STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JACK AND HELEN ARMEL	:	DETERMINATION DTA NO. 811255
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1987 and 1988.	:	

Petitioners, Jack and Helen Armel, 770 South Palm Beach Avenue, Sarasota, Florida 34236, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1987 and 1988.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 18, 1993 at 9:15 A.M., with all briefs to be filed by December 3, 1993. Petitioners filed their briefs on September 30, 1993 and November 22, 1993. The Division of Taxation filed its brief on November 5, 1993. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Craig Gallagher, Esq., of counsel).

ISSUES

I. Whether petitioners, Jack and Helen Armel, were taxable as residents of New York in 1987 under Tax Law § 605 because they were domiciled in New York.

II. Whether petitioners were taxable as residents of New York in 1988 under Tax Law § 605 because they were domiciled in New York or, alternatively, because they maintained a permanent place of abode in New York and spent more than 183 days in New York State.

FINDINGS OF FACT

Petitioners, Jack and Helen Armel, filed a New York State Nonresident Income Tax Return for the year 1987. They listed their address as 770 South Palm Avenue, Sarasota, Florida 33577 and allocated a portion of their income to New York. Petitioners reported

income from, among other things, the rental of a cottage in Saratoga Springs, New York and from a subchapter S corporation known as Knolls Spring Park, Inc.

Petitioners filed a New York State Nonresident and Part-Year Resident Income Tax Return for the year 1988. Petitioners listed their address as being at 770 South Palm Avenue, Sarasota, Florida 33577 and allocated a portion of their income to New York. On a supplemental income schedule, petitioners reported income from the rental of a cottage in Saratoga Springs, New York and from Knolls Spring Park, Inc.

On April 16, 1990, the Division of Taxation ("Division") assigned an auditor to the task of examining petitioners' returns. On September 21, 1990, the case was transferred to another auditor who completed the case.

In the course of its audit, the Division examined a series of documents in order to ascertain petitioners' residency and domicile. The Division found that petitioners' U.S. Individual Income Tax Return for the years 1987 and 1988 listed their address as 770 South Palm Avenue, Sarasota, Florida 33577. The returns for both years claimed Mrs. Armel's aunt as a dependent and reported that she lived in petitioners' home 12 months of the year. Petitioners' return for 1988 also claimed a grandchild as a dependent and reported that he lived in petitioners' home each month of the year.

The Division noted that petitioners executed a mortgage dated September 13, 1990 on property located at 23 Ruggles Road, Saratoga Springs, New York. The mortgage secured a loan of $200,000.00.

The Division examined the S corporation reports and returns filed by Knolls Spring Park, Inc. of Saratoga Springs, New York for the years 1987 through 1990. The report for the year 1987 states that petitioner Jack Armel is the owner of 40 shares out of a total of 100 shares. The returns for the years 1988 through 1990 state that petitioner owns 40 shares out of a total of 101 shares. The report for 1987 and the returns for the years 1988 through 1989 designate a particular shareholder, other than petitioners, as a nonresident of New York. The return for 1990 designates petitioners as nonresidents of New York.

Each of the returns or reports was accompanied by a schedule K-1 entitled Shareholder's Share of Income, Credit, Deduction, Etc. pertaining to petitioners. The schedule K-1's for the years 1987 through 1989 listed petitioners' address as RD #6, Ruggles Road, Saratoga Springs, New York. The schedule K-1 for the year 1990 listed petitioners' address as 770 South Palm Avenue, Sarasota, Florida 33577.

In order to determine the number of days spent in and out of New York, the Division reviewed Merrill Lynch Cash Management Account Monthly Statements which showed Visa charges and checks written. The Division also reviewed Florida telephone bills. The Division wanted to examine New York telephone bills; however, petitioners were unable to make these available.

As disclosed by its workpapers, the Division attributed the following days as days spent in New York:

1987		1988	
Period	Days in N.Y.	Period	Days in N.Y.
1/1-1/5	5	5/6-5/31	26
4/2-4/8	7	6/1-6/30	30
4/28-4/30	3	7/1-7/31	31
5/1-5/13	13	8/1-8/31	31

5/18-5/31	14[1]	9/1-9/30	30
6/1-6/30	30	10/1-10/15	15
7/1-7/31	31	12/6-12/31	26
8/1-8/31	31		189
9/1-9/30	30		
10/1-10/14	14		
	178		

In several instances, the Division placed a question mark after the period. For the year 1988, the question mark was placed after the time period 12/6-12/31. It may be deduced from the available documents that the reason 26 days were attributable to New York for the period December 6, 1988 through December 31, 1988 was because a telephone bill for the period after December 7, 1988 was not made available.

On or about May 8, 1991, the Division prepared a list of contrasting factors which support a finding that petitioners were domiciled in either New York or Florida. In support of its position that petitioners were domiciled in New York, the Division listed the following factors:

(a) Mr. Armel was raised in New York State.

(b) The last year petitioners filed as year-long New York State residents was 1985.

(c) The property at RD #6, Ruggles Road, Saratoga Springs, New York was deeded to petitioners on February 15, 1968.

(d) Petitioners informally tried to sell the property on Ruggles Road in Saratoga Springs in 1986 for $425,000.00. The property included 8½ acres of land. From July of 1987 to March of 1988, the property was formally listed with a realtor for $369,000.00. From July of

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[1] The workpaper listed the period "5/28-5/31". It is assumed that this was a mistake since the Division concluded that petitioners spent 178 days in New York in 1987. It is noted that whether petitioners spent four days or fourteen days in New York on this occasion is irrelevant since, in either event, the total number of days in New York in 1987 is conceded to be less than 183.

1989 to November of 1989, it was listed with a different realtor for $365,000.00. In 1990, petitioners changed realtors again and the property, which included 4½ acres, was listed for $265,000.00.

(e) According to the audit report, petitioners claimed two dependents on the 1987 and 1988 income tax returns.[2] Their grandson attends college in New York State and lives with petitioners wherever they are when he is on vacation. Mrs. Armel's aunt lives with petitioners at whatever location petitioners are residing at the time. At the time the Division prepared its list, the aunt was in a nursing home in Florida.

(f) There were deeds dated January 24, 1986, October 6, 1986, October 14, 1987 and July 26, 1989 which set forth Mr. Armel's address as being at RD #6, Ruggles Road, Saratoga Springs, New York.

(g) The Division reviewed a mortgage dated September 13, 1990 from National Savings Bank of Albany for $200,000.00. The mortgage placed a lien on the property at 23 Ruggles Road, Saratoga Springs, New York.

(h) Petitioners have a checking account in New York at Norstar Bank.

(i) Petitioners are shareholders in a subchapter S corporation in Saratoga Springs, New York known as Knoll Spring Park, Inc. The Division noted that petitioners' representative stated that petitioners had little or no involvement in the corporation. The Division then pointed out that the 1987 and 1988 schedule K-1's list Mr. Armel's address in Saratoga Springs and, unlike another partner, do not list Mr. Armel as a nonresident partner.

(j) Petitioners have a cottage on the property at Saratoga Springs which is rented throughout the year.

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[2]This portion of the audit report is in error. In fact, petitioners claimed only Mrs. Armel's aunt as a dependent on their 1987 income tax return.

(k) Petitioners hold mortgages on several New York properties.

(l) Petitioners' 1986 Florida tax bill was mailed to a New York address.

(m) Petitioners' 1987 Form 1099 for Social Security income was mailed to petitioners' New York address.

(n) Petitioners owned a car which was registered in New York State and kept in New York State all year.

(o) Petitioners rented a safe deposit box from a New York bank.

(p) Mrs. Armel has a New York driver's license which was used to cash checks.

(q) Petitioners' representative stated that petitioners spend one-half of the year in New York and one-half of the year in Florida.

(r) Petitioners have a New York State accountant and lawyer.

(s) According to petitioners' representative, petitioners spent at least 173 days in New York State in 1987 and 165 days in New York State in 1988. According to the Division, it has not been substantiated that petitioners spent more than 183 days outside New York State during the years in issue.

In reaching the conclusion that petitioners were domiciliaries of New York, the Division considered the following factors which ostensibly support a Florida domicile:

(a) Mr. Armel explained that the first Florida condominium was acquired in 1984 for investment purposes. Petitioners traded four parcels in New York for the condominium in Florida which was worth $125,000.00.

(b) In 1986, petitioners sold the condominium, which was purchased in 1984, and acquired two adjoining condominiums for $265,000.00. Petitioners broke through the walls and made one large apartment. The

renovations were completed in November 1988.

(c) In March 1987, petitioners' Merrill Lynch brokerage account was transferred to Florida.

(d) Mr. Armel has a Florida driver's license which was issued on February 6, 1987.

(e) Petitioners own a Rolls Royce which is registered in Florida.

(f) Petitioners acquired a 1987 Florida homestead tax exemption.

(g) Petitioners' wills state they are residents of Florida. The date of the wills was not provided.

(h) Petitioners bought new furnishings for the Florida apartment.

(i) Petitioners obtained a checking account at a Florida bank.

(j) Petitioners have no family in New York State.

(k) Petitioners representative stated that petitioners' New York cable television is disconnected when they leave New York and reconnected when they return. This was not documented and therefore petitioners were not given the benefit of being away on certain dates.

(l) Petitioners supplied a Florida certificate of registration to vote dated March 3, 1986.

(m) Petitioners voted in Florida on November 4, 1986, November 8, 1988, March 14, 1989 and November 6, 1990.

(n) Petitioners filed 1987 and 1988 Florida intangible tax returns.

(o) Petitioners' representative claimed that Social Security is directly deposited to Florida banks. According to the Division, this has not been substantiated.

(p) Petitioners rent a safe deposit box in a Florida bank.

On the basis of its field audit, the Division concluded that petitioners were domiciliaries of New York for each of the years in issue and were statutory residents of

New York during the year 1988. Accordingly, the Division issued a Notice of Deficiency dated July 19, 1991 to petitioners, Jack and Helen Armel, which asserted a deficiency of personal income tax under Article 22 of the Tax Law as follows:

Period Ended	Tax	Interest	Penalty	Balance
12/31/87	$ 6,048.42	$1,962.01	$1,283.42	$ 9,293.85
12/31/88	7,646.85	1,761.62	1,263.15	10,671.62
	$13,695.27	$3,723.63	$2,546.57	$19,965.47

Mr. Armel was born in a foreign country and arrived in the United States in 1934 when he was 12 years old. Most of Mr. Armel's early life was spent in New York State with the exception of the years he spent in the Armed Forces and the years he spent as a student in Paris, France.

Mr. Armel was employed as an engineer until 1975 when he retired. As an engineer, Mr. Armel worked for a number of engineering companies. The last 10 years of Mr. Armel's professional life were spent as president and founder of Gama Processing Company ("Gama"). During its growth period, Gama had a laboratory in Chicago, Illinois and plants in Brooklyn and Malta, New York. Petitioners moved to Saratoga Springs in 1970 since the Malta plant was the most important facility. The house that was subsequently constructed was referred to as RD #6 or 23 Ruggles Road. The property also includes a guest cottage. The land on which the house was built was acquired in 1968.

Mr. Armel entered into an exclusive listing contract dated July 7, 1987 for the sale of the property located at 26 Ruggles Road in Saratoga. The house remained on the market during the period in issue.

Petitioners had difficulty selling their home in Saratoga Springs. In order to facilitate the sale, Mr. Armel retained the services of a surveyor who subdivided the property in 1989 into two parcels. Thereafter, one of the lots was subdivided again. However, no sale was ever consummated.

In or about 1989, a contract for the sale of the home in Saratoga Springs was signed but not performed. One of the problems was that the prospective purchasers wanted to acquire all

of petitioners' furniture, antiques and paintings in the house.

Mr. Armel first purchased a condominium in Florida in 1984. The following year he traded in the old unit and obtained a pair of units which could be made into one. The renovation, which converted the two apartments into one unit, occurred in 1987. The work was performed during the winter and took a few weeks to complete. Petitioners remained at the new address during the years in issue.

Petitioners' condominium in Florida is simply furnished. The transporting of valuables from the home in Saratoga Springs to the condominium in Florida was a very gradual process.

Knolls Spring Park, Inc. ("Knolls Spring Park") was a subchapter S corporation which was organized for the purpose of purchasing a certain tract of land in the proximity of Ruggles Road in the City of Saratoga Springs, New York. The organizers of the corporation intended to develop the parcel as a single-family subdivision. According to the individual who was the president of Knolls Spring Park from inception through January 4, 1991, Mr. Armel is a minority shareholder and, since prior to 1986, he has been inactive in any management matters. This individual further states that Mr. Armel has been neither an officer nor a director and, as a consequence of his spending the majority of the year outside New York State, he has taken virtually no part in corporate decisions.

Mr. Armel owns several parcels of land in New York. First, the land adjoining the house in Saratoga Springs was divided into three parcels. Petitioner also owns two lots, which he was unable to sell, in a nearby subdivision. The two lots in the subdivision arose from Mr. Armel's investment in Knolls Spring Park.

On December 17, 1985, petitioners executed a "Declaration of Domicile" declaring that they were domiciled in the State of Florida.

On February 6, 1987, the State of Florida issued a driver's license to Mr. Armel. The license expired on March 22, 1993. Mrs. Armel had a New York driver's license. However, she drove very little, if at all. Mrs. Armel's driver's license was used for cashing checks and for identification.

On January 10, 1991, the Supervisor of Elections of Sarasota County, Florida certified that petitioners registered to vote in Florida on March 3, 1986. Petitioners voted in Florida on November 4, 1986, November 8, 1988, March 14, 1989 and November 6, 1990.

According to the records of the Commissioner of Elections of Saratoga County, New York, the last time petitioners voted in Saratoga County was in 1984.

At the hearing, petitioners offered a document signed by six individuals on either October 22, 1990 or October 23, 1990 which stated as follows:

"TO WHOM IT MAY CONCERN:

"WE, THE UNDERSIGNED, MEMBERS OF THE LOU GREEN DOWNTOWN POKER CLUB OF SARASOTA, FLORIDA, HEREBY TESTIFY AS FOLLOWS:

"OUR CLUB MEETS ONCE A WEEK, ON TUESDAY EVENING, SINCE ITS FOUNDING IN 1984. MR. JACK ARMEL, A FOUNDING MEMBER ATTENDS THESE MEETINGS EVERY TUESDAY NIGHT, FROM THE MIDDLE OF OCTOBER TO THE MIDDLE OF MAY EVERY YEAR SINCE THE FOUNDING OF THE CLUB."

Petitioners offered a series of two affidavits and an unsworn statement from acquaintances or neighbors which averred that petitioners left New York in October and returned in May every year since 1984. Two documents set forth specific dates as follows:

"LEAVE SARATOGA	ARRIVE SARATOGA
October 15, 1986	May 15, 1987
October 19, 1987	May 10, 1988
October 16, 1988	May 14, 1989
October 10, 1989	May 10, 1990"

On September 18, 1987, Classic Travel, Inc. prepared round-trip airline tickets for petitioners which scheduled departures from Albany, New York to Sarasota, Florida on October 15, 1987 and scheduled a return trip on May 2, 1988.

Mr. Armel received a tax levy for 1987 real estate taxes in Sarasota County, Florida. The taxes levied were reduced by a homestead exemption. According to Mr. Armel, this benefit was only given to "full fledged residents." The assessment was addressed to Mr. Armel in Sarasota, Florida.

The respective wills of Jack and Helen Armel, which are dated May 7, 1990, declare that petitioners are residents of and domiciled in Sarasota County, Florida.

Petitioners hold mortgages on several New York properties. They acquired the mortgages because, in prior years when Mr. Armel sold land, it seemed appropriate to accept a mortgage to help bring the sale to fruition. Mr. Armel used his New York address on the deed dated October 14, 1987 because the offer to buy the property was accepted in the summer and he was not paying attention to the address appearing on the deeds.

Beginning in 1985 and continuing through the years in issue, petitioners' Social Security checks were sent to Barnett Bank in Sarasota, Florida.

During the period in issue, petitioners kept a 1980 Ford automobile in New York because it was useful to have access to a car in order to go shopping during the summer. In Florida, petitioners drove a Lincoln Continental or a Rolls Royce.

Petitioners maintained checking accounts with Norstar Bank of New York and Barnett Bank of Florida.

Petitioners rented a safe deposit box in Florida and in New York. The safe deposit boxes were used by Mrs. Armel to store jewelry.

Petitioners filed a tax return with the Florida Department of Revenue. The return imposed a tax on certain intangible assets and stated that it must be postmarked by June 30, 1987. On the return, petitioners answered "yes" to the question of whether they filed in prior years.

Mr. Armel manages the rental of a cottage in Saratoga, New York. This includes collecting the rent and calling people, as needed, to repair property.

When petitioners go to New York for the summer, they have the telephone calls which were directed to their Florida telephone forwarded to New York. The mail sent to Florida is forwarded to New York also.

In order to establish the number of days spent in and out of New York, petitioners presented a series of Merrill Lynch Cash Management Account Monthly Statements which

reported transactions on a Visa account and a checking account. The portion of the monthly statement pertaining to the Visa account contained columns for transaction date, date cleared, description, location and amount. In general, the Visa account statements show that purchases which occurred between January 3, 1988 and May 5, 1988 took place in Florida or Texas. There is one transaction dated February 5, 1988 which is reported as occurring in Reading, Massachusetts.

The listing of Visa card transactions reports a transaction dated May 17, 1988 at an establishment called Paula Young in South Easton, Massachusetts and two transactions involving Carl's Drug Store, dated, respectively, April 17, 1988 and May 17, 1988. The statements report that the latter two transactions cleared on May 26, 1988 and that they both occurred in Rome, New York. A handwritten note appears next to the April 17, 1988 date which states "date error." A second handwritten note states "charged both on 5/17."

The credit card statements also report transactions, occurring between September 29, 1988 and October 12, 1988, in either Ballston Spa or Saratoga Springs, New York. Transactions occurring between October 18, 1988 and November 10, 1988 are reported to have taken place in either Sarasota or Osprey, Florida. There are no credit card transactions reported after November 10, 1988.

The information pertaining to the checking account is not sufficiently detailed to draw any conclusions regarding petitioners' location during the year.

Mr. Armel offered a series of monthly telephone bills from GTE Communications Corporation for 1988. The telephone bills offered into evidence were copies of the same bills reviewed by the Division. The bills dated January 7, 1988 through May 7, 1988 were addressed to Mr. Armel in Sarasota. Similarly, the bills dated November 7, 1988 and December 7, 1988 were addressed to Mr. Armel in Sarasota. The bills dated June 7, 1988 through October 7, 1988 were addressed to Mr. Armel in Saratoga, New York. No billings were provided for the period after December 7, 1988.

SUMMARY OF THE PARTIES' POSITIONS

At the hearing, petitioners argued that the Division's policy of taxing people in their position discouraged people from living in New York. In their brief, petitioners maintain that their telephone bills show that they were not in New York for 183 days in 1988. Further, petitioners submit that they were aware of the 183-day rule and would not violate the rule at any time. With respect to the domicile issue, petitioners submit that they made numerous attempts to sell their home during and after the period in issue. Petitioners further contend that the fact that the Knolls Spring Park tax return does not refer to Mr. Armel as a nonresident only means that he was a resident when the company was formed in 1984. According to petitioners, the fact that some mail is addressed to petitioners in Saratoga Springs is no more significant than the Division's mailing its correspondence to petitioners in Florida. Petitioners also note that they tried to dispose of their New York properties and that these transactions were noted in the nonresident portion of the return.

In response to the foregoing, the Division submits that petitioners have not presented evidence that they severed their ties with New York and abandoned their New York domicile for a Florida domicile. The Division then recites that the maintenance of a New York house, the continuation of utility service and banking habits demonstrate a New York domicile, citing Matter of Kornblum v. Tax Appeals Tribunal (194 AD2d 882, 599 NYS2d 158). The Division also calls attention to petitioners' interests in land and mortgages in New York as well as the information on the schedule K-1 to argue that the foregoing factors in conjunction with the maintenance of a home, checking account and driver's license in New York establish a New York domicile, citing Matter of Kartiganer v. Koenig (194 AD2d 819, 599 NYS2d 312). The Division further contends that petitioners did not show that they were not present in New York for more than 183 days in 1988. Lastly, the Division argues that petitioners have not established reasonable cause for the waiver of penalties.

In a reply brief, petitioners reviewed the facts set out in the Division's brief and assert that they are either irrelevant or inaccurate. Petitioners then repeat that they intended to be Florida residents. Petitioners submit that they would not have paid Florida taxes if their goal

was to avoid taxes. It is also noted that petitioners made efforts to sell their New York property.

Petitioners point out that their desire to avoid the hot weather by leaving Florida in the summer should not be held against them. Petitioners noted that they dismissed their New York accountant. However, they kept a New York lawyer because they were trying to sell their New York property. Further, the small house in New York is rented because petitioners have been unable to sell it. Petitioners conclude with a statement of the reasons why they moved to Florida and why they dislike New York.

CONCLUSIONS OF LAW

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

> "(b) Resident, nonresident and part-year resident defined. (1) Resident individual. A resident individual means an individual:
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> "(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of place elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or
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> * * *
>
> "(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. In this case, the Division acknowledged that petitioners did not spend more than 183 days of the taxable year in New York State in 1987. Therefore, for the year 1987, the questions which remain are whether petitioners were domiciled in New York, whether they maintained a permanent place of abode in New York, whether they maintained a permanent place of abode outside of New York, and whether they spent more than 30 days in 1987 in New York State.

C. The term "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."

D. Since the condominium in Sarasota, Florida and the house in Saratoga Springs, New York were dwelling places permanently maintained by petitioners, it is concluded that

petitioners maintained a permanent place of abode in both New York and Florida. Further, since petitioners' testimony and evidence was to the effect that they went to Florida in October of each year and returned to New York the following May, there is no question that petitioners spent more than 30 days of 1987 in New York State. Accordingly, the one issue which remains for 1987 is whether petitioners changed their domicile from New York to Florida.

E. There is no definition of "domicile" in the Tax Law. However, the Commissioner's regulations provide, in part, as follows:

> "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.
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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." (20 NYCRR former 102.2[d].)

F. In order for there to be a change in domicile, there must be an actual change in residence, coupled with an intent to make the new location a fixed and permanent home (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). Before there can be a finding that a taxpayer changed his domicile, the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, supra). In Matter of Newcomb (192 NY 238, 250-251), the Court of Appeals discussed the substance of the matter as follows:

> "'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 a 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."

G. 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 quoting Matter of Bourne's Estate, 181 Misc 238, 41 NYS2d 336, affd 267 App Div 876, 47 NYS2d 134, affd 293 NY 785). The importance of establishing intent was articulated by the Court of Appeals 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."

H. Historically, petitioners were domiciliaries of New York. It is petitioner's contention that by 1987 they gave up their New York domicile and acquired a Florida domicile.

I. Clearly, petitioners continued to maintain substantial ties to New York. They owned a house and automobile in Saratoga, maintained business interests in New York and utilized a

bank account in New York. There are cases where these factors would weigh heavily against petitioners (see, Matter of Silverman, Tax Appeals Tribunal, June 8, 1989). However, the facts pertaining to each case must be carefully considered in order to ascertain whether a change of domicile occurred.

J. For the reasons set forth below, it is concluded that, by 1987, petitioners changed their domicile to Florida. First, the weight of the evidence supports the conclusion that, during the periods in issue, Mr. Armel had only passive business interests in New York. It is recognized that the schedule K-1 indicates that Mr. Armel was an active participant in Knolls Spring Park. However, the statements on the schedule K-1, which petitioners did not prepare, are not convincing since they were contradicted by the president of Knolls Spring Park and Mr. Armel's credible testimony. An additional difficulty with reliance upon the schedule K-1 is that there is no evidence that the preparer of the schedule had any basis for the representation on the schedule.

Petitioners' efforts to sell the property in New York also support the conclusion that petitioners had changed their domicile by 1987. Among other things, the record shows that petitioners informally tried to sell the property in 1986. In 1987, petitioners reduced their asking price for the New York property and made efforts to find a buyer through a real estate firm. Coinciding with petitioners' efforts to sell the New York residence were petitioners' efforts to construct a suitable condominium in Florida.

The fact that petitioners maintained a checking account in a New York bank does not carry particular significance when one considers that petitioners also had a bank account in Florida. The same conclusion is reached with respect to the safe deposit box.

The weight of the evidence with respect to the automobiles further supports a Florida domicile. Petitioners kept one older automobile in New York. In contrast, petitioners kept a Rolls Royce and a Lincoln Continental in Florida.

Formal declarations such as the execution of a Florida Declaration of Domicile are not nearly as significant as objective acts (see, Matter of Roth, Tax Appeals Tribunal, March 2,

1989). However, other factors which support a finding of a Florida domicile include the transfer of a Merrill Lynch brokerage account to Florida, the receipt of a Florida driver's license by Mr. Armel, the filing of Florida intangible tax returns, the regular pattern of voting in Florida, the development of social ties through the poker club and the direct deposit of Social Security checks into a Florida bank. Considered as a group, the foregoing factors establish, by clear and convincing evidence, that petitioners were domiciliaries of Florida during the years in issue.

K. In reaching the foregoing conclusion, it is recognized that Mrs. Armel continued to have a New York driver's license. Nevertheless, in view of the fact that Mrs. Armel mainly used the driver's license for identification or to cash checks, this fact bears little weight. Further, Mr. Armel's explanation that it was through inadvertence that the Saratoga Springs address was used on a deed in 1987 is accepted. The use of the Saratoga Springs address on deeds prior to 1987 has no probative value since petitioners did not claim a change of domicile until 1987. Further, the Division's reliance upon Matter of Kornblum v. Tax Appeals Tribunal (supra) and Matter of Kartiganer v. Koenig (supra) is misplaced. In neither of the cases cited by the Division did the taxpayer actively try to dispose of his New York residence. Further, it appears that in each of the cases relied upon by the Division the taxpayers remained actively involved with New York business interests. In contrast, in the instant matter, petitioners' business interests in New York were largely passive.

L. Once a domicile is established, it continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there (20 NYCRR former 102.2[d][2]). Since petitioners have established a domicile in Florida in 1987 and did not move to a new location in 1988, it is concluded that petitioners continued to be domiciliaries of Florida during the remaining year in issue.[3]

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[3]If it had been found that petitioners were domiciliaries of New York in 1987, they would have remained domiciliaries of New York in 1988. Therefore, they would have been taxable as residents in both years.

M. The Division did not concede the number of days spent outside of New York in 1988. Accordingly, the question arises whether petitioners established that they did not spend more than 183 days in 1988 in New York State.

N. The regulations in effect during the years in issue provided, in part, that:

> "[i]n counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while travelling by motor, plane or train through New York State to a destination outside New York State. Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State" (20 NYCRR former 102.2[c]).

O. What constitutes adequate evidence of the amount of time spent in and out of New York has been the subject of repeated litigation. For example, in Matter of Roth (supra) the Tribunal concluded that a summary from an illegible diary was unreliable since the source document was illegible. Further, the Tribunal had no means of examining its accuracy in light of the records made available. Additionally, the diaries were not accompanied by credible, detailed testimony which explained their creation

and meaning. In Matter of Kornblum (Tax Appeals Tribunal, January 16, 1992, confirmed 194 AD2d 882, 599 NYS2d 158), the petitioners presented testimony and a schedule of their location. The schedule was prepared by the petitioners' accountant based on utility bills, credit card summaries and discussions with the petitioners. The Tribunal concluded that this evidence was insufficient because the utility bills were not sufficiently precise to identify the petitioners' location on a specific day; the bills were inconsistent with the schedule; and Mr. Kornblum's testimony was inconsistent with the schedule.

P. Here, petitioners seek to establish the number of days spent in New York in 1988 through records of credit card purchases, airline tickets, telephone bills, letters from acquaintances and the testimony of Mr. Armel.

Q. Initially, it is noted that petitioners concede they were in New York from approximately mid-May to mid-October. Therefore, it is the balance of the year to which attention must be directed.

The letters offered by petitioners are entitled to little weight. It is unlikely that neighbors or friends would have a precise recollection of petitioners' arrival and departure years after the fact. The unexplained inconsistency in the departure and arrival dates between the airline tickets and the letters casts further doubt upon the accuracy of the letters. Petitioners' reliance upon the airline tickets is also unavailing since it does not show whether there were trips to New York between the scheduled departure and arrival.

Generally, a record of credit card purchases and telephone bills is not considered sufficiently precise to meet the requirements of 20 NYCRR former 102.2(c) (see, e.g., Matter of Kornblum, supra). This is particularly true in this instance since petitioners have not presented any reason for concluding that the Division's analysis was erroneous. With respect to the telephone bills, there is no explanation as to why no bills were presented for the billing period after December 7, 1988. In sum, petitioners have not satisfied the regulatory requirement of showing that they did not spend 183 days in New York State in 1988.

R. The penalties are sustained since petitioners have not presented any evidence or argument as to why the penalties should be abated.

S. The petition of Jack and Helen Armel is granted only to the extent that the Notice of Deficiency for the year 1987 is cancelled; in all other respects the notice is sustained, together with such interest as may be lawfully due.

DATED: Troy, New York
May 26, 1994

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE