

additional findings of fact numbered 26 and 27, to more fully describe the procedural history of this matter. These additional findings of fact, together with the findings of fact as determined by the Administrative Law Judge, are set forth below.

1. Petitioners, Thomas A. Boniface and Jean Boniface, filed form IT-203 (New York State nonresident and part-year resident income tax return) for the year 2013 as New York State part-year residents with a filing status of married filing joint return. The form reflects that petitioners moved out of New York State on June 11, 2013. They asserted that on the last day of the tax year, they lived outside of New York but received income from New York State sources during their nonresident period. Petitioners listed a Tavares, Florida mailing address, but did not provide a permanent home address.

Included with the return was a W-2 from Pine Bush Physical Therapy for wages, tips and other compensation in the amount of \$349.00 for Mrs. Boniface and a W-2 from ADP Total Source for wages, tips, and other compensation in the amount of \$647.00 for Mr. Boniface. The address on both W-2s was the same Tavares, Florida, address as on petitioners' return. Also included was a form 1099-R (Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.), reflecting a distribution to Mrs. Boniface. Her address listed on the form 1099-R was the same Tavares, Florida, address.

2. Petitioners filed form IT-203 for 2014 as nonresidents of New York, with a filing status of married filing joint return. Petitioners 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 space for their permanent home address. Their mailing address was listed as the same Tavares, Florida, address as their 2013 return.

Included with the return was a W-2 from ADP Total Source for wages, tips, and other compensation in the amount of \$432.00 for Mr. Boniface. His address on the W-2 was in Tavares, Florida. Also included was a form 1099-R (Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.), reflecting a distribution to Mrs. Boniface. Her address listed on the form 1099-R was the same as Mr. Boniface's.

3. On October 17, 2016, Robert W. Sheehan, a Tax Auditor I with the Division of Taxation (Division), sent petitioners a letter advising them that they were selected for audit for the period January 1, 2013 through December 31, 2015. Included with this letter was an Information Document Request (IDR) requesting documents and information, including whether petitioners had an interest in any partnerships, LLPs, LLCs or S Corporations, a copy of the Schedule K-1 for each partnership, LLP, LLC or S corporation petitioners had an interest in, form 1040, U.S. Individual Tax Return, a Nonresident Questionnaire to be completed, and a chronological history of petitioners' residence and employment.

4. A completed Nonresident Questionnaire was not included in the record.

5. In a memo to petitioners' representative, Thomas R. DiGovanni, CPA, dated January 4, 2017, Mr. Sheehan provided a chronology of petitioners' whereabouts gleaned from charge card statements and documents provided by petitioners up to that point. Mr. Sheehan found that on April 30, 2013, the utilities in petitioners' Florida home were turned on and that petitioners purchased such home on May 3, 2013. Mr. Sheehan also wrote that on June 11, 2013, Mrs. Boniface obtained a Florida driver's license and that on October 24, 2013, Mr. Boniface obtained a Florida driver's license. Mr. Sheehan found that petitioners moved into their Florida home on May 5, 2013 according to their homestead exemption application, and that petitioners purchased a car from a Florida dealer on October 13, 2013.

With this memo, Mr. Sheehan included a warranty deed for petitioners' Florida property dated May 3, 2013. There were also copies of two drivers' licenses where the words "The Sunshine State" can be read, but the licenses are otherwise illegible. Mr. Sheehan also had a copy of petitioners' application for a property tax exemption for 2014 for their new home. Their Florida property is located at the same Tavares, Florida address as reported on their 2013 IT-203. On the application, petitioners' both checked the box "No" for the question "Are you or your spouse currently receiving any permanent-residency based tax benefits on ANY other property?" They also wrote that they became permanent Florida residents on May 5, 2013. Petitioners also stated on the application that they had Florida drivers' licenses beginning in June of 2013. Both also claimed that they were retired when asked who their current employer was. This form was prepared by petitioners on June 11, 2013.

6. Petitioners' Florida home is larger and more expensive than their New York home. Their New York home is located in Pine Bush, New York. It was listed for sale in 2015 for \$269,000.00. An estimate from www.zillow.com shows the estimated value for petitioners' home in Tavares, Florida, to be \$339,092.00. The Florida home was listed as being 4 beds, 3 baths and 2,619 square feet in size.

7. On February 13, 2017, Mr. Sheehan sent Mr. DiGovanni a letter stating that he had reviewed the information supplied to date and in addition to the outstanding information due from his letter of October 17, 2016, more information was needed to continue with the audit process. The information requested included credit card information from a Bank of America account for March 29, 2014 through August 25, 2014, a Chase account for March 4, 2014 through August 5, 2014 and September 1, 2014 through October 2, 2014, and a Citi account from January 1, 2014 through March 27, 2014 and April 27, 2014 through June 30, 2014. In

this letter, Mr. Sheehan also requested any additional records petitioners would like to supply, a description of all principal activities for each partnership, LLC, LLP, or S corporation, a chronological history of petitioners' employment from 2010 through the present, a chronological history of petitioners' residence, a complete list of petitioners' medical doctors, a list of all family members in New York and Florida for the periods under audit, and any additional information to support petitioners' change of domicile from New York to Florida effective June 11, 2013.

8. On March 2, 2017, Mr. DiGovanni sent a memo in response to Mr. Sheehan's letter, stating that the entire year of bank statements for 2014 was represented in the statements he previously sent. He also advised that petitioners were passive investors and did not take an active role in the management of rental properties owned by the businesses in which Mr. Boniface had an ownership interest. He stated that when Mr. Boniface worked for East Pine Bush and Pine Bush Equipment, he was involved in sales, but that he became ill in late 2009 or early 2010 and retired in early 2010 as a result. Mr. DiGovanni advised that Mr. Boniface used a VA medical facility in Castle Point, New York, when he resided in New York, but he now uses the VA facility in Florida. Mr. DiGovanni also stated that Mrs. Boniface has retained her OBGYN from New York, but now that petitioners reside in Florida, they otherwise use doctors in Florida for their medical and dental needs. The dates when petitioners changed to using doctors located in Florida, when Mr. Boniface began using a VA medical facility in Florida, and any documents substantiating the same, were not included with this letter. Mr. DiGovanni also wrote that petitioners have four sons, all of whom live in New York.

9. On July 18, 2017, Mr. Sheehan sent a letter again requesting a copy of Mr. Boniface's calendar for 2014 with supporting records.

10. On September 14, 2017, Mr. Sheehan sent Mr. DiGovanni a letter stating that the additional information previously requested had not been supplied. Mr. Sheehan further requested a copy of all monthly credit card statements and cell phone records for 2014 and offered to issue subpoenas for such records on petitioners' behalf.

11. On December 7, 2017, Mr. Sheehan sent petitioners' representative a letter advising that a subpoena was issued, and documents were received by the Division regarding Mr. Boniface's Verizon cell phone records. The letter provided that the records were used to determine Mr. Boniface's location for most of the days throughout the audit period, but that there were a few periods where the cell phone was not used, and Mr. Boniface's location could not be determined. Because of this, the Division requested documentation for February 9 through February 17, 2014 and March 29 through April 11, 2014.

12. On March 6, 2018, Mr. Sheehan sent Mr. DiGovanni a letter stating that numerous requests had been made to verify petitioners' change of domicile from New York to Florida effective June 11, 2013. Mr. Sheehan continued that the documentation supplied was insufficient to support the stated change and noted that the burden of proving a change of domicile was on petitioners. He stated that because of the limited information that had been supplied, it was the Division's position that petitioners had not met their burden. He wrote that the Division's determination was limited to two factors, time and home, due to the limited documentation supplied. A review of the time spent in and out of New York in 2014 at the time of the letter was calculated at 195 days in New York, including 25 days where petitioners could not show they were not in New York and 151 days in Florida. Mr. Sheehan acknowledged that petitioners may have established some ties to Florida but found that their general habit of life indicated an equal commitment to both states.

Mr. Sheehan acknowledged that the purchase of the home in Florida was significant, but noted that the historical New York home was still maintained and used by petitioners on a frequent basis. He stated that he did a review of the other major factors used in determining domicile but found that with the limited information supplied, they did not support a finding of domicile in one state more than the other for 2014. At the conclusion of this letter, Mr. Sheehan again asked for credit card statements and any other third-party documentation to support petitioners' change of domicile from New York.

13. On April 18, 2018, Mr. Sheehan sent Mr. DiGovanni a letter informing him that he had finalized his review of the time petitioners spent in and out of New York and Florida for 2014. He found that petitioners had spent 173 days in New York, including 2 days that were unsubstantiated as to petitioners' location and 151 days in Florida. A calendar dated August 28, 2018 reflecting the days spent in and out of New York and Florida and the basis for the determination for each day was included with Mr. Sheehan's audit papers.

14. On June 15, 2018, Mr. DiGovanni sent Mr. Sheehan an email asserting that petitioners bought a house and physically moved to Florida in 2013. He also wrote that during 2013, they registered to vote in Florida, changed their driver's licenses, bought a car from a Florida dealer, executed wills in Florida, and became active in their community. Mr. DiGovanni stated that Mr. Boniface is an avid car collector and restorer, that he has 10 such cars that he has worked on, and that all of them are in Florida. No supporting information was included with this email, including when the vehicles were transferred to Florida.

15. On October 3, 2018, following the audit, the Division issued petitioners a notice of deficiency with assessment ID L-048843854, asserting additional New York State personal income tax due for the years 2013 and 2014 in the amounts of \$102.00, plus interest, and

\$52,994.00, plus interest, respectively. This notice was premised upon the assertion that petitioners were domiciled in New York State for 2013 and 2014.

16. Petitioners filed a petition contesting only that they were New York domiciliaries for 2014. They are not challenging the finding that they were domiciliaries for 2013 or the notice of deficiency resulting from the same.

17. Once the parties agreed to proceed with this matter by submission, the Division was required to submit its documents by August 7, 2020. Petitioners were then required to submit their documents and brief in support by September 11, 2020, on which date the record closed.

After the record closed and with their reply brief, in addition to resubmitting documents petitioners had submitted previously, they submitted a certificate of title for a trailer and utility bills for their New York home for 2012 and 2014.

18. Included with petitioners' timely submitted evidence, Mr. DiGovanni offered a letter addressed to Supervising Administrative Law Judge Herbert Friedman (Supervising Administrative Law Judge Friedman), that he originally sent on or about June 13, 2019 (June letter). He had submitted the June letter "as an answer" to the Division's answer filed in this matter. Because this proposed reply to the Division's answer was not served within 20 days of the service of the answer, which was filed on March 13, 2019, Supervising Administrative Law Judge Friedman found the June letter to be untimely and returned it to Mr. DiGovanni.

19. In the June letter, Mr. DiGovanni provided petitioners' position as to why their domicile for the year 2014 was Florida and not New York. Mr. DiGovanni explained that as Mr. Boniface approached retirement age, he began to divest himself of ownership in various family businesses that he had built over the years and he and his wife began implementing their plan to relocate to Tavares, Florida, where she had family. Mr. DiGovanni stated that in early

2013, petitioners found a house with a three-car garage in Tavares, Florida. He also claimed that petitioners' new home was more than double the size of their old residence in Pine Bush, New York. Mr. DiGovanni provided that petitioners closed on the Florida property on May 3, 2013, moved in on May 5, 2013, and applied for a 2014 State of Florida Homestead Exemption on June 11, 2013. He then alleged that petitioners spent the remainder of 2013 transitioning household goods and their antique car collection, so that by the end of 2013, they considered themselves Florida domiciliaries and they filed a nonresident New York State return for 2013.

Mr. DiGovanni alleged that Mr. Sheehan's allocation of days and his finding that petitioners spent a greater percentage of time in New York in 2014 were not correct. He asserted that two of the days counted as New York days were travel days to and from New York City airports for a trip to Ireland. He also asserted that for this vacation and a vacation to St. Maarten, neither were counted as New York days or Florida days, but for both trips they departed from and returned to Florida and they should be considered as days in Florida. He contended that if those days were allocated to Florida, the percentage of time in New York was 47.8 percent. He alleged that it cannot be concluded that petitioners were predominantly in New York.

Mr. DiGovanni stated that petitioners considered themselves "retired," that they took numerous vacations, and attended car shows in New York, Pennsylvania and Florida. Mr. DiGovanni alleged that Mr. Boniface is an avid Ford car and pickup collector and restorer.

Mr. DiGovanni also explained that because they were retired, petitioners had time to spend with their grandchildren and asserted that visiting with their grandchildren should have no determining effect on their domicile. He alleged that they spent considerable time in New York in the summer of 2014 because it was unbearably hot in Florida and their grandchildren

were off from school. He asserted that when petitioners visited their grandchildren, they stayed with their children, not in their home in Pine Bush, New York.

Mr. DiGiovanni asserted that petitioners' new home was significantly larger and more costly than their New York house and that it was more conducive to their new leisurely lifestyle. He explained they were close to a lake and had a 3-bay garage to house a few of the vehicles from Mr. Boniface's vehicle collection. He stated that their Florida home was where they entertained when family visited them and that it was the focal point of their newfound personal life. He also claimed Mr. Sheehan failed to consider that Mr. Boniface's vehicle collection, which was "near and dear" to him, was relocated to Florida. This included over 10 Ford vehicles from the 1950s and 1960s. Mr. DiGiovanni also included a narrative from Jean Boniface regarding events that occurred from September 18, 2014 through January 2, 2015, involving the movement of Mr. Boniface's vehicle collection from New York to their new home in Florida. In her note, Mrs. Boniface asserts that Mr. Boniface went to New York in the end of September 2014 to pack up his 1959 Skyliner and that petitioners returned to New York on October 27, 2014 to pick up Mrs. Boniface's 1966 Mustang.

Mr. DiGiovanni asserted that, while petitioners do have family in New York, Mr. Sheehan failed to consider that they also have family in Florida. He explained that Mrs. Boniface's family are all located in central Florida.

Mr. DiGiovanni alleged that with regards to Mr. Boniface's business affiliations, he was a shareholder/officer with his brothers in four subchapter S corporations and a member of an LLC with other family members. Mr. Boniface's ownership percentages in 2014 remained consistent with his interests in 2012 and 2013, except that his interest increased in one of the

corporations due to the passing of his brother. Mr. DiGovanni alleged that during 2014, Mr. Boniface was not taking an active role in the business operations.

Mr. DiGovanni concluded the June letter by summarizing its points. He stated that the day count is too close to constitute a predominant number of days in New York. He claimed that petitioners created a new home for themselves and that they were in New York to visit grandchildren, wrap up business affiliations, and move assets. He claimed that Mr. Boniface has been reducing his ownership in various family businesses since 2012 and retired from daily responsibilities during 2013. He ended the letter requesting that Administrative Law Judge Friedman conclude that petitioners' intent was to permanently reside in Florida beginning in 2013.

20. In addition to his letter, Mr. DiGovanni also submitted a calendar of whereabouts prepared by Mrs. Boniface and attached it to a day count calendar used by Mr. Sheehan that was dated October 23, 2017. The first page of this exhibit was an unsigned typed statement that the calendars agree except for travel days and that petitioners made two trips in 2014 where they flew in and out of New York airports but originated and ended their trips in Florida.

21. A review of the calendars submitted by petitioners makes clear that they are not fully in agreement. In January, Mrs. Boniface's calendar has petitioners in New York through January 11th and in Florida for the remainder of the month. However, Mr. Sheehan's calendar shows that, based on cell phone records, petitioners were back in Florida on January 6, 2014, but that Mr. Boniface then returned to New York on January 13th and stayed through January 17, 2014.

Both calendars show that petitioners traveled to and from New York for their trip to Ireland in February 2014. Petitioners arrived in New York on February 8, 2014 and again on

February 18, 2014. Petitioners began traveling back to Florida on February 18, 2014. They were in North Carolina on February 19, 2014 and back in Florida by February 20, 2014. Mrs. Boniface's calendar attributes the entire month of February as days in Florida.

Both parties agree that petitioners were in Florida for the month of March until they left for St. Maarten on March 28, 2014. Petitioners flew to and from St. Maarten from Florida. Petitioners returned to Florida from St. Maarten on April 23, 2014. Both parties agree that petitioners remained in Florida for the rest of April.

Petitioners returned to New York in May of 2014. Petitioners assert that they arrived on May 15, 2014. However, the cell phone records used by Mr. Sheehan show that petitioners were in New York beginning on May 14, 2014. Petitioners remained in New York for substantially all of June, July and August of 2014.

Petitioners' calendar shows that they were in New York through September 17, 2014, at which time they returned to Florida. Petitioners assert that Mr. Boniface returned to New York on September 24, 2014 and remained in New York until October 8, 2014. Mr. Sheehan's calendar shows that, based on petitioners' cell phone records and credit card charges, they were in New York until September 14, 2014, that Mr. Boniface was then again in New York on September 17 and 18, 2014 before returning to Florida, and that he returned to New York on September 24, 2014, where he stayed until October 9, 2014. Mrs. Boniface's calendar shows Mr. Boniface arriving in Florida on the evening of October 10, 2014. Mr. Sheehan's calendar shows Mr. Boniface returned to Florida on October 11, 2014.

Mr. Sheehan's calendar shows that petitioners left Florida on October 26, 2014 and returned to New York on October 28, 2014. Mrs. Boniface's calendar shows that petitioners

were in Florida until October 28, 2014, with a handwritten note on that day that they checked into a Quality Inn in Virginia, and that they arrived in New York on October 29, 2014.

Both parties agree that petitioners left New York on November 1, 2014. Mrs. Boniface's calendar attributes the rest of the days in November to Florida. Mr. Sheehan's calendar does not show petitioners in Florida until November 4, 2014, despite the fact that Mr. Boniface's cell phone was used in Florida on November 3, 2014. Mr. Sheehan's calendar shows that Mrs. Boniface remained in Florida for the rest of November 2014 and that Mr. Boniface traveled to Wyoming and South Dakota from November 8, 2014 through November 11, 2014 but was otherwise also in Florida for the remainder of November.

Mr. Sheehan's calendar shows that petitioners remained in Florida through December 20, 2014, they were in New York from December 21 through December 29, and in Florida December 30 and 31, 2014. Mrs. Boniface's calendar shows petitioners in Florida through December 19, 2014 and then in New York from December 20, 2014 through December 28, 2014. Her calendar shows petitioners flying back to Florida on December 29, 2014 where they remained through the end of the year.

22. Petitioners also submitted a marked-up version of Mr. Sheehan's calendar that was dated October 23, 2017. It is identical to the calendar they submitted for comparison to Mrs. Boniface's calendar and also to the older version of the calendar that was provided as part of the audit file, except that it has handwriting on it. February 8 and 18, 2014 are circled and February 9 through 17, 2014 are selected with a line to a type-written note stating, "Should be Florida days- As a domicile, left and Returned [sic] from and to Florida." The word "Ireland" is also written next to the section for February 9 through 17, 2014.

For the month of March 2014, it is handwritten that the last three days of March “Should all be Florida days.” The same note is written for the month of April for the dates from April 1, 2014 through April 23, 2014.

There is a handwritten note on the page for the month of November 2014 that November 8 through 11, 2014 was for a hunting trip and that Mr. Boniface went on the trip from Florida and returned to Florida.

23. Mr. DiGovanni also submitted a copy of credit card receipt for Mr. Boniface’s Citi Master Card dated March 30, 2014, from The Villas At Simpson Bay Resort with a handwritten note that said “check in.” He further submitted a copy of a credit card receipt from an unknown card from the same place dated April 20, 2014. There was also a handwritten note on top of this image that stated, “check out.” A page of a passport was also submitted with a stamp of March 28, 2014. It is not clear whose passport this is from.

24. Mr. DiGovanni submitted photos from a Google search of Mr. Boniface’s car collection, including when a few of the cars were at car shows. These included a picture of a car Mr. DiGovanni asserts is a 1959 Ford Skyliner. Next to the picture is an icon of a calendar and the date October 12, 2014. It also states that this picture was taken in Tavares, Florida. There was also a picture with a handwritten note that it was taken at the Apopka Car show in Apopka, Florida. The caption on top of the picture is March 8, 2014. It is not clear what car this picture is depicting or if it is a car owned by petitioners. There is also a picture of a vehicle with a caption on top of the vehicle that says, “Fruitland Park” and it is dated September 18, 2014. There is a handwritten note next to the picture that reads “Tom’s 1965 Mustang Body Shop.” There is also a picture of what appears to be the same vehicle as the first picture at a car show in Ocala, Florida. There is a calendar icon with the date of October 26, 2014. The last

picture is a picture of a gentlemen, presumably Mr. Boniface, holding an award reading “Best Stock Restored Ocala Pumpkin Run LLC, 2014 ‘Horsepower in Horse Country’ Classic Car Show.”

25. Mr. DiGiovanni also submitted a sheet of images alleging one of the pictures was petitioners’ New York house in Pine Bush, New York, and the other was petitioners’ Florida home located in Tavares, Florida. There was no additional information about the Pine Bush home, but the picture of the Florida home also states that it had four beds, three baths, 2,619 square feet and had an estimated market value of \$340,401.00. Attached to this sheet is a second sheet with a picture of a truck and what appears to be a large garage with the caption of Tavares and a date of December 3, 2014.

26. Petitioners and the Division executed a mutual consent to have this matter determined on submission without a hearing on July 28 and 29, 2020, respectively. The Administrative Law Judge confirmed receipt of the waiver of hearing by correspondence dated July 29, 2020 and established a schedule for documents and briefs in this matter to be submitted by November 5, 2020.

27. Petitioners submitted additional documents with their exception to the Tribunal. The Secretary to the Tax Appeals Tribunal acknowledged the proposed additional evidence by correspondence dated August 13, 2021 and asked the parties to submit arguments, due by August 30, 2021, as to why this Tribunal should or should not accept the submitted documents after the Administrative Law Judge’s closing of the record. Petitioners and the Division responded to the Tribunal’s request by correspondence dated August 23 and 25, 2021, respectively.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination in this matter by referencing the sections of the Tax Law that describe New York residency for tax purposes. The Administrative Law Judge distinguished between the two bases of New York tax residency provided under the Tax Law, statutory residency and, as relevant here, domicile.

Next, the Administrative Law Judge turned to the definition and description of “domicile” under the Division’s regulations. She found that the regulations defined domicile as the place which an individual intends to be his or her permanent home. According to the Administrative Law Judge, a domicile, once established, continues until one moves to a new location with the bona fide intention of making that place one’s fixed and permanent home. However, temporary relocation without an intention to make such place a permanent home is insufficient to show a change of domicile. The burden is upon the party asserting a change of domicile to show that the necessary intention to make the new place a permanent home existed.

The Administrative Law Judge noted that while a determination of domicile necessarily considers the subjective intent of a taxpayer, this Tribunal and the courts of this state have recognized that certain objective criteria can demonstrate whether a taxpayer’s general habits of living indicate a change of domicile. Those criteria include whether the taxpayer has retained his or her New York home, the location of the taxpayer’s active business ties, location of the taxpayer’s family and social and community ties, and amount of time spent in the purported new domicile relative to the old one. The Administrative Law Judge also noted that no single factor is determinative and the unique circumstances of each case must be considered.

The Administrative Law Judge determined that petitioners had not submitted credible evidence that their habits of life indicated a change of domicile to Florida. The Administrative

Law Judge stated that this was because petitioners' evidence consisted primarily of unsworn and unsubstantiated statements made by petitioners' representative on their behalf, which, while constituting admissible hearsay, are entitled to little weight and thus are insufficient to meet petitioners' burden of proof. The Administrative Law Judge also found that petitioners' retention of their historic home in New York and the amount of time spent in New York relative to Florida indicated a lack of intent to change their domicile to Florida. For the Administrative Law Judge, the unsworn statements regarding the nature of Mr. Boniface's business ties were insufficient to indicate an unequivocal intention to change their domicile.

The Administrative Law Judge weighed the family factor, but, as the statements regarding the location of petitioners' family were given in unsworn statements, such statements were accorded little weight. According to the Administrative Law Judge, the record simply did not include sufficient evidence to meet petitioners' burden of proof to support the conclusion that they had established a new domicile in Florida. The Administrative Law Judge then explained that the documents that petitioners submitted after the closing of the record could not be considered in reaching her determination. The Administrative Law Judge denied the petition and sustained the notice of deficiency.

ARGUMENTS ON EXCEPTION

Petitioners argue on exception that the Administrative Law Judge erred in failing to give greater weight to the statements of their representative regarding their habits of daily life. They disagree with the auditor's determination regarding the number of days petitioners were in New York for 2014, and state that any variation between their submitted calendar and the auditor's day count analysis was inconsequential. Petitioners also maintain that the photographs they submitted indicate that they had brought their most cherished possessions with them to Florida,

showing that they had the intention of establishing a domicile there. Petitioners claim that their failure to report the maintenance of living quarters in New York on their personal income tax return was not inaccurate as the house they owned stood empty in 2014 and thus did not qualify as living quarters. Petitioners claim that, if asked, they would have provided sworn statements supporting their position that they had, in fact, changed their domicile. Petitioners ask that the notice of deficiency be canceled.

The Division requests that the determination of the Administrative Law Judge be affirmed and the notice of deficiency be sustained. It argues that the Administrative Law Judge correctly determined that petitioners qualified as New York domiciliaries for tax year 2014. In support of its argument, the Division states that all notices of deficiency are entitled to a presumption of correctness, and petitioners here have failed to overcome that presumption. According to the Division, the burden of proof lies with a taxpayer to demonstrate by clear and convincing evidence that the notice of deficiency was erroneous. The Division asserts that the Administrative Law Judge correctly determined that the domicile factors indicate that petitioners retained their New York domicile in 2014.

OPINION

Tax Law § 601 imposes personal income tax on residents and nonresident individuals (Tax Law § 601 [a] - [c], [e]). As noted by the Administrative Law Judge in her determination below, residents are subject to tax on their entire incomes (Tax Law § 611 [a]), while nonresidents are only subject to tax on their New York source incomes (Tax Law § 631 [a]).

Residency, for purposes of imposition of personal income tax, is defined at Tax Law § 605 (b) (1) (A) and § former 605 (b) (1) (B):

“Resident individual. A resident individual means an individual:

- (A) Who is domiciled in this state, unless (i) the taxpayer maintains no permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .
- (B) Who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.”

It is uncontested that petitioners spent more than 30 but less than 184 days in New York in 2014; therefore, the only question on exception is whether petitioners qualified as New York domiciliaries in tax year 2014.

Domicile is not defined in the Tax Law, but the Division’s personal income tax regulations describe it as “the place which an individual intends to be such individual’s permanent home” (20 NYCRR 105.20 [d] [1]; *see also Matter of Campaniello*, Tax Appeals Tribunal, July 21, 2016, *confirmed Campaniello v New York State Div. of Tax Appeals Trib.*, 161 AD3d 1320 [3d Dept 2018], *lv denied* 32 NY3d 913 [2019]; *Matter of Newcomb*, 192 NY 238, 250 [1908]). Once established, a domicile continues until the individual moves to a new location with the bona fide intention of making such a place the individual’s fixed and permanent home (*id.*; *Matter of Ingle*, Tax Appeals Tribunal, December 1, 2011, *confirmed Matter of Ingle v Tax Appeals Trib. of the Dept. of Taxation & Fin. of the State of N.Y.*, 110 AD3d 1392 [3d Dept 2013]; *see also* 20 NYCRR 105.20 [d] [2]). An individual can only have one domicile at a time (20 NYCRR 105.20 [d] [4]). A temporary relocation does not result in a change of domicile (*Matter of Newcomb*, at 250; *see also* 20 NYCRR 105.20 [d] [2]). Ultimately, the burden of proving a change in domicile rests with the party asserting the change (*id.*; *see also Matter of Newcomb*, at 250).

As it is petitioners who are claiming a change of domicile to Florida, they bear the burden of showing by clear and convincing evidence such a change (*id.*; *see also Matter of*

Bodfish v Gallman, 50 AD2d 457 [3d Dept 1976]). Formal declarations are considered in determining a change of domicile, but more weight is accorded the informal acts that demonstrate an individual's "general habit of life" (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989; citing *Matter of Trowbridge*, 266 NY 283, 289 [1935]).

It is well established that the courts of this state and this Tribunal have looked to certain objective criteria to determine whether a taxpayer's general habits of living have demonstrated a change in domicile (*see e.g. Matter of Campaniello; Matter of Ingle; Matter of Gray*, Tax Appeals Tribunal, May 25, 1995, *affd Matter of Gray v Tax Appeals Trib. of State of N.Y.*, 235 AD2d 641 [3d Dept 1997]). Among the factors considered are retention of a home in the historical domicile (*id.*); location of business activity (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); location of family ties (*Matter of Gray; Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993); location of social and community ties (*id.*, *Matter of Getz*, Tax Appeals Tribunal, June 10, 1993); and time spent in the historic domicile relative to the purported new domicile (*Matter of Adams*, Tax Appeals Tribunal, September 3, 2021; *Matter of Angelico*).

As noted in the findings of fact, petitioners and the Division opted to have the petition decided on submission pursuant to our Rules of Practice and Procedure (Rules) (*see* 20 NYCRR 3000.12). Pursuant to our Rules, affidavits as to relevant facts may be received, for whatever value they may have, by the administrative law judge in lieu of in-person testimony (20 NYCRR 3000.15 [d]). However, in this case, petitioners neither testified nor submitted affidavits supporting their argument that they had changed their domicile to Florida. As recognized by the Administrative Law Judge, other than the few formal declarations of a change of domicile contained in the audit file, petitioners' evidence consisted of unsworn statements

made by petitioners' representative. While hearsay testimony is properly admissible (*see Matter of Seguin*, Tax Appeals Tribunal, October 22, 1992) we have held that unsworn, unsubstantiated statements such as these are insufficient to meet petitioners' burden of proof (*Matter of Greenfeld*, Tax Appeals Tribunal, March 7, 2019, citing *Matter of Bello v Tax Appeals Trib. of the State of N.Y.*, 213 AD2d 754 [3d Dept 1995]; *Matter of Erdman*; *Matter of Café Europa*, Tax Appeals Tribunal, July 13, 1989). This is especially the case where, as here, it must be determined whether petitioners formed the necessary intent to abandon their old domicile and adopt a new one. We agree with the Administrative Law Judge that in the absence of any sworn statements or testimony explaining the significance of the documents submitted, such evidence is entitled to little weight.

We do not agree with petitioners that the Administrative Law Judge erred in concluding that the evidence submitted was insufficient to meet their burden. The Administrative Law Judge considered the domicile factors and the evidence that was timely submitted to support petitioners' claims. In light of our prior cases discussed above, we find that the Administrative Law Judge properly accorded little weight to the unsworn and unsubstantiated evidence submitted. Accordingly, we agree with the Administrative Law Judge that petitioners failed to bear their burden of proof to show by clear and convincing evidence that they had changed their domicile before the period at issue.

We have considered petitioners' request to consider additional documents submitted in support of their petition and this exception. We note that administrative law judges have authority to fix the time for filing of legal memoranda and other documents, both in the course of a hearing and on submission by the parties (20 NYCRR 3000.12 [b], 20 NYCRR 3000.15 [c] [3]). Because these additional documents were submitted after the record was closed on

September 11, 2020, we do not consider them in rendering our decision. To do so would interfere with the conduct of the hearing below and jeopardize the finality of the determination and our decision in this matter (*Matter of March*, Tax Appeals Tribunal, November 26, 2018; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas A. and Jean Boniface is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Thomas A. and Jean Boniface is denied; and
4. The notice of deficiency dated October 3, 2018, is sustained.

DATED: Albany, New York
June 30, 2022

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner