

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEREMY WIESEN : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826284
of New York State and City Personal Income Taxes under :
Article 22 of the Tax Law and the Administrative Code :
of the City of New York for the Years 2007 and 2008. :
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Petitioner, Jeremy Wiesen, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2007 and 2008.

On December 14, 2015, petitioner, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by September 2, 2016, which date began the six-month period for issuance of this determination. Pursuant to Tax Law § 2010(3), the six month period was extended to nine months. After due consideration of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined that petitioner was a domiciliary of New York City during the years 2007 and 2008.

II. Whether petitioner is liable as a statutory resident of New York City for the year 2007.

III. Whether the Division of Taxation properly denied Schedule C expenses claimed by petitioner in the years 2007 and 2008.

IV. In the alternative, whether the Division of Taxation properly determined that petitioner failed to properly allocate income to New York during the years 2007 and 2008.

V. Whether petitioner has established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. On August 31, 2013, following a field audit, the Division of Taxation (Division) issued to petitioner, Jeremy Wiesen, a notice of deficiency assessing additional New York State and New York City personal income taxes due for the years 2007 and 2008 in the aggregate amount of \$221,581.00, plus penalty and interest.¹ With respect to the year 2007, the notice of deficiency assessed \$152,630.00 in additional New York State and City taxes due, plus negligence penalty pursuant to Tax Law § 685(b) and interest. With respect to the year 2008, the notice of deficiency assessed \$68,951.00 in additional New York State and City taxes due, plus penalties for failure to file on or before the due date (Tax Law § 685[a][1]) and for negligence (Tax Law § 685[b]) and interest. This deficiency resulted from the Division's conclusion that petitioner remained a domiciliary of New York City during the years 2007 and 2008 and, thus, was subject to tax as a New York State and City resident for the years 2007 and 2008.

2. For the year 2007, petitioner filed a New York nonresident and part-year resident tax return (Form IT-203) claiming single filing status, and indicating his address as South Flagler Drive, West Palm Beach, Florida. Petitioner did not report living in New York City as a part-year resident in any month in 2007 in item (E) on page 1 of the Form IT-203. On this return,

¹ Petitioner's former representative, Jack B. Goldhaber, CPA, executed two consents extending the period of limitations for assessment of income tax(es) under Article(s) 22, 23, 30, 30A and 30-B of the Tax Law for the year 2007 until any time on or before October 15, 2013.

petitioner reported the following items as part of his federal adjusted gross income of \$1,659,145.00: wages of \$774,062.00, taxable interest income of \$730.00, ordinary dividends of \$402.00, taxable refunds of state and local income taxes of \$179.00, federal Schedule C business income of \$611,778.00, a capital gain in the amount of \$268,110.00,² taxable social security benefits of \$11,665.00, other income of \$411.00, and adjustments to income in the amount of \$8,192.00 for one half of self-employment tax paid. New York adjustments of \$11,844.00 were subtracted from the federal adjusted gross income to arrive at New York adjusted gross income of \$1,647,301.00. After claiming itemized deductions after modifications in the amount of \$130,862.00, petitioner determined his New York State taxable income to be \$1,516,439.00, and the New York State tax due on that amount to be \$103,876.00. Petitioner then multiplied the New York State income percentage of 17.65%³ by the base New York State tax of \$103,876.00 and determined his allocated New York State tax to be \$18,334.00. Petitioner reported withholdings totaling \$31,733.00,⁴ a total tax liability of \$18,334.00, and an over payment of \$13,399.00 on this return. Petitioner did not compute any New York City personal income tax on the 2007 return.

3. On Schedule B of the Nonresident and Part-Year Resident Income Allocation and College Tuition Itemized Deduction Worksheet Attachment to Form IT-203 (Form IT-203-B) attached to the 2007 return, petitioner reported living quarters maintained for and by him in New

² Sales of assets reported on the 2007 Form 1040 Schedule D included a painting acquired on January 1, 1990, and sold on March 1, 2007, for \$275,000.00.

³ Petitioner determined the New York State income percentage by dividing the adjusted gross income in the New York column on line 31 of Form IT-203 in the amount of \$290,729.00 by the adjusted gross income in the federal column on line 31 in the amount of \$1,647,301.00

⁴ The 2007 Form IT-2 Summary of Form W-2 Statements attached to petitioner's return reported \$774,062.00 in wages, and New York State and New York City taxes withheld in the amounts of \$20,488.00 and \$11,425.00, respectively, by petitioner's former employer, New York University (NYU).

York State at a Wireless Road, East Hampton, New York, address, and a 254 East 68th Street, New York, New York, address. On Schedule B, petitioner also reported 150 days spent in New York State in 2007. The Schedule A, Allocation of wage and salary income to New York State, of the Form IT-203-B was not completed.

4. Among the documents attached to petitioner's 2007 nonresident tax return was a document entitled: "YEAR 2007 STATEMENT ATTACHED TO NYS IT-203" that provided as follows:

"The wages that are taxable to New York State and City, \$290,729 are those allocable for the period that Jeremy Wiesen was employed during 2007, i.e. January 1, 2007 to June 30, 2007, and for employer compensation for ten year back pay.

Pursuant to New York State Tax Law Section 601(e), a nonresident individual is subject to taxation on income earned in New York. A taxpayer who gives up his right to future employment is giving up an intangible right. Under New York law a sale of an intangible right by a nonresident is not subject to New York tax.

Jeremy Wiesen, a nonresident individual of New York State, received the balance of the wages shown on the 2007 form W-2 as consideration for the relinquishment of his right to future employment, and as for his resignation.

As such the balance of the wages is not subject to taxation by New York State. See, e.g. New York State Administrative Rulings:

Robert C, and Eileen H. Butler, New York Division of Tax Appeals, Administrative Law Unit, DTA No 812807, December 14, 1995; and TSB-A-00(7)I, New York Commissioner of Taxation and Finance, Petition No 1000413A, September 6, 2000.

Jeremy Wiesen was provided with tax advice Roberts & Holland LLP, 825 Eighth Ave, New York NY 10019, which was agreed to by his employer New York University for the purpose of withholding."

5. On page two of his 2007 Form 1040, petitioner listed his occupation as consultant.

Attached to petitioner's 2007 federal return was a Schedule C, Profit or Loss From Business, on

which he reported \$725,000.00 in gross receipts, \$113,222.00 in total expenses⁵ and a resulting net profit of \$611,778.00. On this Schedule C, petitioner listed a code number of “541990” for his principal business or profession, and his business address as the South Flagler Drive, West Palm Beach, Florida, address.

6. For the year 2008, petitioner filed a federal income tax return claiming single filing status, and indicating his address as South Flagler Drive, West Palm Beach, Florida, and his occupation as consultant. On this return, petitioner reported total income in the amount of \$632,216.00, consisting of taxable interest income of \$187.00; ordinary dividends of \$5,256.00; taxable refunds of state and local taxes of \$2,910.00; Schedule C business income of \$603,783.00 from consulting; a capital loss of \$3,000.00; Schedule E rental real estate income of \$2,444.00 from the rental of a cabana at the Maidstone Club, East Hampton, New York; and taxable social security benefits of \$20,636.00. Petitioner subtracted one-half of self-employment tax in the amount of \$14,409.00 from total income of \$632,216.00, and determined his federal adjusted gross income to be \$617,807.00. He also claimed itemized deductions in the amount of \$116,602.00 on his 2008 federal return.

7. Attached to petitioner’s 2008 federal income tax return was a Schedule C, Profit or Loss From Business, on which he reported \$725,000.00 in gross receipts, \$121,217.00 in total expenses,⁶ and a resulting net profit of \$603,783.00. On this Schedule C, petitioner listed his principal business or profession as consulting, with a code number of “541990,” and his business

⁵ The reported total expenses consisted of car and truck expenses of \$5,355.00; legal and professional services of \$60,911.00; office expense of \$3,881.00; travel of \$28,028.00; deductible meals and entertainment of \$5,012.00; and other expenses of \$10,035.00.

⁶ The reported total expenses consisted of car and truck expenses of \$2,726.00; legal and professional services of \$29,687.00; office expense of \$2,675.00; rent or lease of other business property of \$25,200.00; travel of \$5,200.00; deductible meals and entertainment of \$4,166.00; and other expenses of \$51,563.00.

address as the South Flagler Drive, West Palm Beach, Florida, address.

8. Petitioner only filed an extension of time to file with New York State for the year 2008.

9. On June 2, 2010, the Division commenced a general verification field audit of petitioner's income tax returns for the years 2007 and 2008. In her letter dated July 7, 2010, the auditor, Connie Marcus, requested that petitioner complete an enclosed audit questionnaire, and an enclosed AU-262.5 for purposes of allocating his wages from New York University. The letter also asked petitioner to provide the date, the details and supporting documentation of his move out of New York; a copy of his 2008 federal Form 1040, including all statements; any Forms 1099 to support the source and amount of the consulting receipts reported as Schedule C income; the location of the art work prior to its sale in 2007, and the insurance riders to support that location; and the results of any recent federal audit. In addition, Ms. Marcus advised that the Division's records indicated that a New York return for the year 2008 had not been filed and asked petitioner to explain why the return was not filed.

10. Subsequently, petitioner executed a power of attorney appointing Jack B. Goldhaber, CPA, as his representative. Typed responses to the audit questionnaire for the year 2007, dated as signed by Mr. Goldhaber on November 15, 2010, were provided to the auditor. A summary of the responses follows:

a. petitioner's current address was listed as South Flagler Drive, West Palm Beach, Florida, a 2,800 sq. ft., four bedroom and four bath, condominium owned by petitioner;

b. petitioner's "NY State homes" were listed as 254 East 68th Street, New York, New York, a 975 sq. ft., one bedroom, rent stabilized apartment that petitioner acquired in August 1980 and disposed of on May 15, 2007; and Wireless Road, East Hampton, New York, a 2,500 sq. ft. house acquired in October 1999;

- c. the 254 East 68th Street apartment “contained personal belongings until move out in May 15, 2007,” and the Wireless Road house contains petitioner’s personal belongings;
- d. insurance for the 254 East 68th Street apartment “is insured for Gavin Wiesen (son and resident of the apartment) and Jeremy Wiesen”;
- e. petitioner’s son, Gavin, “has lived at 68 St. during the audit period”;
- f. petitioner is “[R]etired”; however, he was a business school professor;
- g. petitioner voted in Manhattan in 1972 and 1976;
- h. petitioner has three automobiles registered in East Hampton, New York, and two automobiles registered in West Palm Beach, Florida;
- i. petitioner has a Florida driver’s license; and
- j. no personal income tax return required in any state.

The following additional information was also included in the responses to the audit questionnaire:

“Jeremy Wiesen affirmed that he ‘permanently vacated’ his New York City rent stabilized apartment on May 15, 2007 in the State of New York Division of Housing and Community Renewal annual Income Certification Form. In 2008, Mr. Wiesen provided the landlord with documentation they had said they required to permit his son to succeed to the apartment; nevertheless the landlord would only provide a renewal lease to Mr. Wiesen which he signed protesting that the landlord had given him no alternative and he continued to ask them to transfer the lease to his son since Mr. Wiesen had ‘permanently vacated’ the apartment and moved to Florida. Mr. Wiesen has since been served with a ‘Notice to Tenant of Non-Renewal of Lease, Termination of Tenancy and Landlord’s Intention to Recover Possession,’ the lease has expired, and the landlord is reviewing documents for Mr. Wiesen’s son to succeed to the apartment in which he lives.”

11. In addition to the responses to the audit questionnaire, by letter dated November 15, 2010, Mr. Goldhaber also provided some answers and documentation in response to the auditor’s request. In that letter, Mr. Goldhaber indicated that petitioner left New York on May 15, 2007, at

which time he “permanently vacated the New York City apartment”; no New York State income tax return was required for 2008 because “there was no New York taxable earned income for 2008”; and the painting sold in 2007 was located at the Arcature Fine Arts Gallery, Palm Beach, Florida, and “was sold from there to a Florida purchaser.” Documentation provided consisted of “Mr. Wiesen’s Florida Department of Revenue Homestead Application known as ‘Original Application for Ad Valorem Tax Exemption’”; a copy of “the Florida voter registration card in effect since 2004”; “a signed copy of the Income Certification form filed with the Division of Housing and Community Renewal”; a copy of Jeremy Wiesen’s June 5, 2008 letter to Rudin Management Company, Inc.; copies of Jeremy Wiesen’s June 25, 2008 and July 18, 2008 letters to Rudolph Henry, Rudin Management Company, Inc.; a copy of the 2007 “Statement Attached to NYS IT-203”; and a copy of a letter from the Internal Revenue Service (IRS) dated August 30, 2010.

12. On the Florida Department of Revenue Original Application for Ad Valorem Tax Exemption for the tax year 2008 filed on or about April 30, 2007 (original application for homestead exemption),⁷ petitioner applied for a \$25,000.00 homestead exemption for the South Flagler Drive, West Palm Beach, condominium. On this original application for homestead exemption, petitioner reported his last year’s address as “254 E 68TH ST NY 10021,” that he did not own property anywhere other than Florida, and that he did not have an out of state’s driver’s license or vehicle tag. In the “Proof of residence for all owner [sic]” section of the original application for homestead exemption, petitioner provided the following information: he last became a permanent resident of Florida on April 27, 2007; his date of occupancy was June 11,

⁷ The copy of the Florida Department of Revenue Original Application for Ad Valorem Tax Exemption is unsigned and has “COPY” stamped at the top.

2001, the date on which the deed for the South Flagler Drive condominium was recorded; his Florida Driver's license number and an issuance date for the same of March 30, 2007; one Florida vehicle tag number; declaration of domicile "res. date" of April 27, 2007; he was retired; and "254 E 68TH ST, NYC, NY 10021" was the address listed on his last IRS return.⁸

13. The copy of an unsigned Voter Card Palm Beach County, Florida, submitted by Mr. Goldhaber, bears petitioner's name and the South Flagler Drive, West Palm Beach, address. The record does not include petitioner's record of actual voting in Florida.

14. The copy of the State of New York Division of Housing and Community Renewal (NYS DHCR) Office of Rent Administration Income Certification Form - 2009 Filing Period, submitted by Mr. Goldhaber, lists Rudin Management Co., Inc., as the owner or managing agent, and Jeremy Wiesen, as the tenant of the 254 East 68th Street, apartment subject to income certification. At the beginning of the income certification form, the following information, among other things, is provided:

"The New York City Rent Stabilization Law and Emergency Tenant Protection Act ("rent stabilization") as well as the New York City Rent and Rehabilitation Law and Emergency Housing Rent Control Law ("rent control") permit an owner to make an annual application to exempt from rent regulation housing accommodations having a "maximum rent" (rent controlled) or "legal regulated rent" (rent stabilized) of \$2,000.00 or more per month. If the tenant(s) timely respond to a separate notice of the deregulation application from the NYS Division of Housing and Community Renewal (DHCR), the NYS Department of Taxation and Finance will review whether the housing accommodation is occupied by persons who have a total annual income in excess of \$175,000.00 in each of the two preceding calendar years. Annual income means federal adjusted gross income as reported on the New York State income tax return. For housing accommodations subject to rent stabilization, total annual income means the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant on a lease who occupy the housing accommodation, whether or not as a primary residence, and of all other persons who occupy the housing

⁸ Although this section asked for information about the applicant's Florida voter registration number and the date of such registration, petitioner did not provide any information regarding the same.

accommodation as their primary residence on other than a temporary basis. . . . In all cases, the operative date for determining the nature of any person's status or occupancy is the date that this form is served upon the tenant. . . . This form, when served upon a tenant initiates the process of determining whether this housing accommodation qualifies for deregulation based upon the above criteria. This housing accommodation can only be deregulated pursuant to a separate order issued by the Division of Housing and Community Renewal in response to an owner's filing a petition for deregulation based on the tenant's (s') income."

15. Part A of the income certification form was hand dated and signed by the owner or managing agent, Rudolph Henry, on February 10, 2009. Part B, section 5 of the form required the tenant to supply the names of all tenants of the housing accommodation, including all persons whose names are recited as the tenant or co-tenant on any lease; the status of such tenants,⁹ including the date on which the tenant vacated the housing accommodation (if applicable); whether the tenant filed New York State income tax returns for 2007 and 2008, or the reason for not filing a return for one or both years. In addition, Part B, section 6 required the tenant to list the names of all other persons who occupy this housing accommodation as a primary residence on other than a temporary basis as of the date this form was served upon the tenant by the owner, or who occupied it as a primary residence on other than a temporary basis at any time during the period from January 1, 2007 through the date this form was served upon the tenant by the owner (including children and other relatives). Part B, section 6 also required information regarding the status for such listed persons; the date of vacancy or change in use (if applicable); the relationship of such persons, i.e., employee, subtenant or child; the age of the child; and whether a New York State income tax return was required to be filed for 2007 and 2008 and whether the same were filed. In Part B, section 5 of the form, Jeremy Wiesen is listed as the tenant "(on

⁹ The choice of status is "a" for those tenants who occupy the housing accommodation as a primary residence; "b" for those tenants who occupy it as a non-primary residence; "c" for those tenants who have temporarily vacated the housing accommodation; and "d" for those tenants who have permanently vacated the housing accommodation.

lease),” with a status of “d” and a vacancy date of “5/15/07,” who filed a New York State income tax return for the year 2007, but not for 2008 because he was “[N]o longer resident or income.” In Part B, section 6 of the form, “Gavin Wiesen” is listed as the occupant, with a status of “a,” i.e., one who occupies the housing accommodation as a primary residence; and is identified as “child.” No information was provided with respect to Gavin’s age, and whether New York State income tax returns were required to be filed for 2007 and 2008, or if he filed such returns. At the bottom of page 2, the following handwritten statement appears: “Jeremy Wiesen has permanently vacated the apartment[.] [sic] Gavin Wiesen is the successor tenant.” In Part B, section 8. Income Certification, petitioner certified that the total annual income was \$175,000.00 or less in either of the two preceding calendar years, and hand dated and signed the same, on June 2, 2009. The date on which the completed income certification form may have been returned to the owner, as required by the form, is not part of the record.

16. As noted, in support of his position that he vacated the 254 East 68th Street apartment, petitioner submitted letters dated June 5, 2008, June 25, 2008, and July 18, 2008, addressed to the building’s management company.¹⁰ In his June 5, 2008 letter, petitioner provided some information to support his request that his son Gavin succeed to the 254 East 68th Street apartment under the rent stabilization laws. Petitioner also asked the management company to issue a new lease to Gavin as a successor tenant beginning August 1, 2008. In a subsequent faxed letter dated June 25, 2008, petitioner requested a response to his June 5, 2008 letter and a recent telephone call to the management company’s office. The attachment of a signed NYS DHCR Office of Rent Administration Income Certification Form - 2008 Filing Period was

¹⁰ Mr. Goldhaber did not submit any information or attachments referenced in the three letters.

referenced in the June 25, 2008 letter. In his letter dated July 18, 2008, petitioner claimed that he sent back the renewal lease after requesting that the management company put in Gavin's name and the management company did not respond. Petitioner requested that the management company conform the documents to reflect Gavin as the tenant of the apartment. On each of these letters, only petitioner's email address and a phone number are listed.

17. The IRS letter, dated August 30, 2010, addressed to petitioner in care of Mr. Goldhaber, advised that as a result of a correspondence examination, no changes were made to the tax reported on Mr. Wiesen's return for the tax period ended December 31, 2007. The record does not contain any other information regarding the IRS's examination of petitioner's 2007 federal return.

18. The auditor reviewed the audit questionnaire and the documentation submitted, and found that petitioner had not supplied his federal tax returns, moving documents, the Form AU-262.5, Schedule C detail or insurance documents. A January 18, 2011 entry in the Tax Field Audit Record (audit log) indicates that those items would be requested again. It further indicates that the auditor researched rent stabilization rules, and noted that petitioner would qualify until 2007, the year he received a lump sum from his previous employer and the year he claims to have moved. She also noted that a supplied document concerning petitioner's son as the successor tenant of the New York City rent stabilized apartment contained incorrect information because petitioner asserted that his income was not more than \$175,000.00 in the last two years. The January 18, 2011 entry also notes that the auditor researched petitioner's son and found that he had listed the New York City apartment as his address since 2001. However, the auditor found that the son "appears to be a writer, producer up and coming," whose "income does not seem to support NYC rental expenses." She also noted that the New York City telephone was still in

petitioner's name. The auditor determined that bank statements were needed to see who maintained the New York City apartment. She also determined information was needed with respect to domicile, day count data and back up, petitioner's employment and severance agreements, wage type and amount breakdown, the Florida house, and the sale of the artwork.

19. In continuance of the audit for the years 2007 and 2008, the auditor sent a letter, dated January 18, 2011, to Mr. Goldhaber requesting the following information: copies of petitioner's 2007 and 2008 Forms 1040 including all schedules; all insurance contracts and special riders in effect during 2006, 2007 and 2008; specific information regarding ownership, maintenance and physical characteristics of the South Flagler Drive apartment; moving documents to support the date of move from New York to Florida, or the reason the same could not be supplied; a list of the specific dates petitioner was in New York during 2007 and 2008; a breakdown of the amount of compensation included in petitioner's wage and tax statements, Forms W-2, for 2007 and 2008; the completion of the previously mailed Form AU-262.5, which would provide the detail as to how petitioner arrived at New York wages; details of petitioner's Schedule C income, including Forms 1099 and, if applicable, an identification of receipts by payer name, address and amount; and the inclusive dates that the artwork was located at the Arcature Fine Arts Gallery, as well as the artwork's prior location and the inclusive dates at that location. This letter also requested a complete set of the following documents for January 1, 2007 until February 28, 2009: bank statements and cancelled checks; telephone statements (with detail) for each location; cell phone records; EZ Pass statements; personal and corporate credit card statements; travel documents such as frequent flier statements, passports, and boarding passes; and any other documents that petitioner has to support his location.

20. In response to the auditor's January 18, 2011 letter, Mr. Goldhaber submitted a letter

dated March 30, 2011, and the following documents: petitioners federal Forms 1040 for the years 2007 and 2008; petitioner's Form W-2 for the year 2007; the "New York University confidential agreement"; Forms 1099-Misc for the years 2007 and 2008; and a "copy of the \$270,000 deposit"¹¹ related to the sale of the painting. In his letter, Mr. Goldhaber stated that petitioner was still gathering documentation requested by question number 2, i.e., the insurance contracts and riders, and question number 6, i.e., the bank statements, telephone statements, cell phone records, EZ Pass statements, personal and corporate credit card statements, travel documents, and any other documents supporting petitioner's location.

21. Mr. Goldhaber's March 30, 2011 letter also contained, in relevant part, the following responses to the auditor's January 18, 2001 letter:

"Number 3. Flagler Drive apartment:

- a. The Flagler Drive apartment in West Palm Beach Florida is a condominium unit. Mr. Wiesen is the sole owner.
- b. Mr. Wiesen has owned the condominium apartment since 2002.
- c. In the year 2004, Mr. Wiesen purchased the next door apartment. The combined apartments include four bedrooms and four baths. The apartment is now approximately 2,600 sq. ft.

Number 4. Moving documents.

When Mr. Wiesen vacated his New York City apartment in May 2007, and his office at New York University, he was systematically moving his personal effects to Florida over a period of time, which culminated in the spring of 2007, at which time he also vacated the office at New York University.

Mr. Wiesen's Florida home has been fully furnished and available for constant use since 2002. He has spent considerable amount of time in Florida. In 1999 he purchased a home in Palm Beach proper. As explained in our previous correspondence, the New York City apartment was left with household effects for Mr. Wiesen's son, Gavin, who has been living in the apartment since then.

Number 5. New York dates. [The 2008 diary will be mailed under separate cover]

¹¹ The audit file submitted into the record does not include a copy of the \$270,000.00 deposit.

As to the year 2008, Mr. Wiesen kept a diary that will show that he was in New York for far fewer [sic] than the 183 days

The number of days spent in New York State in the year 2007 will not determine the taxability of the earnings in that year. As explained in the attachment to the New York State Form IT-203, the taxable wages for the year 2007 are subject to New York State [Tax] [sic] Law Section 601(e). Mr. Wiesen had given up his right to future employment, which is an intangible right. Under New York law the sale of an intangible right by a nonresident is not subject to New York tax.

As shown on the 2007 Form W-2, there was New York State and New York City withholding on the wages earned for the spring term in 2007 and for rectifying of prior years earnings. By vacating his home in New York City and not being employed anymore after June 30, 2007, Mr. Wiesen had relinquished his right to future employment and all income received after that date are not taxable by New York.

The following points indicate that Mr. Wiesen was a Florida domiciliary and resident for 2007:

- Signed a domiciliary registration with Florida
- Homestead filing
- Florida driver's license
- Continued voter registration in Florida.
- Signed statement with the State of New York Division of Housing and Community Renewal Offices of Rent Administration in which Mr. Wiesen surrendered right to the rent stabilized apartment on May 15, 2007.
- New will drafted

Number 7 and Number 8. Compensation.

The W-2 for the year 2007 . . . includes Mr. Wiesen's compensation as associate professor at New York University for the spring term, as well as compensation for (1) underpayment of salary of income for 10 years, and (2) for the relinquishment of Mr. Wiesen's contractual right as a tenured professor.

New York University relied on, among other authorities, the administrative ruling: Robert C. and Eileen H. Butler, New York Division of Tax Appeals, Administrative Law Judge Unit, DTA No. 812807, December 14, 1995; and TSB-A-00(7)I, New York Commissioner of Taxation and Finance, Petition No. 1000413A, September 6, 2000.

In 2008 the payments from New York University were specifically determined to be for pain, suffering, and defamation.

Number 9. New York University confidential agreement:

The pages relating to the termination compensation are enclosed. . . .

Number 10. Schedule C income for 2007 and 2008 consists of only one source, New York University Form 1099-Misc for \$725,000. Copies attached. . . .

Number 11. Sale of painting:

After the painting failed to sell at Christies – Fine Art Auction House in 2005, the painting was shipped to the Arcature Fine Arts Gallery in Palm Beach, Florida. The sale took place on May 24, 2007, when Mr. Wiesen was a resident and domiciliary of Florida. (Copy of the \$270,000 deposit enclosed.)”¹²

22. The Confidential Agreement, Release and Waiver of All Claims (confidential agreement) between Jeremy Wiesen and NYU, signed by Mr. Wiesen on June 22, 2007, sets forth the terms and conditions of the settlement of a lawsuit. Pursuant to the terms of the confidential agreement, in full consideration of petitioner’s execution of the agreement, “his agreement to be bound by its terms and his undertakings as set forth” therein, NYU agreed to provide petitioner “with payments in the total amount of” \$2,175,000.00, payable as follows:

(a) \$725,000.00, less payroll taxes, withholdings and other deductions as required by law, “[T]he amount of this payment shall be” \$502,930.85. Of this \$725,000.00, the parties “agreed that two-thirds of said amount (\$483,333) is being paid for the relinquishment of Wiesen’s contractual rights to future employment as a tenured professor.” NYU agreed not to withhold or deduct New York State and New York City income taxes from the \$483,333.00, “[B]ecause Wiesen has indicated that as of April 15, 2017 he is a resident of Florida, and because of Wiesen’s contention, based on advice he received from his tax advisor, that the \$483,333 should not be subject to any withholdings and deductions” for the same. Payment under this paragraph was to be made no later than July 6, 2007;

¹² See Footnote 11.

(b) \$725,000.00 to be paid on January 8, 2008. The parties agreed “that this payment is being made in settlement of Wiesen’s claimed emotional distress and pain and suffering, and that it does not constitute back pay, front pay or salary”; and

(c) \$725,000.00 to be paid no later than July 6, 2007. The parties agreed “that this payment is being made in settlement of Wiesen’s claimed damage to reputation and that it does not constitute back pay, front pay or salary”

23. Review of this confidential agreement also reveals that effective June 1, 2007, petitioner “voluntarily retired in good standing from his position as a tenured Associate Professor at the University’s Stern School of Business” (Stern School); at the time of his retirement, petitioner “held the position of ‘Associate Professor of Business Law and Accounting’”; and in retirement, petitioner was permitted to use the title of “Professor of Entrepreneurship, Retired.” Further review of this confidential agreement also indicates that petitioner agreed “to vacate his University office and/or work space premises no later than the date he receives payment in full of all monies due to him” pursuant to (a) and (c) outlined above in Finding of Fact 22; and NYU agreed “to provide Wiesen with a lump sum payment of his salary for June, July and August 2007, less payroll taxes, withholdings and other deductions as required by law, on the next regularly scheduled pay period following Wiesen’s execution of the Agreement,” i.e., a check in the amount of \$9,307.72.

24. NYU issued to petitioner a 2007 Form W-2 Wage and Tax Statement that listed his address as 254 East 68th Street, New York, New York. NYU also issued to petitioner Forms 1099-Misc for the years 2007 and 2008, each of which listed his address as 254 East 68th Street, New York, New York, and reported nonemployee compensation in the amount of \$725,000.00.

25. Under a separate letter dated March 30, 2011, Mr. Goldhaber submitted a

“compilation of the days [petitioner] spent in Florida, California and New York for the year 2008” and a “copy of [petitioner’s] 2008 calendar and receipts.” In this letter, Mr. Goldhaber asserted that “[P]er the calendar’s compilation, Mr. Wiesen spent less than 183 days in New York, so that he is not a resident of New York.” The monthly compilation of Jeremy Wiesen’s “Calendar for 2008,” prepared by Mr. Goldhaber, lists a total of 212 days in Florida, 6 days in California and 148 days in New York.

26. In an April 29, 2011 audit log entry, the auditor noted that copies of large calendars and individual receipts for selected transactions were submitted, along with selected credit card statements. She further noted the absence of phone bills and other documents needed to resolve all issues previously raised. On April 29, 2011, the auditor called Mr. Goldhaber regarding the documentation submitted to date. During that telephone call, Mr. Goldhaber indicated that he thought what he submitted would not lend to any ambiguity as to where petitioner was during the period. The auditor agreed to go through the documents and follow up with him after her review.

27. Subsequently, in May 2011, Mr. Goldhaber submitted the following credit card and club statements for 2008: The Beach Club, West Palm Beach, Florida - bills ending January, June, and September 2008; The Harmonie Club, New York, New York - bills ending January, June, September, October, November and December 2008; Citi Gold AAdvantage credit card statements - closing dates of March 18, 2008, May 19, 2008, July 21, 2008, August 19, 2008, September 18, 2008, and October 20, 2008; The Harvard Club, New York, New York - bills ending January and February 2008; the Maidstone Club, East Hampton, New York - bills ending January, February, March, April, June, July, August, September, October, and December 2008; the Mayacoo Lakes Country Club, West Palm Beach, Florida - January, February, March, April, May, June, July, August, September, October, November, and December 2008; and American

Express statements for December 28, 2007 through February 26, 2008, April 25, 2008 through October 26, 2008, and November 26, 2008 through January 31, 2009.

28. After reviewing the credit card and club statements submitted for the year 2008, the auditor created a spreadsheet identifying each credit card by name and the billing statements for the same submitted for the months ending January 2008 through January 2009. Review of the auditor's spreadsheet indicates, among other things, that three billing statements were supplied for The Beach Club, not five as indicated in Mr. Goldhaber's letter; American Express statements, including one partial statement for May 2008, for card number 1008 (a Platinum card) were supplied; and one American Express statement for August 2008 for card number 94003 (a "Personal" card) was supplied. The auditor then created a spreadsheet with calendar entries for the year 2008, on which she entered information from the credit card statements, and activity from the billing statements from the country clubs and social clubs. The auditor noted that petitioner's summary count by month differed from the calendar notations she made. Specifically, the auditor's current audit count for the year 2008 was 169 days New York State days, with 92 New York City days and 77 East Hampton days, and 54 unknown or unsubstantiated days. The auditor also noted that no documentation or day count was submitted for the year 2007.

29. Upon review of petitioner's submissions to date, the auditor concluded that information previously requested remained outstanding, and additional information was needed to complete her audit review for the years 2007 and 2008. As a result, the auditor sent a detailed letter, dated July 18, 2011, to Mr. Goldhaber, requesting the following previously requested items that remained outstanding: a list of the specific dates petitioner was in New York State and New York City for 2007; all insurance contracts and special riders for each dwelling in effect during

2006, 2007, and 2008; petitioner's original NYU employment agreement with any updates; and for the period January 1, 2007 through February 28, 2009, a complete set of bank statements and cancelled checks, telephone statements (with detail) for each location, cell phone statements, EZ Pass Statements, personal and corporate credit card statements,¹³ and travel documents (frequent flier statements, passports, boarding passes). In her letter, the auditor also requested the following additional information: specific dates petitioner was in New York State versus New York City in 2008; petitioner's travel pattern for the year 2006 and prior years; where petitioner resided while he was working at NYU; with respect to the 254 East 68th Street apartment, an explanation of living arrangements for this one bedroom apartment (petitioner and his son); an explanation as to why part year New York City residence tax was not calculated on the 2007 tax return; the last date petitioner reported to work in the Spring 2007 semester; the date petitioner cleared out his NYU office, and whether he received assistance from NYU as suggested in the confidential agreement; justification and support for expenses taken against petitioner's 2007 award from NYU for emotional distress reported under the principal business of consulting on Schedule C; justification and support for expenses taken against petitioner's 2008 award from NYU for damage to his reputation reported under the principal business of consulting on Schedule C; and whether petitioner operated a consulting business from his home on South Flagler Drive, including information about such business. The auditor also asked for information (including inclusive dates) about petitioner's connection with the following entities, "which appear to have New York ties:" Cynthia Witter, Hamptons International Film Festival, Jeremy Wiesen (Cookie & Cracker Manufacturing), Jeremy Wiesen Foundation, and Global Green.

¹³ The auditor only requested the missing credit card statements for the year 2008.

30. The auditor did not receive a response to her July 18, 2011 letter. Subsequently, on February 8, 2012, the auditor called Mr. Goldhaber and indicated that a response to the July 18, 2011 letter had not been received. During that telephone call, Mr. Goldhaber suggested that petitioner did not have any additional documentation, and he felt that he had answered all of the auditor's inquiries to his knowledge at this point. The auditor requested that Mr. Goldhaber review her last request and send something in writing indicating the same. Mr. Goldhaber stated that he would do so. The auditor also indicated that at that point, she would bill petitioner based upon the information on hand and that might give him incentive to move this matter along. Mr. Goldhaber agreed.

31. After discussions with her team leader, the auditor sent a letter, dated March 12, 2012, to Mr. Goldhaber making a final request for a response to the letter dated July 18, 2011. Her March 12, 2012 letter also included the following audit findings to date:

- “1. The taxpayer did not change his domicile from New York City; notwithstanding,
2. The taxpayer did not move from New York City during the spring of 2007, notwithstanding,
3. The taxpayer maintained a permanent place of abode in New York and spent more than 183 days in New York City during the audit period, notwithstanding,
4. The taxpayer was employed at will and all payments from NYU are New York sourced, notwithstanding,
5. Schedule C income is New York sourced, notwithstanding,
6. Deductions against Schedule C income for emotional distress, damage to reputation, and meals and entertainment are disallowed, notwithstanding,
7. The gain from the sale of artwork is New York sourced.”

32. On April 20, 2012, the auditor left a message on Mr. Goldhaber's phone indicating that if she did not hear from him, she would have no choice but to prepare a bill. No additional information was supplied.

33. After again reviewing the documentation submitted during the audit, the auditor found

that petitioner failed to support

“a change of domicile, the date of change of domicile, relief from statutory residency rules for NYS and NYC, relief from part year NYC resident tax, NYU wage allocation, omission of 1099 payments from NYU, excluding Schedule C income, deductions reported on Schedule C, exclusion of capital gain from the sale of art work either sourced in NY or sold during his residency period, and expenses reported on Sch E pertaining to his vacation home.”

As such, the auditor concluded that petitioner was a New York City domiciliary in 2007 and 2008. The auditor also disallowed petitioner’s claimed federal Schedule C expenses for the years 2007 and 2008 because they were not substantiated, ordinary and necessary. Expenses reported on the 2007 federal Schedule E related to property located at Wireless Road, East, Hampton, New York, were disallowed because they were deemed to be personal in nature.¹⁴ Alternatively, the auditor concluded that petitioner was a New York State and New York City statutory resident in 2007 and 2008. The auditor also concluded that petitioner failed to properly allocate items of income and capital gain during the years 2007 and 2008.

34. The auditor recomputed petitioner’s New York State and New York City personal income tax liability for the year 2007 using a filing status of single. To the corrected federal adjusted gross income of \$1,659,145.00, the auditor subtracted \$11,844.00 (taxable refunds of state and local income taxes of \$179.00 plus taxable amount of social security benefits of \$11,665.00), then added \$113,222.00 (federal Schedule C unsupported expenses that she disallowed), the net adjustment to New York State adjusted gross income, and determined the corrected New York State adjusted gross income to be \$1,760,523.00. From this amount, the auditor subtracted corrected itemized deductions after modifications in the amount of

¹⁴ The Schedule E attached to petitioner’s 2007 federal return reported total expenses in the amount of \$55,807.00 associated with the alleged rental of the Wireless Road, East Hampton, New York, property. No rental income for such property was reported on this Schedule E. None of the \$55,807.00 loss was reported on line 17 of petitioner’s 2007 federal return.

\$130,862.00, and determined corrected New York State taxable income to be \$1,629,661.00, recomputed New York State tax to be \$111,632.00 and recomputed New York City tax to be \$59,332.00. After subtracting prior tax payments of \$18,334.00 from the corrected New York State tax liability of \$111,632.00, the auditor determined the additional New York State tax liability to be \$93,298.00 and the additional New York City tax liability to be \$59,332.00, for a total New York State and City tax liability due in the amount of \$152,630.00 for the year 2007.

35. The auditor recomputed petitioner's New York State and New York City personal income tax liability for the year 2008 using a filing status of single. To the corrected federal adjusted gross income of \$617,807.00, the auditor added \$121,217.00 (federal Schedule C unsupported expenses that she disallowed), then subtracted a total of \$23,546.00 (taxable refunds of state income taxes of \$2,190.00 plus taxable amount of social security benefits of \$20,636.00), and determined the corrected New York State adjusted gross income to be \$715,478.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications of \$57,552.00, and determined corrected New York State taxable income to be \$657,926.00, the corrected New York State tax liability to be \$45,068.00 and the corrected New York City tax liability to be \$23,883.00. Since there were no prior payments for the year 2008, the auditor determined the corrected New York State tax liability to be \$45,068.00 and the corrected New York City tax liability to be \$23,883.00, for a total New York State and City tax liability due in the amount of \$68,951.00 for the year 2008.

36. As a result of the auditor's conclusions, the Division issued a consent to field audit adjustment, dated August 22, 2012, with respect to the years 2007 and 2008. The additional New York State and New York City income taxes determined to be due for each year was as follows:

Period Ended	Jurisdiction	Additional Tax	Penalties	Interest	Total
12/31/2007	New York City	\$59,332.00	\$14,000.00	\$22,069.00	\$ 95,401.00
12/31/2007	New York State	\$93,298.00	\$22,015.00	\$34,703.00	\$150,016.00
12/31/2008	New York City	\$23,883.00	\$10,575.00	\$ 6,823.00	\$ 41,281.00
12/31/2008	New York State	\$45,068.00	\$19,957.00	\$12,874.00	\$ 77,899.00
Total					\$364,597.00

Penalties were imposed on the additional New York State and New York City tax liabilities determined to be due for the years 2007 and 2008 pursuant to Tax Law § 685(b)(1) and (2) for negligence, and for 2008 pursuant to Tax Law § 685(a)(1) for failure to file on or before the due date. The consent explained that an enclosed letter set forth the details of the audit adjustments made to petitioner's tax liability for the years 2007 and 2008.¹⁵

37. After the consent to field audit adjustment was issued, no additional documentation was submitted to the auditor.

38. As noted in Finding of Fact 1, the Division issued a notice of deficiency to petitioner asserting additional New York State and New York City personal income taxes due for the years 2007 and 2008 in the aggregate amount of \$221,581.00.

39. After the assessment was issued, the auditor obtained documentation from various third-parties, including, among others, the Citi Gold AAdvantage and the American Express credit card companies, via subpoenas, and such documentation is included in the record in this matter. After reviewing the additional documentation obtained, the auditor concluded that petitioner was present at least 260 days in New York (214 in New York City and 46 days in East Hampton); 66 days in Florida; and 33 unknown days in 2007. She also concluded that petitioner

¹⁵ The enclosed letter, dated August 22, 2012, contained the same audit findings as summarized in Finding of Fact 33.

spent at least 171 days in New York (91 days in New York City and 80 days in East Hampton); 180 days in Florida; and 11 unknown days in 2008.

40. Petitioner's 254 East 68th Street, New York, New York, address is listed on his Citi Gold AAdvantage credit card statements through the closing date of June 17, 2008. His 254 East 68th Street address is also listed on statements issued for American Express Platinum and Personal credit cards through the closing dates of December 26, 2007 and December 21, 2007, respectively.

41. The record includes an initial lease (and attachments pertinent to the rules and regulations under the rent stabilization law), dated July 10, 1980, between Rudin Management Co., Inc., as agents for 254 East 68th Street, Inc., and Jeremy Wiesen, Esq., the tenant, for an apartment located at 254 East 68th Street, New York, New York. The initial one-year lease term commenced on August 1, 1980 and ended on July 31, 1981.

42. The record includes a copy of a renewal lease form executed, on or about April 26, 2006, by petitioner and Rudin Management Co., Inc., as agents for the owner, that renewed the lease for the 254 East 68th Street apartment for a period of two years, commencing on August 1, 2006 and ending on July 31, 2008. It also includes a copy of a renewal lease form executed by petitioner and Rudin Management Co., Inc., as agents, on May 20, 2008 and May 23, 2008, respectively, that renewed the lease for the 254 East 68th Street apartment for a period of two years, commencing on August 1, 2008 and ending on July 31, 2010. On each of these renewal lease forms, the tenant's name is recited as Jeremy Wiesen, Esq.

43. The record includes a faxed copy of a three-page NYS DHCR Office of Rent Administration Income Certification Form - 2008 Filing Period (2008 income certification form). In Part B, section 5 of the 2008 income certification, the following information appears: Jeremy

Wiesen was identified as the tenant, both the “Status” and “Vacancy Date for status (c) or (d)” columns were blank, a NYS income tax return was filed for 2006 but not in 2007 because it was “on extension.” In Part B, section 6 of the form, the named occupant was identified as Gavin Wiesen, status “a,” a child of age 33, who was required to file NYS income tax returns for 2006 and 2007, and filed a NYS income tax return for 2006 but not in 2007 because it was “on extension.” In the Part B, section 8, petitioner certified that the total annual income of all persons identified in items 5 and 6 was certified as \$175,000.00 or less in either of the two preceding calendar years, hand dating and signing the income certification (section 8) on June 25, 2008. The record also includes a faxed copy of a NYS DHCR Office of Rent Administration “Notice To Owner Of Family Members Residing With The Named Tenant In The Apartment Who May Be Entitled To Succession Rights/Protection From Eviction (NYS DHCR notice form). The instructions contained within the NYS DHCR notice form indicates the purpose of the form is to provide information about a family member who may have a right to a renewal lease or protection from eviction. The instructions also state that the form may be filed by tenants of rent stabilized and rent controlled apartments, at any time. Review of this NYS DHCR notice form indicates that petitioner, with a listed mailing address of 254 East 68th Street, New York, New York, submitted the notice to Rudin Management Co., Inc. In the “Statement of Tenant” section of the form, Gavin Wiesen was listed as a person other than the tenant residing in the apartment, the year 1980 was listed as the date of commencement of his primary residence in the apartment, and the family relationship column was blank. Petitioner signed and dated the form on June 23, 2008. A fax date of June 25, 2008 appears at the top of both 2008 income certification form and the NYS DHCR notice form.

44. The record includes a copy of the NYS DHCR Office of Rent Administration’s Order

Denying Petition for High Income Rent Deregulation for the 2009 filing cycle, issued on March 24, 2011. The order was denied because the rent administrator found “that the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant on the lease who occupied” the 254 East 68th Street apartment “and of all other persons who occupied” the 254 East 68th Street apartment “as their primary residence on other than a temporary basis (excluding bona fide employees and bona fide subtenants); WAS NOT IN EXCESS OF \$175,000 in 2007, 2008.”

45. The record indicates that petitioner’s son Gavin became the primary tenant and lessee of the 254 East 68th Street apartment, on or about April 1, 2012. The record also indicates that petitioner maintains the apartment as his son’s income could not support the same.

46. The record indicates that following 2008, petitioner spent more time in New York in an effort to find employment.

47. After a conciliation conference was conducted on October 24, 2013, the conciliation conferee sustained the Notice of Deficiency in a Conciliation Order dated March 7, 2014. Subsequently, petitioner filed a petition challenging the Notice of Deficiency issued for the years 2007 and 2008. In his petition, petitioner contended that he was a domiciliary of Florida by 2007. He further contended that he was in New York State for the statutory number of days in 2007, but not in 2008. Petitioner also asserted that even though he was still employed by NYU for part of 2007, he was not in New York City for the statutory number of days in either 2007 or 2008. He maintained that his travel schedule to Palm Beach from New York City was such that he “was basically commuting to teach classes with fourteen round trips for weekends and vacations in 2006.” Petitioner also maintained that after settling his case with NYU in March 2007, he agreed to resign from NYU effective the end of the semester, and he gave up his rent

stabilized apartment by notifying the landlord that the apartment should be turned over to his son since he was leaving. He also claimed that after retiring, he was 65 years old, had a beautiful home in West Palm Beach, belonged to a wonderful golf club and beach club in Florida, and he had survived cancer surgery. Petitioner further claimed that there was no place for him to live and nothing for him to do in New York City, the summer season was only a couple of months long in East Hampton, and he also “traveled somewhat.” Lastly, petitioner contended that he did not have any New York State source income during 2007 and 2008, except for small rental income for a cabana at an East Hampton club “which brings in close to \$3,000 some summers.”

48. The parties agreed to proceed in this matter by written submission. In accordance with the briefing schedule established by the undersigned’s correspondence dated January 26, 2016, the Division filed documents on April 5, 2016. Although petitioner’s filing of documents and a brief was due on June 2, 2016, he did not submit any documentation or file a brief on the record.

49. The record does not include petitioner’s personal and business diaries for the year 2007. It also does not include any of petitioner’s frequent flier statements, airline boarding passes or EZ Pass statements for the years 2007 and 2008. A copy of petitioner’s passport is not part of the record.

50. The record does not include documentation related to petitioner’s travel pattern for the year 2006 and prior years.

51. The record does not include the insurance contracts and special riders for the 254 East 68th Street apartment, the Wireless Road, East Hampton house, and the South Flagler Drive, West Palm Beach condominium in effect during the years 2006, 2007 and 2008. The record also does not include any moving bills.

52. Other than the confidential agreement, the record does not include any additional

information regarding petitioner's employment at NYU, such as the dates of employment, tenure dates and positions held. It also does not include petitioner's employment contract with NYU.

53. The record does not include any supporting documentation substantiating the Schedule C expenses claimed for the years 2007 and 2008.

54. The record does not include any documentation supporting petitioner's income allocation to New York for the years 2007 and 2008.

SUMMARY OF THE PARTIES' POSITIONS

55. The Division contends that petitioner failed to carry his burden of proving, by clear and convincing evidence, his claimed change of domicile from New York City to Florida during the years 2007 and 2008. It maintains that the factors that weigh most heavily against petitioner are the retention and continued use of his historic New York City domicile, his significant amount of time spent in New York City, his general habit of life remained centered in New York City, his son resided in New York City, his continued use of a second New York home in East Hampton and the retention of personal belongings, clothing and vehicles at both his New York City and East Hampton residences for his use when he regularly returned to New York. The Division maintains that these factors are determinative of petitioner's continued general habit of living as a domiciliary of New York City. It also points out that these actions were made of petitioner's volition and clearly show his intention to continually retain his general habit of life and his historic New York City domicile. The Division points out that petitioner did not offer any evidence to the contrary in this proceeding.

56. The Division also maintains that petitioner failed to meet his burden of proving by clear and convincing evidence that he did not spend in the aggregate more than 183 days in New York City in 2007. It points out that petitioner failed to submit any contemporaneous records

detailing his whereabouts for any day during 2007.

57. The Division contends that for the years 2007 and 2008, petitioner failed to substantiate Schedule C and Schedule E income and deductions, failed to allocate income reported on “W-2 and 1099-Miscellaneous wage statements,” and failed to report the gain on the sale of art work. It points out that the burden is on petitioner to come forth with proof of the specific nature and source of various items of income demonstrating that it constituted non-New York source income. The Division maintains that during the audit, documentation was requested to substantiate petitioner’s New York allocation; however, none of the requested documentation was ever supplied to the auditor. It further maintains that no such documentation was submitted by petitioner during this proceeding. As such, the Division asserts that petitioner has failed to establish by clear and convincing evidence that he properly allocated income to New York during the years 2007 and 2008. The Division also contends that petitioner failed to prove that reasonable cause exists to abate the negligence penalty imposed for the years 2007 and 2008 and the failure to file on or before the due date penalty for the year 2008.

58. In his “response” to the Division’s brief (reply brief), petitioner contends that the 254 East 68th Street, New York City apartment is a rent stabilized one bedroom apartment that he rented after his divorce in 1980, when his son Gavin was five years old. Petitioner further contends that when he left NYU in the Spring of 2007, he asked the owners, Rudin Management Co., Inc., to transfer the apartment to his son since he was moving to his home in West Palm Beach, Florida. He maintains that by taking such action, he had abandoned his New York City residency and he would never be offered another lease. Petitioner claims that the owners did not respond and when the new lease was offered in 2008, he told them to issue it to Gavin. He further claims that the owners did not respond and he decided to pay the rent rather than take

court action to force the succession of the apartment to his son. Petitioner asserts that his places in Florida in 2007 and 2008 and before were much larger than the one bedroom NYC apartment. He further asserts that his love affair with Palm Beach, Florida, and his homes, family, friends and lifestyle there was genuine and existed for decades. Petitioner maintains that for many years prior to 2007, he would buy approximately twelve round-trip tickets to Palm Beach for the coming school season. He further maintains that some of the tickets were for the holidays but he was still at his NYU office much of the thirty weeks of school and had NYU responsibilities the rest of the time. It is petitioner's belief that this shows his longing to be in Palm Beach, where he had homes: the first, a large 3,500 square foot home in 1999 and the condominiums starting in 2001. Petitioner claims that his goal post-retirement from his tenured professorship at NYU was to live in his home in Palm Beach, where he had an exciting life built up over the past 25 years.

59. In the reply brief, petitioner concedes that in the year 2007, he was in New York State for over 180 days but not in New York City. He asserts that he maintained a contemporaneous calendar for the year 2007, but it was not as detailed as the calendar for the year 2008 that was presented at audit. Petitioner also acknowledges that he was working at NYU in New York City for the first half of 2007 and, therefore, "meeting a day test would be hardly possible." Petitioner points out that state and city taxes were withheld by NYU. He maintains that when NYU bought out his tenure he was told by tax counsel and NYU agreed that the sum was for the future; and since he had changed his domicile to Florida there was no need to withhold state and local taxes. Petitioner asserts that he maintained meticulous records for 2008 that show he was present in New York State for only 162 days, and such documents were presented at audit. He further asserts that during the audit, his former representative, Mr. Goldhaber, provided all documents substantiating Schedule C and Schedule E income and deductions, the allocation of Form W-2

and Forms 1099-Misc income, and the sale of the art work. Petitioner requests that a determination be made that he “was not a domiciliary of New York State and New York City for 2007, but rather domiciled in Florida except for statutory domicile where appropriate.” He further requests that it be held that the buy-out of his tenure at NYU was a payment for the future and his future “was to be in Florida and therefore not subject to New York taxation.” In addition, petitioner requests that “any information that the Division believes it does not have regarding calendars for 2007 and 2008 and matters of income allocation be reviewed” with him “and reported back to the court before any final determination” is rendered.

60. In his reply brief, petitioner did not address the imposition of penalties for the years 2007 and 2008.

CONCLUSIONS OF LAW

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

B. Tax Law § 601 and New York City Administrative Code § 11-1701 impose New York State and New York City personal income tax on “resident individuals.” Tax Law § 605(b)(1)(A) and (B) sets forth the definition of a New York State resident individual for income tax purposes as follows.

“A resident individual means an individual:

(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . .

., or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.”

For New York City income tax purposes, the definition of resident is identical to that for State income tax purposes, except for the substitution of the term “city” for “state” (*see* New York City Administrative Code § 11-1705[b][1][A] and [B]). The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources.

C. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State or City, namely (A) the domicile basis or (B) the statutory residence basis, i.e., the maintenance of a permanent place of abode in the state or city and (2) physical presence in the state or city on more than 183 days during a given taxable year.

D. The first question to be addressed is whether petitioner maintained a permanent place of abode in New York State or New York City in 2007 and 2008. “Permanent place of abode” is defined as “a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer’s spouse” (20 NYCRR 105.20[e][12]).

In August 1980, petitioner rented the 254 East 68th Street, New York City apartment. Since August 1980, and continuing through the years at issue, petitioner retained continual, uninterrupted, maintenance and personal use of his historic domicile located at 254 East 68th Street, New York City, for himself and his son. There is no evidence that petitioner’s use of the 254 East 68th Street apartment was restricted in any way during the years at issue. Indeed,

petitioner executed a renewal two-year lease for the 254 East 68th Street apartment in May 2008 that extended his tenancy in the apartment through July 31, 2010. Whenever petitioner was in New York City, he would stay at the 254 East 68th Street apartment. It is also noted that since 1999, petitioner has retained, continual, uninterrupted, ownership, maintenance and personal use of a residence located at Wireless Road, East Hampton, New York. Petitioner clearly maintained a permanent place of abode in New York State and New York City during the years 2007 and 2008.

E. The Division's regulations define "domicile," at 20 NYCRR 105.20(d), in relevant part as follows:

"(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.

* * *

(4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive."

F. It is well established that an existing domicile continues until a new one is acquired and

the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (*see Matter of Bodfish v. Gallman*, 50 AD2d 457 [3d Dept 1976]). Whether there has been a change of domicile is a question “of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals” (*Matter of Newcomb*, 192 NY 238, 250 [1908]). The test of intent with regard to a purported new domicile is “whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it” (*Matter of Bourne*, 181 Misc 238, 246 [1943], *affd* 267 App Div 876 [1944], *appeal denied* 267 App Div 961 [1944], *order affd* 293 NY 785 [1944]); *see also Matter of Bodfish v. Gallman*). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which demonstrate an individual’s “general habit of life” (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, citing *Matter of Trowbridge*, 266 NY 283, 289 [1935]).

G. The concept of intent was addressed by the Court of Appeals in *Matter of Newcomb*:

“Residence means living in a particular locality, but domicile means living in that locality with the intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one’s domicile.

* * *

In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect. . . . Residence is necessary, for there can be no domicile without it, and important evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration . . . ” (*Matter of Newcomb*, 192

NY at 250-251).

In *Matter of McKone v State Tax Commission* (111 AD2d 1051 [3d Dept 1985], *affd* 68 NY2d 638 [1986]) the Court favorably quoted the following treatise on the intent necessary to establish domicile:

“The intention necessary for acquisition of a domicile may not be an intention of living in the locality as a matter of temporary expediency. It must be an intention to live permanently or indefinitely in that place. But it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period.’ (25 Am Jur 2d *Domicile* § 25, at 19 [1966].)” (*Id.* at 1053.)

H. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer’s general habits of living demonstrate a change of domicile. “The taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct” (*Matter of Simon*, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see e.g. Matter of Gray v. Tax Appeals Tribunal*, 235 AD2d 641 [3d Dept 1997] *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989); (2) the location of business activity (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); (3) the location of family ties (*Matter of Gray; Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852 [3d Dept 1994]); (4) the location of social and community ties (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (*Matter of Trowbridge; Matter of Gray; Matter of Getz*).

I. Upon review of the entire record and pursuant to the foregoing standards, it is concluded that petitioner has not proven, by clear and convincing evidence, that he gave up his New York

City domicile and acquired a domicile in Florida during the years at issue.

As noted above, retention of a permanent place of abode in the location of the historic domicile is a factor in consideration of the domicile issue (*see Matter of Gray v. Tax Appeals Tribunal*). Beginning in August 1980, petitioner used and maintained the 254 East 68th Street, New York City, rent stabilized apartment as his domicile. Contrary to petitioner's argument that he effectively abandoned the rent stabilized apartment on or about May 15, 2007, the record clearly shows that he continued to use and maintain his historic domicile for himself and his son during the years at issue. He executed a two-year renewal lease for the 254 East 68th Street apartment in May 2008 that extended his tenancy in the apartment through July 31, 2010. Petitioner received mail concerning rent stabilization, ownership, property management, maintenance, phone service and credit cards at his 254 East 68th Street address. Petitioner's 254 East 68th Street address was listed on the 2007 Form W-2 and the 2007 and 2008 Forms 1099-Misc issued to him by NYU. On his 2008 Florida original application for homestead exemption, petitioner listed his 254 East 68th Street address for his IRS filings. Additionally, in 1999, petitioner acquired a residence located at Wireless Road, East Hampton, New York, that he continued to own, maintain and use during and after the years at issue. Whenever petitioner was in New York, he would stay at his New York City domicile and his East Hampton residence. Petitioner's personal belongings, clothing and vehicles were maintained at both the 254 East 68th Street apartment and the East Hampton residence for his use in New York during the years at issue. The record shows that petitioner spent a significant amount of time in New York State and New York City in 2007 and 2008. During the audit, petitioner submitted noncontemporaneous summary "compilations" of days for the 2008. Petitioner did not submit any accounting of his whereabouts on a daily basis for the year 2007. Based upon the available documentation, the

auditor concluded that petitioner was present at least 260 days in New York (214 days in New York City and 46 in East Hampton); 66 days in Florida and 33 unknown days in 2007. The auditor also concluded that petitioner was present at least 171 days in New York (91 days in New York City and 80 days in East Hampton); 180 days in Florida and 11 unknown days in 2008. In this proceeding, petitioner presented no evidence to refute the Division's conclusions regarding his whereabouts in either 2007 and 2008. Although petitioner purchased his South Flagler Drive, West Palm Beach, condominium in 2001, the record lacks any evidence of petitioner's historic use of that Florida residence. In addition, while petitioner asserted in his petition and reply brief that he established a pattern of commuting to Palm Beach from New York City prior to 2007, the record lacks any evidence of such travel. The record also lacks any sense of the "sentiment, feeling and permanent association" with which petitioner regarded that Florida residence (*see Matter of Bourne*). The Division's regulation's provide that where an individual has more than one home the length of time customarily spent at each location is an important factor in determining domicile (*see* 20 NYCRR 105.20[d][4]). Petitioner was an associate professor at NYU's Stern School, until his retirement in June 2007. The record shows that following 2008, he spent more time in New York in an effort to find employment. Active business ties have been considered an indication of a failure to abandon a New York domicile (*see Matter of Kartiganer v. Koenig*, 194 AD2d 879 [3d Dept 1993]).

As noted previously, the maintenance of family ties in New York is a factor in determining domicile (*see Matter of Buzzard*). During 2007 and 2008, petitioner's son resided in the 254 East 68th Street apartment with petitioner. Petitioner's son continues to reside in New York City.

It is noted that petitioner registered to vote in Florida in 2004, and obtained a Florida

driver's license in 2007. He also filed a Florida original application for homestead exemption for tax year 2008 in April 2007. However, as noted previously, such formal declarations are less significant than informal acts demonstrating an individual's general habit of life (*Matter of Silverman*). Moreover, the significance of the 2004 voter registration is undermined by the lack of any evidence in the record regarding petitioner's subsequent voting history.

Other than allegations set forth in his petition and reply brief, this record contains no evidence as to petitioner's intent to abandon his New York City domicile and acquire a new one in Florida. Petitioner did not submit an affidavit of his intent. Nor were affidavits from any persons fully familiar with petitioner submitted. The paucity of evidence to support petitioner's position necessitates the conclusion that he failed to carry his burden of showing, by clear and convincing evidence, that he effected a change of domicile (*see Matter of Estate of Gucci; Matter of Labow*, Tax Appeals Tribunal, March 20, 1997). Petitioner was therefore properly subject to tax as a resident individual of New York City for the years 2007 and 2008 pursuant to Tax Law § 605(b)(1)(A) and the New York City Administrative Code § 11-1705(b)(1)(A).

J. Having concluded that petitioner was properly subject to tax as a New York State and New York City domiciliary for the years 2007 and 2008, it is not necessary to address whether petitioner has met his burden of proving by clear and convincing evidence that he was not present in New York City for more than 183 days in 2007 and thus not subject to tax as a "statutory resident" pursuant to Tax Law § 605(b)(1)(B) and the New York City Administrative Code § 11-1701(b)(1)(B).

K. Pursuant to Tax Law § 612(a), the New York adjusted gross income of a New York resident is federal adjusted gross income, with certain modifications. Section 62(a)(1) of the Internal Revenue Code (IRC) defines the adjusted gross income as an individual's gross income

minus certain deductions. Among the deductions permitted are expenses that are “ordinary and necessary” for the production of income in carrying on a trade or business (IRC § 162[a]). The taxpayer has the double burden of (1) demonstrating entitlement to the deduction and (2) substantiating the amount of the deduction (*see* Tax Law §§ 658[a]; 689[e]; 20 NYCRR 158.1; *Matter of Macaluso*, Tax Appeals Tribunal, September 22, 1997 *confirmed* 259 AD2d 795 [3d Dept 1999]). Furthermore, petitioner was required to maintain adequate records of the items of income, loss and deduction for the years at issue (Tax Law § 658[a]; 20 NYCRR 158.1[a]; Treas. Reg § 1.6001-1[a]).

In the instant matter, the Division disallowed petitioner’s claimed Schedule C business expenses in the amounts of \$113,222.00 and \$121,217.00 for the years 2007 and 2008, respectively, because no documentation was submitted to support such deductions. Although the parties agreed to have this matter considered on submission, petitioner failed to submit any documentation to substantiate any of the claimed business expenses for the years 2007 and 2008. Therefore, the Division properly denied the claimed Schedule C business expenses for the years 2007 and 2008.

L. Based upon Conclusion of Law I, issue IV is rendered moot.

M. The Division imposed penalties in the instant matter pursuant to Tax Law § 685(a)(1), for failure to file a tax return for the year 2008, and Tax Law § 685(b), for negligence for the years 2007 and 2008. Petitioner bears the burden of proving that the failure to file was due to reasonable cause and not due to negligence (Tax Law §§ 685[b]; 689[e]). Tax Law § 685(b) requires the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 of the Tax Law or the regulations promulgated thereunder. Petitioner failed to articulate any rationale for abatement of the penalties imposed for the years 2007 and

2008. Therefore, the imposition of penalties is sustained.

N. The petition of Jeremy Wiesen is denied and the Notice of Deficiency dated August 31, 2013 is sustained.

DATED: Albany, New York
June 1, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE