

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BERNARD AND PEARL SISKIND	:	DETERMINATION
	:	DTA NO. 815562
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Years 1990 through 1992.	:	

Petitioners, Bernard¹ and Pearl Siskind, 1096 Surfside Drive, P.O. Box 1803, Bridgehampton, New York 11932, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1990 through 1992.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 18, 1997 at 10:15 A.M., continued at the same location on November 19, 1997 at 9:15 A.M., and December 29, 1997 at 10:15 A.M., and continued to conclusion at the same location on December 30, 1997 at 9:15 A.M., with all briefs to be submitted by September 25, 1998, which date began the six-month period for the issuance of this determination. Petitioners appeared by Hodgson, Russ, Andrews, Woods & Goodyear, LLP (Paul R. Comeau, Esq., of

¹By a letter dated January 19, 1999, while this determination was pending, the Division of Tax Appeals was advised by petitioners' representative of the death of Mr. Bernard Siskind.

counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals lacks jurisdiction over this matter because the Division of Taxation was required to shoulder the burden of proving that it complied with the mailing requirements of Tax Law § 681(a) in issuing the Notice of Deficiency against petitioners and failed to do so or, alternatively, whether the Notice of Deficiency should be vacated or annulled absent proof by the Division of Taxation that it was properly and timely mailed before the statute of limitations for assessments expired.

II. Whether the Division of Tax Appeals has jurisdiction to review petitioners' complaint that the Division of Taxation failed to comply with the requirements of the Freedom of Information Law, and if so, whether the Division of Taxation failed to properly disclose to petitioners in response to their freedom of information request the U.S. Postal Service return receipt in the auditor's files, which appears to have been signed by petitioner Pearl Siskind upon her receipt of the Notice of Deficiency at issue, and if so, whether the Division of Taxation should be precluded from introducing the return receipt into evidence, or, in the alternative, whether the return receipt should be given little evidentiary weight.

III. Whether the consent to extend the period of limitations for assessment of 1990 income tax against petitioners, which was executed on their behalf by a prior representative, was ineffective because the prior representative was a New Jersey, and not a New York, certified public accountant so that the period of limitations for assessing 1990 income tax had expired before the issuance of the Notice of Deficiency.

IV. Whether petitioners, who were domiciled in Connecticut during the years at issue, established that they did not maintain a permanent place of abode in New York and therefore were not taxable as statutory residents of New York.

V. Whether the assessment of tax for 1992 lacked a rational basis because the auditor did not request and examine records for 1992.

VI. Whether the assessment of tax for 1990 and 1991 lacked a rational basis because the auditor's workpapers showed that petitioners did not spend more than 183 days in New York in either year.

VII. Whether petitioners have established that they were not present in New York State and City for more than 183 days during each of the years at issue and therefore may not be taxed as statutory residents of New York.

VIII. Whether, if petitioners were taxable as statutory residents of New York for the years at issue, penalties imposed against them should be abated.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued three statements of personal income tax audit changes, each dated January 10, 1995, against petitioners, Bernard and Pearl Siskind, showing New York State and New York City income tax due (i) for 1990 of \$70,937.43 and \$45,197.71, respectively, plus penalty² and interest, (ii) for 1991 of \$60,933.77 and \$42,472.98, respectively, plus penalty and interest, and (iii) for 1992 of \$29,236.36 and \$21,266.15, respectively, plus penalty and interest.

²The Division asserted negligence penalties under Tax Law § 685(b) and penalties for substantial understatement of liability under Tax Law § 685(p) for each of the three years at issue.

The statement of audit changes for 1990 showed the following calculation for “Corrected N.Y. State Taxable Income”:

N.Y. State adjusted gross income per return	\$1,227,185.00
Itemized deductions per return	29,229.00
N.Y. itemized deduction adjustment	14,614.50
Corrected itemized deductions after modification	14,614.50
Corrected N.Y. State taxable income	\$1,212,570.50

The 1990 statement showed a “corrected tax liability” of \$94,772.43 for New York State income tax and of \$47,011.71 for New York City income tax and “additional tax liability” of \$70,937.43 for New York State income tax and of \$45,197.71 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of \$23,835.00 and \$1,814.00, respectively).

The statement of audit changes for 1991 showed the following calculation for “Corrected N.Y. State Taxable Income”:

N.Y. State adjusted gross income per return	\$1,005,078.00
Corrected adjusted gross income	1,005,078.00
Standard deduction allowed	9,500.00
Corrected N.Y. State Taxable Income	\$ 995,578.00

The 1991 statement showed a “corrected tax liability” of \$78,401.77 for New York State income tax and of \$43,944.98 for New York City income tax and “additional tax liability” of \$60,933.77 for New York State income tax and of \$42,472.98 for New York City income tax (after crediting

petitioners for New York State income tax and New York City nonresident earnings tax previously paid of \$17,468.00 and \$1,472.00, respectively).

The statement of audit changes for 1992 showed the following calculation for “Corrected N.Y. State Taxable Income”:

N.Y. State adjusted gross income per return	\$ 526,203.00
Corrected adjusted gross income	526,203.00
Standard deduction allowed	9,500.00
Corrected N.Y. State Taxable Income	\$ 516,703.00

The 1992 statement showed a “corrected tax liability” of \$40,690.36 for New York State income tax and of \$22,586.15 for New York City income tax and “additional tax liability” of \$29,236.36 for New York State income tax and of \$21,266.15 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of \$11,454.00 and \$1,321.00, respectively).

In sum, the three statements of audit changes assert the following tax liabilities against petitioners:

	1990	1991	1992	Totals
New York State income tax	\$ 70,937.43	\$ 60,933.77	\$ 29,236.36	\$ 161,107.56
New York City income tax	45,197.71	42,472.98	21,266.15	108,936.84
Totals	\$116,135.14	\$ 103,406.75	\$ 50,502.51	\$ 270,044.40

2. The statement of audit changes for 1990 included the following explanation:

As a result of examination, you were found to be a domiciliary of New York State and New York City [and] residents under Section 605(b) of the Tax Law and subject to tax on all income regardless of source. Alternatively, if it is decided

that you are not domiciled in New York State/City, you are being held as statutory residents based on the following:

1) You continue to maintain a permanent place of abode, located at 12 Beekman Place, New York City.

2) You did not establish through adequate records, that you did not spend more than 183 days of tax years 1990, 1991, and 1992 within New York State. This supersedes our statement of November 25, 1994 [which was not included in the administrative record].

The statements of audit changes for 1991 and 1992 referenced the above explanation in their respective sections for “remarks.”

3. The Division then issued a Notice of Deficiency dated July 20, 1995 against petitioners for 1990, 1991, and 1992 showing total income tax due for the three years of \$270,044.40, plus penalty and interest. The Notice of Deficiency showed a breakdown of this total which corresponded to the amounts for each of the years noted in Finding of Fact “1”.

Petitioners’ New York Income Tax Returns

4. For each of the years at issue, petitioners timely filed a New York State Nonresident Income Tax Return (Form IT-203) checking the filing status of “married filing joint return.” For the years at issue, petitioners reported their income, with allocations to New York State, as follows:

	1990		1991		1992	
	Federal Amount	State Amount	Federal Amount	State Amount	Federal Amount	State Amount
Wages & Salaries	\$131,720	\$98,972	\$31,720	\$ 21,843	\$32,330	\$22,263
Taxable Interest Income	114,739	-0-	100,170	-0-	181,069	-0-
Dividend Income	9,733	-0-	11,431	-0-	7,529	-0-

Taxable refunds of state and local taxes	2,340	-0-	38,736	-0-	9,126	-0-
Capital gain or (loss)	-3,000	-0-	10,056	-0-	-3,000	-0-
Other gains or (losses)	-595	-0-	-27	-0-	-3	-0-
Income from partnerships and S corporations	980,880	211,459	859,178	212,357	519,526	188,744
Totals	\$1,235,817	\$ 310,431	\$1,051,264	\$234,200	\$746,577	\$211,007

These tax returns were each prepared for petitioners by a paid preparer, J.H. Cohn & Company of Roseland, New Jersey.

5. Petitioners did not complete a Schedule B, Living Quarters Maintained in New York State by a Nonresident, on a Form IT-203-ATT for any of the three years at issue because they answered “No” to the following question on each of the respective nonresident income tax returns: “Did you or your spouse maintain living quarters in New York State in [the tax year covered by the particular tax return, i.e., 1990, 1991, or 1992]?” If they had answered “Yes,” they would have been required to give the address of any living quarters maintained in New York State and to note the number of days spent in New York State in the tax year covered by the particular tax return on a Schedule B, Living Quarters Maintained in New York State by a Nonresident. Petitioners did complete a Schedule A, Allocation of Wage and Salary Income to New York State, on respective Forms IT-203-ATT included with the nonresident income tax returns for two of the three years at issue, 1990 and 1991. These schedules show the following calculation of days worked by petitioner Bernard Siskind in New York State:

	1990	1991
Wages, salaries, etc. to be allocated	\$130,420	\$ 30,420
Total days in year	365	365
Nonworking days:		
Saturdays and Sundays	104	104
Holidays	10	10
Sick leave	5	5
Vacation	15	15
Other nonworking days	-0-	-0-
Total nonworking days	134	134
Total days worked in year	231	231
Total days worked outside New York State	58	75
Days worked in New York State	173	156
New York State amount of allocated wages, salaries, etc.	$173 \div 231 \times \$130,420 = \$97,672$	$156 \div 231 \times \$30,420 = \$20,543$

The 1992 nonresident income tax return entered into evidence does not include a Form IT-203-ATT with a completed Schedule A. The record does not disclose whether petitioners' 1992 nonresident income tax return as filed, in fact, had a Form IT-203-ATT, with a completed Schedule A.

6. As noted in Finding of Fact "4", most of petitioners' reported income for each of the years at issue consisted of income from partnerships and S corporations. The nonresident income tax returns for 1990 and 1991 introduced into evidence do not include a copy of the respective

Federal Schedule E (form 1040). However, the nonresident income tax return for 1992 includes a copy of petitioners' Federal Schedule E (form 1040) for 1992 which provides the following breakdown of their income from partnerships and S corporations as follows:

Entity	P for partnership; S for S corporation	Passive loss	Passive income	Nonpassive income
Bernette Knitwear Corp.	S			\$ 63,579.00
Bernette Realty Trust	P		\$35,962.00	
Bernette Textile Company	P			420,741.00
Arvida/JMB Partners, L.P.	P	(\$790.00)		
Felmor Sportswear Mfg., Inc.	S		34.00	
Totals		(790.00)	\$35,996.00	\$484,320.00
Total partnership and S corporation income	\$520,316.00			

7. Petitioner Bernard Siskind also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of the years at issue and allocated a percentage of his gross wages to New York City as follows:

	1990	1991	1992
Mr. Siskind's gross wages	\$130,420	\$30,420	\$31,005
Allocation to N.Y.C. percentage	74.89%	67.53%	67.53%
N.Y.C. gross wages	\$97,672	\$20,543	\$20,938

Mr. Siskind completed a Schedule A, Allocation of wage and salary income, on each of his respective City of New York nonresident earnings tax returns. These schedules show the following calculation of days worked by Mr. Siskind in New York City and the fraction or percentage used to allocate his wages to New York City for purposes of the nonresident earnings tax as follows:

	1990	1991	1992
Total days in year	365	365	366
Nonworking days:			
(i) Saturdays and Sundays	104	104	105
(ii) Holidays	10	10	10
(iii) Sick leave	5	5	5
(iv) Vacation	15	15	15
Total nonworking days	134	134	135
Total days worked in year	231	231	231
Total days worked outside of N.Y.C.	58	75	75
Days worked in N.Y.C. ³	173	156	156
City of New York allocation percentage	$173 \div 231 = 74.89\%$	$156 \div 231 = 67.53\%$	$156 \div 231 = 67.53\%$

For each of the years at issue, Mr. Siskind also reported net earnings from self-employment that were subject to New York City nonresident earnings tax as follows: in 1990, \$211,459.00; in 1991, \$212,357.00; and in 1992, \$188,744.00. Petitioner Pearl Siskind also filed City of New York nonresident earnings tax returns for 1990 and 1992 on which she reported gross wages of \$1,300.00 and \$1,325.00 for 1990 and 1992, respectively, but no part of such wages subject to

³In contrast with the number of days worked in New York City shown above of 173, 156 and 156 in 1990, 1991, and 1992, respectively, by a bill of particulars dated March 25, 1997, petitioners stated that they “were present in New York City” for specified days that totalled 132 days in 1990, 108 days in 1991, and 107 days in 1992. Further, during cross-examination, Mr. Siskind testified that the days shown as worked in New York City on his tax returns had been “an estimate, an assumption” by his accountant (tr., p. 781).

New York City nonresident earnings tax based upon exclusions claimed of \$1,300.00 and \$1,325.00 for 1990 and 1992, respectively. Mr. Siskind on his three respective New York City nonresident earnings tax returns and Mrs. Siskind on her two respective New York City nonresident earnings tax returns answered “No” to the following question:

Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year? If *Yes*, give address below and number of days spent in the City of New York during [the particular year]. [Emphasis in original.]

8. As noted in Finding of Fact “5”, Mr. Siskind calculated his New York State amount of allocated wages as \$97,672.00 for 1990, and \$20,543.00 for 1991, which are the same amounts which petitioner reported as his wages allocated to New York City, as noted in Finding of Fact “7”. Furthermore, if Mrs. Siskind’s 1992 wages of \$1,325.00 are subtracted from the \$22,263.00 reported as petitioners’ New York State amount for wages, the resulting amount of \$20,938.00 corresponds to the amount reported by Mr. Siskind as his New York City wages subject to nonresident earnings tax, as noted in Finding of Fact “7”. On the basis of this analysis, a finding may be made that for purposes of their New York nonresident income tax returns and New York City nonresident earnings tax returns, the number of days worked in New York State used to allocate Mr. Siskind’s wages to New York State was the same as the number of days worked in New York City used to allocate Mr. Siskind’s wages to New York City. In other words, petitioners’ tax returns do not show that Mr. Siskind worked more days in New York State than in New York City. As noted later in these findings of fact, petitioner established that he worked on Long Island in Mineola (Nassau County), without spending any part of his Long Island workday in New York City, in addition to days worked in New York City. However, the record does not reveal why the position taken in petitioners’ tax returns does not account for such Long

Island workdays as New York *State* workdays only.

9. From 1968 to the spring of 1985, petitioners were domiciled in New Jersey, with their primary residence located in Englewood Cliffs, New Jersey. In the spring of 1985, petitioners sold their primary residence in New Jersey and moved into a newly renovated and expanded seaside residence located at 14 Surf Road in Westport, Connecticut, which became their primary residence, and Connecticut, their new state of domicile. Nonetheless, in 1985 and 1986, petitioners filed New York *State* resident income tax returns although they did not file New York *City* resident income tax returns, maintaining that Mr. Siskind spent more than 183 days in New York *State* but not more than 183 days in New York *City*. During 1985 and 1986, Mr. Siskind spent, in his words, “a great deal of time” (tr., p. 234) at his company’s manufacturing facility, known as Felmor Sportswear Mfg., Inc. (“Felmor”), on Long Island in Mineola (Nassau County). Since, in late 1984, petitioners had purchased a two bedroom Manhattan apartment located at 12 Beekman Place (“Beekman Place apartment”) which they continue to own to date, they filed as statutory residents of New York State in 1985 and 1986 when Mr. Siskind spent more than 183 days in New York State. Petitioners introduced into evidence only the first pages of their 1985 New York State resident income tax return and 1985 New York City nonresident earnings tax return. The first page of their 1985 state tax return shows their Westport, Connecticut address as their mailing address, and there is no mention of their Beekman Place apartment. On the first page of their 1985 New York City nonresident earnings tax return, they incorrectly answered “No” to the same question, as noted in Finding of Fact “7”, which appeared on the New York City nonresident earnings tax returns for each of the three years at issue:

Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year? [If Yes],[g]ive address below and number of days spent in the City of New York during 1985.

In 1993, although petitioners remained domiciled in Connecticut, living in their primary residence in Westport, they also filed a New York *State* resident income tax return although they did not file a New York *City* resident income tax return, presumably for the same reason as noted above for the years 1985 and 1986, i.e., Mr. Siskind spent more than 183 days in New York *State* but not more than 183 days in New York *City* during 1993.

10. Petitioner Bernard Siskind has dedicated his working life to the success of a family-run operation that, during the period at issue, was a designer, manufacturer and wholesaler of sweaters and other clothing items. During 1990, the first year of the three-year audit period, the family business also operated a retail store in Palisades Park,⁴ New Jersey, in the nature of an outlet store. Mrs. Siskind testified that she “did the window displays and some of the interior displays” for the store (tr., p. 827). Just prior to the audit period, the family business also operated a second store in Norwalk, Connecticut. The family operation is run through various entities which share the name Bernette in their legal names, as noted in Finding of Fact “6”. Mr. Siskind is a part-owner and officer of the various family corporate units and a partner in the family partnership known as Bernette Realty Trust. In addition, the family operation manufactures many of its goods through Felmor, an S corporation, located on Long Island in Mineola (Nassau County), in which, Mr. Siskind has an ownership interest. Mr. Siskind oversaw the design, production, marketing and distribution of the sweaters and other clothing items wholesaled by the family business. Petitioner’s brother, Howard Siskind, in contrast, was responsible for the operation of the showroom and central offices of the family business located in the Empire State Building in midtown Manhattan. In other words, Mr. Siskind was the man

⁴Mrs. Siskind referred to the New Jersey store as being located in Palisades Park while Mr. Siskind noted its location as Bergen, New Jersey.

out in the field, while his brother was primarily the office man for the family business. Further, in the fall of 1992, petitioners' younger son, Jeffrey Siskind, joined the business "on the sales end" (tr., p. 851).

11. Petitioner Pearl Siskind is an accomplished artist who specializes in contemporary figurative painting. During the period at issue, Mrs. Siskind maintained an art studio in petitioners' residence in Westport, Connecticut. She also maintained a presence in a small studio which she shared with another artist in Manhattan at 41 Union Square.

The Audit

12. The Division offered the testimony of its auditor, John Flanagan, who first contacted petitioners by his letter dated September 1, 1993 mailed to them at their Westport, Connecticut home, which was the address used by the Siskinds on their tax returns for 1990 and 1991, the two years then under audit. Mr. Flanagan scheduled an appointment at 10:00 A.M. on October 5, 1993 at his office and requested that petitioners:

Please have available information pertaining to the income and deductions reported on your return(s). Specific items required are:

1. Substantiation of your allocation of days worked outside of New York. Records may take the form of diaries supported by receipts or other documentation, memoranda, employer reimbursement, hotel & transportation records and other pertinent data. Include a list of each day claimed as a non-working day (holiday, vacation, sick, etc).

2. Copies of Federal returns for [1990 and 1991] with all supporting schedules including documentation on Capital Gains and Losses, K-1's on all partnership and/or Sub.S corporations, and all W-2(s). Please submit copies of Federal returns by September 28, 1993 so that review can be completed prior to your appointment.

3. Substantiation of Real Estate taxes and Interest expense claimed on Federal 1040, Schedule A.

13. At the request of Gerry Kohn, who was associated with the accounting firm, Richard

Eisner & Company, the initial appointment was postponed to October 26, 1993 and relocated to the accounting firm's offices in Manhattan. The auditor's field audit record indicates that Mr. Kohn, in response to the auditor's question whether he would have the information requested by the auditor on the postponed appointment date, stated that "if there was a problem he would call [the auditor]." The record does not indicate any such call.

14. Prior to the October 26, 1993 appointment with petitioners' accountant, the auditor researched the Manhattan phone books for 1989-90 and 1992-93, which were readily available to him in his office, and discovered that petitioners had phone listings in Manhattan at a 12 Beekman Place and a 41 Union Square address. He also determined that petitioners had filed as residents of New York State in 1985 and 1986 and had been listed in a directory⁵ at 12 Beekman Place since 1985. Based upon petitioners' filing as residents of New York State in 1985 and 1986, their listings at Manhattan addresses in phone books, and their answering "No" to the question whether they maintained an apartment or other living quarters in New York City on the nonresident income tax returns under review, the auditor became suspicious that the Siskinds' nonresident income tax returns under audit were not accurate filings.

15. On October 26, 1993, the auditor met with Irwin Gedinsky,⁶ an accountant with Richard A. Eisner, Co., who, on a power of attorney executed by petitioners on October 22, 1993, noted that he was a licensed certified public accountant in New Jersey. Mr. Gedinsky produced Mr. Siskind's personal diary for 1990 at the initial meeting. Based on a review of the

⁵The name of the particular directory cannot be deciphered from the auditor's handwritten field audit record.

⁶The transcript shows the spelling of Mr. Gedinsky's surname as Godinsky. Petitioners introduced into evidence an affidavit dated December 24, 1997 of Mr. Gedinsky's, which shows the spelling of his surname as used in this determination.

diary, the auditor determined that Mr. Siskind had 162 working days in New York City⁷ during 1990, which is 11 days fewer than the 173 New York City and New York State working days reported on the 1990 tax return, as noted in Findings of Fact “5” and “7”, respectively. Further, the auditor performed what he called a “real estate substantiation” (tr., p. 52) at the first appointment date which disclosed that petitioners claimed as a deduction on their Schedule A for 1990 real estate taxes paid on two residences, their Westport home and their apartment located at 12 Beekman Place. The auditor became more distrustful of the accuracy of the New York nonresident returns because (i) the day count used in the 1990 return did not tie into the day count shown in the 1990 diary, which oddly showed fewer New York City workdays, and (ii) petitioners had deducted real estate taxes paid on their 12 Beekman Place apartment which had not been disclosed as living quarters on their New York tax returns.

16. A couple of months after the initial appointment, in mid-December 1993, the auditor indicated in his field audit record that he was advised by Scott Guber, an individual associated with petitioners’ then representative, that petitioners’ “phone bills and everything [are] being gathered and will be available the first week of January [1994]” although petitioners did not have available a closing statement on their purchase of the Beekman Place apartment and did not have any credit card statements. However, the auditor’s field audit record indicates that on January 13, 1994, the auditor was informed by Mr. Guber that petitioners “did not have the phone bills for the NY apartment,” and it was not until April 27, 1994 that the auditor met for a second time with petitioners’ representative, Irwin Gedinsky, who produced Mr. Siskind’s personal diary for 1991. Based on his review of the 1991 diary, the auditor determined that

⁷The auditor testified that he treated days shown in the diaries for 1990 and 1991 as days spent by Mr. Siskind at Felmor, the manufacturing operation in Mineola (Nassau County), as New York City days because the “taxpayer never said where they started from or ended up that day” (tr., p. 156).

Mr. Siskind had 173 New York workdays, which was 17 days greater than the 156 New York State workdays and 156 New York City workdays reported in the 1991 nonresident income tax return, as noted in Findings of Fact “5” and “7”, respectively. The auditor questioned the reliability of the diaries produced by petitioners for 1990 and 1991, although he reviewed them and computed days worked in New York based upon his review, because there were “a large amount of unaccounted for days in both years” (tr., p. 47). The auditor’s field audit record notes that the following additional information was produced at the second meeting with petitioners’ representative: (i) American Express statements⁸ for 1991, (ii) cancelled checks to show payment of phone bills for the Beekman Place apartment and Union Square address, and (iii) a floor plan for the Beekman Place apartment. The auditor emphasized in his field audit record that “Rep did not have the 2119, for sale of New Jersey home.” He testified that “no 2119 was ever provided [by the petitioners]” (tr., p. 110). Internal Revenue Service Form 2119, “Sale of Your Home,” is required to be attached by taxpayers to their Federal income tax return in order to report the sale of their main home (even if the taxpayers can exclude or postpone all or part of any gain from the sale of their main home). On the form 2119, taxpayers indicate whether they had bought or built a new main home. The auditor’s distrust of the accuracy of petitioners’ nonresident income tax returns under audit deepened as a result of the lack of any form 2119⁹ to show that petitioners had rolled over the gain from the sale of their main home in Englewood Cliffs, New Jersey to a new

⁸The auditor mistakenly used the word “statements” instead of “receipts” in his notes. As noted in Finding of Fact “40”, the statements were never available for review.

⁹The auditor’s field audit record shows that on August 11, 1994, the auditor requested a form 2119 from the Internal Revenue Service. However, none was ever made a part of the administrative record. At the hearing, petitioners introduced into evidence an affidavit of Irwin Gedinsky dated November 17, 1998 which stated that:

“4. As part of the Siskinds’ 1985 federal tax return, I completed a Form 2119-Sale of Your Home.

5. The gain from the sale of the Siskinds’ New Jersey home was rolled into the Westport, Connecticut home.”

However, the record does not disclose why petitioners never introduced a copy of the Form 2119 into evidence.

main home in Westport, Connecticut. In fact, the auditor's field audit record notes that at the second meeting on April 27, 1994, the auditor "explained to [Mr. Gedinsky] that we would try to make the Siskinds domiciliaries of New York." The auditor apparently assumed that if petitioners had filed a form 2119 which showed the sale of their main home in New Jersey and the purchase of a new main home in Connecticut, it would have been produced by petitioners' representative at the second meeting.

17. As noted in Finding of Fact "12", the audit initially focused on verifying (i) Mr. Siskind's allocation of days worked in and out of New York and (ii) petitioners' income and deductions. However, by June, 1994, the audit had expanded to include petitioners' status as nonresidents of New York, and the field audit record shows that on June 24, 1994, the auditor made a third appointment through Mr. Guber to review additional information that was being gathered by petitioners at the offices of Robert Eisner and Co, petitioners' accountants, on July 25, 1994. On that date, the auditor reviewed canceled checks written by petitioners during 1990 and 1991 on their personal checking account. Based on his review, the auditor concluded that petitioners paid all expenses on the Beekman Place apartment, including monthly maintenance charges of \$1,919.00 and all utility expenses, and that petitioners' checks on their personal checking account maintained at European American Bank (EAB) at the United Nations Plaza in Manhattan showed the Beekman Place apartment as their address. In addition, the auditor compared the amounts paid by check for utilities at petitioners' Westport home and the Beekman Place apartment and determined in the auditor's words:

Basically looking at this there is consistent usage throughout the whole year for the New York City apartment and there is much higher usage in Connecticut during the summer and much lower during the winter months (tr., p. 101).

The auditor viewed petitioners' Westport, Connecticut home as a "summer vacation home" (tr.,

p. 94). The auditor never knew the size of petitioners' Westport, Connecticut home in the course of his audit.

18. As noted in Finding of Fact "1", the Division issued three statements of audit changes against petitioners dated January 10, 1995, which was approximately six months after the auditor's third meeting with petitioners' accountants on July 25, 1994. In that six-month period, the auditor determined that petitioners had purchased their Westport, Connecticut home on July 19, 1983 for \$365,000.00 and their Beekman Place apartment on November 14, 1984 for \$480,000.00, and he concluded that petitioners had established a New York City domicile upon the sale of their home in Englewood Cliffs, New Jersey towards the end of 1984, with the purchase of the Manhattan apartment and the continued business interests of Mr. Siskind, which were centered in New York City. In contrast, according to the auditor, Westport, Connecticut was located 50-60 miles from New York City.

Addition of 1992 Tax Year to Audit Period

19. The field audit record includes an entry by the auditor on May 16, 1994 to "request 1992 [nonresident tax return of petitioners from Albany] & update audit period to '92." An entry dated October 13, 1994 stated that the auditor reviewed the case with his supervisor, Nick Masi, and that the auditor was to "[m]ake up bills holding them as residents for 1990-1993."¹⁰ The auditor had a fourth appointment with petitioners' then representative, Irwin Gedinsky, on October 14, 1994 and described this meeting in his field audit record as follows:

State our position, and that the only piece of evidence left is the 2119 from 1985. [Irwin Gedinsky] stated he would review w/ client but conceded to [statutory]-resident. He stated he would contact me in 1 week.

¹⁰In 1993, petitioners, in fact, filed as residents of New York State and nonresidents of New York City, and the auditor billed petitioners for tax due based upon residency in New York State and New York City only for 1990 through 1992.

The auditor testified that he also brought up with Mr. Gedinsky whether to include 1992 in the audit:

[M]y supervisor, Nick Masi, was with me and we met with Irwin Gedinsky and we stated that the taxpayer probably would be audited in subsequent years. We asked him if he wanted to include 1992 in this in order to avoid that and he agreed to include 1992 (tr., p. 161).

The auditor also testified that he asked Mr. Gedinsky “if they [petitioners’ representatives] could bring any documentation for 1992 and at the closing conference they brought a diary” (tr., p. 161). The auditor’s field audit record does not record these particulars concerning his phone conversations with Mr. Gedinsky. Further, the auditor never made any written request for petitioners’ 1992 records as related to their 1992 nonresident income tax return. In addition, an affidavit dated December 24, 1997 of Irwin Gedinsky contradicts the auditor as follows: “At no time during the course of the audit did the auditor request records or information for an audit of 1992.”

20. A little over a month later, Mr. Gedinsky contacted the auditor, and the auditor’s entry in his field audit record for November 25, 1994 noted as follows:

Contacted by Irwin Gedinsky who states [taxpayers] might agree to [statutory] resident for entire audit period but not domicile. Make up bill holding Siskinds as [statutory residents] for 1990-1992.

The auditor was then advised by Mr. Gedinsky, according to an entry in the field audit record dated December 23, 1994, that the petitioners “would not agree to audit findings, and were presently seeking legal representation.”

21. Approximately one month later, according to an entry in his field audit record dated January 30, 1995, the auditor received a power of attorney from petitioners’ current representative, and soon thereafter, he received waivers extending the period of limitations for

assessing tax due for 1990 and 1991 to August 15, 1995. Petitioners' former representative, Irwin Gedinsky had earlier executed a consent extending the period of limitation for assessment of personal income tax for 1990 until April 15, 1995.

22. It was not until the auditor's conference with petitioners' new representative on May 23, 1995, which was in the nature of a closing conference by which the audit would be closed, that he quickly reviewed Mr. Siskind's personal diary for 1992. The auditor and his supervisor spent just minutes looking over the 1992 diary and concluded, in the words of attorney Sharon M. Kelly, who represented the petitioners at the meeting:

That they did not wish to perform a detailed review because the 1992 diary was similar to Mr. Siskind's 1990 and 1991 diaries, which they had already discounted on the grounds that the diaries showed where Mr. Siskind was working and not where he stayed overnight or where he was on weekends or holidays.

In fact, the auditor never did a day count for 1992 as he did for 1990 and 1991.

Mailing of the Notice of Deficiency

23. As noted in Finding of Fact "3", the Division issued a Notice of Deficiency dated July 20, 1995 against petitioners for the three years at issue, which was approximately two months after the closing conference with petitioners' new representative. The Notice of Deficiency used petitioners' Westport, Connecticut address of 14 Surf Road.¹¹ The Notice of Deficiency was originally sent from Albany to petitioners at their Westport, Connecticut address and was returned to the Division as undeliverable. The auditor was given the undelivered Notice of Deficiency, and he testified:

¹¹The record does not disclose what address was used by petitioners on their 1994 New York nonresident income tax return, which would have been the last income tax return filed by petitioners prior to the issuance of the Notice of Deficiency dated July 20, 1995. The record does include a copy of the first page of a Form 2119 for the year 1995 which indicates that petitioners purchased their new home in Bridgehampton on January 15, 1993. However, it also noted that petitioners did not sell their Westport home until January 6, 1995. Further, Mrs. Siskind testified that she and her husband moved into their new home in Bridgehampton in 1995.

Then I remembered hearing that they had moved to Bridgehampton [on Long Island in Suffolk County] and that's when I put the certified mail into the other — with the new address and I mailed it (tr., p. 177).

The Division introduced into evidence the original PS Form 3800, "Receipt for Certified Mail," which shows that an item P 866 085 496 was sent to "Bernard & Pearl Siskind, PO Box 1803, Bridgehampton, NY 11932." This receipt also shows the auditor's name on the side and a stamp of the Department of Taxation and Finance, Westchester District Office, indicating August 2, 1995 as the "received" date. In addition, the Division introduced into evidence the original PS Form 3811, "Domestic Return Receipt," which shows that an item P 866 085 496 was addressed to "Bernard & Pearl Siskind, PO Box 1903, Bridgehampton, New York 11932" and was delivered on August 8, 1995. This receipt has the signature of Pearl Siskind as well as a postmark dated August 8, 1995 of the Bridgehampton, New York 11932 post office. The signature on the domestic return receipt is very similar to Mrs. Siskind's signature on each of the three nonresident income tax returns for the years at issue. The domestic return receipt was returned to the attention of the auditor, John Flanagan, at the following address: "NYS Dept. of Taxation, 90 S. Ridge St., Ryebrook, NY 10573." The auditor admitted that his own mailing of the Notice of Deficiency to petitioners was unusual and not the normal procedure: "That's the first time that I've ever done something like that before and since" (tr., p. 178). Petitioners contend that the Division should have been precluded from introducing this receipt into evidence because it was not disclosed by the Division prior to hearing in response to their freedom of information request.

24. The petition dated December 16, 1996 filed by petitioners soon after the issuance of a conciliation order dated October 4, 1996, which had sustained the Notice of Deficiency dated July 20, 1995, did not raise an issue concerning the timeliness of the issuance of the Notice of

Deficiency or the expiration of the period of limitations before the issuance of such Notice. The petition also had an attached copy of the Notice of Deficiency dated July 20, 1995.

A Home in Connecticut and an Apartment in Manhattan

25. Soon after the conclusion of the formal hearing in this matter, the Division by a letter dated January 21, 1998 conceded “that the petitioners were domiciled in Connecticut during the years 1990, 1991 and 1992.” Nonetheless, in order to address the issue concerning the number of days spent by petitioners in New York City and State during the three years at issue, it is relevant to address in some detail the nature of the Siskinds’ permanent home or domicile in Westport, Connecticut as compared with their Beekman Place apartment.

26. During the four-day hearing in this matter, petitioners introduced much evidence, never before considered or seen by the auditor, in support of their position that they became domiciliaries of Connecticut in the spring of 1985 when they sold their primary residence in Englewood Cliffs, New Jersey and moved into a newly renovated and expanded residence in Westport, Connecticut. Moreover, petitioners established that their general habit of life was centered on their home in Connecticut. Their Westport home, although purchased for \$365,000.00, an amount nearly 25% less than the purchase price of \$480,000.00 for the Beekman Place apartment, was renovated and expanded over a nearly two-year period at a cost of an additional \$250,000.00 so that petitioners’ investment¹² in their Westport residence, in fact, totalled \$615,000.00, an amount nearly 30% greater than the purchase price for their Beekman Place apartment. Further, Mrs. Siskind worked personally with petitioners’ architect to renovate the property to their liking. The Westport property was transformed into a dream home, a two-

¹²In early 1995, petitioners sold their Westport home for \$1,150,000.00.

story, bright and airy contemporary home, with four bedrooms, three bathrooms, cathedral ceilings and a swimming pool, all centered on the water with mooring for petitioners' yacht in a section of Westport known as Bermuda Lagoon. With 4,700 square feet, petitioners' Westport residence was larger than the 3,400 square feet of their previous home in Englewood Cliffs and was nearly four times the size of their Beekman Place apartment's 1,200 square feet. In renovating the Westport property, Mrs. Siskind took care in creating an art studio on the first floor of the home consisting of 600 to 700 square feet. In contrast, the studio she shared with another artist in New York City, consisted of 225 square feet.

27. The contents of petitioners' Englewood Cliffs home were moved to Westport, which was carefully furnished, in Mrs. Siskind's words, "with antiques, collections I had made over the years, and a mixture of very lovely furniture, and I had all of my special things that I loved in the house" (tr., p. 814) . In contrast, the Beekman Place apartment, consisting of two bedrooms, one bathroom, a small galley kitchen, living room and dining area, was never renovated by petitioners and was furnished, in Mr. Siskind's words, "Very basic. Couch, couple of chairs. Nothing elaborate" (tr., pp. 240-241).

28. As noted in Finding of Fact "9", petitioners purchased their apartment at 12 Beekman Place in late 1984. In May 1986, their older son, Adam Siskind graduated from college in Boston and moved into the Beekman Place apartment. The apartment was Adam Siskind's principal home from May 1986 until the middle of 1991 when he moved out of the Beekman Place apartment into his own apartment¹³ on Manhattan's west side. Furthermore, in May 1989, the Siskind's younger son, Jeffrey Siskind, graduated from college in Washington, D.C. and

¹³Mr. Siskind helped both his sons purchase their own apartments, Adam Siskind in mid-1990, and Jeffrey Siskind, in August 1992.

moved into the Beekman Place apartment making it his principal home. The two brothers shared the apartment for approximately two years until Adam Siskind moved out in the middle of 1991. Jeffrey Siskind continued to live in the apartment until August of 1992 when he moved out of the Beekman Place apartment into his own apartment, which, like his brother Adam's apartment, was also located on Manhattan's west side. Consequently, during the three-year period at issue, the Beekman Place apartment was occupied by either one or two of petitioners' sons except for the latter four months of 1992. During the period that their son or sons lived in the Beekman Place apartment, petitioners continued to pay all of the expenses on the apartment including maintenance charges and utilities.

29. During the period when both of their sons lived in the Beekman Place apartment, i.e., all of 1990 and up through the middle of 1991 when Adam Siskind moved into his own apartment, Mr. Siskind described the sleeping arrangements when he and Mrs. Siskind would spend the night in the apartment as follows:

My son, Adam, had one bedroom, Jeffrey had the other bedroom. If I would stay over that one night or two nights a week,¹⁴ they would double up and my wife and I would use the master bedroom, the bigger bedroom.

* * *

They would use one of the bedrooms and double up using - - we had double beds and they would just for that one night. (Tr., p. 252.)

During the period when Jeffrey alone lived in the Beekman Place apartment, i.e., from the middle of 1991 up through August 1992, he would move out of the master bedroom into the smaller

¹⁴Mr. Siskind testified concerning the frequency with which petitioners stayed over in the Beekman Place apartment as follows: "Once or twice a week possibly or sometimes not at all during the week and probably three or four times a month average" (tr., pp. 242-243). Mrs. Siskind in her testimony later in the hearing would agree with her husband's estimate, noting that she and Mr. Siskind would stay overnight in the Beekman Place apartment "sometimes once a week" (tr., p. 818).

bedroom so that his parents could use the larger bedroom. During the entire period when their sons (either singly or together) were occupying the Beekman Place apartment, i.e., all of 1990, 1991 and up through August 1992, petitioners always phoned ahead to advise that they would be spending the night in the apartment. Mr. Siskind testified: “We would call ahead and generally tell Jeff, you know, we’ll be over that particular night to stay over and sleep over” (tr., p. 299). Although petitioners would always give advance notice to their sons that they would be sleeping over in the apartment, Mr. Siskind answered affirmatively, “Yes”, when asked “Would you sleep there any time?” (tr., p. 297). Nonetheless, petitioners slept over in the Manhattan apartment on an infrequent basis as noted above and in footnote “14”.

30. Mrs. Siskind testified that she and her husband did not keep clothing or other personal items in the Beekman Place apartment. Rather, “We would just take a bag with us, what we needed” (tr., p. 818). The record is not clear whether during the four-month period after both of their sons had moved out of the Beekman Place apartment, i.e., from September 1992 onward, these facts held true.

Petitioners’ Family and Social Life During the Audit Period

31. Petitioners’ family and social life during the audit period was centered around their home in Westport, Connecticut. With their sons grown, petitioners could focus on their personal pursuits: Mr. Siskind, on his love of boating and Mrs. Siskind, on her painting. With his yacht moored in the lagoon behind his house, Mr. Siskind, especially in the summer months, spent as much time as he possibly could at his Westport home. He testified as follows:

I don’t like to spend too much time in the summertime in New York City. I don’t think too many people do. I would much rather have gone back every night, if I could, to Connecticut. I would go back. I would do my leisure thing. I could swim when I got back in the evening. Maybe take out the boat for an hour or two (tr., p. 426).

Mr. Siskind pointedly noted that he was not attracted to New York City's urban appeals:

I didn't care for New York City. All my recreational facilities were at Connecticut, at Westport. I had my boat there. I had my swimming. I had my golf. I had my friends. I love the area. Loved the outdoors (tr., p. 249).

Mr. Siskind belonged to no clubs in New York City, and petitioners did not attend theater or often dine in the city. Rather, Mr. Siskind pointed out: "We had a Westport playhouse and we had many fine restaurants in Westport. There is where we frequent" (tr., p. 303). In addition, two times a week, Mr. Siskind utilized the health club facility located at the Tenafly, New Jersey Jewish Community Center, which was near his former home in Englewood Cliffs. In fact, Mr. Siskind was still an active member of the center as of the end of 1997 when the hearing in this matter took place. Mrs. Siskind's sizeable studio, with its nearness to the natural beauty of the Connecticut shore, suited her artistic needs and was where she spent most of the time she devoted to painting.

32. Petitioners generally spent their weekends and holidays at home in Westport. They entertained relatives at their Westport home, including extended visits by Mrs. Siskind's mother, a Florida resident, who spent a good part of the summer with petitioners. Their sons and other family members, including petitioners' nephews who lived in Texas, visited petitioners in Westport.

Days Spent in New York City and State

33. As noted in Finding of Fact "10", Mr. Siskind was the man *out in the field* for the family business which was based in the Empire State Building in Manhattan. Nonetheless, business demands would draw Mr. Siskind into the New York City offices. In particular, Mr. Siskind usually spent Wednesdays of each week at the offices of the family business in the Empire State Building in order to pay bills and to take care of receivables. Mr. Siskind testified:

“I took care of the receivables and making sure our customers paid the bills properly” (tr., p. 251). But during the three years at issue, Mr. Siskind worked regularly at the Union City, New Jersey warehouse owned by the family partnership known as Bernette Realty Trust where he had use of a desk and phone. The warehouse, which was approximately 15,000 square feet all on one floor, was used by the family business as a warehouse for its manufactured goods as well as a distribution center from which the goods were shipped to retail stores throughout the United States. An affidavit dated in the month of December 1997, with the particular day handwritten and unreadable, of Jack Samson, the warehouse manager of the New Jersey facility, provided the following details concerning Mr. Siskind’s responsibilities at the warehouse as follows:

Mr. Siskind’s responsibilities at the Facility include:

- (a) checking the delivery book for timeliness of shipments to customers;
- (b) reviewing quality of garments received from the various manufacturing suppliers;
- (c) reviewing inventory quality control;
- (d) coordinating delivery schedules to customers; and
- (e) reviewing current inventory levels.

Mr. Samson also stated in his affidavit that “Mr. Siskind typically spends one or two days each week at the [New Jersey warehouse].”

34. Furthermore, Mr. Siskind also worked regularly in Mineola (Nassau County) at Felmor, a finishing plant of approximately 8,000 to 9,000 square feet, which according to Mr. Siskind “does approximately half our finishing for our production” (tr., p. 441). Mr. Siskind described what he did at Felmor as follows:

Administrative Law Judge: Your visits to Long Island were focused on insuring that production was going as scheduled?

Mr. Siskind: Yes. The quality of production. Inspecting the production. Making sure that it fit properly. Making sure that the knitting was proper from A to Z. (Tr., p. 441.)

Mr. Siskind had use of his own desk and phone at the Felmor facility as well. An affidavit dated

December 9, 1997 of Maria Correia, who identified herself as the managing partner¹⁵ of the Felmor¹⁶ manufacturing partnership, provided the following details concerning Mr. Siskind's responsibilities at Felmor:

- (a) checking patterns to insure that the design specifications are correct;
- (b) reviewing production specifications;
- (c) reviewing inventory of fabrics on hand;
- (d) coordinating inventory levels with current orders for fabric on specific lines;
- (e) reviewing new shipments of fabric for compatibility with current production specifications; and
- (f) development and implementation of monthly operating budgets.

Ms. Correia also stated in her affidavit that Mr. Siskind "typically spends one or two days each week at [Felmor]."

35. Mr. Siskind was also responsible for monitoring the services and goods provided by various suppliers and contractors utilized by the family operation. Many of the contractors and suppliers were located in Brooklyn, but some were located in New Jersey. Mr. Siskind testified that during the years at issue, the family business utilized three to five contractors who "made product for us in Brooklyn" (tr., p. 591). A contractor called New Jersey Mills also manufactured goods for the business in locations near Union City, New Jersey.

36. In sum, Mr. Siskind's general working pattern was to spend Mondays and Tuesdays of the workweek at the New Jersey warehouse and distribution center for the family business, Wednesdays at the offices and showroom of the business located at the Empire State Building in Manhattan and Thursdays and sometimes Fridays at the Felmor manufacturing operation in

¹⁵In petitioners' Schedule E to their federal income tax return for 1992, Felmor is listed as a Subchapter S corporation not a partnership.

¹⁶Ms. Correia's affidavit shows the spelling of the manufacturing facility in Mineola as Fel Mor, and it is noted that Felmor has been spelled in different ways in the administrative record. The spelling used in this determination conforms to the spelling of this S corporation's name as shown in petitioners' 1992 Schedule E to their Federal income tax return which was attached to their New York nonresident income tax return.

Mineola (Nassau County) or visiting various contractors and suppliers located in Brooklyn and New Jersey. This general pattern would vary in the course of the year. For example in the late autumn when shipments of goods to its customers were the number one priority for the family business, Mr. Siskind would spend a greater amount of time at the New Jersey warehouse and distribution center. When the business was developing a new clothing article, Mr. Siskind, in turn, would spend more time at the Felmor manufacturing plant.

37. The transcript of the four-day hearing in this matter consists of 869 pages, of which Mr. Siskind's testimony constituted nearly 600 pages. Mr. Siskind accounted for his presence in and out of New York on a day-by-day basis over a three-year period, which was the primary reason for the length of his testimony. In testifying in late 1997 concerning his presence in and out of New York on a day-by-day basis during the period 1990 through 1992, Mr. Siskind relied upon his personal diaries, one for each of the years at issue, credit card receipts, his passport and his recollection.

Mr. Siskind's Diaries

38. As noted in Finding of Fact "9", in 1985 and 1986, petitioners filed New York State resident income tax returns because Mr. Siskind had spent more than 183 days in New York during each of these years. Consequently, during the years at issue, Mr. Siskind was aware that he needed to keep track of his presence in New York for tax purposes and not only for the reason that if he spent more than 183 days in New York, he would have to file New York resident income tax returns. In addition, for purposes of allocating his salary from his New York based family business, Mr. Siskind knew he had to keep track of his working days in and out of New York. Moreover, Mr. Siskind noted that his "accountants felt it should be done" (tr., p. 611). As a result, Mr. Siskind relied upon his personal diaries to keep track of his days in New York. In

addition, Mr. Siskind used his diaries to keep track of his appointments and job duties. However, the diaries did not account for Mr. Siskind's presence in and out of New York on weekend days and holidays, which were generally left blank in the diaries.

39. Initially, Mr. Siskind testified in the affirmative to the leading question whether his diaries were "contemporaneous"¹⁷ (tr., p. 343). This term does not adequately describe, and, to some extent, confuses the way in which Mr. Siskind maintained and used his diaries. Later in his testimony, Mr. Siskind elaborated as follows:

Administrative Law Judge: I would want to note that I've observed that different color inks are used on different days as well as pencil [in the original diaries¹⁸]. These entries were made on a contemporaneous basis, on a daily basis or what?

Mr. Siskind: It could have been on a daily basis, every two or three days. There was no pattern to when I would do it. I would do it for my recollection and it would be either every day, every two or three days.

Administrative Law Judge: If, for example, you spent Monday in the New Jersey warehouse, when would you write in your diary the Jersey warehouse?

Mr. Siskind: Whether I did it in New York or home¹⁹— wherever my diary was at the time. I would go back and write it in.

Administrative Law Judge: Would you ever write something in a month ahead of time?

Mr. Siskind: No.

Administrative Law Judge: What would be the most time?

Mr. Siskind: If you had a meeting coming up or something like that? That's

¹⁷ "Contemporaneous" is defined as "existing, occurring, or originating during the same time" (Webster's Ninth New Collegiate Dictionary 283 [1983]).

¹⁸Photocopies of the diaries were introduced into evidence, not the originals.

¹⁹Later in his testimony, during cross-examination, Mr. Siskind testified that he kept his diary in his New York City office in the Empire State Building and that he "very rarely to never" carried it with him (tr., p. 613).

about it. Three or four days in advance. That's about it. (Tr., pp. 419-420.)

In sum, it appears that Mr. Siskind made entries in his diaries in advance of the events specified as well as entries after certain events had transpired.

40. In preparing his count of days in and out of New York, Mr. Siskind also relied on American Express charge card slips or receipts. However, the charge card statements were not made available for review by the auditor or introduced at the hearing. It took effort to draw out from Mr. Siskind why the statements were not available:

Administrative Law Judge: What has been marked into evidence as Petitioners' Exhibit 45 are photocopies of charge slips on an American Express account. That was the credit card you most commonly used?

Mr. Siskind: That's for business purposes.²⁰

Administrative Law Judge: Are all of these photocopies of American Express?

Mr. Siskind: I believe so, Your Honor.

Administrative Law Judge: How do we know that these are all of the charge slips for American Express for that year [1990]?

Mr. Siskind: There is a statement, Your Honor. Each month we get a statement from American Express. It's illustrated on the statement.

Administrative Law Judge: You have the statements here?

Attorney Palmer: I've never seen them.

Paralegal Nordin: Mr. Palmer has seen a letter from American Express advising us that this was a corporate account and that they would only provide copies of charges that were relative to that. I don't know that I brought that letter.

Mr. Palmer: I'm a little bit vague on it. I can't recall.

²⁰Mr. Siskind testified that he did not have any other credit cards. However, he did have a Visa card through Merrill Lynch, which was an active card for only two months in the audit period, October and November 1991.

* * *

Administrative Law Judge: Mr. Siskind . . . [c]ould you just on the record tell me a little bit about this account. What are the slips related to, what charge account?

Mr. Siskind: They would be - - this would be our company charge account of which - - what was shown here is the slips that I use or when I use the account - -

Administrative Law Judge: How do you know those are the slips you used?

Attorney Comeau: He signed them.

Mr. Siskind: I signed them.

Administrative Law Judge: I want the witness to respond.

Mr. Siskind: That's my signature.

* * *

Administrative Law Judge: How many people in the company have the authority to use this American Express corporate credit card?

Mr. Siskind: Could be four or five. . . .

* * *

Administrative Law judge: On a monthly basis, how would it work? The company would get its statement?

Mr. Siskind: That's correct.

Administrative Law Judge: What's the process within your company for that, the payment of the statement and the receipt [of the statement]?

Mr. Siskind: We would each review it, make sure that it was our signature and make sure it pertained to us.

* * *

Administrative Law Judge: Tell me how it works. A statement comes in, the secretary receives it?

Mr. Siskind: Yes.

Administrative Law Judge: What happens then?

Mr. Siskind: She gives it to me.

Administrative Law Judge: You're the first one to get it?

Mr. Siskind: Generally.

Administrative Law Judge: Why is that?

Mr. Siskind: Either my brother or I would. We're the principals. I would okay all of mine. . . .

* * *

Administrative Law Judge: Then what would happen to that statement that came into your office?

Mr. Siskind: It would be filed. . . .

Administrative Law Judge: Where are those files now?

Mr. Siskind: 1990 files?

Administrative Law Judge: Yes.

Mr. Siskind: I don't know if they are around anymore.

Administrative Law Judge: Did you ever make a search for them?

Mr. Siskind. Yes. I believe we did.

Attorney Comeau: I think that's why we had to obtain this from American Express.

Mr. Siskind: We didn't have it. [Tr., pp 367- 373.]

Mr. Siskind also testified that he did not use the American Express charge card "that much" (tr., p. 801) and that if a purchase has "nothing to do with business, I pay for it [in cash]" (tr., p. 802).

41. For each of the three years at issue, petitioners introduced into evidence color coded calendars, which noted Mr. Siskind's presence in and out of New York on a daily basis. Days

out of New York are colored yellow, days in New York City are colored red, and days in New York State, but *not* New York City, are colored brown. The three color coded calendars show the following totals for the respective years, by months, as follows:

1990	Days in New York City	Days in New York State But <i>Not</i> New York City	Days Outside New York State/City
January	8	3	20
February	10	1	17
March	12	3	16
April	13	2	15
May	13	5	13
June	14	3	13
July	12	4	15
August	12	3	16
September	9	5	16
October	14	3	14
November	10	1	19
December	8	0	23
1990 Totals	135	33	197
1991			
January	8	4	19
February	9	5	14
March	11	4	16
April	15	6	9
May	11	3	17
June	11	4	15
July	13	4	14
August	11	4	16

September	5	2	23
October	7	3	21 ²¹
November	13	3	4
December	10	2	19
1991 Totals	124	44	197
January	11	2	18
February	11	1	17
March	11	1	17 ²²
April	11	3	16
May	10	2	19
June	10	2	18
July	11	3	17
August	12	19	0
September	9	2	19
October	8	3	20
November	12	2	16
December	8	1	22
1992 Totals	124	41	199

Petitioners presented separate day counts for Mr. Siskind’s presence in New York City and his presence in New York State but not New York City as detailed above. Adding these two amounts together provides petitioners’ position concerning Mr. Siskind’s days in New York State as follows:

²¹Petitioners’ exhibit mistakenly noted 20 days outside of New York State/City instead of 21 as summarized in their back-up exhibit as described in Finding of Fact “40”.

²²Petitioners could not account for Mr. Siskind’s presence in or out of New York on March 30 and 31. Consequently, only 29 days in March 1992 are accounted for in the exhibit.

Year	Total Days in New York State
1990	168
1991	168
1992	165

42. These color coded calendars detailed in Finding of Fact “41” were based upon summaries which show petitioners’ whereabouts on a daily basis for each of the respective years and a reference to Mr. Siskind’s (i) diary, (ii) passport, or (iii) American Express receipts if such sources support the position taken for a particular day. These summaries also categorize the particular day in one of six ways as follows: (1) vacation day, (2) holiday, (3) Saturday & Sunday, (4) New York State workday, (5) New York City workday, and (6) workday outside New York State and City. It is noted that the summaries and the color coded calendars were prepared sometime in 1997 for purposes of the formal hearing in this matter. For a random example, the first seven days of November 1991 are listed as follows on the summary prepared for 1991:

Day In November	Mr. Siskind’s whereabouts	Vacation Days	Holidays	Saturdays & Sundays	NYS workday	NYC workday	Outside NYS NYC workday
1	Ct. to Brooklyn mills diary to Ct.					1	
2	Connecticut			1			
3	Connecticut			1			
4	Ct. to New York office diary					1	
5	NYC American Express to New Jersey diary to Connecticut	0.5					0.5

6	Ct to New York office diary to Ct					1	
7	Ct to Long Island diary to Ct				1		

43. Mr. Siskind testified as follows with regard to the preparation of the summaries for each of the three years:

Administrative Law Judge: How was this prepared, [Petitioners' Exhibit] 43 [summary for 1990]?

Mr. Siskind: It was prepared by myself and Nancy Nordin²³

Administrative Law Judge: How did you go about doing that?

Mr. Siskind: We went through the diary and my recollection.

Administrative Law Judge: Your recollection. Anyone else's recollection?

Mr. Siskind: I don't think so. My wife might have had an input. I don't recall. (Tr., p. 402.)

Later in the hearing during cross-examination, Mr. Siskind added that in addition he relied upon his American Express receipts and passport in preparing the summaries with the assistance of Mrs. Nordin. Mr. Siskind also noted on cross-examination that he would treat a day as outside New York if his diary showed he was at the New Jersey warehouse: "Generally [the day is] spent there in the New Jersey area about all the time" (tr., p. 615). According to Mr. Siskind only if he had a charge receipt in New York would he treat the day as a New York day if his diary showed the New Jersey warehouse for the particular day: "In 99 percent of the time I spent [the entire day] in New Jersey" (tr., p. 615).

44. As noted in Finding of Fact "41", petitioners' color coded calendar for 1990 shows a

²³Mrs. Nordin is a paralegal employed by the law firm representing petitioners in this matter. She was present in the hearing room for the four days of the formal hearing.

day count for Mr. Siskind's presence in New York during 1990 of (i) 135 days in New York City, and (ii) 33 days in New York State but not New York City resulting in a total count of 168 days in New York State. In the course of his lengthy testimony concerning his presence in New York during 1990, Mr. Siskind noted that (i) one more day should be treated as a New York State but not New York City day because his diary showed that he was on Long Island on April 18, 1990, which had been treated incorrectly as a day out of New York, and (ii) one more day should be added to the New York City count of 135 days because his diary showed that he was in Brooklyn on May 10, 1990, which had been treated incorrectly as a day in New York State but not New York City. Mr. Siskind also pointed out that his American Express charge receipts include a receipt for a charge at a deli in Manhattan on a date shown as "20/08/90". Mr. Siskind treated February 8, 1990 as a day spent outside of New York and argued that this charge receipt was not clear enough to require him to concede February 8, 1990 as a New York City day. It is observed that Mr. Siskind also claimed August 20, 1990, i.e., 8/20/90, as a day spent outside of New York. Mr. Siskind also conceded that his diary, which did not indicate his presence in New York on the following three days, was inconsistent with charge receipts showing New York charges: March 8, 1990, March 12, 1990 and June 21, 1990. Mr. Siskind noted that he realized this inconsistency and, in fact, these three days were included as New York days in the color coded calendar. In sum, based on Mr. Siskind's direct testimony, the day count noted in the color coded calendar for 1990 should be increased by one additional New York City day, with days in New York State but not New York City remaining the same number (April 18, 1990 is an additional day in New York State but not New York City, but May 10, 1990 is no longer in this category because it is a New York City day), which results in the following totals:

Year	Days in New York City	Days in New York State but <i>not</i> New York City	Total Days in New York State	Days Outside New York State/City
1990	136	33	169	196

45. As noted in Finding of Fact “41”, petitioners’ color coded calendar for 1991 shows a day count for Mr. Siskind’s presence in New York during 1991 of (i) 124 days in New York City, and (ii) 44 days in New York State but not New York City resulting in a total count of 168 days in New York State. In the course of his lengthy testimony concerning his presence in New York during 1991 on a day-by-day basis, Mr. Siskind noted that on July 22, 1991 he had a charge receipt for a restaurant in Ridgewood, which is located in the New York City borough of Queens, so that this day should be treated as a New York City day. However, the total count for New York days would remain the same because he had treated this day in the color coded calendar as a New York State but not a New York City day. He also noted that there was a charge slip showing a purchase of gasoline in New York City on April 14, 1991, which was a Sunday. However, Mr. Siskind did not concede that this day should be treated as a New York City day speculating that the charge might have been made by his son or that he had, in fact, charged gasoline on the Monday, April 15, 1991 and the date on the receipt was in error. Further, the Division pointed out in its brief that petitioners in their bill of particulars conceded that Mr. Siskind worked in New York City on February 22 and 25, 1991. However, at the hearing, Mr. Siskind testified that he was at a trade show in California from February 21 to February 27, 1991 and pointed to American Express charge receipts in California on February 21 and February 27, 1991. In sum, based on Mr. Siskind’s direct testimony, the day count noted in the color coded calendar for 1991 should be increased by only one additional New York City day, with days in

New York State but not New York City decreased by one, which results in the following totals:

Year	Days in New York City	Days in New York State but <i>not</i> New York City	Total Days in New York State	Days Outside New York State/City
1991	125	43	168	197

46. As noted in Finding of Fact “41”, petitioners’ color coded calendar for 1992 shows a day count for Mr. Siskind’s presence in New York during 1992 of (i) 124 days in New York City, and (ii) 41 days in New York State but not New York City resulting in a total count of 165 days in New York State. In the course of his lengthy testimony concerning his presence in New York during 1992 on a day-by-day basis, Mr. Siskind noted that in preparing the color coded calendar and the summary on a day-by-day basis for 1992, he could not identify his whereabouts on two days, a Monday and Tuesday, March 30 and 31, 1990. He also testified that one more day should be added to the New York State but not New York City count of 41 days on the basis that his diary showed that he motored in his yacht from his home in Westport to Sag Harbor on the eastern end of Long Island. Mr. Siskind noted that it was more than likely that he docked and went ashore to visit the scenic town. However, he testified that he incorrectly conceded on the color coded chart for 1992 that October 4, 1992, a Sunday, was a New York City day based on an American Express receipt for a car rental which he testified was likely made by his son. Since he had use of an automobile, there was no reason for him to rent a car on this particular day. Mr. Siskind also testified that he incorrectly treated November 24, 1992, a Tuesday, as a New York City day when an American Express charge slip shows a gasoline charge at a Long Island location. Therefore, Mr. Siskind contended that this day should be treated as a New York State but *not* a New York City day. In sum, based on Mr. Siskind’s direct testimony, petitioners

maintain that the day count noted in the color coded calendar for 1992 should be changed to the following:

Year	Days in New York City	Days in New York State but <i>not</i> New York City	Days in New York State	Days Outside New York State/City
1992	122	43	165	199

47. As noted above, Mr. Siskind's testimony concerning his days spent in New York was based upon the color coded calendars and summaries prepared prior to the hearing with the assistance of a paralegal employed by petitioners' representative. The summaries, in turn, had been prepared by Mr. Siskind and the paralegal by their review of Mr. Siskind's personal diaries, American Express charge card receipts, Mr. Siskind's passport and his recollection. During cross-examination, the Division established that Mr. Siskind had not accounted for three additional days spent in New York City based upon two particular American Express charge receipts which were included with the receipts provided by petitioners. A charge receipt dated February 19, 1991, a Tuesday, which was signed by Mr. Siskind, shows the payment of \$16.75 for parking at a garage in midtown Manhattan. On the color coded calendar for 1991, petitioners treated February 19, 1991 as a New York State but not a New York City day while it should have been treated as a New York City day based upon this charge receipt. In addition, petitioners' color coded calendars for 1991 and 1992 show December 31, 1991 and January 1, 1992 as days spent outside of New York, respectively. However, on cross-examination of Mr. Siskind, the Division established that petitioner had an American Express charge receipt in the amount of \$1,555.60 for food and beverage from the Algonquin Hotel in Manhattan, and although the charge receipt showed the date of the charge as January 2, 1992, Mr. Siskind testified that this

charge was for a New Year's Eve celebration. Therefore, petitioners were present in New York City on December 31, 1991 and January 1, 1992, and these two days should be treated as days spent in New York City. In addition, as pointed out by the Division, January 17 and February 6, 1992 were New York City days because petitioners' Exhibit 81 shows that Mr. Siskind spent the nights of January 16 and February 5, 1992 in New York City so that on the following mornings he was also present in New York City. In addition, Mr. Siskind had a signed American Express charge receipt for parking in a Manhattan garage on January 2, 1992 so that this day should also be treated as a New York City day. As a result of these additional days in New York City, the count of days in New York City as noted in Findings of Fact "43" and "44" for 1991 and 1992, respectively, should be revised, while petitioners' count of New York days for 1990, based upon the documents made available for review, would remain the same. Therefore, the count of days, based upon Mr. Siskind's testimony and the documents presented, would be as follows:

Year	Days in New York City	Days in New York State but <i>not</i> New York City	Total Days in New York State	Days Outside New York State/City
1990	136	33	169	196
1991	127	42	169	196
1992	126	43	169	195 ²⁴

48. On cross-examination of Mr. Siskind, the Division also brought out inconsistencies between his personal diaries which showed his presence outside New York and American Express charge receipts which showed his presence in New York for the following five days:

²⁴As noted in Footnote "21" petitioners could not account for Mr. Siskind's presence in or out of New York on March 30 and 31 of 1992. Consequently, the total days accounted for in 1992, a leap year with 366 days, was 364 days. If the two days petitioners cannot account for in 1992 are treated as New York City days, their total days in New York City for 1992 would be 128 days and total days in New York State would be 171 days.

January 11, 1990, March 8, 1990, December 26, 1990, July 4, 1991, and October 10, 1991. Except for October 10, 1991, petitioners conceded that these days were New York days and accounted for them as such in the totals shown in Finding of Fact “45”. With regard to October 10, 1991, Mr. Siskind speculated that the charge for a gasoline purchase in Queens on October 10, 1991 might have been made by his son or that the gasoline was purchased on the way home to Connecticut from the airport after petitioners had returned from a European trip. Mr. Siskind’s personal diary for 1991 showed his return with Mrs. Siskind from Europe on October 11, 1991, but Mr. Siskind speculated that it might have been off by one day to explain the gasoline purchase in Queens. The photocopy of his passport in the record does not have a readable date stamp showing his return to the United States. There is a date stamp of October 3, 1991 showing Mr. Siskind’s arrival at the Charles De Gaulle airport in Paris. The Division also established on cross-examination that Mr. Siskind’s personal diaries were blank on days he testified were spent at his home in Westport, Connecticut. However, petitioners do not contest the fact that Mr. Siskind’s testimony concerning days spent at home in Westport was based on his general practice to spend his free time at his home in addition to his recollection and not on specific notations in his diaries.

Mr. Siskind’s Credibility As A Witness

49. The most striking aspects of Mr. Siskind’s testimony were its length, consisting of approximately 600 pages, and Mr. Siskind’s endurance in answering questions concerning his presence in New York on a day-by-day basis for a three-year period. Further, Mr. Siskind took much care not to testify in a way that would harm petitioners’ case. For example, as noted in Finding of Fact “39”, Mr. Siskind’s testimony concerning the unavailability of the American Express statements was extremely cautious and initially not responsive to the questioning. In

addition, on cross-examination, Mr. Siskind, demonstrating his concern not to harm his case, conceded his presence in New York on April 14, 1991 in an unwise attempt to second-guess the Division's attorney. He later was compelled to clarify that he was not, in fact, in New York on such day. Mr. Siskind also showed some difficulties with his memory. For example, only later in the hearing, after conferring with his wife and son, was Mr. Siskind able to recall that the automobile he used during the years at issue had New Jersey license plates. He also could not remember if he had filed Connecticut income tax returns during the years at issue. Later, copies of his Connecticut returns were, in fact, submitted into evidence. Nonetheless, the fact that he had filed Connecticut returns, and yet answered that he could not remember whether he had, reflects the overall honest nature of his testimony. Further, only by leading questions was Mr. Siskind able to testify that the summaries of his days in and out of New York were revised over time. Leading questions were also used to bring out important facts such as when entries were made in the diary, which does affect the ability to evaluate Mr. Siskind's credibility.

Despite the difficulties with Mr. Siskind's testimony as noted above, viewing his testimony in its entirety, a finding may be made that Mr. Siskind was a credible witness whose testimony was fundamentally truthful concerning his presence in and out of New York. Further, the errors established during cross-examination are not sufficient justification to alter this finding although the count of days in New York was marginally increased. In particular, Mr. Siskind's testimony that when he and Mrs. Norden prepared the summaries of his days in and out of New York, he "had more recollection" was believable based upon the concentration of his energies and time in preparing the summaries (tr. p. 669). Mr. Siskind testified: "I spent days with [the summaries], and weeks with it" (tr., p. 669). Moreover, the reliability of Mr. Siskind's testimony was bolstered by the concise testimony of Mrs. Siskind on the last day of the four days of hearing.

Mrs. Siskind, who was present in the hearing room during the entire hearing, testified that she was in agreement with Mr. Siskind's testimony and that her recollection was consistent with her husband's.

50. Petitioners submitted 33 proposed findings of fact. Proposed findings of fact "1", "3", "4", "5", "6", "7", "8", "9", "11", "12", "13", "16", "17", "18", "19", "20", "21", "22", and "31" are accepted and incorporated into this determination.

Proposed findings of fact "2", "10", "14", "15", "23", "24", "25", "26", "27", and "28" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

(i) Proposed finding of fact "2" implies that the Division did not *audit* 1992. Findings of Fact "19" through "22" set forth the details concerning the auditor's addition of the 1992 tax year to the audit period and the extent of his review of any records provided by petitioners with reference to 1992. Although the auditor never did a day count for 1992, as he did for 1990 and 1991, he included 1992 in his audit, and it is best addressed in the conclusions of law whether the addition of 1992 to the audit period was reasonable so that it may be concluded that the auditor performed an "audit" of 1992. In addition, the statement of audit changes included a statutory reference to support the two types of penalty asserted against petitioners which may be viewed as an "explanation" of the penalties asserted.

(ii) The assertion in proposed finding of fact "10" that petitioners' Beekman Place apartment "was truly a hotel substitute" is rejected since it was not *merely* a hotel substitute. Further, the use of the bedrooms in the apartment by petitioners' sons is addressed more exactly in Finding of Fact "29". The proposed finding of fact also includes an apparent typographic error since one bedroom was not used "by each of the Siskind sons" but rather each of the bedrooms

were used by one of the Siskind sons during the portion of the audit period when they both lived in the apartment.

(iii) With reference to proposed finding of fact “14”, the Siskind sons lived in the Beekman Place apartment together for only a portion of the audit period.

(iv) With reference to proposed finding of fact “15”, the Siskind sons would be required to double up in one of the bedrooms during the portion of the audit period when they shared the Beekman Place apartment.

(v) With reference to proposed finding of fact “23”, as noted in Finding of Fact “23”, the domestic return receipt was returned by the post office to the auditor at his Ryebrook (Westchester County) office. To the extent that the proposed finding of fact implies an intention not to disclose this document in response to the freedom of information request made to the Division in Albany, it is rejected. Further, the only other records, which were not made available to petitioners until the hearing, consisted of documents relating to the conciliation conference, and there is no evidence of any intent on the part of the Division not to disclose these documents, which were also made available to petitioners at the hearing.

(vi) With reference to proposed finding of fact “24”, the record is not clear concerning when the auditor became aware that petitioners had actually *moved into* their new home in Bridgehampton. As noted in Footnote “11”, the record does not disclose what address was used by petitioners on their 1994 New York nonresident income tax return, which would have been the last income tax return filed by petitioners prior to the issuance of the Notice of Deficiency dated July 20, 1995.

(vii) With reference to proposed finding of fact “25”, the Division mailed the Notice of Deficiency two separate times to petitioners. The second mailing “did not follow standard

mailing procedures.”

(viii) With reference to proposed finding of fact “26”, as noted in Finding of Fact “19”, the auditor testified that he asked petitioners’ then representative, Mr. Gedinsky, “if they could bring any documentation for 1992.” Mr. Gedinsky’s affidavit stated that “At no time during the course of the audit did the auditor request records or information *for an audit* of 1992” (emphasis added). If Mr. Gedinsky is using the term “audit,” in the same strict fashion as petitioners’ current representative to mean a thorough review and evaluation of documents and records, the auditor’s testimony and Mr. Gedinsky’s affidavit may yet be harmonized. Further, the ramifications of whether the Division performed an “audit” of 1992 is best addressed in the conclusions of law.

(ix) With reference to proposed finding of fact “27”, the auditor did not “determine” the day count proposed. Rather, *assuming* the validity and reliability of petitioners’ records, the auditor counted up the number of days noted as petitioners’ days in New York.

(x) With reference to proposed finding of fact “28”, whether Mr. Siskind’s diaries were “contemporaneous” is addressed in Finding of Fact “39”.

Proposed findings of fact “29”, “30”, “32”, and “33” are rejected for the following reasons:

(i) With reference to proposed findings of fact “29” and “30”, the record does not reflect that the Division agreed that petitioners’ evidence substantiated any particular number of days.

(ii) With reference to proposed findings of fact “32” and “33”, Finding of Fact “47” shows the count of petitioners’ days in and out of New York for 1991 and 1992, which varies slightly from the count proposed.

51. Petitioners also attached a table, consisting of 21 pages, to their brief, which purports to summarize the positions of the parties on a day-by-day basis concerning Mr. Siskind’s

presence in and out of New York. As such, it is more in the nature of a proposed finding of fact than new or additional evidence and has not been excluded from the administrative record as requested by the Division.

SUMMARY OF THE PARTIES' POSITIONS

52. Petitioners argue that the Division of Tax Appeals lacks jurisdiction over this matter because the Division of Taxation failed to meet its burden of proving that it timely issued the Notice of Deficiency. They contend that the receipt for certified mail, which according to the auditor shows Mrs. Siskind's signature, may not be considered because it was not disclosed to them in response to their freedom of information request:

In the alternative, if preclusion is deemed inappropriate, the receipt should be given greatly diminished weight because of the circumstances concerning its concealment and the prejudicial effect it has on Petitioners' case [footnote omitted]. (Petitioners' brief, p. 13.)

With regard to the year 1992, petitioners argue that "the Division summarily added the 1992 tax year to the assessment for the 1990 and 1991 years for expediency and convenience" which does not provide the necessary "rational basis for the assessment" as required by the Tax Appeals Tribunal in *Matter of Fortunato* (February 22, 1990). With regard to 1990 and 1991, according to petitioners, the auditor determined that petitioners' days in New York totalled 164 and 174, respectively, which does not provide a rational basis for the assessment for each of these two years because a statutory resident of New York must have spent more than 183 days in New York in a given year.

Petitioners also contend that they did not maintain a permanent place of abode in New York during the years at issue because:

"they did not maintain a permanent place of abode in New York for their use during the audit period; rather they maintained a permanent place of abode in New

York for the use of their adult sons” (Petitioners’ brief, p. 20).

Therefore, they may not be treated as statutory residents of New York since their domicile was in Connecticut, as conceded by the Division after the hearing was completed.

In the alternative, petitioners maintain that they established by clear and convincing evidence that they were not in New York more than 183 days in any of the audit years:

Petitioners’ testimony, diaries, credit card statements [sic], passport, and other documentation proved that the taxpayers were not statutory residents of New York State or New York City for 1990, 1991 and 1992” (Petitioners’ brief, p. 22).

53. The Division counters that the deadline for the issuance of the Notice of Deficiency was August 15, 1995 pursuant to consents extending the period of limitations. Substantial evidence established that the Notice of Deficiency was delivered to Mrs. Siskind on August 8, 1995:

If Pearl Siskind did not sign the PS Form 3811 (exh. O) or if the certified mailing she received on August 8, 1995 did not contain the notice of deficiency, it was incumbent on her to so state during her testimony as the opposite is to be inferred from her silence” (Division’s brief, p. 3).

Citing the decision of the Tax Appeals Tribunal in *Matter of Estate of Markowitz* (February 27, 1997), the Division argues that the Division of Tax Appeals lacks jurisdiction to provide a remedy to the petitioners for noncompliance by the Division with a freedom of information law request, and, in any event, petitioners were not harmed by any delay in the furnishing of documents.

The Division also argues that it had a rational basis for the 1992 assessment:

From his review of the 1992 diary wherein he noted its similarities to the earlier two diaries, [the auditor] had a basis to conclude that there were a similar number of undocumented days which in turn formed part of the basis of his conclusion that Bernard Siskind was a statutory resident of New York during 1992” (Division’s brief, p. 6).

In addition, the Division contends that petitioners maintained a permanent place of abode in New York City during the three years at issue. They owned a two-bedroom Manhattan apartment, their personal checks showed the Manhattan apartment as their address, they slept overnight in the apartment “averaging three or four nights a month” with just a phone call to their sons to “tell” them they were sleeping over, and they paid all of the expenses for the apartment including utility bills (Division’s brief, pp. 6 - 7).

The Division also maintains that petitioners failed to meet their burden of proving that Mr. Siskind did not spend more than 183 days in New York City and New York State during each of the years at issue. The Division’s position from the time of the audit through the hearing and to date has been consistent: “*The diaries simply do not accurately record all of Mr. Siskind’s travels into New York City and New York State*”(Division’s brief, p. 14 [emphasis in original]). The Division maintains that the absence of a credit card receipt showing Mr. Siskind’s presence in New York does not mean that he was not in New York pointing out that Mr. Siskind changed his position and conceded he was in New York on a number of occasions after he was shown a charge receipt for a New York based transaction:

What we do not know is how many times Mr. Siskind stopped off in New York City following a New Jersey work day when he made no Amex purchases in New York City. It is clear that neither his diaries nor his recollection suffice to identify such days (Division’s brief, p. 17).

54. In their reply brief, petitioners raised an additional issue concerning the validity of the extension of the statute of limitations signed by Mr. Gedinsky, petitioners’ former representative. Petitioners contend that Mr. Gedinsky was not qualified to execute a waiver of the statute of limitations on petitioners’ behalf because he was not licensed to practice in New York as a certified public accountant, only in New Jersey. The Division was permitted to file a response to

this newly-raised issue. By a letter brief dated September 17, 1998, the Division rejected petitioners' contention noting that Mr. Gedinsky was authorized under Tax Law § 3006(c) to represent petitioners during the audit stage, although during the hearing stage, he would have been required to obtain special permission from the Tax Appeals Tribunal under Tax Law § 2014(1).

CONCLUSIONS OF LAW

A. Tax Law § 681 provides in relevant part as follows:

(a) General. -- If upon examination of a taxpayer's return under [Article 22, Personal Income Tax] the [Division of Taxation] determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer. . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.

(b) Notice of deficiency as assessment. -- After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition under section six hundred eighty-nine.

B. The Tax Appeals Tribunal, in a string of decisions beginning with *Matter of Katz* (November 14, 1991), has imposed on the Division of Taxation a significant burden when the Division seeks to deny the jurisdiction of the Division of Tax Appeals over a taxpayer's petition challenging a notice of deficiency, on the basis that the notice had become an unchallengeable assessment pursuant to Tax Law § 681(b) cited above. In such circumstances, the Tax Appeals Tribunal has required the Division to prove that it mailed by certified or registered mail the notice of deficiency to the taxpayer's last known address. If the Division fails to prove such mailing, the Tax Appeals Tribunal has ruled that the Division of Tax Appeals has jurisdiction to hear the petition on the merits (*see, Matter of Roland*, Tax Appeals Tribunal, February 22,

1996).

C. Petitioners' argument that a similar burden of proving the mailing of the Notice of Deficiency dated July 20, 1995 should be imposed on the Division in this matter is rejected. Unlike the situation in *Katz (supra)*, the Division has not asserted that the Notice of Deficiency dated July 20, 1995 has become an unchallengeable assessment. Rather, the Division has vigorously defended the issuance of this Notice of Deficiency against petitioners *on the merits*. Further, if petitioners' position is, in fact, that the Notice of Deficiency was not timely issued to them, their argument, in substance, is that the statute of limitations for issuing an assessment against them had expired. It is petitioners, not the Division of Taxation, who have the burden of proving that the statute of limitation applies to bar the assessment against them (*see, Matter of Pittman*, Tax Appeals Tribunal, February 20, 1992). Petitioners have not met this burden. Rather, the evidence in the record, in fact, supports a conclusion that the Notice of Deficiency was received by Mrs. Siskind on August 8, 1995. Mrs. Siskind was present at the hearing, and her failure to contest this fact established by the domestic return receipt, received back by the auditor, may be construed against petitioners (*see, Noce v. Kaufman*, 2 NY2d 347, 161 NYS2d 1; *Matter of Donahue*, Tax Appeals Tribunal, December 8, 1994).

D. The domestic return receipt referenced in Conclusion of Law "C" has been given evidentiary weight. Petitioners' argument that the Division should be precluded from introducing this return receipt into evidence is rejected. The Division of Tax Appeals has no jurisdiction to review the compliance by the Division of Taxation with a taxpayer's freedom of information request (*see, Matter of Markowitz*, Tax Appeals Tribunal, February 27, 1997). At best, a continuation of the formal hearing might have been granted in order to rectify any surprise or prejudice resulting from the disclosure at the hearing of a document that had not been

previously disclosed (*cf.*, *Tao v. State Tax Commission*, 125 AD2d 879, 510 NYS2d 233, *lv denied*, 70 NY2d 601, 518 NYS2d 1023). No such request for a continuation was made.

E. As noted in Finding of Fact “12”, the auditor initially sent an appointment letter directly to petitioners at their Westport, Connecticut home. In response, he heard from an individual, identified in the record as Gerry Kohn, who was associated with the accounting firm of Richard Eisner & Company. At the initial appointment on October 26, 1993, the auditor met with Irwin Gedinsky, an accountant associated with Richard Eisner & Company, who was acting on behalf of petitioners pursuant to a power of attorney dated October 22, 1993. On this power of attorney, Mr. Gedinsky indicated that he was a certified public accountant licensed in the State of New Jersey. Petitioners have contested Mr. Gedinsky’s authority to execute a consent extending the period of limitation for assessment of personal income tax for 1990 until April 15, 1995 on the basis that he was licensed as a certified public accountant in New Jersey and not in New York. Although it is necessary to obtain special permission from the Tax Appeals Tribunal for a New Jersey certified public accountant to appear on behalf of a taxpayer before the Division of Tax Appeals, no similar requirement is imposed during the audit stage (*see*, 20 NYCRR 3000.2[a][4] [wherein a certified public accountant licensed in a state other than New York may seek special permission to appear in a particular matter from the Tax Appeals Tribunal]). Rather, under Tax Law § 3006, Mr. Gedinsky was authorized, as a certified public accountant licensed in New Jersey, to represent petitioners during the audit stage. Consequently, the consent to extend the period of limitations for assessment executed by Mr. Gedinsky, on behalf of petitioners, was effective.

F. Tax Law § 601 imposes New York State personal income tax on “resident individuals.” In turn, 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.

The definition of “resident” for New York City income tax purposes, pursuant to the New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term “city” for “state.”

G. As noted in Finding of Fact “25”, soon after the conclusion of the formal hearing in this matter, the Division conceded that petitioners were domiciled in Westport, Connecticut during the years at issue. Therefore, the issues that remain to be resolved in order to determine whether petitioners were resident individuals required to pay New York personal income tax are (1) whether they maintained a permanent place of abode in New York City in the form of the Beekman Place apartment and (2) whether they spent in the aggregate more than 183 days of each of the years at issue in New York State and City for state income tax purposes and in New York City alone for city income tax purposes.

H. The Tax Appeals Tribunal in *Matter of Evans* (June 18, 1992, *confirmed* 199 AD2d 840, 606 NYS2d 404), held that in its view, “one maintains a place of abode by doing whatever is necessary to continue one’s living arrangements in a particular dwelling place.” Petitioners have argued that during the years at issue, the Beekman Place apartment was merely a hotel substitute. It was much more than that. As noted in Finding of Fact “28”, petitioners purchased the apartment in late 1984 for \$480,000.00, and during the years at issue, they paid all of the expenses to maintain the apartment, including utility bills and maintenance charges. They used

the apartment's address on their personal checks and stayed over in the apartment approximately 36 to 48 nights each year. Although their "living arrangements" in the apartment were subsumed by their desire to provide living arrangements for their grown sons in the apartment, petitioners nonetheless had certain defined "living arrangements" in the apartment. The Siskinds felt no hesitation to sleep over in the apartment as long as they gave advance notice to their sons and stayed within their limited usage of 36 to 48 nights each year, as detailed in Finding of Fact "29". The Division is correct to point out the word choice used by Mr. Siskind in describing the procedure he would follow in giving advance notice to his sons that he and Mrs. Siskind would be staying over in the apartment: "We would call ahead and generally *tell* Jeff, you know, we'll be over that particular night to stay over and sleep over" [emphasis added]. Mr. Siskind also answered "Yes" to the question "Would you sleep there any time?" Of course, Mr. Siskind desired to utilize the apartment only on certain weekdays, and his demands on his sons were modest especially given the fact that he was paying all expenses on the apartment. Nonetheless, the master bedroom was vacated for the Siskinds' usage, and petitioners clearly had certain "living arrangements" in the Beekman Place apartment during the years at issue. Furthermore, petitioners' *ownership* of the apartment clearly made the apartment a "permanent" place of abode (*see, Matter of Evans, supra*). Petitioners' reliance on the decision of the Tax Appeals Tribunal in *Matter of Moed* (January 26, 1995) is misplaced since Mr. Moed had no property rights in his wife's rented apartment and his access to his wife's apartment was more limited than petitioners' ability to gain access to the Beekman Place apartment. Mr. Moed phoned ahead to his wife and *asked* if he could stay over in *her* apartment. In sum, petitioners maintained a permanent place of abode in New York City during the years at issue.

I. Before turning to the issue of whether petitioners have established that they were not

present in New York State and City for more than 183 days during each of the years at issue, petitioners' argument that the Division lacked a rational basis for the assessment of income tax against them must be addressed. Initially, it is noted that the Notice of Deficiency dated July 20, 1995, which was issued soon after the three statements of personal income tax audit changes, each dated January 10, 1995, provided petitioners with information sufficient for the preparation of their case so that it raised a presumption of correctness that placed the burden of proof on the petitioners (*cf.*, *Matter of Schneier*, Tax Appeals Tribunal, November 9, 1989).

J. Petitioners assert that they have introduced evidence that establishes that the assessment of income tax for each of the three years at issue had no rational basis. With regard to 1990 and 1991, petitioners argue that the auditor determined that petitioners' days in New York totaled 164 and 174, respectively, which does not provide a rational basis for the assessment for each of these two years because a statutory resident of New York must have spent more than 183 days in New York in a given year. However, what petitioners call the auditor's determination is merely his count of days *if* Mr. Siskind's personal diaries are viewed as reliable. The Division has consistently questioned the reliability of the diaries, and petitioners' argument that the assessment of income tax for 1990 and 1991 lacked a rational basis is rejected. With regard to 1992, it is also concluded that the assessment of income tax for 1992 had a rational basis based upon the auditor's cursory review of Mr. Siskind's personal diary for 1992. Like the diaries for 1990 and 1991, the auditor's quick review of the 1992 diary showed that many days did not indicate Mr. Siskind's presence in or out of New York. As detailed in Findings of Fact "14" through "17", the failure of petitioners during the audit to provide a copy of their I.R.S. Form 2119, "Sale of Your Home," their failure to answer in the affirmative on their nonresident tax returns that they maintained living quarters in New York when they were deducting expenses on

New York real property on their income tax returns, their listings at Manhattan addresses in phone books, their filing as residents of New York State in 1985 and 1986, their failure to provide credit card *statements*, and the fact that they reported *more* days in New York on their tax returns than what their own documents showed provided a background of suspicion which led the auditor to view Mr. Siskind's personal diaries warily, including the 1992 diary even after only a brief review. In such circumstances, the assessment of income tax for 1992 had a rational basis in the first instance.

Petitioners' reliance on the decision of the Tax Appeals Tribunal in *Matter of Fortunato* (February 22, 1990) is misplaced since the facts of that matter may be distinguished. The Tribunal noted that *Fortunato* was a case:

where the Division first destroyed relevant evidence, then neglected to ask the taxpayer for any information and then without even a scintilla of evidence to support its conclusion (for example that petitioner was employed by the same employer from 1981 through 1984) concluded that petitioner's income in 1983 and 1984 bore a direct relationship to his income in 1981 and 1982.

The Division certainly had a scintilla of evidence to assess petitioners as residents of New York for the 1992 taxable year.

K. Turning to the ultimate issue of whether petitioners have established that they were not present in New York State and City for more than 183 days during each of the years at issue, it is noted that testimony alone may well be sufficient to carry petitioners' burden of proof. The Tax Appeals Tribunal in *Matter of Avildsen* (May 19, 1994) noted:

[W]e find no support in the statute or regulations for the Administrative Law Judge's conclusion that testimony alone was insufficient as a matter of law to prove that petitioner did not spend more than 183 days in New York.

In *Avildsen*, the taxpayer's proof of days outside New York City consisted of (i) his secretary's testimony, which was based upon her review of desk diaries and calenders that she kept for the

taxpayer, and a schedule she prepared of days in and out of New York City, (ii) airline bills and (iii) telephone and utility bills for both the taxpayer's Manhattan apartment and his Hamptons (Long Island)-area home. The actual diaries and calendars were not produced by the taxpayer, nor did the taxpayer testify at the hearing.

L. In the matter at hand, unlike *Avildsen*, petitioners did not present only a third party to testify as to Mr. Siskind's whereabouts during the years at issue. Rather, Mr. Siskind testified at great length concerning his whereabouts during the years at issue. Whether Mr. Siskind accurately remembered the details concerning his whereabouts and whether he truthfully recounted these details is at the heart of this matter.

M. The diaries contained many blank days mostly for weekend days and holidays. However, as noted in Finding of Fact "32", a finding has been made that petitioners generally spent their weekends and holidays in their home in Connecticut, and Mr. Siskind's testimony, on a day-to-day basis, which confirmed his weekends in Connecticut, is accepted as credible. The Division's complaint that on several occasions, Mr. Siskind was forced to alter his position concerning his whereabouts outside New York based upon evidence of a transaction in New York charged on his American Express card does not alter the ultimate finding of fact that Mr. Siskind was a credible witness. The number of instances when Mr. Siskind was forced to revise his position did not rise to the level that his overall testimony may be dismissed as not credible.

N. As noted in Finding of Fact "47", Mr. Siskind's days in New York totaled 169, 169, and 169 for 1990, 1991, and 1992, respectively. Adding two additional days to the total for 1992, due to Mr. Siskind's inability to identify his whereabouts on March 30 and 31, 1992, as noted in Finding of Fact "44", results in a total for days in New York during 1992 of 171.

Adding an additional New York City day to 1990 because of a New York City deli charge on

either “2/8/90” or “8/20/90,” both days treated by Mr. Siskind as outside New York as noted in Finding of “Fact “42”, results in a total for days in New York of 170 in 1990. In order to be held as statutory residents of New York, petitioners must be found to have spent more than 183 days in New York. Consequently, it must be found that Mr. Siskind spent an additional 14 days, 15 days, and 13 days in New York, in 1990, 1991, and 1992, respectively, in order to hold petitioners liable for New York resident income tax. The evidence does not support an increase of such magnitude, and it is not merely Mr. Siskind’s testimony that supports the day counts determined above. In addition, Mrs. Siskind’s testimony was in support of Mr. Siskind’s recollection (*cf.*, *Matter of Tamagni*, Tax Appeals Tribunal, November 30, 1995, *confirmed*, 230 AD2d 417, 659 NYS2d 515, *affd* 91 NY2d 530, 673 NYS2d 44, *cert denied* ___ US ___, 142 L Ed 2d 280 [wherein one spouse contradicted the testimony of the other spouse concerning days spent in New York City]. Furthermore, as noted in Findings of Fact “33” and “34”, Mr. Siskind’s general working pattern was supported by affidavits of the warehouse manager of the New Jersey facility and the managing partner of the Long Island facility, which bolstered Mr. Siskind’s testimony concerning his pattern of working at these particular facilities. In sum, although there may be some question whether Mr. Siskind’s testimony and the American Express charge receipts, without the introduction of the charge statements, standing alone represented *clear* and *convincing* evidence concerning petitioners’ presence in and out of New York during the audit period, Mr. Siskind’s testimony, along with Mrs. Siskind’s testimony and the affidavits as discussed in the findings of fact, rise to such level of proof (*cf.*, *Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, *annulled in part* 204 AD2d 916, 612 NYS2d 503, *modified* 86 NY2d 165, 630 NYS2d 680, *cert denied* 516 US 989, 133 L Ed 2d 426 [wherein the Tribunal noted that the clear and convincing standard of proof, not the preponderance of the evidence

standard, is applicable to income tax audit cases]).

O. In light of the above analysis, the issue designated “VIII” at the beginning of this determination is rendered moot.

P. The petition of Bernard and Pearl Siskind is granted, and the Notice of Deficiency dated July 20, 1995 is cancelled.

DATED: Troy, New York
March 11, 1999

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE