STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL A. AND ELLEN E. BURKE	:	DETERMINATION DTA NO. 810631
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1987, 1988 and 1989.	:	

Petitioners, Paul A. and Ellen E. Burke, 3322 Casseekey Island Road, Jupiter, Florida 33458, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1987, 1988 and 1989.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 3, 1992 at 9:15 A.M., with all briefs to be submitted by February 22, 1993. Petitioners, appearing by Damon and Morey, Esqs. (Gary M. Kanaley, Esq., of counsel), submitted a brief on January 7, 1993. The Division of Taxation, appearing by William F. Collins, Esq. (Gary Palmer, Esq., of counsel), submitted a responding brief on January 25, 1993. Petitioners submitted a reply brief on February 22, 1993.

ISSUE

Whether petitioners were properly subject to tax as residents of the State of New York pursuant to Tax Law § 605(b)(1)(A) for any or all of the years 1987, 1988 and 1989.

FINDINGS OF FACT

Petitioners, Paul A. and Ellen E. Burke, husband and wife, timely filed (pursuant to extensions granted) New York State nonresident income taxreturns (Forms IT-203) for each of the years 1987, 1988 and 1989. On each of such returns petitioners listed their address as 3322 Casseekey Island Road, Jupiter, Florida, and chose filing status "2" ("Married Filing Joint Return"). Attached to petitioners' returns were Wage and Tax Statements (Form W-2) issued by

Burke Rental Corporation, 1705 Third Avenue, Niagara Falls, New York. Such Forms W-2, issued to Paul A. Burke for each of the years at issue and to Ellen E. Burke for the years 1987 and 1988, carry petitioners' address as 471 Mountain View Drive, Lewiston, New York.

On March 11, 1991, the Division of Taxation ("Division") issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the years 1987, 1988 and 1989 in the aggregate amount of $49,435.47, plus interest. As shown via explanatory computational sheets attached to the Notice of Deficiency and via a Statement of Personal Income Tax Audit Changes issued previously to petitioners on November 9, 1990, the Division's Notice of Deficiency followed an audit of petitioners' returns, and was issued upon the premise that petitioners were properly taxable as residents of New York State for the years in question.[1]

Petitioner Paul A. Burke was born in Buffalo, New York on August 17, 1927. He and his family moved to Ohio shortly thereafter, where he was raised and educated. Mr. Burke served in the armed forces, after which he returned to Ohio. Mr. Burke and petitioner Ellen E. Burke were

married in Ohio in 1947. Presumably, Mrs. Burke was born and raised in Ohio. They subsequently moved to Buffalo, New York in 1948.

Upon moving to Buffalo, New York, Paul A. Burke went into business with a local real estate broker and began to do some construction work in the western New York area. Paul Burke Construction, Inc., formed in the early 1950's and owned entirely by petitioner Paul A. Burke, was engaged in the construction of residential housing (primarily VA and FHA financed housing), and also performed a modest amount of commercial warehouse construction. This construction activity required Mr. Burke's hands on, day-to-day management and involvement. In this regard, Mr. Burke testified that "without my presence there, there wasn't any construction

---

[1]It appears that dollar amounts are not in dispute in this proceeding. That is, if petitioners are held to be taxable as residents of New York, the Notice of Deficiency correctly reflects their New York tax liability and if, conversely, petitioners are not so taxable, their nonresident returns as filed correctly reflected their New York tax liability.

company." During these early years, Ellen E. Burke performed all of the construction business's accounting, bookkeeping and mortgage placement functions. Petitioners described the construction business as entailing long hours of work (generally 7:00 A.M. to 7:00 P.M.).

In the early 1960's, petitioners purchased a home located at 6654 Errick Road, North Tonawanda, New York. This property included a large house (approximately 5,000 square feet) together with approximately 17 acres of land on which were located several buildings suitable for housing Paul Burke Construction, Inc.'s heavy equipment and building supplies and materials. The property also included a nine-hole golf course. The Burkes also purchased a duplex rental house located immediately adjacent to the property.

The construction operation continued to expand, building upwards of 100 or more houses per year, until approximately 1977 or 1978. At that point, Mr. Burke began the transition from building houses to developing low-income housing for the elderly.

In connection with the transition from house construction to development of high-rise senior citizen housing, petitioner Paul A. Burke formed Burke Rental Corporation to facilitate the management of various rental real estate properties acquired by petitioners, including duplexes, single-family and apartment houses, as well as the high-rise senior citizen housing that Paul Burke Construction, Inc. was in the midst of developing. Burke Rental Corporation was owned equally by petitioners Paul A. and Ellen E. Burke. The business address of both Paul Burke Construction, Inc. and Burke Rental Corporation was, and continues to be, 1705 Third Avenue, Niagara Falls, New York.

By the late 1970's and early 1980's, the Burkes had acquired ownership of approximately 30 rental properties. In addition, Paul A. Burke had acquired, developed and owned, together in partnership with one William Sanders of Atlanta, Georgia, four high-rise senior citizen apartment buildings as follows:

Property Name	Location	No. of Apartment Units
Urban Park Towers Co.	Buffalo, N.Y.	150 units
Niagara Towers Co.	Niagara Falls, N.Y.	200 units
Tonawanda Towers Co.	Tonawanda, N.Y.	100 units
Riverview Apartments Co.	Elmira, N.Y.	128 units

Mr. Burke also owned, in partnership with one John Gross, a 278-unit mobile home park known as Sabre Park, located in western New York. It appears the Burkes sold the 30 rental properties prior to the years at issue herein. The high-rise properties were described as "section 8" (Federal Housing Assistance Program) housing, under which the Federal government subsidizes a portion of the rent paid by the tenants.

Paul A. Burke testified at length that his intent from the beginning was to get out of the hands-on, daily involvement required in residential housing construction and to acquire a "stable" of rental income properties plus develop and own the high-rise senior citizen apartment buildings as a means of generating a steady stream of retirement income for he and Mrs. Burke. As part of accomplishing this aim, Paul A. Burke transferred some of the senior staff of Paul Burke Construction, Inc. to Burke Rental Corporation. He explained that his ultimate goal was to assemble a management team capable of running Burke Rental Corporation without his presence or input, thus resulting in a self-sustaining entity which would afford Paul Burke the confidence and ability to play a passive role in the business when he and Mrs. Burke retired. More specifically, Mr. Burke described the formation of Burke Rental Corporation, the transfer of some of his senior staff, and his overall plan, as follows:

> "to get into a rental management configuration with the plan of going into high rise development to acquire properties that I ultimately would hold for an unlimited period of time to generate a retirement income for myself through a management corporation that would oversee and safeguard my investment."

Mr. Burke further explained that his purpose in forming Burke Rental Corporation was to expand it into "an entity that could have a passive hand." He explained that Burke Rental Corporation was a "policy-oriented corporation that could function with a manager and without my presence."

During the time period 1982 through 1985, Paul Burke began to diminish his day-to-day involvement with the operation of Burke Rental Corporation. By 1985, all of the operations of the business had been turned over to one Judith Bugenhagen, a trusted, long-term employee of Paul Burke Construction, Inc., who had been hired by Ellen E. Burke in the mid-1960's. Mr. Burke testified that Judith Bugenhagen's responsibilities continually expanded over the

years from the time of her hiring as his business interests grew. Eventually, Ms. Bugenhagen began to oversee the management of all of the buildings, including purchases of supplies, handling of rental unit repairs, roof inspections and hiring and firing of personnel. During the years at issue, and through the present, Ms. Bugenhagen handles nearly $6,000,000.00 of transactions each year as business manager of Burke Rental Corporation. Ms. Bugenhagen is responsible for auditing, accounting and all legal matters pertaining to all of the Burkes' New York State holdings, as well as all Burke Rental Corporation payroll, accounts receivable, accounts payable and bank accounts including issuance of checks and transfer of funds. Paul A. Burke testified that Ms. Bugenhagen had, and continues to have, complete day-to-day control of all of the business operations of Burke Rental Corporation.

Commencing in or about 1983, petitioners began spending upwards of six months or more away from New York, principally staying in the Bahamas at a condominium they had previously purchased (see, infra). Mr. Burke testified that 1985 became a crucial year with regard to his overall retirement plan, in that he ceased to be actively involved in the day-to-day operations of Burke Rental Corporation and began treating the business as a passive investment. Accordingly, he continued to stay away from the office so as to allow his management team to operate autonomously and to assess its effectiveness.

With a capable management team for Burke Rental Corporation firmly in place, the Burkes purchased a 2,300-square foot condominium in Jupiter, Florida, on November 1, 1985 in a complex called Jonathan's Landing. The Jonathan's Landing condominium was purchased for $226,000.00, and replaced an 1,100-square foot condominium in the Bahamas purchased by the Burkes in the mid-1970's. The Bahamas condominium was sold including its furnishings and, in turn, the Burkes spent considerable amounts to furnish their new Florida condominium. Mr. Burke testified that the change from the Bahamas to Florida was occasioned, in part, because of "instability and drug activities" in the Bahamas and, in part, because the Burkes could not become permanent residents of the Bahamas. Thereafter, in October 1986, the Burkes' Errick Road residence, which had been their home for some 26 years, was listed for

sale.

In June of 1986, the Burkes purchased a 4,300-square foot home located at 471 Mountain View Drive, Lewiston, New York. This property, costing approximately $250,000.00, is near a golf course and country club, which the Burkes joined. Paul A. Burke testified that he and Mrs. Burke looked at summer home properties in the Carolinas, but they did not care for the mountains and found the climate too foggy and wet. He further testified that:

> "Whether we bought in New York or Maine or Vermont or Canada, we were going to buy some other place [outside of Florida]. This house [Mountainview Drive] came along with a lovely view. So, we bought the house."

Petitioners spend approximately five months each year in New York State (150 to 170 days per year).[2] In addition, Mr. Burke testified to taking vacations to other states with friends from Florida even when the Burkes were staying in New York, thus noting that petitioners' actual time spent within New York State has been gradually declining.

The Burkes ultimately sold their Errick Road residence in June of 1987 for $165,000.00. Most of petitioners' household items including living room furniture and accessories, dining room furniture, kitchen appliances,

pool table, recreational furniture and various pieces of bedroom furniture were sold for $20,000.00, which was in addition to the $165,000.00 sale price of the residence. Paul A. Burke testified that the "package sale" of the Errick Road property included, among other things, the 17 acres, the golf course, and the rental duplex located next door to the principal residence. Mr. Burke also testified that the management staff of Burke Rental Corporation could not effectively manage the complexities of the home, outbuildings, rental duplex and golf course located on the 17-acre Errick Road property, and thus petitioners sold such premises. Additionally, petitioners both testified that substantially all of their belongings that were of

---

[2]The parties stipulated that petitioners have not spent in the aggregate more than 183 days during any of the taxable years in question in New York.

some sentimental or personal value, consisting of 11 boxes of items such as Wedgewood and Stafford china, cut glass collection, cookie-making equipment, photographs and albums, were moved to their Florida condominium in 1985. Petitioners had their 38-foot Chriscraft cabin cruiser moved from a marina on the Niagara River to the Jonathan's Landing Marina in 1985. The boat was also refitted in Florida for deep-sea saltwater fishing, and petitioners were not involved in boating activities thereafter in New York.

In 1990, petitioners sold their Jonathan's Landing condominium and purchased a single-family home in the same Jupiter, Florida area for approximately $600,000.00. Paul Burke testified that he and his wife have expended between $50,000.00 to $60,000.00 to furnish this Florida home.[3]

In explaining their reasons for desiring to change domicile from New York to Florida, petitioners described their goal as being able to retire in a stable retirement community in Florida. In connection with this goal, petitioners claimed to have ceased active involvement in their New York business interests. Petitioners' only surviving son and Paul A. Burke's only brother both lived in Seminole, Florida. Petitioners had many friends in Florida with similar lifestyles and social activities while, as a result of their long absences from New York, petitioners had very few friends remaining in New York. Petitioners enjoyed fishing and playing golf year-round, were actively involved in various community and charitable activities in Florida and were not involved in any community or charitable activities in New York.

Petitioners also testified to the following:

(a) Since 1988, petitioners' Florida intangible tax returns were filed in Tallahassee, Florida, and their Federal income tax returns were filed in Atlanta, Georgia, respectively;

(b) All of petitioners' personal obligations such as utilities, credit card bills and travel

---

[3]It appears consistent that in each instance where petitioners sold a dwelling (i.e., Errick Road, the Bahamas condominium and, later, the Florida condominium) they also sold the furniture/furnishings and, at the same time, purchased new furniture/furnishings upon acquisition of new dwellings.

expenses were, and continue to be, centrally accounted for through the Burke Rental Corporation office located at 1705 Third Avenue in Niagara Falls, New York because of the convenience factor involved;

(c) On average, since 1984, Paul Burke has visited the Niagara Falls, New York business office approximately 10 to 15 times per year and each visit lasted approximately 15 minutes;

(d) While in Florida, petitioners converse with their business manager, Judith Bugenhagen, once or twice per week mostly regarding petitioners' personal affairs;

(e) Petitioners do not discuss management issues relating to the New York properties or collection of the rentals with Judith Bugenhagen, nor are they advised as to expenses, repairs and/or other day-to-day operations of their business interests in New York;

(f) Petitioners moved most of their liquid investments from New York to Florida in 1985 and 1986, including $2,000,000.00 in Treasury Bills, CD's and cash;

(g) Petitioners have been members of the Jonathan's Landing Golf Club since 1985, and purchased a $17,300.00 membership bond there on October 27, 1986;

(h) Paul A. Burke only began regularly playing golf in 1985, when he ceased active involvement in his business interests.

Petitioners claim a homestead exemption for their Florida residence, and utilized their one-time Federal tax election (gain exclusion) upon the sale of their Errick Road personal residence in 1987. Petitioners each filed a Declaration of Domicile in Florida on or about April 10, 1986, and have filed Florida intangible tax returns since the beginning of 1988. Petitioners were each registered to vote in Florida on April 10, 1986. Paul A. Burke was issued a Palm Beach County Public Library card in 1987, and petitioners each applied for and received Florida drivers' licenses on January 23, 1987. Petitioners' automobiles are registered in the State of Florida. Petitioners use a Burke Rental Corporation car when they are in New York. Petitioners claimed exemptions from jury duty in New York on January 22, 1987 upon the basis

that they were permanent residents of the State of Florida. Petitioners opened a Florida bank account on November 11, 1985. Petitioners also have bank accounts in New York.

Petitioners have no business interests or pursuits in Florida.

Petitioners raised two sons. One son resides in Seminole, Florida. Their other son, now deceased, is survived by two children. Mr. Burke noted that his grandson resides in western New York and his granddaughter resides in a house owned by the Burkes at 767 Lee Avenue, North Tonawanda, New York. He described a few visits with the grandchildren, but explained that the relationships are not particularly close.

Ms. Bugenhagen holds no ownership interests, stock or otherwise, in any of the businesses or rental properties. Mr. Burke acknowledged that either he or his partner, as the ultimate owners, could terminate the employment of Ms. Bugenhagen, or any of the staff. He noted, however, that to do so would not be sensible, not only for lack of any reason to do so, but because the balance of the staff would almost certainly quit thus ruining his management team and requiring him to become involved in the business. In this regard, Mr. Burke testified he would sell the properties rather than go back to work.

Petitioners' business and personal accounting and auditing services are provided by McGladrey and Pullen, a certified public accounting firm based in Atlanta, Georgia, with offices nationwide including offices in New York. Petitioners switched from their long-time New York accounting/auditing firm to McGladrey and Pullen at the request of William Sanders, the other general partner in the high-rise apartment buildings.

Petitioners' wills, drawn by an attorney in New York and executed in New York, list petitioners as residing in Florida.[4] Mr. Burke described the process of making these wills as involving many telephone, facsimile and computer disk communications between petitioners in Florida and an attorney in Buffalo, New York before acceptable wills were drawn. Mr. Burke described execution of the wills in New York as due to the fact that petitioners were in New

---

[4]Petitioners' entire wills were not offered in evidence; rather submitted as Division's Exhibits "O" and "P" were the first and last pages of petitioners' wills.

York when the wills were finally completed. He noted that the wills were later revised (after the years in question), and that the revised wills were executed in Florida.

Mr. Burke explained the retention of both Florida and New York driver's licenses as based on his understanding that neither license, alone, was valid in the other state given the length of time spent in each state. Mr. Burke was allegedly told that if a person is present in New York or Florida for more than 30 days, a license for each state is necessary. He noted that his New York license entitles him to operate heavy equipment/wide-load vehicles (a Class I license), but he testified he has not done so since approximately late 1970 and would not feel qualified to do so now.

Paul A. Burke holds a pistol permit issued many years ago in New York. He explained, however, that his only gun is and has been kept in Florida for many years. In similar fashion, Mrs. Burke holds an insurance

broker's license in New York. She obtained this license in the 1960's when she placed insurance in connection with the Burkes' construction business. She has not used this license since the 1970's but testified that she has not let it lapse because it is something she "earned".

The Burkes described the central accounting and payment of their personal expenses by the management company as a matter of convenience, noting specifically that it "makes no sense" to do this work when the office can do it for them. In this regard, Mr. Burke testified that most of his telephone calls to the business were to confirm with Judith Bugenhagen the propriety of paying the personal charges and expenses, since Ms. Bugenhagen would not know where and when the Burkes ate, shopped, etc. By contrast, he explained the business involved few decisions, in that its operations were well established ("cut and dry"). The high-rise apartment buildings involved 30-year government rent subsidy contracts, with all rent increases government approved and with a set protocol for approval of any major repairs (involving trustee approval, three bids and reserve fund payment approvals as spelled out in a trust indenture). Mr. Burke (and Mr. Sanders in Georgia) receive periodic printouts of rents

collected and expenses paid in connection with the high-rise properties.

Burke Rental Corporation was described as headed (managed) by Judith Bugenhagen, who has an office staff of three other people, plus four building managers (one in each building) and approximately 12 additional maintenance staff workers. Judith Bugenhagen plus one other staff person hold registered apartment managers' licenses (called RAM certificates) issued by the National Builder's Association and recognized/required by the Federal government to manage Federally-subsidized housing.

By affidavit, Judith Bugenhagen stated that Mr. Burke visits the Burke Rental Corporation offices approximately 10 to 15 times per year, with such visits averaging 15 minutes in length, and that his visits never last for more than an hour. She, and Mr. Burke by his testimony, indicated these visits related to personal matters. Mr. Burke testified that he believed he visited the offices less frequently than Ms. Bugenhagen estimated, but he offered no estimate of such number of visits.

Mr. Burke receives bi-monthly sheets from Judith Bugenhagen summarizing the results of operations of the businesses and the flow of money in and out of his personal bank account (described as a "catch-all" [apparently a net-result profit] account).[5] Mr. Burke admitted that, as one of two ultimate owners, he had access to audit information regarding income, expenses, operations, etc., but explained that he has not reviewed the same and instead has relied on Judith Bugenhagen and the management team.

Mr. Burke decides where to invest his partnership profits (generally in tax-free municipal bonds or Treasury bills).

Petitioners transferred their primary medical and optical care affiliations to doctors in Florida in or about 1985. When in New York, any medical needs are handled by a physician who, with his wife, are long-time personal friends of the Burkes.

---

[5]At some point, petitioners' bank account and the business account(s) were moved from petitioners' long-term bank (Marine Midland) to a new bank (M & T Bank). This move was made at Ms. Bugenhagen's request and was approved by Mr. Burke.

Petitioners testified that their social activities in Florida include golfing, boating and fishing as their most avid pursuits, as well as

bridge, dinners and theatre activities. They testified that since they are out of New York for such extended periods it is difficult to step into and out of any regular schedule of social activities with persons who live in New York on a year-round basis. By contrast, petitioners' friends in Florida are on similar schedules with the Burkes (i.e., away from Florida during the summer months) thereby leaving it much easier to step into (pick up and maintain) a full schedule of activities. Mr. Burke testified to regular contacts, mainly involving golf matches and dinners, with only three or four friends when the Burkes are in New York.

Mr. Burke described 1985 as the critical decision year during which petitioners decided to sell the Errick Road and Bahamas properties, purchased the Florida property and commenced looking for another property away from Florida (ultimately settling on the Mountain View Drive property). At this same time, petitioners transferred substantial financial assets (Treasury bills, etc.) and their personal belongings to Florida. Mr. Burke testified that he felt by such time his management team and system was in place and functioning capably, noting that he would not walk away from a several million dollar business investment without such assurance.

The parties entered into a stipulation of certain facts prior to hearing, and such stipulated facts have been included in the Findings of Fact set forth hereinabove. However, with the submission of its brief, the Division advised that it wished to "opt-out" of stipulated fact "23" pursuant to its reserved right to do so per stipulated fact "31". These two stipulated facts read, verbatim, as follows:

> "23. Mr. Burke communicates via telephone with the Niagara Falls, New York office approximately one (1) to two (2) times per week and said telephone conversations last five (5) to fifteen (15) minutes.
>
> * * *
>
> "31. It is further stipulated and agreed that this stipulation is not in any way intended to restrict the presentation of either party's case during this proceeding. Should any of the facts stipulated hereby be contradicted during the course of this proceeding, by testimony or other evidence, either party may opt out of that portion

> of this stipulation which is so controverted. This option shall be exercised by notifying the ALJ and the opposing party in writing. The remainder of this stipulation shall remain in full force and effect."

In their briefs, both parties present an analysis of petitioners' Florida telephone bills during the period April 22, 1986 to January 19, 1990. As a general proposition, these analyses support the fact that, on average, one or two telephone calls per week were made from the Burkes' Florida telephone number to the New York office of Burke Rental Corporation and that such calls varied in length from 1 minute to 45 minutes. It is clear, also, that the number of calls in excess of 20 minutes was very small in comparison to the number of calls lasting less than 15 minutes. It is also true that in some months petitioners averaged more than two calls per week to the offices and that in other months they averaged less than two calls per week with no particular pattern of calling emerging. Similarly, on certain days, more than one or two calls were made to the business offices on the same day. Conversely, on other days no calls were placed to such offices. Ultimately, the Division maintains that the telephone calls undermine the testimony and claim that Mr. Burke's business was run autonomously by the office staff without Mr. Burke's active decision-making intervention. In contrast, petitioners maintain that Mr. Burke's testimony and Ms. Bugenhagen's affidavit support the claim that the telephone calls related to personal matters and, in fact, that the total phone time of all of the calls amounted to approximately eight hours per year, an amount clearly insufficient to constitute active involvement in running a several million dollar business operation.

In contrast to Mr. Burke's testimony that Burke Construction Company, Inc.'s activities wound down when the housing construction phased out, the Division points out that such entity's total asset value (per its subchapter S tax report) increased from $121,000.00 in 1987 to $410,000.00 in 1988. The nature of, or reason for, such increase was not specified by petitioners. In addition, petitioners' personal income tax return for 1987 reveals (at Schedule E and Statement 5) that petitioners treated their Mountain View Drive property as rental property, reporting rental income of $9,342.00 and deductible expenses (including depreciation) of $18,655.00 thus claiming a net loss of $9,313.00. This unexplained treatment, which is not

claimed for the later years 1988 and 1989, contrasts with petitioners' claim that the property was dormant when not used by petitioners. Finally, the Division points out that petitioners' returns reflect a claim, made via checking the "yes" box on their tax return schedules, of "active participation" in the high-rise housing partnerships. Petitioners claim that the same represents clerical error by petitioners' accountants, noting also that the benefit allegedly gained by petitioners via "active" participation (and denied for "passive" involvement) becomes moot because any such benefit is phased out for taxpayers, such as petitioners, whose adjusted gross income exceeds $150,000.00.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1)(A) provides, in pertinent part, as follows:

"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 . . . ."

B. While there is no definition of "domicile" in the Tax Law (compare, SCPA 1103[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 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, 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." While petitioners made certain formal declarations that they changed their domicile (e.g., Florida Declaration of Domicile, voter and car registration), such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (see, Matter of Silverman, Tax Appeals Tribunal, June 8, 1989, citing Matter of Trowbridge, 266 NY 283, 289). A taxpayer may change his or her domicile without "severing all ties with New York State" (see, e.g., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990). The question is whether petitioners' overall conduct contradicted their formal declarations of a change of domicile to Florida.

E. In this case there is no dispute that petitioners were domiciliaries and residents of New York from approximately 1950 until approximately 1985, at which point, petitioners contend, they abandoned their New York domicile and acquired a Florida domicile at their residence in Jupiter, Florida. As in many instances, this matter turns not only upon the documentary evidence, but on the testimony of the person(s) claiming to have obtained a new domicile. In this case, petitioners admittedly maintained ties to New York, including ownership of a house and ownership interest in properties from which petitioners' stream of income was generated, and spent fairly long periods of time during each of the audit years in New York. However, the fact remains that one need not abandon New York entirely but rather only need abandon New York as his or her domicile or "home" in order to effect a change of domicile. In this regard, I am convinced that petitioners moved their focus of home from New York to Florida prior to the years in question. Petitioners' actions are consistent with this conclusion. Petitioners sold their

long-term home in New York (Errick Road) and purchased a condominium in Florida. At the same time, petitioners sold a condominium in the Bahamas, acquired in the mid-1970's and used extensively over the years by petitioners. The Florida condominium was approximately twice as large as the Bahamas condominium. Petitioners changed the nature of their business (from building houses to owning and renting properties), and subsequently reduced their involvement in their business interests in New York in connection with retiring. Petitioners did acquire a new house in New York after selling their long-term home. While the new house was admittedly substantial (4,300 square feet), it was smaller than petitioners' Errick Road home, and its size was not inconsistent with petitioners' financial ability to afford to purchase a large house. In addition, not only did petitioners make most, if not all, of the formal declarations commonly made by those seeking to show a change of domicile, but petitioners' entire range of conduct, commencing prior to the years in question, shows a gravitation away from New York as their home or center point.

Petitioners claim to have begun changing their domicile as early as late 1984 or early 1985. Petitioners changed their primary medical affiliations (doctors and dentists) to Florida. While the amount of time spent in New York may show a certain affinity for New York, the same is consistent with their lifestyle and with the fact that petitioners spent their entire working lives in New York, and does not require a conclusion that petitioners did not change their domicile. So too, petitioners' ownership and use of a house in New York and their ownership interests in the described housing properties does not compel a conclusion against a change of domicile. The house was, as described, substantial but still downsized from their former home, and provided petitioners with a suitable place to stay when in New York. Similarly, the business was configured so as to provide a retirement stream of income while being managed by others, with little apparent need for petitioners to be involved.

Petitioners also had established a social life in Florida. While not completely divesting themselves of their New York interests or abandoning all connections to New York, such interests and connections were diminished while like interests and connections to Florida were

significantly increased. While not discounting a motive of tax savings, it appears clear that petitioners changed the focus of their lives and their concept of home to Florida.

It is significant that petitioners moved their most important personal possessions and memorabilia to Florida, including photographs, china and the like. Their boat was moved to Florida and was retrofitted for deep sea use appropriate to Florida waters. Petitioners actively sought to distance themselves from the operations of the New York business interests (the income properties) from 1984/1985 onward. Petitioners' business was not, as set up by 1985, one requiring or receiving petitioners' personal services or attention on any ongoing basis (Matter of Sutton, supra; compare, Matter of Kartiganer, Tax Appeals Tribunal, October 17, 1991, confirmed, __AD2d__, __NYS2d__, [3d Dept June 10, 1993]; Matter of Feldman, Tax Appeals Tribunal, December 15, 1988). The Division has focused mainly on petitioners' business, attempting to undermine Mr. Burke's testimony that due to the competence of his hand-picked management team and the nature of the business (see, Findings of Fact "26" and "27") he was able to retire and enjoy a hands-off, uninvolved role therein. In this regard, the Division notes the telephone calls between Florida and the New York office, as described, and the visits to the office when the Burkes are in New York, thus creating the implication that Ms. Bugenhagen and the management team run the business somewhat autonomously with additional telephone input from Mr. Burke when he is in Florida, and that Mr. Burke takes a more active role when he is in New York. However, running counter to this implication are several factors. First, the overall amount of telephone contact (some 24 hours over three years) and the limited number of office visits do not seem sufficient to constitute active involvement, or to foster efficiency, in managing the business. Furthermore, Ms. Bugenhagen handled personal business (e.g., central bill paying) for the Burkes. While she would know which business operational expenses needed paying, she would not know which personal bills were valid and should be paid (not having been with the Burkes). Thus it is not unreasonable to accept the explanation that the telephone calls/office visits related primarily to such personal matters. In addition, there is no sense from the description of the business, as finally

established, that active involvement by Mr. Burke was required, either on an overall basis or during the part of the year when the Burkes were physically present in New York. Such a conclusion would run counter to the credible testimony by Mr. Burke that he neither needed nor wanted to be active in the business and that such involvement would undermine the authority and autonomy of Ms. Bugenhagen and her staff -- a result directly contrary to the system petitioners had worked to establish. While it is reasonable to expect that Mr. Burke would take some interest in a business he had built and which supplied a stream of income in retirement (along with the Burkes' other, not insubstantial investments in Treasury Bills, municipal bonds, etc.), the same does not, given all of the circumstances and credible testimony, compel a conclusion that Mr. Burke was actively involved in the business. Further, it is not implausible to accept and expect, after 30 years of full-scale construction and development with its attendant stress and long work days, that the Burkes would be more than ready for a change to a hands-off, relaxed and recreation/social-oriented lifestyle. To this end, the Burkes configured their business to be managed by others, and made their home where people of like circumstances, aims and means were situated (i.e., in Florida). In the same manner, it is not surprising that petitioners purchased a house for summer use in New York, given that they spent their working lifetimes in New York and certainly were familiar, and presumably were comfortable, with the western New York area. Other than having a retirement income flow from rental properties managed by a trusted, well-established management team, and accepting that New York is a "nice, familiar place" to spend the summer, petitioners did not retain any significant "home" ties to New York.

Petitioners had no overriding family considerations or ties to New York. Their only surviving son, and petitioner Paul A. Burke's only brother, lived in Florida. Petitioners' relationship with their two grandchildren, who lived in New York, was not close (compare, Matter of Buzzard, Tax Appeals Tribunal, February 18, 1993). There is no sense that petitioners maintained the house at Mountain View Drive purely out of sentiment, feeling or permanent association as opposed to convenience in light of petitioners' lifestyle and interests

(specifically golfing). Petitioners' pattern of travel (summer in New York/winter in Florida) could be typical of either New York or Florida domiciliaries. In fact, petitioners' retirement lifestyle, and their financial wherewithal, permitted them the flexibility to travel for extended periods to visit relatively more temperate climates during summer and winter. New York was the focus of petitioners' business and personal activities for most of their lives, and it is only natural to expect that petitioners might keep some associations with New York. However, it is clear that they had significant ties to Florida, and that by the years in question they had shifted their focus so as to make their permanent home (in retirement) and domicile in Florida. In sum, petitioners were "summering" in New York, but lived in Florida. Hence, petitioners were properly considered domiciliaries of Florida during the years 1987, 1988 and 1989.

F. The petition of Paul A. and Ellen E. Burke is hereby granted and the Notice of Deficiency dated March 11, 1991 is cancelled.

DATED: Troy, New York
August 5, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE