STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

JAMES E. SIMON

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the year 1980.

DECISION
DTA NO. 801309

Petitioner, James E. Simon, 219 Hartford Avenue, Buffalo, New York 14223, filed an exception to the determination of the Administrative Law Judge issued on August 19, 1988 with respect to his petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1980 (File No. 801309). Petitioner appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner filed a brief on exception. The Division did not submit a brief. Oral argument was requested by petitioner but was denied.

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

ISSUE

Whether, during the year at issue, petitioner was a domiciliary of New York State who maintained a permanent place of abode in New York, spent more than 30 days in New York or did not maintain a permanent place of abode outside the State, and was thus taxable as a full-year resident individual.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination except that we modify finding of fact "1". Such facts may be summarized as follows.

Finding of fact "1" is modified to read as follows:

> Petitioner, James E. Simon, and his wife, Virginia A. Simon, timely

> filed a 1980 New York State Income Tax Resident Return. On their return petitioner and his wife elected a filing status of "Married filing separately on one return".

On April 12, 1984, the Division of Taxation issued to petitioner, James E. Simon, a Notice of Deficiency for the year 1980 asserting $1,878.99 in tax due,plus interest of $676.75, for a total amount due of $2,555.74. As indicated in a Statement of Audit Changes issued to petitioner on April 2, 1984, the Division's issuance of the aforementioned Notice of Deficiency was premised on its position that petitioner had a New York domicile during the year at issue and was therefore taxable as a full-year resident individual. On his return petitioner reported as his total income $25,776.00. He claimed a New York subtraction of $26,428.00 as "Non NYS Income". He reported $75.00 as his Total New York Income.[1]

Petitioner, a native of the Buffalo, New York area, moved from Buffalo to Miami, Florida on September 1, 1978. Prior to his move, petitioner had been employed at the State University of New York at Buffalo for about eight years, and he had completed work on his doctorate. The completion of work on his doctorate caused employment opportunities to arise for petitioner. One such opportunity arose at the University of Miami, and it was this opportunity which prompted petitioner's move to Florida in 1978. While in Florida, petitioner rented apartments located in Miami. From September 1, 1978 through August 31, 1979 he rented an apartment at West 82nd Street in Miami and from September 1, 1979 through August 31, 1981 he rented an apartment on North Kendall Drive in Miami. Petitioner borrowed furniture from the University of Miami to furnish his apartments.

During the period he maintained a residence in Florida, petitioner continued to maintain a home in Buffalo. He had owned this home, located at 219 Hartford Avenue in Buffalo, for about 25

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[1]Given the apparently incorrect calculations on petitioner's return it should be noted that the Division recomputed petitioner's New York income as follows:

Total New York income reported	$ 75.00
Federal income not included	25,701.00
Total New York income corrected	$25,776.00

years. Petitioner continued to pay property taxes on his home. Petitioner's wife and sons continued to reside at the Hartford Avenue home. Petitioner was married during the period discussed herein, but was experiencing marital difficulties. Notwithstanding such difficulties, he continued to provide financial support to his wife and their two sons, then about 17 and 20 years old. During the period he maintained an apartment in Florida, petitioner returned to his home in Buffalo during summers and holidays. His wife visited him in Florida on occasion and often stayed for a month or longer. One of his sons also visited him in Florida. Petitioner obtained a Florida driver's license soon after he moved there. He also kept his New York driver's license for a long period of time following his move to Florida.

Petitioner subsequently moved to Scranton, Pennsylvania in September 1981 to take a job with the University of Scranton in that University's Department of Physical Therapy. Petitioner spent the summer preceding his move to Scranton at his home in Buffalo. Petitioner lived in Scranton until January 1988. While in Scranton he rented furnished apartments. During the time he lived in Scranton petitioner, as he had done while living in Florida, continued to maintain his home in Buffalo, continued to support his wife and sons, and continued to return home to Buffalo during holidays and summers. In January 1988 petitioner moved back to his home at 219 Hartford Avenue, Buffalo, and once again took up residence with his wife. He returned to Buffalo following his acceptance of a job at D'Youville College in Buffalo. At hearing petitioner explained that “I’m getting pretty close to retirement. I thought I’d take on that job and then retire”.

OPINION

In the decision below, the Administrative Law Judge concluded that petitioner was a resident individual of New York State for personal income tax purposes for the year 1980. Specifically, it was determined that petitioner failed to show that he intended to abandon his New York domicile and to acquire another domicile in either Florida or Pennsylvania. As a result, the Notice of Deficiency issued to petitioner on April 12, 1984 asserting tax due for the year 1980 was sustained.

On exception petitioner contends that he not only abandoned his New York domicile, but that he also established new domiciles in Florida and then in Pennsylvania. Specifically, petitioner argues

that the facts he presented establish the requisite intent to work such a change. Alternatively, petitioner claims that the official New York State publications do not provide adequate assistance for one attempting to change his domicile and that he relied on these in attempting to do so. As a result, petitioner contends that he was not a resident individual of New York State for personal income tax purposes for the year 1980.

In response the Division of Taxation relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge in its entirety.

Section 605(a) of the Tax Law defines a resident individual as one:

> "(1) who is domiciled in this state, unless (A) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .
>
> "(2) 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, unless such individual is in active service in the armed forces of the United States."

While the Tax Law does not contain a definition of domicile (compare, Surrogate Court Procedure Act, § 1103[15]), the Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part, as follows:

> "Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he 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 his 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 his 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, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.
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> * * *
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> "(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home.

> In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Subdivision (e)(1) of said regulation defines permanent place of abode as:

> ". . . a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode."

In order to create a change of domicile, both the intention to make a new location a fixed and permanent home and actual residence at that location must be present (Matter of Minsky v. Tully, 78 AD2d 955). Explaining the difference between residence and domicile the Court of Appeals stated:

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile." (Matter of Newcomb, 192 NY 238, 250.)

The test of intent with respect to a purported new domicile has been stated as "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 Bodfish v. Gallman, 50 AD2d 457, 458 [quoting Matter of Bourne, 181 Misc 238, 246, affd 267 AD 876, affd 293 NY 785]). Further, the standard for evidence supporting the intention to make a change of domicile requires the evidence to be clear and convincing (Matter of Bodfish v. Gallman, supra, at 458; Ruderman v. Ruderman, 193 Misc 85, 87, affd 275 AD 834). Even moves to other states where permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, revg 77 AD2d 725; Matter of Nask, Tax Appeals Tribunal, September 29, 1988).

Petitioner has failed to prove that he intended to change his domicile from New York State to either Florida or Pennsylvania. The facts indicate that the moves were not made with the intention of acquiring a fixed and permanent home in either Florida or Pennsylvania. Throughout his residency in both Florida and Pennsylvania petitioner continued to own and maintain his home in

Buffalo. In addition, petitioner's wife and children continued to live in the home. Further, petitioner made frequent and extended visits to his Buffalo home while he resided in Florida and Pennsylvania. Ultimately petitioner returned to his Buffalo home. These facts are indicative of a lack of intent by petitioner to abandon his New York domicile. Further, the record reveals that petitioner rented apartments in Florida and Pennsylvania and did not purchase any furniture indicating a lack of intent to make either Florida or Pennsylvania his fixed and permanent home.

As a result, we conclude that petitioner did not meet his burden of proving that he intended to abandon his New York domicile and acquire a new domicile elsewhere by clear and convincing evidence. While the question is one of fact, the circumstances here dictate our result. Intent must be determined from the facts presented and the facts before us do not indicate a change in domicile. While petitioner did take some affirmative steps towards such a move by acquiring a Florida driver’s license for example, the facts taken as a whole are not in his favor.

Lastly, we address petitioner's assertion that he detrimentally relied upon official New York State publications to assist him in an attempt to change his domicile. A change in domicile is not a form of chess where a given set of manuevers, of themselves, will carry the day for a taxpayer claiming to have changed his domicile. Instead, the taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct. Publications of the Division of Taxation could at best provide examples of the objective facts and circumstances upon which other taxpayers have relied to establish their genuine subjective intent. These publications cannot themselves develop a taxpayer's intent to change his domicile. The intent must, of course, come from the taxpayer himself.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, James E. Simon, is denied;

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

3. The petition of James E. Simon is denied and the Notice of Deficiency issued on April 12, 1984 is sustained.

Dated: Albany, New York
March 2, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner