STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN CARL WARNECKE	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1988.	:	DETERMINATION DTA NOS. 811896 AND 812470

Petitioner, John Carl Warnecke, 300 Broadway, #12, San Francisco, California 94133-4530, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1988.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 22, 1995 at 9:45 A.M., and was continued to conclusion before the same Administrative Law Judge at the same location on February 23, 1995 at 9:15 A.M., with all briefs to be submitted by September 1, 1995. Petitioner, appearing by George Zelma, Esq., submitted a brief on May 22, 1995. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel), submitted its brief on July 6, 1995. Petitioner's reply brief was submitted on September 1, 1995, which date commenced the six-month period for the issuance of this determination (Tax Law § 2010[3]).

ISSUE

Whether petitioner has established that as of the year 1988 he had changed his domicile from New York to California, such that he was notrequired to pay tax under the status of a resident of New York State and New York City for such year.

FINDINGS OF FACT

1. Petitioner, John Carl Warnecke, is an internationally known and acclaimed architect, and is a Fellow of the American Institute of Architects. Petitioner was born in California in 1919. Petitioner's father was an architect, and petitioner started his career as an apprentice in his father's offices in Oakland, California. Thereafter, petitioner attended Stanford University and, ultimately, graduated from Harvard University with a degree in architecture.

2. Petitioner started his practice of architecture in Richmond, California, apparently in association with his father's offices in Oakland. Petitioner's reputation for outstanding work grew rapidly, and the scope and stature of the projects he was hired to design increased in step.

3. In 1960, petitioner moved out of his father's offices in Oakland, California and established his own offices in San Francisco. In or about 1962, petitioner opened an office in Washington, D.C., to serve as an East Coast base in connection with several major East Coast projects, including the re-design of the Lafayette Square area in Washington, D.C., and a large ongoing project at the U.S. Naval Academy in Annapolis, Maryland. At or about the same time, petitioner also opened an office in Hawaii. Petitioner explained that he usually obtained a license to practice in any jurisdiction where he had a major project, noting that over the course of the years he became licensed to practice architecture in approximately 20 states.

4. In or about 1967, petitioner moved his East Coast base of operations from Washington, D.C. to New York City. Petitioner established what would become his flagship office at 59th Street and Fifth Avenue, overlooking the Plaza Hotel and Central Park. Petitioner's office move to New York was made, in part, in conjunction with his involvement in the design of the AT&T building in New York City.

5. Petitioner was married in 1969 and, at about the same time, leased an apartment located at 525 Park Avenue (Apartment 9-B). Petitioner described this apartment as a luxury apartment located in one of the most prestigious areas of Manhattan. Petitioner explained that, although at this period of time he was travelling all over the world in conjunction with various major projects, "New York became my home for my new wife and my base. So that was my East Coast home, . . . I basically moved to the East when I got the [Hart] Senate [Office] Building

[project]. I made a commitment to actually come myself to the East and design the Hart Senate Office Building so they knew they were getting me." Petitioner went on to note that he "moved body and soul into New York after leaving Washington, D.C."

6. Petitioner opened an office in Los Angeles in 1972, and throughout the 1970's and into the early to mid-1980's continued to design and build many major projects. Petitioner's firm, John Carl Warnecke and Associates, Inc. (a subchapter S corporation for Federal tax purposes) grew to be one of the largest architectural firms in the country, with its largest office in New York City. At its peak in the mid-1970's, petitioner's firm employed approximately 280 architects. Included among the landmark projects designed by petitioner over his long career are the American Embassy in Bangkok, Thailand, the Hawaiian State Capitol, the Embassy Building of the (former) Soviet Union in Washington, D.C., Logan International Airport in Boston, the American Hospital in Paris, the Hart Senate Office Building in Washington, D.C., San Francisco International Airport, Lafayette Square in Washington, D.C., the AT&T building in New York City, a number of Nieman-Marcus stores throughout the United States, the Charleston, South Carolina downtown restoration, the Atlantic City and San Francisco Hilton Hotels, and the gravesite of President John F. Kennedy, who had been a close friend to petitioner.

7. In 1985, petitioner's firm had offices in New York, Washington, D.C., Boston, San Francisco and Los Angeles, and employed approximately 125 architects in total. There were about 40 employees in the New York office, with the balance of employees split almost equally between the other offices (with perhaps a few additional employees in the Washington, D.C. office). However, at this time, petitioner began to realize that his firm was in serious financial difficulty. More specifically, the firm was engaged in several major projects including the Charleston, South Carolina project (ultimately an award-winning project) and a large project for IBM, each of which was mired in litigation, and separate Hilton Hotel projects in Atlantic City and San Francisco. These latter projects were, according to petitioner's testimony and to documents in evidence, underbid as to the fee structure in relation to the amount of design work

involved, especially in the San Francisco situation which was a "build as you draw" project. Petitioner explained that due to ongoing revisions and an inability to know the overall scope of the San Francisco project, petitioner's firm was performing half-again as much design work as had been contracted per the original bid. Under these circumstances, the firm's current liabilities ran abnormally high in relation to its net fees (and incoming cash), leaving a shortage of cash to meet current liabilities. At this point in time, petitioner faced outstanding bank loans of over one million dollars owed by his firm. He had also placed a mortgage of approximately $250,000.00 on a large tract of property he owned in Sonoma County California (to be described hereinafter) in order to secure needed cash for his firm. Petitioner described his financial situation as dire noting that he was, at the time, faced with the prospect of bankruptcy.

8. Petitioner ultimately realized that his best means of resolving the described financial situation would be to collect on as many of his firm's receivables as possible, sell off his practice for the highest possible amount of money, and rezone and subdivide his property in California. In this latter regard, petitioner could then sell or mortgage only a portion of the property, as opposed to risking the entire property, in order to raise cash.

9. The California property is located in Healdsburg, Sonoma County, California on Chalk Hill Road, and includes some 4000 feet of frontage on the Russian River which runs through the property. Petitioner, his mother and his sister had inherited the property, which originally included approximately 60 acres, from petitioner's father. Petitioner thereafter purchased the property interests held by his mother and sister and, over the years, bought additional adjoining acreage such that by the mid 1980's the property included approximately 265 to 270 acres as a single unit. Some of the property had been used as a dairy farm. Petitioner replanted this area to become a working vineyard and winery. The property included several houses and outbuildings and was described by petitioner as a "summer place where I had raised my four children."

10. Petitioner first aimed to subdivide and sell some 95 acres of the property. This parcel, known as the Ranch, consisted of 5 houses, 2 cottages and other facilities on 47 acres, plus an

additional 48-acre area. This section of the property is shown in a brochure as having been offered for sale at a price of $1,675,000.00 in 1988. Petitioner also explained that the property could be divided into 9 parcels (it is not entirely clear if this meant the entire property including the above-described 95-acre Ranch parcel, or if the 9-parcel subdivision would be a division of the balance of the acreage excluding the 95-acre Ranch). Petitioner's design aim was that each of these nine parcels would be set so as to have an unobstructed view of the surroundings without any other houses being visible in the panorama. Petitioner noted that by subdividing and selling at least a portion of the property he could pay off his debts, including the mortgage on the property, could in the future sell additional individual parcels to raise cash (or could mortgage individual parcels to raise cash without mortgaging and potentially jeopardizing the entire property), and could ultimately provide for his children to sell one or more parcels if necessary to raise cash and pay estate taxes without losing the entire property in the event of petitioner's death.

11. In addition to his business financial difficulties, a new owner and management company had taken over the building in which petitioner's New York apartment was located, and intended to convert the premises to condominium ownership. According to petitioner, the new owners wanted to "get rid of the old timers" who occupied rent controlled or stabilized apartments, and so engaged in a pattern of "rudeness and harassment". Petitioner described how new service employees at the premises were openly rude to petitioner and others in general and specifically in front of guests, and that the premises were not repaired in either general terms or specifically in the case of petitioner's apartment. In this regard, petitioner noted that the apartment had not been repainted as required every three years and, most distressingly, that a leak in the apartment above petitioner had not been fixed, despite repeated requests by petitioner, causing the paint and plaster in the living room of petitioner's apartment to curl and fall. Petitioner pointed out, and submitted photographs to show, that in addition to the interior plaster and paint damage, the windows were in a state of deterioration and needed replacement.

In sum, petitioner described the premises as "uninhabitable", specifically for purposes of inviting guests or entertaining clients or potential clients.

12. In October 1986, an eviction action was commenced by the landlord in New York State Supreme Court, seeking petitioner's ouster on the allegation that petitioner was not residing in the apartment as his primary residence and thus was not entitled to continue as a rent stabilized tenant (the "non-primary residence lawsuit"). Petitioner opposed this lawsuit noting, however, that he could not at the time afford to incur large legal fees and thus his opposition was more passive than aggressive in combatting the landlord's allegations. At the same time, it appears that the landlord did not aggressively seek to move forward with the suit. However, the ongoing pattern of rudeness toward petitioner and the failure to repair the apartment continued.

13. Petitioner's apartment at 525 Park Avenue included an entry foyer/hallway, T.V./sitting room, den, kitchen, living room and two bedrooms, for which petitioner paid approximately $1200.00 per month in rent. The focal point of the apartment was the wall in the front hall on which was displayed, floor-to-ceiling, three generations of petitioner's family's artwork, consisting of paintings and drawings by petitioner, his father and his daughter. Petitioner noted that while the wall of artwork remained a focal point upon entry, and also covered the fact that the apartment had not been painted in years, the condition of the balance of the premises was such that he could not use it to entertain--specifically stating that at a "critical financial period" when he would have loved to be able to use the apartment to "help him" in his business by creating the image of business success and strength portrayed by living in a luxury apartment located in one of the most desirable spots in Manhattan he was unable to do so.

14. The lease on petitioner's flagship office at Central Park South ended as of April 1985. In view of his financial problems petitioner could not afford to renew the lease, and so he leased approximately 10,000 square feet of loft space in the area of Broadway and Canal Street in Manhattan (near Chinatown). Petitioner described this space as "cheap", noting that he intended to use the same to finish up the projects being run by his New York offices. At this point in time (1985), the active (design and build) phase of the projects run by petitioner's New

York office were finished with the remaining activities centered on resolving pending disputes, including litigation, and collecting fees.

15. By 1987, petitioner had decided that he had to sell his practice and collect what he could in outstanding fees in order to avoid bankruptcy. By this time, petitioner had no more active projects in, or operated out of, his New York office, but was still involved in attempting to resolve litigation in connection with several of such projects. Petitioner sought to consolidate his operations out of his San Francisco office, and at the same time negotiate the sale of his practice and office in Washington, D.C., move along with the subdivision plans for the California (Sonoma County) property and, hopefully, resolve his financial problems.

16. Petitioner's only daughter, Margo, an architect, was then recently married and lived in New York City. She was interested in using petitioner's loft space to operate a "design collaborative", wherein a number of individuals could practice while sharing office space and equipment. In or about mid-1987, petitioner's daughter opened the "Warnecke Design Collaborative" in the loft space. While the collaborative was operated by petitioner's daughter and did not involve petitioner, his name remained on the lease through approximately 1990 or 1991. At about the same time, one of petitioner's employees in the San Francisco office (Warren Megrian) came to New York to sort through the years of accumulated drawings, plans, designs and artwork. Some of this material was moved to petitioner's Washington office, and some was moved to barns at the California property or to adjacent warehouses for archival storage. Petitioner thus closed his New York office.

17. Petitioner had opposed the landlord's non-primary residence lawsuit, as noted, and had been advised by his attorney that he had to be at (i.e., using/living at) the apartment in order to maintain his status as a rent stabilized tenant. Instead, however, petitioner decided to sublease the premises to one Julienne Michel, a friend of his then-fiance Dolores Smithies, and go west. In this regard, petitioner reiterated that when he needed the apartment to help him in 1985, 1986 and early 1987, he had been unable to use it because of its condition. However, with the closing of his New York office and the general financial condition of his business leaving him unable to

devote any money to promotion aimed at developing and attracting new business, there was no longer such a need for the apartment. He further expressed his belief that he had lost the apartment due to the landlord's actions and lawsuit, and so he decided to "get out and go west". However, petitioner considered hanging on to the apartment until he could afford to purchase the apartment at the insider's price (described as $479,700.00 versus the outsider's price of $738,000.00 [see, Petitioner's Exhibit 24]), and then resell to gain additional cash. The potential resale price petitioner believed possible ranged from about $600,000.00 without undertaking any repairs, to about $700,000.00 with minimal repairs. Petitioner stated his thoughts with regard to the apartment at the time to be that he "didn't care anymore about the damn apartment because it wasn't--I couldn't use it for anything in my position. I couldn't entertain there. I looked ridiculous in a Park Avenue apartment with the damn plaster falling. It's hard enough to be facing bankruptcy and try to keep the show going." Petitioner went on to state that "[t]he words legal domicile never entered my mind. I just moved myself and my efforts [West] and intended to take care of all my problems and live there. That is where I came from." Finally, petitioner stated that "I came West to try to make sense out of the economic thing I was involved in."

18. Petitioner subleased the apartment without seeking the landlord's permission, a course of action against the advice of his attorney. Petitioner stated that without the leak in the ceiling, his apartment could have rented for upwards of $5,000.00 per month. However, he rented the premises to Ms. Michel "as is" for $2,500.00 per month (slightly more than twice the rent he was paying for the apartment), with Ms. Michel agreeing to pay for utilities, cable television and phone costs. Ms. Michel rented the apartment from November 1987 through June 1989. Petitioner and Ms. Michel did not enter into a written lease agreement, but rather operated under a verbal understanding.

19. During 1988, petitioner spent some 34 full days plus 22 partial days (described as in and out travel days) in New York. The balance of petitioner's time was spent in Washington, D.C., where he was principally involved in negotiations which culminated in the sale of his office and

practice there, and in California. In California, petitioner's time was split between San Francisco, where his remaining office was located, and his property in Healdsburg. In addition, petitioner spent a few days in Key Biscayne, Florida with his fiance Dolores Smithies, and an additional few days in various other places, including Egypt, apparently in connection with business matters. On overnight trips to New York, petitioner stayed at his fiance's apartment, which was located approximately two blocks from his own 525 Park Avenue apartment. From mid-to-late 1987 through mid-1989 petitioner visited his New York apartment on only a few occasions to see if any repairs were being undertaken.

20. When he subleased the New York apartment, petitioner gave a few pieces of furniture to his daughter, who was then recently married and furnishing her home. These items included a dining room table, an antique desk and a Japanese screen. The balance of petitioner's possessions were left in the apartment, including clothing, tools, books in the library and the wall of three generations of Warnecke artwork described above. The utilities, cable and telephone services remained in petitioner's name, although the charges were paid by Ms. Michel.

21. Petitioner's negotiations to sell his practice in Washington, D.C. came to fruition in November 1988, when the practice was sold to the architectural/engineering firm of Spillis and Candela. As part of the sale, the purchasing firm rented an apartment in the Georgetown area for petitioner's use for a period of three years, in connection with continuing the prestige of having petitioner's name associated with the firm's practice. Petitioner's fiance directed the decoration and furnishing of this apartment, and petitioner used the apartment whenever he was staying in the Washington area. Petitioner also described the activities ongoing at his California property during 1988 as involving research, working with local (California) land planners, engineers and county officials in connection with developing a preliminary plan and obtaining approvals for the subdivision of the property. Documents in evidence show that such process commenced somewhat earlier than 1988, and that the amount of time and effort increased

during 1988 and continued thereafter at a comparable level into and through 1989, 1990, 1991, 1992 and beyond.

22. Petitioner has three sons, John, Roger and Frederick, each of whom lives in California, and a daughter, Margo, who as described above lives in New York. Petitioner's sons John and Frederick each have two children who also live in California. Petitioner's son Roger, who at an early age displayed great talent as an artist, has been institutionalized for acute schizophrenia for over 25 years. His institutionalization had involved a number of different facilities over the years, and one of petitioner's concerns during 1988 was in obtaining placement for his son in a facility providing adequate care. To this end petitioner, as his son's legal guardian, obtained placement in a facility in Eureka, California, located approximately four hours north of San Francisco via automobile.

23. Several additional events occurred during and shortly after 1988. Most, if not all, of the pending litigation on petitioner's projects was settled. This enabled petitioner to collect sufficient monies to resolve, in connection with the sale and closure of his offices and practice (save for the San Francisco office), his business financial problems and also remove the mortgage on the California property. Subdivision approval (to the extent of some of the California property) was obtained such that petitioner's concerns about the ability to mortgage or sell a part of the property and raise cash if necessary and/or to cover the potential estate tax liability with regard to the property in the event of his death were resolved. In addition, petitioner's son Roger had begun to respond favorably to treatment and make progress against his illness at the new facility in Eureka. Finally, the landlord in New York changed tactics and, toward the end of 1988, actively solicited petitioner as a potential subscriber for the purchase of his apartment, allegedly because the landlord was hard pressed to reach the minimum number of subscription agreements needed to obtain regulatory approval to proceed with the plan to convert the premises to condominium ownership. The landlord agreed to fix the leak, make the other required repairs and repaint petitioner's apartment.

24. In December 1988, petitioner requested opinions from several realtors as to the market value of the apartment. The specific results of these requests were not offered in evidence. However, petitioner noted that his requests were made in connection with the possibility of purchasing and reselling the apartment at a profit. In addition, the pattern of harassment and rudeness also ceased at this time. In January 1989 petitioner signed a subscription agreement for the purchase of his apartment and paid a $1,500.00 deposit in connection therewith.

25. In view of the above circumstances, petitioner "began considering a move back to New York". In addition to the resolution of his financial problems, and the change in his landlord's stance, petitioner also stated that he began to appreciate the "convenience" of living in the city as opposed to the country. Here, petitioner noted that he had received certain sanctions for driving infractions in California (the record includes two tickets issued to petitioner for speeding). Petitioner feared losing his license to drive, given that unlike New York where there is the ability to walk or take public transportation to nearly every imaginable need or amenity, it is essential to have the ability to drive to get around in California.

26. Shortly after petitioner's execution of the subscription agreement, an error therein was discovered which the parties were unable to amicably resolve. In turn, the landlord resumed its prior activities toward petitioner including a threat to press forward with the non-primary residence lawsuit, a matter petitioner believed to have been discontinued upon his execution of the subscription agreement. Ultimately, in April 1989, petitioner appeared in court, apprised the court of the nature of the condition of his apartment, and the landlord in response agreed to rectify the problems (with the court's admonition that the conditions were to be fixed within one year).

27. Petitioner's sublease of the apartment to Julienne Michel ended as of June 1989. Petitioner, in turn, came back to New York in mid-to-late 1989 to supervise the repairs to his apartment. The upstairs leak was fixed in October 1989, but the plaster was not repaired nor was the apartment repainted until a later date. Although these repairs (plastering and painting)

were not made, and the windows were not replaced (the windows were ultimately never replaced), petitioner re-occupied his apartment in late 1989.

28. Petitioner had received a two-year renewal lease for the apartment from his landlord, covering the term June 1, 1989 through May 31, 1991. After ongoing negotiations concerning the promised but unmade repairs, rent withholdings by petitioner, and a partial rent abatement by the landlord, the apartment was plastered and painted in mid-to-late 1990. In early 1991, the landlord notified petitioner that a renewal lease to the apartment would not be offered. This ultimately led to petitioner's May 1991 commencement of an action against the landlord to compel the issuance of a proper lease and for the payment of damages to petitioner.

29. For many years prior to 1988, and for 1989, petitioner filed New York State and City of New York resident income tax returns (Forms IT-201). However, for 1988 petitioner filed a New York State and City of New York Non-Resident and Part-Year Resident Income Tax Return (Form IT-203). On said return, petitioner reported New York income of $34,608.00 (at line 12 pertaining to "Rents, Royalties, Partnerships, Estates, Trusts, Etc."). In turn, petitioner's five percent New York income percentage (derived from a comparison of the New York amount of Federal adjusted gross income to the total Federal adjusted gross income) was applied to petitioner's reported New York income, to result in a New York tax liability of $3,196.00. This liability was offset against the $17,928.09 of New York tax withheld from petitioner's wages, thus resulting in a $14,732.00 refund to petitioner. Subsequently, petitioner filed an amended Form IT-203 for the year 1988. This amended return differed from petitioner's earlier return by its elimination of the $34,608.00 amount of income from line 12 (i.e., effectively claiming that petitioner had no income derived from or connected with New York sources or subject to New York tax). In turn, petitioner requested an additional refund equal to the $3,196.00 liability calculated on his initial return.

30. In addition to his New York nonresident filings, petitioner filed a California Long Tax Form (Form 540) for 1988 as a resident. Said return showed a net tax liability to California in

the amount of $60,523.00. Line 25 of said return (and Schedule S filed therewith) reflected a claimed credit for $3,118.00 based on taxes paid to New York.

31. In September 1991, the Division of Taxation ("Division") conducted a field audit of petitioner's return(s) for the year 1988. On February 16, 1993, the Division issued to petitioner a Notice of Deficiency asserting additional personal income tax due for the year 1988 in the amount of $40,198.56 (consisting of $16,254.52 in New York State tax and $23,944.04 in New York City tax), plus penalty and interest. Reference to a January 15, 1993 Statement of Audit Changes issued to petitioner prior to the Notice of Deficiency, reveals that the Division calculated and allowed a resident credit in the amount of $46,431.00 based on taxes paid to another jurisdiction (California), thereby reducing the amount of petitioner's New York State (resident) liability as calculated on audit. The Division's Notice of Deficiency is premised upon the position that petitioner did not change his domicile to California for 1988, as claimed, and that he therefore remained subject to tax as a resident of New York State and New York City.[1] Petitioner challenged the Division's notice and requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conference was held, after which an Order was issued sustaining the notice as to tax but cancelling the penalty asserted as part of the notice. Petitioner continued his protest to the notice by instituting the proceedings herein.

32. When in California during 1988, petitioner spent time at the Healdsburg property and in an apartment at 155 Jackson Street in San Francisco. This latter address was described as a small (600 square feet) studio apartment located a few blocks from petitioner's San Francisco office at 300 Broadway. While petitioner indicated that he had acquired this apartment in 1978, an April 24, 1991 letter from petitioner to his attorney (Petitioner's Exhibit "23") in connection with the landlord situation in New York states that the apartment "I occasionally use while I am

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[1]At the commencement of proceedings, the Division conceded that since petitioner spent less than 184 days in New York in 1988, the issue of "statutory resident" (whereunder a nondomiciliary remains subject to tax as a resident by virtue of the number of days spent in the State and/or City of New York) was not at issue. Given that petitioner has admitted to spending in excess of 30 days in New York State and City during 1988, the sole and determining issue in this matter is whether petitioner remained a domiciliary of New York and not of California for said year.

in San Francisco . . . never belonged to me, but rather has always belonged to Mr. Leonard Blackford . . . . [A]s you know, my home for more than twenty years has been Apartment 9-B at 525 Park Avenue [in New York City]."

33. Petitioner's tax returns for the year 1988 all list his address as the 300 Broadway, San Francisco office address, while the Wage and Tax Statement (Form W-2) attached to his initial New York return lists the 525 Park Avenue address. When asked to specify where his domicile was in California, petitioner responded that it was "difficult to say", in that he spent time at both the Healdsburg property and at the 155 Jackson Street apartment.

34. Petitioner listed the California property as 13125, 13301, 13281 and 13427 Chalk Hill Road, Healdsburg, California. Petitioner also listed the same properties as properties from which he received rental income during the year in question. The record does not specify which, if any, of the addresses or houses at the property might not have been rented and in which petitioner might have lived. In connection with these proceedings, petitioner queried his accountant as to why a California return (as opposed to a New York resident return) was filed for 1988. In response, petitioner's accountant noted that such filing appeared proper in that petitioner was living in California rather than in New York during such year. Petitioner noted that he relied on his accountant to handle his tax matters, and did not make a calculated decision to file as a resident of California rather than New York. Instead he simply filed his returns as prepared by his accountant (it of course may be reasonably inferred that petitioner continues to agree with the manner in which his returns were filed for 1988 in light of the pursuit of these proceedings).

35. During the year at issue, petitioner was registered to vote in California, held driver's licenses in both California and New York, and belonged to social clubs in California, New York and Washington, D.C. During 1988, petitioner treated with physician's in New York, although it is noteworthy that these were long-term doctor-patient relationships apparently involving rather routine annual or semi-annual visits.

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 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." (emphasis added).

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 formal declarations as to a change of domicile are certainly to be considered, 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 petitioner's overall conduct contradicted his formal declarations of a change of domicile to California.

E. In this case there is no dispute that petitioner was a domiciliary and resident of New York for many years up to the latter part of 1987, at which point, petitioner contends, he abandoned his New York domicile and acquired a California domicile either at the apartment at 155 Jackson Street in San Francisco and/or at the Healdsburg property. However, in view of the circumstances under which petitioner left his longtime apartment in New York, and noting his continued ties to such apartment, I am not convinced that petitioner moved his focus of "home" from New York to California as of, or for, 1988. Petitioner's actions are simply not fully consistent with such a conclusion. Rather, what emerges most clearly is that Mr. Warnecke left New York for the main purpose of resolving his financial problems. There is no strong sense that petitioner intended to live permanently at the California property. Instead, the main focus of his intent and activities there seems to have been aimed at subdividing the property for purposes of eventual piecemeal sale. His desire to be in a position to sell or mortgage a part of the property, if necessary, to raise cash without jeopardizing the entire property indicates more of an aim to reconfigure the property such that it would provide a long-term financial resource for petitioner as opposed to any sense that petitioner wanted to live there on a permanent basis. In fact, there is no testimony or other claim that any particular part of the property as subdivided was to be reserved for petitioner as his home.

At the same time, petitioner made no clean break with New York. He retained his own tenant status with respect to his New York apartment, albeit that he did not occupy the apartment while he was resolving his financial problems. Petitioner made much of the fact that he did not obtain the landlord's permission to sublease, likening the same to open defiance of his landlord. However, it stands to reason that permission, if sought, would almost certainly have been denied and, further, would have likely brought immediate action by the landlord against petitioner in the context of the then-pending non-primary residence lawsuit. Furthermore, a written sublease allowing someone else to live in the apartment and/or changing

the utilities, cable television and phone services out of petitioner's name would support the landlord's claim that petitioner was not living at the apartment and, perhaps, did not intend to return. Thus, even if not actively hiding the sublease, the choice not to seek the landlord's permission provided some possibility of not getting "caught", whereas such possibility would obviously be eliminated by admitting the existence of the sublease. Stated differently, while subletting on a non-notice verbal basis carried with it the risk of discovery and consequence, subletting on notice assured "discovery" and carried the nearly certain consequence of loss.

F. Certain additional factors weigh against a conclusion that petitioner clearly established his intent to change his domicile from New York to California. For instance, petitioner's claim that his apartment was "uninhabitable" stemmed from his inability to use the apartment to help in providing a successful image and thus attract new business. However, this speaks more to the business financial crisis then facing petitioner, and the steps he needed to undertake to resolve the same, than to a more personal sense that he no longer wanted to live in the apartment. Obviously, the apartment was not uninhabitable, given that Ms. Michel lived at the apartment and was willing to pay twice petitioner's own monthly rent to do so. In fact, petitioner himself reoccupied the apartment before full repairs were made (see, Finding of Fact "27"). The overall sense conveyed is that petitioner had pressing matters to attend to, and the apartment was simply not then an asset which could help him in attending to such matters.

In addition, while petitioner and his employee (Warren Megrian) sorted through and moved many years worth of documents, drawings, etc. out of New York to Washington, D.C. and California, the same was necessitated by the closing of petitioner's New York office. There was no mention of any particular items "near and dear" or of particular personal/sentimental value being moved. In the same manner, while petitioner gave a few items of furniture to his daughter, who at the time was recently married and was furnishing her own home, he left the balance of items, including clothing, books, tools and, significantly, the wall of artwork, in

place at the apartment.[2] Leaving such items in the apartment, and leaving the utilities, cable and phone service in his name do not support or indicate an intent to leave the apartment and make his home elsewhere. Also, petitioner's manner of California tax filing, and his accountant's recollections of the reasons therefor, indicate a filing based mainly on the accountant's perception that petitioner was physically present in California in 1988. This, however, has essentially no bearing on the issue of petitioner's intent as to permanent domicile.

Finally, petitioner's opposition to the non-primary residence lawsuit, although not pushed in an actively aggressive manner for lack of cash to support legal fees, his statement that "my home for more than twenty years has been apartment 9-B at 525 Park Avenue", his inability to state clearly where his home (domicile) was in California (either the 155 Jackson Street apartment belonging to Mr. Blackford or the Healdsburg property), his execution of a subscription agreement for the New York apartment in January 1989, his renewal of the lease for the two-year term commencing June 1989, and his return to the apartment shortly thereafter despite the fact that the requested repairs had not been made, all militate against a conclusion that petitioner clearly intended to abandon his New York domicile or that he established a new domicile in California.

G. In sum, the picture that emerges most clearly is that petitioner was, as of the latter part of 1987 and into 1988, facing dire financial problems in his business and, at the same time, facing a difficult landlord who either wanted petitioner out of the apartment (thus resulting in a vacant, non-rent stabilized unit which could be sold at the outsider's price) or, at best, wanted petitioner to agree to subscribe for the purchase of the apartment. Petitioner, in turn, clearly lacking the financial wherewithal to purchase the apartment at the time (even at the insider's price), held out against the landlord's efforts to evict him, hung on to the apartment, and went about dealing with his financial problems. As petitioner candidly testified, "I came West to try to make sense out of the economic thing I was involved in". During 1988, petitioner focused on resolving his

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[2]Petitioner's claim, by brief, that the artwork had been appraised for possible sale or relocation to California and thus only remained in the apartment for convenience and temporary storage is not found in the testimony or other evidence in the record.

business financial problems, rearranging his finances for the future, and arranging for suitable institutional care for his son Roger. In turn, with these aims accomplished, petitioner returned to resume living near his friends in the New York apartment that had been his long-term home. In fact, it seems clear that petitioner's move to California was not due to any obvious affinity for California over New York, or desire to make his home there as opposed to New York, but rather was made primarily because California was where he could best resolve his financial problems. Accordingly, under all of the circumstances, petitioner has not established that he changed his domicile and home from New York to California as of, or for, 1988.

H. The petition of John Carl Warnecke is hereby denied and the Notice of Deficiency dated February 16, 1993, modified only insofar as to eliminate the penalty included thereon (per BCMS Order), is sustained.

DATED: Troy, New York
February 8, 1996

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE