

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THOMAS MCMANUS : DETERMINATION
For Redetermination of a Deficiency or for Refund of New : DTA NO. 827116
York State Personal Income Tax under Article 22 of the :
Tax Law for the Year 2009. :

Petitioner, Thomas McManus, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2009.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on August 15, 2017 and continued to completion on August 16, 2017, in New York, New York, with all briefs to be submitted by August 7, 2018, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined petitioner to be a domiciliary of New York State during 2009.

FINDINGS OF FACT

1. On August 6, 2013, following a field audit, the Division of Taxation (Division) issued to petitioner, Thomas McManus, a notice of deficiency asserting additional New York State

personal income tax due for the year 2009 in the amount of \$53,203.00, plus interest.¹ The deficiency resulted from the Division's determination petitioner was a domiciliary of New York State during the year 2009, "or in the alternative, the correct amount of income was not allocated to New York State (and/or New York City) as a nonresident."

2. For the year 2009, petitioner filed a New York nonresident and part-year resident income tax return (form IT-203), claiming married filing separate return status, indicating his address as High Ridge Avenue, Ridgefield, Connecticut, and listing his occupation as stockbroker. On this return, a part year resident "move in date" of "12-30-2009" was listed, and the "No" box was checked in response to the question: "Did you or your spouse maintain living quarters in NYS in 2009?" 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 2009 return, petitioner reported living quarters maintained for and by him or his spouse in New York State at a Normandy Road, Bronxville, New York, address.

3. For the year 2009, Kaori McManus filed a form IT-203, claiming married filing separate return status, and indicating her address as High Ridge Avenue, Ridgefield, Connecticut. On this return, a part year resident "move out date" of "06-28-2009" was listed, and the "Yes" box was checked in response to the question: "Did you or your spouse maintain living quarters in NYS in 2009?" On schedule B of form IT-203-B attached to the 2009 return, Mrs. McManus reported living quarters maintained for and by her or her spouse in New York State at a Normandy Road, Bronxville, New York, address. On schedule B, Mrs. McManus also reported

¹ Petitioner executed two consents extending period of limitation for assessment of income tax under article(s) 22, 23, 30, 30A and 30B of the Tax Law until any time on or before December 31, 2013.

221 days spent in New York State in 2009. Mrs. McManus allocated 100% of her wage income to New York and listed her occupation as teacher on this return.

4. On January 19, 2012, the Division commenced a general verification field audit of petitioner's income tax return for the year 2009. In her letter dated January 24, 2012, the auditor, Suk Fong, requested that petitioner complete an enclosed nonresident questionnaire, and submit copies of: the lease or closing agreement for the High Ridge Avenue, Ridgefield, Connecticut, residence; the moving bill; and his dependents' school records for 2009.

5. After receiving additional time in which to respond to the auditor's initial request for information, petitioner submitted: responses to the nonresident questionnaire; a copy of the deed for High Ridge Avenue, Ridgefield, Connecticut; "evidence of three separate move operations"; and school records for two children for 2009.

6. In his response to the nonresident questionnaire, dated August 27, 2011 [sic],² petitioner indicated that he last filed a New York State resident income tax return for the year 2008; during the period January 1, 2009 through December 31, 2009, he was employed by Wachovia Securities (now Wells Fargo Advisors), St. Louis, Missouri; and he was not involved with any other business activities conducted in New York State (e.g. partnership, LLCs, S Corporations, etc.) during the audit period. Petitioner, in his response to the nonresident questionnaire, stated that he maintained (owned) living quarters in New York State during the audit period, located at Normandy Road, Bronxville, New York, and these living quarters were maintained from August 2002 through July 2011. He further stated, in his response to the nonresident questionnaire, that

“[o]ver the same period that I maintained living quarters (December 2002 to date) in New York State, I also maintained living quarters in CT. The CT living

² Petitioner's response has a computer generated date and time of "8/26/2012 5:31 PM" at the bottom of each page, and a handwritten date of "August 27, 2011" beneath his signature.

quarters are suitable for our work and other activities in New York State. Over the audit period (actually, from December 15, 2008 through December 29, 2009) I maintained separate living quarters in Missouri at: . . . St. Louis, MO 63102.”

In his response to the nonresident questionnaire, petitioner stated that he was present in New York State for a total of 76 full or part days for work purposes, including days he met with colleagues and/or clients in New York, and days at the Bronxville home involved in work; and an additional 17 days for the purpose of securing employment in the New York City area, a combined total of 93 days in 2009. Petitioner further stated that in 2009, he was present in New York State for nonworking days, including weekends, vacations, holidays and illness on a total of 38 days or part days. “Included in this total are visits to my country club for activities or meals, Church functions, day trips to Fire Island and Hyde Park, and part-days when I arrived at my home from out of state too late in the evening to accomplish any work.”

7. After reviewing the information initially supplied by petitioner, the auditor determined that additional information was needed to substantiate petitioner’s nonresident status, and to determine whether any wages needed to be allocated to New York.

8. A review of the Tax Field Audit Record (audit log) indicates that the auditor made a number of written requests to petitioner for information and documentation, consisting of, among other items, the following:

a) a specific listing of days and locations that he spent in and out of New York [City and State] for the year 2009;

b) for days that he spent in New York during 2009, information regarding the days and locations where he executed services for his Missouri employer and the days that he was securing employment;

c) documentation such as boarding passes, credit card statements, “cell phone records with the origination information etc.” to substantiate the days he spent outside New York [City and State] during the year 2009;

d) a copy of his Missouri income tax return for the year 2009;

e) information regarding Connecticut income tax returns that petitioner may have filed, if any, for the years 2002 through 2008; and

f) a copy of petitioner’s Connecticut resident income tax return for the year 2009.

9. Notations in the audit log indicate that over time, petitioner supplied a copy of the Missouri income tax return filed by petitioner and Mrs. McManus, as nonresidents of Missouri, for the year 2009; calendar/schedule of days he spent in and out of New York in 2009; Mrs. McManus’s American Express credit card statements for transactions beginning on December 15, 2008 and ending on January 15, 2010; petitioner and Mrs. McManus’s Wachovia Crown Classic Banking bank statements for the period August 29, 2008 through January 14, 2010; Verizon Wireless cell phone records; E-Z pass statements; AT&T phone records for the Connecticut residence; and a summary entitled “Tom McManus Residency Audit discussions 23-May 2013,” in which petitioner summarized the primary domicile factors. Petitioner also emailed some information regarding American Airline flights to the auditor.

10. In addition to supplying documentation to the auditor for her review, entries in the audit log indicate that the auditor met with petitioner and Mrs. McManus on December 28, 2012 for a conference; and the auditor, her team leader, the section head and the program manager met with petitioner for a closing conference on May 23, 2013. During each of those meeting, petitioner summarized his employment history and residence history.

11. In discussions with the auditor, petitioner claimed to be domiciled in Connecticut since the Connecticut residence was purchased in 2002. However, he subsequently admitted that he did not file Connecticut resident income tax returns before 2009.

12. According to correspondence submitted to the auditor, petitioner purchased the Bronxville, New York, residence in August 2002 and it was used primarily for its close proximity to his work in New York City, and the children attended school in Bronxville as well. The correspondence also indicated that petitioner's spouse kept an office for managing the family finances at the Bronxville, New York, residence. With respect to the Connecticut residence, petitioner's correspondence indicated that it was purchased in December 2002 and was used for family gatherings during the weekends and holidays, as well as summer vacation. According to petitioner's correspondence, the family album, yearbooks, passports, vehicle titles, birth certificates, and "heirlooms" were all kept at the Ridgefield, Connecticut, residence.

13. Information submitted to the auditor regarding petitioner's employment history indicated that petitioner worked in New York from 1980 to April 2008, and in September 2008, he accepted a new position and began to work in St. Louis, Missouri, until December 2009. It also indicated that petitioner began actively seeking employment in the New York City area in early 2009 and returned to work in New York City in 2010.

14. Information supplied to the auditor indicated that petitioner's children continued to go to school in New York State and the school records listed the Bronxville, New York, address during the year 2009.

15. After conducting an in-depth review of petitioner's calendar/schedule for the year 2009, petitioner's cell phone records, the bank statements, the credit card statements, the flight information, the AT&T phone records for the Connecticut residence, the cell phones records for

two other lines, and the E-Z pass statements, the auditor prepared a detailed in and out schedule for petitioner for the year 2009, and concluded petitioner spent 156 days in New York and 146 days in Connecticut during that year.³ The auditor also prepared a detailed work paper showing the whereabouts of petitioner's spouse and children during the year 2009.

16. After a detailed analysis of the information submitted by petitioner, including the cell phone records, bank statements, E-Z pass statements and credit card statements, the auditor found that there was a continuous and consistent presence of not only petitioner, but also his family, in New York during the audit period, even though they all spent time in Connecticut for the weekends and holidays as well as summer recess. She further found that the nature of the use of the Connecticut residence did not change and was consistent with the earlier years when petitioner filed as a New York State resident “(weekends, holidays and summer recess except when the taxpayer worked in St. Louis, MO or on travel status).” In her findings, the auditor also noted that petitioner began actively seeking employment in the New York City area in early 2009 and returned to work in New York City in 2010. As such, it “appears that New York continues to play a prominent role in his career.” The auditor, in her findings, further noted that the following facts indicate that petitioner's general habit of life was centered in New York during the audit period: petitioner's children attending school in New York; business ties to New York; time spent in New York; maintenance of a New York residence; and receipt of important financial documents at the Bronxville, New York, residence. The auditor concluded that petitioner had not established by clear and convincing evidence that he intended to change his domicile from New York to Connecticut and, therefore, petitioner was considered to be a New

³ The auditor concluded that petitioner spent 45 days exclusively in New York, 40 days exclusively in Connecticut, and 105 days exclusively in St. Louis, Missouri, during the year 2009.

York State resident for income tax purposes. Since he was a resident, the auditor determined that petitioner was subject to tax on all of his income regardless of the source.

17. The auditor recomputed petitioner's New York State personal income tax liability for the year 2009 using a filing status of married filing separately on separate forms. To the federal adjusted gross income reported in the amount of \$1,543,755.00, the auditor added the New York State additions of \$382.00 in interest income on state and local bonds reported in the federal column of the nonresident return and subtracted the New York State subtractions in the amount of \$5,000.00 (New York State 529 college saving program deduction) reported in the federal column of the nonresident return, and determined a corrected New York State adjusted gross income of \$1,539,137.00. From this amount, the auditor subtracted the New York standard deduction of \$7,500.00 and \$2,000.00 in dependent exemptions, and determined corrected New York State taxable income to be \$1,529,637.00 and recomputed New York State tax to be \$137,208.00. After allowing a New York State resident tax credit (form IT-112R) in the amount of \$78,697.00 (taxes paid to Missouri), the auditor determined corrected New York State tax due in the amount of \$58,511.00. After subtracting prior payments of \$5,308.00⁴ from the corrected New York State tax liability of \$58,511.00, the auditor determined the additional New York State liability to be \$53,203.00 for the year 2009.

18. As a result of the auditor's conclusions, the Division issued a consent to field audit adjustment, dated June 20, 2013, with respect to the year 2009. The consent to field audit adjustment set forth additional New York State income tax due in the amount of \$53,203.00, plus

⁴ On his 2009 form IT-203, petitioner reported tax due in the amount of \$5,308.00, New York State tax withhold in the amount of \$51,789.00, and a \$46,481.00 overpayment that was refunded to petitioner on an unknown date.

interest in the amount of \$14,708.00, for a total amount due of \$67,911.00. The consent to field audit adjustment contained the following explanation for the year 2009:

“As a result of a field audit, we have determined that you have not established by clear and convincing evidence that you intended to change your domicile from New York to Connecticut. Therefore, you are considered New York State resident for income tax purposes. As resident you are subject to tax on all income regardless of the source.

Alternatively, if it is decided that you are not resident of New York State for income tax purposes, your allocation of wages and other compensation to New York, as originally reported, may be adjusted to reflect the correct amount of New York income.

19. After receiving the consent to field audit adjustment, petitioner faxed to the auditor a copy of the joint Connecticut resident income tax return filed by petitioner and Mrs. McManus for the year 2009. Petitioner also requested a meeting to discuss the proposed audit adjustments.

20. On July 18, 2013, petitioner met with the section head, the team leader and the auditor. During that meeting, petitioner explained his position: his general habit of life was changed during the audit period because he no longer worked in New York. He further explained that he bought the Bronxville, New York, house because he worked in New York. He claimed the Bronxville, New York, residence was only a hotel substitute to him. He further claimed that the Ridgefield, Connecticut, residence has always been his home. During the meeting, the Division explained its position: the Ridgefield, Connecticut, house is considered a second home that petitioner used for social gatherings and spent the weekends, holidays and vacation days there. This pattern was consistent with the prior years when he worked in New York. The audit log entry for July 18, 2013 indicates that petitioner disagreed with the audit finding but made a payment, in the amount of \$67,911.00, to stop the running of interest.

21. As noted in finding of fact 1, on August 6, 2013, the Division issued the notice of deficiency to petitioner asserting additional tax due in the amount of \$53,203.00 plus interest of \$14,708.00, less assessment payments/credits of \$67,911.00, for a current balance due of \$0.00.

22. The record includes information regarding the distances between following locations:

- a) the Ridgefield, Connecticut, house and the Bronxville, New York, house: 39.94 miles;
- b) the Ridgefield, Connecticut, house and the New York City school: 54.13 miles
- c) the Bronxville, New York, house and the New York City school: 15.74 miles
- d) the Ridgefield, Connecticut, house and LaGuardia (LGA) airport: 51.97 miles; and
- e) the Bronxville, New York, house and LGA airport: 15.82 miles.

23. At the hearing, petitioner presented only himself as a witness and several exhibits.

24. Petitioner was born in Queens, New York, in 1956. He received a bachelor's degree in operations research from Columbia University School of Engineering and Applied Science in 1981. Petitioner is a historic domiciliary of New York since 1984.

25. In August 1992, petitioner married his wife, Kaori, in Katonah, New York. He and Mrs. McManus have two daughters - the first born in 1995 and the second born in 2001.

26. Petitioner and his spouse purchased a marital/family residence located at 310 Pea Pond Road, Katonah, New York, in 1993. In March 1995, petitioner and Mrs. McManus purchased a Copper Beech tree and had it planted on the 310 Pea Pond Road, Katonah property.

27. Petitioner and his wife filed a joint New York State resident income tax return (form IT-201) as New York residents and domiciliaries in 1999.

28. Petitioner and his wife purchased a marital/family residence located at Normandy Road, Bronxville, New York, in August 2002. This townhome is a 2,213 square foot single family residence, containing four bedrooms and three bathrooms, with an attached garage, on a

3,920 square foot lot. According to petitioner, the Bronxville residence had an open space basement containing a half-bath, the mechanicals for the house, a washer and dryer, and an electric piano used by his daughters; a main floor containing a kitchen, a dining room and a sunken living room; a second floor containing the master bedroom and master bathroom, a second bedroom subdivided into an office for Mrs. McManus's use and a small "baby's room," with a small bathroom off that bedroom; and a third floor containing two small bedrooms and a bathroom, used by his daughters. Petitioner described the Bronxville, New York residence as a "great place," but on a small lot. According to petitioner, he and his spouse decided in 2002 to purchase the Bronxville, New York, residence because of its proximity to his office in New York City, and also for its access to a very high quality school district. The Bronxville school district is very small, grades kindergarten through 12 are all in one school building. The Bronxville residence is located a short distance from the Bronxville public school.

29. Petitioner purchased another residence at High Ridge Avenue, Ridgefield, Connecticut, in December 2002. This two-story single family residence is located on a 1.73 acre lot. Petitioner described it as a sprawling house, with an entrance hallway about 35 feet long and about 14 feet wide, a 25-foot by 25-foot living room, and a spiral staircase up to the second floor. According to petitioner, there are two master bedrooms facing west where the prevailing breeze is coming, and three smaller bedrooms on the south and the east that were used as bedrooms for the original owners' staff. Other than a photograph of a jacuzzi style bathtub surrounded by ceramic tile, there is no information about the bathrooms in this house. Petitioner estimated the square footage of the house to be 7,000 square feet. There is also a cottage, and a garage on the property. According to petitioner, in addition to purchasing the Ridgefield, Connecticut, residence, they also purchased the grand piano located in the house at that time. Petitioner

described the house as “amazing” and “a place to entertain.” In 2006, Mrs. McManus had several photographs taken by petitioner in the 1970’s enlarged and framed. Since that time, those photographs have hung in the Ridgefield, Connecticut, residence.

30. The 310 Pea Pond Road, Katonah, New York, property was already listed on the market when petitioner and Mrs. McManus purchased the Ridgefield, Connecticut, residence. However, 310 Pea Pond Road did not sell until June 2003. According to petitioner, the furniture located in the 310 Pea Pond Road, Katonah, property was moved to the Ridgefield, Connecticut, residence in May 2003. Proof of such move consists of a photocopy of a check drawn on Mrs. McManus’s JP Morgan Chase checking account, dated May 3, 2003, and payable to Mike Hennessey. The notation “MOVE” is written in the memo section of this check. Petitioner testified that in May 2003, five trees, including the Copper Beech tree, were transplanted from the 310 Pea Pond Road, Katonah property to the Ridgefield, Connecticut, property. Proof of such transplants includes a couple of photographs and a photocopy of a check drawn on Mrs. McManus’s JP Morgan Chase checking account, dated May 22, 2003 and payable to Gossett Brothers Nursery in the amount of \$15,632.00. The notation “Tree work at 310 Pea Pond Road, Katonah” is written in the memo section of this check.

31. Petitioner and his wife filed federal tax returns from 2003 through 2008 listing their Bronxville, New York, address as their primary residence. He and his wife filed New York State tax returns from 2003 through 2008 listing their Bronxville, New York, address as their primary address.

32. Petitioner’s 2008 New York State tax return listing the Bronxville, New York, address was executed and filed in October 2009.

33. Petitioner is a licensed stock broker,⁵ whose career in the financial services industry began in the 1980's. Petitioner's field specialty is investment strategy, a field that petitioner, at the hearing, described as one that is

“in great demand for those of us who can understand how conditions are changing around the world in terms of interest rates, GDP growth and what that means for the expected returns on stocks and bonds and currencies and commodities around the world.”

34. Early in his career in the financial services industry, petitioner worked for Morgan Stanley and Goldman Sachs in their New York City offices. From January 1999 through April 2008, petitioner worked for Banc of America Securities in New York City. In April 2008, petitioner was laid off from his position as chief investment strategist at Banc of America Securities. Petitioner testified that he immediately began networking. According to petitioner, in May 2008, he was contacted by a headhunter who was seeking to fill an important senior position at a bank/brokerage firm in St. Louis, Missouri. The bank was called Wachovia and the brokerage firm was called Wachovia Securities, LLC (Wachovia Securities). Petitioner began the vetting process for a very senior investment leader position at Wachovia Securities in June 2008. In July 2008, he and his spouse were invited to St. Louis to see if they might want to make their home there. According to petitioner, the offer of employment with Wachovia Securities came in mid-August 2008. Some time was spent negotiating the offer back and forth, and terms were agreed upon in the late-August 2008. On September 2, 2008, petitioner “boarded a plane at LaGuardia and flew out to St. Louis with a suitcase and my laptop,” and a hotel reservation. His suitcase contained several articles of clothing, i.e., “a couple suits,” “a couple of fresh shirts,” “socks and underwear.”

⁵ The record is silent as to the year in which petitioner obtained his securities license as a stock broker.

35. In September 2008, petitioner joined Wachovia Securities⁶ as its chief investment officer and director of advisory services, reporting to co-presidents of the brokerage firm's financial services group. The September 3, 2008 press release issued by Wachovia Securities stated that as chief investment officer, petitioner "will lead the firm's Advisory Services Group, which is responsible for setting the overall investment policy and strategy that support the firm's financial advisors as they provide clients with holistic, unbiased investment advice." The press release also stated that petitioner "will be relocating to St. Louis with his wife and their two daughters." Petitioner's employment contract with Wachovia Securities is not part of the record.

36. Shortly after petitioner joined Wachovia Securities, Wachovia Bank suffered severe economic distress. In October 2008, Wells Fargo purchased Wachovia Bank and Wachovia Securities. Petitioner recognized that his association with Wachovia Securities/Wells Fargo was damaging his reputation and business career, and in early-2009, he began actively seeking employment in the New York City area. In early-2009, he interviewed with a number of potential employers in the New York City area. In June 2009, petitioner informed his boss that he would not be extending his contract beyond December 2009.

37. In April 2010, petitioner began working for Lazard in New York City and continues to do so to the present time.

38. Beginning in 2002 and continuing through 2009, petitioner continually and uninterruptedly maintained his Bronxville, New York, marital residence for both his and his family's personal use.

⁶ Wachovia Securities provided financial advisory, brokerage, asset management and other financial services through more than 18,000 registered representatives in over 4,000 locations nationwide.

39. Petitioner's general pattern of use indicates weekdays at the Bronxville residence and weekends at the Connecticut residence.

40. Petitioner enrolled his first daughter in the Bronxville school district from 2002 through the end of the 2007 - 2008 school year, i.e., June 2008.

41. Mrs. McManus was admitted to Teachers College, Columbia University, beginning the spring term 2008. She was accepted to the Master of Arts degree program in the university's Department of Mathematics, Science and Technology, with a specialization in mathematics education. In May 2008, Mrs. McManus was offered a teaching position at the Trinity School in New York City. At that time, Mr. and Mrs. McManus's older daughter was offered admission into the Trinity School.

42. Mrs. McManus began working at the Trinity School in New York City in September 2008. Petitioner's older daughter entered Trinity School as an eighth grader in September 2008. Mrs. McManus and this daughter would commute weekdays from their Bronxville residence to the Trinity School in New York City, and then return to the Bronxville residence.

43. Petitioner's second daughter attended elementary school in the Bronxville school district from 2005 through the end of the 2008 - 2009 school year, i.e. June 2009. In July 2009, Mrs. McManus notified the Bronxville School district that this daughter was exiting from the third grade class. In September 2009, the second daughter began attending third grade at the Trinity School in New York City. At that time, she was moved out of the Scarsdale ballet program and enrolled in Steps on Broadway in New York City, and also moved out of piano lessons at the Concordia Conservatory music program and enrolled in the Trinity School music program.

44. Petitioner's wife and children slept at the Bronxville residence during the week.

45. From September 2009 through the year 2010, petitioner's wife and their two children would commute weekdays from their Bronxville residence to Trinity School in New York City, and then return back to the Bronxville home.

46. Petitioner's first child graduated from Trinity School in 2013.

47. Petitioner's daughters attended St. Joseph's Church (Church) in Bronxville. In 2009, both daughters received sacraments of the Catholic Church at the Bronxville Church. The date on which the first daughter was confirmed is not part of the record. The second daughter received her first Communion on Saturday, May 16, 2009. A party celebrating both daughters' receipt of those sacraments took place at the Ridgefield house on Saturday, June 6, 2009.

48. Petitioner's wife's office was located at the Bronxville, New York, residence. Mrs. McManus handled the financial affairs for the family in that office.

49. Petitioner's Verizon statements, Wachovia bank statements, and business correspondence were sent to the Bronxville address during the year 2009.

50. From September 2008 through December 2009, petitioner would generally leave St. Louis on either Thursday evening or Friday around lunchtime and fly into LaGuardia airport. When petitioner left St. Louis on Thursday evening, he would return to Bronxville, New York, and stay overnight at the Bronxville residence. Typically, after his wife and children returned to their Bronxville, New York, home on Friday evening, petitioner and his family would travel to the Ridgefield, Connecticut, residence to spend the weekend. On many occasions when he left St. Louis on a Friday afternoon, Mrs. McManus and their children would pick him up at the airport and they would go to the Ridgefield, Connecticut, residence to spend the weekend. On Sundays, petitioner and his family would leave the Ridgefield, Connecticut, residence and return to the Bronxville, New York, home, where he would let his spouse and children do whatever they

needed to do to get ready for school the next day. While at the Bronxville home, petitioner would do “a couple of little chores,” and on some occasions, meet a limousine to take him to the airport for the flight to St. Louis. On other occasions, Mrs. McManus would drive petitioner from the Bronxville home to LaGuardia airport for the flight to St. Louis.

51. Petitioner’s general pattern through at least 2010 was to spend weekends in Connecticut and then return to the Bronxville home on Sunday evening so his children and wife could prepare for school Monday through Friday.

52. Petitioner’s Bronxville, New York, residence was listed to sell in 2010 and was shown frequently in the latter half of 2010 and the first half of 2011. Petitioner and his spouse sold the Bronxville residence in August 2011. Upon the sale of the Bronxville residence, petitioner and Mrs. McManus took a \$200,000.00 federal exclusion on the gain of the sale of a primary residence.

53. Beginning in 1984 and continuing through to the present time, petitioner has been a regular member of the Waccabuc Country Club, located in Waccabuc, New York.

54. Petitioner was registered to vote in New York. He voted in New York in 2009.

55. Petitioner had vehicles registered in New York in 2000, 2008, 2009 and 2010.

56. Petitioner had a New York driver’s license in 2009.

57. Petitioner did not register to vote in Connecticut until September 2010.

58. Petitioner did not register any vehicles in Connecticut.

59. When he was asked by the undersigned administrative law judge the date on which he claimed to have changed his domicile to Connecticut, petitioner gave a protracted vague response and finally testified that “somewhere between the beginning of September of 2008 and March of 2009, . . . those last two factors, both time and family had completed the pattern of domicile.”

60. Petitioner enjoys aviation. He obtained his private pilot's license in 1989, his instrument rating in 1990, and a commercial license thereafter. Petitioner purchased a Mooney aircraft N252CN in 1991 and has based and maintained it, along with another plane, a Cessna 172L N4327Q,⁷ at the Danbury Municipal Airport located in Danbury, Connecticut, ever since. At the hearing, petitioner testified that those two planes are his near and dear items.

61. At the hearing, petitioner testified that near and dear items located at the Ridgefield, Connecticut, residence included the Copper Beech tree, the framed photographs, the grand piano, the jacuzzi bathtub, and a custom-made walnut table allegedly moved from the 310 Pea Pond Road, Katonah, New York, property in May 2003.

62. From 2003 through 2008, petitioner's parents lived in Pound Ridge, New York. They moved to Kingston, Rhode Island, in 2008 and, after his mother's passing in 2012, his father lived there until 2016.

63. Petitioner has six siblings. A brother and his family have lived in Newtown, Connecticut, since the 1990's. Until the year 2010, another brother and his family lived in Lewisboro, New York.

64. Mrs. McManus's parents live in Japan. In the summer of 2009, Mrs. McManus and her daughters took a trip to Japan to visit her family.

65. As part of exhibit "1," petitioner submitted a table listing the day count of the location of overnight stays and the location of the prior night's stay for the year 2009. According to this table, petitioner claimed he spent the night a total of 144 days at the St. Louis apartment, a total of 108 days at the Ridgefield, Connecticut, residence, a total of 86 days at the Bronxville, New

⁷ The Cessna 172L was owned by his father until it was transferred to petitioner at some point prior to his father's death in 2016. However, petitioner paid the annual maintenance and tie down charges for this plane.

York, residence, and a total of 27 days at other locations during the year 2009. As part of exhibit “1,” petitioner also submitted a table listing the day count of the location of overnight stays and the location of the prior night’s stay for the period September 2008 through December 2008. According to this table, petitioner claimed he spent the night a total of 71 days at the St. Louis apartment, a total of 27 days at the Ridgefield, Connecticut, residence, a total of 16 days at the Bronxville, New York, residence, and a total of 8 days at other locations during the period September 2008 through December 2008. Neither of these tables contains a listing of the specific dates at each location.

66. At the conclusion of the hearing, petitioner requested and received permission to submit post-hearing documentation by October 4, 2017, limited to the following documents:

a) an affidavit of Kaori McManus regarding her tax filings and those of petitioner for the year 2009, and a clarification or explanation of her March 2009 email regarding the Bronxville, New York, home;

b) documentation, which exists already, that clarifies the 2009 W-2’s issued by Fidelity and Bank of America;

c) documentation in existence regarding 2009 vacations;

d) documents regarding the period from April 2008 through December 31, 2009, concerning time spent in Connecticut, particularly at the house in Connecticut; and

e) an affidavit of Devon Chapin and documents, limited to repairs made to an airplane in August 2008.

67. In accordance with the revised post-hearing submission schedule, petitioner submitted proposed exhibits, described in the schedule accompanying the documents, as follows:

1. Copy of affidavit of Kaori McManus (as preparer of petitioner’s tax returns);

2. Copies of work orders, dated August 29, 2008, for two airplanes owned/maintained by petitioner;

3. Copies of original account opening documents for Wachovia Bank in Ridgefield, Connecticut, dated August 29, 2008;

4. Copies of bank statements, covering the period August 29 through year-end 2008, for the Wachovia Bank account in Ridgefield, Connecticut;

5. Copies of bi-monthly E-Z pass account statements for April through December 2008;

6. Copies of monthly statements (with L.D. call detail) for AT&T landline service provided to petitioner's Ridgefield Connecticut, home (2008);

7. Copies of monthly statements (January through November 2008) from Waccabuc Club;

8. Copies of monthly statements (January through December 2008) from American Express (shared account); and

9. Copies of monthly statements (January through December 2008) from Verizon Wireless (cell phone).

There are two notes at the bottom of the schedule accompanying the proposed exhibits, note 1

indicates that exhibit "1" was requested by the undersigned administrative law judge, and the

second note states that exhibits "2" through "8" provide "documentation of petitioner's

whereabouts during 2008, with a focus on the months after he left his NY employer in April.

Documents the analysis of 'time spent' from September-December 2008, summarized on page 73 of petitioner's [exhibit 1] submitted at the hearing . . . and discussed at that time."

68. The above listed 9 exhibits have been received into evidence as petitioner's exhibits "5" through "13," respectively. It is noted that names and/or addresses, account numbers and telephone numbers have been redacted from several of these submitted exhibits. Cover sheets,

containing account information, including names and/or addresses, for billing statements were not included with the documentary evidence submitted.

69. The record includes the affidavit of Kaori McManus, in which she asserts that she prepared all 2009 income tax returns filed by petitioner. She further asserts that she is a full time high school teacher and does not have expertise in tax return preparation. Mrs. McManus maintains that she used Turbo Tax by Intuit to prepare the tax returns. She further maintains that she was unaware of a software error on petitioner's 2009 form IT-203 until a discussion with the audit team. Mrs. McManus asserts that the correct entries for Line 73 (Part-year residents only) and line 73a should be blank. She further asserts that for Line 74 ("Nonresidents: Did you or your spouse maintain living quarters in NYS in 2009?"), the correct answer should be "Yes." Mrs. McManus, in her affidavit, claims that she believes these software errors arose from her entries for deductible expenses for petitioner's move out of Missouri to Connecticut in December 2009. She further claims that she did not prepare an amended return for 2009 (form IT-203X) because audit staff led her to believe that the misunderstanding was cleared up by discussions with them and tax officials in Albany, "which led to a downward revision of the amounts they requested to correct the return."

70. The record includes two bills, each issued by Curtiss Aero, LLC, Danbury, Connecticut, to petitioner, Normandy Road, Bronxville, New York, for aircraft maintenance and service performed on two airplanes, a Mooney M20K and a Cessna 172L. Review of the bill, dated August 29, 2008, for annual service and parts for the Mooney M20K airplane indicates that credit was given for 3.5 hours of owner participation. Review of the bill, dated August 29, 2008, for annual service and parts for the Cessna 172L airplane indicates that credit was given for 2.5 hours of owner participation.

71. The Division submitted 37 proposed findings of fact. The Division's proposed findings of fact 1, 3, 4, 7, 8, 9, 11 through 14, 16, 18, 19, 21 through 33, and 35, are accepted and have been substantially incorporated into the findings of fact. The Division's proposed findings of fact 2, 5, 6, 10, 15, 17, 20 and 34 are rejected as they do not adequately reflect the record.

CONCLUSIONS OF LAW

A. New York State imposes a personal income tax on resident individuals pursuant to Tax Law § 601. Tax Law § 605 (b) (1) defines such a resident individual, in relevant part, as someone:

“(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”

The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State source income, whereas residents are taxed on their income from all sources (*compare* Tax Law § 611 [a] *with* § 631 [a]).

B. The Division's regulations define the term “domicile,” in relevant part, as follows:

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

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

be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate 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" (20 NYCRR 105.20 [d]).

With respect to the domicile or domiciles of a husband and spouse, the regulations provide that "[g]enerally, the domicile of a husband and wife are the same. However, if they are separated in fact, they may each, under some circumstances, acquire their own separate domiciles even though there is no judgment or decree of separation" (20 NYCRR 105.20 [d] [5] [i]).

C. 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, 458 [3d Dept 1976]; 20 NYCRR 105.20 [d] [2]). 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 [Sur Ct Westchester County 1943], *affd* 267 AD 876 [2d Dept 1944], *affd* 293 NY 785 [1944]); *see also Matter of Bodfish v Gallman*).

D. 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 Commn.* (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.)

E. 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 Trib.*, 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*). “For a taxpayer to meet [his] burden of proof to establish a change in domicile, [he] must show a change in lifestyle” (*Matter of Ingle*, Tax Appeals Tribunal, December 1, 2011, *confirmed* 110 AD3d 1392 [3d Dept 2013]; *Matter of Doman*, Tax Appeals Tribunal, April 9, 2012).

F. 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 domicile and acquired a domicile in Connecticut as of the year in 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*). Petitioner and his spouse purchased a marital/family residence located at Normandy Road, Bronxville, New York, in August 2002. Beginning in 2002 and continuing through 2009, petitioner continually and uninterruptedly maintained his Bronxville, New York, marital residence for both his and his family’s personal use. Whenever petitioner was in New York, he lived at his Bronxville home. Petitioner’s wife and children lived in the Bronxville home Monday through Friday. Petitioner received mail, bank statements, Verizon billing statements, and business correspondence at his Bronxville home during the year at issue. Petitioner’s Bronxville, New York, address was listed on the joint federal and New York State tax returns filed by petitioner and Mrs. McManus for the year 2008. Petitioner had a New York driver’s license and vehicles registered in New York in 2009. Petitioner voted in New York in 2009. The record clearly shows

that petitioner's life remained centered in Bronxville, New York, during the year at issue. Beginning in September 2008 and through December 2009, petitioner returned to New York from travel and left from New York for travel. Petitioner stayed overnight at his Bronxville home. Petitioner's wife and children stayed in Bronxville Monday through Friday. Petitioner's children attended New York schools and the school records listed the Bronxville, New York, address during the year 2009. Petitioner's children attended a Bronxville church, and both received sacraments of the Catholic Church there in 2009. There is no evidence that petitioner took any steps to sever his relationship with his New York domicile during the year 2009.

Where an individual has two homes, such as petitioner, the length of time spent at each location is a factor to be considered in determining domicile (*Matter of Angelico*, citing 20 NYCRR former 102.2 [d]). In his reply brief, petitioner contends that he changed his domicile to Connecticut on September 2, 2008, the date he flew to St. Louis to begin his employment with Wachovia Securities. He contends that an analysis of where he slept the night clearly shows that he spent more time at the Ridgefield, Connecticut, home than he did at the Bronxville, New York, home beginning in September 2008 and continuing through December 31, 2009. In support of his position, petitioner submitted two tables listing the total day count and locations of where he slept the night. For the period September 2008 through December 2008, petitioner contends that he slept the night a total of 27 days at the Ridgefield, Connecticut home and a total of 16 days at the Bronxville, New York, home. For the year 2009, petitioner contends that he slept the night a total of 108 days at the Ridgefield, Connecticut, home and a total of 86 days at the Bronxville, New York, home. As the Division correctly points out in its brief, the domicile time factor contemplates an accounting of an individual's cumulative presence in a given locality, not such an unconventional accounting approach. In his post-hearing submission of documents, petitioner

submitted redacted documentation that he contends supports his position regarding his presence in Connecticut and New York during the year 2008. He did not submit a schedule or calendar detailing his whereabouts for any day in the year 2008. As such, it is impossible to determine if there was any change in petitioner's long-established pattern of use of the Ridgefield, Connecticut, home. Given his failure to submit a detailed accounting of his time for the year 2008, he has failed to prove that he spent more time in Connecticut than New York during the period September 1, 2008 through December 31, 2008. It is noted that petitioner and his spouse filed a New York State resident tax return for the year 2008. The auditor conducted an in-depth review of petitioner's calendar/schedule for the year 2009 and the documentation submitted by petitioner in the support of the same, and determined petitioner spent 156 days in New York and 146 days in Connecticut during the year 2009, the sole period under audit. I do not find that petitioner has shown a change in his lifestyle that would support his claimed change of domicile to Connecticut for the year 2009 (*see Matter of Ingle*).

Petitioner is a stock broker, who was actively employed in New York City by Banc of America Securities until 2008. In September 2008, he began employment with Wachovia Securities in St. Louis, Missouri. Although the record does not include his employment contract with Wachovia Securities, petitioner admitted, during the audit, that he was present in New York State for a total of 76 days for work purposes, including days he met with colleagues and/or clients in New York, and days at his Bronxville home involved in work, and an additional 17 days for the purpose of seeking employment in the New York City area during the year 2009. Petitioner did not engage in any business activity in Connecticut during the year 2009. 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 the year 2009, petitioner's wife and minor children resided in the Bronxville home. Petitioner's children attended a Bronxville, New York, church. Petitioner's wife worked in New York City. During the audit, petitioner admitted spending weekends and vacations with his family in New York. Petitioner also has extended family in New York, a brother and his family. Petitioner has one brother and his family living in Connecticut. Petitioner continued to maintain a regular membership at the Waccabuc Country Club, located in Waccabuc, New York, during the year at issue. There is no evidence of any social or church membership in Connecticut during the year 2009.

At the hearing, petitioner testified about some of his near and dear items located in Connecticut, i.e., two airplanes, a Copper Beech tree, some framed photographs, a grand piano, a jacuzzi bathtub, and a custom-made walnut table. The record show that the two airplanes have been based and maintained at the Danbury Municipal Airport, located in Danbury, Connecticut, since 1991, long before petitioner's claimed change of domicile in 2009. The transplant of the Copper Beech tree from the 310 Pea Pond Road, Katonah, New York, property to the Ridgefield, Connecticut, property tends to support petitioner's position. The photographs taken by petitioner in the 1970's that Mrs. McManus had professionally enlarged and framed in 2006 tend to support support petitioner's position. The record shows that the grand piano was purchased from the owners of the Ridgefield, Connecticut, residence at the time petitioner and Mrs. McManus purchased the residence. There is no evidence that the grand piano was ever used by petitioner in New York. The jacuzzi bathtub located in the Ridgefield, Connecticut, house is realty, not personalty. Near and dear items are personalty that can be transferred from one location to another location. Accordingly, it does not support petitioner's position. As for the custom-made walnut

table, there is insufficient evidence in the record to show that it was moved from the 310 Pea Pond Road, Katonah, New York, house to the Ridgefield, Connecticut, house as claimed by petitioner. As such, I find the custom-made walnut table does not support petitioner's position.

In support of his position that he abandoned his New York State domicile and acquired a new one in Connecticut, petitioner presented his testimony and documentary submissions. Other than the affidavit of Mrs. McManus, as preparer of petitioner's tax returns for the year 2009, petitioner did not submit affidavits from any persons fully familiar with him. I find that petitioner's testimony was vague regarding the date on which he claimed to have abandoned his New York State domicile and acquired a new one in Connecticut. The documents submitted post-hearing in support of his claimed change of domicile contain redactions of pertinent information related to the address to which the various bills and statements were sent. It is impossible to find a change of domicile based upon the record before me. Petitioner has failed to carry his burden of proving by clear and convincing evidence that he intended to change his domicile from New York State to Connecticut.

G. The petition of Thomas McManus is denied, and the notice of deficiency, dated August 6, 2013, is sustained.

DATED: Albany, New York
February 7, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE