

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRANK DELFINO AND GERALDINE DELFINO	:	DECISION
	:	DTA No. 811012

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law and :
the New York City Administrative Code for the Years 1986
and 1987.

Petitioners Frank Delfino and Geraldine Delfino, Box 916 Sunny Branch Road, Far Hills, New Jersey 07931, filed an exception to the determination of the Administrative Law Judge issued on February 24, 1994. Petitioners appeared by Courter, Kobert, Laufer, Purcell & Cohen (Donald A. Richards, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donna Gardiner, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in response. Petitioners also filed a reply brief which was received on September 1, 1994, which date 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 domiciled in New York City in 1986 or 1987.
- II. Whether, if petitioners were not domiciled in New York City for all or part of 1986 or 1987, they maintained a permanent place of abode there after June or July 1987.
- III. Whether, if petitioners maintained a permanent place of abode in New York City, they have established that they spent less than 183 days per year in New York City and New York State in 1986 or 1987.

IV. Whether, if it is found that petitioner Frank Delfino changed his statutory residence in 1987, he is required to allocate his 1987 distributive share of partnership gain to New York.

V. Whether petitioners have established that any failure to comply with the Tax Law was not due to negligence and was due to reasonable cause.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "6" and "7" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioners, Geraldine Delfino and Frank Delfino, were married in 1964. They purchased a home at 346 Ardsley Street, Staten Island, New York, in the early 1970's and lived there with their three children. Mrs. Delfino's mother and father and a close friend, Susan Perosi, lived close by.

We modify the Administrative Law Judge's finding of fact "2" to read as follows:

During the years relevant to this proceeding, 1985 through 1987, Frank Delfino was the executive vice-president and an employee of Carver Development Corporation which had its offices at 2 Gannett Drive, White Plains, New York ("Carver"). Carver was a real estate developer. In 1985 it was engaged in the development of four office buildings in Parsippany, New Jersey collectively called Gatehall Corporate Center Project. Frank Delfino was also a limited partner in three partnerships which owned equity interests in the development of Gatehall Centers II, III and IV: Gatehall Corporate Center II Associates, Gatehall Corporate Center III Associates and Gatehall IV Realty Associates. Petitioners submitted in evidence Federal schedules K-1 filed by each partnership on Mr. Delfino's behalf for the years 1986 and 1987. The address of each partnership as shown on the K-1's is 2 Gannett Drive, White Plains, New York. Each Federal Schedule K-1 lists Frank Delfino's address as being located in New Jersey.¹

Geraldine Delfino was a stockbroker for Shearson-Lehman Brothers, Inc., a position she held for 15 years, beginning in about 1976. Her office was located at the World Trade Center in Manhattan.

¹ We modified finding of fact "2" by adding the last sentence to reflect additional details in the record.

Early in 1985 petitioners decided to move closer to the Gatehall Projects in New Jersey to reduce Mr. Delfino's commuting time to the construction sites (approximately one hour) and to escape the confines of the city. They purchased property in Far Hills, New Jersey in June 1985. Far Hills is approximately 20 minutes south of Parsippany and 45 miles northwest of Staten Island. At the time of purchase, there was an existing dwelling on the property, but it was small and unsuited to petitioners' needs. Petitioners intended to either redesign and add to the existing structure or to build a new house on the property. In either case, they did not plan an immediate move to Far Hills at the time the property was purchased. Consequently, they agreed to lease the house to the sellers, Collier and Joan Baird, and entered into a lease agreement with them for the period June 28, 1985 through December 31, 1985.

By January 1986, petitioners were still not prepared to begin construction on the Far Hills, New Jersey property. On January 20, 1986 they executed a lease for the rental of that house to Carmen Franco and Joyce Franco for a term of 11 months beginning March 15, 1986 and ending February 15, 1987. The lease contains the following statement: "Payment to be made directly to: Mr. Frank Delfino, 346 Ardsley St., Staten Island, New York 10306."

We modify the Administrative Law Judge's finding of fact "6" to read as follows:

Development of the building called Gatehall Corporate Center II ("Gatehall II") began in January 1985 when a build-to-suit lease with Chem Network Processing Services, Inc. ("Chem Network") was executed. Petitioners submitted into evidence a document entitled "CLOSING MEMORANDUM" which is a copy of the lease agreement between Michael S. Carver and Carver Development Corporation II of Northern NJ and Chemical Bank and Chem Network. The Closing Memorandum identifies the landlord of the property as "Gatehall Corporate Center II Associates, a New Jersey limited partnership" and the developer of the project as Carver Development Corporation II of Northern NJ. Mr. Delfino is identified as executive vice-president of the developer corporation. Gatehall Corporate Center II is also listed as a New Jersey partnership in the option to purchase and the deed to Chem Network Processing. Federal schedules K-1 filed by Gatehall Corporate Center II Associates show a New York address for that partnership.

We modify the Administrative Law Judge's finding of fact "7" to read as follows:

The agreement between Chem Network and Carver called for significant concessions amounting to two days of rent abatement for each day the construction completion date was delayed beyond February 28, 1986.

By January 1986, Gatehall II was substantially complete, but the developers were still several months from satisfying all of the terms of the agreement with Chem Network. Since Frank Delfino had general supervisory responsibilities for Carver's construction projects, he and his partners decided that it would be necessary for him to be present at the construction site as much as possible. Rather than commute from Staten Island, Mr. Delfino decided to make arrangements to live close to the construction site.

An employee of the construction company actually building Gatehall II, Robert Mariani, offered to let Mr. Delfino use a spare bedroom in his house. Mr. Mariani was single at the time and owned a three-bedroom, single-family home located at 3 Roy Street, Dover, New Jersey. Dover is very close to the site of the Gatehall projects. In March 1986, Mr. Delfino moved a foldaway bed, items of clothing and a portable television to the Roy Street house where he began staying three to four nights per week. He had no formal arrangement with Mr. Mariani to either share expenses or pay rent, although he did contribute to maintenance expenses on an informal, occasional basis as he saw fit. Mr. Delfino spent three to four nights per week at the Roy Street house in 1986.

Construction of Gatehall II was completed in about June 1986. Construction on Gatehall Corporate Center IV began in or about May 1986. Frank Delfino had general supervisory responsibilities for construction of this building as well as Gatehall II and was often required to be present at the construction site. He continued living in Mr. Mariani's house throughout 1986 to be close to the construction project.

Mrs. Delfino's mother, who lived close to her daughter, was diagnosed with cancer in 1986. Mrs. Delfino was very involved in her mother's care and determined to remain in Staten Island to attend to her mother as long as necessary. Petitioners' youngest child was still attending high school and living at home with her mother throughout 1986. It is not clear from

the record whether the two older children were living at home or not, although it would appear that each lived at home for at least a part of 1986 and 1987. Their oldest daughter, Diane, attended St. John's University and graduated in 1987. Their son John began attendance at St. John's in the fall of 1987 but left before completing his degree.

In June 1986, Mr. and Mrs. Delfino began efforts to sell the Ardsley Street house on Staten Island. The house was listed with a real estate broker in July 1986, and advertisements for its sale were published in the Staten Island Advance.

In December 1986, Mr. Delfino opened a joint checking account with his wife at the Parsippany, New Jersey branch office of United Jersey Banks. An initial deposit of \$2,000.00 was made to their account on December 30, 1986. The address imprinted on the checks was Far Hills, New Jersey (no street address or post office box), but the bank statements were sent to the couple's Staten Island address. Petitioners explained that this arrangement was made because Mrs. Delfino maintained their personal checking accounts and other personal financial documents. They did not explain why they put a Far Hills address on the checks when neither of them lived in Far Hills.

Frank Delfino and Geraldine Delfino entered into a lease agreement with Mr. Mariani on December 29, 1986 for lease of the 3 Roy Street house at a rent of \$600.00 per month. In the lease agreement, Mr. Mariani is identified as the landlord, and his address is shown as 26 Long Acres, Fairfield, New Jersey 07006. The tenants are identified as Frank and Geri Delfino. The rented property is shown as 3 Roy Street, Dover, New Jersey. The term of the lease was January 1, 1987 to January 1, 1988. Under the category, "Additional agreements" is the statement: "Tenant to take care of lawn maintenance and snow removal at walkway and steps." Both Frank and Geraldine Delfino signed the lease as tenants. The address listed for Mr. Mariani on the lease is a rental property which he owned.

The terms of the lease notwithstanding, Mr. Mariani continued to reside at the 3 Roy Street address during the lease period, although he testified that he spent much of his time with

his fiance at her home. Mrs. Delfino continued to reside in Staten Island. Mr. Delfino occupied one bedroom in the Roy Street house and shared the rest of the house with Mr. Mariani. Mr. Delfino had use of Mr. Mariani's telephone during the time he lived in the Roy Street house. However, in or about February 1987, Mr. Delfino had his own separate phone service installed in his bedroom. He stated that this was done because his wife was concerned that he wouldn't hear the phone ring in the kitchen. Mr. Mariani continued to maintain phone service under his own name. Mr. Delfino sent and received mail from the Roy Street address and had occasional visitors. Mr. Delfino paid rent to Mr. Mariani by check drawn from the United Jersey Banks account.

Mr. Delfino admitted to returning to Staten Island on occasion during 1987, although he claimed that he spent no more than 10 to 15 days in New York in 1987. He stated that he returned only for holidays, birthdays and the like, and would occasionally spend a weekend there.

In February 1987, Carmen and Joyce Franco vacated the Far Hills house. By that time, petitioners had decided to build their "dream house" on the property rather than add to the existing structure. The old house was demolished shortly after the Francos vacated, and work then began on the new house. Mr. Delfino acted as his own general contractor on the new house.

By June 1987, the Far Hills, New Jersey house was substantially complete and Mr. Delfino moved in. He moved his personal belongings from the Roy Street house with the help of Mr. Mariani. He applied for and received a post office box in Far Hills on June 12, 1987. Petitioners received a certificate of occupancy for the Far Hills house on or about August 5, 1987. On July 1, 1987, Mr. Delfino and his wife opened a joint bank account at the Bedminster, New Jersey branch of the Somerset Trust Company.

Geraldine Delfino began making plans to transfer out of Shearson-Lehman's Manhattan offices late in 1985. At that time, she asked to be reassigned to a position as a regular retail

broker in one of their branch offices. She received training and was transferred to a branch office in Brooklyn. In either May or July 1987, she requested a transfer to a New Jersey branch office and received the transfer in September 1987. Mrs. Delfino moved from Staten Island to Far Hills, New Jersey on or about July 17, 1987. Furniture and personal belongings were moved by members of the Delfino family and friends. A professional moving service was not employed at this time. Mrs. Delfino stated that there was not much heavy furniture to move. Petitioner's daughter, Nancy, registered for school in New Jersey in June 1987 and attended Bernard's High School in Bernardsville, New Jersey during the 1987 to 1988 school year.

Petitioners submitted in evidence a letter dated January 28, 1992 from Bonnie Pinto of Zodiac Realty to petitioners. It states:

"According to our records, your house at 346 Ardsley Street was listed with us in June 1986 through June 1987.

"The house was shown on numerous occasions in 1986.

"In 1987 the house was shown on 2/14, 2/28, 4/7, 4/26, 5/12, 5/30, 5/31, 6/6, 6/14, 6/20, 6/27, 6/28 and on several other occasions in 1987.

"Our records also indicate that on June 14, 1987 the house was empty and special appointments had to be made in order to show the premises."

Petitioners placed an advertisement for the sale of the Ardsley Street house in the Staten Island Advance in November 1987. A check in payment of that advertisement was drawn from petitioners' account at the Bedminster, New Jersey branch of the Somerset Trust Company. The check is dated November 11, 1987.

Frank Delfino surrendered his New York driver's license to New Jersey on October 21, 1987.

Petitioners filed joint New Jersey resident income tax returns and Federal returns for 1986 and 1987. Their address on all of these returns is shown as Box 916 Sunnybranch Road, Far Hills, New Jersey. They reported New Jersey taxable income for 1986 of \$787,646.00 (including wages, salaries and tips of \$109,018.00), with a tax due on that amount of \$26,458.00. They reported New Jersey taxable income for 1987 of \$1,885,941.00, with a tax

due on that amount of \$65,485.00. There are no dates on the file copies of the New Jersey returns placed in evidence to indicate when they were prepared and whether they were filed on a timely basis. The returns were prepared by petitioners' accountant, Michael J. Barrett.

Petitioners filed timely 1986 and 1987 New York State and City nonresident personal income tax returns. The 1986 return was filed under the status filing separately on one return. The 1987 return was filed jointly. Both returns show petitioners' mailing address as Box 916, Sunnybranch Road, Far Hills, New Jersey. The 1986 return was filed on September 15, 1987 and the 1987 return was filed on October 15, 1988. The returns were prepared and signed by their accountant, Michael J. Barrett.

Attached to the 1986 New York return were three wage and tax statements ("W-2 forms"). The first W-2 form was issued to Geraldine Delfino by Shearson-Lehman Brothers, Inc. and shows New York State and New York City wages in the amount of \$18,946.74. The second W-2 form was also issued to Geraldine Delfino by Shearson-Lehman and shows additional social security wages of \$488.90. Mrs. Delfino's address is shown on both returns as 346 Ardsley Street, Staten Island. The third W-2 form was issued to Frank Delfino by Parkcliff Realty Management Ltd., 2 Gannett Drive, White Plains, New York (apparently a Carver affiliate) and shows wages of \$89,581.82. His address is shown as 346 Ardsley Street, Staten Island. All of Mrs. Delfino's wage income was reported as New York source income, but none of Mr. Delfino's wage income was included in the calculation of his New York source income. Total New York income for each was calculated on the return as follows:

	<u>Federal Amount</u>	<u>New York State Amounts</u>	
		<u>Geri</u>	<u>Frank</u>
Wages, salaries, tips, etc.	\$109,018.00	\$ 19,436.00	-
Interest income	4,290.00	-	-
Dividends	2,235.00	-	-
Taxable refunds of State and local taxes	1,245.00	1,245.00	-
Business income	25,050.00	-	-
Capital gain (loss)	263,100.00	75,021.00	75,022.00
Rents and royalties	(47,895.00)	(1,167.00)	(1,167.00)
Partnerships, estates, etc.	(365,161.00)	(182,581.00)	(182,580.00)

Total	(8,118.00)	(88,046.00)	(108,725.00)
Federal adjustments	5,747.00	2,000.00	
Total income	(13,865.00)	(90,046.00)	(108,725.00)
New York Subtractions			
Refunds of State and local taxes	1,245.00	1,245.00	
Total New York income	(15,110.00)	(91,291.00)	(108,725.00)

On their Federal Schedule D for 1986 (attached to their 1986 New York nonresident return), petitioners reported a net long-term capital gain from the sale of stock of \$732.00; a gain from the sale of a summer house in Pennsylvania of \$17,632.00; a gain from the sale of investment property located at 352 Ardsley Street, Staten Island, New York of \$150,043.00; a net long-term capital gain from partnerships and S corporations of \$483,608.00; and a loss of \$562.00. This yielded a net long-term capital gain of \$651,453.00. Of this amount, petitioners reported only the gain attributable to the sale of the Staten Island property on their New York return, divided between them, \$75,021.00 to Geri Delfino and \$75,022.00 to Frank Delfino. The Federal amount reported on line 7 of the New York return (\$263,100.00) represents 40% of the net long-term capital gain as shown on Schedule D. Line 8 of the New York nonresident return which requires the taxpayer to report "40% of capital gain distributions not reported on line 7" was left blank on petitioners' return.

Included with the 1986 return was a Nonresident Earnings Tax Return for the City of New York, prepared by Michael J. Barrett and signed by Geraldine Delfino. Mrs. Delfino responded "no" to 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 1986 tax return was signed by Frank Delfino and Geri Delfino.

Attached to petitioners' 1987 New York return were two W-2 forms. One W-2 form, issued to Geri Delfino by Shearson-Lehman, shows New York State and New York City wages of \$29,342.28. Of this amount, \$22,008.00, or approximately 75%, was allocated to New York State on the basis that Mrs. Delfino worked in New York City for nine months of the year. Again, the Nonresident Earnings Tax Return filed by Mrs. Delfino indicated that neither she nor

her spouse maintained living quarters in New York for any part of 1987. The form was signed by Frank Delfino and Michael J. Barrett.

The second W-2 form, issued to Frank Delfino by Parkcliff Realty Management Ltd., 2 Gannett Drive, White Plains, New York, shows wages, tips and other compensation of \$17,538.48, but no New York State or City wages. Mr. Delfino did not report this compensation as New York source income. The address shown on the W-2 forms for both Mr. and Mrs. Delfino is 3 Roy Street, Dover, New Jersey.

Petitioners attached a Federal form 4797 (Gains and Losses from Sales of Assets Used in a Trade or Business and Involuntary Conversions) to the 1987 New York return. That form shows a sale of "2 Gatehall", acquired in 1985 and sold in 1987 at a gross sales price of \$2,322,488.00. The cost basis of the property is reported as \$621,835.00, for a total gain of \$1,700,653.00. Petitioners also reported a capital loss of \$6,183.00 on a Federal schedule D, yielding a net capital gain of \$1,694,471.00. This gain was reported on petitioners' 1987 Federal income tax return, but not on their 1987 New York nonresident income tax return.

According to a 1986 Federal schedule K-1 filed by Gatehall Corporate Center II Associates, 2 Gannett Drive, White Plains, New York, Mr. Delfino received a loss of ordinary income from the partnership of \$374,317.00. This loss was included by petitioners in their calculation of Federal income or losses from partnerships in 1986 (Schedule E, form 1040). Total losses from partnerships was reported as \$365,161.00. Petitioners reported this loss as New York source income for 1986, each one claiming a loss of \$182,581.00. The same partnership, at the same address, filed a 1987 Federal schedule K-1 showing a distribution to Mr. Delfino of \$2,322,489.00. Gatehall Corporate Center II Associates sold its interest in Gatehall II to Chem Network on or about July 28, 1987 for the aggregate purchase price of \$44,000,000.00. Apparently, the partnership distribution to Mr. Delfino represented his share of the profits from this sale. This amount was not included by Mr. Delfino in his calculation of 1987 New York income. Gatehall Corporate Center II Associates had a taxable year ending on

December 31 of each year.

The Division of Taxation ("Division") began an audit of petitioners' 1986 and 1987 New York returns in June 1989. The auditor first contacted petitioners by letter dated July 14, 1989. The letter asked petitioners to call the auditor to schedule an audit appointment. It also asked that petitioners complete an Audit Questionnaire which was enclosed with the letter and submit 12 items of information including: copies of Federal tax returns; cancelled checks for 1986 and 1987; the results of any Federal audits which may have been conducted; doctor and dental bills; telephone bills and utility bills for petitioners' New Jersey and New York houses; a complete itinerary or daily diaries for 1986 and 1987 to enable the Division to determine the number of days spent in New York; the date that petitioners last filed New York resident income tax returns; a description of the New Jersey and New York houses; and closing statements for the sale of houses located at 216 Ardsley Street and 346 Ardsley Street, Staten Island.

On July 18, 1989, the auditor was contacted by petitioners' representative, Mr. Barrett, and an appointment was scheduled for August 2, 1989. A completed Audit Questionnaire for the year 1987 was provided to the Division. It was signed by both Frank Delfino and Geri Delfino and provided the following information. Carver Development Corporation was listed under employer's name. The address of that corporation was stated as One Gatehall Drive, Parsippany, New Jersey. No information was given regarding Mrs. Delfino's New York employment. Space provided on the questionnaire to list any business activity with New York (New York partnerships for example) was left blank. Petitioners claimed that the house they owned in New York "was empty and for sale since 86". In response to the question, "If you do not maintain living quarters in New York, where do you regularly stay while in New York State?", petitioners responded: "was not in N.Y. State".

At some point, the Division was also provided with a copy of a letter to Mr. Barrett, signed by Frank Delfino, responding to the requests for information made in the Division's letter of July 14, 1989. The letter is dated July 27, 1989, and indicates that the following information

was to be given to the Division's auditor: copies of Federal returns, some cancelled checks and telephone bills related to the 3 Roy Street address, an attorney's letter showing the closing date on the Far Hills, New Jersey property and a copy of the deed for that property, a description of petitioners' New York and New Jersey residences, "including temporary Roy Street residence", and a closing statement for the 346 Ardsley Street house. Mr. Delfino stated that he was not registered to vote in either New York or New Jersey, that there were no recent Federal audits and no doctor or dental bills.

On August 2, 1989, the auditor met with Mr. Barrett and advised him of the nature and scope of the audit and advised that more information would be necessary to substantiate petitioners' claim that they were not New York State statutory residents in 1986 or 1987. The auditor gave Mr. Barrett a handwritten list of information to be provided by petitioners for the years 1986 and 1987 including the following: Federal partnership tax returns and a statement of what the partnership does and where it was located, information regarding the basis of the capital gains distributed to Mr. Delfino as partnership income; cancelled checks and bank statements; telephone bills and utility bills for the houses in New Jersey and Staten Island; medical and dental bills; a daily diary for 1986 and 1987; moving bills showing the date that petitioners moved their furniture and other belongings from Staten Island to New Jersey; credit card statements and charge slips; copies of driver's licenses and automobile registrations; evidence of rental payments for the Roy Street house and evidence that petitioners lived at the Roy Street address in 1986; information regarding Mrs. Delfino's alleged commute to New York in 1986 and 1987; information regarding the residence of petitioners' three children; and a description of the house leased by petitioners in 1987.

The auditor went to Mr. Barrett's office on September 12, 1989 to review documents available at that time. The auditor was given a document entitled "SUMMARY RESPONDING TO REQUEST FOR INFORMATION FOR FRANK DELFINO NEW YORK STATE 1986 AND 1987 TAX RETURNS". The responses are drafted in the first person indicating that they

were prepared by Mr. Delfino, although he testified that he did not "type" this document. For instance, the summary states: "As I indicated to you previously, I have never paid a moving company to move me. I have always moved myself with the help of friends and relatives." The responses correlate with the handwritten list of requested information given to Mr. Barrett by the auditor. Information provided to the Division at this time included the following: partnership returns (Federal schedules K-1); telephone bills (apparently for the Roy Street house only); some medical bills indicating that Mr. Delfino saw a doctor in New Jersey while Mrs. Delfino saw a doctor in Staten Island; and a copy of a letter from Zodiac Realty, apparently the same one submitted in evidence and quoted above. The summary indicates that no diaries were kept for 1986 and 1987 as they were not considered necessary. The following information was provided in response to the Division's request for information regarding the whereabouts of petitioners' three children in 1986 and 1987:

"Two of my three children were attending St. John's University which I understand attracts students from 48 states and 72 countries on 6 continents. My youngest daughter attended Wagner High School and stayed with my mother-in-law (who lived on Staten Island) while finishing her term."

The summary also includes this statement:

"I knew the Roy Street address would only be temporary until we could relocate to Sunnybranch Road, plus my children were attending St. John's most of the week and usually only came home for the weekend."

Mr. Barrett and Mr. Delfino met with the auditor on December 6, 1989. At that time, Mr. Delfino objected to supplying the Division with cancelled checks and credit card statements. At this meeting, Mr. Barrett and Mr. Delfino continued to assert that petitioners changed their domicile from New York to New Jersey before January 1, 1986.

Mrs. Delfino testified that she did not meet with the auditor during the course of the audit and did not personally discuss the income tax returns filed on her behalf with Mr. Barrett. However, petitioners and the Division submitted as an exhibit to a stipulation of facts a letter dated February 14, 1990 from Mr. Barrett to petitioners' representative, Donald A. Richards, stating, in part, as follows:

"During [the] period [1981 through 1987], I would meet with Mr. and Mrs. Delfino often to discuss various aspects of their financial and tax matters. As is my practice, I met with them at their home. I do this with my larger accounts because I have found that when I meet with clients in an atmosphere that they are familiar in, and a place where they are most comfortable, more can be accomplished. After a careful check of my diary I have found that I met with the Delfino's [sic] from December, 1985 through March, 1987, as follows:

<u>Date</u>	<u>Place</u>
Wed. 12/4/85	Staten Island
Thurs. 12/19/85	My office
Thurs. 1/29/86	Roy Street
Sun. 2/23/86	Roy Street
Sun. 4/27/86	Roy Street
Mon. 5/9/86	My office
Sun. 6/29/86	Roy Street
Sun. 8/18/86	Roy Street
Sat. 10/4/86	Roy Street
Sun. 10/19/86	Roy Street
Thurs. 1/15/87	Roy Street
Mon. 3/9/87	Sunnybranch Rd."

In February 1990, petitioners changed representatives. At that point, petitioners began to assert that Mr. Delfino changed his domicile to New Jersey on March 1, 1986 and that Mrs. Delfino changed her domicile to New Jersey in July 1987. Petitioners then provided the Division with some of the documentation previously requested, including cancelled checks and credit card statements. The credit card statements provided to the auditor show regular purchases in New York, primarily in Staten Island through the end of 1987. The copies placed in evidence by the Division are almost illegible, and it is not possible to read every entry and determine the relationship of New Jersey and New York purchases made with the credit card. However, the pattern of New York purchases establishes that one or both petitioners were present in New York on days after their move to Far Hills, New Jersey. Mrs. Delfino testified that she often visited her mother on Staten Island and shopped for her.

After review of all of the information provided by petitioners, the Division determined that both petitioners were statutory residents of New York State and City in 1986 and 1987. The Division recalculated petitioners' tax liability on a separate basis for 1986 and a joint basis for 1987. The resulting deficiencies resulted primarily from the inclusion in New York income

of certain long-term capital gains not reported on the 1986 return; Mr. Delfino's wage income and income from business in 1986 and 1987; and a partnership distribution representing a gain from the sale of Gatehall II in 1987.

By the statements of audit changes, the Division asserted deficiencies in tax and penalties as follows:

	<u>1986</u> <u>Frank</u>	<u>1987</u> <u>Geri</u>	<u>Joint</u>
State Tax	\$15,684.44	\$-1,646.15	\$187,009.69
Penalty (Tax Law § 685[b])	3,089.15	-0-	29,611.68
Penalty (Tax Law § 685[p])	1,568.44	-0-	18,700.97
City Tax	9,222.65	1,820.27	57,891.12
Penalty (Tax Law § 685[b])	1,816.46	358.51	9,152.10
Penalty (Tax Law § 685[p])	922.27	-0-	5,779.91

In addition to showing the calculations relied on by the Division, each statement contained the following explanation:

"You have one domicile. Your domicile does not change until you move to a new location with the sincere intention of making your permanent home there. Since you have not proved your change of domicile, you are taxed as a resident of N.Y. State and City.

Also you failed to prove that you did not spend more than 183 days in N.Y."
(Original entirely in capital letters.)

The Division issued a Notice of Deficiency to Geri Delfino, dated January 14, 1991, asserting a deficiency of 1986 State and City income tax, plus penalty and interest, for a total due of \$338.29. The Division issued a Notice of Deficiency to Frank Delfino, dated September 14, 1990, asserting a deficiency of 1986 State and City income tax of \$24,907.09, plus interest and penalties, for a total due of \$39,811.01. The Division issued to Frank and Geraldine Delfino a Notice of Deficiency dated September 14, 1990 for 1987, asserting State and City personal income tax of \$244,808.80, plus interest and penalty, for a total due of \$362,843.94.

In her opening statement at hearing, the Division's attorney described the issues to be litigated by the parties. She stated:

"if the Court finds that they are neither domiciliary nor statutory residents, petitioner Frank Delfino must allocate part of his income allocation for the year 1987" (tr., p. 15).

Later in the hearing, the auditor testified that if Mr. Delfino was found to not be a statutory resident of New York after July 1987, he would be required to allocate a portion of the partnership distribution from the sale of Gatehall II to New York. The auditor cited to the governing regulations, stating:

"Under section -- regulations 148, 146.6 [sic], if the taxpayer changes the residence during the middle of the year -- so whatever the partnership distribution that they got for that particular year is distributed or taxed or prorated based upon the number of months that they were residents" (tr., p. 107).

Petitioners' representative did not object to this testimony at the time it was offered.

The allocation of partnership income was not referred to in the statements of audit adjustment or notices of deficiency issued by the Division. The Division's answer to the petition did not allege that petitioners were required to allocate a portion of their partnership income to New York if they were found to not be statutory residents of New York after June or July 1987. The first reference to the relevant regulation which would require allocation of partnership income was in the testimony of the auditor. In its brief, the Division asserted that, if petitioners proved that they changed their resident status in 1987, a portion of the partnership distribution to Mr. Delfino must be allocated to New York under 20 NYCRR 148.6.

Petitioners requested 59 findings of fact, based on the record, and 10 ultimate findings of fact. Proposed findings of fact "5", "14", "20", "28", "40", "41", "43", "46", "47", "48", "49", "50" and "58" were not adopted because, after review of the record, it was determined that they were not supported by the evidence or did not completely and accurately reflect the evidence in the record. Proposed findings of fact "21", "39", "42", "52" and "53" were determined to be ultimate conclusions of law and were not adopted for that reason. The remaining proposed findings of fact were incorporated into the Administrative Law Judge's determination with modifications necessary to more fully reflect the record. There is no provision in the State Administrative Procedure Act for the submission of "ultimate" findings of fact. Those submitted by petitioners are, in effect, factual inferences and conclusions of law which petitioners draw from evidence offered in the record. They were not adopted in the

Administrative Law Judge's determination, since the evidence does not support the inferences made by petitioners.

Petitioners and the Division entered into two stipulations of fact which consist primarily of descriptions of 46 exhibits which the parties agreed to enter into evidence. The stipulated facts which merely identify the exhibits have been omitted here. The remaining stipulated facts were incorporated into the Administrative Law Judge's determination.

OPINION

Petitioners, on exception, requested additional findings of fact. We incorporate three proposed findings of fact and reject the others as either redundant, not supported by the record or conclusions of law.

With respect to 1986, the Administrative Law Judge determined that petitioner Frank Delfino failed to prove that he changed his domicile to New Jersey on or before December 29, 1986. The Administrative Law Judge found the following facts relevant: 1) Mr. Delfino stayed at the 3 Roy Street address only three or four nights a week and returned to Staten Island for the remainder where his family was still located, 2) petitioners always intended to move into their "Dream Home" in Far Hills upon its completion and, consequently, the Roy St. address was always intended to be temporary, 3) Mr. Delfino did not register to vote in New Jersey in 1986, 4) Mr. Delfino did not register a personal automobile in New Jersey in 1986, 5) Mr. Delfino did not obtain a New Jersey driver's license in 1986 and 6) Mr. Delfino did not have a bank account in New Jersey during this period. The Administrative Law Judge went on to note that because Mr. Delfino was clearly shown to be domiciled in New York in 1986, there was no need to address whether he spent fewer than 183 days in New York that year.

The Administrative Law Judge gave little weight to the lease agreement between petitioners and Mr. Mariani, as evidence of a change in domicile, due in large part to inconsistencies between the terms of the lease and the testimony presented by petitioners' witnesses. In general, the Administrative Law Judge also found Mr. Delfino's testimony was

not credible. The Administrative Law Judge also found other discrepancies in the record, including that Mr. Delfino was receiving wage income from an employer with a New York address, but did not report any of that income on his New York returns. Attached to the separately filed 1986 nonresident return, Mrs. Delfino indicated that neither she nor Mr. Delfino maintained a permanent place of abode in New York City in 1986. However, testimony by petitioners at trial was to the effect that Mrs. Delfino was living at their residence in Staten Island caring for her terminally ill mother during this period. As a result, the Administrative Law Judge concluded Mrs. Delfino was also domiciled in New York in 1986.

The Administrative Law Judge next addressed whether petitioners were resident individuals in 1987 under Tax Law § 605(b)(1)(B). The Administrative Law Judge determined that despite the fact they were presumably no longer New York domiciliaries after their move to Far Hills, New Jersey, they nevertheless failed to prove they were not statutory residents of New York after that time. The Administrative Law Judge began by noting that petitioners failed to establish that they permanently abandoned the Staten Island home when they took up residence in New Jersey. The Administrative Law Judge cited the following facts as establishing that petitioners maintained a permanent place of abode in Staten Island: 1) petitioners continued to own the Staten Island house, 2) the record fails to establish that all of the furniture was removed from the house, such that occasional use was precluded, 3) Mrs. Delfino continued to work in Brooklyn until at least September 1987 and 4) credit card receipts offered in evidence establish a pattern of purchases in Staten Island through the end of 1987.

The Administrative Law Judge then addressed whether petitioners had established that they spent fewer than 183 days in New York in 1987. In concluding that Mr. Delfino spent greater than 183 days in New York, the Administrative Law Judge found the following relevant: 1) the business address of Mr. Delfino's employer and the partnerships with which he was associated were in New York, 2) Mr. Delfino received wage income from Parkcliff Realty Management, a New York State employer, and he made no attempt to explain his relationship

with the business and 3) other than his own testimony, which was deemed not credible, Mr. Delfino offered little proof that he was not present in New York on at least 183 days in 1987. The Administrative Law Judge also found that Mrs. Delfino spent more than 183 days in New York during 1987.

The Administrative Law Judge went on to point out that if it were determined that petitioners were part-year residents, Mr. Delfino was required to prorate the distributive share of partnership gain from Gatehall Corporate Center II Associates as required by section 154.6 of the regulations (20 NYCRR 154.6). The Administrative Law Judge rejected petitioners' argument that the Division failed to timely raise the issue of whether some portion of Mr. Delfino's distributive share would have to be allocated to New York. The Administrative Law Judge determined that the issue of allocation of Mr. Delfino's distributive share of partnership gain was so closely related to the primary issues of residency that there could be no objection to the Division's having raised the issue in the course of the hearing. The Administrative Law Judge also concluded that petitioners had a full opportunity to offer evidence of factual matters relevant to the issue of prorating the partnership income.

The Administrative Law Judge also determined that petitioners were liable for penalty and interest. Upon review of the evidence in the record, which the Administrative Law Judge characterized as "either false or somewhat deceptive" (Determination, conclusion of law "G"), the Administrative Law Judge concluded petitioners failed to act reasonably or with good cause.

Petitioners, on exception, argue that their intent to change their domicile is evidenced by their purchase of property in Far Hills, New Jersey with the idea of either constructing a home or substantially modifying the existing structure. Petitioners note that their Staten Island residence was listed for sale as early as June of 1986. Petitioners also point out that Mr. Delfino was compelled to be present at the Gatehall construction site as long and as often as possible. Mr. Delfino contends that the 3 Roy Street address was his permanent residence and he cites the following facts in support: 1) he sent and received mail at this address, 2) he established his

own telephone listing, 3) he set up a joint bank account in New Jersey and 4) he received guests, including his family, at the Roy Street address.

Petitioners, assuming arguendo that Mr. Delfino did not change his domicile in 1986, also argue that Mr. Delfino did not spend more than 183 days in New York during the calendar year 1987. For support, petitioners rely on Mr. Delfino's continued professional responsibilities at the Gatehall construction site, in addition to his function as general contractor for the construction of his own residence which began in February of 1987. Mr. Delfino contends that a review of the facts establishes that he spent no more than 10 to 15 days in New York during calendar year 1987.

Petitioners contend that if the Tribunal finds Mr. Delfino changed his domicile in June 1987, the period when he moved into his Far Hills residence, the distribution from Gatehall Corporate Center II Associates on the sale of Gatehall II cannot be allocated to New York State. Petitioners argue that Mr. Delfino's distribution would have accrued after Mr. Delfino changed his domicile and, as a result, would be allocated to New Jersey only.

Petitioners also contend that the issue of allocation of Mr. Delfino's distributive share of partnership income and/or gain from Gatehall Corporate Center II Associates was not timely asserted by the Division. Petitioners contend the issue was not raised until the Division's opening comments at the hearing and that no reference is made to former regulation 20 NYCRR 148.6 until the testimony of the Division's auditor.

As a final matter, petitioners argue they should not be liable for penalty and interest given their reliance on their accountant. Petitioners, relying on 20 NYCRR 105.20(d)(5)(i), argue that Mrs. Delfino and her accountant were justified in treating the domicile of a wife as the same as her husband in filing as a nonresident of the City and State of New York, despite her not moving to New Jersey until July 1987. Further, petitioners assert that the facts support Mr. Delfino's claim that he was a domiciliary of New Jersey in March 1986.

Petitioners do not except to the Administrative Law Judge's finding with regard to

Mrs. Delfino's resident status in 1986.

We affirm the determination of the Administrative Law Judge. With regard to whether petitioners were residents for the years 1986 and 1987, we find the Administrative Law Judge correctly and fully addressed these issues and we affirm for the reasons stated in the determination.

We also affirm the Administrative Law Judge's holding, in the alternative, that even if Mr. Delfino was a resident of New York for only a portion of 1987, a portion of his distributive share of partnership gain from Gatehall Corporate Center II Associates must be allocated to New York. The Administrative Law Judge concluded that 20 NYCRR 154.6 required this allocation.

On exception, petitioners assert that:

"[e]ven if Regulation §148.6 is held to apply, Frank Delfino's partnership income would have accrued to him on December 31, 1987 at a time when there is no doubt that he was not a domiciliary or resident of New York. Since, the source of the partnership's income and/or gain was from the development and sale of New Jersey real property, no portion of that income and/or gain is allocable to New York taxable income" (Petitioners' brief on exception, p. 22).

20 NYCRR 154.6 provides as follows:

"For taxable years beginning before 1988, where an individual . . . is a member of a partnership and such individual . . . changes resident status during the taxable year from resident to nonresident . . . the distributive share of partnership income, gain, loss and deduction, and any New York modifications relating thereto, of such individual . . . to be included in the determination of New York taxable income or New York unearned income, and the items of tax preference of the partnership to be included in the determination of New York minimum taxable income of such individual . . . must be prorated between the separate New York State resident and nonresident periods according to the number of months covered by the separate New York State resident and nonresident income tax returns required under section 654 of the Tax Law, as such section was in effect for taxable years beginning before 1988" (emphasis added).

We see no basis for petitioners' position that Mr. Delfino's distributive share of partnership income or gain is not subject to the proration required by this regulation. If Mr. Delfino was a resident of the State for only a portion of the year, during this portion of the year

his income from all sources was subject to New York State tax (Tax Law § 612[a]). The regulation, 20 NYCRR 154.6, provides a means to allocate the distributive share of partnership income and gain between the resident and the nonresident period. Such a regulation is necessary because a partner is required to pay tax on his distributive share of partnership income and gain without regard to the amount of partnership distributions actually made to the partner in the taxable year (see, Matter of Wertheimer, Tax Appeals Tribunal, January 12, 1995, citing United States v. Basye, 410 US 441, reh denied 411 US 940). After the allocation required by the regulation is made, and a portion of the distributive share of partnership income or gain is allocated to the resident period, the fact that the income or gain may have a non-New York source has no relevance to its taxability.

As noted by the Administrative Law Judge, section 154.6 of the regulations was promulgated by the Division in an effort to comply with the Court of Appeals decision in Matter of McNulty v. New York State Tax Commn. (70 NY2d 788, 522 NYS2d 103) which held that the prior regulation was invalid. The prior regulation (20 NYCRR former 148.6) required taxpayers who changed residency during a taxable year to allocate their distributive share of partnership income, gains or losses entirely to either the resident or nonresident return depending on when the taxable year of the partnership ended.

"Recognizing that the taxpayer's distributive share of partnership income did not indicate actual receipt of the income, the Court of Appeals in McNulty found the harm of regulation 148.6 to be that it compelled the taxpayer to report all of his partnership income on one of two returns 'regardless of when the income was actually received' (Matter of McNulty v. New York State Tax Commn., supra, 522 NYS2d 103, 104, emphasis added)" (Matter of Wertheimer, supra).

The current regulation overcame this harm by requiring the distributive share of partnership gain and income to be prorated between the resident and nonresident returns.

In support of their position, petitioners rely on the following quote from the Appellate Division decision in McNulty: "[a]s noted by Special Term, if the partnership income was derived entirely from New Jersey sources rather than New York, the partnership income would

not have been taxable, such income having accrued in their non-resident period from a New Jersey source" (Matter of McNulty v. New York State Tax Commn., 118 AD2d 1041, 500 NYS2d 415, 416, revd Matter of McNulty v. New York State Tax Commn., supra). This quotation does not advance petitioners' claim, however, because in it the Appellate Division is describing the result under the regulation declared invalid by the Court of Appeals when it reversed the Appellate Division. As described above, under the invalid regulatory scheme, a distributive share of partnership income was allocated entirely either to the resident or to the nonresident return. If the distributive share was allocated entirely to the nonresident return and was from non-New York sources, it, as the Appellate Division stated, would not have been subject to New York tax. However, this result has nothing to do with the issue here, which involves a distributive share of partnership income or gain allocated, under the current regulation, to the resident return. Because the Division has not sought to tax the portion of the distributive share of income or gain allocated to the nonresident return, we need not decide whether the distributive share was from non-New York sources.

As a final matter, we also feel the Administrative Law Judge adequately and correctly addressed whether the Division timely raised the allocation issue and the issue of penalties assessed against petitioners. As a result, we affirm the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frank Delfino and Geraldine Delfino is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Frank Delfino and Geraldine Delfino is denied; and

4. The notices of deficiency dated September 14, 1990 and January 14, 1991 are sustained.

DATED: Troy, New York
February 23, 1995

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

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