

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SEBASTIAN AND FLORENCE ANGELICO : DECISION
for Redetermination of a Deficiency or for : DTA No. 807985
Refund of New York State and New York City :
Income Taxes under Article 22 of the Tax Law :
and the New York City Administrative Code for :
the Years 1984 and 1985. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 19, 1992 with respect to the petition of Sebastian and Florence Angelico, 6 Poillon Avenue, Staten Island, New York 10312. Petitioners appeared by Leonard Rosen & Company, P.C. (Leonard Rosen, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in response. A reply brief was due on October 7, 1993 and this date began the six-month period for the issuance of this decision. Oral argument, requested by the Division of Taxation, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner Sebastian Angelico changed his domicile from New York City to New Jersey prior to the years in question.

II. Whether the issue of statutory residency under former section 605(a)(2) of the Tax Law was properly raised by the Division of Taxation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3(b)," "4(a)," and "4(b)" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

(a) Petitioners, Sebastian and Florence Angelico, were both born in Brooklyn, New York and as young adults they married and moved to New Jersey where they lived for ten months. They then moved back to New York and resided for five years at 11 Demopolis Avenue, Staten Island, and for six years at 31 Goodall Street, Staten Island, and then in July 1981 moved to 6 Poillon Avenue, Staten Island. This house was a four-bedroom colonial which had been purchased in 1981 for \$250,000.00.

(b) Mr. and Mrs. Angelico have three children who, in 1984, were about 18, 11 and 9 years of age.

(a) Mr. Angelico was a commodities broker doing business under the name of Angelico Commodities at 4 World Trade Center in New York City. He was responsible for customers. He traveled extensively, including trips "all over Connecticut," London, Chicago and Florida. Mr. Angelico also derived a large amount of income in each year from other sources, including profits from trading in property for his own account and a number of investments in partnerships and "S corporations." The tax returns of these partnerships and S corporations have not been produced and Mr. Angelico has not been able, in his testimony or otherwise, to specify their geographic source of income. One exception is a partnership, Annadale Stables, which raced horses in the Meadowlands (New Jersey). For both years, however, Annadale showed losses on Mr. Angelico's returns.

(b) Mrs. Angelico had no income of her own.

(a) Mr. and Mrs. Angelico were having marital difficulties in 1982 and 1983. One problem was Mr. Angelico's great amount of business travel. They had a few meetings with a parish priest at St. Patrick's Church on Staten Island.

We modify the Administrative Law Judge's finding of fact "3(b)" to read as follows:

(b) Mr. and Mrs. Angelico saw a lawyer (Mr. John A. Fusco) concerning their problems. A letter in evidence from the lawyer corroborates this. They decided not to have a formal separation agreement, but that Mr. Angelico would continue to provide financial support to Mrs. Angelico and the children and later there would be an uncontested divorce and division of property. In addition to providing financial support to his wife and children, Mr. Angelico also continued to pay all the expenses of the New York home.¹

We modify the Administrative Law Judge's finding of fact "4(a)" and "4(b)" to read as follows:

(a) Mr. Angelico moved out of the Staten Island house in January 1984. Mrs. Angelico and the children stayed in the house and maintained their home there. This separation was corroborated by a witness who identified himself as a long-time friend of both Mr. and Mrs. Angelico. During this period of separation Mr. Angelico never stayed at the Staten Island residence and when he went there to pick up the children he never went into the house.²

(b) Mr. Angelico moved to the Windsor Terrace condominiums at 1300 Rock Avenue, Unit 2-C, North Plainfield, New Jersey 07060. This property had been purchased by Mr. Angelico and his sister-in-law, Anna Day, jointly in October 1983 with the intent originally to lease it out. It had remained vacant and Mr. Angelico bought his sister-in-law's interest in the property prior to his moving in. Mr. Angelico intended to make this his home.³

1

We modified the Administrative Law Judge's finding of fact "3(b)" by adding the last sentence to reflect more details of the record.

2

We modified the Administrative Law Judge's finding of fact "4(a)" by adding the last sentence to reflect more details of the record.

3

The Administrative Law Judge's finding of fact "4(b)" read as follows:

"(b) Mr. Angelico moved to the Windsor Terrace condominiums at 1300 Rock Avenue, Unit 2-C, North Plainfield, New Jersey 07060. This property had been purchased by Mr. and Mrs. Angelico jointly in October 1983 with the intent originally to lease it out. It had remained vacant and Mr. Angelico bought Mrs. Angelico's interest in the property

(a) Mr. Angelico had a telephone in New Jersey and received all his mail there. He attended, at least occasionally, St. Bartholomew's Church in Edison, New Jersey. He purchased a car and paid New Jersey sales tax on it and had a New Jersey driver's license. He had one of his personal checking accounts at the Central Bank of New Jersey.

(b) During the period of separation Mr. Angelico would go to the Staten Island house to pick up his children and take them out or take them to his New Jersey home. His son spent the summer of 1984 in New Jersey.

In 1985, Mr. Angelico changed his business affairs. He ceased being active in Angelico Commodities and hired other floor brokers to be responsible for customers there. He has, since 1985, operated a commodities clearing firm under the name of "Mercafe." He deals with other floor brokers and not with outside customers. He does little or no business travel.

In the middle of 1985, Mr. and Mrs. Angelico were reconciled. Mr. Angelico moved back to the Staten Island house. (The New Jersey condominium was leased out for a while and later sold.)

(a) Mr. and Mrs. Angelico filed for 1984 a New York joint return on a nonresident form IT-203 showing only Mr. Angelico's business income of \$34,133.00 and certain New York modifications for an adjusted gross income of \$34,358.00.

(b) Mr. and Mrs. Angelico filed two part-year New York joint returns for 1985. One was filed on the nonresident form IT-203 for the first half of the year and the other on a resident return (IT-201) for the second half of the year. Each return showed one-half of each item reported on the Federal return and makes New York adjustments. The total New York income in the first half of the year was \$20,925.00 and in the second half, \$70,466.00. On the nonresident return (for the first half of the year) petitioners reported one-half of the business income reported on the Federal return for the year from Angelico Commodities, one-half of the

prior to his moving in. Mr. Angelico intended to make this his home."

The Administrative Law Judge's finding of fact mistakenly stated that Mr. and Mrs. Angelico had bought the condominium together, and that Mr. Angelico had later bought out Mrs. Angelico's interest. Mrs. Angelico never had any interest in the New Jersey condominium.

farm loss, one-half of the "other" income (from "Mercafe" and "Trionics") and losses of \$9,966.00 from schedule E income. (These losses include one-half of all losses from the partnerships Fidelity Energy Associates III, FRS Realty and Annadale Stables and the S corporation, Orcim-Micro, Inc. It did not include any loss from Fidelity Realty Associates II.)

(a) Mr. and Mrs. Angelico filed a New Jersey resident return (NJ-1040) for 1984. Their New Jersey gross income was \$699,101.00. Petitioners reported on their New Jersey return all of the income reported on their Federal return.

(b) Mr. Angelico filed a New Jersey resident return (NJ-1040) for the first half of 1985. On the return he reported interest of \$2,728.00 (this is one-half of the interest on the Federal return for the whole year, exclusive of interest from "US Treas. bills"), business income ("schedule C") of \$26,226.00 (one-half of the Federal figure) and gains from the disposition of property of \$74,833.00 (one-half of his Federal "schedule D" figure of \$149,666.00). He reported nothing on his New Jersey return for the miscellaneous income from Mercafe and Trionics Developers, Ltd. Neither does he report the losses from farm income nor the losses from any of the various partnerships and S corporations. The New Jersey total income amounted to \$103,787.00.

(a) The Division of Taxation issued a Notice of Deficiency against petitioners on March 25, 1988 for New York State and New York City income taxes for both 1984 and 1985 in the amount of \$85,651.00, plus interest of \$21,856.68, for a total amount due of \$107,507.68.

(b) The deficiency was calculated on the basis of the Federal adjusted gross income less the New York adjustments shown on the return for 1984 and the adjustments shown on the resident return for 1985.

We find the following facts in addition to those found by the Administrative Law Judge.

11. (a) The Statement of Audit Changes issued to petitioner, dated December 14, 1987, states the basis for the assessment as follows: "Since a temporary removal from the State does not constitute a bonafide change of resident status under New York State Tax Law, you are considered a New York State resident" (Division's exhibit "H").

11. (b) The Answer of the Division states that "the audit determined that petitioner Sebastian Angelico had
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changed his domicile from New York to New Jersey during January 1, 1984 through June 30, 1985 and was a resident of New York State." The Answer further states that "petitioners have not met their burden of proving that Sebastian Angelico was not a resident of New York State during 1984 and the first half of 1985" (Division's exhibit "K").

12. At the opening of the hearing, the following exchange took place:

Administrative Law Judge: "Both of you will be arguing the law of domicile I expect? How about the problem with permanent place of abode and days in New York and so on? Do either of you have any presentation on that?"

Petitioner's Representative: "Yes. For his domicile being in New Jersey I have some case law on that also, your honor."

OPINION

The Administrative Law Judge determined that petitioner met the requirements to show a change of domicile from New York to New Jersey for 1984 and for the first half of 1985. Therefore, the Administrative Law Judge concluded that petitioner was not taxable as a New York State and New York City resident under Tax Law § 605 (former [a][1]) and the Administrative Code of the City of New York former § T46-101, respectively. The Administrative Law Judge found that although petitioner's separation from his wife was not pursuant to a formal agreement and they later reconciled, such does not negate that fact that they had separate domiciles during the period in question.

On exception, the Division of Taxation (hereinafter the "Division") asserts that petitioner did not establish, by clear and convincing evidence, an intent to abandon his New York domicile and take up a New Jersey domicile. The Division argues that Mr. Angelico's move to New Jersey, establishing a permanent residence there, does not in and of itself provide clear and convincing evidence of an intent to change domicile. The Division presents the following facts as contradicting petitioner's claimed intent: (1) Mr. Angelico continued to own and financially maintain his New York home, in which his wife and children still lived; (2) Mr. Angelico continued to own and operate his New York business interests from his New York office during the period in question; and (3) Mr. Angelico subsequently reunited with his wife and moved back to New York. The Division also asserts that even if petitioner was not a New York

resident based on domicile, he was a "statutory resident" within the definition of Tax Law § 605 (former [a][2]), in that he maintained a permanent place of abode in New York and did not show that he spent less than 183 days in the State during the taxable year.

The petitioner responds that: (1) the Administrative Law Judge's determination that Mr. Angelico intended to establish his residence, domicile, and permanent place of abode in New Jersey was supported by substantial evidence and should not be disturbed; (2) Mr. Angelico's later reconciliation with his wife and return to New York are irrelevant in determining his intentions at the the time that he moved; (3) seeing that Mr. Angelico did not maintain a permanent place of abode in New York, the "statutory resident" issue and the 183-day test are not applicable; and (4) even if it is found that Mr. Angelico did maintain a permanent place of abode in New York, the Administrative Law Judge had sufficient evidence in the record to determine that Mr. Angelico did not spend more than 183 days in New York.

We affirm the determination of the Administrative Law Judge.

During the period in question Tax Law § 605 (former [a]) defined "resident individual" as someone:

"(1) who is domiciled in this state, unless (A) 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 . . .

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

The definition of "resident" for City purposes is provided under the Administrative Code of the City of New York former § T46-105, and is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state."

Regulation 20 NYCRR former 102.2(d) defines "domicile" as follows:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

"(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his 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 his 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, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

"(4) A person can only have one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode 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 he may be domiciled elsewhere.

"(5) 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 be no judgment or decree of separation."

The absolute and fixed intention to abandon one domicile and acquire another must be established by clear and convincing evidence (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Moves to other states where permanent places of abode are established do not necessarily provide clear and convincing evidence of intent to change domicile absent other proof (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990, revg 77 AD2d 725, 430 NYS2d 419). The importance of a person's intention in determining whether they have effectively changed domicile was expressed by the Court of Appeals in In re 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.

"The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention

without residence is of no avail There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration

"Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice"

Initially, we address the issue of whether Mr. Angelico was properly found to not be a New York domiciliary. We agree with the Administrative Law Judge. It is not disputed that Mr. Angelico actually moved out of his marital home in the beginning of 1984, and into a condominium in New Jersey which he had purchased during the previous year. The Administrative Law Judge found, based on the credible testimony of Mr. Angelico and his witness, and based on the affidavit of Mr. Angelico's attorney, that petitioner's separation from his wife was not intended to be temporary at the time that he moved out, and that the Angelicos intended to get a divorce. The Administrative Law Judge also found that as a consequence of this separation, Mr. Angelico intended to make New Jersey his new home when he moved there. Although we are not absolutely bound by an Administrative Law Judge's assessment of credibility, we do defer to such assessments (see, Matter of Spallina, Tax Appeals Tribunal, February 27, 1992), and there is insufficient evidence in the record to question these findings of fact made by the Administrative Law Judge.

The Division argues that Mr. Angelico's retention of his New York residence is not consistent with his asserted change of domicile. We disagree. Although continued ownership of the former New York home is often an indication that there was not an intent to change domicile (see, Matter of Zinn v. Tully, *supra*; Matter of Kartiganer v. Koenig, 194 AD2d 879, 599 NYS2d 312; Matter of Silverman, Tax Appeals Tribunal, June 8, 1989; Matter of Roth, Tax Appeals Tribunal, March 2, 1989), this is only one factor that needs to be considered. The retention of a dwelling in New York does not conclusively determine a lack of intent to change domicile (see, Matter of Doman, Tax Appeals Tribunal, April 9, 1992; Matter of Sutton, Tax Appeals Tribunal, October 11, 1990). Where a person has two homes, as Mr. Angelico did, his domicile is the one which he considers and uses as his permanent home, and the length of time

spent at each location is an important factor in determining intention in this regard (20 NYCRR former 102.2[d]). Mr. Angelico's uncontroverted testimony at the hearing was that he never entered the New York residence during the 18 months in question. He continued to pay the expenses of the New York household for his wife and children, but agreed to move out of the home as part of the Angelicos' informal separation agreement. Mr. Angelico's intent to get a divorce and his absence from the New York home diminish the importance of retention of the New York home in the determination of domicile.

The second area in which the Division asserts that the evidence contradicts Mr. Angelico's claimed intent to change domicile is in his continued business contacts with New York. This may be an important factor in determining intent (*see*, Matter of Zinn v. Tully, *supra*; Matter of Kartiganer v. Koenig, *supra*; Matter of Clute v. Chu, 106 AD2d 841, 484 NYS2d 239; Matter of Roth, *supra*), but as with the retention of the New York home, it is just one factor to be considered within the totality of the circumstances. When viewed in light of all the relevant circumstances, Mr. Angelico's business activities in New York do not provide an adequate basis for disturbing the determination of the Administrative Law Judge as to the intent to change domicile.

Petitioner's return to New York upon reconciling with his wife is another factor raised by the Division in its argument that petitioner never changed his domicile. Although it is true that such an action could be significant in showing the "range of sentiment, feeling, and permanent association" (Matter of Bodfish v. Gallman, *supra*, 378 NYS2d 138, 140) that a person felt for their purported new domicile (Matter of Roth, *supra*), it is not conclusive. A later return to New York does not automatically preclude Mr. Angelico from having had the sincere intention of remaining permanently in New Jersey at the time that he moved there. The Administrative Law Judge had the opportunity to observe petitioner and his witness testify, under oath and subject to cross examination. The Administrative Law Judge concluded that the testimony presented was credible, and that coupled with the documentary evidence (New Jersey tax forms, insurance

cards, etc.), it established petitioner's intention to make New Jersey his new permanent home. There is not a sufficient basis in the record to disturb this conclusion.

We turn next to the issue of whether petitioner was a "statutory resident" within the definition of Tax Law § 605 (former [a][2]). To be a statutory resident, one must have maintained a permanent place of abode in New York and spent in the aggregate more than 183 days of the taxable year in the State.

The initial consideration on the matter of statutory residency is whether the issue was adequately raised by the Division below. We conclude that it was not. In its exception, the Division claims that on two occasions the issue of statutory residency was clearly presented to petitioner: 1) in the use of the general term "resident" contained in the Statement of Audit Changes and in the Division's Answer, and 2) in the questions of the Administrative Law Judge at the opening of the hearing.

Contrary to the Division's claim, the statutory residency issue was not clearly raised in the pre-hearing communications. At no point prior to the hearing were the matters of "permanent place of abode," "days in New York," "statutory residency," or Tax Law § 605 (former [a][2], presently [b][1][B]) mentioned by the Division or by petitioner. The Statement of Audit Changes issued to petitioner by the Division states: "[s]ince a temporary removal from the State does not constitute a bonafide change of resident status under New York State Law, you are considered a New York State resident" (Division's exhibit "H"). In addition, the Answer states "Sebastian Angelico had not changed his domicile from New York to New Jersey during January 1, 1984 through June 30, 1985 and was a resident of New York" (Division's exhibit "K"). These communications give the impression that the Division was asserting residency based on domicile alone, not in addition to the statutory residency basis. We find that, under the circumstances, simply using the term "resident" did not provide sufficient notice by the Division to petitioner that petitioner must prove he was not a statutory resident of New York in addition to proving that he was not a New York resident based on domicile.

The second instance given by the Division to show that statutory residency was raised as an issue below involves the Administrative Law Judge's questioning of the parties at the hearing. The relevant exchange was as follows:

Administrative Law Judge: "Both of you will be arguing the law of domicile I expect? How about the problem with permanent place of abode and days in New York and so on? Do either of you have any presentation on that?"

Petitioner's Representative: "Yes. For his domicile being in New Jersey I have some case law on that also, your honor."

We conclude that petitioner's response to the Administrative Law Judge's series of questions is too unclear to allow us to conclude that petitioner was agreeing that statutory residency was in issue. The Administrative Law Judge did not believe that this line of questioning placed statutory residency in issue either, as he stated in his opinion that it was not an issue in the case. The uncertainty of the meaning of these questions and answers is further emphasized by the fact that the questions were an offer to address certain matters; an offer that was not accepted by either party.

The Tribunal has the authority to determine what issues are properly before it on exception and to take appropriate action to insure that a just decision is reached in all cases (Tax Law § 2000, 20 NYCRR 3000.0; Matter of Small, Tax Appeals Tribunal, August 11, 1988). Consistent with this authority, we determine that it would be inappropriate in this case to permit the Division to raise the issue of statutory residency for the first time on exception. To find otherwise would be prejudicial to petitioner under the circumstances, as he was not presented with a fair opportunity to meet his burden of proof on the matter (Matter of Clark, Tax Appeals Tribunal, September 14, 1992; Matter of Consolidated Edison, Tax Appeals Tribunal, May 28, 1992).

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 Sebastian and Florence Angelico is granted; and

4. The Notice of Deficiency dated March 25, 1988 is cancelled.

DATED: Troy, New York
March 31, 1994

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner