STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| STANFORD E. TAYLOR AND DORTHEA L. TAYLOR | : | DETERMINATION |
| | : | DTA NO. 810047 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1987. | : | |

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Petitioners, Stanford E. Taylor and Dorthea L. Taylor, Hawk Drive, Lloyd Harbor, New York 11743, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1987.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 6, 1992 at 9:15 A.M. and continued to conclusion on January 22, 1993 at 9:15 A.M. Petitioners filed a brief on April 19, 1993. The Division of Taxation filed a brief on May 13, 1993. Petitioners were allowed until May 28, 1993 to file a reply brief but did not do so. Petitioners appeared by William J. Bernstein, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioners have established that they changed their domicile from New York to Vermont for the year at issue and were, therefore, not properly taxable as residents of New York.

II. Whether the Division of Taxation has met its burden of proof under Tax Law § 689(e)(3) to show that interest earned by petitioners in 1987 onmunicipal bonds of states other than New York was properly includable in petitioners' New York taxable income.

FINDINGS OF FACT

Petitioners, Stanford E. Taylor and Dorothea L. Taylor, own a home in Lloyd Harbor, New York. This waterfront home, which petitioners purchased in 1964, contains over 5,000

square feet of living space.

Petitioners purchased a home located on West Hill Road, Wallingford, Vermont in approximately 1970. Formerly an inn, this is a 6,000 square foot, 22-room home, located on 600 acres and contains several miles of horse trails.

Petitioners also maintained a home in Florida during the relevant period.

All of petitioners' homes were fully furnished.

Petitioners filed a joint New York State Nonresident Income Tax Return (Form IT-203) for the year 1987. For that same year, petitioners also filed a joint Vermont resident income tax return.

For every year prior to 1987, petitioners filed New York State resident income tax returns.

On their 1987 New York nonresident and Vermont resident income tax returns, petitioners listed West Hill Road, Wallingford, Vermont as their mailing address. Petitioners also listed this address on their 1987 Federal income tax return.

Petitioner Stanford Taylor was president of Instructional/ Communications Technology, Inc. ("I/CT"). Formed in 1972, I/CT was in the business of creating and selling educational materials related to reading improvement. I/CT sold these materials to schools.

As president, petitioner was ultimately responsible for all aspects of I/CT's operation. Petitioner concentrated on creating the educational materials sold by I/CT. Petitioner was not involved in I/CT's financial or sales activities on a day-to-day basis. I/CT employed a comptroller to manage I/CT and this individual reported to petitioner. On days he was in New York, Mr. Taylor generally went into the I/CT office (located in Huntington Station, New York) to work. Petitioner typically worked in the office from about 10 or 11 A.M. until 4 or 5 P.M.

Petitioners, along with their son, own 85 to 90 percent of the stock of I/CT. Petitioners' son is the largest single shareholder. Petitioners gave the stock to their son in the hope that it would be of value to him.

For the years prior to 1986, I/CT made a profit. In 1986, I/CT suffered a loss of over

$90,000.00 (down from a profit of $85,000.00 in 1985). Given this loss, Mr. Taylor elected to take a cut in salary and to apply that money to I/CT's sales operation.

There is no dispute in the instant matter that petitioners were domiciled in New York prior to 1987. For 1987, petitioners claimed that they changed their domicile to Vermont. At hearing, Mr. Taylor testified that petitioners reached a decision in late 1986 to change their domicile based upon a number of factors. Mr. Taylor testified that among these factors was his son's graduation from high school in 1986 and his enrollment at Cornell University in the fall of 1986. Petitioners thus no longer had any children residing at home. Also, Mr. Taylor determined that his daily presence at I/CT was not necessary and that he could perform his business function while living in Vermont.

Petitioners could easily afford to own and maintain their home in New York during 1987 and continued to do so. Petitioners also continued to employ a live-in housekeeper at their New York home.

Petitioners did not consider selling their New York home because: (1) as noted, they could afford it; (2) the property was waterfront and therefore unique and valuable; and (3) the possibility existed that their son might want to use the house following his college graduation.

In January 1987, petitioners' registered to vote in Vermont. They did not actually vote in Vermont in 1987, however, because they were unaware of the local election held that year.

Petitioners had been registered to vote in Suffolk County, New York prior to 1987. In 1988, petitioners changed their voting registration back to New York.

In 1987, petitioners opened a bank account in Vermont at the Howard Bank. Petitioners continued to maintain accounts at several New York banks during that year. Petitioners also had a Florida bank account.

A review of petitioners' 1987 Form 1040, schedule B, reveals that petitioners earned $5,163.00 in interest on their Howard Bank account out of total bank interest income of approximately $77,300.00

Petitioners submitted into evidence a copy of a Howard Bank statement of account dated

June 19, 1987. This statement was addressed to petitioners at their Hawk Drive, Lloyd Harbor, New York address.

During 1987, petitioner Stanford Taylor had a New York driver's license which had a 1988 expiration date. Petitioners had three cars registered in Vermont and three cars registered in New York.

In approximately April 1987, petitioners notified their insurance agency that their Vermont home would be their primary residence.

Petitioners opened a safe deposit box at The Howard Bank in February 1987.

Petitioners also joined the Equinox Country Club in Manchester, Vermont in 1987, and contributed to the Dorset, Vermont Theatre Festival. Petitioners also joined the Southern Vermont Art Center and the Vermont Timberland Owners' Association. Additionally, petitioners entered into a forest management plan for their approximately 600 acres of Vermont land.

Also in 1987, petitioners purchased two riding horses for their personal use and enjoyment. Petitioners' Vermont property had a training ring and several miles of riding trails.

Petitioners revised their wills in 1987 to indicate a Vermont residence. This was consistent with their standard practice of revising their wills approximately every two years. Petitioners subsequently revised their wills in 1989 to indicate a New York residence.

Petitioners went to their long-time physicians in Great Neck, New York for their annual physicals in 1987. Mr. Taylor was treated by a Vermont chiropractor in 1987.

Petitioners continued to use their long-time, New York-based accountant in 1987. Petitioners used both New York and Vermont attorneys in 1987.

In 1986, petitioners were advised by their accountant that their Vermont resident income tax liability would exceed their New York resident income tax liability by about $5,000.00.

At hearing petitioners introduced into evidence a document (Exhibit "8") listing their whereabouts during 1987. This document indicated that petitioners spent 180 days in Vermont, 159 days in New York and 26 days elsewhere during 1987. On brief, petitioners contended that

the record herein established that petitioners could not have spent more than 175 days in New York in 1987. In response, the Division of Taxation ("Division"), in its brief contended that the record herein showed that petitioners did spend 175 days in New York in 1987.

While in Vermont during 1987, Mr. Taylor was in frequent contact with I/CT by telephone.

Petitioners' Vermont telephone bills were addressed to their New York address.

In 1987, I/CT sustained losses of about $156,000.00. I/CT also lost several of its field representatives during that year. Furthermore, it was apparent I/CT would require loans to continue operating and that the source of such loans would be petitioners. Mr. Taylor determined, therefore, that it would be necessary for him to spend more time at the I/CT offices and to become more involved in the business operations.

Petitioners thus decided to spend more time in New York in 1988. Petitioners notified their homeowner's insurance agency that their primary residence in 1988 would once again be New York. Petitioners filed New York State resident income tax returns for 1988 and all subsequent years.

On audit, the Division determined that petitioners were residents of New York during the year at issue and, therefore, adjusted petitioners' New York adjusted gross income from a reported $2,558.00 to $414,491.00, petitioners' adjusted gross income as reported on their Federal return. The Division then determined petitioners' "corrected" New York taxable income by allowing itemized deductions as reported on the Federal return of $45,253.00 and personal exemptions totalling $2,700.00 to reach taxable income of $366,538.00. The Division then computed petitioners' additional income tax liability resulting from these adjustments to be $43,092.76. The Division advised petitioners of these adjustments by Statement of Audit Adjustment dated August 12, 1991.

On October 3, 1991, the Division issued to petitioners a Notice of Deficiency which asserted additional personal income tax due of $43,092.76, plus penalty pursuant to Tax Law § 685(b) and (p) and interest for the year 1987.

At the hearing held in this matter, the Division served upon petitioners' representative a Notice of Claim and asserted thereby a deficiency greater than that asserted in the October 3, 1991 Notice of Deficiency. By its Notice of Claim, the Division asserted $15,705.05 in additional income tax due from petitioners over and above that asserted in the statutory notice, plus penalty and interest.

The basis of the Division's assertion of such greater deficiency was petitioners' interest income of $133,660.00 earned on municipal bonds issued by states other than New York. Specifically, petitioners provided the Division with a list of their total municipal bond interest for 1987. This information indicated total interest earned on such bonds of $277,305.00. Of this amount $143,645.00 was earned on New York bonds. The Division determined that the remaining $133,660.00 in interest was properly subject to New York personal income tax. Included in this $133,660.00 amount was $26,250.00 in interest on bonds issued by the Commonwealth of Puerto Rico.

On brief, the Division conceded that the $26,250.00 earned on the Puerto Rico bonds was not properly subject to tax, leaving $107,410.00 asserted in taxable bond interest income. The Division noted that its assertion of tax due by its Notice of Claim should be adjusted accordingly.

CONCLUSIONS OF LAW

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

"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

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[1]Pursuant to Laws of 1987 (ch 28), said section was amended and renumbered Tax Law § 605(b).

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 1103[15]), the Division's regulations (20 NYCRR former 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 State is taxable as a resident even though he may be domiciled elsewhere."

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, 126 NYS 970). 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, 433 NYS2d 276). 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 considera- tion . . . . [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 connected 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, 140). 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, 442 NYS2d 990). 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." Additionally, formal declarations of domicile or principal residence are generally less persuasive in establishing intent than one's "general habit of life" (see, Matter of Trowbridge's Estate, 266 NY 283).

E. A review of the record compels the conclusion that petitioners have failed to meet their burden of proving by clear and convincing evidence their asserted intention to change their domicile from New York to Vermont (see, Matter of Bodfish v Gallman, 50 AD2d 457, 378 NYS2d 138; Matter of Buzzard, Tax Appeals Tribunal, February 18, 1993).

The record herein shows that petitioners retained substantial ties to New York during

1987. The most significant of these ties were Mr. Taylor's business ties to I/TC, petitioners' retention of their historical home in New York, and the amount of time spent in New York by Mr. Taylor in 1987. All of these factors support a conclusion that petitioners did not abandon their New York domicile and acquire a Vermont domicile in 1987.

By his own testimony, Mr. Taylor was actively involved with I/CT designing product. He also spent a considerable amount of time in New York at I/CT's offices and he was in frequent contact with I/CT by telephone. Similarly "active" business ties have been considered an indication of a failure to abandon a New York domicile (see, Matter of Kartiganer, Tax Appeals Tribunal, October 17, 1991, confirmed ___AD2d___, 599 NYS2d 312). Indeed, the significance of Mr. Taylor's business ties to New York is shown by the fact that these same business interests ultimately caused petitioners in late 1987 to abandon any further efforts to establish a Vermont domicile.

Petitioners' retention of their historical New York residence also weighs against a finding of a new domicile. While retaining one's historical New York home does not preclude a change of domicile, clearly, by retaining a long-held home one preserves a significant tie to New York (see, Matter of Wechsler, Tax Appeals Tribunal, May 16, 1991). Further, as happened in this case, by retaining one's historical home, one preserves the option of returning to New York.

It is noted that petitioners explained that they retained their New York home, in part, because they wanted the New York home to be available for their son following his college graduation. Given petitioners' own extensive use of their New York home during the year at issue, this explanation is properly given little weight.

Additionally, the record shows that petitioners spent a considerable amount of time in New York during 1987 (see Finding of Fact "29"). In fact, petitioners spent about as much time in New York as in Vermont in 1987. This factor also weighs against a finding that petitioners abandoned their New York domicile (see, 20 NYCRR former 102.3[d][4]).

Also significant is the lack of evidence in the record regarding petitioners' "general habit of life" prior to 1987. The record does not reveal petitioners' pattern of living (i.e., time spent in

Vermont and New York) prior to the year at issue. Absent such evidence, it is difficult to see the degree to which petitioners' lifestyle changed in 1987 and, given petitioners' extensive New York ties, it is therefore difficult to find a change of domicile as petitioners assert.

Finally, it is noted that there are numerous secondary and tertiary factors in the record which support petitioners' position: Vermont voter registrations, Vermont codicils, Vermont bank account and safe deposit box, Vermont country club membership, and other Vermont activities. These factors are negated somewhat by other secondary and tertiary factors which do not support petitioners' position: Mr. Taylor's New York driver's license; petitioners' use of New York professionals; petitioners' several New York bank accounts (with much more money deposited than petitioners' Vermont account); the fact that, although registered to vote in Vermont, petitioners' did not do so; petitioners' use of their New York address on their Vermont bank statements and telephone bills.

Upon review of the entire record, however, it is clear that the more salient indicia of domicile, such as business ties, retention of the historical home, and days spent in New York all point toward a finding against petitioners herein.

F. Following the issuance of a Notice of Deficiency and the filing of a petition, the Division may assert a greater deficiency than that asserted in the notice (Tax Law § 689[d][1]). Where the Division makes such an assertion, it bears the burden of proof (Tax Law § 689[e][3]). Here the Division has asserted that petitioners' New York taxable income should include interest earned on municipal bonds of states other than New York. Tax Law § 612(b)(a) provides for the addition to New York adjusted gross income of interest earned on obligations of states other than New York to the extent that such interest is exempt from Federal income tax. Internal Revenue Code § 103(a) provides that interest on state and local bonds are generally excluded from Federal gross income. Accordingly interest earned on municipal bonds is properly added to New York adjusted gross income under Tax Law § 612(b)(a).

G. Pursuant to the foregoing, it is concluded that the Division has met its burden of proof with respect to its assertion of a greater deficiency than that asserted in the statutory notice.

There is no dispute herein that petitioners earned interest on municipal bonds of states other than New York. Nor have petitioners asserted that the interest earned on such bonds was not exempt from Federal tax and includable in New York adjusted gross income. Additionally, petitioners have not disputed the amount of such interest earned by them in 1987.

H. The petition of Stanford E. Taylor and Dorthea L. Taylor is in all respects denied and the Notice of Deficiency, dated October 3, 1991, and the Notice of Claim (see, Finding of Fact "36"), as adjusted pursuant to Finding of Fact "38", are sustained.

DATED: Troy, New York
November 4, 1993

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE