

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
DR. CHARLES F. BRUSH, III	:	
AND	:	DETERMINATION
THE ESTATE OF ELLEN S. BRUSH	:	DTA NO. 817204
	:	
for Redetermination of a Deficiency or for Refund	:	
of New York City Personal Income Tax under the	:	
New York City Administrative Code for the Years	:	
1991, 1992 and 1993.	:	

Petitioners, Dr. Charles F. Brush, III and The Estate of Ellen S. Brush, 42 Ram Island Road, Shelter Island, New York 11964, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the New York City Administrative Code for the years 1991, 1992 and 1993.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 5, 2000 at 10:45 A.M., was continued at the same location on June 6, 2000, and was continued to completion on June 7, 2000, with all briefs to be submitted by October 13, 2000, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioners appeared by Milbank, Tweed, Hadley & McCloy LLP (Robert A. Jacobs, Esq. and Joseph A. Persinger, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation correctly held petitioners subject to New York City personal income tax as resident individuals pursuant to New York City Administrative Code § 11-1705(b)(1)(A) or (B) for any of the years 1991, 1992 or 1993.

II. Whether, assuming petitioners were properly subject to tax as residents of New York City either on the basis of domicile or “statutory” resident status, penalties imposed by the Division should be abated.

FINDINGS OF FACT¹

1. On November 3, 1997, following an audit, the Division of Taxation (“Division”) issued to Charles F. Brush, III and Ellen S. Brush a Notice of Deficiency asserting additional New York City personal income tax due for the years 1991, 1992 and 1993 in the aggregate amount of \$137,672.98, plus penalties and interest. The computation portion of the notice specified the dollar amounts of tax, penalties and interest asserted as due for each of the individual years. The calculation of the dollar amounts shown on the notice is not in contest. Rather, the asserted liability arises because the Division believes Charles F. Brush, III was properly subject to tax as a resident of New York City during the subject years. Petitioners dispute this claim and assert that Dr. Brush was a domiciliary of Shelter Island, New York and was not taxable as a resident of New York City.²

¹ The parties executed a Stipulation of Facts in connection with this matter. Such stipulated facts have been included in the Findings of Fact set forth herein.

² Ellen S. Brush died on May 1, 1999. Mrs. Brush, and now her estate, is party to this proceeding because she filed Federal and New York State personal income tax returns jointly with her husband, petitioner Charles F. Brush, III. Unless otherwise noted, Charles F. Brush, III and Ellen S. Brush or the Estate of Ellen S. Brush, as contextually appropriate, will be referred to jointly as petitioners, while the singular term petitioner will refer to Charles F. Brush, III.

2. Petitioners challenged the Division's Notice of Deficiency by filing a Request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On May 21, 1999, following a conciliation conference, a Conciliation Order (CMS No. 165962) was issued sustaining the Notice of Deficiency. Petitioners continued their challenge by filing a petition with the Division of Tax Appeals.

3. On October 14, 1999, petitioners filed a motion for summary determination seeking cancellation of the asserted deficiency. Petitioners maintained in their motion that there are no material facts in dispute, and that the facts as set forth by petitioners in the moving papers established, as a matter of law, that Charles F. Brush, III was not a domiciliary of New York City and thus was not subject to New York City personal income tax as a resident for any of the years in issue. Petitioners further claimed that the question of whether Charles F. Brush, III was subject to tax as a so-called "statutory" resident of New York City was not raised as an issue in this case until the Division filed its answer to the petition.³

4. The Division opposed petitioners' motion for summary determination, arguing that the facts of this matter are not undisputed, and maintained the position that petitioner was a domiciliary of New York City. Further, the Division asserted that the question of statutory resident status has always been an issue in this case. Finally, the Division cross moved for summary determination that a certain apartment located at 655 Park Avenue, New York, New York, constituted a permanent place of abode maintained by petitioner Charles F. Brush, III.

5. By an Order dated March 13, 2000, petitioners' motion for summary determination was denied as was the Division's cross motion for summary determination, upon the conclusion that

³ A "statutory" resident of the City of New York is an individual who maintains a permanent place of abode within the City of New York and spends, in the aggregate, more than 183 days in a given year in the City (*see*, Administrative Code §11-1705(b)(1)(B)).

after review of the motion papers, affidavits, affirmations and pleadings, there remained unresolved material issues of fact concerning petitioners' intent with regard to domicile, the number of days spent in New York City by petitioner Charles F. Brush, III, and the question of whether petitioner "maintained" a permanent place of abode in the City.

6. Petitioners have admitted, contrary to their position at the time of audit, that Ellen S. Brush was a domiciliary of New York City, whose home was 655 Park Avenue before and during the years at issue. However, petitioners maintain that Charles F. Brush, III was a domiciliary of Shelter Island, New York, whose home was located at 42 Ram Island Road before, during and after the years at issue. In fact, petitioner claims that he has not been domiciled in New York City at any time since he left his mother's home in Riverdale, New York or, at the latest, at any time since 1945, the year of his first marriage.

7. Petitioner Charles F. Brush, III was born in Cleveland, Ohio in 1923, and subsequently moved to Riverdale, New York with his mother and stepfather in 1927. He traveled extensively as a youth, including a 1941 trip around the world at age 17 with his mother. After graduating from the Fountain Valley School in Colorado in 1941, petitioner commenced undergraduate studies at Yale University in New Haven, Connecticut. He interrupted his studies to serve in the U.S. Army Signal Corps from 1943 to 1945 and, in 1945, married his first wife, Barbara Porter Brush, in Missouri. He returned to continue his studies at Yale in 1945, settling at that time, with Barbara and their daughter, in a two-bedroom saltbox style home he purchased in nearby Woodbridge, Connecticut. Petitioner earned a B.A. degree in Sociology from Yale in 1947, and an M.A. degree in Sociology from Yale in 1948.

8. Petitioner and Barbara Porter Brush were divorced in 1949, and petitioner moved to 193 Whitney Avenue, New Haven, Connecticut, where he resided in a rented room at the New

Haven Lawn Club. He married his second wife, Joan Labora, in Connecticut on January 11, 1950 and continued at Yale as a research associate until 1952. Petitioner and Joan Labora spent time working together in Jamaica, BWI, and petitioner purchased a house there. During this period of time his United States passport, issued in Jamaica, identified his address in the United States as 193 Whitney Avenue, New Haven, Connecticut. Petitioner and Joan Labora Brush were separated in 1954, and divorced in 1958.

9. After separating from Joan Labora Brush in 1954, petitioner returned from Jamaica to begin his doctoral studies in anthropology at Columbia University. This program of study required petitioner to spend large amounts of time engaged in research outside the United States. In 1958, petitioner married his third wife, Ellen Sparry, who was also engaged in doctoral studies in anthropology at Columbia University. Ellen Sparry Brush was born and had been raised in New York City, and her parents resided in New York City.

10. Petitioner continued to rent the room at 193 Whitney Avenue, New Haven, Connecticut. In addition, from 1958 to 1962 while he and Ellen S. Brush pursued their degrees at Columbia, petitioner rented what was termed a “convenience apartment” at 791 Park Avenue, New York, New York. Between 1958 and 1962, petitioners lived in this apartment when they were in New York City, with respect to which time frame petitioner explained “we had to have someplace to live.”

11. In 1960, Ellen S. Brush gave birth to petitioners’ daughter Karen A. Brush and in 1963 she gave birth to petitioners’ son Charles F. Brush, IV. In 1962 petitioner purchased an apartment at 655 Park Avenue, New York, New York, “for use by petitioners when they were in New York City.” It is this apartment, described hereinafter, which petitioners claim was Ellen Brush’s home and domicile before and during the years in issue, but was allegedly not

petitioners's home and domicile. Petitioners spent time in New York City between 1958 and 1969, but also traveled extensively as was required during this period in connection with their academic pursuits, including extended time periods spent doing archeological excavations in the Gueraro, Mexico area.

12. A December 26, 1993 article appearing in the New York Times just prior to petitioner's 1994 sale of the 655 Park Avenue apartment was relied upon by the Division's auditor in conducting his audit and forming his conclusion as to petitioner's domicile. This article describes the 655 Park Avenue premises as a nine-room, four-bedroom apartment, with a working fireplace in the living room, plus a 3,000-square-foot terrace and greenhouse. The apartment included a library, dining room, kitchen, and three bathrooms. The article characterized the apartment as a "penthouse," although petitioner clarified the error of this statement, by noting that the apartment was not located on the top floor of the apartment house building. The article includes a photograph of petitioner standing in the terrace area of the apartment. Petitioner did not provide the information or basis for the statement appearing in the article indicating that the entire Brush family always returned to 655 Park Avenue after their travels to various distant places.

13. In 1964, petitioner purchased property located on the far eastern end of Long Island at 42 Ram Island Road, Shelter Island, New York, including a house and approximately 11 acres. The house was a modest 1950s style residence, with no outbuildings, pool or dock. Petitioner claims that this 1964 purchase was made with the intent that the Shelter Island premises would become his home when he completed his Ph.D. studies at Columbia. Petitioner used both the 655 Park Avenue premises and the Shelter Island premises between 1964 and 1969 while

attending graduate school at Columbia in pursuit of his doctorate. He wrote much of his Ph.D. dissertation at Shelter Island.

14. Over the years from 1964 through 1994, petitioner made a number of significant improvements and additions to the Shelter Island property, including building a jetty, a dock, a two-story garage including living quarters and his primary office (or study), a circular addition to the house, a wine cellar approximately 15 feet by 20 feet in dimension, some smaller outbuildings, a large deck and a swimming pool. Petitioner, along with his son Charles and local laborers hired by petitioner, also cut numerous walking trails throughout the 11-acre property. Petitioner was directly involved in the planning and physical building of the additions and improvements at Shelter Island. As existing during the years in issue, the Shelter Island premises included five bedrooms, with one used as a library, and two living rooms. After completing his wine cellar at Shelter Island, petitioner's wine collection, which had been stored with various merchants in New York City, was moved to Shelter Island. Petitioner maintained his wine collection, his portion of petitioners' extensive collection of Taiwanese aboriginal art, his ceramics and several tons of potsherds from various excavations at Shelter Island during the years in issue.⁴

15. In contrast to the additions and improvements at Shelter Island, petitioner installed a prefabricated greenhouse on the terrace at 655 Park Avenue, installed larger windows overlooking the terrace, and also replaced the "wall sleeve" air conditioning units. One of the four bedrooms at 655 Park Avenue was used as a study by Mrs. Brush. Petitioner did not have a study at 655 Park Avenue.

⁴ Petitioners divided their large collection of Taiwanese aboriginal art between the two of them in 1969, with Mrs. Brush's portion of the collection remaining at 655 Park Avenue.

16. The travel time between 655 Park Avenue and Shelter Island, a distance of approximately 110 miles, ranged from two and one half hours to more than three hours, depending on the traffic.

17. Ellen S. Brush received her doctorate from Columbia in 1968, and Charles F. Brush, III received his doctorate from Columbia in 1969. Over the years the Brush family, consisting of petitioners and their children, Charles F. Brush, IV and Karen Brush, regularly spent time during the summer months from June through mid-September together on Shelter Island, spent many weekends there on a year-round basis, and also spent many holidays there. For the balance of the year, and when not traveling, Ellen Brush and the children lived in New York City at the 655 Park Avenue apartment.

18. Petitioner and Ellen S. Brush remained married for some 41 years until Ellen S. Brush's death in May 1999, but led in many aspects essentially separate lives. Their relationship is thus not accurately described as that of a traditional marriage, and is perhaps most succinctly summarized in the affidavit and testimony of Karen A. Brush, who stated that "[m]y parents loved each other deeply, but were unable to live together for any length of time, due in part to my mother's abuse of alcohol . . . and to my father's constant need to travel and somewhat difficult personality."

19. During the summer months from June through September, 655 Park Avenue would essentially be closed down ("mothballed"). The rugs were rolled up, the drapes were removed and sent out for cleaning, and the furniture was covered with cloths. Petitioners' pets and their housekeeper and cook went to Shelter Island for the summer. In earlier years, petitioners' children were enrolled in summer-long sailing classes on Shelter Island. During the years 1991 through 1993, petitioners' son Charles F. Brush, IV spent the summers living at 655 Park Avenue

by himself, with trips to Shelter Island on the weekends and at other times to help maintain the premises there, including mowing the lawn, clearing brush and the like. During at least one of these years, he established a music recording setup at 655 Park Avenue. In connection with describing the infrequency of petitioner's visits to 655 Park Avenue, he noted that his father did not see or learn of the recording setup at 655 Park Avenue.

20. On August 19 and 20, 1991, Hurricane Bob hit Eastern Long Island including Shelter Island, leaving a great deal of damage. Petitioner and his son, along with various local day laborers hired by petitioner, worked for some period of time to cut trees and clear debris left from the storm. These day laborers, described as itinerant workers, were hired on a number of other occasions by petitioner to work with him at Shelter Island. They were paid, either individually or through their foreman, on a daily basis via checks drawn by petitioner on his account with the Shelter Island branch of the Bank of New York. When these laborers were paid through their foreman, petitioner would draw a check payable to cash, which could then be cashed and disbursed to the workers by the foreman.

21. Petitioners' children received their elementary and secondary education at private schools in New York City during the fall, winter and spring months. Thereafter Karen A. Brush attended and graduated from Yale with a B.A. degree in invertebrate paleontology. She continued her studies at the University of Kansas in 1983, returned to New York City in 1984 and rented an apartment there from the summer of 1984 through 1985. In 1986 she earned a Master's degree from Yale in invertebrate paleontology. She commenced a Ph.D. program at Columbia, but transferred to Cambridge, England in 1988. She was in Cambridge from January 1991 through April 1, 1991, returned to New York where she split time between 655 Park Avenue and Shelter Island, until June 18, 1991 at which time she returned to Cambridge. She

remained in England until November 1992, at which time she returned to 655 Park Avenue, where she remained based and working on her Ph.D. dissertation in medieval archaeology, except when visiting Shelter Island or otherwise traveling. She did return to England at the end of 1993 for the Christmas and New Year holiday, staying with her family in an historic house rented by petitioner. Charles F. Brush, IV attended Wittenberg College in Ohio and graduated with a B.A. degree in history in 1986.

22. Both of petitioner's children considered his presence at 655 Park Avenue to consist of a "handful of days" at best. When Karen A. Bush was in England, she would not telephone 655 Park Avenue to speak with petitioner, but rather would call him either at Shelter Island or in Sausalito or, if he was not at either of these places, she would contact petitioner's personal assistant Jean Taylor to learn his whereabouts and would then call him. While petitioner traveled on a very frequent basis, he generally did not travel as extensively or for periods of longer duration in the summers as compared to the winters. Petitioner did attend most, if not all, of the meetings of the boards of directors of Brush Wellman, Inc. and the other organizations for which he was a director. Typically, this required him to fly from and return to New York City airports (LaGuardia or Kennedy), although sometimes petitioner's flights would begin or end at the Islip Airport on Long Island with connecting flights through Newark, New Jersey. The Islip airport was more convenient and much closer to Shelter Island than were the New York City airports.⁵ However, flights to and from Islip were generally more available in the summer months than during the winter months, and he tried to use the Islip Airport whenever practicable.

⁵ According to petitioner, the Islip Airport is about 35 miles from Shelter Island whereas the New York City airports are about 100 miles from Shelter Island.

23. Ellen Brush had a serious problem with alcohol abuse. She began drinking heavily in the 1960s and was described as a “Jekyll and Hyde” personality, and an “all or nothing drinker” whose personality changed from essentially docile and endearing to a mean and verbally abusive drunk. When drunk, she was described as coarse, accusatory, bellicose and belligerent. The extent of Mrs. Brush’s problem with alcohol abuse led her to treatment for one month at the Hazleton Foundation in Center City, Minnesota in or about 1985. The treatment program was not successful and she resumed drinking shortly after her treatment ended.

24. When petitioner and Mrs. Brush were together, either at Shelter Island or when they traveled together, Mrs. Brush drank rarely if at all. Mrs. Brush was described as drunk 90 percent of the time in New York City, sober 90 percent of the time at Shelter Island, and not a drinker when she was traveling. However, when petitioner was not with Mrs. Brush or upon the advent of his return from his extensive travels, she would drink. Exacerbating this situation was the fact that petitioner traveled extensively without telling Mrs. Brush his whereabouts or when he might be returning. While petitioner spent significant time living on his houseboat in Sausalito, California during the winters, Mrs. Brush and the children never visited the houseboat, save for one visit by Charles F. Brush, IV which occurred after the years in issue. The only person who was consistently advised by petitioner as to his whereabouts when traveling was his personal assistant, Jean Taylor. This situation, in conjunction with the fact of his ongoing and extensive travel, caused great difficulty for Mrs. Brush in portraying the social image that she and petitioner lived together in a harmonious and traditional marriage. Petitioner, for his part, did not challenge the accuracy or import of many of the outward indications maintained by Mrs. Brush that they lived together, based on his view that such claims were not significant and, apparently,

as a kind of concession to her desire in this regard to portray the social facade of a typical married couple.

25. In addition to the Shelter Island and 655 Park Avenue premises described above, Charles F. Brush, III alone, or together with Ellen S. Brush, owned a number of other properties during and after the years in issue, as follows:

- an apartment at 336 Central Park West, New York, New York, occupied by petitioner's first wife Barbara Carter Brush.

- a house in Huntington Beach, California occupied by petitioner's step-daughter Danielle Schmid and her daughter Kelly.

- the Spruce Goose Too, a houseboat docked in Sausalito, California which petitioner claims as his winter residence.

- a houseboat held as rental property and also docked in Sausalito, California.

- premises located at 76 Cartwright Road, Shelter Island, New York purchased and maintained for Ellen S. Brush's parents during their lifetimes and rented sporadically thereafter.

- an apartment located at 360 East 72nd Street, New York, New York, used as an office by petitioner's personal assistant, Jean Taylor, and his former bookkeeper, JoAnn Creighton.

- a two-bedroom apartment at 1050 Fifth Avenue, New York, New York, purchased in 1994 after the sale of the 655 Park Avenue premises.

26. Petitioner's houseboat in Sausalito, California was 20 feet by 40 feet in dimension.

The houseboat was in a very deteriorated condition when purchased by petitioner, and had to be completely rebuilt starting in early 1991.

27. Petitioner's personal (primary) doctor, Edgar Grunwaldt, M.D. has his office on Shelter Island. Petitioner's dentist, Arthur S. Lamia, D.D.S. has his office approximately one mile away from Shelter Island in Greenport, New York. Petitioner was present in Dr. Lamia's offices in Greenport for dental procedures in 1991 on July 2nd, September 18th and November 6th;

in 1992 on June 15th , August 31st , and December 19th and 21st ; and in 1993 on March 29th and 31st , April 12th , June 12th , July 26th and 27th , August 11th , October 30th , November 9th , 13th , and 20th , and December 18th . Medicare statements specify visits to Dr. Grunwaldt's office in 1991 on July 2nd , and September 5th , 6th and 8th ; and in 1992 on July 3rd and 25th . Petitioner has consulted with and been treated by various other medical professional over the years, including undergoing surgical procedures in California and cardiac tests and procedures in Cleveland, Ohio. Petitioner has had no overnight hospital stays in New York City hospitals during the past 15 years.

28. As noted earlier, petitioner's principal office (or study) is located at Shelter Island. Petitioner also maintains, but seldom personally uses, an office at 360 East 72nd Street in New York City. He has, for many years, engaged Jean Taylor to serve as his personal assistant. During the years in question petitioner also engaged, on a part-time basis, a bookkeeper, one JoAnn Creighton, and a computer specialist, one Harriet Moulton, to assist Jean Taylor. These individuals performed their duties at the 72nd Street office. Most of petitioner's personal and family bills, as well as many periodicals and newsletters he subscribes to, are received at this 72nd Street office, where Mrs. Taylor provides the essential family services required by Charles F. Brush, III, including maintaining some 60 years of permanent family financial and real estate records and correspondence in cabinets and approximately 30 permanent file boxes.

29. Petitioner banks with Chase Manhattan Private Bank, located at 1211 Avenue of the Americas, New York, New York, and maintains his safe deposit box at Chase's 360 East 72nd Street offices, where Jean Taylor maintains his financial and real estate documents. Petitioner also has bank accounts at the Bank of New York on Shelter Island and at the WestAmerica Bank in Sausalito, California. The vast majority of petitioner's bills are in fact paid by Mrs. Taylor

through the 72nd Street office. In contrast, the Bank of New York (Shelter Island) and WestAmerica (Sausalito) bank accounts are used by petitioner for his incidental expenses and cash needs when he is at such locations. For example, bills for petitioner's credit cards are addressed to the 72nd Street office, while payments for itinerant day laborers and for local (Shelter Island) fees such as automobile registrations and dock permit fees are made by checks drawn by petitioner on his Bank of New York account in Shelter Island. In contrast, however, safe deposit box rental invoices, some legal correspondence and bills for legal services, and some brokerage statements were mailed to petitioner at 655 Park Avenue during the years 1991, 1992 and 1993.

30. In earlier years, Mrs. Brush took care of paying the bills (physically writing checks), but problems occasioned by her drinking and, apparently, by her overly generous nature, led petitioner to the decision to hire Jean Taylor to pay all bills. Mrs. Taylor and petitioner's accountant prepared the payment checks, apparently on the Chase Private banking account, for bills to be paid, and petitioner signed the checks. This signing apparently took place either at the 72nd Street office when petitioner went there, or at Shelter Island. In this latter regard, Jean Taylor also owns a home near Shelter Island and from time to time (approximately twice per month) she would bring items of mail, periodicals and, presumably, checks to be signed, to petitioner at Shelter Island.

31. Petitioner had five credit cards: American Express, Master Card, Diners Club, Discover, and AT&T Universal. Despite claims that only petitioner used certain of these cards, it appears that they were used by various family members for various purchases and, on occasion, by Jean Taylor to make mail order purchases as directed by petitioner. Most of the non-credit card purchases at 655 Park Avenue were made as house charges ("on account") with various

local merchants. Some purchases on Shelter Island were made by credit card, by both petitioners and apparently by their children. Other purchases of goods and services at Shelter Island, including payments by petitioner to various day laborers doing cleanup work on the premises in the wake of Hurricane Bob and at other times, were also made by check drawn by petitioner on the Shelter Island branch of the Bank of New York.

32. Petitioner viewed his time in New York City as “utilitarian” time, where he either met with his personal assistant and his bookkeeper, embarked on or returned from a trip by plane, or attended a function organized by or involving his wife. With regard to New York City petitioner stated, unequivocally, that “I don’t like New York City. I don’t like the crowds. I don’t like the dirt. I don’t like anything about the city . . . I don’t like any city.” Petitioner stated that he would be in New York City mainly when there was some specific reason requiring his presence there and described his time in New York City as “camping out,” stating that he “never considered himself to be living [in New York City].” Petitioner flatly stated that “655 Park Avenue is not my home . . . it has never been my home.” Petitioner kept a very limited wardrobe at 655 Park Avenue, consisting essentially of a change of clothes.

33. Petitioner did sometimes stay overnight at 655 Park Avenue, but claimed that these instances were not frequent due to the harassment he would usually be confronted with when Mrs. Brush had been drinking. Petitioner’s description of “needing permission” to stay at 655 Park Avenue consisted, usually, of his making a phone call prior to arriving at 655 Park Avenue in an attempt to see if Mrs. Brush had been drinking, the result of which would determine whether or not he stayed the night.

34. Ellen Brush was active during the years in question in the American Scandinavian Society and in the Society of Women Geographers, both of which are centered in New York City.

She also was actively involved with the Shelter Island Garden Club and the Shelter Island Library. Mrs. Brush did not work in New York City or elsewhere, or derive any earned income during the subject years. Aside from some comparatively small amounts of investment income received by Ellen S. Brush, petitioner was Mrs. Brush's sole source of support. Except for the investment income received by Ellen S. Brush, the income at issue in this proceeding is petitioner's income, the bulk of which is derived from family trusts and investments. Petitioner received no employment income during any of the years at issue other than some corporate director fees, none of which was attributable to any services performed by him in New York City.

35. Petitioner pays all of his own expenses, as well as those associated with the various properties owned, including 655 Park Avenue. He also paid his wife's expenses and, apparently, many of his children's expenses, plus housing costs and some other expenses for his former wives and some of their children. Petitioner personally used only the Shelter Island premises, the Sausalito houseboat and, on occasion, 655 Park Avenue. The other properties listed were maintained by petitioner for family members or loved ones.

36. The accounting firm formerly engaged by petitioner to prepare Federal, State and local tax returns for the Brushes did not report Ellen S. Brush's investment income as subject to New York City personal income tax for a number of years, including those at issue. Petitioner engaged the services of a new accounting firm and, on July 29, 1999, amended returns were filed for the years 1991 through 1997 reporting such investment income as subject to New York City personal income tax, presumably on the basis of the admission that Ellen S. Brush was a New York City domiciliary, and the tax due thereon was paid. Notwithstanding the time that Mrs. Brush spent on Shelter Island and certain indicia connecting her to Shelter Island (e.g., voter registration, serving jury duty, etc.) which might lend themselves to an argument that Mrs. Brush

was a Shelter Island domiciliary, petitioners have specifically conceded that Mrs. Brush was a domiciliary of New York City whose home was 655 Park Avenue before and during the years in issue, and raise no challenge that Mrs. Brush spent 183 or more days outside of New York City during any of the years in issue.

37. Petitioner does not hold a “regular” job or perform work in the more ordinary sense of the word. Due to his holding of stock in organizations founded by earlier generations of his family and to interests in certain trusts established by family members, petitioner enjoys an income sufficient to allow him pursue whatever activities he finds interesting, to provide financially for his family including what could be termed his extended family of former spouses and in-laws, to travel at will and to live wherever and for whatever reasons, including desire or whim. Petitioner performs his “work” from four offices, all located outside of New York City, maintained by or made available to him. He has access to and uses two offices made available to him by corporations in which he has a significant financial interest and for which he serves on the boards of directors. He also has an office available to him at Yale University. His principal office or study has, since 1969, been maintained at the Shelter Island premises as described earlier.

38. Petitioner lists several organizations, none of which is headquartered in New York, with which he has been involved. Their locations, and his role therein, are as follows:

<u>ORGANIZATION</u>	<u>POSITION</u>	<u>LOCATION</u>
Brush Wellman, Inc	Director	Cleveland, Ohio
Deep Ocean Engineering	Director	San Leandro, Cal.
The Brush foundation	Trustee	Cleveland, Ohio
Sierra Club Foundation	Trustee	San Francisco, Cal.
Sierra Club-Sierra Club Foundation		
Joint Development Committee	Chairman	San Francisco, Cal.
Institute of Noetic Sciences	Director	Sausalito, Cal.

Peabody Museum-Yale University
Committee on Peabody Museum
Yale Club of Shelter Island

Chairman
President

New Haven, Conn.
Shelter Island, N.Y.

Petitioner attempts to attend as many of the meetings of these various organizations as he can, and he attended nearly all, if not 100 percent, of the Brush Wellman, Inc. directors' meetings in Cleveland.

39. Petitioner also lists many (some 30) philanthropic and educational organizations to which he contributed. None of the organizations listed were headquartered in New York City. The only listed organizations with New York locations were in Shelter Island, New York and Greenport, New York, with the balance of the listed organizations located in Washington, D.C., Ohio, California, Connecticut, Virginia and Colorado.

40. Many documents list petitioner's address as 42 Ram Island Road, Shelter Island, New York, including his driver's licence, automobile registration, passport, wills, voter records, listing in Who's Who In America, and the like. Other documents dating mainly from the 1950s and 1960s, including Federal security clearance applications, passport, and the like, list the 193 Whitney Avenue, New Haven, Connecticut address.

41. Petitioners' 1993 Christmas card provided the following address listings:

New Winter Addresses

Ellen
1050 Fifth Avenue
New York, N.Y. 10028

212-737-6560

and

Charlie Brush
Spruce Goose Too
Berth 5, Gate 6½
Sausalito, CA. 94965
415-331-2131

This dual listing was a cause of upset and embarrassment to Ellen Brush, in that the same was inconsistent with her desire to portray the facade that she and petitioner lived together at all

times. Petitioner expressed his regret, in hindsight, at his decision to send the card showing the separate addresses.

42. The May 1999 Certificate of Death issued for Ellen S. Brush lists her address as 1050 Fifth Avenue, New York, New York, but lists petitioner's address as 42 Ram Island Road, Shelter Island, New York.

43. The premises at 655 Park Avenue were sold in 1994, with the premises at 1050 Fifth Avenue purchased thereafter. The sale was made after petitioners' children Karen and Charles decided in 1993 to move out of the 655 Park Avenue premises, and thus a smaller, two-bedroom apartment at 1050 Fifth Avenue was purchased as Mrs. Brush's personal residence. Petitioner did not elect, for income tax purposes, to exclude from income the amount of the sales proceeds from 655 Park Avenue which were reinvested in the replacement apartment at 1050 Fifth Avenue, thus foregoing a significant tax savings. The asserted reasoning behind this choice was that the apartment at 655 Park Avenue was not his principal residence and therefore the tax election to exclude was not available to him. On the Real Estate Transfer Tax Return for this sale, petitioner did claim that the transfer was exempt from the (former) gains tax (Tax Law former Article 31-B) as premises used as a residence (although not as his residence) as opposed to business property.

44. Petitioner has relied upon various professional service providers and advisors, including accountants, lawyers, bankers and physicians, located in New York City, Cleveland, Ohio, Shelter Island, New York, California, and elsewhere, depending upon their particular expertise and the nature of the particular job to be done.

45. Petitioners were listed in the 1997 New York City Social Register as living at 1050 Fifth Avenue. The 1992 and 1993 Social Registers were sent to petitioners at 655 Park Avenue.

Petitioner Charles F. Brush, III was, during the years in issue, listed in the NYNEX phone book as having a telephone at 655 Park Avenue.

46. Petitioner's Who's Who in America (43rd ed. 1985) entry lists his residence as "42 Ram Island Road, Shelter Island, NY 11964." Petitioner is registered to vote in Shelter Island and voted in 26 Shelter Island elections between 1969 and 1996, with all votes cast by him in person at the Shelter Island polling place, save for two absentee ballots. Petitioner served jury duty on Shelter Island in 1990 while Mrs. Brush did so in 1994. Petitioner's 1991 Saab automobile is registered at the Shelter Island address, his passport in effect during the years in issue, and driver's license shows this address, and each of the wills he executed in 1975, 1984, 1985 and 1992 identify his residence as Shelter Island, New York. For his 50th Yale College reunion, petitioner identified his addresses as Shelter Island, New York and Sausalito, California. Petitioner's vehicle (the 1991 Saab) was kept at Shelter Island, and he has never applied for or possessed a New York City Parking Tax Exemption Certificate.

47. Petitioner took up marathon race walking, for which he trained in Shelter Island, at the age of 50. He prepared for his extended expeditions, including mountain climbing, at Shelter Island.

48. Certain magazine subscriptions addressed in petitioner's name to 655 Park Avenue were in fact subscriptions taken by Ellen S. Brush or the children, as were memberships in certain New York City social clubs or organizations and affiliations (e.g., New York Junior League, Cosmopolitan Club, City Garden Club of New York).

49. Petitioner belonged to a number of clubs, including clubs located in New York City such as the Explorer's Club, Yale Club, Union Club, Coffee House Club, Century Association and the New York Athletic Club. These memberships were primarily for convenience and social

use, and petitioner resigned from many of them in or about 1991 when his income was somewhat reduced following a reduction in Brush Wellman, Inc. dividends.

50. Petitioner's oldest daughter, Barbara Wright, and petitioners' son, Charles F. Brush, IV, were listed on petitioner's passport as the persons to contact in the event of an emergency. Petitioner was not confident that his wife, in a drunken state, would be able to handle an emergency situation.

THE DAY COUNT

51. The Division's auditor performed a "day count" analysis as part of his audit for each of the years at issue. The auditor concluded that the information made available to him did not establish that petitioner spent fewer than 183 days in New York City during any of the years in question. More specifically, while the auditor found some 50 days on which petitioner established that he was not in New York City (i.e., petitioner established that he was somewhere else) he concluded that the balance of days for each year in issue had not been established as non-New York City days (referred to as "undocumented" days). Coupling this review with his conclusion that petitioner maintained a permanent place of abode at 655 Park Avenue resulted in the auditor's determination that petitioner was properly taxable as a statutory resident of the City.

52. Petitioners produced three schedules of Charles F. Brush, III's whereabouts during the years in question. The first was produced by petitioner's personal assistant Jean Taylor early in the audit, when many of the records underlying such schedule were not physically in her possession but rather were in the possession of petitioners' former representatives to be provided to the auditor for his review. The second schedule was produced about a year later, and the third was produced for presentation in connection with this proceeding. Each schedule was progressively more detailed and required more effort to produce, and each is somewhat different

in result, with the later schedules claiming a number of days initially shown as New York City days to be days spent outside of New York City, either at Shelter Island or elsewhere. In reviewing records and producing these schedules, Jean Taylor and Harriet Moulton were advised by petitioner's representatives to proceed under the assumption that petitioner's presence in New York City on any part of a day was to be counted as a New York City day for statutory resident purposes. Petitioner's witnesses Jean Taylor and Harriet Moulton explained that the first two schedules were of a "rough" nature because the actual documentation was not physically in their possession, whereas the third and final schedule is far more detailed and allegedly more accurate because of the time and effort expended in combing through voluminous records. The documents relied upon in preparing the schedules were provided in evidence at hearing, including airline frequent flyer mileage statements, credit card billing statements, passports, prescription drug records, and the like. This evidence, together with the schedules, was used to assist petitioner's recall regarding his whereabouts as he testified during the course of the hearing.

53. After review of the documents and schedules, the parties arrived at an agreement concerning the number of days petitioner was present in New York City, the number of days he was out of New York City and the resulting number of days in dispute. This agreement, as of the close of the hearing, provided as follows:

<u>YEAR⁶</u>	<u>AGREED DAYS IN NYC</u>	<u>AGREED DAYS OUT OF NYC</u>	<u>DISPUTED DAYS</u>
1991	128	131	106
1992	80	143	143
1993	66	119	180

The foregoing total of days includes as New York City days any situation where petitioner was present in New York City on any part of a day, save for instances where his presence in the City was alleged to be only incidental to traveling to or returning from another, non-New York City, destination, and the instance where petitioner seeks to treat the days June 3 through June 7, 1991 as non-New York City days because his presence in New York City was only in connection with his wife's hospitalization there for treatment of an infected bug bite.

54. The following pages provide a detailed listing of the days remaining in dispute for each of the years in issue, as specified by date in the Division's post-hearing brief in comparison to petitioner's schedules at Exhibit "5-a, b and c." The middle ("Places") column and the right ("Notes") column reflect information on petitioner's claimed whereabouts as well as information concerning the disputed days including, where available, a brief description of the basis for the claim.

⁶ For 1991, the parties' initial summary of days listed 133 New York City days, 135 non-New York City days and 97 disputed days (Exhibit "2-a"). At the commencement of proceedings on June 7, 2000, the parties stipulated to a revised summary of days under which nine days were changed from agreed days to disputed days. Specifically, the five days spanning June 3rd through 7th, originally conceded as New York City days by petitioner, are now in dispute under the claim that petitioner was present in New York City only in connection with his wife's hospitalization, and the four days spanning October 7th through 10th, originally agreed to by the Division as non-New York City days when petitioner was in Vermont are now in dispute. The total set forth in Finding of Fact "53" reflect the revised summary of days in accordance with the parties' June 7th stipulation (Exhibit "8").

1991

<u>DATES</u>	<u>PLACES</u>	<u>NOTES</u> ⁷
01/17 - 01/21	Shelter Island	No specific evidence or recall for the 17 th or 18 th ; 19 th and 20 th are weekend days; Shelter Island car service on 21 st from Greenport. L.I. by local driver to NYC airport for flight to Cleveland for directors' meeting for Brush Wellman, Inc.
02/03	Greenwich, Ct.	No specific evidence or recall of going directly from Greenwich, Ct. to NYC airport on 3 rd .
02/23	Shelter Island	On Shelter Island (undisputed) the prior (22 nd) and following (24 th) days; participated in 10 kilometer race-walk on Shelter Island on 24 th ; 23 rd is a weekend (Sat) day.
03/30 - 04/01	Shelter Island	30 th and 31 st are (Easter) weekend days; no specific evidence or recall for the 1 st .
04/02 - 04/03	Toronto, Canada	Specific recall of visiting friend for birthday; passport entry stamped on 2 nd ; cash advance taken in Toronto on 3 rd .
04/18 - 04/20	Shelter Island	No specific evidence or recall for the 18 th ; Bank of NY checks paid to local carpenter on 19 th and for lawn mowing on (Sat.) the 20 th .
05/25 - 05/27	Shelter Island	Memorial Day long weekend with family; Sunrise Coach from Shelter Island to NYC airport on 27 th for

⁷ A weekend, absent any other specific description, claim, or recall of a "long weekend," is presumed to include only Saturday and Sunday.

		flight to Cleveland for Brush Wellman, Inc. directors' meeting. ⁸
05/31 - 06/01	Shelter Island	Flight from San Francisco to NYC with Sunrise Coach to Shelter Island on 31 st ; Yacht Club commissioning; 1 st is a weekend (Saturday) day.
06/04 - 06/06	New York City	Solely in New York City in connection with Mrs. Brush's hospitalization at Lenox Hill Hospital for treatment of an infected bug bite; hospital stay was from admission on the 3 rd through discharge on the 13 th . ⁹
06/07 - 06/12	Shelter Island	No specific evidence or recall for 7 th ; 8 th and 9 th are weekend days; Bank of NY checks paid to local laborers on 10 th , 11 th and 12 th .
06/14 - 06/17	Shelter Island	No specific evidence or recall for 14 th or 17 th ; 15 th and 16 th are weekend days.
06/28 - 07/06	Shelter Island	28 th is listed as a NYC day on petitioner's schedules; 29 th and 30 th are weekend days; dentist's affidavit plus Medicare statement for appointment on the 2 nd ; golf lesson on the 2 nd ; July 4 th holiday with town fireworks display and party on the 6 th ; the Division concedes the 2 nd as a Shelter Island day; no specific evidence or recall for the 1 st , 3 rd or 5 th .

⁸ The Sunrise Coach provides shuttle bus service between (to/from) New York City and Long Island, including Shelter Island.

⁹ As noted in Footnote "6" to Finding of Fact "53", petitioner seeks to treat the days spanning June 3rd through 7th as non-New York City days because his presence in New York City was due only to his wife's hospitalization.

07/16	San Francisco	10:00 P.M. flight from San Francisco on 16 th landed in New York on 17 th at 5:00 A.M.
07/20	Shelter Island	20 th is a weekend (Saturday) day.
08/09 - 08/21	Shelter Island	No specific evidence or recall for 9 th , 13 th through 15 th or 19 th through 21 st ; 10 th and 11 th and 17 th and 18 th are weekend days; Bank of NY checks payable to cash on 12 th and 16 th ; Hurricane Bob on 19 th and 20 th ; testimony is somewhat unclear, although it appears that petitioner was not on Shelter Island during the hurricane but went there shortly after on 22 nd .
08/23 - 08/26	Shelter Island	Sunrise Coach to Shelter Island on 22 nd ; no specific evidence or recall for 23 rd or 26 th ; 24 th and 25 th are weekend days.
09/01 - 09/17	Shelter Island	Labor Day long weekend through 2 nd ; no specific evidence or recall for the 3 rd through 6 th or 9 th through 13 th or 16 th and 17 th ; 7 th and 8 th , and 14 th and 15 th are weekend days; no specific testimony establishing who incurred credit card charge at local restaurant on 3 rd .
10/05 - 10/14	Vermont/Shelter Island	5 th and 6 th are weekend days; specific recall of trip via Point Orient to New London, Ct. ferry and through Ct. to Vermont, staying from 7 th through 10 th ; including purchase of two chairs in Vermont for use on Shelter Island; return to Shelter Island via ferry on 11 th ; 12 th and 13 th are weekend days; no specific evidence or recall for 14 th

10/21	Cleveland	Flight from Denver to Cleveland to attend Brush Wellman, Inc. directors' meeting
10/26 - 10/27	Shelter Island	26 th and 27 th are weekend days.
10/30	Shelter Island	No specific evidence or recall for 30 th ; claim of Halloween is one day early; no specific testimony establishing who incurred credit card charge at Caldor in Bridgehampton.
11/06	Shelter Island	The Division concedes the 6 th as a Shelter Island day.
11/11 - 11/15	Connecticut/Shelter Island	No specific evidence or recall for 11 th ; charge for dinner at Homestead Inn in Greenwich, Ct. on 12 th with testimony that Mrs. Brush did not have friends with whom she socialized in Connecticut; no specific evidence or recall for 12 th and 13 th ; no other specific testimony to establish who incurred credit card charge at Caldor in Bridgehampton; Bank of NY checks for local laborers on 14 th and to Shelter Island pharmacy on 15 th .
11/22 - 11/25	Shelter Island	No specific evidence or recall for 22 nd or 25 th ; 23 rd and 24 th are weekend days.
11/29 - 11/30	Shelter Island	Checked out of Ramada Inn in New Hampshire on 28 th ; no specific evidence of who placed phone call from New Hampshire on 29 th ; 30 th is a weekend (Sat) day.

1992

03/18 - 03/22	Shelter Island	No specific evidence or recall for the 18 th through the 20 th ; 21 st and 22 nd are weekend days, although petitioner's schedule (Ex 5-b) shows
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		22 nd as a NYC return day from Shelter Island.
03/26 - 03/27	Shelter Island	No specific evidence or recall establishing who made purchase of nursery items in Riverhead, L.I.
03/30 - 03/31	Shelter Island	No specific evidence or recall for 30 th or 31 st .
04/14 - 04/15	Kansas/Greenwich, Ct.	No specific evidence or recall of going directly from the NYC airport to Greenwich on 14 th ; credit card charges in Greenwich on 15 th with testimony that Mrs. Brush did not have friends with whom she socialized in Connecticut.
04/18 - 04/20	Shelter Island	18 th and 19 th are (Easter) weekend days; No specific evidence or recall for the 20 th .
04/30	Shelter Island	No specific evidence or recall of who incurred restaurant, nursery and Agway charges on Long Island on 30 th .
05/01 - 05/03	Shelter Island	Record and recall of penicillin purchase as dental prophylactic on 1 st ; 2 nd and 3 rd are weekend days.
05/06 - 05/24	France, Shelter Island	The Division concedes May 6 th through May 19 th as days spent in France on bicycle tour; no specific evidence or recall for 20 th (including who picked up Saab automobile from garage on Long Island) or 21 st ; meeting in NYC with bookkeeper JoAnn Creighton on 22 nd followed by flight to Cleveland; 23 rd and 24 th are (Memorial Day) long weekend days.
05/27 - 05/31	Shelter Island	Flight from Cleveland to Washington, D.C. to Islip, L.I. on 26 th , but no specific evidence or

recall for 27th through 29th including who incurred charges at Caldor in Bridgehampton; 30th and 31st are weekend days.

06/05 - 06/08	Shelter Island	Bank of NY checks to local laborers on the 5 th , 6 th , and 7 th ; 6 th and 7 th are weekend days; no specific evidence or recall that presence in NYC on 8 th only incidental to flying to San Francisco.
06/12 - 06/22	Shelter Island	Flight from San Francisco to Newark to Islip, Long Island on 12 th ; 13 th and 14 th , and 20 th and 21 st are weekend days; cash advance and dental appointment on 15 th ; no specific evidence or recall for 16 th through 19 th ; Shelter Island to NYC airport by bus on 22 nd incidental to flight to Cleveland on June 22 nd for Brush Wellman, Inc. directors' meeting.
07/02 - 07/07	Shelter Island	No specific evidence or recall for 2 nd but schedule indicates meeting with accountant JoAnn Creighton at 72 nd Street office on 2 nd ; no specific evidence or recall for 5 th through 7 th ; 3 rd and 4 th (Independence Day) are holiday weekend days; doctor's appointment on 3 rd .
07/12 - 07/16	Marblehead, Mass.	Specific recall of visiting Mrs. Brush's cousin James Marsh on 12 th through 14 th ; no specific evidence or recall for 15 th or 16 th .
07/24 - 07/26	Shelter Island	Return from California on 24 th but no specific evidence or recall of going directly to Shelter Island; recall of clam bake on Shelter Island on 25 th ; 25 th and 26 th are weekend days.

08/01 - 08/03	Shelter Island	1 st and 2 nd are weekend days; no specific evidence or recall for 3 rd .
08/06 - 08/17	Shelter Island	8 th and 9 th , and 15 th and 16 th are weekend days; flight from Islip, L.I. to Newark to San Francisco on 17 th ; no specific evidence or recall for 6 th and 7 th , or 10 th through 14 th .
08/21 - 08/31	Shelter Island	Flight from San Francisco to Newark to Islip, L.I. on 21 st ; 22 nd and 23 rd , and 29 th and 30 th are weekend days; dental appointment on 31 st ; no specific evidence or recall for 24 th through 28 th .
09/02 - 09/06	Shelter Island	No specific evidence or recall for 2 nd through 4 th ; 5 th and 6 th are weekend days; doctor's appointments on 5 th and 6 th .
09/22-09/30	Shelter Island	No specific evidence or recall for 22 nd through 25 th including going directly to Shelter Island on 22 nd , or for 28 th and 30 th ; 26 th and 27 th are weekend days; Bank of NY check to local laborer on 29 th .
10/01 - 10/04	Shelter Island	No specific evidence or recall for 1 st and 2 nd ; 3 rd and 4 th are weekend days; Bank of NY check to local laborer on 3 rd .
10/23 - 10/29	Shelter Island	No specific evidence or recall for the 23 rd ; 24 th and 25 th are weekend days; Division concedes petitioner was in Cleveland on 26 th and 27 th , but disputes that his presence in NYC on these days was solely incidental to traveling; no specific evidence or recall for 28 th and 29 th .
11/04 - 11/07	Shelter Island	Voted on Shelter Island on November 3 rd ; no specific evidence or recall for 4 th ; Bank of NY checks

		to local laborers clearing debris on 5 th ; no specific evidence or recall for 6 th ; 7 th is a weekend (Sat) day.
11/25 - 11/29	Shelter Island	Specific recall of Thanksgiving at Shelter Island with relatives from New Hampshire and Vermont (20 to 25 people) from 25 th through 27 th based on tradition of alternating locations for family get-together back and forth; 28 th and 29 th are weekend days.
12/02 - 12/03	Shelter Island	No specific evidence or recall for either day.
12/20 - 12/31	Shelter Island/Connecticut	20 th is a weekend (Sun) day; dental appointment on 21 st ; no specific evidence or recall for 22 nd through 24 th ; 25 th is Christmas celebrated at Shelter Island with family; 26 th and 27 th are weekend days; no specific evidence or recall for 28 th through 31 st .

1993

01/01	Connecticut	No specific evidence or recall.
01/17 - 01/24	California	Flight from Texas to San Francisco on 16 th ; flight from San Francisco to Cleveland on 25 th with return to San Francisco on 26 th ; multiple telephone calls from 655 Park Avenue to the houseboat in Suasalito, Ca. during this period (17 th through 24 th).
01/27 - 02/15	California/Shelter Island	Specific recall of attending Alexander Nevsky concert in California; return flight from San Francisco to New York on February 13 th ; 14 th is a weekend (Sun) day; Bank of NY check paid to local woodworker hired by petitioner on 15 th .

02/20	Shelter Island	No specific evidence or recall for this date; present in NYC on preceding and following days.
03/23 - 03/25	Connecticut	No specific evidence or recall of going directly to Ct. on 23 rd or of staying over in Ct.; multiple telephone calls to houseboat in Suasalito, Ca. inconsistent with claim that no one else visited or used the houseboat.
03/29 - 04/02	Shelter Island	Dental appointments on 29 th and 31 st with related dental prescriptions for penicillin on 29 th , 30 th and 31 st ; no specific evidence or recall for 1 st or 2 nd preceding flight from NYC airport to Charlottesville, Virginia on 2 nd for Noetic Sciences board meeting.
04/07 - 04/14	Shelter Island	No specific evidence or recall for 7 th through 9 th ; 10 th and 11 th are weekend days; dental appointment on 12 th ; Bank of NY checks to local laborers on 13 th and 14 th clearing land with petitioner.
04/17	New York City	In NYC on 15 th ; no specific evidence or recall of returning to Shelter Island on 16 th and then returning to NYC on 17 th for flight to San Francisco.
04/26 - 04/27	Cleveland/Geneva	Flight from San Francisco to Cleveland on 25 th for Brush Wellman Corp. directors' dinner and meeting; flight from Cleveland to NYC on 27 th and from NYC on to Geneva, Switzerland for Rolex Spirit of Enterprise Awards.
05/05 - 05/06	Connecticut/Shelter Island	No specific evidence or recall for 5 th ; Bank of NY check paid to local day

		laborers for clearing land at Shelter Island on 6 th .
05/08 - 05/09	Connecticut	No specific evidence or recall for 8 th ; flight from White Plains to Chicago to San Francisco on 9 th , but no specific recall of event other than testimony that White Plains is very close to Greenwich, Ct; 8 th and 9 th are weekend days but claim is not of a weekend spent at Shelter Island.
05/29 - 05/31	Shelter Island	Memorial day long weekend with presence in NYC on 31 st incidental to flight to Cleveland to attend Brush Wellman Corp. directors' meeting.
06/12 - 06/15	Shelter Island	Flight from San Francisco to Newark to Islip, Long Island on 11 th ; dental appointment on 12 th ; 12 th and 13 th are weekend days; Bank of NY checks to local laborers on 14 th and 15 th .
06/19 - 06/22	Shelter Island	19 th and 20 th are weekend days; Bank of NY checks paid to local laborers on 21 st and 22 nd ; flight from Islip, L.I. to Newark to Washington, D.C. on 23 rd .
06/28 - 07/04	Shelter Island	Flight from Washington, D.C. to Newark to Islip, L.I. on 27 th ; Bank of NY check paid to Town of Shelter Island on 29 th ; no specific evidence or recall for 28 th , 30 th , or 1 st ; Bank of NY check to local laborer on 2 nd ; 3 rd and 4 th are (Independence Day) weekend days.
07/14 - 08/01	Connecticut/Shelter Island	Flight from San Francisco to White Plains on 14 th but no specific evidence or recall of going to Connecticut versus NYC; no specific evidence or recall for 15 th and 16 th , or 19 th through 23 rd , or 29 th and 30 th

or of who incurred various credit card charges on some of these dates; 17th and 18th , and 24th and 25th are weekend days; dental appointments with related prescriptions on 26th and 27th ; Bank of NY checks for real estate rental commission to Shelter Island realtor and to local day laborer on 28th ; 31st and 1st are weekend days; took daughter to airport in New York City on 1st .

08/07 - 08/29

Shelter Island/California

7th and 8th are weekend days; no specific evidence or recall for 9th or 10th ; dental appointment on 11th; Bank of NY check paid to local laborer on 12th ; specific recall of overnight visit with friends in New Haven, Ct. on 13th ; 25 kilometer race walk in Albany, NY on 14th with overnight stay at Thruway Inn; then on to Vermont and Heath, Mass. on 15th; no specific evidence or recall for 16th through 18th ; flight from Islip, L.I. to Newark to Denver to San Francisco on 19th; the Division concedes August 23rd as a day in California; flight from San Francisco to Texas (petitioner had an investment in College Station, Tx) on 24th ; flight from College Station to Houston to Islip, L.I. on 26th ; no specific evidence or recall for 27th; 28th and 29th are weekend days.

09/02 - 09/06

Shelter Island

Bank of NY checks paid to local laborer on 2nd ; no specific evidence or recall for 3rd ; 4th through 6th are long weekend (including Labor Day) days; Bank of New York check paid to local laborer on 6th for work on Shelter Island house.

09/24 - 09/26

Shelter Island

No specific evidence or recall for 24th or specific evidence of who

		incurred credit card charge at local restaurant; 25 th and 26 th are weekend days.
09/28 - 10/04	Connecticut/France	No specific evidence or recall for 28 th through 30 th , or specific evidence of who incurred credit card charges; specific recall of winning bid for long weekend champagne trip to Paris, France 1 st through 4 th with return flight on to Cleveland on 4 th to attend Brush Wellman Corp directors' meeting .
10/08 - 10/27	Greece	The Division concedes 8 th through 26 th in Greece; return flight from Greece to NYC on 28 th .
10/30	Shelter Island	30 th is a weekend (Sat) day; dental appointment on 30 th .
11/10	Shelter Island	No specific evidence or recall that the prescription was filled on the day, 10 th , it was written; in NYC on preceding (9 th) and following (11 th) days; dental appointment on 9 th .
11/13 - 11/23	Shelter Island/Connecticut	13 th and 14 th , and 20 th and 21 st are weekend days; no specific evidence or recall for 15 th through 19 th , including visit to Greenwich, Connecticut on November 17 th , 18 th and 19 th , or 22 nd and 23 rd , or specific evidence or recall regarding who incurred credit card charges.
11/26 - 11/29	N. Hampshire/Shelter Island	No specific evidence or recall for 26 th ; 27 th and 28 th are weekend days; no specific evidence or recall that any presence in NYC on 29 th was incidental only to flight to San Francisco on 29 th .
12/10 - 12/11	Shelter Island	No specific evidence or recall for 10 th ; 11 th is a weekend (Sat) day.

12/17 - 12/18	Shelter Island	No specific evidence or recall for 17 th ; dental appointment on 18 th which is a weekend (Sat) day (dental appointment erroneously listed on schedule as 17 th but was on 18 th per affidavit made by petitioner's dentist).
12/21 - 12/31	England	Flight to Gatwick, England airport with passport entry stamped on 21 st .

55. As specified above, the Division has conceded that a number of additional days were days spent outside of New York City, such as those petitioner spent in Greece in 1993. Such concessions result, specifically, in 2 additional noncontested (i.e., out-of-New York City) days in 1991 (July 2th and November 6th), 14 additional noncontested days in 1992 (May 6th through 19th), and 20 additional noncontested days in 1993 (August 23rd and October 8th through 26th).

CONCLUSIONS OF LAW

A. New York City Administrative Code § 11-1705(b)(1)(A) and (B), sets forth the definition of a New York City resident individual for income tax purposes as follows:

Resident individual. A resident individual means an individual:

(A) who is domiciled in this city, unless (1) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city . . . , or

(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

The definition of a New York State “resident” is identical to the City resident definition, except for the substitution of the term “state” for “city.” (*See*, Tax Law § 605[B][1].) The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York

State or City (as relevant) source income, whereas residents are taxed on their income from all sources.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York City, and both are at issue in this proceeding. The first or domicile basis for resident status is specified under Administrative Code § 11-1705(b)(1)(A), and turns largely on the concept of an individual's "home." The second, or "statutory" resident basis, is specified under Administrative Code § 11-1705(b)(1)(B), with the dual predicates for resident tax status being (1) the maintenance of a permanent place of abode in the City and (2) physical presence in the City on more than 183 days during a given taxable year.

C. The Division takes the position, based on its audit, that both petitioners were domiciled in New York City and that both were subject to tax as residents of the City. The Division also asserts that petitioners spent in excess of 183 days in New York City and maintained a permanent place of abode in the City, and thus even if not domiciled in New York City they remained subject to tax as New York City statutory residents. The Division's conclusions are based upon the auditor's review of information supplied by petitioners' former representatives, his review of telephone and utility usage patterns at the Shelter Island and 655 Park Avenue premises, the December 26, 1993 article in the New York Times concerning the sale of the Park Avenue premises (*see* Finding of Fact "12"), telephone directory listings, credit card charge and billing information, subscriptions to magazines and certain other bills received at or listed for delivery to the 655 Park Avenue address. The auditor's report notes that only one magazine was found with a delivery address for Shelter Island. He also determined that telephone and electricity usage at 655 Park Avenue was greater than at Shelter Island during each of the years 1991, 1992 and 1993. The auditor noted that petitioners' former representative claimed petitioners were both

domiciliaries of Shelter Island. The auditor rejected this claim and concluded that both petitioners were domiciled at the 655 Park Avenue premises based on the above-noted and apparently contrary, or unexplained, indications. The auditor also pointed out that at no time did petitioners allege that Charles F. Brush, III's access to the Park Avenue premises was in any manner restricted.

D. Treated first is the issue of whether petitioner was a domiciliary of New York City. Neither the Tax Law nor the New York City Administrative Code contains a definition of domicile, but a definition is provided in the regulations of the New York State Department of Taxation and Finance (*see*, 20 NYCRR 105.20[d]).¹⁰ As relevant, it provides as follows:

Domicile. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.

* * *

(4) A person can have only one domicile. *If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home.* In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not

¹⁰ The definition of "domicile" in the Division's current regulations cited above, effective January 29, 1992, is the same as the definition in the former income tax regulations, with changes not relevant to this discussion.

necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere. (Emphasis supplied.)

E. There is no question that spouses who in fact lead essentially separate lives may have separate and different domiciles (*Matter of Moed*, Tax Appeals Tribunal, January 26, 1995; *see also* 20 NYCRR 105.20[d][5][i]). It is also clear that petitioner had the financial wherewithal to have many residences and the ability to use the same, allegedly independently from his wife, whenever and for whatever reasons (relatively more temperate climate in different seasons, personal, professional or academic interest, simple enjoyment or mere whim). Still, under the case law, a person has only one domicile and “home.”

F. The evidence in this case clearly supports petitioner’s claim that he did not in fact live together with Ellen Brush in New York City. Rather, petitioners led, in many respects, separate lives in separate homes. This situation was precipitated by a number of factors including most directly Ellen Brush’s desire to live in New York City versus petitioner’s disinclination to live in any city, including specifically New York City, coupled with his strong affinity for Shelter Island both for its own appeal as well as for its suitability to his life’s pursuits, interests and travels. Clouding the issue is the fact that Ellen Brush sought to portray to the world at large the image that the Brush family, and most specifically she and petitioner, lived together at all times. This desire resulted in the maintenance of certain outward appearances seeming to show that petitioner was with his family whenever they were in the City. Notwithstanding these outward appearances and the fact that petitioner admittedly did spend time in New York City, the pattern of petitioner’s life that emerges from the record is that New York City was not his home and domicile. While Ellen Brush summered on Shelter Island, she lived in New York City. In

contrast, the most accurate conclusion with regard to petitioner is that his home was Shelter Island, that he wintered at his houseboat in Suasalito, California, that he traveled extensively, and that while he came to New York City on occasion and indeed spent some nights in 655 Park Avenue and at other places in New York City, the City was not his home or domicile. The nights petitioner spent in New York City included nights when petitioner was unable to return to Shelter Island because the ferry was closed, or when he had a late flight into the City or an early flight out of the City the next morning, or when there was some social event, such as the Scandinavian Society Ball, organized by Mrs. Brush which he attended at her request. Other time spent in New York City mainly involved instances when petitioner had some personal reason to be in New York City, such as visiting with friends, or attending to matters with his former accountant or personal assistant at the 72nd Street office. Those nights petitioner chose to spend at 655 Park Avenue were mostly nights when petitioner determined that Ellen Brush had not been drinking. Other nights spent in the City appear to have been spent at the maid's quarters at his half-sister's apartment. In sum, while petitioner slept in the City on occasion and may indeed have, as a first choice, desired to spend any such nights at 655 Park Avenue, the strong sense emerging from this record is that he did not regard 655 Park Avenue as his home or as anything more than a place of habitation when needed. It is noteworthy that petitioner's tax treatment on the sale of 655 Park Avenue in 1994 is entirely consistent for both income tax and transfer tax purposes, with the conclusion that this apartment was not his principal residence and domicile. That is, he did not claim the income tax rollover benefit upon the sale of 655 Park Avenue since the premises were not his principal residence. Further, for transfer tax purposes, including the gains tax imposed under Tax Law former Article 31-B, his claim of exemption based on residence is consistent with the treatment under such tax where the exemption turns on

whether the property or interest therein was used for residential purposes rather than for business purposes (*see* 20 NYCRR former 590.25[d]).

G. Petitioner claims that he never established his domicile in New York City, notwithstanding his rental of 791 Park Avenue from 1958 through 1962 and his purchase of 655 Park Avenue in 1962 coupled with his use of such premises while he and Mrs. Brush were in New York City during and after this time frame. In this regard even assuming, *arguendo*, that petitioner had established his domicile at 791 Park Avenue, or thereafter at 655 Park Avenue, at some point in the late 1950s or early 1960s, the record supports a conclusion that he, unlike his wife, changed his domicile and life focus from New York City (if ever, indeed, his focus was there) to Shelter Island. Clearly, the surroundings at Shelter Island were more in line with petitioner's life interests and pursuits. In this regard, petitioner planned and directly participated in the construction of a number of significant additions and improvements at Shelter Island (see Finding of Fact "14"). While the phrase "money is no object" is trite, the same is of obvious impact here for the fact is that money was of little or no object and certainly presented no apparent impediment to petitioner in pursuing his many and varied interests. He could live essentially wherever he chose and travel whenever he chose. As his grounding place among many possibilities, petitioner chose Shelter Island, which he most consistently referred to as his home. In sum, petitioner's peripatetic lifestyle was centered and based at Shelter Island. Notwithstanding certain outward appearances upon which the auditor relied, including utility and telephone usage patterns, purchases by petitioner's wife or children who lived primarily at 655 Park Avenue, the delivery address for certain magazine subscriptions, and certain directory listings maintained largely by petitioner's wife as part of a facade for social purposes, the record strongly supports the conclusion that petitioner did not live with his family at 655 Park Avenue

on any regular or ongoing basis, nor did he show or express in word or deed any strong affinity for such locale. While there is clearly no absolute and unfailing regular schedule under which petitioner had to be at any particular place at any particular point in time (and indeed petitioner had the good fortune of freedom not to be required to adhere to any such regular place and time schedule), there is a generally consistent showing that petitioner returned to and was based out of Shelter Island. His wife and children did spend considerable time with petitioner at Shelter Island, but he largely set his own schedule independent of them, and centered his life there. Accordingly, during the years in issue petitioner was a domiciliary of Shelter Island and was not a domiciliary of New York City.

H. Turning next to the issue of statutory residence, Administrative Code § 11-1705(b)(1)(B) sets only two conditions which, if met, subject a nondomiciliary to tax as a resident. These conditions are maintenance of a permanent place of abode in the City and physical presence in the City on more than 183 days in any given year. With regard to the physical presence condition, the statute and relevant regulation neither quantifies any requisite length of stay in the City, nor qualifies any particular purpose for one's presence in New York City, save for specifically excepting from the statute's coverage those persons who are in the active service in the armed forces (*id.*, *see* 20 NYCRR 105.20[c]). Petitioner was not in active service in the armed forces during the years in question.

I. In addressing the issue of whether 655 Park Avenue was a permanent place of abode, 20 NYCRR 105.20(e)(i) provides as follows:

[a] permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction

which does not contain facilities . . . for cooking, bathing, etc., will generally not be deemed a permanent place of abode.¹¹

Clearly, the apartment at 655 Park Avenue was a permanent place of abode. It was not a camp or cottage suitable only for vacation and, in fact, it was the domicile of Mrs. Brush and presumably of the Brush's two children during the years in question. The more particular question is whether the apartment constituted a permanent place of abode for petitioner.

J. Petitioner unquestionably maintained the apartment at 655 Park Avenue. It is undisputed that he paid all bills associated with the premises, including most if not all of the bills of those who occupied the premises. In *Matter of Evans* (Tax Appeals Tribunal, June 18, 1992, *confirmed* 199 AD2d 340, 606 NYS2d 404), the Tribunal was asked to decide the meaning of the phrase "maintains a permanent place of abode." The Tribunal noted that the term "maintain" is not defined in the pertinent statute or regulation and, accordingly, examined the legislative history of the statutory language, concluding:

Given the various meanings of the word 'maintain' and the lack of any definitional specificity on the part of the Legislature, we presume that the Legislature intended, with this principle in mind, to use the word in a practical way that did not limit its meaning to a particular usage so that the provision might apply to the 'variety of circumstances' inherent to this subject matter. In our view, one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place. This would include making contributions to the household, in money or otherwise. (*Matter of Evans, supra*).

A few years before its decision in *Evans*, the Tribunal, in applying the phrase "permanently maintained" stated: "The operative words of the regulation are 'permanently maintained' which the petitioner does through his continued ownership of the house . . ." (*Matter of Feldman*, Tax Appeals Tribunal, December 15, 1988).

¹¹ Prior to January 29, 1992, the applicable regulation was 20 NYCRR 102.2(e)(1) which contained the identical language as is cited herein.

K. Petitioner's claim is that notwithstanding his financial maintenance of 655 Park Avenue, it was not a permanent place of abode for him, in that when his wife had been drinking he was effectively unable to utilize the premises and stay there. Petitioner claims this circumstance resulted in a severe infringement on his unfettered access to the premises. In short, petitioner asserts that his wife's alcoholism effectively barred his presence and ability to stay at 655 Park Avenue on any regular basis. Contrary to petitioner's position, he was not denied access to the premises at 655 Park Avenue as a matter of right, nor was he physically or legally precluded from using the premises. Rather, the restriction on use was ultimately the result of his choice to avoid or escape what was undoubtedly on many occasions an unpleasant if not downright hostile situation. Neither the fact that petitioner may have preferred to spend his time at Shelter Island rather than in New York City, nor his choice not to endure the verbal abuse he was usually met with at 655 Park Avenue, result in a conclusion that he did not have a permanent place of abode available to him in New York City. He admittedly did stay at 655 Park Avenue on a number of occasions, had a key to the premises or access via the doorman, and he kept at least some clothes there. It appears that his actual use of the premises was infrequent and was sometimes difficult to endure due to his wife's condition. However, the only actual impediment to petitioner's staying at 655 Park Avenue was the condition, drunk or sober, of his wife. His decision or ability to stay at 655 Park Avenue, i.e., his access, turned on a matter of choice. While it was certainly reasonable to choose not to stay when his wife was in a very drunken state, his ability to stay was not prohibited, and while staying might have been unpleasant on many occasions, he was not restricted or precluded from doing so. There was no explicit or implicit agreement or understanding between petitioners that Charles F. Brush, III could only stay at 655 Park Avenue with Mrs. Brush's permission (*Matter of Moed, supra.*). By the years in question,

petitioners' children were certainly old enough to leave yet they continued living at 655 Park Avenue with Mrs. Brush. Petitioner, in contrast, chose not to stay there. In fact and in keeping with Mrs. Brush's avowed desire to portray the image of a typical family to the world at large, one would assume she wanted petitioner to stay at 655 Park Avenue.¹² Ultimately, it was only Mrs. Brush's state of sobriety or inebriation on any given day which governed petitioner's choice of whether or not to stay at 655 Park Avenue. The premises at 655 Park Avenue were in fact continuously available to petitioner, albeit sometimes under difficult and unpleasant circumstances. Accordingly, 655 Park Avenue constituted a permanent place of abode for petitioner during the years in issue.

L. Having concluded that 655 Park Avenue was a permanent place of abode maintained by petitioner leaves only the question of whether petitioner was present in New York City on more than 183 days in any of the years in issue. In this regard, 20 NYCRR 105.20(c), prescribes rules for determining days spent within and without New York State for purposes of resident status, as follows:

In counting the number of days spent within and without New York State, presence within New York State for any part of the calendar day constitutes a day spent within New York State, except that such presence may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State. Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the [Division of Taxation] adequate records to

¹² There has been an assertion that petitioner's use of the maid's quarters at his half-sister's apartment as a place to stay on certain nights rendered such quarters a permanent place of abode maintained by and for him in the City. However, this assertion is rejected in that the record contains no evidence that petitioner in any manner contributed to maintaining such premises.

substantiate that such person did not spend more than 183 days of such taxable year within New York State.¹³

An interpretation or construction of a statute by an agency charged with its administration will be upheld if it is not irrational or unreasonable (*Matter of Lumpkin v. Dept. of Social Services*, 45 NY2d 351, 408 NYS2d 421, 423). In fact, the Appellate Division has upheld the general rule under 20 NYCRR 105.20(c) that a “day” for purposes of calculating the 183-day requirement includes a “presence within New York State for any part of a calendar day” (*Matter of Leach v. Chu*, 150 AD2d 842, 540 NYS2d 596).¹⁴ Petitioner does not challenge the premise that his presence in New York City on any part of a day counts as a City day, and his schedules reflect this approach. However, petitioner does claim that certain days when he was in New York City were “in-transit” days because petitioner was allegedly present only in connection with flying to or from some out-of-state destination. These claimed “in-transit” days ultimately turn on the specific evidence provided for such days. Petitioner also claims that the five days spanning June 3 through 7, 1991 should be treated as non-New York City days because his wife’s hospitalization in New York City was allegedly his only reason for being in the City.

M. With regard to the hospital days, case law has added only one exception in addition to the military exception in the statute and the in-transit exception in the regulation described above. In *Stranahan v. New York State Tax Commn.* (68 AD2d 250, 416 NYS2d 836), a divided court held that when a nondomiciliary seeks treatment in New York for a serious illness,

¹³ 20 NYCRR Appendix 20, § 1-2(c) contains the same language as 20 NYCRR 105.20(c) except for the insertion of the word “city” for “state.”

¹⁴ The Division’s audit guidelines do note that “[t]he literal interpretation of ‘any part of a day’ could mean stepping over the state line for one second; however, no audit is expected to be based on such a minimal amount of time spent in New York. Common sense must prevail.” None of the days in dispute here appear to involve merely stepping over a State (or in this case City) line, a situation which might be labeled “inadvertent” rather than purposeful presence.

the time spent in a medical facility for treatment of such illness should not be counted in determining whether the nondomicilliary was a resident for income tax purposes. In ***Stranahan***, the majority based its decision on an implied exception for hospital stays. The majority stated that:

The concept of involuntary presence in the State as distinguished from a voluntary presence in the State has no express statutory or regulatory basis. There is, however, no rational basis for a distinction between an employee domiciled in another state and assigned to the employer's office for a fixed and limited period for the accomplishment of a particular purpose, which may be for more than 183 days, and an individual domiciled in another state who comes into the State for the limited purpose of obtaining medical treatment and is prevented from leaving the State before the expiration of 183 days *by reason of physical condition and her inability to return to Florida*. (Emphasis added.)

The concurring opinion in ***Stranahan*** placed specific emphasis on the fact that the taxpayer, after her release from the hospital, was unable to remove herself from New York State due to her illness, thus focusing on the involuntary or constructive nature of her presence in the jurisdiction.

In contrast, the dissenting opinion in ***Stranahan*** called for a strict adherence to the language of the statute and accompanying regulation, noting that neither the statute nor the regulation contained any exception from counting in-state days based on “involuntary presence” in the State (i.e., one’s inability to leave the jurisdiction due to one’s medical circumstances after a volitional entry into the jurisdiction).

N. The existing exceptions, as described, are premised on “military service” (under the statute); “pass-through” or “in-transit” presence (as in the case of travelers boarding a plane, train or bus, or traversing New York State en route to another destination under 20 NYCRR 105.20[c]); and “involuntary presence” (as in ***Stranahan***). Petitioner’s presence in New York City while Mrs. Brush was in Lenox Hill Hospital was purposeful and voluntary. In fact, and as the Division points out, it was Mrs. Brush and not petitioner who was in the hospital. Hence,

there appears to be no basis upon which to treat Mrs. Brush's hospital days as non-New York City days for petitioner, and petitioner has not pointed to any such clear basis for doing so.

O. Turning, finally, to the day count, the Division argues that the schedules prepared by petitioner are not reliable, noting that there were three schedules prepared over time with three somewhat different results in each instance. The Division also points to certain instances where the documents underlying the schedules paint an apparently conflicting picture, such as credit card charges in different locales on the same date, or misdated credit card charges. Petitioner counters with the assertion that each successive schedule reflects the results of a more detailed and in-depth review of all of the voluminous records, with each successive schedule becoming more accurate. It is noteworthy that petitioner's first schedule was compiled without much of the documentary backup being immediately available to those charged with creating the schedules since the same was in the possession of petitioners' former representatives to be available to the auditor for his review. Moreover, petitioner maintains that the credible and consistent testimony presented by several witnesses including petitioner, in conjunction with the documentary evidence, provides clear evidence sufficient to establish that petitioner was not present in New York City on more than 183 days during any of the subject years.

P. Cases involving the intertwined issues of domicile and statutory residence are fact intensive and turn, almost invariably, on a combination of testimony viewed together with the related documentary evidence. In reviewing the documentary evidence and the testimony in this case for purposes of determining whether petitioner established his claim that he was not in New York City on some or all of the disputed days, a number of factors were considered. While petitioner did not produce a daily diary, he did produce a great deal of documentary and testimonial evidence. Petitioner has traveled extensively and to many different places throughout

his life, including specifically during the years in question, and the evidence tendered such as airline mileage statements, credit card charge statements and the like, together with his testimony reflects these varied travels. Petitioner testified candidly and credibly for several hours over the course of two days as to his general pattern and habit of living and to his whereabouts during the subject years. His testimony concerning his whereabouts during the years in question was credible and direct. He candidly admitted at the outset that he had no independent and specific recall of precisely where he might have been on each and every particular day of the three years in issue. This is not surprising given the numerous places visited by petitioner. Thus, petitioner referred to the schedules and documents to aid his recall in testifying. This manner of proceeding should not necessarily be viewed as lessening the accuracy or credibility of petitioner's testimony. In fact, it would not be realistic to expect anyone to recall each specific daily event or the location where one was on a given date when questioned in the abstract several years after the fact. To testify otherwise would make such testimony appear coached at best.

Petitioner's testimony as well as that given by Jean Taylor and Harriet Moulton covering the manner in which the schedules submitted at hearing were prepared, shows a great deal of integrity infused into the attempt to accurately reach the correct number of days spent in New York City versus outside of New York City. This effort at honesty and accuracy is borne out by instances such as May 7, 1993 which petitioner counted as a New York City day notwithstanding that his only presence in the City was a "dart" into the City to a computer store to pick up a new laptop computer he had eagerly been awaiting. Petitioner's additional witnesses, including his children, generally did not testify as to specific dates and places concerning petitioner's whereabouts during the subject years. However, they did uniformly and credibly testify to his affinity for Shelter Island and to the frequency of his presence there. They also testified to the

regular pattern of spending weekends at Shelter Island with their father and mother. Petitioner's personal assistant Jean Taylor testified to bringing items to petitioner at Shelter Island. In sum, the uniform testimony is that the Brush family spent weekends at Shelter Island unless they had some specific and particular commitment in New York City or were otherwise traveling. This testimony rings particularly true as to petitioner in that he was described as being at Shelter Island in general, and on weekends in particular, unless he was traveling or spending extensive time in California. Furthermore, this testimony placing petitioner on Shelter Island on weekends unless he was somewhere else in particular was, in many instances, buttressed by additional documentary evidence, including records of doctor and dentist appointments specific to petitioner, placing him on Shelter Island. Thus, as a first step in reviewing the disputed days, weekend days were generally accepted and allowed as Shelter Island (i.e., non-New York City) days unless the evidence indicated petitioner was somewhere else (*see, Matter of Reid*, Tax Appeals Tribunal, October 5, 1995; *Matter of Moss*, Tax Appeals Tribunal, November 25, 1992).

Q. Petitioner's supporting documents also included checks drawn by him on the Shelter Island branch of the Bank of New York. These checks were coupled with credible testimony by petitioner that local itinerant day laborers hired by petitioner to work with him at Shelter Island were paid by him on a daily basis by such checks. Hence, unless some countervailing piece of documentary evidence specifically refuted petitioner's presence on Shelter Island, such check dates were accepted as establishing petitioner's presence on Shelter Island and out of New York City on the particular check date (*id.*; *see also, Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994). So too, where the record specifically indicated that petitioner used a bus service (Sunrise Shuttle) to travel directly from Shelter Island to an airport in New York City or from a

New York City airport to Shelter Island, petitioner's presence in New York City was accepted as solely in connection with his travels and was treated as an in-transit (i.e., a non-New York City) day in accordance with 20 NYCRR 105.20(c). On this score, however, there was also testimony by Jean Taylor that petitioner sometimes came to the New York City office to take care of certain matters such as signing checks before or after traveling. Accordingly, where there was no such indication of bus transport directly between Shelter Island and a New York City airport, the day was not allowed as an in-transit day. In the same manner, on days where petitioner had no specific recall of his whereabouts and could offer no objective evidence establishing that he (versus another family member) incurred credit card or other charges in an out-of-City location including, but not limited to, Shelter Island, the claimed day was not allowed as a non-New York City day (*see, Matter of Kornblum*, Tax Appeals Tribunal, January 16, 1992). In these instances, as the Division correctly points out, the fact that family members in addition to petitioner had access to and use of some if not all of the credit cards undermines the reliability of the credit card charges as verifying petitioner's presence in a specific location on a particular day. Absent some specific testimonial recall establishing petitioner's use of a credit card to make a particular purchase, the mere existence of a charge on a particular day (notwithstanding that the charge was ultimately paid for by petitioner) does not establish that petitioner personally made the charge or was present at the location where the charge was made.

R. In addition to the foregoing, and similar to the Division's approach in its review of the days, where petitioner was in a far distant locale with evidence of a flight there and a return flight several days later, the interim days were allowed as non-New York City days. In this regard, while it is possible that petitioner would fly from California to New York for one day and then return to California the next day, the same is highly unlikely and it simply conflicts with common

sense to accept such a scenario. Thus, on a given “interim” day there may be no objective evidence that petitioner remained in California. However, with no evidence of an “interim” return plane trip to New York (or to the Newark, New Jersey airport), such days were accepted as non-New York City days. Under similar reasoning, when petitioner’s return flight was to the Islip Airport, and the following day was established as a day on Shelter Island, common sense simply dictates the conclusion that the flight day was a non-New York City day.

S. The record also includes instances of certain days, for which petitioner could offer no evidence or specific recall of being on Shelter Island, falling between two Shelter Island days. While it may seem inconsistent to deny a claimed day out of New York City when that day falls between two days each of which was a Shelter Island or other out-of-New York day, there are instances (e.g., August 22, 1991) where petitioner did return to New York City for a day sandwiched between two Shelter Island or other non-New York City days. While petitioner established a general pattern of traveling from and returning to Shelter Island (*see*, Conclusion of Law “P”), and that he spent substantial time at Shelter Island and in California, in light of petitioner’s frequent and extremely varied travel schedule and the relative proximity of Shelter Island to New York City, it does not simply follow that once petitioner was at Shelter Island all following days were spent there until the evidence established a change to another place. In point of fact, while Shelter Island is some distance from New York City, it is not so far distant as to be comparable to the situation of someone who spends most of his time in Florida or some other far more distant locale with occasional forays into New York City. (*Compare, Matter of Kern*, Tax Appeals Tribunal, November 9, 1995; *Matter of Armel*, Tax Appeals Tribunal, August 17, 1995.) Accordingly, it was incumbent upon petitioner to establish his presence on Shelter Island as opposed to elsewhere, including the relatively close New York City, on the

disputed days other than weekends as previously discussed. Thus, in instances where the evidence did not specifically establish petitioner's presence at Shelter Island or elsewhere other than New York City on such "interim" or "sandwich" days, the same were not allowed as non-New York City days.

T. After repeated careful review of the evidence (documents and testimony) presented (as summarized at Finding of Fact "54"), and applying the reasoning and considerations set forth above, including consideration of petitioner's whereabouts on days preceding and following the disputed days or periods where relevant, it is concluded that petitioner has met his burden of establishing that he was not present in New York City (including the days conceded by the Division)¹⁵ on 60 of the 106 disputed days in 1991, 74 of the 143 disputed days in 1992, and 128 of the 180 disputed days in 1993. Adding such days to those previously agreed to by the parties as non-New York City days (*see*, Finding of Fact "53") leaves petitioner present in New York City on fewer than 183 days in each of the years in issue. The specific days allowed as non-New York City days are set forth in Appendix A, attached to this determination. The basis for accepting such specific days may be discerned by comparing such days to the information set forth in Finding of Fact "53", in light of the guiding criteria set forth above in Conclusions of Law "P" through "S". Accordingly, based on the day count determined herein, petitioner was not present in New York City on more than 183 days during any of the years 1991, 1992 or 1993,

¹⁵ As detailed in Finding of Fact "55", the Division conceded by post-hearing brief that petitioner was not present in New York City an additional 2 days in 1991, 14 days in 1992 and 20 days in 1993. These days are included in the count of days allowed herein as non-New York City days.

and therefore was not properly subject to tax as a statutory resident of New York City for any of such years.¹⁶

U. The petition of Charles F. Brush, III and The Estate of Ellen S. Brush is hereby granted and the Notice of Deficiency dated November 3, 1997 is canceled.

DATED: Troy, New York
April 12, 2001

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

¹⁶ In total, petitioner has established that he was not present in New York City on at least 191 days in 1991, 217 days in 1992 and 247 days in 1993. The remaining disputed days (called “undocumented” days) number fewer than 183 days in each year and petitioner is therefore below the requisite number of days to be treated as a statutory resident of New York City. The specific days determined to be non-New York City days for each of the years in issue are specified in Appendix A attached hereto.

APPENDIX A
1991

<u>MONTH AND DATES</u>	<u>TOTAL NUMBER OF DAYS</u>
January 19, 20, 21	3
February 23	1
March 30, 31	2
April 2, 3, 19, 20	4
May 25, 26, 27, 31	4
June 1, 8, 9, 10, 11, 12, 15, 16, 29, 30	10
July 2, 4, 6, 16, 20	5
August 10, 11, 12, 17, 18, 24, 25	7
September 1, 2, 7, 8, 14, 15	6
October 5, 6, 7, 8, 9, 10, 11, 12, 13, 21, 26, 27	12
November 6, 14, 15, 23, 24, 30	<u>5</u>
	<u>60</u>

1992

January	0
February	0
March 21	1
April 15, 18, 19	3
May 1, 2, 3, 6 through 19, 23, 24, 30, 31	21
June 5, 6, 7, 12, 13, 14, 15, 20, 21, 22	10
July 3, 4, 5, 12, 13, 14, 25, 26	8
August 1, 2, 8, 9, 15, 16, 17, 21, 22, 23, 29, 30, 31	13
September 5, 6, 26, 27, 29	5
October 24, 25	2
November 5, 7, 25, 26, 27, 28, 29	7
December 20, 21, 25, 26 27	<u>5</u>
	<u>75</u>

1993

<u>MONTH AND DATES</u>	<u>TOTAL NUMBER OF DAYS</u>
January 17 through 24, 27, 28, 29, 30, 31	13
February 1 through 15	15
March 29, 30, 31	3
April 10, 11, 12, 13, 14, 27	6
May 6, 29, 30, 31	4
June 12, 13, 14, 15, 19, 20, 21, 22, 29	9
July 2, 3, 4, 17, 18, 24, 25, 26, 27, 28, 31	11
August 7, 8, 11, 12, 13, 14, 15, 19 through 29	17
September 2, 4, 5, 6, 25, 26	6
October 1, 2, 3, 4, 8 through 27, 30	25
November 13, 14, 21, 21, 27, 28	6
December 11, 18, 21 through 31	<u>13</u>
	<u>128</u>