

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OTIS G. PIKE	:	DETERMINATION DTA NO. 811484
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1985, 1986 and 1987.	:	

Petitioner, Otis G. Pike, A-26 The Billows, 1180 Reef Road, Vero Beach, Florida 32963, 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 1985, 1986 and 1987.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeal, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on August 16, 1993 at 9:15 A.M. Petitioner submitted his brief on October 8, 1993. The Division of Taxation submitted its brief on November 5, 1993 and petitioner filed his reply brief on December 3, 1993. Petitioner appeared by Coudert Brothers (Edmund S. Cohen, Esq., and Elizabeth A. Whalen, Esq., of counsel) and Ernst & Young (Corey L. Rosenthal, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Craig Gallagher, Esq., of counsel).

ISSUE

Whether petitioner was a domiciliary of the State of New York for the years 1985, 1986 and 1987, and thus subject to tax as a resident individual.

FINDINGS OF FACT

Stipulated Fact

Petitioner, Otis G. Pike, spent more than 183 days outside of, and thus was not a statutory resident of, New York State in any of the taxable years 1985, 1986 or 1987.

Additional Facts

Petitioner was born in Riverhead, New York in 1921. Upon his father's death at the age of two, his mother moved the family to Honolulu, Hawaii. After his mother's death when he was eight, petitioner was returned to Long Island. At the age of eleven, he returned to live in Riverhead in the same home, to be raised by a caretaker. He inherited the Riverhead house, 132 Ostrander Avenue, Riverhead, New York 11901, when his mother's estate was divided, and acquired title thereto by confirmation deed. Petitioner held title to this house individually until 1989.

During World War II, petitioner enlisted in the United States Marine Corps where he flew over 125 combat missions. From November 1944 until June 1945, petitioner volunteered to be trained as a night fighter pilot in Vero Beach, Florida, in order to be stationed in a warmer part of the country. He enjoyed both the warmer climate and the community there. After completing his military service, petitioner married his present wife Doris, in 1946, returned to complete his college education and then attended Columbia Law School. Upon graduation from law school in 1948, petitioner moved into the house in Riverhead which he owned. This house had been rented for the nine years from 1939, when petitioner began college, to 1948. In Riverhead, petitioner commenced the practice of law.

In 1960, petitioner successfully ran for election to the U.S. House of Representatives. Initially, his family lived half of the year in Washington, D.C. while Congress was in session and the other half in Riverhead. However, petitioner and his wife concluded it was too difficult to educate their children under these circumstances and, thereafter, petitioner's wife chose to remain in Riverhead with their children for the entire year. While Congress was in session, petitioner would split his time between Washington, D.C. and Riverhead, returning to Riverhead on weekends to see his wife and children.

During the years following petitioner's election to Congress, Mrs. Pike obtained a Bachelor's Degree in Spanish and a Master's Degree in Education from Dowling College on Long Island. She accepted a teaching position at the Patchogue-Medford Schools on Long

Island where she taught English as a second language. In addition, Mrs. Pike later became a member of the Board of Trustees of Dowling College.

During petitioner's years in Congress, he served on the House Ways and Means Committee, the Armed Services Committee, the Budget Committee, the Joint Economic Committee, and was also Chairman of a Special Subcommittee formed to investigate U.S. intelligence operations.

While vacationing in Vero Beach, Florida in 1971, Mr. and Mrs. Pike purchased a condominium there. They intended to retire to Vero Beach upon petitioner's retirement from Congress.

In 1948, on the advice of his legal guardian, petitioner purchased his first five shares of stock in Long Island Home, Ltd. ("LI Home"), which operated a psychiatric hospital and a long-term nursing care facility. Petitioner became a member of the board of directors of LI Home in 1948, attending monthly meetings of the board, which lasted approximately 2½ hours, and receiving an annual stipend. The board was responsible for hiring an executive director and administrator, approving major capital expenditures and looking after the stockholders' interests. The board was not involved in any capacity with the day-to-day operations of LI Home. In fact, petitioner had no office, desk, files or telephone at LI Home. In 1975, petitioner became vice-president, with no increase in his responsibilities but with an increase in his salary.

By 1979, petitioner had increased his ownership of LI Home stock to 31% of total shares. As a result of a successful legal battle with another stockholder, petitioner took over control of the board, split the stock and increased the dividends substantially. Petitioner was named president and chairman of the board of LI Home. However, even after being appointed to these positions, his sole responsibility was to continue to attend board meetings once a month. He continued to lack an office, desk, files, or a telephone at LI Home. During the years at issue, petitioner's investment in LI Home stock was his largest asset and his compensation as president and the dividends he received from the stock were his largest sources of income. On his tax returns, petitioner indicated his occupation to be "corporate executive" and "corporate

president". During his term as president and chairman of the board, petitioner negotiated one contract with the executive director and administrator of LI Home, attended one conference where LI Home's executive director and administrator was being honored and used the LI Home corporate credit card for LI Home related travel expenses. He also has a retirement and pension plan with LI Home.

Petitioner retired from Congress in 1979. He accepted a position to write a political column for Newsday, a Long Island newspaper, which required him to devote some of his column to matters of local interest (requiring his presence in New York). It was also during 1979 that petitioner met Mary Cole, a lawyer residing in Washington, D.C. Shortly after their initial contact, petitioner began an extramarital affair with Ms. Cole, a relationship which continued through the years at issue. In 1981, petitioner switched to the Newhouse News Service in Washington, D.C., which syndicated his column on a national basis. Being a nationally syndicated column, the emphasis was on national events which de-emphasized the importance of being in New York. Between the time of his retirement and the move to Vero Beach, Florida, petitioner split his time between New York, Washington, D.C. and Florida.

Mrs. Pike accompanied petitioner on several visits to the Vero Beach, Florida condominium between 1979 and 1983. Mrs. Pike testified that she became restless during extended stays, as she missed the intellectual and social stimulation her involvement with Dowling College and her love of teaching provided. She also liked the cold weather of New York. These reasons, along with petitioner's continuing adulterous affair with Ms. Cole, led Mrs. Pike to realize that she could not live with petitioner in Florida. Accordingly, petitioner and his wife decided to live separate lives.

The political process and the right to vote carry a great deal of significance to petitioner. In addition, Election Day was treated as a family holiday for many years by petitioner, his wife and their children. On November 22, 1983, petitioner registered to vote in Florida. This is the day petitioner claims to have changed his domicile to Florida. Since then, petitioner has voted in every general election in Florida.

Petitioner's biggest passion in life, following his retirement from politics, was boating and fishing. He maintained boats in New York, Washington, D.C. and Florida. The New York boat was stored during the winter months at a marina located on Long Island. The boat was docked during the months of boating and fishing at a dock in Riverhead on land owned by petitioner. The property taxes of the lot were paid by petitioner. During the audit years, petitioner would return to New York to fish with long-time friends, although over the years he lost contact with some friends and the quality of the fishing declined.

During the years 1979 through 1983, petitioner's dividends from his shares of LI Home stock increased significantly. Consequently, petitioner was able to retire a substantial portion of his existing debt which he had incurred in prior years and improve his financial situation. As a result of this improvement in his financial position, petitioner no longer needed to rent the Vero Beach condominium and was financially able to move to Florida.

In 1981, petitioner made a charitable donation of real estate which he owned on Fisher's Island, New York to an organization which planned to use the property as a bird sanctuary. Originally, petitioner and his wife intended to build a summer home on the property for retirement purposes but other events negated those plans.

During 1982 and 1983, petitioner transferred to his wife LI Home shares, municipal bonds, rental income derived from the office attached to the Riverhead house and control over his New York checking and savings accounts, all with the intention of making his wife financially independent. During the years at issue, petitioner continued to provide his wife with a monthly allowance, paid all of her personal income taxes as well as the property taxes on the Riverhead home and office.

On November 23, 1983, petitioner obtained a Florida driver's license and surrendered his New York driver's license. He resigned from all his New York clubs, including the Riverhead Yacht Club, American Legion, VFW and the Masonic Lodge. In Vero Beach, Florida he joined the Princeton Club and, with his wife, the Moorings Club. Upon his move to Florida, petitioner brought with him most of his clothing, fishing gear, two banjos, tennis

racquet, shop tools and, in particular, a mounted white marlin, which petitioner testified to being his most prized personal possession.

By December 1983, petitioner had closed all but two New York bank accounts (a joint checking account at Suffolk County National Bank ["SCNB"] and his savings account at Riverhead Savings Bank) and deposited the funds in his Florida Federal Savings & Loan account opened in November 1983. Petitioner provided his wife with signed blank withdrawal slips to be used for his New York savings account, thus providing her with control of the funds in the account. Petitioner opened a brokerage account in Florida and a money market account at the Beach Bank of Vero in 1985 with the proceeds of the sale of his second-largest New York investment, his stockholdings in SCNB. During the audit years, petitioner wrote checks totalling approximately \$1,500,000.00 on his Florida accounts and approximately \$240.00 on the New York accounts.

In 1985, petitioner attempted to dispose of all of his shares in LI Home, but certain legal obstacles prevented this attempted sale. Petitioner arranged to have all of his income checks mailed to his Florida home except for his Congressional pension check, which was directly deposited in his D.C. personal bank account. In addition, petitioner began to purchase Florida tax-exempt bonds and to borrow money in Florida.

Petitioner testified that he decided to move to Florida because he had lost contact with most of his New York political and fishing friends, his financial situation had improved to the point where it was possible to move, he could write his column in Florida, it was less embarrassing to carry on his affair with Mary Cole outside of New York since his wife would not give him a divorce and there was better fishing and better weather in Florida.

During the years 1985, 1986 and 1987, petitioner:

(a) filed intangible property tax returns required by Florida for its residents; nonresident New York State tax returns; and joint Federal tax returns with his wife. All returns showed petitioner's address to be 1180 Reef Road, A-26, Vero Beach, Florida 32963;

(b) had two cars registered and located in Florida. Another car was registered in his name in New York for part of the audit period, but the registration showed petitioner to be a resident of Florida. This car was kept at a New York airport for use during his visits to New York;

(c) owned three fishing boats: an unnamed 22-foot Aquasport docked in Vero Beach; the Last Love, a 40-foot DeFever trawler which was registered and docked in Maryland; and the Rabbit, a 38-foot Ronin which was registered in Florida but docked on Long Island during the fishing season. The New York vessel's documents indicated that it was purchased in Florida (the funds were borrowed from the local Florida office of Dean Witter Reynolds, the holder of petitioner's brokerage account), that its home port was Miami, Florida and the residence of the owner was Vero Beach, Florida.

(d) celebrated Christmas, New Year's and Thanksgiving in Florida with his wife and children. Petitioner celebrated Labor Day, July Fourth and his birthday on Block Island, Rhode Island with his children;

(e) contributed funds to the Florida Democratic Party and certain Florida Congressmen. He donated to both Florida and New York charities, although he became actively involved in the affairs of the Florida charities, whereas in New York he had merely contributed money. Petitioner offered to contribute \$250,000.00 to the library of Indian River County (in which Vero Beach is located) towards its purchase of real estate for a site he thought to be most suitable. He once gave, as a surprise Christmas gift to his wife, a \$100,000.00 contribution to establish a scholarship for future teachers to Dowling College. Petitioner was not active in the affairs of and rarely visited Dowling College;

(f) obtained all his medical care, including skin cancer surgery and continuous treatment for sciatica, in Florida. Petitioner's dental care was also obtained in Florida except for two visits while in New York;

(g) had a will that was executed in Florida in November 1983 that states he is a resident of the State of Florida and provides for probate in Florida. This will was subsequently reaffirmed by petitioner in March 1985;

(h) had his credit card statements, which show his residence as Florida, and all journals, periodicals and other professional publications mailed to his Washington, D.C. office except for the Value Line Investment Survey, which was mailed to Vero Beach, Florida. The only two personal credit cards petitioner retained that were connected with New York were (i) an Avis card which expired during the audit years and (ii) a Mobil card which was his wife's card on which he was the second signatory;

(i) had his burial arrangements made at Arlington National Cemetery, Virginia; and

(j) maintained his membership in the D.C. bar. He did not practice in Florida.

Petitioner last paid New York Bar Association dues in approximately 1979. Since that time, he has neither practiced in New York State nor paid New York Bar Association dues.

Petitioner spent the months of January, February, March, November and December in Florida, with the remaining months split between New York, Washington, D.C. and Maryland. While in New York, petitioner split his time between his boat, the unheated bungalow owned by his wife in Jamesport, Long Island (on Peconic Bay, where he sometimes anchored his boat) and in the Riverhead home. In general, he spent slightly less than one-half of each year with his wife and the same amount of each year with Mary Cole.

The legal title to the condominium in Florida which petitioner claims to be the residence of his place of domicile is held jointly by petitioner and his wife. The homeowners insurance statement for the Florida home was sent to petitioner and his wife at the Riverhead address. The expenses for the Florida condominium were paid from the personal funds of petitioner with checks drawn on his Florida bank accounts. The title to the Riverhead home remained in the name of petitioner. The Florida condominium in Vero Beach was appraised at \$280,000.00,

while the Riverhead home was appraised at \$165,000.00. When in Washington, D.C., petitioner generally stayed on his boat or at the home of Mary Cole.

Mrs. Pike testified that she considered petitioner to be a resident of Florida. She also testified that the house in Riverhead was her own, since she lived there and maintained, painted and decorated it. Mr. Pike testified that he considered the Riverhead house to be his wife's, regardless of whose name the title was in. The rent check for the office next door, which was in the name of petitioner, was made out to him, but was endorsed by Mrs. Pike and deposited in the office account. The office was maintained and managed by Mrs. Pike. During the years at issue, petitioner paid all of his wife's personal income tax obligations. In addition, petitioner and his wife spoke on the telephone each day. They generally took separate vacations.

Petitioner owned an office/apartment building located in Washington, D.C. The office was used for his syndicated column and he employed a part-time secretary to work in the office. While in Washington, D.C., he was generally in the company of Mary Cole. Petitioner maintained both a personal and business checking account with the National Capital Bank and the First American Bank, respectively. Some of petitioner's obligations and charitable contributions, including those in Florida, were paid out of these accounts. Credit card statements, periodicals, Florida bank account statements, financial statements relating to the brokerage account, boat registration on the Florida boat, LI Home dividends and the Congressional retirement checks bore the address and/or were mailed to petitioner's Washington, D.C. residence. In addition, petitioner had a safe deposit box and used a travel agent in Washington, D.C., as well as one on Long Island.

During the years 1981 through 1987, petitioner spent the following days in New York and Florida:

	<u>New York</u>	<u>Florida</u>
1981	154	38
1982	159	47
1983	127	88
1984	104	146
1985	93	110

1986	77	133
1987	85	120

The remaining days of the years were spent on Block Island, Rhode Island, Washington, D.C. or Maryland. It is noted that the Division of Taxation ("Division") accepted certain "documented" days as being outside New York State, with the remaining being inside the State. Petitioner presented his own and his wife's testimony, petitioner's boat logs, telephone bills and his wife's calendars in an effort to establish where petitioner spent the "undocumented" days during the years at issue. Based upon the documentation and credible testimony of both witnesses, petitioner's statements of where certain days were spent each year are accepted.

On January 25, 1991, the Division issued a Statement of Personal Income Tax Audit Changes to petitioner for the years 1985, 1986 and 1987 wherein total income of petitioner from all sources was held taxable to New York State on the basis that petitioner was a statutory resident. The statement stated that petitioner "is deemed to be a resident of New York State."

On March 11, 1991, the Division issued a Notice of Deficiency to petitioner for the years 1985, 1986 and 1987 asserting additional New York State personal income tax of \$176,354.00, plus penalty and interest.

Petitioner and the Division executed a series of four consents extending the period of limitation for assessment of personal income tax under Article 22 of the Tax Law. The four consents had the effect of extending the period of limitation for assessment of the years 1985 and 1986 to April 15, 1991.

CONCLUSIONS OF LAW

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

"Resident individual. A resident individual means an individual:

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

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

B. While there is no definition of "domicile" in the Tax Law (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.

* * *

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

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

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

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

"This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

D. The test of intent with respect to a purported new domicile has been stated to be "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138, 140). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990). 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."

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

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

A taxpayer may change his or her domicile without severing all ties with New York State (see, e.g., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990). The question is whether petitioner's overall conduct established a change of domicile to Florida.

E. Upon review of the record in this matter, it is determined that petitioner has established by clear and convincing evidence that he intended to change his domicile during 1985, 1986 and 1987.

Petitioner has presented numerous facts which would substantiate his claim of a change of domicile. Some, such as registering to vote in Florida, obtaining a Florida driver's license, registering his automobiles in Florida and registering two of his three boats in Florida, are merely ministerial in nature, while others, most notably the increasing days spent in Florida each year with a corresponding decreasing number of days spent in New York during the audit years, the places where he resided while in New York (1/3 on his boat, 1/3 in a summer bungalow and 1/3 in the Riverhead home), the donation of real estate on Fisher's Island to a New York charity, the sale of 6,435 shares of SCNB stock and the opening of a brokerage account in Florida with the proceeds, the attempt to dispose of his shares in LI Home, the arrangement to have most of his income checks mailed to his Florida home, the \$1,500,000.00 in checks written on Florida checking accounts compared to \$240.00 on New York accounts, and petitioner's relationship with his wife as well as his relationship with Mary Cole, are all highly probative of an intent by petitioner to make Florida his permanent home. Also persuasive are the efforts petitioner made to make his wife financially independent.

Important as well are the facts that petitioner filed Florida intangible property tax returns, New York nonresident income tax returns, joint Federal income tax returns with his Florida address, moved his personal possessions to Florida, resigned from all social clubs in New York, celebrated major holidays with his wife and children in Florida, made political contributions to Florida candidates, but none in New York, was actively involved in the affairs of his Florida charitable interests while he only contributed money to his New York charitable interests, received most of his medical care in Florida and executed a will in Florida which stated he was

a resident of Florida and provided for probate in Florida. Petitioner's acts, when taken together, evidence an intent by petitioner that his move to Florida be permanent and that the Florida condominium would be his principal residence.

F. Individuals do not have to eliminate all of their contacts to New York to be determined to be nonresidents (Matter of Sutton, supra). Because the issue is one of intent, the issue of domicile cannot be resolved merely by adding up facts on both sides of an equation. The question is whether the taxpayer's overall conduct and situation contradicts his or her declared intention of abandoning a New York domicile and establishing a new domicile elsewhere.

Petitioner's conduct after 1983 is consistent with an intention to establish a domicile in Florida. Petitioner was desirous of establishing a home in Florida for approximately 10 years prior to his move there. By 1983, his financial condition made such a move possible. A move to Florida was consistent with his passion for boating, fishing and warmer weather as well as his long-standing relationship with Mary Cole. During the years at issue, he sold his shares of stock in SCNB, his second largest New York investment, and attempted to sell his stock in LI Home, his largest investment. He donated to a charitable organization a large piece of property in New York (Fisher's Island) on which he and his wife at one time thought of building a retirement home. His other property in New York consisted of the Riverhead home, in which his wife lived, the office attached to the home, the rental income of which went to his wife, and the property on Peconic Bay where he docked his boat.

The Division points to four sets of circumstances which it argues defeat petitioner's claim of a change of domicile: (1) the contacts that petitioner maintained with New York State; (2) petitioner's wife's continued maintenance of a New York residence in Riverhead, New York, to which petitioner held legal title; (3) petitioner's business activities relating to LI Home; and (4) the number of days petitioner spent in New York.

The cases relied upon by the Division to support its position have all rested on stronger sets of facts and circumstances than those that exist here. Each of those decisions involves a

taxpayer who maintained a permanent place of abode in New York, as well as additional facts supporting a finding of New York domicile. In several of those cases, the taxpayer returned to New York after periods of residency in other locations, contradicting the taxpayer's claim that he had established a domicile outside New York (see, Matter of Cooper v. State Tax Commn., 82 AD2d 950, 441 NYS2d 30; Matter of Simon, Tax Appeals Tribunal, March 2, 1989; Matter of Roth, Tax Appeals Tribunal, March 2, 1989). The taxpayer in Matter of Feldman (Tax Appeals Tribunal, December 15, 1988) did not prove that he was in New York less than 183 days per year, and the evidence showed that he continued to carry on his profession as a medical doctor two days per week when in his Brooklyn home. The taxpayer in Matter of Zapka (Tax Appeals Tribunal, June 22, 1989) retained ownership of a home in New York and rented a fully furnished condominium in Florida. The taxpayer in Matter of Chrisman (43 AD2d 771, 350 NYS2d 468) never voted in Florida, never owned real property in Florida, and two years before his death swore under oath that Watkins Glen, New York was his domicile. The taxpayer in Matter of Clute v. Chu (106 AD2d 841, 484 NYS2d 239) not only retained a residence in New York, but used that residence more than he did his Florida home and spent a considerable portion of his time in New York fulfilling his responsibilities as director of two New York banks. The taxpayers in Matter of Kornblum (Tax Appeals Tribunal, January 16, 1992, confirmed 194 AD2d 882, 599 NYS2d 158) maintained a residence in New York, retained title to property in New York and spent considerable time in New York at their residence during the years at issue (approximately 145 days per year). In another case, the ultimate decision in favor of the State Tax Commission hinged upon facts showing that the taxpayer not only retained his home in New York, but also retained substantial interests in businesses located in New York, returned to New York frequently in connection with those interests, and retained joint responsibility with his brother for the day-to-day management of business ventures in New York (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990, revg 77 AD2d 725, 430 NYS2d 419 on the dissenting opinion of Greenblatt, J.). In Matter of Kartiganer v. Koenig (194 AD2d 879, 599 NYS2d 312), the taxpayer retained a significant proprietary interest in the engineering

firm he founded and continued to play an active role in its day-to-day operations. The taxpayer remained in constant communication with the firm by telephone and carrier service.

Cases decided in favor of taxpayers claiming a change in domicile (e.g., Matter of Angelico, Tax Appeals Tribunal, March 31, 1994; Matter of Sutton, *supra*) establish that petitioner's continued contribution to the maintenance of a New York residence and continued investment in a New York business are not conclusive facts, although they may be significant ones. It is also significant, though not determinative, that petitioner's wife lived in the Riverhead house. Other facts also show that petitioner maintained personal ties to New York: bank accounts; returning to New York to boat and fish; residing at the Riverhead house while in New York; and docking a boat in New York. In weighing the significance of these facts, the determinative question is whether they contradict the claimed change of domicile. Under these circumstances, they do not. Petitioner's lingering ties with New York do not contradict his claim that the Riverhead house is the house of his wife, which is used, along with the bungalow and his boat, to provide a place to stay on occasional personal and business trips. In addition, where a person has two homes, his domicile is the one which he considers and uses as his permanent home, and the length of time spent at each location is an important factor in determining intention in this regard (20 NYCRR former 102.2[d]). Mr. Pike clearly spent more time at his Florida residence than at the Riverhead house during the years at issue, averaging 121 days at the Florida condominium each year while averaging 28 days at the Riverhead house per year. Petitioner spent less and less time in New York and more and more time in Florida; he did not practice a profession or carry on a business in New York (the LI Home relationship was in the nature of an investment, and the legal action he became involved in was to protect that investment); there is no evidence of active civic or community activities in New York as there was in Florida; he did not return to make New York his permanent home after a period away; he consistently voted in Florida; and there are no formal declarations which contradict his declaration of Florida domicile.

The facts which weigh most strongly against petitioner's claim of a change of domicile

are those related to petitioner's relationship with his wife. Petitioner jointly owned the Florida property with his wife. They filed a joint Federal return, maintained joint bank accounts in Florida and New York, joined the Mooring Club in Vero Beach, Florida together, spent holidays together and spoke on the telephone every day. Petitioner paid all of Mrs. Pike's personal income tax obligations and the property taxes on the Riverhead house and office.

In making a determination of domicile, the crucial question is not whether the taxpayer continues to maintain some links to New York, but whether the remaining ties to New York demonstrate that New York is, in fact, the taxpayer's permanent home. Here, the question is whether petitioner's relationship with his wife and continuance of his wife's New York domicile, in combination with his remaining personal ties and ownership of property in New York, demonstrates that petitioner did not intend to make Florida his fixed and permanent home. Petitioner and his wife are on friendly, but not intimate, terms. They enjoy separate and incompatible interests in New York (wife) and Florida (petitioner). Petitioner took numerous steps to insure that his wife would be financially independent and able to live apart from him. He had offered his wife a divorce on many occasions but she had refused. Petitioner's relationship with Mary Cole was a factor in both petitioner's desire to move to Florida and his wife's desire to remain in New York. His wife's domicile in New York does not contradict petitioner's claim of a Florida domicile (Matter of Angelico, supra).

Petitioner was not carrying on a business in New York as a result of his relationship with LI Home. His responsibilities as a board of directors member included attending meetings once a month and reviewing decisions made by the executive director and administrator of LI Home, who resided on the premises and supervised all day-to-day operations. Petitioner's role in the legal proceedings concerning control of the board of directors was to protect his investment in LI Home and was not related to any day-to-day business operations of LI Home. There is no evidence that petitioner actively engaged in business or investment activities in New York.

Petitioner's contacts with New York do not establish a lack of intent to effect a change of domicile to Florida. Although petitioner visited a Long Island dentist on two occasions, he had all his other major medical care in Florida, including major cancer surgery and ongoing treatment for sciatica during the audit years. A New York savings account in petitioner's name was effectively transferred to his wife, while petitioner wrote approximately \$1,500,000.00 on his Florida checking account and only \$240.00 on the New York joint checking account. The insurance policy on the Florida condominium was mailed to the Riverhead house, but was paid for by petitioner out of his Florida account. Legal title to the Riverhead office was held by petitioner, but the rental income was retained by his wife, who was responsible for all maintenance and managerial responsibilities relating to the office.

In sum, petitioner has established through clear and convincing evidence that he was not domiciled in New York during the audit years.

G. The petition of Otis G. Pike is granted and the Notice of Deficiency dated March 11, 1991 is cancelled.

DATED: Troy, New York
June 2, 1994

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE