STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
DAVID RUSSEKOFF AND AMANDA NUTILE	:	DETERMINATION DTA NOS. 827740
For Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2009 through 2013.	:	AND 827741

Petitioners, David Russekoff and Amanda Nutile, filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2009 through 2013.

On August 31, 2018, petitioner, appearing by Hutton & Solomon LLP (Stephen L. Solomon, Esq., Kenneth I. Moore, Esq., and Roger S. Blane, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Linda A. Farrington, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by June 19, 2019, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners are entitled to a New York personal income tax credit for the years 2010 through 2013 for taxes paid to the State of Connecticut on capital gains from the sale of securities, upon the premise that the capital gains were derived from Connecticut within the meaning of Tax Law § 620 (a).

FINDINGS OF FACT

1. Petitioners, David Russekoff and Amanda Nutile, were domiciliaries of New York City, residing at 111 East 88th Street, New York, New York, until September 30, 2009. Petitioners were domiciliaries of the State of Connecticut, residing at 37 Bury Hill Road, Greenwich, Connecticut, during the period October 1, 2009 through December 31, 2013.

2. Petitioners and the Division of Taxation (Division) agree that petitioners were not statutory residents of New York State for the tax year 2009, under Tax Law § 605 (b) (1) (B) and New York City Administrative Code § 11-1705 (b) (1) (B). The parties further agree that the year 2009 is no longer at issue in this matter, and that the Division will accept petitioners' jointly filed New York State part-year resident income tax return (form IT-203) as originally filed for that year.

3. Petitioner David Russekoff was present in New York State for more than 183 days for each of the tax years 2010 through 2013.

4. During the tax years 2010 through 2013, petitioners owned a residence in New York State located at 30 Merkel Lane, Shelter Island, New York. That residence was suitable and available for use (as a residence) for 12 months a year in each of the tax years 2010 through 2013.

5. Petitioner David Russekoff was an employee of Perry Corp. (Perry), for the tax years 2010 through 2013. Perry was a hedge fund manager, and managed numerous investment vehicles.

6. Petitioners initially filed joint New York State nonresident income tax returns (form IT-203) for the tax years 2010 through 2013.

7. Petitioners also filed joint Connecticut State resident income tax returns (form CT-1040) for the tax years 2010 through 2013.

8. The Division conducted audits of petitioners' New York State nonresident income tax returns for the years 2009 through 2013. Upon completion of its audits, the Division concluded that petitioner David Russekoff was a statutory resident of New York State under Tax Law § 605 (b) (1) (B) for each of such years.

9. On or about May 5, 2015, the Division issued to petitioners a consent to field audit adjustment (form AU-251), proposing assessments in the amounts of $38,474.00 for tax year 2009 (tax of $26,287.00 plus interest of $12,187.00), and $978,741.00 for tax year 2010 (tax of $747,071.00 plus interest of $257,957.00).

10. On or about May 14, 2015, in order to minimize the accrual of interest for any potential tax liability, petitioners paid the foregoing amounts of tax and accrued interest (totaling $1,017,215.00), that would be due if they were subject to tax as residents of New York State, without claiming a credit for taxes paid to Connecticut.

11. On June 3, 2015, the Division issued to petitioners a notice of deficiency (L-043015528), asserting tax due plus interest pursuant to its audit findings for the tax years 2009 and 2010, and reflecting petitioners' payment, as above, thus leaving a balance due of zero.

12. On or about July 17, 2015, petitioners filed amended New York State resident income tax returns (form IT-201) for tax years 2009 through 2013, claiming thereon credits for taxes paid to the State of Connecticut for such tax years.

13. For the years 2009 and 2010, petitioners' amended returns resulted in claimed refunds in the amounts of $18,108.00 and $516,960.00, respectively. On August 17, 2015, the Division issued a notice of disallowance of the foregoing claimed refunds for 2009 and 2010.

14. For the years 2011, 2012, and 2013, petitioners' amended returns resulted in claimed refunds in the amounts of $189,826.00, $1,659,941.00, and $4,365,077.00, respectively.

15. On or about February 25, 2016, the Division issued to petitioners a consent to field audit adjustment (form AU-251), denying the claimed resident credits and consequent refunds based thereon, and proposing assessments in the amounts of $328,707.00 for tax year 2011 (tax of $266,134.00 plus interest of $62,573.00), $2,458,875.00 for tax year 2012 (tax of $2,199,302.00 plus interest of $259,573.00), and $6,124,190.00 for the tax year 2013 (tax of $5,757,578.00 plus interest of $366,612.00). On May 10, 2016, the Division issued to petitioners a letter confirming payment of the foregoing proposed assessments in the aggregate amount of $8,911,772.00.

16. On April 4, 2016, the Division issued to petitioners a notice of deficiency (L-044620070), asserting tax due plus interest pursuant to its audit findings for the tax years 2011, 2012, and 2013, in the amounts set forth on the foregoing consent to field audit adjustment, and reflecting petitioners' payment of such amounts, as above, thus leaving a balance due of zero.

17. For the tax years 2010 through 2013, petitioners' capital gains/losses (as set forth on line 13 of their federal income tax returns), and their capital gains included therein from the sale of securities, were as follows:[1]

[1] The total amounts set forth are further itemized in detail in exhibits 14 and 15, as part of the record on submission herein.

Capital Gains/Losses

Year	2010	2011	2012	2013
Amount	$5,801,486.00	$3,663,513.00	$24,029,058.00	$61,559,597.00

Capital Gains From the Sale of Securities

Year	2010	2011	2012	2013
Amount	$5,674,453.00	$3,565,109.00	$21,780,374.00	$59,968,562.00

CONCLUSIONS OF LAW

A. Tax Law § 605 (b) (1) defines a New York State resident individual as one who is either domiciled in this state (Tax Law § 605 [b] [1] [A]), or who is not domiciled in this state but maintains a permanent place of abode in this state and who spends in the aggregate more than one hundred eighty-three days of the taxable year in this state (Tax Law § 605 [b] [1] [B]). This latter provision is known familiarly as the statutory resident provision. There is no dispute that for the years remaining in issue (2010 through 2013), petitioners were domiciled in Greenwich, Connecticut, and were taxable by Connecticut as such, but were also taxable as statutory residents of New York State under Tax Law § 605 (b) (1) (B).[2]

B. The classification as a resident is significant, since New York residents are, generally, subject to tax on their income from all sources, i.e., their worldwide income (***see*** Tax Law § 612 [a]). By contrast, nonresidents are subject to New York tax only to the extent their income is derived from or connected with New York sources (***see*** Tax Law § 631; ***Matter of John S. Tamagni, et al v NYS Tax Appeals Tribunal***, 91 NY2d 530 [1998]; ***cert denied*** 525 U.S. 931

[2] For the year 2009, petitioners were not domiciled in New York State, and did not meet the criteria for statutory resident status. For each of the years remaining in issue, petitioner David Russekoff owned a residence located in Shelter Island, New York, and was present in New York State for more than 183 days. Petitioners elected to file joint tax returns for the years 2009 through 2013.

[1998]). If an individual is subject to tax as a New York resident, there is nonetheless a credit available for income taxes paid to other states upon income derived therefrom. This resident credit is set forth under Tax Law § 620 (a), which provides, in relevant part, that:

> "[a] resident shall be allowed a credit against the tax otherwise due under [article 22] for any income tax imposed for the taxable year by another state of the United States . . . upon income both derived therefrom and subject to tax under [article 22]".

In order to qualify for the resident credit under section 620 (a), the tax imposed by the other state must be on income "derived therefrom" (***see Matter of Tamagni***; Tax Law § 620 [a]; 20 NYCRR 120.1 [a] [2]; 20 NYCRR 120.4 [d] ["the resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction"]).

C. Consistently, and as noted above, New York may impose tax on the income of a nonresident, if that income is derived from or connected with New York sources (***see*** Tax Law § 631). To the extent the income is not so connected, it is not subject to New York tax. In this regard, Tax Law § 631 (b) (2) specifies that income from intangible personal property of a nonresident is New York source income only to the extent such income is from property employed in a business, trade, profession, or occupation carried on in New York. 20 NYCRR 132.5 (a) further provides as follows:

> "items of income, gain, loss and deduction attributable to intangible personal property of a nonresident individual, including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property, do not constitute items of income, gain, loss and deductions derived from or connected with New York State sources, except to the extent attributable to property employed in a business, trade, profession or occupation carried on in New York State."

D. In this case, petitioners seek a resident credit from New York State for taxes paid to the State of Connecticut on intangible income, specifically on gains from the sale of securities, arguing that such gains were derived from Connecticut within the meaning of Tax Law § 620 (a). Petitioners admit that the income in question resulted from the sale of intangible assets, and that such intangible assets were not employed in a business, trade, profession, or occupation carried on in Connecticut. Petitioners maintain, however, that since intangible personal property is deemed to be located at the domicile of its owner, here Connecticut, then the income or gain therefrom must likewise be considered derived from or connected with Connecticut, and therefore eligible for the credit at issue. Petitioners premise their argument on section 3 of article 16 of the New York State Constitution, which provides as follows:

> "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, . . ."

E. The argument advanced by petitioners has been previously addressed and rejected. In ***Matter of Tamagni***, a case involving substantially the same circumstances as are present here, the Court of Appeals held that intangible investment income that was subjected to tax by New Jersey, on the basis that its recipient was a domiciliary and resident of that State, and also subjected to tax by New York, on the basis that its recipient was a statutory resident of New York, did not result in constitutionally impermissible double taxation. The Court explained that the income at issue was not "out-of-state income," but was "intangible income," which "has no identifiable situs," "is not derived, at least directly, from the taxpayer's efforts in any jurisdiction outside of New York, and cannot be traced to any jurisdiction outside of New York," and "is subject to taxation by New York as the State of residence" (***id.*** at 536).

F. Most recently, the issue of whether subjecting a statutory resident of New York to tax on all income, including income from intangible assets, without affording a resident credit, under circumstances where such income was also subjected to tax by another state in which the taxpayer was domiciled, and thus was a resident for tax purposes, was revisited in the wake of the United States Supreme Court decision in ***Comptroller of Treas. of Maryland v Wynne***, 575 US____, 135 S Ct 1787 (2015). In ***Wynne***, the Supreme Court invalidated, on dormant Commerce Clause grounds, the State of Maryland's taxation of the income its residents earned both inside and outside of Maryland, and the income that nonresidents earned inside the State, without providing its residents a full credit against the income taxes they paid to other States on the same income. The Court in ***Wynne*** explained, however, that states are within their authority to deny a resident credit if, as is the case in New York, the state does not impose tax on nonresidents for similar income earned within the state.

G. Here, the intangible personal property giving rise to the income in question was not employed in a business, trade, profession or occupation carried on in New York. Thus, the income in question was not derived from or connected with New York sources, such that a nonresident would be subject to New York tax on such income under Tax Law § 631. Since, by definition, a nonresident is not a domiciliary of New York, it follows that such property, and the income derived therefrom, cannot be taxable by New York to a nonresident by sourcing the same on the basis of the owner's domicile under the constitutional provision relied upon by petitioner (***see Burton v NYS Dept of Taxation and Fin.***, 25 NY3d 732, 742 [2015] [Art. 16, § 3 prohibits New York from taxing the intangible personal property of nonresidents not used in a business, trade, profession or occupation in New York, and the income or gain therefrom, based merely on the physical presence of such intangible personal property in New York]). In turn, since New

York is not able to determine that such income was derived from or connected with New York sources based upon physical presence in New York, so as to impose a situs based tax under Tax Law § 631, it follows that such income may not be considered derived from or connected with another state for purposes of allowing the resident credit under Tax Law § 620 (a). Rather than taxing income or gain from intangible personal property not used in a business, trade, profession or occupation carried on in New York based on location, New York has determined that such income or gain is not derived from or connected to any location, and is subject to New York tax solely upon the owner's status as a resident of New York. In sum, and consistent with the Supreme Court's reasoning in ***Wynne***, whether the intangible income at issue could be traced to any jurisdiction under a different definition of derived from or connected with is not relevant, because New York is not imposing tax thereon based on location. Therefore the location of the intangible personal property is not relevant to the imposition of tax in this case. If New York chose to source such property, article 16, section 3 requires that such sourcing must be to the taxpaying owner's state of domicile. However, the physical location of the intangible property is inconsequential to New York's imposition (as here) of a tax based on residency alone (***see Burton*** at 740 ["there is simply no language in Article 16, § 3 that expressly or implicitly constrains the State from imposing any other non-location-based taxes"]). Finally, two very recent, post-***Wynne,*** New York cases reexamined the same factual situation as is presented herein, and concluded that ***Wynne*** does not abrogate the Court of Appeals' holding in ***Matter of Tamagni*** (***see Edelman v New York State Dept of Taxation & Fin.***, 162 AD3d 574 [1st Dept 2018], ***appeal dismissed*** 32 NY3d 1216, No. 2018-1236, 2019 NY Slip Op. 66249 (March 26, 2019), ***cert. denied*** 589 US _____, Order No. 18-1570, October 7, 2019; ***Chamberlain v New***

York State Dept of Taxation & Fin., 166 AD3d 1112 [3d Dept 2018], ***appeal dismissed*** 32 NY3d 1216, No. 2018-1236, 2019 NY Slip Op. 66247 (March 26, 2019)).[3]

H. The petitions of David Russekoff and Amanda Nutile are hereby denied, and the Division's notice of disallowance dated August 17, 2015, and its notices of deficiency dated June 3, 2015 and April 4, 2016, are sustained.

DATED: Albany, New York
December 19, 2019

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[3] In ***Edelman***, the Court distinguished ***Wynne*** from ***Tamagni*** by noting "[f]irst, [***Wynne***] did not involve individuals who faced double taxation on intangible investment income by virtue of being domiciliaries of one state and statutory residents of another. Second, the income subject to tax in ***Wynne*** was not intangible investment income, but business income, traceable to an out-of-state source. Notably, New York tax law does not permit double taxation of such out-of-state income, but provides a credit for taxes paid to the other state." In turn, the Court in ***Chamberlain***, specifically accepted this analysis as persuasive and adopted the same in arriving at its result. Like the taxpayers in ***Edelman*** and ***Chamberlain***, this matter involves individuals who face double taxation on intangible investment income based on their status as domiciliaries of Connecticut and statutory residents of New York, and the result herein is controlled by these cases.