STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GRANT G. BIGGAR	:	DETERMINATION DTA NO. 827817
for Redetermination of a Deficiency or for Refund 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 Year 2014.	:	

Petitioner, Grant G. Biggar, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2014.

A hearing was held before James P. Connolly, Administrative Law Judge, in New York, New York, on February 21, 2018, with all briefs to be submitted by July 11, 2018, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Andersen Tax LLC (Kenneth T. Zemsky, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner has established that he was not taxable as a domiciliary of New York State and the City of New York during the year 2014.

II. Whether, assuming that the additional tax found due on audit is sustained, petitioner has established a basis for cancelling the penalties imposed.

FINDINGS OF FACT

1. Petitioner, Grant G. Biggar, filed form IT-203 (New York State nonresident and part-year resident income tax return) for the year 2014 as a nonresident of New York, with a filing status of single. Petitioner checked the "No" box on line H of the return, which asks "[d]id you or your spouse maintain living quarters in NYS in 2014?," and left blank the "Taxpayer's permanent address" box on page 1 of the return.

2. On August 9, 2016, following an audit, the Division of Taxation (Division) issued to petitioner a notice of deficiency asserting additional New York State and New York City personal income taxes due for the year 2014 in the aggregate amount of $2,082,465.00, plus interest and penalties. This notice was premised upon the assertion that petitioner was a domiciliary of New York State and New York City for 2014.

3. Petitioner was born in Nevin, New Zealand, the oldest of four children, two brothers and a sister. After going to primary school in Nevin, he moved with his family to Auckland, New Zealand's largest city, where he lived with his family in a suburban, 3,000 square foot, house at 6 Pickwick Parade. He attended Auckland University, where he obtained a degree in commerce with a major in accounting. Seeking a career in business, and wanting the best background possible, he decided to become a chartered accountant, the equivalent of a certified public accountant in the United States. In order to get the three years of relevant work experience needed to become a chartered accountant, he accepted a position with the Auckland office of the accounting firm Deloitte Touche, where he worked for about three years, while living at the 6 Pickwick Parade address. He became a chartered accountant and a member of the New Zealand Society of Chartered Accountants in 1991 and remains so today. In January 1991 he accepted a

three month assignment to Deloitte Touche's Vancouver, British Columbia office to help with the tax return preparation season. After completing the Vancouver assignment, and traveling in Europe for a few months, petitioner took a position with Bankers Trust (BT) in its London office in January 1991.

4. At hearing, petitioner testified about his motivation for leaving New Zealand to work abroad. His time in Vancouver convinced him that the New Zealand business world, particularly finance, was small, but that there were great opportunities internationally. Moreover, he had a desire to prove himself on the world stage. Just as importantly, however, he was focused on "wealth creation." He explained that, when he was growing up, his parents had lived a month-to-month financial existence, which he did not want to repeat. In this regard, he realized that to achieve real wealth, "it was necessary to have a share in the value you're creating," which, he could do by "mov[ing] from less . . . of an employee relationship to more of an owner relationship." Petitioner did not testify about what his intentions were in regard to returning to live in New Zealand once he left to work abroad.

5. At BT, petitioner worked in the "middle office" area, which kept track of and controlled the trading activity of overseas traders. London was where he started establishing good business contacts that he still relies on today. While at BT, petitioner became a United Kingdom (U.K.) citizen and obtained a U.K. passport. Petitioner testified that he obtained the passport in order to facilitate working and traveling in the European Union. Obtaining that passport did not require him to renounce his New Zealand citizenship, and he remains a New Zealand citizen today. In January 1993, he accepted a transfer to BT's New York City office, which gave him the

opportunity to work in a bigger middle office group and gave him closer contact with BT's traders.

6. In May 1996 petitioner accepted a position with the New York City office of Intercapital, a U.K.-based brokerage firm. The position was appealing to him because it offered an opportunity to be close to the “client relationship,” which was better compensated, as well as more enjoyable. There he sat at the trading desk, working with clients and arranging transactions. Petitioner testified that another career opportunity came up in 1998, when a group of employees left the company’s Sydney, Australia, office. To help out, petitioner spent a few months working there in 1998, and was formally transferred to that office in January 1999. At that time he did not intend to sever his New Zealand resident status because there is “free transfer of labor between New Zealand and Australia.” While at Intercapital, he met co-workers who were with the company “from the start” and, as a result, were able to achieve wealth.

7. With that lesson in mind, he left Intercapital in early 2000 to join Creditex Group (Creditex), an early stage company founded by a friend. Creditex executed and processed credit default derivative contracts. Before Creditex’s advent, the credit derivative brokerage business was an opaque, voice-arranged market. By bringing technology to bear, Creditex was able to bring more transparency and more exchange-type regulation to that market, thereby generating significant shareholder value. From the outset, petitioner was part of Creditex's six-member senior management team, and his role at the company was very significant. Joining Creditex in early 2000, he set up the company's Sydney, Australia, office. When it became evident that the London market would be more important for the company, petitioner transferred in January 2002 to the company's London office, where he ran Creditex's non-United States business. That office

had 100 employees by 2010. In 2004, petitioner received significant stock options pursuant to Creditex's 10-year stock option plan. An employment agreement dated February 26, 2004, between petitioner and Creditex, lists a London address for petitioner.

8. Creditex was sold to Intercontinental Exchange, Inc. (ICE) in June, 2008 for $625 million, all but $65 million of which was paid in ICE equity shares. As part of that transaction, ICE took over Creditex's stock option plan, which led petitioner to exchange Creditex shares for shares in ICE. It was only when this occurred that petitioner achieved his idea of financial independence.

9. Being part of Creditex's success and growth was a very "powerful" experience for petitioner, and he had assumed that he would probably leave the company when it was sold. Once the sale to ICE occurred, he thus began to look around for the next opportunity. In 2010, ICE asked him to become president of Creditex and take over its New York office, which involved moving to New York City. The position appealed to him because it would give him the experience of being part of a senior management team of a public company such as ICE. On July 8, 2010, petitioner signed an employment agreement with Creditex for the position of president of Creditex. The employment agreement was for a year and it automatically renewed for an additional six months every six months, unless one of the parties notified the other to the contrary. The agreement stated that petitioner's duties were "those commensurate with Executive's position that are set from time to time by ICE's Chief Executive Officer."

10. Petitioner testified that he did not see the new position as "permanent" because his chief task was to oversee the integration of Creditex with ICE, which, by its very nature, was not a long term task. As president of Creditex, petitioner had to manage the company through the

world financial crisis of 2009 and 2010. In 2010, trading volume in the credit derivative market collapsed, as credit derivative products fell out of favor, thereby necessitating significant staffing reductions in Creditex's sales teams. Petitioner did not testify as to whether, in accepting the position as president of Creditex, he expected to leave New York City once the position ended.

11. As part of the transfer to New York City, ICE obtained a L1 visa for petitioner. The L1 visa, which he described as a "management transfer" visa, allowed him to work in the United States. A L1 visa is not permanent and is tied to the job for which it was obtained, such that petitioner would have to leave the country once his position with Creditex terminated. At his request, ICE also applied for a permanent resident visa (green card) on his behalf, which took about a year to process and was granted in 2012. The card indicates that petitioner has been a resident of the United States since June 1, 2012. Petitioner testified that he wanted the green card because it gave him an option to stay in the United States if his employment with Creditex ended. He never considered becoming a United States citizen and is not sure that he is eligible.

12. After only renting property during his years in London, petitioner bought a two bedroom, 2 ½ bath, 2,600 square-foot loft apartment on Laight Street in the lower west side of Manhattan for $2.9 million in December 2009. In 2010, he had a renovation done on the apartment by a New Zealand architect, Davis Howell, for $600,000.00 to $700,000.00. The renovation was the subject of a magazine article in a New Zealand publication, "New Zealand Home," which explained that: "[f]rom the shell of a soulless developer fitout, the collaboration between client, architect and interior designer has produced a home with warmth and character, one that suits the owner's tastes and lifestyle." The article emphasized the active role petitioner played in the renovation:

> "Biggar was particularly involved in this process, hitting the taste-making luxury furniture showroom BDDW in Soho most Saturdays. 'It's a nice time, because the client can share the process and do their own selecting and buying. That was very much Grant's experience–and he wasn't timid about it, he was up for anything,' says Howell. 'It was like he had a birthday every weekend.'"

The article also mentions that major apartment renovations can often function as investments, given New York's "astoundingly resilient market." Petitioner did not testify that his purpose in buying and renovating the Laight Street apartment was as an investment.

13. For 2010, petitioner filed form IT-203, dated May 31, 2011, reporting all of his Federal adjusted gross income as New York State income. On lines 73 and 73a, petitioner indicated that he moved into New York State on June 14, 2010. Petitioner did not check "Yes" or "No" on line 74, which is for nonresidents. Petitioner also filed a change of city resident status form (IT-360.1) in 2010.[1] On that form, petitioner checked box A for a New York City change of residence, and reported that he was a New York City resident from June 14, 2010 to the end of the year. The New Jersey accounting firm of Untracht Early LLC (Untracht) prepared the return and the return bears petitioner's signature.

The instructions to the IT-360.1 for 2010 stated:

> "If during the tax year you had a New York City or Yonkers change of resident status, you must complete Form IT-360.1. . . . If you changed both your NYS residence and New York City or Yonkers residence during the same tax year, you must complete both Form IT-203, *Non-Resident and Part-Year Resident Income Tax Return*, and Form IT-360.1.

[1] The IT-360.1 indicates that it is to be filed as an attachment to either the IT-201, New York State resident income tax return, or the IT-203. The IT-360.1 filed by petitioner in 2010 was introduced into the record as an attachment to an affidavit by the auditor. That affidavit does not say whether the IT-360.1 was filed as an attachment to petitioner's IT-203 for 2010 or as a separate document, but, in his testimony, Mr. David Perez, the CPA who prepared petitioner's 2014 return and who reviewed petitioner's returns for earlier years in preparation therefor, referred to the IT-360.1 as being attached to petitioner's 2010 income tax return.

Your move into or out of New York City or Yonkers will be recognized as a change of resident status if:

— at the time of your move, you definitely intended to permanently leave your home and residence; and
— you definitely intended to establish a permanent home (domicile) someplace else.

The New York State Tax Department will consider your actions as well as your statements in deciding if yo
status."

14. At hearing, petitioner could not remember who had recommended to him the retention of Untracht as his tax preparer. Included in the audit file is a letter dated December 8, 2009, in which ICE's chief financial officer outlined the assistance ICE would give petitioner to help him transition to having New York City as his primary work location. The letter states that:

"[because] this relocation will complicate your personal tax situation, ICE, at its expense, will retain an outside tax advisor to advise you and ICE on your tax matters related to this transition. This outside tax advisor will also be retained by ICE to prepare your personal tax filings in both the U.K. and the U.S. and will continue to be retained by ICE until such time that your tax situation is no longer impacted by your transition from the U.K."

Nothing in the record indicates whether Untracht is the outside tax advisor referred to in the December 8, 2009 letter.

15. At hearing, petitioner did not specifically address his understanding of his filing of the IT-203 return with the attached IT-360.1 form in 2010. In response to the question of why he filed "resident income tax returns in New York" for the 2010 through 2013 tax years, he responded "[b]ased on advice from my tax advisors, but I believe it was because the day count was such that I was considered a New York resident for tax purposes" and that his filing status was not based on his being domiciled in the State.

16. The record contains a copy of a letter dated October 19, 2012, from Creditex's human resources department addressed to petitioner at his Laight Street apartment confirming his separation from the company as of that date. The record also includes a separation agreement with ICE dated December 1, 2012, which lists petitioner as residing in New York State. The agreement included a nine-month covenant not to compete clause. Petitioner testified that he did not see his time in New York "developmentally speaking, in terms of career progress," as any different from his time in London or Sydney.

17. Petitioner remained in New York City after leaving Creditex/ICE in 2012. According to petitioner, he had achieved financial independence by that point, having accumulated shares of stock in ICE at the time of its purchase of Creditex in 2008 and as a result of receiving shares as part of his compensation plan as president of Creditex. He explained his decision to stay in New York City as follows:

> "Yeah, I was trying to figure out really what to focus on next. At that point, I had reached financial independence, so I had a lot of options, and I sort of, you know – you kind of reach the thing you've been working for. But also in those three years in New York, I worked with some pretty amazing people and a lot of those people had also . . . left. So, there were some pretty entrepreneurial people that went out and started other companies. So, I started getting involved in helping entrepreneurs, working with start-up companies, in a lot of cases I invested with them. * * * And so, New York has – continues to have a great ecosystem for innovation, for start-up businesses, so – and I found that really interesting, spending time with those people."

When asked what financial activities he undertook in 2013, he emphasized that one of his goals in 2013 (as well as 2012) was to "cement" relationships he had with people whom he had met as president of Creditex and to make sure that they knew he was now an independent investor and available to invest in start-up businesses. During the 2012–2013 period, having considerable cash to invest and being very bullish on the New York City real estate market, petitioner bought

two New York City apartments, which he proceeded to rent out, and still owned and received rental income from as of the date of the hearing. He also put a down payment on a condominium to be constructed at 150 Charles Street in New York City. Petitioner completed the purchase upon the construction being finished in October 2015.

18. Petitioner purchased and imported into New York artwork worth $94,000.00 in 2012 and artwork worth $130,000.00 in 2013. According to petitioner, the artwork was not near and dear to him, as he purchased it sight unseen, through an art collector friend operating in Madrid, Spain, as a means of diversifying his investments, and at the same time putting something on the walls of his Laight Street apartment.

19. In 2014, petitioner was a founding member of the "TriBeCa Angels," a New York City-based organization, which he described as an investment club for high net worth individuals. It got started when he discovered that he and his next-door neighbor were both investors in start-up businesses and they decided that there would be an advantage to pooling the funds they had available for investment. According to petitioner, he has done investments through the organization, but he has no day-to-day duties with TriBeCa Angels.

20. Petitioner testified that his primary doctor was located in New Zealand and that he only saw doctors in New York when he needed a checkup in order to obtain life or health insurance.

21. In early 2014, petitioner learned that his mother had cancer. Petitioner returned to New Zealand and spent significant time with her until she died in mid-March 2014. Her passing was a great loss to him. Petitioner testified that he was very close to his mother, which he attributed to being the eldest child and not having a family of his own. He had drawn especially close to her after her 1991 separation from his father, which was a very trying time for her. When he traveled

back to New Zealand he would stay with her in the family home at 6 Pickwick Parade, Auckland, as he never owned or leased real property in New Zealand prior to 2014. He testified that he received mail there and considered it his permanent home and domicile. Because her sole means of support was a pension he described as “relatively minimal,” he purchased a new car for her, which she made available to him when he visited. In addition, he contributed to the upkeep and renovation of the home, including replacing every appliance in the house. It was probably because of these contributions he made that his mother bequeathed the family home to him exclusively. She also willed to him paintings she had made, which are of great sentimental value to him, and which currently adorn the walls of his home in Auckland, where he also keeps many family heirlooms, which are near and dear to him, including family photos and books about the family. None of her paintings or family heirlooms are in his New York City apartment.

22. Petitioner testified that, after his mother’s sickness and death, New Zealand became the “center of gravity” of his life. He explained that, with the death of his mother, he wanted to be closer to his father, with whom he had strained relations since the latter’s divorce from petitioner’s mother, and he made a “conscious effort” to spend more time with him. On March 11, 2014, petitioner purchased a penthouse apartment on the top level of a three-floor building at 2C Lombard Street in Auckland for $2.25 million (New Zealand currency), which sale settled on April 10, 2014, according to the contract of sale in the record. The penthouse is 2,000 square feet in size, has three bedrooms, two bathrooms, and parking and storage underneath the building. The penthouse overlooks the ocean in a “premium” address near where he grew up, but not far from central Auckland, and only around 30 minutes from his father’s home. Petitioner testified that, while he told his architect who did the renovation on his Laight Street apartment to

give the place the feel of a "luxury hotel," his Auckland apartment has the feel of "home" for him. Whereas he would give friends and family the key to his Laight Street apartment in New York City, because he does not keep anything of a "personal" nature there, he would not feel comfortable giving them the key to his Auckland apartment. Petitioner is a water sports enthusiast and he keeps his paddle boats, kite surfing, and jet-skiing equipment at the penthouse. Petitioner testified that the Lombard Street penthouse is comparable in value to his Laight Street apartment in New York City. He did not testify as to when he was able to move into the penthouse after purchasing it in 2014.

Other than purchasing the Lombard Street penthouse, and wanting to spend more time with his father, petitioner did not detail in his testimony what other changes his mother's death caused him to make in his lifestyle.

23. Petitioner filed a New York State resident income tax return (form IT-201) for each of the years 2011, 2012, 2013, and 2015.

24. Based on information received from petitioner on audit, the auditor developed a calendar for each of the years in the 2010 through 2015 period. The calendar assigns each day to a particular location. While the audit report does not explain how the auditor treated days spent in travel, such days should not cause a material inaccuracy, assuming the auditor was consistent in her approach. Petitioner stipulated to the accuracy of that information. Those calendars show that petitioner's pattern during the years 2010 through 2014 was to return to New York City between trips to other states or countries, except when the contiguity of his next destination made that pattern impractical. Thus, for example, in 2012, petitioner visited four states and six foreign countries, returning to New York City each time between trips, with one exception. This pattern

continued in 2014. After traveling to New Zealand when he learned of his mother's illness in January 2014, petitioner returned to New York City on April 28, where he remained, except for a three-day trip to Kentucky, until June 12. He then traveled to various countries in Europe, including the U.K., returning to New York on July 10. After staying in New York until August 4, he traveled to a number of other States for the balance of August. After returning to New York City for the first 11 days of September, petitioner spent the rest of September and October and the first nine days of November in California, except for five days in Texas and four days in New York. On November 10, he traveled to New Zealand, where he remained until he traveled back to New York on November 26. He remained in New York until December 4, was in California on December 5 and 6, after which he traveled to New Zealand, where he stayed until the last week in December, which he spent in Australia. Counting from March 1, petitioner spent 92 days in New Zealand versus 93 days in New York City in 2014.

25. Based on the calendars compiled by the auditor, the table below reflects petitioner's presence in New York versus his presence in New Zealand:

Year	New York	Other States	Other Countries	New Zealand
2010	266	12	79	8
2011	288	18	48	10
2012	302	15	47	2
2013	262	33	52	18
2014	102	87	46	130
2015	227	36	8	94

26. By 2014, petitioner thought that the New York City real estate market had grown overpriced. Because he viewed the Los Angeles real estate market as promising and he enjoyed

being there, petitioner traveled to that city to acquire real estate, spending a total of 76 days there in 2014. As a result of these efforts, he eventually purchased real property in Los Angeles in 2015 for around $5.4 million. Petitioner performed some of the coordination of that purchase while in New York.

27. Petitioner testified about a number of New Zealand investments he had made in recent years. In 2013 and 2014, petitioner did a due diligence investigation of Avanti Finance (Avanti), which he described as an established New Zealand non-bank lender. Petitioner eventually made an equity investment in Avanti of a "couple of million dollars" and purchased Avanti notes worth another million dollars. Petitioner did not testify when he made his equity or debt investments in Avanti or whether his investments entail any activities on his part or are passive ones. When asked if he had a "strong business relationship with Avanti," petitioner replied, "Yes, yes, over the years I got to know the founder well."

Petitioner also invested in 2014 in Algomi, a British-based financial technology company, with a New York City office. Petitioner testified that he was asked to serve as an advisor to the company, but he was never an employee of the company, and did not receive any compensation from the company.[2]

In 2015, petitioner purchased a camera store in New Zealand, formerly owned by a friend, in a liquidation sale. Finally, petitioner testified about the equity-type investments he had, without giving the date of investments, one being an investment in ICE Angel Investment Group,

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[2] The Division introduced an article, dated March 19, 2014, from an internet website, www.hedgeweek.com, which reported that petitioner had assumed a role as "strategic advisor" with Algomi. The Division also introduced a printout from Algomi's website that referred to petitioner as a "strategic advisor" of the company. Because of the lack of any description of petitioner's duties as "strategic advisor" in either printout, and the lack of any evidence in the record indicating the reliability of either source of information, it is determined that this evidence was not sufficient to establish that petitioner had any formal advisory role with Algomi.

a New Zealand-based company, which invests in early-stage businesses, and the other being in a U.K. company that does children's animation.

28. Petitioner's brothers and sister are all married and have children. His sister lives in Barcelona, Spain, while one brother lives in New Zealand and another in Australia. He is close to his siblings and their children. He has helped finance college educations abroad for two of his nephews. He also has a large extended family, because his mother's siblings continue to live in New Zealand or Australia, along with many cousins, all forming "a pretty tight family network." Petitioner is currently in a long-term relationship with a New Zealand woman, with whom he now lives in New Zealand. He met her when he worked as a summer intern for her father's brokerage firm around 30 years ago. He did not testify as to whether he was in that relationship in 2014. Petitioner has no family in New York.

29. As of the end of 2015, petitioner continued to own the Laight Street apartment in New York City. He testified that he viewed the apartment as a luxury, which allowed him to stay in a place in which he was familiar when he came to the City, rather than a hotel, and which he made available for the use of friends and family. The audit report lists the "current" value of the apartment as $2.9 million.

30. Rachel Drakes testified that she came to know petitioner when she was assistant to the CEO of ICE. Later she became his assistant when he moved to New York City and became president of Creditex. In that capacity, she worked very closely with him, managing his calendar, and planning his meetings and dinners. While she no longer works with him, she considers him a very good friend. According to Ms. Drakes, when petitioner was taking off for a vacation to New Zealand, he would refer to it as "going home." Petitioner never expressed to her that he

wanted to stay permanently in New York City. She had no doubt that his heart was in New Zealand.

31. Petitioner also presented the testimony of David Perez, a CPA working with the New York City office of Andersen Tax LLC (Andersen). Mr. Perez testified that, working in conjunction with Mr. David Roberts, a managing director at Andersen, he prepared petitioner's New York State and federal income tax returns from 2012 through at least 2015 and petitioner's U.K. tax return for 2014. Petitioner testified that he turned to Andersen because he had grown dissatisfied with his prior tax accountants, Untracht, believing that the firm was not equipped to deal with his multiple-jurisdiction tax situation. As part of Andersen's usual "on-boarding" process for a new client, Mr. Perez reviewed petitioner's income tax returns for earlier years, including the 2010 year, with the IT-360.1 form attached (***see*** finding of fact 13). He testified that he might have done things differently in filing those returns, but that any problems with those returns did not rise to the level of requiring an amended return in his view. He testified that, based on what he learned from petitioner during the on-boarding process, he would not have filed the IT-360.1 with the 2010 return. He did not testify as to whether he discussed the issue with petitioner.

32. Mr. Perez testified that petitioner filed his New York State income tax returns as a resident for 2012, 2013, and 2015 because he qualified as a statutory resident, being in the State more than 183 days in each of those years, and having a permanent place of abode in the State. He testified that it was proper for petitioner to file a nonresident income tax return for New York in 2014 because, in his view, petitioner was not a domiciliary nor a statutory resident of the State in 2014. He further testified that he was aware that petitioner had a permanent place of abode in New York, but he did not explain why the "No" box on line H of the return was checked (***see***

finding of fact 1). At hearing, petitioner could not recall how the “No” box on line H came to be checked on the 2010 return.

33. Included in the hearing record is petitioner’s 2014 U.K. income tax return, which shows that he paid very substantial income tax to the U.K. that year. According to petitioner, that income resulted from sales of stock in ICE.

34. The audit was conducted entirely by correspondence or phone calls. After obtaining information from petitioner’s representative, the Division’s auditor sent a letter dated February 5, 2016, in which she asserted that petitioner “changed his domicile to New York when he moved to New York City in June 2010” and asked for more information. After Mr. Roberts wrote to the auditor objecting to that conclusion, the auditor responded with a more detailed letter, dated April 13, 2016 to Mr. Roberts, in which she analyzed petitioner’s domicile status by applying four traditional factors affecting domicile (i.e., Home, Active Business Involvement, Time, and Items Near & Dear and Family Connections), advising him that the Division had determined that petitioner should be treated as a New York domiciliary for 2014.[3] The letter’s analysis of the “home” factor noted petitioner’s New York City Laight Street residence and the 2C Lombard Street, Auckland, residence that petitioner purchased on March 11, 2014. The letter twice stated that “[i]t is not known if Mr. Biggar maintained a residence in New Zealand prior to 03/11/2014.” The letter concluded that “[i]f you have additional information to refute our determination, please submit it by May 13, 2016. Otherwise a Consent to Field Audit

[3] The auditor’s April 13, 2016 letter mentions that petitioner became a permanent resident of the United States on June 1, 2012, but does not specify when petitioner first became a domiciliary of New York. Petitioner’s witness, Mr. Perez, suggested at hearing, that, given the auditor’s mention of “June 2010" as the date petitioner became a domiciliary of New York in her February 5, 2016 letter, the auditor had contradicted herself and was confused. The auditor’s mention of the June 1, 2012 date does not indicate confusion on her part because there is no indication in the record that she saw the June 1, 2012 date on which petitioner became a permanent resident of the United States as controlling with regard to the issue of when petitioner became a domiciliary of New York.

Adjustment will be issued based on our determination." Mr. Roberts replied by letter dated May 12, 2016, in which he stated:

> "[t]he taxpayer disagrees with your determination, and believes that all of the documentation provided during this audit process adequately supports his position. Please note that at this time, the taxpayer has decided to forego the opportunity to submit any additional documentation for your files."

35. The auditor did not testify at hearing. The Division introduced an affidavit signed by the auditor, which highlights, as a basis of the issuance of the notice of deficiency, petitioner's filing of form IT-203, nonresident and part-year resident income tax return, for 2010, reporting that petitioner moved into the State on June 14, 2010, and his filing of form IT-360.1, change of city resident status, in that year.

36. Pursuant to State Administrative Procedure Act (SAPA) § 307(1),

(a) petitioner submitted 51 proposed findings of fact. Petitioner's proposed findings of fact 1, 2, 11 through 13, 16, 24, 25, 27 through 34, 49 and 50 are supported by the record, have been substantially incorporated herein. Petitioner's proposed findings of fact 4 through 9, 14, 15, 18 through 21, 26, 35, 36, 41, 42, 44, 47, 48, and 51 have been modified to more accurately reflect the record or remove irrelevant material, and, as modified, substantially incorporated herein. Petitioner's proposed findings of fact 3, 10, 17, 23, 37 through 40, and 43 are rejected as not supported by the record or overly broad. Proposed findings of fact 3, 45 and 46 are rejected as irrelevant and proposed finding of fact 22 is rejected as lacking any cite to the record.

(b) the Division submitted 66 proposed findings of fact. Proposed findings of fact 1 through 5, 11 through 15, 17 through 22, 24 through 33, 36, 37, 40, 41, 43 through 55, 57, 61 and 62 are supported by the record and have been substantially incorporated herein. Proposed findings of fact 6 through 10, 16, 23, 34 through 35, 39, 42, 56, 58, 63 and 64 have been

modified to more accurately reflect the record and remove irrelevant, redundant, or inaccurate material and, as so modified, have been substantially incorporated herein. Proposed findings of fact 38, 59, 60, 65 and 66 are rejected as not supported by the record or irrelevant.

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) (A) and (B) define such a resident individual, in relevant part, as someone:

> "(A) who is domiciled in this state, or . . .
>
> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . . ."

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

> "(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.
>
> * * *
>
> (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]).[4]

B. In ***Matter of McKone v State Tax Commn. of the State of New York*** (111 AD2d 1051 [3d Dept 1985], ***affd sub nom McKone v State Tax Commn***., 68 NY2d 638 [1986]), the Appellate Division favorably quoted the following treatises 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].)
>
> When a person has actually removed to another place, which is his fixed present residence, with an intention of remaining there for an indefinite time, it becomes his place of domicile, notwithstanding he may have a floating intention to return to his former domicile at some future and indefinite time. (28 C J S ***Domicile*** § 11, at 19 [1941].)
>
> Though the idea of permanency is sometimes involved in the domicile concept, the term "domicile" is more safely defined in the negative rather than affirmative. A person's domicile is the place he is making his home not "with" a present intention to remain there forever, but "without" a present intention of leaving at some particular future time. (Siegel, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 58A, SCPA 103, p. 21.)"

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]; 20 NYCRR 105.20 [d] [2]). Whether there has been a change of domicile is a question "of fact rather than

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[4] New York City also imposes a personal income tax on its residents pursuant to the Administrative Code of the City of New York § 11-1701. The City's definition of a resident individual is the same as the State's, except for the substitution of the term "city" for "state" (***see*** Administrative Code of the City of New York § 11-1705 [b] [1] [A] and [B]). The Division's regulations relating to the income tax imposed by article 22 apply in their entirety to the income taxes imposed by New York City under article 30 of the Tax Law and the New York City Administrative Code (***see*** 20 NYCRR 290.2).

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 [1943], ***affd*** 267 AD 876 [1944], ***affd*** 293 NY 785 [1944]; ***see also Matter of Bodfish v Gallman***). Certain declarations may evidence a change in domicile; nonetheless, 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]).

C. 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 the Tribunal has considered are: (1) the retention of a permanent place of abode in New York (***see e.g. Matter of Gray v Tax Appeals Trib. of State of N.Y.***, 235 AD2d 641 [3d Dept 1997]; ***Matter of Silverman***); (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 sub nom Matter of Buzzard v Tax Appeals Trib. of State of N.Y.*** 205 AD2d 852 [3d Dept 1994]); and (4) the location of social and community ties (***Matter of Getz,*** Tax Appeals Tribunal, June 10, 1993). "No single factor is controlling and the unique facts and circumstances

of each case must be closely considered" (***Ingle v Tax Appeals Trib. of Dep't of Taxation & Fin. of State***, 110 AD3d 1392, 1393 [3d Dept 2013]; quoting ***Matter of Gadway,*** 123 AD2d 83, 85 [3d Dept 1987]).

D. The burden of proof is on petitioner in this matter to show that he was not domiciled in New York in 2014 (***see*** Tax Law § 689 [c]). Petitioner attempts to meet that burden by pointing to his historic domicile in New Zealand. Citing the rule that "[t]he existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change" (***Matter of Newcomb***, 192 NY 238 at 250), petitioner argues that, given his historic domicile in New Zealand, the Division has the burden of proving that petitioner changed that domicile to New York. The Division does not concede that petitioner's domicile is historically in New Zealand. It does not deny that petitioner was born and raised there, but it points out that petitioner had left there to work abroad in January 1991 and had only visited since. It also asserts that petitioner maintained no permanent place of abode there since that time. These arguments notwithstanding, because the Division does not identify any particular time, prior to 2010, when petitioner abandoned his original New Zealand domicile, it is determined that petitioner's historic domicile, at least prior to 2010, was New Zealand. Accordingly, with regard to whether petitioner was domiciled in New York in 2014, for the Division to prevail, it must establish that petitioner changed his domicile from New Zealand to New York on or before 2014 (***see Matter of Erdman*** [having found that petitioner was domiciled in Florida for the period 1975 to 1985, the Tribunal finds that petitioner was not a domiciliary of New York in 1986 because the Division has not provided facts sufficient to establish a change in domicile]).

E. In that regard, the auditor's affidavit focuses on the nonresident and part-year resident income tax return (IT-203) filed by petitioner for 2010, in which petitioner reported that he "moved into New York State" on June 14, 2010, and the attached IT-360.1, in which petitioner reported a New York City change of residence. Petitioner's filing of the IT-203, nonresident and part-year resident return, rather than an IT-201, resident return, is itself indicative of petitioner being a New York domiciliary in 2014. If petitioner were a resident as a result of being a statutory resident, and not a New York domiciliary, he should have filed the IT-201, resident income tax return, since a statutory resident is a resident for the entire year and thus not a part-year resident or a nonresident (***see*** Tax Law § 605 [b]). Consistent with his decision to report his income tax liability using an IT-203, petitioner attached an IT-360.1. The form and the instructions thereto make clear that the form is only to be filed if the taxpayer has changed his or her New York City or Yonkers resident status as a result of a change in domicile (***see*** finding of fact 13). Thus, by filing the IT-203 with the IT-360.1 attached, petitioner told the Division that he became a domiciliary of New York on June 14, 2010. Unrebutted, petitioner's 2010 IT-203 constitutes clear and convincing evidence that petitioner adopted a New York domicile in 2010 (***see Vogt v Tully***, 53 NY2d 580, 588–89 [1981] [stating that, with reference to a statement on a return, "(w)e do not question that an admission as to tax consequences (even though it is an admission with respect to a conclusion of law) if made by a taxpayer or on his behalf might be binding on him and might therefore properly be made the predicate for imposition of tax liability"]; ***Matter of Heffron v Chu***, 144 AD2d 729, 730 [3d Dept 1988] [a statement on a partnership's state income tax returns, "[a]lthough … not a binding admission on petitioner's part [who was alleged to be a partner], it was probative hearsay evidence of facts relevant to the

ultimate issue in dispute, admissible in a hearing before a State administrative body"]; ***Zinn v Tully***, 77 AD2d 725, 726 [3d Dept 1980], (dissenting opn), ***rev'd on dissenting opn below***, 54 NY2d 713 [dissenting opinion notes as one factor supporting a finding of New York resident status, that "(s)ignificantly, petitioners filed New York State resident income tax returns for 1970, 1971 and 1972 on which they clearly indicated New York residency"]).

F. Thus, the question here is whether petitioner's evidence at hearing was sufficient to counter the evidentiary weight of his filing of an IT-203 with the attached IT-360.1. While petitioner's brief argues that "[t]here was ample testimony that the 2010 tax return was prepared in error," petitioner's proof is, in fact, underwhelming. Petitioner did not have the tax preparer who prepared the return testify; nor did he supply any explanation why it was not possible to have that person testify (***compare Zinn***, 77 AD2d at 726 [to prove that the filing of income tax returns as residents of New York was the accountant's error, petitioners submitted an affidavit from the accountant who prepared the returns]). Furthermore, petitioner did not testify as to what his substantive conversations were with that accountant in 2010, as petitioner did not address the 2010 year specifically, testifying that he thought he was taxable for the 2010 through 2013 tax years as a resident because of his "day count." Petitioner instead cites the testimony of Mr. Perez, the CPA who prepared petitioner's 2012 through 2014 tax returns. Mr. Perez, however, did not prepare petitioner's 2010 return and thus cannot have first-hand knowledge as to how that return's alleged error in reporting petitioner as a New York domiciliary could have occurred. Mr. Perez testified that he noted the filing of the IT-360.1 during his preparatory work, and, based on his discussions with petitioner, considered that filing to be an error, but claimed that, in his view, the error did not require the filing of an amended return. This testimony strains credulity. The

filing of the IT-360.1 for 2010 is an admission by petitioner that he was a New York domiciliary. Its filing thus means that petitioner would be a New York resident and is liable for tax on his non-New York sourced income even in a year when he did not qualify as a statutory resident (***see*** Tax Law § 601 [a]). Accordingly, it is hard to see how Mr. Perez could have concluded that the incorrect filing of that form, given its tax consequences, did not necessitate the preparation of an amended return. Moreover, one would think that, if Mr. Perez had concluded that the filing of the IT-360.1 was in error, he would have at least brought the error to petitioner's attention, which would allow petitioner, a chartered public accountant in his own right, to make a judgement about whether to file an amended return. Yet at hearing, petitioner claimed to have no idea that his 2010 tax return treated him as a New York domiciliary (***see*** finding of fact 15). In sum, Mr. Perez's testimony was not persuasive proof that petitioner's 2010 IT-203 incorrectly treated petitioner as a New York domiciliary.

Furthermore, petitioner did not prove that his intent on moving to New York City in 2010 was inconsistent with his becoming a New York domiciliary. Where a person acquires a "fixed place of residence" in New York with the intention of staying there indefinitely, the person becomes a New York domiciliary (***see McKone***). Here, petitioner acquired a place of residence in the State when he purchased the Laight Street apartment at the end of 2009. Thus, the question is whether, in purchasing that apartment and moving there, petitioner did so with the intention of staying permanently in New York or at least indefinitely. Petitioner offered no testimony regarding how long he planned on staying in New York upon moving there in 2010. He depicted his job as president of Creditex, which required him to be in New York City, as temporary, but he did not say that it was his intention at the end of that employment to leave New

York City. When asked by his counsel "whether you ever during this period had an expectation that you would sever your permanent status in New Zealand" or any expectation that "you would acquire a permanent status as a resident of New York," he answered in the negative. But that testimony does not establish when he expected to leave New York City and thus leaves open the possibility that, consistent with his 2010 New York tax filing, he planned to stay there indefinitely.

There are also a number of factors in the record that, while not determinative of the issue, are consistent with petitioner having no definite plan to leave New York State in 2010. First, after renting during his time in London, petitioner bought the Laight Street apartment in 2009, even before his position in New York City as president of Creditex began. While that could perhaps be attributed, as petitioner testified, to his greater financial resources in 2009, his decision in 2010 to subject the apartment to a major renovation is more consistent with an intention to stay indefinitely than for a short and finite time, as it necessitated hiring an architect and an interior designer, working with them to plan the renovation, bearing with the tumult of the construction work, and buying new furniture to fit the new design, all of which petitioner had to do while managing Creditex through the world financial crisis of 2009 and 2010. Also consistent with an intent to stay in New York City indefinitely is petitioner's decision to have ICE obtain a permanent resident visa on his behalf in order to have the option of staying in the country even when the job ended (***see*** finding of fact 11). Petitioner's decision to stay in New York City when he left Creditex in 2012 also warrants consideration. Petitioner testified that when he left Creditex he had achieved his lifetime goal of becoming financially independent and so he had "many options." He decided to stay in New York City because of its "great ecosystem for

innovation," and spent 262 days in New York City in 2013. Since New York City's economic ecosystem did not suddenly develop in 2012, that economic vitality would presumably also have been attractive to him in 2010, for which year he filed the IT-360.1 reporting himself as a New York domiciliary. Significantly, in his testimony about deciding on his next step after leaving Creditex, petitioner did not even mention the possibility of leaving New York City to return permanently to New Zealand.

In sum, given petitioner's filing of an IT-203 and the IT-360.1 as a domiciliary of New York in 2010, his unconvincing evidence that the filing of these forms was a mere error, and the fact that the balance of evidence is consistent with petitioner having an intention to reside indefinitely in the City, the Division has met its burden of showing by clear and convincing proof that petitioner changed his domicile to New York City in 2010.

G. The Division having met its evidentiary burden of showing that petitioner changed his domicile to New York in 2010, petitioner has the burden of showing that he changed his domicile from New York to New Zealand before or during 2014. In this regard, petitioner points to the death of his mother in 2014 as a life-changing event. He immediately flew to Auckland to be with his mother. He spent significant time with her until she died in mid-March of 2014. Petitioner testified that his mother's illness and death caused New Zealand to become the "center of gravity" of his life from that point on. However, other than the fact that his mother's death made him want to spend more time with his father and extended family in New Zealand, petitioner did not explain in his testimony what resolutions he made about his future in New York City versus moving back permanently to New Zealand. More specifically, he did not testify whether that event caused him to rethink his connections to New York City.

One of the traditional objective factors to be considered in determining a taxpayer's intent to change domicile is business connections (***see e.g. Matter of Kartiganer***, Tax Appeals Tribunal, October 17, 1991, ***confirmed sub nom Kartiganer v Koenig***, 194 AD2d 879 [3d Dept 1993]). That factor is especially important here. Petitioner was very clear in his testimony that what caused him to leave Auckland and work abroad were the superior business opportunities abroad. He was also very clear in his testimony that each of his moves to new cities was driven by the desire to take advantage of a chance to prove himself, advance his career and achieve financial independence. Even when his position as president of Creditex terminated, at which point he had achieved financial independence, and no longer was tied to New York by a job, petitioner decided to remain in New York because of its superior investment opportunities – "its ecosystem for innovation." His testimony made clear that he was very interested in working with the "amazing" people he had met while working with Creditex who had started businesses in New York City and to "cement" his relationship with them (***see*** finding of fact 17). Not surprisingly, then, by 2014, he had accumulated significant business connections to New York City. He owned two apartments (besides the Laight Street apartment in which he lived), was under contract to buy the Charles St. condominium, and had investments with companies started by former colleagues at Creditex (***see*** finding of fact 17). Importantly, in testifying about the change he experienced after his mother's death in 2014, petitioner did not say that he was no longer interested in pursuing opportunities as an independent investor, nor that New York City, other than its real estate market, had ceased to be attractive to him for business investment reasons. Perhaps most importantly, he offered no testimony about any decision he made (or steps he took) to wind down his extensive investments in New York City real estate and start-up

companies. If anything, the record supports that petitioner deepened his business connections to New York in 2014. It was in that year that he became a founding member of the New York City-based TriBeCa Angels, an informal investment group for investing in start-ups, through which he eventually made investments (***see*** finding of fact 19). As late as 2015, petitioner chose to complete his purchase of the Charles Street condominium (***see*** finding of fact 17).

Against this evidence of continuing business connections to New York City, petitioner emphasizes his investments in New Zealand, especially his investment in Avanti, a New Zealand finance company in 2013 and 2014. Petitioner's hearing brief contends that his investment in Avanti was "the most significant investment activity in terms of time spent" in 2014. That is not borne out in the record, as petitioner's testimony was only that he did due diligence work on Avanti in 2013 and 2014, and that he eventually made an investment in the company of several million dollars (***see*** finding of fact 27). Petitioner did not establish when he made the investment in Avanti. He also did not specify as to how active his role was with the company, testifying only that he knew the founder well. Since petitioner also did not elaborate about how actively he was involved with the New York City start-ups in which he had invested, there is no proof in the record that his day to day involvement in Avanti's affairs was any greater than his involvement in the New York City-based businesses in which he had invested, considered as an aggregate. While it is not necessary to sever all business connections with the prior domicile to establish a change in domicile (***Matter of Sutton***, Tax Appeals Tribunal, October 11, 1990), here, petitioner failed to show either any significant reduction in his New York City-based business activities or any significant increase in his New Zealand based investment activities with regard to 2014.

The Tribunal has also focused on the time spent in New York relative to the time spent in

the new domicile claimed by the taxpayer (***see Matter of Smith***, Tax Appeals Tribunal, July 23, 1998; ***Matter of Gray***). Here petitioner did not significantly wind down his New York City activities in 2014. After his mother's death in mid-March 2014, petitioner still spent more of his days in New York City than in New Zealand (***see*** finding of fact 24). Even taking 2014 as a whole, petitioner spent almost as many days in New York City as in New Zealand (102 versus 130). The slightly larger number of days spent in New Zealand is not clear and convincing proof of a change of domicile to New Zealand in 2014 (***see Matter of Gray*** [finding it significant that petitioner spent "almost as many days in New York" as in new claimed domicile, 145 versus 183 days]). Moreover, the pattern of petitioner's travel in 2014 indicates that New York City continued to function as a "home base" of sorts, as he generally returned there between trips unless the contiguity of his next destination made a return to New York City impractical (***see*** finding of fact 24). This pattern of returning to New York after traveling outside the State has been found to be indicative of a continuing New York domicile (***see Matter of Ingle***, Tax Appeals Tribunal, December 1, 2011). It also bears noting that petitioner admitted to doing some portion of his purchase of Los Angeles real property in New York, which again makes his New York City apartment seem like a home base. Finally, in 2015, petitioner spent much more time in New York than in Auckland (227 days versus 94 days), which again militates against the conclusion that in 2014 petitioner decided to change his domicile to New Zealand. Thus, the time spent factor also does not support petitioner's contention that he changed his domicile to New Zealand in 2014.

The place of abode factor requires extended analysis because in that year petitioner had residences in both New York City and New Zealand. In 2014 petitioner retained his Laight

Street apartment. Against his retention of this apartment must be weighed his claimed Auckland, New Zealand, residences, the family home owned by his mother at 6 Pickwick Parade, where he stayed when he visited in New Zealand after leaving in 1991, and the Lombard Street penthouse, his purchase of which settled on April 10, 2014. For a number of reasons, the 6 Pickwick Parade house cannot be viewed as petitioner's residence in the same sense as his Laight Street apartment. Petitioner purchased the latter for $2.9 million in 2009, renovated it to his taste, and spent all of his time there when not traveling, at least through 2013. In contrast, petitioner only spent a total of 38 days in New Zealand in the four year 2010 through 2013 period (***see*** finding of fact 25). Petitioner did spend substantial sums to maintain the 6 Pickwick Parade property, but his decision to do that could as easily be ascribed to his financial concern for his mother whose only income was a "relatively minimal" pension, as to a feeling that the house was his residence. Petitioner testified that he received mail there, but that testimony is incomplete at best, because the record makes clear that petitioner used other addresses as his mailing addresses while living abroad (***see*** findings of fact 7 and 16). Moreover, if petitioner always considered the 6 Pickwick Parade house as his "permanent residence," it is difficult to understand why that was not brought to the auditor's attention in response to the latter's April 13, 2016 letter, in which the auditor twice stated that she did not know if petitioner has maintained any residence in New Zealand other than the Lombard Street penthouse and invited petitioner to supply her with any other information he wanted in order to refute the Division's conclusion that petitioner was a domiciliary of New York in 2014 (***see*** finding of fact 34). As for his Lombard Street penthouse, while there is no proof as to when he was able to move into that property, even assuming he was able to do so after the closing on April 10, 2014, petitioner could have spent a maximum of 50

days there in 2014, which is far fewer than the number of days he spent in New York City, presumably at the Laight Street apartment (***see*** finding of fact 24). Under these circumstances, the place of abode factor is either neutral or militates slightly against petitioner's claim of a change of domicile to New Zealand in 2014 (***see Ingle*** ["this Tribunal has held that where a person has two homes, the length of time spent at each location is an important factor in determining intention for purposes of domicile"]).

Some of the objective domicile factors do support petitioner's contention that he changed his domicile to New Zealand in 2014. Petitioner has no family connections to New York, while he has a tight family network in New Zealand (***see*** finding of fact 28). Furthermore, the "items near and dear" factor supports a change in domicile, as petitioner kept his mother's paintings and other family heirlooms in his New Zealand penthouse in 2014 and not in New York City. Nevertheless, given that petitioner (1) retained his New York City Laight Street apartment and his business connections to New York City in 2014; (2) spent almost as much time in the City as in New Zealand in 2014; and (3) continued his pattern of returning to New York City after trips, he has not shown by clear and convincing proof that he changed his domicile to New Zealand in 2014.

H. The Division imposed negligence and substantial understatement penalties here pursuant to Tax Law §§ 685 (b) (1), (2), and 685 (p). Petitioner argues that penalty should be abated here because domicile involves applying the Division's discretionary authority to a taxpayer's subjective intent, and the Division has long had a practice of not imposing a penalty under such circumstances, citing ***Matter of Greenwich Mills*** (State Tax Comm'n, April 2, 1985). In ***Matter of McGaughey*** (Tax Appeals Tribunal, March 19, 1998, ***confirmed sub nom Matter***

of McGaughey v Urbach, 268 AD2d 802 [3d Dept 2000]), the Tribunal held that a careful weighing of facts and circumstances is necessary to determine whether "a taxpayer acted with ordinary business care and prudence in attempting to ascertain his tax liability and that penalties should be abated." Here, after filing form IT-203 that treated him as a New York domiciliary for 2010, petitioner filed his 2014 IT-203 income tax return on the basis of not being a New York resident. As discussed above, petitioner's relationship to New York State had not changed so dramatically as to justify the conclusion that petitioner had changed his domicile to New Zealand in 2014. Moreover, on his IT-203 for 2014, petitioner checked the box "No" with regard to the question of whether he maintained "living quarters" in New York State, notwithstanding that he had owned his New York City Laight Street apartment for some four years. Under these circumstance, abatement of penalty is not justified (***see Matter of Campaniello***, Tax Appeals Tribunal, July 21, 2016).

I. Petitioner and the Division introduced evidence relating to petitioner's activities, investments, and location in the years after 2015. Because petitioner's domicile for 2014, and his intentions relating thereto, are at issue here, evidence from those later years is too remote to be probative in this matter.

J. The petition of Grant G. Biggar is hereby denied and the notice of deficiency dated August 9, 2016, together with penalties and interest thereon, is sustained.

DATED: Albany, New York
January 10, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE