

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHARLES J. HULL, JR. AND MARY HULL	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA No. 810833
Personal Income Tax under Article 22 of the Tax Law for	:	
the Years 1988, 1989 and 1990.	:	

Petitioners Charles J. Hull, Jr. and Mary Hull, 218 Edgemere Way South, Naples, Florida 33999, filed an exception to the determination of the Administrative Law Judge issued on March 17, 1994. Petitioner appeared by Sherman F. Levey, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donna M. Gardiner, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation submitted a letter stating that it would not be filing a brief in opposition which was received on July 14, 1994 and began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioners were residents of New York State as defined by Tax Law § 605(b)(1) as individuals domiciled in the State of New York, or individuals not domiciled in the State of New York but who maintained a permanent place of abode in the State of New York and spent in the aggregate more than 183 days of each of the taxable years at issue in the State of New York.

II. Whether the penalties asserted by the Division of Taxation pursuant to Tax Law § 685(a), (b), and (p) should be abated due to petitioners' demonstration that their failure to pay the tax or failure to file a return was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

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

Petitioners, Charles J. Hull, Jr. and Mary Hull, were life-long residents of Rochester, New York. Up until tax year 1988, the Hulls filed New York State resident income tax returns in New York. In tax year 1988, the Hulls filed as part-year residents. Thereafter, considering themselves domiciled in the State of Florida, petitioners filed no further New York State returns.

Petitioners were married in August 1979, the second marriage for both Mr. and Mrs. Hull. Mrs. Hull had two stepsons from her prior marriage, one of whom resided in the State of California and the other in the State of New Hampshire. Mr. Hull had four children by his prior marriage, three daughters and one son. Two of his daughters resided in the State of Florida during the years in issue, while his son resided in the State of Pennsylvania and then in Florida during the years in issue. A fourth child, a daughter, is now deceased, but resided in Rochester, New York during the relevant period.

After initially building a large 3,000-square foot home in the Rochester area in 1980, petitioners sold that home and purchased a condominium located at 31 Tobey Brook in the Rochester suburb of Pittsford, New York in 1983. They maintained this residence throughout the audit period.

Mr. Hull retired from the Eastman Kodak Company in 1980 after 35 years of service. Mrs. Hull had not been employed since approximately 1956. Following Mr. Hull's retirement, petitioners were able to travel quite extensively, including visits to the State of Florida. Petitioners were frequently accompanied on these trips by Mrs. Hull's father. The frequency of Mrs. Hull's father's travels decreased after his entrance into an Episcopal Church Home in 1982. Although Mrs. Hull's father was permitted to travel, his declining health during the mid-1980's placed more and more restrictions on his travel plans. Additionally, her father could not be

away from the Episcopal Church Home for more than 30 days without risking losing his bed at the home. These factors limited the amount of time petitioners could spend on their trips as well.

During 1986, Mrs. Hull's father purchased a club cottage at the "PGA National" in Palm Beach Gardens, Florida. It was a small cottage, approximately 1,300 square feet in area.

In 1987, petitioners purchased a townhouse at "PGA National" in Palm Beach Gardens which was approximately 1,600 square feet.

Petitioners discussed the feasibility of moving to the State of Florida, but never felt comfortable with that decision while Mrs. Hull's father was still living. Therefore, no decision was made prior to Mrs. Hull's father's death in February 1988.

On March 28, 1988, petitioners flew to Florida and, on Tuesday, March 29, 1988, petitioner Charles J. Hull, Jr. filed a Declaration of Domicile, formally declaring his domicile to be in the State of Florida and further alleging that he became a bona fide resident of the State of Florida on March 29, 1988. Mr. Hull listed his residence as 68 Balfour Road East, Palm Beach Gardens, Florida.

On April 13, 1988, petitioners returned to New York and remained until they flew to Florida again on June 1, 1988, returning to New York by way of Boston, Massachusetts, on Monday, June 6, 1988. Petitioners returned to Florida on Saturday, July 16, once again by air, and returned to New York on July 25. It was during this trip to Florida in July 1988 that petitioners purchased a single-family residence located at 16 Balfour Road West, Palm Beach Gardens, Florida, approximately 3,000 square feet in area and costing approximately \$330,000.00. Petitioners did not return to Florida again until October 24, 1988, and remained there the rest of the year.

With regard to petitioners' condominium in Rochester, petitioners obtained several appraisals of the property in 1988, but were unhappy with the appraisal values in the relatively depressed Rochester market. Although petitioners' original purchase price for the property was approximately \$230,000.00, and improvements had cost them approximately \$40,000.00, the

market value as established by the appraisals was only between \$220,000.00 and \$230,000.00.

Petitioners did not list the property for sale with a real estate agent or agency, but chose to market the property themselves when they were in Rochester (Pittsford). Additionally, petitioners realized that they spent a good amount of time in Rochester during the year and owned two dogs which made obtaining a rental more difficult. Therefore, they were in no rush to sell their condominium in Rochester, New York. Although petitioners testified that they received some serious inquiries, none of them documented, the property did not sell until March 15, 1993.¹

During their time away from their condominium in Rochester, petitioners maintained an alarm system and telephone service.

Besides filing a Certificate of Domicile, petitioners opened a bank account in Florida, obtained drivers licenses in the State of Florida, transferred their church affiliation card to an Episcopal church in Florida (although there was no documentation of this) and joined the PGA National Country Club in Palm Beach Gardens. They also registered to vote in Florida and voted in Florida in each of the years in issue. Petitioners retained memberships in social clubs in the Rochester area, particularly the Monroe Golf Club, because of their intent to return to Rochester every summer. Their original intent was to live in Florida between October 15 and May 15 of each year.

Petitioners each retained bank accounts in Rochester for various reasons. Mrs. Hull, the beneficiary of a trust from her first husband, retained a checking account at the Chase Lincoln First Bank where the trust fund was located for the purpose of making deposits and other transfers. Additionally, petitioners stated they retained a bank in Rochester for their convenience, since they spent so much time there during the summer months.

Although petitioners retained these accounts in Rochester, they moved their safe deposit box to the Barnett Bank in Florida, where bearer bonds and other valuables were kept during

¹The record is not clear with respect to the exact period of time for which the condominium was offered for sale. No brokers were involved and no documentation was submitted. The record is not clear as to the degree of effort made to sell the house. Mrs. Hull testified they actively marketed it in the summer while they were in Rochester.

part of the years in issue. Mr. Hull testified that he had his retirement annuity directly deposited to a Florida bank.

Petitioners' checking account at the Barnett Bank in Palm Beach Gardens, Florida, and the checking account in Mrs. Hull's name alone at Chase Lincoln First Bank in Rochester, indicated cyclical activity evidencing the amount of time spent in the two locations by petitioners during the years in issue. The number of checks written from each of the two accounts is approximately equal throughout the audit period.

According to New York State Department of Motor Vehicle records, both petitioners surrendered their New York State drivers licenses to the State of Florida on January 19, 1989.

In 1988, Mrs. Hull reported a capital gain of \$938,637.00 on the sale of stock in the Irving Trust Company. Mrs. Hull received this stock from her father over a period of years during his lifetime and, after a tender offer during 1988, Mrs. Hull sold the stock on October 11 and 17, 1988.

After Mr. Hull's retirement from Eastman Kodak in 1988, the Hulls had no formal business ties with the State of New York other than retirement annuities and Mrs. Hull's trust account at the Chase Lincoln First Bank.

Mr. Hull has had a storied medical history. In 1983, he suffered an aortic aneurysm, requiring open-heart surgery. In 1985, he suffered a popliteal aneurysm, also requiring an operation. In 1986, he suffered from internal bleeding, resulting in the removal of part of his stomach and intestine and later that same year contracted Guilliam-Barre syndrome, a neuromuscular condition which caused paralysis. After suffering from this syndrome for two years, he was able to gain back approximately 90% of his physical strength and coordination. Mr. Hull testified that with the Guilliam-Barre syndrome, his body does not function well under 50 degrees.

Due to Mr. Hull's medical history, it was necessary for him to locate an internist in the State of Florida and he located, by referral, one Dr. Moskowitz. Mrs. Hull also utilized the services of a dermatologist and both utilized the services of a dentist while in Florida. It was

noted that the couple never returned to Rochester for any medical procedure that could be done in Florida while they were in Florida. However, checks indicated that doctors were used in the Rochester area during the period in issue.

While in Florida, petitioners participated in Kiwanis Club activities, the Naples Council of World Affairs, the Round Table in Palm Beach, the Pundits in Palm Beach, as well as making their new Episcopal church affiliation in Palm Beach.

Petitioners consulted with attorneys concerning effecting a change in domicile prior to 1988 and relied upon their advice when trying to effect the change. They always hired a tax return preparer and assumed that the returns were prepared accurately and in a professional manner. The Hulls testified that they made a full disclosure of facts pertinent to the preparation of their Federal and State income tax returns to their paid preparer for all years in issue.

From the Department of Motor Vehicles records in evidence, the buttressing testimony of the auditor and the checking account analysis, it was determined that petitioners owned a 1983 Buick, the New York registration for which expired on February 1, 1989; a 1985 Chevrolet with a New York registration which expired June 4, 1989; a 1987 Buick with a New York registration that expired on November 15, 1989; a 1987 Chevrolet with a New York registration that expired on June 26, 1989; and a recreational vehicle with a New York registration that expired on June 29, 1990. The recreational vehicle, purchased in Rochester and registered in New York State, was used to transport personal items to Florida, including silver, a fur jacket, crystal, pots and pans and artwork. However, it was noted by Mrs. Hull, that petitioners were "blessed" with household items of three different families -- enough to furnish more than one residence.

On audit, petitioners were determined to have maintained certain memberships in Rochester during the years in issue at the Faculty Club of the University of Rochester, the Rochester Yacht Club, the Midtown Tennis Club, the Rochester Wellsley Club, the Genesee Figure Skating Club and the Retired Professionals Society of Rochester. The auditor confirmed her findings with regard to these memberships through third-party confirmation and checking

account analysis. The auditor determined that petitioners maintained their "active" membership status at the Faculty Club through the end of 1990; at the Rochester Yacht Club through the end of 1989; at the Midtown Tennis Club through mid-1990; at the Rochester Wellsley Club through April 1991; at the Genesee Figure Skating Club through October 1991; and at the Retired Professionals Society through July 1989. There was also evidence that petitioners had affiliation with the YMCA, Historic Pittsford, Rochester Museum and Science Center, the Automobile Club of Rochester and the Finger Lakes Chapter of the Family Motor Coach Association.

The auditor requested, on more than one occasion, a list of clubs, organizations and affiliates with which petitioners maintained an active status, but received no response.

Petitioners filed an audit questionnaire with regard to tax years 1988, 1989 and 1990 dated June 1991 in which they asserted that they had registered all of their motor vehicles in Florida and changed their drivers licenses to Florida as of March 1988; that they had switched various social memberships from Rochester, such as the Wellsley Club, the Kiwanis Club, the Moose, etc. They also stated that they had switched most of their banking relationships to the Barnett Bank in Florida, other than investment management and tax return preparation services which had previously been provided by the Central Trust Company of Rochester, New York and a checking account at the Chase Lincoln First Bank which they said was used only on their occasional visits to Rochester.

In the same questionnaire, petitioners stated that they had switched their membership from Christ Church in Pittsford, New York to Church of Bethesda-By-The-Sea as of March 1988. However, upon third-party source confirmation, the auditor found that petitioners had not been members of Christ Church in Pittsford for approximately seven years. No further documentation was provided to resolve this confusion.

Upon further investigation, the auditor determined that petitioners maintained regular membership status at the Monroe Golf Club, the Tennis Club of Rochester and the English Speaking Union.

Petitioners asserted that substantially all of their check-paying was administered through their Florida checking account. However, an analysis of the number of checks written from the Chase Lincoln First account in Rochester and the Barnett Bank in Florida indicated that usage was evenly distributed.

On September 17, 1991, approximately three months after petitioners submitted their audit questionnaire, the auditor met with their representative at his Rochester office at which time a document listing days out of New York was presented to the auditor along with three appointment books, one for each of the years in issue, and checking account statements from the Barnett Bank and the Chase Lincoln First Bank. From the auditor's review of the account statements it became obvious that checks were drawn on the two accounts in cycles depending upon where petitioners were residing. At this meeting, the auditor was not presented with, although she requested, all cancelled checks, a list of all organizations, affiliations and clubs to which petitioners belonged in New York State during the years in issue and all credit card statements. Petitioners' representative was given until September 25, 1991 to produce these documents at the representative's office. On that date, petitioners' representative, Sherman Levey, Esq., submitted cancelled checks for the audit years, as well as charge account statements. He did not present a list of organizations and affiliations that petitioners belonged to during the period under audit. Mr. Levey stated that he would submit this list at the next meeting he had with the auditor. However, on October 10, 1991, the next meeting between the two, no such list of affiliations was produced. Yet another request for these affiliations with the various organizations, associations and memberships maintained by petitioners during the audit period was made on October 15, 1991 and petitioners' representative responded by telling the auditor that he would produce the requested information by October 23, but added that their wills would not be produced because of confidential material they contained. That meeting never took place, but a meeting did take place on November 13, 1991 between petitioners' representative, the auditor and her team leader. At that time, the audit findings, conclusions and determination to hold petitioners as New York domiciliaries and statutory residents were

explained to the representative. No further substantiation of petitioners' affiliations with clubs, organizations, etc. was made.

With regard to the issue of statutory residence, it is critical that petitioners establish the number of days they spent in the State of New York. Petitioners assert that they spent 187 days outside of New York State during 1988, and supplied the following chart to substantiate their assertion:

<u>1988</u>		
<u>Days Out of State</u>	<u>Date</u>	<u>Location</u>
19	January 5 - 23	Florida
11	February 14 - 25	Florida
16	March 4 - 14	Vail, Colorado
	March 19 - 23	Westminster, Maryland including trip home
17	March 28 - April 13	Florida
4	April 22 - April 25	New Hampshire
9	May 19 - May 27	Arizona
5	June 1 - June 5	Wellesley, Mass.
10	July 16 - July 25	Florida
3	August 19 - August 22	Pennsylvania
35	August 31 - October 4	N.H., Maine, Atlantic Province Canada
<u>68</u>	October 25 - December 31	Florida
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It is noted that petitioners erroneously counted days of departure from and arrival in New York as days out of state. Additionally, the Division did not accept certain dates reported by petitioners because they did not correspond with entries in the appointment books. Those dates will be discussed more fully below.

Petitioners were able to recreate the years 1988, 1989 and 1990 through the use of calendars referred to as "week at a glance" appointment books kept by Mrs. Hull for each of the years in issue.

The Division disagreed with petitioners' characterization of the appointment book records and determined that petitioners had spent 196 days in New York State during 1988. With regard to petitioners' trip to Florida, which they stated began on February 12, 1988 in Rochester and ended with their return to Rochester on February 23, 1988, the Division noted that the

appointment book indicated February 14 as the departure date from Rochester, not February 12. Additionally, the Division found charges made on petitioners' Visa card with Chase Lincoln First in Pittsford, New York on February 21 and 22, 1988 indicating a presence in New York on those dates.

It is noted that petitioners testified that they decided to leave two days earlier for Florida, on February 12, 1988, due to a party they wished to attend in Florida. However, no flight information exists under the February 12, 1988 entry as it does for February 14, 1988. Additionally, petitioners testified that all of their children were authorized and had access to use their Chase Lincoln First Visa card. However, no corroborating evidence was submitted of this fact.

As noted above, petitioners indicated that they had left Rochester on April 22, 1988 for a trip to New Hampshire from which they returned to New York State on April 27, 1988. The Division found Chase Lincoln First Visa charges on petitioners' account made in Rochester on April 25.

The auditor indicated that the Division did look at the diaries for the years 1989 and 1990, but they were unable, due to the information in the documents submitted, to confirm or disaffirm days in or out of the State for those years. Essentially, the Division conceded petitioners' records or appointment books for the years 1989 and 1990 which indicated that petitioners spent only 136 days in the State of New York during 1989 and 137 days in the State in 1990.

It is noted that on at least three occasions in the appointment books Mrs. Hull referred to returning to Rochester as "home", to wit: Tuesday, April 26, 1988 (erased, but legible); Saturday, April 29, 1989; and again on Saturday and Sunday, May 19 and 20, 1990, Mrs. Hull refers to returning to Rochester with the simple word "home".

By careful analysis of the checks written by petitioners during the audit period, the Division determined that petitioners continued to maintain relationships with New York State doctors, dentists, accountants, lawyers and other professionals. These same records indicated

that petitioners utilized two trust accounts and investment management services in New York State and continued to maintain a major checking account in New York State despite their claims to the contrary. They continued to have their automobiles serviced and pet care provided in New York State.

At the conclusion of the audit, the auditor determined that petitioners were domiciliaries and statutory residents for the years 1988, 1989 and 1990. Additionally, the Division imposed Tax Law § 685(b) negligence penalty for the following reasons:

(a) Petitioners claim that they had not maintained certain club memberships, but third-party information disaffirmed these assertions.

(b) Petitioners claim that they had changed membership status to limited membership, but third-party information disaffirmed this assertion as well.

(c) The Division thought that petitioners' assertion of switching memberships to Florida was misleading and that petitioners never provided a list of all New York State memberships or statuses during the course of the audit.

(d) Although petitioners claim to have switched church membership, the information provided was misleading and disaffirmed by third-party information.

(e) Petitioners claim that almost substantially all of their check-paying was done from their Barnett Bank in Florida, but a check analysis disaffirmed this assertion as well.

(f) Although petitioners claimed to have surrendered their New York licenses upon alleged change of domicile, it was found that they did not do so until ten months after they declared Florida as their new domicile under Declaration of Domicile with the State of Florida.

(g) Although petitioners asserted that they had registered all of their motor vehicles in Florida upon changing their domicile, it was found that at least three registrations were made after the date of their declaration of intent to change domicile.

The Division imposed Tax Law § 685(a) penalty for the years 1989 and 1990 for failure to file income tax returns and also Tax Law § 685(p) penalty for the years 1988 and 1989 for

substantial understatement of income tax liability.

On November 20, 1991, the Division issued to Charles J. Hull, Jr. and Mary Hull three statements of personal income tax audit changes for the years 1988, 1989 and 1990. For the year 1988, the statement indicated additional tax liability of \$83,571.86, plus penalties and interest, for a total amount due of \$130,167.14. For the year 1989, the statement indicated additional tax liability of \$2,668.83, plus penalties and interest, for a total amount due of \$4,390.83. For the year 1990, the statement indicated additional tax liability of \$1,420.09, plus penalties and interest, for a total amount due of \$1,969.28.

On February 18, 1992, the Division issued to Charles J. Hull, Jr. and Mary Hull a Notice of Deficiency for personal income tax due for the years 1988, 1989 and 1990 indicating a total amount of additional tax due for all three years of \$87,660.78, interest of \$25,282.27 and penalty of \$26,670.37, for a balance due of \$139,613.42.

OPINION

The Administrative Law Judge found that petitioners did not abandon their New York domicile during any of the years in question. The Administrative Law Judge based this conclusion on petitioners' conduct, both formal and informal. Specifically, the Administrative Law Judge found that petitioners did not show a clear intent to abandon New York as their domicile and acquire a new domicile in Florida (Matter of Newcomb, 192 NY 238; Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276; Aetna Natl. Bank v. Kramer, 142 App Div 444, 126 NYS 970). The Administrative Law Judge further found that petitioners' pattern of life did not change during the years in question. The Administrative Law Judge also found that petitioners' purchase of a residence in Florida, did not provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990), and that the purchase of a residence is merely one factor to be considered in determining domicile. The Administrative Law Judge further found that petitioners maintained their home in Rochester throughout the audit period and, although they testified that they placed the house on the market, no evidence was submitted to that effect. In addition, the Administrative Law

Judge found that petitioners utilized New York attorneys and accountants during this period, and while testifying at length about using a Florida doctor, still utilized New York medical providers.

With regard to their level of activity in social, charitable and religious organizations, the Administrative Law Judge found that many of the organizations that petitioners asserted they resigned from upon changing their domicile to Florida in 1988 did, in fact, show activity or membership well after that date. In addition, the Administrative Law Judge found that, pursuant to Tax Law § 689(e), the burden of proof was upon petitioners to provide the necessary information to show the level of their activity or membership in these organizations and that petitioners did not meet this burden.

The Administrative Law Judge also found that petitioners did not surrender their New York drivers' licenses in March of 1988 as they asserted but instead the licenses were surrendered in January of 1989. In addition, the Administrative Law Judge found that petitioners, contrary to their statements, registered several motor vehicles in New York after their purported change of domicile.

With respect to petitioners' statement that the majority of their checks were drawn on a Florida bank, the Administrative Law Judge found that a review of the record revealed that petitioners used their New York and Florida checking accounts equally.

The Administrative Law Judge also found that the Division conceded that petitioners did not spend more than 183 days in New York State during 1989 and 1990. With respect to 1988, the Administrative Law Judge found that petitioners were not able to demonstrate that they spent less than 183 days in New York State. The Administrative Law Judge further determined that if petitioners' children had authorization to use their parents' credit cards, the burden was on petitioners to provide substantiation of this fact and that their children did in fact use the cards on the days in question.

Finally, the Administrative Law Judge upheld the imposition of penalties stating that "petitioners have been shown to have been less than candid with the auditor's direct requests for

information concerning social, religious and charitable organizations, they did not produce their wills, and information concerning their drivers' licenses, vehicle registrations and bank accounts" (Determination, conclusion of law "G"). The Administrative Law Judge also found that petitioners did not demonstrate reasonable cause for abatement of penalties and that following "the advice of counsel and return preparers in good faith . . . does not constitute reasonable cause (Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990)" (Determination, conclusion of law "G"). The Administrative Law Judge also found, relying on Matter of Auerbach v. State Tax Commn. (Sup Ct, Albany County, Mar. 27, 1987, Williams J., affd 142 AD2d 390, 536 NYS2d 557), that good faith in an incorrect legal interpretation does not constitute reasonable cause.

On exception, petitioners argue that: (1) they have established that they changed their domicile to Florida in 1988; (2) they were not statutory residents of New York for any of the years involved; (3) their failure to file a return for 1989 and 1990 was due to reasonable cause and not willful neglect; and (4) any underpayment for any year was due to reasonable cause and not willful neglect.

On exception, petitioners have raised the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Charles J. Hull, Jr. and Mary Hull is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Charles J. Hull, Jr. and Mary Hull is denied; and

4. The Notice of Deficiency, dated February 18, 1992, is sustained.

DATED: Troy, New York
December 8, 1994

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner