STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES W. AND MARJORIE W. MURRAY	:	DETERMINATION DTA NO. 811730
for Redetermination of a Deficiency or for Refund of New York City Income Taxes under the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioners, Charles W. and Marjorie W. Murray, P.O. Box 2174, Dogwood Street, Montauk, New York 11954, filed a petition for redetermination of a deficiency or for refund of New York City income taxes under the New York City Administrative Code for the years 1986 and 1987.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 25, 1994 at 9:15 A.M., with all briefs to be submitted by July 8, 1994. Petitioners, appearing by Hodgson, Russ, Andrews, Woods & Goodyear (Sharon M. Kelly, Esq., of counsel), filed a brief on May 6, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Craig Gallagher, Esq., of counsel), submitted its brief and memorandum of law on June 17, 1994. Thereafter, the Division of Tax Appeals received a reply brief from petitioners on July 11, 1994.

ISSUES

I. Whether petitioners were domiciliaries of New York City for the years 1986 and 1987 or maintained a permanent place of abode within New York City and spent more than 183 days in New York City and were thus taxable as resident individuals.

II. Whether the Division of Taxation has violated petitioners' due process rights.

III. Whether petitioners have shown reasonable cause for abatement of penalties.

FINDINGS OF FACT

Petitioners submitted 20 proposed findings of fact for consideration by the Administrative Law Judge. Findings of fact 1 through 6, 8 and 10 through 20 are accepted and incorporated into the Findings of Fact set forth below. Findings of fact 7 and 9, though incorporated in pertinent part within the Findings of Fact set forth below, have been modified to more fully reflect the record. The Division of Taxation ("Division") submitted six proposed findings of fact, all of which have been accepted and incorporated into the findings below.

Charles Murray, born in 1926, moved to Massapequa, Long Island when he was approximately a year and a half old and continued to live on Long Island throughout his young adult life. He later married and he and his first wife raised three children on Long Island. In 1962, he married his current wife, Marjorie Murray, and lived in Muttontown, Long Island until 1979.

Marjorie Murray was raised in Great Neck, Long Island and lived on Long Island until she and Mr. Murray sold their Muttontown home in 1979. Mrs. Murray's four young children lived with her and Mr. Murray in Muttontown and attended schools in nearby Hicksville. Petitioners were members of the Nassau Country Club at that time and Mrs. Murray and her children were active in the Trinity Lutheran Church.

With respect to his professional life, Mr. Murray was a municipal bond broker who worked between professional companies such as Smith Barney and Merrill Lynch. In 1952, he and two other men formed the firm of Clifford Drake and Company. The firm was located in New York City and Mr. Murray commuted from Muttontown, where he and his wife resided, to New York City on a daily basis. Mr. Murray testified that in the late 1970's when the children were grown and commuting had become more difficult, petitioners decided they would move to New York City until Mr. Murray retired. Mr. Murray testified that at the time he decided to move into New York City to alleviate the commuting pressure, he intended to live there permanently and, at the time, was not concerned imminently with his retirement. Petitioners spent one summer in the City and decided they would rent homes in Montauk for succeeding

summers. From 1979 to 1985 petitioners rented homes during the summer in or around the Montauk area.

In 1979, petitioners bought an apartment at 75 East End Avenue in New York City. At the time they bought this apartment, the Murrays intended to live in New York City until Mr. Murray retired from Clifford Drake.[1] Mr. Murray testified: "I love Long Island and always have. We planned that we would stay in New York until I retired." Mrs. Murray testified: "Charles said, 'I am getting too old to do this commuting. I would like to, for the interim period until I retire, I would like to go in and get an apartment in the city and we will think about where we want to locate permanently'" (tr., p. 56). She added that, after Clifford Drake was sold, "we wanted definitely to get out and get back to the island where we had our roots" (tr., p. 57).

Mr. Murray described the apartment located at 75 East End Avenue as a "very big apartment" at 4,800 square feet. It was a five-bedroom, five and a half-bathroom apartment, with a living room, library, dining room and kitchen. In 1983, Security Pacific Corporation purchased Mr. Murray's firm, Clifford Drake and Company. In part, as a result of the firm having been bought, the Murrays decided to scale down their living quarters, anticipating that Mr. Murray would be retiring in years soon to come. Thus, in 1983, petitioners sold 75 East End Avenue and purchased 60 East End Avenue, a three-bedroom apartment of approximately 2,800 or 2,900 square feet.

As previously stated, the Murrays rented homes in the Montauk area for summers between 1979 and 1985 and did so with the idea of eventually wanting to find the right home in which to live their retirement years. Mr. Murray testified that "while we were renting them each

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[1]Petitioners proposed a finding of fact which included a characterization that petitioners intended to remain in the City only "temporarily". This portion of the proposed finding of fact was not incorporated into the determination since, at the time of the purchase in 1979, the record does not establish that the term or the time during which petitioners would remain in New York City was temporary in nature.

year we would be looking for homes out there" (tr., p. 17). The house on Dogwood Road was the house that the Murrays rented during the summer of 1985 with an option to buy. By the end of December 1985, the Murrays owned that home, a 3,000 square foot home with four bedrooms, three bathrooms, a living room, dining room, family room, kitchen, two-car garage and a pool on one acre of property. The Montauk residence was purchased for $309,000.00. After its purchase, petitioners added a poolhouse, a generator and other such renovated improvements. They redecorated the home and purchased new furniture, installed a cedar closet and safe, all of which was accomplished in the early part of 1986. Little or none of the furnishings from the New York City apartment were transferred to their new Montauk home. Mrs. Murray testified that, upon completion of such projects, approximately in the spring of 1986, she transferred some personal belongings to the Montauk home such as flatware, china, glassware, linens and other such personal items.

Petitioners testified that at the time petitioners purchased their home in Montauk, they did not intend it to be a weekend or vacation home. They intended it to be their future home. Mr. Murray stated that "we had a different outlook after the firm was sold because I was getting where I didn't want any part of the firm any more or the City any more, to tell you the truth" (tr., p.18). He stated that they continued to own 60 East End Avenue for some period because, at first, an attempt to sell the apartment revealed to them that they could not command a certain price and, secondly, there was no mortgage on this apartment and the cost of the maintenance was less than what he would have paid to rent an apartment bearing similar characteristics.

Petitioners testified as to their habit of life and days spent in and out of New York City. Mr. Murray's work pattern in 1986 and 1987 was essentially a three and a half or four-day work week, extending generally between Monday and Thursday, with a return to Montauk on Thursday, remaining there until the following Monday. Sometimes he would leave New York City for Montauk on Wednesday and not return again until Monday.

Mrs. Murray often left New York City before Mr. Murray so she could play golf at Nassau Country Club and then proceed on to Montauk. During the summer, she generally

stayed in Montauk with her visiting children and grandchildren. The Murrays spent Thanksgiving with their son in other states during both the tax years in issue and Christmas with their daughter in New Jersey. They spent New Years Eve, Easter and Independence Day in Montauk.

Prior to the purchase of Clifford Drake by Security Pacific Corporation in 1983, Mr. Murray was a principal shareholder in the company. Although he became an employee of Security Pacific Corporation, Mr. Murray's employment was full time through 1986. Subsequently, Clifford Drake was purchased by J. J. Kenny and, at the time of his retirement in 1989, Mr. Murray was working for Kenny Drake. Mr. Murray negotiated a consulting arrangement with Kenny Drake until his retirement in 1989.

During 1986 and 1987, Mr. Murray received mail at his 60 East End Avenue address as well as at his business address in the City. He believes both his credit card statements and bank statements were being mailed to his New York City apartment in 1986 and 1987. Newspaper delivery continued regularly to the New York City apartment until approximately April or May 1986.

After the Murrays purchased the Montauk residence, Mr. Murray made some attempt to sell the New York City apartment. He claims to have consulted with a few real estate people in order to get a feel for the market. However, he characterized his efforts with respect to selling the apartment as "half-hearted". He did not enter into a listing agreement or formally place the property on the market.

In 1986 and 1987, only one of the Murrays' seven (adult) children lived in New York City and none of their grandchildren resided there. Three of their children lived on Long Island and various members of the family frequently visited them in Montauk. Holidays were either spent in Montauk or at their children's homes in New Jersey or Colorado.

The Murrays' social life consisted of boating near their Montauk home, membership and golfing in the Nassau Country Club, and involvement in other Montauk community affairs.

Mr. Murray's employment arrangements with Security Pacific Corporation resulted in

the elimination of his day-to-day responsibilities as he previously had with Clifford Drake. His position became that of a liaison between the former employees of Clifford Drake and the new bank executives and employees. His contract instead provided for responsibilities that were of a general, supervisory nature. Although he was expected to work several days per week, Security Pacific anticipated long vacations on his part. In return for his arrangement, he was to receive an annual salary in an amount substantially lower than the full-time company executives employed by Security Pacific received at the time.

In 1986, Mr. Murray began to explore the potential for establishing a taxi/limousine service on Long Island. He eventually invested approximately $300,000.00 in a business which began operations in 1989, but would eventually prove unsuccessful.

In 1989, the Murrays sold 60 East End Avenue.

Petitioners, Charles W. and Marjorie W. Murray, filed a New York State Resident Income Tax Return (IT-201) for the year 1986. On this return, petitioners listed their address as Dogwood Street, Montauk, New York 11954. In conjunction with their return, petitioners filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) which reported that petitioners did not maintain an apartment or other living quarters in the City of New York during any part of the tax year. Both Mr. Murray and his accountant, Alan Dlugash, personally signed at the bottom of Form IT-203 on April 15, 1987. Mr. Murray's wage income as a bond broker was stated on the return in the amount of $230,923.00. The allocation of wage and salary income shows Mr. Murray as having reported 151 days as worked in the City of New York.

Petitioners filed a New York State Resident Income Tax Return (Form IT-201) for the year 1987 also listing their address as Dogwood Street, Montauk, New York. In conjunction with their return for 1987, petitioners filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) which reported that petitioners did not maintain an apartment or other living quarters in the City of New York during any part of the tax year. Petitioner Charles Murray and his accountant, Alan Dlugash, signed at the bottom of NYC-203 on June 29 and 21,

1988, respectively. In addition, the allocation of wage and salary income indicated the number of days Mr. Murray worked in the City of New York was 153. Mr. Murray's wage income reported on the 1987 return was in the amount of $428,838.00.

Petitioners filed both a U.S. Individual Income Tax Return (Form 1040) and a New York State Resident Income Tax Return (Form IT-201) for the year 1989 with the same address. On petitioners' Form 1040, specifically on Form 2119, entitled "Sale of Your Home", petitioners indicated that they used the home they sold in 1989 as their main home for a total of at least three years of the five-year period before the sale. As such, petitioners took a one-time exclusion of the gain on the sale of the residence they sold. In conjunction with their return for 1989, petitioners also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) which reported that petitioners did not maintain an apartment or other living quarters in the City of New York during any part of the tax year. Petitioners' accountant, Alan Dlugash, initialed the bottom of Form NYC-203 on May 8, 1990. The allocation of wage and salary income on page 2 of the form indicated that the number of days Mr. Murray worked in the City of New York was 365. His wage income reported on the 1989 return was in the amount of $222,044.00.

On or about November 17, 1989, the Division commenced an audit of petitioners' tax returns for the years 1986 and 1987. On November 21, 1989, Karen Vickers of the New York City Audit Group, Income Tax Section, issued correspondence to petitioners indicating an appointment scheduled for December 6, 1989 for the purpose of commencing an audit. The information document request which accompanied the letter specified as its subject personal income tax for the years 1986 and 1987. It additionally requested copies of leases and/or purchase agreements for two addresses: (a) 60 East End Avenue, New York City, and (b) Dogwood Street, P.O. Box 2174. Additional information requested included backup documentation to support the number of working days allocated to New York, such as corporate calendars, airline receipts, credit card receipts and other third-party verification for the two tax years in question, and copies of bank statements, cancelled checks and credit card statements for

the years in issue.

The auditor's log contained an entry on April 23, 1990 referencing information that was reviewed by the auditor. The log entry reported the following:

> "Attended audit conference @ reps office:
>
> - examined all cancelled checks for Republic Natl Bank. (86-87)
> - examined credit card statements & utility bills (86-87)
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> "Taxpayers seem to be domiciled on Long Island. However, need more imp. cancelled checks for many L.I. social, religious & political associations. Also cancelled checks for support payments to several L.I. community organizations (i.e., fire dept., PBA, PAL, Montauk Historical Society). Tps have a boat docked near their L.I. home & have extensive payments for landscaping & garbage disposal. Utility & tel. exp. on LI are consistently higher on LI than in NYC."

At the time of the hearing, the auditor was no longer employed by the Division, and therefore the auditor did not testify at the hearing. Petitioners' accountant testified that his office had sent the Murrays' original documentation to the auditor without retention of any copies and that it had not been returned to his office or to the Murrays. This missing documentation is the subject of some controversy.

Maintaining the position that Montauk had become their domicile in 1985, petitioners introduced into evidence several items of correspondence from personal and business acquaintances on Long Island who indicate their belief that the Murrays' intention was to make their Montauk relocation permanent in nature. Included with such correspondence was a letter from John Keeshan, owner of John Keeshan, Inc., a real estate firm in Montauk. He states:

> "This will acknowledge that in October, 1985 my firm, John Keeshan, Inc., was instrumental in selling a home located on Dogwood Street in Montauk, N.Y. to Mr. and Mrs. Charles Murray. The Murrays purchased this home to relocate permanently in the Village of Montauk.
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> * * *
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> "Incidentally, after the purchase of his home here in Montauk, Mr. Murray requested my assistance in selling his apartment in New York. Though I was able to make suggestions, I know because of Market conditions, he was unsuccessful in the selling of his apartment for several years."

The permanency of the Murrays' residency in Montauk from 1985 on, active participation in community affairs and social acquaintances were also described in letters from Perry Duryea,

Jr., chairman of the board of the Long Island Commercial Bank, Harold Herbert of Herb's Montauk Market, and Reverend Raymond Nugent of the St. Therese of Lisieux Roman Catholic Church in Montauk.

The Murrays introduced their Montauk voter registration documents which listed the registration date for both petitioners as October 11, 1986. Petitioners did not vote in 1986 or 1987 because they did not feel sufficiently knowledgeable about the candidates in the local elections. They did vote in the 1988 election and in subsequent years.

The Murrays registered and insured their cars in Montauk beginning in 1986, they patronized numerous local stores and businesses, they received their personal mail in Montauk and purchased cable television service there.

With respect to the locations where petitioners lived during the years in question, the parties stipulated to the following facts:

(a) Petitioners bought a cooperative apartment at 60 East End Avenue, New York City on September 13, 1983; and

(b) Petitioners bought a house in Montauk, New York in December 1985 and invested considerable amounts in renovations.

With respect to days spent in and outside New York City during 1986 and 1987, the parties stipulated to the following:

	1986	1987
NYC work days	151	153
NYC non-work days	6	1
	157	154
Non-NYC work days	29	28
Non-NYC work days	14	35[2]
Non-NYC days	50	51
	93	114

[2] Although the stipulation indicates that "the following 35 dates in 1987 were non-New York City work days", it appears when a comparison is made to other documents in the record that the parties intended this to reference non-work days as opposed to work days.

The remaining days in each year are the subject of controversy. Petitioners did not submit documentation for the remaining 115 days in 1986 or the remaining 97 days in 1987.

During the audit, Mr. Murray and an associate of petitioners' accountant, a woman by the name of Rhonda Cohen, prepared schedules showing Mr. Murray's location on each day of 1986 and 1987 which were made part of the record and introduced into evidence with the audit file. The schedules were based on information extracted from credit card statements, cancelled checks, travel and expense reports, Mr. Murray's business diaries, and utility and telephone bills. The schedules showed that Mr. Murray had spent 158 days in New York City in 1986 (one day different from the actual stipulation) and 154 days in New York City in 1987. Her schedules also show that Mr. Murray had verified 43 days outside New York City in 1986 and 63 days outside New York City in 1987. Prior to the hearing and incorporated as part of the stipulated facts (see, Finding of Fact "24"), the Division agreed to an additional 50 documented days outside New York City in 1986 and an additional 51 documented days outside New York City in 1987.

A Statement of Personal Income Tax Audit Changes dated October 4, 1990 was issued to petitioners indicating that "taxpayers status is changed to reflect NYC residence for income income [sic] tax purposes." Accordingly, an adjustment was made resulting in additional New York City income tax due for 1986 in the amount of $96,225.00 and $9,062.00 with respect to 1987. The statement reflected interest to date. Although the statement did not contain an explanation of the penalties asserted, it set forth the Tax Law sections pursuant to which the penalties were asserted as follows:

"685(b)(1) - negligence
685(b)(2) - additional negligence
685(p) - substantial understatement"

Petitioners executed a consent extending the period of limitations for assessment for personal income taxes with respect to this matter such that personal income tax due for the year 1986 could be determined at any time on or before

December 31, 1990.

The Division issued to petitioners, Charles W. and Marjorie W. Murray, a Notice of Deficiency dated November 16, 1990 asserting additional income tax for the years 1986 and 1987 in the amounts of $96,225.00 and $9,062.00, respectively, plus interest and penalty amounts, which resulted in current balances due for each of the respective years of $156,984.24 and $13,801.83.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners maintain that they never changed their domicile to New York City, but rather maintained their Muttontown domicile until 1985 when they established their new permanent home in Montauk. However, in the alternative, petitioners argue that if they became domiciliaries of New York City in 1979, the evidence clearly shows that they changed their domicile to Montauk in 1985. In addition, petitioners argue they have provided sufficient proof that they did not spend more than 183 days in New York City during 1986 or 1987. In addition, petitioners allege penalties should be abated since they are inappropriate.

The Division takes the position that petitioners' conduct confirmed that they lacked clear manifestation of intent to abandon their New York City domicile and acquire a new one in Montauk. The Division additionally supports taxation of petitioners under an alternative theory that petitioners were also resident individuals of New York City, having maintained a permanent place of abode in New York and failed to sustain their burden of proof that they did not spend in the aggregate more than 183 days of the years in question in New York City.

CONCLUSIONS OF LAW

A. Section 11-1705(b)(1) of the Administrative Code of the City of New York provides, in pertinent part, as follows:

"City resident individual. A city resident individual means an individual:

"(A) who is domiciled in this city, unless: (i) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and

spends in the aggregate not more than thirty days of the taxable year in this city, or . . .

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

B. The foregoing section of the Administrative Code of the City of New York corresponds with Tax Law § 605(b)(1). The Division's regulations promulgated pursuant to Tax Law § 605 provide, in pertinent part, as follows:

"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." (20 NYCRR former 102.2[d].)

C. 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, quoting Matter of Bourne, 181 Misc 238, 41 NYS2d 336, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785). In order to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present (Matter of Minsky v. Tully, 78 AD2d 955). The crux of the matter was stated 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 considera- tion . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention . . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animo revertendi . . . .

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

D. Petitioners have maintained from the inception of this case that they changed their domicile to Montauk in 1985 when they purchased their "retirement home" on Long Island. Petitioners attempt to support this position in two ways: (a) that petitioners never changed their domicile to New York City when they purchased their apartment in 1979 or, alternatively, (b) that even if they become domiciliaries of New York City in 1979, they clearly changed their domicile to Montauk in 1985.

In large part, the Murrays lived their entire lives on Long Island. Their sole home as a family unit was in Muttontown, where they lived for approximately 17 years raising their children. Their social, civic, religious and community ties were centered there. The Murrays contend that they went to New York City for a limited time only and never intended to make

their permanent home there. Thus, their Muttontown domicile continued until 1985, they argue, when they established their new permanent home in Montauk. Admittedly, the Murrays moved to New York City with the intention of living there for several years until Mr. Murray's retirement in 1979. The duration of their situation in New York City, of course, was unknown at that time. During the period they spent in the City, they still maintained contacts with the Long Island communities with respect to friendships and summertime vacations.

Regardless of whether it is determined that the Murrays did not change their domicile to New York City in 1979, in any event they believe they have established their domicile in Montauk in 1985. They first contracted to purchase their home in the fall of 1985 and closed on the sale in December of the same year, moving in shortly thereafter. They undertook numerous renovation projects and enhanced their long-standing attachments to the Long Island community. They made their social, religious and community ties to Montauk and provided correspondence from members of the community supporting such claims. Beginning in 1983, Mr. Murray's involvement with the New York City brokerage business changed as Clifford Drake was sold to Security Pacific. In 1985, a contract which Mr. Murray signed at the end of 1985 with Security Pacific provided that his responsibilities were of a general supervisory nature with no day-to-day responsibilities. He was solely responsible at that time for the amount of time he spent meeting such responsibilities.

The Division takes the position that petitioners' newest assertion, that they never abandoned their Muttontown domicile to acquire a New York City domicile, is discredited by their own petition which clearly states that at the beginning of 1986 they had changed their domicile from New York City to Montauk. It is well established that after 1979 the Murrays no longer maintained living quarters in Muttontown and their only home from 1979 to 1985 was in New York City. The Division points out that nowhere in the record do petitioners indicate an intention ever to return to Muttontown, nor did they do so. References to establishing their domicile hinge in large part on Mr. Murray's retirement. The Division notes the fact that Mr. Murray did not retire until 1989, several years after they now claim to have changed their

domicile, and that not only did he retire from Clifford Drake that year, but it was also the year he sold his New York City apartment and the year he began a taxi business on Long Island. The Division points out that in reporting the sale of their cooperative apartment on their 1989 tax return (Form 2119) petitioners stated that the former New York City apartment was used by them as a main home for a total of at least three of the five years before the sale, which of course must have included both 1986 and 1987. The Division maintains that petitioners did not come forward with clear and convincing evidence which shows the severing of long-term ties with New York City and abandonment of a New York City domicile for one in Montauk. The Division notes the questioning by the Administrative Law Judge about the fact that petitioners' tax returns reflected Mr. Murray's 1987 salary at an amount almost twice his 1986 salary and requested an explanation. Mr. Murray stated "I guess I didn't get cut, I guess, until 1988 or something. That was the bonus, I think" (tr., p. 54). The Division believes petitioners' proof fails in that they did not clearly and convincingly establish that they intended to abandon their New York City domicile until after the years in issue.

E. Petitioners' argument that they never became domiciled in New York City is rejected. In addition to the fact that to deny that such change took place is contradictory to evidence in the record, petitioners completely severed Muttontown ties which included, of course, the sale of their home in 1979. The move to New York City in 1979 may not have had the personal sentiment associated with it that the Murrays eventually established they have with Long Island, however in 1979 it was clear that retirement was not in the very near future and, in fact, Mr. Murray's formal retirement was not for another 10 years. There is no doubt that the Murrays did not intend to remain in New York City indefinitely. However, it is clear that the association the Murrays had with New York City during the years 1979 until their change in domicile to Montauk was a permanent one.

F. There is no doubt that the Murrays' intention when they purchased their home in Montauk was to return to Long Island as a place for retirement. When Mr. Murray's company was bought out in 1983, the winding down of his business affairs and a change in his status as

owner of a company was part of a natural process. A transition of this kind is not something that takes place overnight, and his employment status continued to change throughout the six-year period from 1983 until his final retirement in 1989. During those years, he maintained much daily contact with New York City, including the maintenance of a permanent place of abode at 60 East End Avenue, as well as utilizing New York City for many of his daily services and professional contacts. Virtually no ties with New York City were severed in their entirety, but rather the Murrays began to establish contacts and continuity with Montauk associations during these two years. What they did not accomplish, however, was a change in domicile. It is not clear from the record what took place after 1987 as to the characterization of Mr. Murray's employment. The facts remain that Mr. Murray, especially, did not sever his business ties until 1989, did not sell their cooperative apartment until 1989 and did not begin his new business venture until 1989. What petitioners affirmatively did was begin a transitional period during which their change in domicile was taking place. As the court well established in Matter of Newcomb (supra), severing old ties is as equally important as the formulation of ties to a new location. While the Murrays were accomplishing the latter, the former did not take place until after 1987. Accordingly, petitioners' domicile was New York City during the tax years 1986 and 1987.

G. Although the Division has established that petitioners' domicile was New York City during the years in issue, the Division additionally argues that petitioners are statutory residents pursuant to section 11-1705(b)(1)(B) of the Administrative Code of the City of New York. Thus, if it is determined that petitioners were domiciled in Montauk during 1986 and 1987, the Division asserts they would still be considered residents of New York City since they maintained a permanent place of abode within the City and they failed to establish that they did not spend more than 183 days of each taxable year within the City boundaries. Thus, the question presented is whether petitioners substantiated the number of days spent within and without New York City.

20 NYCRR Appendix 20, § 1-2(c) states that:

> "Rules for days within and without the City.--In counting the number of days spent within and without this City, presence within the City for any part of a calendar day constitutes a day spent within the City except that such presence within the City may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside of the City, or while traveling by motor, plane or train through the City to a destination outside the City. Any person domiciled outside the City who maintains a permanent place of abode within the City during any taxable year and claims to be a nonresident must keep and have available for examination by the Finance Administrator adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the City.

H. Petitioners claim that during the audit they provided the auditor with certain documentation which was never returned to them. Since the accountant who reviewed such information is deceased and the Division's auditor is no longer employed with the Division, it is impossible to determine whether such fact is true and what bearing it may or may not have had on the establishment of the number of days spent in and out of New York City. As previously stated, the parties have stipulated to a substantial number of days in each tax year that have been substantiated by some form of documentation of petitioners' whereabouts. For 1986, 250 of 365 days (nearly 70%) have been substantiated by documentation. For 1987, 268 of 365 days (over 73%) have been stipulated as substantiated by petitioners. Of those days, the number of days spent in New York City during 1986 and 1987 were 157 and 154, respectively. In each of the tax years, the number of days which have not been substantiated by any documentation is 115 days for 1986 and 97 days for 1987. At the request of the Administrative Law Judge, petitioners' representative set forth post-hearing two tables which depicted the agreed-upon days of the location of Mr. and Mrs. Murray for both 1986 and 1987. Having reviewed the table for 1986, of the 115 days not substantiated by documentation, according to the table nearly 70 days are a Friday, Saturday or Sunday, 13 days are holidays or holiday weekends and 18 days are represented by Thursdays. A review of 1987 yields a similar result. Of the 97 days in 1987 not substantiated by documentation, nearly 80 days were Fridays, Saturdays and Sundays that were not accepted by the Division due to the lack of documentation, 14 were Thursdays and approximately 4 were holidays. The testimony of the Murrays was found to be credible and consistent with documentation that was available. They have well established that they intended to enter into retirement in the Montauk community and there is no doubt in my mind

that their intention, along with Mr. Murray's abbreviated work schedule leading toward final retirement, was in fact what the taxpayers actually did. If I accept as competent and truthful the testimony that weekends, some Thursdays and holidays were spent on Montauk or with family members in different states, then it is not possible for petitioners to have spent more than 183 days in the City of New York during each of the two tax years. This is not a case where petitioners are attempting to sustain their burden of proof solely on testimonial evidence, as such would run a very great risk. However, when a person is able to communicate a work pattern and a habit of life such as this, which does not require recollection of specific days in a given tax year, the testimony is even more believable. The Division's position that the remaining days were undocumented is unreasonable, given the fact that 70 to 80 of the remaining days were weekend days for which the average person would have no documentation. The Tax Appeals Tribunal has clearly established that credible testimony is sufficient as a matter of law to satisfy petitioners' burden of proof and the Division always has the opportunity to impeach the testimony of the witness through cross examination, i.e., to show that the witness was not in a position to know the facts or is not able to accurately remember them (Matter of Avildsen, Tax Appeals Tribunal, May 19, 1994). Petitioners worked with the member of petitioners' accounting firm to compile a schedule from diaries and other documentation which has since become unavailable. Approximately 70% or more of the days in each year were substantiated by documentation. The information presented was accepted in large part by the Division and what is really at issue are the remaining number of days and whether it is plausible that Mr. Murray, particularly, would be in a position and have the ability to communicate his whereabouts during the remaining days of 1986 and 1987. What he has shown is not that he was necessarily present in a particular place on a specific day, but his testimony clearly provides a pattern which, when applied to the listing of days, leads one to the conclusion that he did not spend more than 183 days in New York City in either 1986 or 1987. Since he had the capacity to recollect his habit of life during those years, communicated the same competently, and exhibited truthfulness during such testimony, it is accepted as having

substantiated the remaining days in issue. Accordingly, petitioners are found not to have spent more than 183 days in the City of New York during either of the years in issue.

I. In their reply brief, petitioners raised the argument that they were deprived of due process, and their rights violated by virtue of the fact that the Division for the first time, in its response brief, raised a new theory upon which to tax petitioners in this matter. Petitioners are specifically challenging the fact that the Division made reference to (1) the checking of boxes regarding the New York City dwelling place question on Forms NYC-203, and (2) the fact that the Division raised petitioners' statement that they had used their New York City apartment as their main home for purposes of their one-time over-55 capital gain exclusion on Form 2119 filed in 1989 reporting such sale.

The first time the Division specifically referred to these two segments of the evidence was, in fact, in its reply brief. Petitioners are reminded, however, that the briefs, by their very nature, provide the parties with an opportunity to summarize the facts, review the evidence and comment on the same in light of the legal arguments which must be supported. The evidence upon which the Division commented was contained within the audit file submitted into evidence as Exhibit "J" during the hearing. However, prior to its introduction into the audit process, those documents were a part of petitioners' records and prepared by either (or both) petitioners and their accountant. New York law recognizes due process as the observation of fundamental fairness essential to the very concept of justice. Due process is not a mechanical formula or a rigid set of rules. It represents a realistic and reasonable evaluation of the respective interests of the parties under the circumstances of the particular case (20 NY Jur 2d, Constitutional Law § 390). The documents bearing the evidence upon which the Division commented were petitioners' own documents prepared by them or their representative and were within their availability upon which to offer rebuttal evidence. In fact, petitioners could have taken further opportunity in their reply brief to counter the Division's argument, but chose not to do so. Instead, petitioners requested that any comments with respect to such issues be stricken or, alternatively, that the hearing be reconvened so they could address these items. Inasmuch as

the fact that the Division merely commented on evidence also readily available to petitioners and, more importantly, based on the fact that the Division did not assert a new theory, but merely utilized the available evidence to further buttress its position, petitioners' due process rights have not been violated. Petitioners' request for relief for such violation is denied.

J. Although petitioners assert that the imposition of penalties in this case is inappropriate, petitioners have failed to establish reasonable cause for the waiver of such penalties. Accordingly, penalties are sustained.

K. The petition of Charles W. and Marjorie W. Murray is hereby denied and the Notice of Deficiency dated November 16, 1990 asserting additional income tax due for 1986 and 1987 is sustained.

DATED: Troy, New York
January 6, 1995

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE