STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CRAIG F. KNIGHT	:	DETERMINATION DTA NO. 819485
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1996 and 1997.	:	

Petitioner, Craig F. Knight, c/o Michael H. Goldsmith, Esq., Wealth and Tax Advisory Services, Inc., 425 Fifth Avenue, New York, New York 10018, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1996 and 1997.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 3, 2004 at 10:00 A.M., with all briefs to be submitted by December 9, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Wealth and Tax Advisory Services, Inc. (Michael H. Goldsmith, Esq., and Jonathan G. Spisto, Esq., of counsel) and Kaye Scholer LLP (Sydney E. Unger, Esq., and Michael A. Lynn, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUES

I. Whether the Division properly determined that petitioner was domiciled in New York State and New York City for 1996 and 1997, and as such was taxable as a resident individual of New York State and New York City pursuant to Tax Law § 605(b)(1)(A) and the Administrative Code of the City of New York § 11-1705 (b)(1)(A).

II. Whether petitioner was a New York State and New York City resident liable for City and State personal income taxes for 1997 because he maintained a permanent place of abode in New York City and spent over 183 days in New York City during that year.

III. Whether petitioner was required to allocate $1,076,869.00 in Schedule C business income from Knight Financial Consulting to New York State and New York City as New York source income for 1996.

IV. Whether the penalties imposed pursuant to Tax Law § 685(b) and (p) should be abated.

FINDINGS OF FACT

1. On February 18, 2003, following an audit, the Division of Taxation (the "Division") issued to petitioner, Craig F. Knight, a Notice of Deficiency, Notice Number L-022026963-7, asserting additional New York State and City personal income tax due for the years 1996 and 1997 in the aggregate amount of $545,076.91, plus penalty and interest. This deficiency resulted from the Division's conclusion that petitioner was properly subject to tax as a resident of New York State and City from April 1, 1996 through December 31, 1996 and for the year 1997. The penalties asserted were those for negligence and substantial understatement of tax, pursuant to Tax Law § 685(b) and (p).

2. Petitioner and Patricia M. Knight[1] timely filed a joint New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203) and City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of the years 1996 and 1997. The mailing address shown on the returns is 444 Russell Avenue, Wyckoff, New Jersey 07481. On their 1996 IT-203 petitioner and Mrs. Knight responded "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 petitioner and Mrs. Knight responded "No" to the same question as applied to 1997.

3. The Division selected the Knights' tax returns for audit because a tape match program with the Internal Revenue Service ("IRS") indicated that certain of petitioner's Federal tax documents, i.e., forms 1099, showed a New York address for him, yet petitioner failed to file a New York State resident tax return.

4. Petitioner was born in Paterson, New Jersey on September 1, 1955, attended primary and secondary school in New Jersey and graduated from Rutherford High School in 1974. In 1977, Mr. Knight received a Bachelor of Arts Degree in History from Catawba College in Salisbury, North Carolina. Sometime thereafter, he was admitted to Oxford University ("Oxford") in the United Kingdom where he studied law. Mr. Knight received a BA degree and an MA Degree in Law from Oxford in 1982. He then attended the graduate program at New York University ("NYU") School of Law from which he received an LL.M. in Corporate Law in 1983. Subsequently, petitioner was admitted to practice law in New York State.[2]

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[1] Petitioner and Patricia Knight were divorced in or about June 2000. For purposes of this determination, Patricia Knight will be referred to as Mrs. Knight.

[2] The record is silent as to the year in which Mr. Knight gained admission to the New York State bar.

5. On September 26, 1981, petitioner married his first wife, Patricia. In 1983, petitioner and Mrs. Knight lived in Carlstadt, New Jersey. At some point, the Knights moved to Hackensack, New Jersey. Sometime in 1988, the Knights moved to 444 Russell Avenue, Wyckoff, New Jersey (the "Wyckoff property").[3] Subsequent to the years at issue, and as part of the matrimonial settlement agreement, Mrs. Knight received title to the Wyckoff residence and petitioner received a credit in the amount of $202,500.00, representing 50 percent of the May 2000 stipulated fair market value of this property. Two sons were born of petitioner's marriage to Patricia, namely, Garrett, born on March 23, 1988, and Connor, born on December 3, 1991.

6. Sometime prior to 1996, the Knights jointly acquired two vacation homes in Vermont. The first is a home located in North Hero, Vermont ("North Hero property"). The second is a townhouse condominium located at Smuggler's Notch in Jeffersonville, Vermont ("Smuggler's Notch property"). Subsequent to the years in issue and as part of the matrimonial settlement agreement, petitioner received title to the North Hero property and Mrs. Knight received title to the Smuggler's Notch property.

7. In 1996, petitioner owned three automobiles, two Volvo station wagons (1986 and 1994 model years) and a 1995 Porsche. Mrs. Knight also owned a Volvo station wagon. There is insufficient evidence in the record to establish where petitioner's automobiles were registered in either 1996 or 1997.

8. For many years prior to and through the years at issue, petitioner's parents, G.R. and Ruth Knight lived in a three-bedroom house located at 400 Carmita Avenue, in Rutherford, New

[3] The record does not contain any information concerning the purchase of the Wyckoff residence, including, among other things, the closing date, the purchase price and the size or amenities.

Jersey (the "Rutherford property"). In 1995, G.R. Knight was diagnosed with lung cancer. He passed away in April 1998. Sometime after her husband's death, Ruth Knight moved to Carlstadt, New Jersey.

9. Petitioner has one younger sibling, a brother Scott, who has lived in New Jersey all of his life. During 1996 and 1997, Scott, along with his wife and infant son, lived in a four-bedroom home located at 41 Montross Avenue, in Rutherford, New Jersey, about seven blocks from his parents' house. Subsequent to the audit period, Scott and his family moved to Franklin Lakes, New Jersey.

10. Petitioner informally separated from his wife, Patricia, on or about March 26 or 27, 1996, moved out of the Wyckoff property and moved into his childhood bedroom in the upstairs of his parents' home in Rutherford, New Jersey. Rutherford, New Jersey is 10 to 12 miles south of Wyckoff, New Jersey, about a 20-minute drive. The record does not specify either the size of petitioner's childhood bedroom or the size of his parents' home. His brother, Scott, described this bedroom as "a real throwback" that was furnished with a twin bed, a dresser, a black metal desk with some sort of Formica top and a green shag rug on the floor. According to petitioner, at the time of the informal separation, he and Mrs. Knight had been married about 15 years. However, the marriage had been disintegrating for the last five years or so.

11. Petitioner moved into his parents' home for a number of reasons. First, it was a matter of personal convenience. His parents' home was readily available to petitioner. Second, after his father had been diagnosed with cancer in 1995, petitioner, who was very close to his father, began spending two or three days a week with his father at his parents' home. Lastly, since petitioner had married the girl next door and his in-laws' home was right next to his parents'

home, he knew that when he had the children it would be a great convenience to keep the family together and give the children the opportunity to visit with both sets of grandparents.

12. Petitioner and Scott moved some of petitioner's personal belongings into their parents' home in New Jersey. Such personal belongings included golf clubs, tennis racquets, skis, a bike, some of petitioner's clothing, degrees and certificates. They did not move any furniture out of the Wyckoff property. The record indicates that, in July 1997, petitioner had a painting sent from a Rochester, New York art gallery to the Rutherford property.

13. In March 1996, some of petitioner's clothing, wine and a car were moved to Scott's house. During 1996 and 1997, petitioner occasionally assisted Scott with home improvements at Scott's home. While working on these projects with Scott, petitioner stayed overnight at Scott's house from time to time. When petitioner stayed overnight at his brother's house, he stayed in the spare bedroom.

14. During 1996 and 1997, petitioner remained active in his sons' lives and regularly brought them to stay at his parents' home in Rutherford, New Jersey and visit with their grandfather who was suffering from lung cancer. In 1996 and 1997, petitioner spent Thanksgiving and Christmas Eve with his children in New Jersey. During the audit period, he also took some vacations with his children in Vermont. During 1996 and 1997, petitioner served as head coach on Connor's T-ball team and as an assistant coach on Garrett's Little League team in New Jersey. In 1996 and 1997, petitioner's brother, Scott, his parents and petitioner's in-laws, attended several Little League games coached by petitioner and Little League opening day parades in which petitioner participated. Petitioner often refereed and coached soccer games in New Jersey during the audit period.

15. As noted above, petitioner and his wife informally separated in March 1996 and he moved out of the Wyckoff property. However, after March 1996, Mrs. Knight allowed him to stay in the Wyckoff residence overnight on some weekends to be with his children. In September 1996, Mrs. Knight informed petitioner that he no longer could stay in the Wyckoff residence overnight. In September 1996, petitioner and Mrs. Knight formally separated.

16. During 1996 and 1997, Garrett Knight attended the Saddle River Day School in Saddle River, New Jersey. The record is silent as to whether or not Connor had begun attending school and, if so, the name and location of such school.

17. After he informally separated from Mrs. Knight and moved out of the marital home in Wyckoff, New Jersey, petitioner continued to pay all expenses and repairs relating to that home. After the commencement of the formal separation in September 1996 and during 1997, petitioner continued to support his wife and children, including making payments for household expenses, utilities, a mortgage on the Smuggler's Notch property, a car and Garrett's tuition. During 1996 and 1997, Mrs. Knight did not work outside the home.

18. Upon graduating from NYU, Mr. Knight was employed as an associate at Chadbourne, Parke, Whiteside & Wolff in New York City for about a year and a half. He then worked for another New York City law firm, Winthrop, Stimson, Putnam & Roberts, as an associate for about a year and a half. Sometime in 1986, petitioner joined Prudential Bache Securities ("Prudential Securities") in the corporate finance area as an investment banker. In 1990, petitioner was a founding shareholder and finance director of Custom Expressions, Inc. which was subsequently sold to American Greetings Corporation. In 1991, he left Prudential Securities and joined a start-up leasing firm called Foltram International Partners. On or about January 21, 1992, petitioner began working for Wachovia Corporate Services, Inc. ("Wachovia

Corporate"), an affiliate of Wachovia Bank of Georgia, National Association ("Wachovia Bank"),[4] as a consultant. A Consulting Agreement dated January 21, 1992 ("consulting agreement") was entered into between petitioner and Wachovia Corporate. A copy of this consulting agreement is not part of the record.

19. Petitioner's consulting services for Wachovia Corporate involved the development of sophisticated financial products for Wachovia Corporate's clients, including leasing transactions, options and the Management Equity Investment Program, as well as the private placement of securities. According to petitioner, the leasing transactions that he developed for Wachovia Corporate were very similar to the tax benefit transfer leases that were executed in the early 1980s. Specifically, his leasing products were considered tax leases that would transfer the tax benefits of ownership of certain properties that could not be used by the current owner to an owner that could, in fact, use the tax benefits. Wachovia Corporate's role in these leasing transactions was initially as an advisor to clients and eventually Wachovia Corporate became an investor in these leasing transactions.

20. While working as a consultant for Wachovia Corporate, petitioner reported to Samuel V. Tallman, Jr. Mr. Tallman was the senior vice president and group executive in charge of Wachovia Corporate's corporate finance department, located in Atlanta, Georgia. In addition to offices in Atlanta, Georgia, Wachovia Corporate leased office space in New York City, among other places. At some point, Wachovia Corporate leased the 37th floor of 152 West 57th Street, New York, New York.

21. In conjunction with his development of various products for Wachovia Corporate, petitioner traveled to Wachovia Corporate's clients and the foreign investment banks involved in

[4] Wachovia Bank was dually headquartered in Winston-Salem, North Carolina and Atlanta, Georgia.

the various transactions. As such, petitioner traveled to numerous cities throughout the United States and Europe. At some point, while working at Wachovia Corporate's Zurich office, petitioner met and worked with Pieter van Tol.

22. In 1995, petitioner developed a leveraged lease financing transaction for commuter rail cars owned by the Chicago Transit Authority (the "CTA transaction"). The CTA transaction closed in Amsterdam, The Netherlands, on or about September 27, 1995. The closing took place in Amsterdam because the lender in the transaction, ABN AMRO, was a foreign bank. Petitioner did not submit into the record any of the expense reimbursement invoices that he submitted to Wachovia Corporate in 1995.

23. On October 11, 1995, Steven W. McConnell sent a letter to the secretary of the Racquet and Tennis Club ("Racquet Club") proposing Mr. Knight for resident membership in the Racquet Club, a social club with dining facilities and game facilities, located at 370 Park Avenue, New York, New York.

24. Petitioner joined the Racquet Club upon his election as a member on December 14, 1995. The Racquet Club's rules state that anyone having an office within 50 miles of New York City is considered a resident member. According to the Racquet Club's records, petitioner paid dues of $1,970.00, plus sales tax for each of the years 1996, 1997 and 1998.

25. On or about December 1, 1995, petitioner joined The University Club, located at 1 West 54th Street, New York, New York. The University Club has dining facilities and game facilities. His active membership in The University Club continued throughout the audit period and the subsequent years.

26. By letter dated October 9, 2002, Mr. Tallman responded to the Division's inquiries concerning petitioner's work schedule during 1996. In this letter, Mr. Tallman stated that "from

January to April 1996, Mr. Knight was a contract consultant to Wachovia Corporate and worked out of Wachovia Corporate's offices at 152 West 57th Street, Suite 3700, New York, New York 10019." The record does not include petitioner's actual work schedule for the period January through March 1996.

27. In addition to working out of Wachovia Corporate's New York City offices, petitioner also worked out of the New York City offices of lawyers and investment bankers during 1995 and the period January through March 1996.

28. On March 27, 1996, the Articles of Organization of Knight, Tallman & van Tol Capital Partners, L.L.C. ("KTV"), a limited liability company under section 203 of the Limited Liability Company Law of the State of New York, were filed with the New York State Secretary of State by its organizer, Richard H. Kronthal, Esq., an attorney with Strook & Strook & Lavan, 7 Hanover Square, New York, New York. According to KTV's Articles of Organization, the county within New York State in which the office of the company was to be located is New York County and the management of the company would be vested in one or more of the members. Article Sixth of KTV's Articles of Organization provides that "[t]he Company has or may have classes or groups of members having such relative rights, powers, preferences and limitations as the Operating Agreement may from time to time provide."

29. On March 29, 1996, the Operating Agreement of Knight, Tallman & van Tol Capital Partners L.L.C. ("operating agreement") was entered into and adopted by Craig F. Knight, Samuel V. Tallman, Jr. and Temmes Capital Partners L.L.C. ("Temmes Capital").[5] A review of Article I , Section 1.3 of the operating agreement indicates that KTV's principal purposes are "to

[5] According to the Operating Agreement, Temmes Capital's address is in care of Mr. Cees van Tol, Wassenaareseweg 75b, 2223 LA Katwijik, The Netherlands. Review of the operating agreement indicates that Pieter van Tol is the beneficial owner of approximately 99% of the voting equity interests of Temmes Capital.

originate and structure leveraged leases, cross-border tax-effective financings and investment structures, cross-border private equity investment funds, Management Equity Investment ("MEIP") financings, to provide cross-border tax advisory services and foreign domiciliary services outside the United States."

30. A review of the operating agreement indicates that KTV had three "Members," i.e., Mr. Knight with a 40-percent ownership interest, Mr. Tallman with a 40-percent ownership interest and Temmes Capital with a 20-percent ownership interest. The operating agreement required the three Members and Mr. van Tol to devote all of their time to KTV business.

31. On March 29, 1996, petitioner and Wachovia Corporate entered into a written agreement terminating his January 21, 1992 consulting agreement with Wachovia Corporate (the "termination agreement"). According to this termination agreement, petitioner and Wachovia Corporate "mutually desire[d] to terminate" the consulting agreement because KTV and Wachovia Capital Markets, Inc., ("Wachovia Capital"),[6] an affiliate of Wachovia Corporate, planned on entering into a Services Agreement on March 29, 1996. This termination agreement settled "a disputed claim made by" petitioner against Wachovia Corporate for "internal fees" relating to the consulting agreement and implements the undisputed portion of his consulting agreement and the letter agreement dated September 26, 1995 ("letter agreement").

32. With respect to Mr. Knight's disputed claim, Wachovia Corporate agreed to make an aggregate payment of $2,443,833.00, of which $643,833.00 was to be paid in accordance with Section 1.1 of the termination agreement and $1,800,000.00 was to be paid pursuant to a deferral agreement. Section 1 of the termination sets forth the parties' agreement concerning "the

[6] Wachovia Capital is a subsidiary of Wachovia Corporation, a registered bank holding company that is also the parent of Wachovia Bank.

aggregate compensation payable to Knight for services rendered pursuant to the Consulting Agreement" and the manner in which it was to be paid. Section 1.1 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $643,833.00 Section 1.3 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $128,863.00, "representing interest accruing on the principal amounts owed by" Wachovia Corporate to petitioner "pursuant to the Consulting Agreement." Section 1.4 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $1,627.00, "representing interest accruing on the principal amount of $100,00.00 owed by [Wachovia Corporate] to Knight pursuant to the Electrolux Agreement." Pursuant to Section 1 of the termination agreement, Wachovia Corporate paid petitioner a total of $774,323.00. Petitioner reported this amount as other income on his 1996 Schedule C.

33. A review of Section 4 of the termination agreement reveals that this agreement sets forth "the entire [a]greement and understanding between the parties and merges and supercedes all prior discussions, agreements, and understandings of every kind and nature between them concerning the subject matter thereof." Further review of the termination agreement reveals that Section 7 provides that this agreement "shall be governed by the laws of the State of New York, without giving effect to the principles of conflicts of law."

34. It is noted that the termination agreement is addressed to petitioner at "444 Russell Avenue, Wychoff [sic], New Jersey 07481" and to Wachovia Corporate at "191 Peachtree Street, N.E., Atlanta, GA 30303." The termination agreement was executed by both parties in Atlanta, Georgia.

35. The record does not include many of the documents identified and referred to within the provisions of the termination agreement. Specifically, the record does not include, among

other documents, the January 21, 1992 consulting agreement (as noted above), the letter agreement dated September 26, 1995, the deferral agreement dated March 29, 1996, the engagement letters between Wachovia Corporate and each of Electrolux and ED & F Mann, the Electrolux Agreement, the rabbi trust dated March 29, 1996 and the engagement letter between KTV and Wachovia Capital dated March 29, 1996. As for the disputed claim made by petitioner against Wachovia Corporate for "internal fees" relating to the consulting agreement that was settled by the termination agreement, petitioner has not submitted any documentary evidence regarding this disputed claim. At the hearing, petitioner admitted that the Electrolux agreement did not have anything to do with the CTA transaction.

36. Pursuant to Section 1 of the termination agreement, Wachovia Corporate paid Mr. Knight a total of $774,323.00.

37. A review of the Knights' matrimonial settlement agreement indicates that the trust created under an agreement dated March 29, 1996, by and between Wachovia Corporate and Morgan Guaranty Trust Company of New York as Trustee under the Wachovia Corporate Services Inc. Deferred Compensation Agreement for Craig Knight, i.e., the JP Morgan Rabbi Trust, had been funded in accordance with the provisions of the termination agreement. Further review of this matrimonial settlement agreement indicates that the trust assets were held in a Morgan Guaranty Trust Company of New York account.

38. Shortly after the termination agreement was executed in Atlanta, Georgia on May 29, 1996, KTV and Wachovia Capital entered into a services contract entitled "SERVICES AGREEMENT" ("services agreement") dated March 29, 1996. Pursuant to the terms of this services agreement, KTV would provide certain services to Wachovia Capital in connection with Wachovia Capital's "engagement in the Subject Businesses" and KTV and Wachovia Capital

"will provide each other respective rights of first refusal to participate in any transaction proposed by or to the other involving the Subject Businesses ('proposed transactions')."

39. According to the services agreement, in consideration for KTV's services and the right of first refusal to participate in "KTV-developed" proposed transactions, Wachovia Capital agreed to pay KTV a "contract fee" and the parties also agreed to allocate between them the revenues from any proposed transactions in which Wachovia Capital participates ("subject transactions"). For the first year of the services agreement, the contract fee is $200,000.00 per month for each month through March, 1997 and if the parties failed to otherwise reach an agreement "prior to the 30th calendar day preceding the commencement of each subsequent year" of the services agreement, the contract fee for each year is $854,000.00. Wachovia Capital also agreed to pay out-of-pocket expenses it expressly approved.

40. In the services agreement, the parties also agreed to distribute the fees and other benefits comprising the "allocated revenue" for each subject transaction entered into by KTV and Wachovia Capital in accordance with Article III, Section 3.3. A review of this section indicates that the allocated revenue received during a calendar quarter would be distributed as follows. First, it would be distributed to Wachovia Capital, in an amount equal to the cumulative annual contract fees that have not been previously paid to Wachovia Capital pursuant to this first priority. Then the allocated revenue would be distributed to KTV, in an amount equal to the "priority revenue allocation" ($2,030,000.00, less all amounts previously paid to KTV as the priority revenue allocation). Lastly, any remaining allocated revenue would be paid 50 percent to Wachovia Capital and 50 percent to KTV.

41. Pursuant to Article VI, Section 6.14 of the services agreement, Wachovia Capital agreed to provide KTV with office space within the office space Wachovia Capital leased in

Atlanta, Georgia and New York, New York and, "subject to any applicable federal bank or bank holding company regulation," Zurich, Switzerland. This section also requires KTV to "clearly mark and identify (by appropriate signs and other appropriate means of identification)," the space occupied by it and "otherwise comply with any Legal Requirement regarding such space occupancy arrangements."

42. At the time KTV was formed, Mr. Tallman was living in Atlanta, Georgia and Mr. van Tol was living in Zurich, Switzerland. Mr. Tallman was president of KTV and was based in KTV's Atlanta office. He was in charge of the general administration of KTV. In May 1996, KTV hired Michael Zuravel as a vice president of KTV. Mr. Zuravel, who lived in Atlanta, Georgia, was also based in KTV's Atlanta office. KTV's Atlanta office was wholly within the Atlanta offices of Wachovia Corporate.

43. Beginning in April 1996 and continuing through the remainder of the audit period, petitioner managed KTV's New York City office which was wholly within Wachovia Corporate's offices located on the 37th floor of 152 West 57th Street. The KTV office occupied approximately 4,000 square feet of space within Wachovia Corporate's offices and included the 36 ft. by 20 ft. office used by petitioner when he was a consultant to Wachovia Corporate. Mr. Knight continued to use this same office while working for KTV. KTV's New York City office was petitioner's primary work place from April 1, 1996 through the remainder of the audit period and continued to be his primary work place in subsequent years. The record does not include records pertaining to petitioner's actual work schedule for the period April 1996 through the year 1997. On or about May 1996, KTV hired two professionals to work with petitioner in New York City. Later in 1996, KTV also hired a secretary, Joyce North, to work in its New York City offices.

44. On April 15, 1996, petitioner, as senior managing director of KTV, executed a lease on behalf of KTV for apartment 8K, a two-bedroom apartment, located at 333 East 56th Street in New York City (the "East 56th Street apartment"). The address listed for KTV in this lease is "c/o Wachovia Corp. Services Inc., 152 W. 57th 37th Fl., New York, N.Y. 10022." The initial term of this lease covered the period May 1, 1996 through April 30, 1997 and provided for a monthly rent due in the amount of $3,125.00. Petitioner personally guaranteed the initial lease for the East 56th Street apartment. A review of his guaranty reveals that it remains in effect for any subsequent renewals of the lease for the East 56th Street apartment. Since KTV was a new company, the landlord required four months' rent ($12,500.00) as a security deposit. The first month's rent and the security deposit, a total of $15,625.00, was paid by a KTV check signed by both petitioner and Mr. Tallman. It was KTV's unwritten policy that checks in amounts greater than $5,000.00 required the signatures of two Members. The only information supplied by petitioner concerning the apartment is that it has two bedrooms.

45. Included as part of the lease for the East 56th Street apartment is an agreement containing a clause that reads "Whereas, the tenant signed a lease for the above numbered apartment in the name of a Corporation, and AGREES that the sole occupant of said apartment during the term of this lease, and all extensions, if any, shall be Craig F. Knight, Sam Tallman and Michael Zuravel." Petitioner signed this agreement as senior managing director of KTV.

46. The landlord issued three keys for the East 56th Street apartment, a key for each of the occupants of this apartment, i.e., petitioner and Messrs. Tallman and Zuravel.

47. Petitioner personally arranged for electric and telephone service for the East 56th Street apartment. KTV reimbursed him for the NYNEX telephone installation charges. From May 1996 through the remainder of the audit period, both the Con-Ed electric and the NYNEX

telephone services were billed to petitioner personally at the East 56th Street address. However, the electric and telephone bills for this apartment were paid for by KTV out of its bank account, on checks executed by Mr. Tallman.

48. Petitioner personally selected and purchased furniture, household items and supplies for the East 56th Street apartment. The record reveals that in May 1996 and September 1996, KTV reimbursed him for the purchase of, among other things, two queen size mattresses, box springs and bed frames, lights, art supplies, various electrical appliances, miscellaneous kitchen items, linens and towels and various supplies including food and cleaning products. Some of petitioner's purchases for the East 56th Street apartment were made on weekends in New York City.

49. Mr. Tallman also purchased furniture for the East 56th Street apartment. KTV reimbursed him for his May 1996 Bloomingdale purchases of a table and four chairs and a wall unit.

50. In order to be reimbursed by KTV for expenses Members and employees incurred on its behalf, they had to submit a written expense report. A review of Expense Report # 3, dated May 15, 1996, submitted by petitioner for reimbursement by KTV, indicates that he requested reimbursement for parking fees in the total amount of $936.00 as well as other expenses, including, among other things, meals and taxi expenses. The itemization of these parking fees included an entry for May 7, 1996 in the amount of $716.00 along with the following explanation of this fee. "This fee is based on a $408.00 per month charge minus a $50.00 charge for a sports car. The amount includes a 1-month security deposit." Further review of this expense report also reveals requests for reimbursement of parking fees and taxi fares incurred on weekends in New York City.

51. Review of the checks issued by KTV in payment of the rent on the East 56th Street apartment during the initial term of the lease reveals that on October 2, 1996, petitioner signed a check payable to Glenwood Management Corp. in the amount of $3,125.00, for payment of the October 1996 rent for the East 56th Street apartment. On November 26, 1996, Mr. Tallman signed a check payable to Glenwood Management Corp. in the amount of $3,533.00, for payment of the December 1996 rent for the East 56th Street apartment. It is noted that nothing is written in the memo section of this check. On January 29, 1997, Mr. Tallman signed a check payable to Glenwood Management Corp. in the amount of $3,447.00, for payment of the February 1997 rent for the East 56th Street apartment. The memo section of this check contains the handwritten notation "NY APT & Parking." On February 26, 1997, Mr. Tallman signed a check payable to Glenwood Management Corp. in the amount of $3,490.00, for payment of the March 1997 rent for the East 56th Street apartment. The memo section of this check contains the handwritten notation "NY Apt & Parking." On March 28, 1997, Mr. Tallman issued a check to Glenwood Management Corp. in the amount of $3,490.00, for payment of the April 1997 rent for the East 56th Street apartment. The memo section of this check contains the handwritten notation "NY Apt & Parking."

52. During 1996 and 1997, Messrs. Tallman and Zuravel lived in Atlanta, Georgia and Mr. van Tol lived in Switzerland. When they were in New York City, Messrs. van Tol, Tallman and Zuravel would always arrive at the East 56th Street apartment by taxi or car service and would never drive their own automobiles. During 1996 and 1997, petitioner drove his personal automobile in New York City.

53. At the hearing, petitioner was asked about the parking fees included in the some of the checks paid to Glenwood Management Corp. for the rental of the East 56th Street apartment during the initial term of the lease. However, he was unable to explain these parking fees.

54. The lease for the East 56th Street apartment was subsequently renewed for an additional one-year term covering May 1, 1997 to April 30, 1998 and provided for a monthly rent due in the amount of $3,312.50. Mr. Tallman signed the lease renewal on behalf of KTV.

55. During 1996 and 1997, both Mr. Tallman and Mr. Zuravel made trips to New York City to perform work on matters related to KTV's business. They often stayed at the East 56th Street apartment during these trips. Mr. Tallman stayed at the East 56th Street apartment on 49 days during 1996, the vast majority of which were prior to October 1996, and on 33 days in 1997. Mr. Zuravel stayed at the East 56th Street apartment on approximately 53 days during 1996 and on approximately 45 days during 1997. Sometimes, Messrs. Tallman and Zuravel stayed at the East 56th Street apartment at the same time.

56. Petitioner could not recall if KTV maintained a tenant's insurance policy for the East 56th Street apartment in 1996 and 1997.

57. Both Mr. Tallman and Mr. Zuravel had keys to the East 56th Street apartment that they kept with them in Atlanta, Georgia. Mr. Knight kept his key at KTV's New York City offices.

58. There was no written agreement among the partners that restricted or even addressed the use of the East 56th Street apartment. KTV also did not maintain a log book to establish a business use for the East 56th Street apartment. Rather, petitioner's secretary, Joyce North, would confirm the availability of the East 56th Street apartment with petitioner when others called to use it.

59. During 1996 and 1997, petitioner received personal bank statements at the East 56th Street apartment address.

60. During 1996 and 1997, whenever he stayed overnight in New York City, petitioner stayed at either the East 56th Street apartment or a friend's New York City apartment.

61. On occasion, the East 56th Street apartment was used for business meetings during 1996 and 1997.

62. In 1996 and 1997, Wachovia Capital was KTV's primary client and provided about 80 percent of KTV's business in each year. KTV closed its New York City office around June 1999 because the services agreement was terminated by Wachovia Capital around that time. By the time the services agreement was terminated by Wachovia Capital, Branch Banking & Trust ("BB&T") was providing the majority of KTV's business. Sometime after the closing of KTV's New York City offices, it opened offices in Connecticut.

63. KTV terminated the lease on the East 56th Street apartment in June 1999.

64. A December 30, 1999 letter from the postmaster of the Franklin D. Roosevelt Post Office located on Third Avenue in New York City indicates that mail in the name of Craig or Patricia Knight was forwarded from 333 East 56th Street in New York City to Apt # 26G, 1365 York Avenue in New York City.

65. In the fall of 1994, petitioner met Teresa Lin, an investment banker. On January 16, 1995, Ms. Lin leased apartment 26G, a one-bedroom apartment, located at 1365 York Avenue in New York City (the "York Avenue apartment"). Petitioner began having a relationship with Ms. Lin in the summer of 1995. His relationship with Ms. Lin eventually led to petitioner's divorce from his first wife and remarriage to Ms. Lin. Petitioner would visit Ms. Lin early in the morning on his way into work and again at the end of the workday before returning home. Ms.

Lin made arrangements for petitioner to be signed into her building on a permanent basis so that petitioner could enter or leave the building without signing in or being announced by the doorman.

66. When petitioner and Ms. Lin began their relationship, Ms. Lin lived in the York Avenue apartment and she continued to live in this apartment during the entire audit period. During 1996 and 1997, Ms. Lin's apartment had two locks on its front door. In June 1996, Ms. Lin provided petitioner with a key to only one of these locks. Ms. Lin generally kept both locks on the door to her apartment engaged. On certain occasions, when she gave petitioner express permission to enter her apartment while she was not present, she would engage only the lock to which petitioner had a key. Petitioner could enter the York Avenue apartment only if he made pre-arranged announced visits. On other occasions, petitioner would have to wait for Ms. Lin to arrive before he could physically enter her apartment because both locks on the door to her apartment were engaged. In such situations, petitioner would typically sit on the floor in the hallway outside of Ms. Lin's apartment, or in a coffee shop across the street, waiting for her to arrive.

67. On June 5, 2000, the York Avenue doorman reported to the Division's investigator that the Knights moved out two weeks before, but had lived in the York Avenue apartment on a daily basis since at least 1996.

68. On June 15, 2000, R.P. Andrew McNee, Esq., vice president of the legal department of Glenwood Management Corporation, sent a letter to the auditor indicating that he had information that Mr. Knight was Ms. Lin's roommate. Mr. McNee further believed that Mr. Knight occupied apartment 8-K at 333 East 56th Street under a corporate lease with KTV.

69. Glenwood Management Corporation managed both the East 56th Street apartment and Ms. Lin's York Avenue apartment.

70. The East 56th Street apartment is approximately one mile from Ms. Lin's York Avenue apartment, and approximately one mile from KTV's offices at 152 West 57th Street in New York City.

71. Ms. Lin's York Avenue apartment is less than 2 miles from KTV's offices at 152 West 57th Street in New York City.

72. During 1996 and 1997, petitioner regularly stayed with Ms. Lin in her apartment.

73. According to Scott Knight, he first met Ms. Lin at a birthday dinner for petitioner in September 1996.

74. In 1996 and 1997, Ms. Lin was employed as a senior vice president at Dillon Read & Co. ("Dillon Read") located at 535 Madison Avenue, New York, New York. Ms. Lin's W-2s for 1996 and 1997 reflect that she earned approximately $383,500.00 in 1996 and approximately $127,000.00 in 1997. The record indicates that Dillon Read was involved in many of KTV's leasing transactions during 1996.

75. The record includes only two expense reports prepared and signed by Mr. Knight seeking reimbursement of expenses incurred on behalf of KTV, i.e., a May 1996 Expense Report # 3 and a September 1996 Expense Report # 4. A review of these reports indicates that petitioner requested reimbursement for many business-related meals, drinks and entertainment during the period April 1996 through September 1996. As part of the itemization of these business-related expenses, petitioner included the names of the individuals entertained and the companies for which they worked and the business purpose of the meal or entertainment. A review of these meal and entertainment expenses indicates that, from April 1996 through

September 1996, Ms. Lin was present at a substantial number of the New York City business meals as well as business meals that took place in, among other places, London, Boston and Rockport, Massachusetts. It is noted that some of these business meals took place on weekends.

76. There is no evidence in the Division's audit file with respect to petitioner indicating that he had access to Ms. Lin's apartment.

77. In or about June 2000, petitioner and Patricia Knight were divorced. Petitioner and Ms. Lin were married on July 29, 2000.

78. Petitioner submitted his New Jersey voter registration information to establish that he continued to vote in New Jersey during the audit period. On or about January 1, 1983, petitioner registered to vote somewhere within Bergen County, New Jersey. On August 23, 1988, his Bergen County voter registration was transferred to reflect the Russell Avenue, Wyckoff, New Jersey address. Review of the voting history maintained by Bergen County for petitioner indicates that he voted in the general elections held in the years 1988 through 1990 and the years 1992 through 1994 and failed to vote in either 1991 or 1995. His voting history also indicates that he voted in the general elections held in 1996 and 1997 and did not vote in either 1998 or 1999.

79. During 1996 and 1997, petitioner spent a great deal of time with his father while his father was sick and often visited his father in the hospital with his brother, Scott.

80. During 1996 and 1997, petitioner made substantial donations to Grace Church. The location (address) of this church is not part of the record. Petitioner submitted copies of checks payable to Grace Church and his Federal income tax returns for the years 1996 and 1997 to establish these donations. During the same period, petitioner also made substantial donations to the Star of Hope Ministry in Paterson, New Jersey. A review of the Knights' joint 1997 Federal

income tax return indicates that a $3,500.00 donation was made to Grace Bible Church as well. The location (address) of Grace Bible Church is not part of the record.

81. During 1996 and 1997, petitioner occasionally volunteered at the Star of Hope Mission in Paterson, New Jersey.

82. Petitioner submitted his American Express Platinum Card year-end summaries for the years 1996 and 1997 in support of his claim that he continued to be domiciled in New Jersey during the audit period ("1996 Am Ex year-end summary" and "1997 Am Ex year-end summary," respectively). According to petitioner, the 1996 American Express year-end summary reflects all of his charges for that year.

83. The record indicates that the 1996 Am Ex year-end summary was addressed as follows, "CRAIG F. KNIGHT, WACHOVIA CORP SRVCS, 152 W. 57th ST, 37th FL, NEW YORK NY 10019-3310."

84. A review of the 1996 and 1997 American Express year-end summaries indicate that petitioner obtained health care as follows. He obtained medical care twice in January 1996, once in March 1996 and once in June 1996 at Whitney Medical located in East Rutherford, New Jersey. Petitioner consulted an eye care professional in Paramus, New Jersey in July 1996 and July 1997 and had his prescriptions filled at Pearle Vision located in Paramus, New Jersey.

85. The American Express year-end summaries indicate that petitioner utilized the services of a hair stylist in New York City in 1996 and 1997.

86. A review of the 1996 Am Ex year-end summary indicates that petitioner played tennis at Quest II in Mahwah, New Jersey on Thursday, September 12th. There are no other charges for Quest II in the 1996 Am Ex year-end summary. Further review of this year-end summary indicates that petitioner played tennis at the Roosevelt Island Racquet Club located on Roosevelt

Island, New York on Sunday, October 20, 1996 and Saturday, November 10, 1996. A review of the charges posted in the Am Ex year-end summary for the services at the Roosevelt Island Racquet Club indicate that petitioner was a member. No charges for Quest II are reflected in the 1997 Am Ex year-end summary.

87. Review of the 1996 Am Ex year-end summary indicates that petitioner made many purchases at retail establishments and restaurants located in New York City. From April 1996 through December 31, 1996, many of these New York City purchases were made on the weekends. Further review of the 1996 year-end summary indicates that during the period October 1996 through December 1996, petitioner made, among other retail purchases, large purchases of electronic equipment and furniture in New York City on many weekends.

88. Review of the 1997 Am Ex year-end summary indicates that petitioner incurred a significantly greater number of charges for retail items, groceries and restaurants in New York City than he incurred in New Jersey during 1997. Many of these New York City charges were made on weekends.

89. Many of the charges reflected on petitioner's 1996 and 1997 Am Ex year-end statements were for purchases made at high-end retail establishments in New York City including, among others, Hermes, Tiffany and Versace. In addition, both years' statements reflect numerous restaurant charges at many of New York City's fashionable, upscale restaurants.

90. Review of the matrimonial settlement agreement indicates that petitioner purchased approximately 40 paintings in 1996 and 1997 for approximately $275,000.00. Petitioner retained sole title to these paintings pursuant to this matrimonial settlement agreement.

91. At the hearing, petitioner estimated that during the audit period he owned approximately 25 pieces of art and about 23 of them were kept at his New York City office, i.e., KTV's offices in New York City. Petitioner did not insure these paintings. The record includes some invoices from art galleries, art dealers and artists located in Rochester, New York, Boston, Rockport, Dedham and Westwood, Massachusetts and Stowe, Vermont.

92. A review of the American Express year-end summaries indicate that, in 1996 and 1997, petitioner had his automobiles serviced by the New Jersey dealerships from which they had been purchased.

93. Review of the telephone bills for the East 56th Street apartment for the period May 1996 through December 31, 1997, as well as other documents in the record, indicate that petitioner made numerous telephone calls to various locations in New Jersey, Vermont, Connecticut and Massachusetts on nights and weekends from that telephone.

94. A review of the 1996 Am Ex year-end summary indicates that petitioner rented movies from a local Wyckoff, New Jersey video store on a few occasions during the first half of the year. A review of the 1997 Am Ex year-end summary indicates that petitioner rented movies and videos from both Blockbuster Video in New York City and a local Wyckoff, New Jersey video store. The year-end summaries for both 1996 and 1997 reflects charges for petitioner's purchase of tickets for numerous New York City theatrical and musical performances during both years. Furthermore, a review of the 1997 Am Ex year-end summary indicates that petitioner purchased dancing lessons from Arthur Murray's Dance Studio in New York City in April 1997.

95. Documents in the record indicate that KTV rented an apartment from Gables Corporate Apartment Homes for Mr. van Tol in Atlanta, Georgia for the months of January and February 1997. KTV did not have a tenant's insurance policy for this apartment.

96. In addition to offices in Atlanta, New York City and Zurich, KTV also had an office within Wachovia Corporate's London, England offices. Documents in the record indicate that KTV leased a two bedroom apartment at 41 Cadogan Square, in London, England on July 25, 1997 for a period of one year running from September 1, 1997 through August 31, 1998. The documents further indicate that Mr. Tallman and Mr. Zuravel were the residents of this apartment. Neither the partners nor KTV had a written policy concerning the use of this apartment. KTV also did not maintain a tenant's insurance policy for this apartment.

97. Petitioner's matrimonial settlement agreement with Mrs. Knight allows him "parenting time" with his children every Wednesday evening for three hours and every other weekend. The matrimonial settlement agreement also sets forth both parents' holiday and vacation time with the children.

98. Subsequent to the audit period, petitioner purchased a home in New Canaan, Connecticut.

99. As noted in Finding of Fact "2," for the year 1996, the Knights filed a New York State Nonresident and Part-Year Resident Income Tax Return ("state income tax return"). Included as an attachment to this state income tax return is a copy of the Knights' 1996 joint Federal income tax return (Form 1040) and the supporting schedules. One of the schedules attached to their 1996 Federal income tax return is a Schedule C ("Profit or Loss From Business [Sole Proprietorship]") for petitioner (the "1996 Schedule C"), whose business address is listed as 444 Russell Avenue, Wyckoff, New Jersey.

100. A review of petitioner's 1996 Schedule C indicates a gross income of $1,076,869.00, consisting of gross receipts or sales in the amount of $302,546.00 and other income from "Wachovia" in the amount of $774,323.00, from Knight Financial Consulting, the sole proprietorship that petitioner operated during the first three months of 1996. On Line 28 of the Schedule C, petitioner reported $62,219.00 in total expenses. Of that amount, $38,152.00 is allocated to travel expenses. Review of Part V of petitioner's 1996 Schedule C, entitled "Other Expenses" reveals that petitioner claimed an expense in the amount of $300.00 for the New York Bar annual fee. A tentative profit of $1,014,650.00 was reported on Line 29 of the 1996 Schedule C. Petitioner did not claim any expense for business use of his home on Line 30 of his Schedule C. Therefore, a net profit of $1,014,650.00 was reported on petitioner's 1996 Schedule C and Line 12 of the Knights' Form 1040. None of the $1,014,650.00 in business income reported on Line 12 of the Knights' 1996 Form 1040 was allocated to New York State.

101. During the audit, the auditor requested supporting documentation for the expenses shown on petitioner's 1996 Schedule C. In response to that request, petitioner submitted documentation which consisted of a copy of a cover letter from his representative and a copy of a four-page invoice, dated March 25, 1996, in the total amount of $24,108.17, submitted by "Craig F. Knight, Esq., Financial Consultant" to Mr. Tallman at Wachovia Corporate requesting reimbursement for expenses incurred in connection with "NYC business, trips to Germany, UK, Steamboat, Boston, St. Louis and Chicago." A review of this invoice indicates travel expenses from January 11, 1996 through March 24, 1996 with the notation "CTA Deal" typewritten throughout the comment section of the pages of the invoice. The expenses listed on this invoice include, among other items, tolls and parking fees incurred while conducting New York City business for Wachovia Corporate. The documentation submitted to the auditor did not support

all of the expenses actually reported on petitioner's 1996 Schedule C. During the audit, petitioner did not submit any expense reports for 1995 to establish that he worked on the CTA transaction for Wachovia Corporate in 1995.

102. Based on his review of the documents submitted during the audit, the auditor concluded that petitioner became a domiciliary of New York State and New York City on April 1, 1996 and was a domiciliary of New York State and New York City for the period April 1, 1996 through December 31, 1996. The basis of the auditor's conclusion included the following. During the relevant period, petitioner spent a far greater number of days in New York than in New Jersey. Many of petitioner's weekends were spent in New York City and he also made credit card charges in New York City on the weekends. During the relevant period, petitioner had strong business ties to New York and no business ties to New Jersey. Additionally, during the relevant period, telephone calls were made from the East 56th Street apartment in the evenings that would be consistent with a residence by petitioner.

103. The auditor recomputed petitioner's New York State and New York City tax liability for the period April 1, 1996 through December 31, 1996 using the filing status married filing separately on separate forms. In his computation of petitioner's New York State adjusted gross income, the auditor included the entire $225,000.00 in wages or salary that petitioner received from KTV, $51,944.00 in interest income (75 percent of the interest income for the year), $8,241.00 in dividend income (75 percent the dividend income for the year) and $892,120.00 in Schedule E income consisting of $880,336.00 in partnership income from KTV and $11,784.00 in other S-corporation income (75 percent of the S-corporation income for the year) and determined the corrected New York State adjusted gross income to be $1,177,294.00. The corrected Federal adjusted gross income was determined to be $2,133,680.00. The auditor

determined the corrected New York State itemized deductions after modifications to be $103,483.00. After deducting the corrected itemized deductions in the amount of $103,483.00 and exemptions totaling $2,000.00 (for two exemptions) from the corrected Federal adjusted gross income of $2,133,680.00, the auditor determined a corrected New York State taxable income in the amount of $2,028,197.00. After determining a base New York State tax on $2,028,197.00 to be $144,509.04, the auditor multiplied this base New York State tax by the New York State income percentage of 55.18 percent ($1,177,294.00/$2,133,680.00) and recomputed the tax liability to be $79,740.09. After allowing $17,168.00 in credits for taxes paid to the State of Georgia, the auditor determined the corrected New York State tax liability to be $62,572.09 and the corrected New York City tax liability to be $52,183.00. For the year 1996, petitioner had previously paid $9,006.00 in New York State tax and $790.00 in New York City tax. After subtracting these previously paid New York State and New York City tax amounts from the corrected New York State and corrected New York City tax liabilities computed above, the auditor determined an additional New York State tax liability in the amount of $53,566.09 and an additional New York City tax liability in the amount of $51,393.00.

104. On August 20, 2002, the Division issued a Statement of Personal Income Tax Audit Changes to petitioner reflecting the above-described proposed audit adjustments for the year 1996. This statement shows additional New York State tax due in the amount of $53,566.09 and additional New York City tax due in the amount of $51,393.00. Negligence and substantial understatement of tax penalties pursuant to Tax Law § 685(b)(1), (2) and (p) in the total amount of $37,162.25 plus interest were added to the additional tax asserted as due.

105. The auditor did not include any of the $1,076,869.00 in 1996 Schedule C business income from Knight Financial Consulting in the Statement of Personal Income Tax Audit Changes issued on August 20, 2002 for the year 1996.

106. For the year 1997, based on the available information, the auditor concluded that petitioner intended to change his domicile from New Jersey to New York and therefore petitioner was considered to be a New York State resident for income tax purposes. Since he was a resident, the auditor determined that petitioner was subject to tax on all of his income regardless of the source. Alternatively, the auditor concluded that petitioner was a statutory resident of New York based on the following. Petitioner maintained a permanent place of abode, the East 56th Street apartment, in New York City and had a permanent place of abode maintained for him at 1365 York Avenue in New York City. Petitioner had failed to establish through adequate records that he did not spend more than 183 days of the year 1997 within New York State.

107. The auditor recomputed petitioner's New York State and New York City tax liability as a resident for the year 1997 using a filing status of married filing separately on separate forms. To the amount of the New York State adjusted gross income reported on petitioner's return, $1,889,501.00, the auditor added $3,332,634.00 as the residency adjustment and determined the corrected New York State adjusted gross income to be $5,222,135.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications in the amount of $232,462.00 and allowable exemptions (two) totaling $2,000.00 and determined the corrected New York State and New York City taxable income to be $4,987,673.00. The auditor determined the corrected New York State tax liability to be $341,655.60 and the corrected New York City tax liability to be $222,280.22. For the year 1997, petitioner had previously paid New

York State taxes in the amount of $123,611.00 and New York City taxes in the amount of $75.00. After subtracting these previously paid New York State and New York City tax amounts from the corrected New York State and New York City tax liabilities computed above, the auditor determined an additional New York State tax liability in the amount of $218,044.60 and an additional New York City tax liability in the amount of $222,205.22.

108. On August 20, 2002, the Division issued a Statement of Personal Income Tax Audit Changes to petitioner reflecting the above-described audit adjustments for the year 1997. This statement shows additional New York State tax due in the amount of $218,044.60 and additional New York City tax due in the amount of $222,205.22. Negligence and substantial understatement of tax penalties pursuant to Tax Law § 685(b)(1), (2) and (p) in the total amount of $135,555.63 plus interest were added to the additional tax asserted as due.

109. The penalties were asserted as due on these statements of personal income tax audit changes because of petitioner's negligence in failing to properly file and the inadequate disclosure of his New York State residence on his 1996 and 1997 New York State tax returns.

110. As noted in Finding of Fact "1," on February 18, 2003, the Division issued a Notice of Deficiency asserting additional New York State and City personal income tax, interest and penalty in the aggregate total amount of $923,533.88 for the years 1996 and 1997.

111. On May 19, 2003, petitioner filed a petition challenging the Division's determination that petitioner was a resident of New York State and New York City for the years 1996 and 1997. Alternatively, the petition challenges the Division's determination that the allocation percentages reported on petitioner's originally filed returns do not accurately reflect days worked in New York for the years 1996 and 1997. The petition also challenges the imposition of penalties.

112. Neither the Notice of Deficiency issued on February 18, 2003 nor the Division's Answer, dated July 30, 2003, challenged petitioner's treatment of the $1,076,869.00 in business income from Knight Financial Consulting reported on the 1996 Schedule C or alleged a deficiency in tax for this income reported on the 1996 Schedule C attached to the Federal income tax return jointly filed by petitioner and Patricia M. Knight for 1996. The first allegation of a deficiency by the Division with respect to the $1,076,869.00 in business income was made in the Division's Hearing Memorandum, dated April 26, 2004. This allegation was also raised at the hearing.

113. Prior to the hearing in this matter, the original auditor who conducted the audit retired. Since the current supervisor assigned to the audit was unavailable to testify at the hearing, the Division assigned Jon Obert, a Tax Auditor 2, in the Division's Suffolk District Office to testify at the hearing. During his career with the Division, Mr. Obert has worked on hundreds of audit cases involving residency.

114. Prior to the hearing, Mr. Obert reviewed the entire audit file. After reviewing the documents in the file, he concluded that the original auditor erroneously failed to include the 1996 Schedule C income from Knight Financial Consulting in the Statement of Personal Income Tax Audit Changes issued for the year 1996. Mr. Obert based his conclusion on the fact that documentation submitted during the audit indicated that petitioner conducted business in New York during the period January 1, 1996 through March 31, 1996. This documentation included, among other documents, a copy of a four-page expense invoice, dated March 25, 1996 (originally submitted to Wachovia Corporate for reimbursement of expenses), submitted to the auditor to support the expenses that petitioner claimed on the 1996 Schedule C, a letter dated October 9, 2002 from Mr. Tallman, the executive to whom petitioner reported while working as

a consultant to Wachovia Corporate, a January 29, 2002 letter with attachments from the general manager of the Racquet Club, documentation obtained from The University Club, the mailing address listed on petitioner's 1996 American Express year-end credit card summary and the credit card charges listed in the 1996 American Express year-end summary. Mr. Obert observed that the expenses listed on the four-page expense invoice indicated that petitioner conducted business in New York and at least a portion of the Schedule C income should have been allocated to New York.

115. An additional tax deficiency of $73,669.00 plus interest and penalties was asserted at the hearing via a document, prepared on May 1, 2004 by Mr. Obert, entitled "Summary: Allocation of Sch. C Income to non resident period 1/1/96 - 3/31/96" ("summary"). This summary includes a work paper that he used to determine the proper amount of income to include in the Federal and State columns as if petitioner was a nonresident and received this income during the short period January 1, 1996 through March 31, 1996 and the Statement of Personal Income Tax Audit Changes issued on May 1, 2004.

116. The auditor computed the Federal income for the short period by allocating 25 percent of the interest income, or $4,107.00, 25 percent of the dividend income, or $2,747.00 and 100% of the Schedule C income, or $1,014,650.00. After adding these three amounts together to arrive at a subtotal in the amount of $1,021,504.00 and subtracting a Federal adjustment related to petitioner's consulting agreement in the amount of $69,057.00, the auditor determined the Federal adjusted gross income to be $952,447.00. He also allocated 25 percent of the itemized deductions to the short period, or $68,989.00. The auditor determined petitioner's New York State income for the nonresident period to be $1,014,650.00, the entire amount reported on the 1996 Schedule C as the net profit from Knight Financial Consulting. The auditor also allocated

25 percent of the New York State tax previously paid, or $2,252.00 and 25 percent of the New York City tax previously paid, or $198.00 to the short period.

117. A Statement of Personal Income Tax Audit Changes for the period January 1, 1996 through March 31, 1996 was issued to petitioner on May 1, 2004 that reflected the allocation of the 1996 Schedule C income from Knight Financial Consulting to New York State during the nonresident period January 1, 1996 through March 31, 1996. In that Statement of Personal Income Tax Audit Changes the following adjustments were made: the New York State amount of Federal gross income was increased by $1,014,650.00 to $1,014,650.00 and the New York itemized deductions were decreased by $34,495.00 to reflect a New York itemized deduction adjustment. As a result of the audit adjustments, the New York State taxable income for the short period was determined to be $915,953.00 and the base New York State tax on that amount was determined to be $65,262.00. The New York State income percentage of 106.53 percent ($1,014,650.00/$952,447.00) was multiplied by the base New York State tax of $65,262.00 and the recomputed New York State tax for the short period was determined to be $69,524.00. The corrected taxable income for New York City purposes was determined to be $1,014,650.00 and the additional New York City tax was determined to be $6,595.00. The statement shows a corrected tax liability for New York State for the period January 1, 1996 through March 31, 1996 in the amount of $69,524.00 and for New York City for the period January 1, 1996 through March 31, 1996 in the amount of $6,595.00. A credit for New York State and New York City taxes previously paid in the amount of $2,252.00 and $198.00, respectively, was allowed. The statement shows additional New York State tax due in the amount of $67,272.00 and New York City tax due in the $6,397.00. Negligence and substantial underpayment of tax penalties pursuant to Tax Law § 685(b)(1), (2) and (p) in the total amount of $35,073.00 plus interest were

added to the additional tax asserted as due. The auditor imposed the penalties because none of the business income from Knight Financial Consulting was allocated to New York even though it appeared, based on the documentation submitted, that at least some of this income was earned in New York State and New York City.

118. At the hearing, petitioner stipulated that he spent in excess of 183 days in New York City in 1996.

119. At the hearing, petitioner stipulated that he spent in excess of 183 days in New York City in 1997.

120. At the hearing, the Division waived the issue of whether petitioner was a statutory resident of New York for 1996.

121. Petitioner submitted proposed findings of fact numbered "1" through "123." All proposed findings of fact have been substantially incorporated into this determination with the exception of the proposed finding of fact "3" which is unnecessary since it merely states that a hearing was conducted; proposed findings of fact "8," "19," "21," "22,""24," "27," "30," "35" "36," "40," "41," "42," "47," "48," "54," "56," "59," "60," "73," "75," "77," "78," "80," 83," "88," "92," "94," "95," "97," "98," "99," "100," "101, "102," "105, "107," "108" and "116" which are not supported by the evidence; proposed findings of fact "20," "25," "26," "29," "33," "38," "39," "51," "52," "61, "71," "86," "87," "90, "96" and "122" which have been modified to more accurately reflect the record; proposed findings of fact "104" and "115" which are argumentative or speculative and proposed findings of fact "113" and "114" which are unnecessary for purposes of this determination.

The Division submitted proposed findings of fact numbered "1" through "75." All proposed findings of fact have been substantially incorporated into this determination with the

exception of proposed findings of fact "13," "45," "65" and "72" which are in the nature of legal argument; proposed findings of fact "48," "49" and "50" which are not supported by the evidence and proposed findings of fact "22," "44," "59," "60," "64" and "73," which are unnecessary for purposes of this determination.

SUMMARY OF PETITIONER'S POSITION

122. Petitioner asserts that he did not abandon his historical domicile in New Jersey in April 1996 and acquire a New York State and New York City domicile at that time. He argues that his activities in 1996 and 1997 served only to maintain his already firmly established domicile in New Jersey and did not reflect the intent and actions necessary to change his domicile from New Jersey to New York. Petitioner asserts that he maintained a significant home in Wyckoff, New Jersey where he resided with his wife, Patricia, and children through the end of March 1996. At that time, petitioner and his wife informally separated and he moved in with his parents in their home in nearby Rutherford, New Jersey. Petitioner contends that, contrary to the Division's unsubstantiated position that his domicile changed shortly after his informal separation from his wife, his actions reflect a continuation of his status as a domiciliary of New Jersey.

123. Petitioner contends that he compensated his parents for his use of their home, by paying them rent, or, in lieu of paying them rent, purchasing them a second home in Florida and sending them on several vacations.

124. Petitioner asserts that he maintained his strong connections to New Jersey during 1996 and 1997 in other ways as well. He contends that he maintained a New Jersey driver's license and registered all of his automobiles in New Jersey during the audit period.

125. During 1996 and 1997, petitioner contends that he commuted into New York City from Wyckoff or Rutherford, New Jersey in his Volvo station wagon. Petitioner also asserts that, during the audit period, when he commuted into New York City from New Jersey he would park at one of two parking garages near his office.

126. With respect to his consulting agreement with Wachovia Corporate, he contends that, under the terms of the consulting agreement, he was given an annual "draw" of $125,000.00 as a salary and his expenses were covered. In addition to his salary, under the consulting agreement, petitioner claims that he was entitled to receive 60 percent of any fees received by Wachovia Corporate in excess of his $125,000.00 salary, plus expenses.

127. With respect to the 1995 CTA transaction, petitioner asserts all of the work on this transaction was performed in 1995 and the transaction closed in 1995. According to petitioner, he spent about eight months in various cities working on the CTA transaction in 1995.

128. Petitioner claims that on March 29, 1996, as a result of the 1995 CTA transaction, he and Wachovia Corporate entered into the settlement agreement regarding certain fees that were earned in 1995 and payable under the consulting agreement. He maintains that Wachovia Corporate paid him $774,323.00 pursuant to the settlement agreement which was reported on the 1996 Schedule C. In addition to the $774,323.00, petitioner claims that he received $302,546.00 from Wachovia Corporate in January 1996 with respect to the 1995 CTA transaction as well. Petitioner did not submit any documentation concerning the $302,546.00 amount.

129. While working for Wachovia Corporate during 1995 and through March 29, 1996, petitioner claims to have worked only intermittently out of Wachovia Corporate's New York City office.

130. With respect to the apartments KTV leased in New York City, Atlanta, Georgia and London, England, petitioner claims that they were leased for employees and clients to use while traveling on business. Petitioner further claims that KTV's policy on the use of these apartments mandated that use by clients always came first, and to the extent that a client was in need of an apartment, the client had priority.

131. With respect to the East 56th Street apartment, petitioner maintains that he initially guaranteed the lease for this apartment because KTV was a brand-new company with no credit record, and the building's management company would not accept the creditworthiness of a new corporation as a tenant without a guarantor. Petitioner contends that he did not guarantee the renewed lease on the East 56th Street apartment. Petitioner claims that KTV leased a two bedroom apartment because Mr. Tallman and Mr. Zuravel often traveled together to New York City for business. He also claims that the electric and telephone services were placed in his name solely as a matter of convenience.

132. According to petitioner, he did not live in the East 56th Street apartment and did not store any personal belongings there. He further claims that, other than some clean shirts and a change of clothing that he kept at his health clubs in New York City and some underwear that he kept at Ms. Lin's apartment, he did not keep any clothing in New York City. Petitioner claims that, as with all KTV apartments, KTV's policy on the use of the East 56th Street apartment mandated that use by clients always came first and to the extent that a client was in need of an apartment, the client had priority. According to petitioner, he used the East 56th Street apartment once or twice a month. However, he claims that he was unable to use the East 56th Street apartment whenever he wanted and there were several occasions when petitioner wanted to use

this apartment but could not do so because someone else was using the apartment. Petitioner contends that neither his brother nor his parents ever used the East 56th Street apartment.

133. Petitioner submitted the affidavit of Samuel Tallman and the affidavit of Michael Zuravel, the KTV Member and employee, respectively, listed as occupants of the East 56th Street apartment in the agreement attached to the lease for the apartment, who stayed at the East 56th Street property on numerous days in 1996 and 1997.

134. While petitioner admits that he regularly stayed with Ms. Lin in her York Avenue apartment during1996 and 1997, he maintains that he did not either reside in or maintain the York Avenue apartment.

135. It is petitioner's position that negligence and substantial underpayment of tax penalties assessed by the Division are unwarranted. He contends that he relied upon the Division's guidance concerning the determination of an individual's residency status.

CONCLUSIONS OF LAW

A. In proceedings in the Division of Tax Appeals a presumption of correctness attaches to a notice of deficiency and the petitioner bears the burden of overcoming that presumption (***see, e.g., Matter of Estate of Gucci***, Tax Appeals Tribunal, July 10, 1997, citing ***Matter of Atlantic & Hudson***, Tax Appeals Tribunal, January 30, 1992; ***see also*** Tax Law § 689[e]).

B. Tax Law § 605(b)(1)(A) and (B), sets forth the definition of a New York State resident individual for income tax purposes as follows:

> Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this state, unless (1) 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 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 a New York City "resident" is identical to the State resident definition, except for the substitution of the term "city" for "state." (***See,*** Administrative Code § 11-1705[b][1][A], [B]; ***see also*** 20 NYCRR 295.3[a]; 20 NYCRR Appendix 20, § 1-2[c]). The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources.

C. The first question to be addressed is whether petitioner maintained a permanent place of abode in New York State and City in 1996 and 1997. "Permanent place of abode" is defined as a "dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse (20 NYCRR 105.20[e][1]).

Maintenance of a permanent place of abode is not limited to "any particular usage" and thus applies to "a variety of circumstances" (***see, Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d, 606 NYS2d 404). One may maintain a permanent place of abode by "doing whatever is necessary to continue one's living arrangements in a particular dwelling place . . . includ[ing] making contributions to the household, in money or otherwise" (***Matter of Evans, supra; see also, Matter of El-Tersli***, Tax Appeals Tribunal, January 23, 2003, ***confirmed*** 14 AD3d 808, 787 NYS2d 526).

Based on the information available during the audit, the Division concluded that petitioner had two permanent places of abode in New York City during the audit period, i.e., the East 56th

Street apartment and Ms. Lin's York Avenue apartment. In its brief, the Division no longer asserts that Ms. Lin's York Avenue apartment was a permanent place of abode maintained by petitioner in either 1996 or 1997. Rather, the Division maintains that the East 56th Street apartment was petitioner's permanent place of abode in 1996 and 1997. Petitioner asserts that the evidence clearly establishes that the East 56th Street Apartment was not his permanent place of abode in either 1996 or 1997.

D. I find that petitioner maintained a permanent place of abode in New York State and City continuously from May 1, 1996 through the year 1997. Shortly after KTV was formed, petitioner executed the initial lease on the East 56th Street apartment as senior managing director of KTV and personally guaranteed the initial lease and all subsequent renewals. The initial lease covered the term commencing May 1, 1996 and ending on April 30, 1997. It was renewed for an additional one-year term commencing on May 1, 1997 and ending on April 30, 1998. In addition to executing the initial lease, petitioner also signed a KTV check payable to Glenwood Management Corporation for the October 1996 rent on the East 56th Street apartment. Petitioner personally arranged for electric and telephone service for the East 56th Street apartment and the bills for these utility services were addressed to him personally at the East 56th Street apartment from May 1,1996 through December 31, 1997. Petitioner personally secured monthly parking for the apartment and paid the security deposit and the initial month's parking fee. He personally selected and purchased much of the furniture, household items and supplies for the East 56th Street apartment. Petitioner contends that he did not pay any of the expenses associated with maintaining the East 56th Street apartment because KTV paid the monthly rent and utilities and reimbursed him for his payment of the telephone installation charges and his purchases of furniture, household items and supplies for this apartment as well as the parking fees. I disagree.

During the audit period, petitioner was a Member of KTV, a New York State Limited Liability Company, with a 40 percent ownership interest. Since KTV's operating agreement provided that profits and losses were to be allocated to the Members pro rata in accordance with their membership interest, petitioner indirectly paid 40 percent of all expenses related to the East 56th Street apartment, including among other expenses, the rent and utilities.

Petitioner argues that he did not have free and continuous access to the East 56th Street apartment because KTV policy mandated that clients had priority over KTV members and employees in the use of the East 56th Street apartment. His argument is without merit. There was no written agreement among KTV's partners concerning the use of the East 56th Street apartment. The only written agreement produced relating to the use of the East 56th Street apartment was an agreement attached to the lease that states that the "sole occupant of said apartment during the term of the lease, and all extensions if any, shall be Craig F. Knight, Sam Tallman and Michael Zuravel." Clearly, petitioner had the absolute legal right under the lease to occupy the East 56th Street apartment at any time. Any restrictions placed on petitioner's use of the East 56th Street apartment were self-imposed. Petitioner received one of the three East 56th Street apartment keys issued by the management company. He chose to keep this key at KTV's New York City office. Since none of the partners had a greater controlling interest in KTV than petitioner had, he was authorized to decide if someone else could use the East 56th Street apartment. Furthermore, under KTV's operating agreement, Members had the exclusive right to manage the company's business and to act in all matters on the company's behalf. Indeed, petitioner was consulted by his secretary before the apartment was used by someone else. If petitioner gave KTV's clients and other professionals who worked with KTV preferential treatment with regard to the use of the East 56th Street apartment on particular nights, it was his

personal choice to do so. It is clear that petitioner had unfettered access to the East 56th Street apartment.

Petitioner also asserts that he did not keep any personal belongings in the East 56th Street apartment during 1996 and 1997. In support of this assertion, petitioner submitted the affidavits of Messrs. Tallman and Zuravel, the Member and employee, respectively, of KTV, listed, along with petitioner, as the occupants of the East 56th Street apartment in the agreement attached to that apartment's lease. In addition, petitioner submitted the affidavits of Dr. Begemann and Messrs. Kronthal and Shannon, a client and business associates, respectively, of KTV, who allegedly stayed at the East 56th Street apartment on various days in 1996 and 1997. The Division contends that these affidavits are far from dispositive because the allegations set forth in the affidavits of Messrs. Tallman and Zuravel cannot be reconciled with the allegations set forth in the affidavits of Dr. Begemann and Messrs. Kronthal and Shannon. Specifically, Messrs. Tallman and Zuravel, in their respective affidavits, allege that they kept clothing at the East 56th Street apartment for personal use during their stays in 1996 and 1997; while Dr. Begemann and Messrs. Kronthal and Shannon, in their respective affidavits, each alleges that he stayed at the East 56th Street apartment on various days in 1996 and 1997 and each further alleges that, during his various stays in those years, he saw no evidence in the East 56th Street apartment to indicate that petitioner had been residing there. The Division argues that the affidavits of Dr. Begemann and Messrs. Kronthal and Shannon do not set forth the basis for their conclusion that the clothing allegedly kept at the East 56th Street apartment during 1996 and 1997 did not in fact belong to petitioner. Citing ***Matter of Orvis v. Tax Appeals Tribunal*** (86 NY2d 165, 630 NYS2d 680 ***cert denied*** 516 US 989, 133 L Ed 2d 426), the Division argues that while affidavits are clearly admissible in lieu of oral testimony, the weight to be given to an

affidavit requires careful consideration since it denies the Division the opportunity to cross-examine the witness and it precludes the fact finder from assessing the credibility of the witness.

The regulations of the Tax Appeals Tribunal authorize the submission of affidavits in lieu of oral testimony (20 NYCRR 3000.15[d]), and findings of fact may be made on the basis of affidavits (***see, Matter of Orvis v. Tax Appeals Tribunal***, ***supra***; ***Matter of Seguin***, Tax Appeals Tribunal, October 22, 1992). Affidavits, like testimony, must be scrutinized and weighed with other relevant evidence in the record to determine their ultimate value (***see, Matter of Orvis***, ***supra***; ***Matter of Erdman***, Tax Appeals Tribunal, April 6, 1995). After carefully reviewing the allegations set forth in the five affidavits and the relevant evidence in the record, I do not accord much weight to these affidavits. The affidavits of Messrs. Tallman and Zuravel contain vague allegations which for the most part are not supported by relevant evidence. However, Findings of Fact "55" and "61" are based primarily upon the affidavits of Messrs. Tallman and Zuravel and the relevant evidence in the record. As for the affidavits of Dr. Begemann and Messrs. Kronthal and Shannon, each of these affiants alleges only the total number of days he stayed at the East 56th Street apartment during 1996 and 1997. None of their affidavits contain specific dates for their alleged stays during 1996 and 1997. Nor do the affiants indicate how each individual was able to recall how many days he stayed in the apartment approximately seven to eight years ago. Furthermore, KTV did not maintain a log book documenting the business use of the East 56th Street apartment during 1996 and 1997. As such, I am unable to verify the veracity of the three affiants on this point. In addition, as the Division correctly points out, none of the affiants explain how they knew that the clothing allegedly kept at the East 56th Street apartment during 1996 and 1997 did not in fact belong to petitioner. These affidavits are clearly

insufficient to prove that petitioner's access to the East 56th Street apartment was restricted in any way during 1996 and 1997.

Petitioners contends that there is no evidence of a shared rental. He maintains that he rarely used the East 56th Street apartment, spending on average one or two days per month there throughout the period at issue. His contention is without merit. Clearly, based upon his own admission, petitioner used the East 56th Street apartment as a place of abode in an ongoing and continuous manner, albeit infrequently, from May 1, 1996 through the year 1997. Accordingly, I find that he maintained a permanent place of abode (***see, Matter of Roth***, Tax Appeals Tribunal, March 12, 1989). Among other factors that support the conclusion that the East 56th Street apartment was petitioner's permanent place of abode is the following. Petitioner admitted that he received bank statements personally addressed to him at this apartment from May 1, 1996 through the remainder of the audit period. When the lease was subsequently terminated in June 1999, petitioner had his mail forwarded to Ms. Lin's York Avenue apartment in New York City. Clearly, petitioner received mail at the East 56th Street apartment that he felt was important enough to have forwarded to his new address.

For all of the above reasons, it is clear that petitioner maintained the East 56th Street apartment located at 333 East 56th Street, in New York City as his permanent place of abode continuously from May 1, 1996 through the year 1997.

E. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State and City, and both are at issue in this proceeding. The first, or domicile basis, turns largely on the concept of an individual's "home." The second, or "statutory" resident basis, requires dual predicates for resident tax status, to wit: (1) the

maintenance of a permanent place of abode in the State and City and (2) physical presence in the State and City on more than 183 days during a given taxable year.

F. Neither the Tax Law nor the New York City Administrative Code contain a definition of domicile, but a definition is provided in the regulations of the New York State Department of Taxation and Finance (***see***, 20 NYCRR 105.20[d]). As relevant, it provides as follows:

> *Domicile*. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation in some other place.
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> * * *
>
> (4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode 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.
>
> (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].)

G. In order for there to be 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; ***Matter of Smith and Groh***, Tax Appeals Tribunal, July 23, 1998). Before there can be a finding that a taxpayer changed his domicile, 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'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.

H. 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 in 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,*** 19 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***). The Court of Appeals articulated the importance of establishing intent, when, in ***Matter of Newcomb*** (***supra*** at 251) 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." Performance 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***, 266 NY 283, 289; ***Matter of Jay***, Tax Appeals Tribunal, September 9, 2004).

I. The Division determined that petitioner abandoned his New Jersey domicile and acquired a new domicile in New York City in April 1996. It also determined that this new domicile continued through the year 1997. The Division based this determination upon the new, major life decisions, centering around New York City, made by petitioner in March 1996 and April 1996. Petitioner asserts that he did not abandon his historical domicile in New Jersey in April 1996 and acquire a New York (State and City) domicile at that time. He contends that his activities in 1996 and 1997 served only to maintain his firmly established domicile in New Jersey and did not reflect the intent and actions necessary to change his domicile from New Jersey to New York (State and City).

As the Division correctly points out, petitioner made many life changing decisions in late March 1996 and April 1996. On or about March 26 or 27, 1996, petitioner informally separated from his wife, Patricia, moved out of the marital home in Wyckoff, New Jersey and moved into his childhood bedroom in the upstairs of his parents' home in Rutherford, New Jersey. At that time, petitioner and Scott moved some of petitioner's personal belonging into their parents' home. They also moved some of petitioner's clothing, wine and an automobile to Scott's home at that time as well. On March 27, 1996, the Articles of Organization of KTV, a limited liability company under Section 203 of the Limited Liability Law of the State of New York, were filed with the New York State Secretary of State. On March 29, 1996, the operating agreement of KTV was entered into and adopted by petitioner, Samuel V. Tallman, Jr., and Temmes Capital.

Petitioner, with a 40 percent ownership interest, was one of three Members of KTV. On March 29, 1996, in Atlanta, Georgia, petitioner and Wachovia Corporate entered into a written agreement terminating his January 21, 1992 consulting agreement with Wachovia Corporate. Shortly thereafter, on the same date, KTV entered into a services agreement with Wachovia Capital. As part of this services agreement, Wachovia Capital agreed to provide KTV with office space within the office space Wachovia Capital leased in, among other places, New York, New York. Beginning in April 1996 and continuing through the year 1997, petitioner managed KTV's New York City office which was wholly within Wachovia Corporate's offices located on the 37th floor of 152 West 57th Street. On April 15, 1996, petitioner, as senior managing director of KTV, executed the initial lease on a two-bedroom apartment located at 333 East 56th Street in New York City. Petitioner personally guaranteed the initial lease and all subsequent renewals. The initial lease covered the term commencing May 1, 1996 and ending on April 30, 1997. The lease was renewed for an additional one-year term commencing on May 1, 1997 and ending on April 30, 1998. In April 1996, Ms. Lin, petitioner's then girlfriend (now wife), lived in a one-bedroom apartment on York Avenue in New York City. However, at that time, his relationship with Ms. Lin had not progressed to the point where he was given a key to her apartment. While I believe these events indicate that petitioner's life was in transition, they do not support a finding that petitioner changed his domicile from New Jersey to New York (State and City) in April 1996.

J. A review of the record compels the conclusion that petitioner changed his domicile from New Jersey to New York (State and City) on October 1, 1996 and continued to be domiciled in New York (State and City) in 1997.

Petitioner claims that his actions after his informal separation from his wife reflect a continuation of his status as a New Jersey domiciliary. He maintains that, after his informal separation from his wife, he moved into his parents' home in Rutherford, New Jersey where he continued to live for the remainder of 1996 and 1997. At the hearing, petitioner testified that he compensated his parents for his use of their home by paying them a monthly rental for the first few months that he was living there. Petitioner further testified that, thereafter, in lieu of paying his parents rent, he purchased a small condominium for them in Florida and also paid for several of their vacations and other expenses. According to petitioner, the agreed upon monthly rent was $750.00 plus utilities. In support of his testimony, petitioner submitted the affidavit of his mother, Ruth Knight, copies of some checks payable to petitioner's father, G.R. Knight, and documents pertaining to the purchase of the Florida condominium. The documentary evidence is at odds with petitioner's testimony and the allegations set forth in Ruth Knight's affidavit. First, the record includes only five checks payable to G.R. Knight during the period late March 1996 through September 1996, the length of petitioner's informal separation from his wife, Patricia. The first check payable to G.R. Knight is dated May 28, 1996 and the last check payable to G.R. Knight is dated September 29, 1996. In addition, only the last three checks contain the notation "rent" in the memo section of the check. If, indeed the agreed upon monthly rental was $750.00 plus utilities, petitioner should have been paying rent each month beginning in April 1996, not in the sporadic manner evidenced by the checks. It is significant that the first check written to G.R. Knight is dated May 28, 1996, the end of the same month petitioner began maintaining the East 56th Street apartment in New York City. It is also significant that petitioner stopped giving his father checks in September 1996, the month in which he and his wife formally separated and the same month in which he was no longer allowed to stay in the Wyckoff, New Jersey marital home

overnight on some weekends. I also find it significant that petitioner signed KTV's check in payment of the October 1996 rent for the East 56th Street apartment. As for petitioner's claim that his purchases of a small condominium in Florida, trips and other items for his parents were in lieu of rent, the timing of these purchases does not support his claim. The small condominium was purchased in February 1997 and the cruise was purchased in June 1997, many months after the last check was written to G.R. Knight. Grown children make gifts to their parents all the time. Since petitioner had the means to do so, his gifts were generous. Furthermore, I find it incredible that the agreed upon rental for the use of petitioner's childhood bedroom was $750.00 plus utilities. While petitioner in his brief describes his childhood bedroom as substantial in size, the exact dimensions of this bedroom are not part of the record. I find it significant that, at the time of his informal separation, petitioner was unable to move all of his clothing into this bedroom and had to move some of his clothing into his brother Scott's home. At the time of his informal separation, petitioner moved only personal belongings out of the marital home, not furniture. In light of the utilitarian nature of this bedroom, I find it incredible that petitioner did not purchase any furnishings for this bedroom during the entire period he claims to have resided there. In contrast, petitioner personally selected and purchased much of the furniture, household items and supplies for the East 56th Street apartment in New York City.

Petitioner testified that he had his mail, personal items, works of art and other retail items sent to his parents' home during the time he lived there. This testimony is not supported by the record. From May 1996 through 1997, petitioner received personal bank statements at the East 56th Street apartment in New York City. After the lease for the East 56th Street apartment was terminated, petitioner had his mail forwarded to Ms. Lin's York Avenue apartment in New York City. In addition, his 1996 Am Ex year-end summary was addressed to him in care of Wachovia

Corporate's New York City offices. Moreover, the record indicates that only one painting was shipped to his parents' home in July 1997. At the hearing, petitioner testified that he owned approximately 25 paintings during 1996 and 1997 and about 23 of them were kept at his New York City office (KTV's New York City office).

In support of his claim that he continued to be domiciled in New Jersey after late March 1996, petitioner points out that he continued to support his wife and family, including making payments for household expenses, utilities, a mortgage on the Smuggler's Notch property, a car and Garrett's tuition. Although petitioner and Mrs. Knight formally separated in September 1996, the terms of that separation agreement are not part of the record. There is no question that Mrs. Knight was domiciled in New Jersey during 1996 and 1997. However, since petitioner and Mrs. Knight formally separated in September 1996, he could acquire his own separate domicile.

Petitioner maintains that after he moved out of the Wyckoff property in late March 1996, he continued to remain an active part of the New Jersey community where he lived in 1996 and 1997. At the hearing, petitioner testified that he continued to attend Grace Church in New Jersey and made substantial donations to this church and to the Star of Hope Ministry in Paterson, New Jersey. Although the documentation submitted by petitioner establishes that he did in fact make substantial donations to a Grace Church, it is impossible to ascertain the location of this church. Furthermore, the evidence presented is insufficient to support a finding that petitioner attended Grace Church on a regular basis during 1996 and 1997. The evidence does support a finding that petitioner made substantial donations to the Star of Hope Ministry in 1996 and 1997. It also supports a finding that he occasionally volunteered at the Star of Hope Mission, in Paterson, New Jersey during 1996 and 1997. Petitioner testified that, during 1996 and 1997, he served as a trustee and treasurer of the finance committee for the Saddle River Day School, the school his

son Garrett attended. However, I do not accord any weight to this testimony, in light of the fact that the only evidence presented in support of this testimony were credit purchases of gasoline at a Saddle River gas station reflected in petitioner's American Express year-end summaries for 1996 and 1997. Petitioner testified that he belonged to an indoor tennis club called Quest II, located in Mahwah, New Jersey, and played there twice a week during 1996 and 1997. A review of petitioner's 1996 Am Ex year-end summary indicates that petitioner played tennis only once at this facility, on Thursday, September 12th. There are no charges for Quest II reflected in the 1997 Am Ex year-end summary. In contrast, a review of the 1996 Am Ex year-end summary indicates that petitioner played tennis at the Roosevelt Island Racquet Club located on Roosevelt Island, New York on Sunday, October 20, 1996 and Saturday, November 10, 1996. Further review of these charges indicate that petitioner was a member of the Roosevelt Island Racquet Club at that time. During 1996 and 1997, petitioner maintained active memberships in two social clubs located in New York City, The University Club and the Racquet Club. During the same period, petitioner did not maintain any memberships in any New Jersey social clubs.

Petitioner claims that he maintained his strong connections to New Jersey during 1996 and 1997 in other ways as well. He points out that he voted in New Jersey local elections. Petitioner's voting history is part of the record and he did indeed vote in the general elections held in New Jersey in 1996 and 1997. However, it is noted that he did not vote in the New Jersey general election held in 1995. I am not persuaded that his acts of voting in these two general elections should be accorded more weight than his informal acts which reflect a change of domicile. Petitioner contends that he maintained a New Jersey driver's license and all of his automobiles were registered and serviced in New Jersey during 1996 and 1997. There is insufficient evidence in the record to support his contentions that he continued to maintain his

New Jersey driver's license and the automobile registrations in 1996 and 1997. There is evidence that petitioner continued to have his automobiles serviced at New Jersey dealerships from which the automobiles had been purchased. However, I do not accord much weight to this point on the issue of petitioner's domicile. Many owners of automobiles have them serviced at the dealership from which they purchased the automobile because of warranty reasons. Petitioner also claims that his doctors, dentist and eye care specialists were all in New Jersey and remained so during 1996 and 1997. The record indicates that petitioner did use the services of a New Jersey physician during the first half of 1996 and the services of a New Jersey eye care professional in 1996 and 1997.

K. Petitioner emphasizes that, during 1996 and 1997, he remained active in his sons' lives, both of whom continued to live with their mother in the Wyckoff, New Jersey home, and he spent a great deal of time with his father whose health continued to deteriorate. He points out that he regularly brought his children over to stay with him and his parents at his parents' Rutherford, New Jersey home and to visit with their grandfather who was suffering from lung cancer. Petitioner also points out that he spent Thanksgiving and Christmas Eve in New Jersey and vacations in Vermont with his children during 1996 and 1997. In addition, petitioner points out that, in 1996 and 1997, he served as head coach on his younger son Connor's T-ball team and as an assistant coach on his older son Garrett's Little League team in New Jersey. There is no doubt that petitioner remained active in his sons' lives after he informally separated from his wife in March 1996. Indeed, the record indicates that he continued to remain active in their lives after he formally separated from Mrs. Knight in September 1996. The record also indicates that petitioner and his brother Scott spent time with their father while his health deteriorated and he was hospitalized. It is not necessary for an individual to sever all ties in order to change his

domicile (***see, e.g., Matter of Sutton***, Tax Appeals Tribunal, October 11, 1990). While petitioner's relationship with these family members cannot be disregarded, his general habit of life establishes that he changed his domicile to New York City in October 1996.

Petitioner concedes that he was an active member of a limited liability company that had an office in New York City and that after March 1996, KTV's New York City office was his primary work location, although he often worked outside of New York. Indeed, documents in the record (expense reports and the 1996 Am Ex year-end summary) indicate that, during the period April 1996 through September 1996, petitioner actively worked on a number of pending or potentially sophisticated leasing transactions including one for the Chicago Transit Authority. The documents indicate that the investment banking firm of Dillon Read participated in many of KTV's leasing transactions during the period April 1996 through September 1996. These documents also indicate that, while conducting KTV business, petitioner entertained many of KTV's clients, potential clients and business associates during the period April 1996 through September 1996. Further review of these documents indicates that many of the business-related meals and entertainment took place at New York City restaurants, or the Racquet Club and The University Club - - the two New York City social clubs in which petitioner maintained active memberships during 1996 and 1997. Moreover, some of these business-related meal and entertainment expenses were incurred by petitioner on the weekends.

As noted in the findings of fact, petitioner began his relationship with Teresa Lin in the summer of 1995. The record indicates that, after he informally separated from his wife in late March 1996, his relationship with Ms. Lin continued to grow. In June 1996, their relationship had progressed to the point that Ms. Lin gave petitioner one of the two keys to the front door of her York Avenue New York City apartment. In September 1996, the same month he became

formally separated from his wife, petitioner introduced Ms. Lin to Scott Knight at petitioner's birthday dinner. A review of the expense reports, submitted by petitioner to KTV for reimbursement of expenses he incurred on behalf of KTV, indicate that, from April 1996 through September 1996, Ms. Lin, a senior vice president at Dillon Read, was present at a substantial number of the New York City business-related meals as well as business-related meals that took place in, among other places, London, Boston and Rockport, Massachusetts. It is further noted that some of these business-related meals took place on weekends. It is clear that Ms. Lin provided both personal and professional support to petitioner during the period of his informal separation from his wife. During 1996 and 1997, petitioner regularly stayed overnight at Ms. Lin's York Avenue apartment in New York City. During 1996 and 1997, whenever he stayed overnight in New York City, petitioner stayed at either the East 56th Street apartment or Ms. Lin's York Avenue apartment. It is noted that petitioner's personal relationship with Ms. Lin ultimately led to his divorce from Patricia Knight and his remarriage to Ms. Lin in July 2000. Clearly, petitioner had an emotional bond with Ms. Lin that continued to grow after September 1996.

Petitioner has admitted to spending in excess of 183 days in New York City in both 1996 and 1997. Indeed, documents in the record indicate that petitioner spent an overwhelmingly greater number of days in New York than in New Jersey. A review of the 1996 Am Ex year-end summary and the expense reports indicates that in April 1996, petitioner began spending more time in New York (State and City) than he did in New Jersey and by December 1996, petitioner was spending significantly more time including many weekends in New York (State and City) than he was in New Jersey. A review of the 1997 Am Ex year-end summary indicates that petitioner incurred a significantly greater number of charges for retail items, groceries and

restaurants in New York City than he incurred in New Jersey during 1997. Many of these New York City charges were made on weekends. A substantial number of the charges reflected on petitioner's 1996 and 1997 Am Ex year-end summaries were for purchases made at high-end retail establishments in New York City. In addition, both years' summaries reflect restaurant charges at many of New York City's fashionable, upscale restaurants. The summaries for both years also reflect purchases of tickets for numerous New York City theatrical and musical performances. Furthermore, the Am Ex summaries for both years reflect New York City weekday and weekend parking fees. A review of the telephone bills for the East 56th Street apartment for the period May 1996 through December 31, 1997 as well as other documents in the record indicate that petitioner made numerous telephone calls to various locations in New Jersey, Vermont, Connecticut and Massachusetts on nights and weekends from that telephone. It is clear that petitioner spent the majority of his time in New York and not in New Jersey.

In Conclusion of Law "D," based on a number of factors, I concluded that petitioner maintained the two-bedroom East 56th Street apartment as a permanent place of abode continuously from May 1, 1996 through the year 1997. An important factor which must be emphasized again is petitioner's receipt of personal bank statements at the East 56th Street apartment from May 1996 through December 31, 1997. Given the close proximity of the East 56th Street apartment to both KTV's New York City office at 152 West 57th Street and Ms. Lin's York Avenue apartment, I find it implausible that petitioner would endure an approximately 40 minute commute from his parents' home in Rutherford, New Jersey on a regular basis. I also find it implausible that petitioner would use his childhood bedroom, containing only a twin bed, in the upstairs of his parents' home, when the East 56th Street apartment, located in prime mid-town Manhattan, contained two bedrooms furnished with queen sized beds chosen personally by

petitioner. Moreover, in May 1996, petitioner secured monthly parking for a sports car and sought reimbursement for same in his expense report. Despite petitioner's total inability to recall the specifics of this rental, the record indicates that this monthly parking was associated with the leasing of the East 56th Street apartment. Since Messrs. Tallman, Zuravel and van Tol used taxi or car services to get to the East 56th Street apartment whenever they were in New York City conducting KTV business and petitioner admitted to using his personal automobile in New York City, I must conclude that this monthly rental was for the garaging of petitioner's automobile.

Petitioner claims that he kept all of his "near and dear" property in New Jersey including, among other things, a substantial wine collection, works of art, several automobiles and his academic degrees, with the exception of a limited amount of works of art that he kept in KTV's New York City office. The record belies petitioner's claim. At the hearing, petitioner testified that he owned approximately 25 pieces of artwork and about 23 of them were kept in his New York City office. This leaves only two pieces of artwork that could be kept in New Jersey. Indeed, there is evidence that one painting was shipped to his parents' home in July 1997. A whole paragraph of the matrimonial settlement agreement was devoted to the artwork acquired by petitioner during 1996 and 1997. Obviously, these paintings had significant emotional value to petitioner. In addition, petitioner garaged his Porsche in New York City. While there is evidence that petitioner stored some wine at his brother Scott's home in Rutherford, New Jersey, there is no indication that petitioner had a substantial wine collection.

Even though petitioner made formal declarations that he was domiciled in New Jersey, formal declarations such as voter registration and petitioner's general testimony at the hearing are less significant than informal acts demonstrating an individual's general habit of life (***Matter of Silverman, supra***; ***Matter of Jay***, ***supra***). The totality of the evidence thus compels the

conclusion that petitioner abandoned his New Jersey domicile and acquired a New York State and City domicile on October 1, 1996 and such domicile continued through the year 1997.

L. Even if it were concluded that petitioner was not domiciled in New York (State and City) during the year 1997, he would be properly assessed herein if he maintained a permanent place of abode within New York City and spent in the aggregate more than 183 days there during the year 1997 (Tax Law § 605[b][1][B]; Administrative Code § 11-1705[b][1][B]). 20 NYCRR 105.20(a) provides that an individual not domiciled in New York State is taxable as a resident when such individual maintains a permanent place of abode for substantially all of the taxable year in New York State and spends in the aggregate more than 183 days of the taxable year in New York State. At the hearing, the Division waived the issue of whether petitioner was a statutory resident of New York in 1996.

In Conclusion of Law "D," based on a number of factors, I concluded that petitioner failed to prove that he did not maintain the two-bedroom East 56th Street apartment located at 333 East 56th Street in New York City as a permanent place of abode from May 1, 1996 through the year 1997. Petitioner conceded the second prong of the statutory residency test, stipulating that he spent more than 183 days of the year 1997 in New York City. Accordingly, since petitioner maintained a permanent place of abode in New York City and was present in New York City more than 183 days during 1997, the Division properly concluded that the petitioner was a statutory resident of New York City and New York State for 1997 (***see***, Tax Law § 605[b][1][B]; Administrative Code § 11-1705[b][1][B]; ***see also***, 20 NYCRR 105.20[a]).

M. Tax Law § 689(d)(1) provides as follows:

> If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency and to determine if there

> should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at or before the hearing under rules of the tax commission.

In the instant matter, the Division selected the Knights' tax returns for audit because a tape match program with the IRS indicated that certain Federal tax documents of petitioner's showed a New York address for him, yet he failed to file a New York resident tax return. During the audit, it was discovered that petitioner's 1996 Schedule C indicated gross income in the amount of $1,076,869.00 from Knight Financial Consulting, a sole proprietorship that petitioner operated during the first three months of 1996. Petitioner did not allocate to New York any portion of the $1,076,869.00 in gross income reported on his 1996 Schedule C. Upon review of the original audit workpapers, the Division asserted a greater deficiency at the hearing (***see,*** Findings of Fact "112" through "116").

The record clearly establishes that the Division properly asserted an additional deficiency at the hearing pursuant to Tax Law § 689(d)(1).

N. Tax Law § 601(e) imposes a tax on the New York source income of a nonresident individual. New York source income of a nonresident individual is defined as "the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . derived from or connected with New York sources . . ." (Tax Law § 631[a]).

O. The Division contends that the entire amount of the Schedule C income is "derived from or connected with New York sources" and thus, is properly allocated to New York. Petitioner asserts that he earned the entire $1,076,869.00 in income for consulting services that he provided to Wachovia Corporate in 1995 on a leveraged lease financing transaction for commuter rail cars owned by the Chicago Transit Authority (the CTA transaction). He claims that the CTA transaction was completed and all the work related to this transaction was

performed by him, in 1995. Petitioner further claims that virtually all of his work on this project was done out of the marital home in Wyckoff, New Jersey, in London, Atlanta, Amsterdam, The Netherlands, Zurich and in Chicago, Illinois where the project was located. He maintains that only a *de minimus* amount of work on this project, involving meetings on a few days, was performed in New York City. Therefore, petitioner avers that none of this income reported on his 1996 Schedule C is properly allocable to New York.

After reviewing the record, I find that the $1,076,869.00 in business income from Knight Financial Consulting reported on petitioner's 1996 Schedule C was completely derived from or connected with New York sources and the Division properly allocated the entire amount of this income to New York for the period January 1, 1996 through March 31, 1996.

Petitioner began working as a consultant for and entered into a written consulting agreement with Wachovia Corporate on or about January 21, 1992. However, petitioner failed to submit a copy of this consulting agreement into the record. Rather, at the hearing, petitioner offered very limited testimony concerning the terms of his consulting agreement. Under the terms of the consulting agreement, petitioner claims he was given an annual "draw" of $125,000.00 as a salary plus his expenses were covered. In addition to his salary, petitioner also claims that he was entitled to receive 60 percent of any fees received by Wachovia Corporate in excess of his $125,000.00 salary, plus expenses. Petitioner did not provide any information concerning the procedures he followed to receive his "draw," plus expenses and his 60 percent share of the fees received by Wachovia Corporate in excess of his $125,000.00, plus expenses. He did not offer any other testimony concerning the provisions of his consulting agreement with Wachovia Corporate. Wachovia Corporate, an affiliate of Wachovia Bank, had offices in, among other places, Atlanta, Georgia and New York, New York. At some point prior to the

years at issue, Wachovia Corporate leased the 37th floor of 152 West 57th Street, New York, New York. Petitioner offered very vague testimony concerning his agreement with Wachovia Corporate with regard to his use of Wachovia Corporate's New York City office. While he admitted that a "guest office" within Wachovia Corporate's New York City office space was available for his use during the year 1995 and the period January through March 1996, he claimed that he used that office only "intermittently" during that period. I find petitioner's testimony concerning the terms of his consulting agreement and his use of Wachovia Corporate's New York City offices to be vague and less than forthright. Documents in the record indicate that, during the year 1995 and the period January through March 1996, while working as a consultant to Wachovia Corporate, petitioner worked out of Wachovia Corporate's New York City offices. Specifically these documents include a copy of the four-page invoice, dated March 25, 1996, that petitioner submitted to Wachovia Corporate for reimbursement of various expenses incurred during the period January 11, 1996 through March 24, 1996. The expenses listed on this invoice include tolls and parking fees incurred while performing New York City business for Wachovia Corporate. The record also indicates that in addition to working out of Wachovia Corporate's New York City offices, petitioner also worked out of the New York City offices of lawyers and investment bankers during the year 1995 and the period January through March 1996. It is clear that petitioner performed consulting services for Wachovia Corporate in New York City during the year 1995 and the period January through March 1996. Furthermore, based on the manner in which petitioner identified himself in the invoice he submitted to Wachovia Corporate and his claimed deduction of the New York State Bar fee on his 1996 Schedule C, it is clear that petitioner rendered legal advice as part of his performance of consulting services for Wachovia Corporate. Therefore, all income that petitioner earned

performing consulting services for Wachovia Corporate in New York State is attributable to a profession carried on in this State and is subject to New York State and City taxes (***see, Matter of Vigliano***, Tax Appeals Tribunal, January 20, 1993).

In support of his contention that he received a total of $1,076,869.00 in 1996 from Wachovia Corporate for fees he earned in 1995 in connection with the CTA transaction, petitioner submitted a copy of a termination agreement dated March 29, 1996. The terms of this termination agreement do not support petitioner's contention that the $1,076,869.00 was earned in 1995 in connection with the CTA transaction. This termination agreement, entered into by petitioner and Wachovia Corporate, settles "a disputed claim made by" him against Wachovia Corporate for "internal fees" relating to the January 21, 1992 consulting agreement, and implements the undisputed portion of his consulting agreement and a letter agreement dated September 26, 1995. With respect to Mr. Knight's disputed claim, Wachovia Corporate agreed to make an aggregate payment of $2,443,833.00, of which $643,833.00 was to be paid in accordance with Section 1.1 of the termination agreement and $1,800,000.00 was to be paid pursuant to a deferral agreement. Section 1 of the termination sets forth the parties' agreement concerning "the aggregate compensation payable to Knight for services rendered pursuant to the Consulting Agreement" and the manner in which it was to be paid. Section 1.1 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $643,833.00. Section 1.3 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $128,863.00, "representing interest accruing on the principal amounts owed by" Wachovia Corporate to petitioner "pursuant to the Consulting Agreement." Section 1.4 provides that, upon the execution of this agreement, Wachovia Corporate would pay petitioner the sum of $1,627.00, "representing interest accruing on the

principal amount of $100,000.00 owed by [Wachovia Corporate] to Knight pursuant to the Electrolux Agreement." Pursuant to Section 1 of the termination agreement, Wachovia Corporate paid petitioner a total of $774,323.00. Petitioner reported this amount as other income on his 1996 Schedule C. It is clear from reading this termination agreement, that, of the total amount of $774,323.00 paid by Wachovia Corporate pursuant this agreement, $772,696.00 was paid in settlement of petitioner's disputed claim for internal fees related to his January 21, 1992 consulting agreement and the remaining $1,627.00 was paid pursuant to the Electrolux agreement. Petitioner failed to submit copies of many of the documents identified and referred to within the provisions of the termination agreement including, among others, the consulting agreement and the Electrolux agreement. He also did not submit any documentary evidence regarding his disputed claim against Wachovia Corporate for "internal fees" relating to the consulting agreement. At the hearing, petitioner admitted that the Electrolux agreement did not have anything to do with the CTA transaction. Since I do not have either the documents related to petitioner's disputed claim for internal fees or the Electrolux agreement, I must rely on other evidence in the record in making my determination. As noted above, it is clear that petitioner performed consulting services for Wachovia Corporate in New York City during the year 1995 and the period January through March 1996. Since all of the consulting services that petitioner performed for Wachovia Corporate were performed in accordance with his written consulting agreement, I must conclude that the entire $774,323.00 is derived from or connected with New York sources for the period January 1, 1996 through March 31, 1996 and is properly allocated to New York State and New York City as New York source income.

In addition to the $774,323.00 that he received in March 1996 pursuant to the termination agreement, petitioner claims that he received $302,546.00 from Wachovia Corporate in January

1996 for fees he earned in 1995 in connection with the CTA transaction. Petitioner did not submit into the record any of the invoices, previously submitted to Wachovia Corporate, in which he sought reimbursement of expenses he incurred during the year 1995. Rather, the record includes a copy of a four-page expense invoice, dated March 25, 1996, originally submitted to Wachovia Corporate, indicating travel expenses from January 1, 1996 through March 24, 1996 submitted by petitioner during the audit in support of claimed travel expenses on his 1996 Schedule C. The notation "CTA DEAL" is typewritten throughout the comment section of this four-page invoice. Inasmuch as petitioner deducted these travel expenses along with other expenses including his New York State Bar fee from the $1,076,869.00, i.e., the sum of $774,323.00 (the amount paid pursuant to the consulting agreement) plus $302,546.00, I must conclude that the $302,546.00 that petitioner reported as gross receipts or sales on his 1996 Schedule C is derived from or connected with petitioner's performance of services for Wachovia Corporate in New York during the period January 1, 1996 through March 31, 1996 and, as such, is properly allocated to New York State and New York City as New York source income.

In sum, the Division's determination that $1,076,869.00 in business income from Knight Financial Consulting reported on petitioner's 1996 Schedule C was completely derived from or connected with New York sources and its allocation of the entire amount of this income to New York for the period January 1, 1996 through March 31, 1996 was proper.

P. In the original Notice of Deficiency issued on February 18, 2003, the Division imposed penalties 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. The issue of domicile is a legal one, albeit driven by the facts of the case. Petitioner's failure to pay the tax herein was due to a different legal interpretation from that of the Division. The failure to pay tax due to a different legal interpretation of a statute need not be considered reasonable cause. If it were so considered, the Division would rarely be entitled to levy such penalties (***Matter of Auerbach v. State Tax Commn***., Sup Ct, Albany County, March 27, 1987, Williams, J., ***affd*** 147 AD2d 390, 536 NYS2d 557; ***see also***, ***Matter of Erdman***, ***supra***). Petitioner's denial that he maintained living quarters in New York on his and Mrs. Knight's 1996 nonresident return supports the imposition of the negligence penalties. Additionally, petitioner failed to prove that he was not a statutory resident. The imposition of penalties is therefore sustained.

Q. As noted in Finding of Fact "1," on February 18, 2003, the Division issued the original Notice of Deficiency asserting additional New York State and City personal income tax in the aggregate amount of $545,076.91, plus penalty and interest. This deficiency resulted from the Division's conclusion that petitioner was properly subject to tax as a resident of New York State and City from April 1, 1996 through December 31, 1996 and for the year 1997. In Conclusion of Law "J" and "K," I determined that petitioner abandoned his New Jersey domicile and acquired a New York State and City domicile on October 1, 1996 and such domicile continued through the year 1997. Therefore, the Division is directed to recompute the New York State and New York City tax due for the period April 1, 1996 through September 30, 1996 in accordance with the determination that petitioner was a nonresident of New York State and City during this period.

R. The petition of Craig F. Knight is granted in accordance with Conclusion of Law "Q"; the Division is directed to modify the Notice of Deficiency dated February 18, 2003 accordingly,

but in all other respects the petition is denied. As so modified, the Notice of Deficiency dated February 18, 2003 is sustained and the assertion of a greater deficiency in the amount of $73,669.00 by the Division is allowed.

DATED: Troy, New York
June 9, 2005

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE