STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARTHUR C. REICHSTETTER	:	
	:	DETERMINATION DTA NO. 818356
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1996 and 1997.	:	
	:	

Petitioner, Arthur C. Reichstetter, 331 West 20th Street, Apt. 2, New York, New York 10011, filed a petition for redetermination of a deficiency or for refund of New York State personal income taxes under Article 22 of the Tax Law for the years 1996 and 1997.

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 October 3, 2001, at 10:30 A.M., with all briefs to be submitted by May 6, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Morrison and Foerster, LLP (Paul H. Frankel, Esq. and Michael A. Pearl, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

Whether the Division of Taxation properly determined that petitioner changed his domicile on or about May 3, 1996, contrasted with petitioner's contention of a domicile change to Florida on February 8, 1996.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice of Deficiency (Assessment ID No. L-018899411-6) dated December 1, 2000, to petitioner, Arthur Reichstetter, asserting New York State personal income tax due for the years 1996 and 1997, pursuant to a field audit, in the following amounts:

Tax Period Ended	Tax Assessed	Interest Assessed	Penalty Assessed	Balance Due
12-31-96	$317,160.16	97,353.36		$414,513.52
12-31-97	$175,181.64	36,258.46		$211,440.10
Totals	$492,341.80	$133,611.82		$625,953.62

2. Petitioner filed a consent extending the period of limitation for assessment of personal income tax for tax year 1996 until any time on or before December 31, 2000.

3. The Division's assessment was based on its conclusion that petitioner had not shown by clear and convincing evidence that he had changed his domicile from New York State to Florida for tax years 1996 and 1997. For both tax years, however, it was determined by the Division that petitioner had spent far less than 183 days in New York.

4. Petitioner was born in Providence, Rhode Island on June 14, 1946, and resided in a small Rhode Island town on the ocean until he graduated from high school in 1964. Petitioner served in the U.S. Army between 1967 and 1969, attending Officers Candidate School and serving as a Green Beret. Post-service, petitioner married a woman from Rhode Island and commenced attending the University of Rhode Island, where he graduated first in his engineering class in two and one-half years. In 1972, petitioner attended graduate school at the Dartmouth Amos Tuck School of Business Administration. When he graduated in 1974, petitioner accepted an investment banking position in New York with First Boston Corporation,

where he became very successful leading the firm's worldwide energy practice, and invited to become a partner in 1982. His position as an investment banker was very demanding and his commitment involved very long hours and rigorous travel.

During 1979 and 1981, respectively, petitioner's daughter and twin sons were born while the family was living in Larchmont, New York. In 1987, petitioner purchased a larger home in Larchmont, New York, at 19 Oak Bluff Avenue ("the Larchmont home"), on Long Island Sound. Petitioner and his wife divorced the following year, and in their property settlement, petitioner acquired sole ownership of the Larchmont home. Petitioner's former spouse purchased a home across the street from the Larchmont home so the children could move freely to be with both parents.

In 1989, petitioner's brother introduced him to Lindy Shuttleworth, who resided in Florida. A few months after their initial introduction, the two met again in Montana. She was visiting a friend and petitioner was vacationing with his children and visiting his brother, which he had done over the course of many years. Thereafter, petitioner and Ms. Shuttleworth began spending a great deal of time together, especially at her home in Florida. Petitioner made it known to friends and family that he intended to retire by age 50 and that Florida was where he would like to live. Petitioner began searching for a parcel of property in Florida in the early 1990s and in 1994 put a deposit on a large ocean-front condominium that was being built in Boca Raton. The contractor declared bankruptcy, forcing petitioner to withdraw his deposit and continue to look for ocean-front property, which he ultimately purchased in 2000.

In the early 1990s, while dating Lindy Shuttleworth, petitioner became acquainted with her brother Thorpe Shuttleworth, an attorney who had moved to New York from Florida to pursue his career in the business side of the entertainment field. Over a number of years, the two

men discussed the television production industry and petitioner became intrigued with the substantial rate of return obtainable in episodic television production. Petitioner was also attracted to Thorpe Shuttleworth's idea that a production facility could be established in Florida for a fraction of the cost that would be necessary in New York City. During 1994, petitioner and Thorpe Shuttleworth created Palm Beach Ocean Studios, with Thorpe Shuttleworth as president and manager, and petitioner as sole owner. They developed the second largest sound studio in Florida, after the Disney studio in Orlando. Petitioner financed the studio for $6 million, by obtaining bank financing secured by the stock in his brokerage account. Petitioner was actively involved in the planning and construction phases of the studio, until its completion in early 1996. Palm Beach Ocean Studios opened for business in early 1996. The studio was not the success that petitioner and Thorpe Shuttleworth had hoped it would be, losing money in 1996 and 1997, and continuing to lose money thereafter.

Petitioner's travel to Montana over many years eventually led to his investment in a lodge, a tennis complex and a real estate development, which his brother managed for him. In addition, petitioner also built a large vacation home in Montana, financed in large part by margin debt on his brokerage account. The greatest part of the Montana investment, a 29-room lodge, incurred $1.39 million in operating and capital losses, between its construction in1993 and its sale in 2000.

In 1993, petitioner was approached by Merrill Lynch to lead its worldwide energy group, which he accepted. He joined Merrill Lynch with 25 others from his former firm.

In December 1995, petitioner suffered a snow-boarding accident in Montana, when he hit a patch of ice and slid a half mile over two rock ledges. He was fortunate to survive. It resulted in five broken ribs and a severe left ankle fracture requiring three subsequent surgeries and much

physical therapy. Petitioner spent 16 weeks on crutches and endured ongoing physical pain. As a result of the accident, his retirement target date was slightly accelerated, since petitioner did not believe he could readily meet the hours and other demands of the investment banking pace and global travel required of him by Merrill Lynch. In January 1996, petitioner put his New York affairs in order in anticipation of retiring from Merrill Lynch and relocating to Florida. Petitioner had set his sights on retiring by age 50 from the investment banking industry, and as he approached 50, his extreme wealth was paving the way for him to do so. Given the pace and stress level at which one is required to operate as an investment banker, especially in Manhattan, many people in the industry retire or move on to another pursuit by their early to mid forties. Seven months prior to reaching age 50, when petitioner suffered the snow-boarding accident, he accelerated his decision to retire. He notified Merrill Lynch that he was resigning and they entered into a Termination Agreement dated effective February 7, 1996, at which time petitioner's active employment with Merrill Lynch & Co. ceased. By such agreement petitioner would serve as a consultant to Merrill Lynch from February 8, 1996 until December 31, 1996 to effect smooth relationship transitions for the clients he served. However, the company would not require petitioner to perform any duties outside the State of Florida, a contract provision devised by petitioner with the assistance of his attorney. On February 8, 1996, he arrived in Florida at Ms. Shuttleworth's condominium and declared that he was "there for good." Having spent much time with Ms. Shuttleworth at her condominium in Florida, and assisting her with improvement and redecorating decisions over a number of years, petitioner had grown attached to the condo. At this point in time in Ms. Shuttleworth's life, she had quit her job and gone back to school. Desirous of getting out from under the financial burden of condo ownership, Ms. Shuttleworth had made a decision to sell her condo. Since petitioner was very fond of it, he

entered into a contract with her for the purchase of the condo. The contract documents were executed on February 9, 1996 and the closing on the property occurred on May 3, 1996.

5. On February 9, 1996, petitioner obtained a Florida driver's license and registered to vote in Florida in Palm Beach County.

6. Petitioner shipped his cars to Florida and registered them there. Effective February 13, 1996, they were added to his Florida insurance policy.

7. Petitioner resigned his membership from the Larchmont Yacht Club in New York effective February 15, 1996.

8. Petitioner executed a Declaration of Domicile on February 28, 1996, and filed the same with the Palm Beach County Clerk in Florida.

9. Petitioner transported other belongings to Florida, such as his fishing gear, family pictures and books.

10. Petitioner executed a revised Last Will and Testament on April 26, 1996, subject to Florida estate laws.

11. Petitioner closed his New York bank accounts and established new ones in Florida.

12. November 7, 1996, petitioner signed a contract for the sale of 19 Oak Bluff, the Larchmont home, and closed this sale on January 29, 1997. When petitioner moved to Florida, he left furnishings in the Larchmont home so it could be shown to prospective purchasers fully furnished, and moved only his personal belongings.

Just before petitioner's Larchmont home was sold, on January 17, 1997, petitioner rented a home less than 1/3 the size of the Larchmont home in a nearby town in order to return to New York on alternate weekends for the sole purpose of being with his teenage children in a home-

like setting, where they could entertain friends and store sports gear and similar items belonging to the children. Petitioner had no other family or social ties in New York.

The lease term for the rental house was two years and five months, from January 17, 1997 to June 17, 1999, when petitioner's twin boys would graduate from high school. After the summer of 1999, petitioner anticipated that the boys would be entering college, which his daughter had already done, and petitioner would have no need for a place in New York

13. During 1996, petitioner owned two securities that represented between 65% and 80% of his liquid assets. Those securities were used as collateral for the studio loan, and margin debt on petitioner's brokerage account was used to build his Montana vacation home and finance a substantial part of his Montana investments. Because of financial problems with the companies represented by such stocks and other negative disclosures, the values of the two securities and therefore, a substantial portion of petitioner's net worth, declined precipitously within a few months. Attempting to regroup, petitioner put the Florida studio up for sale and set asking prices for all the Montana assets. By the end of 1997 petitioner realized he would have to, at least temporarily, return to investment banking and consequently New York, and did so by obtaining a new position in February 1998, at Wasserstein Parella, a firm subsequently acquired by Dresdner Kleinwort Benson, where he is still employed.

14. Petitioner filed New York State nonresident and part-year resident returns, Forms IT-203, for tax years 1996 and 1997. The 1996 return indicated that the date of petitioner's last move was on February 9, 1996. The address listed as petitioner's home address on both returns was 4505 South Ocean Blvd., Highland Beach, Florida, the address associated with the condo purchased by petitioner from Ms. Shuttleworth.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner maintains that he changed his domicile from New York State on February 8, 1996, upon terminating his employment with Merrill Lynch, when he moved to Florida with the intention of retiring there, months short of his retirement goal, after the tragic snow-boarding accident accelerated his plans to do so.

16. Post-hearing the Division conceded that petitioner changed his domicile during 1996 from New York to Florida, but maintains that petitioner did not make such change until he closed the transaction on the purchase of the new residence on May 3, 1996.

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:
>
> (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.

There is no contention by the Division that petitioner spent 183 days or more in New York during the audit years. Furthermore, the Division conceded to the issue of petitioner's domicile for 1996 and 1997. Rather, the Division's primary assertion is that petitioner has not established by clear and convincing evidence that he changed his domicile from New York State to Florida until he purchased and closed on his condo on May 3, 1996.

B. While there is no definition of "domicile" in the Tax Law, 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.
>
> * * *
>
> (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.

C. 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.

> 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.

D. 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; ***affd*** 267 AD 876, 47 NYS2d 134). 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.

E. The Division's conclusion that petitioner was domiciled in New York until May 3, 1996 is premised solely on the fact that May 3 is when the purchase of petitioner's Florida condo was finalized in a real estate closing. The Division asserts that when petitioner took possession of his purchased residence in Florida that he met the standard set forth in ***Minsky v. Tully*** (***supra***), since before that point in time, the Division maintains, petitioner did not maintain such residence there. Finally, the Division argues that third-party statements indicating petitioner's state of mind regarding retirement during years prior to 1996, though offered to show intent, only show his desire to place in motion a retirement plan sometime in the future. Accordingly, the Division maintains that the first step of putting his retirement plan in motion was the execution of his termination agreement from Merrill Lynch on February 7, 1996, and the final step, demonstrating that petitioner had abandoned his New York domicile and changed his lifestyle, was the closing of his Florida condo on May 3, 1996.

Petitioner and numerous witnesses, including friends, business associates and professional advisors, provided credible testimony that petitioner had a goal to retire by age 50 and his sights were set on doing so in Florida. Based upon his wealth accumulation, that was clearly realistic to accomplish. It is also a common industry practice for investment bankers to leave these high stress positions in their forties. In December 1995, and in the weeks to follow, petitioner was forced to evaluate his physical ability to perform in a professional position that required him to work long hours, balance a stressful environment and travel extensively after his skiing accident, while undergoing many weeks of physical therapy and additional surgeries. Prior to petitioner's accident, in addition to his desire to retire at age 50, petitioner had established a close relationship with a Florida resident, Lindy Shuttleworth, between 1989 and the years in issue. He had entered into a business arrangement with Thorpe Shuttleworth, involving approximately a $6 million investment in the creation of Palm Beach Studios, in Florida, between 1993 and 1996; and petitioner made known to friends, family and real estate sales personnel his desire to purchase ocean-front property in Florida for the purpose of building a retirement home, and had placed a deposit on a Florida ocean-front condo in 1994, prior to the contractor's bankruptcy.

The circumstances under which petitioner made a decision to retire and move to Florida, i.e., an unforseen snow-boarding accident, posed a very different circumstance in this case. Petitioner's skiing accident was a catalyst to place in motion petitioner's actual retirement, for which petitioner had been planning before his accident. He soon thereafter negotiated a Termination Agreement with Merrill Lynch and moved. He took with him belongings that were near and dear to him and had his cars shipped to Florida. He informed Lindy Shuttleworth, with whom he had developed a close personal relationship, he was in Florida to stay. Then petitioner

commenced the more formal steps involved in a change in domicile, such as obtaining a Florida driver's license, registering to vote in Florida, properly insuring his vehicles in Florida, resigning a club membership in New York, changing his bank accounts, executing a Declaration of Domicile in Florida, and executing a new Last Will and Testament subject to Florida estate laws. Most of these transfers were performed or effective in February 1996. Added to the more formal steps, on the day after he arrived in Florida he signed a contract for the purchase of a condominium with which he was already familiar, one owned by Lindy Shuttleworth, that was going to be sold due to changed circumstances in her life.

The record shows that petitioner made formal and informal declarations, took certain actions and exhibited motives concerning his move to Florida, 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 his domicile. Although petitioner performed such tasks, these factors are not necessarily dispositive (***see, Matter of Kartiganer v. Koenig***, 194 AD2d 879, 599 NYS2d 312). However, when those facts are combined with an actual change in residence and a motive to abandon his old domicile for the new one, petitioner's intent to become a Florida domiciliary is quite clear. In addition, the informal declarations are supportive of petitioner's clearly established intent and not in any way contradicted by his conduct. In fact, quite the contrary.

The Division attempts to argue that a change in domicile is a process over time which began when petitioner left New York and was solidified when he purchased the condo and closed on it in May 1996. I agree with the Division that changing one's domicile is a process that occurs over a period of time, and suggest that such time frame differs greatly from person to person. Arthur Reichstetter is highly intelligent, obviously very professionally motivated, and

enormously successful. He had attained a level of wealth that permitted him great freedom at a youthful age and had done so by making wise decisions. He gathered the facts surrounding him and placed in motion a process that had begun prior to his skiing accident, not after. His first "step" of placing his plan in motion was not terminating his position with Merrill Lynch, though this clearly demonstrated a significant change in his general habit of life. His first step in fulfilling his retirement plan and relocation to Florida, was the thought process post-accident which led him to negotiate the Termination Agreement with Merrill Lynch. Once petitioner committed to the termination of his employment in his own mind, he took the steps to place in motion his change of domicile. The first documented step was his Termination Agreement, and petitioner followed with additional consistent actions (see, Findings of Fact "4" through "12"), including placing himself under contract to purchase Ms. Shuttleworth's condo. The Division's assertion that he did not take up residence in Florida until the closing of the condo completely misrepresents the standard set forth in ***Minsky***, requiring an actual change in residence coupled with an intent to abandon the former domicile and acquire another. If the Division's argument were to prevail, anyone who intended to change their domicile to another location, but lived with family or friends, or chose to rent a place to reside rather than purchase one, would never be able to meet the "change in residence" criteria, and clearly this is not what is envisioned by the law, regulations or case law in this area.

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 petitioner made life decisions which reflect that Florida was the

place he wanted to be from February 8, 1996 forward. Petitioner's intention to abandon his New York domicile is abundantly clear. The credible testimony of petitioner and each of his friends, business associates and advisors, together with all of petitioner's actions, support the same conclusion. The fact that he moved into a condominium that he previously visited over many years in no way defeats a change of domicile occurring on February 8, 1996. Petitioner demonstrated by clear and convincing evidence that such change took place effective February 8, 1996.

F. The petition of Arthur C. Reichstetter is hereby granted, and the Notice of Deficiency dated December 1, 2000, as modified, is canceled.

DATED: Troy, New York
October 31, 2002

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE