STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
RONALD AND CHRIS LABOW	:DETERMINATION DTA NO. 812779
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 1986 and 1987.	:

Petitioners, Ronald and Chris Labow, 126 Hurst Lane, Bellevue, Idaho, 83313, 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 1986 and 1987.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 1, 1995 at 9:15 A.M., with all briefs to be submitted by May 26, 1995, which date began the six-month period for the issuance of this determination. Petitioners appeared by Bart L. Fooden, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Donna M. Gardiner, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that petitioners were taxable as residents of New York City during the years 1986 and 1987.

II. Whether the Division of Taxation properly disallowed

claimed alimony payments by petitioner Ronald Labow in the amounts of $252,157.00 in 1986 and $730,451.00 in 1987.

III. Whether the Division of Taxation properly disallowed a claimed business loss by petitioners in the amount of $246,262.00 for 1986.

IV. Whether penalties imposed upon the deficiencies for the years at issue should be abated.

FINDINGS OF FACT

Pursuant to a field audit of Ronald and Chris Labow ("petitioners") which commenced in November 1989, the Division of Taxation ("Division"), on August 1, 1991, issued a Statement of Personal Income Tax Audit Changes to petitioners asserting additional New York State and City of New York personal income tax due in the amount of $248,836.00, plus penalties and interest, for a total amount due of $380,222.35 for the years 1986 and 1987. The Statement of Personal Income Tax Audit Changes advised petitioners that the deficiencies resulted from a determination by the Division that petitioners were residents of New York City for such years as well as disallowance of a loss of $246,262.00 for the year 1986 (thereby increasing petitioners' taxable income by that amount) and disallowance of an alimony deduction for each of the years at issue.

On September 25, 1991, the Division issued a Notice of Deficiency to petitioners asserting additional State and City personal income taxes due of $248,836.00, plus penalties and interest, for a total amount due of $432,348.55 for the years 1986 and 1987.

Previously, petitioners' representative executed two consents extending the period of limitation for assessment of personal income taxes relating to the 1986 tax year (see, Division's Exhibits "B" and "C"), the second of which agreed that taxes for 1986 could be determined at any time on or before October 2, 1991.

The Division's auditor, Luis E. Pulgarin, appeared at the hearing and testified that an initial appointment letter and request for records was mailed to petitioners (at 360 Pea Pond Road, Katonah, New York 10536) on December 4, 1989, setting up an appointment for examination of the records on December 21, 1989 (see, Division's Exhibit "M"). The letter was returned to the Division with the notation, made by the U.S. Postal Service, that the "forwarding time expired".

A second letter (see, Division's Exhibit "N") was sent to petitioners at 86 Stone Hill, Pound Ridge, New York 10576 setting the appointment date for February 6, 1990. The auditor stated that petitioners' representative postponed the appointment on a couple of occasions; the meeting eventually took place on June 6, 1990. Some records were provided to the auditor on that date, but the auditor made several additional written requests for documentation (see, Division's Exhibits "O", "P", "Q", "R" and "S").

On May 16, 1991, the auditor met with petitioner Ronald Labow and petitioner's representative, Bart L. Fooden, at the latter's office. The auditor testified that Mr. Labow alleged that he had already provided the documentation requested and, as

a result, he prepared a list of documents (the list was dated February 6, 1990 because of a prior document request) which both he and the auditor signed. Pursuant to the list (see, Division's Exhibit "T"), documents provided to the auditor were: a power of attorney, Federal return and related schedules, bank statements for certain periods during the years at issue, driver's license and automobile registration and a letter from the school where petitioners' daughter was enrolled.

The auditor testified that, at the May 16, 1991 meeting, he obtained a letter to Ronald Labow from the District Counsel, Internal Revenue Service dated July 21, 1987 and a Form 1098, Mortgage Interest Statement for 1987 issued to petitioner Chris Labow. Both of the documents were addressed to the respective petitioners at 1725 York Avenue, New York, New York.

The auditor further testified that he spoke with Mr. Labow at the May 16, 1991 meeting and that Mr. Labow stated that:

(a) He worked five days per week for Neuberger & Berman, an investment banking firm, at its Fifth Avenue offices in New York City;

(b) He commuted to work each day by train or automobile;

(c) He had only one credit card in 1986 and 1987, i.e., an American Express card; and

(d) He maintained a bank account in the Mountain State Bank in Idaho and Mrs. Labow had an account at the Dollar Drydock Savings Bank in White Plains, New York.

The auditor stated that petitioners had filed as New York

City residents for 1985. For each of 1986 and 1987, petitioners filed a joint New York State resident return (Form IT-201) and petitioner Ronald Labow filed a City of New York nonresident earnings tax return (Form NYC-203). On each of the City of New York nonresident returns, Mr. Labow answered "no" to the following questions:

(a) "Were you a City of New York resident for any part of the taxable year?"

(b) "Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year?"

Petitioners did not appear at the hearing nor did they submit affidavits. Their representative, Bart L. Fooden, stated that they resided in New York City at 1725 York Avenue from 1982 through November 1985 at which time they moved to Katonah (Westchester County), New York primarily because they wanted to enter their daughter in a private school in Caanan Ridge, Connecticut. Mr. Fooden stated that, in 1988, petitioners purchased and moved into a new home in Pound Ridge, New York (Westchester County). Mr. Fooden acknowledged that, by virtue of his having commuted to work in New York City during the years at issue, Mr. Labow was in New York City for more than 183 days in each of 1986 and 1987.

Mr. Fooden stated that the apartment at 1725 York Avenue was owned by petitioner Chris Labow, as evidenced by the shares of stock of 1725 York Owners Corp. (see, Petitioners' Exhibit "7"). Initially (after their move to Katonah), petitioners desired to

retain the New York City apartment for use as Mrs. Labow's place of business (she was an interior decorator). Subsequently, because of its distance from Katonah, Mr. Fooden stated that petitioners decided to put the apartment up for sale but, due to market conditions, it was not sold until July 19, 1988 (see, Petitioners' Exhibit "7").

As previously indicated (see, Finding of Fact "1"), petitioner Ronald Labow claimed an alimony deduction for each of the years at issue which deductions were disallowed by the Division. For 1986, as part of Federal adjustments to income (line 19 of State return), petitioner claimed alimony paid in the amount of $252,157.00; for 1987 (on line 17 of the return), petitioner claimed to have paid $730,451.00 in alimony.

Petitioners submitted the affidavit of James Kaufman, Esq. (see, Petitioners' Exhibit "1"), sworn to on January 30, 1995. The affidavit stated that Mr. Kaufman represented petitioner Ronald Labow in various court actions brought against him by his ex-wife, Myrna Labow. Mr. Kaufman's affidavit stated that he reviewed his records and court papers regarding the monies claimed to have been paid by Mr. Labow in 1986 and 1987. The $252,157.00 claimed to have been paid in 1986 consisted of two payments, $139,653.15 on February 21, 1986 and $112,504.86 on December 18, 1986. As to these payments, the affidavit stated as follows:

> "1. $139,653.15 for unallocated alimony and child support arrears for a time period prior to October, 1985.
>
> "2. $112,504.86 for unallocated alimony and child support arrears for the time period from November, 1985

> to July, 1986, and court-imposed penalties (in the amount of $52,250). But when the Appellate Division, First Department, of the Supreme Court of the State of New York reversed the lower court and ordered such penalties to be eliminated, the court also ordered that Myrna Labow give Mr. Labow a credit in the amount of $52,250 towards unallocated alimony and child support then owing or to be owed."

As to the payment of $730,451.00 allegedly made in August 1987, the affidavit of James Kaufman states that this amount was allocated as follows:

> "3. $118,958.94 for unallocated alimony and child support arrears for the time period from August, 1979 to April, 1983.
>
> "4. $58,242.07 for unallocated alimony and child support arrears for the time period from March, 1985 to October, 1985.
>
> "5. $458,210.20 for alimony and child support arrears for the time period from October, 1985, to April, 1987, and real estate taxes (in the amount of $95,655, plus interest from December 28, 1984 to date of payment at 8% per annum).
>
> "6. $80,940 for alimony and child support arrears for the time period from April 13, 1987, to August 4, 1987.
>
> "7. $14,100 for alimony and child support arrears for the time period from August 4, 1987, to August 24, 1987."

Copies of checks were furnished after the hearing (see, Petitioners' Exhibits "8" through "13"). All of the checks were drawn on the account of Neuberger & Berman.

The judgment of divorce of the Supreme Court, Fairfield County (Connecticut), dated August 28, 1978 (see, Petitioners' Exhibit "2"), provided, in part, that the defendant (petitioner Ronald Labow) was required to pay to the plaintiff (Myrna Labow) "the sum of $4,500.00 monthly for alimony and support of the three minor children issue of this marriage, said sum being

unallocated as between alimony and support." The decree stated that the three minor children were as follows: Brenda Hope Labow, born June 30, 1961; Sabrina Labow, born November 7, 1967; and Steven Lance Labow, born April 9, 1970. Petitioner was also required to pay the sum of $566.85 per week to his ex-wife for real estate maintenance, rent, mortgage, taxes, insurance and any charges arising from cooperative apartment maintenance. The record does not disclose which of the parties owned the cooperative apartment or if it was jointly owned.

Attached to the affidavit of James Kaufman (see, Petitioners' Exhibit "1") were pages 4, 9, 30, 31 and 32 of the Memorandum of Decision of George A. Saden, State Trial Referee of the Superior Court at Bridgeport dated September 9, 1985, which, among other things, provided that the defendant, Ronald Labow, was to pay the sum of $4,500.00 per week to plaintiff, as alimony, and the sum of $200.00 per week for the support of each minor child until such child attained the age of 18.

Submitted as additional evidence subsequent to the hearing was a photocopy of a handwritten receipt allegedly signed by Myrna Labow on August 6, 1987 (see, Petitioners' Exhibit "14"). The receipt stated that she received four checks, drawn on the account of Neuberger & Berman, as follows:

Check No.	Amount
6701	$458,210.20
6702	80,940.00
6703	58,242.07
6704	118,958.94

The receipt described the allocation of the checks as follows:

(a) Check No. 6701 ($458,210.20) for order dated July 20, 1987;

(b) Check No. 6702 ($80,940.00) for alimony arrears and child support April 15, 1987 to August 8, 1987;

(c) Check No. 6703 ($58,242.07) for January 23, 1987 judgment; and

(d) Check No. 6704 ($118,958.94) for amounts before Referee Colgan, May 29, 1987 order.

The report of Florence Belsky, Special Referee, dated September 5, 1990 (see, Petitioners' Exhibit "15") set forth a list of court orders, judgments and decisions involving petitioner Ronald Labow and his ex-wife, Myrna Labow. This list indicated that, in 1986, Ronald Labow paid $139,633.15 on February 21, 1986 and paid $112,504.86 (including penalties of $52,250.00) on December 8, 1986. For 1987, the report stated that Ronald Labow made payments in the amount of $730,000.00 on August 5, 1987 and made a payment of $14,000.00 on August 27, 1987.

Petitioners' Exhibit "16", an order of the Supreme Court, New York County, reversed that portion of a November 6, 1986 order which directed Ronald Labow to pay Myrna Labow the sum of $52,250.00 in penalties for not having timely paid his support obligations. The covering letter submitted by petitioners' representative, accompanying Exhibits "8" through "16", states that the amount previously paid as penalty of $52,250.00 was

applied to alimony arrears; however, there is no additional evidence to support that statement.

In support of petitioners' contention that they incurred a loss in the amount of $246,262.00 for 1986, they submitted Ronald Labow's brief in the court case (United States Court of Appeals for the Second Circuit) of Competex, S.A., plaintiff-appellee v. Ronald Labow, defendant-appellant. From petitioners' brief in the present matter and in the brief filed in the aforementioned case, the underlying circumstances surrounding this loss, according to petitioners, can be summarized as follows:

(a) As a result of commodity trading with an English broker on the London Metal Exchange, petitioner Ronald Labow suffered a loss, in 1978, of 39,852.92 pounds which was owed to the British brokerage firm, Competex, S.A. (this statement was derived solely from allegations contained in petitioners' brief). Labow disagreed that the amount was due so, in 1991, Competex sued Labow. Competex obtained a judgment of 187,929.82 pounds (which included interest and costs).

(b) In an attempt to enforce the judgment, Competex commenced an action in U.S. District Court to recover the amount due under the English judgment. A trial was held in October 1983 and the validity of the English judgment was upheld. The court also held that the judgment was to be converted to United States dollars at the prevailing exchange rate on March 16, 1981 (1 pound = $2.20), the date

on which the English judgment was entered. Therefore, the corresponding United States dollar amount of the English judgment was $413,445.60. To that amount was added $103,406.70 (interest to February 4, 1984) and a U.S. fee award of $66,349.48, resulting in a total U.S. judgment of $583,201.78 which was entered on February 4, 1984.

(c) On December 10, 1984, Mr. Labow paid the entire English judgment, in pounds, and the entire U.S. fee award, in U.S. dollars, in both cases plus interest (Mr. Labow paid a total of 226,448.13 pounds and $71,408.68). Competex then attempted to recover the balance of the U.S. judgment. On May 24, 1985, it was held that Mr. Labow's obligation could be satisfied only in dollars. The U.S. District Court determined that, as of December 10, 1984, the U.S. judgment was equal to $627,780.77, against which a credit of $391,546.10 (for the December 10, 1984 payment) was allowed. A balance of $236,234.67 was, therefore, still due and owing. Mr. Labow appealed this ruling to the U.S. Court of Appeals which held that he was liable for the additional amount of the judgment in U.S. dollars.

(d) Petitioners submitted the affidavit of Vincent T. Cavallo, a general partner of Neuberger & Berman (see, Petitioners' Exhibit "5"), which stated that, on May 5, 1986, at the request of Ronald Labow, Mr. Cavallo caused Neuberger & Berman to issue a check in the amount of $246,261.54 to Orens, Elsen & Lupert, attorneys for Competex, S.A. (a copy of the check was attached to the

affidavit). In addition, Mr. Cavallo stated that, on the same date (May 5, 1986), he required Ronald Labow to sign a promissory note in the amount of $246,261.54, plus interest at the rate of 10% per annum, in favor of Neuberger & Berman (a copy was attached to the affidavit). Finally, the affidavit stated that, on May 22, 1986 and May 29, 1986, Ronald Labow repaid the promissory note in full, with interest, by endorsing payroll checks (with taxes withheld) to Neuberger & Berman and by a personal check (in the amount of $41,000.00) from Arthur Labow, petitioner Ronald Labow's brother (see, Petitioners' Exhibit "6").

SUMMARY OF THE PARTIES' POSITIONS

Petitioners' position may be summarized as follows:

(a) Residency - Petitioners contend that they were domiciliaries and residents of New York City from 1982 through November 1985 when they moved to Katonah (Westchester County), New York. At that time, they maintain that they changed their domicile from New York City to Katonah, New York. In 1988, they purchased and moved into a new residence in Pound Ridge (Westchester County), New York. During 1986 and 1987, petitioner Chris Labow continued to own the New York City cooperative apartment wherein petitioners had previously resided, i.e., 1725 York Avenue. She intended to maintain it solely for business purposes (she was a self-employed interior decorator). However, early in 1986, she decided to sell the apartment. Because of a decreased market for cooperative apartments and

restrictions imposed by the board of directors of the cooperative, it did not sell until 1988. Petitioners acknowledge that petitioner Ronald Labow spent more than 183 days in New York City during each of 1986 and 1987. Petitioners contend that the 1725 York Avenue cooperative apartment should not be considered a "permanent place of abode";

(b) Alimony Deduction - The documentary evidence presented explains the alimony obligation and the fact that, during the years at issue, petitioner Ronald Labow made the alimony payments claimed. With respect to the fact that the payments were made by Mr. Labow's employer, Neuberger & Berman, petitioners contend (see, Petitioners' reply brief, pp. 12-13) that these payments were charged against his personal securities account at the firm and, since the amount did not contain sufficient liquid funds for all of these payments, Mr. Labow's margin account was charged for the excess. They further allege that Ronald Labow was charged margin interest on the loan and that the margin account was repaid in full through interest and dividends earned on the securities in the account and through the sale of securities in the account. These amounts (reported on Forms 1099-INT, 1099-DIV and 1099-B) were included in his returns for the applicable year;

(c) Foreign Exchange Loss - Petitioners claimed an ordinary loss ($246,262.00) which occurred as a result of payment of a debt denominated in foreign currency which had

declined in value against the U.S. dollar during the period in which the debt was outstanding. The judgment was paid on May 5, 1986, on behalf of petitioner Ronald Labow, by his employer, Neuberger & Berman. Mr. Labow executed a promissory note to Neuberger & Berman and repaid the entire note through payroll withholding and a personal check (drawn on the account of his brother) by May 29, 1986. Petitioners contend that Mr. Labow repaid his brother, although they admit that no evidence exists to substantiate this contention; and

(d) Penalties - Petitioners, in their brief, maintain that they exercised due care in preparing and filing their returns and that reasonable and substantial authority exists for the positions taken with respect to the income and deductions reported thereon. They allege that the burden of proof is on the Division to prove that the taxpayers acted negligently and, since they never received an explanation as to the reasons for the assessment of penalties, petitioners cannot submit evidence showing reasonable cause.

The position of the Division is as follows:

(a) Residency - From the evidence submitted, the intent as to petitioners' domicile cannot be ascertained. Petitioners did not appear to testify; no affidavits setting forth their intent were submitted. Even if it could be established that a change of domicile had been effectuated, petitioners have failed to establish that the cooperative apartment at 1725 York Avenue was not a permanent place of

abode. Since petitioner Ronald Labow, admittedly, spent more than 183 days in New York City for each of the years at issue, and since the apartment must be considered to have been a permanent place of abode, they were properly taxed as residents for 1986 and 1987;

(b) Alimony Deduction - The Division maintains that petitioners have failed to show that Ronald Labow's employer (Neuberger & Berman) was ever reimbursed for the payments made to his ex-wife, Myrna Labow. Secondly, the Division contends that petitioners have failed to demonstrate that the payments were for alimony only;

(c) Foreign Exchange Loss - The Division states that, without more information, it cannot be determined whether petitioner Ronald Labow suffered a capital loss or, as contended by petitioners, an ordinary loss. The Division contends that, regardless of the characterization of the loss, petitioner has not proven that he (rather than Neuberger & Berman and petitioner's brother) paid the amount at issue; and

(d) Penalties - The burden of proof (pursuant to Tax Law § 689[e]) is on petitioners to prove that the assessment of penalties was erroneous, i.e., that their failure to report and pay the proper amount of tax was due to reasonable cause and not due to willful neglect. Petitioners have failed to sustain their burden of proof. Moreover, on their returns for the years at issue, petitioners failed to disclose the existence of their New

York City apartment.

CONCLUSIONS OF LAW

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

> "City resident individual. A city resident individual means an individual:
>
> "(A) who is domiciled in this city, unless (i) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or . . .
>
> "(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States."

Petitioners, by virtue of statements made at hearing by their representative and allegations set forth in their brief and reply brief, contend that, at the end of 1985, they changed their domicile from New York City to Katonah, New York. Since Administrative Code § 11-1705(b)(1) contains the identical language as that of Tax Law § 605(b)(1), case law (both of New York courts and of the Tax Appeals Tribunal) relating to New York State residency may be examined for precedent.

B. 20 NYCRR 105.20(d), made applicable to City of New York domicile and resident matters by the provisions of 20 NYCRR 290.2, provides, in pertinent part, as follows:

> "(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.
>
> "(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's

> 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 such individual's 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, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.
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> * * *
>
> "(4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year 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 such person may be domiciled elsewhere."

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

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

domicile.

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

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

D. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne,

181 Misc 238, 41 NYS2d 336, 343, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785; see, Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138, 140).

E. In the present matter, other than the statements, at hearing, of petitioners' representative and allegations set forth in their brief and reply brief, this record contains no evidence as to petitioners' intent to abandon their New York City domicile and to acquire a new one in Westchester County. No evidence regarding the Katonah residence was provided including the actual date of residence there. Petitioners did not appear at the hearing to offer testimony nor did they furnish affidavits concerning their intent. No testimony from any persons fully familiar with petitioners was offered; no documentary evidence (except that relating to the sale of petitioners' New York City apartment) was produced at the hearing. Accordingly, it cannot be found herein that petitioners have sustained their burden of showing, by clear and convincing evidence, that they effected a change of domicile for the years at issue.

F. Even assuming, arguendo, that petitioners had successfully proven that a change of domicile had occurred, they would still be properly taxed as New York City residents for the years at issue by virtue of the provisions of Administrative Code § 11-1705(b)(1)(B). Admittedly (see, Finding of Fact "7"), petitioner Ronald Labow spent, in the aggregate, more than 183 days in New York City for each of the years 1986 and 1987. Petitioners contend, however, that since the apartment was

essentially vacant (it was initially used as petitioner Chris Labow's place of business in 1986 and, later, was not used at all), it was not a "permanent place of abode".

20 NYCRR former 102.2(e)(1) defined "permanent place of abode" as follows:

> "A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling placed owned or leased by his or her spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which only contains bachelor-type quarters but does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode."

There is no evidence herein that the apartment at 1725 York Avenue was anything other than a dwelling place suitable for full-time occupation by these or any other persons. The mere fact that petitioners may have chosen to remove most or all of their furniture from this apartment during 1986 and 1987 (and that fact has not been established) does not cause it to lose its status as a "permanent place of abode". Moreover, as was the case with the issue of domicile, this record does not contain any testimony or other evidence by which petitioners could sustain their burden of proving that they did not (or could not) reside in the apartment during 1986 and 1987. Therefore, it must be determined that the Division properly taxed petitioners as New York City residents for each of these years.

G. Internal Revenue Code § 215(a) provides that:

> "[i]n the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or

> separate maintenance payments paid during such individual's taxable year."

H. For divorce or separation instruments executed before January 1, 1985, Internal Revenue Code former § 71(b) provided as follows:

> "PAYMENTS TO SUPPORT MINOR CHILDREN. -- Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support."

By virtue of the above provision, payments which were fixed by the decree or agreement as child support payments were not deductible by the payor or includible in the income of the payee. Unless the payments were specifically designated by the written agreement or decree as allocable to child support, the entire amount of the payments were deductible by the payor (husband) and includible as income by the payee (wife) (see, Commissioner v. Lester, 366 US 299, 6 L Ed 2d 306).

As indicated in Finding of Fact "9", petitioner Ronald Labow was required to pay the sum of $4,500.00 monthly for (unallocated) alimony and child support pursuant to a judgment of divorce dated August 28, 1978.

I. For divorce or separation instruments executed after December 31, 1984 (or for those executed before January 1, 1985 but modified thereafter), Public Law Nos. 98-369, 99-514 amended Internal Revenue Code § 71. Subdivision (b) thereof provided as follows:

> "(1) IN GENERAL. -- The term 'alimony or separate maintenance payment' means any payment in cash if --
>
> "(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
>
> "(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and now allowable as a deduction under section 215,
>
> "(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
>
> "(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse (and the divorce or separation instrument states that there is no such liability)."

The divorce decree was modified on September 9, 1985 (see, Finding of Fact "9") to provide that petitioner Ronald Labow was to pay the sum of $4,500.00 per week to his ex-wife, as alimony, and the sum of $200.00 per week for the support of each minor child. As of the date of the modification, the eldest child (Brenda Hope Labow) had already attained majority, the middle child (Sabrina Labow) would be attaining majority in approximately two months (November 7, 1985) and the youngest child (Steven Lance Labow) would not reach the age of 18 years of age until April 9, 1988.

J. Pursuant to Temp Treas Reg § 1.71-1T (Q/A-6), payments to maintain property owned by the payor (husband) and used by the payee (wife), including mortgage payments, real estate taxes and insurance premiums, do not qualify as alimony or separate

maintenance payments. In the present matter, no evidence has been introduced relative to the ownership of the cooperative apartment for which petitioner Ronald Labow was obligated to make the $566.85 weekly payments (see, Finding of Fact "9").

K. Tax Law § 612(a) provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income with certain modifications. There is no provision in the statute for increasing Federal adjusted gross income by "adding back" any portion of the alimony deducted pursuant to Internal Revenue Code § 215.

L. It must initially be pointed out herein that, because of protracted litigation and late payments made by petitioner Ronald Labow to his ex-wife, Myrna Labow, it is not readily ascertainable whether all payments made constituted alimony which was properly deductible. This is further complicated by petitioners' failure to present testimony to clarify these complications.

The Division correctly asserts that petitioners have failed to show that Mr. Labow ever reimbursed Neuberger & Berman for the payments which it made, on his behalf, to Myrna Labow. The Division states that, by virtue thereof, petitioners have not demonstrated that these payments constituted additional income. The Division did not, however, assert that these payments were additional income; it merely disallowed the claimed alimony deduction. The Division points to no circumstance whereby petitioners would not be entitled to claim this deduction providing, of course, that it could be proven that the payments

(or some portion thereof) were payments of alimony. Whether petitioner Ronald Labow was advanced these monies by Neuberger & Berman as a loan, as a gift or as additional income does not change the fact that, if the amounts can be substantiated as alimony payments, they are deductible by petitioners in the years paid. Therefore, even absent evidence as to the method, if any, by which Ronald Lebow reimbursed Neuberger & Berman and as to the terms upon which the monies were advanced, petitioners are entitled to the deductions if properly paid as alimony. The payments and the issue of properly deductible amounts will, therefore, hereinafter be considered.

M. After a review of the documentary evidence presented (see, Petitioners' Exhibits "1", "2" and "8" through "16"), it is hereby determined that the following amounts were properly deducted as alimony:

(1) For 1986, the affidavit of James Kaufman (see, Petitioners' Exhibit "1") and the report of the Special Referee, Florence Belsky (see, Petitioners' Exhibit "15") substantiates that petitioner Ronald Labow paid the sum of $139,653.15 for arrearages prior to October 1985. This payment was made on February 21, 1986 and is fully deductible for that year;

(2) Also for 1986, petitioner made a payment, on December 18, 1986, of $112,504.86 which the affidavit of James Kaufman states was for unallocated alimony and child support arrears for the time period from November 1985 to July 1986, plus court-imposed penalties of $52,250.00.

Pursuant to the order of modification (see, Finding of Fact "9"), alimony and child support were specifically separated ($4,500.00 per week alimony; $200.00 per week per child for child support). Since, as of November 1985, only one child remained a minor (see, Finding of Fact "9") and since the period November 1985 to July 1986 encompasses approximately 38 weeks, the maximum child support arrears for this period would be $7,600.00. The balance of the alimony arrears, minus penalty, would be $52,654.86 ($112,504.86 - $52,250.00 - $7,600.00). While penalties were rescinded (see, Petitioners' Exhibit "16"), the court order does not indicate that petitioner Ronald Labow was to receive a credit therefor, as petitioners' brief contends. Therefore, of the payment of $112,504.86 made on December 8, 1986, only the sum of $52,654.86 is allowed as an alimony deduction. Accordingly, the total alimony deduction allowable for 1986 is $192,308.01.

(3) For 1987, the payments in August 1987 of $118,958.94 (for unallocated alimony and child support for the period August 1979 to April 1983) and $58,242.07 (for unallocated alimony and child support arrears for the period March 1985 to October 1985), substantiated by the affidavit of James Kaufman (see, Petitioners' Exhibit "1"), the receipt of Myrna Labow (see, Petitioners' Exhibit "14") and the report of the Special Referee (see, Petitioners' Exhibit "15"), are allowed in full.

(4) As to the payment of $458,210.20 made on August 6,

1987, Mr. Kaufman's affidavit indicates that the payment was for alimony and child support arrears for the period October 1985 through April 1987 and real estate taxes ($95,655.00 plus interest from December 28, 1984 to date of payment at 8% per annum). As previously indicated (see, Finding of Fact "9" and Conclusion of Law "J"), no evidence was introduced as to ownership of the subject property. Therefore, the real estate taxes ($95,655.00 plus interest from December 28, 1984 to August 6, 1987 at 8% per annum, or $21,343.85, for a total of $116,998.85) were not properly deductible. Of the balance ($458,210.20 - $116,998.85 = $341,211.35), only that portion representing alimony is deductible. Based upon the modification of September 9, 1985, 95.74% ($4,500.00 alimony per week ÷ $4,700.00 alimony and child support) represented alimony. Therefore, $326,675.75 (341,211.35 x .9574) was properly deductible as alimony.

(5) With respect to the payment, on August 6, 1987, of $80,940.00 for alimony and child support arrears for the period April 13, 1987 through August 4, 1987, such period encompasses 17 weeks. During that period, petitioner was obligated to pay $3,400.00 in child support (17 x $200.00 = $3,400.00). The balance thereof, $77,540.00, is properly deductible as alimony.

(6) As to the payment of $14,100.00 for alimony and child support arrears for the period August 4 to August 24, 1987, petitioner was obligated to pay $13,500.00 in alimony

($4,500.00 x 3 weeks) and $600.00 in child support ($200.00 x 3 weeks). Accordingly, $13,500.00 is properly deductible as alimony.

(7) Therefore, for 1987, petitioners were entitled to claim an alimony deduction (based upon the computations set forth in [3] through [6] herein) of $594,916.76.

N. Pursuant to Conclusion of Law "M", petitioners were entitled to an alimony deduction of $192,308.01 (out of a claimed deduction of $252,157.00) for 1986 and an alimony deduction of $594,916.76 (out of a claimed deduction of $730,451.00) for 1987.

O. Internal Revenue Code § 165 provides, in pertinent part, as follows:

> "(a) GENERAL RULE. -- There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.
>
> * * *
>
> "(c) LIMITATION ON LOSSES OF INDIVIDUALS. -- In the case of an individual, the deduction under subsection (a) shall be limited to --
>
> "(1) losses incurred in a trade or business;
>
> "(2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and
>
> "(3) except as provided in subsection (h), losses of property not connected with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft.
>
> * * *
>
> "(f) CAPITAL LOSSES. -- Losses from sales or exchanges of capital assets shall be allowed only to the extent allowed in sections 1211 and 1212."

Internal Revenue Code §§ 1211(b) and 1212(b), applicable to noncorporate taxpayers, set forth limitations on losses from sales or exchanges of capital assets and on net capital losses for a particular taxable year, respectively.

P. With respect to the issue as to the deductibility of the alleged business or foreign exchange loss, the only evidence presented (other than statements set forth in petitioners' brief and reply brief) is the brief of Ronald Labow in a matter before the United States Court of Appeals for the Second Circuit (see, Petitioners' Exhibit "4"). Nowhere in this brief are the facts surrounding the incurrence of this loss set forth. The only other evidence produced which relates to this issue is the affidavit of Vincent T. Cavallo and attachments (see, Petitioners' Exhibit "5"). However, these documents relate only to the payment of Mr. Labow's judgment by Neuberger & Berman and the manner in which Mr. Labow repaid the company.

As the Division correctly asserts, there is no basis upon which it can be determined, from the evidence presented, whether or not the $246,261.54 paid by Neuberger & Berman to Orens, Elsen & Lupert, attorneys for Competex, S.A., represented a loss incurred by Ronald Labow in a trade or business or in a transaction entered into for profit, as required by Internal Revenue Code § 165. It should also be noted that there has been no evidence presented which would prove that petitioner Ronald Labow was not reimbursed, by insurance or otherwise, for the amount paid. Accordingly, the Division's disallowance of this claimed loss was proper.

Q. Petitioners bear the burden of proving that the deficiencies asserted herein were not due to negligence (Tax Law §§ 685; 689[e]). Clearly, petitioners have not met this burden of proof. As the Division has correctly pointed out in its brief, petitioners have failed to offer any explanation as to why they failed to disclose the existence of the York Avenue apartment on their returns for 1986 and 1987 (see, Finding of Fact "6"). A mere general assertion that they exercised due care in preparing and filing their returns and that reasonable and substantial authority exists (none was cited) for the position taken with respect to the income and deductions reported does not suffice. Penalties imposed are, therefore, sustained.

R. The petition of Ronald and Chris Labow is granted to the extent indicated in Conclusion of Law "N"; the Division is directed to modify the Notice of Deficiency issued to petitioners on September 25, 1991 accordingly; and, except as so granted, the petition is, in all other respects, denied.

DATED: Troy, New York
November 22, 1995

/s/ Brian L. Friedman

ADMINISTRATIVE LAW JUDGE