

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
UMBERTO AND GIOVANNA STELLARI : SMALL CLAIMS
 : DETERMINATION
 : DTA NO. 820304
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Years 1999 and 2000. :

Petitioners, Umberto and Giovanna Stellari, 11 Oakland Avenue, Yonkers, New York 10710, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1999 and 2000.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 5, 2005 at 9:15 A.M., with all briefs to be submitted by December 21, 2005, which date began the 90-day period for the issuance of this determination. Petitioners appeared by Ronald M. Marks, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Matthew Roberts).

ISSUE

Whether petitioner Umberto Stellari has shown that he was not domiciled in New York State during 1999 and 2000 and was, therefore, not taxable as a resident individual pursuant to Tax Law § 605(b)(1)(A).

FINDINGS OF FACT

1. For each of the years 1999 and 2000, Umberto and Giovanna Stellari (“petitioners”) filed timely New York State resident income tax returns (forms IT-201) under the status “married filing joint return.” On the returns, wage income from petitioner Giovanna Stellari’s employer, Pavia & Harcourt of New York City, and from petitioner Umberto Stellari’s employer, Premuda (Atlantic), Inc. of Houston, Texas were included.

2. On August 9, 2002, Umberto and Giovanna Stellari filed amended New York State resident income tax returns on which they indicated that a joint return had been filed in error since petitioner Umberto Stellari was a resident of Texas and that his income had, therefore, been erroneously included. Pursuant to the amended returns, petitioners sought a refund of New York State personal income tax in the amount of \$3,524.00 for 1999 and \$4,268.00 for 2000.

3. On August 6, 2003, the Division of Taxation (“Division”) issued a Notice of Disallowance to petitioners which provided, in part, as follows:

Consideration of information provided along with other available information fails to clearly establish a change in domicile. Job assignments no matter how long, along with easily controlled items such as voters registration, car licenses, does [sic] not in itself constitute a change in domicile. Other factors such as the value of property owned in each state, timing and value of your purchase of residential property located at 11 Oakland Avenue, Yonkers, New York, combined with family ties does [sic] not support your claim.

4. At the hearing held in this matter, neither petitioner appeared to offer testimony to substantiate their claim that petitioner Umberto Stellari was not a New York domiciliary during the years 1999 and 2000.

5. Prior to the issuance of the Notice of Disallowance, the Division, on February 3, 2003, wrote a letter to petitioners in which it was requested that petitioners complete a nonresident

audit questionnaire. In lieu of the questionnaire, petitioners' representative, Ronald M. Marks, CPA, replied by letter dated February 4, 2003 in which he stated, in pertinent part, as follows:

In the year 1999, Mr. Stellari obtained employment with Premuda Atlantic, Inc., a company in the shipping business, which operated in the harbor area of Houston, Texas. The job required him to work on a full time basis in the Houston Texas Office of Premuda. His job description was shipping superintendent, in which he represented Premuda. In order to fulfill these requirements, he rented an unfurnished apartment at Metropolitan Uptown, 3300 Sage Road, Apt. 5305, Houston, TX 77050. He moved from this apartment to 5510 South Rice Avenue, Apt. 435, Houston, TX 77081, where he presently resides. This was also an unfurnished apartment. Mr. Stellari was required to furnish both apartments, since he lives there on a full time basis.

Mr. Stellari is a registered voter in Harris County Texas As a result, he served on jury duty in that location. Mr. Stellari purchased a Dodge Durango automobile in Texas, which he registered there. He is also a licensed driver in the State of Texas. . . .

6. By letter to petitioners dated March 26, 2003, the Division acknowledged receipt of Mr. Marks's letter; however, it was again requested that petitioners complete the nonresident questionnaire.

7. In response to the Division's letter of March 26, 2003, petitioners' representative stated that he felt that his previous reply (the February 4, 2003 letter) adequately answered all of the Division's questions. However, Mr. Marks attached a letter to the Division dated April 7, 2003 from Luca Benzi, Vice President of Premuda (Atlantic), Inc. which stated as follows:

In reply to your letter of March 26, 2003 to Mr. Umberto Stellari, we are pleased to confirm and state that Mr. Stellari was hired by Premuda Atlantic Inc. in March 1999. Premuda Atlantic Inc. has offices only in Houston, Texas from where its shipping business is conducted.

Mr. Stellari serves Premuda Atlantic Inc. in the capacity of Marine Manager. In this capacity he was required to move to Houston where he established his residence in March 1999. He continues to reside in Houston and works full time and on a permanent basis for Premuda Atlantic Inc.

8. Subsequently, on July 18, 2003, petitioner Umberto Stellari submitted to the Division a completed nonresident audit questionnaire. On the questionnaire, petitioner stated that he had lived at rented premises at 336 Longvue Terrace, Yonkers, New York from September 1994 until September 1996 and that he lived in a Scarsdale cooperative apartment at 143 Garth Road, Apt. 2C, Scarsdale, New York from September 1996 until he sold it on July 26, 1999. He stated that his current New York address was 11 Oakland Avenue, Yonkers, New York.

On the questionnaire, Mr. Stellari was asked to give the dates that he actually stayed in New York State during the past three years and, in responding, he indicated that he had stayed in New York on 19 days in 1999 and on 65 days in 2000.

During the years 2001 and 2002 which are not at issue in this proceeding, petitioner indicated that he spent 96 days and 104 days in New York, respectively.

9. Prior to his employment with Premuda (Atlantic) Inc., petitioner Umberto Stellari worked for Phillips Petroleum, Union 76, Sun Oil and Marathon Oil, each of which has operations all over the world.

Petitioners were married in 1976. During 1977 and 1978, petitioners, who were born in Italy, worked in Rome. Petitioner Umberto Stellari also worked in Saudi Arabia, Dubai, Belgium and Holland.

In 1980, petitioners moved to the United States. Mrs. Stellari moved in with her mother in Brooklyn, New York while Mr. Stellari went to New Orleans where he was employed. In 1982, Mr. Stellari's employer, Marine Transport, moved to Seacaucus, New Jersey; petitioners then

lived in Fort Lee, New Jersey.¹ In 1990, petitioners moved back to Italy where Mr. Stellari first worked for Premuda (Atlantic), Inc.

In 1994, Mrs. Stellari moved back to the United States and lived with her sister in Westchester County, New York. Mr. Stellari lived in Monte Carlo and worked there as well as in Russia, Yugoslavia, Portugal, Korea, Japan, Africa and South America. In 1997 or 1998, he moved back to the United States and went to work for V Ships in Florida. He later worked for General Maintenance Corp. which was based in Stamford, Connecticut and also worked for Ewig International Maritime Corp. in Pennsylvania and New Jersey. He was out of work for a period of time until March 1999 when he again began working for Premuda (Atlantic) Inc. in Houston. Mr. Stellari worked for Premuda (Atlantic) Inc. until June 2004 when the company closed its Houston office. Presently, Mr. Stellari works for Apex Marine in New York City; therefore, for 2004, he filed as a New York resident.

10. In 1999 and 2000, petitioner Giovanna Stellari resided in New York. During these years, she worked for Pavia & Harcourt, a New York City law firm. In August 1999, petitioners purchased a home at 11 Oakland Avenue, Yonkers, New York.

11. For the year 2001, petitioners filed a joint New York State resident return; however, Mr. Stellari's wages from Premuda (Atlantic) Inc. were not included.

SUMMARY OF PETITIONERS' POSITION

12. Petitioners assert that Mr. Stellari was never domiciled in New York. They contend that Mrs. Stellari lived in New York in order that their daughter could enroll at Eastchester High School which is an excellent school. In 1999, she graduated as the valedictorian. She

¹ It was alleged by petitioners' representative that petitioners owned a condominium in New Jersey; however, the record contains no evidence as to when this condominium was purchased and sold.

subsequently graduated summa cum laude from Harvard University and received a fellowship from the National Science Foundation to pursue her PhD at Cornell University.

Petitioner Umberto Stellari maintains that he was domiciled in New Jersey (petitioners' condominium was allegedly sold in 1999) before moving to Houston. However, petitioners' representative stated at the hearing that this condominium was rented out by petitioners for a number of years.

CONCLUSIONS OF LAW

A. The issue in this proceeding is whether petitioner Umberto Stellari was domiciled in the State of New York during the years at issue. This is significant because if it is determined that this petitioner was domiciled in New York, he is taxed as a resident individual whose income from all sources is subject to tax pursuant to Tax Law § 611.

B. Tax Law § 605(b)(1) defines "resident individual" as someone:

(A) *who is domiciled in this state*, unless (i) 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 (ii)(I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which such period of five hundred forty-eight consecutive days begins and the nonresident portion of the taxable year with or within which such period ends, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such portion of the taxable year bears to five hundred forty-eight, or

(B) *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 (Emphasis added.)

C. While the term “permanent place of abode” is not defined in the Tax Law, the Commissioner’s regulations, 20 NYCRR 105.20(e), provide as follows:

Permanent place of abode. (1) A permanent place of abode means a dwelling place maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer’s spouse.

For the year 1999, petitioners owned and maintained a permanent place of abode at 143 Garth Road, Apt. 2C, Scarsdale, New York from January through July and thereupon purchased a home at Oakland Avenue, Yonkers, New York, also a permanent place of abode, which was owned and maintained from August 1999 to the present.

D. The Division’s regulations define “domicile” in relevant part as follows:

(1) Domicile, in general, is the place which an individual intends to be such individual’s permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual’s 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 such individual’s 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, such individual’s declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual’s conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.

* * *

(4) A person can have only one domicile. If such person has two or more homes, such person’s domicile is the one which such person regards and uses as such person’s permanent home. In determining such person’s intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of

the taxable year 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 such person may be domiciled elsewhere.

(5)(i) Husband and wife. Generally, the domicile of a husband and wife are the same. However, if they are separated in fact, they may each, under some circumstances, acquire their own separate domiciles even though there is no judgment or decree of separation. Where there is a judgment or decree of separation, a husband and wife may acquire their own separate domicile. (20 NYCRR 105.20[d].)

E. The classic distinction between domicile and residency was explained many years ago by the Court of Appeals in *Matter of Newcomb's Estate* (192 NY 238, 250):

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.

It is well established that an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (*see, Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138). Whether there has been a change of domicile is a question “of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals” (*Matter of Newcomb's Estate, supra*, 192 NY at 250). The test of intent with regard to a purported new domicile is “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 Bourne*, 181 Misc 238, 41 NYS2d 336, 343, *affd* 267 App Div 876, 47 NYS2d 134, *affd* 293 NY 785); *see also, Matter of Bodfish v. Gallman, supra*). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which

demonstrate an individual's "general habit of life" (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989).

F. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. "The taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct" (*Matter of Simon*, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see, e.g., Gray v. Tax Appeals Tribunal*, 235 AD2d 641, 651 NYS2d 740 *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman, supra*); (2) the location of business activity (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); (3) the location of family ties (*Matter of Gray, supra; Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852, 613 NYS2d 294); (4) the location of social and community ties (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (*Matter of Gray, supra; Matter of Getz, supra*).

G. As previously noted, petitioner Umberto Stellari claims, by means of assertions made at hearing by his representative, that he was never a New York domiciliary, i.e., that he was domiciled in New Jersey until moving to Houston, Texas upon accepting employment with Premuda (Atlantic), Inc. This assertion was made despite the fact that for the entire period at issue, his wife and daughter lived in New York in a home owned by petitioners.

Petitioner Umberto Stellari did not appear at the hearing to offer testimony concerning his intent with respect to his domicile. Despite the fact that he (and his wife, petitioner Giovanna Stellari) initially rented and later owned permanent places of abode in New York continuously

from September 1994 through the present time, he maintains that he was never domiciled in New York.

While it is contended that Mr. Stellari, prior to his employment with Premuda (Atlantic), Inc., was domiciled in New Jersey, there is no evidence in the record to substantiate such contention. Petitioners' representative stated that petitioners, for a number of years, owned a condominium in New Jersey which was sold in 1999. Since he also indicated that petitioners had been renting out this condominium for several years, it is unclear whether Mr. Stellari had actually been residing in the New Jersey condominium prior to his employment in Houston. Accordingly, since petitioner Umberto Stellari has failed to sustain his burden of proving that he was a New Jersey domiciliary prior to moving to Houston, Texas in 1999 and in light of the fact that he and his wife continuously maintained a permanent place of abode in New York from September 1994 until Mr. Stellari moved to Houston in March 1999, it is hereby determined that petitioner Umberto Stellari was a domiciliary of New York when he moved to Houston to accept new employment.

H. As previously noted in 20 NYCRR 105.20(d)(5)(I), generally, the domicile of a husband and wife are the same unless separated. While it is not necessary that the husband and wife be legally separated for separate domiciles to be acquired, there is no evidence in this proceeding that petitioners were, in fact, separated. The record indicates that during the entire marriage, petitioner Umberto Stellari worked for a variety of employers in many different locations around the world. While petitioners clearly lived apart for much of their marriage due to Mr. Stellari's employment, there is no indication that in 1999, he intended to abandon his New York domicile and move to Houston, Texas to establish a fixed and *permanent* home there.

Based upon his employment history, it seems unlikely that any of his employment related moves could be considered permanent.

The facts of this case are somewhat similar to the facts in *Matter of Simon* (Tax Appeals Tribunal, March 2, 1989) wherein that petitioner, after having completed work on his doctorate in Buffalo, New York, moved to Florida. Mr. Simon rented apartments in Florida for approximately three years. During his residence in Florida, he continued to own and maintain a home in Buffalo where his wife and sons continued to reside. Petitioner also continued to provide financial support to his wife and sons during the period of his residence in Florida. During this period, he returned to Buffalo during the summer and holidays. The Tribunal, in affirming the Administrative Law Judge's determination that petitioner failed to show that he had abandoned his New York domicile and acquired a new domicile in Florida, stated that moves to other states where permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile.

The record in this matter discloses that during the year 2000, Mr. Stellari spent 65 days in New York despite residing in Houston. For years subsequent to the audit period, he spent even more time in New York. Clearly, when the opportunity arose, he chose to return to New York to spend time with his wife and daughter. Since a person can have only one domicile (20 NYCRR 105.20[d][4]) and absent clear and convincing evidence to establish that petitioner Umberto Stellari abandoned his New York domicile in 1999 and acquired a new domicile in Texas in that year, it is hereby determined that despite his move to Texas for employment purposes, he remained a domiciliary of New York during the years at issue. Accordingly, the denial of petitioners' claim for refund by the Division was proper.

I. The petition of Umberto and Giovanna Stellari is hereby denied.

DATED: Troy, New York
March 9, 2006

/s/ Brian L. Friedman
PRESIDING OFFICER