STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN CARL WARNECKE	:	DECISION DTA Nos. 811896
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1988.	:	and 812470
	:	

Petitioner John Carl Warnecke, 300 Broadway, #12, San Francisco, California 94133-4530, filed an exception to the determination of the Administrative Law Judge issued on February 8, 1996. Petitioner appeared by George Zelma, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition to the exception. Petitioner filed a reply brief which was received on July 23, 1996, which date 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.

ISSUE

Whether petitioner established that he changed his domicile from New York to California for the tax year 1988.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "6," "18" and "29" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, John Carl Warnecke, is an internationally known and acclaimed architect, and is a Fellow of the American Institute of Architects. Petitioner was born in California in

1919. Petitioner's father was an architect, and petitioner started his career as an apprentice in his father's offices in Oakland, California. Thereafter, petitioner attended Stanford University and, ultimately, graduated from Harvard University with a degree in architecture.

Petitioner started his practice of architecture in Richmond, California, apparently in association with his father's offices in Oakland. Petitioner's reputation for outstanding work grew rapidly, and the scope and stature of the projects he was hired to design increased in step.

In 1960, petitioner moved out of his father's offices in Oakland, California and established his own offices in San Francisco. In or about 1962, petitioner opened an office in Washington, D.C., to serve as an East Coast base in connection with several major East Coast projects, including the re-design of the Lafayette Square area in Washington, D.C., and a large ongoing project at the U.S. Naval Academy in Annapolis, Maryland. At or about the same time, petitioner also opened an office in Hawaii. Petitioner explained that he usually obtained a license to practice in any jurisdiction where he had a major project, noting that over the course of the years he became licensed to practice architecture in approximately 20 states.

In or about 1967, petitioner moved his East Coast base of operations from Washington, D.C. to New York City. Petitioner established what would become his flagship office at 59th Street and Fifth Avenue, overlooking the Plaza Hotel and Central Park. Petitioner's office move to New York was made, in part, in conjunction with his involvement in the design of the AT&T building in New York City.

Petitioner was married in 1969 and, at about the same time, leased an apartment located at 525 Park Avenue (Apartment 9-B). Petitioner described this apartment as a luxury apartment located in one of the most prestigious areas of Manhattan. Petitioner explained that, although at this period of time he was travelling all over the world in conjunction with various major projects, "New York became my home for my new wife and my base. So that was my East Coast home, . . . I basically moved to the East when I got the [Hart] Senate [Office] Building [project]. I made a commitment to actually come myself to the East and design the Hart Senate

Office Building so they knew they were getting me." Petitioner went on to note that he "moved body and soul into New York after leaving Washington, D.C."

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

> Petitioner opened an office in Los Angeles in 1972, and throughout the 1970's and into the early to mid-1980's continued to design and build many major projects. Petitioner's firm, John Carl Warnecke and Associates, Inc. (a subchapter S corporation for Federal tax purposes) grew to be one of the largest architectural firms in the country, with its largest office in New York City.[1]

In 1985, petitioner's firm had offices in New York, Washington, D.C., Boston, San Francisco and Los Angeles, and employed approximately 125 architects in total. There were about 40 employees in the New York office, with the balance of employees split almost equally between the other offices (with perhaps a few additional employees in the Washington, D.C. office). However, at this time, petitioner began to realize that his firm was in serious financial difficulty. More specifically, the firm was engaged in several major projects including the Charleston, South Carolina downtown restoration project (ultimately an award-winning project) and a large project for IBM, each of which was mired in litigation, and separate Hilton Hotel projects in Atlantic City and San Francisco. These latter projects were, according to petitioner's testimony and to documents in evidence, underbid as to the fee structure in relation to the amount of design work involved, especially in the San Francisco situation which was a "build as you draw" project. Petitioner explained that due to ongoing revisions and an inability to know the overall scope of the San Francisco project, petitioner's firm was performing half-again as much design work as had been contracted per the original bid. Under these circumstances, the firm's current liabilities ran abnormally high in relation to its net fees (and incoming cash), leaving a shortage of cash to meet current liabilities. At this point in time, petitioner faced outstanding bank loans of over one million dollars owed by his firm. He had also placed a mortgage of approximately $250,000.00 on a large tract of property he owned in Sonoma

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[1] This fact was modified by deleting the third and fourth sentences which are not relevant to the issue in this case.

County California (to be described hereinafter) in order to secure needed cash for his firm. Petitioner described his financial situation as dire noting that he was, at the time, faced with the prospect of bankruptcy.

Petitioner ultimately realized that his best means of resolving the described financial situation would be to collect on as many of his firm's receivables as possible, sell off his practice for the highest possible amount of money, and rezone and subdivide his property in California. In this latter regard, petitioner could then sell or mortgage only a portion of the property, as opposed to risking the entire property, in order to raise cash.

The California property is located in Healdsburg, Sonoma County, California on Chalk Hill Road, and includes some 4000 feet of frontage on the Russian River which runs through the property. Petitioner, his mother and his sister had inherited the property, which originally included approximately 60 acres, from petitioner's father. Petitioner thereafter purchased the property interests held by his mother and sister and, over the years, bought additional adjoining acreage such that by the mid 1980's the property included approximately 265 to 270 acres as a single unit. Some of the property had been used as a dairy farm. Petitioner replanted this area to become a working vineyard and winery. The property included several houses and outbuildings and was described by petitioner as a "summer place where I had raised my four children."

Petitioner first aimed to subdivide and sell some 95 acres of the property. This parcel, known as the Ranch, consisted of 5 houses, 2 cottages and other facilities on 47 acres, plus an additional 48-acre area. This section of the property is shown in a brochure as having been offered for sale at a price of $1,675,000.00 in 1988. Petitioner also explained that the property could be divided into 9 parcels (it is not entirely clear if this meant the entire property including the above-described 95-acre Ranch parcel, or if the 9-parcel subdivision would be a division of the balance of the acreage excluding the 95-acre Ranch). Petitioner's design aim was that each of these nine parcels would be set so as to have an unobstructed view of the surroundings without any other houses being visible in the panorama. Petitioner noted that by subdividing

and selling at least a portion of the property he could pay off his debts, including the mortgage on the property, could in the future sell additional individual parcels to raise cash (or could mortgage individual parcels to raise cash without mortgaging and potentially jeopardizing the entire property), and could ultimately provide for his children to sell one or more parcels if necessary to raise cash and pay estate taxes without losing the entire property in the event of petitioner's death.

In addition to his business financial difficulties, a new owner and management company had taken over the building in which petitioner's New York apartment was located, and intended to convert the premises to condominium ownership. According to petitioner, the new owners wanted to "get rid of the old timers" who occupied rent controlled or stabilized apartments, and so engaged in a pattern of "rudeness and harassment". Petitioner described how new service employees at the premises were openly rude to petitioner and others in general and specifically in front of guests, and that the premises were not repaired in either general terms or specifically in the case of petitioner's apartment. In this regard, petitioner noted that the apartment had not been repainted as required every three years and, most distressingly, that a leak in the apartment above petitioner had not been fixed, despite repeated requests by petitioner, causing the paint and plaster in the living room of petitioner's apartment to curl and fall. Petitioner pointed out, and submitted photographs to show, that in addition to the interior plaster and paint damage, the windows were in a state of deterioration and needed replacement. In sum, petitioner described the premises as "uninhabitable", specifically for purposes of inviting guests or entertaining clients or potential clients.

In October 1986, an eviction action was commenced by the landlord in New York State Supreme Court, seeking petitioner's ouster on the allegation that petitioner was not residing in the apartment as his primary residence and thus was not entitled to continue as a rent stabilized tenant (the "non-primary residence lawsuit"). Petitioner opposed this lawsuit noting, however, that he could not at the time afford to incur large legal fees and thus his opposition was more passive than aggressive in combatting the landlord's allegations. At the same time, it appears

that the landlord did not aggressively seek to move forward with the suit. However, the ongoing pattern of rudeness toward petitioner and the failure to repair the apartment continued.

Petitioner's apartment at 525 Park Avenue included an entry foyer/hallway, T.V./sitting room, den, kitchen, living room and two bedrooms, for which petitioner paid approximately $1200.00 per month in rent. The focal point of the apartment was the wall in the front hall on which was displayed, floor-to-ceiling, three generations of petitioner's family's artwork, consisting of paintings and drawings by petitioner, his father and his daughter. Petitioner noted that while the wall of artwork remained a focal point upon entry, and also covered the fact that the apartment had not been painted in years, the condition of the balance of the premises was such that he could not use it to entertain--specifically stating that at a "critical financial period" when he would have loved to be able to use the apartment to "help him" in his business by creating the image of business success and strength portrayed by living in a luxury apartment located in one of the most desirable spots in Manhattan he was unable to do so.

The lease on petitioner's flagship office at Central Park South ended as of April 1985. In view of his financial problems petitioner could not afford to renew the lease, and so he leased approximately 10,000 square feet of loft space in the area of Broadway and Canal Street in Manhattan (near Chinatown). Petitioner described this space as "cheap", noting that he intended to use the same to finish up the projects being run by his New York offices. At this point in time (1985), the active (design and build) phase of the projects run by petitioner's New York office were finished with the remaining activities centered on resolving pending disputes, including litigation, and collecting fees.

By 1987, petitioner had decided that he had to sell his practice and collect what he could in outstanding fees in order to avoid bankruptcy. By this time, petitioner had no more active projects in, or operated out of, his New York office, but was still involved in attempting to resolve litigation in connection with several of such projects. Petitioner sought to consolidate his operations out of his San Francisco office, and at the same time negotiate the sale of his

practice and office in Washington, D.C., move along with the subdivision plans for the California (Sonoma County) property and, hopefully, resolve his financial problems.

Petitioner's only daughter, Margo, an architect, was then recently married and lived in New York City. She was interested in using petitioner's loft space to operate a "design collaborative", wherein a number of individuals could practice while sharing office space and equipment. In or about mid-1987, petitioner's daughter opened the "Warnecke Design Collaborative" in the loft space. While the collaborative was operated by petitioner's daughter and did not involve petitioner, his name remained on the lease through approximately 1990 or 1991. At about the same time, one of petitioner's employees in the San Francisco office (Warren Megrian) came to New York to sort through the years of accumulated drawings, plans, designs and artwork. Some of this material was moved to petitioner's Washington office, and some was moved to barns at the California property or to adjacent warehouses for archival storage. Petitioner thus closed his New York office.

Petitioner had opposed the landlord's non-primary residence lawsuit, as noted, and had been advised by his attorney that he had to be at (i.e., using/living at) the apartment in order to maintain his status as a rent stabilized tenant. Instead, however, petitioner decided to sublease the premises to one Julienne Michel, a friend of his then-fiance Dolores Smithies, and go west. In this regard, petitioner reiterated that when he needed the apartment to help him in 1985, 1986 and early 1987, he had been unable to use it because of its condition. However, with the closing of his New York office and the general financial condition of his business leaving him unable to devote any money to promotion aimed at developing and attracting new business, there was no longer such a need for the apartment. He further expressed his belief that he had lost the apartment due to the landlord's actions and lawsuit, and so he decided to "get out and go west". However, petitioner considered hanging on to the apartment until he could afford to purchase the apartment at the insider's price (described as $479,700.00 versus the outsider's price of $738,000.00 [see, Petitioner's Exhibit 24]), and then resell to gain additional cash. The potential resale price petitioner believed possible ranged from about $600,000.00 without

undertaking any repairs, to about $700,000.00 with minimal repairs. Petitioner stated his thoughts with regard to the apartment at the time to be that he "didn't care anymore about the damn apartment because it wasn't--I couldn't use it for anything in my position. I couldn't entertain there. I looked ridiculous in a Park Avenue apartment with the damn plaster falling. It's hard enough to be facing bankruptcy and try to keep the show going." Petitioner went on to state that "[t]he words legal domicile never entered my mind. I just moved myself and my efforts [West] and intended to take care of all my problems and live there. That is where I came from." Finally, petitioner stated that "I came West to try to make sense out of the economic thing I was involved in."

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

> Petitioner subleased the apartment without seeking the landlord's permission, a course of action against the advice of his attorney. Petitioner stated that without the leak in the ceiling, his apartment could have rented for upwards of $5,000.00 per month. However, he rented the furnished premises to Ms. Michel "as is" for $2,500.00 per month (slightly more than twice the rent he was paying for the apartment), with Ms. Michel agreeing to pay for utilities, cable television and phone costs. Ms. Michel rented the apartment from November 1987 through June 1989. Petitioner and Ms. Michel did not enter into a written lease agreement, but rather, operated under a verbal understanding.[2]

During 1988, petitioner spent some 34 full days plus 22 partial days (described as in and out travel days) in New York. The balance of petitioner's time was spent in Washington, D.C., where he was principally involved in negotiations which culminated in the sale of his office and practice there, and in California. In California, petitioner's time was split between San Francisco, where his remaining office was located, and his property in Healdsburg. In addition, petitioner spent a few days in Key Biscayne, Florida with his fiance Dolores Smithies, and an additional few days in various other places, including Egypt, apparently in connection with business matters. On overnight trips to New York, petitioner stayed at his fiance's apartment, which was located approximately two blocks from his own 525 Park Avenue

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[2] This fact was modified to reflect that the premises subleased to Ms. Michel were furnished.

apartment. From mid-to-late 1987 through mid-1989 petitioner visited his New York apartment on only a few occasions to see if any repairs were being undertaken.

When he subleased the New York apartment, petitioner gave a few pieces of furniture to his daughter, who was then recently married and furnishing her home. These items included a dining room table, an antique desk and a Japanese screen. The balance of petitioner's possessions were left in the apartment, including clothing, tools, books in the library and the wall of three generations of Warnecke artwork described above. The utilities, cable and telephone services remained in petitioner's name, although the charges were paid by Ms. Michel.

Petitioner's negotiations to sell his practice in Washington, D.C. came to fruition in November 1988, when the practice was sold to the architectural/engineering firm of Spillis and Candela. As part of the sale, the purchasing firm rented an apartment in the Georgetown area for petitioner's use for a period of three years, in connection with continuing the prestige of having petitioner's name associated with the firm's practice. Petitioner's fiance directed the decoration and furnishing of this apartment, and petitioner used the apartment whenever he was staying in the Washington area. Petitioner also described the activities ongoing at his California property during 1988 as involving research, working with local (California) land planners, engineers and county officials in connection with developing a preliminary plan and obtaining approvals for the subdivision of the property. Documents in evidence show that such process commenced somewhat earlier than 1988, and that the amount of time and effort increased during 1988 and continued thereafter at a comparable level into and through 1989, 1990, 1991, 1992 and beyond.

Petitioner has three sons, John, Roger and Frederick, each of whom lives in California, and a daughter, Margo, who as described above lives in

New York. Petitioner's sons John and Frederick each have two children who also live in California. Petitioner's son Roger, who at an early age displayed great talent as an artist, has

been institutionalized for acute schizophrenia for over 25 years. His institutionalization had involved a number of different facilities over the years, and one of petitioner's concerns during 1988 was in obtaining placement for his son in a facility providing adequate care. To this end petitioner, as his son's legal guardian, obtained placement in a facility in Eureka, California, located approximately four hours north of San Francisco via automobile.

Several additional events occurred during and shortly after 1988. Most, if not all, of the pending litigation on petitioner's projects was settled. This enabled petitioner to collect sufficient monies to resolve, in connection with the sale and closure of his offices and practice (save for the San Francisco office), his business financial problems and also remove the mortgage on the California property. Subdivision approval (to the extent of some of the California property) was obtained such that petitioner's concerns about the ability to mortgage or sell a part of the property and raise cash if necessary and/or to cover the potential estate tax liability with regard to the property in the event of his death were resolved. In addition, petitioner's son Roger had begun to respond favorably to treatment and make progress against his illness at the new facility in Eureka. Finally, the landlord in New York changed tactics and, toward the end of 1988, actively solicited petitioner as a potential subscriber for the purchase of his apartment, allegedly because the landlord was hard pressed to reach the minimum number of subscription agreements needed to obtain regulatory approval to proceed with the plan to convert the premises to condominium ownership. The landlord agreed to fix the leak, make the other required repairs and repaint petitioner's apartment.

In December 1988, petitioner requested opinions from several realtors as to the market value of the apartment. The specific results of these requests were not offered in evidence. However, petitioner noted that his requests were made in connection with the possibility of purchasing and reselling the apartment at a profit. In addition, the pattern of harassment and rudeness also ceased at this time. In January 1989 petitioner signed a subscription agreement for the purchase of his apartment and paid a $1,500.00 deposit in connection therewith.

In view of the above circumstances, petitioner "began considering a move back to New York". In addition to the resolution of his financial problems, and the change in his landlord's stance, petitioner also stated that he began to appreciate the "convenience" of living in the city as opposed to the country. Here, petitioner noted that he had received certain sanctions for driving infractions in California (the record includes two tickets issued to petitioner for speeding). Petitioner feared losing his license to drive, given that unlike New York where there is the ability to walk or take public transportation to nearly every imaginable need or amenity, it is essential to have the ability to drive to get around in California.

Shortly after petitioner's execution of the subscription agreement, an error therein was discovered which the parties were unable to amicably resolve. In turn, the landlord resumed its prior activities toward petitioner including a threat to press forward with the non-primary residence lawsuit, a matter petitioner believed to have been discontinued upon his execution of the subscription agreement. Ultimately, in April 1989, petitioner appeared in court, apprised the court of the nature of the condition of his apartment, and the landlord in response agreed to rectify the problems (with the court's admonition that the conditions were to be fixed within one year).

Petitioner's sublease of the apartment to Julienne Michel ended as of June 1989. Petitioner, in turn, came back to New York in mid-to-late 1989 to supervise the repairs to his apartment. The upstairs leak was fixed in October 1989, but the plaster was not repaired nor was the apartment repainted until a later date. Although these repairs (plastering and painting) were not made, and the windows were not replaced (the windows were ultimately never replaced), petitioner re-occupied his apartment in late 1989.

Petitioner had received a two-year renewal lease for the apartment from his landlord, covering the term June 1, 1989 through May 31, 1991. After ongoing negotiations concerning the promised but unmade repairs, rent withholdings by petitioner, and a partial rent abatement by the landlord, the apartment was plastered and painted in mid-to-late 1990. In early 1991, the landlord notified petitioner that a renewal lease to the apartment would not be offered. This

ultimately led to petitioner's May 1991 commencement of an action against the landlord to compel the issuance of a proper lease and for the payment of damages to petitioner.

We modify finding of fact "29" of the Administrative Law Judge's determination to read as follows:

> For the years 1986, 1987, 1989 and 1990, petitioner filed New York State and City of New York resident income tax returns (Forms IT-201). However, for 1988 petitioner filed a New York State and City of New York Non-Resident and Part-Year Resident Income Tax Return (Form IT-203). On said return, petitioner reported New York income of $34,608.00 (at line 12 pertaining to "Rents, Royalties, Partnerships, Estates, Trusts, Etc."). In turn, petitioner's five percent New York income percentage (derived from a comparison of the New York amount of Federal adjusted gross income to the total Federal adjusted gross income) was applied to petitioner's reported New York income, to result in a New York tax liability of $3,196.00. This liability was offset against the $17,928.09 of New York tax withheld from petitioner's wages, thus resulting in a $14,732.00 refund to petitioner. Subsequently, petitioner filed an amended Form IT-203 for the year 1988. This amended return differed from petitioner's earlier return by its elimination of the $34,608.00 amount of income from line 12 (i.e., effectively claiming that petitioner had no income derived from or connected with New York sources or subject to New York tax). In turn, petitioner requested an additional refund equal to the $3,196.00 liability calculated on his initial return. Petitioner failed to claim any rental income he received from Ms. Michel for the sublease of his Park Avenue apartment during 1988 on his New York State and City Non-Resident Income Tax Return.[3]

In addition to his New York nonresident filings, petitioner filed a California Long Tax Form (Form 540) for 1988 as a resident. Said return showed a net tax liability to California in the amount of $60,523.00. Line 25 of said return (and Schedule S filed therewith) reflected a claimed credit for $3,118.00 based on taxes paid to New York.

In September 1991, the Division of Taxation ("Division") conducted a field audit of petitioner's return(s) for the year 1988. On February 16, 1993, the Division issued to petitioner a Notice of Deficiency asserting additional personal income tax due for the year 1988 in the amount of $40,198.56 (consisting of $16,254.52 in New York State tax and $23,944.04 in New York City tax), plus penalty and interest. Reference to a January 15, 1993 Statement of Audit

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[3] We modified the first sentence of this finding of fact to accurately reflect the testimony of the auditor (Tr., pp. 15-20) and the information contained in his workpapers (Exhibit "K"; see also, Exhibits "M" and "N"). We added the last sentence to accurately reflect the record.

Changes issued to petitioner prior to the Notice of Deficiency, reveals that the Division calculated and allowed a resident credit in the amount of $46,431.00 based on taxes paid to another jurisdiction (California), thereby reducing the amount of petitioner's New York State (resident) liability as calculated on audit. The Division's Notice of Deficiency is premised upon the position that petitioner did not change his domicile to California for 1988, as claimed, and that he therefore remained subject to tax as a resident of New York State and New York City.[4] Petitioner challenged the Division's notice and requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conference was held, after which an Order was issued sustaining the notice as to tax but cancelling the penalty asserted as part of the notice. Petitioner continued his protest to the notice by instituting the proceedings herein.

When in California during 1988, petitioner spent time at the Healdsburg property and in an apartment at 155 Jackson Street in San Francisco. This latter address was described as a small (600 square feet) studio apartment located a few blocks from petitioner's San Francisco office at 300 Broadway. While petitioner indicated that he had acquired this apartment in 1978, an April 24, 1991 letter from petitioner to his attorney (Petitioner's Exhibit "23") in connection with the landlord situation in New York states that the apartment "I occasionally use while I am in San Francisco . . . never belonged to me, but rather has always belonged to Mr. Leonard Blackford . . . . [A]s you know, my home for more than twenty years has been Apartment 9-B at 525 Park Avenue [in New York City]."

Petitioner's tax returns for the year 1988 all list his address as the 300 Broadway, San Francisco office address, while the Wage and Tax Statement (Form W-2) attached to his initial New York return lists the 525 Park Avenue address. When asked to specify where his domicile

[4]At the commencement of proceedings, the Division conceded that since petitioner spent less than 184 days in New York in 1988, the issue of "statutory resident" (whereunder a nondomiciliary remains subject to tax as a resident by virtue of the number of days spent in the State and/or City of New York) was not at issue. Given that petitioner has admitted to spending in excess of 30 days in New York State and City during 1988, the sole and determining issue in this matter is whether petitioner remained a domiciliary of New York and not of California for said year.

was in California, petitioner responded that it was "difficult to say", in that he spent time at both the Healdsburg property and at the 155 Jackson Street apartment.

Petitioner listed the California property as 13125, 13301, 13281 and 13427 Chalk Hill Road, Healdsburg, California. Petitioner also listed the same properties as properties from which he received rental income during the year in question. The record does not specify which, if any, of the addresses or houses at the property might not have been rented and in which petitioner might have lived. In connection with these proceedings, petitioner queried his accountant as to why a California return (as opposed to a New York resident return) was filed for 1988. In response, petitioner's accountant noted that such filing appeared proper in that petitioner was living in California rather than in New York during such year. Petitioner noted that he relied on his accountant to handle his tax matters, and did not make a calculated decision to file as a resident of California rather than New York. Instead he simply filed his returns as prepared by his accountant (it of course may be reasonably inferred that petitioner continues to agree with the manner in which his returns were filed for 1988 in light of the pursuit of these proceedings).

During the year at issue, petitioner was registered to vote in California, held driver's licenses in both California and New York, and belonged to social clubs in California, New York and Washington, D.C. During 1988, petitioner was treated by physicians in New York, although it is noteworthy that these were long-term doctor-patient relationships apparently involving rather routine annual or semi-annual visits.

OPINION

In his determination below, the Administrative Law Judge concluded that petitioner failed to establish a change in domicile to California prior to or during 1988. The Administrative Law Judge stated that although petitioner did not reside in his apartment in New York City during the year in question, in view of the circumstances under which petitioner left this apartment (see, findings of fact "11" and "12"), it was not established that petitioner

moved with the intention of abandoning New York City and acquiring a new domicile in California.

The Administrative Law Judge emphasized that petitioner left New York for financial reasons. As noted by the Administrative Law Judge in finding of fact "7," petitioner described his financial situation as dire and, at that time, was faced with the very real prospect of bankruptcy. Specifically, the Administrative Law Judge found that petitioner did not demonstrate that he intended to live permanently in California, but rather, the focus of his intent and activities in moving to California seemed to have been directed at subdividing his Healdsburg property for eventual sale of some of the subdivided lots in an effort to raise cash when it was required. The Administrative Law Judge noted that petitioner provided no testimony or evidence which indicated that any particular part of this property was to be reserved for him as his home.

Moreover, the Administrative Law Judge stated that petitioner failed to demonstrate a clean break with New York. He noted that there was no evidence showing that any particular items "near and dear" to petitioner were moved from New York to California which included the wall of artwork made by members of three generations of his family.

Lastly, the Administrative Law Judge discussed petitioner's opposition to the non-primary residence lawsuit filed by his landlord. The Administrative Law Judge determined that although the lawsuit was not pursued in an aggressive manner, such actions were limited due to the increase in legal costs to petitioner of defending the lawsuit. Furthermore, the Administrative Law Judge relied on petitioner's statement that "my home for more than twenty years has been apartment 9-B at 525 Park Avenue" (see, Exhibit "23"). Also, the Administrative Law Judge noted that although petitioner alleged a domicile change to California, he was unable to state specifically where in California he was domiciled. Therefore, the Administrative Law Judge concluded that petitioner's move to California was temporary and was made primarily because California was where he could best resolve his financial problems.

Accordingly, it was determined that petitioner failed to establish a change of domicile to California as of, or for, 1988.

In his exception, petitioner argues that he was a life-long domiciliary of California from the time of his birth until 1986 at which point he changed his domicile to New York. Thereafter, with the tactics engaged in by his landlord as well as the closing of his New York City office, petitioner argues that he decided at that point to move permanently to California to "create or recreate, his domicile on his Ranch" (Petitioner's brief, p. 7). Petitioner asserts that his filing resident tax returns in 1989 and 1990 coupled with his monthly visits to New York from California were principally done to obtain title to the Park Avenue apartment and that such facts demonstrate that petitioner never really established a New York domicile after 1987.

In response, the Division argues that petitioner has failed to meet his burden of proof by clear and convincing evidence to demonstrate his intention to acquire a new domicile in California in place of his domicile in New York City. The Division claims that petitioner's move to California in 1987 was a temporary move in order to accomplish a particular purpose and, when such purpose was completed, petitioner returned to his New York City domicile. The Division states that, based upon the evidence submitted, the Administrative Law Judge's determination was correct and requests that it be sustained.

We affirm the determination made by the Administrative Law Judge.

We begin by addressing the submission of many documents that petitioner attached to both his notice of exception as well as to his brief submitted in support of his exception. We stated in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991) that:

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing."

At the conclusion of the hearing, petitioner was asked by the Administrative Law Judge whether he had anything further to submit prior to the Administrative Law Judge's statement that, once the hearing record is closed, he would not take any additional evidence from either

side with certain exceptions which he set forth (Tr., p. 406). Petitioner stated that he had nothing further to submit (Tr., p. 406). Therefore, since the record in this matter was closed by the Administrative Law Judge at the conclusion of the hearing, we cannot consider any of the documentation submitted by petitioner subsequent to the hearing in rendering this decision.

In turning to the merits of this case, petitioner urges that he demonstrated a change in domicile in 1987 when he sublet his Park Avenue apartment to Ms. Michel and went to California. Domicile, though not defined in the Tax Law, is addressed at 20 NYCRR former 102.2(d) and states, in pertinent part, that:

> "Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent.
>
> "(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given undue weight, but they will not be conclusive if they are contradicted by his conduct" (emphasis added).

Creating a change of domicile requires both the intent to make a new location a fixed and permanent home, and actual residence at that location (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). As stated by the Court of Appeals in Matter of Newcomb (192 NY 238):

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile" (Matter of Newcomb, supra at 250).

The measure of intent regarding a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne, 181 Misc 238, 41 NYS2d 336, 343, affd 267

AD 876, 47 NYS2d 134, lv denied 267 AD 961, 48 NYS2d 439, citing Beale, Conflict of Laws, Vol. 1, pp. 124-127; see also, Matter of Doman, Tax Appeals Tribunal, April 9, 1992).

Petitioner asserts on exception that he was a life-long domiciliary of California from the time of his birth in 1919 until 1986. This assertion was contradicted by the testimony of petitioner wherein he referred to New York City as being his house and home for over 20 years (Tr., pp. 267-268; see also, Tr., pp. 147-148). Petitioner argues that although this fact is implied by his testimony, in actuality, he used his Park Avenue apartment for entertaining and as a satellite for business for the New York regional office and, as such, was clearly not his domicile. This assertion, however, is not supported by the record below.

Next, petitioner argues that, by mid-1987, he:

> "totally rejected any thought that he had had of trying to live in New York and **decided to permanently go home, and create or recreate, his domicile on his Ranch ('River Compound') in the State of California"** (Petitioner's brief, p. 7).

This assertion is completely without merit. Petitioner could not articulate which location in California was indeed his alleged domicile (Tr., pp. 356-361). Specifically, petitioner testified as follows:

> "Q [Division's attorney]. Do I understand that you considered both the Somona [sic] River property and the San Francisco apartment as your domicile after you left New York City?
>
> "A [petitioner]. I spent time up there. It is a summer place where I raised my four children.
>
> "Q. The ranch?
>
> "A. The ranch. And it's a place where there are active periods in harvesting grapes or summer activities. The buildings -- the barn is a single wall construction like I learned in Hawaii. It doesn't hold the heat" (Tr., p. 358, lines 2-12).

Petitioner was asked explicitly whether one location or the other or even both locations were considered by him to be his domicile and his answer was as follows: "I don't know what you want to call it. I lived between my ranch and the little studio apartment" (Tr., p.356). At no point during his testimony did petitioner state that he considered the ranch to be his domicile.

In his brief, petitioner alleges that he never came back to New York to live after 1987 (Petitioners brief, p. 11). This statement directly contradicts his testimony at the hearing. In fact, petitioner's attorney asked him explicitly whether he ever returned to New York to live. Petitioner testified that there were a number of reasons which made him return to New York which included the fact that he had problems driving and in California, in order to get around, you needed to be able to drive (Tr., pp. 282-285). This was not the case in New York City. Petitioner testified that, for a person of his age, it was a lot more convenient to live in New York City and do all the things that he needed to do (Tr., p. 285). Moreover, he testified that he missed living near his daughter in New York City and he wanted to spend more time with her now that his financial condition had been resolved (Tr., pp. 285-286). Accordingly, based upon his own testimony, petitioner conceded that he returned to New York at some point during 1989 (see also, Exhibit "J," ¶ 1).

Therefore, we agree with the determination of the Administrative Law Judge that petitioner failed to demonstrate by clear and convincing evidence that he changed his domicile from New York City to California as of 1988.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Carl Warnecke is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of John Carl Warnecke is denied; and

4. The Notice of Deficiency as modified by the conciliation order is sustained with interest.

DATED: Troy, New York
January 23, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner