STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DIANE ALFANO	:	
	:	DETERMINATION DTA NO. 817356
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1993 through 1996.	:	

Petitioner, Diane Alfano, 5 Yacht Club Road, Masons Island, Mystic, Connecticut 06355-3258, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1993 through 1996.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 27, 2000, at 10:30 A.M., with all briefs to be submitted by October 13, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by DeGraff, Foy, Holt-Harris & Kunz, LLP (James H. Tully, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that petitioner was a resident of New York State and New York City for each of the years in issue.

II. Whether the Division of Taxation properly disallowed petitioner's itemized deductions for clothing items purchased for business.

III. Whether petitioner has met her burden of proof to show reasonable cause to abate penalties.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice of Deficiency (Assessment ID No. L-015537790-6) dated September 8, 1998, to petitioner, Diane Alfano, asserting New York State and New York City personal income tax due for the years 1993, 1994, 1995 and 1996 in the following amounts:

Tax Period Ended	Tax Assessed	Interest Assessed	Penalty Assessed	Balance Due
12-31-93	$ 6,483.22	$ 2,631.52	$ 1,721.91	$ 10,836.65
12-31-93	5,777.37	2,345.02	1,534.42	9,656.81
12-31-94	5,031.10	1,536.20	1,070.64	7,637.94
12-31-94	4,921.32	1,502.68	1,047.26	7,471.26
12-31-95	6,163.86	1,254.80	935.59	8,354.25
12-31-95	7,957.43	1,619.92	1,207.83	10,785.18
12-31-96	9,326.57	1,057.29	994.96	11,378.82
12-31-96	9,068.01	1,027.99	967.39	11,063.39
Totals	$ 54,728.88	$ 12,975.42	$ 9,480.00	$ 77,184.30

The notice provided this explanation:

> You only have one domicile. Your domicile does not change until you move to a new location with the sincere intention of making your permanent home there. If you move to a new location but intend to stay there only for a limited time (no matter how long), your domicile does not change.

> Your domicile is New York State unless you meet ALL THREE of the following conditions:
>
> 1. You did not maintain a permanent place of abode in New York State during the entire tax year; AND
>
> 2. You maintained a permanent place of abode outside New York State during the entire tax year; AND
>
> 3. You spent 30 days or less in New York State during the tax year.

Petitioner filed a consent extending the period for limitation of assessment of personal income tax for tax years 1993 and 1994 until any time on or before April 15, 1999.

2. Petitioner filed New York State nonresident and part-year resident returns, Forms IT-203, for tax years 1993 through 1996. The 1993 return indicated that petitioner moved out of New York State on July 1, 1993. The allocation of wage and salary income depicted days worked in New York City and days worked outside New York City, as follows: 1993, 127 and 181; 1994, 143 and 118; 1995, 144 and 86; and 1996, 121 and 111, respectively. Wage and tax statements, Form W-2, showing wages earned by petitioner between $125,000.00 and $200,000.00 for the years in issue, were attached to three out of four returns (1993, 1995 and 1996). Such W-2s indicate petitioner's address to be 5 Yacht Club Road, Masons Island, Mystic, CT 06355.

Petitioner filed Federal income tax returns, Form 1040, for the years in issue, and deducted on Schedule A, as an itemized deduction, the following amounts for clothing purchased for her business as an events planner: 1993, $15,000.00; 1994, $15,000.00; 1995, $13,548.00; and 1996, $16,419.00.

Petitioner filed a Connecticut Nonresident or Part-Year Resident Income Tax Return for 1993 (Form CT-1040NR/PY), and Connecticut resident income tax returns (Form CT-1040) for 1994, 1995 and 1996.

3. Diane Alfano was born on January 31, 1956 in Connecticut and raised there. During the years in issue, petitioner's parents resided in Suffield, Connecticut when not in Florida. Her brother and two sisters resided in Suffield, Connecticut, Lincoln, Rhode Island, and San Francisco, California, respectively.

Petitioner graduated with a bachelor of arts degree from Tufts University in Boston in 1978. In 1979, she moved to New York City and accepted a position with Burroughs Corporation (which subsequently became Unisys) on Wall Street, where she worked for five years. In 1984, petitioner accepted a position as a salesperson in the events membership business of Institutional Investors, Inc.,[1] with offices on Madison Avenue in New York City and in London, England. From the sales position, petitioner was promoted to a position in new business development, where the business of Institutional Investors, Inc. grew dramatically. She was later promoted to Director of the Conference Division, where she oversaw the Membership Group Division for the company, organizing approximately 40 events during each year all over the world.

Institutional Investors, Inc. provides memberships primarily to financial organizations who come together to cover global investment management and financial industry concerns. By virtue of their membership, the business executives acquire the privilege of attending a series of meetings designed for the financial industry, which gives them access to programming, content,

[1] Institutional Investors was acquired by Euromoney Institutional Investor, PLC after the audit period in 1997. Any reference to Euromoney Institutional Investor, PLC was deemed to refer to Institutional Investors.

high-level industry speakers, and peers, as well as competitors, of their respective businesses in the global financial arena. Approximately 650 clients from 33 countries around the world attend the events organized by petitioner's employer. Petitioner was responsible for the creation, programming, sales, production and execution of the seven membership organizations that existed during the audit period. Of those seven memberships, six were created, launched and executed by Diane Alfano. Service to petitioner's global client base required extensive worldwide travel. Petitioner managed teams of sales, editorial and logistics personnel in New York City and London. Outside of those locations Ms. Alfano visited clients and attended organized events. Ms. Alfano was also responsible for the creation of new membership products and special projects.

The types of events for which petitioner was responsible were held all over the world, sometimes in very exotic locations, with lavish social functions which petitioner was required to attend. The type of clothing and accessories that petitioner often wore to such events was not merely office attire, or clothing suitable for everyday use, but formal wear, resort clothing and native dress specific to a particular country. Such items of clothing were purchased for the specific events and were not clothes she would have ordinarily purchased. Amounts claimed as Schedule A deductions did not include her standard business attire.

4. In 1983, petitioner married Frank Bruno, with whom she resided until the onset of marital difficulties in1992. In 1986, petitioner purchased a 1,300 square foot cooperative apartment at 969 Park Avenue in New York City where she resided with Mr. Bruno. Funds for the purchase were provided by petitioner and her parents. The cooperative apartment was purchased for approximately $400,000.00, with petitioner's parents contributing $200,000.00 toward its purchase; however, ownership of the cooperative shares was in the name of petitioner

and her (now former) husband. Copies of two bank checks totaling $200,000.00, dated December 5, 1986, were provided as evidence. Petitioner's parents frequently went into New York City for shopping, theater and Mr. Alfano's business with New York attorneys and stayed at the apartment when they could. When petitioner and her husband separated, although the Alfanos were interested in having petitioner retain the cooperative for their use when in New York City, petitioner's primary reason for not selling the apartment during the years in issue was because Frank Bruno owned the cooperative shares with Diane Alfano, and did not relinquish his rights until July 1996.

5. In 1992, petitioner and her husband began experiencing marital difficulties. Since he would not vacate the apartment, petitioner was forced to consider alternative living arrangements. Petitioner sought refuge near her family in Connecticut where she was raised, away from what she considered a threatening situation with Frank Bruno. A home located at 5 Yacht Club Road, Mason's Island, Stonington, Connecticut, (hereinafter "the CT home") was purchased on December 18, 1992, by the Mary Ann Alfano Family Irrevocable Trust, which held the ownership of the home in which petitioner began to reside. Petitioner's parents contributed significantly to the purchase of this home. They established a trust to assist with the purchase for protection from Frank Bruno's efforts to assert ownership over petitioner's assets and in order to treat petitioner and her siblings fairly, since she and her three siblings were beneficiaries of the trust. Petitioner contributed approximately 25% of the purchase price of the CT home, her sisters made no contribution, and her brother made a small contribution. The balance of the $500,000.00 purchase price was supplied by Mr. and Mrs. Alfano, through the trust. After the purchase, numerous renovations were made to the property.

6. The CT home contained approximately 3,500 square feet and was decorated entirely by petitioner, who bought a substantial portion of the furnishings and all the appliances. Records indicate that petitioner spent a significant amount of money for the purchase of furniture and household items. During the audit period, petitioner, her second husband (Carlo Lazzari) and her father were the only ones with keys to the CT home. Petitioner was the principal user of the CT home. Petitioner's parents make their home in Suffield, Connecticut, and spend winters in Florida.

7. When petitioner moved into the CT home in June 1993, she moved all of her valuables, jewelry, heirlooms, and personal documents, all that was near and dear to her, to the CT home. Petitioner did not have a New York driver's license, but did maintain a Connecticut license, where her car was registered. She has been a registered voter in Stonington, Connecticut since August 1995. Petitioner executed a new will in July 1993 as a Connecticut resident.

8. Petitioner received mail at the New York City apartment and in Connecticut. Petitioner made arrangements with the doorman at the apartment building in New York to separate and hold her mail so that her former husband would not have access to it. Petitioner's personal assistant in Investor's New York City office handled her personal mail and bills, and made all her bank deposits, when petitioner was out of the country.

9. After moving to Connecticut petitioner changed her working arrangements to permit her, in weeks other than the 25 to 40 she was traveling, to come to New York on Tuesdays and leave on Thursday or Friday afternoons for Connecticut. Petitioner was frequently in contact with her administrative assistant by phone, and took care of much business in that manner.

10. On July 4, 1997, petitioner was married at the CT home to Carlo Lazzari, a resident of Rome, Italy. When Mr. Lazzari was in the United States, he and petitioner only stayed in Connecticut.

11. During the audit period, in addition to staying in Connecticut, petitioner used the New York city apartment on a limited basis, and the apartment she and Mr. Lazzari had rented in Italy at the end of 1992, particularly when she was on business in Europe. For the four audit years, petitioner utilized the New York apartment only when her employment required her presence in New York, and when her former husband was away. On other occasions, petitioner utilized New York hotels, which is reflected in the audit file.

12. On February 15, 1995, as a resident of Connecticut, petitioner instituted divorce proceedings there against Frank Bruno and was granted a judgment of divorce by the Connecticut Superior Court on February 15, 1996.

13. The Division's audit included a review of credit card usage and showed a pattern of card use in New York on weekdays and some weekend use in Connecticut, along with a wide variety of charges outside both locations to coincide with the extensive traveling petitioner was required to do for her position.

14. Petitioner was treated by a New York City dentist and maintained an association with doctors in New York City with whom she had established relationships. During the audit period, petitioner received medical services in New York, Connecticut and Europe. Petitioner maintained health club memberships in both New York City and Rome, Italy during the years in issue. Petitioner's safety deposit box was in Connecticut, although she did her primary banking with Citibank, headquartered in New York City, in order to have a bank with global capability given the extensive travel required of her position.

15. When petitioner filed a complaint with the Superior Court of the State of Connecticut in February 1995 seeking dissolution of her marriage to Frank Bruno, she stated that one of the two parties (the inference being petitioner) had continuously resided in the State of Connecticut twelve months prior to the date of the filing of the complaint.

16. Petitioner's daily calendars show the following breakdown of days within and without New York:

	1993	**1994**	**1995**	**1996**
Days worked in NY	119	122	113	121
Days worked outside NY	116	122	123	111
Non-working days in CT	50	67	69	59
Non-working days in NY	9	11	0	21

17. Review of petitioner's American Express credit card statements reveal retail expenditures by her for apparel, designer clothing, footwear and accessories, gowns, and jewelry in the amounts of approximately $20,500.00 in 1993; $18,500.00 in 1994; $18,500.00 in 1995; and $20,000.00 in 1996.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner maintains that she changed her domicile from New York State and New York City to Connecticut in1993, and she asserts that the facts support an actual change in residence and the requisite intent to abandon the old domicile for the new one. Petitioner argues that the Division improperly disallowed the deduction for the purchase of clothing which was necessary for her employment and not adaptable to use as ordinary street wear. As to penalties, petitioner believes that her tax returns were prepared in good faith, and that penalties are unwarranted.

19. The Division maintains that petitioner was a resident of New York State and New York City for each of the audit years by reason of her failure to prove by clear and convincing evidence that she moved to Connecticut with the bona fide intention of making Connecticut her domicile. The Division believes it properly disallowed petitioner's claimed Schedule "A" deductions by reason of her failure to substantiate the purchases made, and her failure to show that the items purchased were not suitable for general or personal wear. The Division claims petitioner has not met her burden of proof to show the existence of reasonable cause so as to entitle her to the abatement of penalties.

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes New York State personal income tax on "resident individuals." In turn, Tax Law § 605(b) defines resident individual, in pertinent part, as follows:

> (1) Resident individual. A resident individual means an individual:
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> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .
>
> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

The definition of a New York City "resident" is identical to the State resident definition, except for the substitution of the term "city" for "state" (***see***, New York City Administrative Code § 11-1705[b]).

B. The Division's assertion of tax liability is premised entirely on Tax Law § 605(b)(1)(A) and the New York City Administrative Code § 11-1705(b)(A). There is no contention by the Division that petitioner spent 183 days or more in New York City during the audit years. In fact

there is no dispute over the number of days petitioner spent in the various locations. Rather, the Division's primary assertion is that petitioner has not established by clear and convincing evidence that she changed her domicile from New York City and New York State to Connecticut in 1993.

C. While there is no definition of "domicile" in the Tax Law or the New York City Administrative Code, the Division's regulations (20 NYCRR 105.20[d]) provide, in pertinent part:

> (d) *Domicile*. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home -- the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the person 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 in some other place.
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> * * *
>
> (4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere.

D. It is well established that an existing domicile continues until a new one is acquired, and the burden of proof to show a change in domicile rests upon the party alleging the change

(***see, Matter of Newcomb's Estate***, 192 NY 238). To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (***Matter of Minsky v. Tully***, 78 AD2d 955, 433 NYS2d 276). Both the requisite intent as well as the actual residence at the new location must be present (***id***). The concept of intent was addressed by the Court of Appeals in ***Matter of Newcomb*** (192 NY 238, 250-251):

> Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.
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> The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile . . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention . . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The *animus manendi* must be actual with no *animo revertendi*. . . .
>
> This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice.

E. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (***Matter of Bodfish v. Gallman***, 50 AD2d 457, 378 NYS2d 138, 140, ***citing Matter of Bourne***, 181 Misc 238, 246, 41 NYS2d 336, 343). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (***Matter of Zinn v. Tully***, 54 NY2d 713, 442 NYS2d 990). Declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (***see***, ***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989, citing ***Matter of Trowbridge***, 266 NY 283, 289). A taxpayer may change his or her domicile without severing all ties with New York State (***see***, ***e.g.***, ***Matter of Sutton***, Tax Appeals Tribunal, October 11, 1990).

As is evident from the cases cited, in determining an individual's domicile, the facts and circumstances of the particular case are paramount. While certain declarations may evidence a change of domicile, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life." (***Matter of Silverman, supra***.) A physical move to another place in which a permanent residence is established does not necessarily provide the clear and convincing evidence of an intent to change one's domicile (***Matter of Zinn v. Tully***, ***supra***). Only when coupled with the clear intent to change one's domicile does the fact of a changed residence become a true changed domicile.

F. The auditor's conclusion that petitioner was domiciled in New York City during the years under audit, and did not effectuate a change in domicile to Connecticut in 1993, was based on several factors. The most significant factor is that petitioner was in New York more time than any other place each audit year, though there is no assertion that her time in New York

State or City approaches 183 days. Petitioner's whereabouts at other times during each year, however, exceeded working days and nonworking days in New York in total (***see*****,** Finding of Fact "16"). She traveled extensively all over the world as part of her professional position, and spent much time in Connecticut.

The auditor noted that petitioner had no Connecticut credit card activity during the work week. Based on petitioner's explanation of her professional travel during the week, the lack of Connecticut credit card activity is consistent with her not being present in Connecticut except for many weekends. Review of her credit card activity shows charges for merchandise, meals and other travel expenses in New York and other locations around the world. In addition, petitioner often charged merchandise purchased through mail order.

Other factors highlighted by the auditor concerned the facts that the CT home was purchased by petitioner's family, allegedly not for her exclusive use, and the expenses of the home were paid by the trust. Undisputedly, petitioner's family, using a trust as a vehicle, purchased the CT home. However, the purchase was not without significant contributions from petitioner in the nature of a contribution toward the purchase of the home, the maintenance of the home, the purchase of the appliances and furniture, and expenditures for all of the decorating. Petitioner credibly explained that the trust was used to insulate the assets from any claims from her then estranged husband, and it placed petitioner's siblings on equal footing with her with respect to the financial assistance received from petitioner's parents. Although petitioner's parents may have visited the CT home, they resided in two other locations throughout the year. Petitioner was the principal user of the CT home and the place she and her second husband would reside when he was in the United States. Clearly, petitioner had a vested

interest in the CT home, and spent a great deal of her resources on the home, consistent with establishing a new domicile.

The auditor also raised as a concern the fact that petitioner used the New York City apartment when her employment required her presence in New York, and that her travel often showed her going to and from the New York apartment. Petitioner provided credible testimony that once she and Mr. Bruno began facing marital difficulties, and she moved to Connecticut, she altered her working arrangements, requiring less presence in New York City. As a result, she used the New York City apartment only on a limited basis and when Mr. Bruno was traveling and not present in the apartment. Given the fact that petitioner's travel elsewhere consumed most of 25 to 40 weeks each year, the need for the New York apartment was significantly reduced.

G. The record shows that petitioner made formal and informal declarations, took certain actions and exhibited motives concerning her move to her CT home, all of which represent the type of evidence considered by the courts on the question of whether an individual had the requisite state of mind to have changed her domicile. Although petitioner executed a will in Connecticut, had a Connecticut driver's license, filed Connecticut tax returns for the audit years, had a safe deposit box in Connecticut, and had her marriage ceremony to Carlo Lazzari performed there, these factors are not necessarily dispositive (***see, Matter of Kartiganer v. Koenig***, ***supra***, 194 AD2d 879, 599 NYS2d 312). However, when those facts are combined with an actual change in residence and a motive to abandon her old domicile for the new one, petitioner's intent to become a Connecticut domiciliary is quite clear. The fact that petitioner maintained the New York City apartment for her use in connection with her business life is not itself enough to defeat a change in domicile in this case. Furthermore, the circumstances under

which she was forced to retain the apartment posed a very different circumstance in this case. First, petitioner would not subject herself to an unhappy and what she considered a threatening situation with her former husband. Although petitioner's parents had provided about half the funds for the apartment, petitioner had placed ownership of the cooperative shares in her name with her former husband. At their separation, he refused to sign over the shares to petitioner. This made a transfer of such property an impossibility during the audit years. The strain upon petitioner during this time of her life and the difficult situations postured by Frank Bruno were, in part, confirmed by the credible testimony of petitioner's confidential administrative assistant and her father, Charles Alfano. Secondly, petitioner's parents, as constructive owners of the apartment, having contributed to its purchase, desired to have petitioner retain it for their business and nonbusiness purposes.

The fact that petitioner maintained a personal bank account in New York, which she needed to be able to access from all over the world, received mail in New York where her administrative assistant handled her affairs, was an active member of a health club in New York, was treated by physicians in New York with whom she had become established, are not alone or in conjunction with one another sufficient to defeat a change in domicile.

Petitioner asserted she had a particular attachment to Connecticut in general, since it was where she was born and raised, in addition to the fact that several family members were nearby in Connecticut. When petitioner made the decision to move, her most precious belongings were moved from the New York City apartment to the Connecticut home. The fact that petitioner also felt the need to protect such items from her former husband does not defeat the fact that the items moved when she did. The reason petitioner moved is also very compelling in this case. She sought the comfort of her family members during the time of an extremely difficult divorce.

If New York State and New York City were so near and dear to her heart, she could have merely rented or purchased another place and contributed her resources to such place. But instead, she made a fresh beginning, and did so actively seeking the support of her family. This was not a case where petitioner is going "south" for a warmer climate or retiring to another location and trying to minimize business ties to New York. This, in fact, is a very unique situation where a high level successful business executive who was facing divorce sought to live near her family in Connecticut. Her position with Institutional Investors took her all over the world for portions of 25 to 40 weeks per year. The fact that she did not live close to one of her employer's main offices does not defeat the facts that support petitioner's change in domicile.

As stated by the Court in ***Newcomb*** (***supra***), the motive for a change of domicile is immaterial, except as it indicates intent, and the test of intent with respect to changing one's domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (***Matter of Bodfish v. Gallman***, ***supra***, 378 NYS2d at 140). I believe that place was Connecticut for petitioner. The fact that she moved to Connecticut to be safe and near her family may not be the motive most prevalent in a case of this type. However, as previously stated, her motive is only relevant to the extent it sheds some light on petitioner's intention. Petitioner's intention to abandon her New York domicile is abundantly clear. In sum, petitioner clearly established that she intended to change her domicile from New York to Connecticut. Accordingly, the Division did not properly assess tax on the basis of New York State and City residency.

H. It has been determined herein that petitioner was a domiciliary of Connecticut for the years in issue, commencing on July 1, 1993. Accordingly, as to her connection to New York source income and deductions, petitioner was a nonresident during such years. The personal

income tax imposed upon a nonresident is the tax computed as if a taxpayer were a full-year resident, allocated to New York according to the ratio of New York adjusted gross income to Federal adjusted gross income (Tax Law § 631[a]). Generally, the New York itemized deductions of a resident individual means the total amount of deductions from Federal adjusted gross income, other than Federal personal exemptions and modifications not applicable herein (Tax Law § 615[a]). Thus, we must look to Federal statutes and case law to examine whether the Division properly disallowed petitioner's Schedule A deduction for work clothes, since the origination of such deduction is petitioner's Federal income tax return. Petitioner carries the burden of proving both the deductibility of the expenditure and the amount expended.

Internal Revenue Code §162(a) allows a deduction for ordinary and necessary expenses incurred in the conduct of a trade or business. Clothing is deductible under Internal Revenue Code §162 if (1) the clothing is required or essential in the taxpayer's employment ; (2) the clothing is not suitable for general or personal wear; and (3) the clothing is not so worn (***Pevsner v. Commissioner***, 628 F2d 467; ***Donnelly v. Commissioner***, 262 F2d 411). Clothing not suitable for general or personal wear is that which is not adaptable for what is generally accepted as ordinary street wear (***Pevsner, supra***).

Petitioner relied on ***Yeomans v. Commissioner*** (30 TC 757) in support of her position that the clothing expense taken on her tax returns for the years in question was deductible. In ***Yeomans***, the petitioner was employed as a fashion coordinator for a shoe manufacturing company. Her employment necessitated her attendance at meetings of fashion experts and at fashion shows, where she was expected to wear clothing that was of the most advanced styles and fashion, and, as such, was more likely to be sought after by women of high fashion desires. However, for her personal wear, the petitioner therein preferred a plainer and more conservative

style of dress. As such, some of the items she purchased were not suitable for her private and personal wear and were not so worn. The Tax Court allowed a deduction for the cost of the items that were not suitable for her personal wear. In this case, petitioner established that the clothing expense she deducted was for clothes for the events connected to her employment with Institutional Investors, that she would not have ordinarily bought for herself, but for the existence of her position.

In contrast to the Tax Court's decision in ***Yeomans***, the Circuit Courts of Appeal that have faced this issue have taken a more objective approach which receives the support of the Internal Revenue Service ("IRS"). Under the objective test, no reference is made to the individual taxpayer's lifestyle or personal taste. Instead adaptability for personal or general use depends upon what is generally accepted for ordinary street wear (***Pevsner, supra***; ***Donnelly, supra***).

The taxpayer in ***Pevsner*** was manager of the Yves St. Laurent Rive Gauche Boutique ("YSL") in Dallas, Texas. YSL, a leading designer of woman's apparel, expected the taxpayer to wear YSL clothes at work in order to project the image of an exclusive lifestyle and to demonstrate her awareness of the YSL fashions and fashion trends in general. Although the clothing and accessories purchased by the taxpayer were the type used for general purposes by the customers of the boutique, the taxpayer was not a normal purchaser of these clothes. The taxpayer's life was a simple one with limited and informal social activities. The Tax Court, though recognizing that the YSL apparel might be used by some women for general purposes, relying upon ***Yeomans***, believed that because such clothing was inconsistent with the taxpayer's lifestyle, there existed a sufficient reason for allowing the deduction for clothing expenditures. On appeal the Circuit Court reversed, relying upon the objective standard of whether clothing required for employment is adaptable to general use as ordinary street wear.

The Tax Court, in more recent cases, has applied the objective standard of "adaptable for ordinary use" (***see, Teschner v. Commissioner***, 74 TCM 1108, [where a professional musician in a rock band was permitted a deduction for flashy and loud clothing items worn during his performances since they might not be acceptable for ordinary wear]; ***Popov v. Commissioner***, 76 TCM 695 [where a professional violinist was permitted a deduction for items of clothing identified as sequined and formal and not adaptable for general and personal wear]; ***Genck v. Commissioner***, 75 TCM 1984 [where a musician and band manager was permitted a deduction for stage clothes worn during her performances that were deemed not suitable for ordinary use]).

I. The auditor testified that the record showed purchases for clothing and accessories were made, but that the items did not appear to be uniforms or safety items. The Division believed the purchases to be street clothing. In fact, there is no dispute about several key facts: that extensive clothing and accessory purchases were made in each of the audit years; such purchases were described in some detail on petitioner's American Express credit card statements; and such items were not uniforms or the purchase of safety items. The question concerning deductibility is whether such items could be adaptable for general purposes.

Petitioner provided credible and detailed information regarding her visibility in a company that constantly dealt with high ranking business and government officials in a worldwide financial setting. She described the types of lavish events that would often be the subject of her business travel, which entailed portions of 25 to 40 weeks per year during the audit period. Petitioner held a very unique position with Institutional Investors, and was in the spotlight at every event. Petitioner referred to the purchases she made as a required part of her presence to manage and oversee the entire conference division. Petitioner provided unimpeached testimony that the clothing items for which deductions were taken were special clothing for formal

functions that one would not normally wear to the office, such as resort wear, evening attire, silk sarongs and country specific native clothing. The deductions did not include her general business attire. The deductions included purchases for clothing that she would not have ordinarily bought for herself.

However, under the standard provided by both the Tax Court and the Circuit Courts of Appeal as to "suitable for ordinary use," petitioner has not carried her burden of proving that all the purchases for which deductions were taken met the criteria for deductibility. Certainly, eveningwear that petitioner purchased for a business function would serve her in a personal function. As such, the ordinary use of that eveningwear is for a formal function, and is suitable for both business and personal use. Likewise with resort wear. Although country specific native wear may not have been suitable for any "ordinary use," petitioner did not carry her burden of identifying such items and their cost. Accordingly, the Division properly disallowed petitioner's itemized deductions for clothing items purchased for business.

J. The final issue is whether petitioner was properly assessed penalties under Tax Law § 685(b) for negligence or intentional disregard.

In support of her position that penalties should be abated, petitioner argues that the deductions were taken by petitioner's accountant who advised her. In considering her position, I refer to the Tribunal's decision in ***Matter of McGaughey*** (Tax Appeals Tribunal, March 19, 1998, ***confirmed*** 268 AD2d 802, 702 NYS2d 415), where it was stated:

> It is a well-settled principle that each taxpayer has a nondelegable duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause (***see, Logan Lumber Co. v. Commissioner***, 365 F2d 846; ***see also, Sanderling, Inc. v. Commissioner***, 571 F2d 174).

> In making a determination as to whether reasonable cause exists when a taxpayer has relied on the advice of a professional, it must be shown that the taxpayer relied in good faith on the advice he received and it must have been "reasonable" for the taxpayer to rely upon the particular advice he was given (***see***, ***LT & B Realty Corp. v. New York State Tax Commn.***, 141 AD2d 185, 535 NYS2d 121). When determining whether the taxpayer has shown that his reliance was reasonable, the burden is on the taxpayer to demonstrate that he acted with ordinary business care and prudence in attempting to ascertain his liability, if any, for taxes (***see***, ***United States v. Boyle***, 469 US 241; ***Matter of Koether, supra***).

Petitioner permitted her accountant to estimate deductions for clothing, having been advised she was permitted to take such deductions under her set of facts. From the testimony, it appears as though the deductions were likely taken on the same information reviewed in this case, or perhaps less. Had all the information provided during this hearing been given to petitioner's accountant, I do not believe the deduction would have been taken, or at the very least, limited to specific and documented items. I believe petitioner had knowledge of details which should have made her question whether the advice she received was such that she could have placed reasonable reliance on it (***Matter of Felix Industries v. Tax Appeals Tribunal***, 183 AD2d 203, 589 NYS 2d 641). Accordingly, it is determined that petitioner did not act with prudence in attempting to ascertain her liability for tax, and the penalty is upheld.

K. The petition of Diane Alfano is hereby granted as to Conclusion of Law "G", but denied pursuant to Conclusions of Law "I" and "J", and the Notice of Deficiency dated September 8, 1998 is modified accordingly.

DATED: Troy, New York
April 12, 2001

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE