STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NATHAN GOLDMAN	:	DETERMINATION DTA NO. 812966
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1990.	:	

Petitioner, Nathan Goldman, 184 Bradley Place, Palm Beach, Florida 33480, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1990.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on April 12, 1995 at 1:15 P.M., with all briefs due by October 13, 1995. Petitioner, represented by Hodgson, Russ, Andrews, Woods & Goodyear (Michel P. Cassier, Esq., of counsel), filed a brief on June 19, 1995. The Division of Taxation, represented by Steven U. Teitelbaum, Esq. (David Gannon, Esq., of counsel), filed a brief on September 18, 1995. Petitioner filed a reply brief on October 13, 1995, which date commenced the six-month period for issuance of this determination.

ISSUE

Whether petitioner is entitled to roll over the gain from the sale of his principal residence in New York City to a new residence in Floridapursuant to Internal Revenue Code § 1034(a) on the ground that the new residence is his principal residence.

FINDINGS OF FACT

1. The Division of Taxation submitted 23 proposed findings of fact which have been incorporated into the following findings of fact unless otherwise indicated.

2. At the time of the hearing on April 12, 1995, petitioner, Nathan Goldman, and his wife, Jacqueline Goldman, had been married 32 years. During that period of time, petitioner and his wife had never been legally separated.

3. Approximately 40 years ago, Mr. Goldman formed a company, Sonneblick and Goldman Company, in which he owned a 50% interest. The company was involved in the financing and sale of real property, primarily apartment houses and office buildings, in the New York City area. Mr. Goldman is a licensed real estate broker. At different times, petitioner served as president, vice-president and chairman of the board.

4. In 1985, petitioner sold his ownership interest in the company and remained as an employee paid on a commission basis. In 1990, he earned no commission income as an employee. In 1991, he earned $77,510.20 in commissions from his employment with the company. Petitioner reported, however, interest income and dividend income in excess of $200,000.00 for each of the years 1990 and 1991.

5. In 1990, petitioner and his wife sold their home of 25 years for $6.5 million. The sale closed on January 12, 1990. The home was a 16-room apartment located at 778 Park Avenue. The apartment included 6 bedrooms, 9 bathrooms and approximately 30 closets. The Goldmans employed a domestic staff of two while they lived at that address. Petitioner was 81 years old at the time of the sale.

6. Petitioner and his wife also had a country house in Oyster Bay, Long Island that they used primarily on weekends. They owned the country house for approximately 22 years prior to its sale in 1994.[1]

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[1]In the Division's proposed finding of fact "2", it stated that the country house was sold in 1992. The Division cites to pages 49-50 and 103 of the hearing transcript to support this fact. There are, however, no references on those pages to when the country property was sold. Mr. Goldman testified that the property was sold the year before the date of the hearing. (Tr., p. 74.) Therefore, this portion of the proposed finding of fact is rejected.

7. After the sale of their Park Avenue home, petitioner and his wife rented on a monthly basis a one-bedroom hotel apartment at the Del Monico Hotel located at 502 Park Avenue. Mr. Goldman signed the lease on January 17, 1990, effective January 28, 1990. The monthly rental was $3,785.00 which included the hotel staff's cleaning service. Therefore, petitioner did not separately employ any domestic staff with respect to the apartment. At some point, petitioner and his wife were dissatisfied with the rented apartment and moved to another one-bedroom hotel suite located at 781 Fifth Avenue.

8. In Mrs. Goldman's nonresident and part-year resident New York State tax return for 1991, she listed the 502 Park Avenue address as a living quarter maintained in New York. Handwritten under that address was the statement "owned by Husband only". Based on this document, the Division requested the following proposed finding of fact "7" -- "Mrs. Goldman regarded the Del Monico apartment as being owned solely by her husband, i.e., not by both of them." This finding of fact is rejected inasmuch as one cannot extrapolate from this statement that Mrs. Goldman regarded the hotel apartment as being owned solely by her husband. Clearly, Mr. Goldman did not "own" the hotel apartment but rented it on a month-by-month basis. The wording on the return was apparently poorly chosen. Mr. Goldman testified that he primarily used the apartment when he was in New York City during the week and would use the country house on the weekends during the summer months. He noted that he was a member of a nearby country club in Long Island where he also played golf. He also testified that Mrs. Goldman would infrequently come to New York in the winter, would stay with him at the rented apartment when she came to the City, and would use the country house during the week and on weekends in the summer months when she was in New York. Mrs. Goldman was not questioned on her use of the hotel apartment.

9. After the sale of the Park Avenue home, petitioner and his wife recuperated from an illness at their Palm Beach home -- a two-story house they had acquired many years prior to the sale of the Park Avenue home. Because of the illness and the advanced age of Mr. Goldman,

the Goldmans decided to sell the two-story house and purchase a home in Florida with living quarters all on one floor.

10. On March 9,1990, the Goldmans signed a purchase contract for a seven-room condominium in Palm Beach, Florida for $1,044,000.00. The closing was set for May 4, 1990. They invested approximately $750,000.00 in renovations in the condominium because the apartment had never been used before and was in an unfinished state. The condominium was 2,800 square feet including three bedrooms, four bathrooms, and two terraces with a view of the intercoastal waterway. During the renovation period in the summer of 1990, Mrs. Goldman spent much of her time in Florida supervising the renovations. The Goldmans employ a part-time domestic staff for household duties with respect to the condominium. Sometime after the purchase of the condominium in 1990, the Goldmans sold the two-story house.

11. On July 5, 1990, petitioner signed a Declaration of Domicile declaring himself a citizen of the State of Florida with the Palm Beach condominium listed as his residence.

12. Mr. Goldman has three children from a prior marriage. His son lives in New York City and also works for Sonneblick and Goldman Company. One daughter has a home in Florida located within three-quarters of an hour travel time from the Goldman's condominium. The other daughter has a home in Florida in the same location and also an apartment in Great Neck, Long Island. Mrs. Goldman has two sons from a previous marriage. The two boys lived with the Goldmans in the Park Avenue home and currently live in Palm Beach, Florida in homes within a half an hour's commute from the Goldman's condominium. One son has four children and the other son has two children. The Goldmans have a close relationship with their grandchildren. The grandchildren often times sleep over at the Goldmans' condominium. Mrs. Goldman credibly testified that she and her husband were very close to their children and grandchildren. With respect to their grandchildren's sleep overs, she testified as follows:

> "They come, they sleep over, and they're very close with my husband. As a matter of fact, they have pillow fights, they look forward to pillow fights in the morning when they wake up with my husband. He waits on purpose before going to golf to have pillow fights and then have breakfast. They're very close." (Tr., pp. 98-99.)

13. Petitioner and his wife had a very active social life. Mrs. Goldman assumed responsibility for their social calendar with the assistance of a social secretary. When they owned the Park Avenue home, the Goldmans would entertain guests at least once a week in their home. After the sale of the Park Avenue home and the purchase of the Palm Beach home, the Goldmans would entertain, socialize with friends or attend charity events four to five times a week when they were in Florida. Mr. Goldman would also play golf on the average two to four times a week. On a typical day in Florida, petitioner would telephone his New York office in the morning to get messages, play golf at the Palm Beach Country Club, have lunch at the club with his wife, play bridge in the afternoon and then socialize in the evening. A typical day in Florida for Mrs. Goldman would be to make phone calls for charitable organizations in the morning; visit, usually twice a day, her mother who was an invalid and lived near by; have lunch with her mother, daughter-in-law or husband at the club; at times pick up her grandchildren from school in the afternoon; and then rest before socializing in the evening.

14. In addition to being members of the Palm Beach Country Club, petitioner and his wife also belonged to the Palm Beach Yacht Club and two private dining clubs - the Club Collette and Club Poinciana. The Goldmans became members of Temple Emanuel in Palm Beach around the mid-1980's and discontinued their membership in the Park Avenue Synagogue around 1990.

15. Petitioner credibly testified at hearing that despite the fact that he was financially secure, he continued work with the company. Petitioner described his reasons for continuing to work as follows:

> "Q. Why did you continue to work?
>
> A. Because I tried staying longer periods in Florida and found that I had to come back for a few days to refresh myself. It was just too much to stay in New York, I was gradually curtailing my work efforts.
>
> Q. When you say 'refresh yourself' why did you need to come to New York to refresh yourself?
>
> A. Just to change the atmosphere, so-to-speak.

Q. You didn't like Florida?

A. Oh, yes. Very much. But our business is very interesting so I wanted to come back just to see what was going on, even if I didn't make deals." (Tr., p. 81.)

16. Petitioner testified that he would commute back and forth to New York and that generally his schedule was to be in Florida for ten days and then in New York for four days, but that even this schedule would vary because of various social obligations. Petitioner submitted into the record an airline flight printout for Mr. Goldman for the years 1990 and 1991 indicating extensive travel by Mr. Goldman to and from New York during this period. The printout confirmed that petitioner would often spend long weekends or a week or two at a time in Florida commuting to New York on a Monday and returning to Florida on a Thursday or Friday during the winter months from October through May in 1990 and 1991. According to this printout petitioner spent over 100 days in Florida the first year after the Palm Beach home was renovated. It also appears that petitioner was out of the country for two weeks during that year.

17. Mr. Goldman testified that a typical day for him in New York would be to go to the office at 9:00 A.M., return to his rented apartment at 4:00 P.M., and then either stay in for the evening or dine with his granddaughter, son or friend. He stated that his work schedule was not busy and that on the average he would have one appointment every two days. In the summers, petitioner would leave New York City for the country house in Long Island on Thursday evening and then return to the City on Monday morning. In the winter months, petitioner would generally spend weekends in Florida. He testified that because of its small size, he and his wife did no entertaining in the rented apartment other than to have a few people up for drinks. Petitioner belonged to an athletic club (Harmony Club) in New York at which he entertained clients and the Doubles Club, a dining club located in the building in which he rents an apartment.

18. Petitioner also testified that he and his wife travel to Europe at least once a year for ten days to two weeks and that his wife goes to Paris three or four times a year to visit an elderly aunt.

19. The Goldmans filed a joint Federal income tax return for 1990. In that return, they claimed a rollover of the gain from the sale of their Park Avenue home to their Florida condominium pursuant to Internal Revenue Code § 1034. Mrs. Goldman filed a separate nonresident New York State tax return for 1990. Mr. Goldman filed a resident New York State tax return for 1990 listing 502 Park Avenue as his mailing address. Mr. Goldman filed as a resident because he believed that he spent enough time in New York State to qualify him as a statutory resident. In each separate return, they asserted a rollover of one-half of the gain from the sale of their Park Avenue home up to the cost of their Florida condominium.

20. Henrietta Lubkowski, Tax Auditor I of the Division of Taxation, sent a letter, dated December 11, 1992, to petitioner in which she stated:

> "Your New York State Resident Personal Income Tax Return has been referred to this office for the years indicated above.
>
> In our review, we will be addressing your non-domicile status and, if applicable, your allocation of income to New York State. To assist in establishing your non-domicile status along with the income allocation, please complete the enclosed questionnaire."

21. Ms. Lubkowski sent a letter, dated April 8, 1993, to petitioner's accountant, Elliot Leinwand, informing him that the Division of Taxation ("Division") was disallowing the rollover of petitioner's half of the gain from the sale of the Park Avenue home. In that letter, she stated, inter alia, that:

> "We have reviewed the tax return and the information you have submitted regarding the above taxpayer and as we discussed in a previous meeting the replacement property in Florida by Mr. Goldman is not his main home.
>
> "The Internal Revenue Service defines a taxpayers [sic] main home as the place you live in the most, as Mr. Goldman has spent more than half the year in New York City his main home is the apartment in New York City and not the Florida property."

22. In response, Mr. Leinwand sent a letter, dated May 19, 1993, protesting Ms. Lubkowski's decision and setting forth some of the reasons he believed indicated that Mr. Goldman's principal residence was the Florida condominium. In that letter, he stated that:

> "The New York apartment sold was a sixteen room apartment on Park Avenue, and the condominium in Florida is a six room apartment, while the New

York premises is merely one bedroom and a living room in a residential hotel. The apartment in New York was on a month-to-month basis.

"The Goldman's social activities are many and varied, and were carried out in New York, very often in their apartment. With the sale of the large apartment and the move to the N.Y. hotel, the social activities shifted to Florida, and to the condominium apartment.

"The Goldmans have severed most of their ties to New York such as temple memberships, cultural event subscriptions and the like, and have joined a Palm Beach temple and are involved in the activities of Palm Beach.

"Mr. Goldman has joined several clubs in the Palm Beach area.

"It is clear from our analysis of the facts that Mr. Goldman has become a Florida domiciliary and that in fact the condominium in Florida is his principal residence.

"In IRC Sec. 1034, the definition of residence and domicile are essentially identical. And in NYS Regulations 105.20(d)(5)(i), it indicates that generally the domicile of a husband and wife are the same."

23. The Division issued to petitioner a Statement of Personal Income Tax Audit Changes, dated July 21, 1993, for State and City tax due, plus interest, for the total amount of $57,850.18. In that document, the Division stated:

"Recognition of the gain on the sale of the principal residence because the taxpayer did not replace the residence within the two year period per regulation section 1034. The taxpayer has failed to prove a change in domicile with clear and convincing evidence to Florida.

See attached detailed explanation."

Attached to the statement were audit notes. In those notes, the auditor stated that:

"Mr. and Mrs. Goldman do not have the traditional marriage where the wife's domicile is the same as her husbands [sic]. Mrs. Goldman verified this statement with the presentation of the separate lifestyle, the financial independence and social and family ties to the different states. . . . Mrs. Goldman's children and grandchildren live in Florida. She was born in France and has relatives living there currently. During the audit period she visited France in 1990 for 30 days and 1991 for 55 days. . . . It was stated during the audit that Mr. & Mrs. Goldman do not have the same domicile as Mr. Goldman has no intention of leaving New York. A statement is made on Jacqueline's return that Nathan is a New York State and City resident. . . . Mrs. Goldman's time is allocated as follows:

	1990	1991
Florida	200 days	164 days
New York	134 days	146 days
Out of Country	31 days	55 days

The time spent in New York is to be with her husband Nathan."

The auditor in this case did not attend the hearing. In her affidavit submitted after the hearing, the auditor stated that she prepared this document; however, she does not explain what is meant by, or identify from whom she obtained the information upon which she based her conclusion that Mr. and Mrs. Goldman did not have a traditional marriage. Mr. and Mrs. Goldman both testified that neither of them had direct contact with the auditor prior to the issuance of the Statement of Personal Income Tax Audit Changes and that information was provided to the auditor through their accountant or Mrs. Goldman's secretary.

24. The Division issued to petitioner a Notice of Deficiency, dated August 27, 1993, for income tax due in the amount of $48,880.62, plus interest in the amount of $9,236.43, for the total amount of $58,117.05.

25. Mr. Leinwand filed a Request for Conciliation Conference, dated September 20, 1993, on behalf of petitioner. In the request, Mr. Leinwand referred to the contents of his two letters, dated May 19, 1993 and July 28, 1993, sent to the Division as the basis for petitioner's protest.

26. The Internal Revenue Service (IRS) issued a Notice of Deficiency, dated April 6, 1994, to Mr. and Mrs. Goldman asserting additional Federal personal income tax due for the period ending December 31, 1990 in the amount of $116,138.00, plus interest, for the total amount of $147,600.00. The notice indicated that the added tax reflected the amount of gain on the sale of their residence. The notice also referred to the State audit and informed them that if they receive a favorable finding from the state, to send a copy and then the IRS would re-evaluate their case.

27. After a conciliation conference, the conferee issued a Conciliation Order, dated April 22, 1994, sustaining the statutory notice.

28. The Goldmans filed a petition, dated June 30, 1994, with the U.S. Tax Court seeking review and cancellation of the Federal deficiency. The Goldmans filed a memorandum of law, dated November 15, 1994, with the U.S. Tax Court. In that memorandum, they stated:

"The New York auditor . . . concluded that Mr. Goldman was not a domiciliary of Florida but was, instead, domiciled in New York. Based on this conclusion, she determined that the Goldmans' Palm Beach home, purchased in 1990, was not Mr. Goldman's principal residence and she disallowed Mr. Goldman's portion of the § 1034 rollover of gain from the couple's 1990 sale of their old principal residence."

29. Petitioner filed a petition, dated July 1, 1994, alleging that the Division erred in concluding that petitioner's share of the gain on the sale of his principal residence could not be excluded from income on his 1990 Federal tax return under Internal Revenue Code § 1034, and in increasing his taxable income for 1990 by $414,780.00.

30. The Division filed an answer, dated September 22, 1994, affirmatively stating that the burden of proof is on petitioner to establish that the Division's determination was erroneous or improper.

31. Petitioner's representative sent a letter, dated February 16, 1995, to the Division's counsel in an attempt to resolve petitioner's State tax deficiency. The representative informed the Division's counsel of the IRS's cancellation of the Federal tax deficiency as follows:

"The sole issue in this case is New York's inclusion in Mr. Goldman's 1990 income of $414,780, representing one half of the gain from the Goldmans' sale of their Park Avenue apartment in January of 1990. This inclusion was based on a determination by the New York State auditor that the Goldmans' home in Palm Beach, purchased May 3, 1990, was not Mr. Goldman's principal residence during the two year period following the January 1990 sale and therefore did not qualify for a rollover under Internal Revenue Code § 1034.

"The New York assessment was provided to the Internal Revenue Service and, as a result, the IRS also issued an assessment taxing Mr. Goldman on the additional $414,780. That assessment was based solely on New York's determination; no separate IRS audit was ever conducted. On Mr. Goldman's behalf, we filed a Tax Court petition protesting the IRS assessment and the matter was referred to the IRS Appeals Office.

"Mark Klein and I met with an IRS Appeals Officer to review this case and subsequently provided him with additional information and documents. We discussed various facts with him . . . .

* * *

"Having reviewed the facts of this case and the documentation supporting them, the IRS conceded the § 1034 rollover. An agreement to this effect was signed by both parties and has been forwarded to the Tax Court for the issuance of an order that no deficiencies are due from Mr. Goldman for 1990. I am enclosing a copy of that agreement.

* * *

> "We hope that this matter can be resolved quickly. Please discuss it with your client and call me if you have any questions."

32. On February 22, 1995, a United States Tax Court order was entered, pursuant to the agreement of the parties, determining that no deficiencies in income tax were due from the Goldmans for the taxable year 1990.

33. Petitioner sent a letter, dated March 13, 1995, to the Division's counsel responding to his request for the documents provided to the IRS appeals officer. Attached to the letter were two documents--a confirmation that petitioner had rented a one-bedroom hotel apartment on a monthly basis and a copy of petitioner's airline flight statements. Petitioner noted that the IRS appeals officer did not request, nor was he provided with additional documentation. Petitioner again stated in this letter that the sole issue was whether Mr. Goldman's home in Palm Beach was his principal residence for purposes of calculating his Federal adjusted gross income.

34. Petitioner filed a motion for summary determination with the Division of Tax Appeals on March 29, 1995, requesting cancellation of the statutory notice and a stay of the hearing in the matter pending determination of the motion. In that motion, petitioner argued that the matter involved a decision on a legal issue without the need for a costly and lengthy hearing. Petitioner identified the legal issue as follows:

> "whether the State should be required to follow a United States Tax Court Decision concluding that under federal law which New York has explicitly adopted, Mr. Goldman was entitled to the benefit of Internal Revenue Code § 1034, and further concluding that Mr. Goldman's Federal AGI was accurate as reported."

Petitioner requested a stay of the hearing scheduled for April 12, 1995 and noted that because the Tax Court decision had just been issued and the Division's counsel had not informed him until March 27, 1995 that it would not honor the Tax Court decision, petitioner could not have made the motion within 30 days of the filing of the Division's answer. Thus, concluded petitioner, in the interest of fairness, the motion should be treated as timely filed.

35. By letter dated April 3, 1995, the Assistant Chief Administrative Law Judge, Daniel J. Ranalli, denied the motion for a stay and the hearing was held on April 12, 1995.

36. At hearing, the Division's counsel, David Gannon, argued in his opening statement that based on the petition and recent letters he received from petitioner, the sole issue in the case was the application of IRC § 1034; that domicile was not asserted by petitioner, and therefore by default, petitioner conceded he was a domiciliary of New York; and that based on this concession, it follows that petitioner's principal residence was the rented apartment in New York and not his Palm Beach home. Mr. Gannon also appeared to imply by his argument that petitioner was prevented from providing any evidence relating to petitioner's status as a domiciliary of Florida. Referring to the Division's position that petitioner was a domiciliary of New York, Mr. Gannon set forth his objection as follows:

> "Mr. Gannon: It was addressed at BCMS. It was raised --
>
> ALJ: BCMS?
>
> Mr. Gannon: May I finish? And they sustained in favor of the Division. But it was not included in the pleading, which sprung from the BCMS order. Therefore, the issue is moot. It's conceded. They can't raise the issue now, its's too late." (Tr., p. 14.)

In response to Mr. Gannon's position on this matter, petitioner's representative, Michel Cassier, stated:

> "The adjustment here is a section 1034 adjustment. That's what we petitioned. We didn't see a reason to plead domicile, it's academic."

Based on Mr. Cassier's statement, the Division requested the adoption of proposed finding of fact "23", which reads "At the April 12, 1995 hearing in this matter, petitioner admitted that he did not plead the issue of domicile in his petition."

This proposed finding of fact is rejected inasmuch as it is a misleading statement and involves a legal argument relied on by the Division's counsel. Moreover, among the facts alleged by petitioner in his petition, he states that he and his wife intended in good faith to make their Palm Beach home their principal residence, and that he filed a Declaration of Domicile declaring Florida his bona fide residence.

SUMMARY OF THE PARTIES' POSITIONS

37. Petitioner argues that the Tax Court decision effectively resolved the controversy and therefore his motion for summary determination should be granted; that the audit workpapers should be given no evidentiary weight because they primarily consist of the auditor's narrative that is conclusory, incomplete, inconsistent and contradictory, and the auditor was not made available for cross examination; that the audit lacked a rational basis because it was not designed to develop information relevant to a determination under IRC § 1034; that domicile in New York was not conceded by petitioner and, in any event, the issue is academic and not properly before the Division of Tax Appeals; and that the objective facts as well as petitioner's subjective intent show that petitioner's principal residence for purposes of section 1034 was the Palm Beach home in Florida.

38. The Division argues that the motion for summary determination should be denied because the Division is not bound to accept as correct any change made by the IRS and instead is free to make an independent determination; that there was a rational basis for the Division's assertion of a deficiency and petitioner's allegations that the audit workpapers are inconsistent and contradictory are illusory; that petitioner has conceded that he is a domiciliary of New York City; and that because petitioner spent a majority of his time in New York City and conceded that he was a statutory resident and domiciliary of New York City, petitioner's rented hotel apartment in New York City was the principal residence which he regarded and used as his permanent home rather than the Palm Beach home.

CONCLUSIONS OF LAW

A. Citing to Tax Law §§ 607 and 612(a), petitioner asserts that his motion for summary determination should be granted on the basis that the United States Tax Court has already determined that petitioner was entitled, under IRC § 1034, to nonrecognition of the gain from the sale of the Park Avenue home. The Division asserts that under Tax Law § 659 and the regulation, 20 NYCRR 159.4, it is not bound to accept as correct any change made by the IRS,

and instead, can conduct an independent audit and investigation on the application of section 1034.

The granting of the motion for summary determination is moot to the extent that the purpose of the motion was to avoid a lengthy and costly hearing. However, the legal issue will still be addressed. Tax Law § 612(a) provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income as defined in the laws of the United States, except with respect to certain specified modifications. Petitioner argues there is no modification listed in section 612(b) that in any way alters or eliminates the nonrecognition of gain under section 1034, and therefore, gain excluded from the Federal adjusted gross income should be excluded from New York adjusted gross income. Petitioner also cites cases for the proposition that the principle of conformity requires New York to follow Federal interpretations of Federal law unless there is a New York provision to the contrary.

Although the IRS determination, which permitted petitioner the nonrecognition of gain for Federal purposes, is persuasive, it does not require New York State to make the same determination. The Federal courts define the laws of the United States. In this case, the U.S. Tax Court decided that there were no income tax deficiencies due from petitioner pursuant to the agreement of the parties. That court did not define or interpret section 1034 with respect to the facts in petitioner's case. Therefore, section 612(a) does not require cancellation of the tax deficiency based on the U.S. Tax Court's determination that no deficiencies were due from petitioner.

B. Internal Revenue Code § 1034(a) permits the nonrecognition of gain on the sale of real property by a taxpayer if he or she used that property as his or her principal residence and, within a period beginning two years prior to the date of the sale and ending two years after the date of the sale, purchased a new residence that is used as his or her principal residence. Section 1.1034-1(c)(3)(i) of the Treasury Regulations provides that in the case where a taxpayer uses more than one property as a residence, determining whether or not a particular property is used by the taxpayer as the principal residence "depends upon all the facts and circumstances in

each case, including the good faith of the taxpayer." There are no hard-and-fast rules or formula in making such a determination and while the presence of one factor may be relevant in one case, that same factor may be irrelevant when weighing all the facts and circumstances in another case. (see, Thomas v. Commr, 92 TC 206; Clapham v. Commr, 63 TC 505; Aagaard v. Commr, 56 TC 191).

Using a residence as the principal residence means "habitual use" of the residence as the principal residence (Stolk v. Commr, 40 TC 345, affd 326 F2d 760, 64-1 US Tax Cas ¶9228). In Stolk, the judge opined that the taxpayers had not used a new residence, a farm in Virginia, as their principal residence during the requisite replacement period[2] because the taxpayer and his wife used that dwelling only on the weekends and holidays and spent the rest of their time in their apartment in New York City where the taxpayer's chief occupation required his presence during most of the week. The court further noted that the New York apartment was the home to which the taxpayers returned from business and vacation trips, that the apartment was the address for voting purposes and that the taxpayer intended to continue living in the apartment until he was eligible for retirement from his chief occupation which would be about ten years from the purchase date of the Virginia farm.

In this case, petitioner's entire lifestyle should be considered. Unlike the taxpayer in Stolk, petitioner had sold the business in which he was a 50% owner and had resigned his position as an officer. Although he remained as an employee, he was paid on a commission basis only and apparently had great flexibility as to his hours or how much he wanted to work. Petitioner was not financially dependent on this commission income and based on his testimony, which was credible, petitioner spent his week days in New York City because he found his work interesting and needed some change from the retirement lifestyle, which for him consisted of going to the club to dine and to play golf and cards. Given the significant travel

[2]This portion of the decision was dicta inasmuch as the judge had already determined that the old residence that was sold was not the taxpayers' principal residence. Recognizing that this determination itself was dispositive of the case and that it was unnecessary to address the second issue, he decided nonetheless to address it.

costs of flying to and from New York City and the fact that he made no commission income in 1990 and only $77,510.20 in commissions in 1991, it becomes apparent that petitioner traveled to New York not out of necessity but to indulge his interests. Petitioner used the New York City apartment to facilitate those interests as a temporary arrangement on a month-to-month basis. Although his wife occasionally would stay with him at this apartment, it is clear that the center of their family life was at their home in Palm Beach. Four of their five children, all six grandchildren and Mrs. Goldman's mother all lived near their Palm Beach home. From the testimonies and demeanor of Mr. and Mrs. Goldman during the hearing, it is clear that the Goldmans' family was an important element in their lives. Moreover, the Goldmans' lifestyle involved a significant amount of social entertaining which shifted to their Palm Beach home after the sale of their Park Avenue home.

The Division's assertion that petitioner's principal residence was the New York City apartment does not comport with the lifestyle that petitioner and his wife had established over the years. Furthermore, the fact that petitioner also used their country house in Long Island during some weeks and on weekends during the months of May through October militates against a finding that petitioner's principal residence was the New York City apartment. (see, Thomas v. Commr, supra).

The Division cites Thomas for the proposition that because petitioner spent a majority of his time in the City and State of New York with the remainder of the year split between traveling in Europe, the Florida house and the Palm Beach home, his principal residence was the New York City apartment. The Division's argument is not persuasive. In Thomas, the court looked at a variety of factors in determining whether the taxpayer's principal residence was his Illinois home prior to its sale. The question was whether the taxpayer ceased to use the Illinois home as his principal residence once he and his family moved between it and three different residences in Florida. Among the factors the court considered was the amount of time spent at one residence as opposed to another, whether the taxpayer abandoned the Illinois home with the intent not to return, and whether the temporary rental of the Illinois property was necessary

because of adverse market conditions and not because he intended to convert the property from his home into income-producing property. In holding that the Illinois home was the taxpayer's principal residence, the court noted that the taxpayer spent half his time living in the Illinois home and that his residence time in Illinois was spent entirely in that home whereas the residence time in Florida was split between three different residences. From that observation the court concluded that of the four residences, the taxpayer's principal residence was the Illinois home. The court also found relevant the following factors as well: the taxpayer's sole business location was Illinois, he filed Illinois State income tax returns as a full-time resident and as a part-time resident, he was a registered voter in Illinois, contributed to and attended a church in Illinois and had only an Illinois driver's license.

As noted by the court in Thomas, one must weigh all the facts and circumstances of a particular case and what might appear as a relevant factor in one case may have no relevance in another case. Although petitioner had spent a significant amount of time in New York State as evidenced by his airline flight schedules and as admitted by petitioner when he filed his State tax returns as a statutory resident, his time in New York was split between the hotel apartment and the country home in Long Island. As was true for the taxpayer in Thomas with respect to his Illinois home, petitioner's residence time in Florida was spent entirely at his Palm Beach residence. Contrary to the Division's claim, the time petitioner spent at his two-story Florida residence in 1990 is not relevant because that home was sold once petitioner and his wife bought and renovated the Palm Beach home. In contrast to the situation in Thomas, the issue in this case is not whether the residence sold was petitioner's principal residence but whether the residence bought was his principal residence. Therefore, any residence in Florida that petitioner no longer owned after the purchase and renovation of the Palm Beach home is not relevant. Petitioner's trips to Europe are also not relevant in an analysis of his principal residence except as an indicator of a lifestyle that was anything but sedentary during this period. Thus, the proposition for which the Division cited Thomas instead supports petitioner's position.

In any event, the amount of time spent in one residence is but one factor to consider. The regulations also provide that the evidence be weighed as to both the objective and subjective facts in the particular case (Thomas v. Commr, supra). In this case, the amount of time petitioner spent in the New York apartment is not as significant as the quality of the time that was spent there as compared to the quality of the time that he spent at his Palm Beach home. As noted above, petitioner's family life was centered in the Palm Beach home with his wife, children and grandchildren. The fact that petitioner spent time in New York City reflected his financial means and desire to keep active with certain interests. After placing all the factors in their proper perspective, of the three residences, petitioner's principal residence was the Palm Beach home and not the Long Island country home or the one-bedroom hotel apartment in New York City which petitioner occupied primarily alone and rented on a monthly basis.

Also, there are other factors that were considered in Thomas which can be applied favorably to petitioner. Petitioner and his wife discontinued their membership in the New York temple and became a member of a Palm Beach temple, petitioner declared himself a domiciliary of Florida, and joined a country club and various dining clubs in Florida. As noted above, the fact that petitioner's sole employment was in New York City does not have the same relevance as it did in Thomas inasmuch as petitioner sold his interest in the company years before his move to Florida and his employment in New York was not dependent on a required presence but on commissions and how much time petitioner wanted to spend at his work. Based on the objective and subjective facts, of the three residences that petitioner used, his principal residence was the Palm Beach home, therefore, he should be permitted nonrecognition of his half of the gain on the sale of the Park Avenue home.

C. The Division argues that petitioner conceded he was a domiciliary of New York, and therefore, his principal residence was the hotel apartment in New York City. I can find no basis in this record for the Division's conclusion that petitioner conceded he was a domiciliary of New York. Furthermore, whether petitioner was a domiciliary of New York is not the issue, nor is it determinative, in this case. As noted above, how much time a taxpayer spents in one

residence versus another is but one factor to consider in determining the taxpayer's principal residence. The weight to be given that factor depends on all the facts and circumstances in a particular case. Moreover, the fact that a person is domiciled in one state versus another does not necessarily reflect the amount of time spent in the domicile state and does not necessarily determine the location of a person's principal residence for a particular period of time.

D. The petition of Nathan Goldman is granted and the Notice of Dificiency, dated August 27, 1993, is cancelled.

DATED: Troy, New York
March 7, 1996

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE