STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PAUL A. AND ELLEN E. BURKE	:	DECISION DTA No. 810631
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1987, 1988 and 1989.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 5, 1993 with respect to the petition of Paul A. and Ellen E. Burke, 3322 Casseekey Island Road, Jupiter, Florida 33458. Petitioners appeared by Damon and Morey, Esqs. (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioners filed a brief in opposition to the exception. The Division of Taxation filed a letter as its reply brief, which was received on December 21, 1993 and began the six-month period of the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners were properly subject to tax as residents of the State of New York pursuant to Tax Law § 605(b)(1)(A) for any or all of the years 1987, 1988 and 1989.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "16" and "18" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioners, Paul A. and Ellen E. Burke, husband and wife, timely filed (pursuant to extensions granted) New York State nonresident income tax returns (Forms IT-203) for each of the years 1987, 1988 and 1989. On each of such returns petitioners listed their address as 3322 Casseekey Island Road, Jupiter, Florida, and chose filing status "2" ("Married Filing Joint Return"). Attached to petitioners' returns were Wage and Tax Statements (Form W-2) issued by Burke Rental Corporation, 1705 Third Avenue, NiagaraFalls, New York. Such Forms W-2, issued to Paul A. Burke for each of the years at issue and to Ellen E. Burke for the years 1987 and 1988, carry petitioners' address as 471 Mountain View Drive, Lewiston, New York.

On March 11, 1991, the Division of Taxation ("Division") issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the years 1987, 1988 and 1989 in the aggregate amount of $49,435.47, plus interest. As shown via explanatory computational sheets attached to the Notice of Deficiency and via a Statement of Personal Income Tax Audit Changes issued previously to petitioners on November 9, 1990, the Division's Notice of Deficiency followed an audit of petitioners' returns, and was issued upon the premise that petitioners were properly taxable as residents of New York State for the years in question.[1]

Petitioner Paul A. Burke was born in Buffalo, New York on August 17, 1927. He and his family moved to Ohio shortly thereafter, where he was raised and educated. Mr. Burke served in the armed forces, after which he returned to Ohio. Mr. Burke and petitioner Ellen E. Burke were married in Ohio in 1947. Presumably, Mrs. Burke was born and raised in Ohio. They subsequently moved to Buffalo, New York in 1948.

Upon moving to Buffalo, New York, Paul A. Burke went into business with a local real estate broker and began to do some construction work in the western New York area. Paul Burke Construction, Inc., formed in the early 1950's and owned entirely by petitioner Paul A. Burke, was engaged in the construction of residential housing (primarily VA and FHA financed

[1]It appears that dollar amounts are not in dispute in this proceeding. That is, if petitioners are held to be taxable as residents of New York, the Notice of Deficiency correctly reflects their New York tax liability and if, conversely, petitioners are not so taxable, their nonresident returns as filed correctly reflected their New York tax liability.

housing), and also performed a modest amount of commercial warehouse construction. This construction activity required Mr. Burke's hands on, day-to-day management and involvement. In this regard, Mr. Burke testified that "without my presence there, there wasn't any construction company." During these early years, Ellen E. Burke performed all of the construction business's accounting, bookkeeping and mortgage placement functions. Petitioners described the construction business as entailing long hours of work (generally 7:00 A.M. to 7:00 P.M.).

In the early 1960's, petitioners purchased a home located at 6654 Errick Road, North Tonawanda, New York. This property included a large house (approximately 5,000 square feet) together with approximately 17 acres of land on which were located several buildings suitable for housing Paul Burke Construction, Inc.'s heavy equipment and building supplies and materials. The property also included a nine-hole golf course. The Burkes also purchased a duplex rental house located immediately adjacent to the property.

The construction operation continued to expand, building upwards of 100 or more houses per year, until approximately 1977 or 1978. At that point, Mr. Burke began the transition from building houses to developing low-income housing for the elderly.

In connection with the transition from house construction to development of high-rise senior citizen housing, petitioner Paul A. Burke formed Burke Rental Corporation to facilitate the management of various rental real estate properties acquired by petitioners, including duplexes, single-family and apartment houses, as well as the high-rise senior citizen housing that Paul Burke Construction, Inc. was in the midst of developing. Burke Rental Corporation was owned equally by petitioners Paul A. and Ellen E. Burke. The business address of both Paul Burke Construction, Inc. and Burke Rental Corporation was, and continues to be, 1705 Third Avenue, Niagara Falls, New York.

By the late 1970's and early 1980's, the Burkes had acquired ownership of approximately 30 rental properties. In addition, Paul A. Burke had acquired, developed and owned, together in partnership with one William Sanders of Atlanta, Georgia, four high-rise senior citizen apartment buildings as follows:

Property Name	Location	No. of Apartment Units
Urban Park Towers Co.	Buffalo, N.Y.	150 units
Niagara Towers Co.	Niagara Falls, N.Y.	200 units
Tonawanda Towers Co.	Tonawanda, N.Y.	100 units
Riverview Apartments Co.	Elmira, N.Y.	128 units

Mr. Burke also owned, in partnership with one John Gross, a 278-unit mobile home park known as Sabre Park, located in western New York. It appears the Burkes sold the 30 rental properties prior to the years at issue herein. The high-rise properties were described as "section 8" (Federal Housing Assistance Program) housing, under which the Federal government subsidizes a portion of the rent paid by the tenants.

Paul A. Burke testified at length that his intent from the beginning was to get out of the hands-on, daily involvement required in residential housing construction and to acquire a "stable" of rental income properties plus develop and own the high-rise senior citizen apartment buildings as a means of generating a steady stream of retirement income for he and Mrs. Burke. As part of accomplishing this aim, Paul A. Burke transferred some of the senior staff of Paul Burke Construction, Inc. to Burke Rental Corporation. He explained that his ultimate goal was to assemble a management team capable of running Burke Rental Corporation without his presence or input, thus resulting in a self-sustaining entity which would afford Paul Burke the confidence and ability to play a passive role in the business when he and Mrs. Burke retired. More specifically, Mr. Burke described the formation of Burke Rental Corporation, the transfer of some of his senior staff, and his overall plan, as follows:

> "to get into a rental management configuration with the plan of going into high rise development to acquire properties that I ultimately would hold for an unlimited period of time to generate a retirement income for myself through a management corporation that would oversee and safeguard my investment."

Mr. Burke further explained that his purpose in forming Burke Rental Corporation was to expand it into "an entity that could have a passive hand." He explained that Burke Rental Corporation was a "policy-oriented corporation that could function with a manager and without my presence."

During the time period 1982 through 1985, Paul Burke began to diminish his day-to-day involvement with the operation of Burke Rental Corporation. By 1985, all of the operations of the business had been turned over to one Judith Bugenhagen, a trusted, long-term employee of Paul Burke Construction, Inc., who had been hired by Ellen E. Burke in the mid-1960's. Mr. Burke testified that Judith Bugenhagen's responsibilities continually expanded over the years from the time of her hiring as his business interests grew. Eventually, Ms. Bugenhagen began to oversee the management of all of the buildings, including purchases of supplies, handling of rental unit repairs, roof inspections and hiring and firing of personnel. During the years at issue, and through the present, Ms. Bugenhagen handles nearly $6,000,000.00 of transactions each year as business manager of Burke Rental Corporation. Ms. Bugenhagen is responsible for auditing, accounting and all legal matters pertaining to all of the Burkes' New York State holdings, as well as all Burke Rental Corporation payroll, accounts receivable, accounts payable and bank accounts including issuance of checks and transfer of funds. Paul A. Burke testified that Ms. Bugenhagen had, and continues to have, complete day-to-day control of all of the business operations of Burke Rental Corporation.

Commencing in or about 1983, petitioners began spending upwards of six months or more away from New York, principally staying in the Bahamas at a condominium they had previously purchased (see, infra). Mr. Burke testified that 1985 became a crucial year with regard to his overall retirement plan, in that he ceased to be actively involved in the day-to-day operations of Burke Rental Corporation and began treating the business as a passive investment. Accordingly, he continued to stay away from the office so as to allow his management team to operate autonomously and to assess its effectiveness.

With a capable management team for Burke Rental Corporation firmly in place, the Burkes purchased a 2,300-square foot condominium in Jupiter, Florida, on November 1, 1985 in a complex called Jonathan's Landing. The Jonathan's Landing condominium was purchased for $226,000.00, and replaced an 1,100-square foot condominium in the Bahamas purchased by the Burkes in the mid-1970's. The Bahamas condominium was sold including its furnishings

and, in turn, the Burkes spent considerable amounts to furnish their new Florida condominium. Mr. Burke testified that the change from the Bahamas to Florida was occasioned, in part, because of "instability and drug activities" in the Bahamas and, in part, because the Burkes could not become permanent residents of the Bahamas. Thereafter, in October 1986, the Burkes' Errick Road residence, which had been their home for some 26 years, was listed for sale.

In June of 1986, the Burkes purchased a 4,300-square foot home located at 471 Mountain View Drive, Lewiston, New York. This property, costing approximately $250,000.00, is near a golf course and country club, which the Burkes joined. Paul A. Burke testified that he and Mrs. Burke looked at summer home properties in the Carolinas, but they did not care for the mountains and found the climate too foggy and wet. He further testified that:

> "Whether we bought in New York or Maine or Vermont or Canada, we were going to buy some other place [outside of Florida]. This house [Mountainview Drive] came along with a lovely view. So, we bought the house."

Petitioners spend approximately five months each year in New York State (150 to 170 days per year).[2] In addition, Mr. Burke testified to taking vacations to other states with friends from Florida even when the Burkes were staying in New York, thus noting that petitioners' actual time spent within New York State has been gradually declining.

The Burkes ultimately sold their Errick Road residence in June of 1987 for $165,000.00. Most of petitioners' household items including living room furniture and accessories, dining room furniture, kitchen appliances, pool table, recreational furniture and various pieces of bedroom furniture were sold for $20,000.00, which was in addition to the $165,000.00 sale price of the residence. Paul A. Burke testified that the "package sale" of the Errick Road property included, among other things, the 17 acres, the golf course, and the rental duplex located next door to the principal residence. Mr. Burke also testified that the management staff of Burke Rental Corporation could not effectively manage the complexities of the home, outbuildings, rental duplex and golf course located on the 17-acre Errick Road property, and

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[2]The parties stipulated that petitioners have not spent in the aggregate more than 183 days during any of the taxable years in question in New York.

thus petitioners sold such premises. Additionally, petitioners both testified that substantially all of their belongings that were of some sentimental or personal value, consisting of 11 boxes of items such as Wedgewood and Stafford china, cut glass collection, cookie-making equipment, photographs and albums, were moved to their Florida condominium in 1985. Petitioners had their 38-foot Chriscraft cabin cruiser moved from a marina on the Niagara River to the Jonathan's Landing Marina in 1985. The boat was also refitted in Florida for deep-sea saltwater fishing, and petitioners were not involved in boating activities thereafter in New York.

In 1990, petitioners sold their Jonathan's Landing condominium and purchased a single-family home in the same Jupiter, Florida area for approximately $600,000.00. Paul Burke testified that he and his wife have

expended between $50,000.00 to $60,000.00 to furnish this Florida home.[3]

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

> In explaining their reasons for desiring to change domicile from New York to Florida, petitioners described their goal as being able to retire in a stable retirement community in Florida. In connection with this goal, petitioners claimed to have ceased active involvement in their New York business interests. Petitioners' only son who had remained in New York died in July of 1988, while petitioners' only surviving son and Paul A. Burke's only brother both lived in Seminole, Florida. Petitioners had many friends in Florida with similar lifestyles and social activities while, as a result of their long absences from New York, petitioners had very few friends remaining in New York. Petitioners enjoyed fishing and playing golf year-round, were actively involved in various community and charitable activities in Florida and were involved in only limited charitable activities in New York.[4]

Petitioners also testified to the following:

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[3]It appears consistent that in each instance where petitioners sold a dwelling (i.e., Errick Road, the Bahamas condominium and, later, the Florida condominium) they also sold the furniture/furnishings and, at the same time, purchased new furniture/furnishings upon acquisition of new dwellings.

[4]The Administrative Law Judge's finding of fact "16" was modified by adding "Petitioners' only son who had remained in New York died in July of 1988" in the third sentence and changing "not involved in any community or charitable activities in New York" to "involved in only limited charitable activities in New York." This finding of fact was modified at the request of the Division to more fully reflect all the details contained in the record (see, Tr., pp. 77-78, 167).

(a) Since 1988, petitioners' Florida intangible tax returns were filed in Tallahassee, Florida, and their Federal income tax returns were filed in Atlanta, Georgia, respectively;

(b) All of petitioners' personal obligations such as utilities, credit card bills and travel expenses were, and continue to be, centrally accounted for through the Burke Rental Corporation office located at 1705 Third Avenue in Niagara Falls, New York because of the convenience factor involved;

(c) On average, since 1984, Paul Burke has visited the Niagara Falls, New York business office approximately 10 to 15 times per year and each visit lasted approximately 15 minutes;

(d) While in Florida, petitioners converse with their business manager, Judith Bugenhagen, once or twice per week mostly regarding petitioners' personal affairs;

(e) Petitioners do not discuss management issues relating to the New York properties or collection of the rentals with Judith Bugenhagen, nor are they advised as to expenses, repairs and/or other day-to-day operations of their business interests in New York;

(f) Petitioners moved most of their liquid investments from New York to Florida in 1985 and 1986, including $2,000,000.00 in Treasury Bills, CD's and cash;

(g) Petitioners have been members of the Jonathan's Landing Golf Club since 1985, and purchased a $17,300.00 membership bond there on October 27, 1986;

(h) Paul A. Burke only began regularly playing golf in 1985, when he ceased active involvement in his business interests.

We modify finding of fact "18" of the Administrative Law Judge's determination to read as follows:

> Petitioners claim a homestead exemption for their Florida residence, and utilized their one-time Federal tax election (gain exclusion) upon the sale of their Errick Road personal residence in 1987. Petitioners each filed a Declaration of Domicile in Florida on or about April 10, 1986, and have filed Florida intangible tax returns since the beginning of 1988. Petitioners were each registered to vote in Florida on April 10, 1986. Paul A. Burke was issued a Palm Beach County Public Library card in 1987, and petitioners each applied for

> and received Florida drivers' licenses on January 23, 1987. Petitioners' automobiles are registered in the State of Florida. Petitioners use a Paul A. Burke Construction car when they are in New York. Petitioners claimed exemptions from jury duty in New York on January 22, 1987 upon the basis that they were permanent residents of the State of Florida. Petitioners opened a Florida bank account on November 11, 1985. Petitioners also have bank accounts in New York.[5]

Petitioners have no business interests or pursuits in Florida.

Petitioners raised two sons. One son resides in Seminole, Florida. Their other son, now deceased, is survived by two children. Mr. Burke noted that his grandson resides in western New York and his granddaughter resides in a house owned by the Burkes at 767 Lee Avenue, North Tonawanda, New York. He described a few visits with the grandchildren, but explained that the relationships are not particularly close.

Ms. Bugenhagen holds no ownership interests, stock or otherwise, in any of the businesses or rental properties. Mr. Burke acknowledged that either he or his partner, as the ultimate owners, could terminate the employment of Ms. Bugenhagen, or any of the staff. He noted, however, that to do so would not be sensible, not only for lack of any reason to do so, but because the balance of the staff would almost certainly quit thus ruining his management team and requiring him to become involved in the business. In this regard, Mr. Burke testified he would sell the properties rather than go back to work.

Petitioners' business and personal accounting and auditing services are provided by McGladrey and Pullen, a certified public accounting firm based in Atlanta, Georgia, with offices nationwide including offices in New York. Petitioners switched from their long-time New York accounting/auditing firm to McGladrey and Pullen at the request of William Sanders, the other general partner in the high-rise apartment buildings.

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[5] The Administrative Law Judge's finding of fact "18" was modified by changing "Burke Rental Corporation" to "Paul A. Burke Construction." The finding of fact was modified at the request of the Division to correctly reflect the record.

Petitioners' wills, drawn by an attorney in New York and executed in New York, list petitioners as residing in Florida.[6] Mr. Burke described the process of making these wills as involving many telephone, facsimile and computer disk communications between petitioners in Florida and an attorney in Buffalo, New York before acceptable wills were drawn. Mr. Burke described execution of the wills in New York as due to the fact that petitioners were in New York when the wills were finally completed. He noted that the wills were later revised (after the years in question), and that the revised wills were executed in Florida.

Mr. Burke explained the retention of both Florida and New York driver's licenses as based on his understanding that neither license, alone, was valid in the other state given the length of time spent in each state. Mr. Burke was allegedly told that if a person is present in New York or Florida for more than 30 days, a license for each state is necessary. He noted that his New York license entitles him to operate heavy equipment/wide-load vehicles (a Class I license), but he testified he has not done so since approximately late 1970 and would not feel qualified to do so now.

Paul A. Burke holds a pistol permit issued many years ago in New York. He explained, however, that his only gun is and has been kept in Florida for many years. In similar fashion, Mrs. Burke holds an insurance broker's license in New York. She obtained this license in the 1960's when she placed insurance in connection with the Burkes' construction business. She has not used this license since the 1970's but testified that she has not let it lapse because it is something she "earned."

The Burkes described the central accounting and payment of their personal expenses by the management company as a matter of convenience, noting specifically that it "makes no sense" to do this work when the office can do it for them. In this regard, Mr. Burke testified that most of his telephone calls to the business were to confirm with Judith Bugenhagen the propriety of paying the personal charges and expenses, since Ms. Bugenhagen would not know where and when the Burkes ate, shopped, etc. By contrast, he explained the business involved

[6]Petitioners' entire wills were not offered in evidence; rather submitted as Division's Exhibits "O" and "P" were the first and last pages of petitioners' wills.

few decisions, in that its operations were well established ("cut and dry"). The high-rise apartment buildings involved 30-year government rent subsidy contracts, with all rent increases government approved and with a set protocol for approval of any major repairs (involving trustee approval, three bids and reserve fund payment approvals as spelled out in a trust indenture). Mr. Burke (and Mr. Sanders in Georgia) receive periodic printouts of rents collected and expenses paid in connection with the high-rise properties.

Burke Rental Corporation was described as headed (managed) by Judith Bugenhagen, who has an office staff of three other people, plus four building managers (one in each building) and approximately 12 additional maintenance staff workers. Judith Bugenhagen plus one other staff person hold registered apartment managers' licenses (called RAM certificates) issued by the National Builder's Association and recognized/required by the Federal government to manage Federally-subsidized housing.

By affidavit, Judith Bugenhagen stated that Mr. Burke visits the Burke Rental Corporation offices approximately 10 to 15 times per year, with such visits averaging 15 minutes in length, and that his visits never last for more than an hour. She, and Mr. Burke by his testimony, indicated these visits related to personal matters. Mr. Burke testified that he believed he visited the offices less frequently than Ms. Bugenhagen estimated, but he offered no estimate of such number of visits.

Mr. Burke receives bi-monthly sheets from Judith Bugenhagen summarizing the results of operations of the businesses and the flow of money in and out of his personal bank account (described as a "catch-all" [apparently a net-result profit] account).[7] Mr. Burke admitted that, as one of two ultimate owners, he had access to audit information regarding income, expenses, operations, etc., but explained that he has not reviewed the same and instead has relied on Judith Bugenhagen and the management team.

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[7]At some point, petitioners' bank account and the business account(s) were moved from petitioners' long-term bank (Marine Midland) to a new bank (M & T Bank). This move was made at Ms. Bugenhagen's request and was approved by Mr. Burke.

Mr. Burke decides where to invest his partnership profits (generally in tax-free municipal bonds or Treasury bills).

Petitioners transferred their primary medical and optical care affiliations to doctors in Florida in or about 1985. When in New York, any medical needs are handled by a physician who, with his wife, are long-time personal friends of the Burkes.

Petitioners testified that their social activities in Florida include golfing, boating and fishing as their most avid pursuits, as well as bridge, dinners and theatre activities. They testified that since they are out of New York for such extended periods it is difficult to step into and out of any regular schedule of social activities with persons who live in New York on a year-round basis. By contrast, petitioners' friends in Florida are on similar schedules with the Burkes (i.e., away from Florida during the summer months) thereby leaving it much easier to step into (pick up and maintain) a full schedule of activities. Mr. Burke testified to regular contacts, mainly involving golf matches and dinners, with only three or four friends when the Burkes are in New York.

Mr. Burke described 1985 as the critical decision year during which petitioners decided to sell the Errick Road and Bahamas properties, purchased the Florida property and commenced looking for another property away from Florida (ultimately settling on the Mountain View Drive property). At this same time, petitioners transferred substantial financial assets (Treasury bills, etc.) and their personal belongings to Florida. Mr. Burke testified that he felt by such time his management team and system was in place and functioning capably, noting that he would not walk away from a several million dollar business investment without such assurance.

The parties entered into a stipulation of certain facts prior to hearing, and such stipulated facts have been included in the Findings of Fact set forth hereinabove. However, with the submission of its brief, the Division advised that it wished to "opt-out" of stipulated fact "23" pursuant to its reserved right to do so per stipulated fact "31". These two stipulated facts read, verbatim, as follows:

> "23. Mr. Burke communicates via telephone with the Niagara Falls, New York office approximately one (1) to two (2) times per

week and said telephone conversations last five (5) to fifteen (15) minutes.

* * *

"31. It is further stipulated and agreed that this stipulation is not in any way intended to restrict the presentation of either party's case during this proceeding. Should any of the facts stipulated hereby be contradicted during the course of this proceeding, by testimony or other evidence, either party may opt out of that portion of this stipulation which is so controverted. This option shall be exercised by notifying the ALJ and the opposing party in writing. The remainder of this stipulation shall remain in full force and effect."

In their briefs, both parties present an analysis of petitioners' Florida telephone bills during the period April 22, 1986 to January 19, 1990. As a general proposition, these analyses support the fact that, on average, one or two telephone calls per week were made from the Burkes' Florida telephone number to the New York office of Burke Rental Corporation and that such calls varied in length from 1 minute to 45 minutes. It is clear, also, that the number of calls in excess of 20 minutes was very small in comparison to the number of calls lasting less than 15 minutes. It is also true that in some months petitioners averaged more than two calls per week to the offices and that in other months they averaged less than two calls per week with no particular pattern of calling emerging. Similarly, on certain days, more than one or two calls were made to the business offices on the same day. Conversely, on other days no calls were placed to such offices. Ultimately, the Division maintains that the telephone calls undermine the testimony and claim that Mr. Burke's business was run autonomously by the office staff without Mr. Burke's active decision-making intervention. In contrast, petitioners maintain that Mr. Burke's testimony and Ms. Bugenhagen's affidavit support the claim that the telephone calls related to personal matters and, in fact, that the total phone time of all of the calls amounted to approximately eight hours per year, an amount clearly insufficient to constitute active involvement in running a several million dollar business operation.

In contrast to Mr. Burke's testimony that Burke Construction Company, Inc.'s activities wound down when the housing construction phased out, the Division points out that such entity's total asset value (per its subchapter S tax report) increased from $121,000.00 in 1987 to $410,000.00 in 1988. The nature of, or reason for, such increase was not specified by petitioners. In addition, petitioners' personal income tax return for 1987 reveals (at Schedule E

and Statement 5) that petitioners treated their Mountain View Drive property as rental property, reporting rental income of $9,342.00 and deductible expenses (including depreciation) of $18,655.00 thus claiming a net loss of $9,313.00. This unexplained treatment, which is not claimed for the later years 1988 and 1989, contrasts with petitioners' claim that the property was dormant when not used by petitioners. Finally, the Division points out that petitioners' returns reflect a claim, made via checking the "yes" box on their tax return schedules, of "active participation" in the high-rise housing partnerships. Petitioners claim that the same represents clerical error by petitioners' accountants, noting also that the benefit allegedly gained by petitioners via "active" participation (and denied for "passive" involvement) becomes moot because any such benefit is phased out for taxpayers, such as petitioners, whose adjusted gross income exceeds $150,000.00.

OPINION

The Administrative Law Judge determined that petitioners were properly considered domiciliaries of Florida during the years 1987, 1988 and 1989. The Administrative Law Judge held that, notwithstanding that the Burkes maintained some ties to New York, a taxpayer may change his or her domicile without severing all ties to New York State and petitioners did so by moving their focus of home from New York to Florida prior to the years in question. Specifically, the Administrative Law Judge noted that "[i]t is significant that petitioners moved their most important personal possessions and memorabilia to Florida . . ." (Determination, conclusion of law "E"). Further, the Administrative Law Judge found that petitioners actively sought to distance themselves from the operations of their New York business interests and configured their business to be managed by others. Moreover, the Administrative Law Judge held that petitioners did not retain significant family ties to New York, and maintained a New York residence as a secondary summer home. Therefore, the Administrative Law Judge reasoned that, in light of petitioners' diminished connections to New York, they had demonstrated the requisite intent to abandon their New York domicile and, thus, change their domicile to Florida.

On exception, the Division asserts that petitioners have not demonstrated a change in domicile. The Division states that the Administrative Law Judge's conclusion to the contrary is incorrect for the following reasons: (1) the implication that Florida family ties are stronger than New York family ties is not supported by the record; (2) the finding that Paul A. Burke was not actively involved in the affairs of his New York business interests is not a rational interpretation of the evidence; (3) the record does not support the premise that petitioners moved their focus of home from New York to Florida prior to the years in question; and (4) the testimony of Paul Burke as to the purpose of the telephone calls to his office is incredible.

In response, petitioners present arguments to support the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 605(b)(1)(A) provides, in pertinent part, as follows:

> "Resident individual. A resident individual means an individual:
>
> > "(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . ."

While there is no definition of "domicile" in the Tax Law (cf., SCPA 1103[15]), the Division's regulations (20 NYCRR former 102.2[d]) provide, in pertinent part:

> "(1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he 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 his 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 his 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, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

> "(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined in the regulations at 20 NYCRR former 102.2(e)(1) as:

> "a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

As the Administrative Law Judge stated:

> "[t]o effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276)" (Determination, conclusion of law "C").

The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.
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> "The 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. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile . . . . There must be a present, definite, and honest purpose to give up the old and take up the new

> place as the domicile of the person whose status is under consideration . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention . . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine, and the evidence to establish both clear and convincing. The animus manendi must be actual with no animo revertendi . . . .
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> "This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

The Administrative Law Judge, after considering all of the evidence and testimony presented, concluded that petitioners had demonstrated a change in domicile. Applying the above principles to the facts of this case, we agree that petitioners have proven, by clear and convincing evidence (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138), their intention to change their domicile from New York State to Florida.

The Division makes several arguments on exception. However, these arguments fail to warrant resolution of this matter in favor of the Division. The underlying tone of all the arguments the Division sets forth is that, during the years in dispute, petitioners maintained ties to New York which evince a clear lack of intent to change domicile. However, we agree with the Administrative Law Judge that, notwithstanding that petitioners maintained some ties to New York, a taxpayer may change his or her domicile without severing all ties to New York State (see, e.g., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990) and petitioners did so by moving their focus of home from New York to Florida prior to the years in question. Our affirmance of the Administrative Law Judge is based upon several aspects of his determination.

First, we disagree with the Division that the finding that Paul A. Burke was not actively involved in the affairs of his New York business interests is not a rational interpretation of the evidence. The Division argues that given the magnitude of the rental operation managed by Burke Rental Corporation that it was unreasonable for the Administrative Law Judge to believe

Mr. Burke's testimony that his telephone calls to New York were mostly about personal financial affairs. The Division contends that these telephone calls were about the business and that these telephone calls indicate Mr. Burke's role in the business was not passive, and that Mr. Burke took a more active role when he is in New York.

Several factors support the Administrative Law Judge's conclusion. The most important factor is that the Administrative Law Judge determined that Mr. Burke's explanations as to the content of the telephone calls and the nature of his involvement in the business were credible after hearing the testimony and evaluating its reasonableness. We defer to this evaluation of credibility (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992) and the Division has not pointed to any facts sufficient to override our deference.[8] Also, as the Administrative Law Judge found:

> "the overall amount of telephone contact (some 24 hours over three years) and the limited number of office visits do not seem sufficient to constitute active involvement, or to foster efficiency, in managing the business. Furthermore, Ms. Bugenhagen handled personal business (e.g., central bill paying) for the Burkes. While she would know which business operational expenses needed paying, she would not know which personal bills were valid and should be paid (not having been with the Burkes)" (Determination, conclusion of law "E").

Thus, we agree with the Administrative Law Judge that it is not unreasonable to accept petitioners' explanation that the telephone calls/office visits related primarily to such personal matters. In addition, there is no sense from the description of the business, as finally established, that active involvement by Mr. Burke was required, either on an overall basis or during the part of the year when the Burkes were physically present in New York. As the Administrative Law Judge noted:

> "Such a conclusion [that Mr. Burke was actively involved in his business interests] would run counter to the credible testimony by Mr. Burke that he neither needed nor wanted to be active in the business and that such involvement would undermine the authority and autonomy of Ms. Bugenhagen and her staff -- a result directly contrary to the system petitioners had worked to establish" (Determination, conclusion of law "E").

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[8]We do not find it significant that petitioners indicated that they were actively involved in the high rise housing partnerships on their tax returns for the years in question. As stated in the facts, petitioners claim that this was a clerical error from which they received no tax benefit. The Division has not disputed the latter claim.

Next, the Division contends that if petitioners had any family ties they existed in New York. However, as manifested in the findings of fact, petitioners' family and social lives, while not exclusive to, both became centered in Florida prior to the years in question.

The fact that the Burkes continue to maintain a large New York residence, and did not sell their original New York home until 1987, does not indicate that they could not have intended to effectuate a change in domicile.[9] A taxpayer may change his or her domicile without severing all ties to New York State (see, e.g., Matter of Sutton, supra). The test of intent with respect to changing one's 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 Bodfish v. Gallman, supra, 378 NYS2d 138, 140). In this regard, we agree with the Administrative Law Judge that it is very significant that the Burkes moved their most personal belongings and memorabilia to Florida, including photographs, china and the like.

Finally, the Administrative Law Judge found that the Burkes clearly changed their lifestyle when they changed their domicile from New York to Florida in 1985. The Burkes retired in 1985, became passive in their business interests and retired to a stable Florida retirement community. The Administrative Law Judge found that petitioners were ready to change "to a hands-off, relaxed and recreation/social-oriented lifestyle" in contrast to the long work days and lifestyle the Burkes maintained while they lived in New York prior to 1985.

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[9] In conclusion of law "E," the Administrative Law Judge's determination stated, in relevant part:

> "[p]etitioners sold their long-term home in New York (Errick Road) and purchased a condominium in Florida. At the same time, petitioners sold a condominium in the Bahamas, acquired in the mid-1970's and used extensively over the years by petitioners. . . . Petitioners did acquire a new house in New York after selling their long-term home" (Determination, conclusion of law "E").

Here, the Administrative Law Judge misstates the sequence of petitioners' real estate transactions involving their Bahamas, Florida and two New York properties. Petitioners purchased the Florida condominium prior to the sale of their long-term New York home and acquired a new New York house before this sale. However, this sequence is correctly reflected by the Administrative Law Judge and this Tribunal in the findings of fact.

Based on the foregoing, we agree with the Administrative Law Judge that petitioners have shown, in a clear and convincing manner, that they perfected a change in domicile to Florida prior to the years in dispute.

Accordingly, it is ORDERED, ADJUDGED and DECREED that;

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

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

3. The petition of Paul A. and Ellen E. Burke is granted; and

4. The Notice of Deficiency dated March 11, 1991 is cancelled.

DATED: Troy, New York
June 2, 1994

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

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