STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

ROBERT S. LUDWIG

DETERMINATION
DTA NO. 819315

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1997.

Petitioner, Robert S. Ludwig, c/o Noah Weinshel, CPA, 269 Kneeland Avenue, Yonkers, New York 10705, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1997.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 1, 2003 at 10:00 A.M., with all briefs submitted by April 15, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Noah Weinshel, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner has shown that he was not domiciled in New York State during 1997 and therefore not taxable as a resident individual pursuant to Tax Law § 605(b)(1)(A).

II. Whether petitioner has shown that he was not present in New York State for more than 183 days during 1997 and therefore not taxable as a resident individual pursuant to Tax Law § 605(b)(1)(B).

III. Whether petitioner has shown that negligence penalty imposed pursuant to Tax Law § 685(b) should be abated.

FINDINGS OF FACT

1. On September 28, 2001, following an audit, the Division of Taxation ("Division") issued to petitioner,

Robert S. Ludwig, a Notice of Deficiency which asserted additional personal tax due for the years 1996 and 1997, plus negligence penalty pursuant to Tax Law § 685(b) and interest. Prior to the hearing in this matter petitioner withdrew his petition with respect to the 1996 tax year. With respect to 1997, the Notice of Deficiency asserts $44,650.83 in additional tax due, plus negligence penalty and interest. The deficiency results from the Division's determination that petitioner was properly subject to tax as a New York resident.

2. Petitioner, who was born on September 8, 1948, filed New York State resident returns from at least the 1983 tax year through the 1995 tax year. Petitioner filed New York State nonresident returns for the 1996 and 1997 tax years.

3. Petitioner resided at 132 Pondfield Road, Bronxville, New York from January 1980 through August 1986. He resided at 5 The High Road, Bronxville from August 1986 through April 1993. He then moved to 15 Elm Rock Road, Bronxville in April 1993.

4. Petitioner resided at the 5 The High Road and 15 Elm Rock Road residences with his wife, Gwenyth E. Rankin, and their five children. Ms. Rankin was the sole owner of the 5 The High Road and 15 Elm Rock Road properties.

5. During 1997, petitioner's wife and their children lived at the 15 Elm Rock Road, Bronxville residence. At least four of the children attended primary or secondary schools in the Bronxville area during 1997.

6. Gwenyth Rankin received ongoing medical treatment at a New York medical facility in 1997. The record refers to both Columbia Presbyterian Hospital and Sloan-Kettering Memorial Hospital (both in New York) as the location of such treatment.

7. Petitioner was employed by Salomon Brothers (or Salomon Equity Partnership or Salomon Smith Barney) ("Salomon") as an investment banker for many years. Prior to 1996, petitioner worked for Salomon in New York.

8. In 1996, petitioner's employment with Salomon became based in Europe as he managed an emerging markets fund with a focus on Russia, the former Soviet Union, and Eastern Europe.

9. Petitioner maintained an apartment in Russia in 1996.

10. In approximately April 1997, petitioner became employed by the Swiss investment banking firm Julius Baer & Co., Ltd. where he continued to manage an emerging markets fund similar to his work for Salomon.

11. Petitioner maintained a residence in Switzerland in 1997.

12. Petitioner also obtained a Resident B visa status in Switzerland as of May 4, 1997, allowing him to

work in Switzerland and granting him full resident status.

13. Petitioner continued to work and maintain a residence in Europe subsequent to the year at issue.

14. Petitioner also maintained a residence in Baker, West Virginia in 1997. The record does not show when petitioner acquired such residence, but does show that petitioner had long-standing ties to West Virginia. Specifically, petitioner registered to vote in Baker, West Virginia on May 22, 1970. The record does not establish whether petitioner voted elsewhere in subsequent years or where he voted in 1997. Petitioner also was issued a West Virginia driver's license on January 5, 1999. The record, however, does not establish whether petitioner had such a license during the year at issue.

15. Petitioner's Federal income tax returns in evidence report income from his employment as an investment banker of $1,425,219 in 1996 and $589,816 in 1997. Petitioner's Federal returns also indicate that he conducted a consulting business based in Switzerland in 1996 and 1997. Petitioner reported $82,124 in gross receipts and $53,006 in net profit from this business in 1997. For 1996, petitioner reported $160,000 in gross receipts and $89,640 in net profits for the consulting business.

16. Petitioner filed a Schedule F ("Profit or Loss from Farming") with his Federal returns for both 1996 and 1997. For 1997, petitioner reported $7,250 in gross income from farming and a net farm loss of $7,148. For 1996, petitioner reported $6,725 in gross farming income and a net farm loss of $17,042. Petitioner's farm was located in West Virginia.

17. Schedule A of petitioner's 1997 Federal income tax return reports a $100,000 charitable donation to 4-H of Hardy County, West Virginia and a $65,000 donation to East Hardy High School, Baker, West Virginia. Petitioner's 1996 Federal return reports charitable donations of $5,800 to Hardy County 4-H.

18. Petitioner's returns also report substantial charitable donations to Sloan-Kettering Memorial Hospital ($125,000 in 1996 and $10,000 in 1997).

19. Petitioner's passport indicates extensive international travel prior to, during and subsequent to the year at issue. With respect to 1997, the passport stamps indicate petitioner's entry into the following countries on the following dates:

February 3, 1997	Turkey
February 6, 1997	Czech Republic
February 10, 1997	England
February 13, 1997	USA
March 14, 1997	Bermuda
March 29, 1997	Antigua and Barbuda

May 4, 1997	Switzerland
June 8, 1997	Switzerland
July 24, 1997	Czech Republic
September 6, 1997	Turkey
October 2, 1997	USA
October 31, 1997	Mongolia
November 21, 1997	England
November 22, 1997	USA

20. The passport contains other stamps indicating further travel by petitioner. Such other stamps are, however, illegible on the copy of the passport submitted in evidence.

21. Petitioner's passport also indicates that visas were issued to petitioner by Turkey in 1996, and by Mongolia, Ukraine, and Switzerland in 1997.

22. Petitioner submitted copies of his European Mastercard bills detailing purchases from July through December 1997. With the exception of a purchase dated November 24, 1997 and identified as "Winks Furniture Yonkers" none of the purchases listed on the bills appear to have any connection to New York.

23. The auditor's log contains the following comment dated June 6, 2000 regarding the issue of days spent in New York:

> Mr. Weinshel [petitioner's representative] provided a schedule based on his review of the passports which showed that the taxpayer [petitioner]
> was in New York for about 30 days in 1996 based upon the passport markings. He claims the taxpayer was in New York for even less time in
> 1997. Reviewed the audit file and found a prior review of the passports. Proceeded to review it again, and it appears correct, that the taxpayer
> would not have spent much more time in New York than is claimed by the representative.

24. On his 1997 New York nonresident return petitioner answered "No" to the question "Did you or your spouse maintain living quarters in New York State in 1997?"

25. Petitioner reported 15 Elm Rock Road, Bronxville as his address on his 1997 New York nonresident return, which was filed under the status "married filing separate return." Petitioner and his spouse's joint Federal returns for both 1996 and 1997 also report 15 Elm Rock Road as their address.

26. Petitioner did not personally appear at the hearing and thus did not testify in support of his petition. Petitioner's representative provided the only testimony in the record on his behalf.

CONCLUSIONS OF LAW

A. At the outset, I note that in proceedings in the Division of Tax Appeals a presumption of correctness attaches to a notice of deficiency and the petitioner bears the burden of overcoming that presumption (***see***, ***e.g.***, ***Matter of Estate of Gucci***, Tax Appeals Tribunal, July 10, 1997 citing ***Matter of Atlantic & Hudson***, Tax Appeals Tribunal, January 30, 1992; ***see also*** Tax Law § 689[e]).

B. Tax Law § 601 imposes New York State personal income tax on "resident individuals." Tax Law § 605(b)(1) defines "resident individual" as someone:

> (A) *who is domiciled in this state*, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or (ii)(I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which such period of five hundred forty-eight consecutive days begins and the nonresident portion of the taxable year with or within which such period ends, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such portion of the taxable year bears to five hundred forty-eight, or
>
> (B) *who is not domiciled* in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . . . (Emphasis added.)

C. Although petitioner did not expressly address the issue of whether he maintained a permanent place of abode in New York in 1997, he did emphasize his wife's ownership of their Bronxville residences (***see***, Finding of Fact "4"). It is therefore appropriate to consider whether petitioner "maintained a permanent place of abode" in New York in 1997 within the meaning of Tax Law § 605(b)(1).

Maintenance of a permanent place of abode is not limited to "any particular usage" and thus applies to "a variety of circumstances" (***see***, ***Matter of Evans***, Tax Appeals Tribunal, June 18, 1992, ***confirmed*** 199 AD2d 840, 606 NYS2d 404). Accordingly, ownership of a dwelling place is not a prerequisite to a finding that a taxpayer maintained a permanent place of abode in New York (***see***, 20 NYCRR 105.20[e][l]). One may maintain a permanent place of abode by "doing whatever is necessary to continue one's living arrangements in a particular dwelling place . . . includ[ing] making contributions to the household, in money or otherwise" (***see***, ***Matter of Evans, supra***). Maintenance of a permanent place of abode "will generally include a dwelling place owned or leased by such taxpayer's spouse" (***see***, 20 NYCRR 105.20[e][l]).

Here, there is no evidence or claim that petitioner was in any manner precluded from access to or use of the residence at 15 Elm Rock Road in Bronxville (***cf***., ***Matter of Moed***, Tax Appeals Tribunal, January 26, 1995). Nor is there any suggestion that petitioner did not contribute to the household where his wife and minor children resided (***cf***., ***Matter of Donovan***, Tax Appeals Tribunal, February 26, 2004). Petitioner has thus failed to meet his burden of proof to show that he did not maintain a permanent place of abode in New York during the year at issue.(1)

D. The Division's regulations define "domicile" in relevant part as follows:

> (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.
>
> (2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.
>
> * * *
>
> (4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere.
>
> (5)(i) Husband and wife. Generally, the domicile of a husband and wife are the same. However, if they are separated in fact, they may each, under some circumstances, acquire their own separate domiciles even though there is no judgment or decree of separation. Where there is a judgment or decree of separation, a husband and wife may acquire their own separate domicile. (20 NYCRR 105.20[d].)

The classic distinction between domicile and residency was explained many years ago by the Court of Appeals in ***Matter of Newcomb's Estate*** (192 NY 238, 250):

> Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

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

E. Although petitioner strenuously contends that he was a nonresident of New York in 1997, he does not directly address the issue of domicile. Indeed, at no point in this proceeding has petitioner expressly asserted the location of his domicile in 1997. Given his claim that he was a nonresident, however, it is reasonable to examine whether the record supports a finding that petitioner was not domiciled in New York in 1997, but was domiciled in either West Virginia or Switzerland in that year.

With respect to West Virginia, it may be petitioner's position that his historic domicile was West Virginia and that he remained domiciled in West Virginia during the entire time he filed New York resident returns and continuing through 1997. Alternatively, it may be petitioner's position that he changed his domicile from New York to West Virginia at the time he acquired a residence and employment in Europe.

Addressing first the West Virginia as historic domicile scenario, although the record shows that petitioner had longstanding ties to West Virginia, the record also shows that petitioner lived and worked in New York from 1980 through 1995. Further, the record shows that petitioner's wife and children lived in New York and that the children went to school in New York. There is no evidence that petitioner's wife and children ever used the West Virginia residence as their primary residence. Additionally, as noted previously, the Division's regulations provide that where an individual has two residences, the length of time the individual customarily spends at each location is a factor in determining domicile (***see***, 20 NYCRR 105.20[d][4]). In this case, however, the record lacks any evidence of petitioner's historic pattern of use of his New York or West Virginia residences. Further, the record lacks any sense of the

"sentiment, feeling and permanent association" with which petitioner regards either his West Virginia or New York residences (***see***, ***Matter of Bourne***, ***supra***). The nature and extent of continuing business ties is also a factor in determining domicile (***see***, ***Matter of Kartiganger v. Koenig*** 194 AD2d 879, 599 NYS2d 312). Here, such factor does not point toward a West Virginia domicile, for petitioner's West Virginia business, i.e., his farm, generated little revenue and incurred losses in 1996 and 1997, while petitioner earned substantial income from and obviously devoted most of his time to investment banking during those years (***see***, Findings of Fact "15" and "16"). There is no evidence of the revenue and losses or income generated by the farming business for other years.

Also while the record shows that petitioner registered to vote in West Virginia in 1970 and that he obtained a West Virginia driver's license in 1999, as noted previously, such formal declarations are less significant than informal acts demonstrating an individual's general habit of life (***Matter of Silverman, supra***). Moreover, the significance of the 1970 voter registration is undermined by the lack of any evidence in the record regarding petitioner's subsequent voting history. Additionally, the weight to be accorded the West Virginia driver's license is undermined by the absence of evidence of whether petitioner had such a license prior to 1999.

The evidence in the record is thus insufficient to show that petitioner's historic domicile was West Virginia and that he remained a West Virginia domiciliary throughout the period of his New York residency and continuing through the year at issue.

Addressing next the possibility that petitioner changed his domicile from New York to West Virginia at the time he moved to Europe, it is noted that for a taxpayer to meet his burden of proof to establish a change of domicile, he must show a change in lifestyle (***see***, ***Matter of Doman***, Tax Appeals Tribunal, April 9, 1992). In this case, while it is clear that petitioner's lifestyle changed when he began living and working in Europe, such change does not support a finding of a West Virginia domicile.

Petitioner has also failed to show that he changed his domicile from New York to Switzerland in 1997. Although he was employed in Switzerland and spend most of his time there and elsewhere in Europe in 1997, petitioner's family remained in New York and he continued to maintain his New York residence. Further, there is no evidence that petitioner ever intended to make Switzerland his fixed and permanent home (***see***, 20 NYCRR 105.20[d][2]).

As noted previously, domicile is largely a matter of intent. The best evidence of petitioner's intent is petitioner himself. By his decision not to testify, the record in this matter is deprived of this evidence and the administrative law judge is deprived of a better opportunity to ascertain petitioner's intent. The testimony of petitioner's representative is insufficient to establish petitioner's intent regarding the location of his domicile in 1997.[(2)]

In sum, the record herein compels the conclusion that petitioner has failed to establish by clear and convincing evidence that he was not domiciled in New York during the year at issue. He was therefore properly subject to tax as a resident individual of New York pursuant to Tax Law § 605(b)(1)(A).

F. Having concluded that petitioner was properly subject to tax as a New York domiciliary, it is not necessary to address whether petitioner has met his burden of proving by clear and convincing evidence that he was not present in New York State for more than 183 days in 1997 and thus was not subject to tax as a "statutory resident" pursuant to Tax Law § 605(b)(1)(B).

G. The Division imposed penalties in the instant matter pursuant to Tax Law § 685(b), which requires the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 of the Tax Law or the regulations promulgated thereunder. Petitioner failed to articulate any rationale for the abatement of penalties. Additionally, petitioner's denial on his 1997 nonresident return that either he or his spouse maintained living quarters in New York (***see***, Finding of Fact "24") supports the imposition of negligence penalties. The imposition of penalties is therefore sustained.

H. Petitioner asserted both at hearing and on brief that the receipt of evidence related to the 1996 tax year was inappropriate and prejudicial. This assertion is without merit. Clearly, to the extent to which evidence regarding 1996 relates to the issue of petitioner's intent to change his domicile such evidence is relevant and was properly received in evidence.

I. The petition of Robert S. Ludwig is denied and the Notice of Deficiency dated September 28, 2001, as it relates to the 1997 tax year (***see***, Finding of Fact "1"), is sustained.

DATED: Troy, New York
August 19, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE

1. Since petitioner maintained a permanent place of abode in New York during 1997, neither the 30-day rule of Tax Law § 605(b)(1)(A)(i) nor the 548-day rule of Tax Law § 605(b)(1)(A)(ii) are applicable herein. Further, since petitioner maintained a permanent place of abode he faces exposure to tax as a "statutory resident" unless he can show that he was not present in New York for more than 183 days during 1997 (***see***, Tax Law § 605[b][1][B]).

2. It would be difficult to overstate the importance of the petitioner's testimony in a case where domicile or residency is at issue. While such testimony does not promise victory for the petitioner, the absence of such testimony surely invites defeat.

[Back to Top][What's New?][Home]