

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PETER C. AUSNIT : DECISION
for Redetermination of a Deficiency or for : DTA No. 808144
Refund of New York State Personal Income Tax :
under Article 22 of the Tax Law and New York :
City Personal Income Tax under the Administra- :
tive Code of the City of New York for the Year :
1985. :

Petitioner Peter C. Ausnit, c/o Murray Appleman, Esq., 225 Broadway, 39th Floor, New York, New York 10007, filed an exception to the determination of the Administrative Law Judge dated November 5, 1992. Petitioner appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter brief in response. Oral argument, requested by petitioner, was denied. The six-month period to issue this decision began on April 14, 1993, the date by which petitioner could submit a reply brief.

Commissioner Jones delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUE

Whether petitioner was taxable as a resident individual either because he was a domiciliary of New York State and New York City for the year 1985, or because he maintained a permanent place of abode within New York State and City and spent more than 183 days in the State and City.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On August 8, 1988, the Division of Taxation ("Division") issued a Statement of Audit Changes to petitioner, Peter C. Ausnit, for the year 1985 wherein total income earned by petitioner from all sources was held taxable to New York State and City on the basis that petitioner was a domiciliary of New York State and City and was therefore taxable as a resident individual. On November 15, 1988, the Division issued a Notice of Deficiency to petitioner for the year 1985 asserting additional New York State personal income tax of \$753,981.74 and additional New York City personal income tax of \$269,627.63, plus interest, for a total amount of tax due of \$1,023,609.37.

For the year 1984, petitioner filed a New York State Resident Income Tax Return, Form IT-201. The resident return listed petitioner's address as "29 Round Hill Club Road, Greenwich, CT 06830", showed the preparer's address as "150 Great Neck Road, Great Neck, New York 11021", and bore a New York postmark. Among the properties which the return indicated were owned by petitioner during 1984 was a building located at 112 East 61st Street in New York City. The return was filed on June 17, 1985.

For the year at issue, petitioner filed a New York State Nonresident Income Tax Return, Form IT-203. The nonresident return listed petitioner's address as "29 Round Hill Club, Greenwich, CT 06830", showed the preparer's address as "150 Great Neck Road, Great Neck, New York", listed rental loss from property located at 112, 114 and 118 East 61st Street, New York, New York and listed income and losses from six New York partnerships. The return was filed on October 15, 1986.

For the year 1986, petitioner filed, on December 28, 1987, a New York State Resident Income Tax Return, Form IT-201. The return listed petitioner's address as "112 East 61st Street, New York, New York." For the years 1988 and 1989, petitioner filed Resident Income Tax Returns, Form IT-201. The returns listed petitioner's address as "112 East 61st Street, New York, New York" and showed the preparer's address as "150 Great Neck Road, Great Neck, New York 11021".

Petitioner was a real estate investor and principal shareholder of 525 Park Avenue Corporation, which owned the building located at 525 Park Avenue.

Petitioner and his wife were long-time domiciliaries of New York City and the State of New York prior to the year at issue. Petitioner, his wife and two children resided in the penthouse of 525 Park Avenue until 1982, when petitioner and his wife separated. Pursuant to a separation agreement dated April 1, 1982, petitioner's wife and children were to remain in the penthouse while petitioner was to reside in apartment 6C.

In May 1984, petitioner and the corporation sold the buildings located at 110 East 61st Street and 525 Park Avenue. It is unclear from the record whether petitioner vacated apartment 6C. Petitioner also owned at this time apartment buildings located at 895 Park Avenue, 112 East 61st Street, 114 East 61st Street and a commercial building located at 202 West 34th Street. All of these buildings are located in New York, New York.

On April 1, 1985, petitioner contracted to purchase a house at 29 Round Hill Club Road, Greenwich, Connecticut for \$1,200,000.00. In September 1985, petitioner purchased another home located at 15 Benedict Court, Greenwich, Connecticut. The utilities in the 29 Round Hill Club Road house were turned off in October 1985, and the house was sold in April 1986. Petitioner voted in Connecticut in 1985, applying for voting registration on April 4, 1985.

During 1985, petitioner wrote numerous checks to various businesses and organizations located in New York City and State, including the New York City Ballet, the Auto Club of New York, the New York City Parking Violations Bureau, several large department stores, a number of doctors and a garage located at 220 East 39th Street, New York, New York. In addition, petitioner wrote checks to Con Edison, New York Telephone and Manhattan Cable TV. For the 112 East 61st Street building, petitioner made payments for heating oil, electricity, repairs and maintenance.

During 1985, petitioner continued to list telephone numbers for himself at 525 Park Avenue, 895 Park Avenue and 112 East 61st Street in the Manhattan telephone book. Petitioner had a New York State driver's license, which was valid through October 11, 1986, and which contained the 525 Park Avenue address. In addition, his automobile was registered in New York State.

In December 1985, petitioner was diagnosed as suffering from an acute manic depressive disorder. He returned to New York City for psychiatric treatment at the end of 1985.

Petitioner introduced a minimal amount of documentary evidence and no testimonial evidence into the record of this matter.

OPINION

The Administrative Law Judge found that petitioner was taxable as a resident individual for the year 1985 because petitioner had failed to prove either that he was not a domiciliary of New York State and New York City for the year 1985, or that he did not maintain a permanent place of abode in New York City in which he spent less than 183 days during the taxable year. The Administrative Law Judge found that petitioner, having introduced only minimal documentary evidence and no testimonial evidence, had failed to prove that he had either changed his domicile from New York to Connecticut for the year 1985, or that none of the

several residential addresses maintained by petitioner in New York City were permanent places of abode during 1985. Further, the Administrative Law Judge found that petitioner failed to prove that he spent less than 183 days in New York during 1985 since petitioner introduced no evidence whatsoever on that issue. The Administrative Law Judge also found that holding the hearing in Troy, New York rather than in New York City did not violate petitioner's due process rights because petitioner had been afforded a hearing in which he had the opportunity to present evidence and legal argument in support of his petition. The Administrative Law Judge noted that petitioner cited no regulatory, statutory or case law authority for his position that due process required the hearing to be held in New York City.

On exception, petitioner asserts that he has always been domiciled in Connecticut and that he did not spend more than 183 days in New York in 1985. Petitioner alleges that witnesses and records necessary to substantiate both of his claims were located in New York City, and he is apparently arguing, as he did below, that these witnesses and records would have been available if the hearing had been held in New York City. Petitioner asserts that the convenience of the parties and witnesses should have been considered in determining the location of the hearing.

In response to the exception, the Division asserts that it has established a rational basis for its determination that petitioner was a resident of New York, and that petitioner has not presented sufficient evidence to meet his burden of proving that he was not a resident. Further, the Division argues that petitioner has failed to particularize the documents or witnesses which would have been produced had the hearing been held in New York City, or explain why a New York City hearing location was required to produce records that are alleged to support petitioner's position. The Division also asserts that petitioner could have subpoenaed the witnesses to the hearing in Troy or used depositions or affidavits to present their testimony.

We uphold the determination of the Administrative Law Judge for the reasons stated in that determination. Petitioner has presented nothing on exception that was not adequately considered by the Administrative Law Judge below. As the Administrative Law Judge

discussed below, the location of one's domicile, the existence or nonexistence of a change in that domicile, or the maintenance of a permanent place of abode in the State are questions of fact on which the petitioner has the burden of proof. Given the extremely limited production of evidence on these issues (and we note, no evidence at all on the question of whether or not petitioner spent 183 days in the State during the taxable year), no conclusion other than a finding that petitioner has failed to meet his burden of proof is possible.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Peter C. Ausnit is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Peter C. Ausnit is denied; and
4. The Notice of Deficiency dated November 15, 1988 is sustained.

DATED: Troy, New York
August 5, 1993

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

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

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