STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TIMOTHY W. AND KATHLEEN A. JAY	:	DECISION DTA NO. 818984
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 Years 1996 and 1997.	:	

Petitioners Timothy W. and Kathleen A. Jay, 15 Old Mill Road, Greenwich, Connecticut 06830-3342, filed an exception to the determination of the Administrative Law Judge issued on October 23, 2003. Petitioners appeared by Robert W. Taylor, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Petitioners' request for oral argument was denied.

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

ISSUES

I. Whether petitioners have shown that they were not domiciliaries of New York State and City during the period at issue and, therefore, not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

II. Whether petitioners have shown that they were not present in New York State and City for more than 183 days during 1996 and, therefore, not taxable as resident individuals for that year pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

III. Whether petitioners have shown that penalties imposed herein pursuant to Tax Law § 685(b) and (p) should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "21" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

On June 26, 2000, following an audit, the Division of Taxation ("Division") issued to petitioners, Timothy W. and Kathleen A. Jay, a Notice of Deficiency which asserted $93,502.04 in additional New York State and City personal income tax due, plus penalty and interest, for the years 1996 and 1997. The deficiency resulted from the Division's conclusion that petitioners were properly subject to tax as residents of New York State and City for the year 1996 and from January 1, 1997 through March 31, 1997.

At all times relevant herein, petitioner Timothy Jay was employed by Lehman Brothers, Inc., where he has worked since 1983. Until April 1, 1997, petitioner's office was located at 200 Vesey Street in New York City. At that time petitioner accepted a transfer to the Lehman Brothers London (U.K.) office. Petitioner later transferred back to Lehman Brothers' New York City office in 1998 or 1999.

From at least 1989 through June 1994, petitioners resided in a co-op apartment located at 440 West End Avenue, located on the Upper West Side of Manhattan in New York City.

On March 3, 1993, petitioners purchased a residence located at 28 Saw Mill Road, Sherman, Connecticut for a purchase price of $625,000.00. The transaction included the purchase of dining room and bedroom furnishings.

On June 27, 1994, petitioners sold their apartment at 440 West End Avenue for $795,000.00. On June 28, 1994, petitioners purchased a co-op apartment located at 173 Riverside Drive, also on the Upper West Side. The purchase price was $1,225,000.00.

Petitioners sold their Riverside Drive apartment in late 1999 for $2,295,000.00.

Petitioners have three minor children, Meghan, Kirby and Kelly. Meghan was enrolled at the Calhoun School, located on New York's Upper West Side, during the 1995-1996 and 1996-1997 school terms (September 1- June 15). Kirby was enrolled at the Calhoun School for the 1996-1997 school term. The record does not reveal the ages of petitioners' children.

Petitioners had a joint Lehman Brothers checking account during the period at issue which listed their address as 173 Riverside Drive.

Petitioners jointly filed New York resident returns (Form IT-201) for the years 1989 through 1994. For the years 1989 through 1993, petitioners' New York return listed their 440 West End Avenue apartment as their mailing address. For the year 1994, petitioners' New York return listed 173 Riverside Drive as their mailing address.

Petitioners filed nonresident New York returns (Form IT-203) for the years 1995, 1996 and 1997. Petitioners listed 28 Saw Mill Road, Sherman, Connecticut as their mailing address on their 1995 and 1996 returns. They listed a London (U.K.) address as their mailing address on their 1997 return.

On their 1996 Form IT-203, petitioners did not check a response ("Yes" or "No") to the question posed of nonresidents in Item G: "Did you or your spouse maintain living quarters in New York State in 1996?" On their 1997 Form IT-203, petitioners responded "No" to the same question as applied to 1997.

Petitioners registered to vote in Sherman, Connecticut in 1995 and voted in Sherman in the election of November 5, 1996 by absentee ballot.

On audit, the Division reviewed petitioners' credit card statements, bank statements, cable television bills, wireless telephone bills, bills for trash removal, and bills related to the Sherman, Connecticut home (Connecticut Light and Power). With respect to the 1996 year, all such bills were addressed to the Riverside Drive apartment. In 1997, bank statements for a bank account at New Milford, Connecticut Savings Bank were addressed to a post office box in Sherman, Connecticut. The Division's audit report indicated that petitioners made 57 purchases from a fish market located on Broadway in New York City in 1996. Such review also showed that petitioners had the New York Times delivered to their Riverside Drive apartment daily from June through September 1996, then for weekends only beginning in September 1996.

At hearing, petitioner Timothy Jay submitted in evidence his 1996 and 1997 Lehman Brothers expense reimbursement forms with attached receipts and other supporting documentation. This expense documentation shows that petitioner frequently traveled in connection with his employment and that he frequently went to restaurants in and around New York City in connection with his employment. Such documentation showed that petitioner used

a car service in connection with his business travel for transportation to and from New York area airports as well as for transport to various locations in and around New York City. Such car service expense reimbursement forms show that 173 Riverside Drive was a destination 17 times in 1996 and that such destination was frequently designated as "home" on the expense vouchers. The same documents show that petitioner traveled from New York airports to his Sherman, Connecticut home five times in 1996.

At the Division's request during the audit, petitioners completed a Nonresident Audit Questionnaire. Petitioners stated on the questionnaire that they did not reside and did not maintain living quarters in New York in 1996 or 1997. Petitioners further stated on the audit questionnaire that they stayed in hotels while in New York and that they did not spend any days in New York in 1996.

Petitioners advised the Division during the audit that the Riverside Drive apartment was purchased for investment purposes only.

At the conclusion of the audit, the Division determined that petitioners were present in New York City on 223 days and in New York State on 226 days during 1996. Of the remaining non-New York days, the Division determined that petitioners were present in Connecticut on 72 days in 1996.

Petitioners asserted that the Division's audit determination for 1996 of 223 days in New York City and 226 days in New York State was in error. Petitioners contended that the Division erroneously included 48 non-New York days in its count and thus asserted that they spent, in total, 175 days in New York City and 178 days in New York State during that year. Petitioners submitted a list of business trips taken by petitioner Timothy Jay during 1996. Such trips totaled 64 days. Petitioners asserted that errors made by the Division totaling 48 days were contained in

these 64 days. Petitioners submitted no other evidence regarding their whereabouts on any other day or days in 1996.

The evidence in the record regarding the 64 days comprising petitioner Timothy Jay's business trips in 1996 is discussed below.

a) January 5-9 (5 days). Petitioner's expense forms indicate a flight to Washington, D.C. on January 5 with a return to New York the same day. The Division's audit report indicates credit card charges in New York City on January 5, 6, and 9 and New York City ATM usage on January 8 and 9.

b) January 29-February 2 (5 days). Petitioner's expense forms indicate car service to bring luggage from "home," listed as 173 Riverside Drive, to office for business travel. Although it previously determined January 30 and 31 to be New York days, the Division reclassified these days as non-New York days following a review of the evidence submitted at the hearing. The audit report indicates a charge at a dental office on February 1.

c) February 11-16 (6 days). Petitioner's expense forms indicate a car service pick-up at 173 Riverside Drive at 10:08 AM on February 11 and transport to JFK airport. Although it previously determined February 12-16 to be New York City days, the Division conceded that these days were non-New York days following a review of the evidence submitted at the hearing.

d) March 29-April 1 (4 days). On audit the Division determined March 29 and 30 to be non-New York days. Following a review of the evidence submitted at the hearing, the Division determined March 31, classified on audit as New York City, to be a non-New York day. The audit report shows a food purchase in New York City on April 1.

e) April 10-11 (2 days). Petitioner's expense forms and receipts show departure from New York's Laguardia Airport on April 10 for Toronto and a return on the morning of April 11. The audit report shows other New York City credit card charges on those days.

f) April 14-18 (5 days). The audit report shows New York City charges on April 14 and New York City ATM usage on April 15. Petitioner's expense documentation shows car service on the 15th from his office to "home," i.e., 173 Riverside Drive, and then to JFK Airport. On audit the Division categorized April 16 and 17 as non-New York. Following a review of petitioner's documentation the Division also designated April 18 as non-New York.

g) June 4-7 (4 days). Petitioner's expense documentation shows use of a car service from 173 Riverside Drive to his office on June 4. Following a review of petitioner's documentation, the Division reclassified June 5 as non-New York. On audit the Division classified June 6 and 7 as non-New York. Petitioner's expense documentation shows use of a car service from JFK Airport to Sherman, Connecticut on June 7. The audit report shows New York City ATM usage on June 7.

h) June 28-30 (3 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport on June 28. On audit, the Division designated June 28 and 29 as non-New York days. Petitioner's expense documentation shows a return fight to Laguardia and the use of a car service from the airport to Riverside Drive on June 30. On audit, the Division designated June 30 as a Connecticut day.

i) July 18-22 (5 days). Petitioner's expense documentation shows use of a car service on the morning of July 18 from his home on Riverside Drive to Newark airport for a flight to Atlanta. On audit, the Division designated July 18-22 as non-New York days.

j) July 29-31 (3 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport for a flight to Washington, D.C. on the afternoon of July 29.

The audit report also shows Connecticut ATM usage and a gasoline purchase in Brewster, New York on the 29th. Petitioner's expense documentation shows that he was in Washington on July 30 and that he returned to New York via Amtrak on July 31. The audit report also shows a credit card purchase in New York on the 31st. On audit the Division designated July 29 and 30 as non-New York days and July 31 as a New York City day.

k) August 16-22 (7 days). On audit the Division designated these dates as non-New York days. Petitioner's expense documentation shows that he returned from London to JFK on August 22. The Division has designated August 23 through September 1 as days spent in Connecticut.

l) September 9-10 (2 days). Petitioner's expense documentation shows that he flew from Laguardia to Toronto on September 9 and returned on the 10th. Such documentation also shows that petitioner purchased food and beverage at a New York restaurant on September 10.

m) October 22-23 (2 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport for a flight to Toronto on the afternoon of October 22 and that he returned to New York on the afternoon of the 23rd. The audit report also shows a New York City credit card purchase on the 23rd.

n) October 28 - 30 (3 days). Petitioner's expense documentation shows use of a car service from his office to Laguardia Airport for a flight to Washington, D.C. on the afternoon of October 29. Petitioner returned to New York via Laguardia on the morning of the 30th. He used the car service for transport from the airport to his office. The audit report shows payment for dental services on the 30th. The Division concedes October 29 is a non-New York day.

o) November 14-16 (3 days). Petitioner's expense documentation shows use of a car service from his office to Newark Airport on the morning of November 14 for a flight to Los Angeles and that he returned on November 16 and used a car service from JFK to his home in

Sherman, Connecticut. The Division concedes that November 15 and 16 were not New York days.

p) November 19-23 (5 days). Petitioner's expense documentation shows use of a car service from his "home" on Riverside Drive to his office and then to Newark Airport on the afternoon of November 19 for a flight to London. Such documentation also shows that he returned to New York via JFK on November 23 and used a car service from the airport to "home" on Riverside Drive. On audit the Division determined that November 21 and 22 were non-New York days. Following a review of petitioner's expense documentation the Division also concedes that November 20 was a non-New York day.

A review of the days in/days out count in the Division's audit report reveals that, of the 64 days discussed above, the Division designated 29 of such days as days out of New York State and City. Only 35 of the days were designated as New York City days in the Division's audit count of days in and days out of New York.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

> At hearing, petitioners offered documentary evidence regarding petitioners' claimed days in/out of New York, which the Division had not had an opportunity to see before. In offering this evidence, petitioners' counsel stated to the Administrative Law Judge:
>
> > I recognize that this is coming late to the Audit Division. If there is some way that you would permit it, I would request that they be given some time to examine it and come up with any errors that they think they would find . . . . [I]f they want time to look it over . . . then I would say please grant it to them (Tr., p. 85).
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> Petitioner's evidence was admitted. Before closing the hearing, the Administrative Law Judge, *without objection* from petitioners, granted the Division's request to review petitioners' documents and file an affidavit with the

Administrative Law Judge showing where it agreed or disagreed with petitioners' evidence (Tr., pp. 85-91).[1]

After its review of petitioner's expense documentation, the Division made certain adjustments to its days in/days out count and concluded that petitioner was in New York State and City 233 days during 1996. The Division further found following such review that petitioner was in Connecticut for 66 days during that year.[2]

At hearing petitioner testified that when he and his wife purchased their home in Sherman in 1993, it was his intention to abandon his New York residence and domicile and to become a resident of Sherman, Connecticut.

We make the following additional finding of fact.

Since petitioner, Timothy Jay, took a job out of the country on April 1, 1997, the Division did not undertake a day count examination concerning Mr. Jay's status as a statutory resident of New York City for 1997 (Tr., p. 14). Petitioners did not offer evidence in the record to show specific days during the first three months of 1997 when they were within and without the City or State of New York.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

New York State imposes a personal income tax on "resident individuals" (Tax Law § 601), which is defined by Tax Law § 605(b)(1) as someone:

(A) who is domiciled in this state, . . . or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-

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[1]The substance of the Division's review is reflected in findings of fact "19" through "21" of the Administrative Law Judge's determination.

[2]We modified finding of fact "21" of the Administrative Law Judge's determination to more fully reflect the record.

> three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.[3]

The Administrative Law Judge noted that "domicile" is defined by the Division's regulations, in relevant part, as follows:

> (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's 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 such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. . . . The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.
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> * * *
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> (4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere (20 NYCRR 105.20[d]).

Residence means living or inhabiting in a particular locality. Residence only requires physical presence in a particular location, while domicile means living in that locality with the intent to make it a fixed and permanent home (***Matter of Newcomb's Estate,*** 192 NY 238).

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[3]The definition of "resident" for New York City income tax purposes, pursuant to New York City Administrative Code § 11-1705(b)(1)(A) and (B), is identical, except for the substitution of the term "city" for "state."

The Administrative Law Judge pointed out that an existing domicile continues until a new one is acquired and the party alleging the change in domicile bears the burden of proof by clear and convincing evidence (***see***, ***Matter of Bodfish v. Gallman***, 50 AD2d 457, 378 NYS2d 138). The test of intent with regard to a purported new domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (***see***, ***Matter of Bourne's Estate***, 181 Misc 238, 41 NYS2d 336, 343, ***affd*** 267 App Div 876, 47 NYS2d 134, ***affd*** 293 NY 785); ***see also***, ***Matter of Bodfish v. Gallman***, ***supra***).

The Administrative Law Judge found that petitioners failed to establish by clear and convincing evidence that they gave up their historic New York City domicile and acquired a Connecticut domicile at any time prior to or during the period at issue. Therefore, the Administrative Law Judge concluded that petitioners were domiciled in New York City during the period at issue and were, thus, subject to tax as resident individuals of the City and State of New York pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

The Administrative Law Judge noted that evidence in the record established that petitioners continued to maintain their historic New York City domicile during the subject period. When they purchased their Sherman, Connecticut residence in 1993, petitioners retained their home at 440 West End Avenue on New York City's Upper West Side. The West End Avenue apartment had been petitioners' sole residence and domicile since at least 1989. In 1994, petitioners sold their West End Avenue apartment. However, the Administrative Law Judge noted, petitioners did not abandon the City at that point, but immediately purchased the Riverside Drive apartment, also located on the Upper West Side. The Administrative Law Judge

found that petitioners' continued retention of a residence in New York City undermined their claim that they intended to abandon their New York City domicile and acquire a Connecticut domicile (***see***, ***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989). The Administrative Law Judge also found based on the record, and contrary to petitioners' assertion that the Riverside Drive apartment was purchased solely for investment purposes, that the Riverside Drive apartment was petitioners' primary residence throughout the period at issue and that petitioners had significant familial, social and business ties to New York City during that time. Specifically, two of petitioners' children were enrolled at a private school on the Upper West Side. Also, petitioner Timothy Jay continued to work for Lehman Brothers in New York City. Additionally, Mr. Jay frequently used a car service either to or from the Riverside Drive apartment and frequently referred to that location as "home" on his business expense vouchers. Petitioners made 57 purchases from a New York City fish market in 1996 and had the New York Times delivered to the Riverside Drive apartment during that year. Nearly all bills reviewed by the Division on audit were addressed to the Riverside Drive apartment. Petitioners' personal checking account listed the Riverside Drive address. Petitioners also spent far more days in New York City than in Connecticut. Citing the Division's regulations, the Administrative Law Judge noted that where an individual has more than one home, the length of time customarily spent at each location is an important factor in determining domicile (20 NYCRR 105.20[d][4]).

In contrast, the Administrative Law Judge found that other than petitioners' voter registration, the record contains no evidence of any significant business, familial or social ties to Sherman, Connecticut. An individual's formal declarations, such as voter registrations and general testimony at the hearing as to his or her intent, are less significant, the Administrative

Law Judge observed, than informal acts demonstrating the person's general habit of life (***Matter of Silverman***, ***supra***). Based on the totality of the evidence, the Administrative Law Judge concluded that petitioners did not abandon their New York City domicile and did not acquire a Connecticut domicile at any time prior to or during the period at issue.

The Administrative Law Judge next addressed the second prong of the residency test (Tax Law § 605[b][1][B]), i.e., "statutory residency." To prevail here, petitioners had the burden of proving by clear and convincing evidence that they were not present in New York State or City for more than 183 days during 1996 (***see***, ***Matter of Kornblum v. Tax Appeals Tribunal***, 194 AD2d 882, 599 NYS2d 158).[4] Generally, for purposes of counting the number of days spent within and without New York, presence within New York for any part of a calendar day constitutes a day within New York (***see***, 20 NYCRR 105.20[c]).

Upon review of the record, the Administrative Law Judge found that petitioners failed to meet their burden of proof, and that the Division's determination that petitioners were subject to tax as statutory residents in 1996 was proper. The Division determined on audit that petitioners spent 223 days in New York City and 226 days in New York State in 1996. At hearing, Timothy Jay offered evidence as to his whereabouts for 64 days during that year. Petitioners offered no other evidence with respect to their whereabouts on any specific day or days in 1996. The Administrative Law Judge noted that, on audit, the Division counted 29 of those 64 days as non-New York days. Only 35 of the 64 days were counted as New York City days and, thus, only 35

[4]The Administrative Law Judge's footnote pointed out that petitioners did not dispute, and the record clearly established, that they "maintained a permanent place of abode" within New York City pursuant to Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B) (***see***, ***Matter of Evans v. Tax Appeals Tribunal***, 199 AD2d 840, 606 NYS2d 404; 20 NYCRR 105.20[e][1]). Indeed, as discussed above, the record shows that the Riverside Drive apartment was petitioners' primary residence during the period at issue.

days are in dispute herein. Accordingly, the Administrative Law Judge observed, the Division's New York City and State day count could be reduced, at most, by 35 days.[5] Such a reduction would result in 188 New York City days and 191 New York State days. Thus, the Administrative Law Judge found that even under a best case scenario for petitioners, the record establishes that they were statutory residents of New York State and City for the year 1996.

Furthermore, the Administrative Law Judge's review of the evidence with respect to the 35 days in dispute showed that petitioners failed to prove that they were not present in the City or State of New York on the following days during 1996: January 5-9, 29; February 1, 11; April 1, 10, 11, 14; June 4; July 31; September 9, 10; October 22, 23, 28, 30; and November 14, 19 and 23. Accordingly, the Administrative Law Judge found that these days were properly designated by the Division on audit as New York City days. The Administrative Law Judge found that petitioners established that the following 12 days of the 35 days in dispute were spent outside New York State and City: January 30, 31; February 12-16; March 31; April 15, 18; June 5; and November 20. The Administrative Law Judge found that the record establishes that petitioners spent 211 days in New York City and 214 days in New York State in 1996.[6]

Petitioners claimed that certain days should be deemed non-New York days based upon an exception to the general rule in the Division's regulations for days within and without New York. That exception provides that the general rule that presence for any part of a day in New

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[5]In his footnote, the Administrative Law Judge noted that petitioners asserted that the Division made errors with respect to 48 of the 64 days. However, since the Division classified 29 of the 64 days as non-New York, the greatest number of errors the Division could have made is 35.

[6] This day count does not consider the Division's assertion that certain days determined on audit as non-New York days should properly be counted as New York City days. The Division made this assertion following its review of petitioner's expense documentation. Accordingly, all non-New York days as determined on audit are deemed non-New York days in this count.

York counts as a New York day does not apply where presence in New York is "solely for the purpose of boarding a plane . . . for travel to a destination outside New York" (20 NYCRR 105.20[c]). Clearly, the Administrative Law Judge noted, that exception does not apply where an individual leaves from or returns to his or her New York home. The Administrative Law Judge pointed out that, consistent with this exception, certain days on which petitioner Timothy Jay returned from a trip outside New York and traveled directly to Sherman, Connecticut (e.g., June 7, August 22 and November 16) were properly deemed non-New York days by the Division.

The Division imposed penalties in the instant matter pursuant to Tax Law § 685(b) and (p). Tax Law § 685(b) provides for the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 of the Tax Law or the regulations promulgated thereunder. Tax Law § 685(p) provides for the imposition of a penalty where there is a "substantial understatement" of the amount of income tax required to be shown on a return. The Administrative Law Judge found that petitioners' failure to disclose that they maintained living quarters in New York on their 1996 nonresident return and their denial that they maintained living quarters in New York on their 1997 nonresident return supports the imposition of negligence penalties. The Administrative Law Judge also found that petitioners' responses to the Nonresident Audit Questionnaire regarding their living quarters in New York during the period at issue supported the imposition of negligence penalties. The Administrative Law Judge concluded that petitioners offered no evidence of reasonable cause for their failure to properly file resident returns for the period at issue and sustained the imposition of penalties.

ARGUMENTS ON EXCEPTION

Petitioners on exception raise the same arguments as were raised before the Administrative Law Judge. Petitioners deny they were domiciliaries of the City or State of New York for 1996 or 1997. Petitioners also deny that they were "statutory residents" of the City or State of New York for 1996. Petitioners allege error by the Administrative Law Judge because he made no holding with respect to petitioners' status as statutory residents for the 1997 tax year.

The parties agreed at the conclusion of the hearing that the Division, in response to petitioners' evidence, would undertake a review of the audit results and file an affidavit with the Administrative Law Judge showing where the Division agreed or continued to disagree with petitioners regarding days in and days out of New York (Tr., pp. 85-91).[7] The Division made its review and submitted its affidavit (***see***, Exhibit "F").[8] Petitioners argue that the revised schedule should not have been accepted by the Administrative Law Judge, since it deprived them of the right to cross examination.

OPINION

We find no merit in petitioners' claim that the Division's revised schedule of days in/out of New York was improperly accepted by the Administrative Law Judge or that they were in any way deprived of the right to cross examine the Division's witness at hearing. It was, in fact, petitioners' submission of documentary evidence at hearing, which the Division had no opportunity to see before, that prompted the Division's post-hearing review. We note, in

[7]The substance of the Division's review is reflected in findings of fact "19," "20" and "21."

[8]Also referred to infra, as the Division's "revised schedule."

particular, the words of petitioners' counsel to the Administrative Law Judge when seeking to have their (petitioners') evidence admitted:

> I recognize that this is coming late to the Audit Division. If there is some way that you would permit it, I would request that they be given some time to examine it and come up with any errors that they think they would find . . . . [I]f they want time to look it over . . . then I would say please grant it to them (Tr., p. 85).

Later in the hearing when the Division did, in fact, request an opportunity post hearing to review petitioners' evidence, petitioners' counsel said, "I would have no objection to it" (Tr., p. 88).

The Division, with petitioners' agreement, merely reviewed evidence already in the record, i.e., its audit papers and petitioners' submissions at hearing, to determine the extent, if any, to which there were areas of agreement and revised their audit schedule accordingly. The Division's revised schedule was then provided to petitioners and the Administrative Law Judge. Since this revised schedule did not contain new evidence, but only summarized facts already in the record, this review process did not give rise to a right of further cross examination by petitioners. Finally, we should point out that the Division's revised schedule of days in and days out of New York, while slightly modified from the audit papers based on evidence submitted by petitioners at hearing, was not sufficient to impact the outcome here one way or the other.

Petitioners have had the opportunity to review all of the evidence in this record and present their arguments thereon in briefs to the Administrative Law Judge and to this Tribunal.

Petitioners next urge error by the Administrative Law Judge on the basis that he did not make a specific finding on the issue of whether petitioners were statutory residents for the tax

year 1997.[9] We agree. The Tax Appeals Tribunal's enabling legislation, as implemented by the Tribunal's regulations, provides for *de novo* review of a determination by an Administrative Law Judge (Tax Law § 2006[7]; 20 NYCRR 3000.11[e][1]). It has already been determined that petitioners were statutory residents of the City and State of New York for the tax year 1996. In conducting our review of this record, we find that petitioners have failed to present clear and convincing evidence that they were not statutory residents within the meaning of Tax Law § 605(b)(1)(B) through the end of March 1997 when petitioners moved out of the country.

We affirm the determination of the Administrative Law Judge for the reasons stated therein. Except as provided for above, after a thorough review of the evidence and the arguments presented thereon, we find that the Administrative Law Judge has fully and correctly addressed each of the issues presented by petitioners. We can find no basis to modify the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Timothy W. and Kathleen A. Jay is denied;

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

3. The petition of Timothy W. and Kathleen A. Jay is denied; and

[9]Perhaps the Administrative Law Judge regarded the issue as academic, since it had already been determined that petitioners were domiciliaries of the City and State of New York for the tax years 1996 and 1997.

4. The Notice of Deficiency, dated June 26, 2000, is sustained.

DATED: Troy, New York
September 9, 2004

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

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