

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JEREMY WIESEN : DECISION
 : DTA NO. 826284
for Redetermination of a Deficiency or for Refund of :
of New York State and City Personal Income Taxes under :
Article 22 of the Tax Law and the Administrative Code :
of the City of New York for the Years 2007 and 2008.

Petitioner, Jeremy Wiesen, filed an exception to the determination of the Administrative Law Judge issued on June 1, 2017. Petitioner appeared pro se and by Brian Gordon, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter reply brief. Oral argument was heard in New York, New York on January 11, 2018. The parties were permitted to file additional written submissions following oral argument. The six-month period for the issuance of this decision began on March 16, 2018, the date that the final such submission was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly determined that petitioner was a domiciliary of New York City during the years 2007 and 2008.

II. Whether petitioner is liable as a statutory resident of New York City for the year 2007.

III. Whether the Division of Taxation properly denied schedule C expenses claimed by petitioner in the years 2007 and 2008.

IV. In the alternative, whether the Division of Taxation properly determined that petitioner failed to properly allocate income to New York during the years 2007 and 2008.

V. Whether petitioner has established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 12, 13, 16, 21, 33, 39, 40, 44, 45 and 48. We have also added new findings of fact, numbered 55 and 56 herein. We have made these changes to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified and additional findings of fact appear below.

1. On August 31, 2013, following a field audit, the Division of Taxation (Division) issued to petitioner, Jeremy Wiesen, a notice of deficiency assessing additional New York State and New York City personal income taxes due for the years 2007 and 2008 in the aggregate amount of \$221,581.00, plus penalty and interest.¹ With respect to the year 2007, the notice of deficiency assessed \$152,630.00 in additional New York State and City taxes due, plus negligence penalty pursuant to Tax Law § 685 (b) and interest. With respect to the year 2008, the notice of deficiency assessed \$68,951.00 in additional New York State and City taxes due, plus penalties for failure to file on or before the due date (Tax Law § 685 [a] [1]) and for negligence (Tax Law § 685 [b]) and interest. This deficiency resulted from the Division's conclusion that petitioner

¹ Petitioner's former representative, Jack B. Goldhaber, CPA, executed two consents extending the period of limitations for assessment of income tax(es) under article(s) 22, 23, 30, 30A and 30-B of the Tax Law for the year 2007 until any time on or before October 15, 2013.

remained a domiciliary of New York City during the years 2007 and 2008 and, thus, was subject to tax as a New York State and City resident for the years 2007 and 2008.

2. For the year 2007, petitioner filed a New York nonresident and part-year resident tax return (form IT-203) claiming single filing status, and indicating his address as South Flagler Drive, West Palm Beach, Florida. Petitioner did not report living in New York City as a part-year resident in any month in 2007 in item (E) on page 1 of the form IT-203. On this return, petitioner reported the following items as part of his federal adjusted gross income of \$1,659,145.00: wages of \$774,062.00, taxable interest income of \$730.00, ordinary dividends of \$402.00, taxable refunds of state and local income taxes of \$179.00, federal schedule C business income of \$611,778.00, a capital gain in the amount of \$268,110.00,² taxable social security benefits of \$11,665.00, other income of \$411.00, and adjustments to income in the amount of \$8,192.00 for one half of self-employment tax paid. New York adjustments of \$11,844.00 were subtracted from the federal adjusted gross income to arrive at New York adjusted gross income of \$1,647,301.00. After claiming itemized deductions after modifications in the amount of \$130,862.00, petitioner determined his New York State taxable income to be \$1,516,439.00, and the New York State tax due on that amount to be \$103,876.00. Petitioner then multiplied the New York State income percentage of 17.65%³ by the base New York State tax of \$103,876.00 and determined his allocated New York State tax to be \$18,334.00. Petitioner reported

² Sales of assets reported on the 2007 form 1040 schedule D included a painting acquired on January 1, 1990, and sold on March 1, 2007, for \$275,000.00.

³ Petitioner determined the New York State income percentage by dividing the adjusted gross income in the New York column on line 31 of form IT-203 in the amount of \$290,729.00 by the adjusted gross income in the federal column on line 31 in the amount of \$1,647,301.00.

withholdings totaling \$31,733.00,⁴ a total tax liability of \$18,334.00, and an overpayment of \$13,399.00 on this return. Petitioner did not compute any New York City personal income tax on the 2007 return.

3. On schedule B of the nonresident and part-year resident income allocation and college tuition itemized deduction worksheet attachment to form IT-203 (form IT-203-B) attached to the 2007 return, petitioner reported living quarters maintained for and by him in New York State at a Wireless Road, East Hampton, New York, address, and a 254 East 68th Street, New York, New York, address. On schedule B, petitioner also reported 150 days spent in New York State in 2007. The schedule A, allocation of wage and salary income to New York State, of the form IT-203-B was not completed.

4. Among the documents attached to petitioner's 2007 nonresident tax return was a document entitled: "YEAR 2007 STATEMENT ATTACHED TO NYS IT-203" that provided as follows:

"The wages that are taxable to New York State and City, \$290,729 are those allocable for the period that Jeremy Wiesen was employed during 2007, i.e. January 1, 2007 to June 30, 2007, and for employer compensation for ten year back pay.

Pursuant to New York State Tax Law Section 601(e), a nonresident individual is subject to taxation on income earned in New York. A taxpayer who gives up his right to future employment is giving up an intangible right. Under New York law a sale of an intangible right by a nonresident is not subject to New York tax.

Jeremy Wiesen, a nonresident individual of New York State, received the balance of the wages shown on the 2007 form W-2 as consideration for the relinquishment of his right to future employment, and as for his resignation.

⁴ The 2007 form IT-2 summary of form W-2 statements attached to petitioner's return reported \$774,062.00 in wages, and New York State and New York City taxes withheld in the amounts of \$20,488.00 and \$11,425.00, respectively, by petitioner's former employer, New York University (NYU).

As such the balance of the wages is not subject to taxation by New York State. See, e.g. New York State Administrative Rulings:

Robert C. and Eileen H. Butler, New York Division of Tax Appeals, Administrative Law Unit, DTA No 812807, December 14, 1995; and TSB-A-00(7)I, New York Commissioner of Taxation and Finance, Petition No 1000413A, September 6, 2000.

Jeremy Wiesen was provided with tax advice Roberts & Holland LLP, 825 Eighth Ave, New York NY 10019, which was agreed to by his employer New York University for the purpose of withholding.”

5. On page two of his 2007 form 1040, petitioner listed his occupation as consultant.

Attached to petitioner’s 2007 federal return was a schedule C, profit or loss from business, on which he reported \$725,000.00 in gross receipts, \$113,222.00 in total expenses⁵ and a resulting net profit of \$611,778.00. On this schedule C, petitioner listed a code number of “541990” for his principal business or profession, and his business address as the South Flagler Drive, West Palm Beach, Florida, address.

6. For the year 2008, petitioner filed a federal income tax return claiming single filing status, and indicating his address as South Flagler Drive, West Palm Beach, Florida, and his occupation as consultant. On this return, petitioner reported total income in the amount of \$632,216.00, consisting of taxable interest income of \$187.00; ordinary dividends of \$5,256.00; taxable refunds of state and local taxes of \$2,910.00; schedule C business income of \$603,783.00 from consulting; a capital loss of \$3,000.00; schedule E rental real estate income of \$2,444.00 from the rental of a cabana at the Maidstone Club, East Hampton, New York; and taxable social security benefits of \$20,636.00. Petitioner subtracted one-half of self-employment tax in the amount of \$14,409.00 from total income of \$632,216.00, and determined his federal adjusted

⁵ The reported total expenses consisted of car and truck expenses of \$5,355.00; legal and professional services of \$60,911.00; office expense of \$3,881.00; travel of \$28,028.00; deductible meals and entertainment of \$5,012.00; and other expenses of \$10,035.00.

gross income to be \$617,807.00. He also claimed itemized deductions in the amount of \$116,602.00 on his 2008 federal return.

7. Attached to petitioner's 2008 federal income tax return was a schedule C, profit or loss from business, on which he reported \$725,000.00 in gross receipts, \$121,217.00 in total expenses,⁶ and a resulting net profit of \$603,783.00. On this schedule C, petitioner listed his principal business or profession as consulting, with a code number of "541990," and his business address as the South Flagler Drive, West Palm Beach, Florida, address.

8. Petitioner only filed an extension of time to file with New York State for the year 2008.

9. On June 2, 2010, the Division commenced a general verification field audit of petitioner's income tax returns for the years 2007 and 2008. In her letter dated July 7, 2010, the auditor, Connie Marcus, requested that petitioner complete an enclosed audit questionnaire, and an enclosed AU-262.5 for purposes of allocating his wages from New York University. The letter also asked petitioner to provide the date, the details and supporting documentation of his move out of New York; a copy of his 2008 federal form 1040, including all statements; any forms 1099 to support the source and amount of the consulting receipts reported as schedule C income; the location of the art work prior to its sale in 2007, and the insurance riders to support that location; and the results of any recent federal audit. In addition, Ms. Marcus advised that the Division's records indicated that a New York return for the year 2008 had not been filed and asked petitioner to explain why the return was not filed.

10. Subsequently, petitioner executed a power of attorney appointing Jack B. Goldhaber, CPA, as his representative. Typed responses to the audit questionnaire for the year 2007, dated

⁶ The reported total expenses consisted of car and truck expenses of \$2,726.00; legal and professional services of \$29,687.00; office expense of \$2,675.00; rent or lease of other business property of \$25,200.00; travel of \$5,200.00; deductible meals and entertainment of \$4,166.00; and other expenses of \$51,563.00.

as signed by Mr. Goldhaber on November 15, 2010, were provided to the auditor. A summary of the responses follows:

- a. petitioner's current address was listed as South Flagler Drive, West Palm Beach, Florida, a 2,800 sq. ft., four bedroom and four bath, condominium owned by petitioner;
- b. petitioner's "NY State homes" were listed as 254 East 68th Street, New York, New York, a 975 sq. ft., one bedroom, rent stabilized apartment that petitioner acquired in August 1980 and disposed of on May 15, 2007; and Wireless Road, East Hampton, New York, a 2,500 sq. ft. house acquired in October 1999;
- c. the 254 East 68th Street apartment "contained personal belongings until move out in May 15, 2007," and the Wireless Road house contains petitioner's personal belongings;
- d. insurance for the 254 East 68th Street apartment "is insured for Gavin Wiesen (son and resident of the apartment) and Jeremy Wiesen;"
- e. petitioner's son, Gavin, "has lived at 68 St. during the audit period;"
- f. petitioner is "[R]etired;" however, he was a business school professor;
- g. petitioner voted in Manhattan in 1972 and 1976;
- h. petitioner has three automobiles registered in East Hampton, New York, and two automobiles registered in West Palm Beach, Florida;
- i. petitioner has a Florida driver's license; and
- j. no personal income tax return required in any state.

The following additional information was also included in the responses to the audit questionnaire:

"Jeremy Wiesen affirmed that he 'permanently vacated' his New York City rent stabilized apartment on May 15, 2007 in the State of New York Division of Housing and Community Renewal annual Income Certification Form. In 2008,

Mr. Wiesen provided the landlord with documentation they had said they required to permit his son to succeed to the apartment; nevertheless the landlord would only provide a renewal lease to Mr. Wiesen which he signed protesting that the landlord had given him no alternative and he continued to ask them to transfer the lease to his son since Mr. Wiesen had 'permanently vacated' the apartment and moved to Florida. Mr. Wiesen has since been served with a 'Notice to Tenant of Non-Renewal of Lease, Termination of Tenancy and Landlord's Intention to Recover Possession,' the lease has expired, and the landlord is reviewing documents for Mr. Wiesen's son to succeed to the apartment in which he lives."

11. In addition to the responses to the audit questionnaire, by letter dated November 15, 2010, Mr. Goldhaber also provided some answers and documentation in response to the auditor's request. In that letter, Mr. Goldhaber indicated that petitioner left New York on May 15, 2007, at which time he "permanently vacated the New York City apartment"; no New York State income tax return was required for 2008 because "there was no New York taxable earned income for 2008"; and the painting sold in 2007 was located at the Arcature Fine Arts Gallery, Palm Beach, Florida, and "was sold from there to a Florida purchaser." Documentation provided consisted of "Mr. Wiesen's Florida Department of Revenue Homestead Application known as 'Original Application for Ad Valorem Tax Exemption'"; a copy of "the Florida voter registration card in effect since 2004"; "a signed copy of the Income Certification form filed with the Division of Housing and Community Renewal"; a copy of Jeremy Wiesen's June 5, 2008 letter to Rudin Management Company, Inc.; copies of Jeremy Wiesen's June 25, 2008 and July 18, 2008 letters to Rudolph Henry, Rudin Management Company, Inc.; a copy of the 2007 "Statement Attached to NYS IT-203"; and a copy of a letter from the Internal Revenue Service (IRS) dated August 30, 2010.

12. On the Florida Department of Revenue original application for ad valorem tax exemption for the tax year 2008 filed on or about April 30, 2007 (original application for

homestead exemption),⁷ petitioner applied for a \$25,000.00 homestead exemption for the South Flagler Drive, West Palm Beach, condominium. On this original application for homestead exemption, petitioner reported his last year's address as "254 E 68TH ST NY 10021," that he did not own property anywhere other than Florida, and that he did not have an out of state's driver's license or vehicle tag. In the "Proof of residence for all owner [sic]" section of the original application for homestead exemption, petitioner provided the following information: he last became a permanent resident of Florida on April 27, 2007; his date of occupancy was June 11, 2001, the date on which the deed for the South Flagler Drive condominium was recorded; his Florida Driver's license number and an issuance date for the same of March 30, 2007; one Florida vehicle tag number; declaration of domicile "res. date" of April 27, 2007; he was retired; and "254 E 68TH ST, NYC, NY 10021" was the address listed on his last IRS return.

13. The copy of an unsigned Palm Beach County, Florida, voter card submitted by Mr. Goldhaber, bears petitioner's name and the South Flagler Drive, West Palm Beach, address. The card indicates a registration number and a registration date of October 1, 2004. The record does not include petitioner's record of actual voting in Florida.

14. The copy of the State of New York Division of Housing and Community Renewal (NYS DHCR) Office of Rent Administration income certification form - 2009 filing period, submitted by Mr. Goldhaber, lists Rudin Management Co., Inc., as the owner or managing agent, and Jeremy Wiesen, as the tenant of the 254 East 68th Street, apartment subject to income certification. At the beginning of the income certification form, the following information, among other things, is provided:

⁷ The copy of the Florida Department of Revenue original application for ad valorem tax exemption is unsigned and has "COPY" stamped at the top.

“The New York City Rent Stabilization Law and Emergency Tenant Protection Act (“rent stabilization”) as well as the New York City Rent and Rehabilitation Law and Emergency Housing Rent Control Law (“rent control”) permit an owner to make an annual application to exempt from rent regulation housing accommodations having a “maximum rent” (rent controlled) or “legal regulated rent” (rent stabilized) of \$2,000.00 or more per month. If the tenant(s) timely respond to a separate notice of the deregulation application from the NYS Division of Housing and Community Renewal (DHCR), the NYS Department of Taxation and Finance will review whether the housing accommodation is occupied by persons who have a total annual income in excess of \$175,000.00 in each of the two preceding calendar years. Annual income means federal adjusted gross income as reported on the New York State income tax return. For housing accommodations subject to rent stabilization, total annual income means the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant on a lease who occupy the housing accommodation, whether or not as a primary residence, and of all other persons who occupy the housing accommodation as their primary residence on other than a temporary basis In all cases, the operative date for determining the nature of any person’s status or occupancy is the date that this form is served upon the tenant This form, when served upon a tenant initiates the process of determining whether this housing accommodation qualifies for deregulation based upon the above criteria. This housing accommodation can only be deregulated pursuant to a separate order issued by the Division of Housing and Community Renewal in response to an owner’s filing a petition for deregulation based on the tenant’s (s’) income.”

15. Part A of the income certification form was hand-dated and signed by the owner or managing agent, Rudolph Henry, on February 10, 2009. Part B, section 5 of the form required the tenant to supply the names of all tenants of the housing accommodation, including all persons whose names are recited as the tenant or co-tenant on any lease; the status of such tenants,⁸ including the date on which the tenant vacated the housing accommodation (if applicable); whether the tenant filed New York State income tax returns for 2007 and 2008, or the reason for not filing a return for one or both years. In addition, part B, section 6 required the tenant to list the names of all other persons who occupy this housing accommodation as a primary residence

⁸ The choice of status is “a” for those tenants who occupy the housing accommodation as a primary residence; “b” for those tenants who occupy it as a non-primary residence; “c” for those tenants who have temporarily vacated the housing accommodation; and “d” for those tenants who have permanently vacated the housing accommodation.

on other than a temporary basis as of the date this form was served upon the tenant by the owner, or who occupied it as a primary residence on other than a temporary basis at any time during the period from January 1, 2007 through the date this form was served upon the tenant by the owner (including children and other relatives). Part B, section 6 also required information regarding the status for such listed persons; the date of vacancy or change in use (if applicable); the relationship of such persons, i.e., employee, subtenant or child; the age of the child; and whether a New York State income tax return was required to be filed for 2007 and 2008 and whether the same were filed. In part B, section 5 of the form, Jeremy Wiesen is listed as the tenant “(on lease),” with a status of “d” and a vacancy date of “5/15/07,” who filed a New York State income tax return for the year 2007, but not for 2008 because he was “[N]o longer resident or income.” In part B, section 6 of the form, “Gavin Wiesen” is listed as the occupant, with a status of “a,” i.e., one who occupies the housing accommodation as a primary residence; and is identified as “child.” No information was provided with respect to Gavin’s age, and whether New York State income tax returns were required to be filed for 2007 and 2008, or if he filed such returns. At the bottom of page 2, the following handwritten statement appears: “Jeremy Wiesen has permanently vacated the apartment[.] [sic] Gavin Wiesen is the successor tenant.” In part B, section 8 of the form, petitioner certified that the total annual income was \$175,000.00 or less in either of the two preceding calendar years, and hand dated and signed the same, on June 2, 2009. The date on which the completed income certification form may have been returned to the owner, as required by the form, is not part of the record.

16. In support of his position that he vacated the 254 East 68th Street apartment, petitioner submitted letters dated May 20, 2008, June 5, 2008, June 25, 2008, and July 18, 2008, addressed to the building’s management company. By the May 20, 2008 letter, petitioner transmitted a

signed copy of the two-year renewal lease for the apartment for the period August 1, 2008 through July 31, 2010. The May 20, 2008 letter also states: "As I discussed with you, my son Gavin Wiesen should be a tenant of the apartment." In his June 5, 2008 letter, petitioner provided some information to support his request that his son Gavin succeed to the 254 East 68th Street apartment under the rent stabilization laws. Petitioner also asked the management company to issue a new lease to Gavin as a successor tenant beginning August 1, 2008. In a subsequent faxed letter dated June 25, 2008, petitioner requested a response to his June 5, 2008 letter and a recent telephone call to the management company's office. The attachment of a signed NYS DHCR Office of Rent Administration income certification form - 2008 filing period was referenced in the June 25, 2008 letter. In his letter dated July 18, 2008, petitioner claimed that he sent back the renewal lease after requesting that the management company put in Gavin's name and the management company did not respond. Petitioner requested that the management company conform the documents to reflect Gavin as the tenant of the apartment. On each of these letters, only petitioner's email address and a phone number is listed.

17. The IRS letter, dated August 30, 2010, addressed to petitioner in care of Mr. Goldhaber, advised that as a result of a correspondence examination, no changes were made to the tax reported on Mr. Wiesen's return for the tax period ended December 31, 2007. The record does not contain any other information regarding the IRS's examination of petitioner's 2007 federal return.

18. The auditor reviewed the audit questionnaire and the documentation submitted, and found that petitioner had not supplied his federal tax returns, moving documents, the form AU-262.5, schedule C detail or insurance documents. A January 18, 2011 entry in the tax field audit record (audit log) indicates that those items would be requested again. It further indicates that

the auditor researched rent stabilization rules, and noted that petitioner would qualify until 2007, the year he received a lump sum from his previous employer and the year he claims to have moved. She also noted that a supplied document concerning petitioner's son as the successor tenant of the New York City rent stabilized apartment contained incorrect information because petitioner asserted that his income was not more than \$175,000.00 in the last two years. The January 18, 2011 entry also notes that the auditor researched petitioner's son and found that he had listed the New York City apartment as his address since 2001. However, the auditor found that the son "appears to be a writer, producer up and coming," whose "income does not seem to support NYC rental expenses." She also noted that the New York City telephone was still in petitioner's name. The auditor determined that bank statements were needed to see who maintained the New York City apartment. She also determined information was needed with respect to domicile, day count data and back up, petitioner's employment and severance agreements, wage type and amount breakdown, the Florida house, and the sale of the artwork.

19. In continuance of the audit for the years 2007 and 2008, the auditor sent a letter, dated January 18, 2011, to Mr. Goldhaber requesting the following information: copies of petitioner's 2007 and 2008 forms 1040 including all schedules; all insurance contracts and special riders in effect during 2006, 2007 and 2008; specific information regarding ownership, maintenance and physical characteristics of the South Flagler Drive apartment; moving documents to support the date of move from New York to Florida, or the reason the same could not be supplied; a list of the specific dates petitioner was in New York during 2007 and 2008; a breakdown of the amount of compensation included in petitioner's wage and tax statements, forms W-2, for 2007 and 2008; the completion of the previously mailed form AU-262.5, which would provide the detail as to how petitioner arrived at New York wages; details of petitioner's schedule C income,

including forms 1099 and, if applicable, an identification of receipts by payer name, address and amount; and the inclusive dates that the artwork was located at the Arcature Fine Arts Gallery, as well as the artwork's prior location and the inclusive dates at that location. This letter also requested a complete set of the following documents for January 1, 2007 until February 28, 2009: bank statements and cancelled checks; telephone statements (with detail) for each location; cell phone records; EZ Pass statements; personal and corporate credit card statements; travel documents such as frequent flier statements, passports, and boarding passes; and any other documents that petitioner has to support his location.

20. In response to the auditor's January 18, 2011 letter, Mr. Goldhaber submitted a letter dated March 30, 2011, and the following documents: petitioner's federal forms 1040 for the years 2007 and 2008; petitioner's Form W-2 for the year 2007; the "New York University confidential agreement;" forms 1099-Misc for the years 2007 and 2008; and a "copy of the \$270,000 deposit"⁹ related to the sale of the painting. In his letter, Mr. Goldhaber stated that petitioner was still gathering documentation requested by question number 2, i.e., the insurance contracts and riders, and question number 6, i.e., the bank statements, telephone statements, cell phone records, E-Z Pass statements, personal and corporate credit card statements, travel documents, and any other documents supporting petitioner's location.

21. Mr. Goldhaber's March 30, 2011 letter also contained, in relevant part, the following responses to the auditor's January 18, 2001 letter:

"Number 3. Flagler Drive apartment:

- a. The Flagler Drive apartment in West Palm Beach Florida is a condominium unit. Mr. Wiesen is the sole owner.
- b. Mr. Wiesen has owned the condominium apartment since 2002.

⁹ The audit file submitted into the record does not include a copy of the \$270,000.00 deposit.

- c. In the year 2004, Mr. Wiesen purchased the next door apartment. The combined apartments include four bedrooms and four baths. The apartment is now approximately 2,600 sq. ft.

Number 4. Moving documents.

When Mr. Wiesen vacated his New York City apartment in May 2007, and his office at New York University, he was systematically moving his personal effects to Florida over a period of time, which culminated in the spring of 2007, at which time he also vacated the office at New York University.

Mr. Wiesen's Florida home has been fully furnished and available for constant use since 2002. He has spent considerable amount of time in Florida. In 1999 he purchased a home in Palm Beach proper. As explained in our previous correspondence, the New York City apartment was left with household effects for Mr. Wiesen's son, Gavin, who has been living in the apartment since then.

Number 5. New York dates. [The 2008 diary will be mailed under separate cover]

As to the year 2008, Mr. Wiesen kept a diary that will show that he was in New York for far fewer [sic] than the 183 days

The number of days spent in New York State in the year 2007 will not determine the taxability of the earnings in that year. As explained in the attachment to the New York State Form IT-203, the taxable wages for the year 2007 are subject to New York State [Tax] [sic] Law Section 601(e). Mr. Wiesen had given up his right to future employment, which is an intangible right. Under New York law the sale of an intangible right by a nonresident is not subject to New York tax.

As shown on the 2007 Form W-2, there was New York State and New York City withholding on the wages earned for the spring term in 2007 and for rectifying of prior years earnings. By vacating his home in New York City and not being employed anymore after June 30, 2007, Mr. Wiesen had relinquished his right to future employment and all income received after that date are not taxable by New York.

The following points indicate that Mr. Wiesen was a Florida domiciliary and resident for 2007:

Signed a domiciliary registration with Florida

Homestead filing

Florida driver's license

Continued voter registration in Florida.

Signed statement with the State of New York Division of Housing and Community Renewal Offices of Rent Administration in which Mr. Wiesen surrendered right to the rent stabilized apartment on May 15, 2007.

New will drafted¹⁰

Number 7 and Number 8. Compensation.

The W-2 for the year 2007 . . . includes Mr. Wiesen's compensation as associate professor at New York University for the spring term, as well as compensation for (1) underpayment of salary of income for 10 years, and (2) for the relinquishment of Mr. Wiesen's contractual right as a tenured professor.

New York University relied on, among other authorities, the administrative ruling: Robert C. and Eileen H. Butler, New York Division of Tax Appeals, Administrative Law Judge Unit, DTA No. 812807, December 14, 1995; and TSB-A-00(7)I, New York Commissioner of Taxation and Finance, Petition No. 1000413A, September 6, 2000.

In 2008 the payments from New York University were specifically determined to be for pain, suffering, and defamation.

Number 9. New York University confidential agreement:

The pages relating to the termination compensation are enclosed. . . .

Number 10. Schedule C income for 2007 and 2008 consists of only one source, New York University Form 1099-Misc for \$725,000. Copies attached. . . .

Number 11. Sale of painting:

After the painting failed to sell at Christies – Fine Art Auction House in 2005, the painting was shipped to the Arcature Fine Arts Gallery in Palm Beach, Florida. The sale took place on May 24, 2007, when Mr. Wiesen was a resident and domiciliary of Florida. (Copy of the \$270,000 deposit enclosed.)”¹¹

22. The confidential agreement, release and waiver of all claims (confidential agreement) between Jeremy Wiesen and NYU, signed by Mr. Wiesen on June 22, 2007, sets forth the terms and conditions of the settlement of a lawsuit. Pursuant to the terms of the confidential agreement, in full consideration of petitioner's execution of the agreement, “his agreement to be bound by its terms and his undertakings as set forth” therein, NYU agreed to provide petitioner

¹⁰ There is no will in the record.

¹¹ *See* footnote 9.

“with payments in the total amount of” \$2,175,000.00, payable as follows:

(a) \$725,000.00, less payroll taxes, withholdings and other deductions as required by law, “[T]he amount of this payment shall be” \$502,930.85. Of this \$725,000.00, the parties “agreed that two-thirds of said amount (\$483,333) is being paid for the relinquishment of Wiesen’s contractual rights to future employment as a tenured professor.” NYU agreed not to withhold or deduct New York State and New York City income taxes from the \$483,333.00, “[B]ecause Wiesen has indicated that as of April 15, 2007 he is a resident of Florida, and because of Wiesen’s contention, based on advice he received from his tax advisor, that the \$483,333 should not be subject to any withholdings and deductions” for the same. Payment under this paragraph was to be made no later than July 6, 2007;

(b) \$725,000.00 to be paid on January 8, 2008. The parties agreed “that this payment is being made in settlement of Wiesen’s claimed emotional distress and pain and suffering, and that it does not constitute back pay, front pay or salary”; and

(c) \$725,000.00 to be paid no later than July 6, 2007. The parties agreed “that this payment is being made in settlement of Wiesen’s claimed damage to reputation and that it does not constitute back pay, front pay or salary”

23. Review of this confidential agreement also reveals that effective June 1, 2007, petitioner “voluntarily retired in good standing from his position as a tenured Associate Professor at the University’s Stern School of Business” (Stern School); at the time of his retirement, petitioner “held the position of ‘Associate Professor of Business Law and Accounting’”; and in retirement, petitioner was permitted to use the title of “Professor of Entrepreneurship, Retired.” Further review of this confidential agreement also indicates that petitioner agreed “to vacate his University office and/or work space premises no later than the date he receives payment in full of

all monies due to him” pursuant to (a) and (c) outlined above in finding of fact 22; and NYU agreed “to provide Wiesen with a lump sum payment of his salary for June, July and August 2007, less payroll taxes, withholdings and other deductions as required by law, on the next regularly scheduled pay period following Wiesen’s execution of the Agreement,” i.e., a check in the amount of \$9,307.72.

24. NYU issued to petitioner a 2007 form W-2 wage and tax statement that listed his address as 254 East 68th Street, New York, New York. NYU also issued to petitioner forms 1099-Misc for the years 2007 and 2008, each of which listed his address as 254 East 68th Street, New York, New York, and reported nonemployee compensation in the amount of \$725,000.00.

25. Under a separate letter dated March 30, 2011, Mr. Goldhaber submitted a “compilation of the days [petitioner] spent in Florida, California and New York for the year 2008” and a “copy of [petitioner’s] 2008 calendar and receipts.” In this letter, Mr. Goldhaber asserted that “[P]er the calendar’s compilation, Mr. Wiesen spent less than 183 days in New York, so that he is not a resident of New York.” The monthly compilation of Jeremy Wiesen’s “Calendar for 2008,” prepared by Mr. Goldhaber, lists a total of 212 days in Florida, 6 days in California and 148 days in New York.

26. In an April 29, 2011 audit log entry, the auditor noted that copies of large calendars and individual receipts for selected transactions were submitted, along with selected credit card statements. She further noted the absence of phone bills and other documents needed to resolve all issues previously raised. On April 29, 2011, the auditor called Mr. Goldhaber regarding the documentation submitted to date. During that telephone call, Mr. Goldhaber indicated that he thought what he submitted would not lend itself to any ambiguity as to where petitioner was during the period. The auditor agreed to go through the documents and follow up with him after

her review.

27. Subsequently, in May 2011, Mr. Goldhaber submitted the following credit card and club statements for 2008: The Beach Club, West Palm Beach, Florida - bills ending January, June, and September 2008; The Harmonie Club, New York, New York - bills ending January, June, September, October, November and December 2008; Citi Gold AAdvantage credit card statements - closing dates of March 18, 2008, May 19, 2008, July 21, 2008, August 19, 2008, September 18, 2008, and October 20, 2008; The Harvard Club, New York, New York - bills ending January and February 2008; the Maidstone Club, East Hampton, New York - bills ending January, February, March, April, June, July, August, September, October, and December 2008; the Mayacoo Lakes Country Club, West Palm Beach, Florida - January, February, March, April, May, June, July, August, September, October, November, and December 2008; and American Express statements for December 28, 2007 through February 26, 2008, April 25, 2008 through October 26, 2008, and November 26, 2008 through January 31, 2009.

28. After reviewing the credit card and club statements submitted for the year 2008, the auditor created a spreadsheet identifying each credit card by name and the billing statements for the same submitted for the months ending January 2008 through January 2009. Review of the auditor's spreadsheet indicates, among other things, that three billing statements were supplied for The Beach Club, not five as indicated in Mr. Goldhaber's letter; American Express statements, including one partial statement for May 2008, for card number 1008 (a Platinum card) were supplied; and one American Express statement for August 2008 for card number 94003 (a "Personal" card) was supplied. The auditor then created a spreadsheet with calendar entries for the year 2008, on which she entered information from the credit card statements, and activity from the billing statements from the country clubs and social clubs. The auditor noted

that petitioner's summary count by month differed from the calendar notations she made. Specifically, the auditor's current audit count for the year 2008 was 169 New York State days, with 92 New York City days and 77 East Hampton days, and 54 unknown or unsubstantiated days. The auditor also noted that no documentation or day count was submitted for the year 2007.

29. Upon review of petitioner's submissions to date, the auditor concluded that information previously requested remained outstanding, and additional information was needed to complete her audit review for the years 2007 and 2008. As a result, the auditor sent a detailed letter, dated July 18, 2011, to Mr. Goldhaber, requesting the following previously requested items that remained outstanding: a list of the specific dates petitioner was in New York State and New York City for 2007; all insurance contracts and special riders for each dwelling in effect during 2006, 2007, and 2008; petitioner's original NYU employment agreement with any updates; and for the period January 1, 2007 through February 28, 2009, a complete set of bank statements and cancelled checks, telephone statements (with detail) for each location, cell phone statements, E-Z Pass Statements, personal and corporate credit card statements,¹² and travel documents (frequent flier statements, passports, boarding passes). In her letter, the auditor also requested the following additional information: specific dates petitioner was in New York State versus New York City in 2008; petitioner's travel pattern for the year 2006 and prior years; where petitioner resided while he was working at NYU; with respect to the 254 East 68th Street apartment, an explanation of living arrangements for this one bedroom apartment (petitioner and his son); an explanation as to why part year New York City residence tax was not calculated on the 2007 tax

¹² The auditor only requested the missing credit card statements for the year 2008.

return; the last date petitioner reported to work in the Spring 2007 semester; the date petitioner cleared out his NYU office, and whether he received assistance from NYU as suggested in the confidential agreement; justification and support for expenses taken against petitioner's 2007 award from NYU for emotional distress reported under the principal business of consulting on Schedule C; justification and support for expenses taken against petitioner's 2008 award from NYU for damage to his reputation reported under the principal business of consulting on Schedule C; and whether petitioner operated a consulting business from his home on South Flagler Drive, including information about such business. The auditor also asked for information (including inclusive dates) about petitioner's connection with the following entities, "which appear to have New York ties": Cynthia Witter, Hamptons International Film Festival, Jeremy Wiesen (Cookie & Cracker Manufacturing), Jeremy Wiesen Foundation, and Global Green.

30. The auditor did not receive a response to her July 18, 2011 letter. Subsequently, on February 8, 2012, the auditor called Mr. Goldhaber and indicated that a response to the July 18, 2011 letter had not been received. During that telephone call, Mr. Goldhaber suggested that petitioner did not have any additional documentation, and he felt that he had answered all of the auditor's inquiries to his knowledge at this point. The auditor requested that Mr. Goldhaber review her last request and send something in writing indicating the same. Mr. Goldhaber stated that he would do so. The auditor also indicated that at that point, she would bill petitioner based upon the information on hand and that might give him incentive to move this matter along. Mr. Goldhaber agreed.

31. After discussions with her team leader, the auditor sent a letter, dated March 12, 2012, to Mr. Goldhaber making a final request for a response to the letter dated July 18, 2011. Her March 12, 2012 letter also included the following audit findings to date:

- “1. The taxpayer did not change his domicile from New York City, notwithstanding,
2. The taxpayer did not move from New York City during the spring of 2007, notwithstanding,
3. The taxpayer maintained a permanent place of abode in New York and spent more than 183 days in New York City during the audit period, notwithstanding,
4. The taxpayer was employed at will and all payments from NYU are New York sourced, notwithstanding,
5. Schedule C income is New York sourced, notwithstanding,
6. Deductions against Schedule C income for emotional distress, damage to reputation, and meals and entertainment are disallowed, notwithstanding,
7. The gain from the sale of artwork is New York sourced.”

32. On April 20, 2012, the auditor left a message on Mr. Goldhaber’s phone indicating that if she did not hear from him, she would have no choice but to prepare a bill. No additional information was supplied.

33. After again reviewing the documentation submitted during the audit, the auditor found that petitioner failed to support:

“a change of domicile, the date of change of domicile, relief from statutory residency rules for NYS and NYC, relief from part year NYC resident tax, NYU wage allocation, omission of 1099 payments from NYU, excluding Schedule C income, deductions reported on Schedule C, exclusion of capital gain from the sale of art work either sourced in NY or sold during his residency period, and expenses reported on Sch E pertaining to his vacation home.”

As such, the auditor concluded that petitioner was a New York City domiciliary in 2007 and 2008. The auditor also disallowed petitioner’s claimed federal schedule C expenses for the years 2007 and 2008 because they were not substantiated or ordinary and necessary. Expenses reported on the 2007 federal schedule E related to property located at Wireless Road, East Hampton, New York, were disallowed because they were deemed to be personal in nature.¹³

¹³ The schedule E attached to petitioner’s 2007 federal return reported total expenses in the amount of \$55,807.00 associated with the alleged rental of the Wireless Road, East Hampton, New York, property. No rental income for such property was reported on this schedule E. None of the \$55,807.00 loss was reported on line 17 of petitioner’s 2007 federal return. Hence, the auditor’s disallowance of the reported expenses had no impact on

Alternatively, the auditor concluded that petitioner was a New York State and New York City statutory resident in 2007 and 2008. The auditor also concluded that petitioner failed to properly allocate items of income and capital gain during the years 2007 and 2008.

34. The auditor recomputed petitioner's New York State and New York City personal income tax liability for the year 2007 using a filing status of single. To the reported federal adjusted gross income of \$1,659,145.00, the auditor subtracted \$11,844.00 (taxable refunds of state and local income taxes of \$179.00 plus taxable amount of social security benefits of \$11,665.00), then added \$113,222.00 (federal schedule C unsupported expenses that she disallowed), the net adjustment to New York State adjusted gross income, and determined the corrected New York State adjusted gross income to be \$1,760,523.00. From this amount, the auditor subtracted corrected itemized deductions after modifications in the amount of \$130,862.00, and determined corrected New York State taxable income to be \$1,629,661.00, recomputed New York State tax to be \$111,632.00 and recomputed New York City tax to be \$59,332.00. After subtracting prior tax payments of \$18,334.00 from the corrected New York State tax liability of \$111,632.00, the auditor determined the additional New York State tax liability to be \$93,298.00 and the additional New York City tax liability to be \$59,332.00, for a total New York State and City tax liability due in the amount of \$152,630.00 for the year 2007.

35. The auditor recomputed petitioner's New York State and New York City personal income tax liability for the year 2008 using a filing status of single. To the reported federal adjusted gross income of \$617,807.00, the auditor added \$121,217.00 (federal schedule C unsupported expenses that she disallowed), then subtracted a total of \$23,546.00 (taxable refunds

petitioner's tax liability.

of state income taxes of \$2,190.00 plus taxable amount of social security benefits of \$20,636.00), and determined the corrected New York State adjusted gross income to be \$715,478.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications of \$57,552.00, and determined corrected New York State taxable income to be \$657,926.00, the corrected New York State tax liability to be \$45,068.00 and the corrected New York City tax liability to be \$23,883.00. Since there were no prior payments for the year 2008, the auditor determined the corrected New York State tax liability to be \$45,068.00 and the corrected New York City tax liability to be \$23,883.00, for a total New York State and City tax liability due in the amount of \$68,951.00 for the year 2008.

36. As a result of the auditor's conclusions, the Division issued a consent to field audit adjustment, dated August 22, 2012, with respect to the years 2007 and 2008. The additional New York State and New York City income taxes determined to be due for each year was as follows:

Period Ended	Jurisdiction	Additional Tax	Penalties	Interest	Total
12/31/2007	New York City	\$59,332.00	\$14,000.00	\$22,069.00	\$ 95,401.00
12/31/2007	New York State	\$93,298.00	\$22,015.00	\$34,703.00	\$150,016.00
12/31/2008	New York City	\$23,883.00	\$10,575.00	\$ 6,823.00	\$ 41,281.00
12/31/2008	New York State	\$45,068.00	\$19,957.00	\$12,874.00	\$ 77,899.00
Total					\$364,597.00

Penalties were imposed on the additional New York State and New York City tax liabilities determined to be due for the years 2007 and 2008 pursuant to Tax Law § 685 (b) (1) and (2) for negligence, and for 2008 pursuant to Tax Law § 685 (a) (1) for failure to file on or before the due date. The consent explained that an enclosed letter set forth the details of the audit adjustments made to petitioner's tax liability for the years 2007 and 2008.¹⁴

¹⁴ The enclosed letter, dated August 22, 2012, contained the same audit findings as summarized in finding of fact 33.

37. After the consent to field audit adjustment was issued, no additional documentation was submitted to the auditor.

38. As noted in finding of fact 1, the Division issued a notice of deficiency to petitioner asserting additional New York State and New York City personal income taxes due for the years 2007 and 2008 in the aggregate amount of \$221,581.00.

39. After the assessment was issued, the auditor obtained documentation from various third-parties, including, among others, the Citi Gold AAdvantage and the American Express credit card companies, via subpoenas, and such documentation is included in the record in this matter. After reviewing the additional documentation obtained, the auditor concluded that petitioner was present at least 260 days in New York (214 in New York City and 46 days in East Hampton); 66 days in Florida; and 33 unknown days in 2007. She also concluded that petitioner spent at least 171 days in New York (91 days in New York City and 80 days in East Hampton); 180 days in Florida; and 11 unknown days in 2008.¹⁵

40. Petitioner's Citi Gold AAdvantage credit card statements list his East 68th Street, New York, New York, address through the statement closing date of May 19, 2008, and list his West Palm Beach, Florida address thereafter. Petitioner's American Express Platinum and Personal credit card statements list his East 68th Street address through the statement closing dates of December 26, 2007 and December 21, 2007, respectively, and list his West Palm Beach, Florida address thereafter.

41. The record includes an initial lease (and attachments pertinent to the rules and regulations under the rent stabilization law), dated July 10, 1980, between Rudin Management Co., Inc., as agents for 254 East 68th Street, Inc., and Jeremy Wiesen, Esq., the tenant, for an

¹⁵ That the day counts list a total of only 359 and 362 days for 2007 and 2008, respectively, is unexplained.

apartment located at 254 East 68th Street, New York, New York. The initial one-year lease term commenced on August 1, 1980 and ended on July 31, 1981.

42. The record includes a copy of a renewal lease form executed on or about April 26, 2006, by petitioner and Rudin Management Co., Inc., agent for the owner, that renewed the lease for the 254 East 68th Street apartment for a period of two years, commencing on August 1, 2006 and ending on July 31, 2008. It also includes a copy of a renewal lease form executed by petitioner and Rudin Management Co., Inc., as agent, on May 20, 2008 and May 23, 2008, respectively, that renewed the lease for the 254 East 68th Street apartment for a period of two years, commencing on August 1, 2008 and ending on July 31, 2010. On each of these renewal lease forms, the tenant's name is recited as Jeremy Wiesen, Esq.

43. The record includes a faxed copy of a three-page NYS DHCR Office of Rent Administration income certification form for the 2008 filing period (2008 income certification form). In Part B, section 5 of the 2008 income certification, the following information appears: Jeremy Wiesen was identified as the tenant, both the "Status" and "Vacancy Date for status (c) or (d)" columns were blank, a NYS income tax return was filed for 2006 but not in 2007 because it was "on extension." In Part B, section 6 of the form, the named occupant was identified as Gavin Wiesen, status "a," a child of age 33, who was required to file NYS income tax returns for 2006 and 2007, and filed a NYS income tax return for 2006 but not in 2007 because it was "on extension." In the Part B, section 8, petitioner certified that the total annual income of all persons identified in items 5 and 6 was certified as \$175,000.00 or less in either of the two preceding calendar years, hand dating and signing the income certification (section 8) on June 25, 2008. The record also includes a faxed copy of a NYS DHCR Office of Rent Administration notice to owner of family members residing with the named tenant in the apartment who may be

entitled to succession rights/protection from eviction form (NYS DHCR notice form). The instructions contained within the NYS DHCR notice form indicates the purpose of the form is to provide information about a family member who may have a right to a renewal lease or protection from eviction. The instructions also state that the form may be filed at any time by tenants of rent stabilized and rent controlled apartments. Review of this NYS DHCR notice form indicates that petitioner, with a listed mailing address of 254 East 68th Street, New York, New York, submitted the notice to Rudin Management Co., Inc. In the statement of tenant section of the form, Gavin Wiesen was listed as a person other than the tenant residing in the apartment, the year 1980 was listed as the date of commencement of his primary residence in the apartment, and the family relationship column was blank. Petitioner signed and dated the form on June 23, 2008. A fax date of June 25, 2008 appears at the top of both 2008 income certification form and the NYS DHCR notice form.

44. The record includes a copy of the NYS DHCR Office of Rent Administration's order denying petition for high income rent deregulation for the 2009 filing cycle, issued on March 24, 2011. The order was denied because the rent administrator found "that the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant on the lease who occupied" the 254 East 68th Street apartment "and of all other persons who occupied" the 254 East 68th Street apartment "as their primary residence on other than a temporary basis (excluding bona fide employees and bona fide subtenants); WAS NOT IN EXCESS OF \$175,000 in 2007, 2008." The order lists petitioner as the tenant of the apartment.

45. The record indicates that petitioner's son Gavin became the primary tenant and lessee of the 254 East 68th Street apartment on or about April 1, 2012, when he signed a two-year lease for the period April 1, 2012 through March 31, 2014. The record also indicates that petitioner

maintained the apartment throughout the period at issue as his son's income could not support the same.

46. The record indicates that following 2008, petitioner spent more time in New York in an effort to find employment.

47. After a conciliation conference was conducted on October 24, 2013, the conciliation conferee sustained the notice of deficiency in a conciliation order dated March 7, 2014. Subsequently, petitioner filed a petition challenging the notice of deficiency issued for the years 2007 and 2008. In his petition, petitioner contended that he was a domiciliary of Florida by 2007. He further contended that he was in New York State for the statutory number of days in 2007, but not in 2008. Petitioner also asserted that even though he was still employed by NYU for part of 2007, he was not in New York City for the statutory number of days in either 2007 or 2008. He maintained that his travel schedule to Palm Beach from New York City was such that he "was basically commuting to teach classes with fourteen round trips for weekends and vacations in 2006." Petitioner also maintained that after settling his case with NYU in March 2007, he agreed to resign from NYU effective the end of the semester, and he gave up his rent stabilized apartment by notifying the landlord that the apartment should be turned over to his son since he was leaving. He also claimed that after retiring, he was 65 years old, had a beautiful home in West Palm Beach, belonged to a wonderful golf club and beach club in Florida, and he had survived cancer surgery. Petitioner further claimed that there was no place for him to live and nothing for him to do in New York City, the summer season was only a couple of months long in East Hampton, and he also "traveled somewhat." Lastly, petitioner contended that he did not have any New York State source income during 2007 and 2008, except for small rental income for a cabana at an East Hampton club "which brings in close to \$3,000 some summers."

48. On December 14, 2015, petitioner and the Division waived a hearing and agreed to submit this matter for a determination based on documents and briefs. By letter dated December 16, 2015, the Administrative Law Judge advised the parties of the need to submit all documents that they wished the Administrative Law Judge to consider. The letter noted that the Administrative Law Judge did not have access to documents previously exchanged by the parties. The letter directed the parties to provide copies of all submitted documents to the opposing party and noted that the record would be closed as of the due date for petitioner's documents. The December 16, 2015 letter also listed a schedule for the submission of such documents, subsequently revised by the Administrative Law Judge's letter dated January 26, 2016. The Division submitted its documents in accordance with the revised schedule and provided petitioner with copies. According to the revised schedule, petitioner's documents were due to be submitted about two months after the submission of the Division's documents. Petitioner did not submit any documents to the Administrative Law Judge. Petitioner also did not file a brief with the Administrative Law Judge.

49. The record does not include petitioner's personal and business diaries for the year 2007. It also does not include any of petitioner's frequent flier statements, airline boarding passes or E-Z Pass statements for the years 2007 and 2008. A copy of petitioner's passport is not part of the record.

50. The record does not include documentation related to petitioner's travel pattern for the year 2006 and prior years.

51. The record does not include the insurance contracts and special riders for the 254 East 68th Street apartment, the Wireless Road, East Hampton house, and the South Flagler Drive, West Palm Beach condominium in effect during the years 2006, 2007 and 2008. The record also

does not include any moving bills.

52. Other than the confidential agreement, the record does not include any additional information regarding petitioner's employment at NYU, such as the dates of employment, tenure dates and positions held. It also does not include petitioner's employment contract with NYU.

53. The record does not include any supporting documentation substantiating the schedule C expenses claimed for the years 2007 and 2008.

54. The record does not include any documentation supporting petitioner's income allocation to New York for the years 2007 and 2008.

55. The record contains a photocopy of a check dated December 31, 2007, and drawn on the account of petitioner's son, Gavin Wiesen, in payment of the monthly rent on the East 68th Street apartment. The check was not cashed, but was returned to petitioner with a memorandum from Rudin Management stating that Rudin "cannot accept payment by anyone other than you, the tenant of record."

56. The record contains an affidavit of Gavin Wiesen dated April 30, 2010, in which Mr. Wiesen states that petitioner "permanently vacated the Apartment in May, 2007, at which time he moved to Florida." The affidavit provides no other information relevant to the present matter. The affidavit was apparently part of petitioner's answer to Rudin Management's petition to the NYS DHCR Office of Rent Administration for high income rent deregulation for the 2009 filing cycle (*see* finding of fact 44).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed that a taxpayer may be subject to tax as a resident of New York State or City on the basis of either domicile or physical presence in the State or City for more than 183 days in a given year (statutory residency). She noted that maintenance of a permanent place of abode in New York State or City is a component of residency under both

bases. Accordingly, the Administrative Law Judge examined the record and concluded that petitioner had maintained such an abode during the years at issue.

The Administrative Law Judge next addressed whether petitioner was subject to income tax as a resident based on his domicile. Upon review of the record, the Administrative Law Judge determined that petitioner did not meet his burden of proof to show that he changed his domicile from New York City to West Palm Beach, Florida as of the years at issue. The Administrative Law Judge cited the following evidence in support of this conclusion: petitioner's continued use of the East 68th Street apartment in 2007 and 2008 as indicated by his execution of a two-year lease in May 2008; his continuing receipt of mail at the East 68th Street address; the use of the East 68th Street address on W-2s, 1099s and the Florida homestead exemption application; his continued maintenance of personal belongings and clothing at the East 68th Street apartment; the significant number of days spent in New York State and City during the years at issue; his continuing family ties to New York, i.e., his son's continuing New York residence; and his seeking of employment in New York after 2008. The Administrative Law also found that an absence of evidence in the record on certain points was significant. Specifically, the Administrative Law Judge noted that petitioner provided no evidence of his historic use of his Florida residence. The Administrative Law Judge also noted that the record lacks any evidence of petitioner's express intent to abandon his New York City domicile and to acquire a new domicile in Florida. The Administrative Law Judge determined that such a lack of evidence supports her conclusion that petitioner failed to meet his burden of proof to show a change of domicile.

Having determined that petitioner was subject to tax as a domiciliary of New York State and City for the years at issue, the Administrative Law Judge found that it was unnecessary to address the issue of statutory residency for 2007.

The Administrative Law Judge sustained the Division's disallowance of petitioner's schedule C expenses because petitioner failed to submit any documentation to support such expenses.

The Administrative Law Judge determined that the issue of the proper allocation of petitioner's income during the years at issue was moot given her finding with respect to domicile.

Finally, the Administrative Law Judge sustained the imposition of penalties because petitioner failed to articulate any rationale for abatement.

SUMMARY OF ARGUMENTS ON EXCEPTION

As he did below, petitioner contends that he changed his domicile from New York City to West Palm Beach, Florida at about the time of the settlement of the NYU litigation as evidenced by the confidential agreement. According to petitioner, he no longer had any reason to be in New York City at that point and thus retired to West Palm Beach. Petitioner asserts that, by 2007, his NYU employment was his main connection to New York City and that he had largely abandoned the City well before 2007. He asserts that the settlement was structured to take his status as a Florida resident into account.

In support of his contention that he vacated the East 68th Street apartment in 2007, petitioner asserts that he advised Rudin Management that he wanted his son, Gavin, to succeed him as tenant in the rent-stabilized apartment. He contends that it was necessary for him to sign the two-year lease in 2008 in order to protect Gavin's rights to succeed him as tenant in the apartment. He asserts that Rudin Management refused to accept Gavin's rent checks. He notes that Rudin Management ultimately relented in 2012 and Gavin became the tenant and signed a lease at that time. Petitioner further notes that he prevailed in an Office of Rent Administration proceeding pertaining to the 2009 filing cycle, as indicated by the rent administrator's order,

which found that the sum of annual income of all persons occupying the apartment was not in excess of \$175,000.00 in 2007 or 2008. Petitioner infers from this order that the rent administrator necessarily found that he did not occupy the apartment during 2007 or 2008 because his income exceeded that amount during those years.

As additional support for his claim that he acquired a Florida domicile as of the years at issue, petitioner asserts that his Florida home is much larger than the East 68th Street apartment; that he declared a Florida domicile with his 2007 Florida homestead exemption application; that he had no business ties to New York after he left NYU; that, contrary to the Administrative Law Judge's finding, he did not seek employment or work in New York after 2008; that he kept his cars in Florida and East Hampton, but not in New York City; that he kept paintings, photos, important papers and clothes in Florida; and, with respect to family ties, petitioner asserts that, although his son was a New York City resident, he was working in Los Angeles for much of the period in question; that his two significant others during the relevant period were Florida domiciliaries; that his parents, now deceased, had been Florida domiciliaries since the 1970s; that West Palm Beach was the center of his life; and that he was an important part of the social, athletic and intellectual life of Palm Beach.

Petitioner also contends that the expenses claimed on his returns for the years at issue were attributable to costs incurred in the NYU litigation and were reasonable. Petitioner notes that he received a "no change" letter from the IRS with respect to his 2007 federal returns.

Petitioner also contends that penalties imposed herein should be abated because his returns for the years at issue were prepared after consultation with a tax attorney, who advised that, except as reported on petitioner's returns, the payments from NYU would not be subject to New York income tax.

At oral argument, this Tribunal granted petitioner permission to file an additional written argument in order to request that certain evidence, which was not submitted below, now be received into the record and considered by this Tribunal. Petitioner subsequently proffered certain documents.¹⁶ Petitioner's excuse for his failure to submit such documents at the appropriate time is that he believed that all documentation had been submitted during the audit and that no one advised him that documentation would have to be submitted to the Administrative Law Judge.

Petitioner's post-oral argument submission also includes what is essentially another brief in support of his position.

The Division agrees with the Administrative Law Judge's findings of fact and her conclusion that petitioner failed to meet his burden to show that he changed his domicile to West Palm Beach as of the years at issue. The Division reviews five indicators of domicile as established by case law and finds that each supports its position herein. Specifically, the Division asserts that petitioner retained a permanent place of abode, i.e. the East 68th Street apartment, which was his historic New York City domicile; that he spent more time in New York than in Florida during the period at issue; that he had continuing business ties to New York City; that he retained family ties in New York City; and that he kept near and dear items in New York.

The Division also contends that the Administrative Law Judge properly sustained the imposition of penalties.

As to petitioner's post oral argument submission, the Division urges this Tribunal to decline to consider the new evidence offered by petitioner. In support, the Division notes this

¹⁶ Petitioner's post-oral argument submission also includes several documents that were included in the Division's submission of evidence to the Administrative Law Judge and thus were already part of the record.

Tribunal's longstanding policy against the submission of evidence after the Administrative Law Judge has closed the record.

OPINION

We first address issues arising from petitioner's post-oral argument submission. We reject petitioner's request to receive in evidence and to consider the new documents proffered with that submission. As we advised petitioner at oral argument, it has long been the policy of this Tribunal that we do not consider evidence that was not part of the record before the Administrative Law Judge (*see e.g., Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991; *Matter of Meltzer*, Tax Appeals Tribunal, March 29, 2018). As we have noted many times, receipt of such evidence into the record at this point in the proceeding is contrary to a fair and efficient hearing process (*id.*). We see no unfairness to petitioner by the application of this policy in the present matter, given the history of this proceeding (*see* finding of fact 48). Indeed, petitioner's stated excuses for his failure to submit these documents to the Administrative Law Judge are contrary to that history (*id.*).

Also, we have not considered the written arguments regarding domicile and statutory residency included in petitioner's post-oral argument submission because we did not grant petitioner permission to submit such arguments. As previously noted, petitioner submitted an initial brief on exception and a reply letter brief. We have reviewed and considered those submissions in rendering this decision.

Turning now to the substantive issues presented, it is well established that a presumption of correctness attaches to a notice of deficiency and the petitioner bears the burden of proving that a proposed deficiency is erroneous (*see e.g., Matter of Clifton*, Tax Appeals Tribunal, January 4, 2018).

New York State imposes a personal income tax on resident individuals pursuant to Tax Law § 601. New York City imposes a personal income tax on its residents pursuant to the Administrative Code of the City of New York § 11-1701.

Tax Law § 605 (b) (1) defines such a resident individual, in relevant part, as someone:

“(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”

New York City’s definition of a resident individual is identical to that for State income tax purposes, except for the substitution of the term “city” for “state” (*see* Administrative Code of the City of New York § 11-1705 [b] [1] [A] and [B]).

Resident individuals of both the State and City are taxed on their income from all sources (*see* Tax Law § 611 [a]; Administrative Code of the City of New York § 11-1711 [a]).

Nonresidents of the State and City are taxed only on their State and City source income (*see* Tax Law § 631 [a]; Administrative Code of the City of New York § 11-1902 [a]).

On the question of domicile, the Division’s regulations¹⁷ define that term, 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.

¹⁷ 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).

(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" (20 NYCRR 105.20 [d]).

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, 458 [3d Dept 1976]; 20 NYCRR 105.20 [d] [2]). 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*, 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 [Sur Ct Westchester County 1943], *affd* 267 AD 876 [2d Dept 1944], *affd* 293 NY 785 [1944]); *see also Matter of Bodfish v Gallman*).

In order to establish a new domicile, "the 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). "While the standard is subjective, the courts and this

Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile" (*Matter of Ingle*, Tax Appeals Tribunal, December 1, 2011, *confirmed* 110 AD3d 1392 [3d Dept 2013]). We have considered the following such criteria to be of significance in addressing issues of domicile: (1) the retention and use of a permanent place of abode in New York (*Matter of Wechsler*, Tax Appeals Tribunal, May 16, 1991); (2) the location of business activity (*Matter of Kartiganer*, Tax Appeals Tribunal, October 17, 1991, *confirmed* 94 AD2d 879 [3d Dept 1993]); (3) the location of family ties (*Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852 [3d Dept 1994]); and (4) the location of social and community ties (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993).

Upon review of the record, and in accordance with the foregoing principles, we agree with the Administrative Law Judge's conclusion that petitioner failed to prove, by clear and convincing evidence, that he gave up his New York City domicile on or about May 15, 2007 and acquired a West Palm Beach domicile as claimed.

As noted, the retention and continuing use of one's historic domicile in New York supports a finding of a New York domicile (*see Matter of Wechsler; Matter of Campaniello*, Tax Appeals Tribunal, July 21, 2016 *confirmed* 161 AD3d 1320 [3d Dept 1918]). The record shows that petitioner continued to use the East 68th Street apartment, his domicile since 1980, as a residence after May 15, 2007. There is no dispute that petitioner continued as lessee of the East 68th Street apartment for the entire period at issue and that he executed a renewal lease on May 20, 2008 for the period August 1, 2008 through July 31, 2010. He also continued to pay rent for the entire period at issue and he continued to have unrestricted use of the apartment for

the entire period at issue.¹⁸ The Division's day count for those years makes clear that petitioner regularly used the apartment during that period (*see* finding of fact 39).¹⁹ In particular, the Division's 2007 day count shows a significantly greater presence in New York State (260 days) and City (214 days) than Florida (66 days) (*see* finding of fact 39). Even recognizing that petitioner claims a Florida domicile only as of May 15, 2007, the Division's uncontested 2007 day count clearly weighs against petitioner's position (*see* finding of fact 28; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994; *see also* 20 NYCRR 105.20 [d] [4] [where a person has more than one home, the length of time spent at each location is an important, though not conclusive, factor in determining intention for purposes of domicile]). The Division's day count for 2008 is more favorable to petitioner (*see* finding of fact 39), although it still shows a significant presence in New York State and moderate presence in New York City. We note that petitioner contends that he spent time in New York City in 2008 to attend to his ailing mother and, subsequently, to attend to matters related to her estate, but provided no evidence of this claim. Of lesser import, but also indicative of continuing use of the apartment, petitioner's credit card bills continued to use the East 68th Street address through May 2008 (*see* finding of fact 40).

¹⁸ Based on these facts, and the fact of petitioner's ownership, maintenance and use of his East Hampton residence, the Administrative Law Judge concluded that petitioner maintained a permanent place of abode in New York State and City throughout the years at issue. Petitioner's exception does not contest this conclusion. Therefore, we need not address it.

¹⁹ We have concluded that petitioner used the apartment on the days that he was present in New York City. An affidavit of Cynthia Witter, in which petitioner is identified as Ms. Witter's boyfriend, is among the documents included in the Division's audit file, which is part of the record. That affidavit states that petitioner and Ms. Witter stay at Ms. Witter's apartment when she and petitioner visit the city. The Witter affidavit was apparently part of petitioner's answer to Rudin Management's petition to the NYS DHCR Office of Rent Administration for high income rent deregulation for the 2009 filing cycle (*see* finding of fact 44). It is dated April 29, 2010 and makes no reference to New York City stays by petitioner during 2007 or 2008. The affidavit thus provides no information with respect to petitioner's presence in New York or his use of the apartment during the years at issue. Petitioner offered no other evidence to show that his presence in New York City during those years did not correspond to a use of the apartment.

Petitioner's continuing family tie to New York City through his son's continuing residence in the apartment is another affirmative fact in the record that supports a finding that petitioner failed to prove that he changed his domicile as of the period at issue (*see Matter of Buzzard*). We reject petitioner's unsubstantiated assertion that his son was in Los Angeles for much of the audit period. Petitioner offered no evidence of any family ties in Florida. Petitioner contended that his parents had been Florida domiciliaries since 1973, but offered no evidence on this point.

As noted, petitioner explains his execution of the two-year renewal lease in May 2008 by contending that it was necessary for him to continue to lease the rent-regulated apartment in order to protect his son's rights to succeed him as tenant. Petitioner cites his letters to Rudin Management in support of this claim (*see* finding of fact 16). The letters, however, merely state that petitioner wanted his son to succeed him as tenant. They make no assertion that petitioner was no longer living in the apartment, much less that he had permanently vacated it a full year earlier, in May 2007, as he claims. Additionally, while the record shows that Rudin Management refused a check for rent, dated December 31, 2007, from Gavin Wiesen, the record also shows that Rudin did so because Gavin was not the named tenant of the apartment (*see* finding of fact 55). As there is no dispute that petitioner's adult son resided at the apartment, the fact that he attempted to pay the rent on one occasion does not tend to prove that petitioner no longer used the apartment as a residence. Finally, we do not accept petitioner's explanation that his payment of the rent during the years at issue was solely for his son's benefit. The record lacks evidence, such as testimony or an affidavit, addressing this claim.

Petitioner argues that the NYS DHCR Office of Rent Administration's order denying petition for high income rent deregulation for the 2009 filing cycle, issued on March 24, 2011 (*see* finding of fact 44) also supports his claim that he vacated the apartment in 2007.

Petitioner's argument is premised on the statement in the order that the annual income of all persons who occupied the apartment as their primary residence in 2007 and 2008 did not exceed \$175,000.00 (*id.*). Since petitioner's income exceeded \$175,000.00 during both of those years, he contends that the order necessarily determined that he was not a resident of the apartment in 2007 or 2008. The order, however, does not describe the evidence upon which it was based and it does list petitioner (and not his son) as the tenant of the apartment (*id.*). These facts create an ambiguity that undermines any probative value to be accorded the order in the present matter.

The Office of Rent Administration income certification form for the 2009 filing period, dated June 2, 2009, does summarily state that petitioner permanently vacated the apartment on or about May 15, 2007 (*see* finding of fact 15). The affidavit of petitioner's son, Gavin Wiesen, dated April 30, 2010, also summarily states that petitioner permanently vacated the apartment at that time (*see* finding of fact 56). We find, however, that these documents lack credibility, given the lack of any testimony by petitioner or his son, through which such general assertions could be challenged by cross-examination. Accordingly, such statements fail to overcome other evidence indicating petitioner's continuing maintenance and use of the apartment; that is, his status as lessee, his payment of rent and his physical presence as shown by the day count.

Petitioner also contends that the confidential agreement by which he settled his dispute with NYU and agreed to retire supports his claim that he vacated the East 68th Street apartment on or about May 15, 2007. We disagree. While that agreement establishes petitioner's retirement from NYU, it does not establish that petitioner vacated his East 68th Street apartment for West Palm Beach at that time. Although the agreement states that "as of April 15, 2007 he [petitioner] is a resident of Florida," such language does not indicate that petitioner ceased to be a resident of New York. Rather, the statement's context makes clear that its purpose is to provide

a justification for NYU to make certain settlement payments without withholding any New York State or City taxes (*see* finding of fact 22).

Petitioner's Florida homestead exemption application, by which petitioner claimed to be a Florida domiciliary, filed on or about April 30, 2007; his Florida driver's license, issued March 30, 2007; and his 2004 Florida voter registration are also unconvincing proof of petitioner's claimed May 15, 2007 domicile change under the present circumstances. We note that courts have recognized the "self-serving nature" of such formal declarations when used as evidence to affirmatively establish new domicile (*Wilke v Wilke*, 73 AD2d 915, 917 [2d Dept 1980]) and that they are often less persuasive than informal acts demonstrating an individual's "general habit of life" (*Matter of Trowbridge*, 266 NY 283, 289 [1935]; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989). We note also, as did the Administrative Law Judge, that petitioner's Florida voter registration is made less significant by the lack of any evidence of a Florida voting history.

Finally, we ascribe no evidentiary weight to the statement attached to petitioner's 2007 return asserting petitioner to be a nonresident of New York (*see* finding of fact 4). This is a statement of petitioner's filing position and provides no more support to petitioner's claim of domicile than the nonresident return to which it was attached.

A lack of evidence characterizes other aspects of petitioner's claim that he changed his domicile to West Palm Beach. Petitioner's contention that he completed his domicile change upon his retirement from NYU on or about May 15, 2007 implies a gradual increase in time spent in Florida, at least from the time petitioner purchased the West Palm Beach condominium in 2001. As the Administrative Law Judge noted, however, the record contains no evidence of petitioner's use of the West Palm Beach residence during the years immediately preceding the

period at issue. Additionally, as the Administrative Law Judge also noted, although petitioner claimed a pattern of commuting between West Palm Beach and New York City in 2006, he did not provide any evidence of such travel. Moreover, petitioner did not contest or seek to explain the audit finding that he spent only 66 days in Florida in 2007. Such a finding is plainly not indicative of a change in lifestyle from New York City to Florida (*see Matter of Ingle* [proof of a change in domicile requires proof of a change in lifestyle]).

Regarding the West Palm Beach residence itself, there is no dispute that the condominium was larger than the apartment and that petitioner owned the condominium and leased the apartment. These facts do tend to support a stronger tie to West Palm Beach. Petitioner, however, offered very little other evidence regarding the condominium. While petitioner asserts on exception that he kept important personal possessions i.e., near and dear items, at the condominium, there is no evidence regarding any such items in the record. Petitioner also asserts in his reply brief on exception that the condominium had a large waterfront view, but, again, the record contains no evidence of this claim.

There is also little evidence in the record of petitioner's day-to-day life in West Palm Beach. Petitioner's arguments on exception notwithstanding, there is simply no evidence in the record of petitioner's involvement in any athletic, charitable, civic or educational organizations or activities in Florida.²⁰ By his submission of bills on audit, petitioner did show that he was a member of a beach club and a country club in Florida, but he did not show the extent to which he used those memberships or when he joined those clubs. In any event, such memberships do not establish any particular affinity for Florida because petitioner maintained memberships in clubs

²⁰ Petitioner sought to introduce evidence of involvement in such activities with his post-oral argument submission. As discussed previously, we have not accepted such documents in evidence.

in New York as well (*see* finding of fact 27). Petitioner's brief on exception also refers to significant others who were Florida domiciles with whom he was involved both prior to and during the period at issue. There is no evidence in the record on this point either.

In sum, the evidence in the record regarding petitioner's condominium and his "general habit of life" in West Palm Beach falls well short of clearly and convincingly establishing that petitioner regarded his West Palm Beach residence with the "sentiment, feeling and permanent association" such that it was, in fact, his domicile (*Matter of Bourne*).

While actions generally speak louder than words in matters of domicile, words also matter. Specifically, testimony concerning a taxpayer's intent may be a "critical factor" in determining whether such a taxpayer has met his or her burden of proof to show a change in domicile (*see Matter of Estate of Gucci*, Tax Appeals Tribunal, July 10, 1997). In several cases, we have expressly found that a petitioner's credible testimony, coupled with documentation, proved a change of domicile (*see Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990; *Matter of Doman*, Tax Appeals Tribunal, April 9, 1992). We have also cited the absence of any such testimony as factor in a petitioner's failure to meet that burden (*see Matter of Estate of Gucci*; *Matter of Labow*, Tax Appeals Tribunal, March 20, 1997; *Matter of Ingle*).

Matter of Sutton is particularly instructive to the present matter because, in that case, the petitioners' credible testimony and other acts indicating an intent to establish a new domicile elsewhere overcame the apparent contradiction to that intent indicated by their continuing maintenance of a rent-controlled apartment in New York City. In contrast, because petitioner here chose to submit this matter to the Administrative Law Judge, the record contains no testimony regarding petitioner's actions or intent pertaining to his domicile during the years at issue. Having chosen to submit, petitioner also could have submitted an affidavit detailing such

actions and intent, but he did not. Accordingly, in contrast to *Sutton*, there is no evidence here to overcome the contradictions to petitioner's claim of a new domicile as shown by his continuing payment of rent for the apartment, his execution of the renewal lease in 2008 and his regular use of the apartment as indicated by his physical presence in New York City. Such testimony or affidavit also could have provided evidence of petitioner's life in Florida. Additionally, as discussed previously, we have discounted documents in evidence that do state that petitioner vacated the apartment in 2007 because such documents lack credibility. As our cases show, credible testimony, coupled with those documents might have met petitioner's burden of proof. The absence of any such testimony, that is, the absence of petitioner's own words, is thus a significant factor in our conclusion that he has not met his burden of proof.

While we agree with the Administrative Law Judge's ultimate conclusion with respect to domicile, we differ with her finding that petitioner had active business ties to New York. As noted, the location of business activity is a factor in considering whether a taxpayer has established a change of domicile (*Matter of Kartiganer*). We find that petitioner had no business ties to New York during the period at issue, given his separation from employment at NYU pursuant to the confidential agreement. We disagree with the Administrative Law Judge that evidence of petitioner's presence in New York to seek employment after the years at issue (*see* finding of fact 46) indicates a New York domicile during the years at issue. On the other hand, we see no evidence of business activity in Florida, either. Although petitioner reported a schedule C consulting business under his own name using the West Palm Beach address as its business address (*see* findings of fact 5 and 6), there is no evidence of any activity by this business. The schedule C business's reported gross receipts were payments made by NYU in accordance with the confidential agreement (*see* findings of fact 5, 7, 21, and 22 [b], [c]) and thus

do not indicate Florida business activity. On exception, petitioner contends that he was doing consulting work in Florida through Daphne Simone Enterprises, LLC, BSDC, LLC and the Global Goals Institute. There is no evidence in the record to support this contention.

Furthermore, the apparent absence of any reported income from such purported consulting activity would seem to contradict it. Accordingly, given the lack of evidence of any business activity in either New York or Florida during the years at issue, this factor is neutral.

Having determined that petitioner is subject to tax as a domiciliary of New York State and City for the years at issue, we agree with the Administrative Law Judge's finding that it is not necessary to address the Division's alternative assertion that petitioner is subject to tax as a statutory resident for 2007 pursuant to Tax Law § 605 (b) (1) (B) and of New York City pursuant to the New York City Administrative Code § 11-1701 (b) (1) (B). We note, however, that the Division's day count for 2007, accepted as fact herein, found that petitioner was physically present in New York State on 260 days, New York City on 214 days and Florida on 66 days during that year (*see* finding of fact 39) and that petitioner offered no evidence to refute the Division's day count.

Regarding the Division's disallowance of certain expenses claimed on petitioner's schedule C during the years at issue (*see* finding of fact 33), we agree with the Administrative Law Judge that such disallowance was proper. As the Administrative Law Judge noted, petitioner had the burden to prove both entitlement to the deduction as an ordinary and necessary business expense and to substantiate the amount of the deduction (*see Matter of Macaluso*, Tax Appeals Tribunal, September 22, 1997, *confirmed* 259 AD2d 795 [3d Dept 1999]). Petitioner submitted no documentation to substantiate the amount of these claimed expenses. Furthermore, given the apparent lack of activity of the reported schedule C business as discussed previously,

we find that petitioner has also failed to show that the expenditures were properly deductible as schedule C business expenses, even if the amounts were substantiated. Finally, given the absence of any information in the record regarding the IRS's examination of petitioner's 2007 federal return, we find that the "no change" letter provides no support to petitioner's position (*see* finding of fact 17).

Our conclusion that petitioner was a New York City resident for tax reporting purposes during the 2007 and 2008 tax years renders moot the question of whether petitioner's income from the sale of the painting in 2007 should be allocated to New York. We note however, that petitioner's 2007 New York return reports that the painting was sold on March 1, 2007 (*see* finding of fact 2, footnote 2) and that date falls before petitioner's claimed May 15, 2007 departure from his New York City apartment. During the audit, petitioner claimed that the painting was sold on May 24, 2007, and petitioner's former representative indicated in a letter to the auditor that a copy of a bank deposit receipt had been provided, presumably to corroborate that date (*see* finding of fact 20). There is no such receipt in the record, however (*id.*). Accordingly, we find as a fact that the painting was sold on March 1, 2007, as reported on the 2007 return, when petitioner was concededly a resident of New York City.

Finally, we address whether penalties imposed herein should be abated. The Division imposed penalties pursuant to Tax Law § 685 (a) (1), for petitioner's failure to file a tax return for the year 2008, and Tax Law § 685 (b), for negligence in reporting his tax liability for the years 2007 and 2008. Penalties imposed under Tax Law § 685 (a) (1) must be abated if petitioner establishes that the failure to file was due to reasonable cause and not due to negligence. Penalties imposed under Tax Law § 685 (b) must be abated if petitioner proves that no part of the tax deficiency was due to negligence or intentional disregard of the Tax Law. As

noted, petitioner seeks cancellation of penalties on grounds that his returns for the years at issue were prepared in reliance on the advice of a tax professional, who advised that, except as otherwise reported, the payments from NYU would not be subject to New York income tax.

We agree with the Administrative Law Judge's conclusion that petitioner did not meet his burden of showing reasonable cause for his failures pertaining to the years at issue. "Reliance upon advice from a professional does not in itself insulate a taxpayer from penalties (citation omitted)" (*Matter of Tweed*, Tax Appeals Tribunal, May 23, 1996). Rather, even where a taxpayer relies on a tax professional, the taxpayer must show that he "acted with ordinary business care and prudence in attempting to ascertain his tax liability" and thus must show that his reliance on professional advice was reasonable (*Matter of McGaughey*, Tax Appeals Tribunal, March 19, 1998, *confirmed* 268 AD2d 802 [3d Dept 2000]). Petitioner did not provide any detail regarding the facts and circumstances surrounding his claimed reliance on the advice of a tax professional. Hence, we cannot determine whether his reliance was reasonable. We thus sustain the Division's imposition of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jeremy Wiesen is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jeremy Wiesen is denied; and
4. The notice of deficiency, dated August 31, 2013, is sustained.

DATED: Albany, New York
September 13, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner