STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LEONARD BRAWER	:	DECISION DTA NO. 817000
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1991.	:	

Petitioner Leonard Brawer, c/o Marc Brawer, 7771 West Oakland Park Boulevard, Suite 214, Sunrise, Florida 33351, filed an exception to the determination of the Administrative Law Judge issued on July 19, 2001. Petitioner appeared by Stephen P. Sophir.[1] The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Petitioner's request for oral argument was withdrawn.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

[1]Subsequent to the hearing in this matter, Leonard Brawer passed away. The Estate of Leonard Brawer continues to pursue his interests in this proceeding.

ISSUES

I. Whether petitioner has established that he was properly subject to tax as a nonresident of New York State and City during 1991.

II. Whether, assuming he was properly subject to tax as a New York State and City resident, petitioner has shown that the Division of Taxation improperly disallowed a claimed embezzlement loss of $237,500.00.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "17" which has been deleted. These facts are set forth below.

On March 24, 1997, following an audit, the Division of Taxation ("Division") issued to petitioner, Leonard Brawer, a Notice of Deficiency which asserted $46,281.35 in additional New York State and City personal income tax due, plus penalty and interest, for the year 1991. The deficiency resulted from the Division's conclusion that petitioner was properly subject to tax as a resident of New York State and City for the year at issue. In addition, the Division disallowed a deduction of $237,500.00 claimed by petitioner on his 1991 Federal return as a casualty or theft of property loss.

Petitioner and his wife, Diana Brawer, jointly filed a 1991 New York Nonresident and Part-Year Resident Return (Form IT-203). In their response to line "E" of that return, which asks nonresidents, "Did you or your spouse maintain living quarters in New York State in 1991?," petitioner and his wife indicated "No."

Petitioner was born in Poland on September 22, 1922. At some point, perhaps as late as the 1970s or perhaps much earlier,[2] he purchased a four bedroom, three bathroom house located at 67-20 147th Street, Flushing, New York. Petitioner continued to own this house in 1991 and stayed there when he was in New York. Petitioner's children used the Flushing residence when they were in New York. Petitioner's granddaughter, Sari Kaplan, also had access to and used the Flushing residence during the year at issue. Petitioner's children and granddaughter had access to the telephone at the Flushing residence.

On May 14, 1976 petitioner filed a declaration of domicile in the office of the Circuit Court Clerk, Dade County, Florida. The declaration of domicile states that as of January 2, 1976, petitioner changed his domicile from 67-20 147th Street, Flushing, New York to 6039 Collins Avenue, Miami Beach, Florida.

Petitioner registered to vote in Florida on May 11, 1976. He also obtained a Florida driver's license and joined a temple.

Petitioner and his wife, Diana, had three children, all of whom were adults in 1991. One son, Marc Brawer, lived in Florida, and another, Alan Brawer, lived in California. Petitioner's daughter lived in Westfield, New Jersey.

Petitioner owned a two-bedroom apartment or condominium[3] at 6039 Collins Avenue, Miami Beach. He purchased this residence in the early 1970s.

---

[2]The Administrative Law Judge noted that it is unclear when petitioner purchased this house. While petitioner testified that he bought the house in the early 1970's, the Administrative Law Judge did not accept this testimony as fact given the other evidence in the record regarding petitioner's poor memory and mental condition (***see***, below). Moreover, although the source of this information is uncertain, the auditor's workpapers indicate that petitioner bought the house in the 1950s.

[3]The record establishes that petitioner owned his residence in Florida, but it does not establish the form of ownership.

Petitioner's wife, Diana, was ill during the first part of 1991 and was cared for in southern California. She died in California on May 5, 1991 and was buried in New Jersey.

Petitioner had three accounts at Chemical Bank in New York in 1991. These accounts yielded petitioner a total of $8,872.00 in interest in 1991. Petitioner also had an account with City National Bank in Miami, Florida. Petitioner earned $178.00 in interest on this account in 1991.

Petitioner had several real estate investments in New York in 1991. He was a partner in a partnership known as Park Realty which owned a strip mall on Jericho Turnpike, New Hyde Park, New York. He was also a partner in Brawer and Siflinger, a partnership which owned a strip mall located at 147-01 Union Turnpike, Flushing, New York. He was also a partner in Brawer and Brawer, a partnership which owned a strip mall in North Bellmore, New York. Petitioner's income from these New York real estate investments totaled approximately $21,000.00 in 1991.

Petitioner also had real estate investments in Canada in 1991. Specifically, through an entity known as Brawer Enterprises, Ltd., petitioner owned an apartment building located at 1375 Midland, Scarborough, Ontario, Canada. This building had an apartment which was available for petitioner's use (and which he did use) when he visited the premises. This apartment had a telephone in petitioner's name. Petitioner's 1991 gross income in respect of his Canadian real estate investments was $352,023.00.

Petitioner did not manage the three New York properties on a day-to-day basis during the year at issue. Indeed, he visited the properties very infrequently, if at all, during that year. The strip mall located on Union Turnpike was managed by petitioner's partner, Larry Siflinger. The

mall located on Jericho Turnpike was managed by petitioner's partner in that investment, Samuel Sorger, or Mr. Sorger's son, David Sorger. Petitioner also did not manage the strip mall in North Bellmore. The tenants at that location mailed their rents to the Flushing address. The books for that property were maintained by a bookkeeper, Ellen Berelson. Ms. Berelson was hired, on a part-time basis, by petitioner in early 1991. Ms. Berelson performed her bookkeeping duties at petitioner's Flushing residence.

Petitioner also did not manage his real property interests in Canada on a day-to-day basis. He did travel to Canada on occasion during 1991. While in Canada, he stayed at his apartment in the building at 1375 Scarborough.

Petitioner's son Marc Brawer also occasionally traveled to Canada on business in 1991 and stayed at the apartment at 1375 Scarborough. While there, petitioner's son had access to the telephone. The superintendent of the building at 1375 Scarborough also had access to the telephone.

Petitioner used a Citibank Advantage credit card in 1991. His granddaughter, Sari Kaplan, was an authorized user of the card and did occasionally use the card in 1991.

During the audit, petitioner produced his 1991 New York and Florida telephone bills. The auditor reviewed these bills and made a list of days where the bills indicated a long distance phone call. This list was contained in the auditor's report which was received in evidence. At hearing petitioner submitted into evidence copies of his 1991 phone bills for his apartment at 1375 Scarborough, Ontario, Canada. These bills also identified days on which long distance

phone calls were made. Also at hearing, petitioner introduced copies of his 1991 Citibank Advantage card bills.[4]

Petitioner also submitted in evidence a list of airline tickets purchased during 1991. Such tickets were purchased with petitioner's Citibank Advantage card. The listing provides information regarding the date and amount of purchase, and the ticket seller (airline or travel agency), but does not provide information regarding place of departure, destination or dates of travel. There are about 30 such purchases on the list.

During 1991, petitioner received treatment from New York area doctors, including North Shore Cardiology, Great Neck, New York, where petitioner received treatment on August 24, 1991.

Petitioner traveled to London, England in December 1991. He arrived there on December 13 and, as he testified, was in England for a few days.

Petitioner's granddaughter, Sari Kaplan, visited California in January and April 1991.

On his 1991 Federal return, petitioner claimed a deduction of $237,500.00 arising from a casualty or theft loss. The Form 4684 ("Casualties and Thefts") attached to petitioner's Federal return makes reference to an embezzlement loss with respect to property referred to on the form as "Barnett Plaza" or "Barnett Plaza Assoc." The form also indicates that the property was acquired in 1987.

In 1987, petitioner, his son, Marc Brawer, and a third individual made an investment and became limited partners in Barnett Plaza Associates, a partnership involved in a Florida real

---

[4]We have omitted finding of fact "17" of the Administrative Law Judge's determination. The activity on the telephone bill list and credit card and telephone bills introduced in the record was summarized in Appendix "A" to the determination. The substance of said Appendix "A" is incorporated herein by reference.

estate development project known as Barnett Bank Plaza. This group invested $430,000.00 in Barnett Plaza Associates. The record does not indicate what portion of this amount petitioner invested. It does appear, however, that petitioner invested most of this money. Marc Brawer represented the interests of this group of investors because he is (and was) an attorney and because petitioner and the third investor were often unavailable. Unfortunately for the investors, the building constructed by Barnett Plaza Associates was never able to meet its expenses and a foreclosure ensued. The foreclosure resulted in a total loss for the limited partners.

In or about 1989, during the course of construction of the Barnett Plaza Associates property, Marc Brawer was approached by the principals of that limited partnership regarding a further investment in an expansion of the original project, to be known as "Tri-Parcel." Marc Brawer, petitioner, and a third individual, Joseph Cwiklik, invested additional funds in connection with this expansion project and became limited partners in "Tri-Parcel Developments, Ltd.," a limited partnership formed to develop this expansion project. The Tri-Parcel project also failed and resulted in a total loss for the investors.

Marc Brawer, as trustee for the interests of himself and petitioner, and Joseph Cwiklik subsequently commenced a lawsuit against the principals involved in the Tri-Parcel project. The plaintiffs in the suit alleged, among other things, that the Tri-Parcel developers had improperly used $110,000.00 of the Tri-Parcel project's line of credit, which was secured by certain securities owned by the plaintiffs, to purchase certificates of deposit, which were in turn pledged as security for loans for development projects unrelated to the Tri-Parcel project. One of these other projects involved the Barnett Plaza Associates project. Both of these other projects failed and the $110,000.00 was not recovered. As a result, $110,000.00 of the hypothecated securities

pledged by the plaintiffs to secure Tri-Parcel's line of credit was lost. The amended complaint filed in connection with this suit indicates that the plaintiffs discovered this loss on April 13, 1990.

On July 15, 1994, a judgment was entered against one of the defendants in the suit, Jeffery A. Phillips, in the amount of $104,755.00.

The amount of petitioner's investment in Tri-Parcel is unclear. According to the amended complaint filed in the suit against Tri-Parcel, "the plaintiffs" hypothecated $275,000.00 in securities for the benefit of the Tri-Parcel project. The affidavit of Marc Brawer indicates that, "to the best of his recollection," Marc Brawer, petitioner, and Joseph Cwiklik invested $375,000.00 in the Tri-Parcel project. According to the affidavit of Lee J. Osiason, attorney for Barnett Plaza Associates, the Brawer group invested $150,000.00 in Tri-Parcel.

Petitioner's 1991 Federal and New York tax returns were prepared by his accountant, Jack N. Rosenberg, CPA. In an affidavit received in evidence, Mr. Rosenberg stated that the embezzlement loss of $237,000.00 was "substantiated from outside sources and other documentation provided to me." This claimed loss was not challenged by the Internal Revenue Service.

At the time he testified at the hearing on May 17, 2000, petitioner was suffering from dementia.[5] According to his doctor, petitioner's mental condition had markedly deteriorated from about June 1998. As a result, at around the time of hearing petitioner was often disoriented in time and place. He often discussed matters that happened in the remote past as if they were recent events. He was also subject to exaggeration and delusional thinking, often attributing to

[5]Petitioner was not suffering from dementia or any other form of mental illness or disorder in 1991.

himself acts that were performed by others. In June 2000, petitioner was totally incapacitated and was hospitalized.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Upon review of the record, the Administrative Law Judge concluded that petitioner had failed to meet his burden and the Division's determination that petitioner was subject to tax as a statutory resident in 1991 was proper.

The Administrative Law Judge found that the testimony of Sari Kaplan provided little assistance to petitioner in meeting his burden of showing that he was not present in New York for more than 183 days in 1991. Moreover, the Administrative Law Judge found that the testimony of petitioner himself provided little support to his position regarding the statutory residency issue, as such testimony did not show his whereabouts on more than a handful of specific days during 1991. Additionally, the Administrative Law Judge found the probative value of petitioner's testimony was limited by the accuracy of his memory. The Administrative Law Judge noted that petitioner complained about his failing memory many times during his testimony. Additionally, the affidavits submitted post-hearing militated against according significant weight to petitioner's testimony.

Having discounted the testimonial evidence and the limited evidence of petitioner's air travel, the Administrative Law Judge found that the best evidence remaining in the record regarding petitioner's day-to-day whereabouts in 1991 were the records of credit card purchases and long distance phone calls. That evidence formed the basis for the Administrative Law Judge's determination of the statutory residency issue. The Administrative Law Judge recognized that the use of credit card purchase records and long distance calls for this purpose

was far from flawless. For one thing, others had access to the telephone at the Flushing residence, the Florida residence, and the Canadian apartment. As to the credit card bills, Ms. Kaplan was an authorized user of the card and made purchases using the card in 1991. Furthermore, a credit card bill lists the location of the seller; the purchaser is not necessarily physically present at the seller's location. Notwithstanding these flaws, given the dearth of other evidence in the record regarding petitioner's day-to-day whereabouts, the Administrative Law Judge found that the telephone and credit card bills were the best evidence in the record on this issue.

Inasmuch as the Administrative Law Judge determined that petitioner was subject to New York State and City personal income tax as a statutory resident under Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B), he deemed it unnecessary to determine whether petitioner was a New York domiciliary in 1991 subject to tax as a resident pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

Next, the Administrative Law Judge addressed petitioner's claimed deduction of $237,500.00 as a loss arising from an embezzlement. The Administrative Law Judge noted that the only allegations of activity which may be construed as embezzlement relate to the allegations that the Tri-Parcel developers improperly used $110,000.00 of the Tri-Parcel line of credit to finance non-Tri-Parcel projects and that the failure of such other projects resulted in the loss of $110,000.00 in securities used to secure Tri-Parcel's line of credit. Thus, the Administrative Law Judge reasoned that there could be, at the most, an allegation of an embezzlement loss in the amount of $110,000.00. However, with regard to the $110,000.00 in securities lost, the

Administrative Law Judge concluded that petitioner submitted no documentation to substantiate the claimed loss. The Administrative Law Judge determined that the evidence submitted failed to establish the amount of petitioner's investment in the Tri-Parcel project or the amount of his loss resulting from the claimed embezzlement.

The Administrative Law Judge also found that petitioner failed to prove that an embezzlement, in fact, occurred. In order to substantiate a deduction for a theft or embezzlement loss, the taxpayer must prove that an illegal taking of property occurred and that the taking was done with criminal intent (***see***, Rev. Rul. 72-112). In this case, the Administrative Law Judge found the evidence insufficient to prove that petitioner was the victim of an embezzlement.

The Administrative Law Judge also determined that even if petitioner had proven an embezzlement loss of $110,000.00 resulting from the loss of the hypothecated securities, such loss was not properly deductible in 1991, the year at issue. In this case, the Administrative Law Judge noted, the only portion of petitioner's losses which can be characterized as embezzlement related to the Tri-Parcel securities losses. According to the information submitted by petitioner (i.e., the amended complaint), this loss was discovered in 1990. Under section 165 of the Internal Revenue Code and its accompanying regulations, the Administrative Law Judge found such losses reportable in 1990. While petitioner argued that the extent of his loss was determined in 1991 as a result of litigation and depositions, the Administrative Law Judge found no evidence in the record to support this assertion. Accordingly, the Administrative Law Judge determined that there was no evidence in the record to support the allowance of the claimed deduction in the year at issue.

Petitioner next asserted that the dispute over the claimed embezzlement loss had been "agreed to at the May 17, 2000 hearing" and that the parties had agreed that "this loss was an offset." Again, the Administrative Law Judge found this claim unsupported by the record,[6] and rejected petitioner's assertion that the embezzlement loss issue was resolved at the May 17, 2000 hearing.

Lastly, petitioner argued that the Internal Revenue Service "allowed" the claimed embezzlement loss. The Administrative Law Judge found that, more accurately, the Internal Revenue Service apparently accepted petitioner's return as filed and did not audit petitioner's 1991 return. In any event, the Administrative Law Judge pointed out, petitioner claimed the embezzlement loss on his 1991 New York nonresident return so it was within the Division's authority to examine petitioner's return and to make a determination regarding the propriety of his claimed deduction (***see***, Tax Law § 681). Thus, the Notice of Deficiency issued to petitioner was sustained in its entirety.

ARGUMENTS ON EXCEPTION

Petitioner raises the same arguments as were proffered below. Petitioner urges that he was a nonresident of New York in 1991, and that he suffered a substantial embezzlement loss in that year. Petitioner also takes issue with the Administrative Law Judge's computation of petitioner's days in New York.

---

[6]In discussing petitioner's Canadian rental income and Florida embezzlement loss deduction at the May 17, 2000 hearing, the Division's representative stated that if petitioner was determined to be a nonresident of New York in 1991, then these items would be excluded from any calculation of his New York liability. The Division's representative further stated that if petitioner was determined to be a New York resident, then the question of the substantiation of the claimed deduction would remain at issue (***see***, Tr., p. 6).

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioner objects to the Administrative Law Judge's reliance, in part, on credit card charges in an attempt to determine whether petitioner was within or without New York on given days. Unfortunately, that was made necessary due to petitioner's failure to produce other reliable evidence to demonstrate his whereabouts on specific dates. We find that the Administrative Law Judge correctly and thoroughly addressed each of the issues raised by petitioner. Petitioner has offered no arguments on exception that would justify modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leonard Brawer is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Leonard Brawer is denied; and

4. The Notice of Deficiency dated March 24, 1997 is sustained.

DATED: Troy, New York
August 8, 2002

/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