STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of RICHARD AND CAROLYN FARKAS for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1985.	:	DETERMINATION DTA NOS. 809927 AND 809928
In the Matter of the Petition of RICHARD FARKAS for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1986 and 1987.	:	

Petitioners Richard and Carolyn Farkas, 4230 D'Este Court, Lake Worth, Florida 33463, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1985.

Petitioner Richard Farkas, 4230 D'Este Court, Lake Worth, Florida 33463, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1986 and 1987.

A consolidated hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 22, 1993 at 9:15 A.M., and was continued to completion on November 29, 1993 at 9:15 A.M., with all briefs to be submitted by March 21, 1994. Petitioners appeared by Bier, Mersel &Klein, P.C. (Kenneth Mersel, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Donna M. Gardiner, Esq., of counsel).

ISSUES

I. Whether, for the year 1985, the Division of Taxation properly determined that Richard and Carolyn Farkas were taxable as resident individuals.

II. Whether, for the years 1986 and 1987, the Division of Taxation properly disallowed certain expenses claimed on Schedule E of petitioner Richard Farkas' New York State returns.

FINDINGS OF FACT

On February 21, 1991, the Division of Taxation ("Division") issued a Statement of Personal Income Tax Audit Changes to petitioner Richard Farkas which advised that he was deemed to have been a State and City of New York resident for the period January 1 through October 31, 1985, with the result being that additional State tax of $5,689.00 and additional City tax of $2,235.00 was due, plus penalty and interest, for a total amount due of $14,701.55 for the year 1985. The Statement of Personal Income Tax Audit Changes also indicated that, for the years 1986 and 1987, rental and royalty expenses reported on Federal Schedule E were deemed unsubstantiated (for 1986 there was also a mathematical error in the amount of $200.00) resulting in additional State tax of $2,633.00 and City tax of $1,088.00 being due for 1986 and State tax of $189.00 and City tax of $52.00 being due for 1987. With penalty and interest also asserted, total due for 1986 was $6,298.96 and total due for 1987 was $354.50. For the years 1985 and 1986, penalties pursuant to Tax Law § 685(b)(1), (2) and (p) were asserted; for 1987, penalties pursuant to Tax Law § 685(b)(1) and (2) were asserted to be due.

On June 3, 1991, the Division issued a Notice of Deficiency to Richard and Carolyn Farkas asserting additional New York State personal income tax due in the amount of $5,689.00 and additional City personal income tax due of $2,235.00, plus penalty and interest assessed on both deficiencies, for a total amount due of $15,095.68 for the year 1985.

On the same date, June 3, 1991, the Division issued a Notice of Deficiency to Richard Farkas asserting additional tax due of $3,962.00 (State tax of $2,633.00 and City tax of $1,088.00 for 1986; State tax of $189.00 and City tax of $52.00 for 1987), plus penalty and

interest, for a total amount due of $6,676.77 for the years 1986 and 1987.[1]

Previously, the Division and Richard and Carolyn Farkas executed four consents extending the period of limitation for assessment of personal income taxes (see, Exhibit "C"), the last of which, executed by the Farkas' representative on September 27, 1990 and by the Division on October 1, 1990, agreed that taxes due for the period January 1, 1985 through December 31, 1987 could be assessed at any time on or before December 31, 1991.

For the year 1985, Richard and Carolyn Farkas (filing under the status "married filing joint return") filed a Form IT-203, New York State Nonresident Income Tax Return, on which they attributed $2,786.00 out of total wages of $124,650.00 to New York (see, Exhibit "K"). This amount

was determined by virtue of an allocation whereby 7 out of a total of 201 working days of petitioner were days worked in New York. The return indicated that Carolyn Farkas did not work in New York at all during the year. Total State tax reported was $3.00. The return, signed by Richard and Carolyn Farkas on April 14, 1986, was timely filed. Attached to the return were wage and tax statements indicating that, for 1985, Richard Farkas had received wages of $56,000.00 from Concept Equities Corp. of Carle Place, New York and that Carolyn Farkas had received wages in the amount of $68,650.00 from Thomas Funding Corp. of New York City.

Subsequently, in October 1986, petitioner filed an Amended Resident Income Tax Return (Form IT-201-X) along with a Resident Income Tax Return (Form IT-201), a Nonresident Income Tax Return (IT-203) and a Change of Resident Status (Form IT-360). According to the testimony of petitioner's representative, Kenneth Mersel, the amended return and attached forms (see, Exhibit "L") were voluntarily filed by petitioner because, on or about November 1, 1985,

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[1]The Notice of Deficiency for 1985 was issued to Richard and Carolyn Farkas as the result of their having filed a joint return for that year. For that year, the Division has conceded that Carolyn Farkas was not a domiciliary of New York. For the subsequent years at issue (1986 and 1987), Richard Farkas filed his New York returns as married filing separate returns. Therefore, all references to "petitioner" shall, unless otherwise noted, refer solely to Richard Farkas.

his employer transferred him to the New York office and petitioner believed that he was required to file as a resident since, subsequent to this date, he spent more than one-half of his time in New York.

In January 1989, the audit was commenced by Joseph A. Marquez. From the Field Audit Record (Exhibit "O"), it appears that, after having received some of the documentation requested, the auditor was prepared to close the case and accept the returns as filed. Prior to the case being closed, the auditor's supervisor, in June 1989, ordered him to verify petitioner's wage allocation for 1985. After receipt of a letter from petitioner's employer, the auditor was again prepared to close the case in September 1989. Inquiries of petitioner continued (the case was not closed) and, upon the resignation of Mr. Marquez, the case was assigned to Samaan Wassif in July 1990.

Mr. Wassif appeared at the hearing and testified on behalf of the Division. He stated that when he received the case from Albany, he also received an Audit Fact Sheet (Exhibit "Q") which indicated that petitioner had filed a 1975 resident return with an address of 97-40 62nd Drive, Rego Park, New York. For 1977, a resident return was filed with an address of 153 East 57th Street, New York, New York, and a resident return with this same address was filed by petitioner for 1986.

Mr. Wassif testified at the initial hearing held on July 22, 1993 that petitioner had filed as a resident from 1977 through 1987 with the exception of the period January 1 through October 31, 1985. His audit conclusions, set forth in writing (see, Exhibit "S"), state, in part, as follows:

"a) NEW YORK STATE TAX LAW DEFINES A DOMICILE RESIDENT [sic] AS ONE WHO MAINTAINS A PERMANENT PLACE OF ABODE IN NEW YORK, AND SPENDS IN THE AGGREGATE MORE THAN 30 DAYS IN NEW YORK.

"b) MR. FARKAS MAINTAINED A PERMANENT PLACE OF ABODE IN NEW YORK CITY AS FAR BACK AS 1977. HE SPENT MORE THAN 30 DAYS IN NEW YORK CITY DURING 1985.

"c) TAXPAYER FILED AS NEW YORK STATE AND NEW YORK CITY DOMICILE RESIDENT [sic] ON A CONSISTENT AND LONG TERM BASIS UNTIL 1984, THEN FROM 11/1/85 TO 12/31/87. THE ONLY

PERIOD, TAXPAYER FILED AS NON RESIDENT OF NEW YORK STATE AND CITY IS FROM 1/1/85 - 10/31/85. HIS CONTENTION IS THAT HE WAS ASSIGNED BY HIS EMPLOYER TO THE COMPANY'S OFFICE IN FLORIDA. REMOVAL FROM NEW YORK CITY FOR A TEMPORARY OR LIMITED PERIOD DOES NOT CONSTITUTE A PERMANENT CHANGE IN NEW YORK DOMICILE AND THE PERSON RETAINS THE SAME STATUS HE HAD PRIOR TO SUCH REMOVAL . . . ."

For the years 1986 and 1987, petitioner filed resident returns (Forms IT-201) under the status married filing separate returns (see, Exhibits "M" and "N"). The address listed on these returns was 153 East 57th Street, New York, New York.

According to the testimony of Mr. Wassif and his audit conclusions (Exhibit "S"), Carolyn Farkas proved, to the satisfaction of the Division, that she changed her domicile from New York to Florida and that her returns filed for 1986 and 1987 (nonresident returns) were accepted as filed. Neither the audit conclusions nor the auditor's testimony indicate the date on which she changed her domicile. However, based upon the fact that the auditor stated that Richard Farkas and Carolyn Farkas had filed as State and City residents prior to 1985, it must be presumed that the auditor deemed such change to have occurred in 1985.

Mr. Wassif's audit conclusions state that both taxpayers were employees in a New York corporation with its main office located at 386 Park Avenue South in New York City and a sales office in Boca Raton, Florida; Mr. Farkas spent most of his working days in the New York City office and Mrs. Farkas was a salesperson in the Boca Raton office.[2]

Carolyn Farkas substantiated her change of domicile to Florida by submitting the following documentation to the auditor:

(a) Personal bank statements for Florida bank accounts;
(b) Florida vehicle registration;
(c) Florida voter registration dated October 17, 1978;
(d) Tax exemption renewal receipt;
(e) Florida driver's license; and
(f) Letter from her employer showing full-time assignment to the Boca Raton

[2]Attached to the 1985 return were wage and tax statements (see, Finding of Fact "4") which do not corroborate the auditor's conclusions. Since Carolyn Farkas' 1986 and 1987 returns were not offered into evidence, it cannot be determined whether they worked for the same employer in 1986 and 1987.

office.

The auditor stated, and his audit conclusions indicated, that he received no documentation from petitioner's employer as to how his employment changed from 1984 to 1985.

On a lease renewal (see, Exhibit "R") of his rent-stabilized apartment located at 153 East 57th Street in New York City which was dated September 25, 1986, petitioner indicated that the apartment was used by him as his primary residence, that he had no residence outside of New York City and that he had paid New York City resident income tax for the last calendar year (1985).

At the July 22, 1993 hearing, the Administrative Law Judge, over objections by the Division's representative, agreed to continue the hearing in order to permit petitioner's representative to obtain proof that petitioner had changed his domicile from New York to Florida sometime prior to 1985 and that, contrary to the testimony of the auditor, had filed as a nonresident from 1978 through 1984. Petitioner's representative, Kenneth Mersel, testified that Richard Farkas was a quadriplegic as a result of a disease contracted in 1990 and that he had not left Florida since that time. Accordingly, Mr. Mersel stated that petitioner could not appear and that he would attempt to obtain evidence of such change of domicile.

At that time, the Division's representative indicated that a Demand for Bill of Particulars had been served upon Mr. Mersel, but that no response had been received despite a follow-up letter sent approximately four months later. As a result thereof, the Administrative Law Judge directed Mr. Mersel to respond to the Division's Demand for Bill of Particulars within 30 days (on or before August 23, 1993) or that a motion for an order of preclusion would be entertained.

On August 19, 1993, petitioner responded with a timely bill of particulars. However, many of the demands were not responded to.

On September 14, 1993, a Notice of Motion to Preclude was received from the Division. On October 14, 1993, the Administrative Law Judge received a letter from the Division's representative confirming that she had received no response from petitioner's representative

with respect to the motion.

By Order dated November 24, 1993, the Division's motion to preclude was granted to the extent that petitioner was forbidden from introducing any form of evidence at the continued hearing regarding any paragraph of the demand for which there was a failure to respond either by virtue of a stated objection to such demand or by the indication of "N/A" on the answer to such demand.

At the initial hearing held on July 22, 1993, petitioner's representative introduced into evidence, as Exhibit "3", a mortgage note relative to the purchase, by Richard and Carolyn Farkas, of a condominium in Lake Worth, Florida (4230 D'Este Court) in 1974.

At the second hearing held on November 29, 1993, petitioner's representative introduced into evidence, as Exhibit "4", photocopies of the first page of each of Richard and Carolyn Farkas' New York returns for the years 1977 through 1984, all of which were prepared by Mr. Mersel.

For 1977, Richard and Carolyn Farkas filed a resident return, listing their address as 153 East 57th Street, New York, New York. For the years 1978 through 1984, Richard and Carolyn Farkas filed nonresident returns and indicated their address to be 42-30 D'Este Court, Lake Worth, Florida.

At the hearing held on November 29, 1993, petitioner's representative stated that he had no evidence to offer with respect to the substantiation of certain expenses claimed on Schedule E of petitioner's 1986 and 1987 returns.

SUMMARY OF THE PARTIES' POSITIONS

The position of petitioner may be summarized as follows:

(a) Petitioner's representative testified that, in 1977, Richard and Carolyn Farkas moved from their "historical home" in Queens to Manhattan (which was three years after the purchase of the Florida residence in 1974) and that they began to file as nonresidents the following year (1978). Petitioner's representative stated that, at the time of rental of the Manhattan apartment, they had abandoned their "historical home" where their

children had been raised;

(b) The original auditor, after receipt of all requested documentation, was prepared to close the case and accept the returns as filed. The subsequent auditor, Mr. Wassif, operated under a misconception, i.e., that petitioner had been filing as a resident through 1984;

(c) The Division has harassed these taxpayers long after the case should have been closed. By the time of the request for documentation substantiating the expenses claimed on his 1986 and 1987 returns, petitioner was on life support in a hospital and his records had been discarded by the company which had purchased his business;

(d) Petitioner's Florida driver's license was submitted to the original auditor in 1989; the Division now denies that it was ever received; and

(e) There has been no negligence or intentional disregard of the statutes and regulations and penalty pursuant to Tax Law § 685(b)(1) should not be imposed.

The Division's position is as follows:

(a) The reliance by petitioner on his purchase of a condominium in Florida in 1974 and his subsequent filings (from 1978 through 1984) as a nonresident do not satisfy his burden of proving that he changed his domicile from New York to Florida;

(b) Petitioner stated on his lease renewal (Exhibit "R") that the New York apartment was used by him as his primary residence and that he had no residence outside New York;

(c) While he filed as a nonresident from 1978 through 1984, petitioner has failed to show that he filed Florida intangible tax returns, as a resident thereof, during such years;

(d) Despite disposing of his alleged "historical home", petitioner continuously maintained a permanent place of abode in New York City;

(e) Even if it is held that he changed his domicile to Florida, petitioner has offered no proof, other than his allocation schedule attached to his 1985 tax return, that he did not spend more than 183 days in New York for that year; and

(f) The statement by petitioner's representative that petitioner was not negligent or

willful in his failure to pay tax does not establish reasonable cause. Penalties must, therefore be sustained.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) defines a resident individual as follows:[3]

"Resident individual. A resident individual means an individual:

"(A) who is domiciled in this state, unless

"(i) 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

"(ii)(I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (III) during any period of less than twelve months, which would be treated as a separate taxable period pursuant to section six hundred fifty-four, and which period is contained within such period of five hundred forty-eight consecutive days, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such period of less than twelve months bears to five hundred forty-eight, 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-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, the Division's regulations (20 NYCRR former 102.2[d]) provide, in pertinent part:

"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

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[3]The New York City personal income tax is imposed by the Administrative Code of the City of New York, which contains essentially the same provisions as Article 22 of the Tax Law. All references to particular sections of Article 22 in this determination shall, therefore, be deemed to be references (although uncited) to the corresponding sections of the Administrative Code.

> 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.
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> * * *
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> "(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 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 former 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. In order to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). 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" (Matter of Bourne, 181 Misc 238, 246, 41 NYS2d 336, 343, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785; see, Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Whether there has been a change in domicile is a question "of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (Matter of Newcomb, 192 NY 238, 250). A change of domicile may be made for any reason provided that there is an absolute and fixed intention of abandoning one domicile and establishing another. Moreover, the "intention must be honest, the action genuine and the evidence to establish both, clear and convincing" (id. at 251).

D. It is apparent, after consideration of all of the evidence herein, that the Division, in

reliance upon an erroneous premise, i.e., that petitioner had filed as a State and City resident for all years up through 1984, for the last two months of 1985 and for 1986 and 1987, came to the conclusion that petitioner would have to be a New York domiciliary for the first ten months of 1985 as well.

Petitioner, in rebuttal, has proven that, for the years 1978 through 1984, he filed as a nonresident (see, Exhibit "4"). What he has failed to prove, however, is that he ever changed his domicile from New York to Florida. As the Division correctly points out, the mere fact that his filings as a nonresident were not questioned (through an audit) does not satisfy his burden of proving that a change of domicile occurred and, in addition, when that change took place. In fact, what little evidence has been introduced would reasonably lead to the conclusion that petitioner did not change his domicile at all.

First, while the lease renewal (see, Exhibit "R") was executed after the period in question, this record indicates that petitioner rented the East 57th Street apartment for several years before and after January 1 through October 31, 1985. In order to qualify under the Rent Stabilization Laws of the City of New York, it was necessary to affirm that the apartment was used as his primary residence and that he paid New York City resident income taxes "for the last calendar year." In this instance, the "last calendar year" was 1985, since the document was dated September 25, 1986. Not only does the execution of the document indicate that no change of domicile occurred, it seriously brings into question petitioner's veracity.

Second, and perhaps of even greater import, is petitioner's filing of the amended returns for 1985 (see, Exhibit "L"). If, as petitioner asserts, he was a Florida domiciliary and filed a resident return for the last two months of 1985 solely because he spent more than half of his time in New York because of a change in employment, it must be pointed out that he was not required to do so. As indicated in Conclusion of Law "A", Tax Law § 605(b)(1)(B) provides for the taxation, as a resident individual, of a non-domiciliary who maintains a permanent place of abode in New York only if that individual spends, in the aggregate, more than 183 days in the State. If petitioner was, in fact, a non-domiciliary as he claims to have been, the return indicates

that he spent November and December 1985 (61 days), plus 6 additional days, for a total of 67 days. It was only necessary to file as a resident, under the set of facts proffered by petitioner, if a change of domicile to New York occurred on November 1, 1985. But that is not petitioner's contention in this matter. He maintains that, at some point in the late 1970's, he changed his domicile to Florida and, throughout the years at issue and for years thereafter as well, he remained a Florida domiciliary.

Petitioner has the burden of proving, by clear and convincing evidence, that he changed his domicile from New York to Florida. The testimony of his representative, Kenneth Mersel, is not adequate to establish the requisite intent. This record contains no testimony by petitioner, his wife or anyone in a position to offer credible testimony concerning his intent. There were no affidavits submitted and, except for a mortgage note (Exhibit "3") and copies of the first page of returns for the years 1977 through 1984 (Exhibit "4"), there was no relevant documentary evidence provided which would substantiate that a change of domicile from New York to Florida ever occurred. It must be found, therefore, that the Division properly taxed petitioner as a resident individual for the period January 1 through October 31, 1985.

E. Even if petitioner had successfully proven that he was not domiciled in this State for the period January 1 through October 31, 1985, since he admittedly maintained a permanent place of abode therein (the East 57th Street apartment), he would be required to prove, in order to be taxable as a nonresident, that he did not spend more than 183 days in New York during 1985. Other than the allocation attached to his 1985 return, this record contains no evidence as to his whereabouts during 1985.

F. With respect to the rent and royalty expenses claimed on Federal schedules E attached to petitioner's 1986 and 1987 returns, no evidence was introduced to substantiate entitlement to these deductions. At the November 29, 1993 hearing (see, tr., p. 17), petitioner's representative offered no evidence in response to this issue.

G. As indicated in Findings of Fact "1" and "2", penalties pursuant to Tax Law § 685(b)(1), (2) and (p) were imposed on these deficiencies. Since no evidence has been

offered with respect to the years 1986 and 1987 (the expenses claimed on Schedules E), the imposition of penalty must be sustained.

For 1985, however, petitioner, in his reply brief, states as follows:

> "On page 6 of 'The Dept's.' brief it is stated that reasonable cause has not been established to prove that the 'petitioner was not negligent or willful in his failure to pay tax'. I believe that we have demonstrated that not only were there enough elements of non-residency and change of domicile that the petitioner could make an honest and reasonable assumption of them, even if you do not rule in his favor, but that 'The Dept.' was negligent in reversing the judgments of the initial auditor when they did not understand that the petitioners had been filing as non-residents since 1978 and not January 1, 1985 as they testified."

Petitioner has the burden of proving that the penalty assessment was erroneous (Tax Law § 689[e]; see also, Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990). A mere general allegation that it was reasonable for petitioner to assume that there were "enough elements of non-residency and change of domicile that the petitioner could make an honest and reasonable assumption of them" clearly does not satisfy petitioner's burden. Imposition of penalty on the deficiency for 1985 must, therefore, also be sustained.

H. The petitions of Richard and Carolyn Farkas are denied and the notices of deficiency issued to petitioners on June 3, 1991 are sustained.

DATED: Troy, New York
September 15, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE