STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NICHOLAS F. ALBANESE, JR. AND DAILE A. ALBANESE	:	DETERMINATION DTA NO. 813032
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1987 through 1989.	:	
	:	

Petitioners, Nicholas F. Albanese, Jr. and Daile A. Albanese, 255 River Drive, Tequesta, Florida 33469, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1987 through 1989.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 27, 1995 at 12:15 P.M., with all briefs to be submitted by August 25, 1995, which date commenced the six-month period to issue a determination in this matter. Petitioners, appearing by Wofsey, Rosen, Kweskin & Kuriansky (Brian Bandler, Esq., of counsel), submitted a brief with attached documents on June 27, 1995. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Donna Gardiner, Esq., of counsel), submitted its brief on July 21, 1995. Petitioners submitted a reply brief on August 25, 1995. On September 13, 1995, this proceeding was transferred to Winifred M. Maloney, Administrative Law Judge, who renders the following determination.

ISSUES

I. Whether petitioners were domiciliaries of New York State for the years 1987 and 1988 and were thus taxable as resident individuals.

II. If petitioners are found to be nonresidents of New York State during 1987 and 1988, or in 1989, whether certain income items should have been properly allocated to New York as New York source income.

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

FINDINGS OF FACT

1. Petitioners, Nicholas F. Albanese, Jr. and Daile A. Albanese, filed a petition with the Division of Tax Appeals on July 20, 1994, which requested a redetermination of a deficiency of New York State personal income taxes for the years 1987 through 1989 in the amount of $112,676.40.

2. The petition alleges that petitioners were not domiciliaries of New York State during 1987 and 1988. It also alleges that even if petitioners are found to be nonresidents of New York State for tax years 1987 and/or 1988, the lump-sum retirement plan distribution in tax year 1987 and income from consulting fees and a covenant not to compete in both tax years should not be treated as New York source income in those tax years. For tax year 1989, the petition alleges that the income from consulting fees and a covenant not to compete were not New York source income. The petition also alleges that the Division "errs in not granting Petitioners' request for a refund of tax, penalty and interest for the tax years at issue."

Petitioners state in their petition that they do not contest the characterization of rental income as New York source income.

3. Petitioners filed Federal personal income tax returns (Form 1040) for the years 1987 through 1989. However, they did not file any New York State tax returns for those years.

4. The Division's Exhibit "D" is a copy of petitioners' 1987 joint Form 1040, with schedules attached, which lists their address as "1016 Ocean Drive West, Juno Beach FL 33408". Petitioners claimed a total of six exemptions, four of which were for dependent children. Petitioners reported $236,824.00 as "other income" on line 21 of the Form 1040. The "other income" was broken down on the "STATEMENT OF MISCELLANEOUS INCOME" as follows:

"T[1]	COVENANT NOT TO COMPETE - WESTFAIR [sic]	$ 80,000
T	WESTFAIR [sic] CONSULTING FEE	156,824
	TOTALS	236,824."

The Schedule E Supplemental Income Schedule (From rents, royalties, partnerships, estates, trusts, REMICs, etc.) ("Schedule E"), attached to this return, reported net rental income for a one-half interest in an office building located at 182 Brady Avenue, Hawthorne, NY, in the amount of $5,971.00.

Petitioners reported on line 38 of the Form 1040 additional taxes from Form 4972 in the amount of $128,705.00. Attached to this return were two Form 4972's, Tax on Lump-Sum Distributions, the first in the name of Nicholas F. Albanese, Jr., and the second in the name of Daile A. Albanese. Part 1 of Form 4972 contains a series of questions which a taxpayer must answer in order to see if he qualifies to use Form 4972. The Part 1 questions and petitioners' respective responses follow:

	Nicholas Albanese	Daile Albanese
1. Did you rollover any part of the distribution?	No	No
2. Were you age 50 or over on January 1, 1986?	Yes	Yes
3. Was this a lump-sum distribution from a qualifying pension, profit-sharing or stock bonus plan?	Yes	Yes
4. Was the participant a member of the plan for at least 5 years preceding the year of the distribution?	Yes	Yes
5. Is this distribution paid to a beneficiary of an employee who died?	No	No
6. Did you quit, retire, get laid off, or get fired from your job before receiving the distribution?	Yes	Yes
7. Were you self-employed or an owner-employee and became disabled?	No	No
8. Were you 59½ or over at the time of the distribution?	Yes	No

[1]It appears that "T" refers to petitioner Nicholas F. Albanese, Jr.

The instructions at the end of Part 1 state: "[I]f you qualify to use this form, you may elect to use Part II, Part III, or Part IV; or elect to use Part II and Part III, or Part II and Part IV". Both petitioners elected to use Part II and Part IV. Form 4972 Part II contains a box which, if checked, allows a taxpayer to elect to treat part of his distribution from "pre-74" participation as capital gain. Both petitioners made the election by checking the box. Petitioners reported the following amount on Lines 1 and 2 of Part II:

	Nicholas Albanese	Daile Albanese
"1. Capital gain part from box 2 of Form 1099-R.	119,378	57,393
2. Multiply line 1 by 20% (.20) and enter here.	23,876	11,479"

Part IV of Form 4972 is used "to elect the 10-year averaging method". Line 1 of Part IV of Form 4972 reported "Ordinary income from box 3 of Form 1099-R", while line 23 of Part IV contained the "Tax on lump-sum distribution", which was the sum of Part II, line 2 and Part IV, line 22. Petitioners reported the following amounts on their respective lines 1 and 23:

Nicholas Albanese, Jr.	line 1	$308,394	
	line 23		93,056
Daile A. Albanese	line 1		$148,266
	line 23	35,649.	

5. Petitioners' 1988 Form 1040 (Division's Exhibit "E") lists their address as "1016 Ocean Drive West, Juno Beach FL 33408". Only two exemptions were claimed on this return. Petitioners, on their Schedule E, determined the net income for their one-half interest in the Hawthorne, New York office building to be $8,965.00. They reported "other income" on line 22 of the Form 1040 to be $543,538.00. The "other income" was broken down on the "STATEMENT OF MISCELLANEOUS INCOME" as follows:

"T COVENANT NOT TO COMPETE - WESTFAIR [sic]
240,000
T WESTFAIR [sic] CONSULTING FEE
303,538
TOTALS 543,538."

6. Petitioners' 1989 Form 1040 (Division's Exhibit "F") contains the same Juno Beach, Florida address as was contained on both the 1987 and 1988 Forms 1040. As was the case in

tax year 1988, petitioners claimed only two exemptions on the 1989 return. According to the Schedule E attached to the Form 1040, petitioners' share of the net rental income from the Hawthorne, New York office building was $9,749.00. "Other income" on line 22 of the Form 1040 totaled $150,000.00, which was broken down as follows on the "STATEMENT OF MISCELLANEOUS INCOME":

"T	COVENANT NOT TO COMPETE - WESTFAIR [sic]	80,000
T	WESTFAIR [sic] CONSULTING FEE	70,000
	TOTALS	150,000."

7. Petitioners employed Caporizzo, Dylewsky, Trantanella & Associates of Stamford, Connecticut to prepare their Federal personal income tax returns for tax years 1987, 1988 and 1989.

8. On or about June 1, 1992, the Division commenced a field audit of petitioner, Nicholas F. Albanese, Jr., which was assigned to Joseph Tanzillo. The audit was precipitated by a prior audit of West-Fair Electric, a company of which Mr. Albanese was an original principal owner. The audit indicated that large sums of money were being paid to Mr. Albanese but no returns were being filed by him.

9. As a result of the search he conducted to determine whether the Albaneses had filed as New York residents in the past, Mr. Tanzillo "found that through 1986 they had been filing as residents and after 1986 they stopped filing" (tr., p. 15).

10. The Division's Exhibit "G" is the contact sheets entitled "Tax Field Audit Record and "Contacts and Comments of All Audit Actions" which contained all of the auditor's contacts and comments concerning this audit. According to the contact sheets, the auditor met with petitioners' former representative, Mr. Caporizzo, on June 12, 1992, and discussed the issues of domicile, residency, as well as the taxability of the rental, restrictive covenant and contractor income. At that meeting, the former representative provided the auditor with petitioners' Federal returns for tax years 1986 through 1991, and petitioners' 1986 New York State personal income tax return. In addition, the auditor received a summary statement of

Nicholas Albanese's connection with his former employer, West-Fair Electric. The notes indicate that the auditor requested additional information at that time.

11. On the same day, June 12, 1992, the auditor made a field visit to petitioners' Armonk, New York home. According to the auditor, the Armonk, New York address appeared on the New York State income tax returns filed by petitioners prior to the years in issue.

12. The auditor's next meeting with petitioners' former representative took place on September 21, 1992. According to the contact sheets, the former representative made various records pertaining to the issue of domicile available to the auditor. The notes indicate that petitioners did not provide all of the information requested at the June 12, 1992 meeting.

13. As a result of the September 21, 1992 meeting, the auditor prepared two documents which summarized the evidence submitted on the issue of domicile. The first document, Division's Exhibit "I", is a single page which summarizes the evidence provided by petitioners to support their position that they became Florida domiciliaries in 1987. The second document, Division's Exhibit "J", summarized the evidence submitted which showed that petitioners continued to be New York State domiciliaries from "1987 to 1992". This document consisted of two summary pages, the first of which was prepared on September 21, 1992, while the second was prepared on November 16, 1992 based upon additional evidence obtained subsequent to September 21, 1992, and attachments.

14. According to the contact sheets, the auditor met with petitioner's former representative on October 8, 1992 at which time the auditor reviewed "days in/out records" supplied by the representative. During that meeting, Mr. Tanzillo prepared a list of additional information which he requested be provided to him by November 15, 1992.

15. Petitioners provided additional information which the auditor reviewed at meetings with the former representative on November 12 and 16, 1992.

16. At the conclusion of the audit, the auditor prepared a Form AU-241.26 Income Tax Report of Audit ('audit report") which summarized his audit conclusions. The audit report "Comments" section contained the following:

"This is a residency/allocation case with a source code of 34. It resulted from an earlier withholding one in which it was found the taxpayers were receiving large 1099 payments and not filing personal New York State Income Tax Returns. The payments were made by the taxpayer husband's prior owned New York State corporation. Upon examination of the nature of the payments and the taxpayers' New York State residency status, it was determined a tax liability exists. The taxpayers were found to be New York State domiciliarys [sic] for 1987 and 1988 and to have had allocable New York income in 1989. Since no returns were filed for these years, there are no relevant statute dates.

"The circumstances in this case are as follows. In 1986, Mr. Albanese sold all his shares in his New York corporation and claimed to have changed his residency from New York State to Florida. Previously, the Albaneses filed yearly, personal, resident New York State Income Tax Returns. For 1986, they filed their last resident return and properly accounted for the sale of their New York business. As a result of contractual agreements with his former company in its sale, Mr. Albanese was to receive large payments in subsequent years for assisting his former company with collections of A/R, consulting on various jobs and for a restrictive covenant. The Albaneses also, continued holding a rental property interest in the building where the company is located. Large payments were made to the taxpayers for these items in 1987, 1988 & 1989. No New York returns were filed after 1986.

"The department found all of the aforementioned payments allocable to New York. Although for 1987 and 1988, the taxpayers were also found to be New York domiciliarys [sic], these items are taxable by themselves, thus the 1989 adjustment. This position is supported by applicable regulations and case law, which are contained in the workpapers. In 1987, Mr. Albanese received an allocable lump sum [sic] distribution. This too, is taxable to New York regardless of the taxpayers' residency status and was included in the adjustment. The workpapers contain information for this, too.

"In deciding to hold the taxpayers' domiciliarys [sic] in 1987 and 1988, the following facts were considered:

"The taxpayers retained the same New York home they held as their primary residence prior to their claimed change in residence until 1992. They spent 159 days there in 1987 and 119 days in 1988. After their claimed move, the taxpayers had children attending high school and college and living there at their primary residence. Nothing substantial was moved from their New York home to the Florida one.

"1099's issued to the taxpayers for 1987 thru 1989 show the taxpayers' address in equal numbers as New York and Florida.

"The taxpayers maintained resident membership status in an exclusive country club near their New York home. Their membership was changed from resident to non resident [sic] at the end of 1988.

"Medical substantiation submitted for 1987 and 1988 shows Mr. & Mrs. Albanese using only New York doctors.

"The taxpayers maintained two checking accounts in 1987 at New York banks with branches near their New York home, one being the Bank of New York and the other the Putnam Trust Company. The Putnam Trust Company account

> continued being maintained through at least 1991. Both accounts' sample statements and checks show the taxpayers' address as their New York home. Both accounts also had active use.
>
> "All of the above adjustments were addressed with the taxpayers' representative. No agreement was reached. The taxpayers and their representative are taking the stance that all of the proposed adjustments are wrong. Several meetings were held, including one with supervisory staff to try to reach an agreement.
>
> "The case was closed as completely disagreed. Delinquency and negligence penalties were imposed. Case referred to appeals." (Division's Exhibit "L".)

The following handwritten notation appeared at the bottom of the audit report: "Note: [s]ubsequent to preparation of audit report, t/ps made full payment of assessment, but still disagreed."

17. According to the audit report, the closing conference took place on December 7, 1992. According to the contact sheets, the former representative was provided with copies of the auditor's workpapers at that conference. Notations in the contact sheets indicate that petitioners' former representative requested additional time to enable petitioner Nicholas Albanese and him to make a decision on how to proceed.

18. The notations in the contact sheets reveal that on December 21, 1992 the former representative "requested citations backing up the department's stance". The auditor provided copies of the case law and the Division's regulations to the former representative. Furthermore, the notes indicate that the auditor had an in-depth discussion with the former representative at that time as well.

19. According to the March 16, 1993 notation in the contact sheets, petitioners and their representative did not agree with any of the Division's stances and they decided that the case should go to appeals.[2] The auditor's last entry for March 16, 1993 was "[C]ase closed disagreed".

20. The auditor's notes in the contact sheets indicate that, on May 14, 1993, he had a second conference with taxpayers' new representative.

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[2]It is unclear from the record whether this entry refers to the former representative or the new representatiave.

21. On June 14, 1993, the Division issued three statements of personal income tax audit changes to Nicholas Jr. and Daile Albanese in the amounts of $56,120.11, $45,993.90 and $10,562.39, plus penalty and interest, for the years 1987, 1988 and 1989, respectively.

The statement for 1987 contained the following remarks:

> "AS A RESULT OF AUDIT, YOU HAVE BEEN FOUND TO BE A DOMICILIARY OF NEW YORK STATE FOR 1987 AND 1988. THEREFORE, ALL OF YOUR FEDERAL INCOME IS ALLOCABLE TO NEW YORK FOR INCOME TAX PURPOSES. INADDITION [sic], CERTAIN INCOME ITEMS WOULD HAVE BEEN ALLOCABLE TO NEW YORK STATE REGARDLESS OF RESIDENCY STATUS. THESE INCLUDE NEW YORK DERIVED RENTAL INCOME, INCOME DERIVED FROM SERVICES TO YOUR FORMER NEW YORK COMPANY AS AN INDEPENDENT CONTRACTOR, RESTRICTIVE COVENANT INCOME RESULTING FROM AN AGREEMENT WITH YOUR FORMER COMPANY UPON ITS SALE BY YOU AND INCOME FROM A LUMP SUM
>
> DISTRIBUTION. SINCE YOU WERE NOT FOUND TO BE A N.Y.S. RESIDENT FOR 1989, YOU WERE TAXED FOR THIS PERIODON [sic] THESE APPLICABLE ITEMS."

These remarks were referred to on the statements for 1988 and 1989 as well.

22. On June 24, 1993, petitioners' new representative, Anthony R. Lorenzo, Esq., tendered petitioners' check in the amount of $223,655.46. According to the cover letter which accompanied the check, the payment was in full payment of the additional taxes, penalties and interest which were proposed for assessment by the Division's "Final Audit Report". Mr. Lorenzo wrote, in pertinent part:

> "Please be informed that the taxpayers' [sic] do not consent to the findings detailed in your report and have engaged our firm to represent them in presenting their protest before the administrative and judicial tribunals officially authorized to hear and decide upon such taxpayer appeals. The primary reason for their making payment at this time is to stop the accruing of interest while this matter is being contested."

The breakdown of additional taxes, interest and penalties by tax year follows:

"1987	$116,912.00
1988	88,358.56
1989	18,384.90
	$223,655.46"

23. The Division issued a Notice of Deficiency (Notice No. L-007698392-1), dated August 2, 1993, for personal income taxes due pursuant to Article 22 of the Tax Law for 1987,

1988 and 1989. In that notice, petitioners were assessed (1) a deficiency for 1987 State income tax in the amount of $56,120.11, plus a penalty of $31,487.99 and $29,303.90 in interest; (2) a deficiency for 1988 State income tax in the amount of $45,993.90, plus a penalty of $23,320.33 and $19,044.33 in interest; and (3) a deficiency for 1989 State income tax in the amount of $10,562.39, plus a penalty of $4,719.98 and $3,102.53 in interest.

The computation section of the notice contained the following explanation: "Field audit of your records disclosed additional tax due."

24. Petitioners timely requested a conciliation conference which was held on March 30, 1994. After the conciliation conference, the conferee issued a Conciliation Order (CMS No. 133372) dated April 22, 1994, sustaining the statutory notice.

25. The Division's Exhibit "A" is the Notice of Hearing ("hearing notice") issued in this matter by the Division of Tax Appeals to petitioners, their representative and the Division's representative. This hearing notice contained the following statement:

> "Except as otherwise provided by law, the petitioner has the burden of proof and must establish the facts necessary to show that there is no deficiency or that a refund is due. Such proof may be made by sworn testimony of the petitioner's witnesses or by documentary or other evidence introduced during the course of the hearing."

26. At the hearing held in this matter, petitioners were represented by Brian Bandler, Esq.; however, they were not present.

27. At the beginning of the hearing, Judge Jenkins made the following statement:

> "Bear in mind that all witnesses are subject to cross-examination and any evidence you may have put in in earlier proceedings, if you want me to consider it in my decision, you have to put it in here" (tr., p. 2).

28. At the outset of the hearing, petitioners' representative conceded that the rental income was New York source and should have been included in income (tr., p. 7).

29. The Division presented only one witness, the auditor, Joseph Tanzillo.

30. During the hearing, the auditor proffered the following information concerning petitioners' usage of the Armonk, New York home:

> "Through the course of the audit, information was obtained that the taxpayer spent a substantial amount of time there; that they had children in high school and in

> college still living there, and that they had all there [sic] original possessions that they had obtained over the years while living there still there and had not moved any to Florida" (tr., pp. 26-27).

31. Petitioners have nine children. The record is silent as to the ages of the children during the relevant period. Although the auditor requested their specific ages, he never received that information. The only information supplied "was that at the time before the audit years, the children ranged in the age from high school age through college" (tr., p.27).

32. When asked whether he knew how many children were still living in the Armonk home, the auditor responded: "I believe nine, and it's in the statement that the representative provided to me" (tr., p. 27).

33. Petitioners' representative informed Mr. Tanzillo that none of petitioners' original possessions were moved to Florida and that the Armonk home was kept intact.

34. One of the attachments to the Division's Exhibit "J" is an Internal Revenue Service ("IRS") computer printout entitled "SELECTED IRMF RECORDS", dated June 11, 1992, which listed the addresses at which petitioners received 1099 payments during 1987 through 1989 (tr., p. 53). Review of this printout indicates that in each year an equal number of form 1099's were issued to petitioners at both the Armonk, New York and the Juno Beach, Florida addresses, to wit: 5 each in 1987; 2 each in 1988 and 2 each in 1989.

35. The auditor did an in-depth analysis of petitioners' days in and days out of New York State. Based on the evidence submitted to the auditor, petitioners were in New York 159 days in 1987; 119 days in 1988 and "in the low 70's" in 1989 (tr., p. 31).

36. The auditor determined that by 1989, petitioners were no longer New York domiciliaries. He based his determination on a number of factors which included among others: (1) the substantial drop in the amount of time petitioners spent in New York; (2) at the end of 1988, petitioners "changed their membership in a very exclusive, expensive country club in New York from residents to nonresidents"; and (3) "in 1988 the taxpayers obtained a receipt for the Homestead Exemption in Florida" (tr., p. 32). The auditor also noted that the records provided for tax years 1987 and 1988 indicated that petitioners only used New York doctors.

No records were provided for tax year 1989 concerning petitioners' visits to health care professionals.

37. The auditor asked petitioners' representative whether petitioners ever filed Florida intangible tax returns. The record does not state what response was given to that question. The auditor was never provided with copies of any Florida intangible tax returns that may have been filed, nor were any Florida intangible tax returns submitted into the hearing record.

38. The auditor was asked why, for tax year 1987, the covenant not to compete income was picked up by him as being a New York source income item. His response was:

> "Well, for a series of reasons which we took into account in its entirety. West-Fair Electric has offices in New York, and from our interview, my interview, with the taxpayer representatives, it was the case that the taxpayer predominantly worked in New York and the regulations, as well as case law, indicate that in the case of a covenant not to compete, that that is New York source income and -- including in the case of a nonresident and in a case where he sells his business and that's one of the sources of income for the sale of the business" (tr., p. 17).

According to the auditor, whether or not petitioner was a resident or nonresident the covenant not to compete income would be deemed New York source income.

39. The auditor was asked about the consulting fee income which he picked up as New York source income for tax year 1987. He stated that although he "attempted to obtain information on the nature of the consulting fee income", very little information was provided about it (tr., p. 18). The auditor testified that he obtained "a contract saying that Mr. Albanese would be available to collect for accounts receivable and that that work would be done in New York, and on that basis we presumed it was New York income" (tr., p. 18).

40. For tax year 1987, the Division included the lump-sum distribution as New York source income. The auditor explained that since petitioner had elected for Federal tax purposes, on Form 4972, to compute the tax on the lump-sum distribution separately from the tax on the remainder of his income, "the New York State law works simply that the taxpayer has to do the same with New York State" (tr., p. 19).

The Division's Exhibit "H" is the 1987 Form IT-230 entitled "Separate Tax on Lump-Sum Distributions" which the auditor used to calculate the amount of the separate tax due on

the lump sum distribution. Review of Form IT-230 reveals that although there were two Form 4972's - one for each petitioner, the auditor used the figures from Nicholas Albanese's Form 4972 only to compute the separate tax due for New York State purposes on the lump-sum distribution. The following computations appeared on the Form IT-230: the auditor multiplied $119,378.00, which Mr. Albanese elected to treat as capital gain, by 5.4 % (.054) to determine a tax of $6,446.00 on that portion of the distribution. The auditor determined the tax on the Form 4972 Part IV line 1 ordinary income of $308,394.00 to be $27,480.00. The total separate tax on the lump-sum distribution was determined to be $33,926.00 ($6,446.00 plus $27,480.00) by the auditor.

41. For tax years 1988 and 1989, the auditor included the rental income, covenant not to compete income and the consulting fees as New York source income.

42. As its Exhibits "M" and "N" respectively, the Division submitted the filing instructions for New York State nonresident income tax returns for tax years 1987 and 1988 through 1991. These instructions contain the requirements for filing.

The auditor testified that he took these instructions into account when he determined whether or not penalties should be assessed.

43. Penalties were assessed by the auditor for all three tax years in issue. According to the auditor, penalties were assessed for tax year 1987 because even if petitioners were determined to be nonresidents, they were required to file a New York State nonresident return based on the fact that: (1) they had rental income from New York real property; and (2) Mr. Albanese was "subject to lump sum [sic] distributions derived from or connected with New York State sources" (tr., pp. 35-36). For tax years 1988 and 1989, the penalties were assessed because even if petitioners were nonresidents,they were required to file a return to report the rental income from the New York real property.

44. Petitioners' representative asked Mr. Tanzillo the basis for his determination that Mr. Albanese had provided services in New York to his former employer. His response was:

> "Well, in part, it was, for lack of a better word, from my standpoint circumstantial. His business was located in New York and when I went to the

business originally to conduct the first audit, I saw many people coming and going and I reviewed records that indicated there was a lot of New York jobs but in addition his representative said such and also put it into writing" (tr., p. 37).

45. The Division's Exhibit "O" is the "STOCK REDEMPTION AGREEMENT" ("agreement"), entered into on November 20, 1986, "by and among West-Fair Electric Contractors, a New York Corporation (the 'Corporation'), and Nicholas F. Albanese, Jr. and Daile Albanese ('Albanese')". According to the terms of this agreement, the Albaneses agreed to sell all of their interest in the company, 95 shares, and the Corporation agreed to purchase same from the Albaneses. Paragraph 2(A) of the agreement set forth the purchase price as follows:

> "(i) $800,000.00 in cash or certified check to be paid on or before November 26, 1986 which amount includes Albanese's share of the accounts receivable set forth in Attachment A hereto.
>
> "(ii) Sum of $483,000 in consideration of a Restrictive Covenant Not To Compete in a form as attached hereto and made hereof as Attachment B which payments shall be payable as follows: $80,500 on April 1, 1987; $80,500 on January 2, 1988; $80,500 on July 1, 1988; $80,500 on January 2, 1989; $80,500 on July 1, 1989; $80,500 on January 2, 1990."

Attached to the agreement is "ATTACHMENT B" entitled "Restrictive Covenant" ("covenant not to compete") which stated that:

> "Nicholas F. Albanese Jr. covenants and agrees that he will not establish, re-establish, open, re-open, own, manage, operate, joint control, be engaged in or participate in the ownership, management, operation or control of or be connected in any manner whatsoever with any business directly or indirectly, either as employee, as owner, as partner, as agent or stockholder, director or officer of a corporation or otherwise of any firm or entity engaged in any business of a nature similar to or competitive with the business of West-Fair Electric Contractors, Inc. within the County of Westchester and States of New York and Connecticut for a term of five years from the date hereof."

Petitioner Nicholas F. Albanese Jr. executed this covenant not to compete on November 20, 1986. His signature was witnessed by Kevin Plunkett, Esq., the Corporation's counsel.

46. The following colloquy took place between Administrative Law Judge Jenkins and petitioners' representative:

"ALJ Jenkins: You have no witnesses today?"

"Mr. Bandler: That's correct, your Honor."

"ALJ Jenkins: How do you wish to proceed?"

"Mr. Bandler: I would be glad to make reference to the factual background of this case which I believe is part of the State's information provided in their submissions."

"ALJ Jenkins: At this point it's your turn to put on your evidence. They put on theirs. If you have exhibits, I'd be happy to take them. You don't have any witnesses to present. Do you have any exhibits you would like to present?"

"Mr. Bandler: No, I do not, your Honor."

"ALJ Jenkins: Okay. In that case, do you intend to file a brief?"

"Mr. Bandler: I believe we would then."

"Ms. Gardiner: Yes." (Tr., pp. 56-57.)

47. At that point in the proceedings, Judge Jenkins set the briefing schedule in this matter. He then identified the responsibilities of both parties. Judge Jenkins asked the representatives for both sides whether they wished to make closing statements or "hold it for the brief" (tr., p. 58). The representatives for both sides responded that they wished to hold it for their respective briefs. Judge Jenkins then stated "[t]his matter is concluded. Thank you."

48. Petitioners timely filed their brief in this matter on June 27, 1995. Attached to their brief were five appendices which contained the following documents:

(A) Condominium records; (B) Homestead Exemption; (C) Connecticut bank statements; (D) Realtor's letter; (E) Monthly logs and expenses; (F) Florida bank statements.

49. Petitioners' request to reopen the record is contained in their reply brief along with the arguments in support of their motion. Petitioners did not submit any affidavits in support of this motion. In their motion, petitioners "request that the Administrative Law Judge exercise his discretion and consider the Appendices, either by considering the Appendices as submitted by the Petitioners or by convening another hearing for the purpose of resubmitting Petitioners' evidence, in order to liberally construe the Tax Appeals Tribunal Rules of Practice and Procedure to render justice in this case" (Petitioners' reply brief, p. 2). They contend that, in order to render a just decision on the issue of domicile, the appendices must be considered by

the administrative law judge. Petitioners aver that the appendices bear directly on the issue of their change of domicile and are clearly relevant to that issue.

Petitioners argue that the purpose of the appendices is to complete the Division of Tax Appeals' record and to refute the testimony of the auditor at the hearing. They contend that the Division's exhibits "make reference to a factual background based upon, in part, the information provided in the Appendices" (Petitioners' reply brief, p. 3). They maintain that it was always their "intention that the Appendices form a part of the Department's Division of Tax Appeals record" (Petitioners' reply brief, p. 3). Petitioners assert that Administrative Law Judge Jenkins'

> "language 'put it in here' was understood to mean that Petitioners would be permitted to provide evidence to the Administrative Law Judge for consideration at any point within the entire proceeding, including at the time the Petitioners' briefs were submitted, because nothing within the Tax Appeals Tribunal Rules of Practice and Procedure precludes or restricts the submission of evidence in a brief" (Petitioners' reply brief, p. 4).

Furthermore, they argue that their "attorney stated that although no exhibits or witnesses would be presented at the Hearing, a brief would be filed and closing statements would be set forth in the brief" (Petitioners' reply brief, p. 3).

Petitioners also argue that:

> "[t]he audit investigation and the informal and formal hearings within the Department are all part of an on-going and continuous administrative proceeding. The Hearing should not be treated as the equivalent of a trial de novo. All the facts and evidence set forth in Petitioners' brief (including the Appendices) have been previously submitted to the Department. Accordingly, Respondent would most assuredly not be disadvantaged in any way by Petitioners' 'failure' to resubmit all of the evidentiary materials previously furnished to the Department" (Petitioners' reply brief, p. 5).

Lastly, they assert that even if there is no automatic right to present evidence to an administrative law judge outside of a hearing, "as long as a petitioner requests that the record be reopened while the matter is still pending in the Department's Division of Tax Appeals, the discretion remains with the Administrative Law Judge to reopen the record" (Petitioners' reply brief, pp. 7-8). They maintain that "the equities in this case demand that the Appendices be taken into consideration by the Administrative Law Judge so that a decision on the merits can be properly made" (Petitioners' reply brief, p. 8).

50. The Division's responses to petitioners' submission of the appendices, along with their brief, are contained in its brief. It argues that since the record in this matter was closed at the conclusion of the hearing held on April 27, 1995, the additional documents attached to petitioners' brief should be rejected, and not considered by the administrative law judge in his determination. Citing relevant case law, the Division asserts that "the Tax Appeals Tribunal has consistently rejected similar attempts to introduce additional documents after the record has been closed" (Division's brief, p.6). It argues that Judge Jenkins, at the outset of the hearing, apprised petitioners' representative that:

> "any evidence you may have put in in earlier proceedings, if you want me to consider it in my decision, you have to put it in here." (Division's brief, p.6, citing tr., p.2.)

Furthermore, the Division contends that, after it had presented its case, "Administrative Law Judge Jenkins asked petitioners' representative whether he was planning on introducing any exhibits at the formal hearing to which Mr. Bandler responded that he was not introducing any evidence" (Division's brief, p. 7).

51. On September 15, 1995, both parties' representatives were notified by Andrew F. Marchese, Chief Administrative Law Judge, Division of Tax Appeals, that this matter had been reassigned to Administrative Law Judge Winifred Maloney.

52. The Division submitted five 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 three and four which are conclusory in nature.

SUMMARY OF THE PARTIES' POSITIONS

53. Petitioners contend that the Division improperly determined them to be resident individuals for tax years 1987 and 1988. They argue that the auditor's determination did not follow audit guidelines in effect at the time of the assessment and was arbitrary. Petitioners assert that they changed their domicile to Florida when petitioner Nicholas Albanese retired from his New York business, and they moved into a Florida condominium. They argue that they made numerous formal declarations of their intent to be Florida domiciliaries.

Furthermore, they contend that they maintained the Armonk, New York home throughout the audit period for their adult children's use while they attended school and also to provide a temporary residence for themselves during petitioner Nicholas Albanese's extensive medical treatment in New York.

Petitioners concede that the rental income is properly allocated to New York. Petitioners aver that during the audit period, petitioner Nicholas Albanese did not provide services in New York. They argue that "the income he received in exchange for his availability for consultation and for a covenant not to compete does not integrally relate to the services previously provided in New York" (Petitioners' brief, p. 6).

Petitioners also maintain that the Division improperly subjected the lump-sum distribution from a retirement plan to tax. Raising constitutional arguments, they assert that the Division treats nonresident retirees who receive lump-sum distributions differently from those nonresident retirees who receive annuity payments. Petitioners also request that the negligence penalties be abated.

54. The Division maintains that petitioners have failed to sustain their burden of proof to demonstrate that they intended to change their domicile to Florida during 1987 and 1988. It asserts that there is no proof in the record of what petitioners' intentions were.

The Division contends that the four separate income items, to wit: (1) rental income which petitioners have already conceded should have been allocated to New York; (2) consulting fees received by petitioner Nicholas Albanese; (3) income petitioner Nicholas Albanese received pursuant to a restrictive covenant not to compete; and (4) a lump-sum distribution received during the tax year 1987, which it determined to be New York source items are properly allocated to New York State regardless of residency status. Furthermore, the Division asserts that petitioners have not submitted any evidence to establish reasonable cause for abatement of the penalties imposed pursuant to Tax Law § 685(a)(1)(A) and (b).

CONCLUSIONS OF LAW

A. As noted in Finding of Fact "48", petitioners submitted with their brief five appendices. Petitioners have brought a motion to reopen the record to allow the submission of the five appendices which were attached to their brief into evidence or in the alternative, to convene another hearing in order to afford them the opportunity to resubmit the five appendices into evidence. The arguments in support of this motion are contained in their reply brief. Petitioners assert that these appendices were submitted to the auditor during the audit and relate directly to both the domicile issue and to the evidence presented by the Division at the hearing. They argue that it was always their intent that the appendices be part of the record. Petitioners aver that they believed that they would be allowed to provide evidence to the administrative law judge at any point in the proceeding, up to and including the time for submission of their brief. They contend that this motion is proper and should be granted.

The Division's response to petitioners' motion is contained in its brief. The Division contends that petitioners were given every opportunity to present evidence at the hearing and failed to do so. They assert that it was made clear to petitioners' representative, at the outset of the hearing, by Judge Jenkins that all evidence previously submitted would have to be submitted again, in order to be considered in his determination. It also points out that, during the hearing, petitioners' representative stated that he did not have any exhibits to present. The Division argues that petitioners' motion should be denied and that the record should remain closed.

B. I have reviewed the entire record in this matter, including the motion papers submitted by both sides. I find the petitioners' assertions in favor of reopening the record to be without merit. Petitioners have not demonstrated any extraordinary circumstances to warrant the reopening of the record in this matter. The appendices which petitioners seek to submit into the record are not newly-discovered evidence which was unavailable at the time of the hearing. Rather, it is evidence which had been submitted to the Division prior to the hearing (see, Finding of Fact "49"). It is clear from the record in this matter that petitioners and their representative were aware of who bore the burden of proof prior to the hearing. The Notice of Hearing sent by the Division of Tax Appeals to petitioners and their representative not only

informed them of the date and time of the hearing in this matter, but of the fact that they bore the burden of proof and that they could introduce, during the hearing, proof in the form of sworn testimony of their witnesses or documentary or other evidence (see, Finding of Fact "25"). At the outset of the hearing, Administrative Law Judge Jenkins apprised both parties that any evidence submitted previously by the parties in earlier proceedings must be submitted at the hearing in order to be considered (see, Finding of Fact "27"). There is no evidence in the record that petitioners' representative requested additional time in which to submit evidence. In fact, during the hearing, petitioners' representative stated that he did not have any evidence to present (see, Finding of Fact "46"). The record in this matter was closed at the conclusion of the hearing on April 27, 1995 by Administrative Law Judge Jenkins (see, Finding of Fact "47").

In Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), the Tribunal explained that the consideration of evidence after the record has been closed is improper because:

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record."

Therefore, I see no reason to reopen the record in this matter. The petitioners' motion to reopen the record is denied.

C. Tax Law § 605(b)(1)(A) provides, in pertinent part, as follows:

> "Resident individual. A resident individual means an individual:
>
> "(A) who is domiciled in this state, unless (i) 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 . . . ."

D. 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."

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

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

E. 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."

F. 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).

G. Petitioners assert that they were not domiciliaries of New York in either 1987 or 1988. They contend that the Division improperly determined them to be resident individuals for those years. Petitioners argue that the auditor's determination did not follow audit guidelines in effect at the time of the assessment and was arbitrary. Petitioners assert that the evidence clearly establishes that they were Florida domiciliaries during the relevant period. They contend

that they changed their domicile to Florida when petitioner Nicholas Albanese retired from his New York business and they moved into a 3-bedroom, 3 1/2-bath Florida condominium, which they had purchased in 1985.

Petitioners argue that numerous formal declarations, which they made, clearly show their intent to change their domicile to Florida. They maintain that they: filed their 1986 tax returns reflecting their Florida address and in subsequent years, including the audit period, filed Federal and Florida intangible tax returns; moved their cars to Florida and registered them there; obtained Florida driver's licenses and Florida voter registration cards; filed for the Florida homestead exemption; joined the Tequesta Country Club in Florida, "where they spent significant time, playing golf almost every day"; opened a Florida bank account; maintained a safe deposit box in Florida only and executed their wills reflecting their Florida domicile (Petitioners' brief, p. 9). Petitioners argue that, in addition to their formal declarations, their conduct clearly shows that they had abandoned their New York domicile and established a new domicile in Florida.

Petitioners assert that their Florida home became their permanent home and was the focus of their lives. They contend that they had no intention of returning to New York even though they continued to own the Armonk, New York home. They aver that they maintained the Armonk, New York house throughout the audit period for their adult children's use while they attended school and also to provide a temporary residence for themselves during petitioner Nicholas Albanese's extensive medical treatment. They also assert that at the time of Nicholas Albanese's retirement to Florida, the real estate market was in a recession, and it did not make sense to rush to sell the Armonk, New York house at a distressed price. Petitioners contend that a review of the Connecticut (Putnam Trust) bank statements, which list the Armonk, New York address, shows that the accounts were used predominately for their children's tuition and for utilities and not for everyday expenses.

Petitioners maintain that, in 1988, they listed the Armonk, New York property for sale with a real estate agent. They contend that when the Armonk, New York property was

ultimately sold in 1992, they "did not take any election for federal income tax purposes, such as the Internal Revenue Code ('IRC') Section 121 exclusion or the IRC Section 1034 rollover, that would treat the New York house as a primary residence" (Petitioners' brief, pp. 11 - 12). Petitioners aver that they moved their personal effects to Florida. They concede that they did not move any furniture to Florida. However, they argue that there were a number of reasons why they did not move their furniture to Florida, which included:

> "(i) the Florida home was already furnished; (ii) the children were still living in the house and needed furniture; (iii) heavier furniture suited for northern climates is not suited for warmer climates; (iv) the cost of moving the furniture was prohibitive for such a distance" (Petitioners' brief, p. 12).

Petitioners assert that their "failure to move furniture to Florida does not evidence an intent to use it again in New York except on temporary visits to the state" (Petitioners' brief, pp. 12 - 13).

Petitioners admit that they made numerous trips to New York for medical treatment, during the relevant period, however, they assert that they always returned to Florida. They aver that the monthly logs and medical expense reports prepared for the audit reflect their primary purpose in visiting New York, which was to obtain specific medical treatment from New York physicians. Petitioners assert that petitioner Nicholas Albanese did not provide services in New York pursuant to the consulting agreement. They maintain that, following petitioner Nicholas Albanese's retirement, they completely changed their lifestyle and engaged in activities consistent with persons who permanently retire to Florida. Petitioners claim that the statements from their Connecticut and Florida banks, the monthly logs, and the club expense statements for both the Florida and New York country clubs clearly show that they socialized mainly in Florida. They also contend that their continued use of a New York stock broker and a New York insurance agent is not inconsistent with their claim that, in 1987 and 1988, they were Florida domiciliaries. Petitioners assert that these New York professionals were friends of long duration, and in the case of the insurance broker, he was Nicholas Albanese's longtime golf partner and petitioners socialized with him and his wife. Furthermore, they claim that the stockbroker had a toll-free "800" number available for their use.

Lastly, petitioners contend that the Division's reliance on the form 1099's issued to petitioner Nicholas Albanese, by his former employer, bearing the Armonk, New York address, in support of the Division's position that petitioners continued to be New York domiciliaries, is misplaced. They argue that they "should not be charged with the affirmative duty to correct a third-party statement for domicile purposes" (Petitioners' brief, p. 14). They maintain that their failure to correct that address does not contradict their formal declarations of Florida domicile.

H. 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).

Petitioners carry the burden of proving their claim (see, 20 NYCRR 3000.10[d][4]). In the instant case, petitioners failed to submit any proof that the Division's Notice of Deficiency was incorrect. At the hearing in this matter, petitioners did not present any witnesses, nor did they submit any documentary evidence (see, Finding of Fact "46"). Petitioners did submit a brief in this matter. Attached to and referenced throughout their brief were five appendices containing numerous documents (see, Finding of Fact "48"). Petitioners made a motion to reopen the record to allow the submission of the five appendices into evidence (see, Finding of Fact "49"). Since I have denied this motion, the five appendices cannot be considered in this determination (see, Conclusions of Law "A" and "B").

Petitioners have 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).

I. Although I have found that the Notice of Deficiency is valid and correct, I will address petitioners' assertions that the auditor failed to follow the Division's audit guidelines in effect at the time of the assessment and that his determination was arbitrary. In their reply brief, petitioners argue that even if the appendices are not considered, there is clear and convincing evidence already in the record that petitioners changed their domicile to Florida prior to the years in issue, 1987 and 1988. In this case there is no dispute that petitioners were domiciliaries and residents of New York prior to the years in issue, at which point, petitioners contend they abandoned their New York domicile and acquired a Florida domicile. In their brief, petitioners asserted that it was their intention to make Florida their domicile. They made assertions about their Florida home, their lifestyle change and the recreational activities they engaged in at the Florida country club. Petitioners also made numerous assertions about their use of, their intentions concerning and their continued ownership of the Armonk, New York home. They also contended that they filed Florida intangible tax returns and executed wills which declared their domicile to be Florida.

It is impossible to determine what petitioners' intentions were based on the record before me. Petitioners were not present at the hearing to testify and they did not set forth their intentions in any sworn document. There is no evidence in the record concerning their asserted lifestyle change and the recreational activities in which they contend they engaged. There are no details of petitioners' alleged new domicile in the record. There is no evidence of petitioners' habit of life in Florida. Also, there is no evidence pertaining to the tax returns and petitioners' wills which they contend reflect their change of domicile to Florida. In fact, at the hearing, petitioners did not present any witnesses or offer any evidence at all (see, Finding of Fact "46").

Petitioners continued to maintain their Armonk, New York home for all the years in issue. The Armonk, New York home is a permanent place of abode within the meaning of 20 NYCRR former 102.2(e)(1) (see, Conclusion of Law "D"). There is no evidence in the record that this house was placed on the market in 1988. There is also no evidence of the housing market conditions during this period. Petitioners continued to spend a significant amount of

time in New York in both 1987 and 1988. Based on the evidence submitted to him, the auditor determined that petitioners were present in New York 159 days in 1987; 119 days in 1988 and in the low 70's in 1989 (see, Finding of Fact "35"). It was the significant drop in the number of days petitioners spent in New York in 1989 among other things which led the auditor to determine that petitioners were no longer New York domiciliaries and had become Florida domiciliaries (see, Finding of Fact "36"). During the relevant period, petitioners continued to utilize the services of New York professionals including physicians.

Based on a review of the record in this matter, petitioners have failed to prove that they abandoned their New York domicile in favor of a Florida domicile in 1987 and 1988. The Division properly determined petitioners to be domiciliaries of New York in 1987 and 1988.

J. Tax Law former § 632(a)(1) stated:

> "The New York adjusted gross income of a nonresident individual shall be the sum of the following:
>
> "(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. . . ."

Tax Law former § 632(b)(1)(B) defined income "derived from or connected with New York sources" to include income attributable to "a business, trade, profession or occupation carried on in this state. . . ."

Tax Law former § 632 was renumbered Tax Law § 631, effective January 1, 1988, and is applicable to tax years beginning after 1987.

K. For the years at issue, 20 NYCRR former 131.4(d) read, in pertinent part, as follows:

> "(1) General. Where an individual formerly employed in New York State is retired from service and thereafter receives a pension or other retirement benefit attributable to his former services, the pension or retirement benefit is not taxable for New York State personal income tax purposes if the individual receiving it is a nonresident and if it constitutes an annuity as defined in paragraph (2) of this subdivision. Where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services and, if the individual receiving it is a nonresident, it is taxable for New York State personal income tax purposes to the extent that the services were performed in New York State. The term compensation for personal services as used in the foregoing sentence includes, but is not limited to, amounts received in connection with the termination of employment, amounts received upon early retirement in consideration of past

services rendered, amounts received upon retirement for consultation services, and amounts received upon retirement under a covenant not to compete. . . .

"(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements.

"(i) It must be paid in money only, not in securities of the employer or other property.

"(ii) It must be payable at regular intervals, at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy, as of the date payments begin . . . ."

L. 20 NYCRR former 131.20 states, in pertinent part, as follows:

"If a pension or other retirement benefit does not qualify as an annuity . . . and is attributable to services performed wholly within New York State, the entire amount included in the individual's Federal adjusted gross income is likewise includible in his New York adjusted gross income."

M. Assuming arguendo that petitioners were nonresidents during 1987 and 1988, the issue of whether certain income payments should be allocated as New York source income must be addressed. In addition, since the Division determined that petitioners were nonresidents for tax year 1989, the issue of whether certain income payments should be allocated as New York source income for that tax year must be addressed as well.

In its assessment, the Division determined four separate income items to be New York source items properly allocated to New York State during the period in issue regardless of petitioners' residency status. These income items were: (1) rental income from New York real property; (2) a lump-sum distribution received during the tax year 1987; (3) consulting fees received by petitioner Nicholas Albanese; and (4) income petitioner Nicholas Albanese received pursuant to a restrictive covenant not to compete. I will address each income item in the order listed above.

Petitioners have conceded that the rental income which Nicholas Albanese received from the rental of New York real property is properly allocated to New York State for tax years 1987, 1988 and 1989. (see, Finding of Fact "2" and "28").

Under 20 NYCRR former 131.4(d)(1), a pension or retirement benefit attributable to services performed in New York and paid to a nonresident will be treated as New York source

income unless the pension or retirement benefits constitutes an "annuity" as defined in 20 NYCRR former 131.4(d)(2). Petitioners argue that the Division improperly subjected the lump-sum distribution from a retirement plan to tax. They argue that New York treats nonresident retirees who receive lump-sum distributions differently from nonresident retirees who receive annuity payments. They aver that

> "to discriminate for tax purposes between retirees in this regard, where the income emanates from the same source, is a violation of the Petitioners' federal and New York State constitutional right to equal protection under the law" (Petitioners' brief, p.7).

Alternatively, petitioners argue that the relevant New York law is preempted by the Employee Retirement Income Security Act of 1974, as amended ("ERISA") "which forbids the states from promoting the payment of one form of retirement benefit over another in this manner" (Petitioners' brief, p. 22).

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).

In the instant case, the lump-sum distributions which each petitioner received in 1987 do not qualify as an annuity since each was a one-time payment (see, 20 NYCRR former 131.4[d][2]). 20 NYCRR former 131.20 set forth in Conclusion of Law "L", provides guidance as to how much of petitioners' lump-sum distributions would be included in their nonresident income. Petitioners reported these lump-sum distributions on their joint Form 1040. Both petitioners elected for Federal purposes to compute the tax due on their respective lump-sum distributions separately and each petitioner prepared a Form 4972, Tax on Lump-Sum Distributions, which they attached to their Federal return (see, Finding of Fact "4"). Since petitioners did not report their lump-sum distributions to New York, the auditor had to calculate

the tax due on the lump-sum distributions. During the hearing, the auditor explained exactly how he calculated the separate tax due on the lump-sum distributions (see, Finding of Fact "40"). As noted in Finding of Fact "40", the auditor determined the separate tax due on Nicholas Albanese's lump-sum distributions only, although Daile Albanese received lump-sum distributions as well.

Petitioners, citing Matter of Pardee v. State Tax Commn. (89 AD2d 294, 456 NYS2d 459), argue that in the event the lump-sum distribution to petitioner Nicholas Albanese is treated as New York source income, "the portion of the distribution that reflects the income earned on the employer contributions within the retirement plan should not be New York source income because it relates to interest and dividend income which is otherwise taxable at the time of distribution only in the state of Petitioner's residence" (Petitioners' brief, p. 22). It is impossible to determine from the record before me what if any portion of the lump-sum distributions were attributable to income earned on any employer contributions that may have been made to the West-Fair Electric plan. Petitioners did not present any witnesses or submit any evidence at the hearing (see, Finding of Fact "46"). The only information in the record concerning the lump-sum distributions is contained on the two Form 4972's attached to petitioners' 1987 joint Form 1040 (see, Finding of Fact "4"). Petitioners have failed to prove what, if any, portion of the lump-sum distributions was not "derived from or connected with New York sources". The Division properly included the lump-sum distribution as New York income in tax year 1987.

In the instant case, petitioner Nicholas Albanese received a consulting fee from his former employer West-Fair Electric in the amount of $156,824.00 in the year 1987, $303,538.00 in the year 1988 and $70,000.00 in the year 1989 (see, Findings of Fact "4", "5" and "6"). The auditor determined based on the information given to him that the consulting fee for each of the years in issue was New York source income (see, Finding of Fact "39").

In their brief, petitioners assert that the Division improperly determined the consulting fee to be New York source income. They argue that petitioner Nicholas Albanese did not perform

any services in New York State. They also contend that Mr. Albanese did not maintain an office or place of business in New York State during the relevant period. Petitioners claim that:

> "The consulting fee was payable whether or not consulting services were, in fact, rendered in New York. Any consultations that took place would have been confined to telephone discussions between Florida and New York, for example to assist the company with its accounts receivables or with issues facing former clients" (Petitioners' brief, p. 17).

Furthermore, petitioners contend that the Division bears the burden to produce substantial evidence that the consulting fees paid to petitioners were for services performed in New York.

It is clear from the record that West-Fair Electric is located in New York and that petitioner Nicholas Albanese received consulting fees from West-Fair Electric during each of the years in issue. Contrary to petitioners' contention, the burden of proof is not upon the Division. Rather, the burden of proof is upon petitioners to establish that no services were performed or that the services were performed outside New York State (see, Tax Law § 689[e]). Petitioners made numerous claims about the consulting fees in their brief. However, none of their claims were substantiated at the hearing. Petitioners did not present any testimony or evidence at the hearing. Since petitioners' failed to establish what the consulting fees represented, the Division properly included the consulting fees as New York source income based on the information supplied to the auditor (cf., Linsley v. Gallman, 38 AD2d 367, 329 NYS2d 486, affd 33 NY2d 863, 352 NYS2d 199).

The last income item at issue is the income received pursuant to the restrictive covenant not to compete. Petitioners contend that the income which Nicholas Albanese received pursuant to the covenant not to compete is not New York source income because no services were performed in New York State. They claim that Mr. Albanese is being compensated for not engaging in business in New York. They further assert that the covenant not to compete income does not compensate Mr. Albanese for his past services performed in New York State. In the alternative, petitioners argue that if the payments under the covenant not to compete are deemed to be New York source income, then based on the covenant not to compete's restriction on the

performance of services in Connecticut, as well as New York, there should be an apportionment of income between New York and Connecticut.

20 NYCRR former 131.4(d)(1) includes income which a nonresident receives under a covenant not to compete as New York income (see, Conclusion of Law "K"). The terms of the covenant not to compete are set forth in Finding of Fact "45". It is clear from a review of this covenant not to compete that petitioner Nicholas Albanese was restricted from engaging in certain business activities in New York State and Connecticut for a period of five years. During the years in issue, petitioner Nicholas Albanese received the following amounts from West-Fair Electric under the covenant not to compete: in 1987 - $80,000.00; in 1988 - $240,000.00; and in 1989 - $80,000.00 (see, Findings of Fact "4", "5" and "6"). In each of the years at issue, the Division included the full amount of each payment received by Mr. Albanese under the covenant not to compete as New York income. Petitioners have asserted that an apportionment of income between New York and Connecticut is in order because of the terms of the covenant not to compete. However, petitioners did not submit any evidence at the hearing to show what portion, if any, of the payments received by Nicholas Albanese should be allocated to Connecticut, nor have they offered any figures in their brief. Since petitioners have failed to prove what if any portion of the income is properly allocable to Connecticut, the Division properly included all of the income attributable to the covenant not to compete as New York source income during each of the three years at issue regardless of residency status.

N. Tax Law § 685(a)(1)(A) states that:

> "[i]n case of failure to file a tax return under this article on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate."

Tax Law § 685(b)(1) states that:

> "[i]f any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the deficiency."

O. Petitioners have been assessed penalties pursuant to Tax Law § 685(a)(1), for failure to file tax returns for the years 1987 through 1989 with the State of New York and Tax Law § 685(b) for negligence. Petitioners bear 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]). At the hearing held in this matter, petitioners 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. In their brief, petitioners request that the Tax Law § 685(b) penalty be abated based upon the facts in Matter of Feldman (Tax Appeals Tribunal, December 15, 1988).[3] It appears that petitioners are conceding the failure to file penalty imposed pursuant to Tax Law § 685(a)(1)(A).

Since petitioners did not offer any evidence or testimony, there are no facts in this case to compare to the facts set forth in Matter of Feldman (supra). It is noted that petitioners employed tax professionals to prepare their Federal personal income tax returns for tax years 1987, 1988 and 1989 (see, Finding of Fact "7"). Reliance upon the advice of a tax professional is not sufficient to prove that petitioners' failure to file a return was not negligent (see, Matter of Hull, Tax Appeals Tribunal, December 8, 1994; Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990). Petitioners have failed to sustain their burden of proof.

The Division properly assessed the penalties.

P. The petition of Nicholas F. Albanese, Jr. and Daile A. Albanese is denied; petitioners' motion is denied; and the Notice of Deficiency (Notice No. L-007698392-1) is sustained.

DATED: Troy, New York
February 15, 1996

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

[3]Petitioners cited the administrative law judge's determination; that determination was sustained by the Tax Appeals Tribunal in its decision rendered December 15, 1988.