STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
ELI AND BEATRICE KORNBLUM	:	DECISION DTA Nos. 807810 and 807811
for Redetermination of deficiencies or for Refunds of New York State and New York City Income Taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1983 through 1985.	:	

Petitioners Eli and Beatrice Kornblum, 3403 Bimini Lane, Coconut Creek, Florida 33066, filed an exception to the determination of the Administrative Law Judge issued on May 2, 1991 with respect to their petitions for redetermination of deficiencies or for refunds of New York State and New York City income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York[1] for the years 1983 through 1985. Petitioners appeared by Simon, Meyrowitz, Meyrowitz and Schlussel, Esqs. (Paul Meyrowitz, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in response. Neither party requested oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

[1]The personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

ISSUE

Whether petitioners were subject to taxation as resident individuals because they were domiciliaries of New York State and New York City for the years 1983 through 1985, or, in the alternative, because they were not domiciliaries of New York State and New York City, but maintained a permanent place of abode within New York and spent in the aggregate more than 183 days in the State during each of the years in question.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On August 6, 1984, petitioners, Eli and Beatrice Kornblum, filed a New York State and City of New York Resident Income Tax Return for the year 1983. The return listed petitioners' address as 3403 Bimini Lane, Coconut Creek, Florida 33066. The envelope in which the return was mailed bore a Brooklyn, New York postmark. The wage and tax statement attached to the return was addressed to Eli Kornblum at 2175 East 29th Street, Brooklyn, New York 11226 and listed Duro-Test Corporation as the employer. Petitioners filed with their return New York State and City of New York Change of Resident Status forms which indicated they were residents of New York State during the period January 1, 1983 through October 31, 1983.

On November 1, 1988, the Division of Taxation ("Division") issued a Statement of Income Tax Audit Changes to petitioners for the years 1983, 1984 and 1985 wherein total income of petitioners from all sources was held taxable to New York State and City on the basis that petitioners were statutory residents. On January 13, 1989, the Division issued five notices of deficiency to petitioners for 1983, 1984 and 1985 asserting, in the aggregate, additional New York State personal income tax of $30,267.00 and additional City of New York personal income tax of $10,128.00, plus penalty and interest, for a total amount of tax due of $40,395.00.

At a Bureau of Conciliation and Mediation Services conference held on August 8, 1989, the Division cancelled the assessed penalty, leaving the tax and interest due.

On December 23, 1986, August 20, 1987 and September 19, 1988, petitioners executed three consents extending the period of limitation for assessment of personal income taxes under Articles 22 and 30 of the Tax Law. The three consents had the effect of extending the period for assessing the year 1983 to June 30, 1989.

During the years at issue, the Kornblums maintained a residence at 2175 East 29th Street, Brooklyn, New York. They had purchased the house in approximately 1949 and had resided there continuously from the time of purchase through the years at issue.

In 1982, Eli Kornblum was the president of two corporations that were subsidiaries of Duro-Test Corporation. Petitioner had been employed by the corporation for 51 years. The corporation's warehouse and factory were located in Bergen, New Jersey, while its administrative offices, including Mr. Kornblum's, were located in the Empire State Building in New York, New York. At the end of 1982, the corporation moved its administrative offices to Bergen, New Jersey, a factor which contributed to Mr. Kornblum's retirement because of the increase in the commute from Brooklyn to New Jersey. Mr. Kornblum retired from the Duro-Test Corporation in July 1983 but continued to receive his salary through December 31, 1983. On January 1, 1984, he began receiving his retirement benefits.

During the first four months of 1983, Mr. Kornblum took a leave of absence from his employment with Duro-Test Corporation. Petitioners went to Florida during this period to determine if they would find it an acceptable place to retire. On April 17, 1983, petitioners signed a purchase agreement to buy a condominium in Coconut Creek, Florida. Petitioners closed title to the condominium on October 29, 1983.

After petitioners purchased the condominium in Florida, Mr. Kornblum obtained a Florida driver's license and became active in the Wynmoor Community Council, the

condominium association of their Florida community. Both Mr. and Mrs. Kornblum voted in Florida in 1984 and 1985.

During the years at issue, petitioners maintained a checking account, savings account and safe deposit box in a bank located in Brooklyn, New York. Petitioners also maintained a bank account in Coconut Creek, Florida. They maintained a cash management account with a stock brokerage firm located in New York, New York. The monthly statements issued by the firm were mailed to petitioners at their Florida address.

Petitioners testified at the hearing that upon their purchase of the condominium in October 1983, they intended to make Florida their permanent home and residence. Beginning in 1983, they would stay in Florida from early October to early May to escape the cold weather months of New York. In early May they would return to their house in Brooklyn, New York to escape the summer heat of Florida. In early October they would then return to Coconut Creek, Florida. While they resided in Florida, all of their mail was forwarded there, and upon their move to New York, they would have their mail forwarded to the Brooklyn address. Petitioners did not move their furniture from the Brooklyn house to Florida, but did bring their clothes with them. The unoccupied Brooklyn or Florida residence was not rented during the period of petitioners' absence.

The Kornblums' two children resided in California and upstate New York, while Mrs. Kornblum's late brother's family and Mr. Kornblum's brother and sister lived in Florida.

In the course of the hearing, petitioners introduced a schedule indicating the days spent by petitioners in New York and Florida during the years at issue. The 1983 schedule shows petitioners in Florida from January 1 through May 10, in New York from May 11 through October 3, and in Florida from October 4 through December 31, for a total of 146 days spent in New York during 1983. For 1984, the schedule shows petitioners in Florida from January 1 through May 10, in New York from May 11 through October 3, and in Florida from October 4 through December 31, for a total of 146 days spent in New York during 1984. Finally, for

1985, the schedule shows petitioners in Florida from January 1 through May 9, in New York from May 10 through October 3, and in Florida from October 4 through December 31, for a total of 147 days spent in New York during 1985. Petitioners' accountant testified at the hearing that he prepared the schedule in 1987 based upon petitioners' utility bills from their Florida and New York residences, petitioners' credit card summaries, and conversations with petitioners.

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> The Division introduced into the record of this hearing an auditor's worksheet which listed petitioners' telephone bills from the Southern Bell Telephone Company for four months in 1984 and each month of 1985. In addition, the Division introduced into the record an auditor's worksheet which listed petitioners' telephone bills from the New York Telephone Company for ten months of 1983, five months of 1984 and ten months of 1985. While the bills provided to the auditor for the year 1985 seem generally consistent with the schedule of days submitted by petitioners to verify the amount of time spent in each state during that year, the same cannot be said for the bills submitted to the auditor for 1983 and 1984. Petitioners' claim to have spent 219 days in Florida in 1983; however, none of the bills listed cover any period in Florida in 1983. In all, there are charges listed for the New York phone which indirectly corroborate a stay of only approximately three months in Florida in 1983. Similarly, while the schedule of days indicates that petitioners spent 219 days in Florida during 1984, the bill dated January 7, 1984 for the New York phone does not support petitioners' claim to have been in Florida during that time, a full six months of bills do not appear on either the New York City or Florida list, and of the remaining five months of 1984, only the March bill listed for the

> Florida phone and the February bill listed for the New York phone seem to support petitioners' claim to have been in Florida during those months. In all, therefore, there are telephone charges listed which generally corroborate a stay of only approximately two months in Florida in 1984. In addition, while Mrs. Kornblum's testimony generally corroborated the schedule of days submitted by petitioners (Tr., pp. 89, 91), Mr. Kornblum testified that petitioners spent only four months of each of the years in question in New York, rather than the five months indicated by the schedules (Tr., pp. 57, 62).[2]

The Brooklyn telephone book for 1986 contained a listing for Eli Kornblum with an address of 2175 East 29th Street and the telephone number of the Brooklyn residence.

OPINION

The Administrative Law Judge determined that petitioners had not established a change of domicile from New York to Florida during the years in question. Rather, the Administrative Law Judge found that petitioners' ties to both states were equally strong, and the fact that arguments could be made for either state was an indication that petitioners had not "clearly and convincingly" proven a change of domicile to Florida. Thus, the Administrative Law Judge sustained the notices of deficiency issued separately to Mr. and Mrs. Kornblum.

---

[2] The Administrative Law Judge's finding of fact "10" read as follows:

> "The Division introduced into the record of this hearing an auditor's worksheet which listed petitioners' telephone bills from the Southern Bell Telephone Company for four months in 1984 and each month of 1985. In addition, the Division introduced into the record an auditor's worksheet which listed petitioners' telephone bills from the New York Telephone Company for ten months of 1983, five months of 1984 and ten months of 1985. It appears that for the months provided, petitioners' telephone use was generally consistent with petitioners' testimony and schedule relating to the time spent in Florida and New York during the years in issue."

We modify this finding of fact because we did not agree with the Administrative Law Judge's general assessment of the evidence submitted.

The Administrative Law Judge reasoned that in the alternative, even if petitioners had proven a change of domicile to Florida, petitioners would, nevertheless, be subject to personal income taxes as resident individuals because they maintained a permanent place of abode in New York City during the years in question and failed to prove that they spent in the aggregate 183 days or less in New York during each year of the audit period.

On exception, petitioners argue that they should be exempt from personal income taxation for the years in question because they were not "resident individuals" of New York State or City as defined by Tax Law § 605(b)(1)(A) during those years. Thus, petitioners claim that they were not during the audit period and are not now "domiciled" in New York, as that statute requires, within the intent and meaning of 20 NYCRR 102.2(d).

Emphasizing that a person's intention is "one of the key elements" in an analysis of that person's domicile, petitioners assert that they clearly intended to make Florida their permanent domicile during the years in question (petitioner's brief, p. 2), and, in fact, purchased their condominium with this intention. As evidence of their intent to move their domicile to Florida, petitioners note that they had severed all business ties with New York before moving, and that, once in Florida, they obtained Florida drivers' licenses, registered their cars in Florida, registered to vote and voted in Florida, joined the local library, became members of the Board of Directors of their condominium, and filed their tax returns using the Florida address.

Petitioners assert that they should likewise be exempt from taxation under Tax Law § 605(b)(1)(B) for they were not New York domiciliaries during the years in question, and spent less than 183 days in New York during each of the years in question.[3] Petitioners offer as proof the schedules submitted below evidencing the amount of time spent in each state over the audit period which they claim was corroborated with utility bills and sworn testimony. Petitioners note that the Administrative Law Judge conceded that the bills were consistent with the dates

[3]Petitioners do not take exception to the Administrative Law Judge's conclusion that they maintained a "permanent place of abode" in New York City during the audit period (see, 20 NYCRR 102.2[e][1]).

given in the time schedules. Finally, petitioners emphasize that the Division has not presented any evidence to contradict the information asserted in the time schedules.

In response, the Division asks that the determination of the Administrative Law Judge be sustained.

The Division maintains that petitioners did not establish that they were not New York domiciliaries within the meaning and intent of 20 NYCRR 102.2(d) (see also, Tax Law § 605[b][1][A]). As support for this claim, the Division cites, in part, the maintenance and "constant use of" the Brooklyn residence during the years in question, the fact that petitioners did not take any of the furniture from their Brooklyn home to Florida, petitioners' retention of bank accounts and a safe deposit box in New York, and Mrs. Kornblum's use of a Brooklyn physician during the audit period (Division's brief, p. 10). These factors, the Division asserts, are indications that petitioners never truly "intended" to effect a change in domicile to Florida (Division's brief, p. 13).

The Division contends that even if petitioners were able to establish that they were not New York domiciliaries, petitioners would, nevertheless, be subject to the taxes imposed upon resident individuals in New York because they maintained a permanent place of abode in New York City throughout the years in question and failed to prove that they did not spend in the aggregate more than 183 days in New York during each of these years (see, Tax Law § 605[b][1][B]; 20 NYCRR 102.2[c]).

We affirm the determination of the Administrative Law Judge. Further, because the issues raised on appeal are the same as those raised before the Administrative Law Judge, and because we find that the Administrative Law Judge completely and adequately addressed the issues before him, we deem it unnecessary to analyze these issues any further. Therefore, we affirm the Administrative Law Judge for the reasons stated in his determination. However, we are compelled to discuss two points which have been raised subsequent to the Administrative Law Judge's determination, but which in no way affect his determination.

First, petitioners take exception to the Administrative Law Judge's conclusion that they did not prove that they spent, in the aggregate, more than 183 days within the City of New York in each of the years in question (see, conclusion of law "F," and exception, p. 1). Petitioners assert that the Administrative Law Judge "concedes that the utility bills presented in evidence were consistent with petitioners' schedules and testimony" regarding the time spent in New York versus Florida during the audit period (exception, p. 1; see also, petitioners' brief, pp. 4-5). In other words, petitioners find the two statements inconsistent with one another.

Petitioners have misunderstood and misquoted the Administrative Law Judge. The Administrative Law Judge's finding of fact "10" sets forth that the Division introduced an auditor's worksheet listing petitioners' telephone bills from Southern Bell Telephone Company for four months of 1984 and twelve months of 1985, and from New York Telephone Company for ten months of 1983, five months of 1984,[4] and ten months of 1985. The Administrative Law Judge found that "[i]t appears, that for the months provided, petitioners' telephone use was generally consistent with petitioners' testimony and schedule . . . " (emphasis added). In so stating, the Administrative Law Judge was referring only to those bills that were submitted -- and, as noted, no Florida bills were submitted for 1983,[5] and neither location lists bills for six of the months of 1984 -- and he was not concluding that the bills were perfectly consistent with the time schedules. It would be improper to extrapolate any greater meaning from his statement.

Petitioners have the burden of proving by clear and convincing evidence that they were not residing within New York for more than 183 days during each of the years in question (see, 20 NYCRR 102.2[c]). Because petitioners claim that they were in New York for 146 days of each of the years in question -- only 37+ days short of the statutory 183+ days -- whether or not the

---

[4]A total of six months of bills is available for 1984, as several of the months covered by New York Telephone overlap with those covered by Southern Bell Telephone.

[5]As we pointed out in the modified finding of fact above, it is significant that no Southern Bell bills were submitted to the auditor for 1983, not even for the months of November and December, the first two months petitioners claim to have changed their domicile to Florida.

bills submitted are generally consistent with the time schedules is rendered meaningless when the gaps between bills are sufficient to place the petitioners' ultimate claim in doubt.

Even had there been no gaps between the bills submitted, they are too imprecise in and of themselves to constitute clear and convincing evidence of the number of days spent in each state during the audit period. For example, the New York Telephone bills listed are dated on the seventh of each month, but no further evidence has been submitted to provide us with an indication of the exact dates of calls made. Thus, the evidence submitted cannot tell us for sure that, for instance, petitioners actually left New York on October 4 of each year and returned on May 11. The Southern Bell charges are less specific yet, for we are not even informed of the billing dates for the months listed.

Further, even if there were no gaps between the bills submitted and the bills were more precise, it would not cure the fact that the bills dated May 7, 1983 and January 7, 1984 do not corroborate the time schedules. Finally, we find that Mr. Kornblum's testimony did not corroborate his own time schedules because he said petitioners were in New York for only four months of each of the years in question, rather than the five months to which the time schedules attest.

In sum, we do not agree with the Administrative Law Judge's generous finding that the bills submitted to the auditor are "generally consistent" with the time schedules and we have modified this fact accordingly. However, we point out that even had we agreed with his statement, it would not mean, as petitioners assert, that, therefore, petitioners had proven by clear and convincing evidence that they were not in New York for more than 183 days per year.

A second issue raised before us -- though it has no bearing on our decision here -- is that of the precedential value of determinations of Administrative Law Judges. As the Division correctly points out in its brief, petitioners' reliance on such determinations is improper, for, in accordance with Tax Law § 2010(5): "Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other

proceedings . . . ." Indeed, we have recently held in Matter of Katz (Tax Appeals Tribunal, November 14, 1991) that even fact findings from a determination may not be cited, as the facts of any case are an inextricable part of the ultimate determination of the case; thus, to cite the facts would be to yield them precedential value, in contravention of the intent of the statute.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Eli and Beatrice Kornblum is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Eli and Beatrice Kornblum are denied; and
4. The notices of deficiency dated January 13, 1989 are sustained.

DATED: Troy, New York
January 16, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner