STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JULIAN H. AND JOSEPHINE ROBERTSON	:	DECISION DTA NO. 822004
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the New York City Administrative Code for the Year 2000.	: :	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 15, 2009 in the matter of the petition of Julian H. and Josephine Robertson. Petitioners appeared by Feingold & Alpert, LLP (Fred Feingold, Esq. and Mark E. Berg, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Herbert M. Friedman, Jr., Esq., and Michelle M. Helm, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on March 24, 2010, in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Jenkins dissents for reasons set forth in a separate opinion.

ISSUE

Whether petitioners were properly subject to New York City personal income tax as statutory resident individuals pursuant to New York City Administrative Code

§ 11-1705(b)(1)(B) for the year 2000.[1]

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioners, Julian H. Robertson and Josephine Robertson, filed their New York State Resident Income Tax Return (Form IT-201) for each of the years 1997 and 2000 on the basis that they were nonresidents of New York City, and for each of the years 1998 and 1999 on the basis that they were residents of New York City.

2. On or about September 7, 2000, the Division of Taxation (Division) commenced an audit of petitioners' personal income tax returns for a period which, over time, encompassed the years 1995 through 2001. The audit included review of the propriety of interest deductions taken by certain investment funds, certain other partnership flow-through items in respect of those funds, and petitioners' New York City residency status for the years 1997 and 2000. The auditor determined that petitioners correctly reported the interest expense and other flow-through items, and that petitioners also correctly filed as New York City nonresidents in 1997. With respect to the year 2000, the Division conceded that petitioner was not a domiciliary of New York City, but determined that he had not established to the Division's satisfaction, under its understanding of the applicable burden of proof, that he was not present in New York City on more than 183 days in the year 2000, and on that basis determined that petitioner was subject to tax as a "statutory resident" of New York City.[2]

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[1] Petitioner Josephine Robertson's name appears herein by virtue of having filed joint federal and New York State and City personal income tax returns with her husband, petitioner Julian H. Robertson. Unless otherwise specified or required by context, references using the singular term petitioner shall mean petitioner Julian H. Robertson.

[2] A "statutory resident" of New York City is an individual who maintains a permanent place of abode within New York City and spends, in the aggregate, more than 183 days in a given year in New York City.

3. On September 18, 2006, the Division issued to petitioners a Notice of Deficiency asserting additional New York City personal income tax due for the year 2000 in the amount of $26,702,341.00, plus interest. No penalties or additions to the tax were asserted by the Division. This notice was premised solely upon the Division's conclusion that petitioner was a statutory resident of New York City. A conciliation conference was held, at which time the Division's auditor agreed that three of the seven days which had been in question up to the time of the conciliation conference were properly treated as non-New York City days. Accordingly, on September 17, 2007, a Conciliation Order (CMS No. 216932) was issued sustaining the Notice of Deficiency and confirming that there remained four specific days in dispute, to wit, April 15, July 23, July 31 and November 16, 2000 (the disputed days).

4. Petitioner has acknowledged that he maintained a permanent place of abode in New York City in 2000. Further, the parties have stipulated that petitioner was present in New York City, as such presence has been defined for purposes of counting the number of days in New York City upon which the status of statutory residence is determined, on 183 specific days (NYC days), and was not present in New York City for such purposes on 179 specific days (non-NYC days). The stipulated specific NYC days and non-NYC days, totaling together 362 days, are set forth on separate appendices as part of the parties' stipulation, thus leaving the sole issue in this proceeding whether petitioner has established that none of the four disputed days listed above was a NYC day.

5. During 2000, petitioner was Chairman of Tiger Management (Tiger), which actively managed several large hedge funds and had its offices at 101 Park Avenue in New York City.[3] Since he founded Tiger in 1980, petitioner's role at Tiger has been the "trigger puller," personally

[3] Access to Tiger's offices may be gained via building entrances located both at 101 Park Avenue and at 99 Park Avenue.

approving and overseeing the implementation of roughly 97% of all trades that were made. Petitioner has the highest reputation for integrity, character and honesty, both in the financial community and more generally, and the Division specifically acknowledged that it is not questioning petitioner's integrity or honesty in this proceeding.

6. In May 2000, the hedge funds managed by Tiger were closed down, and over the ensuing months, Tiger's various positions were closed out and Tiger began a gradual transition from being a hedge fund manager to "seeding" other managers' hedge funds. After the hedge funds were closed down, petitioner continued to manage a considerable amount of his personal funds from his offices at Tiger, but was not required to be in the office as much as before the funds were closed. In addition to business activities, petitioners established and have been actively involved in a charitable foundation that recently had a corpus of nearly one billion dollars.

7. Throughout 2000, petitioners maintained their home and their domicile on Long Island in Locust Valley, New York (the Locust Valley home). The Locust Valley home includes a large house situated on ten acres that has served as the Robertsons' family home since 1986. In addition to the Locust Valley home, petitioners also maintained an apartment on Central Park South in New York City (the Apartment), and a vacation home in Sun Valley, Idaho. Petitioners also rented a house in Southampton, New York, for approximately six weeks each summer, including the period July 29, 2000 through September 4, 2000.

8. For the past 22 years, Bob Young has worked for petitioners as the property manager and caretaker of the Locust Valley home and has lived in an attached two-bedroom cottage on the property. Mr Young's telephone line at the cottage is separate from petitioners' telephone lines at the Locust Valley home.

9. As part of his duties as property manager and caretaker over the years, including during 2000, it would not be unusual for Mr. Young to work inside the Locust Valley home on weekdays during his work day, which spans roughly the hours between 8:00 A.M. and 6:00 P.M., and in the course of his duties to place telephone calls from the Locust Valley home, including calls to the Apartment to speak with or leave messages for Mrs. Robertson. When Mrs. Robertson wished to reach Mr. Young, she would always call him at his telephone number at his cottage, rather than at the number for the Locust Valley home. It would have been unusual for Mr. Young to be working in the Locust Valley home in the evening, or for Mr. Young to call the Apartment from the Locust Valley home after 5:00 P.M. While a total of 53 telephone calls were made from the Locust Valley home to the Apartment on days in 2000 when petitioner was not at the Locust Valley home, no such calls were made on a Saturday or Sunday, no such calls were made after 8:00 P.M., and only two of these calls were made after 6:00 P.M.

10. In addition to property management, Mr. Young's duties over the years, including 2000, have included serving as petitioner's driver and, in the course of those duties, driving petitioner from his Locust Valley home to New York City and to local airports, and from New York City and local airports to his Locust Valley home. Mr. Young did not serve as petitioner's driver when petitioner was in Southampton.

11. Over the years, including 2000, when petitioner would spend the weekend in Locust Valley, Mr. Young would routinely pick him up at his office in New York City on Friday afternoons and drive him either to the Locust Valley home or to Deepdale Golf Club in Manhasset (Deepdale), where petitioner regularly played golf. Whenever Mr. Young drove petitioner from his office in New York City to either his home in Locust Valley or Deepdale on a Friday, he customarily picked petitioner up before 3:00 P.M. in order to avoid traffic on the Long

Island Expressway, which tended to get heavier after that time. Leaving between 3:00 and 3:30 P.M. on a Friday, the trip from the office to Locust Valley would generally take roughly two hours. Mrs. Robertson frequently would not accompany petitioner on these car trips from his office to Locust Valley and in such instances, it would not be unusual for petitioner to call Mrs. Robertson when he arrived at the Locust Valley home if she was staying in New York City.

12. Over the years, including 2000, Mr. Young also routinely drove petitioner from the Locust Valley home to his office in New York City on Monday mornings following weekends petitioner spent in Locust Valley. On such mornings, they usually left Locust Valley between 6:00 and 6:30 A.M., again for traffic reasons, which would generally get petitioner to his office between 7:30 and 8:00 A.M. When petitioner traveled from Locust Valley to an airport during Mr. Young's normal working hours, Mr. Young typically drove him there. Mr. Young has never driven from Locust Valley to pick petitioner up from the Apartment for the purpose of driving him to his office, and petitioner would not ask Mr. Young to do so.

13. Generally, if petitioner was leaving New York City after 6:00 or 7:00 P.M., he would not call Mr. Young but rather would take a car service home, if available, or use another means of transportation, if not. There have been occasions over the years when petitioner had difficulties getting a car service to take him from the Apartment to Locust Valley because, for example, a driver would refuse to take petitioners' large dog or would go to the wrong pickup address. Petitioner recalled at least one instance where he had to call multiple car services before getting a car. Petitioner and Mrs. Robertson both testified that there has never, however, been a time, in 2000 or otherwise, when petitioner intended to leave New York City before midnight on a particular day and these or other difficulties prevented him from doing so, even if that meant getting a taxi on the street. Mr. Young used petitioners' vehicle when he drove petitioner

somewhere, and did not issue a voucher or receipt to petitioner nor did he make any records of these car trips, but rather picked petitioner up whenever petitioner or one of petitioner's assistants at Tiger called and asked him to do so. Based on the totality of the records provided, the Division accepted as non-NYC days eight Fridays and Saturdays in 2000 on which petitioner was in Locust Valley but for which there is no car service voucher for a trip to Locust Valley the day before.[4]

14. In 2000, the Apartment was staffed on nearly a full-time basis by individuals including Trudy Ainge, who served as petitioners' chef and lived with her husband in an apartment within the Apartment, and Elizabeth Balagtas, who served as petitioners' housekeeper and was at the Apartment during the day five days per week.

15. The Apartment has several extra bedrooms for use by petitioners' sons and other house guests. In 2000, petitioners had numerous and frequent house guests at the Apartment, both when they were at the Apartment and when they were not, with their son Spencer, in particular, spending a lot of time there in the summer of 2000. All of petitioners' sons, staff and house guests at the Apartment had unlimited access to, and frequently used, the telephones there, and did not have to ask permission to use them. Indeed, in 2000, many persons other than petitioner had access to the telephones at the Apartment, and persons other than petitioner made telephone calls from the Apartment on 127 days on which petitioner was not at the Apartment or otherwise in New York City.

16. Petitioners are avid golfers, and during 2000 they had memberships at several golf clubs on Long Island, including Deepdale. Petitioner travels frequently for both pleasure and business, often but not always with Mrs. Robertson. In 2000, petitioner owned a private aircraft,

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[4] The particular dates are May 6, May 20, June 3, June 10, June 17, September 9, December 9 and December 15.

which was operated and managed by Key Air Incorporated (Key Air), and which he utilized for most of his travel outside the local area. Petitioner's lifestyle, including having a private aircraft and a private driver, enabled him to travel and spend time at each of petitioners' several residences in 2000, and to take numerous trips outside New York City during 2000. In 2000, petitioner spent roughly seven weeks in Australia and New Zealand, five weeks in Southampton, two weeks in Sun Valley, a week in Arizona and shorter periods in each of several other places.

17. In 2000, petitioner's arrangements with Key Air were such that petitioner had the option of flying into or out of any of several New York area airports on his private plane, including Republic Airport in East Farmingdale, Long Island (Farmingdale), Teterboro Airport in Teterboro, New Jersey (Teterboro), and LaGuardia Airport (LaGuardia). He would generally choose which New York area airport to fly out of or into for a particular trip depending on from where he and his traveling companions would be arriving at the airport, or where they would be going from the airport. If the traveling party would all be arriving from or going to Manhattan, petitioner generally chose Teterboro because it is much closer to New York City than is Farmingdale, and less expensive and less prone to ground traffic and air traffic delays than LaGuardia. If, instead, the traveling party would all be arriving from or going to Locust Valley, petitioner generally chose Farmingdale. Finally, if petitioner or other passengers would be arriving from or going to Locust Valley while other members of the traveling party would be arriving from or going to Manhattan or, in some instances, if the nature of the trip would require the travelers to pass through (clear) United States Customs, petitioner generally would choose LaGuardia as an alternative most convenient to all.[5]

[5] Of the four disputed days, only July 23 involved a reference to United States Customs. The flight on this date, from Ireland to LaGuardia, cleared United States Customs in Bangor, Maine.

18. Before the Apartment became available to petitioner in late 1996, petitioner sought and received specific advice regarding the New York City statutory residency rules. Petitioner was advised that once the Apartment became available, he would be considered a New York City statutory resident for any calendar year in which he was present in New York City (other than while in transit between two points outside New York City) on more than 183 days. Petitioner understood that if he spent any part of a day in New York City, even five minutes, that day would be considered a NYC day unless he was traveling through New York City between two non-New York City points. Petitioner's intention for each year beginning with 1997 was to spend fewer than 184 days in New York City so that he would not be held taxable as a resident of New York City.

19. Petitioner in fact limited his New York City presence in 1997 to 183 or fewer days, as the Division determined on audit. Beginning in 1998 and continuing through 1999, however, Mrs. Robertson was being treated for cancer in New York City, and as a result, petitioner was unable to limit his New York City presence during those years to 183 or fewer days. Accordingly, petitioners filed their 1998 and 1999 New York personal income tax returns on the basis that petitioners were statutory residents of New York City for each of such years.

20. Mrs. Robertson's treatment was completed in 1999, and by 2000 she was recovered and remained so until recently. Petitioner's business did not require him to be present in New York City for more than 183 days in 2000, and he determined to arrange his schedule in 2000 so as to limit his NYC days in 2000 to 183 or fewer, and thereby to be considered a nonresident of New York City in 2000. Petitioner was focused throughout 2000 on limiting his New York City presence in 2000 to 183 or fewer days, with the focus intensifying as the year progressed and the

number of remaining available days diminished. In this connection, the following exchange occurred during the Division's cross-examination of petitioner:

> Q: Now you testified that your focus was to leave New York [City] as often as possible because of the day count situation?
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> A: Yes, sir.
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> Q: Was that focus as strong in the early part of the year as it was in the later part of the year?
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> A: Well, I think it was a pretty strong thing, I mean –
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> Q: But obviously earlier in the year –
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> Judge Galliher: You have to let the witness finish. I don't think he was finished.
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> Q: I beg your pardon.
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> A: Well, I mean obviously if it were December the 31st and I was missing a date, I was damn sure going to be out of town. If – so, I guess your point is proven.
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> Q: It's not a point. I am just asking to try to make sure I understand your thought process here. Obviously your focus on getting out of the City is not quite as important in March, let's say, as it would be December 31st, as you pointed out, if there was one day; is that right?
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> A: It's probably right.
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> Q: Probably right or it is right?
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> A: It is right.

21. There is no claim that petitioner spent every Saturday and Sunday in 2000 outside of New York City and the record, including the Electronic Calendar, reflects a number of Saturdays when petitioner had no scheduled appointments in the City yet spent Saturday (and the preceding Friday) in New York City (e.g., January 29, March 4, 11, 18, and 25, April 8). Nonetheless, petitioner took a number of steps to effectuate his intention not to exceed 183 NYC days in 2000.

First, petitioner refrained from spending days in New York City when his schedule did not require such New York City presence, for example, by going to the Locust Valley home on Friday afternoons and not returning to New York City until the following Monday. When he was not required to be in New York City over the weekend, petitioner would leave New York City on Friday, rather than spending Friday evening at his Apartment in New York City, in order to "earn a tax day" on Saturday.[6] Second, petitioner avoided spending unnecessary time during weekends in New York City. Third, petitioner made it a point to leave New York City before midnight on the day before a day he would not need to be in New York City, even when he was entertaining guests at the Apartment in the evening. In this regard, if he did not need to be in New York City the following day, he would leave so that the ensuing day would be a "tax day." Fourth, on travel days, petitioner generally avoided "wasting" a NYC day by arriving at the airport from, or traveling from the airport to, Locust Valley if he did not have a reason to go to New York City prior to his departure or after his arrival. Finally, petitioner specifically charged Julie Depperschmidt, his primary assistant at Tiger, with the responsibility of maintaining an accurate, contemporaneous account of petitioner's whereabouts during 2000 and keeping petitioner advised on a periodic basis of his cumulative days in and out of New York City such that he could plan his schedule so as to achieve his objective of limiting his New York City presence in 2000 to 183 days or fewer.

22. In 2000, petitioner's personal assistants at Tiger were Ms. Depperschmidt and Emily Falkenstein. Ms. Depperschmidt has worked at Tiger since 1994, began working directly with petitioner in 1996 and has been petitioner's primary executive assistant since 1999. Ms.

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[6] Petitioner and his principal assistant, Julie Depperschmidt, used the phrases "earning a tax day," "earning a tax-free day" or "getting the day" as a reference to mean successfully staying out of New York City on a particular day.

Falkenstein began working directly for petitioner in May 2000.

23. Ms. Depperschmidt's principal duties as petitioner's primary executive assistant at Tiger in 2000 included scheduling petitioner's business appointments, keeping a contemporaneous record of petitioner's days in and out of New York City for New York City personal income tax purposes, and keeping petitioner apprised from time to time of his total actual and anticipated NYC days.

24. Additional duties of Ms. Depperschmidt and petitioner's other assistants included making petitioner's business and certain personal travel arrangements, answering petitioner's telephone at Tiger, connecting incoming calls through to petitioner when he was out of the office and placing telephone calls for petitioner both when he was in the office and when he was not in the office. In addition, petitioner's assistants retrieved voicemail messages left on petitioner's direct telephone line. Petitioner does not know how to retrieve voicemail messages at Tiger, and has never done so.

25. Ms. Depperschmidt and Ms. Falkenstein also arranged for town cars to pick petitioner up at the office or at other locations, in which case they, rather than he, would often sign the car service voucher. The car service petitioner used most often in 2000 was UTOG 2 Way Radio, Inc. (UTOG). All of the UTOG vouchers for car trips which petitioner acknowledged he took in 2000 that were not signed by petitioner himself were signed by Ms. Depperschmidt or Ms. Falkenstein.

26. Because petitioner did not carry a cell phone in 2000, and because petitioner made or had input on virtually all of the investment decisions at Tiger, many of which were time-sensitive, it was essential that petitioner's assistants, and particularly his principal assistant Ms. Depperschmidt, know where he was when he was out of the office on a business day so that they

would be able to reach him by telephone on a land line or on his car phone to connect him with people at Tiger or elsewhere who needed to speak with him. When petitioner was out of the office on a business day, whether in Locust Valley, in Southampton or on vacation, he would frequently call the office, starting when he got up in the morning, and his assistants would frequently call petitioner.

27. In 2000, Tiger's offices were open Monday through Friday other than holidays, and were closed on Saturdays and Sundays. When petitioner was in the office, he generally arrived between 7:15 A.M. and 9:00 A.M. Petitioner was not usually in the office on weekends or holidays.[7] Ms. Falkenstein's office hours in 2000 were 7:30 A.M. to 4:00 P.M., Monday through Friday. Ms. Depperschmidt's office hours in 2000 were 9:00 A.M. to 5:30 P.M., Monday through Friday.

28. During 2000, petitioner caused to be maintained as a business record an electronic calendar detailing his appointments and whereabouts (the Electronic Calendar). The Electronic Calendar was contemporaneously maintained by petitioner's assistants at Tiger, and principally by Ms. Depperschmidt.

29. In petitioner's business, the accuracy of records is imperative and, accordingly, petitioner hired people he believed to be highly competent and thoroughly trustworthy to maintain his business records, including his Electronic Calendar. Petitioner chose Ms.

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[7] The record does not specify that petitioner was never in the office on a weekend. However, Ms. Depperschmidt explained that weekend access to the office requires a security pass and petitioner was either never issued a security pass or, if issued a pass, has not seen or used the same in 15 or more years. The notation "Julian not in office," as appearing on various dates in the Planner section of the Electronic Calendar (described and discussed in later Findings of Fact) was a designation used to prevent petitioner's assistants from scheduling appointments rather than as a definitive statement of petitioner's whereabouts, the absence of which designation would indicate petitioner was present in the office.

Depperschmidt to keep the record of his whereabouts during 2000 because he viewed her as highly competent and efficient.

30. Ms. Depperschmidt considered her “mandate” of keeping track of petitioner’s days in and out of New York City for New York City tax purposes to be a very clear direction that was one of her primary roles at Tiger as petitioner’s assistant, second only to managing petitioner’s daily movements (i.e., petitioner’s schedule of appointments, commitments and obligations). Ms. Depperschmidt understood that any day on which petitioner was physically present in New York City, even for five minutes, was considered a NYC day, unless he was in transit between two points outside New York City. She also understood that her mandate in this regard was to ascertain and keep an accurate record of petitioner’s non-NYC days, and that this mandate did not require that she know where exactly outside New York City he was at every moment on any non-business day that was a non-NYC day. Thus, for example, it was not significant to Ms. Depperschmidt in carrying out her mandate whether petitioner spent a non-NYC day in Locust Valley rather than Southampton, or in Australia rather than New Zealand, since her mandate required only that she confirm whether petitioner was or was not in New York City on a particular day. It was significant to Ms. Depperschmidt to be able to contact petitioner during her working hours in order to be able to connect petitioner with or to other people as necessary.

31. Petitioner also charged Ms. Depperschmidt with the responsibility of keeping him advised from time to time during 2000 of his total non-NYC days to date and his anticipated additional non-NYC days for the rest of the year, so that he would know whether and how many more non-NYC days he needed to schedule in order to achieve his objective of limiting his New York City presence to not more than 183 days. Ms. Depperschmidt would remind him “ad nauseum” of what he needed to do to reach 183 or more non-NYC days in 2000, and advised him

to schedule more than 183 non-NYC days in 2000. The advice Ms. Depperschmidt gave petitioner from time to time regarding his non-NYC days to date and his expected non-NYC days to date affected his decisions regarding his whereabouts later in the year.

32. The Electronic Calendar was maintained by Ms. Depperschmidt on a computer software program called Lotus Organizer, a widely used calendar program. Beginning in 2000 and for all years since 2000, the name of the computer file in which data have been contemporaneously entered into the Electronic Calendar has been “Jhr2000.or6,” which file resides on the hard drive on Ms. Depperschmidt’s computer at Tiger. As noted hereinafter, the data for 2000 and each of certain other years has since been “archived,” i.e., copied without change, into an archive file. While the file “Jhr2000.or6" resides on the hard drive in Ms. Depperschmidt’s computer at Tiger, the record does not specify whether the “relevant portions” (i.e., the entries for 2000) today physically remain on the hard drive of Ms. Depperschmidt’s computer or rather were deleted from that hard drive after (and as part of) the archiving process consistent with clearing hard drive space so as to enable better (i.e., faster) program function.

33. Ms. Depperschmidt testified at great length and in great detail regarding the Electronic Calendar, including its components, its features, how it functioned and her methodology in maintaining and utilizing it. In 2000, the Electronic Calendar included two main components: a portion that functioned as petitioner’s appointments calendar (the Appointments Calendar), which was accessible using the tab entitled “Julian’s Schedule,” and a portion that functioned as a planner section, in which staff vacations and certain other items were entered and petitioner’s non-NYC days were contemporaneously recorded (the Planner Section), which was accessible using the tab entitled “Vacation.” Ms. Depperschmidt’s references to the “electronic calendar” in her affidavits and in her testimony meant, to her, the computer file that includes both the

Appointments Calendar and the Planner Section portions of the Electronic Calendar. A printout of the Planner Section of the Electronic Calendar was provided to the Division prior to the execution of the parties' stipulation and prior to the hearing.

34. The Appointments Calendar portion of the Electronic Calendar relates to the part of Ms. Depperschmidt's job at Tiger that consists of scheduling petitioner's appointments and certain other meetings in the Tiger offices. It does not serve as the primary portion of the Electronic Calendar that keeps track of petitioner's NYC days and non-NYC days, nor is it the portion of the Electronic Calendar which assists Ms. Depperschmidt in keeping petitioner apprised of his New York City day count from time to time. Rather, the Planner Section is the portion of the Electronic Calendar that relates to this part of Ms. Depperschmidt's job at Tiger. Nevertheless, although one cannot determine petitioner's whereabouts on every day of 2000 by looking only at the Appointments calendar portion of the Electronic Calendar, it provides a useful record of petitioner's anticipated and actual whereabouts on certain days.

35. The Appointments Calendar portion of the Electronic Calendar is a time-based application of Lotus Organizer, which requires that each entry in the Appointments Calendar be assigned a time of day as the start time. When Ms. Depperschmidt wished to make an entry for an entire day, she would enter 8:00 A.M. as the start time for that entry. Thus, for example, she explained that the entry in the Appointments Calendar for April 15, 2000 which states "8:00 AM JHR in Locust Valley" does not mean petitioner arrived in Locust Valley at 8:00 A.M., but rather means that he spent the entire day outside New York City and was based in Locust Valley that day.

36. With respect to entries on the Appointments Calendar on days petitioner was traveling, Ms. Depperschmidt in some cases included his contact information on the Appointments

Calendar and in other cases referred to itineraries or other documents for such information. Entries in the Appointments Calendar were made for recurring appointments such as investment staff meetings and can be made as much as six months before the scheduled date of the appointment.

37. Unlike the Appointments Calendar portion of the Electronic Calendar, the Planner Section is a date-based rather than time-based application of Lotus Organizer. In the Planner Section, it is possible to create labels, each of which can be assigned a different color and description. Such labels can be applied to designate one or more days with a box having that color and with that description. The designations in the Planner Section that related to Ms. Depperschmidt's mandate to keep an accurate and contemporaneous account of petitioner's non-NYC days in 2000 are a colored box associated with the description "OUT of NYC?" (a category used to record the anticipated days that petitioner intended to be out of New York City), which box at the end of 2000 was a gold-brown color, and a colored box associated with the description "JHR OUT of NYC – confirmed" (a category used to record the actual confirmed days that petitioner was out of New York City), which box at the end of 2000 was black. The "default" setting in the Planner Section was a NYC day, such that if Ms. Depperschmidt could not confirm, using the procedure described hereinafter, that a day was a non-NYC day, she would not designate it with any label and thus the day would, by default, be recorded as a NYC day in the Planner Section.

38. Ms. Depperschmidt's procedure for contemporaneously determining and recording whether any particular day in 2000 was a NYC day or a non-NYC day was as follows:

> a) From time to time, she reflected the days she then anticipated would be non-NYC days for petitioner (e.g., days on which petitioner was scheduled to be on vacation or otherwise traveling outside New York City) by marking

such days with the colored box associated with the description “OUT of NYC?.”

b) On a business day when she saw petitioner in the office or otherwise knew that the day was a NYC day, she would not make any entry for that day and the day by default would be counted as a NYC day. Whenever petitioner and Ms. Depperschmidt were both in the office, they would invariably see one another because petitioner’s office has no door, the walls in the office are made of glass and their desks are situated such that they had a line of sight between them.

c) On a business day which she knew to be a non-NYC day because, for example, she had called petitioner on a land line in a place such as New Zealand, she would, on the next business day or shortly thereafter, mark that day with the colored box associated with the description “JHR OUT of NYC – confirmed.”

d) With respect to any other day in 2000, petitioner and Ms Depperschmidt’s routine was that Ms. Depperschmidt would ask petitioner on the next business day or shortly thereafter whether he “earned a tax day” (i.e., whether the day was a non-NYC day). By 2000, the relationship between petitioner and Ms. Depperschmidt was such that they would have a frank and direct discussion of whether petitioner “earned a tax day.” These discussions, while frequent, would be short and to the point, were generally limited to whether petitioner “earned a tax day,” and in the case of a non-NYC day did not involve a detailed discussion of where outside New York City petitioner was, particularly if he was at one of his usual locations such as Locust Valley. If petitioner confirmed that the day was a non-NYC day, Ms. Depperschmidt would mark that day with the colored box associated with the description “JHR OUT of NYC – confirmed.” If not, Ms. Depperschmidt would not mark that day with the colored box associated with that description and the day, by default, would be counted as a NYC day.

e) Once she confirmed whether the day was in fact a NYC day or a non-NYC day, she would remove the designation for any day previously marked as “OUT of NYC?” (denoting a day it had been anticipated that petitioner would be out of New York City) shortly after the day occurred and either replace it with the designation “JHR OUT of NYC – confirmed” (if she was able to confirm that petitioner was indeed out of New York city on that day) or not replace it at all (if not). Thus, at the end of 2000, or shortly thereafter, the Planner Section of the Electronic Calendar was in final form, and there were no days designated “OUT of NYC?”

39. Ms Depperschmidt's procedure for using the Planner Section of the Electronic Calendar to keep petitioner apprised of his total non-NYC days and then-anticipated non-NYC days to date involved bringing up the Planner Section on her computer screen and placing the cursor on the "JHR OUT of NYC – confirmed" label. On a bar at the bottom of the screen would appear the total number of days which had been designated with the "JHR OUT of NYC – confirmed" label, i.e., the actual non-NYC days to date. She then put the cursor on the "OUT of NYC?" label. On a bar at the bottom of the screen would appear the total number of days which had been designated with the "OUT of NYC?" label, i.e., the anticipated non-NYC days to date. If the sum of petitioner's actual non-NYC days to date (referred to by Ms. Depperschmidt as "days in the bank") plus his projected additional non-NYC days was less than 183, she initiated a conversation with petitioner about additional days he needed to be outside New York City in order to accomplish his objective of being a New York City nonresident in 2000.

40. There have been several occasions over the years on which petitioner advised Ms. Depperschmidt that a particular day was a NYC day even though he had missed "earning a tax day" by a narrow margin and even though Ms. Depperschmidt would not otherwise have known that the day was a NYC day. For example, on one occasion petitioner was coming back from a trip and found himself crossing the bridge from New Jersey into Manhattan at roughly 11:45 P.M. On another occasion, petitioner was in Locust Valley, drove his son Spencer to an airport in New York City and drove back to Locust Valley. In both instances, petitioner reported to Ms. Depperschmidt that the day was a NYC day. August 21, 2000 is another example of a day that Ms. Depperschmidt would not have known was a NYC day had petitioner not told her that it was. Petitioner visited New York City for a medical appointment on August 21, 2000, which was during his annual vacation period in Southampton, and left New York City on the same day.

Petitioner's trip into New York City to visit his doctor on August 21, 2000 had not been previously scheduled or planned, but rather related to a medical condition petitioner was concerned about and wanted to have checked. Petitioner mentioned his unexpected August 21, 2000 visit to New York City to Ms. Depperschmidt on several occasions in order to make certain that she recorded that day as a NYC day, so much that Ms. Depperschmidt got annoyed with petitioner for mentioning it so many times.

41. Petitioner has never told Ms. Depperschmidt that he was not in New York City on a day on which he was in New York City. Ms. Depperschmidt was never asked or instructed by petitioner or by Mrs. Robertson to record a NYC day as a non-NYC day, and would not have done so if asked. Petitioner stated his belief that Ms. Depperschmidt would have "quit on the spot" had he ever asked her to do so. Ms. Depperschmidt stated that had he done so, she would have told him that he "must be mistaken." Petitioner testified that if he had spent any time in New York City (other than for purposes of transit into or out of a non-New York City location) on any of the dates April 15, July 23, July 31 or November 16, 2000, he would have told Ms. Depperschmidt to record such day as a NYC day.

42. Petitioner is confident that Ms. Depperschmidt kept the records of his non-NYC days in 2000 accurately, has no reason to believe otherwise and is confident that Ms. Depperschmidt has never and would not have ever altered the records of his non-NYC days for 2000. Ms. Depperschmidt's records of petitioner's non-NYC days indicated that each of April 15, July 23, July 31 and November 16, 2000 was a non-NYC day, and petitioner is confident that each of these days was in fact a non-NYC day.

43. Ms. Depperschmidt has never marked a day with the designation "JHR OUT of NYC – confirmed" before the day occurred, and has never altered the designation of a day in the Planner

Section as a NYC day or a non-NYC day after such day was so designated on the next business day or shortly thereafter. Neither petitioner, nor anyone else at Tiger, nor petitioner's current or initial representatives in this matter, nor anyone else ever asked Ms. Depperschmidt to make or change any entry in the Planner Section of the Electronic Calendar for 2000 at any time after such entry was contemporaneously recorded, nor did Ms. Depperschmidt ever make or change any entries on the Planner Section of the Electronic Calendar on her own after the first few days of January 2001.

44. Petitioner has never seen the Electronic Calendar on a computer or made any entries in the Electronic Calendar, and would not know how to gain access to or make entries in the Electronic Calendar as he is, by his own admission, "computer illiterate."

45. The amount of "computer space" necessary to run and store the original file Jhr2000.or6 is very small. However, from time to time the amount of data in the file called Jhr2000.or6, in which the Electronic Calendar is maintained on a current basis, becomes so large that the Lotus Organizer program, for this or other reasons, starts to operate more slowly. When this occurs, Ms. Depperschmidt's solution is to "archive" some of the data then contained in the file called "Jhr2000.or6." Archiving data in a Lotus Organizer file such as "Jhr2000.or6" is a simple, automated process which can be done using the menus that are a feature of Lotus Organizer. Archiving data in a Lotus Organizer file does not change the data being archived in any way. When Planner Section data from a Lotus Organizer file are archived, whatever label colors and descriptions are contained in the Planner Section at the time of archiving are carried into the archive file with the rest of the data in the Planner Section. Ms. Depperschmidt archived the Appointments Calendar and Planner Section data for 2000, without changing the data in any

way, five years or so after the end of 2000, and, utilizing the “Archv” default name the program gives to an archive file, named the file into which such data were archived “Archv_00.OR6.”

46. Lotus Organizer permits the user to view and print the data contained in a Lotus Organizer file in numerous different formats. These available print formats include, among others, the Appointments Calendar in a monthly calendar format, the Appointments Calendar in a monthly or daily calendar format “showing through” on the calendar the various labels from the Planner Section applicable to each day, and the Planner Section in a yearly format. Viewing or printing a Lotus Organizer file in any of these or other formats does not change the data contained in such file. The year, date and time appearing at the bottom of a printout from a Lotus Organizer file are the year, date and time such printout was in fact printed, and do not in any way indicate when such Lotus Organizer file was created or when any entries therein were made. Printouts from a single Lotus Organizer file might look different depending on the computer from which they are printed and the printer on which they are printed.

47. A number of printouts from and copies of the Electronic Calendar are in the record in this proceeding, including the following:

> a) A computer compact disc (CD) onto which Ms. Depperschmidt, with the help of Tiger’s IT person, copied the archived 2000 Appointments Calendar and Planner Section portions of the Electronic Calendar from her computer at Tiger on September 9, 2008.
>
> b) Three printouts of the Appointments Calendar portion of the Electronic Calendar in a monthly calendar format, one of which was printed prior to the archiving of the 2000 data in the Electronic Calendar and thus bears the title “Jhr2000.or6,” and the others printed after the 2000 data were archived and thus bearing the title “Arch_00.OR6.” The appointments and other items recorded on Exhibit D to the parties’ Stipulation are identical to those on the Appointments Calendar, and Exhibit D to the parties’ Stipulation is embodied on and may be printed out from the CD that is in the record.
>
> c) Three printouts of the archived 2000 Planner Section portion of the Electronic Calendar in a yearly format, each of which was printed after the

2000 data were archived and thus bear the title "Archv_00.OR6", including the printout made by the Division's expert witness from the CD that is in the record.

d) Printouts from the archived 2000 Appointments Calendar portion of the Electronic Calendar in monthly and daily calendar formats using the print format that "shows through" on the Appointments Calendar the labels from the Planner Section applicable to each day.

e) Screen prints, which are the actual depictions of what appears on the computer screen at the time of printing, made by Ms. Depperschmidt on September 12, 2008 by bringing the archived 2000 Planner Section portion of the Electronic Calendar onto her computer screen at Tiger with the cursor on (I) the "JHR OUT of NYC – confirmed" label at the bottom right corner and (ii) April 15, 2000, respectively, and in each case printing the screen.

48. Apart from different print dates (i.e., the time, date and year appearing at the bottom of the printout) and a different file name in the case of the printout made prior to archiving, the data reflected on each of these printouts from the Appointments Calendar and Planner Section portions of the Electronic Calendar are identical. For example, the appointments and other items recorded on Exhibit C to the parties' Stipulation for each day in 2000 are identical to the appointments and other items recorded on each of Exhibit D to such Stipulation, petitioners' Exhibit 12 and Division's Exhibit LL for each such day. The labels from the Planner Section for each day appear on Division's Exhibit LL, but not on petitioners' Exhibit 12 or Exhibit D to the parties' Stipulation because Division's Exhibit LL was printed using the show-through feature and the other printouts were not. On each of the printouts of the 2000 Planner Section of the Electronic Calendar, the same 183 days in 2000 (all of the parties' stipulated non-NYC days plus the four dates disputed herein [April 15, July 23, July 31 and November 16]) are designated an non-NYC days, i.e., in black as "JHR Out of NYC – confirmed."

49. While Ms. Depperschmidt routinely printed out petitioner's daily schedule of appointments for petitioner's use that day, and discarded such daily schedules on or shortly after

each day, Ms. Depperschmidt rarely printed out the Appointments Calendar in the monthly format and rarely had any reason to print out anything from the Planner Section of the Electronic Calendar. Ms. Depperschmidt did not at the end of 2000 print out the Planner Section for 2000, the 2000 Appointments Calendar in the monthly format or the 2000 Appointments Calendar showing through the labels from the Planner Section, though she could have done so. If she had done so, these printouts would have reflected as non-NYC days (i.e., designated with the label "JHR OUT of NYC – confirmed") exactly the same 183 days that are so reflected as non-NYC days on the various printouts from the Electronic Calendar that are in the record as described above.

50. Ms. Depperschmidt did not like the monthly format because it spread the information for each day over too many pages, but printed out the Appointments calendar in the monthly format at the request of petitioners' initial representatives in this matter, the law firm of McDermott, Will & Emery (MWE).[8] Ms Depperschmidt did not print out the Planner Section because she considered it to be most useful when viewed while sitting at her computer, rather than a document that would be meaningful to anyone else if printed out, and that any such printout would not have been particularly useful since she did not then have a color printer. Ms. Depperschmidt also knew that the Electronic Calendar was available on her computer and could be restored from backups in the event of a computer crash. Furthermore, Ms. Depperschmidt expected that petitioners' initial representatives would use the printout of the Appointments

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[8] MWE was the first law firm retained to represent petitioners in this matter. Thereafter, petitioners retained the law firm of Feingold and Alpert, LLP. While MWE has been referred to at times in the record as petitioners' "prior" representatives, it is least confusing to refer to MWE herein as petitioners' "initial" representatives. The record clearly establishes that petitioners are, and desire to be, represented in this case by Feingold and Alpert, LLP, and petitioner clearly stated so and hence ratified such representation as part of his testimony. Addressing the question of whether MWE technically also remain petitioners' representatives, solely by virtue of the manner in which a successor power of attorney form was executed (specifically a "missed" check box dismissing prior representatives on such form), while noted, is unnecessary and essentially irrelevant to resolving the statutory resident issue presented in this case.

Calendar together with the second column of the document described hereinafter as the "Roadmap" in demonstrating petitioner's NYC days and non-NYC days in 2000. Ms. Depperschmidt provided petitioners' initial representatives with a large amount of information including a printout of the Appointments Calendar, the Roadmap and a great deal of other source documentation such as airline invoices, UTOG vouchers, itineraries and the like, as well as all other available information they requested.

51. At the hearing, the Division presented David Terpening, a Division employee, as an expert in information systems auditing and forensics auditing. Mr. Terpening testified that he and other Division employees have used Lotus Organizer, and that he finds it to be a very user-friendly program. Mr. Terpening testified further that based on his analysis of the Electronic Calendar, although it is impossible to determine when or by whom any particular data entry in the Electronic Calendar was made, or whether any changes were made prior to the creation of a particular file (including an archived file), there is nothing in the file that would indicate that the data entries for 2000 therein were not made contemporaneously in 2000 or that they were ever altered. Mr. Terpening further testified that every time a Lotus Organizer file is opened, the program creates a "time/date stamp" identifying the time and date the file was opened, which time/date stamp says nothing about when entries were made in the Lotus Organizer file.

52. After the end of 2000, Ms. Depperschmidt prepared a schedule relating to petitioner's days in and out of New York City and his whereabouts during 2000, which is in the record and is referred to as the "Roadmap." Ms. Depperschmidt created this document using Microsoft Excel, as a first step in creating a framework for putting together the backup information regarding petitioner's whereabouts in 2000. The Roadmap is not part of, and cannot be printed out from, the Electronic Calendar. In the second column of the Roadmap, which is titled "IN or OUT of

NYC," Ms. Depperschmidt copied the entries of either "IN" (i.e., for a NYC day) or "OUT" (for a non-NYC day) from the contemporaneous entries she had made in the Planner Section of the Electronic calendar, and checked these entries several times. As such, Ms. Depperschmidt is confident that these entries accurately reflect the record she maintained of petitioner's NYC days and non-NYC days in 2000. All days marked as "OUT" on the Roadmap, including each of the four disputed days which are centrally at issue herein, are designated in black as "JHR OUT of NYC – confirmed," i.e., as non-NYC days, on the Planner Section, and none of the days marked as "IN" on the Roadmap are so designated.

53. In the fourth column of the Roadmap, which is entitled "JHR spent the day in:," Ms. Depperschmidt entered whatever information she then had regarding petitioner's location outside New York City on the days in 2000 that had been recorded in the Electronic Calendar as non-NYC days. Ms Depperschmidt completed the first three columns of the Roadmap, but never completed the fourth column of the Roadmap. The last time Ms. Depperschmidt made any entries in the fourth column of the Roadmap was in November 2002, before she went on maternity leave, at which time she turned the Roadmap over to petitioner's initial representatives in electronic form, and no longer had control of that document and made no further edits to the Roadmap thereafter.

FACTS SPECIFIC TO THE FOUR DISPUTED DAYS

April 15, 2000

54. April 15, 2000 was recorded in the Appointments Calendar portion of the Electronic Calendar as a non-NYC day. The Appointments Calendar notes that petitioner was in Locust Valley on April 15, 2000 and the Planner Section reflects that April 15, 2000 was a confirmed non-NYC day.

55. By March 31, 2000, petitioner had accumulated 76 NYC days, and thus had used up over 41.5% of his allowable NYC days in the first quarter of 2000. By April 2000, petitioner was already aware of the need to conserve his remaining available NYC days and "earn tax days" whenever possible, and it would have been consistent for him to have implemented his plan to spend time out of New York City by leaving the city on April 14, 2000. Petitioner reported to Ms. Depperschmidt that he was not in New York City at any time on April 15, 2000, and based on her experience with petitioner, she is confident that petitioner was correct. Petitioner testified that had he been in New York City on April 15, 2000, he would have been able to choose another day later in 2000 to stay outside New York City. The record indicates that petitioner's *focus* on avoiding being in New York City unnecessarily was not as important (or direct) early in the year as it was later in the year, but provides no indication or sense that his *desire* to avoid being in New York City unnecessarily changed or was any more or less important in light of the passage of time over the course of the year (***see***, Finding of Fact "20").

56. Forty of the Sundays in 2000 have been acknowledged by the Division to be non-NYC days, and each of these 40 Sundays but one (Sunday, April 16, 2000) was preceded by a Saturday that has also been acknowledged by the Division to be a non-NYC day. Thus, if April 15, 2000 were a NYC day, the weekend of April 15 and 16, 2000 would have been the only weekend in all of 2000 in which the Saturday was a NYC day but the Sunday was a non-NYC day. The record reveals that petitioner spent non-NYC weekends entirely in Locust Valley, entirely outside of Locust Valley, or partly in Locust Valley and partly in other, non-NYC locales. As of April 2000, petitioner had not spent any Saturdays in Locust Valley.

57. Petitioner testified that he went to Locust Valley after work on Friday, April 14, 2000, and spent the night there rather than at the Apartment with Mrs. Robertson. Although neither

petitioner nor Mr. Young has a specific recollection of Mr. Young driving petitioner to Locust Valley on April 14, 2000, both testified that Mr. Young would routinely pick up petitioner at his office on Friday afternoons and drive petitioner to Locust Valley or to Deepdale, and that it would have been unusual for him not to do so. The last (and only) entry on the Appointments Calendar portion of the Electronic Calendar for April 14, 2000 is "12:00 PM Friday Speaker Lunch JHR plans to attend." There was a telephone call from Locust Valley to the Apartment at 6:04 P.M.

58. Mrs. Robertson testified about the days and events surrounding and including April 15, 2000. Mrs. Robertson returned to New York City on Thursday, April 13, 2000, from a trip to San Antonio, Texas, to visit her mother, and was leaving for a trip to Australia on Sunday, April 16, 2000. After Mrs. Robertson returned from San Antonio, petitioner and Mrs. Robertson spent the evening of Thursday, April 13, 2000, together in New York City. On April 14, 2000 and the morning of April 15, 2000, Mrs. Robertson had a lot of "busy work" to accomplish in New York City, including unpacking from her trip to San Antonio, packing and getting organized for her upcoming trip to Australia to meet with a designer to discuss plans for a golf resort that the Robertsons were then building in New Zealand and getting things together to discuss with the designer. Mrs. Robertson likes to take her time getting these sorts of things done and was better able to do so without having petitioner "in her hair" in New York City. Petitioner would have wanted to leave New York City on April 14, 2000 in any event so that April 15, 2000 would be a non-NYC day. Mrs. Robertson testified that given all that she had to do before leaving the Apartment in the afternoon, it would have been normal for her to have gotten up early on Saturday, April 15, 2000.

59. There was a telephone call from the Apartment to petitioner’s office at 7:42 A.M. on April 15, 2000. Persons other than petitioner made telephone calls from the Apartment to petitioner’s office at Tiger on 10 days on which the Division acknowledges petitioner was not at the Apartment or otherwise in New York City. The auditor did not know who made the call from the Apartment to petitioner’s office on April 15, 2000.

60. Mrs. Robertson would, on occasion, particularly when leaving for a trip, call petitioner’s number at Tiger on weekends, and other days or times the office was not open, to leave voicemail messages for his assistants, asking them to remind petitioner to call someone or do something. Mrs. Robertson testified that since she was about to leave town for three weeks, it would not have been unusual for her to have called petitioner’s office on April 15, 2000 to leave a voicemail message for his assistants.

61. While telephone calls were also placed from the Apartment to petitioner’s office on 134 days in 2000 on which petitioner acknowledges he was in New York City, 131 of these days were weekdays when petitioner’s office was open, and the Appointments Calendar portion of the Electronic Calendar indicates that he was in the office on at least 127 of these 131 days. In 2000, Mrs. Robertson frequently called petitioner at his office, both in the morning and in the afternoon, on average one to three times per day. She also called the office to speak with petitioner’s assistants regarding petitioner’s social engagements in New York City and other matters. In addition, Trudy Ainge, petitioners’ personal chef, called petitioner’s office number on occasion to speak with his assistants about petitioners’ dinner parties and other matters.

62. There was also a telephone call from the Apartment to petitioner’s sister, Wyndham Robertson (Wyndham), at 7:47 A.M. on April 15, 2000. Both Mrs. Robertson and Wyndham offered testimony relating to this telephone call. Wyndham and Mrs. Robertson have known each

other for approximately 40 years and have a very close relationship. In 2000, Wyndham and Mrs. Robertson frequently spoke with one another on the telephone, in some cases when petitioner was with Mrs. Robertson and in other cases when petitioner was not.

63. A surprise party was held at the Morgan Library for petitioner on April 18, 2000 that Mrs. Robertson could not attend because of her long-planned trip to Australia, but which Wyndham did attend. Wyndham left North Carolina for New York City on April 17, 2000, and returned to North Carolina on April 20, 2000. Wyndham testified that it was unusual for her to have stayed in New York City for such a short amount of time and that certain personal e-mails she had found a few months before (and which were introduced at) the hearing indicated to her that she had made a last-minute decision to travel to New York City for the surprise party. While the “ruse” for getting petitioner to the party was that it was an anniversary party for friends of the Robertsons, whom Wyndham did not know well, the party was actually being given by people at Morgan Stanley whom Wyndham did know well.

64. Wyndham stayed at the Apartment while she was in New York City for the surprise party. Wyndham would stay at the Apartment several times a year, including in 2000, and while she always felt welcome, she would always call beforehand to say she was coming, both as a courtesy and in order to work out the logistics for her visit, such as making sure the building staff was alerted that she would be coming and confirming where a key to the Apartment would be left for her. Wyndham would have these and other logistical conversations with Mrs. Robertson rather than petitioner, since it was she who took charge of such matters. In this respect, petitioner noted his shortcomings in such logistical matters. Mrs. Robertson was not involved in the preparations for the surprise party, but would have been involved in working out with Wyndham the logistics of her stay at the Apartment, such as how and when Wyndham would be arriving and

leaving, and how she planned to stay out of petitioner's sight so as not to spoil the surprise. Mrs. Robertson testified that she was not certain as to precisely when she conversed with Wyndham concerning the surprise party, but believed she likely had these discussions with Wyndham after returning from San Antonio on April 13, 2000, and would have wanted to have these discussion with Wyndham before leaving for Australia on April 16, 2000, and out of petitioner's earshot so as not to spoil the surprise. Mrs. Robertson felt free to call Wyndham early in the morning. Two other calls were made from the Apartment to Wyndham when petitioner was not present in New York City.

65. Petitioners often play golf together at Deepdale in Manhasset on Long Island. Mrs. Robertson left the Apartment on Saturday, April 15, 2000 at 10:00 A.M. in a UTOG car, the voucher for which she signed, to play golf at Deepdale with petitioner. Although there were instances in 2000 when petitioner took a UTOG car from the office to Deepdale and thus was in New York City and Deepdale on the same day, each of these days, March 24, June 20, June 29, July 28 and September 6, was a weekday on which petitioner's office was open and in each such case, petitioner reported the day as a NYC day. Mrs. Robertson spent the evening of April 15, 2000 with petitioner in Locust Valley and flew to Australia on Sunday, April 16, 2000, in the late afternoon. Petitioner did not fly to Australia with Mrs. Robertson, but rather he and Spencer flew to Australia to meet Mrs. Robertson and their son Alex, who was then in school in Australia, on April 20, 2000.

July 23, 2000

66. The Appointments Calendar notes that on July 23, 2000, petitioner was playing golf in Ireland and returned to LaGuardia, and the Planner Section reflects that July 23, 2000 was a confirmed non-NYC day.

67. On July 23, 2000, petitioner returned from an annual father-son golfing trip. This annual event has taken place in different locations over many years and, in 2000, as well as in many prior years, took place in Ireland. The return flight landed at LaGuardia at 9:15 P.M. local time (i.e., Eastern Standard Time), the equivalent of 2:15 A.M. for petitioner given that he was returning from Ireland. The tail number of the charter aircraft used on this flight (the Aircraft) was 270MC, and the passengers on this flight (the Irish Flight) included petitioner, his sons Spencer and Alex, petitioner's friend Payson Coleman and his son Chase, and three other passengers. The aircraft was not petitioner's usual plane, but rather, as is indicated by the "MC" in the tail number, his friend Max Chapman's plane, which was also operated and managed by Key Air.

68. In 2000, Mr. Coleman, who was a partner in a law firm that was then known as Winthrop Stimson and is now known as Pillsbury Winthrop, used a car service through his firm called Dial Car, Inc. (Dial Car). Records of telephone calls made from the Aircraft on July 23, 2000 and a voucher dated July 23, 2000 issued by Dial Car (the Dial Car Voucher), in each case together with a foundational affidavit, were introduced at the hearing. Payson Coleman made a telephone call from the Aircraft at 7:19 P.M. on July 23, 2000. As evidenced by the Dial Car Voucher, a car from Dial Car was dispatched for the Dial Car account of Winthrop Stimson and under Mr. Coleman's individual customer identification number, and such car made a pickup on the runway at LaGuardia at the Aircraft (tail number 270MC) at 9:33 P.M. on July 23, 2000. The car thereafter made stops in Old Brookville and Locust Valley. While Payson Coleman, who lived in Old Brookville, New York, in 2000, does not now specifically recall this particular car trip, it is clear to him from the Dial Car Voucher that he was a passenger in the car. Mr. Coleman testified that it was very likely that petitioner was in the car with him on July 23, 2000, and that it

was common for him to arrange shared transportation with petitioner after the annual golf trips they took together over a period of 15 years, as well as various other trips they took on petitioner's plane. Mr. Coleman testified that while it is possible that he shared a car after one of these golfing trips with petitioner and one of his sons, he does not recall ever sharing a car after one of the golfing trips with one of petitioner's sons when petitioner was not also in the car. Petitioner, who recalled at least one instance in which he shared a ride from LaGuardia with Mr. Coleman after a father-son golfing trip, testified that he shared the car on July 23, 2000 with Mr. Coleman and was driven to Locust Valley after Mr. Coleman was dropped off in Old Brookville, and that his son Spencer probably rode home with them. A telephone call was placed from Locust Valley to each of Verizon voicemail and Sarah Collins, who was then Spencer's girlfriend, at 9:21 A.M. and 10:09 A.M, respectively, on July 24, 2000. When Mr. Coleman and petitioner shared a ride home from LaGuardia, the car would drop off Mr. Coleman in Old Brookville first because it is on the way from LaGuardia to Locust Valley, which is only 5 to 15 minutes from Old Brookville. Mr. Coleman testified that neither his adult son Chase nor any of the other three passengers would have had any reason to travel to Locust Valley that night. Mr. Coleman does not recall ever taking a car from LaGuardia to Old Brookville after one of the golfing trips and then having the car go on to Locust Valley with passengers not including petitioner or with no passengers in it. Petitioner has never asked Mr. Coleman to take petitioner's luggage or golf clubs in a car with him and send them on to Locust Valley, and would never have done so, considering such a request to be an imposition on his friend Mr. Coleman.

69. The first time petitioner ever spoke with Mr. Coleman regarding the audit in this matter was in a telephone conversation in the Spring of 2008. A few weeks after that conversation, Mr. Coleman was asked by petitioner's current representatives, for the first time,

whether he recognized the Dial Car number that was called from the Aircraft on July 23, 2000, and Mr. Coleman for the first time obtained a copy of the Dial Car Voucher from Dial Car. A copy of the Dial Car Voucher and a letter from Dial Car were provided to the Division several months prior to the hearing.

70. While petitioner was tired after playing 36 holes of golf on July 23, 2000 and it might have taken somewhat less time for petitioner to go to the Apartment rather than to Locust Valley after landing at LaGuardia that night, both he and Mrs. Robertson testified petitioner went to Locust Valley in order to "earn the tax day," i.e., that it would have been "silly" for petitioner to have wasted a NYC day by spending what would have been roughly two hours on July 23, 2000 at the Apartment. By the time petitioner left for the golf trip to Ireland on July 19, 2000, he already had 136 NYC days, and thus had used up more than 74% of his allowable NYC days in just half of the year.

71. Mrs. Robertson, who did not accompany petitioner on the golfing trip to Ireland, was at the Apartment on July 23, 2000, and stayed at the Apartment that night. On July 23, 2000, the telephone calls made from the Apartment after 9:15 P.M. include a call at 9:44 P.M. to San Antonio, Texas, and two calls to Locust Valley at 10:02 P.M. and 10:37 P.M. Mrs. Robertson testified that she would have made the telephone call to San Antonio, where her mother then lived. Since the golfing party on these annual golfing trips would board their flight home whenever they finished their 36 holes of golf on the last day of the trip, there was no way to know in advance exactly when these flights would land. Mrs. Robertson testified that she probably made the telephone calls to Locust Valley at 10:02 P.M. and 10:37 P.M. to check whether petitioner had yet arrived there from LaGuardia.

72. A telephone call was made from Locust Valley to the Apartment at 10:51 P.M. on July 23, 2000. When petitioner arrived home from a trip on which Mrs. Robertson did not accompany him, such as one of the golfing trips, and Mrs. Robertson was at a different location, it would not be unusual for petitioner to call Mrs. Robertson on the telephone. Mrs. Robertson testified that petitioner likely made the telephone call at 10:51 P.M. on July 23, 2000 to check in with her and to let her know that he was home. While, on occasion, Bob Young has reason to be in the Locust Valley home on a weekend, because he did not work on Sundays he would never have called the Apartment from the Locust Valley home as late as 10:51 P.M. on a Sunday except in an extreme emergency.

73. Petitioner was in his office the next day, Monday, July 24, 2000. A telephone call was made from the Apartment to petitioner's car phone at 6:59 A.M. on Monday, July 24, 2000. When petitioner spent a Sunday night in Locust Valley, it was customary for Mr. Young to drive petitioner from Locust Valley to New York City early on the following Monday. Petitioner sat in the front passenger seat when Mr. Young drove him somewhere. In 2000, petitioner's car phone was situated in this car in a cradle in the front seat area, and was not removed from the car. While being driven from Locust Valley to his office, petitioner made and received calls on the car phone constantly. Testimony by both petitioner and by Mr. Young made clear that a call on petitioner's car phone at 6:59 A.M. on a Monday would not be for Mr. Young, but rather would be for petitioner. Mrs. Robertson testified that she likely made the telephone call at 6:59 A.M. on Monday July 24, 2000 from the Apartment to petitioner on his car phone. Mr. Young has called from or answered calls to petitioner's car phone when petitioner was not in the vehicle, with such instances being to advise petitioner's assistants or answer their inquiries relative to Mr. Young's

arrival time to pick up petitioner or his status as having arrived and being ready for petitioner. The record does not specify the location of petitioner's car at the time the call was received.

74. The entries in the Electronic Calendar and the Roadmap do not include or specify "Locust Valley." The Appointments Calendar portion of the Electronic Calendar reflects, for July 23, Kerry, UK and LaGuardia, while the Planner Section reflects July 23 as a day outside of New York City and July 24 as a day in New York City. The entries in the fourth column of the Roadmap for July 23 and July 24, 2000 are "Kerry, UK>LGA>?" and "?>NYC, NY,?" respectively. The question marks in these entries do not relate to the designation of July 23 as an "OUT" day (i.e., a non-NYC day) in the second column of the Roadmap. The "OUT" designation reflected accurately Ms. Depperschmidt's contemporaneous recording in the Planner Section of the Electronic Calendar of July 23 as a non-NYC day, which in turn was based on her routine conversation with petitioner shortly after July 23, 2000. As of November 2002, when Ms Depperschmidt last made entries in the Roadmap and handed the Roadmap over to petitioners' initial representative, she did not have access to information regarding the time petitioner's July 23, 2000 flight from Ireland had landed at LaGuardia. Thus, she did not then know whether the flight from Ireland had landed before midnight on July 23, 2000, in which case July 23 was a non-NYC day because petitioner went to Locust Valley from LaGuardia, or after midnight (i.e., on July 24), in which case July 23 was a non-NYC day no matter where petitioner went after landing at LaGuardia. The Key Air flight time information did not become available until May 6, 2005, when the auditor received it under a subpoena the Division had issued to Key Air. It was not until March 2006 that Key Air clarified that the flight times in its flight records are stated in Coordinated Universal Time (f/k/a Greenwich Mean Time), commonly referred to as Zulu Time.

Zulu Time is four hours ahead of Eastern Standard Time, and thus the flight records show a 1:15 A.M. arrival at LaGuardia on Monday, July 24, 2000.

July 31, 2000

75. The Appointments Calendar notes that petitioner was in Southampton on July 31, 2000, and the Planner Section reflects that July 31, 2000 was a confirmed non-NYC day. The Appointments Calendar includes an entry “8:30 A.M. Investment Staff Meeting in Tiger.”

76. Petitioners rented a house in Southampton, New York, for the period July 29 through September 4, 2000 (the Southampton Vacation Period) and July 31, 2000 was the first Monday of that period. Mrs. Robertson testified that petitioner’s college friend Ed Crawford and his family, including their son Ted Crawford, spent the first weekend of the Southampton Vacation Period at petitioners’ Southampton rental. Petitioners’ son Spencer and his then-fiancé Sarah Collins were there as well. The Crawfords’ visit was memorable because Ed Crawford was ill and it was the Robertsons’ last family gathering with the Crawfords before Ed Crawford died in the Fall of 2000. Based on the circumstances of that weekend and her experience with petitioner, Mrs. Robertson testified that there would not have been any reason for petitioner to have gone into New York City on the first Monday of the Southampton Vacation Period. Petitioners’ Southampton rental in 2000 was 90.38 miles away from petitioner’s office.

77. While in Southampton, petitioner spends a great deal of time on the telephone with his office, where his assistants often connect him to others who wish to speak with petitioner or with whom petitioner wishes to speak. Ten telephone calls lasting a total of more than 45 minutes were made from Tiger’s offices to the Southampton rental on July 31, 2000 (the July 31, 2000 Calls). The first such call was placed at 8:46 A.M. and the last such call with a listed duration greater than 30 seconds was placed at 3:11 P.M. The longest of the July 31, 2000 Calls lasted

15½ and 11½ minutes. Petitioner, Mrs. Robertson and Ms. Depperschmidt each testified that the number, timing and frequency of the July 31, 2000 Calls make it obvious that petitioner was the recipient of the July 31, 2000 Calls, and inconceivable that anyone else could have been the recipient of these calls.

78. Mrs. Robertson testified that she would not have received more than one telephone call a day from the office during the Southampton Vacation Period. Further, she testified that she would not have been at the Southampton rental when most of the July 31, 2000 Calls were made because she was playing golf in Southampton at a monthly Monday Ladies' Day at Shinnecock Hills Golf Club, and did not return to the Southampton rental until 2:00 or 2:30 P.M. Petitioner was at the Southampton rental when Mrs. Robertson returned from her golf game on July 31, 2000.

79. Petitioner testified that he did not have any reason to go to New York City after the last telephone call with the office on July 31, 2000, and did not do so. Ms. Depperschmidt testified that she was in the office on July 31, 2000, did not see petitioner there and is absolutely certain that petitioner was not in the office on July 31, 2000.

80. Petitioner testified that he was not in New York City at any time during the Southampton Vacation Period except for August 21, 2000, the day on which he traveled to New York City for a previously unscheduled appointment with his doctor. Fourteen telephone calls, ten of which are reflected on the Tiger telephone bill as having the minimum duration of 30 seconds, were made from Tiger's offices to the Robertson's Southampton rental on August 21, 2000. The last call of more than the minimum listed duration on August 21, 2000 was placed at 11:40 A.M.

81. Tiger held periodic meetings at its offices called “investment staff meetings,” which involved the various portfolio managers. These meetings were noted on the Appointments Calendar (***see***, Finding of Fact "75") because petitioner’s assistants were responsible for scheduling and ordering food for these meetings. These investment staff meetings became smaller, less important and less frequent after the hedge funds were closed down in May 2000. Petitioner tried to attend investment staff meetings that were held when he was in the office, and in some cases when he was out of the office he participated in these meetings by telephone, but petitioner did not attend every scheduled investment staff meeting in person. Petitioner and Ms. Depperschmidt both testified that petitioner was not present at an investment staff meeting at Tiger in person, or otherwise at the Tiger offices, on July 31, 2000.

82. Ted Crawford is a friend of petitioners’ son, Spencer, and he worked at an investment relations firm called Lippert/Heilshorn & Associates throughout 2000. A telephone call made from the Apartment to Lippert/Heilshorn at 7:20 P.M. on July 31, 2000 was made by Spencer. During the summer of 2000, Ted Crawford also received telephone calls from Spencer at the apartment he shared with roommates. A call was made from the Apartment to Ted Crawford’s apartment at 7:22 P.M. on July 31, 2000.

November 16, 2000

83. The Appointments Calendar notes that petitioner was in Locust Valley on November 16, 2000 prior to a flight from LaGuardia, and the Planner Section reflects that November 16, 2000 was a confirmed non-NYC day.

84. Petitioner flew to Virginia on November 16, 2000 with Mrs. Robertson and a party of friends and business associates to attend the dedication of the Julian Robertson Capital Markets Room at the University of Virginia (UVa), taking off from LaGuardia at 2:20 P.M. local time.

Petitioner had been made aware in advance that this honor was to be bestowed upon him, and the trip to Charlottesville, Virginia, was scheduled in May 2000. Ms. Depperschmidt testified that she vividly remembers that in light of this anticipated trip, she convinced petitioner to leave New York City and go to Locust Valley on November 15, 2000, the day before the flight to Charlottesville, in order to cause November 16, 2000 to be a non-NYC day. Ms. Depperschmidt also testified that she is absolutely certain that petitioner was outside New York City on November 16, 2000. Petitioner testified that he is “absolutely sure” that he left New York City on November 15, 2000 and spent that night in Locust Valley in order to cause November 16, 2000 to be a non-NYC day. While petitioner would have preferred spending the evening of November 15, 2000 with Mrs. Robertson, he testified that he left New York City that evening in order to “save a tax day.”

85. Nine telephone calls lasting a total more than 100 minutes were made from Locust Valley to the Tiger offices on November 16, 2000. The first such call was made at 7:41 A.M. and the last such call was made at 12:11 P.M. The longest of these calls lasted 45 and 39 minutes, respectively. Petitioner, Mrs. Robertson and Ms. Depperschmidt all testified that it is clear from the number, timing and frequency of these telephone calls that petitioner made them, and the auditor acknowledged in her direct testimony that petitioner likely made these calls. Both petitioner and Mrs. Robertson testified that this pattern of telephone calls makes it clear that petitioner spent the night of November 15, 2000 in Locust Valley, and makes it inconceivable that he spent the night in New York City.

86. Mrs. Robertson testified that she would never have any reason to be on the phone with petitioner’s office for as long as 39 or 45 minutes. It has been stipulated that she was at the Apartment on November 16, 2000 prior to leaving for LaGuardia for the flight to Charlottesville

(the Charlottesville Flight). Mrs. Robertson was a passenger in, and signed the voucher for, a UTOG car that left from the Apartment at 1:20 P.M. on November 16, 2000 and went to LaGuardia. Petitioner's Appointments Calendar includes the following entry for November 16, 2000: "1:10 PM UTOG personal for Josie (#1272)," which reference Ms. Depperschmidt testified necessarily means that petitioner was not in this UTOG car.

87. Petitioner testified, and the auditor acknowledged at the hearing, that Mrs. Robertson, rather than Petitioner, made a number of telephone calls from the Apartment on the morning of November 16, 2000. Mrs. Robertson testified that she also made telephone calls from the Apartment that day to Bob Young at 11:23 A.M. and to the Locust Valley home at 1:01 P.M. to make sure petitioner, who typically leaves only enough time to get somewhere on time if everything goes perfectly, would be leaving Locust Valley for LaGuardia on time.

88. Among those accompanying petitioners on the Charlottesville Flight were John Griffin and Rick Gerson. Both Messrs. Griffin and Gerson testified regarding their vivid recollections of the Charlottesville Flight departing from LaGuardia and the reason it did so, and of petitioner arriving for the Charlottesville Flight last, and separately from, Mrs. Robertson. Mr. Griffin, who organized and raised the funds for the event at UVa, testified that when he found out that the Charlottesville Flight would be leaving from LaGuardia rather than Teterboro, he became concerned that their party would be late for the dedication since LaGuardia often has delays. According to Mr. Griffin, the only reason the plane would have been leaving from LaGuardia would be that petitioner was coming from his house in Locust Valley. Mr. Griffin further testified that the reason he vividly recalls that Mrs. Robertson arrived at LaGuardia for the Charlottesville Flight separately and before petitioner, and that petitioner was the last to arrive for the flight, is that when he noticed petitioner was not with Mrs. Robertson he became even more

concerned that their party would be late for the dedication, particularly since in his experience, petitioner often arrived late when neither Mrs. Robertson nor Mr. Griffin was with him.

89. Mr. Gerson, who was also involved in the event at UVa, testified that he remembered petitioner arrived separately from Mrs. Robertson and was the last to arrive for the Charlottesville Flight because Mr. Gerson did not want to arrive for the flight after petitioner, who was his host for the flight. Aboard the Charlottesville Flight, when Mr. Gerson expressed his surprise that a private plane could fly out of LaGuardia, petitioner told Mr. Gerson that the reason the flight left from LaGuardia rather than Teterboro is that petitioner came to LaGuardia from Locust Valley. In addition, Mrs. Robertson testified that it was typical for petitioner, who tends to "cut everything to the wire," to be the last of the party to arrive at the airport for a flight.

90. As described above, the audit involved not only the issue in this proceeding, but also interest deductions taken by certain investment funds managed by Tiger, certain other flow-through items in respect to those funds, and petitioner's New York City residency status for 1997. Regarding these other issues, the auditor found petitioner's records to be reliable, and determined that petitioner met the burden of proving that he correctly reported the interest expense and other flow-through items and, although the auditor did not accept as non-NYC days each of the disputed days in 1997, also met the burden of proving that he was not present in New York City on more than 183 days in 1997 and correctly reported that he was not a resident of New York City in 1997.

91. The auditor commenced the portion of the audit regarding petitioner's 2000 New York City residency status on May 17, 2002. The first meeting between the auditor and petitioners' initial representatives regarding petitioner's residency status for 2000 occurred on or about August 28, 2003. The printout from the Electronic Calendar that is in the record as Exhibit C to

the parties' stipulation was submitted to the auditor at that first meeting with petitioners' initial representatives, and the auditor was told that it was a printout from the Electronic Calendar that was prepared by Ms. Depperschmidt. The auditor did not, prior to the conclusion of the audit, have in her possession the Electronic Calendar in electronic form or a printout of the Planner Section for 2000. The auditor was never told that she could not have the electronic version of the Electronic Calendar, and did not consider it necessary to subpoena the electronic version because her questions regarding the Electronic Calendar were answered to her satisfaction.

92. Ms. Depperschmidt, who does not have any tax expertise and never had any direct contact with the auditor, did not decide which documents and schedules should be provided to the auditor, but rather provided petitioners' initial and current representatives with any information or documentation they asked her to provide. Ms. Depperschmidt told petitioners' initial representatives that she maintained an electronic calendar in 2000 and gave them a printout of the Appointments Calendar portion of the Electronic Calendar, but no one ever asked Ms. Depperschmidt for the Electronic Calendar in electronic form until petitioners' current representatives did so in April 2008. Shortly after petitioners' current representatives obtained these items, and several months before the hearing, they furnished copies of the Electronic Calendar in electronic form and printouts of the Planner Section of the Electronic Calendar for 2000 to the Division's counsel.

93. The Roadmap was first provided to the auditor by petitioners' initial representatives at a meeting in November 2003, at which the initial representatives told the auditor that the Roadmap had been prepared by Ms. Depperschmidt from the Electronic Calendar, and accurately reflected petitioner's exact NYC days and non-NYC days. The initial representatives also provided the auditor with their own schedules and told the auditor that such schedules were

prepared from the information in the Electronic Calendar. Ms. Depperschmidt did not prepare such schedules and does not recall whether she reviewed these particular schedules before the initial representatives submitted them to the auditor.

94. In addition to these materials, the auditor received significant additional documentation regarding 2000 from petitioners' initial representatives and from petitioners' current representatives, including certain long distance phone bills for the Locust Valley home, petitioner's American Express statements, federal tax return and Schedules K-1, golf club records from Shinnecock Hills Golf Club, National Golf Links of America and Deepdale, Key Air invoices, copies of airline tickets, copies of car service vouchers, Tiger telephone records, frequent flier statements, bank statements for petitioner's account at JP Morgan, a copy of petitioner's passport, travel itineraries and numerous affidavits. Numerous times throughout her testimony, the auditor acknowledged that she had reviewed many documents provided by petitioners' representatives during the audit.

95. The auditor also subpoenaed and reviewed many more records including telephone records for the Apartment and the Locust Valley home, Mrs. Robertson's car phone records, UTOG car service records, Key Air records (including flight logs), bank records from Citibank, additional golf club records and additional American Express records, including those for Mrs. Robertson. For example, during the course of the audit, the Division issued a subpoena duces tecum dated September 8, 2003 to Verizon – New York, Inc., seeking records in respect of petitioners' telephones at the Apartment, and an additional subpoena duces tecum dated December 1, 2004 to Cingular and by means of the September 8, 2003 subpoena, obtained the telephone company records for the Apartment.

96. A month after the Notice of Deficiency was issued, the Division issued two additional subpoenas duces tecum to telephone companies (AT&T and Verizon – New York, Inc.), dated October 18, 2006, and seeking records in respect of petitioners' telephones at the Locust Valley home. By means of the October 18, 2006 subpoena issued to Verizon, the Division obtained the telephone company records for the Locust Valley home for 2000 and thereafter provided a copy of these records to petitioners' representatives.

97. Each of the subpoenas issued to the telephone companies described above (the Telephone Subpoenas) either did not specify a return date or specified a return date that was less than 20 days after service thereof. None of the Telephone Subpoenas was contemporaneously served on or otherwise provided to petitioner or his representatives until the auditor received the subpoenaed information. The Division's letters to the telephone companies accompanying, and referred to in, the Telephone Subpoenas instructed the telephone companies not to "notify the subscriber" of the subpoenas.

98. Upon conclusion of the audit, after reviewing all of petitioner's records, including petitioner's calendar and the affidavits and other documents described above, the Division determined (and later stipulated) that petitioner correctly treated each of the 183 agreed New York City days as such, and that petitioner correctly treated each of the 179 agreed non-New York City days as such. Thus, after reviewing petitioner's records and the other materials obtained in the audit and asking any questions she had regarding these records and materials, the auditor found petitioner's records to be reliable in respect of 362 (or 98.9%) of the 366 days in 2000. The auditor also determined that petitioner had not met her (the auditor's) understanding of the burden of proof as to the remaining four days in 2000. The Division introduced into the record its compilations of the documents that the auditor relied on and which caused her to reach

the determination that each of the days April 15, July 23, July 31 and November 16, 2000 was a NYC day.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioners had established by clear and convincing evidence that petitioner was outside of New York City on the then disputed days, April 15, 2000, July 23, 2000, July 31, 2000 and November 16, 2000 and, thus, properly not subject to the New York City personal income tax as a statutory resident individual pursuant to New York City Administrative Code § 11-1705 (b)(1)(B) for the year 2000.

The Division did not file an exception with respect to July 31, 2000 and November 16, 2000. As such, these two dates will not be addressed.

ARGUMENTS ON EXCEPTION

The Division took exception to the findings of fact and conclusions of law arguing that petitioner had not met his statutory burden of proof and had not demonstrated by clear and convincing evidence that he was not in New York City at any point on April 15, 2000 and July 23, 2000.

The Division made three arguments in support of its exception. The first is that the Administrative Law Judge did not apply the required "clear and convincing standard" in finding that petitioner had not spent any part of April 15, 2000 or July 23, 2000 in New York City. Rather, the Division maintains that the Administrative Law Judge had applied a mere preponderance standard in reaching his determination.

The Division's second argument was that the Administrative Law Judge omitted significant and relevant contradictory evidence, which would have necessitated a different conclusion on the two days at issue and, thirdly, it argues that in regard to July 23, 2000, petitioners' representative

originally indicated that he went to New York City. With regard to April 15, 2000, the Division argues that the Administrative Law Judge ignored a telephone call from the New York City apartment to petitioner's closed office on April 15, 2000.

Petitioners' argument is that the Administrative Law Judge's determination is well-grounded in the facts and consistent with Tribunal precedent and that petitioners have met the evidentiary standard of proof showing that petitioner was outside the city of New York on April 15, 2000 and on July 23, 2000. Petitioners argue that the Division is seeking to apply a significantly higher standard than the Tribunal has ever applied in that the Division seeks to require petitioners to disprove each of a number of speculations as to ways it might have been physically possible for petitioner to be in New York City on a given day. The Administrative Law Judge referred to such a standard as "beyond all doubt," a standard, he noted, that would be higher even than that for criminal conviction.

Petitioner further states that, under the Division's approach, no probative value would be assigned to the evidence of the taxpayer's routines patterns and habits of life that this Tribunal has held to be probative of a taxpayer's whereabouts.

OPINION

New York City Administrative Code § 11-1705(b)(1)(A) and (B) sets forth the definition of a New York City resident individual for income tax purposes as follows:

> Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this city, unless (1) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city . . . or
>
> (B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred

> eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources.

As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York City. Since the parties agree that petitioners are domiciled in Locust Valley and not New York City, this matter involves only the second, or "statutory resident," basis upon which New York City resident tax status may apply pursuant to Administrative Code § 11-1705(b)(1)(B), with its dual predicates for such tax status being (1) the maintenance of a permanent place of abode in the City and (2) physical presence in the City on more than 183 days during a given taxable year. Further narrowing the issue in this case, petitioners admit that they maintained a permanent place of abode, the Apartment, in New York City during the year in issue. Thus, the sole matter in question here is the second prong upon which statutory resident status is premised, namely whether petitioner Julian H. Robertson was physically present in New York City on more than 183 days in the year 2000.

Tax Law § 697(a) allows the Commissioner of Taxation to promulgate rules and regulations necessary to enforce the provisions of Tax Law Article 22. The relevant regulation addressing the question of whether an individual spent more than 183 days in the particular jurisdiction, applicable to both New York State and New York City,[9] is 20 NYCRR 105.20(c), which prescribes the following day-counting rule:

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[9] The definition of a New York City statutory resident is identical to the definition of a New York State statutory resident, except for substitution of the term "City" for "State."

> In counting the number of days spent within and without New York State [or City], presence within New York State [or City] for any part of the calendar day constitutes a day spent within New York State [or City], except that such presence within New York State [or City] may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State [or City], or while traveling through New York State [or City] to a destination outside New York State [or City] (20 NYCRR 105.20[c]; 20 NYCRR 295.2[a], 295.3[a]).

In connection with acquiring and renovating the Apartment for their use, petitioners specifically inquired of their accountants as to the personal income tax ramifications resulting therefrom. There is no dispute that the advice petitioners received, and clearly understood, was that having a permanent place of abode in the city exposed them to the possibility of significant tax liability by being held taxable as residents of the city, with such liability turning entirely upon the number of days they spent in the city. Specifically, petitioners were advised and clearly understood that in order not to be subject to such liability, they would be able to spend no more than 183 days in the city. Indeed, the fiscal impact of spending more than 183 days in the city was surely impressed upon petitioners over the course of the three years immediately prior to the year in question here. That is, while petitioners established upon audit that they spent fewer than 184 days in New York City and, thus, were not held subject to such liability for the year 1997 they were, by unavoidable circumstances, unable to spend fewer than 184 days in New York City and hence were subject to such liability for the two years (1998 and 1999) immediately preceding the year at issue herein (***see***, Finding of Fact "19"). It is also clear that petitioners fully understood and accepted that a "day in the City" meant "any part of a day," no matter how insignificant in time or purpose that part of a day may have been (***see, e.g., Matter of Leach v. Chu***, 150 AD2d 842 [1989]), save for the exception of the so-called "in-transit" situation, set forth at 20 NYCRR 105.20(c) where one is physically present within New York City while in-

transit between two points both of which are outside of the City. Petitioners, for their part, do not question the premise that “any part of a day” spent (i.e., physically present) in New York City in 2000 constituted a “day” for purposes of the statutory resident day count. Reflective of this understanding, and upon the basis of a substantial amount of time and effort expended by both parties and by their counsel, it has been agreed that petitioner was physically present in New York City on 183 days and was not physically present in New York City, except while in transit, only on 181 days, leaving for determination herein the question of physical presence in New York City on two remaining disputed days, to wit, April 15 and July 23, 2000. The Division does not contest the Administrative Law Judge’s determination with regard to July 31 and November 16, 2000.

In order to overcome the deficiency asserted in this case, petitioner bears the burden to “come forward with clear and convincing evidence proving . . . that . . . he did not spend in the aggregate more than 183 days” in New York City in 2000 (***Matter of Holt***, Tax Appeals Tribunal, July 17, 2008). Petitioner may meet this burden of proof through testimonial evidence, documentary evidence, or a combination of the two (***see***, ***Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994; ***see also***, ***Matter of Armel***, Tax Appeals Tribunal, August 17, 1995; ***Matter of Moss***, Tax Appeals Tribunal, November 25, 1992). The Tribunal has held that a clearly established pattern of conduct from which a taxpayer’s location may be determined for a particular day suffices to meet the burden of proof with regard to that day (***see***, ***Matter of Kern***, Tax Appeals Tribunal, November 9, 1995, ***confirmed*** 240 AD2d 969 [3d Dept 1997]) and, further, that general testimony regarding the “patterns and habits of life,” when coupled with supporting documentary evidence, is sufficient to meet the burden of proof (***see, Matter of Armel***, ***supra***). The Tribunal has also held that where a taxpayer presents a contemporaneously

maintained diary or calendar accompanied by consistent and supporting testimony, the same will be sufficient to meet the burden of proof as to the day count, absent other evidence which is inconsistent therewith or indicates that the diary or calendar is in some other manner unreliable (***see***, ***Matter of Moss, supra; Matter of Reid***, Tax Appeals Tribunal, October 5, 1995). Finally, even where taxpayers did not produce a diary or refused to produce a diary, the Tribunal has determined nonetheless that the taxpayers met the burden of proving that they were not present on more than 183 days based upon their testimony and affidavits regarding their habit and pattern of conduct during the last month of the year in issue (***see, Matter of Armel, supra***), based upon the testimony of the taxpayer's secretary regarding entries in the diary the taxpayer refused to submit (***see, Matter of Avildsen, supra***), and based upon affidavits and additional evidence concerning the taxpayers' whereabouts (***see*, *Matter of Golub***, Tax Appeals Tribunal, March 24, 1994).

In ***Matter of Holt***, the Tribunal stated that "[s]tatutory residence cases . . . are very fact intensive and require specific evidence through substantiating contemporaneous records to show a taxpayer's whereabouts on a day-to-day basis during each year in question. Such records could include not only day calendars but airline tickets, restaurant and hotel receipts and credit card statements." The taxpayer's proof in ***Holt*** included no evidence of any patterns, routines or habits of life, but did include conflicting day counts based ultimately on poorly photocopied calendars submitted post-hearing which were in some instances illegible, reflected cryptic, written over or scratched out and changed location information, and with respect to which the taxpayer provided vague testimony and essentially no corroborating or supporting records. Given the inadequacies in the proof, the taxpayer in ***Holt*** was unable to meet the burden of proof and, consequently, did not prevail. By contrast, in ***Moss***, the taxpayer submitted business diaries

which included both contemporaneously and non-contemporaneously made entries, which the taxpayer reasonably explained as part of his overall credible testimony concerning his routines and his best recollection of events during the years in issue. This evidence, taken in light of the taxpayer's awareness of the New York City day count rule and its tax implications, and coupled with the balance of additional evidence which was consistent with the taxpayer's diaries, sufficed to establish that the taxpayer was not present in New York City on more than 183 days (***see***, ***Matter of Reid, supra***). It is possible to argue that the language in ***Holt*** concerning "specific evidence through substantiating contemporaneous records" could be read in isolation to require, as a matter of law, the production of documentary proof positive of one's out-of-state (or city) whereabouts on at least 184 days in any given year in order to meet the burden of establishing that one was not present in the state or city and was present in some other extra-jurisdictional locale. However, in light of the well-developed case law, including that set forth above, this is not the applicable standard of proof (***see***, ***Matter of Avildsen, supra; Matter of Moss, supra***).

From the foregoing, the standard as to counting days so as to determine whether one did or did not spend, in the aggregate, more than 183 days in New York City (or State) is not that there must be an objectively verifiable piece of documentary evidence establishing an individual's whereabouts on every day in question. In fact, as petitioners note, the Division's own audit guidelines recognize this by reference to days such as those spent at home watching television or gardening, for which documentary evidence substantiating one's whereabouts may simply not exist (***see***, Revised Manual for Nonresident Audits, District Audit Manual, p. 7). Thus, while the "gold standard" of proof would be a document, definitively and objectively verifying a taxpayer's presence in a particular place outside of New York City (or State), to the exclusion of any other place, on a particular day (e.g., a jailer's record of incarceration), there are days for which such

objectively verifiable documentary proof simply does not exist. In fact, requiring such evidence for all days would leave the taxpayer's burden of proof to be "beyond all doubt," higher even than the criminal conviction standard of "beyond a reasonable doubt" and far above the standard of "clear and convincing" proof as is required in matters of statutory residence (***see e.g.***, ***Matter of Holt, supra***). At the other end of the spectrum from this "gold standard" is testimony alone unaccompanied by other substantiating supportive evidence. There is little doubt that virtually anyone could accurately recall, without any documentary support, precisely where they were on at least one if not a few specific dates. For example, nearly everyone likely knows precisely where they were on September 11, 2001, a day of national and international historic significance. So too, it seems that most would know with certainty where they were on a particular date attached to which was some very highly significant matter of personal importance. Such testimony, remembered by the significance of the date and event, delivered credibly, would suffice to meet the burden of establishing one's whereabouts on that date. Where there is no definitive document establishing or locking down one's whereabouts on a given date, the evidence of date, time, place and event becomes, as here, a combination of testimony or testimonies to be evaluated in light of each other, in light of the surrounding events which aid the person or persons testifying in recalling the event, date, time and place concerning which the testimony is given, and in light of any additional evidence relied upon by a witness in conjunction with providing his testimony, so as to accrue ultimately in a determination of whether such testimony, as a whole, constitutes credible testimony.

The determination of whether testimony is credible rests with the trier of facts, "who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony" (***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992). A determination of

testimonial credibility rests on the twin components of "competency," which is the "opportunity and capacity to perceive combined with the capacity to recollect and communicate," and "veracity," which is the "truthfulness of the witness" (***Matter of Impath***, Tax Appeals Tribunal, January 8, 2004). Any additional evidence relied on in support of specific testimony given, referenced to refresh the recall of a witness, or otherwise augmenting the testimony given concerning a claim of event, date, time and place, can itself offer insight as to whether the witness's recall is credible and correct and supports the result as to the "place conclusion" desired by the taxpayer. So too, careful and objective review of such evidence and of any accompanying testimony or other evidence may reveal significant inconsistencies weighing against the likelihood that the testimony, thought honestly given, might through the fallibility of human memory, simply be incorrect or not clear and convincing evidence. It is against this background that the evidence in this case, including the testimonial evidence, concerning petitioner's whereabouts on the two disputed days must be evaluated.

The first disputed day is April 15, 2000. The petitioner and his driver, Mr. Young, testified to the routine manner in which he would be picked up at his office in Manhattan and driven to Locust Valley on Friday afternoons. Mrs. Robertson testified, credibly, that she was in the apartment alone after returning from a trip to Texas and was preparing for a trip to Australia. Further, she signed the voucher for transportation for the trip from the apartment to the golf course in Manhasset on April 15, 2000. She testified that this was very much out of the ordinary. The records for the car service are normally signed by the petitioner or by his personal assistant who arranged the transportation.

Petitioner testified that he went to Locust Valley after work on Friday April 14, 2000 and spent the night in Locust Valley rather than with Mrs. Robertson. Petitioner and Mr. Young, his

driver, had no specific recollection of Mr. Young driving petitioner to Locust Valley on April 14, 2000. Both testified that Mr. Young would routinely pick up petitioner at his office on Friday afternoons. Mrs. Robertson testified that petitioner was not in the apartment that day and about her activities on April 14, 2000 and the fact that she had called Mr. Robertson's closed office on the morning of April 15, 2000. The Administrative Law Judge found Mrs. Robertson's testimony to be credible that she was "just as happy to have the petitioner not at the apartment on Friday evening" April 14, 2000 for reasons enumerated in her testimony (Determination, conclusion of law "N"). Ms. Wyndham Robertson also testified as to the reasons Mr. Robertson would not be at the apartment that weekend.

The finding of the Administrative Law Judge regarding April 15, 2000, and July 23, 2000, is based on testimonial evidence backed up by other documentation. As stated by the Tribunal in ***Matter of Spallina (supra)***, the credibility of witnesses:

> is a determination within the domain of the trier of facts, the person who has the opportunity to view the witnesses firsthand and evaluate the relevance and truthfulness of their testimony (***see, Matter of Berenhaus v. Ward***, 70 NY2d 436, 522 NYS2d 478). While this Tribunal is not absolutely bound by an Administrative Law Judge's assessment of credibility and is free to differ with the Administrative Law Judge to make its own assessment, we find nothing in the record here to justify such action on our part.

It should be pointed out that the testimonial evidence is backed up by petitioner's records. The appointments calendar that lists his last appointment in New York City on April 14, 2000 as being at 12 noon, the telephone records indicating a call from Locust Valley to the apartment on the evening of April 14, 2000 at 6:04 P.M., the fact that Mrs. Robertson signed for a car on the morning of April 15, 2000 to go to Manhasset to play golf with petitioner. Credible testimonial evidence becomes clear and convincing when it is backed up by documentary evidence.

The Tribunal has consistently held that a taxpayer such as petitioner who comes forward with a contemporaneously maintained calendar or diary together with supporting and consistent foundational testimony has met the applicable standard of proof (***see, Matter of Moss, supra; Matter of Reid, supra***).

The only evidence offered by the Division to the attested testimony and documentary evidence is the phone call to petitioner's office on April 15, 2000, about which Mrs. Robertson testified, and the fact that up until April 15, 2000, petitioner had not been spending Saturdays in Locust Valley. However, there was a call from Locust Valley to the apartment on Friday night and the electronic records kept by petitioner's assistant stated that he was in Locust Valley that day.

The next day at issue is July 23, 2000. The date is in question because the flight returning from a golf outing in Ireland was originally thought to have arrived after midnight on July 24, 2000. That mistake was because it was originally calculated by Greenwich Mean Time to have arrived at approximately 2:00 A.M.; however, Mr. Robertson and his party actually arrived at 9:15 P.M. according to NY local time. The testimony is that Mr. Robertson returned to Locust Valley in a car contracted for by Mr. Coleman and paid for by Mr. Coleman, first to Mr. Coleman's house to drop him off and then to deliver Mr. Robertson and his son to Locust Valley. This testimonial evidence from Mr. Coleman, a member of the bar, and Mr. Robertson is backed up by a telephone call pattern, especially a call made by Mrs. Robertson from the apartment to Mr. Robertson early the next morning. It appears that Mrs. Robertson would not have called her husband at 6:59 A.M. if he was staying in the apartment. Further, the findings of fact are logical. Mr. Robertson would not have sent his golf clubs alone and asked Mr. Coleman to deliver them

to his home in Locust Valley. Additionally, Mr. Coleman testified that he had no memory of ever being alone in the car with petitioner's son or ever delivering golf clubs alone to Locust Valley.

The Division claims that the Administrative Law Judge committed reversible error by "disregarding several key bits of evidence that support" that he was in New York City on July 23, 2000 (Division's brief in support, pg. 17). Let it be noted that the Division has offered nothing to contradict the facts as found by the Administrative Law Judge with regard to July 23, 2000. It cites records (Exhibits "M" and "CC") which supposedly indicate that July 23, 2000 was a New York City date. Petitioner's explanation is that July 24, 2000, a Monday, was a New York City day, and the mistake was made because the flight was thought to have landed on July 24, 2000 when it had not. It landed on July 23 and all the evidence indicates that the petitioner went immediately to Locust Valley that night and went to New York City early on the morning of the 24th. Both calendars (Exhibits "M" and "CC") indicate that petitioner was out of New York City on the 23rd and in New York on the 24th. The Division contends that the Administrative Law Judge "improperly omitted important relevant evidence." Apparently the evidence to which the Division references is the original entries into the calendars with regard to July 23, 2000. However, the calendar (Exhibits "M" and "CC") support petitioners non-presence in New York City on July 23, 2000. The evidence does nothing to undercut the testimony observed by the Administrative Law Judge.

The determination by the trier of facts of the credibility of the witnesses whose testimony is backed up by other evidence should not be disturbed (***see, Matter of Berenhaus v. Ward, supra; see also, Matter of Stevens v. Axlerod***, 162 AD2d 1025 [1990]); ***Matter of Spallina, supra***).

We affirm the Administrative Law Judge's determination which we find to be based on clear and convincing evidence.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Julian H. and Josephine Robertson is granted; and

4. The Notice of Deficiency dated September 18, 2006 is cancelled.

DATED: Troy, New York
September 23, 2010

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

COMMISSIONER JENKINS dissenting:

I respectfully dissent for the reasons discussed below. Bearing in mind that our decisions are precedential, we must attempt to communicate and educate practitioners and the public by, *inter alia*, presenting a consistent, understandable standard of proof. The determination of the Administrative Law Judge correctly states that petitioner has the burden of proof and that the standard of proof in the Division of Tax Appeals is by clear and convincing evidence and, then, he proceeds to ignore both. I fear that the decision of the majority in affirming the Administrative Law Judge is misguided, and holds the potential for creating confusion and mischief in future cases. I would reverse the determination of the Administrative Law Judge.

We have held that, in cases involving statutory residency, the burden of proof is upon the taxpayer to demonstrate by clear and convincing evidence that he was not within the State or City

of New York for more than 183 days (***e.g., Matter of Holt***, ***supra***; ***Matter of Jay***, Tax Appeals Tribunal, September 9, 2004; ***Matter of Kern***, ***supra***; ***Matter of Boyd***, Tax Appeals Tribunal, July 7, 1994).

The majority relies on ***Colorado v. New Mexico, supra,*** in an attempt to demonstrate that the Division "produced little evidence in support of its contention of a New York City presence on either of the two days at issue." This statement by the majority improperly shifts the burden of proof to the Division to come forward with evidence showing petitioner's presence within New York City on the two disputed days, rather than requiring petitioner to demonstrate by clear and convincing evidence that he was not within the City.

In ***Colorado v. New Mexico***, the Court stated: "a party (petitioner) would achieve the clear and convincing proof standard only if the material offered instantly tilted the evidentiary scales in the affirmative when weighed against the case evidence" (467 US 310 at 316).

The Administrative Law Judge began his analysis with April 15, 2000. The telephone records reflect a call from the New York City apartment to petitioner's office. Mrs. Robertson testified that she remembered placing the call despite the lack of contemporaneous documentation to refresh her memory eight years later. Rather than merely finding that petitioner failed to prove his location outside of the City, given the lack of documentation to substantiate his whereabouts outside of the City for that day, the Administrative Law Judge initiates an exercise of mental gymnastics to find that Mrs. Robertson could have made the call. Instead of focusing on the lack of evidence for April 15, 2000, the Administrative Law Judge concludes that "[p]ersons other than petitioner made telephone calls from the Apartment to petitioner's office at Tiger on 10 days on which the Division acknowledges petitioner was not at the Apartment or otherwise in New York City" (Finding of Fact "59"). I find this statement to be not only

unpersuasive, but indicative of a complete misunderstanding regarding the weight to be given to the testimony of a witness. Primarily, ten days of an entire calendar year certainly does not indicate a pattern of conduct that would rise to the level of proof required to establish a taxpayer's whereabouts on any given day. Secondly, it is the taxpayer's conduct that is at issue in this case. A pattern of conduct that involves anyone other than Mr. Robertson is irrelevant when attempting to establish his whereabouts on any day of the calendar year.

As the majority states, petitioner testified that he went to Locust Valley after work on Friday, April 14, 2000 to spend the night. The majority notes that both petitioner and his driver testified to the routine of the driver picking up petitioner at his office on Friday afternoons. However, as borne out by the evidence, this was allegedly the first Friday afternoon of the taxable year where the driver picked up petitioner from his office to drive him to Locust Valley. Therefore, I find their collective testimony unpersuasive to prove his whereabouts on the following day.

The Administrative Law Judge, in addressing the day of July 23, 2000, stated that this date was never in issue because all of the evidence was consistent in support of its being a non-New York City day because petitioner's flight from Ireland was thought to have arrived at 1:15 A.M. on July 24, 2000. However, after the initiation of the audit process, it was learned that the plane had in fact arrived at LaGuardia on July 23, 2000 at 9:15 P.M. Therefore, the Administrative Law Judge began by focusing on the likelihood or probability of petitioner landing at LaGuardia and driving to his home in Locust Valley, New York rather than driving to the New York City apartment.

I find that the focus of the Administrative Law Judge, and my collegues here, should not be on where petitioner drove to after landing at LaGuardia. Rather, the focus should be on the

contradictory evidence offered by or on behalf of petitioner, i.e., how could all the contemporaneous evidence erroneously claim that on July 23, 2000, petitioner was still in Ireland while, on July 24, 2000, the calendar indicates an arrival into LaGuardia and a notation that he went straight to New York City. To me, this is a clear indication of conflicting evidence. On the one hand, all the contemporaneous documents indicate that he is still in Ireland, yet, in reality, he flew back that day. Relying on ***Colorado v. New Mexico***, I would find the inconsistency created by conflicting documentation did not tilt the scales instantly for me to find that petitioner clearly and convincingly established his whereabouts on that day. In fact, I would find the conflicting evidence offered by petitioner militates against a finding of clear and convincing evidence.

The majority feels that petitioner and his witnesses testified truthfully as to their memory of events. I have no doubt that is true, but in my view, their veracity is not the issue. Their collective memory is another matter.

Petitioner relies on the computer records maintained by Ms. Depperschmidt, his assistant. She relied on the information he provided in treating certain days as New York days or non-New York days. "[T]hey would have a frank and direct discussion of whether petitioner earned a New York tax day . . ." (Finding of Fact "38"). When Ms. Depperschmidt asked petitioner, "Did you earn a tax day," petitioner would tell her and she would enter it into the computer. The point here is her lack of first hand knowledge, at least on those days she had to ask him. Admittedly, on some days she had the necessary first hand knowledge to make computer entries concerning his whereabouts without needing to inquire.

I do not question Ms. Depperschmidt's veracity; however, I question her legal competence to testify as to matters of which she had no first hand knowledge on days when she had to inquire whether a day was a New York City day or a non-New York City day. If this is all it takes for the

majority to find clear and convincing evidence, they have inappropriately redefined the term.

Therefore, I am unable to join my colleagues in deciding this case.

DATED:Troy, New York
September 23, 2010

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner