he needed space. I think he needed to remove himself from some of those tensions, and I think he felt that was when he had to do it.
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> "Let me explain this. I think my husband and I have a very mature relationship, very good understanding of each other and our mutual needs. And one of the things, we have always respected each other. I think when Leon felt this very strong need to have a
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> relief valve, so to speak, and just get a different atmosphere, I think he understood that when I told him that is not where I'm at. I think he just very much respected that and understood. And so, I was very busy at the time; I still am. My demands were in New York; that is where I was. If I had some free time for a weekend or whatever, I would go up to the house with him. We have, I think, a great deal of respect and caring for each other. That's not the issue. I think the maturity, what we did is that we do have this deep feeling for each other that respects where we

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[2]Evidence was submitted into the record verifying that bank accounts, investment portfolio, and insurance policy were maintained in Mrs. Moed's name alone and that bills with respect to the apartment were addressed solely to Mrs. Moed. Petitioner testified that his wife had her own income but that he supplemented that income monthly based on an informal and amicable agreement.

> are now and where we were then and what each of us needed and we don't want to impose any -- he didn't want to impose his will on me, and likewise I didn't want that he should not do what he desperately needed to do, what he felt he needed to do." (Tr., pp. 136-37.)

According to Marilyn Moed's testimony, Jewish holidays were spent with her husband and children at the Manhattan apartment or at their children's homes.

Samuel Moed, the son of Leon and Marilyn Moed, testified that he lived in Englewood, New Jersey, with his wife and children and that on occasion his father would stay overnight at his Englewood home for various reasons including certain family holidays or when his father needed closer access to Newark Airport. Samuel Moed's testimony confirmed his parents' separate living arrangement. In describing his understanding of this arrangement, he testified as follows:

> "the reasons for it, I think, based on what she told me and also being their son, I think it had a lot to do with the personalities of them as individuals. My parents are very different people in terms of their personalities and philosophies. My father is more European, had a more detached, was more into himself, much less emotive, much less involved with the family, very ambitious, and very much kind of a self-motivated person. My mother, on the other hand, is much more social, much more involved with the family, had much more interaction with the children and grandchildren.
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> "I think at that point, once the children were grown up, the different personalities basically led them in two different directions. And I think, based on what my father's needs were at that point, to get away from 30 years of intense pressure in New York, a very intense job, as well as all the other demands of fatherhood, grandfatherhood, at that point basically he needed to change his life, get away, and just get some space for himself, to move and do what he needed to do at this point with his life which fit with who he is and what made him that particular person. My mother was very different; she needed to be in Manhattan for the way she wanted to live." (Tr., pp. 150-51.)

At hearing, petitioner Leon Moed testified that he designed and built the Connecticut home using his own funds, purchased new furnishings for the home and that the mortgage and property were recorded solely in his name. In 1984, he changed his voter registration, passport and driver's license to reflect his Connecticut address. The house contains four bedrooms, three bathrooms, kitchen, pantry, living room, study and library. The property also contains a tennis court and garage behind which is a small apartment unit. Since his move to the Connecticut home, petitioner became involved in a reconstruction project concerning the town hall in the

Connecticut town in which he lived and participated in 1985 house tours of the Connecticut area opening up his home as part of the tour. At hearing, petitioner also produced various documents such as bank accounts, library card, Pratt alumni directory, his will, bills, the partnership business certificate, insurance policies all bearing petitioner's Connecticut address.

Petitioner testified that his habit, when not travelling for the firm, was to drive to work from Connecticut Monday through Thursday;[3] that on the average of once a week he would spend the night at his wife's two-bedroom apartment; and that at times he would also stay with friends in New York City or at his son's Englewood home. Petitioner further testified that he would not stay at his wife's apartment if she was not there and that when the car was readily available to him, he found it more convenient to

spend the night at his son's Englewood home because it was only a 15-minute car ride from the office. Petitioner stated that he had a key to his wife's apartment and kept a change of clothes there only as a "fall back" in the event he unexpectedly stayed overnight. He explained the use of his wife's apartment as follows:

> "What I would generally have, to cover myself, was a toilet kit and clean shirt. On occasion I might have a suit there, but that is it. As I said before, the attitude to that apartment or any place else was in lieu of going to a hotel, having been precluded from going home by virtue of the lateness of the hour, or conversely by having to get up early for a flight." (Tr., p. 206.)

Petitioner testified that his wife visited the Connecticut home twice a month on the average. Mrs. Moed also testified that she did not keep her clothes at the Connecticut home but instead brought a suitcase to Connecticut on such visits. With respect to vacations, petitioner testified that he and his wife vacation together but also take separate vacations.

At the hearing, petitioner submitted three diaries into the record. Two of the diaries were small pocket diaries, one for the period January 1987 through May 1988 and the second for the period May 1988 through June 1989. Petitioner testified that he carried these diaries

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[3]Petitioner drove his car into Manhattan to a garage rented by the firm on East 63rd Street where a driver would then be available to drive him to his office located at East 43rd Street.

with him in a pocket and used them as daily planners to indicate where he was or would be on any specific day. In these diaries, he noted the days he travelled for work-related projects, partnership meetings, vacations and the days he spent in Lakeville, Connecticut. The days spent in Lakeville were marked in the diaries with the notation "L" and an upside down "V" as an abbreviation for "Lakeville".

The third diary was a larger leather bound book for the year 1987 which, petitioner testified, was kept at his office or in his briefcase and was used for recordkeeping purposes to keep track of certain expenses and time charged to clients.[4] Petitioner testified that since 1985, he used Fridays to work privately at home. He described his Friday routine as follows:

A. "I sometimes work five or six days. Generally the routine, whether it's perceived or otherwise, is four days a week in the public eye, in the fish bowl, where my time is not mine, and so in a sense you're responding to people. And what I've done is I've carved out Friday to be my own,to reconstruct myself as a person and as a professional and hopefully as a leader as well."

Q. "When you say you carved out Fridays, what do you mean?"

A. "That means I go up to the house and pull myself together and do the work that I do best privately."

Q. "Do you get home on Thursday evening?"

A. "Right."

Q. "And you don't leave until?"

A. "Monday morning."

Q. "Let me show you [the 1987 pocket diary]. Now, we have the LV with the little arrow. Let me ask you this: Were they entered, all these LV's, typically around Friday and Saturday? Were they entered contemporaneously or before the event?"

A. "They're generally entered before the event."

Q. "The LV's?"

A. "Yes. And the purpose is just to be able to see the week at a glance, enough not to trip myself up and forget it was Friday." (Tr., pp. 201-202.)

Petitioner also submitted into the record cancelled checks written out to Millerton

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[4]At the hearing, the Division's auditor testified that the entries in the smaller pocket diaries did not look familiar but that the entries in the leather-bound diary might have been the ones he reviewed during the audit.

Supermarket which, petitioner testified, was located in New York State, a four-minute drive from his Connecticut home. Petitioner

stated that he shopped at that supermarket on the average of once a week, generally on a Friday.

SUMMARY OF THE PARTIES' POSITIONS

In its post-hearing brief, the Division stated that after hearing the testimony and reviewing the documentary evidence, it conceded that petitioner was domiciled in Connecticut in 1987 and 1988. However, the Division contended that petitioner was a statutory resident subject to New York income tax. The Division asserts that Mrs. Moed's rented apartment constituted petitioner's permanent place of abode and that petitioner failed to prove that he did not spend more than 183 days in the State and City of New York in 1987 and in 1988. The Division argues that because petitioner shopped weekly at the Millerton Supermarket on Fridays, those days should be included as New York State days. The Division contends that petitioner's brief shopping excursions do not fall under the express exceptions provided in the regulations to the general rule that any part of a calendar day spent in New York constitutes a full day spent in New York.

Petitioner argues that his wife's rented apartment is not his permanent place of abode; that the apartment is maintained solely by his wife; that petitioner and his wife are separated "in fact"; and that the apartment was used by him solely "as an occasional, unforeseen, sporadic, late-night substitute hotel." Petitioner further contends that even if he had maintained a permanent place of abode, he did not spend more than 183 days of each taxable year in New York; and that including the Friday shopping day as a New York day is a ludicrous application of the tax regulations and is irrational, arbitrary and capricious.

CONCLUSIONS OF LAW

A. Under Tax Law § 605(b)(1)(B), a taxpayer is considered a resident for New York State income tax purposes when the individual:

> "is not domiciled in the 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 . . . ."[5]

The first two questions arising from this statutory definition of resident are (1) whether petitioner "maintains" the apartment rented by Mrs. Moed and (2) whether petitioner's overnight arrangements at the apartment were within the statute's meaning of "permanent" (see, Matter of Evans, Tax Appeals Tribunal, June 18, 1992). In Matter of Evans, the Tax Appeals Tribunal determined that the Legislature's use of the word "maintain" in the statute was not limited to a particular usage but was intended to be interpreted in a practical way. Thus, reasoned the Tribunal, when interpreting the word "maintains" the general principle applies -- that a taxpayer's status as a resident depends "on a variety of circumstances which differ as widely as the peculiarities of individuals." The Evans Tribunal held that "one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place" whether making contributions to the household in money or other contributions which are not in the form of money. As further noted by the Evans Tribunal, there can be many financial or other arrangements and the fact that certain expenses such as the utility costs, repairs or mortgage payments may not be shared is not,

in itself, determinative of whether an individual is maintaining a place of abode.

In this case, petitioner supplemented Mrs. Moed's separate income based on an informal and amicable agreement on a monthly basis. The amount or nature of the monthly payment was not revealed in the record but it can be inferred that such amount derived from their marital relationship which also provided the basis for his overnight stays. Petitioner and Mrs. Moed may have been separated "in fact"; however, they nonetheless maintained a viable familial relationship.

In Matter of Evans, the Tribunal found relevant that the taxpayer contributed in kind by

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[5] Administrative Code of the City of New York § 11-1705 (b)(1)(B) contains the identical language as in section 605(b)(1)(B) to define a New York City resident for the purposes of imposing City income tax.

furnishing the rectory. Inasmuch as the apartment served as petitioner's marital home prior to 1983, it can be presumed that he contributed to the furnishing of the apartment. Given the particular circumstances of this case, petitioner "maintained" the rented apartment for income tax purposes notwithstanding Leon and Marilyn Moed's determination to maintain separate residences for personal reasons (including Mr. and Mrs. Moed's individual effort to separate certain funds in the payment of bills concerning their respective dwellings).

Whether his wife's rented apartment should be considered petitioner's "permanent" place of abode again depends on the totality of the circumstances of the particular situation. In Matter of Evans, the Tribunal noted that "permanence" encompasses the physical aspects of the dwelling place (e.g., a dwelling without kitchen facilities or cottage suitable and used only for vacations are not permanent places of abode), as well as the individual's relationship to the place (e.g., an apartment leased by one individual but shared with an unrelated individual may be the permanent place of abode of the person not named in the lease). In Evans, the Tribunal found the taxpayer's stay at a rectory during the work week his permanent place of abode despite his claim that he had no lease or legal right to stay there. The Tribunal based its decision on a number of factors including the long-standing and regular nature of the living arrangement and on the fact that the taxpayer possessed a key to the rectory, was free to come and go, kept personal items and clothes there, and had unlimited access to other rooms in the rectory such as a kitchen, dining room and sitting room.

In this case, petitioner argues that he only keeps a change of clothes and toiletries at the apartment as a "fall back" and although he has a key to his wife's apartment, he always calls his wife to make arrangements for an overnight stay and never stays there when she is not present. Notwithstanding these distinguishing factors, there are other factors which indicate that the wife's rented apartment constitutes petitioner's permanent place of abode, the most important of which is petitioner's ongoing, though changed, relationship with Marilyn Moed since 1983. Although Mr. and Mrs. Moed may be separated "in fact" for the purpose of establishing separate domiciles, it cannot be discerned from the facts in this case that petitioner was specifically

limited in his access to the apartment. The testimony instead indicates that petitioner's prior phone calls to his wife before an overnight stay, and his overnight stays elsewhere, may have been a matter of choice and preference, or perhaps, a question of respect for his wife's privacy which he valued so highly for himself as well.

In contrast to the situation in Matter of Evans, petitioner does not stay at the apartment Monday through Thursday; however, petitioner nonetheless stayed at the apartment on the average of once a week. It is not the amount of time that is determinative but the regularity and certainty of the overnight arrangement that is essential in making a determination that the apartment served as a permanent place of abode for petitioner. There is nothing in the record to indicate that this regularity or certainty in the arrangement was at risk due to the marital relationship. The establishment of separate domiciles appears from the testimony to have been a mutually agreed upon arrangement without contemplation of severing the marital and family ties. Marilyn Moed visits with petitioner at the Connecticut home on the average of twice a month. Petitioner and Mrs. Moed spend religious holidays together with family and on occasion they vacation together. The fact that petitioner does not stay at the apartment when Marilyn Moed is not there does not indicate that petitioner is prevented from doing so. In sum, the separate domiciles reflect Mr. and Mrs. Moed's respect for each other's privacy and individual needs but, given the total circumstances, did not effect the permanency of Mr. Moed's overnight arrangements at his wife's apartment, which also served as his marital home prior to his move to Connecticut. The fact that petitioner limited his access to the apartment to an average of once a week appears to have been a matter of personal choice and not one of limited access. Based on all these factors, petitioner maintains a permanent place of abode in New York City for income tax purposes.

B. The next issue is whether petitioner proved that he spent less than 183 days in New York City for City income tax purposes. Petitioner has the burden of proving by clear and convincing evidence that he was not residing in New York for more than 183 days during 1987 and 1988 (see, Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992, confirmed ___

AD2d ___, 599 NYS2d 158; Matter of Moss, Tax Appeals Tribunal, November 25, 1992). After an audit, the Division's auditor rejected certain days claimed by petitioner to be days spent outside New York State. In his audit, 53 days were added back to the days claimed by petitioner to be New York days in 1987 and 48 days were added back to the days petitioner claimed as New York days in 1988.[6] The issue before the Division of Tax Appeals focused on whether petitioner could prove that he did not spend in New York the additional 53 days in 1987 and 48 days in 1988. Petitioner argues that the Fridays he worked at his Connecticut home should be considered non-New York days and that the days he travelled for business during the work week should also be considered non-New York days.

Based on petitioner's credible testimony and the notations in petitioner's pocket diaries, the Fridays, with certain exceptions described below, cannot be counted as New York City days (see, Matter of Moss, supra). According to petitioner's credible testimony, the notations in the diaries indicating Lakeville, Connecticut were entered just prior to the date so that he would not mistakenly schedule appointments on those Fridays. The fact that his entries were made prior to the date, however, does not negate the contemporaneous nature of the notations in general inasmuch as petitioner testified that the pocket diaries were carried with him and were used by him to keep track of where he was on a particular day. Similarly, January 18, 1987 and November 15, 1987 were accepted as days

spent outside New York inasmuch as they fell on a Sunday and were clearly marked as Lakeville days in the 1987 diary.

The following Fridays, however, were not considered days spent outside New York State or New York City because petitioner's general testimony concerning Fridays was not confirmed by notations in the pocket diaries on those particular dates, and no other testimony

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[6]The days claimed by petitioner as non-New York days were indicated on an abstract calendar from which the Division's auditor calculated the number of New York days in 1987 to be 166 and in 1988 to be 159 to which he added the 53 days in 1987 and 48 days in 1988. Based on my review of the abstract calendar, however, the number of days that petitioner conceded to be New York days was 170 in 1987 and 163 in 1988.

was given as to those specific days concerning whether petitioner was in Lakeville or New York:

1987	1988
June 19	January 15
September 18	February 12
November 6	March 18
December 11	March 25
December 18	April 8
	July 8
	August 5
	October 7
	October 14

Petitioner also conceded that on February 16, 1987 he made the phone call to Singapore from his wife's phone. Moreover, petitioner has not carried his burden of proof with respect to the following travel days which he claimed to be non-New York days:

1987	1988
March 31 (Phoenix)	January 19 (Chicago)
April 3 (Washington D.C.)	January 21 (Israel)
April 12 (Charlotte)	February 5 (Washington, D.C.)
July 27 (Chicago)	February 17 (Chicago)
September 16 (Chicago)	March 8 (Chicago)
October 4 (Israel)	October 20 (Chicago)
November 14 (Chicago)	
November 15	
December 9 (Chicago)	

Relying on 20 NYCRR 105.20(c), petitioner argues that the regulations provide that a presence in New York may be disregarded as a New York day if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York. Petitioner has not demonstrated before the Division of Tax Appeals by way of testimony or otherwise that his travels were not via a New York airport (i.e., departed and returned from these destinations through Newark Airport) and that he did not stay in New York City overnight prior to departure or after arrival. In fact, in his testimony, petitioner noted that one reason for staying overnight in New York City would be to arrive for an early flight the next day. Also, there is no testimony or other evidence as to what time petitioner returned from Washington on April 3, 1987 and whether he worked in his New York office prior to his trip to Connecticut for the weekend.

Although petitioner noted in the pocket diary his return from Chicago on November 14 and marked November 15 as a Lakeville day, there is no evidence concerning the time of the flight arrival and whether petitioner returned to Lakeville on November 14 or stayed overnight in New York and returned to Lakeville on November 15. All other travel days indicated in the pocket diaries were accepted as non-New York days inasmuch as they involved returns from trips on days also marked as Lakeville days. Under such circumstances, it is reasonable to infer that petitioner's presence in New York, if he used New York airports, was solely to travel to a destination outside New York.

Furthermore, petitioner did not show that three additional days -- August 20, 1987, January 7, 1988 and November 15, 1988 -- were days spent outside New York. There is no testimony concerning those specific days, which fall on two Thursdays and a Tuesday, respectively, and no contemporaneous entries in petitioner's diaries indicating that he spent the day outside of New York.

In sum, to the 170 days that petitioner conceded were spent in New York in 1987, an additional 16 days are found to be New York City days for a total of 186 days in 1987. To the 163 days that petitioner conceded were New York days in 1988, an additional 17 days are found to be New York City days for a total of 180 days in 1988. Thus, it is concluded that petitioner was not a New York City resident for income tax purposes for 1988 but was a resident for 1987.

C. The remaining issue is whether petitioner demonstrated that he did not spend more than 183 days in the State of New York for the years in question. The determinative issue is whether petitioner's food shopping on Fridays or other weekend days at the Millerton Supermarket should be considered days that he spent in New York State for income tax purposes.

The regulations provide that in calculating the number of days spent within and without New York, the taxpayer's presence within New York for "any part of the calendar day constitutes a day spent within New York" (20 NYCRR 105.20[c]). The only exception in the regulation to this general rule is the situation where a taxpayer is present in New York solely for

the "purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State" (id.).

Petitioner argues that a literal interpretation of the regulation should not be applied if to do so would result in great inconvenience, or produce "inequality, injustice or absurdity". He contends that his trips to the supermarket are analogous to the situations described in the travel exception because his intent "was not to go shopping in New York, but rather to use the supermarket, which happens to be in New York, as a conduit to fill his Connecticut pantry and refrigerator [and that the] four minute drive into New York was not the purpose of his trip, but just the simplest way to go shopping from his Connecticut home" (Pet. Reply Brf., p. 6). The Division asserts that petitioner conceded by his testimony that most, if not all, of the Fridays spent at Lakeville were days he shopped at the Millerton Supermarket and, thus, should be considered New York days. The Division further reasons that because the regulation sets forth express exceptions to the general rule, which do not include shopping visits, no other exception to this rule may be considered.

Tax Law § 697(a) empowers the Tax Commission[7] to make such rules and regulations it may deem necessary to enforce the provisions of Article 22. An interpretation or construction of a statute by an agency charged with its administration will be upheld if it is not irrational or unreasonable (Matter of Lumpkin v. Dept. of Social Services, 45 NY2d 351, 408 NYS2d 421, 423). The Appellate Division has upheld the regulation's general rule that a "day" for the purpose of calculating the 183-day requirement includes a "presence within New York State for any part of a calendar day" (Matter of Leach v. Chu, 150 AD2d 842, 540 NYS2d 596 [upholding 20 NYCRR former 102.2(c)]). Contrary to the Division's position, however, the exception to this general rule is not limited to the travel exception set for the in the regulation. In Stranahan v. New York State Tax Commn. (68 AD2d 250, 416 NYS2d 836), the court held

[7]Tax Law § 2026 provides that references in the Tax Law to the Tax Commission shall be deemed to refer to the Division of Taxation unless such reference is made in relation to the administration of the administrative hearing process in which case the reference is to the Division of Tax Appeals or the Tax Appeals Tribunal.

that when a nondomiciliary seeks treatment in New York for a serious illness, the time spent in a medical facility for treatment of such illness should not be counted in determining whether the nondomiciliary was a resident for income tax purposes.

The question, therefore, is where to draw the line in construing the statute. Clearly, in the circumstances of this case, petitioner's presence in New York for any part of a day with respect to his employment should be considered a New York day inasmuch as his New York employment provides the primary reason for his presence in New York generally. Similarly, family gatherings or other social events arising from his employment, or long-term ties to New York in general, provide the basis for tax liability as a New York resident. This result is particularly compelling because his access to the New York City apartment provided petitioner with a convenient location from which to attend such functions or from which petitioner could depart for early plane flights.[8]

The New York ties, however, become more tenuous in the narrow situation where petitioner's presence in New York was based on a four-minute car ride from his Connecticut home to a local supermarket for groceries for the purpose of supplying the Connecticut pantry. In Stranahan v. New York State Tax Commn. (supra), the concurring opinion noted that the majority opinion based its decision on an implied exception for hospital stays to the statutory period of 183 days, whereas the concurring opinion places an emphasis on the fact that the taxpayer, after her release from the hospital, was unable to remove herself from New York due to her illness. Under both approaches, the entire court nonetheless agreed that, under the unique circumstances of the case, the statute should not be applied to include certain days in which the taxpayer was present in New York.

Under the unique circumstances of this case, it is determined that the statute should not

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[8]Conversely, the apartment could have been used after late plane arrivals.

be applied to include in the 183 days petitioner's presence in New York for the limited purpose of obtaining groceries at his local supermarket which, by chance, was located across the Connecticut border in New York. Petitioner's grocery shopping has a nexus solely with his Connecticut domicile and not with his New York place of abode or New York employment, which provides the principal predicate for his tax liability in New York. In these particular circumstances, it is determined that the Division's interpretation of the statute is unreasonable.

D. With respect to petitioner's challenge to the penalty imposed for the 1987 assessment, there is reasonable cause to waive the penalty under Tax Law § 685(a)(3). Petitioner's interpretation of the statute with respect to "maintaining a permanent place of abode" may appear to be reasonable to a person of ordinary prudence and intelligence at that time (20 NYCRR former 102.7[c][4]; see, Matter of Evans, supra). Petitioner clearly established a separate domicile in Connecticut from that of his wife and no longer considered the rented apartment as his residence. Although petitioner's interpretation of the statute may have been a reasonable one at that time, subsequent events proved him wrong. Despite his intentions and personal view of the situation, based on the Tribunal's analysis in its decision in Matter of Evans (supra), which was issued subsequent to the filing of petitioner's 1987 tax return, it is determined that petitioner's interpretation of the statute is incorrect.

Moreover, petitioner also may have reasonably determined that he was not a statutory resident in 1987 based on a belief that he did not spend more than 183 days in New York. As noted above, although petitioner may have been able to prove that nine travel days in 1987 should not be counted as New York days under the regulatory exception, and might have presented such proof to the Division's auditor, there was no such showing to the Division of Tax Appeals. In sum, considering the novelty of this case and the close set of facts upon which the determination is based, the penalty for the 1987 assessment is cancelled.

E. The petition of Leon Moed is granted to the extent provided in Conclusions of Law "B", "C" and "D" and is otherwise denied. The Notice of Deficiency, dated February 8, 1991, is

cancelled with respect to State and City income tax, penalty and interest for 1988 and the penalty imposed on State and City income tax for 1987 and is otherwise sustained. The interest on the 1987 assessment should be adjusted in accordance with the cancellation of penalties.

DATED: Troy, New York
November 18, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE