

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ERIC A. SANTOS : DETERMINATION
 : DTA NO. 820335
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 1999. :
:

Petitioner, Eric A. Santos, 2 Arden Street, Apartment 47, New York, New York 10040, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1999.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 28, 2005 at 10:30 A.M., with all briefs to be submitted by August 4, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that petitioner was domiciled in New York State and New York City in 1999 and, as such, was taxable as a resident individual for such year.

II. If not, whether the Division of Taxation properly determined that petitioner was a resident individual of New York State and New York City for 1999 on the basis that he maintained a permanent place of abode in the State and City and spent in the aggregate more than 183 days in the State and City during such year.

III. Whether penalties asserted against petitioner should be abated.

IV. Whether a discharge in petitioner's bankruptcy proceeding under chapter 7 of title 11 of the United States Code served to discharge the New York State and New York City personal income tax deficiencies at issue herein.

FINDINGS OF FACT

In its brief filed on July 7, 2006, the Division of Taxation submitted 24 proposed findings of fact each of which has been substantially incorporated into the following Findings of Fact except: that portion of proposed finding of fact "12" stating that petitioner did not obtain a California telephone number, which is not supported by the record; proposed finding of fact "15" which is conclusory in nature; and proposed findings of fact "22" through "24" which are irrelevant to this proceeding.

1. The initial inquiry into petitioner's 1999 New York State and New York City personal income tax liability by the Division of Taxation ("Division") occurred in 2002 when information received by the Division from the Internal Revenue Service indicated that petitioner had filed a 1999 Federal income tax return using a New York State address, yet a review of the Division's records indicated that petitioner had not filed a New York State return for 1999.

In response to the Division's request for information concerning his 1999 State return, petitioner submitted correspondence dated July 31, 2003 in which he stated that in 1999 he worked only in California, he was employed by a company located in New Jersey, his residence

was in California and that he filed returns for 1999 with both California and New Jersey.

Petitioner further indicated that under these circumstances, he felt that he was not required to file a New York State return for 1999.

2. On his 1999 Federal income tax return, petitioner had indicated that his address was 2 Arden Street, Apartment 47, New York, New York 10040. Information provided to the Division by the Internal Revenue Service indicated that petitioner had filed Federal income tax returns for the years 1998 through 2001 using the same New York address.

3. Petitioner lived with his parents at 2 Arden Street, Apartment 47, New York, New York 10040 from approximately 1996 until July 1999. Until 1999, petitioner had always lived in New York.

4. Petitioner lived in New York until July 1999 when he moved to California where he resided for approximately six months. In July 1999, petitioner accepted temporary employment in the field of computer consulting with Red Oak Staffing, Inc., pursuant to an agreement dated July 15, 1999. He agreed to provide services to a customer of Red Oak Staffing, Inc., ReSource Phoenix.com, for a period beginning July 21, 1999 and ending on a set date which is illegible in the copy of the Contract for Temporary Employment Exempt Employee.

5. Petitioner flew from New York to California in July 1999 taking with him two suitcases containing clothing and personal effects. He did not bring any furniture with him to California and did not have any additional personal items sent from New York to California. Petitioner left behind in the Arden Street apartment a considerable number of personal items including clothing.

6. For the first two months after arriving in California, petitioner stayed in hotels. Later, he signed a month-to-month lease dated October 22, 1999 for a furnished house-share apartment

located at 432 Ridge Road, Novato, California, with a term commencing on November 1, 1999. On the Residential Lease-Rental Agreement and Deposit Receipt, petitioner used the 2 Arden Street, New York, New York address as well as his New York cell phone number.

7. Petitioner opened a checking account and a savings account with Wells Fargo Bank, N.A. in 1999 using the 2 Arden Street, New York, New York address. He never changed the address on these bank accounts from his New York address to a California address.

8. Petitioner had all of his mail, including 40 to 60 weekly periodicals, addressed to and delivered to the 2 Arden Street, New York, New York address, whereupon his parents would forward the mail to him in California.

9. Petitioner did not relinquish his New York State driver's license upon his move to California, and he never obtained a California driver's license.

10. Petitioner did not register to vote in California and did not join any clubs in California.

11. While in California, petitioner kept his cell phone registered in New York with a New York telephone number.

12. After moving to California in July 1999, petitioner returned to New York twice during the approximately six months he spent in California to spend the weekend, i.e., from Friday to Sunday.

13. At the end of January 2000, petitioner moved back to 2 Arden Street, Apartment 47, New York, New York.

14. The lease on the 2 Arden Street, Apartment 47, New York, New York address is held by petitioner's parents.

15. During the year 1999, petitioner was present in New York for more than 183 days, i.e., from January through mid-July plus the additional weekend days spent while visiting from California.

16. Petitioner filed New York State resident income tax returns, forms IT-201, for tax years 1998 and 2003 using the address at 2 Arden Street, Apartment 47, New York, New York.

17. On November 28, 2003, the Division issued a Statement of Proposed Audit Changes to petitioner which indicated that based upon the information on file and his reply to the Division's request for information (*see*, Finding of Fact "1"), he was required to file a New York State income tax return for 1999. The Division computed petitioner's New York State and New York City tax liability for 1999 using the information obtained from the Internal Revenue Service under authorization of Internal Revenue Code § 6103(d).

18. On January 4, 2004, the Division issued a Notice of Deficiency to petitioner which asserted a deficiency of New York State personal income tax of \$4,243.26, plus penalty and interest, for a total amount due of \$6,498.40 and a deficiency of New York City personal income tax of \$2,432.05, plus penalty and interest, for a total amount due of \$3,724.59. Therefore, the total amount of tax due pursuant to the Notice of Deficiency was \$6,675.31, plus penalty and interest, for a total amount due of \$10,222.99 for the year 1999.

19. A search of the Division's files indicates that as of September 19, 2005 (nine days prior to the hearing held in this matter), petitioner had not filed a New York State income tax return for 1999.

20. At the hearing held in this matter, petitioner was given 30 days from the date of the hearing to submit to the Division evidence that he had filed California and New Jersey tax returns for 1999 as he had previously asserted. In its brief filed on July 7, 2006, the Division

acknowledged receipt of a copy of a 1999 California Nonresident or Part-Year Resident Income Tax Return and a copy of a 1999 State of New Jersey Income Tax - Nonresident Return. After reviewing the documentation submitted by petitioner, the Division determined that petitioner is entitled to an adjustment for taxes paid to California and New Jersey. Accordingly, the Division concedes that total tax due from petitioner is reduced from \$6,675.31, plus penalty and interest, to \$2,432.05, plus penalty and interest.

21. By letter dated November 21, 2005, the Division advised the Division of Tax Appeals that petitioner had filed a Chapter 7 bankruptcy petition in October 2005 which was corroborated by a letter from petitioner dated November 25, 2005. As a result thereof, a determination in this matter was held in abeyance pending the outcome of the bankruptcy proceeding.

22. On June 5, 2006, the Division of Tax Appeals received a letter from the Division along with a copy of a Discharge of Debtor, Order of Final Decree from the United States Bankruptcy Court, Southern District of New York, dated May 15, 2006, pertaining to the bankruptcy petition filed by petitioner. The Division's letter asserted that the present matter before the Division of Tax Appeals is an unsecured priority tax liability which was not dischargeable in bankruptcy pursuant to 11 USC § 523(a)(1)(B) and, accordingly, that a determination should be issued.

SUMMARY OF PETITIONER'S POSITION

23. Petitioner stated at the hearing that when he went to California, his intention was to move there permanently. While his employment contract indicates that the term thereof was temporary, petitioner maintains that no one in the computer consulting industry gets a permanent employment contract. After about six months, he was burned out, no longer liked California and

decided after visiting his parents in New York just after the New Years holiday that he wanted to come back to New York.

Petitioner states that he worked such long hours that he had no time to obtain a California driver's license, register to vote or join any social organizations. He kept his New York address on his bank accounts because he initially lived in hotels for the first two months after arriving in California.

Petitioner asserts that his discharge in bankruptcy "included all debts over 3 years of age" and that this matter should, therefore, be dismissed as there is no longer any tax liability. He also states that he did file a New York State personal income tax return, by ordinary mail, for 1999 and that such return may have been lost by the Division.

CONCLUSIONS OF LAW

A. The first issue to be considered in this proceeding is whether petitioner was domiciled in the State of New York during the year 1999. This is significant because if it is determined that this petitioner was domiciled in New York, he is taxed as a resident individual whose income from all sources is subject to tax pursuant to Tax Law § 611.

B. 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. 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 indicate 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.

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, 458, 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, 246, 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. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. “The taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct” (*Matter of Simon*, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see, e.g., Gray v. Tax Appeals Tribunal*, 235 AD2d 641, 651 NYS2d 740 *confirming Matter of Gray*, Tax Appeals Tribunal,

May 25, 1995; *Matter of Silverman, supra*); (2) the location of business activity (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); (3) the location of family ties (*Matter of Gray, supra*; *Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852, 613 NYS2d 294); (4) the location of social and community ties (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (*Matter of Gray, supra*; *Matter of Getz, supra*).

F. It is indisputable that petitioner was a domiciliary of New York in years prior to 1999 and up to July 1999, when he accepted employment with Red Oak Staffing, Inc. in California, since the record is clear that petitioner always lived in New York until he left for California in July 1999. As previously noted (*see*, Conclusion of Law “D”), an existing domicile continues until a new one is acquired and petitioner bears the burden to prove, by clear and convincing evidence, that he changed his domicile to California in 1999. Petitioner has failed to sustain his burden of proof for a number of reasons.

First, his employment contract with Red Oak Staffing, Inc. was for a specified period with a stated ending date. Second, upon his arrival in California, he initially stayed in hotels and later signed a month-to-month lease for a furnished apartment. Third, he brought only clothing and personal effects in two suitcases with him to California; his furniture remained at his parents’ apartment at 2 Arden Street in New York City. Fourth, the family apartment in New York City remained accessible to petitioner who subsequently moved back to the apartment in January 2000. Finally, he took no steps which would indicate that he intended to make California his permanent home, such as obtaining a California driver’s license, registering to vote in California, joining social or religious organizations or even changing his address on his bank accounts or other mail which continued to be sent to his parents’ address in New York City. Since it has

heretofore been determined that petitioner did not effect a change of domicile to California, it must be found that he remained a domiciliary of New York for the year 1999. As a result, the Division properly taxed petitioner as a resident individual for 1999.

G. By virtue of the holding in Conclusion of Law “F”, Issue II is moot.

H. Petitioner has presented no evidence which would warrant abatement of penalties asserted on the tax deficiencies at issue herein.

I. 11 USC § 523(a)(1)(B)(i) provides that a discharge in bankruptcy does not discharge an individual debtor from any debt for a tax with respect to which a return, if required, was not filed. Petitioner did not file a 1999 New York State personal income tax return. A search of the Division’s records nine days prior to the hearing held in this matter indicated that petitioner had not filed a return. Nevertheless, petitioner maintains that he filed, by regular postal mail, a return for 1999 and contends that the Division may have lost or misplaced it.

When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995, *confirmed* 222 AD2d 28, 645 NYS2d 352; *Matter of Schumacher*, Tax Appeals Tribunal, February 9, 1995; *Matter of Reeves*, Tax Appeals Tribunal, August 22, 1991; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990). Accordingly, it must be found that absent documentary proof of mailing, petitioner has failed to sustain his burden of proving that he filed a New York State personal income tax return for 1999. Therefore, the tax deficiencies at issue herein were not discharged by petitioner’s subsequent bankruptcy proceeding.

J. The petition of Eric A. Santos is denied and the Notice of Deficiency issued on January 4, 2004, as modified by Finding of Fact “20”, is hereby sustained.

DATED: Troy, New York
February 1, 2007

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE