STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD AND HAZEL RUBIN	:	ORDER DTA NO. 817675
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 1994, 1995 and 1996.	:	

Petitioners, Richard and Hazel Rubin, 36 Mayfair Lane, Greenwich, Connecticut 06831, 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 1994, 1995 and 1996.

On March 28, 2001, petitioner Hazel Rubin, by her representative, Eagle & Fein, Esqs. (Sidney Eagle, Esq., of counsel), filed a motion for an order reducing the deficiency of tax asserted against petitioner Hazel Rubin for the period May 1, 1995 through December 31, 1996. The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel) filed a response to petitioner's motion on April 19, 2001, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affidavits, exhibits and documents submitted therewith, the response by the Division of Taxation and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following order.

ISSUE

Whether the deficiency asserted by the Division of Taxation against petitioner Hazel Rubin for the period May 1, 1995 through December 21, 1996 should be reduced.

FINDINGS OF FACT

1. On January 19, 1999, the Division of Taxation ("Division") issued a Notice of Deficiency to Richard and Hazel Rubin ("petitioners") which asserted a deficiency of New York State and New York City personal income taxes in the amount of $2,340,624.39, plus penalty and interest, for a total amount due of $3,367,602.31 for the years 1994, 1995 and 1996.

2. After the issuance of a Conciliation Order (CMS No. 173374) on March 3, 2000 by the Division's Bureau of Conciliation and Mediation Services, which sustained the Notice of Deficiency, petitioners filed a petition with the Division of Tax Appeals on or about May 4, 2000 which alleged that petitioners were not residents of the State and City of New York during the years 1994, 1995 and 1996 due to the fact that they were domiciled in Connecticut and were not statutory residents of New York.

3. In response to the petition, the Division served its Answer on July 6, 2000. The Answer affirmatively stated that prior to January 1, 1994 and through April 30, 1995, petitioners were domiciled in the State and City of New York and during 1994 and up to and including April 30, 1995, petitioners were resident individuals as is defined in Tax Law §§ 605(b)(1)(A) and 1305(a)(1).

The Answer of the Division also set forth affirmative statements which pertained only to petitioner Richard Rubin: (1) that during the years at issue, he spent more than 183 days of each year within the State and City of New York; (2) that during the years at issue, he was a resident individual of the State and City; (3) that by reason of the fact that petitioner Richard Rubin spent

more than 183 days within the State and City of New York during each year at issue, he would be a resident individual for each year even if he was not domiciled in the State and City; and (4) for each of the years at issue, petitioner Richard Rubin failed to properly allocate and report his New York State and New York City source income in the form of wages and capital gains.

4. Annexed to the Division's Answer was a Demand for a Bill of Particulars which demanded that petitioners:

> Specify each day during 1994, 1995 and 1996 that the petitioner, Richard Rubin, spent no part of within the City of New York, or, in the alternative, specify each day during each said year that said petitioner spent any part of within the City of New York.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioner, Hazel Rubin, asserts:

a. that the true focus of the Division is petitioner Richard Rubin and that if there was any question as to petitioner Hazel Rubin's status as a statutory resident, then the Division would have demanded the same particulars as to this petitioner as well which it did not do; and

b. that the evidence presented in the affidavit of Hazel Rubin and the exhibits attached thereto (deed, bank statements and driver's license,) clearly show that she was a domiciliary of Connecticut during the period May 1, 1995 through December 31, 1996 and that she resided in New York for fewer than 183 days in each of the years 1995 and 1996.

6. The Division contends that petitioner Hazel Rubin's motion is equivalent to a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) and should be denied since there are material issues of fact which remain in dispute. Moreover, the Division maintains

that petitioners bear the burden of proof and that a hearing is necessary to resolve the factual issues relating to each petitioner's domicile and statutory residency.

CONCLUSIONS OF LAW

A. There is no provision in the Tax Appeals Tribunal Rules of Practice and Procedure (***see***, 20 NYCRR, Part 3000) for a motion for an order to reduce a proposed deficiency. Accordingly, this petitioner's motion shall be deemed to be a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b).

B. 20 NYCRR 3000.9(b)(1) states the following:

> [a]fter issue has been joined . . . any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party . . . . Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion.

C. A party moving for summary determination must show that there is no material issue of fact. Such a showing may be made by "tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562, 427 NYS2d 595). Summary determination can serve to expedite a case by allowing resolution as a matter of law upon undisputed facts (***see, Andre v. Pomeroy***, 35 NY2d 361, 362 NYS2d 131). In short, summary determination is appropriate where a hearing would serve nothing more than to create

the redundancy of formally setting forth facts which are not in dispute and which are sufficient to support a determination in favor of either of the parties.

D. Notwithstanding the desirability and benefit of expeditiously resolving cases whenever appropriate, it remains that summary determination is the procedural equivalent of a trial and is not appropriate where there exist material issues of fact or where contrary inferences may be drawn from undisputed facts (***see, Gerard v. Inglese,*** 11 AD2d 381, 206 NYS2d 879). Proceeding to resolution by summary determination forecloses the opportunity for cross-examination as a means of assessing the credibility of witnesses. The issue of intent with regard to domicile itself presents a question of fact. This question of credibility and its bearing on the issue of intent is an important part of the hearing process in general and is critical in a determination involving the fact intensive matters of domicile and residence (***Matter of Smith***, Tax Appeals Tribunal, July 23, 1998).

There is no question that competent evidence can be submitted by affidavit. In this regard, regulations of the Tax Appeals Tribunal authorize the submission of affidavits in lieu of oral testimony (20 NYCRR 3000.15[d]), and findings of fact may be made on the basis of affidavits (***see, Matter of Orvis v. Tax Appeals Tribunal***, 86 NY2d 165, 630 NYS2d 680, ***cert denied*** 516 US 989, 133 L Ed 2d 426). However, in the present matter, petitioner Hazel Rubin seeks to have her affidavit along with a deed, a bank statement and her Connecticut driver's license serve as proof that she was a domiciliary of the State of Connecticut for the period May 1, 1995 through December 31, 1996 without permitting the Division to cross examine her or to submit evidence to refute her allegation that she was a Connecticut domiciliary. Moreover, as to the issue of statutory residency, the bare allegations set forth in her affidavit that she spent fewer than 183 days in New York in 1995 and 1996 do not, standing alone, constitute sufficient evidence to

mandate a determination in her favor. Accordingly, since there are material and triable issues of fact remaining in this matter, petitioner Hazel Rubin's motion must be denied.

E. The motion of Hazel Rubin for summary determination is denied and this matter shall be scheduled for a hearing in due course.

DATED: Troy, New York
June 21, 2001

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE