

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**RALPH AND LEONA KERN** : DECISION  
for Redetermination of a Deficiency or for Refund of : DTA No. 812127  
Personal Income Tax under Article 22 of the Tax Law and :  
the Administrative Code of the City of New York for the :  
Year 1987. :  
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The Division of Taxation and filed an exception to the determination of the Administrative Law Judge issued on September 8, 1994. Petitioners Ralph and Leona Kern, 53 Birchall Drive, Scarsdale, New York 10583, filed an exception to the determination of the Administrative Law Judge issued on September 8, 1994 and to the modified determination of the Administrative Law Judge issued on December 15, 1994.<sup>1</sup> Petitioners appeared by Roberts & Holland (Joseph Lipari, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition to the exception. Petitioners filed a reply brief on May 11, 1995, 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.

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<sup>1</sup>A determination was issued in this matter on September 8, 1994. The Division of Taxation filed a motion to reargue, asserting that the Administrative Law Judge misinterpreted American Express records in evidence. The Division further argued that the Administrative Law Judge failed to address 44 additional days for which no evidence was presented by petitioner Ralph Kern. While the motion was pending, the Division of Taxation filed an exception to the September 8, 1994 determination asserting that petitioner Ralph Kern failed to provide any evidence with respect to 43 days and sufficient evidence regarding a 44th day. Petitioners also filed an exception to the September 8, 1994 determination. The Division of Taxation's motion was granted and the Administrative Law Judge issued a modified determination. It is this modified determination that we will address in our decision.

***ISSUE***

Whether, in 1987, petitioner Ralph Kern spent in the aggregate more than 183 days in the City of New York ("the City").

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact "2" and "3" which have been modified. We also make an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

***CONCEDED ISSUES***

(a) During the hearing in this matter, the Division of Taxation ("Division") cancelled tax of \$467.00, plus penalty and interest, asserted for 1987 on certain disallowed Schedule "C" business expense deductions of Mrs. Kern.

(b) After the hearing, the Division conceded that both petitioners had established that they were not statutory residents of the City during 1986. The Division's attorney duly executed a Cancellation of Deficiency/Determination and Discontinuance of Proceeding in two related matters, DTA Nos. 812128 and 812129, and all income taxes, penalty and interest asserted for 1986 were cancelled.

(c) In its post-hearing brief, the Division conceded that the proof presented on behalf of Leona Kern demonstrated that she was not a statutory resident of the City of New York during 1987.

(d) Finally, the Division's post-hearing brief conceded that no penalties should be assessed in this matter.

Therefore, the issues, facts and conclusions set forth in this determination relate solely to the tax asserted against Ralph Kern for 1987 (DTA No. 812127).

Ralph Kern ("petitioner") and Leona Kern, his wife, lived and maintained their domicile at 40 Olmstead Road, Scarsdale, New York during 1987.

We modify finding of fact "2" to read as follows:

Petitioner maintained a rental apartment in a building at 4 East 89th Street, New York, New York ("the Manhattan apartment") since at least 1986. The apartment building was owned by Clarendon Management, a family partnership. Mrs. Kern is a partner, with Mr. Kern, in Clarendon Management, although she takes no active role in management of the business.<sup>2</sup>

We modify finding of fact "3" to read as follows:

Mr. Kern owns interests in three income-producing real estate investments in New York City. He is builder and 50% owner of an apartment house at 40 East 89th Street in Manhattan. He also built and is 100% owner of an apartment building located at 211 West 56th Street. Petitioner owns a 50% interest in fee of a parcel of land on which a condominium is constructed at 303 East 57th Street in Manhattan. These properties are all managed by his other company, R. W. Kern, Inc., an S corporation. The company's office is located at petitioner's building at 211 West 56th Street, New York, New York.<sup>3</sup> Clarendon Management and R. W. Kern, Inc. are sister companies.<sup>4</sup>

Mr. Kern maintains the Manhattan apartment and his business offices in New York City, does his banking in New York City, frequents restaurants in the City and goes to doctors whose offices are located in the City.

Ralph and Leona Kern filed a nonresident New York City personal income tax return (Form IT-203) for 1987 ("the return"). This return, indicated that Mr. and Mrs Kern did not maintain a residence or place of abode in the City of New York.

The Division, acting by and through the New York City Department of Finance and its auditor, Samaan Wassif ("the auditor"), commenced an audit of petitioner's 1987 return. A request for documents was sent to petitioner on January 18, 1990. Among the documents requested by the Division were a copy of the original lease on the Manhattan apartment and a statement showing the amount of rent, who occupied the apartment, who paid the rent and who paid the bills for telephone and utilities (Ex. "I").<sup>5</sup>

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<sup>2</sup>We modified the first sentence in finding of fact "2" by inserting "4 East 89th Street" in the place of "40 East 89th Street" in order to accurately reflect the record.

<sup>3</sup>Also known as and referred to in the record as "1756 Broadway" (Tr., pp. 64-65).

<sup>4</sup>We modified finding of fact "3" by deleting the following statement in the second sentence "where the apartment is located" because said statement is inaccurate.

<sup>5</sup>It is unclear from the record how the Division first became aware of the Manhattan apartment.

In response, petitioner's accountant, David C. Messenger, C.P.A., wrote the auditor to advise him that the rent, telephone and utilities on the Manhattan apartment were paid by R. W. Kern, Inc. Messenger's letter indicated that the apartment was used by Ralph Kern to rest. "He is not a well individual and requires a place to rest during the day" (Ex. "J"). The letter also indicated that Mr. Kern stayed at the apartment overnight two days per month. A copy of the lease was not provided.

The auditor requested further documentation to show the number of days petitioner spent within the City during 1987. Mr. Messenger provided a hand-drawn calendar (Ex. "K"). Each page of this calendar purported to represent a month for 1987. Some of the days on this calendar had notations showing Mr. Kern's presence at restaurants or at his office in the City, and the spaces for some dates were blank. Mr. Messenger advised the auditor that a "blank" day on the calendar should be interpreted to mean that Mr. Kern was at his home in Scarsdale, New York on that day. Subsequently, Joseph Lipari, Esq., joined Mr. Messenger in representing petitioner.

Mr. Lipari provided the auditor with a printed calendar (Ex. "30") covering the same periods covered by the hand-drawn calendar (Ex. "K"). This printed calendar also had "blank" days purporting to denote Mr. Kern's presence in Scarsdale.

The calendars and documents provided by petitioner indicated that in 1987 he spent 107 days in New York City and 258 days outside of the City.

Based on the documents provided by petitioner, the auditor computed the numbers of days petitioner spent outside the City in 1987 as follows:

Days that were substantiated:	51
Weekend Days:	72 <sup>6</sup>
Days allowed without substantiation	<u>23<sup>7</sup></u>
TOTAL DAYS SPENT OUTSIDE OF NEW YORK CITY IN 1987:	146

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<sup>6</sup>Since petitioner was domiciled in Scarsdale, unless the documents showed otherwise, petitioner was assumed to be in Scarsdale on weekends.

<sup>7</sup>The auditor allowed 30% of the undocumented weekdays as a reasonable allowance of days spent outside of New York City. This percentage was based on a ratio of documented days in New York City to days spent outside of New York City.

Upon review of petitioner's documentation, the auditor computed petitioner's days in the City for 1987 as follows after allowing the unsubstantiated weekend days and 30% of the unsubstantiated weekdays:

Days Claimed by Petitioner as being in New York City:	107
Additional New York City Days found by auditor based on petitioner's lack of substantiation of non-NYC days:	<u>112</u>
TOTAL DAYS SPENT IN NEW YORK CITY:	219

The additional New York City days found by the auditor included 45 days which petitioner claimed to have been in the City for medical reasons.

Petitioner spent several days traveling in 1986 and 1987. The auditor noted that petitioner failed to report his days of departure and/or arrival (9 days) as days in New York City. These 9 days (over the two-year period) were included in the auditor's computation of additional days in New York City.

The calendars, supra, together with some "schedules" (see, Ex. "31") purporting to show petitioner's whereabouts on particular days in 1987, were the only evidence provided to the auditor to show petitioner's days outside New York City. The "schedules" and calendars were not source documents, but rather were prepared by petitioner's representatives for the audit and for this litigation. The auditor found these documents inadequate, illegible and sometimes contradictory. The auditor concluded that petitioner had failed to satisfy his burden of maintaining and making available for examination adequate records to substantiate the number of days petitioner spent outside of the City.

Based on the fact that petitioner maintained a place of abode in the City, i.e., the Manhattan apartment, and the fact that the auditor computed that petitioner had spent more than 183 days in the City in 1987, the auditor determined that petitioner is subject to taxation as a New York City resident.

On March 15, 1990, the Division issued a Statement of Personal Income Tax Audit Changes to petitioner for 1987 recomputing the tax shown as due on petitioner's filed return.

The additional New York City tax, as computed on this statement, was \$86,697.00 plus penalty and interest.

A Notice of Deficiency dated March 16, 1992 was issued to petitioner which asserted additional personal income tax for 1987 in the amount of \$86,697.00, plus penalty and interest.

Petitioner made a timely request for a conference with the Division's Bureau of Conciliation and Mediation Services. A Conciliation Order (CMS No. 121867) sustaining the notice was issued to petitioner on May 28, 1993.

Petitioner then filed a petition with the Division of Tax Appeals and the instant proceeding ensued.

At the hearing, to prove that petitioner spent less than 183 days in New York during 1987, petitioner's representative offered the "calendars" (Ex. "K"<sup>8</sup> and "30") and "schedules" (Ex. "31") that had been prepared based on Mr. Kern's pocket calendar<sup>9</sup> (Ex. "20") and Mr. Kern's "recollection" of his "pattern of behavior" in 1987 (Tr., p. 13).

Exhibit 30 is a printed version of the hand-drawn calendar (Ex. "K"), supra, and covers the same periods (see, above). However, 15 days which appear on Exhibit "K" as "office" days for petitioner do not appear as "office" days on the subsequently prepared Exhibit 30. Other days on Exhibit 30, which was prepared by or on behalf of petitioner, are designated as City days by the letters "NYC," yet these days continue to be a matter of dispute.

Exhibit 31 for identification<sup>10</sup> was submitted by petitioner at hearing not as evidence, but to summarize his evidence. Exhibit 31 consists of Schedules 7, 8, 10, 11 and 12.<sup>11</sup> Schedule 7 purports to show petitioner's documented non-New York City days. Petitioner claims 57 such documented days. Schedule 8 purports to show the 12 days petitioner claims he was hospitalized in the City in 1987. Schedule 10 purports to show the 72 days for which petitioner

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<sup>8</sup>Exhibit "K" was the Division's exhibit, but was prepared and provided to the Division by petitioner.

<sup>9</sup>Sometimes referred to in the record as petitioner's "diary."

<sup>10</sup>For brevity, hereinafter "Exhibit 31."

<sup>11</sup>These are the same "schedules" referred to earlier in this finding and above.

claims no third-party documentation to prove he was outside the City. Schedule 11 summarizes the claimed 23 days on which petitioner visited his doctor in the City. Finally, Schedule 12 sets forth an 18 additional days for which petitioner cannot account for his whereabouts in 1987.

Records relied on by petitioner at hearing included: (i) Mr. Kern's American Express Corporate Card ("Amex") receipts (Ex. "23"); (ii) Amex quarterly reports of petitioner's 1987 spending (Ex. "L,"<sup>12</sup> "29," "32"); (iii) medical bills showing days in 1987 in which petitioner visited his doctor or received medical care in or outside of the City as an inpatient or outpatient (Ex. "25"); and petitioner's passport and yacht contracts to show days when he was traveling outside the City (Ex. "21," "26," "27").

### ***DAYS OUTSIDE THE CITY***

Due to the lack of documentation to support many of the claimed days outside the City, petitioner and his witnesses rely heavily on testimony that is general in content but attempts to establish petitioner's "pattern of conduct". For example, Mrs. Kern testified that "[i]f he [petitioner] wasn't home he was either on a sailing trip or in [the] hospital" (Tr., p. 68). Petitioner testified he went to his office two to three times a week (Tr., p. 154). He testified he usually went to the office on Fridays. It was rare, he said, for him to go into the office on Mondays unless he had an appointment (Tr., p. 247). There was no need for him to go to the office every day, since Mr. Farrell managed the properties. Petitioner's main function was to sign checks. Mr. Kern testified that he generally would go to the office on those days where he and Mrs. Kern planned to go to the theater, or to dinner, or had otherwise planned an evening in New York (Tr., p. 294).

Leona Kern ("Mrs. Kern") testified that since petitioner's income is derived from his property investments, it is not necessary for him to be in the office every day. Mrs. Kern testified that she and petitioner have much free time which they use, whenever possible, to go sailing. During 1987, due to petitioner's heart ailment, they could no longer sail their own boat, so they chartered boat cruises.

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<sup>12</sup>The 1987 reports in Exhibit "L" are identical to those found in Exhibit "32."

Mrs. Kern testified that she and petitioner leased the Manhattan apartment at a time when it appeared that the building might be converted to cooperative ownership. They have continued to lease the apartment since that time. It was noted in testimony that this apartment had a telephone and cable television service listed under the name of Ralph W. Kern. Mrs. Kern did not remember who paid the telephone bill or the bill for cable television.

Mrs. Kern testified that during the months of September to April, she and Mr. Kern came into New York City once or twice a week, had dinner at a restaurant and went to the opera.

Mel Farrell ("Mr. Farrell") has been property manager for R. W. Kern, Inc.'s properties since mid-1987. Evelyn Leitch ("Ms. Leitch") was bookkeeper and office manager for R. W. Kern, Inc. during 1987. Mr. Farrell and Ms. Leitch both testified on behalf of petitioner.

Mrs. Kern, Ms. Leitch and Mr. Farrell all testified that petitioner went to his office in the City only one or two times a week during 1987. Mr. Farrell limited his testimony to 1987 and stated that during that year, Mr. Kern "would hardly ever come into the office" (Tr., p. 67). Mr. Farrell's testimony regarding petitioner's comings and goings was very general, and did not go into petitioner's whereabouts on specific dates. Neither Mrs. Kern, Ms. Leitch nor Mr. Farrell kept a calendar or diary for showing petitioner's whereabouts on particular days.

Ms. Leitch testified that petitioner was out of the office "most of the summer" in 1987 (Tr., p. 101). Ms. Leitch stated that it was not unusual for Mr. Kern to come into the City for a personal appointment and not come into the office (Tr., p. 109). She also testified that sometimes petitioner came to the office first and then went to a doctor's appointment. At other times, petitioner would go to his doctor's appointment first and then come to the office (Tr., p. 108).

Mr. Farrell, Ms. Leitch and Mrs. Kern were all credible witnesses, but the testimony of each suffered from excessive vagueness, i.e., a lack of specifics.

There are 53 days for which petitioner was able to show by documentation and testimony that he was on a cruise or otherwise traveling outside of the City. These days are:

January 1, 2, 9, 12, 13, 14 and 15  
August 1 through 31, inclusive

September 14, 15, 16, 17 and 18  
October 30  
December 4, 7, 18, 24, 25, 28, 29, 30 and 31

In addition, since petitioner is a resident of Scarsdale, he was deemed upon audit, and for purposes of this determination, to be in Scarsdale on every weekend day, except where there was evidence or it was stipulated to the contrary. Accordingly, petitioner was not in the City during the following 85 weekend days:

January 3, 4, 10, 11, 17, 18, 25, 31  
February 1, 7, 8, 14, 15, 21, 22, 28  
March 7, 15, 22, 28, 29  
April 4, 5, 11, 12, 18, 19, 25, 26  
May 2, 3, 9, 10, 16, 17, 24, 31  
June 6, 7, 13, 14, 20, 21, 27, 28  
July 4, 5, 11, 12, 18, 19, 25, 26  
September 5, 6, 12, 13, 19, 20, 26  
October 3, 4, 10, 11, 17, 18, 24, 25, 31  
November 1, 7, 8, 14, 21, 22, 28, 29  
December 5, 6, 12, 13, 19, 20, 26, 27

For many dates, petitioner's testimony is not supported by original documentation other than his pocket calendar ("diary" or Ex. "20").<sup>13</sup> However, petitioner's testimony, combined with his diary entries, was convincing in demonstrating that he was home 25 days when he was sick, had "palpitations", was short of breath or was home mourning the death of his mother.

These dates are:

January 20  
February 4, 5, 26  
  
April 14, 15  
May 12, 21  
September 1, 2, 3, 4, 7, 9, 10, 24, 25, 29  
October 1, 12, 15, 22, 26  
November 11, 26

As noted earlier, Exhibit 30 fails to include 15 "office" days that were included in the original calendar provided to the auditor (Ex. "K"). Many of these days are included in Schedule 12 of Exhibit 31.

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<sup>13</sup>This diary is difficult to read and interpret, which may explain why it was necessary for petitioner's representative to draw up a hand-drawn version for the auditor (i.e., Ex. "K").

***NEW YORK CITY DAYS***

At the hearing in this matter, the parties stipulated to Mr. Kern's being present in the City on 104 days during 1987. These stipulated days do not include days when petitioner claims he was hospitalized in the City or was in the City to see his doctor. The stipulated days appear to track petitioner's Amex receipts (Ex. "23") which show his transactions in the City on specified dates. The stipulated days are:

January 5, 6, 7, 16, 19, 21, 22, 24, 27 and 29  
February 3, 6, 9, 10, 11, 12, 13, 16, 23, 25 and 27  
March 1, 2, 4, 8, 12, 13, 14, 19, 20, 21, 25, 26 and 31  
April 1, 3, 6, 7, 9, 10, 20, 21, 22, 23, 24 and 28  
May 5, 6, 7, 13, 15, 18, 19, 22 and 23  
June 8, 11, 16, 17, 18, 23, 24 and 30  
July 3, 6, 7, 8, 13, 22 and 24  
September 8, 11, 22, 27 and 30  
October 5, 6, 7, 8, 9, 14, 19, 21, 23, 28 and 29  
November 3, 5, 9, 13, 17, 18, 19, 20, 25, 27 and 30  
December 3, 9, 10, 14, 15, 17 and 21

In addition to these stipulated days, petitioner's Amex receipts show he was also present in the City on February 19 and November 15.

In addition to the days found above, the record shows that petitioner was hospitalized as an inpatient at The New York Hospital-Cornell Medical Center ("the Hospital") for 11 days during 1987 (Ex. "25").<sup>14</sup> These days are:

April 29 and 30  
May 1, 25, 26, 27, 28 and 29  
July 14, 15, and 16

In addition to the days found above, petitioner visited his doctor (in the City) or went to the hospital as an outpatient for consultations, laboratory work or to have prescriptions filled (hereinafter collectively referred to as "outpatient doctor visits") on 24 days. The days on which petitioner had outpatient doctor visits in the City are:

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<sup>14</sup>Petitioner claims he was hospitalized 12 days, the additional day being May 30th. However, his medical bills shown that he was discharged on May 29. He returned to the Emergency Room on May 30th and was treated as an outpatient.

April 8 and 27  
May 8, 14 and 30<sup>15</sup>  
June 5, 9, 15, 19, 22 and 29  
July 2, 9, 10, 21, 23, 29 and 30  
September 23  
October 20 and 27  
November 12  
December 8 and 16

As noted, supra, sometimes petitioner would go to his doctor from his office and sometimes he would go directly from home.

There are 40 days for which petitioner did not provide documentation or other clear and convincing evidence that he was not in the City.<sup>16</sup> These days must therefore be treated as additional days in the City:

January 8, 23, 28, 30  
February 2, 17, 18, 24  
March 3, 6, 9, 10, 11, 16, 17, 23, 24, 27 and 30  
April 17  
May 11  
June 1, 3, 4, 10, 12, 26  
July 20, 28, 31  
September 21  
October 13, 16  
November 2, 4, 6, 16  
December 2, 11, 22

As noted, supra, Exhibit "K" was prepared and provided by petitioner to the Division's auditor for audit purposes. One of the ways Exhibit "K" indicated that petitioner spent a day in the New York City office was by writing the word "office". A second calendar, Exhibit "30", was also prepared by petitioner, but failed to include 15 of these "office" days from Exhibit "K". Where Exhibit "K" set forth an "office" day, especially in the absence of clear and convincing proof to the contrary, it has been treated as an admission by a party and deemed a day in the City. Accordingly, it is found that, in addition to the days in New York City found, supra, petitioner was present in New York City on the following days:

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May 30 was petitioner's Emergency Room visit the day following his discharge from the hospital.

<sup>16</sup>Schedule 10 of petitioner's Exhibit 31 specifies 72 days for which he acknowledges no third party documentation to show he was not present in the City. Nevertheless, 32 of those days have been allowed petitioner based on other evidence.

January 26  
March 5  
April 2 and 13  
May 4  
June 2 and 25  
July 1, 17 and 27  
September 28  
October 2  
November 10 and 23  
December 1

In addition to the 15 omitted office days, supra, there are 5 days in which petitioner has not shown documentation or other proof sufficient to show that he was not present in the City.<sup>17</sup>

These days are:

February 20  
March 18  
April 16  
May 20  
November 24

Petitioner was in the City during 1987 for a total of 201 days (see, above). This total includes petitioner's presence in New York City as a hospital inpatient (11 days) as well as his outpatient doctor visits in New York City (24 days).

We make the following additional finding of fact.

The Division did not introduce into evidence the auditor's log or notes for 1987. As a result, the only manner in which one may determine the basis for the auditor's conclusions is from the auditor's report.

### ***OPINION***

The Administrative Law Judge noted that it was undisputed that Ralph and Leona Kern maintained a permanent place of abode in New York City. Therefore, the issue was whether petitioner spent in excess of 183 days in the City. The Administrative Law Judge found the testimony of petitioner and his witnesses to be credible, but not sufficiently specific to meet petitioner's burden. The Administrative Law Judge pointed to the fact that testimony as to petitioner's "pattern of conduct" varied between the individuals testifying. For example, the Administrative Law Judge noted that Mr. Kern testified that he went into his New York office

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<sup>17</sup>Many of these days, and the 15 omitted office days, appear in Schedule 12 of petitioner's Exhibit "31," as days which he neither designates as a City day or non-City day.

only two to three times a week. Petitioner's witness, Mr. Farrell testified, however, that Mr. Kern "hardly ever" went to the office during the period at issue. The Administrative Law Judge did credit petitioner for days where his testimony was corroborated by documentation. Further, relying on Stranahan v. New York State Tax Commn. (68 AD2d 250, 416 NYS2d 836), the Administrative Law Judge also held that 11 days petitioner spent as an inpatient at the New York hospital cannot be counted as days spent in New York City for the purpose of determining statutory residency. The Administrative Law Judge further held that the rule in Stranahan cannot be expanded to include outpatient visits.

We affirm the determination of the Administrative Law Judge.

Section 11-1705(b)(1)(B) of the Administrative Code of the City of New York provides, in part, that a City resident individual includes an individual:

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

As a preliminary matter, we wish to address statements made by petitioner in footnote "8" in his brief on exception. Petitioner questions whether the burden of clear and convincing evidence imposed on taxpayers in statutory residency matters is warranted. Petitioner notes that Matter of Newcomb (192 NY 238), the authority relied on for applying the clear and convincing evidence standard to statutory residency matters, was a domicile case. Petitioner states that, "[b]ecause statutory residence cases do not involve issues of intent . . . but apply an objective test of presence, the need for a heightened level of proof does not appear to exist, and the 'preponderance of the evidence' standard of proof should be applied" (Petitioner's brief on exception, p. 10).

We disagree with petitioner's conclusion. The application by the courts of the standard of clear and convincing evidence has not been limited to issues of intent. The courts have applied this standard in sales tax audit cases where the taxpayer must prove by clear and convincing evidence that either the method used to arrive at the assessment or the assessment itself are erroneous (see, Matter of Flanagan v. New York State Tax Commn., 154 AD2d 758, 546

NYS2d 205; Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219; Matter of Micheli Contr. Corp. v. New York State Tax Commn., 109 AD2d 957, 486 NYS2d 448). This standard has also been applied in income tax audit methodology cases (see, Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, lv denied 81 NY2d 704, 595 NYS2d 398; Matter of Zubawicz v. State Tax Commn., 154 AD2d 735, 546 NYS2d 178; Matter of Gun Hill Plumbing Supply Co. v. Chu, 145 AD2d 769, 535 NYS2d 497; Matter of Giuliano v. Chu, 135 AD2d 893, 521 NYS2d 883; Matter of Jacobson v. State Tax Commn., 129 AD2d 880, 514 NYS2d 145 and Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113), in a highway use tax audit methodology case (Matter of Lionel Leasing Indus. Co. v. State Tax Commn., 105 AD2d 581, 481 NYS2d 520) and in a franchise tax case where the issue was one of statutory interpretation (Matter of Landauer Assocs. v. Tax Appeals Tribunal, 183 AD2d 972, 583 NYS2d 568). As a result, we reject petitioner's claim that a different level of proof is required in this matter than what is necessary to establish a change of domicile.

Petitioner next asserts that New York City Administrative Code § 11-1705(b)(1)(B) does not require a taxpayer to specifically account for his location on every day during a subject year. Petitioner argues that only 61 days (45 days for which there was no witness recollection nor documentary evidence presented, 15 days listed on "Exhibit 'K'" as "office" days and December 23 which was not dealt with by the Administrative Law Judge<sup>18</sup>) were left unaccounted for and that there is no specific evidence pointing one way or the other as to his whereabouts on any of these days. As a result, petitioner contends that, given his pattern of going into the office only two to three days a week, he most certainly was out of the City for at least 7 of these 61 days, the minimum number required to remove petitioner from liability in this matter. Further, petitioner argues that, in order to be considered a statutory resident, he

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<sup>18</sup>December 23 was not addressed by the Administrative Law Judge in his modified determination despite the Division's request in its motion to reargue. This date was also identified in the Division's exception as one of the dates for which no evidence was presented by petitioner. December 23 was the only date listed in the Division's exception and motion to reargue that the Administrative Law Judge did not address in the modified determination. Petitioner, in his brief, agrees that no evidence on this date was presented, but petitioner does not concede December 23 as a day spent in New York City for income tax purposes.

would have had to average 4.2 days a work week for those weeks he was not hospitalized or on vacation. Petitioner claims that, given evidence of his poor health, this result is implausible.

We first note that this Tribunal has stated in the past that the degree of specificity of a taxpayer's testimony regarding days in and out of New York City or New York State will be evaluated based on the nature of the factual issues raised (Matter of Armel, Tax Appeals Tribunal, August 17, 1995). Where a taxpayer can establish a "pattern of conduct" from which his location may be determined for any particular day, the taxpayer need not specifically account for his whereabouts on every day of the subject period. However, where a taxpayer cannot establish a pattern of conduct that covers a large period of time, then more specific evidence relating to daily activity is required. We find that a brief review of the decisional law on statutory residency is warranted.

In Matter of Armel (supra), the issue on exception was the petitioners' location from December 7, 1988 through December 31, 1988. The petitioners testified that every year since 1984, they would leave New York in October and spend their winter months in Florida. We held that the petitioners had established through credible testimony and corroborating affidavits a pattern of travel which established that they were not in New York during the period at issue and, therefore, did not spend in excess of 183 days in New York State. Therefore, it was unnecessary for petitioner Jack Armel to specifically recall where he was during the December days in issue because his pattern of conduct established that he was out of the State during the entire month.

In Matter of Moss (Tax Appeals Tribunal, November 25, 1992), as correctly pointed out by the Division in their reply brief:

"the petitioner testified credibly that he completed his diary at the end of each year by reconstructing events based on, inter alia, his general routine of taking long weekends at Quogue pursuant to an agreement with his employer that he would not work in the New York City office on Fridays and would frequently work in Quogue on Mondays. It was from his stated pattern of conduct and other sources that Mr. Moss was able to recount the specific days he spent in and out of New York City" (Division's brief on exception, p. 3).

In Matter of Reid (Tax Appeals Tribunal, October 5, 1995), the petitioner was able to

prove through testimony and his business logs where he was on every weekday. On weekends, he established through his credible testimony and that of his witness, a "general habit of life" that revolved around his home in Connecticut and did not include travel into New York. The taxpayer was not required to give a specific accounting for every weekend day because of his credible testimony. Nevertheless, every day was accounted for through a combination of business logs and credible testimony.

In Matter of Avildsen (Tax Appeals Tribunal, May 19, 1994) where New York City income tax was at issue, the petitioner traveled frequently, including regular commutes to his office in New York City. Because of the taxpayer's frequent travel, a specific day-by-day accounting was necessary in order to establish he was not in New York City for more than 183 days.

Turning to the facts, petitioner has failed to produce evidence sufficient to prove a cogent pattern of travel accounting for his location during the 61 days at issue. What distinguishes this matter from the foregoing decisions where the taxpayer did prove a pattern of travel is that petitioner has not established any general pattern from which we may accurately determine his location on a particular day. For example, petitioner's argument includes the assertion that he has established a "pattern" of never working on Mondays unless there was a meeting scheduled, while he claims he usually worked on Fridays. However, the record reflects that petitioner spent nearly as many Mondays as Fridays in New York City. The Division in its brief on exception points out that the record shows that petitioner was in New York 23 Mondays and 28 Fridays. While the dates the Division cites for Mondays in New York are not entirely accurate, i.e., May 25 was not a New York City day as the Division contends, while September 28 was stipulated to be, which the Division omitted, our review of the record does confirm the Division's claim that petitioner's asserted pattern is not borne out by the evidence.

The Division also accurately points out that petitioner's asserted pattern of working in his New York City office two to three days a week does not account for the number of days petitioner spent in the City. Petitioner testified that he went into New York for doctor

appointments and that on these days he generally did not go into the office (Tr., p. 257). Petitioner testified that he did not go into the office on these days at least in part because of the difficulty in traveling through Manhattan (Tr., p. 294). Including days visiting a physician with those days petitioner spent in the office adds uncertainty to petitioner's assertion that he could not have averaged more than 4 days per work week in the City. We further note that the record reflects a number of weeks petitioner has, in fact, stipulated to being in New York City at least 4 days in a given work week.<sup>19</sup> As a result, while petitioner's heart condition is well documented, we cannot find for him based on the assertion that it was unlikely that petitioner averaged 4.2 days a work week in New York City.

We next address petitioner's assertion that this matter should be resolved in his favor based on the Administrative Law Judge's finding of credibility. Petitioner asserts that the witnesses:

"[a]ll were in a position to observe at the time how often Mr. Kern went to his office, and Mr. and Mrs. Kern were in a position to observe how often he went into the City or remained at home. While time has reduced competency to testify, solely from memory, where Mr. Kern spent a specific day, these witnesses were certainly competent to recollect, in general terms, the frequency with which he would go to the office during a normal week" (Petitioner's brief on exception, pp. 14-15).

We do not agree that the witnesses' recollections can carry this matter. In past decisions where we have allowed credible testimony to meet a taxpayer's burden, the testimony could account for the petitioner's location by stating with certainty that, for example, the taxpayer was in Florida every December (Matter of Armel, supra) or the taxpayer was home on weekends and not in New York City (Matter of Reid, supra). The difference in the credible testimony in this matter as opposed to the decisions cited above is that the testimony of witnesses in Armel and Reid was unequivocal with respect to the specific days in issue, while in this matter the testimony only raises a probability that petitioner was not in New York for any one of the 61 days in issue. In other words, the testimony does not specifically relate to any particular day. Further, the witnesses' testimony referenced above only considered petitioner's office visits.

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<sup>19</sup>These weeks are those beginning on 2/8, 4/5, 4/19, 4/26, 5/3, 6/14, 6/28, 7/5, 7/19, 10/4, 10/18, 11/15, 12/14.

Other reasons petitioner would be prompted to enter the City were not included. As noted above, petitioner testified that office days did not

necessarily coincide with trips to a doctor's office (Tr., p. 257) a point echoed by petitioner's bookkeeper, Ms. Leitch (Tr., p. 109). As a result, while the witnesses' testimony may have been truthful and competent, in our view it is insufficient to meet petitioner's burden.

We next address petitioner's argument that days where there are no credit card charges should not be counted as New York City days. Petitioner argues that if he had spent the day in New York City he would have had to eat a meal, payment for which would have been made on his credit card. We, however, are unwilling to infer the positive from a negative. The absence of a credit card charge on a given day does not lead to the conclusion that said day was not a New York City day. What petitioner seeks is to essentially extend the presumption granted by the auditor, that, unless there was evidence to the contrary, Saturdays and Sundays were considered spent by petitioner in Scarsdale. We cannot see how such a presumption may be made with respect to the weekdays, however, given the frequency of trips petitioner made into the City during the week. Therefore, we reject petitioner's claim that the absence of a credit card charge on a given day results in excluding said day.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ralph and Leona Kern is denied;
2. The exception of the Division of Taxation is granted to the extent that December 23, the only day not addressed by the Administrative Law Judge in his modified determination, is treated as a New York City day;
3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Ralph and Leona Kern is granted to the extent indicated in conclusions of law "I," "J" and "K" of the Administrative Law Judge's determination, but is otherwise denied; and

5. The Division of Taxation is directed to modify the notice of deficiency dated March 16, 1992 in accordance with paragraph "4" above, but such notice is otherwise sustained.

DATED: Troy, New York  
November 9, 1995

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Donald C. DeWitt

Donald C. DeWitt  
Commissioner