STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

JOHN P. KUZIEMKO :

for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1989. :

DETERMINATION
DTA NO. 816354

Petitioner, John P. Kuziemko, 15 Ardmore Road, Worcester, Massachusetts 01609-1518, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1989.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 8, 1998 at 9:15 A.M., with all briefs to be submitted by December 29, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr. , Esq., of counsel).

ISSUE

Whether petitioner was a domiciliary of New York State and City for the year 1989 and was thus taxable as a resident individual.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Statement of Proposed Audit Changes dated September 7, 1993 against petitioner, John P. Kuziemko, showing New York State income tax due of $2,301.00, plus penalty and interest, and New York City income tax due of $979.00, plus penalty and interest, for 1989. This statement included the following calculation of tax due:

Total Federal adjusted gross income	$39,764.00
New York adjusted gross income	39,764.00
Less: New York standard deduction	(6,000.00)
Balance	33,764.00
New York State taxable income	33,764.00
New York State tax on taxable income	2,301.00
New York City resident tax	979.00
Total New York State and City income tax	$ 3,280.00
Total payments	0.00
Tax due	$ 3,280.00

The following explanation for the assertion of tax due, in relevant part, was provided:

> We do not have a record of a 1989 New York State income tax return on file for you. You did not reply to our previous letter asking about your New York return.
>
> Section 6103(d) of the Internal Revenue Code allowed us to get information from the Internal Revenue Service. This information shows you filed a 1989 Federal income tax return using a New York State address.
>
> Your tax has been computed as a New York resident using the information from your Federal return. The starting point for computing your New York tax is federal adjusted gross income. Subtractions to income . . . have been allowed based on the federal information.
>
> If the New York standard deduction was greater than your allowable itemized deductions it was allowed . . . .

> Since the address on your Federal return shows your residence was in New York City, we have also computed City of New York resident tax.
>
> * * *
>
> We have imposed penalty for late filing at 5% per month up to a maximum of 25% (section 685[a][1] of the New York State Tax Law).
>
> We have imposed a negligence penalty of 5% as an addition to tax under section 685(b)(1) of the New York State Tax Law.
>
> In addition to the 5% negligence penalty, an amount equal to 50% of any interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law has been imposed (section 685[b][2] of the New York State Tax Law).
>
> Interest is required by section 684(a) of the New York State Tax Law. Interest is mandatory under the law and cannot be canceled or adjusted for any reason.
>
> * * *
>
> If you were a resident of another State for 1989, send a copy of the return filed with that State.

2. The Division then issued a Notice of Deficiency, dated October 20, 1993, against petitioner for 1989 showing total income tax due of $3,280.00, consisting of two amounts, $2,301.00 and $979.00, plus penalty and interest. This notice referred petitioner to the Statement of Proposed Audit Changes dated September 7, 1993 (a little more than a month earlier), as detailed in Finding of Fact "1".

3. In March of 1996, approximately two and one-half years after the issuance of the Notice of Deficiency dated October 20, 1993, petitioner filed a form IT-203, New York Nonresident and Part-Year Resident Income Tax Return, on which he allocated $436.00 of his Federal adjusted gross income of $40,494.00 for 1989 to New York. He calculated New York *State* income tax due of $25.91 and remitted such amount. On this return, petitioner indicated that he was a part-year resident of New York State during 1989 and that his "situation" as of the last day of 1989

was as follows: "moved out of New York State and received no income from New York State sources during [his] nonresident period." Petitioner testified on cross-examination that he filed the 1989 New York tax return:

> [B]ecause I thought that there may have been an ethical obligation on my part to pay tax on some amount of my income that was gained in or through a brokerage house in New York City (tr., p. 73).

Petitioner explained that he maintained a "cash brokerage account which paid interest and dividends" (tr., p. 73). The 1989 New York tax return shows an allocation to New York of "taxable interest income" of $80.00 out of a Federal amount of $200.00 and of "dividend income" of $356.00 out of a Federal amount of $965.00. The record does not disclose the specific basis for petitioner's allocation of 40% of his interest income and 36.89% of his dividend income to New York. As noted in Finding of Fact "6", in April of 1989, petitioner moved into an apartment in Derry, New Hampshire after living with his parents in their New York City apartment for the first three months of the year. If Mr. Kuziemko was allocating income based upon the percentage of time that he lived in New York in 1989, he would have allocated 3/12ths or 25% of such income. Consequently, it appears that petitioner did not base his allocation on a pro rate basis of 25%. At the same time, it is not known for a fact whether he based his allocation on when such dividend and interest income was actually received, *i.e.*, if he received the allocable amount during the first three months of 1989, when he conceded he was a New York City resident, then this amount would be taxable to New York.

4. Petitioner is a native of New York City and was raised in the borough of Queens. In 1959 at the age of 18, petitioner was drafted into the United States Army and for the next four years lived in various places in the United States and in the Far East. For one year, prior to entering the Army, petitioner worked in New York City as a technical writer for a company that

wrote technical manuals for the military, and while in military service, he utilized similar skills. After four years in the Army, in 1963, petitioner moved back to New York City, living with his parents in their "rather comfortable [three bedroom] apartment" in the Elmhurst section of Queens, which apparently was also petitioner's childhood home (tr., p. 46). For the next seven years, from 1963 to 1970, petitioner was employed by Applied Devices Corporation of New York City as "an industrial instructor and field engineer" on various military projects. This employment required Mr. Kuziemko to travel widely for extended periods, and petitioner testified: "I was changing addresses constantly in my traveling" (tr., p. 40). In 1970, at the age of 29, petitioner, in his own words, "answered another career field . . . of being a contract technical writer" (tr., p. 41). This new career also required petitioner to travel widely, but somewhat closer to his New York City boyhood home. Petitioner traveled "throughout the northeast taking assignments of three to six months" (tr., p. 41). Petitioner described the nature of his life through the 1970s and 1980s as follows:

> I was taking out-of-town assignments, living in other places and using my parents' address [in Queens] as a mail drop. And, of course, between such out-of-town assignments, I would be *at home* (tr., p. 42 [emphasis added]).

5. In 1986, petitioner accepted an assignment from his direct employer, Volt Information Services, a contract firm, which placed him at the military electronics division of General Electric in the Syracuse area of upstate New York. This assignment initially involved a six-month contract which was eventually extended to November 1987. After this placement at General Electric in Syracuse, petitioner was unemployed from December 1987 through April 1989. During this period of unemployment, petitioner lived with his parents in the Queens apartment.

6. In April 1989, petitioner accepted an assignment from Volt Information Services, which

placed him at the publications department of AT&T-Bell Telephone Laboratories in North Andover, Massachusetts. Mr. Kuziemko's assignment was initially for a six-month period, and he rented a one-bedroom apartment for approximately $600.00 per month in Derry, New Hampshire, which was not far across the border from his Massachusetts work site, for the six-month period. In late September of 1989, petitioner extended his lease on the apartment for an additional eight months with a buyout provision that permitted him to break the lease in exchange for one-month's rent. In November 1989, after completing the six-month assignment, AT&T-Bell Telephone Laboratories offered petitioner direct employment which petitioner accepted. The record does not disclose whether this direct employment was for a specified term of employment or open-ended. Petitioner's New York income tax return for 1989 which he filed in 1996, as noted in Finding of Fact "3", included copies of his W-2 forms showing wages of $36,344.00 from Volt Service Corp. and wages of $648.48 from AT &T Bell Telephone Laboratories during 1989. Except for some minor withholding of Massachusetts income tax in the amount of $4.87 from his wages of $648.48 from AT & T Bell Telephone Laboratories, petitioner paid no Massachusetts income tax on his income earned from his employment in Massachusetts. During the six months of 1989 that he was a contract employee, petitioner testified that he submitted his time sheets to the Salem, New Hampshire office of Volt Services Corp., and his paychecks were "hand delivered by an employee of that office in Salem, New Hampshire to my place of work in North Andover" (tr., p. 75).

7. When he moved into his new apartment in Derry, New Hampshire in April of 1989, petitioner testified that he moved "my bed, my bureau, my computer and other personal and kitchen items to the apartment . . . to set up housekeeping" (tr., p. 56). He left behind in the apartment in Queens "a lot of my books . . . . And clothes that were not appropriate for the

season. . . . Winter clothing I left behind in New York" (tr., p. 56). Petitioner categorized the Queens apartment as "a mail drop [which] also implied that I also used it as a storage place for stuff that I didn't need day-to-day and that were just too heavy to keep moving from *temporary* location to *temporary* location" (tr., p. 56 [emphasis added]). Although in 1989, the New Hampshire apartment was a temporary location, petitioner testified that he viewed it as a "home":

> I lived there for most weekends, only occasionally flying down to New York to visit my parents and other friends in New York. But I was not commuting to that apartment. I was living in Derry, New Hampshire (tr., p. 55).

8. During 1989, petitioner's motor vehicle was registered in New York, and petitioner remained licensed in New York. Petitioner testified:

> I had no assurances that I would be living there for more than the six months, so it did not seem necessary to change registration of the vehicle (tr., p. 55).

9. Petitioner candidly admitted that if his assignment in Massachusetts ended at the end of six months, "I would have gone back to my parents' apartment in New York City for as long as it took me to find another job assignment and perhaps moved somewhere else on the planet" (tr., p. 69).

10. Petitioner also testified that his apartment in Derry, New Hampshire became something more than a temporary location in November 1989 when he accepted direct employment with AT & T Bell Telephone Laboratories starting November 7, 1989:

> Although I considered it only a temporary residence during that first six-month period, when I took direct employment at AT& T Bell Labs in North Andover [Massachusetts], I then felt that I would have to, and would in fact, establish a permanent home in New England, perhaps in New Hampshire, perhaps in Massachusetts closer to work. But at that point I considered myself a resident of New England (tr., pp. 59-60).

Nonetheless, petitioner did not change his car registration or driver's license from New York to New Hampshire in November of 1989. Nor did he change his voter registration to New

Hampshire. Petitioner contends that he did not make such changes due to an "attention deficit disorder" which remained untreated until 1993 when he commenced medical treatment for the disorder. Mr. Kuziemko continued to receive mail such as credit card statements and bank statements at the Queens apartment even after November of 1989.

11. Petitioner made various additional factual statements in his briefs despite the earlier closing of the administrative record to further evidence.[1] For example, in his reply brief, petitioner pointed out that, in fact, he never moved back to New York after the year at issue. Further, Mr. Kuziemko noted that he became a member of American Mensa Ltd. in New Hampshire in July of 1989, after taking an exam two months earlier, which shows "he sought long-term social contact in New Hampshire" and which also "resulted in the Petitioner marrying a New England citizen" at a later unspecified time (Petitioner's reply brief, p. 2).

SUMMARY OF THE PARTIES' POSITIONS

12. In his brief, petitioner argued that he ended his "residence in New York State on April 1, 1989" when he moved to Derry, New Hampshire. According to petitioner, April 1, 1989 was "approximately the 91st day of the year, less than half the statutory 183 days of residence

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[1]Since petitioner appeared *pro se* in this matter, the administrative law judge assisted him in drawing out his testimony and in ensuring that petitioner introduced into the record whatever evidence he wanted the administrative law judge to consider. When specifically asked whether he had "any further testimony . . . to put in the record," petitioner responded that he had "no further testimony at this time" (tr., p. 79). Later in the hearing, petitioner was advised by the administrative law judge that "Anything you want me to consider in terms of evidence has to be in the record today" (tr., p. 81). Petitioner responded, "Not with me today" (tr., p. 82). The administrative law judge noted that he would permit petitioner to submit additional evidence "[if] you described what it is, we could make arrangements to receive it later" (tr., p. 82). Petitioner answered that "The only other aspect of this is my clinical condition of attention deficit disorder" (tr., p. 82). The administrative law judge permitted petitioner to reopen his testimony and testify concerning this disorder. He also permitted petitioner to reserve time to submit "A letter on the letterhead of the doctor treating me," but expressly noted that, "Other than that particular piece of evidence, I will not accept in the record any other evidence" (tr., p. 85). Consequently, petitioner's contention in his reply brief that he was not given "any *opportunity* . . . to disclose these personal details [concerning his membership in the New Hampshire chapter of Mensa, his later marriage and the fact that he never moved back to New York City] during either, questioning by the Bench, or cross-examination by opposing [counsel]" is misleading (Petitioner's reply brief, p. 2 [emphasis added]).

establishing a person as a resident for tax purposes" (Petitioner's brief, p. 3).

13. The Division countered that petitioner remained a domiciliary of New York during 1989 because he failed to demonstrate abandonment of his New York domicile by clear and convincing evidence. According to the Division, the Derry, New Hampshire apartment was a temporary residence. Further, the Division contends that although petitioner "may have grown to adopt New England as his home in the 1990's, the Petitioner never relinquished his New York domicile during the year at issue" (Division's brief, p. 5). Alternatively, the Division argued that petitioner's 1989 income was allocable to New York up until petitioner's direct employment by AT & T Bell Telephone Laboratories in November 1989.

14. In his reply, petitioner argued "that the only facts relevant to this case is [sic] that the petitioner never 'moved back' to New York State, and, in fact 'put down roots' in New England quickly" (Petitioner's reply brief, p. 2).

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) defines a resident individual 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 . . . or
>
> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

The definition of "resident" for New York City income tax purposes, pursuant to the New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state."

B. Petitioner's confusion concerning the basis for the Division's treating him as a resident individual of New York State and City for income tax purposes for 1989 must first be addressed. As noted in Conclusion of Law "A", there are two distinct bases for treating an individual as a New York resident individual for income tax purposes. First, a person who is *domiciled* in New York State and City is treated presumptively as a resident individual for tax purposes *unless* he can show that he meets *each one* of the following *three* conditions: (1) he maintains no permanent place of abode in New York, (2) he maintains a permanent place of abode elsewhere, and (3) he spends in the aggregate not more than 30 days of the taxable year in New York. Second, a person is properly treated as a resident individual even if he is *not domiciled* in New York State and City if the following two conditions apply: (1) he maintains a permanent place of abode in New York and (2) he spends more than 183 days of the taxable year in dispute in New York. As noted in paragraph "12", petitioner mistakenly focused on the second statutory basis, commonly referred to as the *statutory resident* basis, for treating an individual as a New York resident individual for income tax purposes. Rather, the Division's basis for its assertion of tax due against petitioner was the first statutory basis, i.e., petitioner, as a *domiciliary* of New York State and City is liable for New York State and City 1989 personal income taxes unless he can show he meets the three conditions specified above.

C. The Tax Law does not contain a definition of domicile (***compare***, SCPA 103[15]). The Division's regulations (20 NYCRR former 102.2[d])[2] provided, in pertinent part, as follows:

> ***Domicile***. (1) Domicile, in general, is the place which an individual intends to be his permanent home - - the place to which he intends to return whenever he may be absent.

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[2]The definition of "domicile" in the Division's current regulations at 20 NYCRR 105.20(d), effective January 29, 1992, is the same as the definition in the former income tax regulations applicable to 1989, the year at issue, as detailed above.

> (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 individuals'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.
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> * * *
>
> (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.

D. In order to change domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present (***Matter of Minsky v. Tully***, 78 AD2d 955, 433 NYS2d 276). The distinction between domicile and mere residency, which appears to have confused petitioner, and which is the crux of the matter was stated by the Court of Appeals in ***Matter of Newcomb's Estate*** (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.

Born and bred in New York City, petitioner has been a domiciliary of New York State and City since birth, and as provided for in the Division's regulations, "[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"* (20 NYCRR former 102.2[d][2] [emphasis

added]). As noted in Findings of Fact "4" and "5", although petitioner frequently changed addresses and residences from the time he entered the United States Army up to the year at issue, he never established a fixed and permanent home anywhere else. Rather, petitioner testified that "between out-of-town assignments, I would be *at home"* in his parents' New York City apartment (tr., p. 42 [emphasis added]). Further, as noted in Findings of Fact "9" and "10", it was not until his contract work at AT & T Bell Telephone Laboratories became direct employment in early November 1989, that his stay in the Derry, New Hampshire apartment gave even a hint that his domicile might be changing from New York to New Hampshire. Up until November 1989, petitioner admitted that his New Hampshire apartment was a temporary residence. Moreover, a *hint* that petitioner's New Hampshire apartment might have become something more than a temporary residence in November 1989 does not rise to the necessary level of clear and convincing evidence that petitioner had changed his domicile by establishing a fixed and permanent home in New Hampshire (***cf., Matter of Orvis,*** Tax Appeals Tribunal, January 14, 1993, ***annulled in part*** 204 AD2d 916, 612 NYS2d 503, ***modified*** 86 NY2d 165, 630 NYS2d 680, ***cert denied*** 516 US 989, 133 L Ed 2d 426 [wherein the Tribunal noted that the clear and convincing standard of proof is applicable to income tax cases]; ***Ausnit v. Tax Appeals Tribunal***, 212 AD2d 911, 623 NYS2d 168). Furthermore, there are significant facts established in the administrative record that weigh against a conclusion that petitioner changed his domicile to New Hampshire in November 1989. He did not change his driver's license or motor vehicle registration from New York to New Hampshire at that time. Nor did he register to vote in New Hampshire. Petitioner also used his New York City address when he filed, sometime in 1990, his Federal income tax return for 1989, and he continued to receive mail at the New York City apartment. Petitioner's later diagnosis and treatment for attention deficit disorder does not

explain away these facts. In sum, in order for the New Hampshire apartment to be viewed as petitioner's new domicile, it must have become Mr. Kuziemko's "permanent home . . . with the range of sentiment, feeling and permanent association with it" (***Matter of Bourne's Estate***, 181 Misc 238, 41 NYS2d 336, ***affd*** 267 AD 876, 47 NYS2d 134, ***affd*** 293 NY 785). Petitioner did not prove that such was the case during the year at issue.

E. Finally, although petitioner did not establish that the New Hampshire apartment became a fixed and permanent *home,* he did establish that the New Hampshire apartment became a permanent place of *abode* or *residence* in November 1989 (***cf., Matter of Tweed,*** Tax Appeals Tribunal, May 23, 1996). However, since he spent more than 30 days of the taxable year, i.e., 1989, in New York City, one of the three conditions noted in Conclusion of Law "B", as a domiciliary of New York State and City, he was properly taxed as a resident individual of New York State and City in 1989.

F. The petition of John P. Kuziemko is denied, and the Notice of Deficiency dated

October 20, 1993 is to be modified to provide a credit for the income tax paid of $25.91 as noted in Finding of Fact “3”, but, in all other respects, is sustained.

DATED: Troy, New York
April 8, 1999

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE