STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NORMAN AND SUSAN SCHULMAN	:	DETERMINATION DTA NO. 821395
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the Administrative Code of the City of New York for the Years 1998, 1999 and 2000.	:	

Petitioners, Norman and Susan Schulman, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the Administrative Code of the City of New York for the years 1998, 1999 and 2000.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 18, 2007 at 10:30 A.M., with all briefs to be submitted by September 15, 2008, which date began the six-month period for the issuance of this determination. Petitioners appeared by Hirschel Berstein, CPA, and Sidney Yoskowitz, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that petitioners were residents of the City of New York and therefore subject to City personal income tax during the years at issue.

FINDINGS OF FACT

1. Petitioner Norman Schulman is a distinguished surgeon, who has served as the director of Manhattan's Lenox Hill Hospital's Division of Plastic Surgery for nearly 20 years. He maintains his medical offices on Manhattan's Park Avenue and is a Diplomate of the American Board of Plastic Surgery as well as a Diplomate of the American Board of Surgery. Petitioner Susan Schulman is employed by her husband's medical practice and also works out of the Park Avenue medical offices. Dr. Schulman also holds an appointment as an assistant attending surgeon at Long Island's North Shore University Hospital in Manhasset.

2. Prior to becoming the director of Lenox Hill Hospital's Division of Plastic Surgery and establishing his Manhattan medical offices, Dr. Schulman's medical practice was based on Long Island where he maintained a family home in Great Neck with his first wife, Harriet Schulman, and raised their children. Petitioner Susan Schulman, like Dr. Schulman, had also lived and raised her children on Long Island during her prior marriage. In 1991, a couple of years after his divorce from his first wife, Dr. Schulman relocated his medical practice to Manhattan and purchased a one-bedroom, Manhattan apartment on the Upper East Side, near Lenox Hill Hospital. After remarrying, Dr. Schulman and Susan Schulman established married life in the one bedroom East Side apartment until, in the words of Dr. Schulman's friend and accountant, Sidney Yoskowitz, they "developed enough of a nest egg to buy a boat and buy a home in [Glen Cove] Long Island" in 1996. Dr. Schulman noted in a notarized statement dated September 10, 2007 that he "was never comfortable as an apartment-dweller," and it was a "happy" day when he was able to purchase his Long Island home. The new home was a substantial residence with nearly three times the square footage of the Manhattan apartment and a "spectacular" view overlooking the water. Nonetheless, given the costly nature of Manhattan real estate, petitioners'

Long Island home, with its four bedrooms and 3,500 square feet, was worth only approximately 20% more in monetary value than their one-bedroom Manhattan apartment.

3. Petitioners continued to maintain their Manhattan apartment during the years at issue since it was near Dr. Schulman's medical offices and the Lenox Hill Hospital. The new Long Island home was not furnished by moving furniture and other items, such as appliances, into it from the Manhattan apartment, which "remained as it was before the new home in Glen Cove" in the words of Dr. Schulman in his notarized statement.

4. Petitioners' car and boat trailer are registered in Glen Cove and they vote from this Long Island address. Petitioners view Glen Cove as their home where their blended family, consisting of children from their first marriages, gather for social occasions. The Glen Cove home is also near to where Dr. Schulman moors his sailing yacht at the Sea Cliff Yacht Club. Sailing is an abiding passion for Dr. Schulman, who served in the United States Navy, and he dedicates much of his leisure time to sailing his yacht.

5. The Division of Taxation (Division) issued three statements of personal income tax audit changes against petitioners dated October 6, 2004. Each statement explained that petitioners "are deemed to be New York City residents" and imposed New York City resident income tax on them. Petitioners had reported on their respective New York State resident income tax returns for the years at issue, New York City nonresident earnings tax of $1,992.00 for 1998 and of $460.00 for 1999. No New York City nonresident earnings tax was reported by petitioners for 2000.[1] The Division computed New York City resident income tax due of

[1] The wage and tax statements of Dr. Schulman and Susan Schulman, attached to petitioners' New York State resident income tax returns for each of the years at issue, as issued by the employer, "Norman Schulman MD PC, " do not show Dr. Schulman's Park Avenue address where he maintained his medical practice as the employer's address, but rather a Great Neck, Long Island address as the employer's address.

$15,477.79 for 1998, of $14,205.62 for 1999 and of $11,783.60 for 2000, plus negligence penalties and penalties for the substantial understatement of liability and interest. The Division accepted, without any changes, petitioner's New York State resident income taxes as reported due on its respective New York State resident income tax returns for the years at issue, based upon petitioners' reported New York adjusted gross income of $462,101.00 for 1998, $451,967.00 for 1999 and $391,571.00 for 2000.

6. The Division of Taxation issued a Notice of Deficiency dated January 18, 2005 against petitioners, in conformance with the three statements of personal income tax audit changes noted above, asserting New York City resident income tax due of $15,477.79 for 1998, $14,205.62 for 1999, and $11,783.60 for 2000, plus penalties and interest.

7. Although petitioners maintained and used their Manhattan apartment during the years at issue, they failed to disclose this residence on their 1998 and 1999 City of New York nonresident earning tax returns. Rather, they checked, "No," in response to the question "Did you or your spouse maintain an apartment or other living quarters in the city of New York during any part of the year?" As noted in Finding of Fact 5, petitioners did not report any City of New York nonresident earnings tax due for 2000. On a New York City nonresident audit questionnaire completed by Dr. Schulman, which was received by the Division of Taxation on June 12, 2001, he indicated that he spent three and one-half days per week "physically present in New York City" for work purposes during 1998 and 1999. Mrs. Schulman on her New York City nonresident audit questionnaire, also received on June 12, 2001, indicated that she spent three days per week "physically present in New York City" for work purposes during 1998 and 1999.

8. During the audit, petitioners provided very limited documentation concerning their days in and out of New York City. They provided the Division with a copy of their "Citibank

AAdvantage" credit card annual account summary for 1998 but not for 1999 and 2000. They also provided their E-Z Pass monthly statements for only the limited period of July 20, 1999 through January 22, 2000.[2] A review of the auditor's work papers discloses that he made fourteen detailed requests for the production of documents, but received little documentation in response. Specifically, the Division requested that petitioners submit telephone and utility bills for all residences; credit card statements with receipts for all credit cards used during the period at issue; bank statements and canceled checks; expense reports and travel receipts; insurance policies for all residences; a schedule listing specific days spent in and out of New York City; diaries and/or appointment books for the period at issue; moving bills/receipts; and copies of E-Z Pass or monthly commutation ticket.

9. With regard to petitioners' claim that they changed their domicile from New York City to Long Island when they purchased their home in Glen Cove in 1996, the auditor did not "recollect seeing" documentation concerning petitioners' voting registration on Long Island, car registrations with their Long Island address and insurance certificates for the Long Island home. Nonetheless, the record establishes that in response to petitioners' freedom of information request to the Division of Taxation, such documentation was provided to them from the Division's files, which suggests that the auditor was provided such documentation by petitioners.

10. Petitioners proposed four findings of fact which are more in the nature of *ultimate* findings of fact better addressed in the Conclusions of Law.

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[2] The parties initially agreed to focus on 1999 as a test year. The Division rejected a schedule, prepared by petitioners' accountants, showing their presence in New York City during 1999 for only 155 days. Rather, based upon "E-Z Pass activity for the latter half of 1999," the Division determined that petitioners total days in New York City for 1999 "now is 177 days" and indicated to petitioners that it was not satisfied that they had established their presence outside of New York City for the other days in 1999. The Division maintained that adequate documentation was not provided to back up petitioners' day count. Consequently, the auditor requested relevant documents for the other two years at issue, 1998 and 2000, which were not provided as noted above.

11. The Division proposed 31 findings of fact. All of the proposed findings of fact, except for proposed finding of fact 23, are accepted and relevant portions have been incorporated into this determination. Proposed finding of fact 23 is rejected. The auditor's summary of days which petitioners spent in and out of New York City shows his determination that they spent 161 days in New York City during 1998, and that their whereabouts on the remainder was treated as "non-documented." Similarly, the auditor determined that petitioners spent 177 days in New York City during 1999, and that their whereabouts on the remainder was treated as "non-documented." With reference to 2000, the record does not contain a similar "summary of days."

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioners contend that they became domiciled in Glen Cove, Long Island when they purchased their 3,500 plus square foot house overlooking the Long Island Sound in 1996. Their one-bedroom Manhattan apartment then became merely a "hotel substitute" since it was convenient to Dr. Schulman's Park Avenue medical offices and Lenox Hill Hospital. Petitioners concede that they maintained a permanent place of abode in New York City but argue that they did not spend more than 183 days of each year at issue in New York City. Rather, they contend that they spent 127 days in New York City during 1998, 154 days in New York City during 1999, and "In later years [presumably including 2000], Dr. Schulman has cut back [even further] on his time in the [Manhattan] office" (Petitioners' brief, p. 4). They suggest that the only time they spent in New York City was "professional time" related to Dr. Schulman's medical practice and while passing through New York City on their "numerous trips to see a hospitalized, seriously ill grandson in Philadelphia" (Petitioners' brief, p .4). Petitioners maintain that their "historic roots" were not in New York City as the Division maintains, but on Long Island. Petitioners' financial condition prevented them from reacquiring a Long Island residence until

1996. Finally, petitioners argue that the Division had the burden of proving that they were in New York City more than 183 days during each of the years at issue based upon a "Publication 88" which was "issued by the State of New York Tax Department to provide guidance to the general public" (Petitioners' reply brief, p. 3).

13. The Division maintains that petitioners failed to prove that they changed their domicile from New York City to Glen Cove on Long Island. Although conceding that the issue is "a close one," the Division points to the fact that petitioners failed to testify and they "should not be permitted to derive a tactical advantage or to otherwise benefit from their failure to fully describe their activities" (Division's brief, p. 13). The Division contends that the Long Island home "is more likely a second residence rather than a new domicile" (Division's brief, p. 15). The Division emphasizes that petitioners continued to have strong business ties to New York City through the tax years at issue as well as continuing social ties reflected by their dining at many different restaurants in New York City on multiple occasions. According to the Division, the "large amount of time Petitioners spent in New York City indicates their failure to abandon their historic New York City domicile." In sum, the Division maintains that petitioners "retained their historic New York City domicile" (Division's brief, p. 20).

In addition, the Division notes that days which petitioners failed to document their whereabouts are properly treated as days in New York City since it is their burden to prove their whereabouts. For 2000, the Division contends that "all 366 days . . . are considered to be days in New York City" due to petitioners' failure to provide any evidence of their physical location (Division's brief, p. 18). The Division points to 20 NYCRR 105.20(c) which requires that "any individual who maintains a permanent place of abode within New York during any taxable year, and claims to be a nonresident . . . must keep and have available for examination adequate

records to substantiate that they did not spend more than 183 days within New York City [sic][3]" (Division's brief, p. 22).

CONCLUSIONS OF LAW

A. Administrative Code of the City of New York § 11-1701 imposes City personal income tax on every "city resident individual." A "city resident individual" is defined in the Administrative Code as (1) an individual who is *domiciled* in the city or (2) an individual, commonly referred to as a "statutory resident," who is *not domiciled* in the city but who maintains a permanent place of abode in the city and who spends more than 183 days in the city during the taxable year (***see*** Administrative Code § 11-1705[b][1]). This definition of "resident" for city income tax purposes is identical to that for state income tax purposes, as set forth at Tax Law § 605(b)(1), except for the substitution of the term "city" for "state" in the Administrative Code.

B. Although the Tax Law does not contain a definition of domicile (***compare*** SCPA 103[15]), the Division's regulations (20 NYCRR 105.20[d]) provide the following definition, in pertinent part, of domicile:

> *Domicile*. (1) Domicile, in general, is the place which an individual intends to be his permanent home - - the place to which he intends to return whenever he may be absent.
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> (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his 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 his 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, his declarations will be given due weight, but they will not be conclusive if they are

[3] The regulation actually reads "New York *State*" [emphasis added] not "New York City."

> contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation.
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> * * *
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> (4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. . . . [A]s provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode 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. In order to change domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present (***Matter of Minsky v. Tully***, 78 AD2d 955, 433 NYS2d 276 [1979]). The important distinction between domicile and mere residency, was noted by the Court of Appeals in ***Matter of Newcomb's Estate*** (192 NY 238, 250-251) as follows:

> 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.

D. Based upon a careful review of the evidence presented by petitioners, including the testimony of their friend and accountant, Sidney Yoskowitz, as noted in Finding of Fact 2, it is concluded that petitioners have established that they changed their domicile from Manhattan to Glen Cove (Nassau County) on Long Island prior to the years at issue. Unlike the facts in ***Matter of Kartiganer*** (Tax Appeals Tribunal, October 17, 1991) relied upon by the Division of Taxation, petitioners' historical domicile was on Long Island, as noted in Finding of Fact 2. The Kartiganers contended that they changed their domicile from their historic domicile of New York to Florida. Here petitioners established that they returned to their historic domicile of Long

Island when their financial situation permitted them to purchase their dream residence overlooking the water. In addition, petitioners proved that with such purchase, Dr. Schulman was able to pursue his passion for sailing. Further, as detailed in Finding of Fact 4, there are other indicia of a change in domicile to Long Island, particularly the gathering of petitioners' blended families for social and family occasions at their spacious Glen Cove home on Long Island.

E. Consequently, it is necessary to address the issue whether petitioners were statutory residents of the City under Administrative Code § 11-1705(b)(1)(B). Petitioners concede that they maintained a permanent place of abode in New York City during the years at issue even though they argued speciously that their Manhattan apartment became merely "a hotel substitute" when they purchased their residence on Long Island. There can be no doubt that petitioners' million-dollar Manhattan apartment, which had their own furnishings and was their marital home for several years, was something much more than merely "a hotel substitute" even after their purchase of the Long Island home. Therefore, since it is irrefutable that petitioners' Manhattan apartment, as "a dwelling place permanently maintained by the taxpayers," was a permanent place of abode (***see*** 20 NYCRR 150.20[e][1]), the issue becomes whether petitioners have established that they did not spend more than 183 days of each of the years at issue in New York City.

F. Petitioners' contention that the burden to prove their presence in New York City for more than 183 days was on the Division of Taxation is rejected. The law is crystal clear that the burden of proof was upon petitioners to establish that they were not present in New York City for more than 183 days during each of the years at issue (***Matter of Tamagni***, Tax Appeals Tribunal, November 30, 1995, ***confirmed***, 230 AD2d 417, 659 NYS2d 515 [1997], ***affd*** 91 NY2d 530, 673

NYS2d 44 [1998], ***cert denied*** 525 US 931, 142 L Ed 2d 280 [1998]). Consequently, the Division acted reasonably when it treated days, for which petitioners failed to offer proof establishing their whereabouts outside New York City, as days in New York City. Notably, at no time have petitioners produced for the Division's review, as detailed in Finding of Fact 8, "telephone and utility bills for all residences; credit card statements . . . for all credit cards used during the period at issue; bank statements and canceled checks; expense reports and travel receipts . . . ; diaries and/or appointment books for the period at issue . . . ." This failure to produce relevant documentation, together with petitioners' failure to appear and testify at the hearing on their own behalf, requires the denial of the petition since they have not shouldered their burden of proof (***see Matter of Avildsen***, Tax Appeals Tribunal, January 26, 1995 [the credible testimony of a taxpayer is sufficient as a matter of law to establish that a taxpayer did not spend more than 183 days in New York].

G. Furthermore, there is no basis in the law or regulations to support petitioners' request that this matter be "remanded to the Audit Department" based upon the alleged bad faith of the auditor, who they argue had available for his review certain documents which he did not recall ever seeing before the hearing although they were provided to petitioners by the Division in response to their request under the Freedom of Information Law. Such contention ignores petitioners' failure to shoulder their burden of proof, as detailed in Conclusion of Law F. The voting and car registrations and insurance documents, which the auditor could not recall reviewing, fall far short of the necessary proof required of petitioners.

H. Finally, it is concluded that petitioners have not established reasonable cause for the abatement of penalties (***see CBS Corp. v. Tax Appeals Tribunal***, 56 AD3d 908, 867 NYS2d 270 [2008], ***lv denied*** __NY2d__ [2009] [the court reaffirmed the stiff standard imposed upon a

taxpayer to establish that its failure to pay tax was due to reasonable cause and not willful neglect emphasizing that 'willfulness does not require an intent to deprive the government of its money but only something more than accidental nonpayment' ***citing Matter of Auerbach v. State Tax Commn*** (142 AD2d at 395)]). Here, as noted in Finding of Fact 7, there is even some evidence that petitioners might have intended to conceal their Manhattan residence from the Division by checking "No" in response to the question "Did you or your spouse maintain an apartment or other living quarters in the city of New York during any part of the year?" Further, as noted in Finding of Fact 5, the wage and tax statements of petitioners provide a misleading Great Neck, Long Island, address instead of the Manhattan address on Park Avenue where Dr. Schulman's medical practice was based.

I. The petition of Norman and Susan Schulman is denied, and the Notice of Deficiency dated January 18, 2005 is sustained.

DATED: Troy, New York
March 12, 2009

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE