

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD E. GRAY AND JEAN M. GRAY	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA No. 808982
Personal Income Tax under Article 22 of the Tax Law for	:	
the Years 1987 and 1988.	:	

Petitioners Richard E. Gray and Jean M. Gray, 2 Railroad Vine, Amelia Island, Florida 32034 and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on May 27, 1993. Petitioners appeared by Kaye, Scholer, Fierman, Hays and Handler (Peter L. Faber, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Both petitioners and the Division of Taxation filed briefs in support of and in opposition to their respective exceptions. Petitioners filed a reply brief. Oral argument was heard on January 5, 1994, which date began the six-month period for issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioners were resident individuals of New York State in 1987 and 1988.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Richard E. Gray and Jean M. Gray, were domiciled in New York State until at least September 1985.

In 1987 and 1988, petitioners filed New York State nonresident personal income tax

returns. The returns filed for those years show Florida State mailing addresses. Upon audit of those returns, the Division of Taxation ("Division") determined that petitioners were domiciliaries of New York in 1987 and 1988; therefore, they were required by the Division to file personal income tax returns as residents of New York, calculating their income tax accordingly. The Division issued statements of audit adjustment to petitioners recalculating their 1987 and 1988 New York income and tax due thereon in accordance with this determination.

Based on the results of its audit, the Division issued to petitioners a Notice of Deficiency dated November 26, 1990, asserting deficiencies in income tax in the amounts of \$779,360.50 for 1987 and \$60,400.13 for 1988.

As a child, Mr. Gray moved with his family to Fayetteville, New York and later moved to Syracuse. Except for periods of schooling and military service, he lived in the Syracuse area most of his life. He is a graduate of Syracuse University and an avid supporter of the Syracuse football team. In 1952, Mr. Gray went to work for a company started by his father called Gray-Syracuse, Inc.

Gray-Syracuse is a precision casting corporation which focuses primarily on the aerospace industry. Before 1985, Mr. Gray owned 80 percent of the common stock and was the chairman of the board of Gray-Syracuse. The remainder of the stock was owned by key employees hired by Mr. Gray to run the corporation. The corporation has manufacturing facilities in Manlius and Chittenango, New York. It also acquired two industrial plants, one in Troy and one in Oriskany, New York. Mr. Gray personally owned the property upon which Gray-Syracuse's primary facilities were located. He also purchased 48 acres of land as a site for a proposed manufacturing plant. The land was never zoned for industrial purposes, however, so the plant was never built. It remains vacant land and is still held by Mr. Gray.

In about 1970, Mr. Gray began relinquishing direct control over the operations of the corporation, appointing Robert Barbero as president. Over time, he handed over the day-to-day

management of the corporation to Mr. Barbero. As his participation in the corporation declined so did his compensation until Mr. Gray was compensated less for his services than was Mr. Barbero. In the 1970's, Mr. Gray rented a separate office for himself in Manlius, New York to remove himself from the plant premises because he believed his presence would undermine Mr. Barbero's authority. In his personal office, he conducted business connected with Gray-Syracuse and with two other corporations in which he had an ownership interest: Alcumet, Inc., a New Hampshire foundry specializing in aluminum and copper base metal, and Finite Tools, a tool company formed in Georgia in 1983.

Mr. Gray has suffered severe health problems for some time, especially respiratory and heart ailments. In 1981, he was diagnosed as having arrhythmia, a heart condition which can cause sudden blackouts and, if untreated, can lead to death. In May 1981 he was involved in a minor automobile accident after falling unconscious behind the wheel. After that, he continued to experience episodes of lightheadedness. In June 1983, he experienced a loss of consciousness while sitting at his office desk. Because of these experiences, Mr. Gray stopped driving an automobile for a period of about five years.

Also in 1981, Mr. and Mrs. Gray were involved in an almost fatal automobile accident while driving from Sacramento to San Francisco. Following this accident, key employees of Gray-Syracuse approached Mr. Gray and asked him what would happen to them in the event of Mr. Gray's death. Prompted by concerns for his own health and for the well-being of his employees, Mr. Gray began planning for retirement and for the orderly transition of the corporation to new ownership.

In the early 1980's, the Grays began visiting different locations looking for a place with a suitable climate that would allow Mr. Gray to exercise year round. They visited California, New Mexico, North and South Carolina, Georgia and Florida. Initially, they decided to settle on Skidway Island in Georgia. In January 1984, they purchased a residential plot with the intention of building a home there; however, their home design was rejected by the local architectural review committee. By August of 1985, the Grays realized that they would need to

rent housing until they were able to resolve their differences with the review committee. They elected to rent on Amelia Island, Florida because there is a major airport nearby which would allow them to commute to Skidway Island on a regular basis to negotiate their differences with the review committee.

In August 1985, Mrs. Gray met with George Dahl, a realtor, who showed her available housing on Amelia Island. Eventually, they settled on a three-bedroom condominium located at 2201 Linkside Villa, Amelia Island. They executed a one-year lease from November 1985 through November 1986 with an option to renew. At some point in the fall of 1985, petitioners realized that they would never resolve their differences with the architectural review board of Skidway Island, and they then began searching for a permanent residence on Amelia Island.

Letters from two realtors confirm that by the fall of 1985 petitioners began looking for a home to purchase on Amelia Island. By the fall of 1986, the Grays still had not found what they were looking for. On October 3, 1986, the Grays signed an agreement to acquire Lot No. 44, Railroad Vine, Amelia Island Plantation, with the intention of building a new home. The acquisition of Lot No. 44 was completed on November 4, 1986, and the Grays immediately began planning for the design of the new house.

In the meantime, the Grays continued to rent housing on Amelia Island. When the lease at Linkside ended, they did not exercise the option to renew because of a disagreement with the owner of the property. Instead, they leased a second three-bedroom condominium at 2095 Beachwood, Amelia Island Plantation from December 1986 through May 1987. The term was for less than a year because the owner had a prior arrangement to rent it to other tenants.

The Grays spent the summer of 1987 in Syracuse, New York and leased no property in Florida from June through September 15, 1987. They leased a three-bedroom apartment at 22 Wax Myrtle, Amelia Island Plantation from September 15, 1987 through October 1988. The Grays spent the summer of 1988 in Florida. Mr. Gray found the Florida heat and humidity to be extremely oppressive and determined not to repeat the experience.

The design, planning and construction of the Grays' new house stretched from November

1986 through at least December 1988. The original architectural design was rejected by the Amelia Island Plantation Architectural Review Board in December 1986 and had to be revised. The final plans were not approved until June 1987. The construction contract was then let out for bid. A final contract was signed in October 1987. The Grays actively participated in overseeing the design and construction of their new home. They moved into their new residence on December 15, 1988, although the house was only partially complete and swaddled in scaffolding.

When the Grays began planning to move to a warmer climate, they initially thought they would sell their Fayetteville home. They changed their minds for two reasons. One of their children was (and continues to be) unable to keep a steady job because of physical ailments and addictions to drugs. The Grays felt obligated to maintain a home for her, at least until she was able to care for herself. In addition, the Grays decided, as part of their estate planning, that it would be prudent to turn the Fayetteville house over to their children, allowing them to hold it as an investment.

The Grays have five children. Mr. Gray has three children by a prior marriage: Christina, who lives near Syracuse; Stephen who lives in Colorado; and Andrea, who lives in Vermont. Mrs. Gray has two children, also by a prior marriage, Warren and Susan Murphy. Only Susan remains in Syracuse. Late in 1986, legal preparations were begun to effectuate the transfer of the Fayetteville house to the five children. On January 26, 1987, the children formed the partnership Gra-Mur Real Estate Co. ("Gra-Mur"). At that time, the home was valued at approximately \$240,000.00. In February 1987, the Grays gave each child an 8-1/3 percent interest in the Fayetteville house. They gave an additional eight and one-third percent interest to each child in November 1988. The remaining interest was transferred to the children in May 1989. The Grays elected to transfer the property to their children in this manner in order to take advantage of federal and New York State gift tax exemptions. Had they transferred the property without thought to the tax consequences, they would have transferred the property to their children all at once.

The Grays rented (and continue to rent) the Fayetteville house from Gra-Mur on a year-round basis. They do so in order to provide themselves with a summer home away from the oppressive Florida heat. During part of the period in issue, the Grays also provided year-round housing for one of their daughters.

The Fayetteville house was appraised again in March 1987 and had a value at that time of approximately \$300,000.00. It has approximately 3,200 square feet. It is furnished with rather heavy antique furniture, appropriate to a northern climate. When the Grays moved to their newly-built house in Florida, they purchased all new furniture suitable for the Florida climate and the style of the new house. The Florida house has approximately 3,400 square feet. Glass windows are used throughout the structure, including ceilings and walls, and there are extensive plantings. Construction costs were approximately \$619,000.00.

In 1981, when he first began thinking about retirement, Mr. Gray entertained several plans for extricating himself from Gray-Syracuse. He initially considered having his son, Stephen Gray, assume ownership and management control of the corporation. When Stephen expressed no interest, Mr. Gray considered a sale to the employees through a stock option plan, but this proved not to be feasible. Finally, Mr. Gray considered a sale to third-party buyers.

In about 1984, Mr. Gray retained the Geneva Corporation, a business consulting firm, to establish a price for the business and later that year he consulted the firm of Peat, Marwick & Mitchell about his plans. Mr. Gray had definite ideas about the type of purchaser he was looking for. He was interested in finding a company that would share his views as to how the corporation would be managed. It was important to him that the corporation not be merged into another business, that it remain in New York State and that his key employees be offered the opportunity to purchase stock. Mr. Gray was approached by many companies interested in purchasing including, Steele Heddle, Waukesha Foundry, Chromalloy, and Sturm Ruger.

In late 1986, ESCO Corporation ("ESCO"), a Portland, Oregon corporation, expressed an interest in purchasing Mr. Gray's interest in Gray-Syracuse. Serious negotiations were begun late in 1986 after Mr. Gray determined that ESCO would be a suitable buyer. On August 12,

1987, Mr. Gray announced to the employees that ESCO was going to purchase Gray-Syracuse by September 15, 1987. Mr. Gray agreed to sell to ESCO his 80 percent stock ownership in the corporation and the real property and manufacturing facilities owned by him. He hoped that 20 percent of the common stock would continue to be owned by the corporation's key personnel. Towards that end, Mr. Gray retained some of his holdings until other key employees became eligible to be shareholders. The shares retained by Mr. Gray were intended to create a pool from which key personnel could purchase shares, with ESCO always retaining 80 percent of the outstanding common stock. Some Gray-Syracuse employees elected to sell shares of stock they already owned, and in the end, Mr. Gray retained eight or nine percent of the common stock as a minority shareholder. Mr. Gray was asked by ESCO to serve on the Gray-Syracuse board of directors, and he did so without compensation until sometime in 1990.

Although Mr. Gray was not actively involved in the day-to-day management of Gray-Syracuse, he participated in running the corporation up until its sale in September 1987. As he stated:

"I was deeply, deeply involved, but not on an operating level. So therefore, in the time frame of 1987, I had to maintain bank relations and relations within the business community of Syracuse; it was vital to the health of the company." (Tr., p. 140.)

In 1987, Mr. Gray received salary and wages from Gray-Syracuse in the amount of \$160,994.57. In 1988, he received wages and salary from Gray-Syracuse in the amount of \$59,790.00. Mr. Gray described this as a bonus earned in 1987 but paid in 1988. The wage and tax statements issued to Mr. Gray show a Florida address, and he credibly testified that he sometimes conducted business related to Gray-Syracuse from his residence in Florida.

Throughout 1987 and 1988, Mr. Gray retained his office in Manlius, New York, where he conducted business in connection with Alcumet and Finite Tools and looked after his personal financial interests. Until Gray-Syracuse was sold in 1987, he also conducted business on behalf of that corporation from the Manlius office.

As a life-long resident of the Syracuse area and a successful businessman, Mr. Gray had extensive business, social and civic ties in the Syracuse community. He was the treasurer of the

Manufacturers Association of Central New York for approximately 10 years and also served as president of that organization. He was a member and past president of the Citizen's Foundation and a member of the Metropolitan Development Association and the Employer's Support for the Guard and Reserve. By the end of 1986, Mr. Gray had resigned from all of these organizations. He rejected invitations to serve on the boards of several community organizations in New York because he knew that he was moving to Florida. In 1987 and 1988, Mr. and Mrs. Gray continued their memberships in two Syracuse social organizations, the Onondaga Golf Club and the Century Club. In addition, Mr. Gray continued his membership in the Orange Pack, an organization for boosters of the Syracuse University football team.

Beginning in 1985, Mr. and Mrs. Gray's pattern of charitable contributions shifted from New York to Florida. In 1985, the Grays made no contributions to Florida charitable organizations, while making substantial donations to organizations in New York and elsewhere. By 1988, the Grays' New York contributions were confined primarily to Syracuse University and the Orange Pack. The bulk of their charitable contributions were made to Florida organizations. Mrs. Gray became a member of St. Michael's, a Florida church, in 1985 and began making contributions to that church in 1986. In 1986, the Grays began contributing to the United Way of Northeast Florida, and by 1988 they were contributing to six different Florida organizations.

On September 9, 1985, Mr. Gray executed a Declaration of Domicile and Citizenship in Nassau County, Florida, stating, in part:

"I have changed my domicile to and am . . . a bonafide resident of the State of Florida since NINTH day of SEPTEMBER, 1985, and I reside at 2201 BEACHWOOD ROAD, FERNANDINA, NASSAU County, Florida"

Mrs. Gray registered a motor vehicle in Florida on November 26, 1985. Both of the Grays were issued Florida driver's licenses on November 27, 1985. The Grays registered to vote in Florida on February 20, 1986. By separate letters dated March 11, 1986, Mr. and Mrs. Gray requested that the Onondaga, New York Board of Elections remove their names from the voter records. On March 10, 1986, Mr. Gray executed a living will declaring the Fernandina

address as his residence. A Florida Vessel Certificate of Title was issued to Jean M. Gray on October 7, 1988. Mr. and Mrs. Gray obtained passports issued in Miami on December 4, 1986.

In the years after 1986, the Grays joined several Florida organizations. Mrs. Gray joined the Plantation Ladies Association in 1986, and Mr. and Mrs. Gray became members of the Pelican Club of Fernandina Beach, Florida early in 1987. Mr. Gray has been an active member of a discussion group called The Breakfast Club since October of 1985. Membership in the group is limited to 25 men who must be permanent residents of Amelia Island, Florida in order to participate. In June 1988, the Grays joined the Council of 100 in Nassau County, Florida, a group dedicated to establishing and supporting an active Republican Party in that part of Florida. The Grays renewed their membership in a Florida branch of the American Automobile Association in June 1987, indicating that they were members before that time.

Beginning in March 1986, Mr. Gray began writing to Florida elected officials on both the state and Federal level to communicate his opinion with regard to issues of concern to him. He consistently identified himself as a Florida resident.

The Grays started seeing a Florida dentist in 1986. Beginning in 1987, they also established ties with Florida doctors. All of their medical records were transferred to Dr. Farid Ullah of Fernandina Beach, Florida in 1987. Mr. Gray consulted with an athletic physician when he was in New York in 1986, but he has not returned to New York for medical treatment of his heart condition since before 1987. The Grays still maintain a relationship with a doctor in Syracuse.

In September 1985, Mr. Gray opened a brokerage account at Merrill Lynch's Fernandina Branch. In November 1985, he opened a checking account with the Barnett Bank of Florida with an initial deposit of \$10,000.00. Shortly thereafter, he obtained a Visa card from the Fernandina Branch of the Barnett Bank. Throughout 1987 and the greater part of 1988, Mr. Gray also maintained accounts with Prudential-Bache of Syracuse and the Seneca Federal Savings and Loan Association of Manlius, New York. He also had brokerage accounts with Wright Investors' Service of Bridgeport, Connecticut, Bear Stearns of New York and New

Mexico Capital Management in Albuquerque, New Mexico. He had investments in limited partnerships located in Salt Lake City, Utah.

Mr. Gray continues to own a 48-acre parcel in the Syracuse area which he purchased with the thought of someday building a manufacturing plant. Mrs. Gray has a first mortgage on a house located in the Syracuse area originally owned by herself and her former husband.

By Mr. Gray's count, the Grays spent 183 days in Florida and 145 days in New York in 1987; in 1988, they spent 266 days in Florida and 67 days in New York. Days in and out of New York were substantiated by voluminous records including: telephone bills, credit card receipts, bank withdrawal receipts, doctor and dentist bills, Amelia Island Plantation Club charges and expense accounts. In addition, Mr. Gray offered in evidence a contemporaneous log showing his whereabouts on a daily basis. Mr. Gray completed the log, usually on a weekly basis, although some entries are made daily and some every few days. Mr. Gray credibly testified as to his whereabouts on days not accounted for by documentation other than the log. Primarily, these were days spent in Florida, and documentary evidence was offered to establish the Grays' presence in Florida on the day immediately preceding and the day following the day for which testimony was offered.

The Grays spent more time in New York in 1987 than they would have liked. One of their daughters had legal and medical problems which forced the Grays to return to Syracuse on several occasions.

Sometime in December of 1983 or January of 1984, the Grays consulted with their attorney regarding the appropriate steps to take to carry out their intention to change their domicile from New York. At that time, they intended to change their domicile to Georgia. When they moved to Amelia Island, they were prepared to execute formal declarations in order to change their domicile to Florida, and they did so.

OPINION

The Administrative Law Judge determined that there was no doubt that in the fall of 1985

petitioners formed an intent to change their domicile from New York to Florida.¹ The crux of the matter in the Administrative Law Judge's view was "not whether the Grays intended to change their domicile but when their intent became actual" (Determination, conclusion of law "C"). The Administrative Law Judge stated that "[w]hile I find this an extraordinarily difficult case to decide, I cannot find that petitioners abandoned their New York domicile in 1986" as they contend.

"The Grays spent almost as much time in New York in 1987 as they did in Florida (by their own accounting 145 days in New York versus 183 in Florida days). The Grays still held a majority interest in their Fayetteville home. From the end of May 1987 through September 15, 1987, petitioners were not leasing a residence in Florida. Their actual, and only, residence for June, July and August 1987 was in New York. The construction contract on their new home in Florida was not signed until October 1987. The Grays had severed many of their ties to New York by January 1987, but not one of the most significant links, Mr. Gray's association with Gray-Syracuse. Mr. Gray remained deeply involved in the affairs of Gray-Syracuse until its sale in September 1987. He was the chairman of the board and the majority stockholder. He negotiated the sale of Gray-Syracuse and continued to represent the corporation to the business community and financial institutions. He maintained an office in Manlius, New York where he actively conducted business on behalf of Gray-Syracuse. Mr. Gray was an employee of Gray-Syracuse and received a significant salary from Gray-Syracuse in 1987. All of these factors, especially Mr. Gray's continuing ties to his New York business, establish that the Grays did not abandon their New York domicile by January 1, 1987 (see, Matter of

Kartiganer, Tax Appeals Tribunal, October 17, 1991)" (Determination, conclusion of law "D," emphasis added).

Considering all of the facts in the case, the Administrative Law Judge concluded that with the sale of Gray-Syracuse on September 15, 1987, the Grays finally abandoned their New York domicile.

"By that time, most of the Grays' ties with New York were severed. Mr. Gray was no longer actively involved in Gray-Syracuse. He held no

¹The Administrative Law Judge pointed to the following factors as support for her finding: Mr. Gray executed a declaration of Florida domicile in September 1985; Mr. and Mrs. Gray rented a large condominium unit, executing a one-year lease for the period November 1, 1985 to November 1, 1986; they used realtors to look for a home to purchase on Amelia Island; in February 1986 they obtained Florida drivers' licenses and registered an automobile; and in February 1986 they registered to vote.

compensated position;² his stockholdings were less than 10 percent of the shares outstanding; and he was no longer actively involved in the company's financial affairs. Mr. Gray resigned from membership in most of the New York organizations he had previously belonged to. The Grays had rented a residence in Florida from September 15, 1987 through November 15, 1988, at which time they intended to move into their new home which was then in the process of construction. In short, by September 15, 1987 the Grays had severed their most substantial ties with New York and moved to Florida with the intention of remaining" (Determination, conclusion of law "D," emphasis added).

The Administrative Law Judge, while finding credible petitioners' assertion that Mr. Gray "was winding down his involvement in Gray-Syracuse for a long period of time prior to 1985 . . . I do not believe [these actions] negate Mr. Gray's own active involvement in the financial affairs of the business" (Determination, conclusion of law "D").

The Administrative Law Judge also stated that, while she had "no doubt about the truth" of petitioners' assertions that they would have sold their Fayetteville family home were it not for estate planning consideration and their desire to maintain a living space for one of their daughters, she believed that these facts "merely demonstrate how deeply rooted the Grays were in the Syracuse community. Thus, a lifetime of habits, personal associations and affections appear to have kept the Grays tied to New York, perhaps longer than they would have liked" (Determination, conclusion of law "D").

The Administrative Law Judge also determined that petitioners proved by clear and convincing evidence that they did not spend in the aggregate more than 183 days in New York in 1987 and 1988. The Division's contention that petitioners failed to carry their burden of proof in this matter is rejected pointing to the fact that:

"[p]etitioners provided substantial documentary evidence of days spent in and out of New York, including a contemporaneous log kept by Mr. Gray, Amelia Island Plantation club charges, Visa credit card statements, telephone bills, and expense reports. In addition, Mr. Gray credibly testified to his whereabouts on each day for which documents, other than his personal log, were not offered (fewer than 30 days in 1987 and 45 days in 1988). Most of these were single days which fell between two documented days spent in Florida. The Division offered no evidence of its own to refute the documents and testimony offered by petitioners.

2

Mr. Gray was paid a bonus in 1988, but the bonus was earned in 1987 and payable in 1988.

In fact, it is not clear from the Division's letter brief on what grounds the Division finds petitioners' proof wanting. In any case, the law is clear that a taxpayer may prove his whereabouts through a combination of documentary evidence and credible testimony, as petitioners have done here (see, Matter of Sutton, Tax Appeals Tribunal, October 11, 1990)" (Determination, conclusion of law "E").

On exception, petitioners assert that the facts in the case clearly establish that beginning in the early 1980's the Grays shifted the focus of all their activities to Florida such that by January 1, 1987 "[t]he connections that they established with Florida far outweighed their remaining contacts in New York" (Petitioners' brief, p. 21, emphasis added).³ The core of petitioners' exception is the weight given by the Administrative Law Judge: 1) to petitioners' involvement with Gray-Syracuse and 2) the maintenance of ownership by the Grays of their Fayetteville home, the two pivotal factors in the Administrative Law Judge's weighing of the evidence and the basis of her determination.

Petitioners assert that the Administrative Law Judge's conclusion that Mr. Gray's continuing ties to his New York business barred a finding that the Grays changed their domicile by January 1, 1987 was based:

"on a clear factual error and is wrong as a matter of law.

"The ALJ incorrectly found that Mr. Gray 'remained deeply involved in the affairs of Gray-Syracuse until its sale in September 1987.' (ALJ p. 17) This finding is based on an inadvertent misreading of the record and is 180 degrees wrong. The ALJ quotes Mr. Gray as stating:

"I was deeply, deeply involved, but not on an operating level. So therefore, in the time frame of 1987, I had to maintain bank relations and relations within the business community of Syracuse; it was vital to the health of the company.' (ALJ p. 8 [quoting Tr. 140]).

"This statement has been misquoted and taken out of context by the ALJ. The quote omits an essential word that has a significant effect on the interpretation of its meaning. A review of the transcript confirms that Mr. Gray testified that he was deeply involved in his New York business 'in the time frame of until 1987' and not 'of 1987!' (Tr. 140). The statement as reported in the opinion suggests that Mr. Gray was deeply involved in Gray-Syracuse during 1987 when in fact Mr. Gray's

³Petitioners point to many of the factors cited by the Administrative Law Judge as indicators that the Grays had formed an intent to change their domicile and they need not be recited for purposes of this opinion.

testimony actually states that he was only deeply involved before 1987.

"A review of the context from which the quote was taken provides additional support for the conclusion that in discussing his involvement in Gray-Syracuse Mr. Gray was referring to a period of time before 1987. The context of the quote reads:

"I would say we were talking '84 and '85; I was still the responsible executive for Gray-Syracuse. Even though I was not operating the business on a daily basis, I was the motivator of the business; I was the extender of the business; I was the one that took the comparable risks and had my house and everything else on the line to buy equipment and build buildings and all of that stuff. So I was deeply, deeply involved, but not on an operating level. So therefore, in the time frame of until 1987, I had to maintain bank relations and relations within the business community of Syracuse; it was vital to the health of the company.' (Tr. 139-40) (emphasis added).

"Mr. Gray's statement in its entirety indicates that he was 'deeply involved' in Gray-Syracuse before 1987. His testimony refutes the ALJ's erroneous conclusion that he was deeply involved during 1987" (Petitioners' brief, pp. 40-41).

Petitioners go on to assert that the facts show that Mr. Gray was not actively involved in the day-to-day management of Gray-Syracuse but that his only involvement in the business was financial and not sufficient to bar a finding that he changed his domicile citing Matter of Sutton (supra). Petitioners also assert that the Administrative Law Judge's reliance on Matter of Kartiganer, Tax Appeals Tribunal, October 17, 1991, affd 194 AD2d 879, 599 NYS2d 312) as support for the proposition that Mr. Gray's business ties preclude a finding that he abandoned his New York domicile, is misplaced since the taxpayer in Kartiganer "never terminated" his business ties, while Mr. Gray did so terminate his business ties with Gray-Syracuse.

The Division asserts that petitioners did not:

"prove by clear and convincing evidence that they abandoned their New York domicile and took up a new domicile in Florida (Matter of Larkin v. Herbert, 185 AD2d 607; Matter of McKone v. State Tax Commn. of State of N.Y., 111 AD2d 1051, affd 68 NY2d 638; Matter of Newcomb, 192 NY 238; Matter of Bodfish v. Gallman, 50 AD2d 457). The Appellate Division, Third Department, recently emphasized the importance of the burden of proof in domicile cases in the Matter of Kartiganer v. Koenig, decided June 10, 1993, in stating that 'Indeed, while it might be said that the question presented here is a close one, that acknowledgment is the antithesis to the proposition that petitioners have established their Florida domiciliary by clear and convincing evidence'" (Division's brief, p. 12).

In essence, the Division goes on to assert that the Administrative Law Judge did not properly weigh the various facts in determining when the intent of petitioners to change their domicile became actuality.

The Division asserts that had the Administrative Law Judge:

"used the burden of proof standard set out by the Tax Law and case law noted she would have concluded that the Grays did not show by clear and convincing evidence that they abandoned their New York domicile and took up a new domicile in Florida" (Division's brief, p. 12).

We deal first with the Division's exception. The fact that the Administrative Law Judge stated: "I find this an extraordinarily difficult case to decide," does not, in any way, cause us to alter or modify her determination. We find that the Administrative Law Judge correctly applied the burden of proof to the facts in this case in concluding that petitioners were not domiciliaries of New York for the calendar year 1988 and affirm her determination for the reasons stated therein.

We agree with petitioners, however, that the Administrative Law Judge, in her findings of fact, did misquote the transcript. Under the circumstances, it would be inappropriate speculation for this Tribunal to attempt to determine whether the Administrative Law Judge would find credible the meaning ascribed to the misquoted statement by petitioners, i.e., that "Mr. Gray was referring to a period of time before 1987."

We are remanding this matter to the Administrative Law Judge for a supplemental determination based on a corrected reading of the transcript on the issue of whether petitioners changed their domicile for the year 1987. If either of the parties disagrees with the Administrative Law Judge's determination on remand, the party may obtain review of the determination by filing a timely exception to the determination on remand. If no exception is filed to the determination on remand, this decision shall be final for purposes of section 2016 of the Tax Law after the period for filing an exception to the determination on remand has expired.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The exception of Richard E. Gray and Jean M. Gray is denied except with respect to the issue of whether petitioners were domiciliaries of New York for the calendar year 1987 in light of a statement misquoted by the Administrative Law Judge, which issue shall be addressed by the Administrative Law Judge in her determination on remand;

3. The petition of Richard E. Gray and Jean M. Gray is denied except to the extent indicated in paragraphs "1" and "2" above;

4. The determination of the Administrative Law Judge is affirmed, except to the extent indicated in paragraph "2" above;

5. The Notice of Deficiency dated November 26, 1990 is sustained except to the extent indicated in paragraphs "1" and "2" above; and

6. This matter is remanded for the issuance of a supplemental determination consistent with this decision.

DATED: Troy, New York
June 30, 1994

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

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