STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ELI AND BEATRICE KORNBLUM		:DETERMINATION
for Redetermination of Deficiencies or for Refunds of New York State and New York City Income Taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1983 through 1985.	:	

Petitioners, Eli and Beatrice Kornblum, 3403 Bimini Lane, Coconut Creek, Florida 33066, filed petitions for redetermination of deficiencies or for refunds of New York State and New York City income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1983 through 1985 (File Nos. 807810 and 807811).

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 25, 1990 at 9:15 A.M., with all briefs submitted by October 24, 1990. Petitioners appeared by Simon, Meyrowitz, Meyrowitz and Schlussel (Paul Meyrowitz, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioners were domiciliaries of New York State and New York City for the years 1983, 1984 and 1985, or maintained a permanent place of abode within New York and spent more than 183 days in the State and were thus taxable as resident individuals.

FINDINGS OF FACT

On August 6, 1984, petitioners, Eli and Beatrice Kornblum, filed a New York State and City of New York Resident Income Tax Return for the year 1983. The return listed petitioners' address as 3403 Bimini Lane, Coconut Creek, Florida 33066. The envelope in which the return

was mailed bore a Brooklyn, New York postmark. The wage and tax statement attached to the return was addressed to Eli Kornblum at 2175 East 29th Street, Brooklyn, New York 11226 and listed Duro-Test Corporation as the employer. Petitioners filed with their return New York State and City of New York Change of Resident Status forms which indicated they were residents of New York State during the period January 1, 1983 through October 31, 1983.

On November 1, 1988, the Division of Taxation ("Division") issued a Statement of Income Tax Audit Changes to petitioners for the years 1983, 1984 and 1985 wherein total income of petitioners from all sources was held taxable to New York State and City on the basis that petitioners were statutory residents. On January 13, 1989, the Division issued five notices of deficiency to petitioners for 1983, 1984 and 1985 asserting, in the aggregate, additional New York State personal income tax of $30,267.00 and additional City of New York personal income tax of $10,128.00, plus penalty and interest, for a total amount of tax due of $40,395.00.

At a Bureau of Conciliation and Mediation Services conference held on August 8, 1989, the Division cancelled the assessed penalty, leaving the tax and interest due.

On December 23, 1986, August 20, 1987 and September 19, 1988, petitioners executed three consents extending the period of limitation for assessment of personal income taxes under Articles 22 and 30 of the Tax Law. The three consents had the effect of extending the period for assessing the year 1983 to June 30, 1989.

During the years at issue, the Kornblums maintained a residence at 2175 East 29th Street, Brooklyn, New York. They had purchased the house in approximately 1949 and had resided there continuously from the time of purchase through the years at issue.

In 1982, Eli Kornblum was the president of two corporations that were subsidiaries of Duro-Test Corporation. Petitioner had been employed by the corporation for 51 years. The corporation's warehouse and factory were located in Bergen, New Jersey, while its administrative offices, including Mr. Kornblum's, were located in the Empire State Building in New York, New York. At the end of 1982, the corporation moved its administrative offices to Bergen, New Jersey, a factor which contributed to Mr. Kornblum's retirement because of the

increase in the commute from Brooklyn to New Jersey. Mr. Kornblum retired from the Duro-Test Corporation in July 1983 but continued to receive his salary through December 31, 1983. On January 1, 1984, he began receiving his retirement benefits.

During the first four months of 1983, Mr. Kornblum took a leave of absence from his employment with Duro-Test Corporation. Petitioners went to Florida during this period to determine if they would find it an acceptable place to retire. On April 17, 1983, petitioners signed a purchase agreement to buy a condominium in Coconut Creek, Florida. Petitioners closed title to the condominium on October 29, 1983.

After petitioners purchased the condominium in Florida, Mr. Kornblum obtained a Florida driver's license and became active in the Wynmoor Community Council, the condominium association of their Florida community. Both Mr. and Mrs. Kornblum voted in Florida in 1984 and 1985.

During the years at issue, petitioners maintained a checking account, savings account and safe deposit box in a bank located in Brooklyn, New York. Petitioners also maintained a bank account in Coconut Creek, Florida. They maintained a cash management account with a stock brokerage firm located in New York, New York. The monthly statements issued by the firm were mailed to petitioners at their Florida address.

Petitioners testified at the hearing that upon their purchase of the condominium in October 1983, they intended to make Florida their permanent home and residence. Beginning in 1983, they would stay in Florida from early October to early May to escape the cold weather months of New York. In early May they would return to their house in Brooklyn, New York to escape the summer heat of Florida. In early October they would then return to Coconut Creek, Florida. While they resided in Florida, all of their mail was forwarded there, and upon their move to New York, they would have their mail forwarded to the Brooklyn address. Petitioners did not move their furniture from the Brooklyn house to Florida, but did bring their clothes with them. The unoccupied Brooklyn or Florida residence was not rented during the period of petitioners' absence.

The Kornblums' two children resided in California and upstate New York, while Mrs. Kornblum's late brother's family and Mr. Kornblum's brother and sister lived in Florida.

In the course of the hearing, petitioners introduced a schedule indicating the days spent by petitioners in New York and Florida during the years at issue. The 1983 schedule shows petitioners in Florida from January 1 through May 10, in New York from May 11 through October 3, and in Florida from October 4 through December 31, for a total of 146 days spent in New York during 1983. For 1984, the schedule shows petitioners in Florida from January 1 through May 10, in New York from May 11 through October 3, and in Florida from October 4 through December 31, for a total of 146 days spent in New York during 1984. Finally, for 1985, the schedule shows petitioners in Florida from January 1 through May 9, in New York from May 10 through October 3, and in Florida from October 4 through December 31, for a total of 147 days spent in New York during 1985. Petitioners' accountant testified at the hearing that he prepared the schedule in 1987 based upon petitioners' utility bills from their Florida and New York residences, petitioners' credit card summaries, and conversations with petitioners.

The Division introduced into the record of this hearing an auditor's worksheet which listed petitioners' telephone bills from the Southern Bell Telephone Company for four months in 1984 and each month of 1985. In addition, the Division introduced into the record an auditor's worksheet which listed petitioners' telephone bills from the New York Telephone Company for ten months of 1983, five months of 1984 and ten months of 1985. It appears that for the months provided, petitioners' telephone use was generally consistent with petitioners' testimony and schedule relating to the time spent in Florida and New York during the years in issue.

The Brooklyn telephone book for 1986 contained a listing for Eli Kornblum with an address of 2175 East 29th Street and the telephone number of the Brooklyn residence.

CONCLUSIONS OF LAW

A. Tax Law § 605 (former [a]), in effect for the years at issue, provided, in pertinent part, as follows:[1]

"Resident individual. A resident individual means an individual:

(1) who is domiciled in this state, unless (A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state..., or

(2) 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-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. While there is no definition of "domicile" in the Tax Law (compare, SCPA 103[15]), the Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part:

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

the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York

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[1]The personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (through uncited) to the corresponding sections of Chapter 46, Title T.

State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined in the regulations at 20 NYCRR 102.2(e)(1) as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

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

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals.... In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect.... Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile.... There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration.... [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention.... No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animo revertendi....

This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations in connection with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

D. The test of intent with respect to a purported new domicile has been stated as

"whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713).

The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra) it stated, "No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing."

E. Petitioners have not established that they changed their domicile from New York to Florida. While they clearly had ties to and spent time in Florida, they had equally strong ties to New York. The evidence does not clearly indicate that petitioners "gave up the old [domicile] and took up the new." Although Mr. Kornblum obtained a Florida driver's license, and petitioners signed their tax return using the Florida address and registered their car in Florida, the courts have recognized the "self-serving nature" of these actions when used as evidence to affirmatively establish a new domicile (Wilke v. Wilke, 73 AD2d 915), and have determined that these formal declarations are admittedly less important than the informal acts of an individual's "general habit of life" (Matter of Trowbridge, 266 NY 283). They are often disregarded in favor of the application of basic legal principles to his manifested acts (Matter of McKone v. State Tax Commission, 111 AD2d 1051, affd 68 NY 638). Whatever the weight to be given to these factors, they clearly do not support petitioners' contention that they were domiciled in Florida. Specifically, persuasive evidence against a change of domicile is demonstrated by the facts that petitioners retained title to real property in New York City (Brooklyn) (Matter of Chrisman, 43 AD2d 771; Matter of Robert and Judith Roth, Tax Appeals Tribunal, March 2, 1989), continued maintenance of a New York City (Brooklyn) residence (Matter of Cooper v. State Tax Commn., 82 AD2d 950; Matter of Simon, Tax Appeals Tribunal, March 2, 1989; Matter of Feldman, Tax Appeals Tribunal, December 15, 1988) and spent considerable time in Brooklyn during the years at issue (Matter of Clute v. Chu, 106

AD2d 841; Matter of Simon, supra; Matter of Feldman, supra). While it must be granted that petitioners have ties to both New York and Florida which make it possible to formulate arguments in favor of petitioners having the intent to establish a domicile in either state, it is New York that must prevail as the domicile under these circumstances. The mere fact that persuasive arguments can be made from the facts in support of both Florida and New York as petitioners' domicile indicates that they have not clearly and convincingly evidenced an intent to change their New York domicile (Matter of Zapka, Tax Appeals Tribunal, June 22, 1989).

F. Even if it were to be concluded that petitioners were not domiciled in New York during the audit period, they would be properly assessed herein if they both maintained a permanent place of abode within New York City and spent in the aggregate more than 183 days there each year during the audit period (Tax Law § 605 [former (a)(2)]). It is concluded that petitioners have not proved that they did not spend at least this amount of time in New York City during each year of the audit period.

A "permanent place of abode" includes "a dwelling place permanently maintained by the taxpayer, whether or not owned by him" (20 NYCRR 102.2[e][1]). There is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it (see, Matter of Smith v. State Tax Commn., 68 AD2d 993, 994). Here, petitioners owned and maintained the 2175 East 29th Street house throughout the audit period. Therefore, the house was a "permanent place of abode" within the meaning of Tax Law § 605 (former [a][2]).

The remaining issue then is whether petitioners spent in the aggregate more than 183 days of the taxable year in New York City. It is concluded that petitioners have failed in their burden to prove that they did not (Tax Law § 689[e]; 20 NYCRR 3000.10[d][4]).

G. Petitioners were under an obligation to maintain adequate records to substantiate the fact that they did not spend more than 183 days of such taxable year within the State (Smith v. State Tax Commission, supra, citing 20 NYCRR 102.2[c]). The schedule and testimony submitted by petitioners and their accountant and the telephone bill summaries submitted by the Division do not provide the requisite documentary evidence to support such a finding. In a case

involving similar facts, the Tax Appeals Tribunal held that the testimony of the taxpayer together with an account statement showing a pattern of electric use for the taxpayer's New York residence did not satisfy the reasonable mandate of 20 NYCRR 102.2(c) (Matter of Feldman, supra). Petitioners' schedule cannot be relied upon since there are no independent means of examining its accuracy. Thus, it cannot be determined how many days petitioners spent in New York State during 1983, 1984 and 1985. Having failed to satisfy their burden on this issue, petitioners would be subject to the Division's assessment even if they were to have demonstrated a change of domicile to Florida.

H. The petitions of Eli and Beatrice Kornblum are hereby denied and the notices of deficiency dated January 13, 1989 are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE