STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
COLIN W. AND DELMA K. GETZ	:	ORDER DTA NO. 809134
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1986, 1987 and 1988.	:	

Petitioners, Colin W. and Delma K. Getz, by their representative, James E. Conway, Esq., have brought a motion for rehearing,[1] dated June 5, 1992. Petitioners requested that the determination of the Administrative Law Judge dated March 12, 1992 be set aside and a new hearing granted on the issues of (1) the significance of petitioner Colin Getz's service as a member of the Capital District Regional Board of Norstar Bank, (2) the status of the adult son of petitioners who resides in petitioners' residence in Delmar, New York, and (3) a typographical error contained in the determination referring to "1988" as opposed to "1987". Based on the papers submitted by petitioners' counsel on June 5, 1992, an affidavit of Gary Palmer on behalf of the Division of Taxation in opposition to the

motion, dated June 9, 1992, and a reply affidavit of James E. Conway, dated June 23, 1992, the following order is rendered.

Section 3000.5 of the Rules of Practice and Procedure of the Tax Appeals Tribunal

[1]Petitioners captioned their papers as "petition for rehearing on limited issues" and filed the petition with the Tax Appeals Tribunal. By letter dated June 12, 1992, the Secretary to the Tax Appeals Tribunal, Robert Moseley Nero, informed petitioners' counsel that a motion for rehearing is properly made before the Administrative Law Judge who rendered the original determination and that, therefore, the file on the case was forwarded to Chief Administrative Law Judge Andrew Marchese for further disposition.

provides, in relevant part, as follows:

> "Motion Practice. (a) General. To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR....
>
> * * *
>
> (6) The appropriate sections of the CPLR regarding motions, where not in conflict with this Part, are applicable to the motion being made."

Thus, petitioners may bring a motion for rehearing inasmuch as such motion is appropriate under CPLR 4404 and CPLR 5015. Rule 4404 provides, in pertinent part, as follows:

> "(b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue."

In addition, CPLR 5015, entitled "Relief from judgment or order", provides, in pertinent part:

> "(a) Grounds. The court which rendered a judgment or order <u>may relieve a party from it upon such terms as may be just</u>, on motion of any interested person with such notice as the court may direct, <u>upon the ground of</u>:
>
> * * *
>
> (2) <u>newly-discovered evidence</u> which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
>
> (3) <u>fraud, misrepresentation, or other misconduct</u> of an adverse party..." (emphasis added).

With respect to the first basis upon which petitioners request a new hearing, petitioners allege as follows:

> "(1) Without prior notice, or request for additional information, the Division, and the Administrative Law Judge, both placed significant reliance on an erroneous assumption that the Petitioner, Colin W. Getz, was a member of the Board of Directors of Norstar Bank of Upstate New York. It is clear from a reading of the testimony that the Petitioner was discussing his part-time attendance at this advisory board meetings [sic], without making the distinction, which the Administrative Law Judge failed to understand, that the advisory board was not the principal Board of Directors of the corporation."

The distinction which petitioners seek to be made on rehearing does not constitute newly-discovered evidence which could not have been discovered at the time of the initial hearing nor

which would have produced a different result. Contrary to petitioners' assertion, they were on notice prior to the initial hearing that they were to prepare their case and submit evidence to carry their burden of proof. In any event, the distinction that petitioners seek on rehearing -- that petitioner Colin Getz was a member of the advisory board and not the principal Board of Directors of Norstar Bank -- was not relevant to the determination. The only reliance in the determination placed on Colin Getz's board membership was the effort made by him to fulfill his duties on the board, in particular his attendance record which indicated his continued ties to New York State.

With respect to the second basis for rehearing, petitioners allege as follows:

> "(2) The Petitioner testified that the adult son of the Petitioners lived in their former principal residence in Delmar, New York, and had continued to do so for a number of years. The Administrative Law Judge seemed to place particular significance on this fact, and that somehow the adult son of the Petitioners was reliant upon the Petitioners, and that Petitioners returned to New York, periodically, to somehow care for and/or support said adult son. It is respectfully submitted that appropriate evidence, to wit testimony by the adult son, as to his employment status, military service, and other matters should be presented to properly focus the attention of the Administrative Law Judge on the insignificance of the total facts connected herewith and to dispel the erroneous conclusions and inferences drawn by the Administrative Law Judge therefrom."

Again, petitioners misconstrue the basis of the determination. Indeed, in the determination I specifically rejected the Division's conclusion that, as a devoted parent, "living with Douglas for six months each year was a matter of priority to Mr. Getz." With reference to petitioners' children, I stated the following:

> "[T]he fact that petitioners have two sons and three grandchildren in Delmar may explain why petitioners chose Delmar to spend their summer months and December holidays but is not conclusive as to petitioners' intent with respect to a change in domicile. Mr. Getz's references to his son Douglas (see, Finding of Fact '8') were made in response to questions concerning his son's caretaking and financial responsibilities with respect to the Delmar house and his decision to maintain the Delmar house, but do not imply, as does the Division's counsel, that it was a priority for Mr. Getz to live with his son Douglas for six months of each year."

In addition, the fact that petitioners' son resided in the Delmar residence did not, as implied by petitioners, work in petitioners' disfavor. The determination contained the following statements on this matter:

> "[P]etitioners' maintenance of the New York residence was multipurpose. It not only provided petitioners with a place to stay during visits but also provided petitioners' son with a place to live. The fact that petitioners also owned a second New York home for the sole purpose of providing financial assistance to another son...and made a similar offer to a daughter living in Georgia supports petitioners' claim that the maintenance of the family home was for the convenience of their son as well as for themselves. In addition, petitioners' decision to maintain the New York residence apparently involved certain tax planning choices with respect to the disposition of their estate. In sum, petitioners have dispelled the notion that the New York home was maintained purely out of sentiment, feeling or any sense of permanent association."

Contrary to petitioners' assertion, nowhere in the determination was it stated or inferred that petitioners' adult son was dependent or reliant on petitioners for care or support. Notwithstanding the baselessness of petitioners' contentions, petitioners may not use a motion for rehearing to relitigate issues and present additional evidence that was available at the time of the hearing.

With respect to petitioners' request that an amended determination be issued to correct a typographical error, petitioners had made a prior request on the same matter by letter dated May 11, 1992. In response to this prior request, I sent to petitioners a letter dated May 12, 1992 wherein the following was stated:

> "Inasmuch as you have already taken an exception and I no longer have the record in the above-entitled case, I will not file an amended decision.
>
> I appreciate your letter giving me the opportunity to make this correction to footnote 7 on page 12 of the decision. However, this error may be pointed out to the Tax Appeals Tribunal on your exception."

Since the date of this letter, petitioners' motion for rehearing was filed with the Tax Appeals Tribunal and referred to the Division of Tax Appeals. Inasmuch as the record is now before me on this motion, an amended determination correcting the typographical error contained in Finding of Fact "20" will be issued and attached to this order. The last sentence in footnote "7" on page 12 of the determination will now state that petitioners conceded that they spent over 183 days in New York State in 1987 (instead of 1988 as incorrectly stated in the determination issued on March 12, 1992). It should be noted, however, that in the March 12, 1992 determination, Conclusion of Law "B" correctly stated that "[p]etitioners concede that they owe income tax for the year 1987."

In a reply affidavit, petitioners' counsel appears to raise the further argument that petitioners were not given a full and fair opportunity to present all the facts and circumstances at hearing because they "[were] not given fair warning or even alerted to the probability that the issues may well be decided upon a narrow finding, which has neither been fully investigated or fully presented, and which is a very narrow, fine and discrete matter of law." Petitioners' counsel also asserted that the auditor in the case made no inquiry to explore the nature of petitioners' country club membership or membership on a business advisory board, "church affiliations, other social clubs, business connections, or other social and non-social activities."

Contrary to petitioners' assertions, there was no indication during the course of the hearing that petitioners were not aware that they had the burden of proof with respect to their case or that all relevant evidence in support of their position was to be presented at the hearing date.

In the Notice of Hearing, dated May 21, 1991, which set the hearing date on June 10, 1991, petitioners were advised as follows:

> "Except as otherwise provided by law, the petitioner has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show that there is no deficiency or that a refund is due. Such proof may be made by sworn testimony of the petitioner's witnesses or by documentary or other evidence introduced during the course of the hearing."

Petitioners were further advised at both the commencement and conclusion of the hearing that all evidence in the case was to be presented during the hearing (Tr. at 5, 118). The parties also were advised at the commencement of the hearing of the following:

> "If there are any questions at any time regarding the procedures we will follow, just request clarification from me and we may stop and try to resolve any questions you may have" (Tr. at 5).

Again, at the conclusion of the hearing, the parties were queried as to whether there were any further issues the parties wished to raise (Tr. at 119).

At no time during the course of the hearing did petitioners give any indication that they did not understand the procedures in presenting evidence or that the case would be decided on the evidence presented during the hearing. Indeed, petitioner Mr. Getz stated that he had

consulted with financial advisors on the domicile issue and had read the case law on this topic as well (Tr. at 42-43, 62-63; Determination, dated March 12, 1992, p. 3, ftn. 2). Although Mr. Getz testified that the case law was "obtuse" concerning the requirements for changing one's domicile, it was clear from his testimony that he understood he was responsible for demonstrating that he had changed his domicile.

Finally, petitioners' complaint that the Division's auditor failed to inquire as to petitioners' church affiliations, etc. is irrelevant inasmuch as petitioners had the opportunity and burden of presenting all the evidence in support of their case at the formal hearing. In sum, there is no basis to petitioners' allegation that they were deprived of their right to a full and fair opportunity to present their case.

Accordingly, petitioners' motion for rehearing is denied.

DATED: Troy, New York
July 16, 1992

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE