

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ESTATE OF ALDO GUCCI	:	DETERMINATION
	:	DTA NO. 812160
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Years 1977 through 1984.	:	

Petitioner, Estate of Aldo Gucci, c/o Stuart A. Smith, Esq., Piper & Marbury, 53 Wall Street, New York, New York 10005, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1977 through 1984.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 19, 1994 at 9:15 A.M., with all briefs to be submitted by March 14, 1995.¹ Petitioner, appearing by Piper & Marbury (Stuart A. Smith, Esq., of counsel), submitted a brief on December 10, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Craig Gallagher, Esq., of counsel), submitted a memorandum on January 24, 1995. Petitioner submitted its reply brief on March 14, 1995, which commenced the six-month period to issue a determination in this matter.

ISSUES

I. Whether the Division of Taxation bears the burden of proof in this matter pursuant to Tax Law § 689(e)(3).

¹The record in this matter was closed by order of the Administrative Law Judge, dated September 1, 1994.

II. Whether the decedent, Aldo Gucci, was a domiciliary of New York State and New York City for the years 1977 through 1984 or whether he was a statutory resident of the City and State of New York during those years.

III. Whether the penalties imposed under Tax Law § 685(a) and (b) should be cancelled.

FINDINGS OF FACT

Petitioner, Estate of Aldo Gucci, filed a petition with the Division of Tax Appeals on August 9, 1993, which requested a redetermination of a deficiency of New York State and New York City personal income taxes for the years 1977 through 1984 in the amount of \$6,695,678.55.²

The petition alleges that petitioner was neither domiciled in New York nor a statutory resident thereof during the years in question. Attached to the petition is a one-page statement which includes allegations of fact as well as arguments of law. The statement of facts does not comply with the regulatory requirement that the petition contain separately numbered paragraphs setting forth a statement of facts upon which petitioner relies to prove each alleged error of the Commissioner (see, 20 NYCRR 3000.3[b][5]). The statement does, however, set forth such facts in narrative fashion.

The petition alleges that the decedent was born in Italy in 1905 and maintained his Italian citizenship until his death in 1990, all the while keeping "extremely close ties" to Italy, and maintaining a permanent place of abode in Florence, Italy. In addition, the petition asserts that the decedent spent practically all of his final years (1988-1990) (years beyond the scope of the audit) in Italy, as that was his place of domicile, the place to which he always intended to return. The petition contends that the decedent, actively involved in directing the business affairs of the Gucci multinational business, with locations around the world, was constantly traveling between New York, Florida, California, the Far East and Europe. Although during the

²Aldo Gucci died on January 19, 1990. Petitioners are listed as Angelo Rosato and Stuart A. Smith, Co-Executors, Estate of Aldo Gucci. The petition is signed only by Stuart A. Smith, Co-Executor.

years in question the decedent concededly maintained a "convenience apartment" in New York City, located in close proximity to the decedent's New York office, the petition denies that the decedent ever spent in the aggregate more than 183 days of any of the taxable years at issue in New York. In addition, the petition claims that the decedent never voted in or obtained a driver's license from New York and, further, that there was never any indicia to suggest that the decedent was a domiciliary of New York. Based on these facts, the petition alleges that the decedent was not a resident individual of New York during the audit period and that the proposed adjustments in the amount of taxes owed by petitioner, the decedent's estate, are without foundation.

The Division of Taxation ("Division") served an answer, dated October 5, 1993, on petitioner. The Division, in its answer, denied petitioner's allegations and stated that: (1) a Notice of Deficiency was issued to decedent petitioner, Aldo Gucci, which determined his liability for New York State and City personal income tax for the years 1977 through 1984; (2) during the years 1977 through 1984, decedent petitioner was domiciled in the City and State of New York; (3) during the years 1977 through 1984, decedent petitioner was a "resident individual" and "city resident individual" as defined in Tax Law §§ 605(b) and 1305(a); and (4) petitioner is liable for payment of personal income tax and City personal income tax for the audit period pursuant to Tax Law §§ 601 and 1301. The answer also states that petitioner has the burden to prove that the determination "is erroneous and/or improper".

In late 1976, Aldo Gucci became a resident alien of the United States of America. During the years at issue, he was a resident alien.

The late Aldo Gucci filed Federal personal income tax returns (Form 1040) for the years 1977 through 1984. However, he did not file any New York State or City tax returns for those years. During the audit period, Mr. Gucci's Federal income tax returns were prepared by Altman, Eisenberg & Company, 570 7th Avenue, New York, New York.

On or about January 17, 1986, Aldo Gucci was charged in U.S. District Court, Southern District of New York, with conspiracy to defraud the United States government and Federal tax

evasion. He was represented in that Federal criminal matter by Milton Gould, Esq., of the law firm Shea and Gould. On that date, a Waiver of Indictment and Information was filed on decedent petitioner's behalf.

Subsequently, in 1986, Aldo Gucci pleaded guilty to conspiracy to defraud the United States government and to two counts of Federal tax evasion. Specifically, he was convicted of conspiracy for failing to report \$11,800,000.00 of income from 1977 to 1982. In addition, he was convicted of Federal tax evasion for the years 1979 and 1980, during which years he evaded \$3,500,000.00.

On or about June 18, 1986, the City of New York, Department of Finance, Bureau of Tax Collection ("Department of Finance") commenced a field audit of decedent petitioner. Bertyl Andrews was the auditor assigned to conduct the audit.

During the hearing, the Division submitted as its Exhibit "N", Volume I of the audit workpapers. Included in the audit workpapers were contact sheets entitled "Contacts and Comments of All Audit Actions" and "Tax Field Audit Record" which contained all of the auditor's contacts and comments concerning this audit. According to the contact sheets, the auditor: (1) met with petitioner's representative on July 15, 1986 and discussed the issue of residency and nonfiling; (2) was notified by petitioner's representative on October 17, 1986 that the taxpayer was having problems with the Federal government and that he would get back to the auditor; (3) on April 27, 1987 sent a document request to petitioner's representative; (4) spoke with petitioner's representative on May 12, 1987 regarding the document request and was informed that petitioner's representative was still involved with the Federal government; and (5) on January 25, 1988 spoke with petitioner's representative who informed him that "he was contacted by Charles Davies in Albany" and that he wanted to know which office was in charge. The notes indicate that the auditor promised to find out why petitioner's representative was contacted by Albany.

On September 29, 1987, Charles Davies, Audit Group Manager of the Division's Audit

Division - Central Income Tax Section, sent a letter to Mr. Gucci.³ Mr. Davies wrote, in pertinent part:

"Under the provisions of Section 6103(d) of the Internal Revenue Code, we have been notified by the Internal Revenue Service that you filed amended United States Individual Income Tax Returns from 1977 through 1981 and original Personal Income Tax Returns for 1982 through 1984 with the Internal Revenue Service in the summer of 1986. Because you have not yet filed comparable returns with New York State, please either send me the necessary returns with a check for the tax and interest made out to 'New York State Income Tax' or contact me to explain your situation. I have enclosed the forms that I believe will be suitable."

Petitioner's representative responded by letter, addressed to Mr. Davies, dated October 21, 1987, in which he stated that:

"I am in receipt of your letter dated September 29, 1987, a copy of which is enclosed for your reference. Please be advised that Aldo Gucci has not spent sufficient time in New York State to require him to file New York State income tax returns for the periods set forth in your letter. I made this position clear to an auditor of the New York State Department of Finance more than a year ago."

In a letter to petitioner's representative dated November 10, 1987, Mr. Davies wrote, in pertinent part:

"Thank you for your letter of October 21, 1987, in which you said that Mr. Gucci had not spent sufficient time in New York State in 1977 through 1984 to require him to file New York State income tax returns, and that you had made this position clear to an auditor from our department more than a year ago.

"I have not been able to find a record of your dealing with this department on that issue, and since there is more involved with filing requirements than one's precense [sic] in the state, would you please answer the applicable questions below

"1. By whom was Mr. Gucci employed from 1977 to 1984 and in what capacity?

"2. Where did Mr. Gucci reside from 1977 to 1984?

"3. If your answer to question #2 indicates that Mr. Gucci resided outside of New York State, please also answer the following:

"a. Did Mr. Gucci maintain an apartment or other place of abode in New York State in 1977-1984? If so, where and when?

"b. Where did Mr. Gucci regularly work from 1977 to 1984?

"c. If the answer to 'b' indicated that Mr. Gucci worked at his home, where

³The letter was addressed to "Dr. Aldo Gucci, c/o Mr. Stuart A. Smith, Esq., Shea and Gould, 111 Washington Avenue, Albany, New York 12210."

was the office that he reported to from 1977 to 1984?

"d. How many days in each year from 1977 to 1984 did Mr. Gucci work in New York State and New York City?"

By letter dated November 24, 1987, petitioner's representative supplied the following answers to Mr. Davies' November 10, 1987 questions:

1. "From 1977 to 1984, Mr. Gucci was employed by each of the companies constituting the worldwide Gucci network. These companies include: Guccio Gucci, S.p.a. (Italy); Gucci Limited (England); Gucci Limited (Hong Kong); Gucci Parfums (Italy); and Gucci Shops, Inc. (New York). He was a director of each of these corporations."
2. "From 1977 to 1984, Mr. Gucci was domiciled in Palm Beach, Florida where he maintained his principal residence. He also maintained residences in Rome and in Florence, Italy. For convenience, he maintained an apartment in New York City."
- 3a. "Mr. Gucci maintained an apartment during the period of 1977 to 1984 at 25 West 54th Street, New York, New York 10019."
- b. "There is no place that can be described as the place where Mr. Gucci regularly worked during the period 1977 to 1984. He was responsible for directing the activities of the worldwide network of Gucci companies and traveled continuously and extensively during this period."
- c. "Not applicable."
- d. "A review of Mr. Gucci's records during the period of 1977-1984 indicates that he worked no more than approximately 100 days in New York City in each year during this period."

Mr. Davies had additional questions which he posed in a letter to petitioner's representative dated January 5, 1988. The questions related to: Mr. Gucci's voter registration; his driver's license; the state in which his personal car was registered; his membership in civic organizations and their locations; his will and his address recited in the will; his ownership of his Florida residence and the execution of a "Florida Certificate of Residency". Mr. Davies also asked the following questions:

1. "In light of his filing status, does Mr. Gucci live with his wife? If he does, where did Mrs. Gucci stay most of the time from 1977 through 1984?"⁴

For tax years 1977 through 1981, petitioner's filing status was "Head of Household" with one dependent child, Patricia Gucci, living with him. For tax years 1982 through 1984, his filing status was "Married filing separate return" and he claimed an exemption for his dependent

2. "What other aspects of Mr. Gucci's life support his domicile in Florida?"
3. "Do the Italian partnerships mentioned on the Schedule E's for Mr. Gucci's 1040's have any offices, stores or warehouses in New York State?"
4. "Where was Mr. Gucci domiciled before he moved to Florida?"

Included with Mr. Davies' letter was a schedule to apportion petitioner's income to New York State and City for tax purposes.⁵ Petitioner's representative was asked to prepare a schedule for each year from 1977 to 1984. Mr. Davies requested a reply within 60 days.

By letter dated April 5, 1988, petitioner's representative responded as follows:

"Mr. Gucci is a citizen of Italy and a resident alien of the United States. He is therefore not eligible to vote in the United States.

* * *

"Mr. Gucci does not have any driver's license issued by any State of the United States. Although he has an Italian driver's license, he has not, in fact, driven an automobile for several years because of his age.

* * *

"His personally owned car is registered in Florida.

* * *

child, Patricia Gucci, who lived with him.

⁵The schedule asked for the income to be apportioned for both New York State and City purposes (and an explanation if the wages shown on the Federal return were different), and an allocation of days in the year, as follows:

"Days in the Year

Less: Nonworking Days

Saturdays and Sundays

Holidays

Vacation Days

Sick Leave

Other Nonworking Days (explain)

Total Nonworking Days

Total Working Days

Less: Total Working Days Outside N.Y. State & N.Y. City

Total Working Days in N.Y. State and N.Y. City"

"Mr. Gucci has been active in Florida civic and charitable organizations for many years. His Florida activities include the Palm Beach Heart Association, the Miami Opera Guild, the Palm Beach Chapter of the American Cancer Association, the Northwood Institute, St. Mary's Hospital of Palm Beach and the Bal Harbour Chapter of the Humane Society. He is also a member of the Pointsiana Club and the Palm Beach Club, which are both located in Florida.

* * *

"Mr. Gucci owns his Florida residence.

* * *

"Mr. Gucci lives with his wife, who is an Italian citizen and who is a non-resident alien. During the period 1977-1984, Mrs. Gucci spent most of the time in Italy. They would spent time together in Italy, England and Florida.

* * *

"Mr. Gucci has a will. The address in his will is his residence in Rome, Italy.

* * *

"Mr. Gucci does not recall whether he has signed a Florida Certificate of Residency. He has, however, maintained a residence in Florida for more than 20 years.

* * *

"During the period 1977-1984, Mr. Gucci was actively involved in directing the affairs of his world-wide business. He traveled extensively and spent considerable amounts of time in Italy, England, Hong Kong, California, and Florida, and spent a minimal amount of time in New York City. In every sense of the word, Mr. Gucci was a citizen of the world and pursued his business activities throughout Europe and the Far East. To the extent he would return home to the United States, he would spend that time at his Florida residence.

* * *

"As indicated above, Mr. Gucci is a citizen of Italy and has considerable ties to the country of his birth. In 1977, he became a resident alien of the United States. More than ten years before that date, he purchased a residence in Florida. Prior to 1977 and thereafter, Mr. Gucci spent considerable amounts of time in Italy. As stated above, to the extent he returned to a home in the United States during 1977-1984, it was to his Florida residence."

There was a negative response to the question, "[d]o the Italian partnerships mentioned on the Schedule E's for Mr. Gucci's 1040's have any offices, stores or warehouses in New York State?"

Mr. Smith also included schedules of financial and personal data which contained the following

information:

	New York <u>State</u>	New York <u>City</u>
Income to be Apportioned for years: 1977	\$ 30,400.00	\$ 30,400.00
1978	31,593.00	31,593.00
1979	75,596.00	75,596.00
1980	90,694.00	90,694.00
1981	90,480.00	90,480.00
1982	185,833.00	185,833.00
1983	320,000.00	320,000.00
1984	493,000.00	493,000.00

Each year 1977 through 1984, inclusive, contained 365 or 366 days, of which 279 were working days and 49 of those were working days in both New York State and City.

On May 19, 1988, the Division's Audit Division - Central Income Tax Section issued to petitioner four documents entitled "Statement of Audit Changes" ("statement") for the tax years 1977 through 1984, inclusive.

The statement issued for taxable years 1977 and 1978 contained the following:

"Explanation: Based on the information submitted on your behalf by your accountant, we have computed your New York State Income Tax liability for the tax years shown above.

"All income of a nonresident of New York State is taxable to New York State if it is attributable to an occupation carried on in the state (Section 632(b)(B) [sic] of the New York State Tax Law).

"All wages of a nonresident of New York City are taxable to New York City when earned within the city (Section U46-2.0(a)(1) of the New York City Administrative Code).

"We have allowed you the standard deduction because it exceeds your allowable itemized deduction.

"Late filing, late payment and negligence penalties are imposed for your failure to file your personal income tax returns for the years above (Sections 685(a)(1), 685(a)(2) and 685(b) of the State Tax Law and Sections T46-185.0(a)(1), T-46-185.0(a)(2) and T46-185.0(b) of the City Code).

"Your additional tax due, which is shown below, is computed in detail on the attached sheets:

	<u>1977</u>	<u>1978</u>	
"New York State Tax Due	\$113.16	\$105.80	
New York City Nonresident			
Earnings Tax	<u>10.53</u>	<u>11.47</u>	
TOTAL TAX DUE	\$123.69	\$117.27	\$240.96

LATE FILING PENALTY	27.83	26.39	54.22
LATE PAYMENT PENALTY	30.92	29.32	60.24
NEGLIGENCE PENALTY	6.18	5.86	12.04
		Interest	<u>297.79</u>
		TOTAL DUE	\$665.25"

Attached to the statement was an "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1977</u>	<u>1978</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1977: \$30,400 x 49/279	\$5,339.00	
1978: \$31,593 x 49/279		\$5,549.00
Less: Standard Deduction	(1,500.00)	(1,900.00)
Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1977: 3 x \$650 x \$5,339/\$1,003.258 [sic]	(10.00)	
1978: 3 x \$650 x \$5,549/\$2,383,509		<u>(4.00)</u>
Corrected New York Taxable Income	<u>\$3,829.00</u>	<u>\$3,645.00</u>
State Tax on the Above	\$ 113.16	\$ 105.80
Less: Maximum Tax Benefit	-0-	-0-
STATE TAX DUE	<u>\$ 113.16</u>	<u>\$ 105.80</u>
New York City Wages (from above)	\$5,339.00	\$5,549.00
Less: Exclusion	<u>3,000.00</u>	<u>3,000.00</u>
Taxable Amount	\$2,339.00	\$2,549.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings tax	\$ 10.53	\$ 11.47"

The statement issued for taxable years 1979 and 1980 contained the same narrative under "Explanation" as was contained in the statement for the years 1977 and 1978 contained above.

The additional tax due was computed to be:

	<u>1979</u>	<u>1980</u>	
"New York State Tax Due	\$531.36	\$725.99	
New York City Nonresident Earnings Tax	<u>50.75</u>	<u>62.68</u>	
TOTAL TAX DUE	\$582.11	\$788.67	\$1,370.78
LATE FILING PENALTY	\$130.97	\$177.45	308.42
LATE PAYMENT PENALTY	145.53	197.17	342.70
NEGLIGENCE PENALTY	29.11	39.43	68.54
		Interest	<u>1330.99</u>
		TOTAL DUE	
	\$3421.43"		

The "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1979</u>	<u>1980</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1979: \$75,596 x 49/279	\$13,277.00	
1980: \$90,694 x 49/279		\$15,928.00
Less: Standard Deduction	(2,124.00)	(2,400.00)
Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1979: 3 x \$700 x \$13,277/\$2,650,821	(11.00)	
1980: 3 x \$750 x \$15,928/\$2,112.802 [sic]		(17.00)
Corrected New York Taxable Income	<u>\$11,142.00</u>	<u>\$13,511.00</u>
State Tax on the Above	\$ 531.36	\$ 725.99
Less: Maximum Tax Benefit	-0-	-0-
STATE TAX DUE	\$ 531.36	\$ 725.99
New York City Wages (from above)	\$13,277.00	\$15,928.00
Less: Exclusion	<u>2,000.00</u>	<u>2,000.00</u>
Taxable Amount	\$11,277.00	\$13,928.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings tax	\$ 50.75	\$ 62.68"

The statement issued for taxable years 1981 and 1982 contained the same narrative under "Explanation" as was contained in the statement for the years 1977 and 1978 contained above in Finding of Fact "17". The additional tax due was computed to be:

	<u>1981</u>	<u>1982</u>	
"New York State Tax Due	\$722.75	\$2,378.30	
New York City Nonresident Earnings Tax	<u>62.51</u>	<u>146.87</u>	
TOTAL TAX DUE	\$785.26	\$2,525.17	\$3,310.43
LATE FILING PENALTY	\$176.68	\$ 568.16	744.84
LATE PAYMENT PENALTY	196.32	631.29	827.61
NEGLIGENCE PENALTY	39.26	\$ 126.26	165.52
		Interest	<u>1,948.91</u>
		TOTAL DUE	\$6,997.31"

The "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1981</u>	<u>1982</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1981: \$90,480 x 49/279	\$15,891.00	
1982: \$185,833 x 49/279		\$32,637.00

Less: Standard Deduction	(2,400.00)	(2,400.00)
Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1981: 3 x \$750 x \$15,891/\$2,209,396	(16.00)	
1982: 3 x \$800 x \$32,637/\$1,450,557		(54.00)
Corrected New York Taxable Income	\$13,475.00	\$30,183.00
State Tax on the Above	\$ 722.75	\$ 2,785.62
Less: Maximum Tax Benefit	-0-	<u>407.32</u>
STATE TAX DUE	\$ 722.75	\$ 2,378.30
New York City Wages (from above)	\$15,891.00	\$32,637.00
Less: Exclusion	<u>2,000.00</u>	-0-
Taxable Amount	\$13,891.00	\$32,637.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings Tax	\$ 62.51	\$ 146.87"

The statement issued for taxable years 1983 and 1984 contained the following:

"Explanation: Based on the information submitted on your behalf by your accountant, we have computed your New York State Income Tax Liability for the tax years shown above.

"All income of a nonresident of New York State is taxable to New York State if it is attributable to an occupation carried on in the state (Section 632(b)(B) [sic] of the New York State Tax Law).

"All wages of a nonresident of New York City are taxable to New York City when earned within the city (Section U46-2.0(a)(1) of the New York City Administrative Code).

"Late filing, late payment and negligence penalties are imposed for your failure to file your personal income tax returns for the years above (Sections 685(a)(1), 685(a)(2) and 685(b) of the State Tax Law and Sections T46-185.0(a)(1), T-46-185.0(a)(2) and T46-185.0(b) of the City Code)."

The additional tax due was computed to be:

	<u>1983</u>	<u>1984</u>	
"New York State Tax Due	\$4,553.70	\$6,815.10	
New York City Nonresident Earnings Tax	<u>252.91</u>	<u>389.63</u>	
TOTAL TAX DUE	\$4,806.61	\$7,204.73	\$12,011.34
LATE FILING PENALTY	\$1,081.49	\$1,621.06	2,702.55
LATE PAYMENT PENALTY	\$1,201.66	\$1,368.90	2,570.56
NEGLIGENCE PENALTY	\$ 240.33	\$ 360.24	600.57
		Interest	<u>3,934.79</u>
		TOTAL DUE	\$21,819.81"

The "AU-18 ATTACHMENT" sheet which contained the following computations:

	<u>1983</u>	<u>1984</u>
"New York Income:		
Wages x Days Worked in NY/Days Worked All Year		
1983: \$320,000 x 49/279	\$56,201.00	
1984: \$493,000 x 49/279		\$86,584.00
Less: New York Deductions		
Federal Deduction x New York Income/Federal Income		
1983: \$107,788 x \$56,201/\$1,453,506	(4,171.00)	
1984: \$120,390 x \$86,584/\$883,745		(11,798.00)
Less: New York Exemption		
Federal Number x State Exemption x NY Income/Federal Income		
1983: 3 x \$800 x \$56,201/\$1,453,506	(93.00)	
1984: 3 x \$800 x \$86,584/\$883,745		(235.00)
Corrected New York Taxable Income	\$51,937.00	\$74,551.00
State Tax on the Above	\$ 5,831.18	\$ 8,997.14
Less: Maximum Tax Benefit	<u>1,277.48</u>	<u>2,182.04</u>
STATE TAX DUE	\$ 4,553.70	\$ 6,815.10
New York City Wages (from above)	\$56,201.00	\$86,584.00
Less: Exclusion	-0-	-0-
Taxable Amount	\$56,201.00	\$86,584.00
Times: Nonresident Earnings Tax Rate	.0045	.0045
New York City Nonresident Earnings tax	\$ 252.91	\$ 389.63 "

On May 25, 1988, Aldo Gucci executed the "Consent to Findings" section of the two statements issued for tax years 1977/1978 and 1979/1980 and submitted two checks to the Division, dated May 25, 1988, in the amounts of \$665.25 and \$3,421.43, respectively.

Petitioner submitted to the Division two checks dated July 12, 1988 in the amounts of \$6,997.31 and \$21,819.81, respectively, for the tax years 1981/1982 and 1983/1984. He did not execute the "Consent to Findings" section on either the statement issued for tax years 1981 and 1982 or the statement issued for tax years 1983 and 1984.

According to the contact sheets, the Department of Finance auditor, Mr. Andrews, was unable to get any information from the Division's Albany office.

On April 26, 1988, the Department of Finance assigned the audit to Ann Marie Murray. Ms. Murray has been employed as an associate tax auditor with the Department of Finance for seven years. Over that period of time she has performed approximately 150 income tax audits

(tr., pp. 51-52).

Review of the contact sheets indicates that Ms. Murray sent her first appointment and document request to Aldo Gucci in care of his representative on June 6, 1988. The appointment was scheduled for July 12, 1988 at 9:30 A.M. Her notes indicate that petitioner's representative did not keep the appointment. The notes also reveal that a packet of documents was allegedly sent by petitioner's representative by certified mail to the auditor prior to the scheduled appointment date; however, she never received them. Petitioner's representative's office resent the packet and cover letter on July 12, 1988. The packet of documents included documentary evidence of petitioner's payment of New York State and City taxes for the years 1977 through 1980.

Subsequently, on July 18, 1988, petitioner's representative sent documentary evidence of petitioner's payment of New York State and City taxes for the years 1981 through 1984.

In a letter to Ms. Murray dated August 15, 1988, petitioner's representative stated that he regarded petitioner's matter as closed because of the Division's assessment of taxes for 1977 through 1981 which "were calculated on the basis of formal questionnaires" sent by the Division's Albany office and petitioner's payment of same.

Ms. Murray sent a letter to petitioner's representative dated September 21, 1988 in which she wrote:

"I have received the copies of the assessments and checks for payment which you sent me. I have also received the audit report from Albany. I realize that New York State issued an assessment and Mr. Gucci paid it. That, however, does not have any bearing on the residency audit being conducted by New York City.

"This case is still open and will remain open until you have provided sufficient documentation for us to reach a decision"

According to the audit workpapers for the New York City audit, the taxpayer was requested to provide the following information for 1977 through 1984 to substantiate residency and allocation:

- "1. Bank statements and cancelled checks for all U.S. bank accounts.
- "2. Monthly statements with receipts for all credit and charge cards.

- "3. Telephone and utility bills for all residences.
- "4. Diaries with backup documentation.
- "5. Any available travel tickets.
- "6. Proof of dependent child's residence, education, and employment.
- "7. Breakdown of directors fees and buying office bills income from Gucci Shops Inc./Gucci Parfums Ltd., with a list of office locations for each and proof of which office Taxpayer worked out of.
- "8. Copies of Florida tax returns and Florida declaration of domicile.
- "9. All passports, alien cards, and reentry visas for Mr. and Mrs. Gucci.
- "10. Affidavits from Mr. and Mrs. Gucci stating where they are domiciled, the date the domiciles were acquired, and what their previous domiciles were.
- "11. A list of all places of abode owned, leased, or used by Taxpayer since he came to the United States.
- "12. State what changed about Taxpayer's lifestyle and intentions to change his status from nonresident alien to resident alien."

At the hearing, Ms. Murray testified that although she had made six detailed requests that Mr. Gucci provide her with an affidavit as to his domicile for the years in question, he failed to do so. She further testified that she had made approximately 10 requests of Mr. Gucci for a day count analysis and supporting documents for the years in question and that he had failed to provide same (tr., pp. 54-55).

Ms. Murray was asked to approximate the number of times she had scheduled a meeting with the taxpayer or his representative and they had failed to show up or had failed to provide the documentation which she had requested. Her response was:

"They failed to show up six times. They failed to provide documents every time, which I think I made 11 requests (tr., p. 55).

As part of its Exhibit "P", the Division submitted part of an agreement, entered into on March 4, 1976, by and between Toby Armour Schneider and Jerome A. Manning, as Trustees under the Will of Rachel A. Doyle for the benefit of Leah Doyle, as Trustees under the Will of Rachel A. Doyle for the benefit of Joshua Klein and Ruth A. Kamen, as sellers, and Gucci Parfums International, Ltd., Inc., a Florida corporation, having its principal office at 256 Worth

Avenue, Palm Beach, Florida, as purchaser, and Aldo Gucci, of 689 Fifth Avenue, New York, New York, as guarantor, for the purchase and sale of the premises located at 683 Fifth Avenue, New York, New York.

During the audit period, petitioner was chairman of Gucci Shops, Inc., a New York corporation. During this same period, he conducted business in and maintained a business office with Gucci Shops, Inc. located at 685 Fifth Avenue, New York, New York.

Petitioner maintained a cooperative apartment in New York City during the years in question at 25 West 54th Street, Apartment 12E, New York, New York. Petitioner purchased this cooperative apartment in 1976.

Petitioner, during the years in question, received mail at both 25 West 54th Street, Apartment 12E, New York, New York, and at 685 Fifth Avenue, New York, New York.

As noted in Finding of Fact "8", petitioner pleaded guilty to conspiracy to defraud the United States government and to two counts of Federal tax evasion. Judge Vincent L. Broderick sentenced him to a term of imprisonment of one year and one day on the conspiracy count and imposed a fine of \$10,000.00; a similar sentence was imposed on each of counts two and three to run concurrently with each other, but suspended execution thereof and placed petitioner on probation for a period of five years to begin upon the expiration of the sentence imposed under count one. Judge Broderick imposed special conditions of probation under counts two and three, to wit, that Mr. Gucci was to make full restitution; that he would cooperate with the government in its continuing investigation with respect to corporate tax violations of Gucci Shops, Inc.; and that he would for the first year of his probation devote himself on a full-time basis to community service.

Shortly before petitioner was to surrender himself to Federal authorities to commence his sentence, his representative, Stuart A. Smith, filed a motion for an order under 8 USC § 1251(b) recommending that Mr. Gucci not be deported. On October 20, 1986, U.S. District Court Judge Edward Weinfeld granted petitioner's motion and denied deportation. Judge Weinfeld, based on documents submitted to him including the presentence report, in his

decision wrote, in pertinent part, that:⁶

"Defendant, who is 81 years of age, is to surrender tomorrow to commence service of his sentence. He is a member of a family that conducts a well known business in the sale of expensive leather goods which was founded by his father in Florence, Italy. Defendant and his brothers carried on a successful business in this city and in prestigious business districts in large cities of the United States and they issued franchises to others to sell under the name of Gucci.

"The defendant first entered the United States from his native country, Italy, and travelled back and forth in connection with family business interests. He became a legal and permanent resident of the United States on December 3, 1976, following which he filed his first tax returns.

"In November 1981, he went through a marriage ceremony with a woman with whom he had been living while married to but separated from his wife. The relationship between defendant and his paramour has been a good one and she maintains an apartment in this city, as well as in England and in Rome. A daughter was born of this marriage, with whom he has a good relationship. She is married and lives with her husband in New York City. The daughter has a child -- a granddaughter with whom the defendant not only has a good relationship but, according to the report, has been a mellowing influence in his life.

"The defendant has been a New York City resident for twenty-five years and has owned cooperative apartments in the city where he maintains his residence and offices. The defendant's business activities for approximately twenty-five years have been centered in this city and in other cities where the Gucci shops function" (United States v. Aldo Gucci, No. 86 Cr. 0058 [U.S. Dist. Ct., SDNY, October 20, 1986]).

On November 3, 1989, Aldo Gucci executed his United States Last Will and Testament in New York, New York. In his will, Mr. Gucci declared 1491 North Ocean Boulevard, Palm Beach, Florida as his residence.

Aldo Gucci died on January 19, 1990 in Rome, Italy.

The United States will executed on November 3, 1989 was presented for probate to the County of New York County Surrogate's Court on February 23, 1990. On March 12, 1991, the New York Surrogate's Court granted Letters Testamentary for the estate of Aldo Gucci late of New York County to Arcangelo C. Rosato and Stuart A. Smith.

On May 1, 1991, the Department of Finance issued four documents entitled "Statement of Personal Income Tax Audit Changes" ("statement") to Arcangelo C. Rosato and Stuart A.

⁶A copy of this decision was submitted as part of the Division's Exhibit "P".

Smith, Executors of the Estate of Aldo Gucci. The following appeared in the "Explanation" section of each statement:

"Taxpayer is deemed to be a resident of New York State & City in accordance with NY Tax Law Ch 60, Art 22, sec 605, NY Tax Law Art 30, sec 1305 & NYC Art 11, Ch 17, sec 11-1705."

The "Explanation" section also contained the following "NYS & NYC residency allocation" of income:

	<u>State</u>	<u>City</u>
1977	\$ 958,559.00	\$ 958,559.00
1978	2,329,053.00	2,329,053.00
1979	2,564,883.00	2,564,883.00
1980	2,026,006.00	2,026,006.00
1981	2,121,237.00	2,121,237.00
1982	1,344,741.00	1,344,741.00
1983	1,291,381.00	1,291,381.00
1984	686,404.00	686,404.00

According to the statements, the corrected taxable income for each of the audit years was determined to be:

	<u>State</u>	<u>City</u>
1977	\$ 962,388.00	\$ 962,388.00
1978	2,332,698.00	2,332,698.00
1979	2,576,025.00	2,576,025.00
1980	2,039,517.00	2,039,517.00
1981	2,134,712.00	2,134,712.00
1982	1,374,924.00	1,374,924.00
1983	1,343,318.00	1,343,318.00
1984	760,955.00	760,955.00

Each statement contained the computation of additional tax, interest and penalties due as follows:

(a) Statement for 1977 and 1978:

	<u>State</u> 1977	<u>City</u> <u>1977</u>	<u>State</u> 1978	<u>City</u> <u>1978</u>	<u>Total</u>
Tax on Corrected Taxable Income	\$142,668.20		\$314,879.96		
Add: New York City Tax		\$ <u>40,982.68</u>		\$ <u>99,906.01</u>	
Corrected Tax Due	\$142,668.20	\$ 40,982.68	\$314,879.96	\$ 99,906.01	
Tax Previously Computed	<u>113.16</u>	<u>10.53</u>	<u>105.80</u>	<u>11.47</u>	
Total Additional Tax Due	\$142,555.04	\$ 40,972.15	\$314,774.16	\$ 99,894.54	\$ 598,195.89
Penalties:					

685(a)(1) Nonfiling					
25% of tax	35,638.76	10,243.04	78,693.54	24,973.64	149,548.98
685(b) Negligence					
5% of tax	7,127.75	2,048.61	15,738.71	4,994.73	29,909.80
Interest to 5/31/91	<u>283,130.22</u>	<u>81,375.24</u>	<u>573,311.71</u>	<u>181,942.19</u>	<u>1,119,759.36</u>
TOTAL	\$468,451.77	\$134,639.04	\$982,518.12	\$311,805.10	\$1,897,414.03

(b) Statement for 1979 and 1980:

	State 1979	City <u>1979</u>	State 1980	City <u>1980</u>	<u>Total</u>
Tax on Corrected Taxable Income	\$ 352,760.36		\$272,993.13		
Add: New York City Tax		<u>\$110,369.08</u>		<u>\$ 87,299.23</u>	
Corrected Tax Due	\$ 352,760.36	\$110,369.08	\$272,993.13	\$ 87,299.23	
Tax Previously Computed	<u>531.36</u>	<u>50.75</u>	<u>725.99</u>	<u>62.68</u>	
Total Additional Tax Due	\$ 352,229.00	\$110,318.33	\$272,267.14	\$ 87,236.55	\$ 822,051.02
Penalties:					
685(a)(1) Nonfiling					
25% of tax	88,057.25	27,579.58	68,066.79	21,809.14	205,512.76
685(b) Negligence					
5% of tax	17,611.45	5,515.92	13,613.36	4,361.83	41,102.56
Interest to 5/31/91	<u>583,486.78</u>	<u>182,748.39</u>	<u>406,159.17</u>	<u>130,136.60</u>	<u>1,302,530.94</u>
TOTAL	\$1,041,384.48	\$326,162.22	\$760,106.46	\$243,544.12	\$2,371,197.28

(c) Statement for 1981 and 1982:

	State 1981	City <u>1981</u>	State 1982	City <u>1982</u>	<u>Total</u>
Tax on Corrected Taxable Income	\$272,736.16		\$168,635.16		
Add: New York City Tax		\$ 91,392.62		\$ 58,721.73	
NYC resident tax surcharge				<u>2,936.09</u>	
Corrected Tax Due	\$272,739.76	\$ 91,392.62	\$168,635.16	\$ 61,657.82	
Tax Previously Computed	<u>722.75</u>	<u>62.51</u>	<u>2,378.30</u>	<u>146.87</u>	
Total Additional Tax Due	\$272,017.01	\$ 91,330.11	\$166,256.86	\$ 61,510.95	\$ 591,114.93
Penalties:					
685(a)(1) Nonfiling					
25% of tax	68,004.25	22,832.53	41,564.22	15,377.74	147,778.74
685(b) Negligence					
5% of tax	13,600.85	4,566.51	8,312.84	3,075.55	29,555.75
Interest to 5/31/91	<u>341,749.45</u>	<u>114,742.89</u>	<u>167,149.93</u>	<u>61,841.36</u>	<u>685,483.63</u>
TOTAL	\$695,371.56	\$233,472.04	\$383,283.85	\$141,805.60	\$1,453,933.05

(d) Statement for 1983 and 1984:

	State 1983	City <u>1983</u>	State 1984	City <u>1984</u>	<u>Total</u>
Tax on Corrected Taxable Income	\$149,397.88		\$ 87,767.74		

Add: New York City Tax		\$ 57,362.67		\$32,321.07	
NYC resident					
tax surcharge		<u>5,736.27</u>		<u>1,616.05</u>	
Corrected Tax Due	<u>\$149,397.88</u>	\$ 63,098.94	<u>\$ 87,767.74</u>	\$33,937.12	
Tax Previously Computed	<u>4,553.70</u>	<u>252.91</u>	<u>6,815.10</u>	<u>389.63</u>	
Total Additional Tax Due	\$144,844.18	\$ 62,846.03	\$ 80,952.64	\$33,547.49	\$322,190.34
Penalties:					
685(a)(1) Nonfiling					
25% of tax	36,211.05	15,711.51	20,238.16	8,386.87	80,547.59
685(b) Negligence					
5% of tax	7,242.21	3,142.30	4,047.63	1,677.37	16,109.51
Interest to 5/31/91	<u>120,213.11</u>	<u>52,158.90</u>	<u>53,091.14</u>	<u>22,001.44</u>	<u>247,464.59</u>
TOTAL	\$308,510.55	\$133,858.74	\$158,329.57	\$65,613.17	\$666,312.03

The Division issued a Notice of Deficiency (Notice No. L-003038767-1) dated September 20, 1991 for personal income taxes due under Article 22 of the Tax Law for the years 1977 through 1984. The amount due was \$6,548,225.06. The computation section of the notice contained the following explanation: "Field audit of your records disclosed additional tax due."

The "Computation Summary Section" contained the following breakdown:

"Tax Period Ended	Tax Amount <u>Assessed</u>	Interest Amount <u>Assessed</u>	Penalty Amount <u>Assessed</u>	Current Balance Due
12-31-77	\$ 142,555.04	\$ 295,058.65	\$ 42,766.50	\$ 480,380.19
12-31-77	40,972.15	84,803.65	12,291.60	138,067.40
12-31-78	314,774.16	598,191.80	94,432.20	1,007,398.16
12-31-78	99,894.54	189,837.99	29,968.32	319,700.85
12-31-79	352,229.00	609,701.56	105,668.70	1,067,599.26
12-31-79	110,318.33	190,958.89	33,095.46	334,372.68
12-31-80	272,267.14	425,166.14	81,680.10	779,113.38
12-31-80	87,236.55	136,226.60	26,170.92	249,634.07
12-31-81	272,017.01	358,940.77	81,605.10	712,562.88
12-31-81	91,330.11	120,514.89	27,399.00	239,244.00
12-31-82	166,256.86	176,490.24	49,877.04	392,624.14
12-31-82	61,510.95	65,297.05	18,453.24	145,261.24
12-31-83	144,844.18	127,636.91	43,453.20	315,934.29
12-31-83	62,846.03	55,380.02	18,853.80	137,079.85
12-31-84	80,952.64	56,845.33	24,285.78	162,083.75
12-31-84	<u>33,547.49</u>	<u>23,557.21</u>	<u>10,064.22</u>	<u>67,168.92</u>
TOTALS	\$2,333,552.18	\$3,514,607.70	\$700,065.18	\$6,548,225.06"

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 119647), dated May 21, 1993, sustaining the statutory notice.

As noted in Finding of Fact "1", the estate of Aldo Gucci timely filed its petition.

As noted in Finding of Fact "4", the Division served its answer, dated October 5, 1993, on petitioner. The Division's representative also served a demand for a bill of particulars, dated October 4, 1993, upon petitioner's representative.

On October 29, 1993, the Division granted petitioner an unlimited time extension, subject to 10 days' notice, to provide the bill of particulars.

By letter dated March 28, 1994, the Division requested petitioner to provide the bill of particulars on or before April 7, 1994.

Petitioner's representative requested and received a short adjournment until April 14, 1994 in which to provide the bill of particulars.

Petitioner did not provide the bill of particulars within the extension period.

On April 15, 1994, the Division brought a motion to the Division of Tax Appeals for an order precluding petitioner from giving evidence at hearing of items regarding which particulars were demanded and not delivered or, in the alternative, for a conditional order of preclusion requiring petitioner to serve a bill of particulars by a set date.

On April 28, 1994, petitioner served a bill of particulars on the Division.

Petitioner did not respond to the Division's motion to preclude.

Upon review of the Division's motion papers, an order, dated May 12, 1994, was issued by Assistant Chief Administrative Law Judge Daniel J. Ranalli. Pursuant to Judge Ranalli's order, petitioner was to produce a bill of particulars no later than May 16, 1994, or be precluded from giving evidence at the hearing of any items not particularized by that date.

Upon receipt of a facsimile copy of Judge Ranalli's conditional order of preclusion, petitioner's representative responded to Judge Ranalli by letter dated May 12, 1994. In this letter, Mr. Smith stated that he believed he had fully complied with the Division's request for a bill of particulars based on the fact that he had served the bill of particulars, dated April 28, 1994, on the Division. He also stated that it was his understanding that Mr. Gallagher would withdraw the motion once he had received the bill of particulars. Attached to this letter was a copy of the bill of particulars.

The Division, by letter dated May 12, 1994, informed petitioner's representative of the deficiency in the proffered bill of particulars. Mr. Gallagher stated that the answer to item 1 of petitioner's bill of particulars was unresponsive and that he was entitled to an itemization of any days either in or out of New York for the period at issue.

On May 13, 1994, the Division informed Judge Ranalli of the omission in petitioner's bill of particulars and that petitioner had been advised that a portion of the bill of particulars was nonresponsive; he also enclosed a copy of his May 12, 1994 letter to Mr. Smith.

By letter dated May 13, 1994, Mr. Smith advised Mr. Gallagher that he was attempting to get an "itemization of days" and would, to the extent that he had records relating to the itemization of days, provide them to him by the May 16, 1994 deadline prescribed by the order.

On May 19, 1994, a hearing in the instant matter was held before Winifred M. Maloney, Administrative Law Judge.

The Division, as part of its evidence, submitted the bill of particulars (Exhibit "J"); the Order of Preclusion (Exhibit "K"); and the supplemental bill of particulars (Exhibit "M").

The supplemental bill of particulars was prepared by petitioner's representative in response to the Order of Preclusion. This supplemental bill of particulars contains a cover letter dated May 16, 1994 and six handwritten and typed pages which are captioned "Dr. Aldo Gucci Travel Analysis" for years 1984-1985 and 1988-1989. According to the supplemental bill of particulars, in 1984 Dr. Aldo Gucci was in New York 31 days out of 365 days -- 6 days in January; 5 days in March; 10 days in April; and 10 days in December.

At the beginning of petitioner's case, its representative requested that the record be held open and a continued hearing date be granted in order that a newly-discovered witness could testify as to the decedent petitioner's whereabouts during the audit period.⁷

⁷This newly-discovered witness, Ruby Hamra, was formerly Director of Public Relations and Advertising for the Gucci worldwide business. It appears from the record that Ms. Hamra's professional association ended with the Gucci organization around the same time the decedent petitioner left the business. The record is silent as to exactly when the decedent petitioner left the business.

The Division's representative objected to petitioner's request on the basis that the Order of Preclusion "prohibits the introduction of any day count information after May 16, 1994" (tr., pp. 18-19). The Division's representative did concede that some day count information for the year 1984 was provided; however, he noted that nothing had been provided for 1977 through 1983. The Division's representative contended that this matter is precluded at hearing and that "there would be no purpose served in calling this witness as any of the documentation Mr. Smith referred to is inadmissible at this point" (tr., p. 19).

After listening to the arguments made by both petitioner's and the Division's representatives on the issues of whether the Order of Preclusion was in effect or whether the record should remain open to allow petitioner to present a newly-discovered witness's testimony and documents at a continued hearing, Administrative Law Judge Maloney ruled that Judge Ranalli's Order of Preclusion was in effect (tr., p. 30). Petitioner's representative was directed to make a motion to reargue the order based on newly-found evidence.⁸

During the hearing, the auditor, Ms. Murray, when asked what her audit conclusions were, testified that she "concluded that taxpayer was a domicile and statutory resident of New York City" (tr., p. 53).

Ms. Murray's written audit conclusions, included in the Division's Exhibit "N", state, in part, as follows:

"The law states that a domicile once established continues until the person in question moves to a new location with the bona fide intention of making it his fixed and permanent home. The burden of proof is upon the person asserting a change of domicile to show that the necessary intention existed. The evidence to establish the required intention to effect a change of domicile must be clear and convincing.

"The Taxpayer came to New York City in 1953 to establish his business. Since then he has continued to maintain a residence in the city and continued to be active

⁸During the hearing, Judge Maloney informed both parties' representatives that if the motion was filed, an order would be issued which would either lift the Order of Preclusion and allow a continued hearing for Ms. Hamra's testimony and the newly-discovered evidence or close the record (tr., p. 30).

in the New York City business. He did not provide any evidence to show that he changed his domicile to Florida.

"The law also states that anyone not domiciled in New York City who maintains a permanent place of abode and spends in that [sic] aggregate more than 183 days in the city will be taxable as a resident. It is the responsibility of such person claiming nonresidency to keep adequate records to substantiate the fact that he did not spend more than 183 days of the taxable year in New York City. During the audit period, Taxpayer maintained a permanent place of abode in New York City and did not provide any evidence to show how much time he spent outside New York City."

Petitioner's representative asked the auditor whether she was aware of his April 5, 1988 letter to Mr. Davies concerning the day count information. In response, the auditor stated that the Department of Finance considered the day count information submitted in that letter to be an insufficient submission on behalf of the taxpayer. When asked how she determined how much of Mr. Gucci's income was to be included in taxable income for New York State and City purposes, she stated that she used the amounts from the Federal returns and that she took the position that all the amounts reported on his Federal returns were taxable as a New York State and City resident. She testified that petitioner's representative had failed to supply the information which would have allowed the Department of Finance to make a determination concerning the taxpayer's qualification as a New York State and City resident. Furthermore, she stated that the Department of Finance did not know how many days the taxpayer had spent in or out of New York State or City because the requested documents had not been provided (tr., pp. 56-58).

Petitioner's representative asked Ms. Murray what were the facts which led the Department of Finance to make the determination that the taxpayer was a resident of New York City during 1977 through 1984. Her response was:

"The taxpayer came to the United States in 1953 and opened his first shop in New York on Fifth Avenue in 1953. At that time he lived in the San Regis Hotel. He had a co-op apartment -- let me get the address -- at 25 West 54th Street. And that's how we determined --" (tr., pp. 58-59).

Petitioner's representative posed additional questions about the auditor's determination. Those questions and her responses follow:

Q. "And so on that basis you determined that the taxpayer was in New York more than 183 days a year and was a domicile of New York, on those facts

and those facts alone; is that correct?"

- A. "We determined that you didn't meet your burden of proof that he wasn't in New York 183 days."

* * *

- Q. "Ms. Murray, just yes or no. Did the department have any independent information as to the taxpayer's comings and goings during the audit period for the nature of his activities in and out of New York that provided it with the basis to make its domiciliary and day count determinations?"

- A. "Yes and no. We had no information regarding a specific day count, but we did have information to say that he was a Director of Gucci Shops, Incorporated and chairman of the board, and that company was located in New York City."

- Q. "So, in other words, is it the case that your determination that the taxpayer was a domicile of New York was made, was prompted by the fact and bottomed on the fact that the taxpayer was the chairman of the board of a company that had an office in New York City?"

- A. "No. The domicile issue was due to he came to New York before he went to Florida and he had a place of abode here, not because he just had the business."

- Q. "So, let me see if I understand this. You're saying that he was a domicile of New York and that that New York domiciliary status stuck with him and did not change; is that what you're saying?"

- A. "He didn't meet his burden of proof to show it changed" (tr., pp. 59-60).

Petitioner presented only one witness, Kathleen Campanile, who testified about her professional relationship with Aldo Gucci, which commenced in June 1988.⁹ She testified that she did not know the decedent petitioner prior to 1988.

Ms. Campanile testified that she prepared the documents described as the supplemental bill of particulars in 1991. She averred that she prepared the typewritten table which contained the years 1984, 1985, 1988 and 1989 and was the first page of the supplemental bill of particulars using pieces of paper attached as part of the Division's Exhibit "M" and records she found in the office. When asked if those records included airplane tickets and travel agency records, she responded in the affirmative. None of the supporting records were submitted into

⁹Ms. Campanile testified that her occupation for Mr. Gucci was as a bookkeeper and then as an office manager.

evidence.

Ms. Campanile testified that during the period June 1988 until January 1990, the decedent petitioner spent on the average 15 to 20 percent of the time in New York City (tr., pp. 34-35).

Ms. Campanile testified that during the time she worked for Mr. Gucci, he maintained only the one office in New York City at the West 54th Street apartment and that that office had been maintained by Mr. Gucci prior to her working there. She further stated that he did not maintain an office in Florida (tr., pp. 45, 46, 48).

Ms. Campanile testified that the apartment contained two bedrooms, as well as the offices. She estimated that the apartment contained about 950 square feet (tr., pp. 48-49).

Ms. Campanile testified that she was present on occasion at the Palm Beach, Florida residence. She described the Palm Beach property as being right on the ocean, a Spanish style home with a guest house, as well as a caretaker's house on the property. She testified that she had stayed at the guest house, which she described as being like an efficiency apartment -- it had a sink, a stove, a table and a queen-size bed. When petitioner's representative asked her to describe Mr. Gucci's own residence, she responded that it "had three bedrooms, a couple of bathrooms, living room and dining room, kitchen, laundry room, garage. It was fully furnished" (tr., pp. 43-44). She testified that "the house in Palm Beach was at least maybe seven thousand square feet" (tr., p. 44).

The Division's Exhibit "O" is Volume II of the audit workpapers. Included in the workpapers is the 1977 Form 1040X -- the U.S. Individual Income Tax Return with attached schedules and forms. One of the attachments was the 1977 Form 957, United States Information Return by an Officer, Director or U.S. Shareholder of a Foreign Personal Holding Company, for Garpeg Ltd. The following information was supplied on the form: Garpeg Ltd. was incorporated on October 26, 1976 under the laws of Hong Kong; it was engaged in overseas management advisory services and property investments and was 100% beneficially owned by Dr. Aldo Gucci. A balance sheet for Garpeg Ltd. for the year 1977 was included.

Listed under "Assets" was "Property (1491 N. Ocean Blvd., Palm Beach, Florida)" valued at \$537,146.00. The acquisition date of this property by Garpeg Ltd. is not part of the record.

At the hearing, no documentary evidence was submitted on behalf of petitioner (tr., p. 14).

Petitioner's representative brought a Motion, on notice to the Division, for Reargument and/or Reconsideration of the Order of Preclusion, dated May 12, 1994, on the basis of newly-discovered evidence pursuant to CPLR 5015(a)(2). Petitioner submitted the affidavit of Stuart A. Smith, Esq., sworn to on June 8, 1994, together with exhibits annexed thereto, and the affidavit of Angelo Rosato, co-executor of the estate of Aldo Gucci, sworn to on June 9, 1994, in support of that motion. Petitioner also submitted a memorandum of law in support of its position, as well as a reply brief. The Division's representative appeared in opposition to that motion. Only a brief was submitted by the Division in opposition to the motion. After due consideration of the facts and documents contained in the motion record and the arguments made thereon, Administrative Law Judge Maloney issued an order dated September 1, 1994 which closed the record.

The Division submitted 11 proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into the Findings of Fact herein except: numbers 3, 4 and 9 which were modified to more accurately reflect the record; and the second sentence of number 6 which is conclusory in nature.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that the decedent, Aldo Gucci, was neither a domiciliary nor a statutory resident of New York State or City during the relevant period. It contends that the decedent was an Italian citizen whose wife resided at his home in Italy and who never intended to establish his domicile in New York. Since the decedent was never a New York domiciliary, petitioner argues that it does not bear the burden of proving that he had changed his domicile from New York.

Petitioner also contends that the decedent, Aldo Gucci, did not spend 183 days in New York and that the evidence it submitted at the hearing supports this contention.

As an alternative argument, petitioner contends that it does not bear the burden of proof that the decedent, Aldo Gucci, was a statutory resident. It maintains that Tax Law § 689(e)(3), which shifts the burden of proof to the Division, should apply in this case.

Lastly, petitioner asserts that the Order of Preclusion issued May 12, 1994 should be lifted at this juncture. In its brief, petitioner formally requests reconsideration of the September 1, 1994 order of this Administrative Law Judge which denied its motion to reargue and/or reconsider the Order of Preclusion which had become effective on May 16, 1994. It seeks permission to supplement the original motion and submit additional affidavits. Attached to petitioner's brief were the affidavits of Stuart A. Smith and Angelo Rosato, which were sworn to on December 6, 1994 and December 7, 1994, respectively.

In his affidavit in support of the motion to reconsider, Mr. Smith made the following assertions:

"2. On May 18, 1994, I met with Ms. Ruby Hamra, who served as Director of Advertising and Public Relations of Gucci Shops, Inc. during the period of 1964-1984, at the suggestion of Angelo Rosato, Executor of Aldo Gucci's United States Estate. Mr. Rosato indicated that he had reason to believe that Ms. Hamra, whom he had just located, might be able to provide first-hand evidence as to Mr. Gucci's travel itinerary during the period 1977-1984.

"3. Ms. Hamra made it clear to me that she was reluctant to become involved in any proceedings regarding the Estate's tax liability because she had left the employ of Gucci Shops at the time that the decedent's nephew Maurizio Gucci took over control of the business.

"4. During our meeting, Ms. Hamra told me unequivocally that, in her capacity as Director of Advertising and Public Relations for Gucci Shops, Inc., she had traveled extensively with the decedent during the period 1977-1984. It was her best recollection that the decedent had spent only approximately fifty (50) days per year in New York during 1977-1984. She also remembered that she had kept contemporaneous diaries detailing the decedent's travel during that period.

"5. Because of Ms. Hamra's reluctance to become involved in these proceedings, it is simply not feasible for me to obtain an affidavit from her setting forth these facts which I believe to be true. She is, however, subject to subpoena when she is in New York, where I believe she spends significant amounts of time."

In further support of its motion to reconsider, the affidavit of Angelo Rosato was

submitted. In this affidavit, he again outlined the steps he took on behalf of the estate to find individuals who could speak with authority on the question of the number of days the decedent, Aldo Gucci, spent in New York State and City during the period 1977 through 1984.

Mr. Rosato asserted:

"3. I have previously advised Mr. Smith that most of the people who worked with the decedent during the period in question are either living abroad, are deceased, or are otherwise unavailable.

"4. In late April or early May, 1994, it came to my attention that Ms. Ruby Hamra might be able to testify as to the number of days the decedent spent in New York State and New York City during the period of 1977 through 1984. Ms. Hamra worked as the Director of Advertising and Public Relations for Gucci Shops, Inc. and personally knew the decedent. I had not seen Ms. Hamra for some years and had little contact with her after she left the employ of Gucci Shops, Inc. It was my understanding that Ms. Hamra had closed her office in New York and moved to Canada. As a result, I did not originally consider her as a possible source of information at the outset of this proceeding when I tried to identify those people who might be able to supply first-hand information as to the decedent's travel schedule during the period 1977-1984.

"5. Sometime in late April, 1994, I met a mutual friend who told me that Ms. Hamra was back in New York. Thereafter, I obtained her telephone numbers and began to call her repeatedly both at her office and at home, leaving messages for her at both locations.

"6. Finally, I was able to locate Ms. Hamra in May, 1994, in Toronto, Canada where she was attending to the needs of her ill sister. During our telephone conversation, I urged her to meet with Mr. Smith as soon as possible and provide him with her recollection with respect to the decedent's travel during the audit period and/or furnish any documentary evidence in her possession. I have been advised by Mr. Smith that Ms. Hamra met with him on May 18, 1994."

The Division asserts that petitioner bears the burden of proof in this matter. It argues that Tax Law § 689(e)(3) is not applicable in the instant case for two reasons. First, the decedent petitioner did not file a petition for the tax deficiencies referenced in the Statement of Audit Changes issued by the Division on May 19, 1988; rather, the decedent petitioner agreed that the tax assessed was properly due and he paid the deficiencies in May and June of 1988. Since a specific requisite of Tax Law § 689(e)(3) was not met by petitioner, the Division contends that its terms are not in force and effect in this matter. Second, the Division maintains that "the assessment in question was not issued as an 'increase' upon the initial assessment, rather, it was issued as a supplemental assessment" pursuant to Tax Law § 682(d) (Division's

brief, p. 4).

The Division contends that if the burden of proof is shifted to it, it has met its burden of proving that the decedent petitioner was a resident and/or domiciliary of New York City based upon the record in this matter.

The Division claims that:

"once a notice of deficiency is issued, there is a presumption of correctness that attaches thereto and the burden of proof is upon the petitioner to clearly and convincingly demonstrate that said notice is incorrect or erroneous" (Division's brief, p. 6).

The Division argues that the failure to present any proof of incorrectness amounts to a surrender to the statutory presumption of correctness of the notice which must be sustained.

The Division claims that petitioner has failed to come forward with evidence that clearly and convincingly shows the severing of long-time ties with New York City and abandonment of a New York City domicile for a domicile anywhere else. It asserts that the record contains no evidence whatsoever to demonstrate that a change of domicile took place. The Division argues that petitioner has failed to meet its burden of proof since it failed to present any documentation or testimony with respect to an intent to change its decedent's domicile from New York City. It requests a determination that the decedent, Aldo Gucci, was a domiciliary of New York State and City during the relevant period.

The Division avers that the decedent petitioner has not provided adequate records or documentation to show that he was not present in New York City for more than 183 days in any of the years in question. It also argues that the unsubstantiated testimony of petitioner's sole witness is not sufficient to meet petitioner's burden of proof. Therefore, it argues, the decedent petitioner has failed to meet his burden of proof to show that he was outside of New York City for 183 days or more during 1977 through 1984. The Division requests a determination that the decedent was a statutory resident of New York State and City for the audit period.

The Division also contends that the Order of Preclusion should remain in force and effect. It argues that this issue has already been addressed twice and on both occasions it has been determined that petitioner is precluded from introducing evidence with respect to day count

during the years in issue. Furthermore, it asserts that petitioner, once again, has failed to produce an affidavit of merits of a person with actual knowledge of the alleged existing documents and, therefore, it has failed to meet the basic requirements to implement CPLR 5015. The Division requests that petitioner's motion be denied.

Lastly, the Division asserts that petitioner has failed to put forth any evidence or testimony to establish reasonable cause for the waiver of penalties assessed in the Notice of Deficiency. It requests that the penalties be sustained in this matter.

In its reply brief, petitioner again argues that the burden of proof is on the Division in this matter and that the Division has failed to meet its burden. Petitioner contends that "[t]here is no justification, either in law or logic, to conclude that the Decedent's full payment of the first deficiency should result in the imposition of the burden of proof upon the Estate" (Petitioner's reply brief, p. 2). In addition, petitioner asserts that there is no meaningful difference between an "increased deficiency" and "supplemental deficiency". It contends that:

"the very existence of the second assessment indicates that the first assessment was incorrect in some respect; otherwise, a second assessment would have been unnecessary. Thus, the presumption of correctness, to which the Department refers repeatedly in its Memo, cannot attach to the second assessment" (Petitioner's reply brief, p. 2).

Petitioner argues that the decedent cannot be taxed as a resident individual based on his domicile. It asserts that the decedent, Aldo Gucci, was born in Italy, was an Italian citizen and his wife lived at their home in Italy. Therefore, he was an Italian domiciliary by origin and he continued to be an Italian domiciliary until his death. Petitioner further contends that there is no evidence in the record that he (the decedent) intended to change his domicile of origin, Italy, to anywhere else in the world. It asserts that the Division did not meet its burden of proof that the decedent abandoned his Italian domicile for New York.

Petitioner also contends that the Division simply assigned resident status to the decedent without any basis in fact. It asserts that the decedent was a resident alien of Florida who spent less than 183 days in New York during the period 1977 through 1984. It maintains that the decedent was very active in Gucci worldwide enterprises and traveled extensively on business

during the relevant period. Petitioner avers that the documentary evidence submitted to the Division and Ms. Campanile's testimony support its contention.

Lastly, petitioner argues that the Order of Preclusion should be lifted and it should be allowed to subpoena Ms. Hamra as a witness. Petitioner states that in order to avoid the effect of an Order of Preclusion, a party must establish (1) an excusable delay and (2) the existence of a meritorious claim. It argues that Messrs. Smith and Rosato's affidavits sufficiently establish the reason for the delay and the critical nature of Ms. Hamra's testimony. Furthermore, it contends that the information possessed by Ms. Hamra is the essence of this case and should be heard. Petitioner avers that:

"to deny the request to lift the Order of Preclusion because an affidavit of merit was not submitted puts form over substance and severely prejudices the Estate's ability to introduce credible and irrefutable evidence that exists establishing that the Decedent spent minimal amounts of time in New York and that the Decedent should not be taxed as a resident for the years in question" (Petitioner's reply brief, p. 8).

Petitioner requests that the Division's assessment be abated or, alternatively, the Order of Preclusion should be lifted and the case restored to the hearing calendar for further proceeding.

CONCLUSIONS OF LAW

A. Tax Law § 282(b) provides that:

"Notice of deficiency as assessment. -- After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section six hundred eighty-nine"

B. Tax Law § 2008 provides, in pertinent part, as follows:

"All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund . . . or any other notice which gives a person a right to a hearing in the division of tax appeals under this chapter or other law."

C. Tax Law § 689(d)(1) provides that:

"Petition for redetermination of deficiency. -- If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of

deficiency and to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at or before the hearing under rules of the tax commission."

D. Tax Law § 682(d) provides that:

"Supplemental assessment. -- The tax commission may, at any time within the period prescribed for assessment, make a supplemental assessment, subject to the provisions of section six hundred eighty-one where applicable, whenever it is ascertained that any assessment is imperfect or incomplete in any material respect."

E. Tax Law § 689(e) provides, in pertinent part, that:

"Burden of proof. In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

* * *

"(3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed"

F. Petitioner contends that it does not bear the burden of proof that the decedent, Aldo Gucci, was a statutory resident. It argues that the Division bears the burden of proof because the Division increased the assessment against petitioner after an initial assessment was made and the tax paid. It asserts that:

"there is no justification either in law or logic, to conclude that the Decedent's full payment of the first deficiency should result in the imposition of the burden of proof upon the Estate" (Petitioner's reply brief, p. 2).

In support of its position, petitioner cites Tax Law § 689(e)(3), which shifts the burden of proof to the Division in instances where it increases the deficiency after a Notice of Deficiency was mailed and a petition filed challenging the original Notice of Deficiency. It asserts that if the decedent, Aldo Gucci, had filed a petition which contested the original Notice of Deficiency, the Division would have borne the burden of proving that the subsequent Notice of Deficiency, which is the subject of this proceeding, was correct and that the decedent petitioner should have been taxed as a New York resident for the years 1977 through 1984. Petitioner argues that there is "no sound basis for imposing the burden of proof in this proceeding upon the Estate simply because it had paid the original assessment and had not filed a petition challenging it" (Petitioner's brief, p. 6). It further contends that:

"To impose the burden of proof in this proceeding upon the Estate would make an irrational distinction between the Estate and other similarly situated taxpayers simply on the ground that such other taxpayers filed a petition challenging the first assessment. This distinction cannot withstand any constitutional level of scrutiny. The Equal Protection Clause of the Constitution forbids, at a minimum, disparate treatment of similarly situated individuals without some rational basis for distinguishing between them" (Petitioner's brief, p. 6).

This argument constitutes a challenge to the constitutionality of the statute on its face.

The jurisdiction of the Tax Appeals Tribunal and the Division of Tax Appeals is prescribed by the enabling legislation (Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (Matter of Unger, Tax Appeals Tribunal, March 24, 1994, citing Matter of Fourth Day Enterprises, supra). At the administrative level, the statutes of the State of New York are presumed to be constitutional (Matter of Fourth Day Enterprises, supra).

The Division is correct that the requirements of Tax Law § 689(e)(3) have not been met, which would shift the burden to the Division (see, Conclusion of Law "E"). The record in this matter clearly shows that the decedent, Aldo Gucci, did not file a petition with the Division of Tax Appeals within 90 days of the issuance of the four statements of audit changes issued by the Division on May 18, 1988; rather, he agreed that the tax assessed was properly due and he paid the deficiencies in May and June of 1988 (see, Findings of Fact "17" through "20"). The Notice of Deficiency which is the subject of this matter was issued by the Division on September 20, 1991, long after the 90-day statutory period had expired (see, Finding of Fact "41"; see also, Conclusions of Law "A", "B" and "D"). Since the Notice of Deficiency which is the subject of this proceeding was issued prior to the filing of the petition, the burden of proof in this matter is on petitioner (see, Conclusion of Law "E").

The Division has stated that the Notice of Deficiency, dated September 20, 1991, was issued as a supplemental deficiency in accordance with Tax Law § 682(d). Petitioner, however, contends that there is no difference between a supplemental deficiency and an increased deficiency made pursuant to Tax Law § 689(d)(1). It argues that whatever the Division chooses to call the second assessment, it is an increase in the amount of tax the Division is seeking from

the estate. Petitioner further argues that "the very existence of the second assessment indicates that the first assessment was incorrect in some respect; otherwise, a second assessment would have been unnecessary" (Petitioner's reply brief, p. 2). It asserts that the presumption of correctness cannot attach to the second assessment and, therefore, the burden of proof in this matter should be on the Division.

Petitioner's argument is meritless. The burden of proof in this matter is not shifted to the Division because a supplemental assessment was issued. The Division issued the Notice of Deficiency dated September 20, 1991 because it had determined that the original assessment was incorrect. Tax Law § 682(d) specifically authorizes the Division to issue a supplemental assessment. Tax Law § 689(e) places the burden of proof on the taxpayer unless one of three exceptions applies, in which case the burden of proof shifts to the Division. In the instant case, none of the exceptions applies. Therefore, the burden of proof is upon petitioner (see, Tax Law § 689[e]).

G. For the years at issue, Tax Law § 605(former [a]) provided, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

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

* * *

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state"

H. Former section T46-105.0(a) of the Administrative Code of the City of New York provided a virtually identical definition of a New York City resident individual for purposes of the City income tax.

I. The Tax Law does not contain a definition of "domicile", but the Division's regulations (20 NYCRR former 102.2[d]) provided, in pertinent part, as follows:

"(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."

J. The concept of domicile for tax purposes was addressed in McKone v. State Tax Commn. (111 AD2d 1051, 490 NYS2d 628, 630, affd 68 NY2d 638, 505 NYS2d 71):

"Domicile is established by physical presence and intent Because the interests of others is often involved in a determination of domicile, we often disregard the stated intent of the parties, look to their acts and apply basic legal principles to those acts In this respect, the courts have used the word 'permanent' to distinguish the duration of a contemplated residence from 'temporary'. It is obvious that the use of the word 'permanent' has caused considerable confusion. To avoid further confusion, we quote at length from scholarly treatises on the nature of the intent necessary to establish domicile.

"The intention necessary for acquisition of a domicile may not be an intention of living in the locality as a matter of temporary expediency. It must be an intention to live permanently or indefinitely in that place. But it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period

"When a person has actually removed to another place, which is his fixed present residence, with an intention of remaining there for an indefinite time, it becomes his place of domicile, notwithstanding he may have a floating intention to return to his former domicile at some future and indefinite time

"Though the idea of permanency is sometimes involved in the domicile concept, the term 'domicile' is more safely defined in the negative rather than affirmative. A person's domicile is the place he is making his home not 'with' a present intention to remain there forever, but 'without' a present intention of leaving at some particular future time" (citations omitted).

K. To effect a change in domicile, there must be an actual change in residence, coupled

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

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

"The existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no 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."

L. 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 Bourne, 181 Misc 238, 246, 41 NYS2d 336, 343, affd 293 NY 785; see, 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." Additionally, formal declarations of domicile or principal residence are generally less persuasive in establishing intent than one's "general habit of life" (see, Matter of Trowbridge's Estate, 266 NY 283).

M. In its petition, petitioner asserts that the decedent, Aldo Gucci, was neither a domiciliary nor a statutory resident of New York State or City during the relevant period. It argues that the decedent cannot be taxed as a resident individual based on his domicile. Petitioner asserts that the decedent was born in Italy, was an Italian citizen and his wife lived at their home in Italy. Therefore, he was an Italian domiciliary by origin and he continued to be an Italian domiciliary until his death.

Petitioner argues that the Division bears the burden to prove that the decedent changed his domicile of origin, Italy, to a New York domicile. It contends that there is no evidence in the record that the decedent intended to change his domicile of origin, Italy, to anywhere else in the world. Petitioner maintains that the Division did not meet its burden of proof that the decedent abandoned his Italian domicile for New York.

Petitioner also contends that the decedent did not spend 183 days in New York during the relevant period and, therefore, is not a statutory resident. It argues that the Division simply assigned resident status to the decedent without any basis in fact. Petitioner maintains that Mr. Gucci was very active in the Gucci worldwide enterprises and travelled extensively on business during the period 1977 through 1984. It avers that the decedent was a resident alien of Florida throughout the audit period who spent less than 183 days in New York during each year of the audit period. Petitioner argues that the documentary evidence submitted to the Division and Ms. Campanile's testimony support its position that the decedent was present for less than 183 days in New York during the period 1977 through 1984.

N. The Tax Appeals Tribunal noted in Matter of Atlantic & Hudson Ltd. Partnership (Tax Appeals Tribunal, January 30, 1992) that a determination of tax must have a rational basis in order to be sustained upon review (see, Matter of Grecian Square v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219). However, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (Matter of Atlantic & Hudson Ltd. Partnership, supra, citing Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, and Matter of Leogrande, Tax Appeals Tribunal, July 18, 1991).

Petitioner carries the burden of proving its claim (see, 20 NYCRR 3000.10[d][4]). In the instant case, petitioner failed to submit any proof that the Division's Notice of Deficiency was incorrect. Petitioner was precluded from submitting any day count information after May 16, 1994 by order of Judge Ranalli (see, Findings of Fact "60" and "61"). At the hearing in this matter, petitioner did not submit any documentary evidence (see, Finding of Fact "73"). Only one witness testified on behalf of petitioner, Ms. Campanile, and her testimony was limited to the statutory residency issue, to wit, the day count. I find Ms. Campanile's testimony to be worthless on the issue of statutory residency. She testified that her professional relationship began with Mr. Gucci in June 1988, after the audit period ended (see, Finding of Fact "66"). Since she did not know Mr. Gucci during the period 1977 through 1984, she had no first-hand knowledge of Mr. Gucci's whereabouts during that period.

Petitioner has failed to submit any proof that the assessment was erroneous and, therefore, the Notice of Deficiency is presumed valid and correct (see, Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, lv denied 81 NY2d 704, 595 NYS2d 398).

O. Although I have found that the Notice of Deficiency is valid and correct, I will address petitioner's arguments concerning the decedent's domicile of origin, Italy, remaining his domicile until his death, his residency in Florida and that the decedent was not present more than 183 days in New York State or City during the period 1977 through 1984.

Petitioner has contended that there is no evidence in the record that the decedent ever

changed his domicile of origin, Italy, to any other domicile. Based on my review of the record, I find that the decedent, Aldo Gucci, was domiciled in New York during the period 1977 through 1984.

As noted in Conclusion of Law "J", when making a determination as to the domicile of an individual for tax purposes, it is often necessary to disregard the stated intent of the party, look at the acts of that person and apply basic legal principles to those acts. Petitioner has argued that the late Mr. Gucci never intended to become a New York domiciliary. The audit in this matter commenced in June 1986, while Mr. Gucci was alive. Yet, the record does not contain any written or oral statements made by Mr. Gucci, himself, to the Division concerning his domicile despite numerous requests by the auditor for information, documents and affidavits. However, the record does contain evidence as to Mr. Gucci's actions prior to and during the audit period.

In a purchase agreement executed on March 4, 1976, Mr. Gucci acted as the personal guarantor for Gucci Parfums International, Ltd., Inc. in the purchase of 683 Fifth Avenue, New York, New York. His address on this document was listed as 689 Fifth Avenue, New York, New York (see, Finding of Fact "30"). In 1976, Mr. Gucci purchased a cooperative apartment on 25 West 54th Street, which he maintained throughout the audit period (see, Finding of Fact "32"). The record indicates that he maintained this apartment until his death. During the period 1977 through 1984, the decedent received mail at two New York City locations: the West 54th Street apartment and 685 Fifth Avenue offices of Gucci Shops, Inc. (see, Finding of Fact "33"). He also employed a New York accounting firm to prepare his personal Federal income tax returns (see, Finding of Fact "6"). In addition, the decedent conducted business and maintained offices at 685 Fifth Avenue, New York, New York during the relevant period (see, Finding of Fact "31"). Mr. Gucci became a permanent resident alien in December 1976. Furthermore, the record contains the decision of U.S. District Court Judge Edward Weinfeld, which denied Mr. Gucci's deportation after his conviction for Federal tax evasion. This decision was issued shortly before the decedent was to begin his sentence. Judge Weinfeld based his decision on

numerous documents, including the presentence report which was prepared from information supplied by Mr. Gucci. This decision states that Aldo Gucci had long-established personal and business ties to New York City which extended over a period of approximately 25 years. It also states that he had strong family ties to New York City which included a paramour who maintained an apartment in the City, as well as an illegitimate daughter, her husband and a granddaughter living there (see, Finding of Fact "35"). Aldo Gucci's acts clearly indicate that he had changed his domicile from Italy to New York. Petitioner has also asserted that the late Mr. Gucci was a resident of Florida when he became a resident alien in December 1976. There is no evidence in the record to support this assertion.

It is clear from this record that the decedent was a domiciliary of New York State and City during the period 1977 through 1984. The record contains no evidence which demonstrates that the decedent intended to abandon his New York domicile for another domicile. Petitioner has failed to carry its burden of proving by clear and convincing evidence that the decedent intended to change his domicile from New York (State and City) to anywhere else.

P. Although I have concluded that petitioner has failed to sustain its burden of proving a change of domicile by the decedent, I will next address the issue of "statutory residency". Even if it is determined that the decedent was not a domiciliary of New York, petitioner would be properly assessed herein if the decedent both maintained a permanent place of abode in New York (State and City) and spent in the aggregate more than 183 days there during each year in the audit period (Tax Law § 605[former (a)(2)]).

Petitioner and the Division agree that the West 54th Street cooperative apartment was maintained by the decedent as a permanent place of abode.

The remaining issue is whether the decedent spent in the aggregate more than 183 days of the taxable year in New York (State and City). Petitioner has the burden of proving by clear and convincing evidence that the decedent did not spend more than 183 days in New York (State and City) during each of the years in issue (Matter of Smith v. State Tax Commn., 68

AD2d 993, 414 NYS2d 803; Matter of Kornblum v. Tax Appeals Tribunal, 194 AD2d 882, 599 NYS2d 158; see also, 20 NYCRR former 102.2[c]). I find that petitioner has failed to sustain its burden.

The decedent was under the obligation to maintain "adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State" (20 NYCRR former 102.2[c]). The record reveals that the decedent failed to supply any documents or records to the auditor concerning a day count analysis (see, Finding of Fact "28"). As part of its supplemental bill of particulars, petitioner submitted a summary schedule of days Dr. Aldo Gucci spent in New York during 1984, a total of 31 days (see, Finding of Fact "58"). No supporting source documents were included with the supplemental bill of particulars. No day count analysis was submitted for the years 1977 through 1983 by petitioner. In fact, petitioner was precluded from submitting any day count information after May 16, 1994 by order of Judge Ranalli (see, Findings of Fact "60" and "61"). At the hearing, petitioner did not submit any documentary evidence into the record (see, Finding of Fact "73"). Petitioner offered the testimony of only one witness, Kathleen Campanile, who did not know the decedent during the period 1977 through 1984 (see, Finding of Fact "66"). I find her testimony to be worthless on the day count issue because she did not have any first-hand knowledge of the decedent whereabouts during the audit period.

Based on the record before me, I am unable to determine how many days the decedent, Aldo Gucci, spent in New York (State and City) during the years in issue. Petitioner has failed to meet its burden of proof on this issue (see, Conclusion of Law "E").

Q. Petitioner has been assessed penalties pursuant to Tax Law § 685(a)(1), for failure to file tax returns for the years 1977 through 1984 with the City and State of New York, and Tax Law § 685(b) for negligence. Petitioner bears the burden of proving that the failure to file was due to reasonable cause and not due to negligence (Tax Law §§ 685[b]; 689[e]). It did not offer any evidence or testimony to establish reasonable cause for the waiver of the penalties assessed by the Division in the Notice of Deficiency. Petitioner has failed to sustain its burden of proof.

The Division properly assessed the penalties.

R. In its brief, petitioner has formally requested reconsideration of the September 1, 1994 order of this Administrative Law Judge which denied its motion to reargue and/or reconsider the Order of Preclusion which had become effective on May 16, 1994. In support of its motion, it has submitted the affidavits of Stuart A. Smith and Angelo Rosato, dated December 6, 1994 and December 7, 1994, respectively. The Division's response to this motion is contained in its brief. Petitioner has argued that the affidavits of Messrs. Smith and Rosato show that there is merit to its case and that the motion to reconsider should be granted based on these additional affidavits. The Division argues that the motion should be denied.

S. CPLR 5015(a) does vest a court with the discretionary power to relieve a party from its judgment or order. In order to vacate an Order of Preclusion for failure to serve a bill of particulars, plaintiffs must demonstrate "extraordinary and exceptional circumstances" in order to excuse their noncompliance with an order of the court (DeJohn v. Winkelman Co., 53 AD2d 1049, 385 NYS2d 896, 897; LaFrois Foods Corp. v. Aetna Ins. Co., 47 AD2d 994, 366 NYS2d 703; RVA Trucking v. Lane Construction Corp., 35 AD2d 773, 316 NYS2d 748; Gonsa v. Licitra, 6 AD2d 755, 174 NYS2d 144).

I have reviewed the affidavits submitted with this motion, the arguments made thereon and the record as a whole and see no reason to disturb my order of September 1, 1994 which denied petitioner's motion for reargument and/or reconsideration and which also closed the record in this matter.

Petitioner has failed to demonstrate the existence of "extraordinary and exceptional circumstances". As I stated in my order dated September 1, 1994, the affidavit of Ms. Hamra setting forth her knowledge of the late Aldo Gucci's presence in New York during the audit period, 1977 through 1984, as well as evidence upon which she bases her knowledge of the facts would have constituted an acceptable affidavit of merits. Petitioner has not included an affidavit by Ms. Hamra or any documentary evidence with its motion. The Smith affidavit submitted with the motion to reconsider again contains only second-hand information.

Mr. Smith's excuse for failing to obtain Ms. Hamra's affidavit is her reluctance to be involved with these proceedings. I find Mr. Smith's excuse to be unconvincing. Mr. Smith now states that Ms. Hamra informed him during their May 18, 1994 meeting that she was unwilling to be involved in these proceedings. He has suggested that Ms. Hamra is subject to subpoena whenever she is in New York, which he believes is quite frequently. It is unclear why Mr. Smith did not subpoena her at that time. It is also unclear why if Ms. Hamra is so frequently in New York, the estate could not locate her sooner. It is still unclear whether Ms. Hamra has any documentary evidence in her possession which is relevant to these proceedings. As for Mr. Rosato's latest affidavit, I find this affidavit to be very vague and lacking of any proof that the estate made any effort, let alone a diligent effort, to locate either witnesses or evidence to prove its case.

Petitioner's motion to reconsider is denied.

T. The petition of Estate of Aldo Gucci is denied; petitioner's motion to reconsider is denied; and the Notice of Deficiency (Notice No. L-003038767-1) is sustained.

DATED: Troy, New York
September 14, 1995

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE