

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JACK SILVERMAN (DECEASED) : DECISION
AND FRANCES SILVERMAN (DECEASED) :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law for :
the Years 1978 through 1982. :

Petitioners, Jack Silverman (Deceased) and Frances Silverman (Deceased) c/o Pegg & Pegg, 370 Lexington Avenue, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on March 24, 1988 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 through 1982 (File No. 802313). Petitioners appeared by John P. Zampino, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioners filed a brief on exception. The Division filed a Memorandum of Law in response. Oral argument was heard, at the request of petitioners' representative, on December 13, 1988.

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

ISSUE

Whether petitioners were domiciled in, and residents of, the State of New York during the years 1978 through 1982, inclusive.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Prior to 1978, Jack Silverman and Frances Silverman, husband and wife (hereinafter the "Silvermans"), were domiciliaries and residents of the State of New York. Their 1977 New York State Income Tax Resident Return bore the home address 847 Ivy Hill Road, Woodmere, New York, and was marked "Final Return." The Silvermans did not file New York State returns for the years subsequent to 1977.

On January 31, 1985, the Division of Taxation issued two statements of personal income tax audit changes to the Silvermans whereon adjustments were made for each year at issue holding their income taxable to New York State based on the same explanation:

"Based upon audit, you have been deemed to be residents of New York State.

Per Sec. 102.2(2),(4),(5)(e) of the personal income tax regulations."

On April 8, 1985, the Division issued two notices of deficiency against the Silvermans:

- (a) one asserting New York State personal income tax for the years 1978, 1979 and 1980 of \$104,994.00, plus interest of \$65,541.61, for a total due of \$170,535.61; and
- (b) the other asserting New York State personal income tax for the years 1981 and 1982 of \$18,159.00, plus interest of \$5,411.98, for a total due of \$23,570.98.

In 1961, the Silvermans purchased a house located at 847 Ivy Hill Road, Woodmere, New York, at a cost of \$65,000.00. In 1967, they spent \$70,000.00 to \$80,000.00 on capital improvements to the house.

In or about 1935, Jack Silverman founded a business known as Modern Maid Food Products, Inc. ("Modern Maid"). Said business, which had its principal place of business in New York, was engaged in the manufacture and sale of flour mixtures for doughnuts, waffles and other food items.

Modern Maid became a publicly-held corporation in 1969. The Silverman family owned approximately 15 percent of the stock, which was the controlling interest. Jack Silverman was the president and chairman of the board of directors of Modern Maid.

In or about 1974, the Silvermans leased an apartment located at 333 Sunset Avenue, Palm Beach, Florida. Said apartment consisted of three bedrooms, three bathrooms, a kitchen, a dining room, a living room and a balcony.

Prior to 1978, Jack Silverman resigned as president of Modern Maid and his son, Stanley Silverman, became president. However, Jack Silverman retained his position as chairman of the board. At this time, Jack Silverman was basically in semi-retirement. He did not work for Modern Maid every day during this period.

In February 1978, all the stock of Modern Maid was acquired by Spillers Limited, a United Kingdom corporation. Subsequent to said acquisition, Jack Silverman was provided with a small office at Modern Maid to be used when he was in New York.

Subsequent to the acquisition, Jack Silverman rendered services to Modern Maid as a consultant. Initially he rented an office in Palm Beach, Florida. Such office was maintained for only a few months. Subsequently, any services rendered to Modern Maid by Jack Silverman from Florida were so rendered from the Florida apartment. As a consultant, his compensation was substantially reduced from what it had been prior to the acquisition.

The Silvermans spent in excess of \$34,000.00 to decorate their Florida apartment. Their most valuable possessions were moved to Florida. Such items included art work, silverware, china, jewelry, furs and personal memorabilia. The Silvermans did not move the furniture situated in their Woodmere home to Florida. The furniture was not suitable for the decor of the Florida apartment and the Silvermans believed that the Woodmere home would be easier to sell if it was shown furnished. The Florida residence was always ready for use. The Silvermans entertained quite often in Florida and family members and friends stayed overnight.

In May 1975, the Woodmere house was listed with a real estate broker and was offered for sale at \$200,000.00 through newspaper advertisements. In August 1975, the asking price was reduced to \$125,000.00. After 1975, Jack Silverman spoke to the broker a few times per year with respect to the sale of the Woodmere house.

The record is not clear with respect to the period of time for which the Woodmere house was offered for sale. The record is also unclear as to the degree of effort made to sell the house. One real estate broker testified that the house "wasn't on the market from '75 to '80. It was off the market for a while. I relisted it, not completely off, but it wasn't that active. As I said, I would call and say, may I show the house?" She further testified that the house went on the active market in 1982 for about \$500,000.00. Then it was reduced to \$475,000.00 and subsequently to \$399,000.00. The Woodmere house was eventually sold in 1983 for \$380,000.00.

Ms. Ethel Washington, the Silvermans' live-in housekeeper for over 30 years, testified that the Silvermans kept the Woodmere house "so when they come home to visit the children, they would have somewhere to stay and then when they went on trips, they would leave from New York." During the years at issue, the Silvermans generally came to New York during the summer months. The Silvermans were not particularly anxious to dispose of the Woodmere house. Jack Silverman would not sell the house unless he received what he felt was a good price. He believed that, if he sold the house, it would cost more to stay at a hotel when he and his wife came to New York during the summer months than it would cost to retain the house.

During the years at issue, Jack Silverman maintained his membership in the Woodmere Club, Inc., a New York country club. Review of the statements from said club shows that for 1978 and 1979, the January through April statements were sent to Mr. Silverman's Florida address, while the May through December statements were sent to his New York address. For the years 1980, 1981 and 1982, all statements were sent to the New York address. Such review also discloses that Mr. Silverman used the club's facilities on numerous days during the months of May through November of each year at issue.

Review of a check analysis prepared by the auditor for each year at issue shows substantially more checking account activity in New York than in Florida. Although most of the New York activity was during the summer months, many checks were written for New York expenditures during the balance of each year.

Mr. Silverman and/or Mrs. Silverman spent the following number of days in New York during the years at issue:

<u>Year</u>	<u>Days in New York</u>
1978	175
1979	176
1980	213
1981	144
1982	155

On many occasions when Jack Silverman travelled outside of Florida, Frances Silverman would remain with Ethel Washington, their housekeeper, at the Silvermans' Florida home.

During two of the years at issue, the Silvermans subscribed to the South Shore Record, a local New York newspaper. The Silvermans maintained their memberships in a New York religious temple and made contributions to New York political campaigns. In 1981, Mr. Silverman owned two automobiles: a Cadillac in Florida and a Pontiac in New York. The Cadillac was registered in Florida in 1978. Mr. Silverman was a member of the Board of Directors of Long Island Jewish Hospital, a New York hospital. He also maintained his affiliation with the United Jewish Appeal Federation in New York. Additionally, he was very involved with Boys' High School in Brooklyn and helped found the school's annual reunion.

According to the Silvermans' Federal tax returns, Jack Silverman was a partner in Landoil '79 Associates, a New York partnership, during the years 1979 through 1982, inclusive. Said returns also showed that during 1982 Jack Silverman was a partner in two other New York partnerships, Exeter Company and Fairfax Company.

Robert Pegg, C.P.A., tax advisor and financial advisor to the Silvermans, advised them to spend less than 183 days in New York during each year at issue. The Silvermans spent more than 183 days in New York during 1980 solely due to major hip surgery which Frances Silverman had undergone in New York. Such surgery and subsequent recovery necessitated her presence in New York for at least 30 days.

The Silvermans had a safe in their Florida home and a safe deposit box at First American Bank in Palm Beach, Florida. They also maintained a safe deposit box in New York. They kept most of their clothing in Florida.

The Silvermans were members of various religious organizations and social clubs in Florida, including Temple Emanu-El, Jewish Federation of Palm Beach, Sisterhood Temple Emanu-El, Palm Beach Round Table, the Breakers, and a dinner club. They attended religious services at a temple in Florida. Frances Silverman performed volunteer work from time to time at a local hospital in Florida. During each year at issue, the Silvermans socialized and entertained in Florida, where most of their friends lived. When in New York, they entertained only members of their immediate family. The Silvermans visited physicians in both Florida and New York.

On January 24, 1979, the Silvermans filed a Florida Declaration of Domicile wherein Jack Silverman declared that both he and his wife became bona fide residents of Florida on November 29, 1977. On November 29, 1977, the Silvermans registered to vote in Florida. Jack Silverman voted in Florida on five occasions during the years 1978 and 1980. Three such votes were placed through absentee ballots. Frances Silverman voted in Florida on eight occasions during the years 1978, 1980, 1982 and 1984. Two such votes were placed through absentee ballots.

The Silvermans had Florida drivers' licenses. Frances Silverman's license was issued in 1978. The record contains no documentation establishing the year in which Jack Silverman's license was issued. Jack Silverman opened a checking account at First American Bank in Palm Beach, Florida in 1978. He also maintained charge accounts in Florida in 1978. The address reported on the charge account statements was that of his Florida home.

The Silvermans filed a Federal income tax return for each of the years at issue. On all returns, except that filed for 1979, they used their Florida address. The 1979 return was filed using the address "c/o Pegg & Pegg, 370 Lexington Avenue, New York, New York 10017." Federal forms K-1 (partner's information returns) issued to Jack Silverman for the years 1979

through 1982 listed the Florida address. The 1977 through 1981 wage and tax statements issued to Jack Silverman for his consulting services and pension from Modern Maid reflected his Florida address. Jack Silverman filed employer's quarterly tax returns for household employees during the years at issue. The Florida address was reported on each return. Various other forms filed with respect to his household employee listed the Florida address.

The Silvermans filed a Florida intangible property tax return for each of the years 1978 through 1982. On the 1978 return, the Silvermans reported the date they moved to Florida as November 29, 1977.

On July 15, 1981, Jack and Frances Silverman each executed a Last Will and Testament. Both wills provided that:

"FIRST: Authorization for New York Probate. Although I am a Florida domiciliary I authorize and direct my Executor, in its judgment and discretion, to offer this my Last Will and Testament and any Codicil to it for probate in a Surrogate's Court in the State of New York and direct that in such event the disposition of my property thereunder be governed by the laws of the State of New York."

Jack Silverman died on June 28, 1982. His obituary notice was placed in a New York newspaper. Frances Silverman died on August 2, 1985. Letters Testamentary on the Estate of Jack Silverman were issued by the Surrogate's Court of the County of New York on October 1, 1982. A certificate of letters testamentary dated October 15, 1982 states that Jack Silverman was "late of Florida". Letters Testamentary on the Estate of Frances Silverman were issued by the Surrogate's Court of the County of New York on September 30, 1985. A certificate of letters testamentary dated October 3, 1985 states that Frances Silverman was "late of the County of New York."¹

Both the United States and Florida estate tax returns filed for the Estate of Jack Silverman listed his domicile at time of death as Palm Beach, Florida. The name and location of the court where the will was probated or estate administered was reported as the New York County Surrogate's Court. Likewise, the United States Estate Tax Return filed for the Estate of Frances

¹This appears to be incorrect as there is nothing in the record to indicate that Frances Silverman ever lived in New York County. It is noted that the Silverman's Woodmere home was in Nassau County.

Silverman listed her domicile at time of death as Palm Beach, Florida and the name and location of the court where the will was probated or estate administered was reported as the New York County Surrogate's Court.

After the death of Jack Silverman in 1982, Frances Silverman lived in Florida at her Florida home. Since the years subsequent to 1982 are not at issue, the record contains no information with respect to her movements between Florida and New York from the time of Jack Silverman's demise to the time of her death.

Petitioner's representative submitted 117 requested findings of fact to the Administrative Law Judge. Requested findings of fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 25, 29, 32, 38, 41, 42, 45, 46, 47, 48, 50, 51, 53, 54, 55, 61, 62, 63, 69, 74, 75, 76, 79, 80, 81, 82, 83, 85, 86, 88, 89, 90, 94, 95, 96, 101, 102, 105, 106, 108, 109, 111, 113 and 116 were accepted and have been included in the findings of fact. Requested findings of fact 15, 18, 19, 34, 37, 40, 43, 52, 56, 66, 78, 92, 93, 97, 98, 99, 103, 114 and 115 were accepted in part. The accepted parts have also been included in the findings of fact. The rejected parts were mainly unsubstantiated. Requested findings of fact 17, 65, 67, 110, 112 and 117 were rejected as conclusionary in nature. Requested findings of fact 20, 21, 22, 23, 24, 26, 27, 44, 49, 60, 68, 72, 84, 91 and 104 were rejected as unsubstantiated. Requested findings of fact 13, 28, 30, 31, 33, 35, 36, 39, 57, 58, 59, 64, 70, 71, 73, 77, 87, 100 and 107 were rejected as irrelevant.

OPINION

The Administrative Law Judge determined that, according to the record, petitioners failed to establish a change in domicile from New York to Florida during the years at issue. In concluding that petitioners were residents of New York, pursuant to section 605(a)(1)(A) of the Tax Law, during each of the years 1978 through 1982, inclusive, the Administrative Law Judge denied their petition and sustained the notices of deficiency that were issued against them on April 8, 1985.

On exception, petitioners contend that the Administrative Law Judge did not include all facts favorable to the petitioners in the determination, and that they established by clear and convincing evidence their intention to make Florida their permanent home.

We affirm the determination of the Administrative Law Judge.

First we must examine petitioners' exceptions to the findings of fact by the Administrative Law Judge. Petitioners claim:

1. that subsequent to the sale of Modern Maid, petitioner Jack Silverman was provided with a "minimum" office and such office was not extensively used by petitioner,
2. that it was clear from the record that good faith attempts were made to sell the Woodmere real estate, and that it was consistently on the market,
3. that there was no evidence in the record to indicate that statements from the Woodmere Country Club were sent to petitioners' address in New York, or that the club was used on numerous occasions by petitioner Jack Silverman during the months of May through December at each year in issue,
4. that checking account activities on the part of petitioner Jack Silverman with New York entities does not establish that the payors were in New York,
5. that petitioner Jack Silverman was not actively engaged as a partner in several partnerships reported on his Federal income tax return, but rather that the losses generated by certain partnership investments indicated that they were passive investments,
6. and that in general, petitioners object to the Administrative Law Judge's rejection of the Requested Findings of Fact of Petitioner on the basis that they were unsubstantiated or conclusory in nature.

After extensive review of the record, we find no support for the claim that the Administrative Law Judge misconstrued or otherwise misinterpreted the facts concerning petitioner's office following the sale of Modern Maid, or the payment of New York expenditures throughout each year.

We also find ample evidence in the record to support the Administrative Law Judge's finding that statements from the Woodmere Country Club were sent to petitioners' address in New York, and that the club in question was used numerous times during the months of May through November of each year at issue. We reviewed each of the collected invoices, and found the actual Woodmere address on those dated May through December. Also included on these monthly statements is an itemized list of the activities engaged in at the club, which supports the factual finding that these facilities were used on numerous days during the months of May through November of each year at issue.

In regard to petitioner Jack Silverman's activities as a business partner in Landoil '79 Associates, the Exeter Company and Fairfax Company during the years at issue, the Administrative Law Judge found as a fact that Jack Silverman was a partner and correctly concluded that petitioner maintained business ties in the State of New York. The Administrative Law Judge did not describe the level of Jack Silverman's activity but simply concluded that petitioners' Federal tax returns clearly showed a continued business relationship with businesses in the State of New York throughout the period at issue.

We find each of petitioners' above enumerated exceptions to be without merit, in that the facts as stated by the Administrative Law Judge correspond with the documentary and testimonial evidence of record. The exception dealing with the sale of the Woodmere home will be subsequently explored in depth, as this finding of fact relates directly to whether petitioners intended to establish themselves as domiciliaries of Florida.

With regard to the issue of domicile, 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.

* * *

"(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."

To effect a change of domicile, there must be an actual change in residence, as well as an intention to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 AD2d 444, 445). The absolute and fixed intention to abandon one domicile and acquire another must, however, be established by clear and convincing evidence (see, Matter of Bodfish v. Gallman, 50 AD2d 457). According to Tax Law section 689(e), the burden of proof is upon petitioners to show that the necessary intention to effect a change in domicile existed. In the present case, petitioners did not establish by clear and convincing evidence that they intended to change their domicile from New York to Florida.

The record reveals that in 1961, petitioners purchased a home in Woodmere, New York. Some thirteen years later, in 1974, petitioners began leasing an apartment in Palm Beach, Florida. The record also indicates that petitioners placed their New York home on the market in May, 1975, and in 1983, it was finally sold. The Administrative Law Judge properly determined that the record is not clear with respect to the period of time for which the New York house was offered for sale, for there exists conflicting testimony as to specifically when the house was actually on the market and when the house was specifically being shown. While it is clear that efforts were made to sell the Woodmere home, it is not clear what degree of effort was made.

The degree of effort made to sell the home is an important factor in determining whether petitioners remained domiciled in, and were resident individuals of the State of New York, because it concerns the issue of intention. Intention as it applies to domicile has long since been recognized by the Court of Appeals as an integral component in making such a determination, when it stated in Matter of Newcomb (192 NY 238, 250):

"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.

"The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change . . . 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 . . . 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

"This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice"

The uncertainty that surrounds the efforts to sell the New York residence clearly undermines petitioners' claim that they acquired a new domicile and abandoned the old.

Petitioners' retention of their home in New York during the years at issue is but one of the elements to be considered in this process, however. In addition to the failure to dispose of the home in Woodmere, petitioners were engaged in various other affiliations within the State of New York throughout this period. The record indicates that petitioner Jack Silverman maintained his membership in the Woodmere Club during the years at issue, and upon his return to New York during the months of May through November, used the club's facilities as well. In 1981, petitioner maintained an automobile in New York. Throughout the period at issue, he maintained a safe deposit box in New York as well. It is also important to note that on July 15, 1981, petitioners each executed a Last Will and Testament which included an authorization for

New York probate. In addition, petitioners continued their membership in a New York religious temple, engaged in substantially more checking account activity in New York than in Florida, and maintained their subscription to their local New York newspaper.

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, *supra*). While petitioners may have moved to Florida in order to establish a residence, they have not provided clear and convincing evidence of an intent to change their domicile such as would warrant a reversal of the Administrative Law Judge. (see, Matter of Zinn v. Tully, 54 NY 713, *revg* 77 AD2d 725).

Although petitioners filed a Florida Declaration of Domicile on January 24, 1979, declaring that they had become bona fide residents of Florida on November 29, 1977, as well as registered to vote in Florida and obtained Florida drivers' licenses, courts have recognized the "self-serving nature" of these formal declarations when used as evidence to affirmatively establish new domicile (Wilke v. Wilke, 73 AD2d 915, 917). These formal declarations are less persuasive than the informal acts of an individual's "general habit of life" (Matter of Trowbridge, 266 NY 283, 289). However, regardless of the weight of these factors, in light of the extent and number of affiliations petitioners maintained with the State of New York, they have not sustained their burden of proving their intent to establish Florida as their new domicile during the years at issue.

For these reasons, we affirm the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of the petitioners, Jack Silverman (Deceased) and Frances Silverman (Deceased) is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jack Silverman (Deceased) and Frances Silverman (Deceased) is in all respects denied; and

4. The notices of deficiency issued on April 8, 1985 are sustained.

DATED: Troy, New York
June 8, 1989

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner