

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JONATHAN ADAMS	:	DECISION
	:	DTA NO. 828793
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2012.	:	

Petitioner, Jonathan Adams, filed an exception to the determination of the Administrative Law Judge issued on December 10, 2020. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller Esq., (Peter Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on March 3, 2021, the date that petitioner's reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation failed to timely serve and file its answer resulting in the deemed admission of the factual allegations made in the petition.

II. Whether petitioner was domiciled in New York City for 2012, and as such was taxable as a resident individual of New York State and New York City.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have added footnote 2 for clarity. As so modified, the Administrative Law Judge's finding of fact are set forth below.

1. Based on an audit of petitioner and a determination that he was a domiciliary of New York City during 2012, the Division of Taxation (Division) issued a statement of proposed audit changes, assessment number L-044511392, dated March 18, 2016, for petitioner's taxable year 2012, asserting additional tax in the amount of \$14,832.00 plus interest. No penalties were assessed.

2. Petitioner submitted correspondence challenging the statement of proposed audit changes and included a payment under protest of \$18,207.41 in full satisfaction of assessment number L-044511392. Petitioner's correspondence included the representations that he disagreed with the Division's findings and that he was a New York State attorney. The Division deemed the payment documents to be a claim for refund. Petitioner's check dated March 29, 2016, in satisfaction of assessment L-044511392, reflected petitioner's address as 471 Riverside Drive, Apartment 5F, New York, New York 10025.

3. The Division issued a refund denial, dated October 17, 2016, of petitioner's deemed refund claim.

4. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services challenging the Division's October 17, 2016 refund denial. A conciliation order (CMS No. 000273733), dated April 13, 2018, sustained the refund denial.

5. Petitioner commenced this proceeding by filing a petition on July 10, 2018 with the Division of Tax Appeals in protest of the Division's refund denial dated October 17, 2016. The

petition had a 39-page attachment, which included the assertion of several facts, legal conclusions, arguments of law, an affirmation from petitioner and proposed documentary evidence. The petition listed petitioner's address as 3545 NY 167th Street, #504, North Miami Beach, FL 33160.

6. On July 25, 2018, the Division of Tax Appeals sent a letter to petitioner acknowledging receipt of the petition. The Division of Tax Appeals' acknowledgment letter was mailed to petitioner at the same address as appeared in the petition.

7. On or around September 19, 2018, the Division filed its answer. The Division mailed the answer to petitioner at the address of 3445 NY 167th Street, #504, North Miami Beach, FL 33160. The Division also sent the answer to the Division of Tax Appeals.

8. On or around November 16, 2018, the Division re-sent a copy of the answer to petitioner at the same address to which it had originally sent the answer on September 19, 2018.

9. During a pre-hearing conference call held on September 23, 2019, between the Administrative Law Judge and the parties, petitioner indicated that he still had not received the answer. During the ensuing discussion it was determined that the address provided for petitioner in his petition contained an error and petitioner's address was in fact 3545 NE 167th Street, #504, North Miami Beach, FL 33160.

10. On or around September 23, 2019, the Division sent a copy of the answer to petitioner at the address of 3545 NE 167th Street, #504, North Miami Beach, FL 33160.¹

11. By way of a consent, executed on October 23, 2019 and October 22, 2019, by the

¹ As petitioner correctly notes in his filings, the copy of the answer the Division mailed on or around September 23, 2019, utilized a different date for when the Division's representative signed such as compared to when the original answer was sent. This change from the original answer is immaterial.

Division and petitioner respectively, the parties agreed to have the controversy determined on submission without hearing.

12. The Administrative Law Judge's initial scheduling letter, dated October 31, 2019, required petitioner to submit his evidence by January 20, 2020.

13. On March 8, 2020, petitioner attempted to submit additional evidence and an executed small claims election in an attempt to convert the controversy to a small claims hearing. Relying on the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules), the Administrative Law Judge rejected the small claims election as untimely (*see* 20 NYCRR 3000.13). Relying on Tribunal precedent, the Administrative Law Judge did not accept the proposed additional evidence for consideration because it was submitted after the established deadline (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

14. In his reply brief to the Administrative Law Judge, petitioner asserted for the first time that the Division did not mail him the answer, mailed it to the wrong address, or the United States Postal Service lost the answer.

15. The Administrative Law Judge provided the parties additional time to file responses to address the issue of whether the answer was properly mailed by the Division.

16. In the petition, petitioner asserted the following facts:

a. Petitioner owned two apartments in New York City during 2012. One apartment was apartment E and the other was apartment 5F. Both apartments were located at 417 Riverside Drive in New York City.

b. Petitioner bought apartment E in 2011, renovated it and sold it, closing in March of 2012. After-tax proceeds on the sale of apartment E were \$209,000.00. Petitioner paid New York State taxes on the sale of apartment E.

c. Petitioner registered to vote in Florida in December 2012 and has continued to be registered to vote in Florida since then.

d. Petitioner obtained a Florida driver's license in December 2012 and has maintained his driver's license in Florida since then.

e. Petitioner purchased a residence in Florida on November 30, 2012. The Florida residence was larger and "nicer" than the residence owned by petitioner in New York City.

f. Petitioner's twin brother lived in Florida for a significant portion of 2012. Petitioner had no family in or within 200 miles of New York City during 2012.

g. Petitioner has serious nervous system health problems. Petitioner found Florida and the warm weather easier to live in, especially because of his health problems. Petitioner's nerve pain symptoms were often aggravated by the cold.

h. Petitioner enjoyed the American suburban chain restaurants found in Florida.

i. Petitioner asserts that he moved his home to Florida in 2012 as part of a plan to sell his New York apartment and to use the funds from that sale to buy a residence for himself in Florida and purchase three additional investment properties in Florida.

j. Petitioner contemplated selling his apartment 5F and expected to receive \$360,000.00 from the sale. Petitioner anticipated using the proceeds to purchase his residence in Florida for approximately \$100,000.00 and to purchase three more residences in Florida as rental units for a total purchase price of approximately \$260,000.00. The actual purchase prices of the Florida properties petitioner bought were \$119,000.00 for his residence, and \$70,500.00, \$85,000.00, and \$85,000.00 for the investment rental units. The residence was in located in North Miami Beach, Florida. The rental properties were in located in North Lauderdale and Boca Raton, Florida.

k. In mid-2012 petitioner realized it might be possible to keep apartment 5F, or rent it, for at least a year or two, based on income from the sale of apartment E. Petitioner intended to make “small” renovations to apartment 5F in order to keep the apartment rather than sell it. Petitioner avers that had he intended to sell his apartment 5F, he would have made much more significant improvements, or “full” renovations. Petitioner indicates that in December 2012 he did pursue “full” renovations to the apartment with the plans of selling it. Petitioner hired a building superintendent to install new cabinets from IKEA in the kitchen and perform minor bathroom renovations that consisted of installing a new vanity from IKEA, adding new floor tiles and painting the bathroom.

l. Petitioner’s Florida home is 652 square feet on the 5th and top floor of the building, and has a nice balcony overlooking a canal. Petitioner’s apartment 5F in New York City is not quite 500 square feet in size.

m. Petitioner bought his new residence in Florida in December of 2012, after months of searching online and in person since 2011.²

n. Petitioner worked as an attorney and had one legal case in 2012. The case was worked on under his New Mexico law license. The case was handled almost entirely from Florida and outside of New York State. Otherwise, all business activity was in Florida, which included searching for and making real estate investments for income.

o. Petitioner did not work for any employer in New York in 2012.

p. Petitioner took the after-tax proceeds of \$209,000.00 from the sale of apartment E

² The documents submitted with the petition indicate both that petitioner bought his Florida residence in December 2012 and on November 30, 2012 (*see* finding of fact 16 [e]). We deem the November 30, 2012 date to be controlling.

and used those proceeds for his real estate investments in Florida. Petitioner's sale of apartment E was his only business interest in New York during the year at issue.

q. Petitioner spent the majority of his time in 2012 looking for apartments in Florida by searching on-line for Florida apartments, staying in Florida hotels for weeks at a time, staying at his new apartment in Florida or traveling.

r. Petitioner spent 177 days in New York State during 2012.

s. Approximately 95 percent of the items near and dear to petitioner were moved to Florida in January 2013. The moving of these items to petitioner's Florida home was delayed from mid-December 2012 until early January 2013 at the request of the previous owner of the Florida property. The previous owner apparently wanted to keep his or her items in the Florida property in order to avoid wear and tear on the home items by placing them in a storage facility; furthermore, the previous owner did not want to pay for storage. Petitioner did move two very important new "vintage-styled" pairs of sneakers to Florida on December 16, 2012.

t. Petitioner moved to Florida to be closer to his brother. Petitioner's twin brother rented an apartment in Miami for a significant portion of 2012.

u. Petitioner stayed with his twin brother in Florida throughout 2012.

17. Petitioner's 2011 New York State resident income tax return, form IT-201, provided petitioner's address as apartment 5F, 417 Riverside Drive, New York.

18. Petitioner's 2012 New York State nonresident and part-year resident income tax return, form IT-203, provided petitioner's address as 3454 NE 167th Street, North Miami Beach, Florida. Petitioner's 2012 New York State nonresident and part-year resident income allocation and college tuition itemized deduction worksheet, form IT-203-B, indicates that for 2012, petitioner maintained living quarters at 417 Riverside Drive, apartment 5F in New York City

throughout the entire year; the form also indicates that petitioner spent 177 days of 2012 in New York State.

19. Petitioner's 2013 New York State resident income tax return, form IT-201, provided petitioner's address as apartment 5F, 417 Riverside Drive, New York.

20. Petitioner's 2012 federal profit or loss from business schedule C indicates that petitioner's business address for 2012 was 417 Riverside Drive, apartment 5F, New York.

21. In his reply brief below, petitioner argued he traveled to the following locations during 2012:

January 15-18, 2012: Las Vegas, Nevada

April 2-3, 2012: Prague, Czech Republic

April 18-19, 2012: Hawthorne, California

May 5-6, 2012: Prague, Czech Republic

May 7-8, 2012: Kiev, Ukraine

May 24-27, 2012: Oslo, Norway

June 6-8, 2012: Los Angeles, California

June 7-10, 2012: Redonda Beach, California

June 23-24, 2012: Dublin, California

July 26-29, 2012: Dnipropetrovsk, Ukraine

Late July, 2012: Zaporozhye, Ukraine

August 8-9, 2012: Rome, Italy

October 4-9, 2012: North Lauderdale, Florida

October 18-25, 2012: Miami Gardens, Florida

October 27-29, 2012: Miami Beach, Florida

October 29-November 1, 2012: Miami Beach, Florida

November 19-20, 2012: Amsterdam, Netherlands

November 23-30, 2012: Miami Gardens, Florida

22. Petitioner's brief below also indicates that even after he purchased the Florida residence, he left his bed in apartment 5F in New York City.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first reviewed the Rules pertaining to the commencement of proceedings and answers. The Administrative Law Judge found that the Division mailed its answer to a different address for petitioner than that provided in the petition and, as a result, petitioner did not receive the answer until it was resent to the correct address more than one year later. The Administrative Law Judge concluded that, as a result of mailing the answer to an incorrect address, the Division failed to timely serve its answer in accordance with the Rules and he thus determined that such failure results in the admission of all material allegations of fact set forth in the petition.

Next, the Administrative Law Judge reviewed the Tax Law and New York City Administrative Code provisions pertaining to residency and domicile. The Administrative Law Judge determined that petitioner maintained his residence in New York City throughout 2012. He found that petitioner spent a significant portion of 2012 in New York City and traveled to locations other than Florida during that year. Additionally, he found that most of petitioner's possessions were not moved to Florida until early 2013. The Administrative Law Judge also found that petitioner had filed a New York State tax return as a resident of New York City in 2011 and 2013, the years immediately preceding and following the year under review, using the address of his historic domicile. While the Administrative Law Judge found evidence of

petitioner's interest in changing his domicile to Florida, he determined that petitioner had not proven, by clear and convincing evidence, that he gave up his New York City domicile and acquired a domicile in Florida for the year 2012.

ARGUMENTS ON EXCEPTION

On exception, petitioner alleges that the Division committed misconduct and falsified the date on the latest answer served in the matter. He claims that the Division tried to create the false impression that the answer was properly served and asks for the deficiency to be annulled.

Petitioner further alleges that the evidence supports his contention that he was domiciled in Florida in 2012. In support, petitioner points to the fact that he purchased a home in Florida in 2012, which is larger than his New York City apartment and has a balcony with a waterfront view. Petitioner asserts that in 2012 he spent only 178 days in New York, 41 of which were days he was in transit through New York.³ Although he maintained a New York law license, petitioner alleges that he had no business activities in New York in 2012, other than the sale of a second apartment that he had owned. Further, petitioner alleges that he moved his most valuable possessions to Florida in 2012, and that he obtained a Florida driver's license and registered to vote in Florida in 2012. Petitioner asserts that he had no family in or within 200 miles of New York City during 2012 but had a twin brother who lived in Florida during that year. On exception, petitioner also contends that the allegation in the petition that he was domiciled in Florida in 2012 should have been admitted as a material allegation of fact by the Administrative Law Judge and should result in a decision in his favor.

³ The petition asserts, and the Administrative Law Judge found, that petitioner spent 177 days in New York in 2012.

Petitioner further alleges that the Administrative Law Judge denied his reasonable request for a hearing by telephone or by “Zoom” in violation of federal and state disability laws. He claims that without such an opportunity to be heard, he was denied due process. Finally, petitioner asserts that the Tribunal should annul the alleged deficiency due to the prejudice caused by what he perceives as unreasonable delays in the case.

The Division argues that the Administrative Law Judge erred in determining that all material allegations of fact in the petition are deemed admitted due to the late service of the Division’s answer. The Division asserts that the incorrect mailing address was harmless error and that petitioner suffered no due process violations by receiving a copy of the answer over a year after it was originally mailed. The Division contends that petitioner participated in the audit examination, was cognizant of the issues involved, and was fully aware of his responsibilities in this matter. The Division argues that petitioner had the answer two months before the beginning of the submission process and fully participated without prejudice in the formal hearing by submission. The Division contends that the Administrative Law Judge misapplied the Rules to yield an unreasonably severe result. Nevertheless, the Division takes the position that the Administrative Law Judge’s ultimate conclusion that petitioner failed to meet his burden to prove a change of domicile to Florida for 2012 is correct and should be sustained.

With regard to the substance of the proceeding, the Division argues that the determinations made by the Division in a statutory notice are presumed correct and petitioner bears the burden of proof to overcome the presumption and to show that the determinations are incorrect. The Division contends that petitioner failed to meet his burden of proof to show that he abandoned his New York City domicile and acquired a new domicile in Florida in 2012. The Division points to the fact that petitioner continued to maintain his historic New York City

domicile located at 417 Riverside Dr., Apt. 5F during 2012 and through 2020. Petitioner's general habit of life consisted of a travel pattern of routinely departing from New York City and returning to New York City during 2012. The Division asserts that petitioner's own tax filings show that he was a resident of New York City in 2011 and 2013. It contends that the fact that he maintained his residence during the year in question weighs strongly against petitioner's claim that for 2012 he abandoned his New York City domicile and switched to Florida. The Division argues that petitioner's nonresident and part-year resident income allocation and college tuition deduction worksheet, form IT-203-B, indicates that petitioner spent 177 days in New York in 2012. Further, the Division asserts that petitioner retained his New York law license and listed his business address on his 2012 federal schedule C for his sole proprietorship as an attorney at his historic domicile in New York City. The Division notes that petitioner did not register to vote in Florida or obtain a Florida driver's license until December 2012.

Finally, the Division alleges that petitioner's allegations of misconduct on the part of the Division are without merit. It asserts that the Administrative Law Judge correctly determined that the change in the date from the originally mailed answer is immaterial. The Division claims the error in petitioner's mailing address is wholly of petitioner's making, in that petitioner supplied an incorrect address in the petition filed with the Division of Tax Appeals. The Division also objects to petitioner's late request to convert the hearing to a small claims hearing.

OPINION

As noted, the Administrative Law Judge concluded that the Division failed to timely serve its answer in accordance with the Rules and, thus, he determined that such failure results in the admission of all material allegations of fact set forth in the petition (*see* 20 NYCRR 3000.4 [b] [4]). In opposition to petitioner's exception, the Division argues that petitioner included an

erroneous address in the petition and that he has demonstrated no harm in receiving the answer that was mailed in 2019. Nevertheless, the Division failed to take an exception to the ruling of the Administrative Law Judge and, accordingly, we do not address this argument and leave the Administrative Judge's determination on this issue undisturbed (*see Matter of Klein's Bailey Foods, Inc.*, Tax Appeals Tribunal, August 4, 1988).

In addition to the foregoing, petitioner claims that the Division falsified the date on the final answer mailed in an effort to mislead the Division of Tax Appeals into believing that the answer was properly and timely served. A review of the record shows that the substance of the answer, the allegations and defenses, was not amended in either of the two subsequently mailed copies of the answer. Additionally, a cover letter was sent with each copy of the answer. The cover letters indicated the date and the type of mail service used. For example, the initial cover letter, dated September 19, 2018, indicated that the letter and answer were "Sent Certified Mail." The cover letter for the second mailing of the answer, dated November 16, 2018, indicated that it was "Re-Sent Regular Mail." Finally, the cover letter for the third mailing of the answer dated, September 23, 2019, indicated that it was "Re-Sent Certified mail." After reviewing the record, we agree with the Administrative Law Judge that the revisions to the date in each of the answers mailed to petitioner are immaterial and were not made with fraudulent intent.

Next, we address petitioner's contention that he was denied an in-person hearing in violation of state and federal disability laws and, consequently, was denied due process of law. The Rules provide that hearings in the Division of Tax Appeals are conducted by administrative law judges who are responsible for regulating the course of the hearings and ruling on questions of evidence (20 NYCRR 3000.15 [c]). The record is not entirely clear when petitioner first requested a hearing by telephone or by "Zoom" claiming that he was unable to "travel and sit for

a hearing.” Moreover, petitioner’s specific health issues are not documented in the record. The Administrative Law Judge, however, in his letter of September 23, 2019, memorializing the discussion in the prehearing conference call and, in accordance with the Tax Appeals’ long-standing policy regarding in-person hearings, wrote that “Hearings are conducted in-person, and requests for hearings to be conducted by phone can not [sic] be accommodated.”

New York State agencies must comply with the provisions of Title II of the Americans with Disabilities Act (ADA), which requires that governmental agencies make “reasonable accommodations” to ensure disabled persons have access to their services (*see* Americans with Disabilities Act [42 USC § 12134]). Under Title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity” (Americans with Disabilities Act [42 USC § 12132]). Government agencies that are subject to Title II of the ADA must make reasonable accommodations to allow “meaningful access” to government services (*see Wright v Giuliani*, 230 F3d 543, 548 [2d Cir 2000] [per curiam]). Meaningful access in the context of this proceeding means that petitioner must be afforded a meaningful opportunity to be heard to satisfy due process principles (*see Tennessee v Lane*, 541 US 509, 532-33 [2004]). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner’” (*Mathews v Eldridge*, 424 US 319, 333 [1976], quoting *Armstrong v Manzo*, 380 US 545, 552 [1965]). To satisfy the requirements of due process, a taxing statute must provide taxpayers with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a “clear and certain remedy” (*McKesson Corp. v Division of Alcoholic Beverages and Tobacco*, 496 US 18, 19 [1990], quoting *Atchison, T. &*

S.F.R. Co. v O'Connor, 223 US 280, 285 [1912]; see *Brault v New York State Tax Appeals Trib.*, 265 AD2d 700 [3d Dept 1999]).

At the time of petitioner's request for a hearing either by telephone or by "Zoom," the long-standing policy of the Division of Tax Appeals required that all hearings before Administrative Law Judges be held in person.⁴ The Rules also provide that the parties may consent to proceed by submission without the need to appear at a hearing (20 NYCRR 3000.12) and petitioner consented to this alternative. By letter to the parties dated October 31, 2019, the Administrative Law Judge set the schedule for the submission of evidence and briefs. The Division was required to submit its documentary evidence by December 20, 2019. Petitioner was required to submit his documentary evidence and his initial brief by January 20, 2020. The Division's brief in opposition was due by February 20, 2020, and petitioner's reply brief was due by March 12, 2020.

In proceeding by submission, petitioner submitted documentary evidence along with three affirmations in support of his allegation that he was a domiciliary of Florida in 2012. Further, as discussed above, all material allegations of fact set forth in the petition were deemed admitted as true. After considering the evidence, the Administrative Law Judge issued his determination sustaining the refund denial on December 10, 2020. Petitioner, thereafter, filed a timely notice of exception with the Tax Appeals Tribunal, dated January 6, 2021. It is noted that petitioner did not request oral argument before the Tribunal, which since the start of the

⁴ In September 2019, the Division of Tax Appeals did not have the technological infrastructure to conduct hearings remotely by video. In March 2020, the Governor declared a state of emergency due to the COVID-19 pandemic. All in-person hearings in the Division of Tax Appeals were adjourned. In order to continue operating during the pandemic, the New York State Office of Information Technology Services provided the capability to conduct hearings remotely over a secure video connection. Those remote hearings continue today. Telephonic hearings before administrative law judges are not conducted.

COVID-19 pandemic has been conducted telephonically. We believe that the procedures for submission without hearing provided petitioner meaningful access to the services of the Division of Tax Appeals and afforded him a meaningful hearing and opportunity to be heard that satisfies due process requirements (*see Wright v Giuliani; McKesson Corp. v Division of Alcoholic Beverages and Tobacco; see also Phillips v Commr.*, 283 US 589 [1931]; *Ames Volkswagen v State Tax Commn.*, 47 NY2d 345 [1979]).

Given these protest procedures and petitioner's consent to proceed by submission, we find that the Administrative Law Judge's determination to not permit a hearing by telephone or by "Zoom" did not result in a violation of petitioner's rights under the ADA or his right to due process under the Fourteenth Amendment.

Turning now to the substantive issues presented, it is well established that a presumption of correctness attaches to a notice of deficiency and that petitioner bears the burden of proving that a proposed deficiency is erroneous (*see e.g. Matter of Clifton*, Tax Appeals Tribunal, January 4, 2018 [notice of disallowance/refund denial]). New York State and New York City impose personal income taxes on resident and nonresident individuals (Tax Law § 601 [a]-[c], [e]; Administrative Code of the City of New York §§ 11-1701, 11-1902). Residents are taxed on their income from all sources (Tax Law § 611 [a]; Administrative Code of the City of New York § 11-1711 [a]). Nonresidents are taxed on their State and City source income (Tax Law § 631 [a]; Administrative Code of the City of New York § 11-1902 [a]). A resident individual includes a person "who is domiciled in this state" (Tax Law § 605 [b] [1] [A]). A resident individual also includes a statutory resident; that is, a person who is not domiciled in New York State, but who maintains a personal place of abode in the state and who spends at least 183 days in the state during the taxable year (Tax Law § 605 [b] [1] [B]). Petitioner contends that he spent less than

183 days in the state and that he abandoned his New York domicile in exchange for a Florida domicile in 2012.

New York City's definitions of a resident individual are identical to the State's, except for the substitution of the term "city" for "state" (Administrative Code of the City of New York § 11-1705 [b] [1] [A], [B]).

The Division's personal income tax regulations define domicile, in 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 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 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" (20 NYCRR 105.20 [d]).

The Division's regulations also apply to the City's income tax on residents (20 NYCRR 290.2).

Domicile is established by physical presence and intent (*Matter of McKone v State Tax Commn. of State of N.Y.*, 111 AD2d 1051 [3d Dept 1985] *affd* 68 NY2d 638 [1986]). 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 [3d Dept 1976]; 20 NYCRR 105.20 [d] [2]). Whether there has been a change in 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]). Generally, this means that a taxpayer must show a change of lifestyle to prove a change of domicile (*see Matter of Doman*, Tax Appeals Tribunal, April 9, 1992).

In order to establish a new 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). “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” (*Matter of Ingle*, Tax Appeals Tribunal, December 1, 2011, *confirmed* 110 AD3d 1392 [3d Dept 2013]). We have considered the following criteria to be of significance in addressing issues of domicile: (1) the retention and use of a permanent place of abode in New York (*Matter of Wechsler*, Tax Appeals Tribunal, May 16, 1991); (2) the location of business activity (*Matter of Kartiganer*, Tax Appeals Tribunal, October 17, 1991; (3) the location of family ties (*Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852 [3d Dept 1994]); and (4) the location of social and community ties (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993).

As noted above, “[t]o change one’s domicile requires an intent to give up the old and take up the new, coupled with an actual acquisition of a residence in the new locality” (*Matter of Bodfish v Gallman* at 458). “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” (*Matter of Newcomb* 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 [Sur Ct, Westchester County 1943], *affd* 267 AD 876 [2d Dept 1944], *affd* 293 NY 785 [1944]); *see also Matter of Bodfish v Gallman*).

Initially, petitioner contends that his declaration of a Florida domicile in the petition is an allegation of fact that must be deemed admitted and, as a result, this case must be decided in his favor. To address this issue, we must distinguish between evidentiary facts and ultimate facts. Evidentiary facts have been defined as “‘facts . . . necessary’ to prove the ‘ultimate fact[s]; they are the premises upon which conclusions of ultimate facts are based . . . facts which furnish evidence of existence of some other fact’” (*see People v Redd*, 167 Misc 2d 774, 780 [Sup Ct 1995], quoting *Black’s Law Dictionary*, [5th ed 1979]).

Although domicile is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case. In order to establish domicile, the unique evidentiary facts and circumstances of a case must be closely considered (*Matter of Gadway*, 123 AD2d 83, 85 [3d Dept 1987] [citations omitted]). From those evidentiary facts, a conclusion or ultimate fact as to domicile may be reasonably and logically extracted (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). Accordingly, a finding of domicile or non-domicile is a finding of ultimate fact as opposed to the evidentiary facts upon which the conclusion regarding domicile must be based (*see Matter of Engel v Calgon Corp.*, 114 AD2d 108, 111 [3d Dept 1986], *affd* 69 NY2d 753 [1987], *rearg denied* 70 NY2d 748 [1987] [employment is an ultimate fact, as opposed to the evidentiary facts upon which the conclusion regarding employment must be based]). Petitioner’s allegation that he was domiciled in Florida

in 2012 is simply a conclusory statement or filing position couched as a factual allegation. The Administrative Law Judge was not bound to accept that statement as true.

Tax Law § 689 (e) provides in pertinent part that “in any case before the tax commission under this article, the burden of proof shall be upon the petitioner” (*see also Matter of Clifton*). It was petitioner’s obligation to show by clear and convincing evidence that he abandoned his domicile in New York City and acquired a new domicile in Florida in 2012 (*Matter of Bodfish v Gallman* at 458). Upon a review of the record and in accordance with the foregoing principles, we agree with the determination of the Administrative Law Judge that petitioner here failed to meet that burden.

There is no dispute that petitioner was a domiciliary of New York City in 2011. Petitioner’s search for a new home in Florida began that year and continued into 2012. Petitioner stayed in hotels and other temporary residences in Florida while he was meeting with realtors and conducting his search. Petitioner continued to maintain his permanent residence and historic domicile at 471 Riverside Drive, Apartment 5F, New York, New York 10025, throughout his search and after his move to Florida. According to his own notes, which he maintained contemporaneously, petitioner spent a total of 178 days in New York, including 41 partial travel days, in 2012. Petitioner also travelled to places other than Florida and New York during that year (*see* finding of fact 21). Petitioner purchased three investment properties in Florida during 2012 but did not acquire his new residence until November 30, 2012, when he closed on apartment #504 at 3545 NE 167th Street, North Miami Beach, Florida. Clearly, then, without a permanent residence in Florida, petitioner could not have obtained a Florida domicile until November 30, 2012 (*see Minsky v Tully*, 78 AD2d 955 [3d Dept 1980] [a change of

domicile requires both the intention to make a new location a fixed and permanent home and actual residence at that location]).

Furthermore, although he had the opportunity to provide evidence through the hearing by submission process, petitioner failed to prove that he established a Florida domicile as of November 30, 2012. Where a taxpayer has two residences, time spent in one location and the accompanying use of the residence in that location may be an important factor in determining domicile (*see Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994; 20 NYCRR 105.20 [d] [4]). Yet, petitioner provided no evidence of the number of days spent in Florida as compared to New York in December 2012. Petitioner registered to vote in Florida and obtained a Florida driver's license, both in December 2012. Such formal declarations, however, have been recognized as self-serving in nature when used as evidence to affirmatively establish a new domicile (*Wilke v Wilke* 73 AD2d 915, 917 [2d Dept 1980]) and they are less persuasive than informal acts demonstrating an individual's "general habit of life" (*Matter of Trowbridge*, 266 NY 283, 289 [1935]; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989). Petitioner contends that after the closing, he immediately moved into the new residence and moved certain items near and dear to Florida during the month of December 2012. The majority of his furniture and personal belongings were not moved until January 2013. Petitioner, however, submitted no objective evidence to show a continuing change of lifestyle to Florida in 2013, or the number of days spent at his Florida residence as compared to his New York residence in 2013 (*Matter of Doman*). Instead, he argued that facts related to any year other than 2012 are irrelevant to establishing domicile in 2012. Further, petitioner's own tax filings reflect that he filed a New York State resident income tax return (IT-201) for 2013 with the address of his historic domicile in New York City, thereby indicating that he was a New York resident in 2013 (*cf Matter of*

Zinn v Tully, 77 AD2d 725 [3d Dept 1980], *revd on dissenting opn below* 54 NY2d 713 [1981] [filing of New York resident income tax returns is evidence of New York residency]).

After the close of the record and during the briefing period below, petitioner asked to have the proceeding converted to a small claims proceeding. Petitioner argued in his reply brief below that the Division was improperly demanding additional evidence and that he needed the ability to testify orally in order to “correct these due process violations.” The Division’s brief in opposition below merely asserted flaws or deficiencies in petitioner’s evidence. In addition, petitioner attempted to submit additional documentary evidence after the close of the record. Both requests were rejected by the Administrative Law Judge. On exception, petitioner continues to claim that certain facts in the determination are either “incomplete” or “inaccurate” because the Administrative Law Judge denied his request for a telephone hearing.

In requesting the conversion to a small claims proceeding and in submitting evidence after the close of the record, petitioner seeks an opportunity to present additional evidence in response to the Division’s arguments. The submission process, however, afforded petitioner the opportunity to submit whatever documentary evidence he deemed relevant in support of his position, including an affidavit. It has long been the policy of this Tribunal that, in order to maintain a fair and efficient hearing system, the hearing process must be both defined and final (*see Matter of Schoonover*). Thus, petitioner’s request to convert the matter to a small claims proceeding and his offer of proof after the record closed was properly denied by the Administrative Law Judge.

On exception, petitioner cites to two Administrative Law Judge determinations, as precedent in support of his position. This was inappropriate, however, because such determinations are not precedential. “Determinations issued by administrative law judges shall

not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state” (Tax Law § 2010 [5]). Accordingly, we have not considered the determinations cited by petitioner in reaching our decision in this matter. We note also that the Administrative Law Judge properly did not cite any such determinations in his determination below.

Finally, petitioner asserts that the Tribunal should annul the alleged deficiency because of what he perceives as delays in this case. Other than a generalized allegation of prejudice due to purported delays, petitioner has come forward with no evidence to substantiate that claim.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jonathan Adams is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jonathan Adams is denied; and
4. The refund denial letter dated October 17, 2016, is sustained.

DATED: Albany, New York
September 3, 2021

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner