STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
RHODA MILLER	:DETERMINATION DTA NO. 812849
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1988 and 1989.	:

Petitioner, Rhoda Miller, 248 Hillspoint Road, Westport, Connecticut 06880-6619, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1988 and 1989.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on February 14, 1995 at 9:15 A.M. Petitioner filed a brief on April 3, 1995. The Division of Taxation filed a brief on May 24, 1995. Petitioner filed a reply brief on June 21, 1995 and this date commenced the six-month period for the issuance of this determination. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Craig Gallagher, Esq., of counsel).

ISSUES

I. Whether petitioner has shown that she was not a domiciliary of New York State and City during the years at issue

and therefore not taxable as aresident individual pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

II. Whether petitioner has shown that she was not present in New York State and City for more than 183 days during each of the years at issue and therefore not taxable as a resident individual pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

III. Whether petitioner has shown that penalties imposed herein pursuant to Tax Law § 685(b) and (p) should be abated.

IV. Whether, if petitioner was a resident of New York State and City during the years at issue, petitioner has established entitlement to a resident credit under Tax Law § 620(a) with respect to tax on capital gains, dividends and interest paid to the State of Connecticut.

FINDINGS OF FACT

Petitioner, Rhoda Miller, was born in Brooklyn, New York. In 1989, petitioner was 65 years old. In 1939, petitioner married Robert Stanley and, in 1951, petitioner and Mr. Stanley jointly purchased a three-bedroom home located at 248 Hillspoint Road, Westport, Connecticut. This home was situated on a ½-acre lot and had 90 feet of private beachfront.

Petitioner was subsequently divorced from Mr. Stanley and married one Larry Wolf in 1965. Following their marriage, petitioner and Mr. Wolf resided in Nevada. Apparently, petitioner took sole title to the Westport, Connecticut home following the divorce, for she continued to own the Westport

home during the time of her marriage to Mr. Wolf.

Mr. Wolf died in or about 1971. Following Mr. Wolf's death, petitioner sold the Nevada home and returned to her Westport, Connecticut home.

In or about 1972, petitioner married Dr. Richard Miller, a physician with a New York City medical practice. At the time of their marriage, Dr. Miller had a leased one-bedroom apartment located at 155 West 68th Street, New York, New York. Dr. Miller continued to lease the apartment through the years at issue.

During the years at issue, petitioner had a key and had access to the 68th Street apartment. The frequency of petitioner's use of the apartment is not established in the record. Petitioner also occasionally received mail at the 68th Street apartment.

At some point during their marriage, the house located at 248 Hillspoint Road became jointly owned by petitioner and Dr. Miller.

In 1993, petitioner and Dr. Miller sold this house and jointly purchased a larger, 11-room home located nearby at 268 Hillspoint Road, Westport, Connecticut.

From Mr. Wolf petitioner inherited interests in two real estate S corporations, Valoc Enterprises, Inc. and Whitehorse Garage, Ltd., and a real estate partnership, Mildel Associates.

Valoc Enterprises ("Valoc") and Mildel Associates ("Mildel") shared an office located at 211 East 43rd Street, New York, New York. Mildel owned two parcels of commercial property located within New York City, both of which were net-leased to

tenants. Valoc owned a long-term leasehold on an office building located in the Grand Central area of Manhattan. Petitioner's business partner and associate in both Mildel and Valoc was Mr. Phillip Abelman. Mr. Abelman, a shareholder and officer of Valoc and a partner in Mildel, ran the operations and made all decisions for both entities, which, according to Mr. Abelman, consisted largely of collecting monthly rental checks and keeping records.

Petitioner was an officer of Valoc and a partner in Mildel but did not participate in the management of either entity.

With respect to petitioner's involvement in these real estate entities, Mr. Abelman testified that "[petitioner's] function is she gets her share" (tr., p. 63) and that "all she wants to get are her checks" (tr., p. 74).

Mr. Abelman also managed petitioner's personal finances, which were strictly separate from those of her husband, Dr. Miller. Pursuant to this responsibility, Mr. Abelman received and opened mail addressed to petitioner at 211 East 43rd Street.

Whitehorse Garage, Ltd. ("Whitehorse"), petitioner's other real estate business interest, had an address of 630 1st Avenue, New York, New York. Whitehorse owned a leasehold on a parking garage located in a New York City apartment building. Petitioner was not involved in the management of Whitehorse. Petitioner did not have an amicable relationship with the other principal of Whitehorse and did not spend any significant amount of time at the Whitehorse offices during the years at issue.

Petitioner timely filed New York State and New York City nonresident income tax returns (Form IT-203) and City of New York nonresident earnings tax returns (Form NYC-203) for both of the years at issue. Although married, petitioner filed separately from her husband.

On petitioner's 1988 NYC-203, on a page signed by both petitioner and her accountant, petitioner represented that neither she nor her husband maintained an apartment in the City of New York during any part of 1988.

On the first page of petitioner's 1989 IT-203 and on petitioner's 1989 NYC-203, petitioner checked boxes indicating that neither she nor her husband maintained living quarters in New York State or City in 1989.

As part of her 1988 nonresident return, petitioner claimed a resident tax credit (Form IT-112-R) of $29,383.00.

Petitioner filed 1988 State of Connecticut capital gains, dividends and interest income tax returns. The tax paid in connection with this return formed the basis of petitioner's 1988 claim for the New York resident tax credit noted above.

Petitioner listed 248 Hillspoint Road, Westport, Connecticut as her address on her 1988 and 1989 New York State and City income tax returns and on her 1988 Connecticut return.

Petitioner's New York returns with respect to the years at issue were prepared by her accountant, Martin S. Kaplan. Mr. Kaplan testified at hearing that he estimated that petitioner spent at most 130 days in New York State and City during each of the years at issue. Mr. Kaplan's estimate presumed that, except

for the summer, petitioner spent three days per week in New York City during the years at issue (3 days x 39 weeks = 117 days), and that during the summer she spent one day per week in the City (1 day x 13 weeks = 13 days). Mr. Kaplan indicated that this estimate was based on a review of petitioner's social diary for those years.

Petitioner did not produce any such social diary on audit. Nor did petitioner produce any such diary at hearing. Petitioner presented no explanation for her failure to produce the diary and gave no indication that she had reviewed or relied on any such diary in her testimony. Furthermore, no testimony was presented as to the manner in which such a diary was maintained.

Mr. Abelman testified that he generally agreed with Mr. Kaplan's estimate and further testified that petitioner would come to the Mildel/Valoc office "one day, sometimes two days. Very rarely three times. In no event more than three days" (tr., p. 67). In reference to Mr. Kaplan's estimate of one New York City day per week during the summer, Mr. Abelman testified: "I would say that is about right . . . some weeks she wouldn't show up at all in the summertime" (tr., p. 67). Mr. Abelman estimated that he was in petitioner's presence at the Mildel/Valoc offices on approximately 60-70 days during each of the years at issue.

As noted previously, petitioner was an investor in Valoc and Mildel and was not involved in the management of these entities. That being the case, according to Mr. Abelman,

petitioner's purpose in going to the office was to read her mail or to have lunch with Mr. Abelman.

Mr. Kaplan was actually in petitioner's physical presence on two days during each of the years at issue.

Mr. Abelman saw petitioner only when she was present in the Mildel/Valoc offices.

W-2 forms issued to petitioner by Whitehorse for both 1988 and 1989 listed petitioner's address as 155 West 68th Street.

W-2 forms issued to petitioner by Valoc for both 1988 and 1989 listed petitioner's address as 248 Hillspoint Road, Westport, Connecticut.

Petitioner received numerous 1099 forms during the years at issue. Computer records entered into evidence by the Division of Taxation ("Division") indicate that two such 1099's bore the 155 West 68th Street address; three bore the 248 Hillspoint Road address; and the remaining approximately 19 such forms bore the 211 East 43rd Street address.

Entered into the record herein was a lease renewal form, dated April 1, 1991, in respect of the apartment located at 155 West 68th Street. Said lease form lists Dr. Miller as the tenant. Attached to the lease form is a "Statement of Tenant", wherein the tenant, i.e., Dr. Miller, is directed to list the names of persons, other than the tenant, residing in the apartment. Petitioner is listed on the Statement of Tenant as such a person.

During the years at issue, petitioner had a Connecticut driver's license. In addition, she registered her car in

Connecticut.

Petitioner also was registered to vote in Connecticut during the years at issue. She was never registered to vote in New York.

Petitioner was a member of a Westport, Connecticut country club.

Petitioner maintained all of her bank accounts in New York City. She and her husband also jointly maintained a safe deposit box in New York. Petitioner also held a New York State real estate broker's license during the years at issue which she had held for approximately 35 years. Petitioner did not use her broker's license during the years at issue and had not been engaged in any activity as a broker for many years.

Petitioner estimated that her residence in Westport, Connecticut was located about 50 miles from New York City and that this trip took about an hour by train.

On audit, petitioner provided to the Division copies of her 1988 and 1989 Federal and New York State and City nonresident returns; the lease renewal dated April 1, 1991 for the apartment located at 155 West 68th Street; copies of telephone bills for the 248 Hillspoint Road, Westport, Connecticut residence pertaining to the period December 1, 1990 through November 17, 1991; and copies of real estate tax bills for the 248 Hillspoint Road, Westport, Connecticut property for the years ended June 30, 1984, June 30, 1986 and June 30, 1992.

Upon review of the documentation submitted by petitioner, the Division concluded that petitioner had not established her

claim of nonresidency. Accordingly, on December 17, 1992, the Division issued to petitioner a Notice of Deficiency which asserted additional New York State and City personal income taxes due for the years at issue as follows:

Year	Additional Tax Due
1988	New York State $ 35,799.83
1988	New York City 42,400.09
1989	New York State 8,933.03
1989	New York City 13,215.23
	Total Additional Tax Due per Notice of Deficiency $100,348.18

The Notice of Deficiency herein also assessed interest and penalties under Tax Law § 685(b) and (p).

The Division's field audit report stated that penalties were imposed herein "because of the seemingly deliberate attempt to avoid providing information and avoiding payment of New York City resident taxes."

Petitioner introduced into the record an Income Tax District Office Audit Manual. This manual went into effect following the completion of the audit at issue herein.

The Division submitted proposed findings of fact numbered "1" through "13". Proposed findings of fact numbered "1" through "6" and "9" through "13" are accepted and have been incorporated, in substance, into the Findings of Fact herein. Proposed finding of fact "7" is unsupported by the record and is rejected. Proposed finding of fact "8", which references, perhaps erroneously, petitioner's 1980 Form 1040, being both

unsupported by the record and irrelevant, is also rejected.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) defines "resident individual" as someone:

> "(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .
>
> "(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. The definition of "resident" for City purposes is provided under the New York City Administrative Code § 11-1705(b), and is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state."

C. Regulation 20 NYCRR 105.20(d) defines "domicile", in part, as follows:

> "(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home -- the place to which such individual intends to return whenever such individual may be absent.
>
> "(2) A domicile once established 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. 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 such individual's 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, such individual's declarations will be given due weight, but they will not be conclusive if they are

contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.

* * *

"(4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year 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 such person may be domiciled elsewhere.

"(5)(i) Husband and wife. Generally, the domicile of a husband and wife are the same. However, if they are separated in fact, they may each, under some circumstances, acquire their own separate domiciles even though there is no judgment or decree of separation. Where there is a judgment or decree of separation, a husband and wife may acquire their own separate domicile."

D. The absolute and fixed intention to abandon one domicile and acquire another must be established by clear and convincing evidence (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Moves to other states when permanent places of abode are established do not necessarily provide clear and convincing evidence of intent to change domicile absent other proof (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990, revg 77 AD2d 725, 430 NYS2d 419). The importance of a person's intention in determining whether they have effectively changed domicile was expressed by the Court of Appeals in In re Newcomb's Estate (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 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."

E. A review of the record herein compels the conclusion

that petitioner was not domiciled within New York State or City at any time during the years at issue. As noted above, the Division's regulations provide that "if a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home" (20 NYCRR 105.20[d][4]). A comparison of the New York City apartment and the Westport, Connecticut home clearly points toward a finding that petitioner regarded the Westport home as her permanent home. First, petitioner had owned the Westport home for approximately 37 years as of the years at issue. Petitioner did not even lease, much less own, the 68th Street apartment; rather, petitioner's husband leased the apartment. Additionally, while the Westport home had three bedrooms, was situated on a ½-acre lot and had 90 feet of beachfront, the 68th Street apartment had one bedroom. Moreover, petitioner's stronger ties to Westport, as opposed to New York City, may be seen in petitioner's subsequent purchase of a larger Wesport home in 1993.

Secondary factors also weigh, on balance, toward a finding of a Westport domicile. Specifically, petitioner had a Connecticut driver's license, automobile registration and voter registration and filed Connecticut tax returns. She also had a Connecticut country club membership. These factors outweigh other secondary factors present in the record, such as New York bank accounts and a safe deposit box, which are supportive of a finding of a New York domicile.

Additionally, it is noted that petitioner's New York

business interests do not militate toward a finding of a New York domicile. Although New York business interests are a factor which may be considered in determining issues of domicile (see, Matter of Kartiganer, Tax Appeals Tribunal, October 17, 1991, confirmed 194 AD2d 879, 599 NYS2d 312), such a factor becomes significant only where the taxpayer is actively involved in the New York business (see, Matter of Burke, Tax Appeals Tribunal, June 2, 1994). Here, the record clearly indicates that petitioner was not actively involved in the management of any of the real estate entities in which she held an ownership interest. Petitioner's involvement in each of these entities was limited to that of a passive investor. Additionally, although petitioner held a real estate broker's license during the years at issue, she was not engaged as a broker during that period and had not been so engaged for many years. Accordingly, petitioner's New York business interests provide little support for a finding of a New York domicile.

F. With respect to the second part of the residency test, it is concluded that petitioner has failed to prove that she was not present in New York State or City for more than 183 days during either of the years at issue.[1] The Division's determination that petitioner was a "statutory" resident of both New York State and City under Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B) during 1988 and 1989 must be sustained.

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[1]Petitioner did not dispute that she "maintained a permanent place of abode" within the meaning of Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B).

Petitioner's contentions regarding her days spent within and without the City and State rest on testimony. Petitioner presented no contemporaneous diaries or calendars, no credit card receipts, no utility bills (pertaining to the years at issue) and no travel receipts (e.g., lodging or airline ticket receipts). Additionally, petitioner did not submit, and offered no explanation for her failure to submit, her "social diary", notwithstanding the fact that her accountant testified that this diary "had quite a bit of information of her [petitioner's] whereabouts on various days of the year" (tr., p. 51).

The testimony presented in support of petitioner's contention regarding the statutory residency issue did not purport to establish petitioner's whereabouts on any specific days during the years at issue, but rather sought to establish a general pattern of activity. Given the lack of documentation in the record, as noted, the testimony presented is clearly insufficient to meet petitioner's burden of proof on this issue. Specifically, as the Division correctly notes in its brief, Mr. Abelman and Mr. Kaplan lacked personal knowledge of the number of days petitioner spent within and without New York. Mr. Abelman testified that petitioner was in his presence at the office on approximately 60 to 70 days per year during

the two years at issue. Except for those estimated 60 to 70 days, Mr. Abelman had no personal knowledge of the number of days spent within or without New York by petitioner. In other words, Mr. Abelman did not see petitioner except for those

occasions when she was present at the office. Additionally, the weight to be accorded Mr. Abelman's testimony regarding his estimate of 60 to 70 days spent by petitioner at the office is adversely affected by the passage of time from the years at issue to the date of the hearing and the lack of any corroborating contemporaneous documentation. Similarly, Mr. Kaplan's testimony is marked by a lack of personal knowledge of petitioner's presence or lack thereof within New York during the years at issue. According to Mr. Kaplan, he was in petitioner's presence on only two days per year during the years at issue. Furthermore, any additional weight to be accorded Mr. Kaplan's testimony based on his references to petitioner's social diary is negated by the absence of the diary from the record. Without the diary, it is impossible to judge the reasonableness of Mr. Kaplan's conclusions regarding petitioner's days spent in New York during the relevant years.

Although she obviously had personal knowledge of her own activities, petitioner's testimony is also insufficient to meet her burden of proving that she was not present in New York for more than 183 days during each of the years at issue. There are several reasons for this insufficiency. First, the testimony is general and nonspecific in nature and is uncorroborated by any documentation. Second, the testimony was given more than five years following the years in question. The difficulty in recalling one's activities and whereabouts with any degree of precision or specificity over such a five-year period seems rather obvious. Indeed, petitioner's testimony underscores this

difficulty inasmuch as it provides little, if any, detail of her activities on specific days during the audit period. Rather, as noted previously, petitioner's testimony seeks to establish a general pattern of activity. Without any evidence in the record indicating that petitioner reviewed any documentation contemporaneous to the audit period and without any corroborating documentation in the record, the testimony given by petitioner is clearly inadequate to sustain her burden of proof.

G. Petitioner's reliance on Matter of Avildsen (Tax Appeals Tribunal, May 19, 1994) to show that petitioner met her burden of proof herein through the testimony presented is misplaced. In Avildsen, the Tribunal determined that testimonial evidence was not insufficient, as a matter of law, to sustain a petitioner's burden of proof on a statutory residency issue. The Tribunal made clear, however, that reliance on testimony in such a matter was a course fraught with peril:

> "Obviously, any taxpayer who attempts to sustain his burden of proof solely on testimonial evidence runs a very great risk that he will not prevail at the hearing because the Administrative Law Judge will determine that the testimony is not credible to establish the necessary facts . . . .
>
> "To prove that a taxpayer was not present in New York for more than 183 days through only testimony is a very significant task because the witness will have to convince the Administrative Law Judge that the witness was in a position to know the taxpayer's whereabouts on every day of a specific year or years, that the witness can accurately remember such details and, as well, that the witness is truthfully recounting these details" (Matter of Avildsen, supra).

Here, as discussed above, the testimonial evidence fails to even allege petitioner's whereabouts on each day during the

years at issue and is thus insufficient to prove the facts necessary to meet petitioner's burden of proof on the statutory residency issue. Furthermore, it is instructive to note the vastly different circumstances present in Avildsen as compared to the instant matter in order to understand the different results reached in the two cases. In Avildsen, a diary's existence was established; a summary of the diary was submitted into evidence; a credible reason was given for the absence of the actual diary; and the witness did rely on the summary in her testimony. Here, the existence of petitioner's social diary is not established; no reason was given regarding petitioner's failure to submit the diary in evidence; there is no evidence that petitioner reviewed or relied on any such diary in her testimony; and petitioner gave no testimony regarding specific days spent in or out of New York during the years at issue. Given such vastly different circumstances, the different results reached in the two cases are well justified.

H. Petitioner also asserted that the Division failed to challenge the testimony of petitioner and Mr. Abelman and Mr. Kaplan on cross-examination and that, therefore, such testimony must be accepted as fact by the Administrative Law Judge. As the finder of fact, it is the function of the Administrative Law Judge to weigh evidence and to evaluate the credibility of witnesses (see, Matter of Avildsen, supra). Moreover, the Division's cross-examination of petitioner's witnesses clearly attacked the competency of such witnesses by revealing that they (the witnesses) were not in a position to know whether

petitioner was not present in New York for more than 183 days during either of the years at issue. Although the Division did not attack, on cross-examination, the credibility of the testimony on statutory residency offered by petitioner, the credibility of this testimony has been previously discussed herein.

I. Tax Law § 685(b)(1) provides for the imposition of penalties "[i]f any part of a deficiency is due to negligence or intentional disregard of [the law]." The burden of proof is upon petitioner to establish that this penalty was improperly imposed (Tax Law § 689[e]). Additionally, Tax Law § 685(p) imposes penalty for substantial understatement of liability. Such penalties may be waived upon a showing of reasonable cause for the substantial understatement and a showing of good faith.

J. Petitioner's argument for abatement of penalties centers on the assertion that the Division failed to follow its own audit manual guidelines by failing to justify the appropriateness of the penalties assessed. Petitioner asserts that the entries in the audit report regarding penalties do not constitute such a justification (see, Finding of Fact "38"). For its part, the Division appears to concede that the entries in the audit report do not justify the imposition of penalties, but notes, correctly, that the guidelines in question were not put in use until long after the subject audit had been completed. The Division further asserts that petitioner's statement on her 1988 and 1989 New York returns indicating that neither she nor her husband maintained an apartment in New York

City during those years constitutes a negligent or intentional disregard of the law and regulations in connection with the preparation and filing of the tax returns in question, and thus justifies the imposition of penalties herein.

Petitioner has failed to show reasonable cause and an absence of willful neglect to justify abatement of the penalties imposed herein. Petitioner's reliance on the audit guidelines as a basis for the cancellation of penalties is misplaced, as the auditor could not reasonably be expected to follow guidelines not yet in effect at the time of the audit (see, Matter of Veeder, Tax Appeals Tribunal, January 20, 1994). Moreover, even if the guidelines were applicable, petitioner has cited no authority to support the proposition that the failure of an auditor to set forth a proper justification for the imposition of penalties in an audit report is fatal to the Division's assessment of such penalties. Furthermore, as the Division correctly asserts, petitioner's failure to accurately indicate that she or her husband maintained an apartment in New York City during the years at issue does militate against a finding of reasonable cause and an absence of willful neglect. Accordingly, the penalties imposed herein are properly sustained.

K. In her petition, petitioner contended, alternatively, that if she were determined to be a resident of New York State and City, then she should be entitled to a resident credit for taxes paid to Connecticut pursuant to Tax Law § 620(a). This contention is rejected. The credit under Tax Law § 620(a)

applies only to income not derived in New York. Therefore, credit for Connecticut's tax on interest, dividends and capital gains rests upon a showing by petitioner that the income taxed by Connecticut is derived from Connecticut (see, Leach v. Chu, 150 AD2d 842, 540 NYS2d 596, lv denied 74 NY2d 839, 546 NYS2d 344). Here, petitioner has made no such showing and the resident credit is properly denied.

L. The petition of Rhoda Miller is denied and the Notice of Deficiency dated December 17, 1992 is sustained.

DATED: Troy, New York
November 22, 1995

/s/ Timothy J. Alston

ADMINISTRATIVE LAW JUDGE