STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TIMOTHY W. AND KATHLEEN A. JAY	:	DETERMINATION DTA NO. 818984
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 Administrative Code of the City of New York for the Years 1996 and 1997.	:	

Petitioners, Timothy W. and Kathleen A. Jay, 15 Old Mill Road, Greenwich, Connecticut 06830-3342, 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 Administrative Code of the City of New York for the years 1996 and 1997.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 6, 2003 at 10:30 A.M., with all briefs to be submitted by May 23, 2003, which date began the six-month period for the issuance of this determination. Petitioners appeared by Robert W. Taylor, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioners have shown that they were not domiciliaries of New York State and City during the period at issue and therefore not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

II. Whether petitioners have shown that they were not present in New York State and City for more than 183 days during 1996 and therefore not taxable as resident individuals for that year pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

III. Whether petitioners have shown that penalties imposed herein pursuant to Tax Law § 685(b) and (p) should be abated.

FINDINGS OF FACT

1. On June 26, 2000, following an audit, the Division of Taxation ("Division") issued to petitioners, Timothy W. and Kathleen A. Jay, a Notice of Deficiency which asserted $93,502.04 in additional New York State and City personal income tax due, plus penalty and interest, for the years 1996 and 1997. The deficiency resulted from the Division's conclusion that petitioners were properly subject to tax as residents of New York State and City for the year 1996 and from January 1, 1997 through March 31, 1997.

2. At all times relevant herein, petitioner Timothy Jay was employed by Lehman Brothers, Inc., where he has worked since 1983. Until April 1, 1997, petitioner's office was located at 200 Vesey Street in New York City. At that time petitioner accepted a transfer to the Lehman Brothers London (U.K.) office. Petitioner later transferred back to Lehman Brothers' New York City office in 1998 or 1999.

3. From at least 1989 through June 1994 petitioners resided in a co-op apartment located at 440 West End Avenue, located on the Upper West Side of Manhattan in New York City.

4. On March 3, 1993, petitioners purchased a residence located at 28 Saw Mill Road, Sherman, Connecticut for a purchase price of $625,000.00. The transaction included the purchase of dining room and bedroom furnishings.

5. On June 27, 1994, petitioners sold their apartment at 440 West End Avenue for $795,000.00. On June 28, 1994, petitioners purchased a co-op apartment located at 173 Riverside Drive, also on the Upper West Side. The purchase price was $1,225,000.00.

6. Petitioners sold their Riverside Drive apartment in late 1999 for $2,295,000.00.

7. Petitioners have three minor children, Meghan, Kirby and Kelly. Meghan was enrolled at the Calhoun School, located on New York's Upper West Side, during the 1995-1996 and 1996-1997 school terms (September 1- June 15). Kirby was enrolled at the Calhoun School for the 1996-1997 school term. The record does not reveal the ages of petitioners' children.

8. Petitioners had a joint Lehman Brothers checking account during the period at issue which listed their address as 173 Riverside Drive.

9. Petitioners jointly filed New York resident returns (Form IT-201) for the years 1989 through 1994. For the years 1989 through 1993, petitioners' New York return listed their 440 West End Avenue apartment as their mailing address. For the year 1994, petitioners' New York return listed 173 Riverside Drive as their mailing address.

10. Petitioners filed nonresident New York returns (Form IT-203) for the years 1995, 1996 and 1997. Petitioners listed 28 Saw Mill Road, Sherman, Connecticut as their mailing address on their 1995 and 1996 returns. They listed a London (U.K.) address as their mailing address on their 1997 return.

11. On their 1996 IT-203 petitioners did not check a response ("Yes" or "No") to the question posed of nonresidents in Item G: "Did you or your spouse maintain living quarters in New York State in 1996?" On their 1997 IT-203 petitioners responded "No" to the same question as applied to 1997.

12. Petitioners registered to vote in Sherman, Connecticut in 1995 and voted in Sherman in the election of November 5, 1996 by absentee ballot.

13. On audit the Division reviewed petitioners' credit card statements, bank statements, cable television bills, wireless telephone bills, bills for trash removal, and bills related to the Sherman, Connecticut home (Connecticut Light and Power). With respect to the 1996 year, all such bills were addressed to the Riverside Drive apartment. In 1997, bank statements for a bank account at New Milford, Connecticut Savings Bank were addressed to a post office box in Sherman, Connecticut. The Division's audit report indicated that petitioners made 57 purchases from a fish market located on Broadway in New York City in 1996. Such review also showed that petitioners had the New York Times delivered to their Riverside Drive apartment daily from June through September 1996, then for weekends only beginning in September 1996.

14. At hearing petitioner Timothy Jay submitted in evidence his 1996 and 1997 Lehman Brothers expense reimbursement forms with attached receipts and other supporting documentation. This expense documentation shows that petitioner frequently traveled in connection with his employment and that he frequently went to restaurants in and around New York City in connection with his employment. Such documentation showed that petitioner used a car service in connection with his business travel for transportation to and from New York area airports as well as for transport to various locations in and around New York City. Such car service expense reimbursement forms show that 173 Riverside Drive was a destination 17 times in 1996 and that such destination was frequently designated as "home" on the expense vouchers. The same documents show that petitioner traveled from New York airports to his Sherman, Connecticut home five times in 1996.

15. At the Division's request during the audit, petitioners completed a Nonresident Audit Questionnaire. Petitioners stated on the questionnaire that they did not reside and did not maintain living quarters in New York in 1996 or 1997. Petitioners further stated on the audit

questionnaire that they stayed in hotels while in New York and that they did not spend any days in New York in 1996.

16. Petitioners advised the Division during the audit that the Riverside Drive apartment was purchased for investment purposes only.

17. At the conclusion of the audit, the Division determined that petitioners were present in New York City on 223 days and in New York State on 226 days during 1996. Of the remaining non-New York days, the Division determined that petitioners were present in Connecticut on 72 days in 1996.

18. Petitioners asserted that the Division's audit determination for 1996 of 223 days in New York City and 226 days in New York State was in error. Petitioners contended that the Division erroneously included 48 non-New York days in its count and thus asserted that they spent, in total, 175 days in New York City and 178 days in New York State during that year. Petitioners submitted a list of business trips taken by petitioner Timothy Jay during 1996. Such trips totaled 64 days. Petitioners asserted that errors made by the Division totaling 48 days were contained in these 64 days. Petitioners submitted no other evidence regarding their whereabouts on any other day or days in 1996.

19. The evidence in the record regarding the 64 days comprising petitioner Timothy Jay's business trips in 1996 is discussed below.

a) January 5-9 (5 days). Petitioner's expense forms indicate a flight to Washington, D.C. on January 5 with a return to New York the same day. The Division's audit report indicates credit card charges in New York City on January 5, 6, and 9 and New York City ATM usage on January 8 and 9.

b) January 29-February 2 (5 days). Petitioner's expense forms indicate car service to bring luggage from "home," listed as 173 Riverside Drive, to office for business travel.

Although it previously determined January 30 and 31 to be New York days, the Division reclassified these days as non-New York days following a review of the evidence submitted at the hearing. The audit report indicates a charge at a dental office on February 1.

c) February 11-16 (6 days). Petitioner's expense forms indicate a car service pick-up at 173 Riverside Drive at 10:08 AM on February 11 and transport to JFK airport. Although it previously determined February 12-16 to be New York City days, the Division conceded that these days were non-New York days following a review of the evidence submitted at the hearing.

d) March 29-April 1 (4 days). On audit the Division determined March 29 and 30 to be non-New York days. Following a review of the evidence submitted at the hearing, the Division determined March 31, classified on audit as New York City, to be a non-New York day. The audit report shows a food purchase in New York City on April 1.

e) April 10-11 (2 days). Petitioner's expense forms and receipts show departure from New York's Laguardia Airport on April 10 for Toronto and a return on the morning of April 11. The audit report shows other New York City credit card charges on those days.

f) April 14-18 (5 days). The audit report shows New York City charges on April 14 and New York City ATM usage on April 15. Petitioner's expense documentation shows car service on the 15th from his office to "home," i.e., 173 Riverside Drive, and then to JFK Airport. On audit the Division categorized April 16 and 17 as non-New York. Following a review of petitioner's documentation the Division also designated April 18 as non-New York.

g) June 4-7 (4 days). Petitioner's expense documentation shows use of a car service from 173 Riverside Drive to his office on June 4. Following a review of petitioner's documentation, the Division reclassified June 5 as non-New York. On audit the Division classified June 6 and 7 as non-New York. Petitioner's expense documentation shows use of a car service from JFK

Airport to Sherman, Connecticut on June 7. The audit report shows New York City ATM usage on June 7.

h) June 28-30 (3 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport on June 28. On audit, the Division designated June 28 and 29 as non-New York days. Petitioner's expense documentation shows a return fight to Laguardia and the use of a car service from the airport to Riverside Drive on June 30. On audit, the Division designated June 30 as a Connecticut day.

i) July 18-22 (5 days). Petitioner's expense documentation shows use of a car service on the morning of July 18 from his home on Riverside Drive to Newark airport for a flight to Atlanta. On audit, the Division designated July 18-22 as non-New York days.

j) July 29-31 (3 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport for a flight to Washington, D.C. on the afternoon of July 29. The audit report also shows Connecticut ATM usage and a gasoline purchase in Brewster, New York on the 29th. Petitioner's expense documentation shows that he was in Washington on July 30 and that he returned to New York via Amtrak on July 31. The audit report also shows a credit card purchase in New York on the 31st . On audit the Division designated July 29 and 30 as non-New York days and July 31 as a New York City day.

k) August 16-22 (7 days). On audit the Division designated these dates as non-New York days. Petitioner's expense documentation shows that he returned from London to JFK on August 22. The Division has designated August 23 through September 1 as days spent in Connecticut.

l) September 9-10 (2 days). Petitioner's expense documentation shows that he flew from Laguardia to Toronto on September 9 and returned on the 10th. Such documentation also shows that petitioner purchased food and beverage at a New York restaurant on September 10.

m) October 22-23 (2 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport for a flight to Toronto on the afternoon of October 22 and that he returned to New York on the afternoon of the 23rd. The audit report also shows a New York City credit card purchase on the 23rd.

n) October 28 - 30 (3 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport for a flight to Washington, D.C. on the afternoon of October 29. Petitioner returned to New York via Laguardia on the morning of the 30th. He used the car service for transport from the airport to his office. The audit report shows payment for dental services on the 30th. The Division concedes October 29 is a non-New York day.

o) November 14-16 (3 days). Petitioner's expense documentation shows use of a car service from his office to Newark Airport on the morning of November 14 for a flight to Los Angeles and that he returned on November 16 and used a car service from JFK to his home in Sherman, Connecticut. The Division concedes that November 15 and 16 were not New York days.

p) November 19-23 (5 days). Petitioner's expense documentation shows use of a car service from his "home" on Riverside Drive to his office and then to Newark Airport on the afternoon of November 19 for a flight to London. Such documentation also shows that he returned to New York via JFK on November 23 and used a car service from the airport to "home" on Riverside Drive. On audit the Division determined that November 21 and 22 were non-New York days. Following a review of petitioner's expense documentation the Division also concedes that November 20 was a non-New York day.

20. A review of the days in/days out count in the Division's audit report reveals that, of the 64 days discussed above, the Division designated 29 of such days as days out of New York

State and City. Only 35 of the days were designated as New York City days in the Division's audit count of days in and days out of New York.

21. After its review of petitioner's expense documentation, Division made certain adjustments to its days in/days out count and concluded that petitioner was in New York State and City 233 days during 1996. The Division further found following such review that petitioner was in Connecticut for 66 days during that year.

22. At hearing petitioner testified that when he and his wife purchased their home in Sherman in 1993, it was his intention to abandon his New York residence and domicile and to become a resident of Sherman, Connecticut.

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes New York State personal income tax on "resident individuals." As relevant herein, Tax Law § 605(b)(1) defines "resident individual" as someone:

> (A) who is domiciled 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 New York City Administrative Code § 11-1705(b)(1)(A) and (B), is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state."

B. The Division's regulations define "domicile" in relevant part as follows:

> (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there

> only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.
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> (4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere.
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> (5)(i) Husband and wife. Generally, the domicile of a husband and wife are the same. However, if they are separated in fact, they may each, under some circumstances, acquire their own separate domiciles even though there is no judgment or decree of separation. Where there is a judgment or decree of separation, a husband and wife may acquire their own separate domicile. (20 NYCRR 105.20[d].)

C. The classic distinction between domicile and residency was explained many years ago by the Court of Appeals in ***Matter of Newcomb's Estate*** (192 NY 238, 250):

> 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.

D. It is well established that an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (***see***, ***Matter of Bodfish v. Gallman***, 50 AD2d 457, 378 NYS2d 138). Whether there has been a change of domicile is a question "of fact rather than law, and it

frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (***Matter of Newcomb's Estate***, ***supra*** 192 NY at 250). The test of intent with regard to a purported new domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (***Matter of Bourne***, 181 Misc 238, 41 NYS2d 336, 343, ***affd*** 267 App Div 876, 47 NYS2d 134, ***affd*** 293 NY 785); ***see also***, ***Matter of Bodfish v. Gallman***, ***supra***). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (***Matter of Silverman,*** Tax Appeals Tribunal, June 8, 1989, ***citing Matter of Trowbridge***, ***supra***).

E. Petitioners have failed to establish by clear and convincing evidence that they gave up their historic New York City domicile and acquired a Connecticut domicile at any time prior to or during the period at issue. It is concluded, therefore, that petitioners were domiciled in New York City during the period at issue and were thus subject to tax as resident individuals of New York State and City pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

The record is replete with facts indicating that petitioners continued to maintain their historic New York City domicile during the period at issue. When they purchased their Sherman, Connecticut residence in 1993, petitioners retained their home at 440 West End Avenue on New York City's Upper West Side. The West End Avenue apartment had been petitioners' sole residence and domicile since at least 1989. In 1994, petitioners sold their West End Avenue apartment. They did not, however, abandon the City at that point, but immediately purchased the Riverside Drive apartment, also located on the Upper West Side. This retention of a residence in New York City undermines petitioners' claim that they intended to abandon their New York City domicile and acquire a Connecticut domicile (***Matter of Silverman***, ***supra***).

Significantly, and contrary to petitioners' assertion that the Riverside Drive apartment was purchased for investment purposes only, the record shows that the Riverside Drive apartment was petitioners' primary residence throughout the period at issue and that petitioners had significant familial, social and business ties to New York City during that time (***see***, ***Matter of Buzzard***, Tax Appeals Tribunal, February 18, 1993, ***confirmed*** 205 AD2d 852, 613 NYS2d 294; ***Matter of Getz***, Tax Appeals Tribunal, June 10, 1993). Specifically, two of petitioners' children were enrolled at a private school also located on the Upper West Side. Also, petitioner Timothy Jay continued to work for Lehman Brothers in New York City. Additionally, Mr. Jay frequently used a car service either to or from the Riverside Drive apartment and frequently referred to that location as "home" on his business expense vouchers. Petitioners made 57 purchases from a New York City fish market in 1996 and had the New York Times delivered to the Riverside Drive apartment during that year. Nearly all bills reviewed by the Division on audit were addressed to the Riverside Drive apartment. Petitioners' personal checking account listed the Riverside Drive address. Petitioners also spent far more days in New York City than in Connecticut. The Division's regulations provide that where an individual has more than one home the length of time customarily spent at each location is an important factor in determining domicile (***see***, 20 NYCRR 105.20[d][4]).

In contrast, other than petitioners' voter registration, the record contains no evidence of any significant business, familial or social ties to Sherman, Connecticut. As noted previously, formal declarations, such as voter registrations and petitioner's general testimony at the hearing as to his intent, are less significant than informal acts demonstrating an individual's general habit of life (***Matter of Silverman, supra***). The totality of the evidence thus compels the conclusion that petitioners did not abandon their New York City domicile and did not acquire a Connecticut domicile at any time prior to or during the period at issue.

F. Turning next to the second prong of the residency test (Tax Law § 605[b][1][B]), so-called "statutory residency," petitioners had the burden of proving by clear and convincing evidence that they were not present in New York State or City for more than 183 days during 1996 (***see***, ***Kornblum v. Tax Appeals Tribunal***, 194 AD2d 882, 599 NYS2d 158; ***Smith v. State Tax Commn.***, 68 AD2d 993, 414 NYS2d 803).[1] Generally, for purposes of counting the number of days spent within and without New York, presence within New York for any part of a calendar day constitutes a day within New York (***see***, 20 NYCRR 105.20[c]; ***Matter of Leach v. Chu***, 150 AD2d 842, 540 NYS2d 596).

G. Upon review of the record, it is clear that petitioners have failed to meet their burden and the Division's determination that petitioners were subject to tax as statutory residents in 1996 was proper. The Division determined on audit that petitioners spent 223 days in New York City and 226 days in New York State in 1996. At hearing petitioner Timothy Jay offered evidence as to his whereabouts for 64 days during that year. Petitioners offered no other evidence with respect to their whereabouts on any specific day or days in 1996. The audit report shows that, on audit, the Division counted 29 of those 64 days as non-New York days. Only 35 of the 64 days were counted as New York City days and thus only 35 days are in dispute herein. Accordingly, at most the Division's New York City and State day count can be reduced by 35 days.[2] Such a reduction would result in 188 New York City days and 191 New York State days.

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1. Petitioners do not dispute and the record clearly establishes that they "maintained a permanent place of abode" within New York City pursuant to Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B) (***see***, ***Matter of Evans v. Tax Appeals Tribunal***, 199 AD2d 840, 606 NYS2d 404; 20 NYCRR 105.20[e][1]). Indeed, as discussed above, the record shows that the Riverside Drive apartment was petitioners' primary residence during the period at issue.

2. Petitioners asserted that the Division made errors with respect to 48 of the 64 days. However, since the Division classified 29 of the 64 days as non-New York, the greatest number of "errors" the Division could have made is 35.

Thus, even under a best case scenario for petitioners, the record shows that they were statutory residents of New York State and City for the year 1996.

H. Furthermore my review of the evidence with respect to the 35 days in dispute shows that petitioners failed to prove that they were not present in New York State or City on the following days during 1996: January 5-9, 29; February 1, 11; April 1, 10, 11, 14; June 4; July 31; September 9, 10; October 22, 23, 28, 30; and November 14, 19, 23. These days were therefore properly designated by the Division on audit as New York City days. Petitioners have established that the following 12 days of the 35 days in dispute were spent outside New York State and City: January 30, 31; February 12-16; March 31; April 15, 18; June 5; and November 20. The record thus shows that petitioner spent 211 days in New York City and 214 days in New York State in 1996.[3]

Petitioners asserted that certain days should be deemed non-New York days based upon an erroneous interpretation of the exception to the general rule for days within and without New York contained in the Division's regulations. That exception provides that the general rule of any part of a day in New York counting as a New York day does not apply where presence in New York is "solely for the purpose of boarding a plane . . . for travel to a destination outside New York" (20 NYCRR 105.20[c]). Clearly, the exception does not apply where an individual leaves from or returns to his or her New York home. It is noted that, consistent with this exception, certain days on which petitioner Timothy Jay returned from a trip outside New York and traveled directly to Sherman, Connecticut (e.g., June 7, August 22 and November 16) were deemed non-New York days by the Division.

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3. This day count does not consider the Division's assertion that certain days determined on audit as non-New York days should properly be counted as New York City days. The Division made this assertion following its review of petitioner's expense documentation. Accordingly, all non-New York days as determined on audit are deemed non-New York days in this count.

I. The Division imposed penalties in the instant matter pursuant to Tax Law § 685(b) and (p). Tax Law § 685(b) provides for the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 of the Tax Law or the regulations promulgated thereunder. Tax Law § 685(p) provides for the imposition of a penalty where there is a "substantial understatement" of the amount of income tax required to be shown on a return. Petitioners' failure to disclose that they maintained living quarters in New York on their 1996 nonresident return and their denial that they maintained living quarters in New York on their 1997 nonresident return supports the imposition of negligence penalties. Petitioners' responses to the Nonresident Audit Questionnaire regarding their living quarters in New York during the period at issue also support the imposition of negligence penalties. Petitioners offered no evidence of reasonable cause for their failure to properly file resident returns for the period at issue. The Division's imposition of penalties is sustained.

J. The petition of Timothy W. and Kathleen A. Jay is denied and the Notice of Deficiency dated June 26, 2000 is sustained.

DATED: Troy, New York
October 23, 2003

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE