

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
GRANT G. BIGGAR : DECISION
for Redetermination of a Deficiency or for Refund : DTA NO. 827817
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 Year 2014. :

Petitioner, Grant G. Biggar, filed an exception to the determination of the Administrative Law Judge issued on January 10, 2019. Petitioner appeared by Andersen Tax LLC (Kenneth T. Zemsky, CPA) and Morrison & Foerster, LLP (Mitchell A. Newmark, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on June 27, 2019, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether petitioner has established that he was not taxable as a domiciliary of New York State and the City of New York during the year 2014.

II. Whether, assuming that the additional tax found due on audit is sustained, petitioner has established a basis for cancelling the penalties imposed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 4, 17, 19, 21, 22, 34 and 35 to more accurately reflect the record. We have added an additional finding of fact numbered 36 herein, which replaces finding of fact 36 as found by the Administrative Law Judge, which listed the Administrative Law Judge's rulings on proposed findings of fact. As so modified, the Administrative Law Judge's findings of fact and the additional finding of fact appear below.

1. Petitioner, Grant G. Biggar, filed form IT-203 (New York State nonresident and part-year resident income tax return) for the year 2014 as a nonresident of New York, with a filing status of single. Petitioner checked the "No" box on line H of the return, which asks "[d]id you or your spouse maintain living quarters in NYS in 2014?," and left blank the "Taxpayer's permanent address" box on page 1 of the return.

2. On August 9, 2016, following an audit, the Division of Taxation (Division) issued to petitioner a notice of deficiency asserting additional New York State and New York City personal income taxes due for the year 2014 in the aggregate amount of \$2,082,465.00, plus interest and penalties. This notice was premised upon the assertion that petitioner was a domiciliary of New York State and New York City for 2014.

3. Petitioner was born in Nevin, New Zealand, the oldest of four children, two brothers and a sister. After going to primary school in Nevin, he moved with his family to Auckland, New Zealand's largest city, where he lived with his family in a suburban, 3,000 square foot house at 6 Pickwick Parade. He attended Auckland University, where he obtained a degree in commerce with a major in accounting. Seeking a career in business, and wanting the best background

possible, he decided to become a chartered accountant, the equivalent of a certified public accountant in the United States. In order to get the three years of relevant work experience needed to become a chartered accountant, he accepted a position with the Auckland office of the accounting firm Deloitte Touche, where he worked for about three years, while living at the 6 Pickwick Parade address. He became a chartered accountant and a member of the New Zealand Society of Chartered Accountants in 1991 and remains so today. In January 1991, he accepted a three-month assignment to Deloitte Touche's Vancouver, British Columbia office to help with the tax return preparation season. After completing the Vancouver assignment and traveling in Europe for a few months, petitioner took a position with Bankers Trust (BT) in its London office in January 1991.

4. At the hearing, petitioner testified about his motivation for leaving New Zealand to work abroad. His time in Vancouver convinced him that the New Zealand business world, particularly finance, was small, but that there were great opportunities internationally. Moreover, he had a desire to prove himself on the world stage. Just as importantly, however, he was focused on "wealth creation." He explained that, when he was growing up, his parents had lived a month-to-month financial existence, which he did not want to repeat. In this regard, he realized that to achieve real wealth, "it was necessary to have a share in the value you're creating," which he could do by "mov[ing] from less . . . of an employee relationship to more of an owner relationship."

5. At BT, petitioner worked in the "middle office" area, which kept track of and controlled the trading activity of overseas traders. London was where he started establishing good business contacts that he still relies on today. While at BT, petitioner became a United Kingdom (U.K.)

citizen and obtained a U.K. passport. Petitioner testified that he obtained the passport in order to facilitate working and traveling in the European Union. Obtaining that passport did not require him to renounce his New Zealand citizenship, and he remains a New Zealand citizen today. In January 1993, he accepted a transfer to BT's New York City office, which gave him the opportunity to work in a bigger middle office group and gave him closer contact with BT's traders.

6. In May 1996, petitioner accepted a position with the New York City office of Intercapital, a U.K.-based brokerage firm. The position was appealing to him because it offered an opportunity to be close to the "client relationship," which was better compensated as well as more enjoyable. There he sat at the trading desk, working with clients and arranging transactions. Petitioner testified that another career opportunity came up in 1998, when a group of employees left the company's Sydney, Australia, office. To help out, petitioner spent a few months working there in 1998, and was formally transferred to that office in January 1999. At that time, he did not intend to sever his New Zealand resident status because there is "free transfer of labor between New Zealand and Australia." While at Intercapital, he met co-workers who were with the company "from the start" and, as a result, were able to achieve wealth.

7. With that lesson in mind, he left Intercapital in early 2000 to join Creditex Group (Creditex), an early stage company founded by a friend. Creditex executed and processed credit default derivative contracts. Before Creditex's advent, the credit derivative brokerage business was an opaque, voice-arranged market. By bringing technology to bear, Creditex was able to bring more transparency and more exchange-type regulation to that market, thereby generating significant shareholder value. From the outset, petitioner was part of Creditex's six-member

senior management team, and his role at the company was very significant. Joining Creditex in early 2000, he set up the company's Sydney, Australia, office. When it became evident that the London market would be more important for the company, petitioner transferred in January 2002 to the company's London office, where he ran Creditex's non-United States business. That office had 100 employees by 2010. In 2004, petitioner received significant stock options pursuant to Creditex's 10-year stock option plan. An employment agreement dated February 26, 2004, between petitioner and Creditex, lists a London address for petitioner.

8. Creditex was sold to Intercontinental Exchange, Inc. (ICE) in June, 2008 for \$625 million, all but \$65 million of which was paid in ICE equity shares. As part of that transaction, ICE took over Creditex's stock option plan, which led petitioner to exchange Creditex shares for shares in ICE. It was only when this occurred that petitioner achieved his idea of financial independence.

9. Being part of Creditex's success and growth was a very "powerful" experience for petitioner, and he had assumed that he would probably leave the company when it was sold. Once the sale to ICE occurred, he thus began to look around for the next opportunity. In 2010, ICE asked him to become president of Creditex and take over its New York office, which involved moving to New York City. The position appealed to him because it would give him the experience of being part of a senior management team of a public company such as ICE. On July 8, 2010, petitioner signed an employment agreement with Creditex for the position of president of Creditex. The employment agreement was for a year and it automatically renewed for an additional six months every six months, unless one of the parties notified the other to the

contrary. The agreement stated that petitioner's duties were "those commensurate with Executive's position that are set from time to time by ICE's Chief Executive Officer."

10. Petitioner testified that he did not see the new position as "permanent" because his chief task was to oversee the integration of Creditex with ICE, which, by its very nature, was not a long-term task. As president of Creditex, petitioner had to manage the company through the world financial crisis of 2009 and 2010. In 2010, trading volume in the credit derivative market collapsed, as credit derivative products fell out of favor, thereby necessitating significant staffing reductions in Creditex's sales teams. Petitioner did not testify as to whether, in accepting the position as president of Creditex, he expected to leave New York City once the position ended.

11. As part of the transfer to New York City, ICE obtained an L1 visa for petitioner. The L1 visa, which he described as a "management transfer" visa, allowed him to work in the United States. An L1 visa is not permanent and is tied to the job for which it was obtained, such that petitioner would have to leave the country once his position with Creditex terminated. At his request, ICE also applied for a permanent resident visa (green card) on his behalf, which took about a year to process and was granted in 2012. The card indicates that petitioner has been a resident of the United States since June 1, 2012. Petitioner testified that he wanted the green card because it gave him an option to stay in the United States if his employment with Creditex ended. He never considered becoming a United States citizen and is not sure that he is eligible.

12. After only renting property during his years in London, petitioner bought a two bedroom, 2 ½ bath, 2,600 square-foot loft apartment on Laight Street in the lower west side of Manhattan for \$2.9 million in December 2009. In 2010, he had a renovation done on the apartment by a New Zealand architect, Davis Howell, for \$600,000.00 to \$700,000.00. The

renovation was the subject of a magazine article in a New Zealand publication, “New Zealand Home,” which explained that: “[f]rom the shell of a soulless developer fitout, the collaboration between client, architect and interior designer has produced a home with warmth and character, one that suits the owner’s tastes and lifestyle.” The article emphasized the active role petitioner played in the renovation:

“Biggar was particularly involved in this process, hitting the taste-making luxury furniture showroom BDDW in Soho most Saturdays. ‘It’s a nice time, because the client can share the process and do their own selecting and buying. That was very much Grant’s experience—and he wasn’t timid about it, he was up for anything,’ says Howell. ‘It was like he had a birthday every weekend.’”

The article also mentions that major apartment renovations can often function as investments, given New York’s “astoundingly resilient market.” Petitioner did not testify that his purpose in buying and renovating the Laight Street apartment was as an investment.

13. For 2010, petitioner filed form IT-203, dated May 31, 2011, reporting all of his Federal adjusted gross income as New York State income. On lines 73 and 73a, petitioner indicated that he moved into New York State on June 14, 2010. Petitioner did not check “Yes” or “No” on line 74, which is for nonresidents. Petitioner also filed a change of city resident status form (IT-360.1) in 2010.¹ On that form, petitioner checked box A for a New York City change of residence, and reported that he was a New York City resident from June 14, 2010 to the end of the year. The New Jersey accounting firm of Untracht Early LLC (Untracht) prepared the return and the return bears petitioner’s signature.

¹ The IT-360.1 indicates that it is to be filed as an attachment to either the IT-201, New York State resident income tax return, or the IT-203. The IT-360.1 filed by petitioner in 2010 was introduced into the record as an attachment to an affidavit by the auditor. That affidavit does not say whether the IT-360.1 was filed as an attachment to petitioner’s IT-203 for 2010 or as a separate document, but, in his testimony, Mr. David Perez, the CPA who prepared petitioner’s 2014 return and who reviewed petitioner’s returns for earlier years in preparation therefor, referred to the IT-360.1 as being attached to petitioner’s 2010 income tax return.

The instructions to the IT-360.1 for 2010 stated:

“If during the tax year you had a New York City or Yonkers change of resident status, you must complete Form IT-360.1. . . . If you changed both your NYS residence and New York City or Yonkers residence during the same tax year, you must complete both Form IT-203, *Non-Resident and Part-Year Resident Income Tax Return*, and Form IT-360.1.

Your move into or out of New York City or Yonkers will be recognized as a change of resident status if:

- at the time of your move, you definitely intended to permanently leave your home and residence; and
- you definitely intended to establish a permanent home (domicile) someplace else.

The New York State Tax Department will consider your actions as well as your statements in deciding if you have met both conditions for a change of resident status.”

14. At the hearing, petitioner could not remember who had recommended to him the retention of Untracht as his tax preparer. Included in the audit file is a letter dated December 8, 2009, in which ICE’s chief financial officer outlined the assistance ICE would give petitioner to help him transition to having New York City as his primary work location. The letter states that:

“[because] this relocation will complicate your personal tax situation, ICE, at its expense, will retain an outside tax advisor to advise you and ICE on your tax matters related to this transition. This outside tax advisor will also be retained by ICE to prepare your personal tax filings in both the U.K. and the U.S. and will continue to be retained by ICE until such time that your tax situation is no longer impacted by your transition from the U.K.”

Nothing in the record indicates whether Untracht is the outside tax advisor referred to in the December 8, 2009 letter.

15. At the hearing, petitioner did not specifically address his understanding of his filing of the IT-203 return with the attached IT-360.1 form in 2010. In response to the question of why he

filed “resident income tax returns in New York” for the 2010 through 2013 tax years, he responded “[b]ased on advice from my tax advisors, but I believe it was because the day count was such that I was considered a New York resident for tax purposes” and that his filing status was not based on his being domiciled in the State.

16. The record contains a copy of a letter dated October 19, 2012, from Creditex’s human resources department addressed to petitioner at his Laight Street apartment confirming his separation from the company as of that date. The record also includes a separation agreement with ICE dated December 1, 2012, which lists petitioner as residing in New York State. The agreement included a nine-month covenant not to compete clause. Petitioner testified that he did not see his time in New York “developmentally speaking, in terms of career progress,” as any different from his time in London or Sydney.

17. Petitioner remained in New York City after leaving Creditex/ICE in 2012. According to petitioner, he had achieved financial independence by that point, having accumulated shares of stock in ICE at the time of its purchase of Creditex in 2008 and as a result of receiving shares as part of his compensation plan as president of Creditex. He explained his decision to stay in New York City as follows:

“Yeah, I was trying to figure out really what to focus on next. At that point, I had reached financial independence, so I had a lot of options, and I sort of, you know – you kind of reach the thing you’ve been working for. But also in those three years in New York, I worked with some pretty amazing people and a lot of those people had also . . . left. So, there were some pretty entrepreneurial people that went out and started other companies. So, I started getting involved in helping entrepreneurs, working with start-up companies, in a lot of cases I invested with them. * * * And so, New York has – continues to have a great ecosystem for innovation, for start-up businesses, so – and I found that really interesting, spending time with those people.”

When asked what financial activities he undertook in 2013, he emphasized that one of his goals in 2013 (as well as 2012) was to “cement” relationships he had with people whom he had met as president of Creditex and to make sure that they knew he was now an independent investor and available to invest in start-up businesses. During the 2012–2013 period, having considerable cash to invest and being very bullish on the New York City real estate market, petitioner bought two New York City apartments on West 18th Street and West 26th Street, respectively, which he proceeded to rent out, and still owned and received rental income from as of the date of the hearing. In 2013, he put a down payment on a condominium to be constructed at 150 Charles Street in New York City. Petitioner completed the purchase in October 2015 upon completion of construction.

18. Petitioner purchased and imported into New York artwork worth \$94,000.00 in 2012 and artwork worth \$130,000.00 in 2013. According to petitioner, the artwork was not near and dear to him, as he purchased it sight unseen, through an art collector friend operating in Madrid, Spain, as a means of diversifying his investments, and at the same time putting something on the walls of his Laight Street apartment.

19. In 2014, petitioner was a founding member of Tribeca Angels, a New York City-based organization, which he described as an investment club for high net worth individuals. It got started when he discovered that he and his next-door neighbor were both investors in start-up businesses and they decided that there would be an advantage to pooling the funds they had available for investment. Petitioner has no obligations or duties as a member of Tribeca Angels and receives no compensation. Petitioner has made investments through the organization.

20. Petitioner testified that his primary doctor was located in New Zealand and that he only saw doctors in New York when he needed a checkup in order to obtain life or health insurance.

21. In January 2014, petitioner learned that his mother had cancer. Petitioner returned to New Zealand and spent significant time with her until she died in mid-March 2014. Her passing was a great loss to him. Petitioner testified that he was very close to his mother, which he attributed to being the eldest child and not having a family of his own. He had grown especially close to her after her 1991 separation from his father, which was a very trying time for her. When he traveled back to New Zealand, he would stay with her in the family home at 6 Pickwick Parade, Auckland, as he never owned or leased real property in New Zealand prior to 2014. He testified that he received mail there and considered it his permanent home and domicile. Because her sole means of support was a pension he described as “relatively minimal,” he purchased a new car for her, which she made available to him when he visited. In addition, he contributed to the upkeep and renovation of the home, including replacing every appliance in the house. After his mother’s death, the house was sold and the proceeds were distributed to petitioner and his three siblings, although an allocation to petitioner was carved out of the proceeds to compensate him for his contributions to the house’s maintenance. Petitioner’s mother also willed to him paintings she had made, which are of great sentimental value to him, and which currently adorn the walls of his residence in Auckland, where he also keeps many family heirlooms, which are near and dear to him, including family photos and books about the family. None of her paintings or family heirlooms are in his New York City apartment.

22. Petitioner testified that, after his mother’s sickness and death, New Zealand became the “center of gravity” of his life. He explained that, with the death of his mother, he wanted to be

closer to his father, with whom he had strained relations since the latter's divorce from petitioner's mother, and he made a "conscious effort" to spend more time with him. On March 11, 2014, petitioner purchased a penthouse apartment on the top level of a three-floor building at 2C Lombard Street in Auckland for \$2.25 million (New Zealand currency), which sale settled on April 10, 2014, according to the contract of sale in the record. The penthouse is 2,000 square feet in size, has three bedrooms, two bathrooms, and parking and storage underneath the building. The penthouse overlooks the ocean in a "premium" address near where he grew up, but not far from central Auckland, and only around 30 minutes from his father's home. Petitioner testified that, while he told his architect who did the renovation on his Laight Street apartment to give the place the feel of a "luxury hotel," his Auckland apartment has the feel of "home" for him. Whereas he would give friends and family the key to his Laight Street apartment in New York City, because he does not keep anything of a "personal" nature there, he would not feel comfortable giving them the key to his Auckland apartment. Petitioner is a water sports enthusiast and he keeps his paddle boats, kite surfing and jet-skiing equipment at the penthouse. Petitioner testified that the Lombard Street penthouse is comparable in value to his Laight Street apartment in New York City. He did not testify as to when he was able to move into the penthouse after purchasing it in 2014.

23. Petitioner filed a New York State resident income tax return (form IT-201) for each of the years 2011, 2012, 2013 and 2015.

24. Based on information received from petitioner on audit, the auditor developed a calendar for each of the years in the 2010 through 2015 period. The calendar assigns each day to a particular location. While the audit report does not explain how the auditor treated days spent

in travel, such days should not cause a material inaccuracy, assuming the auditor was consistent in her approach. Petitioner stipulated to the accuracy of that information. Those calendars show that petitioner's pattern during the years 2010 through 2014 was to return to New York City between trips to other states or countries, except when the contiguity of his next destination made that pattern impractical. Thus, for example, in 2012, petitioner visited four states and six foreign countries, returning to New York City each time between trips, with one exception. This pattern continued in 2014. After traveling to New Zealand when he learned of his mother's illness in January 2014, petitioner returned to New York City on April 28, where he remained, except for a three-day trip to Kentucky, until June 12. He then traveled to various countries in Europe, including the U.K., returning to New York on July 10. After staying in New York until August 4, he traveled to a number of other States for the balance of August. After returning to New York City for the first 11 days of September, petitioner spent the rest of September and October and the first nine days of November in California, except for five days in Texas and four days in New York. On November 10, he traveled to New Zealand, where he remained until he traveled back to New York on November 26. He remained in New York until December 4, was in California on December 5 and 6, after which he traveled to New Zealand, where he stayed until the last week in December, which he spent in Australia. Counting from March 1, petitioner spent 92 days in New Zealand versus 93 days in New York City in 2014.

25. Based on the calendars compiled by the auditor, the table below reflects petitioner's presence in New York versus his presence in New Zealand:

Year	New York	Other States	Other Countries	New Zealand
2010	266	12	79	8

2011	288	18	48	10
2012	302	15	47	2
2013	262	33	52	18
2014	102	87	46	130
2015	227	36	8	94

26. By 2014, petitioner thought that the New York City real estate market had grown overpriced. Because he viewed the Los Angeles real estate market as promising and he enjoyed being there, petitioner traveled to that city to acquire real estate, spending a total of 76 days there in 2014. As a result of these efforts, he eventually purchased real property in Los Angeles in 2015 for around \$5.4 million. Petitioner performed some of the coordination of that purchase while in New York.

27. Petitioner testified about a number of New Zealand investments he had made in recent years. In 2013 and 2014, petitioner did a due diligence investigation of Avanti Finance (Avanti), which he described as an established New Zealand non-bank lender. Petitioner eventually made an equity investment in Avanti of a “couple of million dollars” and purchased Avanti notes worth another million dollars. Petitioner did not testify when he made his equity or debt investments in Avanti or whether his investments entail any activities on his part or are passive ones. When asked if he had a “strong business relationship with Avanti,” petitioner replied, “Yes, yes, over the years I got to know the founder well.”

Petitioner also invested in 2014 in Algomi, a British-based financial technology company, with a New York City office. Petitioner testified that he was asked to serve as an advisor to the

company, but he was never an employee of the company, and did not receive any compensation from the company.²

In 2015, petitioner purchased a camera store in New Zealand, formerly owned by a friend, in a liquidation sale. Finally, petitioner testified about the equity-type investments he had, without giving the date of investments, one being an investment in ICE Angel Investment Group, a New Zealand-based company, which invests in early-stage businesses, and the other being in a U.K. company that does children's animation.

28. Petitioner's brothers and sister are all married and have children. His sister lives in Barcelona, Spain, while one brother lives in New Zealand and another in Australia. He is close to his siblings and their children. He has helped finance college educations abroad for two of his nephews. He also has a large extended family, because his mother's siblings continue to live in New Zealand or Australia, along with many cousins, all forming "a pretty tight family network." Petitioner is currently in a long-term relationship with a New Zealand woman, with whom he now lives in New Zealand. He met her when he worked as a summer intern for her father's brokerage firm around 30 years ago. He did not testify as to whether he was in that relationship in 2014. Petitioner has no family in New York.

29. As of the end of 2015, petitioner continued to own the Laight Street apartment in New York City. He testified that he viewed the apartment as a luxury, which allowed him to stay in a place in which he was familiar when he came to the City, rather than a hotel, and which he made

² The Division introduced an article, dated March 19, 2014, from an internet website, www.hedgeweek.com, which reported that petitioner had assumed a role as "strategic advisor" with Algomi. The Division also introduced a printout from Algomi's website that referred to petitioner as a "strategic advisor" of the company. Because of the lack of any description of petitioner's duties as "strategic advisor" in either printout, and the lack of any evidence in the record indicating the reliability of either source of information, it is determined that this evidence was not sufficient to establish that petitioner had any formal advisory role with Algomi.

available for the use of friends and family. The audit report lists the “current” value of the apartment as \$2.9 million.

30. Rachel Drakes testified that she came to know petitioner when she was assistant to the CEO of ICE. Later she became his assistant when he moved to New York City and became president of Creditex. In that capacity, she worked very closely with him, managing his calendar, and planning his meetings and dinners. While she no longer works with him, she considers him a very good friend. According to Ms. Drakes, when petitioner was taking off for a vacation to New Zealand, he would refer to it as “going home.” Petitioner never expressed to her that he wanted to stay permanently in New York City. She had no doubt that his heart was in New Zealand.

31. Petitioner also presented the testimony of David Perez, a CPA working with the New York City office of Andersen Tax LLC (Andersen). Mr. Perez testified that, working in conjunction with Mr. David Roberts, a managing director at Andersen, he prepared petitioner’s New York State and federal income tax returns from 2012 through at least 2015 and petitioner’s U.K. tax return for 2014. Petitioner testified that he turned to Andersen because he had grown dissatisfied with his prior tax accountants, Untracht, believing that the firm was not equipped to deal with his multiple-jurisdiction tax situation. As part of Andersen’s usual “on-boarding” process for a new client, Mr. Perez reviewed petitioner’s income tax returns for earlier years, including the 2010 year, with the IT-360.1 form attached (*see* finding of fact 13). He testified that he might have done things differently in filing those returns, but that any problems with those returns did not rise to the level of requiring an amended return in his view. He testified that, based on what he learned from petitioner during the on-boarding process, he would not have

filed the IT-360.1 with the 2010 return. He did not testify as to whether he discussed the issue with petitioner.

32. Mr. Perez testified that petitioner filed his New York State income tax returns as a resident for 2012, 2013 and 2015 because he qualified as a statutory resident, being in the State more than 183 days in each of those years, and having a permanent place of abode in the State. He testified that it was proper for petitioner to file a nonresident income tax return for New York in 2014 because, in his view, petitioner was not a domiciliary nor a statutory resident of the State in 2014. He further testified that he was aware that petitioner had a permanent place of abode in New York, but he did not explain why the “No” box on line H of the return was checked (*see* finding of fact 1). At hearing, petitioner could not recall how the “No” box on line H came to be checked on the 2010 return.

33. Included in the hearing record is petitioner’s 2014 U.K. income tax return, which shows that he paid very substantial income tax to the U.K. that year. According to petitioner, that income resulted from sales of stock in ICE.

34. The audit was conducted entirely by correspondence and phone calls. After obtaining information from petitioner’s representative, the Division’s auditor sent a letter dated February 5, 2016, in which she asserted that petitioner “changed his domicile to New York when he moved to New York City in June 2010” and asked for more information. After Mr. Roberts wrote to the auditor objecting to that conclusion, the auditor responded with a more detailed letter, dated April 13, 2016 to Mr. Roberts, in which she analyzed petitioner’s domicile status by applying the traditional factors affecting domicile (i.e., home, active business involvement, time, and items near & dear and family connections), advising him that the Division had determined that

petitioner should be treated as a New York domiciliary for 2014. The letter's analysis of the "home" factor noted petitioner's New York City Laight Street residence and the 2C Lombard Street, Auckland, residence that petitioner purchased on March 11, 2014. The letter twice stated that "[i]t is not known if Mr. Biggar maintained a residence in New Zealand prior to 03/11/2014." The letter concluded that "[i]f you have additional information to refute our determination, please submit it by May 13, 2016. Otherwise a Consent to Field Audit Adjustment will be issued based on our determination." Mr. Roberts replied by letter dated May 12, 2016, in which he stated:

"[t]he taxpayer disagrees with your determination, and believes that all of the documentation provided during this audit process adequately supports his position. Please note that at this time, the taxpayer has decided to forego the opportunity to submit any additional documentation for your files."

35. Although the auditor did not testify at the hearing, the Division did introduce an affidavit signed by the auditor, which highlights, as a basis of the issuance of the notice of deficiency, petitioner's filing of form IT-203, nonresident and part-year resident income tax return, for 2010, reporting that petitioner moved into New York State on June 14, 2010, and his filing of form IT-360.1, change of city resident status, in that year. The affidavit states that the Division interpreted petitioner's use of these forms as indicating that petitioner was a domiciliary of New York as of the date of his move. Copies of petitioner's 2010 forms IT-203 and IT-360.1 and instructions to form IT-360.1 (*see* finding of fact 13) were attached to the affidavit.

36. The auditor was not listed on the Division's hearing memorandum as a witness that it might call to testify. Furthermore, the affidavit signed by the auditor and admitted into evidence was not listed on the Division's hearing memorandum as an exhibit that the Division intended to introduce at hearing. Petitioner objected to the affidavit being admitted into evidence and

requested that if admitted, no weight be accorded to the affidavit by the Administrative Law Judge. Petitioner did not request an adjournment to subpoena the auditor.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that, because the Division did not identify any time before 2010 when petitioner abandoned his original New Zealand domicile, he continued to be domiciled in New Zealand prior to 2010. Next, noting that the party asserting a change in domicile bears the burden of proof to show that such a change occurred, the Administrative Law Judge found that the Division had the burden of proof to show that petitioner changed his domicile from New Zealand to New York on or before 2014 in order to show that petitioner was domiciled in New York in 2014, as it asserts.

The Administrative Law Judge determined that the forms used by petitioner in filing his 2010 return (i.e., form IT-203 [nonresident and part-year resident return] and form IT-360.1 [change of city resident status]) were properly used by taxpayers who considered themselves domiciled in New York and that, accordingly, petitioner's use of such forms indicated that petitioner considered himself a New York domiciliary during that year. According to the Administrative Law Judge, if petitioner was a statutory resident in 2010 as claimed, he should have filed a form IT-201 (resident return). The Administrative Law Judge was unconvinced that petitioner's use of forms IT-203 and IT-360.1 to report his 2014 income was simply a mistake. The Administrative Law Judge noted that the preparer of petitioner's 2010 return did not testify and that petitioner offered no testimony regarding the decision to use those particular forms. The Administrative Law Judge also found that the testimony of petitioner's subsequent tax preparer, to the effect that he did not believe that an amended return was necessary despite the error in the

choice of forms, lacked credibility.

Additionally, the Administrative Law Judge determined that, commencing in 2010, petitioner's conduct was consistent with an intent to remain in New York indefinitely. In support, the Administrative Law Judge noted petitioner's purchase of the loft apartment on Laight Street in December 2009 and its extensive renovation in 2010. The Administrative Law Judge also noted that, although his job as president of Creditex was intended to be temporary, petitioner did not testify that he intended to leave New York at the end of that employment and, in fact, remained in New York following his departure from Creditex. The Administrative Law Judge also cited petitioner's application for and subsequent receipt of a green card in 2012 as conduct consistent with an intent to remain in New York indefinitely.

The Administrative Law Judge thus concluded that the Division met its burden of proof and found that petitioner changed his domicile to New York in 2010. Accordingly, he next analyzed whether petitioner met his burden to show that he changed his domicile to New Zealand before or during 2014.

While acknowledging the 2014 death of petitioner's mother as a life-changing event that made him want to spend more time in New Zealand with his family, the Administrative Law Judge noted that petitioner did not testify whether his mother's death caused him to rethink his connections to New York. The Administrative Law Judge also reviewed petitioner's business connections to both New York and New Zealand and concluded that petitioner failed to show either a significant reduction in his New York-based business activities or a significant increase in his New Zealand-based business activities for 2014.

The Administrative Law Judge also examined petitioner's days spent in New York versus

his days in New Zealand. He observed that, for the ten-month period beginning March 1, 2014, petitioner spent more days in New York than in New Zealand and, considering 2014 as a whole, petitioner spent only a few more days in New Zealand than in New York. The Administrative Law Judge also determined that petitioner's pattern of travel during 2014 indicated that New York functioned as a home base, as he generally returned there between trips. The Administrative Law Judge also noted that petitioner spent significantly more time in New York than New Zealand in 2015.

Additionally, the Administrative Law Judge compared petitioner's New York residence with his New Zealand residences. The Administrative Law Judge determined that the Pickwick Parade house was not petitioner's residence in the same sense as the Laight Street apartment, considering that petitioner spent little time there from 2010 through 2013. Further, while petitioner spent substantial sums to maintain and improve the Pickwick Parade residence, the Administrative Law Judge ascribed these expenditures to petitioner's concern for his mother, who resided there. The Administrative Law Judge also found that petitioner did not refer to the Pickwick Parade house as his permanent residence during the audit. As to the Lombard Street apartment, given the April 10, 2014 date of closing on that property, the Administrative Law Judge observed that petitioner could have spent a maximum of 50 days there, far fewer than the number of days spent in New York in 2014.

The Administrative Law Judge noted that petitioner's family connections and items near and dear were in New Zealand, thereby supporting a change in domicile. However, given his retention of the Laight Street apartment, his continuing New York business connections, the days spent in New York versus New Zealand, and his pattern of returning to New York after trips, the

Administrative Law Judge concluded that petitioner did not meet his burden to show that he changed his domicile to New Zealand in 2014.

The Administrative Law Judge also sustained the imposition of negligence and substantial understatement penalties against petitioner. In support, he cited petitioner's filing of the nonresident and part-year return in 2010 that treated him as a New York domiciliary and the fact that petitioner checked "No" on his 2014 return in response to the question of whether he maintained living quarters in New York, notwithstanding his continued ownership of the Laight Street apartment.

The Administrative Law Judge thus denied the petition and sustained the notice of deficiency.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner notes that the burden to prove a change of domicile from one country to another, as is the case here, is greater than the burden to prove such a change from one state to another. Petitioner asserts that the evidence presented by the Division was inadequate to meet this "enhanced" burden. Petitioner thus contends that the Division failed to meet its threshold burden to show that he acquired a New York domicile prior to 2014.

Petitioner observes that the Division submitted an affidavit from the auditor in this matter and contends that the Administrative Law Judge's ruling that the Division met its burden of proof in this matter is based solely on that affidavit. Petitioner questions the auditor's understanding of the facts of this case. Petitioner asserts that the auditor's April 13, 2016 letter, which states that petitioner became a permanent resident of New York on June 1, 2012 (*see* finding of fact 34), is inconsistent with her affidavit, which states that petitioner became a

domiciliary of New York on June 14, 2010 (*see* finding of fact 35). Petitioner contends that such inconsistency indicates confusion on the auditor's part and undercuts her credibility. Petitioner asserts that such inconsistency demonstrates that the Administrative Law Judge improperly gave the affidavit significant evidentiary weight.

Petitioner also contends that, although his use of forms IT-203 and IT-360.1 to report his 2010 New York income tax was a mistake, that mistake is not apparent from the face of those forms. Petitioner also notes that his tax preparer for 2010 was not a New York practitioner. He asserts that it is thus understandable that he might use an incorrect form. Similarly, he contends that it is unreasonable to expect that petitioner, a New Zealand accountant, to understand the ramifications of those two forms. Petitioner also disagrees with the Administrative Law Judge's rejection of his explanation for his failure to file an amended 2010 return on the correct form. Petitioner notes that such a return would have had zero effect on his tax liability and asserts that a decision not to incur the cost of filing an amended return under such circumstances is reasonable.

Petitioner asserts that the Administrative Law Judge improperly reached conclusions based on findings that petitioner "did not testify" to certain matters, arguing that he did in fact testify to many of those matters. Specifically, petitioner contends that record contains testimony regarding when petitioner moved into the Lombard Street penthouse; whether he was in a relationship in 2014; whether he expected to leave New York when his time as president of Creditex ended; and his purpose in buying and renovating the Laight Street apartment.

Petitioner also takes issue with the determination to the extent that the Administrative Law Judge's findings, contained in findings of fact 4 and 22, respectively, state that petitioner offered no testimony regarding his intent to return to New Zealand to live following his career

abroad or lifestyle changes resulting from his mother's death. As we have modified findings of fact 4 and 22 to delete those particular findings, this complaint is moot.

Petitioner also contends that the determination improperly relies on mere assertions as fact. For example, petitioner contends that the Administrative Law Judge's conclusion that the pattern of petitioner's travel in 2014 indicates that New York continued to serve as a home base of sorts is not supported by a review of petitioner's 2014 day-to-day calendar. Petitioner also objects to the Administrative Law Judge's finding that "counting from March 1" petitioner spent about the same number of days in New York as in New Zealand in 2014 (*see* finding of fact 24). Petitioner contends that 2014 should be considered in its entirety and that such consideration shows a significantly greater presence in New Zealand. Regarding the 6 Pickwick Parade residence, petitioner objects to the Administrative Law Judge's comment in the conclusions of law that "it is difficult to understand why that was not brought to the auditor's attention." Petitioner notes that, by letter from petitioner's representative to the Division's representative, dated January 11, 2018, such information was provided to the Division well before the hearing. Petitioner thus apparently contends that the auditor's lack of knowledge on this point is cured by the January 11, 2018 letter. Finally, petitioner contends that, contrary to the Administrative Law Judge's conclusion, his involvement in Tribeca Angels in 2014 was a minimal investment of time, was not a source of revenue, and was thus not a significant business tie to New York in 2014.

Petitioner also objects to the Administrative Law Judge's finding set forth in a footnote to finding of fact 34 by which the Administrative Law Judge sought to reconcile claimed inconsistencies between the auditor's affidavit and the auditor's April 13, 2016 letter. We have

modified finding of fact 34 to delete that footnote. Hence, petitioner's argument on this point is moot.

Even if this decision finds that he acquired a New York domicile in 2010, petitioner continues to assert his alternative argument that he gave up his New York domicile in 2014 and reacquired a New Zealand domicile.

Petitioner also continues to argue that penalties asserted in the notice of deficiency should be canceled. Petitioner contends that a taxpayer's intent regarding domicile is a subjective inquiry and that it is inappropriate, and counter to Division policy, to impose penalties under such circumstances.

The Division agrees with the Administrative Law Judge's reasoning and conclusion that the Division met its burden to show that petitioner changed his domicile from New Zealand to New York before 2014. Also for the reasons stated in the determination, the Division agrees with the Administrative Law Judge's conclusions that petitioner failed to meet his burden of proof to show that he changed his domicile to New Zealand before or during 2014 and that petitioner failed to establish grounds for abatement of penalties.

OPINION

New York State and New York City impose personal income taxes on resident and nonresident individuals (Tax Law § 601 [a]-[c], [e]; Administrative Code of the City of New York §§ 11-1701, 11-1902). Residents are taxed on their income from all sources (Tax Law § 611 [a]; Administrative Code of the City of New York § 11-1711 [a]). Nonresidents are taxed on their State and City source income (Tax Law § 631 [a]; Administrative Code of the City of New York § 11-1902 [a]).

A resident individual includes a person "who is domiciled in this state" (Tax Law § 605

[b] [1] [A]). A resident individual also includes a statutory resident; that is, a person who is not domiciled in New York State, but who maintains a personal place of abode in the state and who spends at least 183 days in the state during the taxable year (Tax Law § 605 [b] [1] [B]).

Petitioner concedes that he was a statutory resident during 2010 through 2013 and 2015.

New York City's definitions of a resident individual are identical to the State's, except for the substitution of the term "city" for "state" (Administrative Code of the City of New York § 11-1705 [b] [1] [A], [B]).

The Division's personal income tax regulations define domicile, in part, as follows:

“(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the 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.

(3) Domicile is not dependent on citizenship; that is, an immigrant who has permanently established such immigrant's home in New York State is domiciled here regardless of whether such immigrant has become a United States citizen or has applied for citizenship. However, a United States citizen will not ordinarily be deemed to have changed such citizen's domicile by going to a foreign country unless it is clearly shown that such citizen intends to remain there permanently. For example, a United States citizen domiciled in New York State who goes abroad because of an assignment by such citizen's employer or for study, research or recreation, does not lose such citizen's New York State domicile unless it is clearly shown that such citizen intends to remain abroad permanently and not to return. . . .

(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]).

The Division's regulations also apply to the City's income tax on residents (20 NYCRR 290.2).

As noted above in the regulations, 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]). Here, the Administrative Law Judge determined that petitioner had a New Zealand domicile before he moved to New York in 2010.³ Accordingly, in order to prevail in the present matter, the Division must first prove that petitioner acquired a New York domicile before the year at issue (*see Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995 [a Florida domiciliary for the years prior to the audit period was not a New York domiciliary during the audit period as asserted by the Division because insufficient evidence was presented to establish such a change]).⁴ If the Division succeeds on this point, then the burden then shifts to petitioner to prove that he changed his domicile to New Zealand in 2014, the year at issue.

In addition to the above-noted clear and convincing standard of proof, case law has held that the presumption against a change of domicile from one nation to another, as is the case here, is generally greater than the presumption against a change of domicile from one state to another (*see e.g. Matter of Klein v State Tax Commn.*, 55 AD2d 982, 983 [3d Dept 1977], *affd* 43 NY2d 812 [1977], *rearg denied* 44 NY2d 733 [1978]).

³ Although the Division's letter brief "restates its disagreement" with this conclusion, it did not file an exception.

⁴ The Division's burden on this issue obviously contrasts with the general rule in the Division of Tax Appeals that the petitioner has the burden of proof (*see e.g.* 20 NYCRR 3000.15 [d] [5]).

As may be gleaned from the Division's regulations as quoted above, domicile is established by physical presence and intent (*Matter of McKone v State Tax Commn. of State of N.Y.*, 111 AD2d 1051 [3d Dept 1985] *affd* 68 NY2d 638 [1986]). 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]). Generally, this means that a taxpayer must show a change of lifestyle to prove a change of domicile (*see Matter of Doman*, Tax Appeals Tribunal, April 9, 1992). 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*). Although this is a subjective standard, "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]). In other words, "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). "No single factor is controlling and the unique facts and circumstances of each case must be closely considered" (*Matter of Gadway*, 123 AD2d 83, 85 [3d Dept 1987] [citations omitted]). However, we have placed greater significance on "the informal acts of an individual's 'general habit of life'" than on formal declarations (*see Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989 quoting *Matter of Trowbridge*, 266 NY 283, 289 [1935]).

Although our reasoning differs, we agree with the Administrative Law Judge's conclusion that the Division has met its burden of proof to show that petitioner acquired a domicile in New York City on or before 2014.

To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (*Matter of Ingle* citing *Aetna Natl. Bank v Kramer*, 142 App Div 444 [1st Dept 1911]). Moreover, where a taxpayer has two residences, time spent in one location and the accompanying use of the residence in that location may be an important factor in determining domicile (*see Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994; 20 NYCRR 105.20 [d] [4]). Here, petitioner moved to New York from London in 2010 and spent vastly more time in New York than in New Zealand during the 2010 through 2013 period. Petitioner was physically present in New York for a total of 1,118 days during that time (*see* finding of fact 25). He thus made frequent and regular use of his New York residence. In contrast, petitioner spent a total of 38 days (or about 3% of his time) in New Zealand during the same period (*id.*). Such minimal use over this period indicates an abandonment of the Pickwick Parade residence as his domicile. Additionally, although the record does not show petitioner's days spent in New Zealand for years prior to 2010, the record does show that petitioner left New Zealand in 1991 to embark on his business career abroad and did not use his mother's Pickwick Parade house as his primary residence at any point thereafter. We note that petitioner testified that he received mail at the Pickwick Parade address, but we discount that testimony considering that petitioner was so infrequently present there before 2014. We note also, as did the Administrative Law Judge, that petitioner used other addresses as his mailing addresses while living abroad (*see* findings of fact 7 and 16).

That petitioner spent so much time in New York during the 2010 through 2013 period is not surprising considering that his employment and, later, his investment activity were centered there. The location of business activity is also important indicator of domicile (*Matter of Kartiganer*, Tax Appeals Tribunal, October 17, 1991, *confirmed* 194 AD2d 879 [3d Dept 1993]). Petitioner moved to New York to become president of Creditex. He remained so employed until October 31, 2012. He then chose to commence his new career as a private investor in New York. In explaining why he remained there, petitioner cited the many entrepreneurs he had met as president of Creditex as well as New York's favorable environment for start-up businesses (*see* finding of fact 17). In addition to investing in startups, petitioner made investments in three New York City apartments during the 2012-2013 period (*id.*). His continuing presence in New York following his separation from Creditex was thus no longer "a function of his employer's needs," but was, rather, indicative of an intent to be domiciled in New York (*Matter of Bernbach v State Tax Commn.*, 98 AD2d 559, 563 [3d Dept 1984]). We note further that petitioner's 2013 pre-investment due diligence work on Avanti, the New Zealand finance company, is his only New Zealand-connected business activity during the 2010-2013 period (*see* finding of fact 27) and that such activity is far outweighed by his New York business connections.

Additionally, petitioner obtained a green card, or permanent U.S. resident status, in 2012 (*see* finding of fact 11). He did so in order to preserve the option to stay in New York after he left Creditex (*id.*). This circumstance also supports a New York domicile (*see Matter of Mercer v State Tax Commn.*, 92 AD2d 636, 637 [3d Dept 1983] [on question of an asserted domicile change from country to country, temporary versus permanent immigration status is "not without

significance”]; *see also Matter of Bodfish v Gallman* 50 AD2d at 459 [temporary immigration status a factor in holding against acquisition of a foreign domicile]).

Further, where a taxpayer maintains two residences, ownership of a residence may indicate a stronger tie to that location for domicile purposes than non-ownership (*see Matter of Wiesen*, Tax Appeals Tribunal, September 13, 2018). Here, petitioner owned a substantial residence in New York during the 2010 through 2013 period (*see* finding of fact 12). Although he contributed to the upkeep and maintenance of the Pickwick Parade residence (*see* finding of fact 21), he neither owned nor leased that property nor any other real property in New Zealand during this period.

The location of family and near and dear items are also factors in determining domicile (*Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852 [3d Dept 1994]; *Matter of Campaniello*, Tax Appeals Tribunal, July 21, 2016, *confirmed* 161 AD3d 1320 [3d Dept 2018], *lv denied* 32 NY3d 913 [2019]). During the 2010 through 2013 period, petitioner’s mother and brother lived in New Zealand and items such as his mother’s paintings and family photos were located there (*see* finding of fact 21).

While the family ties and near and dear factors support a finding of a New Zealand domicile for petitioner for the 2010 through 2013 period, in our view, they are offset by the other relevant factors in the record, as discussed above. Accordingly, we find that, although petitioner’s emotional ties to New Zealand may have imbued in him a “floating intent to return to [New Zealand] at some future and indefinite time,” his time spent in New York, his business interests there and his immigration status indicate “an intention of remaining [in New York] for an indefinite time” (*Matter of McKone v State Tax Commn. of State of N.Y.* (111 AD2d at

1052, quoting 28 C J S Domicile § 11, at 19 [1941]). Indeed, petitioner's continuing presence in New York following his departure from Creditex also runs contrary to the claim made in his arguments on exception that once he achieved financial independence, he could return to life in New Zealand. Petitioner testified that he had achieved such financial independence when Creditex was sold to ICE in 2008. He subsequently served as president of Creditex for two years and then remained in New York to begin his new career as a private investor. This sequence of events is additional evidence that returning to New Zealand was not a priority for petitioner before 2014.

Pursuant to the foregoing discussion, we conclude that petitioner acquired a New York domiciliary in 2013; that is, following his separation from Creditex, his acquisition of a green card and his commencement of his new career as a private investor in New York.

We note here that the Administrative Law Judge found that petitioner became domiciled in New York in 2010. This difference in opinion is not significant to the outcome of this case, however, because the issue presented is whether petitioner was domiciled in New York or New Zealand in 2014. So long as the Division has established that petitioner acquired a New York domicile before 2014, then the burden shifts to petitioner to prove that he became a New Zealand domiciliary in that year.

Our disagreement with the Administrative Law Judge as to when petitioner became domiciled in New York stems from a difference of opinion regarding the proper weight to be accorded petitioner's 2010 New York income tax returns. Given the Division's burden of proof on the issue of petitioner's domicile change from New Zealand to New York, we find that petitioner's use of forms IT-203 and IT-360.1 to file his 2010 returns is insufficient to establish

that petitioner became a New York domiciliary as of June 14, 2010. While we fully agree with the statement in *Matter of Vogt v Tully* (53 NY2d 580 [1981]), cited in the determination, that “an admission as to tax consequences . . . if made by a taxpayer or on his behalf might be binding on him and might therefore properly be made the predicate for the imposition of tax liability” (53 NY2d at 588-89), we find that petitioner’s filing of forms IT-203 and IT-360.1 for 2010 does not, by itself, constitute an admission that he was a New York domiciliary. Such forms use the term resident, not domicile, and petitioner admits that he was a New York resident in 2010, albeit a statutory resident as defined in Tax Law § 605 (b) (1) (B). While the instructions to form IT-360.1 do refer to domicile, the record lacks any evidence of either petitioner’s or his 2010 tax preparer’s understanding of that form. Mindful of the Division’s burden of proof on this issue, we find that petitioner’s 2010 filings were ambiguous and thus did not clearly admit a New York domicile (*cf. Matter of Zinn v Tully*, 77 AD2d 725 [3d Dept 1980], *revd on dissenting opn below* 54 NY2d 713 [1981] [where petitioners claimed to be nonresidents, filing of resident returns “clearly” indicated New York residency]).

We observe that petitioner’s arguments regarding the sufficiency of the auditor’s affidavit and the credibility of the auditor are academic considering that our decision in this matter places little weight on that document. We nevertheless observe that, contrary to petitioner’s contentions, the determination does not simply rely on the affidavit, but rather relies on the entirety of the record, including the audit file and uncontested facts regarding petitioner’s days spent in New York and elsewhere; petitioner’s real estate purchases; petitioner’s employment history; petitioner’s investments; and petitioner’s immigration status. We further observe that petitioner’s arguments regarding the affidavit’s credibility are misguided. The affidavit appears

to serve two purposes. First, it provides a foundation for the Division's introduction in evidence of petitioner's 2010 New York return documents, the authenticity of which are uncontested. Second, it states the Division's position regarding one consequence of petitioner's 2010 New York tax filings, i.e., that petitioner was self-reporting as a part-year resident and was thus a domiciliary of New York as of the date of his move. Although petitioner disagrees with this interpretation, he does not dispute that this interpretation represents the Division's position in this matter.

Although we have placed little weight on the auditor's affidavit in this decision, we note for the record our concern with the conduct of the Division in not providing petitioner with notice in advance of the hearing of its intention to introduce into evidence the affidavit of the auditor. While it was incumbent on petitioner to subpoena the auditor if he wished to have the auditor's testimony in the record (*Matter of Flanagan*, Tax Appeals Tribunal, June 14 1990), especially as petitioner was aware the auditor was not listed on the Division's hearing memorandum as a witness, petitioner could not make an informed decision on whether to subpoena the auditor without knowing about the affidavit. Having noted our concern, as petitioner did not request an adjournment in order to subpoena the auditor during the hearing, we have no issue to consider on exception.

We now turn to the issue of whether petitioner has met his burden of proof to establish that he changed his domicile from New York to New Zealand in 2014.

There is no dispute that the death of petitioner's mother in mid-March 2014 was a life-changing event for him. He traveled to New Zealand upon learning of her terminal illness in January 2014 and remained there until late April. Petitioner's mother's death kindled in him a

desire to spend more time with his father and his extended family in New Zealand.⁵ Consistent with this desire, petitioner purchased the Lombard Street residence in Auckland in March 2014. Petitioner keeps his mother's paintings, which had been in the Pickwick Parade residence, on the walls of his Lombard Street residence. He keeps other family heirlooms, including family photos and books about the family, there as well. The family ties and near and dear factors thus continue to support a finding of a New Zealand domicile for petitioner in 2014.

With the purchase of the Lombard Street apartment, petitioner owned a residence in both New York and New Zealand. Both are relatively high-end apartments, similar in size and cost. Each offers the unique advantages of its particular setting, including, for the Lombard Street apartment, the opportunity for petitioner to enjoy water sports (*see* findings fact 12 and 22). He also kept an automobile there. Petitioner's purchase of the Lombard Street apartment indicates a stronger tie to New Zealand in 2014 than his use of his mother's house during the 2010-2013 period. Although petitioner testified that the Laight Street apartment felt like a luxury hotel and the Lombard Street apartment felt like home (*see* finding of fact 22), we discount this testimony as self-serving. We do so considering that petitioner spent so much time at the Laight Street apartment during 2010 through 2013 (*see* finding of fact 25) and considering the description of that apartment in the "New Zealand Home" magazine article (*see* finding of fact 12 [the renovation "has produced a home with warmth and character, one that suits the owner's tastes and lifestyle"])). We thus find that petitioner's two 2014 residences were comparable. As noted previously, where, as here, a taxpayer has two residences, length of time spent at each

⁵ Regarding petitioner's desire to spend more time with loved ones, we note that petitioner did not testify as to whether he was involved in a long-term relationship in 2014 (*see* finding of fact 28). Hence, petitioner's current relationship is not a factor in our analysis.

location may be an important factor in determining domicile (*see Matter of Angelico*; 20 NYCRR 105.20 [d] [4]). As the Administrative Law Judge observed, petitioner spent almost as many days in New York (102) during 2014 as in New Zealand (130). Such a relatively close day count does not support a finding that petitioner abandoned his New York domicile (*see Matter of Gray*, Tax Appeals Tribunal, May 25, 1995, *confirmed* 235 AD2d 641 [3d Dept 1997][145 days in New York deemed “almost as much” as 183 days in new claimed domicile]). Petitioner’s 2015 day count provides less support for petitioner’s contention that New Zealand became the “center of gravity” of his life in 2014 (*see* finding of fact 22), as petitioner spent fewer days in New Zealand (94) and more days in New York (227) in 2015 than he did in 2014.

We now compare petitioner’s 2014 New York business connections with his 2014 New Zealand business ties. We begin our analysis by noting that the record lacks evidence of the amount of time that petitioner spent managing any of his investments. We also acknowledge that some portion of petitioner’s management of his investments could have been done remotely (emails, phone calls, etc.) and some would have necessitated face-to-face contact. The record contains no evidence as to how much time petitioner spent managing his investments either remotely or face to face.

In 2014, petitioner continued his private investing in New York-based start-ups. He also continued to hold the apartments on West 18th Street and West 26th Street as investments and continued to hold his interest in the condominium on Charles Street, the purchase of which was completed in 2015. Consistent with his interest in new businesses, he also became involved in the New York-based investment club, Tribeca Angels, in 2014. While petitioner’s association with this club did not require day-to-day involvement, and, indeed, petitioner’s membership in

the club brought no obligations, he did make some investments in start-ups through the club. Contrary to petitioner's contention, there is no evidence in the record indicating that petitioner made any efforts to wind down his involvement in his New York-based investments in 2014 or in 2015.

On the New Zealand side, the record shows that petitioner did due diligence work on Avanti, the New Zealand finance company, in 2013 and 2014. While petitioner eventually made an investment of several million dollars in Avanti, as the Administrative Law Judge observed, the record does not indicate when he made that investment. There is no evidence that petitioner was involved in any other New Zealand businesses in 2014. He acquired a New Zealand camera store in 2015 and sold it in 2017. He became involved with ICE Angels, a New Zealand-based "Angel" investment group, but the date of such involvement is not in the record.

Petitioner's other investments noted in the record provide little support to petitioner's claim of a New Zealand domicile. He spent 76 days in California pursuing a real estate investment in 2014 (*see* finding of fact 26). Also during that year, petitioner invested in, and became an unpaid advisor to, Algomi, Inc., a British-based company with a New York office. Petitioner also has an investment in a U.K. company that does animation, but the date of such investment is not in the record. Additionally, petitioner invested in an Australian non-bank finance company called GetCapital in 2017 after conducting his due diligence in 2016, well after the year at issue.

Based on this record, we find that petitioner's business interests did not shift significantly toward New Zealand in 2014. Hence, the business connections factor does not support a change of domicile for that year.

Upon consideration of all the relevant factors as discussed above, we find that, although petitioner's life underwent significant changes in 2014, most particularly with the death of his mother and the purchase of the Lombard Street apartment, he continued to maintain significant ties to New York. We thus conclude that petitioner failed to prove, by clear and convincing evidence, that he gave up his New York domicile in 2014 and re-acquired a New Zealand domicile in that year.

The Division imposed negligence and substantial understatement penalties here pursuant to Tax Law §§ 685 (b) (1), (2), and 685 (p). Penalties imposed under Tax Law § 685 (b) must be abated if petitioner shows that no part of the tax deficiency was due to negligence or intentional disregard of the Tax Law. Penalties imposed under Tax Law § 685 (p) must be waived if petitioner shows reasonable cause for the substantial understatement and that he acted in good faith. We have held that a careful weighing of facts and circumstances is necessary to determine whether "a taxpayer acted with ordinary business care and prudence in attempting to ascertain his tax liability and that penalties should be abated" *Matter of McGaughey* (Tax Appeals Tribunal, March 19, 1998, *confirmed* 268 AD2d 802 [3d Dept 2000]).

Considering the significant changes that petitioner's life underwent in 2014, as discussed, and also considering his historic New Zealand domicile, we find that petitioner was not negligent and that he acted with prudence and in good faith in filing a nonresident return in 2014. We distinguish *Matter of Campaniello*, cited by the Administrative Law Judge in support of the imposition of penalties in which we found that a taxpayer's failure to report New York living quarters on his nonresident returns to be a factor in sustaining penalties. Significantly, however, that case also featured a finding that the petitioner's stated intent to acquire a new domicile

lacked credibility. There is no similar finding here. Hence, we do not read bad faith into petitioner's unexplained failure to report his New York residence on this 2014 nonresident return. Accordingly penalties imposed herein are properly canceled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Grant G. Biggar is granted as indicated in paragraph 4 below, but is in all other respects denied;
2. The determination of the Administrative Law Judge is modified as indicated in paragraph 4 below, but is in all other respects affirmed;
3. The petition of Grant G. Biggar is granted as indicated in paragraph 4 below, but is in all other respects denied; and
4. The notice of deficiency dated August 9, 2016 is modified to the extent that penalties asserted therein are canceled.

DATED: Albany, New York
December 24, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner