STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HERMAN AND ROSALIND WECHSLER	:	DECISION DTA No. 806431
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1985.	:	
	:	

Petitioners Herman and Rosalind Wechsler, 4770 Fountains Drive South, Apt. 305, Lake Worth, Florida 33467 filed an exception to the determination of the Administrative Law Judge issued on October 4, 1990 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 year 1985 (File No. 806431). Petitioners appeared by Penn B. Chabrow, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq. of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a letter in opposition. Petitioners' request for oral argument was denied.

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 year 1985.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

Petitioners, Herman and Rosalind Wechsler, timely filed a New York State Nonresident Income Tax Return (Form IT-203) for the year 1985. Attached to the form was a City of New York Nonresident Earnings Tax Return (Form NYC-203) for the same tax year indicating that Dr. Herman Wechsler had received wages in the amount of $5,600.00 and self-employment income in the amount of $1,726.46 as a physician whose business address was listed as 69 Lake Shore Drive, Eastchester, New York. Also attached to petitioners' return for 1985 was a Form 1040, Schedule C indicating that Herman Wechsler, as a physician, earned income from both the Bronx Veterans AdministrationHospital and Mid-Borough Medical Group having stated a business address of 69 Lake Shore Drive, Eastchester, New York, and a Change of Resident Status (Form IT-360). The return further included a Form W-2 for 1985 indicating that Herman Wechsler had received $1,800.00 in wages from the University Nursing Home in Bronx, New York.

Until June 15, 1984, Dr. Herman Wechsler maintained a professional practice as a surgeon. At that time he chose to close his medical office in Bronx, New York and enter retirement. During 1985, 1986 and 1987 when Dr. Wechsler was in New York State for a few months of the year, he performed consulting work in the Bronx Veterans Administration Hospital and served on a peer review board for University Nursing Home. The work performed during these years was not the private practice of medicine but merely a service to the VA Hospital and the nursing home. In 1988 and 1989, he performed no VA Hospital services.

Dr. and Mrs. Wechsler lived in New York State from 1909 and 1919, respectively, until the end of 1984. Petitioners owned real estate located in New York State between 1957 and 1989 located at 69 Lake Shore Drive, Eastchester, New York.

Petitioners also own their residence located at 4770 Fountains Drive South, Apt. 305, Lake Worth, Florida where they claim to have been domiciled and resident since December 9, 1984. Petitioners maintain certain personal effects at their residence in Lake Worth, Florida.

On December 11, 1984, petitioners executed a Declaration of Domicile which states that petitioners' domicile is the State of Florida. According to Florida state law, a Declaration of Domicile is executed under penalty of perjury punishable by up to 20 years in a state prison.

Petitioners have registered to vote and have voted in Florida since 1985. Petitioners have continued such registration and have voted only in the State of Florida, having relinquished their rights to vote in New York as of the end of 1984. They have maintained all of their bank accounts in Florida and have a safe deposit box located in West Palm Beach County, Florida. In 1984, petitioners relinquished their New York State drivers' licenses and obtained licenses to operate motor vehicles in the State of Florida. They reregistered their automobiles in the State of Florida and have not maintained any cars registered in New York State since 1984.

Since January 1, 1985 petitioners have filed income tax returns with the Internal Revenue Service Center in Atlanta, Georgia bearing their Florida address. In addition, petitioners have filed intangible personal property tax returns with the State of Florida also bearing their Florida address since the 1985 tax year.

On February 2, 1985, petitioners executed Last Wills and Testaments under the laws of the State of Florida also stating they are residents of and domiciled in Palm Beach County, Florida. Petitioners are members of various clubs, religious institutions and organizations located in the State of Florida, including Lake Worth Jewish Center, Volunteer Ambulance of Lake Worth, Police Benevolent Association of Lake Worth, Women's ORT of Lake Worth, and Hadassah of Lake Worth.

Petitioners are affiliated with physicians in Palm Beach County, Florida. With respect to previously purchased cemetery lots in the Knights of Pythias Cemetery in New York State, when petitioners became permanent residents of Florida at the end of 1984, the cemetery lots were returned to the Knights of Pythias of which Mr. Wechsler was a member for more than 40 years.

We modify finding of fact "10" to read as follows:

> Petitioners maintained their New York property until October 1985. From October 1985 through February 1987, petitioners' son occupied the New

> York property as his primary residence as a result of domestic problems and the need to provide living quarters for himself and his four children. From February 1987 until the present time, petitioners' son made use of the New York property during periods of visitation and custody of his children. Petitioners' son, Robert Wechsler, provided an affidavit which was submitted into evidence affirming the dates of his residency at the New York property in Eastchester, New York.[1]

Submitted into evidence was the Advocate's Comments on Conciliation Conference prepared with respect to the tax year in issue after a conference was held in July 1988. It was determined that petitioners were present in New York State from April 19, 1985 to May 10, 1985 and from June 3, 1985 to October 31, 1985, a total of 174 days during that year. The Division of Taxation does not take issue with the finding that petitioners did not spend more than 183 days in New York State during 1985.

With respect to the Florida property, during 1980 petitioners signed a purchase agreement for an apartment in a building which was to be built. The projected closing date was February 1982. As a result, petitioners spent their vacation in Florida during 1982, 1983 and 1984. During 1984, as mentioned previously, Dr. Wechsler closed his medical practice in Bronx, New York and petitioners spent the remaining months of 1984 in New York State until December when they went to Florida and proceeded to establish residency there. During 1985, petitioners returned to New York for several visits spending nearly half the year there and living in their Eastchester home during their stay in New York.

We make the following additional finding of fact:

> A Notice of Deficiency dated November 17, 1987 was issued to petitioners in the amount of $5,959.23 in tax and $706.89 in interest for a total of $6,666.12. The Statement of Audit Changes dated March 18, 1987 attached to the Notice of Deficiency submitted to the Administrative Law Judge indicates that the deficiency was based on a recalculation of

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[1] The first sentence of the Administrative Law Judge's finding of fact "10" read as follows:

> "As previously stated, petitioners maintained their New York property during the year in question."

We modified this sentence to more accurately reflect the record.

petitioners' return for 1985 as New York residents and an adjustment related to a long-term capital gain.

OPINION

The Administrative Law Judge determined that petitioners had failed to establish by clear and convincing evidence an intent to change their domicile from New York to Florida for the year at issue and concluded that petitioners were taxable as residents of New York, pursuant to Tax Law § 605(a)(1), for the year 1985.

On exception, petitioners allege that they changed their domicile from New York to Florida in December 1984. As such, petitioners argue that the Division of Taxation (hereinafter the "Division") improperly applied Tax Law § 605(a)(1) and 20 NYCRR 102.2(a)(1) instead of Tax Law § 605(a)(2) and 20 NYCRR 102.2(a)(2) since petitioners established, by clear and convincing evidence, that they were not domiciled in New York in 1985, and spent less than 183 days in New York in 1985. In addition, petitioners assert that the Administrative Law Judge incorrectly distinguished decisions of the former State Tax Commission from the facts presented by petitioners.

The Division argues that the facts do not establish a clear intention on the part of petitioners to change their domicile prior to 1985, and, therefore, that the determination of the Administrative Law Judge should be sustained.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

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 (cf., SCPA 1103[15]). However, 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" (20 NYCRR 102.2[e][1]).

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.

> 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 Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990, revg 77 AD2d 725, 430 NYS2d 419; Matter of Brunner v. Hochman, 41 NY2d 917, 394 NYS2d 621; Matter of Babbin v. State Tax Commn., 67 AD2d 762, 412 NYS2d 455, affd 49 NY2d 846, 427 NYS2d 788; Matter of Klein v. State Tax Commn., 55 AD2d 982, 390 NYS2d 686, affd 43 NY2d 812, 402 NYS2d 396; Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138; 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).

Applying these basic principles to the facts presented here, we find that petitioners have failed to meet their burden of establishing by clear and convincing evidence their intention to change their domicile prior to 1985. While a review of the facts indicates that petitioners took many steps towards establishing Florida as their domicile (e.g., filing a Declaration of Domicile, automobile registration, driver's licenses, bank accounts, voting registrations, etc.) these formal declarations, which may be self-serving, must be considered in conjunction with the informal acts which show an individual's "general habit of life" (Matter of Trowbridge, 266 NY 283, 289; see also, Matter of Silverman, Tax Appeals Tribunal, June 8, 1989). The factors which weigh most heavily against petitioners are the retention of their home in Eastchester, New York and their return thereto for approximately six months in 1985. Petitioners' unexplained retention and use of their New York home for most of 1985, combined with Dr. Wechsler's limited medical consulting and service-oriented work to the VA Hospital and the nursing home, militate against the conclusion that petitioners intended to give up their New York domicile and establish a new domicile in Florida in 1984 (cf., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990 [where the petitioner's competent and credible testimony as to his intention to change his domicile to Florida, including an explanation of his retention of an abode in New York, in combination with evidence of the general conduct of his life during the period at issue, was found to establish the petitioner's change of domicile]).

Petitioners' claim that but for the domestic problems of their son, they would have sold their residence in New York. This assertion is not supported by the record. Petitioners waived a hearing and this matter was submitted to the Administrative Law Judge for determination based on documentary evidence and briefs. Petitioners' affidavit dated October 16, 1989 states

that petitioners' son occupied the home in Eastchester, New York "since December 1985." The affidavit submitted by petitioners' son indicates that his need to use the New York property as his residence arose in October 1985, when he became separated from his wife. Petitioners' son's use of the house starting in October 1985 (or December 1985) does not explain petitioners' retention and extensive use of the house during the first ten months of 1985.[2] Under these circumstances, petitioners' proof of their intentions with regard to giving up their New York home falls short of establishing by clear and convincing evidence that the requisite intent to change their domicile to Florida occurred in December 1984.

We turn next to petitioners' assertion that the Administrative Law Judge improperly distinguished the facts in Matter of Rush (State Tax Commn., September 28, 1983) and Matter of Sacks (State Tax Commn., February 6, 1985) from the facts submitted by petitioners. We disagree.

As previously stated, determinations of change of domicile are questions of fact which depend on a variety of individualized circumstances (Matter of Newcomb, supra, at 250). In the decisions cited by petitioners, the former State Tax Commission found that the petitioners in those cases had established the requisite intention to change their domicile, as well as the actual fact of a change. Each has facts which distinguish it from the case presented here.

For example, in Matter of Rush (supra), the petitioner (husband) changed his domicile from New York to Florida by purchasing a home before

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[2]Another explanation for petitioners' retention of their Eastchester home is provided in a letter from Dr. Wechsler to the Division dated November 6, 1987 which was submitted to the Administrative Law Judge as part of the Division's file. This explanation is not, however, referred to in future sworn documents or briefs submitted by petitioner and would appear, therefore, to have been superceded by the explanation contained in petitioners' sworn affidavit.

Petitioners' brief contains statements which appear to expand on petitioners' affidavit with regard to the Eastchester property (see, Petitioners' Brief, pp. 2 and 6). However, as there is no supporting evidence in the record for these statements, they cannot be considered by the Tribunal.

attempting to establish such change, setting up bank accounts, registering his car, and joining various business organizations in Florida. Although the petitioner's wife remained in their New York home to care for her ill mother, the facts indicate that Mr. Rush's change in domicile coincided with a relocation of his employer to Florida. Subsequent to the death of Mrs. Rush's mother, the petitioners sold their home in New York State. It was not unreasonable for the Commission to conclude that but for the illness of Mrs. Rush's mother, the Rush family would have moved to Florida and relinquished its significant ties to New York State through the sale of their New York home at the time of Mr. Rush's relocation.

In Matter of Sacks (supra), it is again the totality of the facts presented which supports the former State Tax Commission's conclusion that the petitioner was a non-domiciliary of New York. In particular, the petitioner adequately explained his remaining ties with New York. For example, although the petitioner retained his former permanent place of abode during the year in question, it was the residence of his wife, from whom he was in the process of getting divorced. The Commission noted that although the petitioner spent time in New York during the year in question, none of that time was spent at the former marital premises.

Unlike Matter of Sacks and Matter of Rush, petitioners' proof in the matter before us fails to contain an adequate explanation of their remaining New York ties. As a result, petitioners have failed to prove by clear and convincing evidence that they intended to change their domicile from New York to Florida prior to 1985.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Herman and Rosalind Wechsler is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Herman and Rosalind Wechsler is denied; and
4. The Notice of Deficiency dated November 17, 1987 is sustained.

DATED: Troy, New York
May 16, 1991

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner