STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HERMAN AND ROSALIND WECHSLER	:	DETERMINATION
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 a 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).

On January 1, 1990 and January 24, 1990, respectively, the Division of Taxation by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel) and petitioners by Penn B. Chabrow, Esq., waived a hearing and agreed to submit the case for determination based on documentary evidence and briefs to be submitted by May 29, 1990. After due consideration of the record, Catherine M. Bennett, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioners were subject to tax as residents of New York State for the tax year 1985.

FINDINGS OF FACT

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 hadreceived 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 Administration Hospital 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.

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

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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the Tax Law provision applicable to their situation is Tax Law § 605(a)(2), since they have established that they were not domiciled in New York State during 1985. Petitioners acknowledge that they maintained a place of abode in New York during 1985, and if they had spent more than 183 days in New York State during that tax year, they would have been subject to New York State taxation as resident individuals under the Tax Law. However, since petitioners did not spend more than 183 days in New York and have established that they were domiciled in Florida, they contend that they are not subject to New York State taxation as resident individuals.

Petitioners, in their reply brief, discussed three New York State Tax Commission cases in support of their position which will be discussed in the Conclusions of Law to follow.

The Division of Taxation maintains that petitioners did not effectuate a change of domicile for the tax year 1985. As a result, the Division of Taxation applies Tax Law § 605(a)(1) to their situation in determining whether they were resident individuals. Since they

did maintain a permanent place of abode in New York State and spent more than 30 days in the State, the Division of Taxation believes it properly determined petitioners to be taxed as New York State residents during that year.

CONCLUSIONS OF LAW

A. Tax Law § 605 (former [a]), in effect for the year at issue, provided, in pertinent part, as follows:

"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."

B. While there is no definition of "domicile" in the Tax Law (compare, SCPA 103[15]), the Division's regulations (20 NYCRR 102.2[d]) provide, in pertinent part:

"(d) 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.

* * *

(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."

Permanent place of abode is defined in the regulations at 20 NYCRR 102.2(e)(1) 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."

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

"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.... [E]very 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....

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."

D. 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, 50 AD2d 457, 378 NYS2d 138). 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, 54 NY2d 713, 442 NYS2d 990). The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra) it stated, "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."

E. Petitioners discuss several cases in support of their position with respect to a determination of whether they effectuated a change in domicile. When the Commission addressed Matter of David H. and Miriam N. Rush (State Tax Commission, September 28, 1983), it was reviewing a set of facts which indicated that petitioner (husband) changed his domicile from New York to Florida by purchasing a home before attempting to establish such change, setting up bank accounts in Florida, registering his car in Florida and joining various business organizations, while at the same time, his wife remained in their New York home traveling to Florida on a regular but limited basis while caring for her ill mother. The facts of the Rush case indicate that the move to Florida by David Rush coincided with or perhaps was even prompted by a relocation on the part of his employer. A new home with new ties was clearly established by Mr. Rush. The facts in that case appear to lead to the conclusion that, but for the illness of his mother-in-law, the Rush family would have moved to Florida maintaining no significant ties to New York State such as the ownership of real estate. This is clearly different from the dual retirement home status of petitioners herein.

Another case discussed by petitioners in support of their position is Matter of Gerald J. Sacks (State Tax Commission, February 6, 1985). The petitioner was determined to be a nonresident of New York having purchased an apartment in Florida, registered to vote in Florida and obtained a Florida driver's license. The Commission found that although petitioner owned a permanent place of abode during the tax year, he only spent 132 days in New York State during that year and therefore, under Tax Law § 605(a)(2), he was not a "resident

individual". Unlike the present case, in the Sacks case petitioner had taken consistent steps over the course of at least four years resulting in the termination of his family ties in New York evidenced by the dissolution of his marriage and the ultimate sale of his New York real estate. The intent to change domicile was much more apparent in the Sacks case than petitioners here have established.

The Commission again addressed the domicile issue, with slightly different facts, in Matter of Sallie C. Melvin (State Tax Commission, October 30, 1981). In the Melvin case, petitioner worked full time in New York and owned an apartment in New York City. She registered her car in Connecticut, had a Connecticut driver's license, registered to vote in Connecticut and had her bank accounts in Connecticut where her parents maintained a home in which she was raised. The Commission determined that the petitioner was not domiciled in New York but was a resident of New York State because she maintained a permanent place of abode in New York and spent in the aggregate more than 183 days in the State during the tax year pursuant to Tax Law § 605(a)(2). Essentially, in the Melvin case, the Commission determined that petitioner's roots in Connecticut had not been severed by an intent to become a New York domiciliary. The affirmative steps taken by petitioner in the Melvin case to maintain a Connecticut domicile were well supported by the primary fact that Connecticut was her "home". It is a different circumstance when one takes similar steps in an attempt to establish a new domicile when the former, in petitioners' case New York, still appears to be their domicile. The case herein can clearly be distinguished from those cited by petitioners in support of their position.

F. In this case, petitioners clearly maintained a permanent place of abode in New York State, their home in Eastchester, New York. Thus, if petitioners are New York domiciliaries, they are taxable as residents under Tax Law § 605(a)(1). However, if petitioners are not New York domiciliaries, they would not be taxable as residents because they did not spend more than 183 days in New York during 1985.

G. Petitioners have not established that they changed their domicile from New York

State to Florida. While they clearly had ties to and spent time in Florida, they had equally strong ties to New York State. The evidence does not clearly indicate that petitioners relinquished their old domicile in order to establish a new one. Rather, it appears as though petitioners are "wintering" in Florida as part of their retirement and that their intention is to maintain a dual retirement home status. Although Dr. Wechsler's involvement in his medical practice changed from private practice to mere consulting and service-oriented work, such business ties serve as a continual link to the local community. The fact that petitioners spent nearly six months in New York during 1985 certainly inhibits a finding that they intended to change their domicile at that time. Thus, petitioners fall short of establishing by clear and convincing evidence an intent to change domicile (see, Matter of Sol Feldman and Lillian Feldman, Tax Appeals Tribunal, December 15, 1988; Matter of Rudolph [Dec'd] and Loretta Zapka, Tax Appeals Tribunal, June 22, 1989).

H. The petition of Herman and Rosalind Wechsler is hereby denied and the Notice of Deficiency dated November 17, 1987 is sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE