STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **RICHARD AND CAROLYN FARKAS** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1985.	:	DECISION DTA Nos. 809927 & 809928
In the Matter of the Petition of **RICHARD FARKAS** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1986 and 1987.	:	

Petitioners Richard and Carolyn Farkas, 4230 D'Este Court, Lake Worth, Florida 33463, filed an exception to the determination of the Administrative Law Judge issued on September 15, 1994. Petitioners appeared by Bier, Mersel & Klein, P.C. (Kenneth Mersel, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Donna M. Gardiner, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in opposition. Any reply brief was due on January 6, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUES

I. Whether, for the year 1985, the Division of Taxation properly determined that Richard and Carolyn Farkas were taxable as resident individuals.

II. Whether, for the years 1986 and 1987, the Division of Taxation properly disallowed certain expenses claimed on Schedule E of petitioner Richard Farkas' New York State returns.

FINDINGS OF FACT

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

On February 21, 1991, the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes to petitioner Richard Farkas which advised that he was deemed to have been a State and City of New York resident for the period January 1 through October 31, 1985, with the result being that additional State tax of $5,689.00 and additional City tax of $2,235.00 was due, plus penalty and interest, for a total amount due of $14,701.55 for the year 1985. The Statement of Personal Income Tax Audit Changes also indicated that, for the years 1986 and 1987, rental and royalty expenses reported on Federal Schedule E were deemed unsubstantiated (for 1986 there was also a mathematical error in the amount of $200.00) resulting in additional State tax of $2,633.00 and City tax of $1,088.00 being due for 1986 and State tax of $189.00 and City tax of $52.00 being due for 1987. With penalty and interest also asserted, total due for 1986 was $6,298.96 and total due for 1987 was $354.50. For the years 1985 and 1986, penalties pursuant to Tax Law § 685(b)(1), (2) and (p) were asserted; for 1987, penalties pursuant to Tax Law § 685(b)(1) and (2) were asserted to be due.

On June 3, 1991, the Division issued a Notice of Deficiency to Richard and Carolyn Farkas asserting additional New York State personal income tax due in the amount of $5,689.00 and additional City personal income tax due of $2,235.00, plus penalty and interest assessed on both deficiencies, for a total amount due of $15,095.68 for the year 1985.

On the same date, June 3, 1991, the Division issued a Notice of Deficiency to Richard

Farkas asserting additional tax due of $3,962.00 (State tax of $2,633.00 and City tax of $1,088.00 for 1986; State tax of $189.00 and City tax of $52.00 for 1987), plus penalty and interest, for a total amount due of $6,676.77 for the years 1986 and 1987.[1]

Previously, the Division and Richard and Carolyn Farkas executed four consents extending the period of limitation for assessment of personal income taxes (see, Exhibit "C"), the last of which, executed by the Farkas' representative on September 27, 1990 and by the Division on October 1, 1990, agreed that taxes due for the period January 1, 1985 through December 31, 1987 could be assessed at any time on or before December 31, 1991.

For the year 1985, Richard and Carolyn Farkas (filing under the status "married filing joint return") filed a Form IT-203, New York State Nonresident Income Tax Return, on which they attributed $2,786.00 out of total wages of $124,650.00 to New York (see, Exhibit "K"). This amount was determined by virtue of an allocation whereby 7 out of a total of 201 working days of petitioner were days worked in New York. The return indicated that Carolyn Farkas did not work in New York at all during the year. Total State tax reported was $3.00. The return, signed by Richard and Carolyn Farkas on April 14, 1986, was timely filed. Attached to the return were wage and tax statements indicating that, for 1985, Richard Farkas had received wages of $56,000.00 from Concept Equities Corp. of Carle Place, New York and that Carolyn Farkas had received wages in the amount of $68,650.00 from Thomas Funding Corp. of New York City.

Subsequently, in October 1986, petitioner filed an Amended Resident Income Tax Return (Form IT-201-X) along with a Resident Income Tax Return (Form IT-201), a Nonresident Income Tax Return (IT-203) and a Change of Resident Status (Form IT-360). According to the

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[1]The Notice of Deficiency for 1985 was issued to Richard and Carolyn Farkas as the result of their having filed a joint return for that year. For that year, the Division has conceded that Carolyn Farkas was not a domiciliary of New York. For the subsequent years at issue (1986 and 1987), Richard Farkas filed his New York returns as married filing separate returns. Therefore, all references to "petitioner" shall, unless otherwise noted, refer solely to Richard Farkas.

testimony of petitioner's representative, Kenneth Mersel, the amended return and attached forms (see, Exhibit "L") were voluntarily filed by petitioner because, on or about November 1, 1985, his employer transferred him to the New York office and petitioner believed that he was required to file as a resident since, subsequent to this date, he spent more than one-half of his time in New York.

In January 1989, the audit was commenced by Joseph A. Marquez. From the Field Audit Record (Exhibit "O"), it appears that, after having received some of the documentation requested, the auditor was prepared to close the case and accept the returns as filed. Prior to the case being closed, the auditor's supervisor, in June 1989, ordered him to verify petitioner's wage allocation for 1985. After receipt of a letter from petitioner's employer, the auditor was again prepared to close the case in September 1989. Inquiries of petitioner continued (the case was not closed) and, upon the resignation of Mr. Marquez, the case was assigned to Samaan Wassif in July 1990.

Mr. Wassif appeared at the hearing and testified on behalf of the Division. He stated that when he received the case from Albany, he also received an Audit Fact Sheet (Exhibit "Q") which indicated that petitioner had filed a 1975 resident return with an address of 97-40 62nd Drive, Rego Park, New York. For 1977, a resident return was filed with an address of 153 East 57th Street, New York, New York, and a resident return with this same address was filed by petitioner for 1986.

Mr. Wassif testified at the initial hearing held on July 22, 1993 that petitioner had filed as a resident from 1977 through 1987 with the exception of the period January 1 through October 31, 1985. His audit conclusions, set forth in writing (see, Exhibit "S"), state, in part, as follows:

> "a) NEW YORK STATE TAX LAW DEFINES A DOMICILE RESIDENT [sic] AS ONE WHO MAINTAINS A PERMANENT PLACE OF ABODE IN NEW YORK, AND SPENDS IN THE AGGREGATE MORE THAN 30 DAYS IN NEW YORK.
>
> "b) MR. FARKAS MAINTAINED A PERMANENT PLACE OF ABODE IN

NEW YORK CITY AS FAR BACK AS 1977. HE SPENT MORE THAN 30 DAYS IN NEW YORK CITY DURING 1985.

"c) TAXPAYER FILED AS NEW YORK STATE AND NEW YORK CITY DOMICILE RESIDENT [sic] ON A CONSISTENT AND LONG TERM BASIS UNTIL 1984, THEN FROM 11/1/85 TO 12/31/87. THE ONLY PERIOD, TAXPAYER FILED AS NON RESIDENT OF NEW YORK STATE AND CITY IS FROM 1/1/85 - 10/31/85. HIS CONTENTION IS THAT HE WAS ASSIGNED BY HIS EMPLOYER TO THE COMPANY'S OFFICE IN FLORIDA. REMOVAL FROM NEW YORK CITY FOR A TEMPORARY OR LIMITED PERIOD DOES NOT CONSTITUTE A PERMANENT CHANGE IN NEW YORK DOMICILE AND THE PERSON RETAINS THE SAME STATUS HE HAD PRIOR TO SUCH REMOVAL . . . ."

For the years 1986 and 1987, petitioner filed resident returns (Forms IT-201) under the status married filing separate returns (see, Exhibits "M" and "N"). The address listed on these returns was 153 East 57th Street, New York, New York.

According to the testimony of Mr. Wassif and his audit conclusions (Exhibit "S"), Carolyn Farkas proved, to the satisfaction of the Division, that she changed her domicile from New York to Florida and that her returns filed for 1986 and 1987 (nonresident returns) were accepted as filed. Neither the audit conclusions nor the auditor's testimony indicate the date on which she changed her domicile. However, based upon the fact that the auditor stated that Richard Farkas and Carolyn Farkas had filed as State and City residents prior to 1985, it must be presumed that the auditor deemed such change to have occurred in 1985.

Mr. Wassif's audit conclusions state that both taxpayers were employees in a New York corporation with its main office located at 386 Park Avenue South in New York City and a sales office in Boca Raton, Florida; Mr. Farkas spent most of his working days in the New York City office and Mrs. Farkas was a salesperson in the Boca Raton office.[2]

Carolyn Farkas substantiated her change of domicile to Florida by submitting the following documentation to the auditor:

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[2]Attached to the 1985 return were wage and tax statements (see above) which do not corroborate the auditor's conclusions. Since Carolyn Farkas' 1986 and 1987 returns were not offered into evidence, it cannot be determined whether they worked for the same employer in 1986 and 1987.

(a) Personal bank statements for Florida bank accounts;
(b) Florida vehicle registration;
(c) Florida voter registration dated October 17, 1978;
(d) Tax exemption renewal receipt;
(e) Florida driver's license; and
(f) Letter from her employer showing full-time assignment to the Boca Raton office.

The auditor stated, and his audit conclusions indicated, that he received no documentation from petitioner's employer as to how his employment changed from 1984 to 1985.

On a lease renewal (see, Exhibit "R") of his rent-stabilized apartment located at 153 East 57th Street in New York City which was dated September 25, 1986, petitioner indicated that the apartment was used by him as his primary residence, that he had no residence outside of New York City and that he had paid New York City resident income tax for the last calendar year (1985).

At the July 22, 1993 hearing, the Administrative Law Judge, over objections by the Division's representative, agreed to continue the hearing in order to permit petitioner's representative to obtain proof that petitioner had changed his domicile from New York to Florida sometime prior to 1985 and that, contrary to the testimony of the auditor, had filed as a nonresident from 1978 through 1984. Petitioner's representative, Kenneth Mersel, testified that Richard Farkas was a quadriplegic as a result of a disease contracted in 1990 and that he had not left Florida since that time. Accordingly, Mr. Mersel stated that petitioner could not appear and that he would attempt to obtain evidence of such change of domicile.

At that time, the Division's representative indicated that a Demand for Bill of Particulars had been served upon Mr. Mersel, but that no response had been received despite a follow-up letter sent approximately four months later. As a result thereof, the Administrative Law Judge directed Mr. Mersel to respond to the Division's Demand for Bill of Particulars within 30 days (on or before August 23, 1993) or that a motion for an order of preclusion would be entertained.

On August 19, 1993, petitioner responded with a timely bill of particulars. However, many of the demands were not responded to.

On September 14, 1993, a Notice of Motion to Preclude was received from the Division. On October 14, 1993, the Administrative Law Judge received a letter from the Division's representative confirming that she had received no response from petitioner's representative with respect to the motion.

By Order dated November 24, 1993, the Division's motion to preclude was granted to the extent that petitioner was forbidden from introducing any form of evidence at the continued hearing regarding any paragraph of the demand for which there was a failure to respond either by virtue of a stated objection to such demand or by the indication of "N/A" on the answer to such demand.

At the initial hearing held on July 22, 1993, petitioner's representative introduced into evidence, as Exhibit "3," a mortgage note relative to the purchase, by Richard and Carolyn Farkas, of a condominium in Lake Worth, Florida (4230 D'Este Court) in 1974.

At the second hearing held on November 29, 1993, petitioner's representative introduced into evidence, as Exhibit "4," photocopies of the first page of each of Richard and Carolyn Farkas' New York returns for the years 1977 through 1984, all of which were prepared by Mr. Mersel.

For 1977, Richard and Carolyn Farkas filed a resident return, listing their address as 153 East 57th Street, New York, New York. For the years 1978 through 1984, Richard and Carolyn Farkas filed nonresident returns and indicated their address to be 42-30 D'Este Court, Lake Worth, Florida.

At the hearing held on November 29, 1993, petitioner's representative stated that he had no evidence to offer with respect to the substantiation of certain expenses claimed on Schedule E of petitioner's 1986 and 1987 returns.

OPINION

In the determination below, the Administrative Law Judge reviewed the definition of a resident individual under Tax Law § 605(b)(1).

The Administrative Law Judge also pointed out that while there is no definition of "domicile" in the Tax Law, same is provided in the Division's regulations (20 NYCRR former 102.2[d]) and further, 20 NYCRR former 102.2(e)(1) defines a permanent place of abode.

The Administrative Law Judge then visited case law referencing the creating of a change of domicile and indicated that:

> "[i]t is apparent, after consideration of all of the evidence herein, that the Division, in reliance upon an erroneous premise, i.e., that petitioner had filed as a State and City resident for all years up through 1984, for the last two months of 1985 and for 1986 and 1987, came to the conclusion that petitioner would have to be a New York domiciliary for the first ten months of 1985 as well" (Determination, conclusion of law "D").

The Administrative Law Judge held that while petitioner proved in rebuttal that for the years 1978 through 1984 he filed as a nonresident, what he failed to prove was that he ever changed his domicile from New York to Florida and, what little evidence was introduced, could reasonably lead to the conclusion that petitioner did not change his domicile at all.

The Administrative Law Judge also discussed the lease renewal for the East 57th Street apartment, petitioner's filing of amended returns for 1985, and in pointing out that petitioner has the burden of proving by clear and convincing evidence that he changed his domicile from New York to Florida held that: 1) the testimony of petitioner's representative was not adequate to establish the requisite intent; 2) credible testimony from petitioner, his wife or anyone else was lacking in the record concerning petitioner's intent; 3) other than a mortgage note and copies of the first page of returns for the years 1977 through 1984 there were no affidavits or relevant documentary evidence to substantiate a change in domicile; and 4) "[i]t must be found, therefore, that the Division properly taxed petitioner as a resident individual for the period January 1, through October 31, 1985" (Determination, conclusion of law "D").

The Administrative Law Judge also held: 1) there is inadequate evidence in the record that petitioner did not spend more than 183 days in New York during 1985; 2) no evidence was introduced to substantiate entitlement to the rent and royalty expenses claimed; 3) since no evidence was offered with respect to the years 1986 and 1987, the imposition of penalties

imposed for those years is sustained; and 4) petitioner's general allegation on the nonresidency and change of domicile issue relating to the year 1985 does not satisfy his burden of proof, thus, the penalties imposed on the 1985 deficiency are also sustained.

Petitioner takes exception to the Administrative Law Judge's holding that "there was no relevant documentary evidence provided which would substantiate that a change of domicile from New York to Florida ever occurred" (Petitioner's brief on exception).

Petitioner also takes exception to the Administrative Law Judge's statement that only "a mere general allegation" was made regarding "enough elements of nonresidency" to satisfy petitioner's burden of proof that no penalty be imposed.

Petitioner argues "that the taxpayer's submission of proof of a Florida driver's license, Florida voter's registration, abandonment of his historical home, proof of purchase of a Florida residence by his wife and filing of unchallenged nonresident tax returns for eight years establishes more than 'a mere general allegation that it was reasonable for the petitioner to assume that there were enough elements of nonresidency and change of domicile that the petitioner could make an honest and reasonable assumption of them'" (Petitioner's brief on exception).

Petitioner also submitted with his brief on exception, three attachments A, B, and C, the latter two not made part of the record below, not having been accepted into evidence by the Administrative Law Judge.[3]

The Division in reply points out that petitioner reiterates his argument made to the Administrative Law Judge that the original auditor contemplated closing out the audit prior to the assignment of a new auditor, but the Division then argues that "[p]etitioner fails to explain how this fact establishes that petitioner changed his domicile to Florida prior to the year in question" (Division's brief, p. 2).

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[3]Attachment B is a letter to "Social Security Disability" signed by Eric C. Kurtz, M.D. describing petitioner's medical condition. Attachment C is entitled "Impairment Rating" and also describes petitioner's medical condition.

The Division also argues that assertions made in petitioner's brief on exception were not made under oath at the hearing, no witnesses were presented on behalf of petitioner, there is no proof in the record to support said allegations, the record is devoid of any proof demonstrating a change of domicile, and the Administrative Law Judge, therefore, correctly determined Mr. Farkas to be a domiciliary of New York City during 1985.

The Division also argues petitioner is prohibited from placing two letters, attachments B and C, into the record after same has been closed.

The Division further argues that: 1) no evidence has been submitted with respect to proving petitioner's intent to establish a change of domicile; 2) the fact that petitioner owned a condominium in Florida and filed nonresident New York income tax returns from 1978-1984 does not establish that petitioner was a domiciliary of Florida during 1985; and 3) petitioner failed to establish reasonable cause for abatement of penalties.

We affirm the determination of the Administrative Law Judge.

Petitioner has not raised any issues on exception that were not raised before the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

However, we must address and reject petitioner's attempt at this late date to place before this Tribunal additional evidence in the form of two letters, attachments B and C, which are not part of the record below.

Petitioner asserts that he sought to introduce attachments B and C at the hearing but the Administrative Law Judge ruled that they were irrelevant and did not allow them into the record. The portion of the transcript relied on by petitioner indicates that petitioner sought to introduce documents about his illness in 1990 with respect to his domicile intent in 1985. Petitioner now asks us to consider attachments B and C with regard to his failure to testify at the

hearing. We conclude that the documents were not relevant for the purpose offered at the hearing and that the Administrative Law Judge properly excluded them. Thus, attachments B and C are subject to our general rule that additional evidence is not admitted into the record on exception.

As we held in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)."

With respect to petitioner's claim that he could not attend the hearing because of his illness, we note that there were a number of possibilities available to petitioner. As the Administrative Law Judge noted, petitioner could have used other witnesses, e.g., his wife, to describe his intent or he could have used affidavits. In addition, petitioner could have requested, pursuant to 20 NYCRR 3000.6(d), that his testimony be taken by deposition. In any event, petitioner's illness could not satisfy his burden of proof and he was required to find a means to present evidence to support his claim of a Florida domicile.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard and Carolyn Farkas is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Richard and Carolyn Farkas is denied; and

4. The notices of deficiency issued June 3, 1991 are sustained.

DATED: Troy, New York
July 6, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner