

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ANDREW M. REID</b>	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 811009
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for	:	
the Years 1986 and 1987.	:	

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Petitioner Andrew M. Reid, One Partridge Hollow Road, Greenwich, Connecticut 06897, filed an exception to the determination of the Administrative Law Judge issued on December 27, 1994. Petitioner appeared by Townsend & Valente, Esqs. (R. Edward Townsend, Jr., Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Craig Gallagher, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief which was received on April 28, 1995 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Francis R. Koenig took no part in the consideration of this decision.

***ISSUES***

I. Whether petitioner is taxable as a resident of New York State and New York City because he maintained a permanent place of abode and spent in excess of 183 days in the State and City.

II. Whether there is reasonable cause to waive the penalties.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact "55" and "72" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Petitioner, Andrew M. Reid, was born in White Plains, New York and grew up in Harrison, New York. His parents moved to Greenwich, Connecticut in 1968-69, and have resided there since that time. Petitioner attended college at the University of Arizona in Tucson, Arizona, and graduated in 1972. He lived with his parents in Greenwich, Connecticut, when he would come home from college during semester breaks and summers, and also for two or three months after he graduated from college (tr., pp. 19, 23-24).

Petitioner has three sisters, one of whom, Addie R. Powell, has resided in New Canaan, Connecticut for over 20 years. One of his other sisters resides in Pittsburgh, Pennsylvania, while the remaining sister resides in California (tr., pp. 19-21).

Petitioner was close to his family. Birthdays as well as major holidays were celebrated with his parents. During the hearing, petitioner testified that his entire family went on a safari together in 1990 to celebrate his parents' 70th birthdays, and they also went to Egypt to celebrate his parents' 50th wedding anniversary in 1992. A family trip to the Far East is planned to celebrate petitioner's father's 75th birthday (tr., pp. 20-22).

In the fall of 1972, petitioner took a job in New York City as a sales trainee for Garland, a Brockton, Massachusetts-based manufacturer of ladies' apparel. A year later, he was employed in New York City by Marshall Ray, a producer of men's clothing based in Troy, New York (tr., p. 24).

In 1975, petitioner started his own business, along with John Pollack and William Mendel. Andy Johns Fashions, Inc. ("the company") was incorporated in New York State on July 23, 1975 and opened its doors on August 1, 1975 (tr., pp. 40-41). The company's business

was the production and sale of women's outerwear, and it initially had offices at 1410 Broadway, New York City (tr., pp. 26-27).

Petitioner was the president of the company; his primary duties were to create, design and merchandise the company's line of clothing, and generally to handle the sales and "front end" of the business. John Pollack was vice president, secretary and treasurer and his primary duties were production and shipping, accounts receivable and payable and bookkeeping -- the "back end" of the business (tr., pp. 27-28).

During the hearing, petitioner testified that he and John Pollack worked seven days a week for about the first three years to get the company off the ground (tr., pp. 29-30). The company's customers were department stores throughout the country and petitioner attempted to sell to every major store in every major city in the United States. Accordingly, petitioner travelled on the average of two or three days a week to visit as many customers as he could, to show the company's line and get it sold (tr., pp. 28-30, 36). When travelling, petitioner shopped the stores to see what the company's competitors were doing, and he periodically travelled to Europe for the same purpose and to research designs and trends (tr., pp. 33, 38).

In 1977, the company rented warehouse space in Patterson, New Jersey because the New York City local contract shipping facility was becoming too expensive. In addition, John Pollack lived in New Jersey. All of the "back end" activities of the business were handled by Mr. Pollack in New Jersey. Petitioner had an office in New Jersey and testified that he was there at least once a week, sometimes twice a week, depending on "what was going on" (tr., pp. 37-38).

At some point, the company was reincorporated under the laws of the State of New Jersey. Petitioner testified that the corporate offices were located in New Jersey (tr., p. 41).

The company had a sales office and an area for some of the design work in New York. In addition, petitioner had an office in New York (tr., pp. 41-42).

At first, the company's manufacturing was done by New York metropolitan area contractors (tr., p. 42). However, after the first year, it started to manufacture garments in

Kentucky. After the second year, most of the manufacturing took place abroad, mainly in the Far East (tr., p. 43).

The warehouse remained located in Patterson, New Jersey for about five years (tr., pp. 43-44). Ultimately, all the company's warehousing was centralized in Kentucky (tr., p. 44).

Petitioner testified that he travelled to Kentucky "quite a few times during a year" to inspect the garments and oversee production (tr., pp. 44-45).

Prior to 1980, petitioner and the other principals of the company started a manufacturing business in Kentucky and became 50% owners of that business, which they still own. Petitioner continues to travel to Kentucky (tr., pp. 45-46).

Petitioner testified that he lived with his parents in Greenwich, Connecticut for two to three months when he started working in New York City; however, by the end of 1972, he had rented an apartment located at 41 East 11th Street, New York City. This apartment was rented by petitioner and petitioner's father's partner's son for two years (tr., pp. 25, 262). At the end of the two-year lease, petitioner moved to East 83rd Street, where he lived for about three to three and a half years (tr., p. 263). Petitioner moved to 1175 York Avenue ("York Avenue") "around 1978" (tr., p. 264).

The York Avenue building in which petitioner's apartment was located had a lobby, elevator service and a doorman. His apartment was located on the eighth floor of the building and faced a back courtyard. It contained three and a half rooms and was approximately 700 square feet. Petitioner described it as a "standard one bedroom" (tr., pp. 57, 95).

In January 1981, petitioner began looking for a place outside of New York City to purchase. He considered a large house in the Hamptons, which would be divided into shares, and the shares rented out, but he decided that he did not want to buy property with friends, and that "after living in New York for a while, [he] missed having a home and being in one and wanted to not be in New York" (tr., p. 47).

Petitioner then spoke with his father, and contacted several real estate people and began looking in Connecticut to buy a home. He was looking for one which, in terms of commuting,

would be only one to one and a half hours outside of New York City, and which he could afford. He spent the next eight or nine weekends looking with a real estate agent. Ultimately, he found a house which he could afford and which was within a reasonable commuting distance from New York. Petitioner testified that he knew he had found the house, in March 1981, when he drove down the driveway and it felt "like home" (tr., pp. 48-49).

On April 10, 1981, petitioner purchased a home in Wilton, Connecticut located at 28 Chicken Street ("Chicken Street"). Petitioner purchased the Chicken Street property for \$218,500.00; he financed the purchase in part by taking out a \$125,000.00 mortgage with People's Savings Bank of Bridgeport, Connecticut<sup>1</sup> (tr., pp. 50-52; Petitioner's Exhibit "1"). The People's Savings Bank mortgage statements were addressed to petitioner at the Chicken Street address<sup>2</sup> (tr., p. 52; Petitioner's Exhibit "2"). The Chicken Street address is reflected on petitioner's refinanced mortgage with People's Savings Bank in June 1983 (tr., p. 71; Petitioner's Exhibit "5"). He also used this address in August 1987 when he set up a commercial collateral note with Dollar Dry Dock Savings Bank secured by a first mortgage on the Chicken Street property (tr., p. 72; Petitioner's Exhibit "6").<sup>3</sup>

The Chicken Street property consisted of about two acres which was "basically a wooded piece of property." The driveway was a quarter of a mile long and there were lawns on either side of the house. About one hundred-year-old stone fences were situated on the property as well. The house contained approximately 3,500 to 3,800 square feet, with expansive windows and sliding glass doors, upstairs and downstairs fireplaces, a garage, a deck and various other amenities. Petitioner described the house as an "A-frame house with cathedral ceiling" (tr., p. 55). The house had forced hot water oil heat and was not air conditioned (tr., p. 60).

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<sup>1</sup>A copy of the deed and mortgage settlement statement was submitted as petitioner's Exhibit "1."

<sup>2</sup>A copy of a People's Savings Bank mortgage statement was submitted as petitioner's Exhibit "2."

<sup>3</sup>The People's Savings Bank mortgage note dated June 3, 1983 was submitted as petitioner's Exhibit "5." The Dollar Dry Dock commercial collateral note dated August 19, 1987 was submitted as petitioner's Exhibit "6."

Petitioner made numerous improvements to the Chicken Street property. He doubled the size of the deck to about 20 feet wide and 40 feet long -- "[i]t ran the length of the house." He testified that the enlarged deck was approximately the size of his York Avenue apartment (tr., p. 58). He installed a security system (tr., p. 62). He also carpeted the downstairs and had shelves built for what he called the play room (tr., pp. 58, 63). He remodeled the master bathroom. He also had an oak floor put down in the living room and dining area (tr., p. 60). In addition, the property needed relandscaping near the house. He testified that he spent about \$25,000.00 to \$30,000.00 improving and remodeling the house (tr., p. 61).

Petitioner spent approximately \$50,000.00 to \$60,000.00 on furnishings for the Chicken Street property (tr., p. 61). Among his purchases was a front projection 50" screen television which he installed in the playroom. This room also contained his collection of liquor bottles. Petitioner also acquired a collection of chicken items and paraphernalia which he had received as housewarming gifts from friends (tr., pp. 58-59).

Shortly after closing on the Chicken Street property, petitioner moved what he termed his personal belongings -- his clothes, books and tapes; his toiletries; kitchen items and food stuffs - - to the Chicken Street property. Petitioner paid a professional moving company \$833.00 for four men working seven hours (tr., pp. 74-75).

Petitioner left the following items in the York Avenue apartment: a bed; a small dresser in the bedroom; a sofa; a little settee; a small kitchen table with two chairs; and a television set (tr., p. 74). When asked why he left furniture in the apartment, petitioner testified that "nothing was going to fit in terms of what I was moving towards. It was old furniture and I wasn't going to use it". He also testified that he was still renting the York Avenue apartment and he could stay there when he wanted or needed to because there was a bed there (tr., p. 74).

Petitioner testified he registered to vote in Connecticut in 1981 and had voted regularly in Connecticut since that time (tr., pp. 147-148). As his Exhibit "22", petitioner submitted a letter from George F. Lenz, Registrar of Voters for the Town of Wilton, Connecticut. Mr. Lenz

certifies that petitioner was a "registered voter in the Town of Wilton in 1986 and 1987. In those years, he was a resident at 28 Chicken Street of this Town."

Petitioner submitted his 1981 Form W-2's from A. J. Imports, Inc. and Andy Johns Fashions, and the first page of (1) his 1981 Federal Form 1040, (2) his 1981 New York State IT-203, and (3) his 1981 State of Connecticut Capital Gains and Dividends Tax Return as his Exhibit "23". Each of these documents contained the 28 Chicken Street, Wilton, Connecticut address.

Petitioner testified, on cross-examination, that he considered himself a New York resident up until he purchased the Chicken Street home. When asked by the Division of Taxation's ("Division") representative when he last filed a New York City tax return as a resident, petitioner testified that it was "probably through 1980" (tr., pp. 263-265).

During the hearing, the Division submitted as its Exhibit "J" the original audit log and pertinent portions of the audit file. One of the documents in Exhibit "J" is the "Master Tax Index Multi Year Search", which identifies the years and types of New York State income tax returns filed by petitioner. According to this document, petitioner did not file any tax return for the years 1973 through 1975 and filed a Form IT-203, a nonresident return, for the years 1976 through 1984.<sup>4</sup>

Petitioner testified that since 1981 he has filed a nonresident New York State income tax return and a resident Connecticut income tax return (tr., p. 151).

At some point, petitioner obtained a Connecticut driver's license and continues to have one. Petitioner submitted a copy of his Connecticut driver's license, which expired on April 25, 1992, as his Exhibit "24". He testified that he threw the previous driver's licenses out when he obtained a new one (tr., pp. 151-152).

Although petitioner did not join a Connecticut temple in 1981, "once or twice a year during the high holidays" he would attend temple in Georgetown, Connecticut (tr., pp. 153-

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<sup>4</sup>1984 was the last year asked for in this multi-year search.

154). In 1992, petitioner and his wife joined the Greenwich Reform Synagogue in Greenwich, Connecticut.

In 1981, petitioner opened bank accounts with People's Savings Bank, a Connecticut bank<sup>5</sup> (tr., p. 156; Petitioner's Exhibit "27").

Petitioner had his safe deposit box at the Manufacturers Hanover Trust Company branch near his office (tr., p. 162). His Visa and MasterCard were also issued by Manufacturers Hanover Trust Company. The billing addresses for the safe deposit box, Visa and MasterCard were all changed to the Chicken Street address<sup>6</sup> (tr., pp. 161-162; Petitioner's Exhibit "28"). Petitioner had his Manufacturers Hanover Trust Company bank statements changed to the Chicken Street address.

Petitioner continued to use various New York health care providers; however, subsequent to his purchase of the Chicken Street property, his doctors sent their bills to the Connecticut address. Petitioner used the Chicken Street address when he made claims on his medical insurance. Also, when petitioner was taken to the emergency room at Mt. Sinai Hospital on February 25, 1983, he used his Connecticut address (tr., pp. 199-205; Petitioner's Exhibits "55" and "56").<sup>7</sup>

As a stockholder and the president of the company and its affiliates, petitioner had to sign various agreements and legal documents, and in all of the documents submitted into evidence during the hearing, petitioner's address for notice and all other purposes is indicated to be 28 Chicken Street, Wilton, Connecticut. The agreements and documents which reflect this range in date from October 31, 1982 through June 12, 1989 and were submitted as follows:

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<sup>5</sup>As part of petitioner's Exhibit "27," he submitted photocopies of two People's Savings Bank Plus Cards -- one was for a special savings account and the other for a savings account.

<sup>6</sup>As his Exhibit "28," petitioner submitted the Manufacturers Hanover Trust notice which accompanied the Visa card valid for the period 10/82 through 9/83; the Visa statement for 5/4/84; the MasterCard statement for 5/4/84; and the Manufacturers Hanover Trust Company Safe Deposit Department receipt dated 6/9/86.

<sup>7</sup>Petitioner submitted insurance claim forms, doctor bills and checks as his Exhibit "55." The emergency room chart from Mt. Sinai Hospital dated 2/25/83 was submitted as petitioner's Exhibit "56."

(a) Stock Purchase Agreement dated October 31, 1982 among Andy Johns Fashions, Inc., A. J. Imports, Inc., William Mendl, petitioner and John Pollack (Petitioner's Exhibit "30");

(b) Stockholders' Agreement dated February [blank], 1983 among petitioner, John Pollack and Andy Johns Fashions, Inc. (Petitioner's Exhibit "31");

(c) Stockholders' Agreement made January 1, 1984 among petitioner, John Pollack and Andy Johns Fashions, Inc. (Petitioner's Exhibit "32");

(d) Discussion draft of Stock Purchase Agreement dated July [blank], 1984 among an unnamed holding company, John Pollack, petitioner and William Mendl (Petitioner's Exhibit "33");

(e) Stock Purchase Agreement dated January 1, 1985 between petitioner and Lee Lipton (Petitioner's Exhibit "34");

(f) Stockholders' Agreement dated February 1, 1985 among petitioner, John Pollack and A. J. Imports, Inc. (Petitioner's Exhibit "35");

(g) Stock Purchase Agreement dated March 1, 1985 between petitioner and Lee Lipton (Petitioner's Exhibit "36");

(h) Stock Purchase Agreement dated May 6, 1986 among XCOR International, Inc., petitioner, John Pollack, Lee Lipton and Lewis Berman (Petitioner's Exhibit "37");

(i) Employment Agreement dated May 30, 1986 between Andy Johns Fashions, Inc. and petitioner (Petitioner's Exhibit "38");

(j) Discussion draft dated November 3, 1987 of Stock Restriction and Purchase Agreement among Phar Shar Manufacturing Company, Inc. and William Mendl, Osco Pharris, John Pollack and petitioner (Petitioner's Exhibit "39");

(k) Letter dated August 20, 1987 from Cynthia L. Stewart of the law firm Brown, Todd and Heyburn to petitioner, among others, with respect to Shareholders' Agreement (Petitioner's Exhibit "40"); and

(l) Letter dated June 12, 1989 from Ms. Stewart to petitioner enclosing the executed Stock Restriction and Purchase Agreement (Petitioner's Exhibit "41").

Petitioner, when purchasing life insurance, used his Connecticut address on the application, and the policies were issued to petitioner at this address. He received the premium notices for various life insurance policies at his Chicken Street address (tr., pp. 181-186).

Petitioner made investments which reflected the Chicken Street address. These included an I.R.A. opened in 1982 at Manufacturers Hanover Trust Company (Petitioner's Exhibit "49"); an investment in Advanced Separations Technologies, Inc. on or about July 12, 1983 (Petitioner's Exhibits "50" and "51"); an I.R.A. at Dollar Dry Dock dated April 5, 1984 (Petitioner's Exhibit "52"); and an investment in Walker Energy Partners, an oil and gas limited partnership, made in 1985 (Petitioner's Exhibit "53") (tr., pp. 192-197).

On July 15, 1987, petitioner's mother reregistered stock in Russ Togs, Inc., a gift which she had made to petitioner under the Uniform Gifts to Minors Act, to reflect his Chicken Street address (tr., pp. 197-199).

After 1987, petitioner's business continued to require him to be in New York City "about the same as before." He continued to be in New York City two to three days a week, and he went to New Jersey one day per week, sometimes two. He continued to travel to the stores.

The Chicken Street property was just under 50 miles from his New York City office (tr., p. 290). The commute took about 1 hour 15 minutes to 1 hour 20 minutes (tr., p. 80).

Petitioner testified that the company supplied him with a car, which it also maintained for him (tr., pp. 79-80). Petitioner's Exhibit "9" is a letter from Jeff Marcus, vice president and controller of Andy Johns Fashions, which stated company policy concerning reimbursement of business-related expenses. Mr. Marcus states:

"[I]t was the policy in 1986 & 1987 of Andy Johns Fashions, Mr. Reid's employer, to reimburse him for all of his out of pocket business related expenses. This included, but was not limited to, entertainment, lunches, travel and automobile gasoline expenses.

"Mr. Reid was reimbursed for such expenses upon presentation and subsequent approval of business related expense reports."

Petitioner testified he would drive into New York City or New Jersey. However, he sometimes got rides with neighbors. In late 1985, petitioner began commuting on a regular basis with a friend, Peter Mazza. Both petitioner and Mr. Mazza testified that generally they would drive into New York City together on Mondays and another day of the week. Mr. Mazza testified that he and petitioner always took his car, which he drove when they rode together. This pattern of commuting two days per week was consistent through all of 1986 and through the first half of 1987. During the latter half of 1987, petitioner rode with Mr. Mazza approximately once a week. Mr. Mazza's business had been sold in early 1987, and the arrangements he had for an office in New York City for the first six months thereafter had terminated. Accordingly, Mr. Mazza established an office in Connecticut and was driving to New York City less frequently (tr., pp. 86-88, 247-249).

Petitioner testified he did not have a monthly parking space in New York City because "the company never was going to reimburse [him] for it so [he] paid as [he] went." In addition, he testified that he believed he saved money "by not taking out a monthly space" because there were days he was in New Jersey or was travelling (tr., pp. 80-81).

Petitioner testified that he did not save parking bills or toll receipts for his commute (tr., p. 289).

Petitioner continued to rent the York Avenue apartment after 1981. In the fall of 1984, petitioner began to dispose of the furniture in the apartment because he was considering subleasing it (tr., pp. 113-114). According to an affidavit (Petitioner's Exhibit "17") submitted by petitioner's sister, Addie Reid Powell, petitioner gave her "one sofa, one loveseat and one queen size bed."

Petitioner did not sublet the apartment because he discovered he would have forfeited his right to purchase the apartment at an insider's price when the building went co-op (tr., pp. 113-114). Petitioner went out and purchased some inexpensive furniture for it because he "had people asking if they could use [it]" (tr., pp. 116-118).

Petitioner testified that he continued to rent the York Avenue apartment because "there was conversation that the building was going to go co-op" (tr., p. 95). He expected to purchase the apartment and double his money upon selling it (tr., pp. 96-97). In 1984, an offering plan was first circulated. At that time, a tenants' association was formed, it hired counsel, and the tenants' association began negotiations with the sponsor. In 1986, the sponsor suddenly died and the co-oping process came to halt. The sponsor's estate ultimately sold the building to a new group of investors, which started the co-oping process all over again. A new tenants' association was formed, negotiations took place with the new sponsor and the building went co-op. Petitioner purchased the York Avenue apartment for \$134,000.00 on June 27, 1989 (tr., pp. 98-103).

In 1989, petitioner testified that he made no effort to sell the apartment because "[t]he recession was in." However, he leased the apartment to his partner, Lee Lipton's, parents for two years. When this lease expired, he allowed his tenants to continue as month-to-month tenants while he tried to sell the apartment. In June 1993, approximately a year and a half after first placing it on the market, he took the first offer he received and sold the apartment at a loss for \$110,000 (tr., pp. 103-107).

Petitioner testified that subsequent to his move to Connecticut he rarely used the York Avenue apartment. His estimate was that in the first few years he used it approximately two to three days per month and thereafter two to three times per year (tr., p. 107). Petitioner allowed friends and business associates to use the apartment frequently.

Petitioner testified that he had given a key to the York Avenue apartment to several people including "his girlfriend at the time, Laura" (tr., p. 110). He stated that she would lend the key to her girlfriends and they would usually leave it downstairs with the doorman. He also stated that there was never any problem getting someone a key and that there were four or five keys around (tr., pp. 110-111). Petitioner did not charge his friends for the use of the apartment (tr., p. 108).

Petitioner maintained a telephone in the York Avenue apartment. He allowed his guests to use the telephone. He did not ask them to reimburse him for their use of the telephone (tr., p. 109).

Petitioner continued to receive mail at his York Avenue apartment after his move to Connecticut. The utility and telephone bills for the apartment were sent there, as well as all bills related to the apartment including the rent bill. He testified he did this to show a presence at the apartment because he did not want to jeopardize his right to buy the apartment at an insider price (tr., pp. 210-211). Petitioner also maintained cable service for the apartment, which was billed to the York Avenue address.

Petitioner testified he received his American Express bill at the York Avenue apartment because he "always needed to make sure that [he] got it and had it and it was the one bill that always had to be paid promptly and [he] always had to take care of it as soon as [he] got it" (tr., pp. 211-212). Petitioner testified that his Wilton, Connecticut mailbox was occasionally damaged and his mail was strewn on the ground (tr., pp. 212-214). Petitioner also received mail concerning investments he had made in the 1970's at the York Avenue address (tr., pp. 215-218).

Petitioner testified that he went to the apartment once or twice a week "to make sure the doorman knew [he] was there." He would pick up his mail during those visits (tr., pp. 284-285).

At some point, petitioner opened a bank account with Manufacturers Hanover Trust Company which reflected the York Avenue address (tr., pp. 293-249). The statements were sent to petitioner at the York Avenue address during the relevant period.

Petitioner testified that he rarely went into New York after being in New Jersey. He testified he would do so only if he had an appointment or something to do in the City. "You would occasionally make dinner plans with key buyers and spend time talking to merchandise managers" (tr., pp. 135-136).

In 1983 or 1984, the company hired two additional individuals, Lee Lipton and Lou Berman, to assist petitioner and Mr. Pollack in the "front end" and "back end" of the business, respectively. Mr. Lipton and Mr. Berman were made partners in March 1985. As a result, petitioner's responsibilities changed and he spent less time visiting specific stores and more time engaged in strategic planning with John Pollack in New Jersey. Petitioner continued to spend usually one or two days a week in New Jersey (tr., pp. 124-126).

Petitioner testified that he had been dating a radiologist, Penny Lustij, for about four or five years prior to the audit period. Dr. Lustij was doing her residency at Queens General in Queens, New York. According to petitioner, Dr. Lustij spent weekends with him in Connecticut. It also appears from the record that Dr. Lustij lived with petitioner during part of 1986 (tr., pp. 298-299). Dr. Lustij would drive her own car to Connecticut. Petitioner stated that during 1986 and 1987 their relationship was winding down and finally terminated during this period (tr., pp. 137-138).

Petitioner immediately began dating Laura Black, a buyer for Woodward and Lowthrop, whom he had met in Washington, D.C. Ms. Black had moved to New York and petitioner testified "[w]e became friends and in '86, '87 we were dating and in 1988 she and I got married" (tr., p. 138). Petitioner testified he began taking Ms. Black to Connecticut (tr., pp. 138-139).

In late 1985, petitioner's father prevailed upon petitioner to purchase his father's cooperative apartment located at 14 East 75th Street, New York City ("East 75th Street") from his mother, in whose name title was held. Petitioner, wanting to assist his father with his retirement plans, convinced himself that this would be a good investment in view of what was happening with real estate values at the time, and that if he fixed it up, he could sell it at a substantial profit (tr., pp. 218-226). Petitioner purchased the apartment on January 10, 1986 for \$875,000.00 (tr., pp. 224-225).

The East 75th Street apartment was a duplex which contained approximately 2,500 square feet. It was located on the second floor and had a living room, dining area, kitchen, laundry/maid-type area, two bedrooms and three bathrooms (tr., pp. 277-278).

Petitioner testified that his parents moved everything out of the apartment and disconnected the telephone when they sold the apartment to him. Through 1986, there was no furniture in the apartment, and although it was vacant, it was habitable. Throughout 1986, petitioner paid the maintenance on the apartment. In late 1986, he hired an architect to draw up plans to renovate the apartment. According to petitioner, "the plans took two, three, four months" (tr., p. 227). The renovations began in "February, March of 1987" and were completed at the end of 1987. Petitioner did install a telephone in 1987 for use by the construction crew. During the period of the renovation, the apartment was uninhabitable (tr., pp. 227-231). The renovations cost petitioner in excess of \$300,000.00 (tr., p. 279).

Petitioner testified that neither he nor anyone ever spent a single night during 1986 or 1987 at the East 75th Street apartment. After the property was renovated, petitioner did not try to sell it (tr., pp. 230-231). Petitioner continues to own this property and use it.

Petitioner maintained a bank account with Manufacturers Hanover Trust Company which reflected the East 75th Street address. The bank statements for that account, as well as utility and maintenance charge bills, were all addressed to the East 75th Street apartment (tr., pp. 280-281, 293-294).

Petitioner testified that he received some personal mail at his New York City business address. He explained that he gave people his business card and they would have sent him mail there (tr., pp. 286-287).

Petitioner had a membership in a New York City tennis club in 1986 or 1987; he was unsure of the exact date. He testified that the tennis club was near his office and he was going to use it for social business (tr., p. 292).

In 1986, the sales of the company were over \$10,000,000.00 and it had 800 or 900 accounts (tr., pp. 121, 123).

The company was sold on May 31, 1986 to XCOR International, Inc. ("XCOR") (tr., pp. 127-128). In connection with the sale of the company to XCOR, petitioner received a five-year

employment contract and remained president of the company. His responsibilities became more corporate than entrepreneurial, since the purchaser was a public company based in Florida (tr., pp. 131-132). Subsequent to the sale of the company, petitioner's work week continued about the same -- two or three days in New York, including most Mondays; one or two days a week in New Jersey, usually a Thursday and/or Friday; and the remaining days travelling (tr., pp. 134-136).

Petitioner timely filed New York State nonresident income tax returns (Form IT-203 with attachments) for 1986 and 1987.<sup>8</sup> Petitioner's mailing address was listed as 28 Chicken Street, Wilton, Connecticut. Form NYC-203, New York City Nonresident Earnings Tax Return attached to Form IT-203, set forth the allocation schedule for days spent in and out of New York City. With respect to petitioner's presence in New York in 1986, of 365 days 231 were working days, 176 were days worked in New York City and on 55 days petitioner conducted business outside the City. Form NYC-203 answered in the negative the question, "Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year?"

The 1987 Form IT-203 filed by petitioner reflected the same address and answered the same question in the negative. The 1987 Form NYC-203 reflected 231 working days out of 365 in 1987 and of that number 178 were days where work was performed in New York City.

A field audit was conducted of petitioner's 1986 and 1987 tax returns. An auditor requested petitioner to fill out an "audit questionnaire". Petitioner submitted a written response to the questionnaire, dated October 20, 1989, in which he stated he was an executive, a "principal -- employee", employed full time by Andy Johns Fashions, Inc., 512 Seventh Avenue, New York, New York. He stated that he was physically present in New York State for work purposes 176 days in 1986 and 178 days in 1987. Petitioner did not respond to the question, "How many days or part days were you physically present in New York State on non-working days such as Saturdays, Sundays, vacations or leave with pay, holidays, illness, and

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<sup>8</sup>The original Form IT-203 with attachments for 1986 was submitted during the hearing as the Division's Exhibit "H." The original Form IT-203 with attachments for 1987 was submitted as the Division's Exhibit "I."

other non-working days." He stated he maintained an apartment in New York at 1175 York Avenue, Apt. 817, New York, New York prior to 1986 through the present.

On December 21, 1989, petitioner, by his former representative, executed a consent to extend the statute of limitations for assessment of personal income taxes for tax year 1986 until April 15, 1991. The consent was executed by the Commissioner's representative on December 22, 1989.

In the spring of 1990, while the audit was still underway, petitioner hired a new representative, Mr. Richard Kandel, a certified public accountant (tr., p. 311). During the hearing, Mr. Kandel testified that petitioner gave him the business logs for 1986 and 1987 which petitioner had obtained from the company. He testified that these logs covered Mondays through Fridays. In response to the question, "Do you know who kept those logs?", Mr. Kandel responded as follows:

"Yes. I was told they were -- the secretaries in the office, I would imagine. The office personnel in the New York showroom kept this so there were several that had access to it and had kept it" (tr., p. 317).

Petitioner submitted the original 1986 and 1987 company logs as his Exhibit "70". Each year's log consists of sheets of paper which contain one work week per sheet. Each sheet in the upper left hand corner contains a box entitled "SALESPERSON" and the upper right hand corner "WEEK OF". Each work day, Monday through Friday, is listed horizontally across the page and the time, broken down in half hour increments, starting with 8:30 A.M. and ending with 4:30 P.M., is listed vertically. Each log contains notations for: petitioner's appointments in New York City; sick days; vacation days; days in New Jersey; as well as days spent "shopping the stores" inside New York and outside New York.

The 1986 log submitted into evidence is missing the week ending May 2nd. These five days were conceded as New York days (tr., p. 332).

We modify finding of fact "55" to read as follows:

Mr. Kandel testified that he personally made a day-by-day analysis of the logs and discussed the logs and his analysis with petitioner. Mr. Kandel testified that "[i]n certain cases, there was documentary evidence -- travel receipts -- that corresponded to the days" which he used to validate his analysis. His analysis was put in summary form for each year (tr., pp. 318-320).

Mr. Kandel met with the Division's auditor and gave him copies of the company logs, Mr. Kandel's analysis and his summary. At a subsequent meeting, Mr. Kandel produced some American Express charge slips for the auditor's review (tr., p. 323). After further review, Mr. Kandel and the auditor agreed that three additional days should be shown to be New York days in 1986 and four in 1987, and this was noted in the summary (tr., pp. 324-325).

After making the above adjustment, Mr. Kandel and the auditor agreed that Mr. Kandel's summary was a fair and accurate summary of the appointment logs and other documents they had reviewed as far as business days were concerned. They agreed that in 1986 petitioner was in New York 160 business days and in 1987 was in New York 159 business days (tr., pp. 325-326). In the Division's Exhibit "J", on the first page of the sheet entitled "Continuation Sheet for Income Tax Report of Field/Office Audit", the auditor states:

"On the statutory [sic] residency question, the diaries were analyzed (work paper #23 & 24), 159 days were determined for year 1987 and 160 days for year 1986 as days allocated to NY and agreed to by representative. The above mentioned diaries did not account as to where the taxpayer spent Saturdays, Sundays and holidays. So these days were added to the business days allocated to NY as per the above statement making a total of days in NY for each year of more than 183 days."

The Division's workpapers (Exhibit "J") also include the auditor's case preparation worksheet in which the auditor states on page three that:

"We analyzed his diaries (which are silent about weekends and holidays) and determined 159 working days in 1987 and 160 working days in 1986 in New York. If we include the weekends and other nonworking days, it makes the required minimum of 184 days in each year for making him a statutory resident of NY."<sup>9</sup>

The two-page summaries for 1986 and 1987 prepared by Mr. Kandel were submitted as petitioner's Exhibit "71". For 1986, the total of working days in New York is listed as 160, with 66 working days outside of New York and a total of 139 non-working days (i.e., Saturdays,

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We modified finding of fact "55" by adding the last paragraph in order to fully reflect the record.

Sundays, holidays, vacations and sick days). For 1987, 159 working days were in New York, 66 working days were outside New York and 140 days were non-working days.

At the conclusion of the audit, two statements of personal income tax audit changes, dated December 7, 1990, calculated additional tax, interest and penalties due for tax years 1986 and 1987.<sup>10</sup> The jurisdictions involved were New York State and City. Resident status for both jurisdictions is listed as "resident". On both statements of personal income tax audit changes, penalty under Tax Law § 685(b), deficiency due to negligence, was asserted for New York City.

On December 13, 1990, the Division received \$438,131.59 from petitioner under protest.

The Division issued a Notice of Deficiency (Notice No. L-002367462-8), dated February 15, 1991, for personal income taxes due pursuant to Article 22 of the Tax Law and the New York City Administrative Code for 1986 and 1987. In that notice, petitioner was assessed (1) a deficiency for 1986 State income tax in the amount of \$230,525.42, plus \$76,584.66 in interest; (2) a deficiency for 1986 City income tax in the amount of \$88,411.42, plus a \$19,147.34 penalty and \$29,476.36 in interest; (3) a deficiency for 1987 State income tax in the amount of \$4,772.58, plus \$1,311.99 in interest; and (4) a deficiency for 1987 City income tax in the amount of \$5,794.80, plus a \$1,114.69 penalty and \$1,593.00 in interest.

The computation section of the notice contained the following explanation: "Field audit of your records disclosed additional tax due."

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 111606), dated April 24, 1992, sustaining the statutory notice.

Petitioner timely filed a petition, dated July 15, 1992, alleging that he was not liable for the tax, interest and penalty assessed; that he was not a New York State resident for the years in question; and that the amount assessed, including penalties was incorrect.

The Division filed an answer dated September 23, 1992.

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<sup>10</sup>The statements of personal income tax audit changes for 1986 and 1987 were submitted as the Division's Exhibit "D."

During the hearing, petitioner was asked where he spent his weekends subsequent to his purchase of the home in Wilton, Connecticut. Petitioner testified as follows:

- A. "Subsequent. I'm sorry. Afterwards. I spent all the weekends -- or I would say as many as I could in Wilton, Connecticut. I never wanted to leave there."
- Q. "What did you do there? Did you have a routine?"
- A. "I would usually come home. A lot of times on Fridays, those were days I was in New Jersey and I could get home at a reasonable hour. It was against the commute and there usually wasn't the traffic getting from New Jersey to Wilton.

"Friday night met friends for movies, go out for dinner, sometimes go home and unwind. Saturday morning rolls around and it was usually a good day to get up, have breakfast and do errands. There is a Route 7 where most of the stores are and you would kind of try to knock them off as quick as you could. I would stop at the hardware store on Saturday mornings. I would go to the food emporium. Caldor was in the same shopping center so you could go and do that. I would go to the dry cleaners. I would go get gas for the car. I would stop off at the frame shop where I had become friendly with the couple that owned it and became good friends with them.

"In the afternoon, go for lunch. Take my girlfriend and go back to the house, have lunch there and usually stop off at the movie, the video store that was closer to the house and that was usually the last stop and then go home. That would be Saturday day. Westport Country Playhouse we went to and enjoyed going to see the shows there. We'd go to the movies. If I went to a movie on Friday night, I didn't go on Saturday night. We would make dinner at home. The picture with Laura and me, I think, is a Saturday night. I would make arrangements to see my sister Addie, who is a gourmet cook, with her husband and my nephew. We'd be going over there for dinner. I would meet my parents sometimes.

"We would see friends. There was usually an activity on Saturday night and Sunday was usually a day to unwind, unplug, do the laundry, spend time puttering around the house in the sense of doing some yard work, which I usually did, and basically it felt like a school night or day so you were always ready -- getting yourself ready for the week ahead a little bit.

"Sunday night was sometimes going to the movies, going out for dinner, watching '60 Minutes'. It would be basically getting ready mentally for the next day at work" (tr., pp. 88-91).

Petitioner averred that he usually went to the movie theaters in Westport because they had five movie theaters there. He did not go to the movies in Wilton because there was one screen "and usually they had six or eight weeks of the Walt Disney movies" (tr., p. 91). He stated he sometimes went to the movies in Greenwich if he went to see his parents.

Petitioner testified that he ate out at restaurants quite a bit. When asked where the restaurants were located, he responded that the restaurants for the most part were in Westport, Connecticut. He further stated that he went to a couple in New Canaan and a few in Greenwich (tr., p. 91).

When asked who accompanied him to the restaurants, petitioner responded:

"[W]ith Peter. Would go with just Laura. Would go with Mark Wagy. He's the gentleman, and his wife, that owned the frame shop. And Addie liked to cook so most times we didn't go out. If it was my family, it was a special occasion. If I went with my parents, it was always a restaurant and sometimes Laura and I would just go the two of us" (tr., p. 92).

Petitioner testified that when he ate at restaurants, he usually paid cash (tr., p. 93).

Petitioner described a typical week in 1986 and 1987 as follows:

A. "In 1986 let's start with Monday morning. Most Mondays I would go into New York. It was a good day to call the stores. You could find out -- calling the stores on Monday was almost like getting a report card. You found out how you were doing and became friendly with the stores.

"If you had sold ten percent, you would probably be talking to the stores about them reordering, placing more. You were glad to kind of plug into the stores on Monday. You would get their travel schedule. The buyers were, many times, going over what opportunity to buy they had, dollars they had to spend and you made an effort to speak to the stores so it was usually a good day to be in the City.

"A typical week would be one to two days, three days in New York setting appointments. If I -- the beginning portions of the months sometimes -- the store buyers regularly or always came in. You couldn't -- they all had their own schedules. You'd try to schedule time to shop a store. Two or three days in the City for that and usually saved Friday to probably go to Jersey.

"Most times if I was going to spend a lot of time with John, I would try to do it toward the back end of the week, usually Thursday-Friday. And then weekends I was not around the office."

\* \* \*

Q. "During 1986 and 1987, where did you spend your weekends?"

A. "I was in my home in Connecticut."

Q. "Did you make plans to come into New York on weekends?"

A. "No."

Q. "Why not?"

- A. "I didn't like it. Connecticut was a way I could unplug the tension of what the week was. It was a routine that I enjoyed. I was glad to go play house with my girlfriend and I had made some friends. I had family there. I didn't want to be in New York City."

\* \* \*

- Q. "If you were sick, where were you?"

- A. "If I was very sick, I was home in bed" (tr., pp. 134-136).

Petitioner submitted the affidavit of his sister, Addie R. Powell, as Exhibit "67". In her affidavit, Mrs. Powell stated that she has resided in New Canaan for over 20 years, and she knows that one of the reasons that her brother moved to Wilton was to be near her and her family. She stated that since 1981 her brother has visited with her and her family every four or five weeks. She usually cooked because her brother likes her cooking and it was convenient. She further stated that "we celebrate virtually every Thanksgiving and Christmas and other special occasions at our home, and our parents are usually in attendance." Mrs. Powell spoke to her brother by telephone at least once every other week, when she called him in Connecticut, or he called her from his Connecticut home. She affirmed that she never tried to reach her brother in New York on weekends, as she knows he is never there. "He is always in Connecticut, or else travelling somewhere in the United States or abroad."

Petitioner's Exhibit "68" is the affidavit of Mark Wagy, a friend of petitioner. Mr. Wagy states:

"2. I met Andy in 1982 when I owned and ran a framing shop named 'Gateway Gallery', located on Danbury Road, in Wilton, Connecticut. Andy and I became and remained close friends until 1990 when I moved away.

"3. During this period, I would estimate that I saw Andy at least every other weekend. Initially, I saw him in connection with visits he made to my Gallery to purchase frames or have items framed. Later, in addition to such visits, we began to eat out together or at his home and we frequented the local movie theatres and rented and watched movies at his home on his large screen television.

"4. Whenever I called Andy in Connecticut on the weekend, I could always reach him, because he was virtually always there."

Petitioner submitted the affidavit of Dr. James J. McSweeney, his next door neighbor, as his Exhibit "69". Dr. McSweeney stated that he resided at 26 Chicken Street, Wilton,

Connecticut and had shared a common driveway with petitioner. He stated that his home was situated slightly above petitioner's. He was, therefore, in a position to see both petitioner's home and garage and to generally know when petitioner was around. He also stated that his dogs consistently barked as petitioner drove and/or walked in and out of his driveway.

Although Dr. McSweeney was away from his home sometimes on weekends, he affirmed that, to the best of his recollection, petitioner was present at his Connecticut home almost every weekend (Friday night through Monday morning) during 1986 and 1987 and also during the entire period he was his neighbor. He stated that petitioner was friendly with him and his wife, they chatted when they met and socialized on occasions, and he knew that petitioner "always considered himself a Connecticut resident and spent as much time in Connecticut as he could."

During the hearing, Mr. Kandel testified that the auditor needed verification of petitioner's whereabouts on weekends and holidays. He testified that the auditor suggested telephone bills to prove presence in Connecticut on a particular day.

Mr. Kandel stated that petitioner saved only the face sheets of his telephone bills, which showed the amount due and had notations of the date paid and check number only; and he threw the rest away. He averred that an attempt was made to get the backup documents from the telephone company. However, the telephone company informed them that records were not saved going back that far and it could not produce any detail of the records. Mr. Kandel testified that he informed the auditors of this, but also stated to them that he would try to produce receipts for other things that petitioner had done in Connecticut and prepare a log, accounting for days "with the receipts of some activity in Connecticut" (tr., pp. 327-329).

Mr. Kandel testified that petitioner was able to furnish him with receipts for weekend activities. He testified that after obtaining the receipts, he "organized them in a fashion where somebody could easily review them and make the determinations that I represented" (tr., pp. 329-330). Mr. Kandel testified that he prepared two manila folders: the first is labeled "1986 - Diary, weekend receipts"; and the second is labeled "1987 - Diary, weekend receipts". These

two folders contain receipts and sheets of paper with analysis of the receipts. Mr. Kandel described the general nature of the receipts as follows:

"Well, we have a combination of the main receipts that I have here are -- I've got home repair bills, gasoline receipts. I've got movie rental receipts. I've got exterminator visits where the exterminator came over during the weekend once a month. I have a few restaurant receipts. I have some of the trips that he made when it overlapped on the weekend. I've got store receipts.

\* \* \*

"I have a letter from the exterminator which outlines his dates of visits in '86, '87 which were either a Saturday or a Sunday" (tr., pp. 330-331).

Mr. Kandel testified that the receipts covered almost every weekend day during the audit period.

We modify finding of fact "72" to read as follows:

The two manila folders of weekend receipts for 1986 and 1987 were submitted in evidence as petitioner's Exhibit "72".

Petitioner's Exhibit "72" includes, inter alia, receipts for: gasoline purchases; meals at restaurants; hotel bills; airplane tickets; and the purchase of services or repairs. The majority of the gasoline receipts are cash receipts and as such do not identify who made the purchase. However, one gasoline receipt, dated March 1, 1986, from Exxon, 1 West Putnam Avenue, Greenwich, Connecticut, was a charge slip. The purchaser of the gasoline on that date was Crazy Horse, Inc.<sup>11</sup> The restaurant receipts submitted are all cash receipts. There are a few receipts for services and repairs with petitioner's name on them. Some receipts for purchases are cash receipts and do not identify who made the purchase. There are a number of airline ticket receipts; however, some are torn and difficult to read. A number of hotel receipts were submitted. One receipt, for an overnight stay in Boston at The Copley Plaza on September 20, 1986 through September 21, 1986, is in the name of D. S. Reed, UV of Alabama, 303 Bethune Way, Huntsville, Alabama.

Petitioner also introduced an American Express receipt indicating payment of a "Club Med" bill. The charge was made on April 26, 1986. Hotel and car rental receipts were also introduced for the week of July 4th which indicated petitioner was in San Francisco, California. One of the airline receipts indicated an arrival in London on the April 21, 1987 and a departure from Milan, Italy on April 29, 1987. Petitioner also introduced into evidence a hotel receipt for a stay in

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Petitioner testified that his father worked at Crazy Horse, Inc. (tr., p. 265).

the U.S. Virgin Islands from November 24 to November 29, 1987.<sup>12</sup>

Petitioner submitted 67 proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into the Findings of Fact herein except: numbers 13, 16, 17, 24, 40, 44, 45, 46 and 47, which are not supported by the record; numbers 11, 14 and 39, which were modified to more accurately reflect the record; numbers 18, 19, 25, 26, 27, 29, 30, 34, 37, 41, 42, 58, 62, 66 and 67, which are conclusory in nature; and numbers 51, 52, 53 and 59, which are irrelevant.

We make the following additional findings of fact.

Mr. Peter Mazza testified as to his weekend activities with petitioner:

"Q. Apart from the commuting, did you see Mr. Reid on weekends?

"A. Almost every weekend we had certain discussions. We also shared in common the movies. We liked movies. We met at the movie. It was things we both liked to do. We could go to movies and dinner at least every other weekend I would say.

"Q. And where were movies located?

"A. Usually Westport, Connecticut. Westport has, I believe, four movie theaters and there is always something interesting to see. We would go to the movies and go to dinner or go to dinner first and go to the movies.

\* \* \*

"Q. Did Mr. Reid spend any holidays with you or see you on the holidays?

"A. Yes. We have seen Andy and is [sic] wife on virtually every Thanksgiving since we have known them. They come for the Christmas holidays. They were always bringing presents for my children. We see them almost every major holiday or stop by and have dinner or stop by on the way to his sister.

\* \* \*

"Q. Did you ever call Mr. Reid anywhere other than Connecticut on weekends?

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We modified finding of fact "72" by inserting the last paragraph in order to reflect additional details in the record.

"A. No" (Tr., pp. 251-254).

On cross examination, Mr. Mazza further testified that:

"Q. You said that you liked to go to shows with Andy and is [sic] wife or to movies?

"A. That's correct.

"Q. Did you ever go to shows or movies in New York --

"A. No.

"Q. -- with Mr. Reid or his wife?

"A. No.

"Q. Did you ever go out, go to New York for dinners with he and is [sic] wife?

"A. No. We're Connecticut people.

"Q. So you never socialized with him in New York?

"A. No" (Tr., p. 259).

We also make the following additional finding of fact.

When questioned whether he travelled to his offices on the weekend, petitioner testified as follows:

"Q. Did you ever go to your office in New Jersey on weekends?

"A. No. After our third year in business or -- I would say third year in business, John and I stopped working weekends. We did the first two years. We worked seven days in '75, '76, and '77. After that, we worked as hard as we could but we each wanted the weekends. He had a family with two kids and we didn't go -- I didn't go to New Jersey on weekends.

"Q. Did you ever go to the New York showroom during the weekends?

"A. No. There was no reason to" (Tr., pp. 93-94).

Petitioner on exception requests an additional 13 findings of fact. Requested finding of fact "10" has been adopted in part. The remaining findings of fact have been rejected as either redundant or irrelevant.

***OPINION***

The Administrative Law Judge held that petitioner established that he changed his domicile before the years at issue. The Administrative Law Judge concluded that petitioner's retention of two apartments in New York City and his business interests in New York were outweighed by petitioner's credible testimony with respect to his "general habit of life" before 1986. The Administrative Law Judge found petitioner's documentary evidence (e.g., savings account and mortgage with Connecticut bank, use of Connecticut address on company documents and new investments) supported petitioner's credible testimony. The Administrative Law Judge further relied on the credible testimony of petitioner's witness, Peter Mazza, to support petitioner's assertion that he commuted from his home in Connecticut in lieu of staying in his New York apartment.

The Administrative Law Judge further concluded that petitioner failed to meet his burden to establish he was not a statutory resident during the period at issue. The Administrative Law Judge accorded little weight to petitioner's business logs, noting that petitioner offered no testimony about the accuracy of the logs. The Administrative Law Judge also rejected petitioner's reliance on receipts purportedly establishing that petitioner was in Connecticut on weekends during the period at issue.

The Administrative Law Judge also held that petitioner's reliance on the advice of his tax advisor did not establish reasonable cause for the waiver of any penalties.

On exception, petitioner asserts that the Administrative Law Judge erred in not concluding that the agreement reached by petitioner's representative and the Division's auditor regarding the number of "workdays" petitioner spent in New York was binding. Petitioner further argues that the Administrative Law Judge failed to consider petitioner's credible testimony with respect to his "general habit of life" to establish that petitioner spent his weekends and holidays in Connecticut and did not venture into New York.

The Division on exception argues that the Administrative Law Judge properly considered the business logs submitted by petitioner. The Division points out that petitioner failed to

testify as to the accuracy of the business logs. The Division further notes that the logs were qualified and introduced during the testimony of a witness who did not meet petitioner until after the audit period and was not aware who prepared the logs. The Division asserts that petitioner incorrectly relies on the agreement between petitioner's representative and the auditor with respect to days worked in New York. The Division argues that there is nothing in the record to indicate an agreement between the parties. The Division further asserts that petitioner was aware that residency would be an issue at the hearing. The Division also points out that the Administrative Law Judge had no specific knowledge of the facts in the case and that the only evidence upon which she could base her decision was that produced at hearing.

As a final point, the Division, relying on our decision in Matter of Veeder (Tax Appeals Tribunal, January 20, 1994), argues that petitioner incorrectly relied on audit guidelines that were not in effect during the period at issue.

In his reply brief, petitioner asserts that the apartment at 1175 York Avenue was not maintained as a permanent place of abode but rather as an item of investment; therefore, petitioner cannot be a statutory resident. Petitioner reasserts that the agreement between petitioner's representative and the auditor related to business days in New York and that said days are no longer at issue. Relying on Matter of Avildsen (Tax Appeals Tribunal, May 19, 1994), petitioner argues that "uncontradicted testimony in and of itself, without corroborating documentary evidence, may be sufficient to carry taxpayer's burden of proving his days in and out of New York" (Petitioner's reply brief, p. 8). Petitioner points out that not only was petitioner's testimony found to be credible, but the testimony of Mr. Mazza as well. Petitioner argues that this testimony, coupled with petitioner's receipts documenting his location on weekends, is sufficient to meet petitioner's burden of proof.

We reverse the determination of the Administrative Law Judge.

Tax Law § 605 (former [a]) provides in part, that a resident is one:

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . . ."

Former section T46-105.(0)(a) of the Administrative Code of the City of New York essentially mirrors the State's definition of resident individual save for the insertion of "city" where "state" appears.

We must first determine if petitioner timely raised the issue of whether he maintained a permanent place of abode in New York.

This Tribunal has held that while new legal issues may be raised on exception (see, Matter of Chuckrow, Tax Appeals Tribunal, July 1, 1993; Matter of Standard Mfg. Co., Tax Appeals Tribunal, July 11, 1991), new factual issues may not (Matter of Howard Enterprises, Tax Appeals Tribunal, August 4, 1994). In this matter, whether petitioner maintained a permanent place of abode is an issue of fact. The reason for the distinction between factual issues and legal issues is generally that the introduction of factual issues after the record is closed deprives the party with the burden to prove the disputed fact of the opportunity to submit evidence, thereby prejudicing that party (see, Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992). In the matter before us, however, the party raising the issue late is petitioner.

Petitioner asserts for the first time on exception that he did not maintain a permanent place of abode in New York. We note that to establish change of domicile it was incumbent on petitioner to introduce all relevant evidence in his possession with respect to the York Avenue and East 75th Street apartments. While the Division had a chance to address the evidence submitted as it related to the issue of domicile, the Division did not have the opportunity to do so with respect to the issue of whether the apartments were maintained as a permanent place of abode. Despite the close relation of the two issues, we find it would be patently unfair for us to address the merits of petitioner's argument when the Division did not have a chance to challenge petitioner's claim at hearing.

We next address whether petitioner spent less than 184 days in the City and State of New York.

On audit, petitioner's representative and the auditor agreed as to the number of workdays petitioner spent in New York. The auditor referred to his conclusion in the Division's workpapers on page three of the auditor's case preparation worksheet:

"[w]e analyzed his diaries (which are silent about the weekends and holidays) and determined 159 working days in 1987 and 160 working days in 1986 in NY. If we include the weekends and other nonworking days, it makes the required minimum of 184 days in each year for making him a statutory resident of NY" (Division's exhibit "J").

The Administrative Law Judge found the agreement between the parties as a fact, nevertheless she rejected the agreement because of a lack of sufficiency, i.e., that the logs were not detailed to the satisfaction of the Administrative Law Judge and that no witness for petitioner testified as to the accuracy of the logs.<sup>13</sup>

We find the Administrative Law Judge erred in rejecting the agreement between the auditor and petitioner's representative. The auditor's conclusions with respect to petitioner's status as a statutory resident are the basis for the Division's issuance of the notice of deficiency in this matter (Tax Law § 681[a]). These conclusions are part of the record and, therefore, provide the starting point for the Administrative Law Judge's determination. Allowing the Administrative Law Judge to reject the auditor's conclusions would inject an element of uncertainty into petitioner's challenge to the statutory notice. Our position is consistent with how courts and this Tribunal have addressed stipulations between a taxpayer and the taxing authority (see, Matter of Ianniello, Tax Appeals Tribunal, November 25, 1992, affd Matter of Ianniello v. New York Tax Appeals Tribunal, 209 AD2d 740, 617 NYS2d 973 [Tribunal found no basis for Administrative Law Judge to delete paragraphs of stipulation from findings of fact where Administrative Law Judge did so because statements contained therein were unsworn, unsigned and constituted mere speculation]; c.f., Jasionowski v. Commissioner 66 T.C. 312

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<sup>13</sup>Petitioner points out in his brief on exception that no such testimony was offered because of the conclusion reached by the auditor with respect to workdays. Further, the Division at hearing did not challenge the contents of the logs relied on by the auditor and, therefore, petitioner considered such testimony unnecessary.

[Tax Court rejected stipulation entered into between the parties because facts adduced at trial were clearly contradictory]). While it is not our position that an auditor's conclusions should be subject to the same standard of deference as a stipulation pursuant to 20 NYCRR 3000.7(e), it is our holding that there must be some showing that the basis for the conclusion (e.g., the audit log in this matter) does not support the result reached by the auditor. As a result, we give full effect to the auditor's conclusions with respect to petitioner's workdays in New York for 1986 and 1987, respectively.

Turning to the matter of petitioner's location on nonworking days, we note that for 1986 and 1987, the auditor included 104 Saturdays and Sundays and 30 holiday/vacation days as New York days. With respect to these days, we find the Administrative Law Judge erred in focusing on 20 NYCRR former 102.2(c) in determining what was required to meet a taxpayer's burden at a Division of Tax Appeals hearing. 20 NYCRR former 102.2(c) provides, in part, that a taxpayer was under the obligation to maintain "adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State." We have previously held that 20 NYCRR former 102.2(c) is a record keeping provision that does not govern the production of evidence at a Division of Tax Appeals hearing and that specific, credible testimony may be sufficient to meet petitioner's burden of proof (see, Matter of Armel, Tax Appeals Tribunal, August 17, 1995; Matter of Avildsen, supra). Therefore, we find the Administrative Law Judge erred by not considering petitioner's credible testimony nor the testimony of Mr. Mazza, who the Administrative Law Judge found to be a very credible witness.

The Administrative Law Judge found that petitioner's testimony as to his "general habit of life" before 1986 supported the conclusion that petitioner changed his domicile. We find no basis to conclude that petitioner's testimony is not equally relevant and probative for the period 1986 and 1987. We so conclude given that petitioner's testimony as to his "general habit of life" was not limited to the period before 1986, but rather encompassed all the years spent in his Chicken Street home. Petitioner testified extensively as to his weekend routine after moving to

Connecticut in 1981 and specifically as to where he spent his weekends during 1986 and 1987. This testimony was the same for the entire period after petitioner moved to Connecticut in 1981.<sup>14</sup>

We find petitioner's testimony regarding his weekend routine to account for the Saturdays and Sundays the auditor included as New York days in 1986 and 1987. Petitioner credibly testified that his weekend activities centered around Connecticut and that he did not travel to New York on Saturdays and Sundays. Petitioner further testified that after the first three years of his involvement with Andy-Johns (i.e., 1975-77) he never worked on weekends. As a result, he never went to his office in New Jersey, nor was there any reason to go to the New York showroom on weekends. Petitioner's testimony as to his weekend routine was corroborated by Mr. Mazza, who testified that when he and petitioner were together on the weekends, their plans never included spending time in New York. We find petitioner's testimony, supported by Mr. Mazza's testimony, is sufficient with respect to his location on weekends to meet his burden of proof (see, Matter of Moss, Tax Appeals Tribunal, November 25, 1992 [fact that petitioner did not present contemporaneous diary entries did not defeat petitioner's position given credible general testimony regarding location on weekends and holidays]).

We next turn to the issue of petitioner's location on holidays, vacation days and sick days. With regard to holidays and vacation days in 1986, the auditor attributed 30 such days as New York days. For the week of April 21st, petitioner's business log lists him as being on vacation. We find the notations in the log are corroborated by an American Express receipt during that week for Club Med. The business log also lists petitioner on vacation in San Francisco for the week of July 4th. The record contains a hotel bill and receipt for a car rental for this week in San Francisco.

The business log also notes five sick days for petitioner in 1986. Five days were listed as sick days by the auditor as well, but were apparently included as New York days along with the

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<sup>14</sup>It is our impression that the Administrative Law Judge was not aware of our decision in Matter of Avildsen (supra). Without being cognizant of our conclusion that a taxpayer's burden could be met with credible testimony alone, it would appear the Administrative Law Judge considered it unnecessary to address petitioner's testimony for the years 1986 and 1987.

other 130 nonworking days. Petitioner at hearing testified that he spent sick days at home. While the Administrative Law Judge did not specifically address petitioner's testimony regarding sick days, we find petitioner's testimony that he was not in New York, but at home in bed in Connecticut, to be logical and sufficient to account for said days.

The elimination of the sick days, as well as the weeks of April 21st and July 4th and Saturdays and Sundays, removes petitioner from liability as a statutory resident.

For 1987, petitioner introduced into evidence an airline receipt indicating arrival in London, England on April 21st and departure from Milan, Italy on April 29th. This receipt corroborates the business log entries for this week which list petitioner as on vacation. The business logs also list petitioner as on vacation for November 24th through 29th. The record contains for these dates a receipt for hotel accommodations in the U.S. Virgin Islands.

These two weeks taken in conjunction with Saturdays and Sundays, as well as five sick days for 1987, result in disqualifying petitioner as a statutory resident for 1987.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Andrew M. Reid is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Andrew M. Reid is granted; and
4. The Notice of Deficiency dated February 15, 1991 is cancelled.

DATED: Troy, New York  
October 5, 1995

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

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