STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SAMUEL G. ALLEN	:	DECISION DTA No. 808589
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and Title T of the Administrative Code of the City of New York for the Years 1982 through 1985.	:	

Petitioner Samuel G. Allen, 6903 Harvey Avenue, Mechantville, New Jersey 08109 filed an exception to the determination of the Administrative Law Judge issued on March 5, 1992 with respect to his petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and Title T of the Administrative Code of the City of New York for the years 1982 through 1985.[1] Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner did not file a brief on exception; however, petitioner sought leave from the Tax Appeals Tribunal to amend his exception to add a request for a new evidentiary hearing based on errors allegedly made at the hearing below. The Division of Taxation filed a letter in lieu of a brief in response to the exception, in which it informed the Tax Appeals Tribunal that it would rely on the record below and the Administrative Law Judge's determination. In addition, the Division of Taxation filed a letter in response to petitioner's leave to amend his exception. Petitioner's request for oral argument was denied.

[1]As the Administrative Law Judge pointed out in her determination, the personal income tax imposed under Title T of the Administrative Code of the City of New York refers to Article 22 of the Tax Law and contains essentially the same provisions. Accordingly, references in this decision to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Title T.

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

ISSUES

I. Whether petitioner was a resident individual of New York State and New York City during the years 1982 through 1985 and, thus, subject to the personal income taxes imposed by the Tax Law and the Administrative Code of the City of New York.

II. Whether petitioner is entitled to a tax refund in the amount of $31,801.60.

FINDINGS OF FACT

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

On January 20, 1988, petitioner, Samuel G. Allen, was tried and found guilty of the crime of repeated failure to file New York State personal income tax returns for the years 1983, 1984 and 1985, with intent to evade tax. This crime is classified as a class E felony under section 1802 of the Tax Law. On March 4, 1988, petitioner was sentenced to a definite term of 30 days at a New York City correctional institution and four years, eleven months probation, with the following conditions: (a) that petitioner serve 500 hours of community service; (b) that petitioner pay restitution of $31,801.60 and file tax returns for the years in question; and (c) that petitioner pay a fine of $25,000.00. On January 19, 1990, petitioner paid the fine of $25,000.00. In March 1990, the Division of Taxation ("Division") received a check in the amount of $31,801.60 in payment of the restitution ordered by the court. Petitioner never filed New York personal income tax returns as ordered by the court.

Petitioner's conviction followed an investigation of his tax liability which was begun by the State of Connecticut, Department of Revenue Services. In the years 1982 through 1985, petitioner filed Federal income tax returns showing his address as Box 536, Greenwich, Connecticut. Upon receipt of this information from the Internal Revenue Service, the State of Connecticut began an investigation to determine whether petitioner was subject to the

Connecticut capital gains and dividends tax during the years 1977 and 1978. From April 1982 through June 1986, petitioner and the State of Connecticut exchanged no fewer than 19 letters. In these letters, petitioner repeatedly stated that he was not a resident of Connecticut during the years under investigation. The State of Connecticut requested that petitioner provide it with copies of state tax returns showing residency in a state other than Connecticut and petitioner repeatedly refused to do so. In a letter dated June 28, 1986, petitioner claimed to be a resident of New Jersey. In each of the letters sent by petitioner to the State of Connecticut, petitioner used a return address of 200 E. 66th Street, Apt. C-202, New York, New York 10021. Letters from the State of Connecticut were sent to petitioner at that address. Under an agreement between New York and Connecticut, the Connecticut Department of Revenue Services made information with regard to its investigation of Mr. Allen available to New York's taxing authorities. New York's investigation revealed that petitioner did not file New Jersey income tax returns in the years 1976 through 1985. Petitioner's conviction followed from New York's investigation.

The investigation of petitioner's tax liability was initially conducted by the Department of Taxation and Finance, Revenue Crimes Bureau. In November 1989, the Revenue Crimes Bureau (also referred to in the record as the Tax Enforcement Unit) transferred the case to the Audit Division to conduct an audit to determine petitioner's liability for personal income taxes due under Article 22 of the Tax Law and Title T of the Administrative Code of the City of New York. As the auditor explained it, he was instructed to calculate the tax due, and it was his understanding that residency was an issue previously determined in the criminal proceedings. A letter, dated November 16, 1989, was sent to petitioner scheduling a field audit of petitioner's personal income tax returns for the period January 1, 1982 through December 31, 1988. Copies of this letter were mailed to petitioner at 6903 Harvey Avenue, Merchantville, New Jersey 08109 and 200 East 66th Street, New York, New York 10021. There was no response, and a second letter, dated November 30, 1989, was mailed to petitioner at both addresses. The letter sent to the New Jersey address was returned with the notation "refused". The letter sent to the

New York address was returned with the notation "Return to sender--move out [sic]". A third audit appointment letter was sent to petitioner at Box 536, Greenwich, Connecticut 06836, on or about January 10, 1990. The Division received no response to this letter.

On March 12, 1990, an auditor visited the building located at 200 East 66th Street in New York City. An individual in the building's management office confirmed that petitioner had lived at that address with his mother, Carolyn H. Allen, until approximately March 1987. The auditor spoke over an intercom system with a woman who identified herself as Carolyn H. Allen. She confirmed that petitioner was living in Merchantville, New Jersey.

The auditor calculated petitioner's New York taxable income for the years 1982 through 1985 based upon information taken from petitioner's Federal income tax returns and the auditor's assumption that petitioner was a resident individual of New York during the subject years.

On or about June 21, 1990, the Division issued to petitioner a Notice of Deficiency, asserting a deficiency of personal income taxes due for the years 1982 through 1985 of $56,766.29 plus penalty and interest.

Petitioner challenges the notice of deficiency and seeks a tax refund of $31,801.60 based on his claim that he was not a New York resident individual during the subject years. He stipulated that he was not challenging the correctness of the Division's calculation of the deficiency.

At the time of his birth, petitioner's parents resided in Connecticut. The Connecticut address found on petitioner's Federal income tax returns is a post office box. At some time, petitioner's mother moved to 200 East 66th Street in New York City, but the date of that move is unknown. Petitioner's mother has a history of mental illness which required hospitalization in August and September of 1972. Petitioner lived with his mother in her New York apartment during the years in issue. It is not known whether or not he maintained a separate residence in New York or New Jersey during those years.

Under cross-examination, petitioner conceded that he slept and ate in the New York apartment on numerous occasions, maintained bank accounts and a safe deposit box in New York City, and spent at least 30 days in New York in 1982. Petitioner either was evasive or refused to answer questions about where he lived in the years 1982 through 1985. Under cross-examination by the Division's attorney, petitioner testified as follows:

Q: "Where do you contend that you were domiciled in 1982?"

A: "Connecticut. However, I must state that is a conclusion of law. It is not an allegation of fact. It is merely a legal opinion of mine. And actually, I object to the question in that it calls for a conclusion of law."

* * *

Q: "How about '83, '84 and '85? Is it your position you were domiciled in New Jersey?"

A: "No."

Q: "Excuse me, Connecticut?"

A: "Yes."

Q: "Where did you reside in 1982, '83, '84 and '85?"

A: "Will you please define what you mean by reside?"

Q: "Where did you live?"

A: "Will you please define what you mean by live?"

During the period January 1, 1977 through March 31, 1986, Carolyn H. Allen executed four leases for the New York City apartment. Petitioner appears as a co-tenant on the lease executed for the period October 1, 1976 through September 30, 1979. Petitioner does not appear as a co-tenant on two leases executed for the period October 1, 1979 through September 30, 1985. Petitioner does appear as a co-tenant on the lease executed for the period October 1, 1985 through September 30, 1987. That lease bears the signatures of Samuel G. Allen and Carolyn H. Allen.

PROCEDURAL HISTORY

The petition in this matter was filed on September 4, 1990. The Division filed an answer to the petition on or about November 5, 1990. On or about November 23, 1990, petitioner

served the Division with a Notice and Demand for a Bill of Particulars. The Division served petitioner with a bill of particulars on or about November 28, 1990.

Petitioner filed a notice of motion for summary determination, dated December 14, 1990, alleging in an affidavit that he was not domiciled in New York during the subject years and that he was entitled to summary determination as a matter of law. By an order dated February 7, 1991, petitioner's motion was denied by Administrative Law Judge Joseph W. Pinto, Jr., on the ground that material and triable issues of fact existed regarding the issue of domicile. At hearing, petitioner testified to the truth of the facts stated in the affidavit.

Petitioner filed a motion dated September 18, 1991, asking the Division of Tax Appeals to preclude the Division from offering evidence at hearing to prove certain matters which the Division of Taxation had failed to particularize in response to petitioner's demand for a bill. Judge Pinto denied petitioner's motion by order dated October 17, 1991, on the ground that the motion was untimely.

On October 23, 1991, petitioner served a subpoena duces tecum upon Deborah Gigliotti, records custodian of New York Hospital in Westchester County. The subpoena requested that the medical records of Carolyn H. Allen be produced at the hearing to be held on October 28, 1991. It is signed by Daniel J. Ranalli, Assistant Chief Administrative Law Judge. In response to the subpoena, the requested records were released to Judge Ranalli with a request by the hospital that the Division of Tax Appeals review the records in camera to determine whether the records are material to the proceeding against petitioner. At the administrative hearing, petitioner moved for a continuance to enable him to present the testimony of Dr. Renatus Hartogs of New York City who treated Mrs. Allen for a period of about two years in the late 1950's. Petitioner proposed to have Dr. Hartogs testify as to Mrs. Allen's mental condition based on his review of the subpoenaed medical records and his personal experience in treating Mrs. Allen. The purpose of that testimony would be to support petitioner's claim that his sole reason for being present in the New York apartment was "to keep a close watch on" his mother

(transcript at 46). The administrative law judge denied petitioner's motion for a continuance on the ground that Mr. Hartogs testimony was not material to the proceedings.

OPINION

Noting that, under certain circumstances, the Division may be required to make an initial showing that the assessment issued is rationally based before the presumption of correctness can attach to the notice of deficiency, the Administrative Law Judge determined that, whether or not this case presents such circumstances, the record establishes that a rational basis existed for the Division's assessment. The evidence specifically pointed to by the Administrative Law Judge includes the fact that petitioner was convicted under section 1802 of the Tax Law for failing to file returns required under Article 22 of the Tax Law for the taxable years 1983 through 1985, that petitioner had an unpaid tax liability for each of these years, and that the auditor was told by a person at petitioner's mother's apartment building in New York City that petitioner had lived in the building for several years prior to moving to New Jersey in or around 1987. The burden, the Administrative Law Judge held, was, therefore, upon petitioner to prove that he was not domiciled in New York in the taxable years 1982 through 1985 (citing Tax Law § 689[e]). In this regard, the Administrative Law Judge stressed that petitioner cannot rebut the presumption of correctness of the notice of deficiency merely by relying on the Division's failure to provide evidence of petitioner's domicile during the years at issue.

The Administrative Law Judge, finding petitioner's assertion of a Connecticut domicile during the subject years incredible in view of the evidence, determined that petitioner had not established that he was domiciled anywhere other than in New York during the years in question. Further, the Administrative Law Judge determined that petitioner's "mere allegation that he never intended New York to be his permanent home" was inadequate to prove that he was not a New York domiciliary in the subject years, especially in light of the evidence to the contrary (e.g., petitioner acknowledged spending over 30 days in New York in 1982, eating and sleeping at his mother's apartment, and keeping clothing and other personal effects there;

furthermore, petitioner could not prove that he spent less than 30 days in New York during each of the other audit years) (Determination, pp. 11-12).

As for petitioner's claim that, even if he were domiciled in New York during the subject years, he was not a resident individual under Tax Law § 605(b)(1) since he did not maintain a permanent place of abode in New York, the Administrative Law Judge noted that every New York domiciliary is a resident individual of New York for tax purposes, unless he satisfies all three of the requirements of section 605(b)(1)(A). The Administrative Law Judge pointed out that petitioner did not prove that he met all these requirements for the years in question. Therefore, the Administrative Law Judge held petitioner liable for the New York income tax assessment as a resident individual during the subject years.

On exception, petitioner argues that: he was not domiciled in, nor was he a resident individual of, New York State during the taxable years 1982 through 1985; he owes no State or City personal income taxes for these years; and he is entitled to a refund of $31,801.60.

Specifically, petitioner contends that his criminal conviction under Tax Law § 1802 does not establish the fact of a tax liability because the Supreme Court which rendered the decision had no jurisdiction to adjudicate questions of tax liability (citing Tax Law § 697[a]; Vallely v. Northern Fire & Marine Ins. Co., 254 US 348). Moreover, petitioner expects the conviction to be overturned (Exception, attached rider, pp. 5-6).

Further, petitioner stresses that one's "established domicile is not lost by temporary absence or temporary residence elsewhere, however long continued" (Exception, attached rider, p. 2, citing Clapp v. Clapp, 272 AD 378, 71 NYS2d 354). Petitioner asserts that, contrary to the Administrative Law Judge's determination, the Division had the burden of proving petitioner's change of domicile from Connecticut to New York, rather than petitioner having the burden of proving the retention of his Connecticut domicile (citing Ratkowsky v. Browne, 267 AD 643, 47 NYS2d 905, lv denied 268 AD 835, 50 NYS2d 464). Petitioner, while insinuating that the Division did not sustain this burden, contends that his own [from petitioner's argument, we assume unnecessary] proof of being a Connecticut domiciliary (i.e., a Connecticut driver's

license, banking records) was not placed in evidence because he was told these items would not be returned.

In addition, petitioner contends that the Administrative Law Judge used the current, rather than the 1982-1985 version of the definition of "resident individual," that is, Tax Law § 605(b) instead of former § 605(a). Petitioner further claims that the Administrative Law Judge incorrectly suggested that petitioner was advocating that, even if he were domiciled in New York, he was not a resident individual under Tax Law § 605(b)(1)(A). Petitioner maintains, rather, that he never conceded, even arguendo, that he was a New York domiciliary. In effect, petitioner asserts that he was basing his nonresident status on section 605(b)(1)(B) (former section 605[a][2]), in that he was not domiciled in New York and did not both maintain a permanent place of abode in New York and spend in the aggregate in excess of 183 days of the taxable year in New York.

Petitioner also alleges that the Administrative Law Judge erred in ruling that "evidence regarding the nature and extent of [petitioner's] mother's mental illness was immaterial and in refusing to enforce the petitioner's subpoena . . . or to grant an adjournment to permit the petitioner to make further attempts to secure the attendance of witnesses . . ." (Exception, attached rider, p. 3). Petitioner asserts that the witnesses and evidence would have established why he needed to spend time, but did not reside, at his mother's New York City apartment to care for her.

Finally, petitioner claims that the Administrative Law Judge made "extensive use" of information which is not in evidence in the record (Exception, attached rider, p. 3).

In petitioner's request for leave to amend his exception to add a request for a new evidentiary hearing, petitioner calls attention to the following "errors" made at the Administrative Law Judge hearing: (1) that the Administrative Law Judge failed to invoke the power invested in her to enforce the subpoena such that the persons subpoenaed could have testified; (2) that the letters which were allegedly written by petitioner to the Connecticut Department of Revenue Services should not have been accepted into evidence because they were partly illegible, were

not authenticated by any representative of the Department, and petitioner was unable to cross-examine anyone regarding the circumstances surrounding them; and (3) that petitioner could not submit certain documents into evidence because the Administrative Law Judge would only accept copies.

In response to petitioner's exception, the Division urges that since petitioner has failed to meet his burden of proving that he was not a resident of New York State during the years in question, the exception should be denied in its entirety and the determination affirmed.

In response to petitioner's request for leave to amend his exception to add a request for a new evidentiary hearing, the Division claims that there is only one new allegation of error contained in petitioner's request for leave to amend (referring to "3" above), and this new allegation is unfounded. Accordingly, the Division reasserts that the original exception should be denied and the determination affirmed.

We affirm the determination of the Administrative Law Judge.

During the period in question, section 605(a) of the Tax Law defined a "resident individual" as follows:

> "(a) Resident individual. A resident individual means an individual:
>
> "(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."[2]

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[2] Subsection (a) of section 605 was redesignated subsection (b)(1) by section 8 of chapter 28 of the Laws of 1987. As noted by petitioner, the Administrative Law Judge erroneously cited section 605(b)(1) of the Tax Law in her determination. This error, however, is immaterial as the relevant portion of the definition was not changed in any significant way.

We find the Division's assessment for taxable years 1983 through 1985 to be rationally based.[3] For, even if petitioner was not convicted under section 1802 based on his New York residency, we find that there is adequate evidence in the record to conclude that petitioner was, in fact, a New York State and City resident during the years 1983-1985. Having had access to the file used in petitioner's conviction (see, Tr., p. 26), the auditor was able to submit certain documents from the criminal trial that established this fact. In addition, the auditor submitted new evidence in support of petitioner's New York residency. Thus, the record contains: (1) Federal tax returns for the years 1982 through 1985 which have a Connecticut post office box address on them (see, Exhibit "W"); (2) a series of letters from petitioner as early as 1982 informing the Connecticut Department of Revenue Services that he was not, in fact, a Connecticut resident - - all of which letters used a New York City return address (see, Exhibit "Q"); and (3) the auditor's testimony and field audit notes that when he visited this same New York City address, which happens to be where petitioner's mother resides, he was informed by a person in the building's management office that petitioner had lived at his mother's address until approximately March of 1987, and that petitioner's mother, Carolyn H. Allen confirmed that petitioner had moved to Merchantville, New Jersey (see, Tr., pp. 28-30; Exhibit "R").

Petitioner had the burden of proof in this matter to establish that he was not a resident of New York (see, Tax Law § 689[e]), such as by offering evidence that he was domiciled in New York but maintained no permanent place of abode in New York, maintained a permanent place of abode elsewhere, and spent in the aggregate 30 or less days in New York during a particular year (former section 605[a]), or that he was not domiciled in New York during the years in question, did not maintain a permanent place of abode in New York, and did not spend in the aggregate more than 183 days of each of the taxable years in question in New York (former section 605[a][2]). Petitioner failed to sustain this burden. Firstly, as the Administrative Law Judge correctly pointed out, "petitioner's mere allegation that he never intended New York to be his permanent home is not sufficient to establish that he was not domiciled in New York"

[3]As noted in the findings of fact, petitioner stipulated that he was not challenging the correctness of the Division's calculation of the deficiency (see, Determination, p. 4).

(Determination, p. 11). Further, petitioner introduced no evidence to establish that he was a Connecticut domiciliary. We find unfounded petitioner's claims (in his exception and in his letter seeking leave to amend his exception to add a request for a new evidentiary hearing) that he did not submit at the hearing certain documentary evidence tending to indicate that he was a Connecticut domiciliary because the Administrative Law Judge would only accept copies. Rather, responding to petitioner's query, the Administrative Law Judge merely informed petitioner that documents placed in evidence are not normally returned and that, therefore, if petitioner wished to submit copies of the materials at a later time, that would be acceptable (see, Tr., p. 44). The Administrative Law Judge did not say that she would not accept original documents. Petitioner, instead of taking the opportunity to submit copies of his documents at a later time, merely opted to withdraw his offer of evidence (see, Tr., p. 44). Therefore, petitioner cannot avail himself of former section 605(a)(2) of the Tax Law.

As for former section 605(a)(1)(A) of the Tax Law, petitioner has not established that he maintained a permanent place of abode in any state other than New York. He also admitted that he spent at least 30 days in New York in 1982, and did not establish that he spent 30 days or fewer in New York in the other audit years. Because he must establish all three requirements under former section 605(a)(1)(A) to attain non-resident status, and petitioner has not proven that he meets the second and third requirements, whether or not petitioner actually pays rent on or helps with the upkeep of his mother's apartment (i.e., whether or not he actually maintains a permanent place of abode in New York) becomes irrelevant.

In sum, we find, in view of the evidence, that petitioner was a resident individual of the State and City of New York during the taxable years 1983 through 1985.

Likewise, because we find that the same evidence detailed above also establishes petitioner's New York residency in taxable year 1982, we find the Division's assessment for the year 1982 to be rationally based. While the criminal conviction covered only taxable years 1983 through 1985, (1) petitioner's Federal tax return from 1982 with the Connecticut post office box address on it, combined with (2) petitioner's letters, sent from his mother's New York City address to the

Connecticut Department of Revenue Services in 1982 stating that he was not at that time a Connecticut resident, and (3) the auditor's conversation with a person in the management office at petitioner's mother's apartment building establishing that petitioner had lived at the apartment with his mother until 1987, all support the conclusion that petitioner was a New York resident in 1982.

Thus, despite the auditor's comment on the record that there was no basis for his determination that petitioner was a New York City resident in 1982 (see, Tr., p. 31), we find that the record does indeed indicate such a basis. In any case, it is not up to the auditor to determine if he had a rational basis for the assessment. Rather, such a determination must be made by this Tax Appeals Tribunal, in light of the record.

In view of our decision that petitioner was a New York resident during the subject years, we must reject petitioner's contention that because he was not a New York resident during these years, he deserves a refund of the $31,801.60 paid to the Division in March of 1990 as restitution ordered by the Supreme Court.

In addition, we see no basis for petitioner's assertion that the Supreme Court's judgment does not establish the fact of tax liability because the Supreme Court has no jurisdiction to adjudicate questions of tax liability. The Supreme Court had jurisdiction over petitioner's criminal prosecution (NY Const, art VI, § 7). Under section 60.27 of the Penal Law, the court was authorized to impose a sentence of restitution upon petitioner and to determine the amount of this restitution. Under this authority, the Supreme Court's judgment required petitioner to pay $31,801.60 to the Division (see, Exhibit "O").

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in respect to petitioner's other allegations.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Samuel G. Allen is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Samuel G. Allen is denied; and

4. The Notice of Deficiency dated June 21, 1990, issued to petitioner Samuel G. Allen, is sustained.

DATED: Troy, New York
December 10, 1992

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

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

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