STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **JONATHAN ADAMS** for Redetermination of 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.	DETERMINATION DTA NO. 828793

Petitioner, Jonathan Adams, filed a petition for redetermination of 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.

By consent, petitioner, appearing pro se, and the Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted the matter for determination pursuant to 20 NYCRR 3000.12 based on documents and briefs to be submitted by June 12, 2020.

Based upon all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

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

1. Based on the audit of petitioner and the 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 disputed payment of $18,207.41 in full satisfaction of assessment number L-044511392. Petitioner's correspondence included the representation that he disagreed with the Division's findings and that he was a New York State attorney. The Division deemed the payment documents as a demand for a refund of the amount paid. 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 demand for the refund of his payment made in satisfaction of assessment number L-044511392.

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 conference was conducted on June 15, 2017, where afterwards the conferee sustained the statutory notice by order CMS No. 000273733, dated April 13, 2018.

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 it had originally sent the answer to on September 19, 2018.

9. During a pre-hearing conference call held on September 23, 2019, between the undersigned and the parties, petitioner indicated that he had 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[1] to petitioner at the address of 3545 NE 167th Street, #504, North Miami Beach, FL 33160.

11. By way of a consent, executed on October 23, 2019 and October 22, 2019, by the Division and petitioner respectively, the parties agreed to have the controversy determined on submission without hearing.

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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.

12. The initial scheduling letter issued by the undersigned 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. The small claims election was rejected as untimely (***see*** 20 NYCRR 3000.13), and the proposed additional evidence was not accepted for consideration because it was submitted after the established deadline (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

14. In petitioner's reply brief, petitioner asserts for the first time that the Division did not mail petitioner the answer, mailed such to the wrong address, or the United States Postal Service lost the answer.

15. The undersigned 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 asserts 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 of such. Petitioner anticipated using the proceeds of such 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 his 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 of 2012 he did pursue "full" renovations to the apartment with the plans of selling such. 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 of 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/or in person since 2011.

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 and used such 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 their 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. Petitioner's reply brief argues that during 2012, petitioner traveled to the following

locations:

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 Angles, 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 indicates that even after he purchased the Florida residence, he left his bed in apartment 5F in New York City.

CONCLUSIONS OF LAW

A. Section 3000.3 of the Rules of Practice and Procedure of the Tax Appeals Tribunal

(Rules) require that the commencement of a proceeding in the Division of Tax Appeals is performed by the filing of a petition. Petitioner performed such on July 10, 2018. One of the requirements of filing a properly completed petition is to provide a petitioner's address in the petition (***see*** 20 NYCRR 3000.3 [b] [1]). Petitioner did, in fact, provide an address in the petition; however, that address was later determined to contain an error. The Division of Tax Appeals acknowledged service of the petition in proper form on July 25, 2018.

B. Section 3000.4 of the Rules requires the Division's office of counsel to serve an answer on the petitioner, or petitioner's representative, within 75 days from the date the supervising administrative law judge acknowledged receipt of the petition. Logic dictates that the answer must be sent to the return address petitioner provides in the petition. Section 3000.4 of the Rules further requires that a copy of the answer with proof of service on the petitioner must be filed with the supervising administrative law judge of the Division of Tax Appeals. In the case at hand, the Division correctly mailed its answer to the Division of Tax Appeals but mailed its answer to a different address for the petitioner than that provided in the petition. The Division provides no explanation for taking such action and such appears to be nothing more than an error. The Division summarily argues that the error is inconsequential. The Division provides no analysis as to how the difference between the address provided in the petition and that the Division mailed its answer to were "inconsequential." Without providing appropriate legal support for the proposition that the difference in the addresses is "inconsequential," the Division's argument in this regard fails.

C. The Division argues that it timely filed its answer with the Division of Tax Appeals and the Division of Tax Appeals mailed its acknowledgement letter to petitioner's address as provided in the petition. The Division avers that because of those facts, and the fact that it

mailed a copy of the answer to the appropriate address on September 23, 2019, some 426 days after the Division of Tax Appeals' acknowledged receipt of the petition, such cures any defect in its original two mailings of the answer to an address that is different from that reflected in the petition. Since the Division failed to serve its answer on the petitioner at his address as provided in the petition within 75 days from the date the Division of Tax Appeals acknowledged receipt of the petition, it is concluded that the Division did not properly comply with the Rules and did not timely serve its answer in this matter. The fact that the address provided in the petition eventually turned out to contain a mistake is of no consequence. Moreover, the difference between petitioner's actual address and that provided in the petition may have been inconsequential since during the September 23, 2019 pre-hearing conference between the parties and the undersigned, petitioner did not assert or challenge that he did not receive the Division of Tax Appeals' acknowledgement letter that had been sent to the address provided in the petition. Rather petitioner complained that he never received the answer the Division supposedly served.

D. The failure of the Division to properly serve its answer results in the admission of all material allegations of fact set forth in the petition (***see Matter of Forest City Enterprises, Inc.,*** Tax Appeals Tribunal, May 19, 2016).

E. Tax Law § 605 (b) (1) (A) and (B) and New York City Administrative Code § 11-1705 (b) (1) (A) and (B) set forth the definition of a New York State and New York City resident individual for income tax purposes as follows:

> "Resident individual.
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> A resident individual means an individual:
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> (A) who is domiciled in this city, unless (i) [h]e maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or ...

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

F. The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their worldwide income (***see Zanetti v New York State Tax Appeals Tribunal***, 128 AD3d 1131 [3d Dept 2015], citing Tax Law §§ 612, 631).

G. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State or City. Since the Division is deemed to have admitted the assertion in the petition that petitioner was within New York State for 177, or less than 184, days, this matter involves only the first, or "domicile" basis upon which New York State or City resident tax status may apply.

H. The Division's regulations define "domicile," at 20 NYCRR 105.20 (d), 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.
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> (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

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2 The definition of a New York City statutory resident is identical to the definition of a New York State statutory resident, except for substitution of the term "City" for "State" (***compare*** Administrative Code § 11-1705 [b] [1] [B] ***with*** Tax Law § 605 [b] [1] [B]).

> 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.
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> * * *
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> (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."

I. 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 [3d Dept 1976]). 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 [Surr. Ct. West. Co. 1943], ***affd*** 267 App Div 876 [2d Dept 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 that 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]).

J. The concept of intent was addressed by the Court of Appeals in ***Matter of Newcomb***:

> "Residence means living in a particular locality, but domicile means living in that locality with the 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.
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> * * *
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> 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. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect.... Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile .... There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration."

K. 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" (***see Matter of Simon***, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are the retention of a permanent place of abode in New York, the location of business activity, the location of family ties, the location of social and community ties and formal declarations of domicile.

L. With respect to the factor regarding the retention of a permanent place of abode, based on petitioner's 2012 tax filings, there is no question that petitioner maintained his residence at apartment 5F in New York City throughout 2012. Retention of a permanent place of abode in the location of the historic domicile is a factor in consideration of the domicile issue (***see Matter of Gray v Tax Appeals Trib. of State of N.Y.***, 235 AD2d 641 [3d Dept 1997], ***confirming Matter of Gray***, Tax Appeals Tribunal, May 25, 1995). Furthermore, petitioner's own tax filings reflect that he filed as a resident of New York City the following year, 2013, with the address of his

historic domicile of apartment 5F, in New York City. Factors, including the location of business activity in Florida and not New York, the location of his family ties in Florida, and his ownership of a residence in Florida, show evidence of petitioner's interest in making Florida his domicile. Travel to Florida, moving a few prized possessions to Florida, changing his driver's license and voting registration to Florida also show evidence of an interest in changing his domicile. However, those factors cannot outweigh the fact that petitioner's own tax filings show he was a resident of New York City for both 2011 and 2013, the immediately preceding and subsequent years to the year in question. This fact combined with the fact that petitioner maintained a residence in New York City for the entire year at issue, spent significant portions of the year at issue traveling to several locations other than Florida, most of his near and dear possessions were not moved to Florida until after the year at issue, and he in fact spent a significant portion of the year at issue, 177 days, in New York weigh strongly against petitioner's claim that for 2012 he abandoned his domicile of New York and switched such to Florida.

M. Accordingly, it is concluded that petitioner has 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 at issue. As such petitioner is taxable as a resident individual of New York State and New York City for 2012.

N. Petitioner requests equitable relief based upon how he believes the Division's representative carried out his duties related to this matter. Petitioner has not provided the undersigned with any appropriate guidance, in either statute or case law, that would establish a basis for granting equitable relief to him (***see Matter of Goodspeed***, Tax Appeals Tribunal, January 29, 2009).

O. The petition of Jonathan Adams is denied, and the refund denial letter dated October 17, 2016, is sustained.

DATED: Albany, New York
December 10, 2020

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE