STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JULIAN H. AND JOSEPHINE ROBERTSON	:	DETERMINATION DTA NO. 822004
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the New York City Administrative Code for the Year 2000.	:	

Petitioners, Julian H. Robertson and Josephine Robertson, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the New York City Administrative Code for the year 2000.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Centre Street, Room 2405, New York, New York 10007 on September 23, 2008 at 10:30 A.M., and was continued, commencing at 9:15 A.M. for three consecutive days thereafter, to conclusion on September 26, 2009, with all briefs to be submitted by February 13, 2009, which date commenced the six-month period for issuance of this determination. By a letter dated August 3, 2009, this six-month period was extended for an additional three months (Tax Law § 2010[3]). Petitioners appeared by Feingold & Alpert, LLP (Fred Feingold, Esq., Mark E. Berg, Esq., and Kristin King, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Herbert M. Friedman, Jr., Esq., and Michelle M. Helm, Esq., of counsel).

ISSUE

Whether petitioners were properly subject to New York City personal income tax as statutory resident individuals pursuant to New York City Administrative Code § 11-1705(b)(1)(B) for the year 2000.[1]

FINDINGS OF FACT [2]

1. Petitioners, Julian H. Robertson and Josephine Robertson, filed their New York State Resident Income Tax Return (Form IT-201) for each of the years 1997 and 2000 on the basis that they were nonresidents of New York City, and for each of the years 1998 and 1999 on the basis that they were residents of New York City.

2. On or about September 7, 2000, the Division of Taxation (Division) commenced an audit of petitioners' personal income tax returns for a period which, over time, encompassed the years 1995 through 2001. The audit included review of the propriety of interest deductions taken by certain investment funds, certain other partnership flow-through items in respect of those funds, and petitioners' New York City residency status for the years 1997 and 2000. The auditor determined that petitioners correctly reported the interest expense and other flow-through items, and that petitioners also correctly filed as New York City nonresidents in 1997. With respect to

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[1] Petitioner Josephine Robertson's name appears herein by virtue of having filed joint federal and New York State and City personal income tax returns with her husband, petitioner Julian H. Robertson. Unless otherwise specified or required by context, references using the singular term petitioner shall mean petitioner Julian H. Robertson.

[2] The parties to this matter entered into a Stipulation of Facts setting forth some 99 numbered and agreed to facts together with supporting documents, and such stipulated facts are incorporated into the Findings of Fact set forth herein. In addition, petitioners submitted with their brief proposed findings of fact numbered 1 through 98. The Division accepted many of such proposed facts but disagreed, in part or in whole, with the accuracy or completeness of 38 of such proposed facts. Petitioners, in response, submitted revised proposed findings of fact to address the Division's disagreements and concerns regarding accuracy and completeness. To the extent not disagreed and, further, as relevant, accurate and appropriate via revisions thereto, the proposed findings of fact have been incorporated into the Findings of Fact set forth herein. Rulings with regard to the disagreed proposed facts are also set forth after the Findings of Fact herein.

the year 2000, the Division conceded that petitioner was not a domiciliary of New York City, but determined that he had not established to the Division's satisfaction, under its understanding of the applicable burden of proof, that he was not present in New York City on more than 183 days in the year 2000, and on that basis determined that petitioner was subject to tax as a "statutory resident" of New York City.[3]

3. On September 18, 2006, the Division issued to petitioners a Notice of Deficiency asserting additional New York City personal income tax due for the year 2000 in the amount of $26,702,341.00, plus interest. No penalties or additions to the tax were asserted by the Division. This notice was premised solely upon the Division's conclusion that petitioner was a statutory resident of New York City. A conciliation conference was held, at which time the Division's auditor agreed that three of the seven days which had been in question up to the time of the conciliation conference were properly treated as non-New York City days. Accordingly, on September 17, 2007, a Conciliation Order (CMS No. 216932) was issued sustaining the Notice of Deficiency and confirming that there remained four specific days in dispute, to wit, April 15, July 23, July 31 and November 16, 2000 (the disputed days).

4. Petitioner has acknowledged that he maintained a permanent place of abode in New York City in 2000. Further, the parties have stipulated that petitioner was present in New York City, as such presence has been defined for purposes of counting the number of days in New York City upon which the status of statutory residence is determined, on 183 specific days (NYC days), and was not present in New York City for such purposes on 179 specific days (non-NYC days). The stipulated specific NYC days and non-NYC days, totaling together 362 days, are set

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[3] A "statutory resident" of New York City is an individual who maintains a permanent place of abode within New York City and spends, in the aggregate, more than 183 days in a given year in New York City.

forth on separate appendices as part of the parties' stipulation, thus leaving the sole issue in this proceeding whether petitioner has established that none of the four disputed days listed above was a NYC day.

5. During 2000, petitioner was Chairman of Tiger Management (Tiger), which actively managed several large hedge funds and had its offices at 101 Park Avenue in New York City.[4] Since he founded Tiger in 1980, petitioner's role at Tiger has been the "trigger puller," personally approving and overseeing the implementation of roughly 97% of all trades that were made. Petitioner has the highest reputation for integrity, character and honesty, both in the financial community and more generally, and the Division specifically acknowledged that it is not questioning petitioner's integrity or honesty in this proceeding.

6. In May 2000, the hedge funds managed by Tiger were closed down, and over the ensuing months, Tiger's various positions were closed out and Tiger began a gradual transition from being a hedge fund manager to "seeding" other managers' hedge funds. After the hedge funds were closed down, petitioner continued to manage a considerable amount of his personal funds from his offices at Tiger, but was not required to be in the office as much as before the funds were closed. In addition to business activities, petitioners established and have been actively involved in a charitable foundation that recently had a corpus of nearly one billion dollars.

7. Throughout 2000, petitioners maintained their home and their domicile on Long Island in Locust Valley, New York (the Locust Valley home). The Locust Valley home includes a large house situated on ten acres that has served as the Robertsons' family home since 1986. In

[4] Access to Tiger's offices may be gained via building entrances located both at 101 Park Avenue and at 99 Park Avenue.

addition to the Locust Valley home, petitioners also maintained an apartment on Central Park South in New York City (the Apartment), and a vacation home in Sun Valley, Idaho. Petitioners also rented a house in Southampton, New York, for approximately six weeks each summer, including the period July 29, 2000 through September 4, 2000.

8. For the past 22 years, Bob Young has worked for petitioners as the property manager and caretaker of the Locust Valley home and has lived in an attached two-bedroom cottage on the property. Mr Young's telephone line at the cottage is separate from petitioners' telephone lines at the Locust Valley home.

9. As part of his duties as property manager and caretaker over the years, including during 2000, it would not be unusual for Mr. Young to work inside the Locust Valley home on weekdays during his work day, which spans roughly the hours between 8:00 A.M. and 6:00 P.M., and in the course of his duties to place telephone calls from the Locust Valley home, including calls to the Apartment to speak with or leave messages for Mrs. Robertson. When Mrs. Robertson wished to reach Mr. Young, she would always call him at his telephone number at his cottage, rather than at the number for the Locust Valley home. It would have been unusual for Mr. Young to be working in the Locust Valley home in the evening, or for Mr. Young to call the Apartment from the Locust Valley home after 5:00 P.M. While a total of 53 telephone calls were made from the Locust Valley home to the Apartment on days in 2000 when petitioner was not at the Locust Valley home, no such calls were made on a Saturday or Sunday, no such calls were made after 8:00 P.M., and only two of these calls were made after 6:00 P.M.

10. In addition to property management, Mr. Young's duties over the years, including 2000, have included serving as petitioner's driver and, in the course of those duties, driving petitioner from his Locust Valley home to New York City and to local airports, and from New

York City and local airports to his Locust Valley home. Mr. Young did not serve as petitioner's driver when petitioner was in Southampton.

11. Over the years, including 2000, when petitioner would spend the weekend in Locust Valley, Mr. Young would routinely pick him up at his office in New York City on Friday afternoons and drive him either to the Locust Valley home or to Deepdale Golf Club in Manhasset (Deepdale), where petitioner regularly played golf. Whenever Mr. Young drove petitioner from his office in New York City to either his home in Locust Valley or Deepdale on a Friday, he customarily picked petitioner up before 3:00 P.M. in order to avoid traffic on the Long Island Expressway, which tended to get heavier after that time. Leaving between 3:00 and 3:30 P.M. on a Friday, the trip from the office to Locust Valley would generally take roughly two hours. Mrs. Robertson frequently would not accompany petitioner on these car trips from his office to Locust Valley and in such instances, it would not be unusual for petitioner to call Mrs. Robertson when he arrived at the Locust Valley home if she was staying in New York City.

12. Over the years, including 2000, Mr. Young also routinely drove petitioner from the Locust Valley home to his office in New York City on Monday mornings following weekends petitioner spent in Locust Valley. On such mornings, they usually left Locust Valley between 6:00 and 6:30 A.M., again for traffic reasons, which would generally get petitioner to his office between 7:30 and 8:00 A.M. When petitioner traveled from Locust Valley to an airport during Mr. Young's normal working hours, Mr. Young typically drove him there. Mr. Young has never driven from Locust Valley to pick petitioner up from the Apartment for the purpose of driving him to his office, and petitioner would not ask Mr. Young to do so.

13. Generally, if petitioner was leaving New York City after 6:00 or 7:00 P.M., he would not call Mr. Young but rather would take a car service home, if available, or use another means of

transportation, if not. There have been occasions over the years when petitioner had difficulties getting a car service to take him from the Apartment to Locust Valley because, for example, a driver would refuse to take petitioners' large dog or would go to the wrong pickup address. Petitioner recalled at least one instance where he had to call multiple car services before getting a car. Petitioner and Mrs. Robertson both testified that there has never, however, been a time, in 2000 or otherwise, when petitioner intended to leave New York City before midnight on a particular day and these or other difficulties prevented him from doing so, even if that meant getting a taxi on the street. Mr. Young used petitioners' vehicle when he drove petitioner somewhere, and did not issue a voucher or receipt to petitioner nor did he make any records of these car trips, but rather picked petitioner up whenever petitioner or one of petitioner's assistants at Tiger called and asked him to do so. Based on the totality of the records provided, the Division accepted as non-NYC days eight Fridays and Saturdays in 2000 on which petitioner was in Locust Valley but for which there is no car service voucher for a trip to Locust Valley the day before.[5]

14. In 2000, the Apartment was staffed on nearly a full-time basis by individuals including Trudy Ainge, who served as petitioners' chef and lived with her husband in an apartment within the Apartment, and Elizabeth Balagtas, who served as petitioners' housekeeper and was at the Apartment during the day five days per week.

15. The Apartment has several extra bedrooms for use by petitioners' sons and other house guests. In 2000, petitioners had numerous and frequent house guests at the Apartment, both when they were at the Apartment and when they were not, with their son Spencer, in particular,

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[5] The particular dates are May 6, May 20, June 3, June 10, June 17, September 9, December 9 and December 15.

spending a lot of time there in the summer of 2000. All of petitioners' sons, staff and house guests at the Apartment had unlimited access to, and frequently used, the telephones there, and did not have to ask permission to use them. Indeed, in 2000, many persons other than petitioner had access to the telephones at the Apartment, and persons other than petitioner made telephone calls from the Apartment on 127 days on which petitioner was not at the Apartment or otherwise in New York City.

16. Petitioners are avid golfers, and during 2000 they had memberships at several golf clubs on Long Island, including Deepdale. Petitioner travels frequently for both pleasure and business, often but not always with Mrs. Robertson. In 2000, petitioner owned a private aircraft, which was operated and managed by Key Air Incorporated (Key Air), and which he utilized for most of his travel outside the local area. Petitioner's lifestyle, including having a private aircraft and a private driver, enabled him to travel and spend time at each of petitioners' several residences in 2000, and to take numerous trips outside New York City during 2000. In 2000, petitioner spent roughly seven weeks in Australia and New Zealand, five weeks in Southampton, two weeks in Sun Valley, a week in Arizona and shorter periods in each of several other places.

17. In 2000, petitioner's arrangements with Key Air were such that petitioner had the option of flying into or out of any of several New York area airports on his private plane, including Republic Airport in East Farmingdale, Long Island (Farmingdale), Teterboro Airport in Teterboro, New Jersey (Teterboro), and LaGuardia Airport (LaGuardia). He would generally choose which New York area airport to fly out of or into for a particular trip depending on from where he and his traveling companions would be arriving at the airport, or where they would be going from the airport. If the traveling party would all be arriving from or going to Manhattan, petitioner generally chose Teterboro because it is much closer to New York City than is

Farmingdale, and less expensive and less prone to ground traffic and air traffic delays than LaGuardia. If, instead, the traveling party would all be arriving from or going to Locust Valley, petitioner generally chose Farmingdale. Finally, if petitioner or other passengers would be arriving from or going to Locust Valley while other members of the traveling party would be arriving from or going to Manhattan or, in some instances, if the nature of the trip would require the travelers to pass through (clear) United States Customs, petitioner generally would choose LaGuardia as an alternative most convenient to all.[6]

18. Before the Apartment became available to petitioner in late 1996, petitioner sought and received specific advice regarding the New York City statutory residency rules. Petitioner was advised that once the Apartment became available, he would be considered a New York City statutory resident for any calendar year in which he was present in New York City (other than while in transit between two points outside New York City) on more than 183 days. Petitioner understood that if he spent any part of a day in New York City, even five minutes, that day would be considered a NYC day unless he was traveling through New York City between two non-New York City points. Petitioner's intention for each year beginning with 1997 was to spend fewer than 184 days in New York City so that he would not be held taxable as a resident of New York City.

19. Petitioner in fact limited his New York City presence in 1997 to 183 or fewer days, as the Division determined on audit. Beginning in 1998 and continuing through 1999, however, Mrs. Robertson was being treated for cancer in New York City, and as a result, petitioner was unable to limit his New York City presence during those years to 183 or fewer days.

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[6] Of the four disputed days, only July 23 involved a reference to United States Customs. The flight on this date, from Ireland to LaGuardia, cleared United States Customs in Bangor, Maine.

Accordingly, petitioners filed their 1998 and 1999 New York personal income tax returns on the basis that petitioners were statutory residents of New York City for each of such years.

20. Mrs. Robertson's treatment was completed in 1999, and by 2000 she was recovered and remained so until recently. Petitioner's business did not require him to be present in New York City for more than 183 days in 2000, and he determined to arrange his schedule in 2000 so as to limit his NYC days in 2000 to 183 or fewer, and thereby to be considered a nonresident of New York City in 2000. Petitioner was focused throughout 2000 on limiting his New York City presence in 2000 to 183 or fewer days, with the focus intensifying as the year progressed and the number of remaining available days diminished. In this connection, the following exchange occurred during the Division's cross-examination of petitioner:

> Q: Now you testified that your focus was to leave New York [City] as often as possible because of the day count situation?
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> A: Yes, sir.
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> Q: Was that focus as strong in the early part of the year as it was in the later part of the year?
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> A: Well, I think it was a pretty strong thing, I mean –
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> Q: But obviously earlier in the year –
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> Judge Galliher: You have to let the witness finish. I don't think he was finished.
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> Q: I beg your pardon.
>
> A: Well, I mean obviously if it were December the 31st and I was missing a date, I was damn sure going to be out of town. If – so, I guess your point is proven.
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> Q: It's not a point. I am just asking to try to make sure I understand your thought process here. Obviously your focus on getting out of the City is not quite as important in March, let's say, as it would be December 31st, as you pointed out, if there was one day; is that right?

A: It's probably right.

Q: Probably right or it is right?

A: It is right.

21. There is no claim that petitioner spent every Saturday and Sunday in 2000 outside of New York City and the record, including the Electronic Calendar, reflects a number of Saturdays when petitioner had no scheduled appointments in the City yet spent Saturday (and the preceding Friday) in New York City (e.g., January 29, March 4, 11, 18, and 25, April 8). Nonetheless, petitioner took a number of steps to effectuate his intention not to exceed 183 NYC days in 2000. First, petitioner refrained from spending days in New York City when his schedule did not require such New York City presence, for example, by going to the Locust Valley home on Friday afternoons and not returning to New York City until the following Monday. When he was not required to be in New York City over the weekend, petitioner would leave New York City on Friday, rather than spending Friday evening at his Apartment in New York City, in order to "earn a tax day" on Saturday.[7] Second, petitioner avoided spending unnecessary time during weekends in New York City. Third, petitioner made it a point to leave New York City before midnight on the day before a day he would not need to be in New York City, even when he was entertaining guests at the Apartment in the evening. In this regard, if he did not need to be in New York City the following day, he would leave so that the ensuing day would be a "tax day." Fourth, on travel days, petitioner generally avoided "wasting" a NYC day by arriving at the airport from, or traveling from the airport to, Locust Valley if he did not have a reason to go to New York City prior to his departure or after his arrival. Finally, petitioner specifically charged Julie

[7] Petitioner and his principal assistant, Julie Depperschmidt, used the phrases "earning a tax day," "earning a tax-free day" or "getting the day" as a reference to mean successfully staying out of New York City on a particular day.

Depperschmidt, his primary assistant at Tiger, with the responsibility of maintaining an accurate, contemporaneous account of petitioner's whereabouts during 2000 and keeping petitioner advised on a periodic basis of his cumulative days in and out of New York City such that he could plan his schedule so as to achieve his objective of limiting his New York City presence in 2000 to 183 days or fewer.

22. In 2000, petitioner's personal assistants at Tiger were Ms. Depperschmidt and Emily Falkenstein. Ms. Depperschmidt has worked at Tiger since 1994, began working directly with petitioner in 1996 and has been petitioner's primary executive assistant since 1999. Ms. Falkenstein began working directly for petitioner in May 2000.

23. Ms. Depperschmidt's principal duties as petitioner's primary executive assistant at Tiger in 2000 included scheduling petitioner's business appointments, keeping a contemporaneous record of petitioner's days in and out of New York City for New York City personal income tax purposes, and keeping petitioner apprised from time to time of his total actual and anticipated NYC days.

24. Additional duties of Ms. Depperschmidt and petitioner's other assistants included making petitioner's business and certain personal travel arrangements, answering petitioner's telephone at Tiger, connecting incoming calls through to petitioner when he was out of the office and placing telephone calls for petitioner both when he was in the office and when he was not in the office. In addition, petitioner's assistants retrieved voicemail messages left on petitioner's direct telephone line. Petitioner does not know how to retrieve voicemail messages at Tiger, and has never done so.

25. Ms. Depperschmidt and Ms. Falkenstein also arranged for town cars to pick petitioner up at the office or at other locations, in which case they, rather than he, would often sign the car

service voucher. The car service petitioner used most often in 2000 was UTOG 2 Way Radio, Inc. (UTOG). All of the UTOG vouchers for car trips which petitioner acknowledged he took in 2000 that were not signed by petitioner himself were signed by Ms. Depperschmidt or Ms. Falkenstein.

26. Because petitioner did not carry a cell phone in 2000, and because petitioner made or had input on virtually all of the investment decisions at Tiger, many of which were time-sensitive, it was essential that petitioner's assistants, and particularly his principal assistant Ms. Depperschmidt, know where he was when he was out of the office on a business day so that they would be able to reach him by telephone on a land line or on his car phone to connect him with people at Tiger or elsewhere who needed to speak with him. When petitioner was out of the office on a business day, whether in Locust Valley, in Southampton or on vacation, he would frequently call the office, starting when he got up in the morning, and his assistants would frequently call petitioner.

27. In 2000, Tiger's offices were open Monday through Friday other than holidays, and were closed on Saturdays and Sundays. When petitioner was in the office, he generally arrived between 7:15 A.M. and 9:00 A.M. Petitioner was not usually in the office on weekends or holidays.[8] Ms. Falkenstein's office hours in 2000 were 7:30 A.M. to 4:00 P.M., Monday through Friday. Ms. Depperschmidt's office hours in 2000 were 9:00 A.M. to 5:30 P.M., Monday through Friday.

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[8] The record does not specify that petitioner was never in the office on a weekend. However, Ms. Depperschmidt explained that weekend access to the office requires a security pass and petitioner was either never issued a security pass or, if issued a pass, has not seen or used the same in 15 or more years. The notation "Julian not in office," as appearing on various dates in the Planner section of the Electronic Calendar (described and discussed in later Findings of Fact) was a designation used to prevent petitioner's assistants from scheduling appointments rather than as a definitive statement of petitioner's whereabouts, the absence of which designation would indicate petitioner was present in the office.

28. During 2000, petitioner caused to be maintained as a business record an electronic calendar detailing his appointments and whereabouts (the Electronic Calendar). The Electronic Calendar was contemporaneously maintained by petitioner's assistants at Tiger, and principally by Ms. Depperschmidt.

29. In petitioner's business, the accuracy of records is imperative and, accordingly, petitioner hired people he believed to be highly competent and thoroughly trustworthy to maintain his business records, including his Electronic Calendar. Petitioner chose Ms. Depperschmidt to keep the record of his whereabouts during 2000 because he viewed her as highly competent and efficient.

30. Ms. Depperschmidt considered her "mandate" of keeping track of petitioner's days in and out of New York City for New York City tax purposes to be a very clear direction that was one of her primary roles at Tiger as petitioner's assistant, second only to managing petitioner's daily movements (i.e., petitioner's schedule of appointments, commitments and obligations). Ms. Depperschmidt understood that any day on which petitioner was physically present in New York City, even for five minutes, was considered a NYC day, unless he was in transit between two points outside New York City. She also understood that her mandate in this regard was to ascertain and keep an accurate record of petitioner's non-NYC days, and that this mandate did not require that she know where exactly outside New York City he was at every moment on any non-business day that was a non-NYC day. Thus, for example, it was not significant to Ms. Depperschmidt in carrying out her mandate whether petitioner spent a non-NYC day in Locust Valley rather than Southampton, or in Australia rather than New Zealand, since her mandate required only that she confirm whether petitioner was or was not in New York City on a

particular day. It was significant to Ms. Depperschmidt to be able to contact petitioner during her working hours in order to be able to connect petitioner with or to other people as necessary.

31. Petitioner also charged Ms. Depperschmidt with the responsibility of keeping him advised from time to time during 2000 of his total non-NYC days to date and his anticipated additional non-NYC days for the rest of the year, so that he would know whether and how many more non-NYC days he needed to schedule in order to achieve his objective of limiting his New York City presence to not more than 183 days. Ms. Depperschmidt would remind him "ad nauseum" of what he needed to do to reach 183 or more non-NYC days in 2000, and advised him to schedule more than 183 non-NYC days in 2000. The advice Ms. Depperschmidt gave petitioner from time to time regarding his non-NYC days to date and his expected non-NYC days to date affected his decisions regarding his whereabouts later in the year.

32. The Electronic Calendar was maintained by Ms. Depperschmidt on a computer software program called Lotus Organizer, a widely used calendar program. Beginning in 2000 and for all years since 2000, the name of the computer file in which data have been contemporaneously entered into the Electronic Calendar has been "Jhr2000.or6," which file resides on the hard drive on Ms. Depperschmidt's computer at Tiger. As noted hereinafter, the data for 2000 and each of certain other years has since been "archived," i.e., copied without change, into an archive file. While the file "Jhr2000.or6" resides on the hard drive in Ms. Depperschmidt's computer at Tiger, the record does not specify whether the "relevant portions" (i.e., the entries for 2000) today physically remain on the hard drive of Ms. Depperschmidt's computer or rather were deleted from that hard drive after (and as part of) the archiving process consistent with clearing hard drive space so as to enable better (i.e., faster) program function.

33. Ms. Depperschmidt testified at great length and in great detail regarding the Electronic Calendar, including its components, its features, how it functioned and her methodology in maintaining and utilizing it. In 2000, the Electronic Calendar included two main components: a portion that functioned as petitioner's appointments calendar (the Appointments Calendar), which was accessible using the tab entitled "Julian's Schedule," and a portion that functioned as a planner section, in which staff vacations and certain other items were entered and petitioner's non-NYC days were contemporaneously recorded (the Planner Section), which was accessible using the tab entitled "Vacation." Ms. Depperschmidt's references to the "electronic calendar" in her affidavits and in her testimony meant, to her, the computer file that includes both the Appointments Calendar and the Planner Section portions of the Electronic Calendar. A printout of the Planner Section of the Electronic Calendar was provided to the Division prior to the execution of the parties' stipulation and prior to the hearing.

34. The Appointments Calendar portion of the Electronic Calendar relates to the part of Ms. Depperschmidt's job at Tiger that consists of scheduling petitioner's appointments and certain other meetings in the Tiger offices. It does not serve as the primary portion of the Electronic Calendar that keeps track of petitioner's NYC days and non-NYC days, nor is it the portion of the Electronic Calendar which assists Ms. Depperschmidt in keeping petitioner apprised of his New York City day count from time to time. Rather, the Planner Section is the portion of the Electronic Calendar that relates to this part of Ms. Depperschmidt's job at Tiger. Nevertheless, although one cannot determine petitioner's whereabouts on every day of 2000 by looking only at the Appointments calendar portion of the Electronic Calendar, it provides a useful record of petitioner's anticipated and actual whereabouts on certain days.

35. The Appointments Calendar portion of the Electronic Calendar is a time-based application of Lotus Organizer, which requires that each entry in the Appointments Calendar be assigned a time of day as the start time. When Ms. Depperschmidt wished to make an entry for an entire day, she would enter 8:00 A.M. as the start time for that entry. Thus, for example, she explained that the entry in the Appointments Calendar for April 15, 2000 which states "8:00 AM JHR in Locust Valley" does not mean petitioner arrived in Locust Valley at 8:00 A.M., but rather means that he spent the entire day outside New York City and was based in Locust Valley that day.

36. With respect to entries on the Appointments Calendar on days petitioner was traveling, Ms. Depperschmidt in some cases included his contact information on the Appointments Calendar and in other cases referred to itineraries or other documents for such information. Entries in the Appointments Calendar were made for recurring appointments such as investment staff meetings and can be made as much as six months before the scheduled date of the appointment.

37. Unlike the Appointments Calendar portion of the Electronic Calendar, the Planner Section is a date-based rather than time-based application of Lotus Organizer. In the Planner Section, it is possible to create labels, each of which can be assigned a different color and description. Such labels can be applied to designate one or more days with a box having that color and with that description. The designations in the Planner Section that related to Ms. Depperschmidt's mandate to keep an accurate and contemporaneous account of petitioner's non-NYC days in 2000 are a colored box associated with the description "OUT of NYC?" (a category used to record the anticipated days that petitioner intended to be out of New York City), which box at the end of 2000 was a gold-brown color, and a colored box associated with the description

"JHR OUT of NYC – confirmed" (a category used to record the actual confirmed days that petitioner was out of New York City), which box at the end of 2000 was black. The "default" setting in the Planner Section was a NYC day, such that if Ms. Depperschmidt could not confirm, using the procedure described hereinafter, that a day was a non-NYC day, she would not designate it with any label and thus the day would, by default, be recorded as a NYC day in the Planner Section.

38. Ms. Depperschmidt's procedure for contemporaneously determining and recording whether any particular day in 2000 was a NYC day or a non-NYC day was as follows:

> a) From time to time, she reflected the days she then anticipated would be non-NYC days for petitioner (e.g., days on which petitioner was scheduled to be on vacation or otherwise traveling outside New York City) by marking such days with the colored box associated with the description "OUT of NYC?."
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> b) On a business day when she saw petitioner in the office or otherwise knew that the day was a NYC day, she would not make any entry for that day and the day by default would be counted as a NYC day. Whenever petitioner and Ms. Depperschmidt were both in the office, they would invariably see one another because petitioner's office has no door, the walls in the office are made of glass and their desks are situated such that they had a line of sight between them.
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> c) On a business day which she knew to be a non-NYC day because, for example, she had called petitioner on a land line in a place such as New Zealand, she would, on the next business day or shortly thereafter, mark that day with the colored box associated with the description "JHR OUT of NYC – confirmed."
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> d) With respect to any other day in 2000, petitioner and Ms Depperschmidt's routine was that Ms. Depperschmidt would ask petitioner on the next business day or shortly thereafter whether he "earned a tax day" (i.e., whether the day was a non-NYC day). By 2000, the relationship between petitioner and Ms. Depperschmidt was such that they would have a frank and direct discussion of whether petitioner "earned a tax day." These discussions, while frequent, would be short and to the point, were generally limited to whether petitioner "earned a tax day," and in the case of a non-NYC day did not involve a detailed discussion of where outside New York

City petitioner was, particularly if he was at one of his usual locations such as Locust Valley. If petitioner confirmed that the day was a non-NYC day, Ms. Depperschmidt would mark that day with the colored box associated with the description "JHR OUT of NYC – confirmed." If not, Ms. Depperschmidt would not mark that day with the colored box associated with that description and the day, by default, would be counted as a NYC day.

e) Once she confirmed whether the day was in fact a NYC day or a non-NYC day, she would remove the designation for any day previously marked as "OUT of NYC?" (denoting a day it had been anticipated that petitioner would be out of New York City) shortly after the day occurred and either replace it with the designation "JHR OUT of NYC – confirmed" (if she was able to confirm that petitioner was indeed out of New York city on that day) or not replace it at all (if not). Thus, at the end of 2000, or shortly thereafter, the Planner Section of the Electronic Calendar was in final form, and there were no days designated "OUT of NYC?"

39. Ms Depperschmidt's procedure for using the Planner Section of the Electronic Calendar to keep petitioner apprised of his total non-NYC days and then-anticipated non-NYC days to date involved bringing up the Planner Section on her computer screen and placing the cursor on the "JHR OUT of NYC – confirmed" label. On a bar at the bottom of the screen would appear the total number of days which had been designated with the "JHR OUT of NYC – confirmed" label, i.e., the actual non-NYC days to date. She then put the cursor on the "OUT of NYC?" label. On a bar at the bottom of the screen would appear the total number of days which had been designated with the "OUT of NYC?" label, i.e., the anticipated non-NYC days to date. If the sum of petitioner's actual non-NYC days to date (referred to by Ms. Depperschmidt as "days in the bank") plus his projected additional non-NYC days was less than 183, she initiated a conversation with petitioner about additional days he needed to be outside New York City in order to accomplish his objective of being a New York City nonresident in 2000.

40. There have been several occasions over the years on which petitioner advised Ms. Depperschmidt that a particular day was a NYC day even though he had missed "earning a tax

day" by a narrow margin and even though Ms. Depperschmidt would not otherwise have known that the day was a NYC day. For example, on one occasion petitioner was coming back from a trip and found himself crossing the bridge from New Jersey into Manhattan at roughly 11:45 P.M. On another occasion, petitioner was in Locust Valley, drove his son Spencer to an airport in New York City and drove back to Locust Valley. In both instances, petitioner reported to Ms. Depperschmidt that the day was a NYC day. August 21, 2000 is another example of a day that Ms. Depperschmidt would not have known was a NYC day had petitioner not told her that it was. Petitioner visited New York City for a medical appointment on August 21, 2000, which was during his annual vacation period in Southampton, and left New York City on the same day. Petitioner's trip into New York City to visit his doctor on August 21, 2000 had not been previously scheduled or planned, but rather related to a medical condition petitioner was concerned about and wanted to have checked. Petitioner mentioned his unexpected August 21, 2000 visit to New York City to Ms. Depperschmidt on several occasions in order to make certain that she recorded that day as a NYC day, so much that Ms. Depperschmidt got annoyed with petitioner for mentioning it so many times.

41. Petitioner has never told Ms. Depperschmidt that he was not in New York City on a day on which he was in New York City. Ms. Depperschmidt was never asked or instructed by petitioner or by Mrs. Robertson to record a NYC day as a non-NYC day, and would not have done so if asked. Petitioner stated his belief that Ms. Depperschmidt would have "quit on the spot" had he ever asked her to do so. Ms. Depperschmidt stated that had he done so, she would have told him that he "must be mistaken." Petitioner testified that if he had spent any time in New York City (other than for purposes of transit into or out of a non-New York City location)

on any of the dates April 15, July 23, July 31 or November 16, 2000, he would have told Ms. Depperschmidt to record such day as a NYC day.

42. Petitioner is confident that Ms. Depperschmidt kept the records of his non-NYC days in 2000 accurately, has no reason to believe otherwise and is confident that Ms. Depperschmidt has never and would not have ever altered the records of his non-NYC days for 2000. Ms. Depperschmidt's records of petitioner's non-NYC days indicated that each of April 15, July 23, July 31 and November 16, 2000 was a non-NYC day, and petitioner is confident that each of these days was in fact a non-NYC day.

43. Ms. Depperschmidt has never marked a day with the designation "JHR OUT of NYC – confirmed" before the day occurred, and has never altered the designation of a day in the Planner Section as a NYC day or a non-NYC day after such day was so designated on the next business day or shortly thereafter. Neither petitioner, nor anyone else at Tiger, nor petitioner's current or initial representatives in this matter, nor anyone else ever asked Ms. Depperschmidt to make or change any entry in the Planner Section of the Electronic Calendar for 2000 at any time after such entry was contemporaneously recorded, nor did Ms. Depperschmidt ever make or change any entries on the Planner Section of the Electronic Calendar on her own after the first few days of January 2001.

44. Petitioner has never seen the Electronic Calendar on a computer or made any entries in the Electronic Calendar, and would not know how to gain access to or make entries in the Electronic Calendar as he is, by his own admission, "computer illiterate."

45. The amount of "computer space" necessary to run and store the original file Jhr2000.or6 is very small. However, from time to time the amount of data in the file called Jhr2000.or6, in which the Electronic Calendar is maintained on a current basis, becomes so large

that the Lotus Organizer program, for this or other reasons, starts to operate more slowly. When this occurs, Ms. Depperschmidt's solution is to "archive" some of the data then contained in the file called "Jhr2000.or6." Archiving data in a Lotus Organizer file such as "Jhr2000.or6" is a simple, automated process which can be done using the menus that are a feature of Lotus Organizer. Archiving data in a Lotus Organizer file does not change the data being archived in any way. When Planner Section data from a Lotus Organizer file are archived, whatever label colors and descriptions are contained in the Planner Section at the time of archiving are carried into the archive file with the rest of the data in the Planner Section. Ms. Depperschmidt archived the Appointments Calendar and Planner Section data for 2000, without changing the data in any way, five years or so after the end of 2000, and, utilizing the "Archv" default name the program gives to an archive file, named the file into which such data were archived "Archv_00.OR6."

46. Lotus Organizer permits the user to view and print the data contained in a Lotus Organizer file in numerous different formats. These available print formats include, among others, the Appointments Calendar in a monthly calendar format, the Appointments Calendar in a monthly or daily calendar format "showing through" on the calendar the various labels from the Planner Section applicable to each day, and the Planner Section in a yearly format. Viewing or printing a Lotus Organizer file in any of these or other formats does not change the data contained in such file. The year, date and time appearing at the bottom of a printout from a Lotus Organizer file are the year, date and time such printout was in fact printed, and do not in any way indicate when such Lotus Organizer file was created or when any entries therein were made. Printouts from a single Lotus Organizer file might look different depending on the computer from which they are printed and the printer on which they are printed.

47. A number of printouts from and copies of the Electronic Calendar are in the record in this proceeding, including the following:

> a) A computer compact disc (CD) onto which Ms. Depperschmidt, with the help of Tiger's IT person, copied the archived 2000 Appointments Calendar and Planner Section portions of the Electronic Calendar from her computer at Tiger on September 9, 2008.
>
> b) Three printouts of the Appointments Calendar portion of the Electronic Calendar in a monthly calendar format, one of which was printed prior to the archiving of the 2000 data in the Electronic Calendar and thus bears the title "Jhr2000.or6," and the others printed after the 2000 data were archived and thus bearing the title "Arch_00.OR6." The appointments and other items recorded on Exhibit D to the parties' Stipulation are identical to those on the Appointments Calendar, and Exhibit D to the parties' Stipulation is embodied on and may be printed out from the CD that is in the record.
>
> c) Three printouts of the archived 2000 Planner Section portion of the Electronic Calendar in a yearly format, each of which was printed after the 2000 data were archived and thus bear the title "Archv_00.OR6", including the printout made by the Division's expert witness from the CD that is in the record.
>
> d) Printouts from the archived 2000 Appointments Calendar portion of the Electronic Calendar in monthly and daily calendar formats using the print format that "shows through" on the Appointments Calendar the labels from the Planner Section applicable to each day.
>
> e) Screen prints, which are the actual depictions of what appears on the computer screen at the time of printing, made by Ms. Depperschmidt on September 12, 2008 by bringing the archived 2000 Planner Section portion of the Electronic Calendar onto her computer screen at Tiger with the cursor on (I) the "JHR OUT of NYC – confirmed" label at the bottom right corner and (ii) April 15, 2000, respectively, and in each case printing the screen.

48. Apart from different print dates (i.e., the time, date and year appearing at the bottom of the printout) and a different file name in the case of the printout made prior to archiving, the data reflected on each of these printouts from the Appointments Calendar and Planner Section portions of the Electronic Calendar are identical. For example, the appointments and other items recorded on Exhibit C to the parties' Stipulation for each day in 2000 are identical to the

appointments and other items recorded on each of Exhibit D to such Stipulation, petitioners' Exhibit 12 and Division's Exhibit LL for each such day. The labels from the Planner Section for each day appear on Division's Exhibit LL, but not on petitioners' Exhibit 12 or Exhibit D to the parties' Stipulation because Division's Exhibit LL was printed using the show-through feature and the other printouts were not. On each of the printouts of the 2000 Planner Section of the Electronic Calendar, the same 183 days in 2000 (all of the parties' stipulated non-NYC days plus the four dates disputed herein [April 15, July 23, July 31 and November 16]) are designated an non-NYC days, i.e., in black as "JHR Out of NYC – confirmed."

49. While Ms. Depperschmidt routinely printed out petitioner's daily schedule of appointments for petitioner's use that day, and discarded such daily schedules on or shortly after each day, Ms. Depperschmidt rarely printed out the Appointments Calendar in the monthly format and rarely had any reason to print out anything from the Planner Section of the Electronic Calendar. Ms. Depperschmidt did not at the end of 2000 print out the Planner Section for 2000, the 2000 Appointments Calendar in the monthly format or the 2000 Appointments Calendar showing through the labels from the Planner Section, though she could have done so. If she had done so, these printouts would have reflected as non-NYC days (i.e., designated with the label "JHR OUT of NYC – confirmed") exactly the same 183 days that are so reflected as non-NYC days on the various printouts from the Electronic Calendar that are in the record as described above.

50. Ms. Depperschmidt did not like the monthly format because it spread the information for each day over too many pages, but printed out the Appointments calendar in the monthly format at the request of petitioners' initial representatives in this matter, the law firm of

McDermott, Will & Emery (MWE).[9] Ms Depperschmidt did not print out the Planner Section because she considered it to be most useful when viewed while sitting at her computer, rather than a document that would be meaningful to anyone else if printed out, and that any such printout would not have been particularly useful since she did not then have a color printer. Ms. Depperschmidt also knew that the Electronic Calendar was available on her computer and could be restored from backups in the event of a computer crash. Furthermore, Ms. Depperschmidt expected that petitioners' initial representatives would use the printout of the Appointments Calendar together with the second column of the document described hereinafter as the "Roadmap" in demonstrating petitioner's NYC days and non-NYC days in 2000. Ms. Depperschmidt provided petitioners' initial representatives with a large amount of information including a printout of the Appointments Calendar, the Roadmap and a great deal of other source documentation such as airline invoices, UTOG vouchers, itineraries and the like, as well as all other available information they requested.

51. At the hearing, the Division presented David Terpening, a Division employee, as an expert in information systems auditing and forensics auditing. Mr. Terpening testified that he and other Division employees have used Lotus Organizer, and that he finds it to be a very user-friendly program. Mr. Terpening testified further that based on his analysis of the Electronic Calendar, although it is impossible to determine when or by whom any particular data entry in the

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[9] MWE was the first law firm retained to represent petitioners in this matter. Thereafter, petitioners retained the law firm of Feingold and Alpert, LLP. While MWE has been referred to at times in the record as petitioners' "prior" representatives, it is least confusing to refer to MWE herein as petitioners' "initial" representatives. The record clearly establishes that petitioners are, and desire to be, represented in this case by Feingold and Alpert, LLP, and petitioner clearly stated so and hence ratified such representation as part of his testimony. Addressing the question of whether MWE technically also remain petitioners' representatives, solely by virtue of the manner in which a successor power of attorney form was executed (specifically a "missed" check box dismissing prior representatives on such form), while noted, is unnecessary and essentially irrelevant to resolving the statutory resident issue presented in this case.

Electronic Calendar was made, or whether any changes were made prior to the creation of a particular file (including an archived file), there is nothing in the file that would indicate that the data entries for 2000 therein were not made contemporaneously in 2000 or that they were ever altered. Mr. Terpening further testified that every time a Lotus Organizer file is opened, the program creates a "time/date stamp" identifying the time and date the file was opened, which time/date stamp says nothing about when entries were made in the Lotus Organizer file.

52. After the end of 2000, Ms. Depperschmidt prepared a schedule relating to petitioner's days in and out of New York City and his whereabouts during 2000, which is in the record and is referred to as the "Roadmap." Ms. Depperschmidt created this document using Microsoft Excel, as a first step in creating a framework for putting together the backup information regarding petitioner's whereabouts in 2000. The Roadmap is not part of, and cannot be printed out from, the Electronic Calendar. In the second column of the Roadmap, which is titled "IN or OUT of NYC," Ms. Depperschmidt copied the entries of either "IN" (i.e., for a NYC day) or "OUT" (for a non-NYC day) from the contemporaneous entries she had made in the Planner Section of the Electronic calendar, and checked these entries several times. As such, Ms. Depperschmidt is confident that these entries accurately reflect the record she maintained of petitioner's NYC days and non-NYC days in 2000. All days marked as "OUT" on the Roadmap, including each of the four disputed days which are centrally at issue herein, are designated in black as "JHR OUT of NYC – confirmed," i.e., as non-NYC days, on the Planner Section, and none of the days marked as "IN" on the Roadmap are so designated.

53. In the fourth column of the Roadmap, which is entitled "JHR spent the day in:," Ms. Depperschmidt entered whatever information she then had regarding petitioner's location outside New York City on the days in 2000 that had been recorded in the Electronic Calendar as non-

NYC days. Ms Depperschmidt completed the first three columns of the Roadmap, but never completed the fourth column of the Roadmap. The last time Ms. Depperschmidt made any entries in the fourth column of the Roadmap was in November 2002, before she went on maternity leave, at which time she turned the Roadmap over to petitioner's initial representatives in electronic form, and no longer had control of that document and made no further edits to the Roadmap thereafter.

FACTS SPECIFIC TO THE FOUR DISPUTED DAYS

April 15, 2000

54. April 15, 2000 was recorded in the Appointments Calendar portion of the Electronic Calendar as a non-NYC day. The Appointments Calendar notes that petitioner was in Locust Valley on April 15, 2000 and the Planner Section reflects that April 15, 2000 was a confirmed non-NYC day.

55. By March 31, 2000, petitioner had accumulated 76 NYC days, and thus had used up over 41.5% of his allowable NYC days in the first quarter of 2000. By April 2000, petitioner was already aware of the need to conserve his remaining available NYC days and "earn tax days" whenever possible, and it would have been consistent for him to have implemented his plan to spend time out of New York City by leaving the city on April 14, 2000. Petitioner reported to Ms. Depperschmidt that he was not in New York City at any time on April 15, 2000, and based on her experience with petitioner, she is confident that petitioner was correct. Petitioner testified that had he been in New York City on April 15, 2000, he would have been able to choose another day later in 2000 to stay outside New York City. The record indicates that petitioner's *focus* on avoiding being in New York City unnecessarily was not as important (or direct) early in the year as it was later in the year, but provides no indication or sense that his *desire* to avoid being in

New York City unnecessarily changed or was any more or less important in light of the passage of time over the course of the year (***see*** Finding of Fact 20).

56. Forty of the Sundays in 2000 have been acknowledged by the Division to be non-NYC days, and each of these 40 Sundays but one (Sunday, April 16, 2000) was preceded by a Saturday that has also been acknowledged by the Division to be a non-NYC day. Thus, if April 15, 2000 were a NYC day, the weekend of April 15 and 16, 2000 would have been the only weekend in all of 2000 in which the Saturday was a NYC day but the Sunday was a non-NYC day. The record reveals that petitioner spent non-NYC weekends entirely in Locust Valley, entirely outside of Locust Valley, or partly in Locust Valley and partly in other, non-NYC locales. As of April 2000, petitioner had not spent any Saturdays in Locust Valley.

57. Petitioner testified that he went to Locust Valley after work on Friday, April 14, 2000, and spent the night there rather than at the Apartment with Mrs. Robertson. Although neither petitioner nor Mr. Young has a specific recollection of Mr. Young driving petitioner to Locust Valley on April 14, 2000, both testified that Mr. Young would routinely pick up petitioner at his office on Friday afternoons and drive petitioner to Locust Valley or to Deepdale, and that it would have been unusual for him not to do so. The last (and only) entry on the Appointments Calendar portion of the Electronic Calendar for April 14, 2000 is "12:00 PM Friday Speaker Lunch JHR plans to attend." There was a telephone call from Locust Valley to the Apartment at 6:04 P.M.

58. Mrs. Robertson testified about the days and events surrounding and including April 15, 2000. Mrs. Robertson returned to New York City on Thursday, April 13, 2000, from a trip to San Antonio, Texas, to visit her mother, and was leaving for a trip to Australia on Sunday, April 16, 2000. After Mrs. Robertson returned from San Antonio, petitioner and Mrs. Robertson spent the

evening of Thursday, April 13, 2000, together in New York City. On April 14, 2000 and the morning of April 15, 2000, Mrs. Robertson had a lot of "busy work" to accomplish in New York City, including unpacking from her trip to San Antonio, packing and getting organized for her upcoming trip to Australia to meet with a designer to discuss plans for a golf resort that the Robertsons were then building in New Zealand and getting things together to discuss with the designer. Mrs. Robertson likes to take her time getting these sorts of things done and was better able to do so without having petitioner "in her hair" in New York City. Petitioner would have wanted to leave New York City on April 14, 2000 in any event so that April 15, 2000 would be a non-NYC day. Mrs. Robertson testified that given all that she had to do before leaving the Apartment in the afternoon, it would have been normal for her to have gotten up early on Saturday, April 15, 2000.

59. There was a telephone call from the Apartment to petitioner's office at 7:42 A.M. on April 15, 2000. Persons other than petitioner made telephone calls from the Apartment to petitioner's office at Tiger on 10 days on which the Division acknowledges petitioner was not at the Apartment or otherwise in New York City. The auditor did not know who made the call from the Apartment to petitioner's office on April 15, 2000.

60. Mrs. Robertson would, on occasion, particularly when leaving for a trip, call petitioner's number at Tiger on weekends, and other days or times the office was not open, to leave voicemail messages for his assistants, asking them to remind petitioner to call someone or do something. Mrs. Robertson testified that since she was about to leave town for three weeks, it would not have been unusual for her to have called petitioner's office on April 15, 2000 to leave a voicemail message for his assistants.

61. While telephone calls were also placed from the Apartment to petitioner's office on 134 days in 2000 on which petitioner acknowledges he was in New York City, 131 of these days were weekdays when petitioner's office was open, and the Appointments Calendar portion of the Electronic Calendar indicates that he was in the office on at least 127 of these 131 days. In 2000, Mrs. Robertson frequently called petitioner at his office, both in the morning and in the afternoon, on average one to three times per day. She also called the office to speak with petitioner's assistants regarding petitioner's social engagements in New York City and other matters. In addition, Trudy Ainge, petitioners' personal chef, called petitioner's office number on occasion to speak with his assistants about petitioners' dinner parties and other matters.

62. There was also a telephone call from the Apartment to petitioner's sister, Wyndham Robertson (Wyndham), at 7:47 A.M. on April 15, 2000. Both Mrs. Robertson and Wyndham offered testimony relating to this telephone call. Wyndham and Mrs. Robertson have known each other for approximately 40 years and have a very close relationship. In 2000, Wyndham and Mrs. Robertson frequently spoke with one another on the telephone, in some cases when petitioner was with Mrs. Robertson and in other cases when petitioner was not.

63. A surprise party was held at the Morgan Library for petitioner on April 18, 2000 that Mrs. Robertson could not attend because of her long-planned trip to Australia, but which Wyndham did attend. Wyndham left North Carolina for New York City on April 17, 2000, and returned to North Carolina on April 20, 2000. Wyndham testified that it was unusual for her to have stayed in New York City for such a short amount of time and that certain personal e-mails she had found a few months before (and which were introduced at) the hearing indicated to her that she had made a last-minute decision to travel to New York City for the surprise party. While the "ruse" for getting petitioner to the party was that it was an anniversary party for friends of the

Robertsons, whom Wyndham did not know well, the party was actually being given by people at Morgan Stanley whom Wyndham did know well.

64. Wyndham stayed at the Apartment while she was in New York City for the surprise party. Wyndham would stay at the Apartment several times a year, including in 2000, and while she always felt welcome, she would always call beforehand to say she was coming, both as a courtesy and in order to work out the logistics for her visit, such as making sure the building staff was alerted that she would be coming and confirming where a key to the Apartment would be left for her. Wyndham would have these and other logistical conversations with Mrs. Robertson rather than petitioner, since it was she who took charge of such matters. In this respect, petitioner noted his shortcomings in such logistical matters. Mrs. Robertson was not involved in the preparations for the surprise party, but would have been involved in working out with Wyndham the logistics of her stay at the Apartment, such as how and when Wyndham would be arriving and leaving, and how she planned to stay out of petitioner's sight so as not to spoil the surprise. Mrs. Robertson testified that she was not certain as to precisely when she conversed with Wyndham concerning the surprise party, but believed she likely had these discussions with Wyndham after returning from San Antonio on April 13, 2000, and would have wanted to have these discussion with Wyndham before leaving for Australia on April 16, 2000, and out of petitioner's earshot so as not to spoil the surprise. Mrs. Robertson felt free to call Wyndham early in the morning. Two other calls were made from the Apartment to Wyndham when petitioner was not present in New York City.

65. Petitioners often play golf together at Deepdale in Manhasset on Long Island. Mrs. Robertson left the Apartment on Saturday, April 15, 2000 at 10:00 A.M. in a UTOG car, the voucher for which she signed, to play golf at Deepdale with petitioner. Although there were

instances in 2000 when petitioner took a UTOG car from the office to Deepdale and thus was in New York City and Deepdale on the same day, each of these days, March 24, June 20, June 29, July 28 and September 6, was a weekday on which petitioner's office was open and in each such case, petitioner reported the day as a NYC day. Mrs. Robertson spent the evening of April 15, 2000 with petitioner in Locust Valley and flew to Australia on Sunday, April 16, 2000, in the late afternoon. Petitioner did not fly to Australia with Mrs. Robertson, but rather he and Spencer flew to Australia to meet Mrs. Robertson and their son Alex, who was then in school in Australia, on April 20, 2000.

July 23, 2000

66. The Appointments Calendar notes that on July 23, 2000, petitioner was playing golf in Ireland and returned to LaGuardia, and the Planner Section reflects that July 23, 2000 was a confirmed non-NYC day.

67. On July 23, 2000, petitioner returned from an annual father-son golfing trip. This annual event has taken place in different locations over many years and, in 2000, as well as in many prior years, took place in Ireland. The return flight landed at LaGuardia at 9:15 P.M. local time (i.e., Eastern Standard Time), the equivalent of 2:15 A.M. for petitioner given that he was returning from Ireland. The tail number of the charter aircraft used on this flight (the Aircraft) was 270MC, and the passengers on this flight (the Irish Flight) included petitioner, his sons Spencer and Alex, petitioner's friend Payson Coleman and his son Chase, and three other passengers. The aircraft was not petitioner's usual plane, but rather, as is indicated by the "MC" in the tail number, his friend Max Chapman's plane, which was also operated and managed by Key Air.

68. In 2000, Mr. Coleman, who was a partner in a law firm that was then known as Winthrop Stimson and is now known as Pillsbury Winthrop, used a car service through his firm called Dial Car, Inc. (Dial Car). Records of telephone calls made from the Aircraft on July 23, 2000 and a voucher dated July 23, 2000 issued by Dial Car (the Dial Car Voucher), in each case together with a foundational affidavit, were introduced at the hearing. Payson Coleman made a telephone call from the Aircraft at 7:19 P.M. on July 23, 2000. As evidenced by the Dial Car Voucher, a car from Dial Car was dispatched for the Dial Car account of Winthrop Stimson and under Mr. Coleman's individual customer identification number, and such car made a pickup on the runway at LaGuardia at the Aircraft (tail number 270MC) at 9:33 P.M. on July 23, 2000. The car thereafter made stops in Old Brookville and Locust Valley. While Payson Coleman, who lived in Old Brookville, New York, in 2000, does not now specifically recall this particular car trip, it is clear to him from the Dial Car Voucher that he was a passenger in the car. Mr. Coleman testified that it was very likely that petitioner was in the car with him on July 23, 2000, and that it was common for him to arrange shared transportation with petitioner after the annual golf trips they took together over a period of 15 years, as well as various other trips they took on petitioner's plane. Mr. Coleman testified that while it is possible that he shared a car after one of these golfing trips with petitioner and one of his sons, he does not recall ever sharing a car after one of the golfing trips with one of petitioner's sons when petitioner was not also in the car. Petitioner, who recalled at least one instance in which he shared a ride from LaGuardia with Mr. Coleman after a father-son golfing trip, testified that he shared the car on July 23, 2000 with Mr. Coleman and was driven to Locust Valley after Mr. Coleman was dropped off in Old Brookville, and that his son Spencer probably rode home with them. A telephone call was placed from Locust Valley to each of Verizon voicemail and Sarah Collins, who was then Spencer's

girlfriend, at 9:21 A.M. and 10:09 A.M, respectively, on July 24, 2000. When Mr. Coleman and petitioner shared a ride home from LaGuardia, the car would drop off Mr. Coleman in Old Brookville first because it is on the way from LaGuardia to Locust Valley, which is only 5 to 15 minutes from Old Brookville. Mr. Coleman testified that neither his adult son Chase nor any of the other three passengers would have had any reason to travel to Locust Valley that night. Mr. Coleman does not recall ever taking a car from LaGuardia to Old Brookville after one of the golfing trips and then having the car go on to Locust Valley with passengers not including petitioner or with no passengers in it. Petitioner has never asked Mr. Coleman to take petitioner's luggage or golf clubs in a car with him and send them on to Locust Valley, and would never have done so, considering such a request to be an imposition on his friend Mr. Coleman.

69. The first time petitioner ever spoke with Mr. Coleman regarding the audit in this matter was in a telephone conversation in the Spring of 2008. A few weeks after that conversation, Mr. Coleman was asked by petitioner's current representatives, for the first time, whether he recognized the Dial Car number that was called from the Aircraft on July 23, 2000, and Mr. Coleman for the first time obtained a copy of the Dial Car Voucher from Dial Car. A copy of the Dial Car Voucher and a letter from Dial Car were provided to the Division several months prior to the hearing.

70. While petitioner was tired after playing 36 holes of golf on July 23, 2000 and it might have taken somewhat less time for petitioner to go to the Apartment rather than to Locust Valley after landing at LaGuardia that night, both he and Mrs. Robertson testified petitioner went to Locust Valley in order to "earn the tax day," i.e., that it would have been "silly" for petitioner to have wasted a NYC day by spending what would have been roughly two hours on July 23, 2000 at the Apartment. By the time petitioner left for the golf trip to Ireland on July 19, 2000, he

already had 136 NYC days, and thus had used up more than 74% of his allowable NYC days in just half of the year.

71. Mrs. Robertson, who did not accompany petitioner on the golfing trip to Ireland, was at the Apartment on July 23, 2000, and stayed at the Apartment that night. On July 23, 2000, the telephone calls made from the Apartment after 9:15 P.M. include a call at 9:44 P.M. to San Antonio, Texas, and two calls to Locust Valley at 10:02 P.M. and 10:37 P.M. Mrs. Robertson testified that she would have made the telephone call to San Antonio, where her mother then lived. Since the golfing party on these annual golfing trips would board their flight home whenever they finished their 36 holes of golf on the last day of the trip, there was no way to know in advance exactly when these flights would land. Mrs. Robertson testified that she probably made the telephone calls to Locust Valley at 10:02 and 10:37 to check whether petitioner had yet arrived there from LaGuardia.

72. A telephone call was made from Locust Valley to the Apartment at 10:51 P.M. on July 23, 2000. When petitioner arrived home from a trip on which Mrs. Robertson did not accompany him, such as one of the golfing trips, and Mrs. Robertson was at a different location, it would not be unusual for petitioner to call Mrs. Robertson on the telephone. Mrs. Robertson testified that petitioner likely made the telephone call at 10:51 P.M. on July 23, 2000 to check in with her and to let her know that he was home. While, on occasion, Bob Young has reason to be in the Locust Valley home on a weekend, because he did not work on Sundays he would never have called the Apartment from the Locust Valley home as late as 10:51 P.M. on a Sunday except in an extreme emergency.

73. Petitioner was in his office the next day, Monday, July 24, 2000. A telephone call was made from the Apartment to petitioner's car phone at 6:59 A.M. on Monday, July 24, 2000.

When petitioner spent a Sunday night in Locust Valley, it was customary for Mr. Young to drive petitioner from Locust Valley to New York City early on the following Monday. Petitioner sat in the front passenger seat when Mr. Young drove him somewhere. In 2000, petitioner's car phone was situated in this car in a cradle in the front seat area, and was not removed from the car. While being driven from Locust Valley to his office, petitioner made and received calls on the car phone constantly. Testimony by both petitioner and by Mr. Young made clear that a call on petitioner's car phone at 6:59 A.M. on a Monday would not be for Mr. Young, but rather would be for petitioner. Mrs. Robertson testified that she likely made the telephone call at 6:59 A.M. on Monday July 24, 2000 from the Apartment to petitioner on his car phone. Mr. Young has called from or answered calls to petitioner's car phone when petitioner was not in the vehicle, with such instances being to advise petitioner's assistants or answer their inquiries relative to Mr. Young's arrival time to pick up petitioner or his status as having arrived and being ready for petitioner. The record does not specify the location of petitioner's car at the time the call was received.

74. The entries in the Electronic Calendar and the Roadmap do not include or specify "Locust Valley." The Appointments Calendar portion of the Electronic Calendar reflects, for July 23, Kerry, UK and LaGuardia, while the Planner Section reflects July 23 as a day outside of New York City and July 24 as a day in New York City. The entries in the fourth column of the Roadmap for July 23 and July 24, 2000 are "Kerry, UK>LGA>?" and "?>NYC, NY,?" respectively. The question marks in these entries do not relate to the designation of July 23 as an "OUT" day (i.e., a non-NYC day) in the second column of the Roadmap. The "OUT" designation reflected accurately Ms. Depperschmidt's contemporaneous recording in the Planner Section of the Electronic Calendar of July 23 as a non-NYC day, which in turn was based on her routine conversation with petitioner shortly after July 23, 2000. As of November 2002, when Ms

Depperschmidt last made entries in the Roadmap and handed the Roadmap over to petitioners' initial representative, she did not have access to information regarding the time petitioner's July 23, 2000 flight from Ireland had landed at LaGuardia. Thus, she did not then know whether the flight from Ireland had landed before midnight on July 23, 2000, in which case July 23 was a non-NYC day because petitioner went to Locust Valley from LaGuardia, or after midnight (i.e., on July 24), in which case July 23 was a non-NYC day no matter where petitioner went after landing at LaGuardia. The Key Air flight time information did not become available until May 6, 2005, when the auditor received it under a subpoena the Division had issued to Key Air. It was not until March 2006 that Key Air clarified that the flight times in its flight records are stated in Coordinated Universal Time (f/k/a Greenwich Mean Time), commonly referred to as Zulu Time. Zulu Time is four hours ahead of Eastern Standard Time, and thus the flight records show a 1:15 A.M. arrival at LaGuardia on Monday, July 24, 2000.

July 31, 2000

75. The Appointments Calendar notes that petitioner was in Southampton on July 31, 2000, and the Planner Section reflects that July 31, 2000 was a confirmed non-NYC day. The Appointments Calendar includes an entry "8:30 A.M. Investment Staff Meeting in Tiger."

76. Petitioners rented a house in Southampton, New York, for the period July 29 through September 4, 2000 (the Southampton Vacation Period) and July 31, 2000 was the first Monday of that period. Mrs. Robertson testified that petitioner's college friend Ed Crawford and his family, including their son Ted Crawford, spent the first weekend of the Southampton Vacation Period at petitioners' Southampton rental. Petitioners' son Spencer and his then-fiancé Sarah Collins were there as well. The Crawfords' visit was memorable because Ed Crawford was ill and it was the Robertsons' last family gathering with the Crawfords before Ed Crawford died in the Fall of

2000. Based on the circumstances of that weekend and her experience with petitioner, Mrs. Robertson testified that there would not have been any reason for petitioner to have gone into New York City on the first Monday of the Southampton Vacation Period. Petitioners' Southampton rental in 2000 was 90.38 miles away from petitioner's office.

77. While in Southampton, petitioner spends a great deal of time on the telephone with his office, where his assistants often connect him to others who wish to speak with petitioner or with whom petitioner wishes to speak. Ten telephone calls lasting a total of more than 45 minutes were made from Tiger's offices to the Southampton rental on July 31, 2000 (the July 31, 2000 Calls). The first such call was placed at 8:46 A.M. and the last such call with a listed duration greater than 30 seconds was placed at 3:11 P.M. The longest of the July 31, 2000 Calls lasted 15½ and 11½ minutes. Petitioner, Mrs. Robertson and Ms. Depperschmidt each testified that the number, timing and frequency of the July 31, 2000 Calls make it obvious that petitioner was the recipient of the July 31, 2000 Calls, and inconceivable that anyone else could have been the recipient of these calls.

78. Mrs. Robertson testified that she would not have received more than one telephone call a day from the office during the Southampton Vacation Period. Further, she testified that she would not have been at the Southampton rental when most of the July 31, 2000 Calls were made because she was playing golf in Southampton at a monthly Monday Ladies' Day at Shinnecock Hills Golf Club, and did not return to the Southampton rental until 2:00 or 2:30 P.M. Petitioner was at the Southampton rental when Mrs. Robertson returned from her golf game on July 31, 2000.

79. Petitioner testified that he did not have any reason to go to New York City after the last telephone call with the office on July 31, 2000, and did not do so. Ms. Depperschmidt

testified that she was in the office on July 31, 2000, did not see petitioner there and is absolutely certain that petitioner was not in the office on July 31, 2000.

80. Petitioner testified that he was not in New York City at any time during the Southampton Vacation Period except for August 21, 2000, the day on which he traveled to New York City for a previously unscheduled appointment with his doctor. Fourteen telephone calls, ten of which are reflected on the Tiger telephone bill as having the minimum duration of 30 seconds, were made from Tiger's offices to the Robertson's Southampton rental on August 21, 2000. The last call of more than the minimum listed duration on August 21, 2000 was placed at 11:40 A.M.

81. Tiger held periodic meetings at its offices called "investment staff meetings," which involved the various portfolio managers. These meetings were noted on the Appointments Calendar (***see*** Finding of Fact 75) because petitioner's assistants were responsible for scheduling and ordering food for these meetings. These investment staff meetings became smaller, less important and less frequent after the hedge funds were closed down in May 2000. Petitioner tried to attend investment staff meetings that were held when he was in the office, and in some cases when he was out of the office he participated in these meetings by telephone, but petitioner did not attend every scheduled investment staff meeting in person. Petitioner and Ms. Depperschmidt both testified that petitioner was not present at an investment staff meeting at Tiger in person, or otherwise at the Tiger offices, on July 31, 2000.

82. Ted Crawford is a friend of petitioners' son, Spencer, and he worked at an investment relations firm called Lippert/Heilshorn & Associates throughout 2000. A telephone call made from the Apartment to Lippert/Heilshorn at 7:20 P.M. on July 31, 2000 was made by Spencer. During the summer of 2000, Ted Crawford also received telephone calls from Spencer at the

apartment he shared with roommates. A call was made from the Apartment to Ted Crawford's apartment at 7:22 P.M. on July 31, 2000.

November 16, 2000

83. The Appointments Calendar notes that petitioner was in Locust Valley on November 16, 2000 prior to a flight from LaGuardia, and the Planner Section reflects that November 16, 2000 was a confirmed non-NYC day.

84. Petitioner flew to Virginia on November 16, 2000 with Mrs. Robertson and a party of friends and business associates to attend the dedication of the Julian Robertson Capital Markets Room at the University of Virginia (UVa), taking off from LaGuardia at 2:20 P.M. local time. Petitioner had been made aware in advance that this honor was to be bestowed upon him, and the trip to Charlottesville, Virginia, was scheduled in May 2000. Ms. Depperschmidt testified that she vividly remembers that in light of this anticipated trip, she convinced petitioner to leave New York City and go to Locust Valley on November 15, 2000, the day before the flight to Charlottesville, in order to cause November 16, 2000 to be a non-NYC day. Ms. Depperschmidt also testified that she is absolutely certain that petitioner was outside New York City on November 16, 2000. Petitioner testified that he is "absolutely sure" that he left New York City on November 15, 2000 and spent that night in Locust Valley in order to cause November 16, 2000 to be a non-NYC day. While petitioner would have preferred spending the evening of November 15, 2000 with Mrs. Robertson, he testified that he left New York City that evening in order to "save a tax day."

85. Nine telephone calls lasting a total more than 100 minutes were made from Locust Valley to the Tiger offices on November 16, 2000. The first such call was made at 7:41 A.M. and the last such call was made at 12:11 P.M. The longest of these calls lasted 45 and 39 minutes,

respectively. Petitioner, Mrs. Robertson and Ms. Depperschmidt all testified that it is clear from the number, timing and frequency of these telephone calls that petitioner made them, and the auditor acknowledged in her direct testimony that petitioner likely made these calls. Both petitioner and Mrs. Robertson testified that this pattern of telephone calls makes it clear that petitioner spent the night of November 15, 2000 in Locust Valley, and makes it inconceivable that he spent the night in New York City.

86. Mrs. Robertson testified that she would never have any reason to be on the phone with petitioner's office for as long as 39 or 45 minutes. It has been stipulated that she was at the Apartment on November 16, 2000 prior to leaving for LaGuardia for the flight to Charlottesville (the Charlottesville Flight). Mrs. Robertson was a passenger in, and signed the voucher for, a UTOG car that left from the Apartment at 1:20 P.M. on November 16, 2000 and went to LaGuardia. Petitioner's Appointments Calendar includes the following entry for November 16, 2000: "1:10 PM UTOG personal for Josie (#1272)," which reference Ms. Depperschmidt testified necessarily means that petitioner was not in this UTOG car.

87. Petitioner testified, and the auditor acknowledged at the hearing, that Mrs. Robertson, rather than Petitioner, made a number of telephone calls from the Apartment on the morning of November 16, 2000. Mrs. Robertson testified that she also made telephone calls from the Apartment that day to Bob Young at 11:23 A.M. and to the Locust Valley home at 1:01 P.M. to make sure petitioner, who typically leaves only enough time to get somewhere on time if everything goes perfectly, would be leaving Locust Valley for LaGuardia on time.

88. Among those accompanying petitioners on the Charlottesville Flight were John Griffin and Rick Gerson. Both Messrs. Griffin and Gerson testified regarding their vivid recollections of the Charlottesville Flight departing from LaGuardia and the reason it did so, and of petitioner

arriving for the Charlottesville Flight last, and separately from, Mrs. Robertson. Mr. Griffin, who organized and raised the funds for the event at UVa, testified that when he found out that the Charlottesville Flight would be leaving from LaGuardia rather than Teterboro, he became concerned that their party would be late for the dedication since LaGuardia often has delays. According to Mr. Griffin, the only reason the plane would have been leaving from LaGuardia would be that petitioner was coming from his house in Locust Valley. Mr. Griffin further testified that the reason he vividly recalls that Mrs. Robertson arrived at LaGuardia for the Charlottesville Flight separately and before petitioner, and that petitioner was the last to arrive for the flight, is that when he noticed petitioner was not with Mrs. Robertson he became even more concerned that their party would be late for the dedication, particularly since in his experience, petitioner often arrived late when neither Mrs. Robertson nor Mr. Griffin was with him.

89. Mr. Gerson, who was also involved in the event at UVa, testified that he remembered petitioner arrived separately from Mrs. Robertson and was the last to arrive for the Charlottesville Flight because Mr. Gerson did not want to arrive for the flight after petitioner, who was his host for the flight. Aboard the Charlottesville Flight, when Mr. Gerson expressed his surprise that a private plane could fly out of LaGuardia, petitioner told Mr. Gerson that the reason the flight left from LaGuardia rather than Teterboro is that petitioner came to LaGuardia from Locust Valley. In addition, Mrs. Robertson testified that it was typical for petitioner, who tends to "cut everything to the wire," to be the last of the party to arrive at the airport for a flight.

90. As described above, the audit involved not only the issue in this proceeding, but also interest deductions taken by certain investment funds managed by Tiger, certain other flow-through items in respect to those funds, and petitioner's New York City residency status for 1997. Regarding these other issues, the auditor found petitioner's records to be reliable, and determined

that petitioner met the burden of proving that he correctly reported the interest expense and other flow-through items and, although the auditor did not accept as non-NYC days each of the disputed days in 1997, also met the burden of proving that he was not present in New York City on more than 183 days in 1997 and correctly reported that he was not a resident of New York City in 1997.

91. The auditor commenced the portion of the audit regarding petitioner's 2000 New York City residency status on May 17, 2002. The first meeting between the auditor and petitioners' initial representatives regarding petitioner's residency status for 2000 occurred on or about August 28, 2003. The printout from the Electronic Calendar that is in the record as Exhibit C to the parties' stipulation was submitted to the auditor at that first meeting with petitioners' initial representatives, and the auditor was told that it was a printout from the Electronic Calendar that was prepared by Ms. Depperschmidt. The auditor did not, prior to the conclusion of the audit, have in her possession the Electronic Calendar in electronic form or a printout of the Planner Section for 2000. The auditor was never told that she could not have the electronic version of the Electronic Calendar, and did not consider it necessary to subpoena the electronic version because her questions regarding the Electronic Calendar were answered to her satisfaction.

92. Ms. Depperschmidt, who does not have any tax expertise and never had any direct contact with the auditor, did not decide which documents and schedules should be provided to the auditor, but rather provided petitioners' initial and current representatives with any information or documentation they asked her to provide. Ms. Depperschmidt told petitioners' initial representatives that she maintained an electronic calendar in 2000 and gave them a printout of the Appointments Calendar portion of the Electronic Calendar, but no one ever asked Mr. Depperschmidt for the Electronic Calendar in electronic form until petitioners' current

representatives did so in April 2008. Shortly after petitioners' current representatives obtained these items, and several months before the hearing, they furnished copies of the Electronic Calendar in electronic form and printouts of the Planner Section of the Electronic Calendar for 2000 to the Division's counsel.

93. The Roadmap was first provided to the auditor by petitioners' initial representatives at a meeting in November 2003, at which the initial representatives told the auditor that the Roadmap had been prepared by Ms. Depperschmidt from the Electronic Calendar, and accurately reflected petitioner's exact NYC days and non-NYC days. The initial representatives also provided the auditor with their own schedules and told the auditor that such schedules were prepared from the information in the Electronic Calendar. Ms. Depperschmidt did not prepare such schedules and does not recall whether she reviewed these particular schedules before the initial representatives submitted them to the auditor.

94. In addition to these materials, the auditor received significant additional documentation regarding 2000 from petitioners' initial representatives and from petitioners' current representatives, including certain long distance phone bills for the Locust Valley home, petitioner's American Express statements, federal tax return and Schedules K-1, golf club records from Shinnecock Hills Golf Club, National Golf Links of America and Deepdale, Key Air invoices, copies of airline tickets, copies of car service vouchers, Tiger telephone records, frequent flier statements, bank statements for petitioner's account at JP Morgan, a copy of petitioner's passport, travel itineraries and numerous affidavits. Numerous times throughout her testimony, the auditor acknowledged that she had reviewed many documents provided by petitioners' representatives during the audit.

95. The auditor also subpoenaed and reviewed many more records including telephone records for the Apartment and the Locust Valley home, Mrs. Robertson's car phone records, UTOG car service records, Key Air records (including flight logs), bank records from Citibank, additional golf club records and additional American Express records, including those for Mrs. Robertson. For example, during the course of the audit, the Division issued a subpoena duces tecum dated September 8, 2003 to Verizon – New York, Inc., seeking records in respect of petitioners' telephones at the Apartment, and an additional subpoena duces tecum dated December 1, 2004 to Cingular and by means of the September 8, 2003 subpoena, obtained the telephone company records for the Apartment.

96. A month after the Notice of Deficiency was issued, the Division issued two additional subpoenas duces tecum to telephone companies (AT&T and Verizon – New York, Inc.), dated October 18, 2006, and seeking records in respect of petitioners' telephones at the Locust Valley home. By means of the October 18, 2006 subpoena issued to Verizon, the Division obtained the telephone company records for the Locust Valley home for 2000 and thereafter provided a copy of these records to petitioners' representatives.

97. Each of the subpoenas issued to the telephone companies described above (the Telephone Subpoenas) either did not specify a return date or specified a return date that was less than 20 days after service thereof. None of the Telephone Subpoenas was contemporaneously served on or otherwise provided to petitioner or his representatives until the auditor received the subpoenaed information. The Division's letters to the telephone companies accompanying, and referred to in, the Telephone Subpoenas instructed the telephone companies not to "notify the subscriber" of the subpoenas.

98. Upon conclusion of the audit, after reviewing all of petitioner's records, including petitioner's calendar and the affidavits and other documents described above, the Division determined (and later stipulated) that petitioner correctly treated each of the 183 agreed New York City days as such, and that petitioner correctly treated each of the 179 agreed non-New York City days as such. Thus, after reviewing petitioner's records and the other materials obtained in the audit and asking any questions she had regarding these records and materials, the auditor found petitioner's records to be reliable in respect of 362 (or 98.9%) of the 366 days in 2000. The auditor also determined that petitioner had not met her (the auditor's) understanding of the burden of proof as to the remaining four days in 2000. The Division introduced into the record its compilations of the documents that the auditor relied on and which caused her to reach the determination that each of the days April 15, July 23, July 31 and November 16, 2000 was a NYC day.

RULINGS WITH REGARD TO PETITIONERS' PROPOSED FINDINGS OF FACT

99. The Division raised no objection to Proposed Findings numbered 1, 4-12, 14-16, 19, 20, 22-26, 31, 35-37, 39-41, 43, 44, 46, 48, 52, 58-63, 65-67, 69, 76-83, 85, 86, 88, 89 and 94-96, and the same have been included in the Findings of Fact. The following rulings are made with respect to the balance of petitioners' Proposed Findings of Fact:

> a) Proposed Findings numbered 18[10], 32 (with the addition of the final sentence to provide clarity), 33, 38(d), 42 (as further clarified by the detail set forth in Finding of Fact 74), 47(b), 49, 53, 54, 55 (with the addition of the final sentence differentiating petitioner's *focus on* versus his *desire to* limit the number of days he was present in New York City), 56 (with the addition of the final sentence to provide further detail), 57, 64 (augmented to specify that Mrs. Robertson did not recall precisely when she telephoned

[10] Whether petitioner was aware of or understood the precise legal standard of proof regarding statutory residence is largely irrelevant. The ultimate question as to petitioner is whether he, in fact, established that he was not present in New York City on any of the four disputed days (other than while "in-transit").

petitioner's sister Wyndham), 70 (in accord with Finding of Fact 55), 71, 72, 73 (with the addition of the final two sentences to provide further detail), 75 (in accord with Finding of Fact 81), 84, 87, 91, 92[11], 93 and 98 are supported by the record as proposed, are accepted, and have been incorporated in the Findings of Fact.

b) Proposed Findings numbered 2, 3, 13, 27, 34, 51 (with the addition of the material in parenthesis therein), 68, 74 (in accord with Finding of Fact 42) and 90 have been revised by petitioners to address the Division's concerns, and as so revised are supported by the record, are accepted, and have been incorporated in the Findings of Fact.

c) The following Proposed Findings have been addressed as follows:

Proposed 17–augmented to note that the ability to obtain United States Customs clearance was a reason for petitioner to, on occasion, route travel through LaGuardia.

Proposed 21–revised to reflect the fact that petitioner spent certain weekend Saturdays in New York City, but otherwise accepted as accurately reflecting the record as to the steps and practices petitioner utilized as a means of limiting his presence in New York City.

Proposed 30–revised by adding that it was significant to know petitioner's whereabouts or have the ability to contact petitioner during Ms. Depperschmidt's working hours so that she would be able to connect petitioner with various people, as necessary.

Proposed 45–revised by adding detail concerning the amount of computer space needed to store the original file and to specify that the accumulation of data or other reasons could impact the operating speed of the Lotus Organizer program.

Proposed 50–revised to refer to MWE as petitioners' "initial" as opposed to "prior" representatives (***see*** Footnote 9).

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[11] Proposed Findings 91 and 92 reflect that the printouts in question are "from" as opposed to "of" the Electronic Calendar. This distinction is to clarify that the printed information pertains to the year in question, 2000, whereas strictly speaking a printout "of" the Electronic Calendar made at the time the printouts were made could be construed to include all of the data in the Electronic Calendar including data pertaining to other years.

CONCLUSIONS OF LAW

A. New York City Administrative Code § 11-1705(b)(1)(A) and (B) sets forth the definition of a New York City resident individual for income tax purposes as follows:

> Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this city, unless (1) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city . . ., or
>
> (B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

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.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York City. Since the parties agree that petitioners are domicilliaries of Locust Valley and not New York City, this matter involves only the second, or "statutory resident," basis upon which New York City resident tax status may apply pursuant to Administrative Code § 11-1705(b)(1)(B), with its dual predicates for such tax status being (1) the maintenance of a permanent place of abode in the City and (2) physical presence in the City on more than 183 days during a given taxable year. Further narrowing the issue in this case, petitioners admit that they maintained a permanent place of abode, the Apartment, in New York City during the year in issue. Thus, the sole matter in question here is the second prong upon which statutory resident status is premised, namely whether petitioner Julian H. Robertson was physically present in New York City on more than 183 days in the year 2000.

C. Tax Law § 697(a) allows the Commissioner of Taxation to promulgate rules and regulations necessary to enforce the provisions of Tax Law Article 22. The relevant regulation addressing the question of whether an individual spent more than 183 days in the particular jurisdiction, applicable to both New York State and New York City,[12] is 20 NYCRR 105.20(c), which prescribes the following day-counting rule:

> In counting the number of days spent within and without New York State [or City], presence within New York State [or City] for any part of the calendar day constitutes a day spent within New York State [or City], except that such presence may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State [City], or while traveling through New York State [or City] to a destination outside New York State [or City]. (20 NYCRR 105.20[c]; 20 NYCRR 295.2[a], 295.3[a].)

D. In connection with acquiring and renovating the Apartment for their use, petitioners specifically inquired of their accountants as to the personal income tax ramifications resulting therefrom. There is no dispute that the advice petitioners received, and clearly understood, was that having a permanent place of abode in the city exposed them to the possibility of significant tax liability by being held taxable as residents of the city, with such liability turning entirely upon the number of days they spent in the city. Specifically, petitioners were advised and clearly understood that in order not to be subject to such liability, they would be able to spend no more than 183 days in the city. Indeed, the fiscal impact of spending more than 183 days in the city was surely impressed upon petitioners over the course of the three years immediately prior to the year in question here. That is, while petitioners established upon audit that they spent fewer than 184 days in New York City and thus were not held subject to such liability for the year 1997 they

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[12] The definition of a New York City statutory resident is identical to the definition of a New York State statutory resident, except for substitution of the term "City" for "State." (***Compare*** Administrative Code § 11-1705[b][1][B] ***with*** Tax Law § 605[b][1][B]

were, by unavoidable circumstances, unable to spend fewer than 184 days in New York City and hence were subject to such liability for the two years (1998 and 1999) immediately preceding the year at issue herein (***see*** Finding of Fact 19). It is also clear that petitioners fully understood and accepted that a "day in the City" meant "any part of a day," no matter how insignificant in time or purpose that part of a day may have been (***see e.g. Matter of Leach v. Chu***, 150 AD2d 842, 540 NYS2d 596[1989]), save for the exception of the so-called "in-transit" situation, set forth at 20 NYCRR 105.20(c) where one is physically present within New York City while in-transit between two points both of which are outside of the City. Petitioners, for their part, do not question the premise that "any part of a day" spent (i.e., physically present) in New York City in 2000 constituted a "day" for purposes of the statutory resident day count. Reflective of this understanding, and upon the basis of a substantial amount of time and effort expended by both parties and by their counsel, it has been agreed that petitioner was physically present in New York City on 183 days and was not physically present in New York City, except while in transit, on 179 days, leaving for determination herein the question of physical presence in New York City on only four specific disputed days, to wit, April 15, July 23, July 31 and November 16, 2000.

E. In order to overcome the deficiency asserted in this case, petitioner bears the burden to "come forward with clear and convincing evidence proving . . . that . . . he did not spend in the aggregate more than 183 days" in New York City in 2000 (***Matter of Holt***, Tax Appeals Tribunal, July 17, 2008). Petitioner may meet this burden of proof through testimonial evidence, documentary evidence, or a combination of the two (***see Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994; ***Matter of Armel***, Tax Appeals Tribunal, August 17, 1995; ***Matter of Moss***, Tax Appeals Tribunal, November 25, 1992). The Tribunal has held that a clearly established "pattern of conduct" from which a taxpayer's location may be determined for a

particular day suffices to meet the burden of proof with regard to that day (***see Matter of Kern***, Tax Appeals Tribunal, November 9, 1995, ***confirmed*** 240 AD2d 969 [3rd Dept 1997]), and further that general testimony regarding the "patterns and habits of life," when coupled with supporting documentary evidence, is sufficient to meet the burden of proof (***see Matter of Armel***). The Tribunal has also held that where a taxpayer presents a contemporaneously maintained diary or calendar accompanied by consistent and supporting testimony, the same will be sufficient to meet the burden of proof as to the day count, absent other evidence which is inconsistent therewith or indicates that the diary or calendar is in some other manner unreliable. (***see Matter of Moss; Matter of Reid***, Tax Appeals Tribunal, October 5, 1995.) Finally, even where taxpayers did not produce a diary or refused to produce a diary, the Tribunal has determined nonetheless that the taxpayers met the burden of proving they were not present on more than 183 days based upon their testimony and affidavits regarding their habit and pattern of conduct during the last month of the year in issue (***Matter of Armel***), based upon the testimony of the taxpayer's secretary regarding entries in the diary the taxpayer refused to submit (***Matter of Avildsen***), and based upon affidavits and additional evidence concerning the taxpayers' whereabouts (***Matter of Golub***, Tax Appeals Tribunal, March 24, 1994).

F. In ***Matter of Holt***, the Tribunal stated that "[s]tatutory residence cases . . . are very fact intensive and require specific evidence through substantiating contemporaneous records to show a taxpayer's whereabouts on a day-to-day basis during each year in question. Such records could include not only day calendars but airline tickets, restaurant and hotel receipts and credit card statements." The taxpayer's proof in ***Holt*** included no evidence of any patterns, routines or habits of life, but did include conflicting day counts based ultimately on poorly photocopied calendars submitted post-hearing which were in some instances illegible, reflected cryptic,

written over or scratched out and changed location information, and with respect to which the taxpayer provided vague testimony and essentially no corroborating or supporting records. Given the inadequacies in the proof, the taxpayer in ***Holt*** was unable to meet the burden of proof and, consequently, did not prevail. By contrast, in ***Matter of Moss***, the taxpayer submitted business diaries which included both contemporaneously and non-contemporaneously made entries, which the taxpayer reasonably explained as part of his overall credible testimony concerning his routines and his best recollection of events during the years in issue. This evidence, taken in light of the taxpayer's awareness of the New York City day count rule and its tax implications, and coupled with the balance of additional evidence which was consistent with the taxpayer's diaries, sufficed to establish that the taxpayer was not present in New York City on more than 183 days (***see also Matter of Reid***). It is possible to argue that the language in ***Holt*** concerning "specific evidence through substantiating contemporaneous records" could be read in isolation to require, as a matter of law, the production of documentary proof positive of one's out-of-state (or city) whereabouts on at least 184 days in any given year in order to meet the burden of establishing that one was not present in the state or city and was present in some other extra-jurisdictional locale. However, in light of the well-developed case law, including that set forth above, this is not the applicable standard of proof (***see Matter of Avildsen, Matter of Moss***)

G. From the foregoing, the standard as to counting days so as to determine whether one did or did not spend, in the aggregate, more than 183 days in New York City (or State) is not that there must be an objectively verifiable piece of documentary evidence establishing an individual's whereabouts on every day in question. In fact, as petitioners note, the Division's own audit guidelines recognize this by reference to days such as those spent at home watching television or gardening, for which documentary evidence substantiating one's whereabouts may

simply not exist (***see*** Revised Manual for Nonresident Audits, District Audit Manual, p. 7). Thus, while the "gold standard" of proof would be a document, definitively and objectively verifying a taxpayer's presence in a particular place outside of New York City (or State), to the exclusion of any other place, on a particular day (e.g., a jailer's record of incarceration), there are days for which such objectively verifiable documentary proof simply does not exist. In fact, requiring such evidence for all days would leave the taxpayer's burden of proof to be "beyond all doubt," higher even than the criminal conviction standard of "beyond a reasonable doubt" and far above the standard of "clear and convincing" proof as is required in matters of statutory residence (***see e.g. Matter of Holt***) At the other end of the spectrum from this "gold standard" is testimony alone and unaccompanied by other substantiating supportive evidence. There is little doubt that virtually anyone could accurately recall, without any documentary support, precisely where they were on at least one if not a few specific dates. For example, nearly everyone likely knows precisely where they were on September 11, 2001, a day of national and international historic significance. So too, it seems that most would know with certainty where they were on a particular date attached to which was some very highly significant matter of personal importance. For example, nearly everyone would be able to clearly recall where they were on the date of their child's wedding, perhaps even more clearly if that wedding took place in a locale other than the person's home jurisdiction and for which non-hotel accommodations were provided, and could provide credible testimony accounting for their whereabouts on such a day notwithstanding the lack of any documentary evidence directly augmenting and supporting such testimony. Such testimony, remembered by the significance of the date and event, delivered credibly, would suffice to meet the burden of establishing one's whereabouts on that date. However, of course, in reality few dates carry the significance and create such lasting, specific and nearly indelible

memories of date, time, place and event as those mentioned above. Thus, where there is no definitive document establishing or locking down one's whereabouts on a given date, the evidence of date, time, place and event becomes, as here, a combination of testimony or testimonies to be evaluated in light of each other, in light of the surrounding events which aid the person or persons testifying in recalling the event, date, time and place concerning which the testimony is given, and in light of any additional evidence relied upon by a witness in conjunction with providing his testimony, so as to accrue ultimately in a determination of whether such testimony, as a whole, constitutes credible testimony.

H. The determination of whether testimony is credible rests with the trier of facts, "who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony" (***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992). A determination of testimonial credibility rests on the twin components of "competency," which is the "opportunity and capacity to perceive combined with the capacity to recollect and communicate," and "veracity," which is the "truthfulness of the witness" (***Matter of Impath, Inc.***, Tax Appeals Tribunal, January 8, 2004). Any additional evidence relied on in support of specific testimony given, referenced to refresh the recall of a witness, or otherwise augmenting the testimony given concerning a claim of event, date, time and place, can itself offer insight as to whether the witness's recall is credible and correct and supports the result as to the "place conclusion" desired by the taxpayer. So too, careful and objective review of such evidence and of any accompanying testimony or other evidence may reveal significant inconsistencies weighing against the likelihood that the testimony, thought honestly given, might through the fallibility of human memory, simply be incorrect or not clear and convincing evidence. It is

against this background that the evidence in this case, including the testimonial evidence, concerning petitioner's whereabouts on the four disputed days must be evaluated.

I. This case presents no new or novel concepts of statutory or caselaw interpretation. Rather, resolution involves a fact-intensive review of both the steps undertaken by petitioner with respect to tracking and accounting for his whereabouts during the year in question as well as all of the evidence pertaining particularly to the four disputed days. First, and in light of having been made aware of the ramifications of being held taxable as New York City residents, petitioner took specific action by which he could track, be made aware of and, ultimately, if necessary as here, account for his whereabouts during the course of a given year. To this end, petitioner specifically charged his personal assistants, who already maintained his business and personal appointments and schedule and who were the persons with the ability to know where petitioner would likely be at any given time so as to be able to contact him, with the additional responsibility of tracking and accounting for the number of days he spent within and without New York City each year. While the need to be aware of days within and without the city clearly impacted and most certainly influenced petitioner's business schedule as well as his personal schedule, and the choices he made in connection therewith, the specific task of physically tracking and accounting for petitioner's days within and without the city for New York City resident tax status purposes, and of periodically advising petitioner of his "day count," was given to petitioner's personal assistants, and most directly to his primary personal assistant, Julie Depperschmidt.

J. In response to this charge petitioner's assistants, most notably and directly Julie Depperschmidt, undertook the maintenance of a day tracking and counting schedule on an ongoing contemporaneous basis. Ms. Depperschmidt did this by using the functions of Lotus

Organizer, a commonly available and easily utilized computer program. It should be noted that petitioner, by his own admission, is not computer literate and did not undertake to track his own whereabouts on a computer program or otherwise. Rather he left this responsibility to his assistants, with the charge that this was an important part of their job. As very specifically detailed in the record, Ms. Depperschmidt utilized two functions of Lotus Organizer in attending to petitioner's scheduling and to maintaining an account of his whereabouts, specifically the Appointments Calendar and the Planner Section. The Appointments Calendar, in summary, was utilized by petitioner's assistants to schedule and record petitioner's appointments, both business and personal, on an ongoing basis including recurring appointments and future events to which petitioner had committed or to which petitioner might decide to commit. The Planner Section, in summary, concerned petitioner's whereabouts and was utilized as a means of accounting for whether petitioner was within or without New York City on an ongoing contemporaneous and cumulative basis. Ms. Depperschmidt distinguished the Appointments Calendar from the Planner Section by describing the relative utility of each, explaining that the "primary purpose" of the former was "for me to execute my job" rather than "to be able to substantiate Mr. Robertson's whereabouts on any particular day." This testimony serves to distinguish "tracking petitioner's daily movements," i.e., his ongoing appointments and commitments, from the other aspect of her job, the charge to keep track of petitioner's whereabouts vis-a-vis presence within and without New York City for New York City resident tax purposes. It was from the Planner Section that Ms. Depperschmidt could see the cumulative number of days spent in New York City as the year progressed, and could advise and remind petitioner of the progress of that cumulative total, as he had instructed her to do, on a periodic basis.

The Planner Section was updated on a contemporaneous basis to confirm petitioner's status as either within or without New York City on any given day. This updating was done directly by Ms. Depperschmidt (i.e., on her own) in instances where (a) she personally observed petitioner to be in the City, such as on days when he was physically present in his office and (b) in instances when she knew petitioner to be outside of the City, such as on days when he was away on business or vacation and she had made, or was aware of, petitioner's travel arrangements. By contrast, in instances when Ms. Depperschmidt was not directly able to observe or otherwise be able to know of petitioner's whereabouts, or was uncertain as to whether he had or had not been physically present in New York City, she updated the day count by directly asking petitioner whether he was or was not within New York City on any part of a particular day, such as on weekends when petitioner's office was closed and petitioner was not traveling to a specific distant place. In sum, by this procedure petitioner established a methodology for tracking his day count and, in concert with his personal assistants, adhered to the routine by which the methodology was carried out.

K. Much has been made of what constitutes the "Electronic Calendar," principally centering around whether or not the Planner Section was included within that term. Clearly, the Planner Section is a part of Lotus Organizer and, as the testimony at hearing makes abundantly clear, was utilized by Ms. Depperschmidt for the purposes described above. Both a compact disc (CD) and printouts of different views of the Planner Section and Appointments Calendar portions of the Electronic Calendar are in evidence. The Planner Section was not printed out or otherwise provided to the auditor during the audit process. The discussion concerning the timing of making the Planner Section known and available to the auditor takes on undertones of either surprise, perhaps in the guise of a litigation strategy or, at a lower level, the possibility that the Planner

Section was somehow created after the fact. As to the former possibility, it is clear that the testimony of Ms. Depperschmidt detailing her use of the Planner Section makes the same admissible in evidence in any event, even if the Planner Section had first been mentioned and provided at the hearing. It was not, having been discussed by the parties and in fact made available to the Division some four months before the hearing. As to the latter possibility, any claim of after-the-fact creation, or of alterations to the Planner Section as it existed prior to being furnished to the Division, must be evaluated in light of the record as a whole. Virtually any calendar or diary, either self-maintained or maintained by others under the ultimate control of the person whose whereabouts are in question, is capable of manipulation. Calendar entries, including electronic calendar entries, can be changed, and such changes can be made in a manner which leaves a reviewer without recourse or ability to ascertain when, or even if, changes may have been made. However, based on the record as a whole, there is no sense of that type of manipulation having been engaged in here and, in fact, the opposite sense emerges. The question of why the Planner Section itself was not provided to the Division as a "stand alone" printed out document at some point early (or earlier) in the audit process has been raised. On this question, the audit process, with its "give and take" back and forth examination of documents between the auditor and petitioners' initial representatives, is not fully known. However, the record clearly discloses that the Roadmap, which is consistent with the Electronic Calendar in its representation that the four disputed days were non-NYC days, was furnished to the auditor along with other schedules prepared by petitioners' initial representatives early in the audit process. In turn, the Roadmap was prepared by Ms. Depperschmidt based upon many supporting sources, including the Appointments Calendar, travel receipts and, very significantly, the Planner Section. The fact that the Roadmap was a culminating compilation based on many other documents, including

specifically and significantly the Planner Section, goes a long way in supporting the claim of the Planner Section's existence, contemporaneous maintenance, and use during 2000. Ms. Depperschmidt's use and reliance on the Planner Section in preparing the Roadmap, in fact incorporating its information into the Roadmap, provides a reasonable explanation as to why the Planner Section itself was not printed and provided to the auditor. Noting these facts in particular leaves no sense that the Planner Section was created after the fact, enhanced after the fact, or was somehow manipulated or changed after the fact.

L. The Electronic Calendar, taken as a whole and encompassing both the Appointments Calendar and the Planner Section, constitutes a routine and systematic method and practice by which petitioner's assistant Julie Depperschmidt tracked and accounted for petitioner's whereabouts, both for New York City resident tax status purposes as well as for the necessary and practical purpose of organizing and following petitioner's schedule of appointments and commitments. With regard to any speculation that the Planner Section was not contemporaneously maintained, the same is overcome through the credible testimony given by petitioner and by Ms. Depperschmidt concerning Ms. Depperschmidt's periodically advising petitioner as to the number of New York City days used and the number of such days remaining available, a function reliant not upon the Appointments Calendar but upon the Planner Section. To carry out this part of her charge concerning tracking petitioner's New York City days, Ms. Depperschmidt had to have been using the Planner Section, for this was a specific function available within the Planner Section of Lotus Organizer. Further, to perform this part of her charge on an ongoing basis during the year, the Planner Section had to have been maintained (i.e., updated) on a contemporaneous basis, else the day count would not only have been incorrect and

essentially useless to petitioner but, by virtue of the Planner Section default function, would have registered all days as New York City days (***see*** Findings of Fact 31, 39).

M. There has been some discussion that this case invites and subjects petitioners to an untenable level of scrutiny in general, and more specifically because it ultimately involves petitioner's whereabouts on only four specific days. It is not surprising that petitioner, a person whose work involves monitoring and acting on small, often time-sensitive changes or differentials, would be fully comfortable in leaving his day count as close as it is in this instance, i.e., precisely at the cutoff point of exactly 183 days within New York City, after which point he would be subject to tax as a statutory resident. This "closeness" does not, however, subject petitioner to a stricter standard of review or a higher burden of proof to meet with regard to the remaining four disputed days, especially when viewed in the light that the parties agree not only to 183 days within New York City, but also agree to the undisputed 179 days without New York City. As the Tribunal pointed out in ***Matter of Holt***, statutory residence cases are clearly highly fact intensive and consistent with this reality, petitioners are and have been "put to their proof" by the Division. Petitioner, for his part, maintained comprehensive records in an effort to ensure that, on audit, his whereabouts on any given day could be determined, and those records were made available to the auditor.

THE DISPUTED DAYS

APRIL 15, 2000

N. The primary basis upon which April 15, 2000 remains a day in question is the absence of any documentary evidence showing that petitioner departed New York City prior to midnight on April 14, 2000. Presumably, a UTOG voucher or other car or transportation service receipt for April 14 would have sufficed to support the claim that petitioner left New York City and did

not, as the Division posits, likely spend the evening of April 14, 2000 at the Apartment, depart for Locust Valley on April 15 and play golf at Deepdale in Manhasset prior to (or on the way to) going to Locust Valley for the balance of the weekend. The Division, in questioning petitioner's whereabouts, maintains that petitioner might have been less focused on saving New York City days in the early part of the year as opposed to later, when the remaining number of available New York City days was fewer. The Division also maintains it is likely petitioner would have desired to spend Friday evening, April 14, with Mrs. Robertson, given that she had just returned on Thursday, April 13, 2000 from a trip to San Antonio, Texas, and was departing again on Sunday, April 16 for an extended trip to Australia and New Zealand, in advance of petitioner, who would be joining Mrs. Robertson (and their family) in those countries later. Finally, the Division notes that there were two telephone calls from the Apartment on the morning of April 15. One call was to petitioner's office and the other was to petitioner's sister, Wyndham Robertson. The evidence, taken as a whole, overcomes the possibility raised by the Division that petitioner did not exit Manhattan on April 14 but rather stayed at the Apartment until the morning of April 15. The evidence and conclusion in this regard are discussed as follows:

a) First, the Planner Section of the Electronic Calendar lists April 15 as a non-NYC day. There has been extensive review of the manner in which petitioner's Electronic Calendar was contemporaneously maintained, and the pattern shown therein with respect to weekend days reflects his overall aim of not spending in excess of 183 days in New York City. The pattern that most clearly emerges from review of the evidence is that when petitioner spent a Sunday outside of New York City in 2000, he also spent the preceding Saturday outside of New York City. If petitioner had spent Saturday, April 15, in New York City, this would have been the only weekend in 2000 when petitioner was in New York City on a Saturday, but outside of New York

City on the accompanying Sunday. While this is not dispositive of the question of petitioner's whereabouts on April 15, nor does it establish that he in fact left the City before midnight on April 14, and while it is clear that petitioner could have had a weekend where one day was spent in New York City and one day was spent in Locust Valley (or elsewhere outside of New York City), it remains that this one weekend would be the only instance at variance with petitioner's stated aim of spending both weekend days outside of the City whenever possible, and the sole aberration from the only real pattern emerging as consistent with petitioner's stated aim.[13] While it might be true that the intensity of petitioner's focus on staying out of New York City may have sharpened during the course of the year, especially in light of the ongoing updates and reminders provided to him by Ms. Depperschmidt, there is no sense that his desire and overall aim to minimize his New York City days when possible was any less keen earlier as opposed to later in the year.

b) As to the question of the lack of any transportation receipt for petitioner's departure from the City on April 14, there has been clear testimony that petitioner was frequently driven from his office to Locust Valley in petitioner's own car by his property caretaker and driver, Bob Young. Obviously, there would be no receipt for transportation furnished under these circumstances. Both petitioner and Bob Young testified to the routine manner in which Bob Young would transport petitioner from his office to Locust Valley, as well as to other locations including golf courses and airports outside of New York City, and would likewise transport petitioner from Locust Valley to his office. Neither petitioner nor Mr. Young made a claim in their testimony that they specifically recalled Bob Young retrieving petitioner from his office on

[13] To be sure, there were weekends when petitioner was present in New York City, whether by choice or by required commitment, though no other instances where petitioner would have been present in New York City on only one of the two weekend days.

April 14 and bringing him to Locust Valley. Such an instance-specific claim would obviously strain credulity. Rather, the testimony clearly establishes that this mode of transportation from petitioner's office to locations outside of New York City was a common and usual occurrence. Augmenting the claim that this was how petitioner left his office on April 14 is the fact that the only transportation voucher for April 14 or April 15 is a UTOG voucher for transportation between the Apartment and Deepdale in Manhasset on April 15. The testimony in the record is clear that for car service transportation provided for petitioner, the receipts were signed either by petitioner himself, or by his personal assistants Julie Depperschmidt or Emily Falkenstein when they had arranged the transportation. Significantly, the UTOG voucher for April 15 is signed by Mrs. Robertson.

c) The Division has maintained that it is likely petitioner would have wanted to spend April 14 at the Apartment, in light of petitioners' admitted general desire to spend time with each other, and upon the conjecture that such desire could have been heightened during this mid-April time frame due to Mrs. Robertson's immediately preceding time away from petitioner while visiting her mother in San Antonio coupled with her imminent departure for Australia and New Zealand. However, it is no great leap to accept Mrs. Robertson's credible testimony that she was just as happy to have petitioner not at the Apartment on Friday evening precisely for the reason that she had just returned from one trip to a distant locale and was about to embark upon another to an even further distant locale, and needed time and space to organize herself and her affairs because of her recent return and imminent departure. As she colloquially phrased her state of mind, she was busy and "happy" to have petitioner "out of her hair." This circumstance is entirely consistent when viewed with the knowledge that petitioners had spent the preceding evening, April 13, together at the Apartment after Mrs. Robertson's return from San Antonio, and

would and did spend the following day, April 15, together golfing at Deepdale and thereafter at Locust Valley prior to Mrs. Robertson's departure for Australia and New Zealand on Sunday, April 16.

d) Finally, as to the telephone calls, the Division points out that the two calls from the Apartment on the morning of April 15 might have been made by petitioner, and that it was at least as likely that such calls would have been made by petitioner as by anyone else who was at the Apartment. This likelihood is diminished by the balance of information in the record. With regard to the call to petitioner's office, Mrs. Robertson explained in her testimony that she frequently phones petitioner's office to speak with his assistants or to leave messages with his assistants regarding various matters about which petitioner might need to be reminded, or with respect to which petitioner might need to be made aware, or which might have impact upon petitioner's schedule and commitments. Given that Mrs. Robertson was leaving for an extended period, it is certainly plausible that she made the call to petitioner's office for such a purpose. More significantly, it is far more likely that she, as opposed to petitioner, would be calling his office for such a purpose, given that the call was made on a weekend day when petitioner's office was closed. As to the call to petitioner's sister, there is a substantial amount of testimony in the record concerning the surprise party for petitioner at the Morgan Library, the ruse by which petitioner would be brought to the party so as to preserve the surprise, the fact that Mrs. Robertson would be absent from the party due to her travel plans, and that petitioner's sister had decided, at the last minute, to fly up from North Carolina to attend the party. This latter fact brings with it the attendant logistical details of Wyndham Robertson's stay at the Apartment, including access to the Apartment, as well as a ruse for her presence in New York City other than her attendance at the party and the like. These logistical matters were handled, by long habit,

pattern and, apparently, necessity almost exclusively by Mrs. Robertson rather than by petitioner, since petitioner was not a person generally interested in or involved with such details. Since the party was a surprise party for petitioner, it is highly likely that Mrs. Robertson made the phone call to Wyndham Robertson. Lastly, the phone call on April 14 from Locust Valley to the Apartment was made at 6:04 P.M., after Bob Young's typical work day had ended. Thus, such a call, while very unusual for Bob Young to have made, would have been entirely usual for petitioner to have made, if for no other reason than to confirm to his wife his arrival at Locust Valley (***see*** Finding of Fact 11).

JULY 23, 2000

O. The primary basis upon which July 23 remains a day in question centers upon the fact that the private plane upon which petitioner returned from Ireland landed at 9:15 P.M. local (New York) time as opposed to 1:15 A.M. as was originally believed. There is no dispute that the time differential stems from the fact that the flight was logged in Zulu Time (f/k/a Greenwich Mean Time), but this fact was not discovered until significantly after the audit process was initially undertaken and the flight logs were obtained and examined. The Division maintains that given the proximity of LaGuardia, where the flight landed, to the Apartment, it is equally if not more likely that petitioner, who was admittedly at work in his office in New York City on the following day, might have simply gone from LaGuardia to the Apartment rather than to Locust Valley for the night as he claimed. As above, careful review of all of the evidence mustered by petitioner shows that petitioner has met the burden of establishing that he went to Locust Valley as opposed to the Apartment after his arrival at LaGuardia and thus was not present in New York City on July 23, 2000. Review of the evidence leading to and supporting this conclusion follows:

a) First, all views of the Electronic Calendar consistently denote July 23 as a non-NYC day. As a practical matter the date July 23 would not have been in issue originally since it appeared the plane landed after midnight, in which case July 23 would have been a non-NYC day in any event. The recording of this date as a non-NYC day is entirely consistent with Ms. Depperschmidt's questioning and petitioner's response that July 23 was a non-NYC day, and is reflective of the typical confirmation process engaged in by the two. Her initial belief that the landing occurred at 1:15 (i.e., on July 24) made further inquiry essentially unnecessary and there is no apparent or compelling reason to expect that Ms. Depperschmidt would further question petitioner on the particulars of his activities during the early morning hours after his arrival, nor to expect that petitioner would feel compelled or find it necessary to provide any such particulars on his evening arrival or, for that matter, his morning commute to New York City. Simply put, Ms. Depperschmidt observed petitioner's presence in the office on July 24 and allowed the same to be confirmed as a NYC day (by Planner Section default) and inquired so as to confirm that petitioner was not present in New York City on the prior day (July 23), and thereafter recorded such day as a non-NYC day in the Planner Section of the Electronic Calendar.

b) As to the impact of the Dial Car receipt, Payson Coleman did not attempt to state in testimony that he remembered the specific details of this particular car trip as distinct from the many he has had with petitioner, both upon returning from their annual golf outings as well as on other occasions. It is, however, significant that he could not recall sharing a car with petitioner's son Spencer when petitioner was not also present. Ultimately, to accept the possibility that the car was sent on to Locust Valley as a ruse so that petitioner could "cover his tracks" regarding a decision to go to New York City would be to elevate mere speculation, in favor of reasonable likelihood, to an unacceptable level. Rather, the most reasonable view of the evidence supports

the conclusion that Payson Coleman, petitioner and petitioner's son Spencer, along with their luggage, shared a ride home after a long day of golf and a long flight home. This conclusion is entirely consistent with the accompanying conclusion that the pattern of telephone calls from the Apartment to Locust Valley and from Locust Valley to the Apartment made during the period just after the plane had arrived reflected confirmation calls between husband and wife that petitioner had returned safely from his trip (***see*** Findings of Fact 11, 71, 72). Additional consistency may be seen in the telephone calls the following morning from Locust Valley to Sarah Collins, who was Spencer Robertson's fiancé at the time (***see*** Finding of Fact 68).

c) Perhaps the most significant supporting item with respect to whether petitioner had gone to Locust Valley from LaGuardia on July 23 is the early morning (6:59 A.M.) telephone call to petitioner's car phone on July 24. It is at best highly unlikely that Bob Young would be randomly driving petitioner's car, alone, for some purpose at that hour, especially given that Bob Young did not pick up petitioner at the Apartment and drive him to his office, and that Bob Young did not normally begin his workday until approximately 8:00 A.M., unless he was driving petitioner from Locust Valley to some location. In contrast, it is both clearly consistent, in light of the long-standing practice, and very highly likely that Bob Young was in fact driving petitioner from Locust Valley to his office and that Mrs. Robertson was calling petitioner on his car phone. It is of course possible that petitioner went to the Apartment and not to Locust Valley upon returning from Ireland, while Spencer Robertson went to Locust Valley via a shared ride with Mr. Coleman, and that the phone calls between Locust Valley and the Apartment were made back and forth between Spencer Robertson and his parents. This result, however, requires a conclusion that both petitioner's recall and Mr. Coleman's recall were entirely incorrect, and that petitioner essentially wasted a tax day outside of the city in favor of spending a very short period of time in

the city, in contravention to his overall aim of gaining such tax days whenever possible. Further, as noted above, this result conflicts entirely with the most reasonable view of who received the call to petitioner's car phone on the morning of July 24 and fails to explain who, other than Spencer Robertson, would likely have been calling Sarah Collins from Locust Valley during the mid-morning hours of July 24, 2000.

July 31, 2000

P. The primary basis upon which July 31 remains a day in question centers on the entry in the Appointments Calendar portion of the Electronic Calendar that reflects an "investment staff meeting" as scheduled for 8:30 A.M. at Tiger's office. The Division also points out that many telephone calls were made on July 31, between approximately 8:30 A.M. and 3:30 P.M., from petitioner's office to premises petitioners rented in Southampton.[14] As above, review of the evidence supports the conclusion that petitioner was not present in New York City on July 31, 2000. Review of the evidence leading to and supporting this conclusion follows:

a) The Electronic Calendar records July 31 as a non-NYC day. Petitioners have for many years rented premises in Southampton as a vacation place for a portion of the summer, and in 2000 that rental period spanned July 29 through September 4. Thus, July 31, 2000 was the third day of the vacation period and followed a memorable weekend spent in Southampton with Edward Crawford, a close friend to Mr. Robertson from the time of their college days, and Mr. Crawford's wife and son, Ted. This was the last time petitioner spent with Mr. Crawford, who was very ill at the time and who died later in 2000.

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[14] Initially, the Division questioned certain calls made from the Apartment on the evening of July 31, including a call to Lippert/Heilshorn. However, the Division has agreed that petitioner adequately explained the calls from the Apartment, including that petitioners' son Spencer had made the call to Lippert/Heilshorn, and such calls are no longer among the bases upon which the Division maintains that petitioner has not met his burden of establishing that he was not present in New York City on July 31, 2000.

b) As to the "investment staff meeting," the same was a recurring entry made by petitioner's assistants on petitioner's Appointments Calendar. The record establishes that petitioner did not personally attend every investment staff meeting, due to various other intervening commitments including business and personal travel, and that while he made some attempts to "attend" by telephone, this procedure was not particularly successful. At the same time, the hedge funds managed by Tiger had been closed and, while petitioner was engaged in winding down such funds and in managing a considerable amount of his own personal wealth, there was less need and importance attached to petitioner's attending such regularly scheduled ongoing staff meetings. In short, there is nothing in the record to indicate that petitioner would have had any particular reason or need to drive 90 miles from his summer vacation rental premises to his office on the first weekday of his summer vacation period, including to attend a recurring if not essentially routine staff meeting.

c) It is also significant that in accordance with the established method by which petitioner's presence in New York City was tracked, Ms. Depperschmidt, who was in Tiger's office on July 31, would have seen petitioner there, thus confirming his presence in New York City and allowing the same to be entered on the Planner Section of the Electronic Calendar by default. However, in fact, Ms. Depperschmidt overrode the default action of the program and entered the date as a non-New York City day, based on petitioner's absence from the office.

d) Petitioner addressed the pattern of telephone calls from Tiger's office to the rental in Southampton, testifying credibly that given the substantial duration of some of such calls, he would have been the only person at the Southampton rental premises who would have been receiving the calls. Petitioner contrasted these calls, which spanned the time frame from 8:30 A.M. to 3:30 P.M., with the pattern of calls from Tiger's offices to the Southampton premises on

August 21, 2000. On August 21, 2000, petitioner made the 90-mile drive from Southampton to New York City due to a medical situation about which petitioner wished to consult with a physician. On August 21, 2000, there were no calls from Tiger's office to the Southampton premises after 11:40 A.M., a time consistent with petitioner's leaving to attend his medical appointment. While petitioner characterizes this trip to New York City as a "dart" into the City, and without commenting on the likelihood of whether or not a trip of such short duration would be "discovered" on audit were it not voluntarily disclosed, it is significant that petitioner nonetheless advised Ms. Depperschmidt that this date was to be recorded as a New York City day. At a minimum these circumstances, confirmed by Ms. Depperschmidt in testimony, speak to the integrity and regularity of the process by which petitioner sought to track and account for his days within and without New York City (***see*** Finding of Fact 40).

NOVEMBER 16, 2000

Q. The primary basis upon which November 16 remains a day in issue centers, as with April 15, 2000, on the question of whether petitioner left New York City before midnight on November 15, 2000, and did not return to New York City on November 16 prior to boarding his plane at LaGuardia. The plane, scheduled to depart at 2:20 P.M., was bound for the University of Virginia in Charlottesville, Virginia where petitioner was to be honored by the dedication of the Julian H. Robertson Capital Markets Room. As above, careful review of all of the evidence surrounding November 15 and 16 leads to the conclusion that petitioner spent the evening of November 15 in Locust Valley and entered New York City on November 16 only for the purpose of boarding the flight to Charlottesville. Review of the evidence supporting this conclusion follows:

a) As with each of the other disputed days, the Electronic Calendar records November 16 as a non-New York City day. In this regard, Ms. Depperschmidt testified convincingly that she advised petitioner, according to their usual and ongoing practice, of the number of New York City days remaining available and, ultimately, persuaded petitioner to leave the City on November 15 so as to "conserve" his remaining "tax days." As noted, petitioner's *focus* on not exceeding the allowable number of NYC days likely intensified as the year went on, and the importance of the overall objective of not exceeding the limit on such days held the same high level of importance (i.e., the *desire* to meet his objective) at all times. To the extent petitioner's focus on meeting the required day count may be said to have sharpened as the end of the year approached, it is reasonable to accept that this was most likely a strong factor in the decision to heed Ms. Depperschmidt's repeated advice and leave the City on November 15.

b) The record also includes the testimony of John Griffin and Rick Gerson, two individuals who worked for petitioner and to whom petitioner had been a mentor. They were involved in the planning and financing of the trading room at UVa. to be dedicated in petitioner's honor, by giving and securing from others substantial donations. They were members of the party traveling to Charlottesville on petitioner's plane. Each testified to their recall of the events leading up to the flight, including Mrs. Robertson's arrival at LaGuardia via car service followed by petitioner's arrival in his own car driven by Bob Young, and each explained how they were able to recall these facts and surrounding events. In the case of Mr. Griffin, who had organized the event, his focus was on whether petitioner would arrive in a timely manner such that the flight would not be delayed and their arrival in Virginia would be timely with respect to the planned events surrounding the dedication. He noted his familiarity with petitioner's habit of arriving at the last minute (or being late) if he was not accompanied by someone, typically either petitioner's

wife or, in past years, Mr. Griffin himself, to "keep him on schedule." Mr. Griffin noted his concern about delay was heightened when Mrs. Robertson arrived at the airport ahead of and without petitioner. Mr. Gerson explained his recall of the day based on his own concern about being on time and not arriving after petitioner, his host for the flight, had arrived. Mr. Gerson noted his relief that he had in fact arrived ahead of both Mrs. Robertson and petitioner, his recall that petitioners in fact arrived separately at the airport, with petitioner being the last to arrive, and Mr. Gerson's conversation with petitioner about the ability to fly privately out of LaGuardia, with petitioner explaining that he chose LaGuardia instead of Teterboro because he (petitioner) was coming to the airport from Locust Valley.

c) The balance of evidence supporting the conclusion that petitioner was in Locust Valley includes the UTOG car voucher for Mrs. Robertson's transportation to LaGuardia signed by Mrs. Robertson on November 16, Mrs. Robertson's testimony that she in fact went to LaGuardia via this car which departed from the Apartment for LaGuardia at 1:20 P.M. (with no stops noted en route), and the testimony of Ms. Depperschmidt together with the entry in the Appointments Calendar showing that Ms. Depperschmidt had arranged this transportation specified to be personal transportation for Mrs. Robertson (as opposed to business transportation for petitioner). Certain telephone calls from the Apartment on November 16, including specifically a call to petitioner's driver, Bob Young, at 11:23 A.M. and a call to the Locust Valley home at 1:01 P.M., described by Mrs. Robertson as her calls aimed at ensuring that petitioner departed Locust Valley for LaGuardia on time, strongly support petitioner's presence in Locust Valley. Finally, there were over 100 minutes of telephone calls from the Locust Valley home on November 16 between 7:30 A.M. and 12:30 P.M., including two calls to Tiger's offices lasting 39 and 45 minutes,

respectively. Several witnesses testified these calls could only, realistically, have been made by petitioner.

R. Evaluating the evidence for the foregoing disputed days, including (a) the consistent claim of non-New York City presence reflected in the Electronic Calendar, (b) the ultimate lack of any significant inconsistencies between and among the various print views of the Electronic Calendar and the Roadmap, (c) the lack of any other indications that the Electronic Calendar and specifically the Planner Section is somehow inherently unreliable, rather than highly reliable as the embodiment of a systematic and regular routine established for the purpose of accounting for petitioner's days within and without New York City, (d) the testimony of all of the witnesses alone and in concert with each other where the same coincide and (e) the supporting documentary evidence, clearly and convincingly supports the conclusion that petitioner has met his burden of proof with respect to the four disputed days. In arriving at the conclusion that petitioner has shouldered his burden of establishing that he was not present in New York City within the contemplation of Administrative Code § 11-1705(b)(1)(B), it is important to bear in mind that the circumstances on each of these days are such that one would reasonably accept that petitioner might likely not have direct and objectively verifiable documentary evidence (beyond the Electronic Calendar printouts) precisely establishing his whereabouts. In particular, petitioner had at his disposal his own vehicle and a driver for that vehicle, and he established his regular pattern of using this means and mode of transportation, for which there would not be the generation of a receipt or other documentary evidence of such travel, to leave New York City from his office and be taken to Locust Valley or elsewhere outside of New York City. Petitioner has claimed that this was the case on April 14 and on November 15, such that on each of the following days he was not present in New York City (save for boarding an airplane at LaGuardia

on November 16). In similar fashion, since Payson Coleman rather than petitioner arranged for and paid the cost of transportation from LaGuardia to Old Brookville and thereafter to Locust Valley, via his account with Dial Car, it would not be reasonable to expect petitioner to have or be able to produce a receipt or other document signed by petitioner and establishing his own transportation on July 23. So too, absent some evidence that petitioner had a reason to traverse from Southampton to New York City on July 31, other than the presence of what is essentially a recurring pro-forma entry of "investment staff meeting" on his Appointments Calendar, the lack of a receipt documenting travel into New York City is not surprising. The absence of other indications of presence in Southampton, such as credit card receipts for dining, is likewise not surprising given that petitioners had a cook in their employ who came with them and was present in Southampton during the vacation period. In this manner, the conclusion that petitioner simply spent the day in Southampton is supported by the fact that he was on vacation and this was only the third day of his vacation period. Ultimately, the evidence does not reflect approximate dates and events, but rather was specific to each of the days in issue and the testimonies given were consistent with the documentary evidence provided and with each other. (***see e.g. Matter of Kornblum***, Tax Appeals Tribunal, November 16, 1992; ***Matter of Feldman***, Tax Appeals Tribunal December 15, 1988; ***Matter of Moss***) As discussed, specific credible testimony can be sufficient to meet a taxpayer's burden of proof, absent evidence which is inconsistent therewith or countervailing thereto (***Matter of Armel***) Here, petitioner's testimony, delivered in a forthright manner, has not been impugned, nor has that of petitioner's other witnesses, including particularly the testimony of Julie Depperschmidt. The testimony of petitioner's other witnesses regarding events which took place on the four disputed days ties to those events, including that of Payson Coleman and the circumstances of the return trip after golfing in Ireland, and of John

Griffin and Rick Gerson concerning the circumstances surrounding the trip to Charlottesville, Virginia. There is no sense that any of the witnesses were not competent to observe, recall or report accurately and truthfully, and their testimonies reflect competence, veracity and hence credibility. Petitioner was clearly aware of the consequences of spending more than 183 days in New York City, and of the need to track his New York City presence. The acceptance and admission that no one can remember his or her precise whereabouts on every day supports the recognition of the need for, and petitioner's creation of, a system to do so, and the use of that system on an ongoing basis. It is noteworthy that the parties have stipulated that petitioner's presence within (183 days) and without (179 days) New York City, totaling 362 out of 366 days in the year 2000, was ultimately accepted as accurate and thus was correctly recorded in the Electronic Calendar, a result which supports the accuracy and reliability of the Electronic Calendar. This, in turn, leaves possible only that the entry for any given one of the four disputed days could have been erroneous, either as the result of error itself in recording, or by reliance on incorrect information in the first instance. Petitioner has overcome these possibilities by the balance of the evidence submitted at hearing. On the four disputed days, each of which is recorded as a non-New York City day, there is no one independently and objectively verifiable piece of documentary evidence which conclusively establishes that petitioner was not physically present in New York City, such as airline receipts and hotel stay documents from a distant locale. However, the standard of proof is not that the petitioner must establish, via an independently and objectively verifiable document or documents, his absence from New York City so as to eliminate any possibility of such presence. Rather, the question is whether all of the available evidence, taken together, supports the conclusion that petitioner was somewhere other than in New York City on the days in issue as claimed and as set forth in the Planner Section of the

Electronic Calendar. Petitioner has met the burden of answering this question in the positive. Petitioner (as well as others providing testimony) admitted the inability to recall his specific whereabouts on a day-to-day basis. It is clear that petitioner had a busy schedule, both on a professional and personal level, and was not focused on the logistical details of that schedule. Instead, he relied upon others to do this for him. At the same time, petitioner did exhibit a strong and clear recall of events of significance, and the nature and delivery of his testimony was forthright and candid as opposed to guarded or coached.

S. It is, of course, possible that petitioner was physically present in New York City on any (or all) of the four disputed days. However, when viewed in light of all of the evidence presented, this mere possibility of presence is insufficient to outweigh the most likely actual fact and conclusion that petitioner was not present in New York City on those days. To accept that the possibility of presence outweighs the most likely actual conclusion to be drawn from all of the evidence would be to impose upon a taxpayer such as petitioner the burden of providing proof positive of presence somewhere other than in New York City so as to eliminate all possibility of New York City presence. This is simply not consonant with the standard of clear and convincing evidence as developed by the significant body of case law concerning statutory residence. Notably, the standard is not clear and convincing *documentary* evidence, but rather is clear and convincing evidence, such that clear and credible testimony viewed in light of all of the evidence and not impugned by contrary or contradicting evidence can, as here, suffice to meet the burden of proof. For all of the reasons set forth herein, petitioners have met the burden of establishing that petitioner was not present in New York City on more than 183 days in the year 2000 within the contemplation of Administrative Code § 11-1705(b)(1)(B) and 20 NYCRR 105.20(c), and thus was not properly subject to tax thereunder as a resident of New York City.

T. Given the foregoing conclusion it is unnecessary to address petitioner's concerns with regard to the Division's issuance of subpoenas in the manner set forth in Findings of Fact 96 and 97.

U. The petition of Julian H. Robertson and Josephine Robertson is hereby granted and the Notice of Deficiency dated September 18, 2006 is canceled.

DATED: Troy, New York
October 15, 2009

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE