

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
SEBASTIAN AND FLORENCE ANGELICO : DETERMINATION  
for Redetermination of a Deficiency or for : DTA NO. 807985  
Refund of New York State and New York City :  
Income Taxes under Article 22 of the Tax Law :  
and the New York City Administrative Code for :  
the Years 1984 and 1985. :

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Petitioners, Sebastian and Florence Angelico, 6 Poillon Avenue, Staten Island, New York 10312, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1984 and 1985.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on July 29, 1991 at 1:15 P.M. Petitioners appeared by Leonard Rosen, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

- I. Whether petitioner Sebastian Angelico, who alleges a separation from his wife, changed his domicile from New York City to New Jersey prior to the years in question.
- II. Whether, if petitioner Sebastian Angelico did not change his domicile to New Jersey, and he remained a domiciliary of New York, a credit would be allowed under Tax Law § 620 for income taxes paid to New Jersey on income from certain intangibles taxable in both states.

FINDINGS OF FACT

(a) Petitioners, Sebastian and Florence Angelico, were both born in Brooklyn, New York and as young adults they married and moved to New Jersey where they lived for ten

months. They then moved back to New York and resided for five years at 11 Demopolis Avenue, Staten Island, and for six years at 31 Goodall Street, Staten Island, and then in July 1981 moved to 6 Poillon Avenue, Staten Island. This house was a four-bedroom colonial which had been purchased in 1981 for \$250,000.00.

(b) Mr. and Mrs. Angelico have three children who, in 1984, were about 18, 11 and 9 years of age.

(a) Mr. Angelico was a commodities broker doing business under the name of Angelico Commodities at 4 World Trade Center in New York City. He was responsible for customers. He traveled extensively, including trips "all over Connecticut", London, Chicago and Florida. Mr. Angelico also derived a large amount of income in each year from other sources, including profits from trading in property for his own account and a number of investments in partnerships and "S corporations". The tax returns of these partnerships and S corporations have not been produced and Mr. Angelico has not been able, in his testimony or otherwise, to specify their geographic source of income. One exception is a partnership, Annadale Stables, which raced horses in the Meadowlands (New Jersey). For both years, however, Annadale showed losses on Mr. Angelico's returns.

(b) Mrs. Angelico had no income of her own.

(a) Mr. and Mrs. Angelico were having marital difficulties in 1982 and 1983. One problem was Mr. Angelico's great amount of business travel. They had a few meetings with a parish priest at St. Patrick's Church on Staten Island.

(b) Mr. and Mrs. Angelico saw a lawyer (Mr. John A. Fusco) concerning their problems. A letter in evidence from the lawyer corroborates this. They decided not to have a formal separation agreement, but that Mr. Angelico would continue to provide financial support to Mrs. Angelico and the children and later there would be an uncontested divorce and division of property.

(a) Mr. Angelico moved out of the Staten Island house in January 1984. Mrs. Angelico and the children stayed in the house and maintained their home there. This separation was

corroborated by a witness who identified himself as a long-time friend of both Mr. and Mrs. Angelico.

(b) Mr. Angelico moved to the Windsor Terrace condominiums at 1300 Rock Avenue, Unit 2-C, North Plainfield, New Jersey 07060. This property had been purchased by Mr. and Mrs. Angelico jointly in October 1983 with the intent originally to lease it out. It had remained vacant and Mr. Angelico bought Mrs. Angelico's interest in the property prior to his moving in. Mr. Angelico intended to make this his home.

(a) Mr. Angelico had a telephone in New Jersey and received all his mail there. He attended, at least occasionally, St. Bartholomew's Church in Edison, New Jersey. He purchased a car and paid New Jersey sales tax on it and had a New Jersey driver's license. He had one of his personal checking accounts at the Central Bank of New Jersey.

(b) During the period of separation Mr. Angelico would go to the Staten Island house to pick up his children and take them out or take them to his New Jersey home. His son spent the summer of 1984 in New Jersey.

In 1985, Mr. Angelico changed his business affairs. He ceased being active in Angelico Commodities and hired other floor brokers to be responsible for customers there. He has, since 1985, operated a commodities clearing firm under the name of "Mercafe". He deals with other floor brokers and not with outside customers. He does little or no business travel.

In the middle of 1985, Mr. and Mrs. Angelico were reconciled. Mr. Angelico moved back to the Staten Island house. (The New Jersey condominium was leased out for a while and later sold.)

(a) Mr. and Mrs. Angelico filed for 1984 a New York joint return on a nonresident form IT-203 showing only Mr. Angelico's business income of \$34,133.00 and certain New York modifications for an adjusted gross income of \$34,358.00.

(b) Mr. and Mrs. Angelico filed two part-year New York joint returns for 1985. One was filed on the nonresident form IT-203 for the first half of the year and the other on a resident return (IT-201) for the second half of the year. Each return showed one-half of each item

reported on the Federal return and makes New York adjustments. The total New York income in the first half of the year was \$20,925.00 and in the second half, \$70,466.00. On the nonresident return (for the first half of the year) petitioners reported one-half of the business income reported on the Federal return for the year from Angelico Commodities, one-half of the farm loss, one-half of the "other" income (from "Mercafe" and "Trionics") and losses of \$9,966.00 from schedule E income. (These losses include one-half of all losses from the partnerships Fidelity Energy Associates III, FRS Realty and Annadale Stables and the S corporation, Orcim-Micro, Inc. It did not include any loss from Fidelity Realty Associates II.)

(a) Mr. and Mrs. Angelico filed a New Jersey resident return (NJ-1040) for 1984. Their New Jersey gross income was \$699,101.00. Petitioners reported on their New Jersey return all of the income reported on their Federal return.

(b) Mr. Angelico filed a New Jersey resident return (NJ-1040) for the first half of 1985. On the return he reported interest of \$2,728.00 (this is one-half of the interest on the Federal return for the whole year, exclusive of interest from "US Treas. bills"), business income ("schedule C") of \$26,226.00 (one-half of the Federal figure) and gains from the disposition of property of \$74,833.00 (one-half of his Federal "schedule D" figure of \$149,666.00). He reported nothing on his New Jersey return for the miscellaneous income from Mercafe and Trionics Developers, Ltd. Neither does he report the losses from farm income nor the losses from any of the various partnerships and S corporations. The New Jersey total income amounted to \$103,787.00.

(a) The Division of Taxation issued a Notice of Deficiency against petitioners on March 25, 1988 for New York State and New York City income taxes for both 1984 and 1985 in the amount of \$85,651.00, plus interest of \$21,856.68, for a total amount due of \$107,507.68.

(b) The deficiency was calculated on the basis of the Federal adjusted gross income less the New York adjustments shown on the return for 1984 and the adjustments shown on the resident return for 1985.

#### CONCLUSIONS OF LAW

A. Petitioners have clearly shown that Mr. Angelico changed his domicile from New York State to New Jersey prior to the years here in question and was therefore not taxable as a resident of New York State or City under Article 22 of the Tax Law or chapter 17 of Title 11 (formerly Part VII of Title T of Chapter 46) of the Administrative Code of the City of New York.

The personal income tax is imposed on every "resident" of the jurisdiction (the State or City, as the case may be) (Tax Law § 601; Administrative Code § 11-1701 [formerly T46-101]). A resident is defined as an individual who is domiciled in the jurisdiction (with exceptions) or who is not domiciled in the state or city, but only under conditions not in issue in this case (Tax Law § 605[b][1]; Administrative Code § 11-1705[b][1] [formerly T46-105]). The concept of domicile is well known (49 NY Jur 2d, Domicil 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). A person's domicile is initially where he is born and raised. A domicile continues until a new one is established. However, a person can change his domicile provided he actually moves to the new location and has the intention of making that location his domicile. The burden of proof to show a change in domicile is, of course, on the person alleging the change which, in this case, is the petitioner (Rosenbaum v. Rosenbaum, 309 NY 371; Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138).

In this case all the evidence indicates that Mr. Angelico met the requirements to show a change in domicile to New Jersey. He actually moved from his Staten Island house to New Jersey. This was corroborated by the witness. His intent was also to move out of the old house and to the new location. Again the fact of his proposed separation from his wife and intent later to get a divorce is clear from his own testimony and is in fact corroborated by statements of both his lawyer (not his representative in this case) and his long-time friend.

While the Division argues that Mr. Angelico did not change his domicile to New Jersey, the case law cited by the Division in support of its argument is not applicable to the facts in this

case. In Matter of Clarke (State Tax Commission, July 31, 1984 [TSB-H-84-(138)-I]) the taxpayer allegedly changing his domicile had declared the old New York address as his address on his Federal return and on his employer's records and did not file a tax return in the state to which he moved. He stayed with his brother's family during this time and did not acquire his own residence until a year later. In Matter of Wechsler (Tax Appeals Tribunal, May 16, 1991), the taxpayers allegedly changing their domicile had returned to the old New York dwelling place for long visits during the year in question. Petitioners' arguments are stronger. Certainly they are correct in their assertion that the mere fact that the separation was not pursuant to a written agreement and that they later reconciled does not negate the fact that during the years in question they did have separate domiciles (Matter of Elvidge, State Tax Commission, April 10, 1981 [TSB-H-81-(136)-I]; see also, Matter of Sacks, State Tax Commission, February 6, 1985 [TSB-H-85-(41)-I]; Matter of Mahabir, State Tax Commission, May 28, 1986 [TSB-H-86-(94)-I]).

B. A credit for tax paid to New Jersey would not be allowable in this case. This issue (raised only very late in the hearing in any event) is moot, because Mr. Angelico, as a nonresident of New York, is not entitled to this credit. Even if he were a New York resident, petitioners would have to show that the income being subjected to tax in New Jersey was derived from New Jersey sources. The derivation of income for this purpose is interpreted to be consistent with the derivation of income for purposes of the source of income of nonresidents in Tax Law §§ 631(b) and 632 (see also, 20 NYCRR 121.4[d]). Thus the source of income from a business is where it is carried on. In this case, petitioner has provided no concrete information as to where the business of his various partnerships and five corporations was carried on.

C. The petition of Sebastian and Florence Angelico is granted and the Notice of Deficiency issued March 25, 1988 is cancelled.

DATED: Troy, New York

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