

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RICHARD SCHARFF : DETERMINATION
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 Chapter 46, Title T of the :
Administrative Code of the City of New York :
for the Years 1980 through 1984. :

Petitioner, Richard Scharff, 3720 Collins Avenue, Miami Beach, Florida 33140, filed a 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 Chapter 46, Title T of the Administrative Code of the City of New York for the years 1980 through 1984 (File No. 805260).¹

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 6, 1989 at 1:15 P.M., with all briefs submitted by July 10, 1989. Petitioner appeared by Anthony M. Abraham, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner failed to change his domicile from New York to Connecticut or New Jersey, or whether he maintained a permanent place of abode in New York so as to be taxable as a resident for income tax purposes during the years in question.

FINDINGS OF FACT

(a) The Division of Taxation issued notices of deficiency in the approximate aggregate amount of \$46,363.04 including penalty and interest for the years 1980 through 1984 against petitioner,

¹All references in this determination to "New York" may be read as to both New York State and New York City.

Richard Scharff.² The notices were sustained by a conciliation conferee in a letter to petitioner on the basis that "the preponderance of evidence indicates that you had a permanent place of residence within New York City during the years in question."

(b) Petitioner filed a motion with Supervising Administrative Law Judge Doris Steinhardt under section 3000.6(a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal for discovery and inspection and for a bill of particulars. Specifically, petitioner requested the "basis and documentation" for the points made in the conciliation conferee's decision. It was ruled that the information did not "pertain to the pleadings" and further that there was no "good cause" for discovery since "the issue of residency is factual in nature" and any difficulty which petitioner may have at hearing could be alleviated by the granting of a continuance.

Mr. Richard Scharff was born in 1926 in Germany. He came to this country in 1939 with his parents, Alfred Scharff and Erna Scharff. The family lived at Apartment 5C, 1290 Ocean Parkway, Brooklyn, New York. This was a five-room apartment with "massive" German furniture. Petitioner's father died in 1972. Mr. Scharff lived in this house at least until 1979. In 1980, according to petitioner's description, it had become a very run-down neighborhood with a very large "minority" population. Mr. Scharff never paid the utility or telephone bills. His mother was in good health and maintained the house at Ocean Parkway until her death in 1982. She was listed in the telephone book at that address with the phone number of 434-2660. Mrs. Scharff's estate maintained the apartment thereafter until sometime in 1984. This was done to provide storage for furnishings because of the very low rent of the premises.

Mr. Scharff never married.

Mr. Scharff was employed until 1979, when he retired, as the comptroller of a freight forwarding business located at the World Trade Center in Manhattan.

Mr. Scharff has not driven a car since 1974. He retained a New York driver's license (which showed the Brooklyn address) until May of 1982 when he did not renew it according to the records of the Department of Motor Vehicles.

A phone listing (769-7162) located in the Brooklyn phone book for an R. Scharff with no address did not belong to petitioner.

In 1979, when he retired, petitioner wanted to make changes in his life and, in particular, wanted to do some writing and moved to Stamford, Connecticut, where he also happened to have some friends and where there was a good library. He lived in a hotel during his entire stay there. An affidavit of a friend he met there vouches for his presence there.

Petitioner filed 1979 and 1980 Federal tax returns showing an address of Box 10903, Stamford, Connecticut. He filed 1979 nonresident returns for both New York State and New York City showing the same address. (His 1980 New York returns are not in evidence.) He filed Connecticut tax returns for 1979 and 1980. The 1979 return was filed in 1982 according

²The amount in issue is approximate because the notices of deficiency were not placed in evidence; however, an accounts receivable printout in the file indicates that the notices were issued on September 8, 1986. It is noted that petitioner did not raise the absence of the notices of deficiency as an issue at hearing.

to a form notice from the State of Connecticut. The 1980 return had omitted some disputable income and a late payment penalty was imposed.

In early 1980, Mr. Scharff desired to do some painting and began looking for appropriate artist's quarters. As of June 1, 1980, Mr. Scharff had a three-year lease on a large loft at 70 Van Houten Street, Paterson, New Jersey, on the top floor of a four-story commercial building. The loft measured about 80 feet by 50 feet and was furnished with all utilities. The rent was \$250.00 per month. Petitioner had located the loft through the Greater Paterson Art Council. At this studio, Mr. Scharff was engaged in painting. He did acrylics, watercolors and ink paintings and was very pleased with his work there. Mr. Scharff lived at the studio according to the testimony of both himself and his landlord. He stayed there, overstaying his lease, until sometime in 1985 when he moved to Florida.

Mr. Scharff's 1981 Federal return and a 1981 New Jersey Gross Income Tax Resident Return was filed showing an address in care of a person in Jersey City, New Jersey, presumably an accountant. For 1982 through 1984, the Federal return showed the address to be Post Office Box 6723, Jersey City, New Jersey. He filed New Jersey gross income tax returns for 1981 through 1984. The 1981 return shows the address of the person in Jersey City. The 1982 return is not in the record. The 1983 and 1984 returns show the address to be the Jersey City Post Office box.

When petitioner first rented the New Jersey Post Office box, he showed the Brooklyn, New York address as his address.

Mr. Scharff did not vote any place during the years in question.

In early 1985, Mr. Scharff moved to Florida.

Mr. Scharff denied having any bank accounts close to where he lived. He stated he had always dealt with major money centers "such as New York". There is nothing concrete in the record to show that Mr. Scharff had bank accounts in Brooklyn, or anywhere else in New York, before, during or after the years in question. In any event, Mr. Scharff had no property in New York during the years in question.

Mr. Scharff has, from time to time, since at least 1969, been a patient at the Fort Hamilton Veteran's Administration Hospital in Brooklyn. The hospital has his records; however, it is not clear from the record when his last visit there was.

Mr. Scharff testified that he spent less than 30 days a year in New York. He submitted no diary or other record to show that this was true.

CONCLUSIONS OF LAW

A. Mr. Scharff's testimony in this case has been forceful and categorical. He denied living in New York or having any property at all in New York during the years in question. His statements acquire added weight by the fact that his activities were the subject of a time-consuming investigation by the auditor and his testimony was subject to cross-examination by the Division of Taxation's attorney.

Much of the auditor's testimony concerning this case must be rejected.

(a) The auditor testified that he sent a letter to Mr. Scharff asking him for schedules of his interest and dividend income and concluded because these letters were unanswered that

Mr. Scharff had banks and investments in New York. This is pure speculation.

(b) The auditor stated that he received an anonymous letter that Mr. Scharff had an investment in a mutual fund managed by Dreyfus & Co. in New York City. The anonymous letter was not received in evidence. Furthermore, there has been no attempt to contact Dreyfus & Co. to confirm such information. No finding of fact can be based on such sources. I also note that the shares in the Dreyfus & Co. mutual funds are advertised and distributed nationwide and therefore cannot be evidence of where a person lives.

(c) The auditor claimed he sent letters to Mr. Scharff at the Brooklyn address and that they were received there. His log, however, in evidence, does not show the address used and the letter itself or a copy of it is not in evidence. The auditor's statements cannot be the basis for a finding of fact.

(d) The auditor had asserted that petitioner's driver's license was renewed in May 1982. This, as found above, is contradicted by a letter from the Department of Motor Vehicles indicating that said license was not renewed.

(e) The auditor testified that he telephoned a person he thought was the landlord of the Brooklyn address. The name he recorded as Santiago Duogoninnio and the phone number he called was 376-7970. The person, according to the auditor, stated that Mr. Scharff continued to receive mail at the Brooklyn address. Calls by petitioner to this number failed to reach any such person. The statement of the auditor must be rejected.

(f) The auditor also testified that in May 1986 he went to the Brooklyn address and found the name "E. Scharff" listed on the door, the doorbell and the mailbox. This, of course, does not go to show that Richard Scharff lived there (and in fact should have caused the auditor to become aware, as he apparently was not, that there may have been a family relationship involved in the case). This testimony must be rejected.

B. Mr. Scharff was not taxable as a resident of New York during the years in question. The New York Tax Law defines residence primarily in terms of domicile (Tax Law § 605 [former (a)]). That concept is well known (49 NY Jur 2d, Domicile and Residence) and is summarized in the regulations of the Commissioner of Taxation (20 NYCRR 102.2[d]) and the decisions of the Tax Appeals Tribunal (e.g., Matter of Silverman, Tax Appeals Tribunal, June 8, 1989). It is elemental that a person's domicile is where he is born and brought up and that a domicile once acquired continues until a new one is established. However, it is also true that a single person, not having the commitments of a married person, must usually be viewed to have his domicile where he actually is located and where he pursues his daily activities, instead of at some other place (see generally Skoe v. Commissioner of Taxation, Minn Tax Ct, September 28, 1967; Kennan, A Treatise on Residence and Domicile, at 922). In this case, Mr. Scharff had lived all his life with his mother in her five-room Brooklyn apartment. He then retired from business. His only remaining attachment to New York was his mother. Yet to pursue his avocations of writing and painting he moved away from his mother's apartment. While Mr. Scharff's activities of writing and painting could easily have been done in the well-known artistic and cultural neighborhoods of New York City, Mr. Scharff chose to go to Connecticut and New Jersey. These locations were much further than an easy commute from his mother's Brooklyn home. This certainly substantiates his testimony that he wanted to get away from his Brooklyn address in furtherance of his attempts to change his lifestyle. A change of lifestyle such as Mr. Scharff made is very strong proof of a change of domicile (In re Trowbridge's Estate v. State Tax Commission, 266 NY 283).

C. Although a person is not a domiciliary of New York, he may still be taxable as a resident if he "maintains a permanent place of abode", and spends more than 183 days in New

York (Tax Law § 605 [former (a)(2)]). Mr. Scharff did not maintain a permanent place of abode in New York during the years in question. The apartment he had lived in was clearly maintained by his mother and, after his mother's death, by her estate (see 20 NYCRR 102.2[e][1]; Matter of Feldman, Tax Appeals Tribunal, December 15, 1988).

D. The petition of Richard Scharff is granted, and the notices of deficiency issued September 8, 1986 are cancelled.

DATED: Troy, New York
January 11, 1990

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE