STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DONALD AND ROSE LIEBERMAN	:	DETERMINATION DTA NO. 824101
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2004 and 2005.	:	

Petitioners, Donald and Rose Lieberman, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2004 and 2005.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 1384 Broadway, New York, New York, on August 30, 2012 at 10:30 A.M. All briefs were submitted by January 18, 2013, which date began the six-month period for the issuance of this determination. Petitioners appeared by S. Sidney Mandel, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioners were domiciled in New York State and New York City during the years 2004 and 2005.

II. Whether petitioners were New York State and New York City residents for the years 2004 and 2005 because they maintained a permanent place of abode in New York City and spent more than 183 days in New York State and New York City during those years.

III. Whether petitioners have established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. Petitioners, Donald and Rose Lieberman, were domiciliaries and statutory residents of both the State of New York and the City of New York prior to claiming a change of domicile and residency on February 1, 2004 on their nonresident and part-year resident income tax return for the year 2004.

2. In 1971, petitioner's were married and purchased a home at 7-03 Parsons Boulevard in Malba, New York, a neighborhood located in the Borough of Queens in New York City (Malba home).

3. In or around 1993, petitioners created a retained interest trust, which provided for them to continue owning the Malba home for ten years, at which time the home was to be transferred to three of petitioners' children. During the pendency of the trust, petitioners continued to pay for all expenses associated with the property, including taxes, insurance, all maintenance and utilities. Neither a copy of the trust nor the deed transferring title to the children was submitted in evidence. Thus, the exact date of the transfer could not be determined.

4. Following the expiration of the trust in or about 2004, petitioners continued to pay for all of the expenses of the Malba home listed above and, in addition, paid rent to each of the three children in the sum of $600.00 per month, for each month throughout the years in issue, 2004 and 2005. In addition, petitioners continued to keep their clothing and household furnishings in the home.

5. During the years in issue, Donald Lieberman was the principal in Don Lieberman Organization, Inc., a real estate brokerage and management firm. Mr. Lieberman was a licensed New York real estate broker. Rose Lieberman also worked for the company as a secretary during those years. In 2004, Donald Lieberman was 78 and Rose Lieberman was 80. Mr. Lieberman also had a passive association with Don Lieberman Associates, LD Realty, DTL Realty and Dawnmark Realty, all of which had business activity conducted in New York State.

6. Due to several health issues in the 1980s, specifically a bout with Guillaume-Barre syndrome and osteoporosis of the hip, Mr. Lieberman began cutting back on his workload. He employed eight to ten employees prior to 1987 but fewer thereafter.

7. Petitioners began traveling to Florida in the early 1980s to escape the cold of New York. After renting for several years, they purchased their first house there in January 1990, located at 5786 Harrington Way, Boca Raton, Florida. The Florida residence was purchased fully furnished, and no furnishings from the Malba home were brought to Florida. This residence required membership in either a social club or golf club as a requirement of ownership in the community. Petitioners joined the social club because they did not play golf.

8. Petitioners sold the Harrington Way house and purchased a second residence at 4575 Northwest 24th Way in Boca Raton in an unspecified year in the early 2000s. The Northwest 24th Way house was not purchased fully furnished, and petitioners purchased new items in Florida, choosing not to move anything down from the Malba home because they were not deemed appropriate for Florida living. The Northwest 24th Way house had no required club memberships.

9. During the audit period, Mr. Lieberman had three children, a son and two daughters. The son lived in Florida during the years in issue and the daughters in Connecticut. Mrs. Lieberman had one child who lived in Arizona. Petitioners had no relatives in New York.

10. On the New York income tax return filed for 2004, petitioners indicated that they were part-year residents, that they had become Florida residents as of February 1, 2004 and that income received during the remaining portion of the year was received as nonresidents. Petitioners declared their Florida domicile for purposes of their New York State tax returns based upon the advice of their accountant and lawyer.

11. Although Mr. Lieberman divested himself of many investment properties in 2004, 2005 and 2006, he continued to operate and manage Don Lieberman Organization, Inc., with the help of an employee in New York who was in constant contact with him by telephone, facsimile transmissions and copy machines. In addition, Mr. Lieberman spoke with his tenants by telephone because he believed they were more comfortable with human contact. He continued to return to New York to "kiss the bricks," a term he used to describe his way of checking on his investment properties and maintain a presence in Long Island City with his tenants. Mr. Lieberman expressed his desire to remember "who I am and what I am." He believed he accomplished this by continuing to negotiate leases, handling renewals and creating new tenancies, all of which were "done through" him, providing him personal contact with his clients, enjoyment and something to do.

12. During the audit period, petitioners had no burial plots and belonged to no religious organizations in New York or Florida. Their only club membership was the mandatory social membership associated with the Harrington Way house. They had three automobiles that were registered in Florida and Mr. Lieberman had a Florida drivers license. Safe deposit boxes were

maintained in both Florida and New York, the latter across the street from Mr. Lieberman's business in Long Island City.

13. Petitioners generally went to Florida in October or November and returned in mid-April (Mr. Lieberman referred to it as "tax time") or May. They sometimes spent portions of the summer in Florida.

14. For both years in issue, petitioners reported on their New York income tax returns that they spent 150 days in New York and maintained living quarters at 7-03 Parsons Boulevard, Malba, New York. A year later, in their nonresident audit questionnaire, petitioners stated that they stayed in New York 154 days in 2004 and 153 days in 2005.

15. On September 26, 2007, the Division sent petitioners an appointment letter informing them that their returns for the years 2004 and 2005 had been selected for audit. The Division requested that petitioners complete a nonresident questionnaire and submit copies of their federal income tax returns.

16. Petitioners submitted a calendar page for each month from January 2004 through December 2005 that indicated the whereabouts of petitioners for purposes of a day count with respect to the issue of statutory residency. In addition, the Division was able to review various bills and statements that substantiated petitioners' location on particular days during the audit period. For the year 2004, the Division determined that petitioners' days in New York totaled 186, with 19 New York days in dispute. For the year 2005, the Division determined that petitioners' days in New York totaled 199, with 35 New York days in dispute.

17. The Division issued to petitioners a consent to field audit adjustment, form AU-251, dated January 16, 2009, which set forth a summary of additional taxes, penalties and interest due for the years 2004 and 2005. The total additional tax due for both the State of New York and the

City of New York was $91,593.00, plus penalty and interest, for a total amount due of $136,692.00.

In its explanation of the adjustment, the Division cited the following reasons for the additional tax for both tax years as follows:

> As you have not established by clear and convincing evidence that you intended to change your domicile from New York to Florida on 02/01/2004, you are considered New York State/New York City residents for income tax purposes. As residents you are subject to tax on all income regardless of the source.
>
> Alternatively if it is decided that you are not domiciled in New York State, you are being held as statutory residents of New York based upon the following:
>
> 1. You continue to maintain a permanent place of abode, located at 7-03 Parsons Blvd., Malba, NY 11357.
>
> 2. You have not established through adequate records that you did not spend more than 183 days of the tax year 2004 [and 2005] within New York State.
>
> Alternatively, if it is decided that you are not residents of New York State for income tax purposes, your allocation of wages and other compensation to New York, as originally reported, must be adjusted to reflect the increase in allocation to New York.
>
> Penalties were imposed since the taxpayer failed to comply with the tax laws, including the maintenance of adequate records. Taxpayers did not establish reasonable cause to abate the penalties that were imposed.

18. The Division issued to petitioners a Notice of Deficiency, dated June 19, 2009, which set forth additional income tax due to the State of New York and the City of New York in the sum of $91,593.00 plus penalties and interest.

CONCLUSIONS OF LAW

A. Tax Law § 601 and New York City Administrative Code § 11-1701 impose, respectively, New York State and New York City personal income tax on state and city "resident

individuals." Tax Law § 605(b)(1) defines "resident individual" as someone:

> (A) who is domiciled in this state, unless (i) the taxpayer 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.

B. The Division's regulations[1] define "domicile" in relevant part as follows:

> (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.
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> * * *
>
> (4) A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive (20 NYCRR 105.20 [d]).

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[1] The Division's regulations with respect to the New York State income tax imposed by Article 22 of the Tax Law are applicable in their entirety to the income taxes imposed by the City of New York pursuant to Article 30 of the Tax Law and the New York City Administrative Code, and any reference in such regulations to "New York State domicile, resident and nonresident . . . shall be deemed to apply in like manner to City of New York domicile, resident and nonresident by substituting City of New York for New York State wherever applicable" (***see*** 20 NYCRR 290.2).

C. It is well established that an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (***see Matter of Bodfish v. Gallman***, 50 AD2d 457, 378 NYS2d 138 [3d Dept 1976]). Whether there has been a change of domicile is a question "of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (***Matter of Newcomb's Estate***, 192 NY 238, 250 [1908]). The test of intent with regard to a purported new 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 Bourne***, 181 Misc 238, 246, 41 NYS2d 336, 343 [1943], ***affd*** 267 App Div 876, 47 NYS2d 134 [2d Dept 1944], ***affd*** 293 NY 785 [1944]); ***see also Matter of Bodfish v. Gallman***). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989, citing ***Matter of Trowbridge***, 266 NY 283, 289 [1935]).

D. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. "[T]he taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct" (***Matter of Simon***, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: the retention of a permanent place of abode in the claimed domicile (***see e.g. Gray v. Tax Appeals Tribunal***, 235 AD2d 641, 651 NYS2d 740 [3d Dept 1997] ***confirming Matter of Gray***, Tax Appeals Tribunal, May 25, 1995); the location of business activity (***Matter of Erdman***, Tax Appeals Tribunal, April 6, 1995; ***Matter of Kartiganer v. Koenig***, 194 AD2d

879, 599 NYS2d 312 [1993]); the location of family ties (***Matter of Gray***); the location of social and community ties (***Matter of Getz***, Tax Appeals Tribunal, June 10, 1993); and formal declarations of domicile (***Matter of Gray***).

E. The record shows that petitioners were domiciled in New York State, continuously maintaining their historic domicile at 7-03 Parsons Boulevard, Malba, New York, since 1971 and that they spent a significant amount of time in New York State in 2004 and 2005. Although petitioners purchased their first home at 5786 Harrington Way, Boca Raton, Florida, in 1990 (14 years before declaring a change in domicile), the record lacks any evidence of petitioners' use of that Florida residence. The record also lacks any sense of the "sentiment, feeling and permanent association" with which petitioners regarded that Florida residence (***see Matter of Bourne***) or the second home they purchased at 4575 Northwest Way. In addition, they did not establish that they spent any more time in Florida after February 2004 than they did prior to that date (***see*** 20 NYCRR 105.20[d][4]).

Active business ties have been considered an indication of a failure to abandon a New York domicile (***see Matter of Kartiganer***). During 2004 and 2005, petitioners earned substantial income from Mr. Lieberman's real estate businesses in New York. Mr. Lieberman employed an individual to manage and report to him frequently when he was not in New York, but nothing suggests that he did not make all management decisions with respect to his business interests. He continued to negotiate leases, handle renewals and create new tenancies, all of which were "done through" him. Petitioners conceded 150 days in New York during the years in issue, and Mr. Lieberman took great pride in actively looking after his tenancies on a personal basis, referring to his business trips to New York as "kissing the bricks."

Although petitioners may have registered to vote in Florida, obtained driver's licenses

and registered their cars there, there is little convincing evidence as to petitioners' intent to abandon their New York State domicile and acquire a new one in Florida. In fact, the pattern described by petitioners was that of traditional snowbirds. They left the inclement weather of the northeast winters as a respite for their medical conditions, returning in the spring to the home in Malba where they kept their clothes and furnishings. It was from that home, their domicile, that they visited family and Mr. Lieberman tended to his significant business ventures. What is glaringly missing, other than the purchase of houses in Boca Raton, was any evidence of an intent to change their domicile to Florida. There was no mention of a daily routine in Florida, much less a social life. There was not a range of sentiment, feeling and permanent association established with Florida.

Petitioners had rented living quarters in Florida prior to purchasing their house on Harrington Way in 1990, but their custom of traveling to Florida to escape the cold weather did not change and there is no evidence to establish that their pattern of conduct changed in 2004, when they decided to declare on their New York tax return that they were no longer New York residents. Since an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (***see Matter of Bodfish v. Gallman***), it must be concluded that petitioners have not met their burden.

F. In the alternative, it is determined that petitioners were residents of the State of New York and the City of New York for the years in issue by virtue of maintaining a permanent place of abode and spending in excess of 183 days there in both 2004 and 2005. (Tax Law § 605[b][1][B]; New York City Administrative Code § 11-1705[b][1][B].)

The first prong of the test for statutory residency is the maintenance of a permanent place

of abode in the state and city. Here the Malba home was petitioners' marital home since 1971 and was maintained by them at all times during the audit period, despite the fact that petitioners transferred legal ownership to the three children after the expiration of the retained interest trust in or about 2004. Credible testimony by Mr. Lieberman indicated that petitioners continued to pay for all expenses associated with the property, including taxes, insurance, maintenance and utilities. In addition, petitioners paid rent to each of their three children in the sum of $600.00 per month, for every month of the years 2004 and 2005. The property was maintained for petitioners' unfettered use at any time during the year, and housed only their furniture and clothing.

"A permanent place of abode means a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer." (20 NYCRR 105.20[e][1].) The Malba home was a permanent place of abode for petitioners.

G. The second prong of the statutory residence test requires petitioners to have spent in excess of 183 days in the State and City of New York. Petitioners conceded in their New York income tax returns that they spent 150 days in New York during the years 2004 and 2005. In the nonresident questionnaire they stated that they spent 154 days in 2004 and 153 days in 2005 in New York State and City.

At hearing, petitioners' testimony did not have the level of specificity necessary to prove their whereabouts on any specific day in the audit period, merely saying they left for Florida in October or November and returned in mid-April or May (***cf. Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994, ***rearg denied*** January 26, 1995 [where the taxpayer's witness provided detailed testimony explaining that the summaries of the taxpayer's activities were prepared by the witness based on her review of the taxpayer's daily diaries which were records maintained

by the witness]).

During the audit, petitioners submitted twenty-four sheets of paper preprinted with calendars for the each of the months of the audit period. On it were marked large blocks of time purportedly spent in Florida, New York and other jurisdictions. However, despite submitting bank statements, telephone bills and credit card statements, underlying substantiation for days spent in and out of New York was either not forthcoming or unsatisfactory to the Division. The majority of the disputed days were either unsubstantiated or block days, i.e., where petitioners' documents differed from the calendar pages they submitted. For the year 2004, the Division determined that petitioners' days in New York totaled 186, with 19 New York days in dispute. For the year 2005, the Division determined that petitioners' days in New York totaled 199, with 35 New York days in dispute.

Petitioners submitted no contemporaneous diaries or other evidence that would have established their whereabouts on the days in dispute and the Division concluded that they were statutory residents for the years in issue.

H. Petitioners' representative stated at hearing that he believed the Division had conceded the issue of statutory residency at the Bureau of Conciliation and Mediation Service (BCMS) conference. The Division's representative said he had no knowledge of any such concession and continued to argue residency on both domicile and statutory residency theories.

The Administrative Law Judge carefully admonished the parties at hearing:

> THE COURT: Most important in this introductory statement that I give is to tell you that, other than the two documents - - the answer, and the petitioner filed an amended answer - - I don't have any other documents relative to this case. Anything you might have submitted previously to the Audit Division or the Conference Unit must be resubmitted if you wish for me to use it in making my determination in this matter. I don't have access to those records.

At the close of the hearing, petitioners' representative was granted 60 days to submit documentation, including affidavits, in support of petitioners' argument that they were not statutory residents, spending in excess of 183 days in New York during the years in issue. This permission to submit additional documentation was in addition to time reserved for the submission of a brief and reply brief. No further documentation or briefs were submitted by petitioners.

The law is clear that the burden of proof was upon petitioners to establish that they were not present in New York 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]). The record demonstrates that petitioners have not met their burden and it is concluded they were statutory residents for the years in issue.

I. Penalties were imposed pursuant to Tax Law § 685(b)(1) and (2), which provide that if any part of the deficiency was due to negligence, a penalty is imposed. Since it has been concluded that petitioners improperly filed as nonresidents for the audit period and failed to file and pay the correct tax due in a timely fashion, they are liable for the penalties asserted.

The burden of proof to show reasonable cause is on the petitioner, and in establishing reasonable cause, the taxpayer faces an "onerous task" (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

> By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted] (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992).

Since petitioners have offered no basis for finding reasonable cause, the penalties are

sustained.

J. The petition of Donald and Rose Lieberman is denied and the Notice of Deficiency dated June 19, 2009 is sustained.

DATED: Albany New York
July 11, 2013

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE