STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

RUDOLPH (DEC'D) AND LORETTA ZAPKA : DECISION

for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law
for the Years 1980, 1981 and 1982. :

Petitioners, Rudolph (Dec'd) and Loretta Zapka, 29 Durand Place, Manhasset, New York 11030, filed an exception to the determination of the Administrative Law Judge issued on September 9, 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 1980, 1981 and 1982 (File No. 804111). Petitioners appeared by Samuel Oser & Associates, P.C. (Samuel Oser, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation submitted a letter in lieu of a brief.

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

ISSUES

I. Whether petitioners have established that they were residents of the State of Florida and not of the State of New York during the years 1980, 1981 and 1982.

II. Whether petitioners' filing of an almost entirely blank unsigned Form IT-203 for 1980 constitutes the filing of a return.

FINDINGS OF FACT

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

Petitioners, Rudolph (Dec'd) and Loretta Zapka, husband and wife, moved to New York State in or about 1975. This move to New York was made in connection with Mr. Zapka's transfer as an employee of Sears, Roebuck and Co. ("Sears") from Chicago, Illinois to New York. Prior to this move the Zapkas had lived in Chicago, Illinois for the major portion of their married life. Upon moving to New York, the Zapkas purchased a home located at 29 Durand Place, Manhasset, Long Island, New York. Mr. Zapka continued to work for Sears until his retirement in late 1978. Upon Mr. Zapka's retirementfrom Sears, the Zapkas contacted a personal friend who owned a fully furnished condominium located at 2121 North Ocean Boulevard, Boca Raton, Florida. Petitioners arranged to lease this condominium in Florida on a renewable, annual basis commencing in 1979 at a monthly rental payment of $745.00

Commencing on January 6, 1979, and continuing through Mr. Zapka's death in January of 1983, petitioners' general pattern was to live in this condominium in Florida from January through approximately May. Petitioners would then drive to the northeast and, during the month of June, petitioners would visit their two daughters, living respectively in Springfield, Virginia and Norwood, Massachusetts, for a period of approximately two weeks each. Petitioners would then spend an additional period of approximately two weeks visiting friends and relatives in Chicago, Illinois. Thereafter, in or about mid-July, petitioners would drive to New York and live in their Manhasset, Long Island home until approximately mid-October, at which time petitioners would return by car to the Florida condominium. As noted, the Florida condominium was furnished, and petitioners' personal belongings and furnishings remained in the Manhasset, Long Island home.

Petitioners did not purchase the condominium they stayed in or any other residence in Florida, but continued to lease the same condominium through the period in question. Likewise, petitioners did not sell their home in Manhasset, Long Island, but continued to own said home. These decisions were both based upon the advice of their accountant and tax adviser (and representative herein), one Samuel Oser, C.P.A. Mr. Oser's advice not to purchase a

condominium in Florida was based on the recommendation that since interest rates during said period were comparatively high, petitioners could (and did) earn more money in interest on their investments than they were paying to rent the condominium. Further, Mr. Oser advised petitioners not to sell their Manhasset, Long Island home based upon his belief that the value of said home would increase dramatically over the course of time. Mr. Oser estimated the value of the Manhasset home at approximately $375,000.00 in the early 1980's, and estimated its current value at approximately $750,000.00.

At or about the time of initially leasing the condominium in Florida, petitioners filed certain documents in the State of Florida, including a Declaration of Domicile (filed December 20, 1978). Petitioners also registered to vote in Florida, although it is not known if petitioners in fact voted during the years in question. Petitioners registered their automobile in Florida, and obtained Florida driver's licenses. Petitioners maintained bank accounts both in Florida and in New York State, and also had certain investments administered through a bank in Chicago, Illinois. Petitioners maintained a safe deposit box in Manhasset, New York. The Zapkas filed Florida intangible tax returns for each of the years in question, listing their address thereon as 2121 North Ocean Boulevard, Boca Raton, Florida. Petitioners' Federal income tax returns for the years in question were also filed listing the same address.

In or about November of 1982, while in Florida, petitioner Rudolph Zapka became seriously ill, suffered a stroke, and returned to New York for surgery and hospitalization. Mr. Zapka died shortly thereafter on January 26, 1983. Mr. Zapka's will had been drafted in Florida, and was also probated in Florida. For purposes of the probate proceeding, Mr. Zapka was deemed a domiciliary and resident of Florida. Mr. Zapka's body was buried in Chicago, Illinois. Mr. Zapka's estate paid New York State estate tax in the amount of $4,593.06, presumably based upon the value of the Manhasset, Long Island home. Subsequent to Mr. Zapka's death, Mrs. Zapka terminated the lease of the Florida condominium and has lived at the Manhasset, Long Island home at all times thereafter.

The Zapkas had no relatives living in New York during the years in question, nor were they engaged in any business activities in New York during the years in question. Petitioners owned certain securities as an investment (15 units of Municipal Securities Trust Series 6). While such securities were physically located in Manhasset, New York, they were not used in the conduct of any business. During the years in question, petitioners were members of the North Hempstead Country Club in Port Washington, Long Island, New York. There is no evidence of any other club memberships nor of any religious affiliations either in New York or in Florida. Form W-2P (Statement for Recipients of Periodic Annuities, Pensions, Retired Pay or IRA Payments) issued to petitioner Rudolph Zapka listed petitioners' Manhasset, New York address. There is no evidence that petitioners ever offered the Manhasset home for sale or made a purchase offer on any residence in Florida. Although not fully clear from the record, it appears that petitioners did not seek the advice of Mr. Oser regarding sale of their Manhasset home and purchase of a Florida residence until 1982.

For the year 1979, petitioners filed a New York State Income Tax Nonresident Return (Form IT-203) listing thereon their address as 2121 North Ocean Boulevard, Apartment 808, Boca Raton, Florida. This return was completely filled out and reflected a refund due in the amount of $1,446.00, which refund was issued to petitioners. For the year 1980, petitioners also filed a Form IT-203, attaching thereto the preprinted label showing the North Ocean Boulevard, Boca Raton, Florida address. The only other information on this return was a handwritten notation on the front of the form stating, "Not a Resident of New York State". This 1980 form was not signed and, other than the aforementioned handwritten notation, contained no information or entries as to petitioners' filing status, income, deductions or exemptions, etc.

On August 8, 1986, the Division issued to petitioners a Notice of Deficiency asserting additional personal income tax due for the years 1980 and 1981 in the aggregate amount of $3,980.70 plus interest. On the same date, the Division issued a Notice of Deficiency to petitioners asserting additional personal income tax due for the year 1982 in the amount of $951.60 plus interest. A Statement of Personal Income Tax Audit Changes previously issued to

petitioners on February 27, 1986 indicated the basis for issuance of these two notices of deficiency was the assertion that petitioners were taxable as residents of New York State for each of the three years in question.

OPINION

In the determination below the Administrative Law Judge decided that the petitioners did not establish that they were domiciliaries of the State of Florida and not of the State of New York during the years 1980, 1981 and 1982. Specifically, it was concluded that while petitioners did take some steps to change their domicile, they did not take sufficient measures to effectuate the change. The factors which weighed most heavily against petitioners were the retention of their home in New York State coupled with their return thereto for three months of each year. As a result, it was held that petitioners were properly subject to tax as resident individuals. Additionally, it was determined that the Division's issuance of a Notice of Deficiency for the year 1980 was not time barred as petitioners failed to file a return for the year at issue.

Petitioners take exception both to the conclusion that they were New York domiciliaries and to the conclusion that the Division was not barred by the statute of limitations from issuing an assessment for the year 1980. In particular petitioners claim that they never became domiciliaries of New York as it was only a temporary force of circumstances which required them to live in the State for a few years. As a result, petitioners seek to have the taxes and penalties imposed for the years 1980, 1981 and 1982 annulled. Additionally, petitioners assert that they properly filed New York State tax returns for the year 1980 such that the statute of limitations began to run for the year. Accordingly, petitioners argue that the notice issued for the year 1980 should be annulled for the additional reason that it was barred by the statute of limitations.

In response the Division contends that petitioners were domiciled in New York and never effectuated a change in their lifestyle significant enough to establish a new domicile in Florida. As support for its claim, the Division notes that petitioners retained their home in New York and continued to reside there for periods of time while they only rented a furnished condominium in

Florida. In addition, the Division asserts that petitioners did not properly file New York State tax returns for 1980 and that as a result the statute of limitations did not begin to run. Specifically, the Division claims that the mere submission of the 1980 Form IT-203, with only a handwritten notation and no signature, does not constitute a proper filing. Accordingly, the Division seeks to have the determination sustained in full.

We affirm the determination of the Administrative Law Judge.

Former Tax Law § 605(a), in effect during the period at issue, defined 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 . . .
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> (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."

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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> (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, 433 NYS2d 276). The substance of the matter was stated long ago by the Court of Appeals 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.
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> 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. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals. . . . 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. . . . every human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided

> there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention. . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animo revertendi.
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> . . . 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."

These basic principles have been restated and refined in numerous cases by a variety of courts in the years since they were laid down by the Court of Appeals (see, Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138; Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990, revg 77 AD2d 725, 430 NYS2d 419; Matter of Brunner, 41 NY2d 917, 374 NYS2d 621; Klein v. State Tax Commn., 55 AD2d 982, 390 NYS2d 686; Matter of Babbin v. State Tax Commn., 67 AD2d 762, 412 NYS2d 455; Matter of Nask, Tax Appeals Tribunal, September 29, 1988).

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). Moves to other states in which 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, supra).

Petitioners have failed to prove by clear and convincing evidence that they changed their domicile from New York to Florida. While a review of the facts indicates that petitioners took some steps towards changing their domicile (e.g., filing a Declaration of Domicile, automobile registration, driver's licenses, voting registrations, etc.) such review compels the conclusion that petitioners never gave up their New York domicile for one in Florida. The factors which weigh most heavily against petitioners are the retention of their home in Manhasset, New York accompanied by their return thereto for approximately three months each year. These factors, combined with the leasing of a furnished condominium in Florida by petitioners, militate against

the conclusion that petitioners intended to give up their New York domicile and establish a new domicile in Florida. While it must be granted that petitioners have ties to both New York and Florida which make it possible to formulate arguments in favor of petitioners having the intent to establish a domicile in either state, it is New York that must prevail as the domicile under these circumstances. The mere fact that persuasive arguments can be made from the facts in support of both Florida and New York as petitioners' domicile indicates that they have not clearly and convincingly evidenced an intent to change their New York domicile.

In addition, we reject petitioners' claim that they never intended to establish a domicile in New York. Specifically, petitioners contend that their move to New York was only a temporary one as an incident to a job transfer. Petitioners have failed to prove this claim and the facts indicate otherwise. The record indicates that petitioners' only remaining contacts with the State of Illinois were certain investments in a bank. On the other hand, petitioners bought a home in New York in which they resided as Mr. Zapka continued his employment with Sears. Thus, we conclude that petitioners were properly subject to tax as resident individuals of New York State for the years at issue.

The final issue which we will address concerns petitioners' claim that they filed their New York State tax return Form IT-203 for 1980 such that the statute of limitations began to run and eventually barred the Division from properly issuing a deficiency for 1980. We agree with the Administrative Law Judge that their submission of a Form IT-203 for 1980, which was totally blank except for an address and the notation "Not a Resident of New York State", does not constitute the filing of a return. In the absence of filing returns, the general three-year statute of limitations provided for by Tax Law § 683(a) does not govern. Thus, the Division's issuance of the notices of deficiency is not barred by the statute of limitations (Tax Law § 683[c][1][a]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners, Rudolph (Deceased) and Loretta Zapka, is denied;

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

3. The petition of Rudolph (Deceased) and Loretta Zapka is in all respects denied; and

4. The notices of deficiency as issued are sustained.

DATED: Troy, New York
June 22, 1989

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

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