STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TATIANA VARZAR	:	DECISION DTA NO. 824044
for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2004 through 2006.	:	

Petitioner, Tatiana Varzar, filed an exception to the determination of the Administrative Law Judge issued on October 31, 2013. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel) on brief and by Richard M. Gabor, Esq., CPA, at oral argument. The Division of Taxation appeared by Amanda Hiller, Esq. (Marvis Warren, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York on October 15, 2014, which date began the six-month period for the issuance of this decision.

ISSUES

I. Whether petitioner has established that she effected a change of domicile from Brooklyn, New York to Pompano Beach, Florida and, thus, was not taxable as a domiciliary of New York for the years 2004 through 2006.

II. Whether petitioner is subject to tax as a statutory resident of New York for the years 2004 through 2006.

III. Whether the Division of Taxation properly denied a capital loss claimed by petitioner in 2004.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 5, 8, 12 and 13, which we have modified to more accurately reflect the record. We have also added additional findings of fact, numbered 14, 15 and 16 herein. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. Petitioner, Tatiana Varzar, filed form IT-203 (New York State nonresident and part-year resident income tax return) for each of the years 2004, 2005 and 2006 as a nonresident of New York, with a filing status of head of household. The two dependents claimed on her tax returns are her daughters, Violetta and Karina Varzar, who resided in petitioner's Brooklyn, New York, house (***see*** Finding of Fact 3). There is no indication that intangible tax returns were filed in Florida for any year.

2. On August 13, 2009, following an audit, the Division of Taxation (Division) issued to petitioner a notice of deficiency asserting additional New York State and New York City personal income tax due for the years 2004, 2005 and 2006 in the aggregate amount of $231,422.00, plus interest and penalties. This notice was premised upon the assertion that petitioner was a domiciliary of New York State and City for the years under audit. It was also asserted that since petitioner maintained a New York residence in Brooklyn, her failure to establish that she was outside of New York for more than 183 days for each calendar year

resulted in her being held as a statutory resident of New York State and City. Lastly, a capital loss claimed in 2004 was disallowed.

3. Petitioner was born in Russia and immigrated to the United States in 1978. In 1985, she and her husband, Michael Varzar, purchased a house in Brooklyn, New York (New York house), where they resided with their two daughters, Violetta and Karina. Petitioner and her husband still own and maintain this residence. There is no dispute that this house is a permanent place of abode.

4. In 1989, petitioner owned and operated a café named Tatiana's Grill on the boardwalk in the Brighton Beach section of Brooklyn. At some point, petitioner acquired more space near the location of this café and started a restaurant and nightclub business called Tatiana's Restaurant and Nightclub, which is operated on a year-round basis. She was the principal shareholder of both businesses. Petitioner received a salary and forms W-2.

5. In 1992, petitioner and her husband purchased a house in Pompano Beach, Florida, and such house was extensively remodeled in 2001. In late 2003 or early 2004, petitioner operated a casino boat business, VTM, in Tampa, Florida. She testified that she worked there on Thursdays through Sundays. She explained that Tampa is roughly a four and a half hour drive from Pompano Beach and, depending on the traffic, could take even longer. For this reason, she testified, she had an apartment in Tampa. This business venture was short-lived and was sold in June 2004.

6. Petitioner was asked to explain why she changed her domicile from Brooklyn to Florida. She testified that she decided to abandon Brooklyn based upon two events. First, she stated that

there was a fire at her restaurant and nightclub in September of 2003 and, secondly, she was beaten and robbed at gunpoint in February 2004.

7. On Thursday, June 9, 2005, the borough president of Brooklyn hosted a reception in honor of Russian Heritage Week. In a press release, the borough president described petitioner as a Brighton Beach resident and restauranteur, and honored her for:

> "representing the best of Brooklyn moxi [sic] and chutzpah, not only through her determination and resilience in rebuilding the restaurant, Tatiana's, less than one year after a devastating fire, but also for her tireless efforts on behalf of Brighton Beach through her service on Community Board 13, and as co-founder of the fabulous Blini Festival."

8. During the audit period, petitioner began a new business venture at the Trump International in Florida, catering parties on New Year's Eve and New Year's Day. According to her testimony, this business amounted to five or six catering opportunities during the audit period.` She also purchased a former Russian restaurant in Hallandale, Florida, which opened in early 2007.

9. Petitioner submitted seven months of bills for Comcast for the year 2005. The bills indicate that service was for the Florida house, yet all the bills were mailed to petitioner at the New York house. Petitioner submitted eight months of bills for DISH network service for the Florida house; however, these bills were in the name of Michael Varzar.

10. Petitioner submitted various other documents that were in the name of Michael Varzar. It is noted that most of this documentation was for periods outside of the audit period and, additionally, the Florida address indicated in these documents does not coincide with the Pompano Beach address of the Florida house. Additionally, Michael Varzar did not testify at this

proceeding, and petitioner did not mention him in her testimony except regarding the aforementioned exhibits with his name on them.

11. Petitioner testified that she delegated all responsibilities regarding personal bills and payment thereof to one of her daughters. Petitioner explained that she did not have the time to devote to ensuring that her bills were paid and requested that all bills be sent to the address of the New York house. Neither of petitioner's daughters testified at this hearing.

12. On her 2004 New York return, petitioner reported a capital loss in the amount of $975,000.00 on an investment in a company called Evora, Ltd. (Evora). Petitioner testified that she invested $1 million in a proposed housing development project in the Ukraine with partners she had known her whole life. According to petitioner, she made this investment by purchasing 500 shares in Evora, a corporation doing business in Ukraine.

In support of this claim, petitioner submitted a document dated September 10, 2004 indicating her "proposal" to purchase 500 shares of the company for $1,000,000.00. Petitioner also submitted a document, encaptioned "Protocol # 19" and dated September 16, 2004, by which the principals of Evora purport to agree to sell shares to petitioner as proposed. Petitioner submitted two English language versions of Protocol #19, neither of which list an address for petitioner, and two Russian language versions of Protocol #19, one listing her Pompano Beach address and the other listing her Brooklyn address.

Petitioner also submitted copies of funds transfer applications documenting six transactions totaling $930,000.00.00 occurring between September 10 and November 30, 2004. The final two such applications, which total $310,000.00, are dated November 29 and 30, 2004. In addition, petitioner submitted documents indicating debits to her bank account totaling $710,000.00.

Petitioner testified that, within months, Evora's project failed due to a lack of government approval. Specifically, she testified that, in November 2004, she received a telephone call from one of the other investors indicating that the corporation had lost everything. She also testified that this other investor offered her $25,000.00 for her now worthless shares, and that, in December 2004, she accepted this offer and sold her shares back.

In support of this claim, petitioner produced four different versions of an undated letter addressed to her and purportedly written by one of the other investors in Evora. The body of each of the letters indicates that petitioner's verbal offer to sell her shares of Evora back to the other investor has been accepted. The letter also indicates that $25,000.00 would be paid for the shares. Two versions of the letter are addressed to petitioner at her Florida address and two have no address. One version is signed. One version of the letter has Evora, Ltd. letterhead and three versions have Iren, Ltd.[1] letterhead.

Petitioner testified that she directed that the $25,000.00 consideration for the buy back of the shares be given to her father, who lived in Russia. As documentation of this transaction, petitioner submitted an undated handwritten note, in Russian, by which her father purports to acknowledge receipt of $25,000.00. The note contains no other information.

Petitioner's 2004 federal income tax return reported a $975,000.00 capital loss on an investment in a company called Virgo, Inc. on a stock purchase made on April 15, 2004.

13. Most of the testimony given by petitioner at the hearing was in response to leading questions by her attorney. Petitioner did not maintain any documentation as to her whereabouts on any particular day over the three-year audit period. Petitioner was unable to provide exact

[1] Iren, Ltd. appears on some documents as the owner of 500 shares of Evora, Ltd.

dates (other than New Year's Eve and New Year's Day) upon which certain events occurred, such as key business transactions or days spent within and without New York State and City. Her testimony regarding her various business ventures during the audit years was vague and so general in nature that it was difficult to discern which business ventures she was discussing during certain periods of time. For these reasons, her testimony was not credible or substantial.

14. Petitioner reported $225,000.00, $244,000.00, and $360,000.00 in wage income from her Brighton Beach businesses during the years 2004 through 2006, respectively. In 2004, petitioner also reported $342,744.00 in income from the casino boat business.

15. On each of her New York nonresident returns filed for the years at issue, petitioner reported that she did not maintain living quarters in New York State during the tax year.

16. During the audit, petitioner completed a nonresident audit questionnaire on which she stated that she moved to Florida at the end of 2001 or the beginning of 2002.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Citing Tax Law § 605 (b) (1) (A) and (B), the parallel New York City Administrative Code § 11-1705 (b) (1) (A) and (B), and case law, the Administrative Law Judge determined that petitioner did not prove that she had affected a change in domicile from New York to Florida as of the years at issue, and further determined that petitioner failed to prove that she was not a statutory resident of New York during any of the years at issue. The Administrative Law Judge thus concluded that petitioner was subject to personal income tax as a resident of New York State and City as asserted by the Division.

The Administrative Law Judge also determined that petitioner failed to demonstrate entitlement to the capital loss claimed on her 2004 return.

The Administrative Law Judge thus sustained in full the notice of deficiency dated August 13, 2009.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that, in late 2003, she abandoned Brooklyn, New York, made Pompano Beach, Florida her domicile, and had no intention of returning to Brooklyn on a regular basis. She continues to assert that traumatic events, i.e., the 2003 restaurant fire and the 2004 robbery, motivated her move. She further contends that, after 2003, her principal business activities were in Florida. She asserts that she was involved in the casino boat operation until early 2004, and subsequently was engaged in establishing a new restaurant business, which opened after the audit period. Petitioner again contends that she and her husband maintained their primary residence at their home in Pompano Beach, Florida, and that she returned to New York primarily during the summer.

On exception, petitioner acknowledges a lack of specific documentary evidence, such as a diary or detailed telephone or credit card records, but asserts that taxpayers may meet their burden of proof on domicile or statutory residency through credible testimony. Petitioner cites our decision in ***Matter of Avildsen*** (Tax Appeals Tribunal, May 19, 1994) in support of this position and asserts that the testimony presented in the present matter was sufficient for petitioner to meet her burden of proof.

Petitioner also continues to assert that the documents presented establish entitlement to the claimed capital loss.

On exception, the Division maintains, as it did below, that petitioner failed to meet her burden of proof on both the domicile and statutory residency issues. The Division also asserts

that the Administrative Law Judge correctly determined that petitioner did not prove that she realized a capital loss in 2004. The Division asserts that inconsistent testimony and inconsistencies in the documents submitted cast doubt on petitioner's claim that she made such an investment.

OPINION

For the reasons that follow, we affirm the determination of the Administrative Law Judge.

New York State imposes a personal income tax on resident individuals pursuant to Tax Law § 601. Tax Law § 605 (b) (1) (A) and (B) define such a resident individual, in relevant part, as someone:

> "(A) who is domiciled in this state, or . . .
>
> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . . ."

New York City also imposes a personal income tax on its residents pursuant to the Administrative Code of the City of New York § 11-1701. The City's definition of a resident individual is identical to that for State income tax purposes, except for the substitution of the term "city" for "state" (***see*** Administrative Code of the City of New York § 11-1705 [b] [1] [A] and [B]).

The Division's regulations[2] define "domicile" in relevant part as follows:

---

[2] The Division's regulations with respect to the New York State income tax imposed by Article 22 of the Tax Law are applicable in their entirety to the income taxes imposed by the City of New York pursuant to Article 30 of the Tax Law and the New York City Administrative Code, and any reference in such regulations to "New York State domicile, resident and nonresident shall apply in like manner to City of New York domicile, resident and nonresident by substituting City of New York for New York State wherever applicable" (***see*** 20 NYCRR 290.2).

> "(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 person 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" (20 NYCRR 105.20 [d]).

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 [1976]; 20 NYCRR 105.20 [d] [2]). 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***, 192 NY 238, 250 [1908]). 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 [1943], ***affd*** 267 AD 876 [1944], ***affd*** 293 NY 785 [1944]); ***see also Matter of Bodfish v Gallman***). 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, ***citing Matter of Trowbridge***, 266 NY 283, 289 [1935]).

While the standard is subjective, the courts and this 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 we have considered are: (1) the retention of a permanent place of abode in New York (***see e.g. Matter of Gray v Tax Appeals Trib. of State of N.Y.***, 235 AD2d 641 [1997]; ***Matter of Silverman***); (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***; ***Matter of Buzzard***, Tax Appeals Tribunal, February 18, 1993, ***confirmed sub nom Matter of Buzzard v Tax Appeals Trib. of State of N.Y.*** 205 AD2d 852 [1994]); and (4) the location of social and community ties (***Matter of Getz,*** Tax Appeals Tribunal, June 10, 1993).

Upon review of the record and pursuant to the foregoing standards, we concur with the Administrative Law Judge's conclusion that petitioner failed to prove that she gave up her domicile in Brooklyn, New York and acquired a new domicile in Pompano Beach, Florida as of the years at issue.

We note first that petitioner's intent, as expressed at the hearing, to give up her Brooklyn domicile and to acquire a Pompano Beach domicile was premised on the traumatizing effects of a fire in September 2003 and a robbery in February 2004 (***see*** Finding of Fact 6). As the

Administrative Law Judge noted, however, the recognition bestowed upon petitioner by the Brooklyn borough president in 2005 (***see*** Finding of Fact 7) is evidence against a finding that petitioner abandoned Brooklyn in 2004, and is thus evidence against her claim that the fire and robbery were motivating factors for a change of domicile. The nonresident audit questionnaire further undermines petitioner's claimed motivation to change her domicile, as it states that petitioner left Brooklyn as of 2002, well before any fire or robbery (***see*** Finding of Fact 16). Additionally, as noted by the Administrative Law Judge, petitioner did not testify to any aspect of life in Pompano Beach that impelled her to make that location her new domicile. The record thus lacks any convincing expression of intent by petitioner to change her domicile from Brooklyn to Pompano Beach.

We also note that petitioner retained and continued to use her home in Brooklyn, i.e., her historic domicile, throughout the audit period. Additionally, as discussed below, petitioner failed to show the number of days she spent at either the Brooklyn or Pompano Beach residence. These facts both weigh against a change of domicile. The record also shows that petitioner retained significant business ties to Brooklyn through her continued active ownership of her two Brighton Beach businesses (***see*** Findings of Fact 4 and 14). In contrast, her business ties to her claimed Florida domicile were limited. That is, her casino boat business, located a significant distance from Pompano Beach, ended early in the audit period (***see*** Finding of Fact 5); her catering business was quite limited (***see*** Finding of Fact 8); and her Hallandale, Florida restaurant did not begin operating until after the audit period (***id***.). The business activity factor thus points toward a Brooklyn domicile. The record also shows evidence of petitioner's family ties to Brooklyn through her daughters, and community ties to Brooklyn as well (***see*** Findings of Fact 7 and 11).

In contrast, there is no evidence in the record of her family life in Pompano Beach or community ties to that area during the audit period.

Accordingly, we conclude that petitioner failed to establish the objective criteria necessary to demonstrate a change of domicile.

Turning to the second prong of the residency test (Tax Law § 605 [b] [1] [B] and Administrative Code § 11-1705 [b] [1] [B]), so-called statutory residency, petitioner had the burden of proving by clear and convincing evidence that she was not present in New York State or City for more than 183 days during any of the years at issue (***see Matter of Kornblum v Tax Appeals Trib. of State of N.Y.***, 194 AD2d 882 [1993]; ***Matter of Smith v State Tax Commn.***, 68 AD2d 993 [1979]). Specifically, pursuant to the Division's regulations, an individual, like petitioner, who claims a domicile outside the State or City but who maintains a permanent place of abode within the State or City, "must keep and have available for examination . . . adequate records to substantiate the fact that such person did not spend more than 183 days . . . within New York State" (20 NYCRR 105.20 [c]).

We agree with the Administrative Law Judge that petitioner failed to meet her burden to prove that she did not spend more than 183 days in New York State or City during any of the years at issue. Petitioner did not testify as to her whereabouts on virtually any specific days during the three year audit period. She offered no diary, credit card records or phone records as evidence of her whereabouts on any specific days. Given this lack of evidence, petitioner's generic claim, made at the hearing, that she was present in New York during the summer is plainly insufficient to establish any general pattern of activity on her part.

As noted, on exception, petitioner acknowledges a lack of specific documentary evidence, but contends that she may meet her burden of proof on domicile and statutory residency through credible testimony. Petitioner cites ***Matter of Avildsen*** in support of this contention and asserts that the testimony presented in the present matter was sufficient for petitioner to meet her burden of proof.

We disagree. As petitioner correctly notes, our decision in ***Avildsen*** does hold that credible testimony may be sufficient, as a matter of law, to prove statutory residency. There is no such credible testimony in the present matter, however, as the Administrative Law Judge specifically found that petitioner's testimony was not credible (***see*** Finding of Fact 13). As discussed below, we concur in this finding. Accordingly, ***Avildsen*** does not provide a means by which petitioner may overcome the lack documentary evidence in the record.[3]

This Tribunal has consistently deferred findings of witness credibility to the Administrative Law Judge. We have long held that:

> "the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand 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 (***see Matter of Stevens v. Axelrod***, 162 AD2d 1025, 557 NYS2d 809)" (***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992).

Similarly, there is nothing in the present record to disturb the Administrative Law Judge's findings with respect to petitioner's credibility. Upon review of the transcript, we agree with the

[3] Given the lack of documentation submitted with respect to days spent in and out of New York, it would appear unlikely that petitioner would prevail on this issue even absent the unfavorable credibility finding. We note that ***Matter of Avildsen*** emphasizes the risks inherent in relying on testimony to sustain one's burden with respect to statutory residency.

Administrative Law Judge's finding that petitioner's testimony was vague and general (***see*** Finding of Fact 13). We also note that petitioner's credibility is further undermined by her tax returns for the years at issue, each indicating, contrary to fact, that she did not maintain living quarters in New York during the years at issue (***see*** Finding of Fact 15).

We also agree with the Administrative Law Judge's conclusion that petitioner failed to establish entitlement to a capital loss of $975,000.00 as claimed on her 2004 return.

We find that the various versions of Protocol #19 and the "buy back" letter undermine claims of authenticity for such documents (***see*** Finding of Fact 12). Additionally, the handwritten note purportedly indicating receipt of $25,000.00 contains no language linking it to the investment and thus is properly accorded no evidentiary weight (***id***.). The differences between the claimed investment loss and the loss as reported on petitioner's federal return also undermine the credibility of petitioner's claim (***id***.). We find petitioner's explanation for this difference, i.e., that it was a clerical error, to be unpersuasive. Additionally, we agree with the Division's contention that the timing of the cash transfers raises questions of credulity. Specifically, petitioner testified that she was advised in November 2004 that the corporation had lost everything. She contends, however, that she continued to invest in the enterprise by transferring an additional $310,000.00 on November 29 and 30, 2004. She further contends that she then accepted a buy back of $25,000.00 for her $1 million investment within 30 days of those transfers. Such a series of events seems highly unlikely. Finally, we note that petitioner's testimony cannot overcome the evidentiary deficiencies in the documents submitted, given our finding that such testimony lacked credibility.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Tatiana Varzar is denied;

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

3. The petition of Tatiana Varzar is denied; and

4. The notice of deficiency, dated August 13, 2009, is sustained.

DATED: Albany, New York
April 2, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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