

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LESLIE MAYS : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826546
New York State and City Income Taxes under Article 22 :
of the Tax Law and the Administrative Code of the City :
of New York for the Years 2009 through 2011. :

Petitioner, Leslie Mays, filed an exception to the determination of the Administrative Law Judge issued on October 6, 2016. Petitioner appeared by the Law Office of Larry Kars, PC (Larry Kars, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Peter Ostwald, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on June 22, 2017, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether petitioner is liable for income tax as a statutory resident of New York City for the year 2011.

II. Whether petitioner demonstrated reasonable cause for abatement of penalties.

FINDINGS OF FACT

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

1. On or about April 5, 2013, the Division of Taxation (Division) commenced an income tax audit of petitioner, Leslie Mays, for the tax years 2008 through 2011.

2. By letter dated April 8, 2013, the auditor contacted petitioner informing her of the audit of her income tax returns for the years 2008 through 2011. Such letter also requested certain pertinent documentation, which included the nonresident questionnaire.

3. At the conclusion of the audit, a notice of deficiency, L-040090512, was issued to petitioner dated September 12, 2013 asserting additional income tax due plus penalty and interest. Petitioner was assessed based upon the Division's finding that she was domiciled in New York City and, alternatively, maintained a permanent place of abode and was present within the city in excess of 183 days, which makes her liable as a statutory resident for income tax purposes for the years 2009 through 2011. The Division concluded that no additional tax liability was warranted for the year 2008.

4. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. By conciliation order CMS No. 260024, dated August 29, 2014, the Division canceled the assessment for the years 2009 and 2010, but sustained tax, penalty and interest for the tax year 2011.¹

5. Petitioner filed a timely petition with respect to the remaining liability for the tax year

¹ The conciliation order incorrectly states that the tax due is \$84,705.00, plus penalty and interest. The tax liability for 2011 listed on the notice is \$83,876.00, plus penalty and interest. This tax amount is the correct number, as confirmed by the auditor in her affidavit (exhibit I, ¶ 13).

2011. The Division maintained that petitioner was liable as domiciliary and, alternatively, as a statutory resident for the year 2011. It is undisputed that petitioner was within New York City in excess of 183 days during the year 2011.

6. A formal hearing was held and petitioner appeared and testified on her own behalf. The Division's cross-examination of petitioner focused on the living quarters she maintained within New York City throughout the year 2011.

7. In its brief in opposition to the petition, the Division has conceded that petitioner was not domiciled in New York City for 2011. Therefore, the sole remaining issue is whether petitioner was a statutory resident for the year 2011.

8. Petitioner worked for Pfizer in New York City during the tax year 2008. At some point during the year, her employment was eliminated.

9. On October 28, 2010, petitioner entered into an employment contract with Avon Products, Inc., with an anticipated start date of January 4, 2011. Petitioner's position with the company was Vice President, Diversity and Inclusion in the Global Human Resources Department of Avon Products, Inc. (Avon). This offer of employment was not for a defined, limited duration.

10. Petitioner participated in Avon's relocation program, which provided her suitable options for apartments in New York City. Ultimately, petitioner chose an apartment in the Marc, which is located at 260 West 54th Street, New York, New York. Apartment 16A was a fully-furnished apartment with one bedroom, bathroom, living/dining room and kitchen. No copy of a lease was provided. Petitioner testified that there was no lease. The original arrangement for the apartment was for 90 days, or approximately until the end of April 2011.

11. Petitioner had exclusive use of this apartment for the duration of her stay at the Marc. Petitioner testified that her stay at this apartment was temporary in nature until such time as she could find suitable permanent housing either within or outside New York.

12. On April 6, 2011, Antonio D. Martin, petitioner's then fiancé, entered into a lease on a two-bedroom apartment located at 525 East 72nd Street, New York, New York. The lease term was from May 16, 2011 through May 31, 2012.

13. Petitioner contacted Pat Molitor, Relocation Service Manager, by email dated April 6, 2011, to inform her about the apartment located on 72nd Street. Petitioner inquired whether she might be able to give her 30-day notice to the Marc mid-month, rather than at the end of April, since the lease for the 72nd Street apartment was effective beginning May 16, 2011. The relocation manager stated that she would extend petitioner's living arrangement at the Marc until the end of May. Petitioner moved into the apartment at 525 East 72nd Street on June 1, 2011. There is no dispute that this apartment was a permanent place of abode.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by citing the relevant sections of the Tax Law that set forth the definition of tax residency in New York City and State. She noted that residency under the Tax Law is based on a taxpayer's status as a New York domiciliary or qualifying as a statutory resident, which entails maintaining a permanent place of abode in New York City or State and being present in the city or state on more than 183 days during a taxable year.

As the Administrative Law Judge found that there was no dispute regarding petitioner's presence in the city for more than 183 days, she addressed the remaining issue as to whether

petitioner maintained a permanent place of abode. The Administrative Law Judge quoted the Division's regulation, which defines "permanent place of abode" as a dwelling place of a permanent nature maintained by a taxpayer. The Administrative Law Judge next turned to the meaning of "maintain" within the context of statutory residency, concluding that maintaining means doing what is necessary to continue one's living arrangements in a particular place. The Administrative Law Judge also examined the meaning of "permanency" within statutory residency, reasoning that it encompasses not only the relationship of a taxpayer to a dwelling, but also its physical attributes.

The Administrative Law Judge determined that the physical attributes of petitioner's apartment indicated that it was a permanent place of abode because it contained all the necessary elements for year round habitation. The Administrative Law Judge also considered petitioner's argument that her stay was necessarily temporary, but concluded that there need not be an intention of indefinite habitation in a particular dwelling place for it to qualify as a permanent place of abode for purposes of statutory residency. The Administrative Law Judge described petitioner's stay as indefinite in nature, as her employment with Avon was not for a predetermined length of time, and as such, the apartment was not temporarily maintained for the accomplishment of a particular purpose.

Next, the Administrative Law Judge addressed whether the permanent place of abode was maintained for substantially the entire year. In analyzing the issue she cited the Division's regulation, which states that "substantially the entire year" means the entire taxable year except for small portions of that year. The Administrative Law Judge found that because petitioner maintained a dwelling at the Marc and subsequently at 72nd Street for eleven months and three

days of the taxable year in aggregate, her maintenance of the dwellings was for substantially the entire taxable year.

Lastly, the Administrative Law Judge turned to petitioner's argument that the negligence penalty should be abated as petitioner relied on her accountant in filing her returns. The Administrative Law Judge disagreed, stating that each taxpayer has a nondelegable duty to file timely tax returns with payment and the mere assertion of reliance on the advice of others was insufficient to show reasonable cause for abatement of penalties.

The Administrative Law Judge denied petitioner's protest and sustained the notice of deficiency, as modified by the conciliation order, that reduced the assessment of tax to reflect tax year 2011 only.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues on exception that her stay at the apartment at the Marc did not qualify as residing at a permanent place of abode in that it was a temporary stay at a corporate apartment. She also argues that even if it does qualify as a permanent place of abode, she cannot be said to have maintained it. She further argues that her periods of residency at the Marc and on 72nd Street, in aggregate, do not amount to substantially the entire year for purposes of statutory residency. Finally, petitioner argues that her reliance on her accountant's advice constitutes reasonable cause for the abatement of negligence penalties.

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge and sustain the notice of deficiency as modified by the conciliation order. It argues that the Administrative Law Judge correctly determined that petitioner failed to meet her burden of proof by establishing through clear and convincing evidence that she did not maintain a

permanent place of abode for substantially the entire year in New York City during 2011. It also argues that the Administrative Law Judge correctly determined that negligence penalties were properly imposed for tax year 2011.

OPINION

The question presented is whether petitioner qualified as a statutory resident of New York State and City for 2011. Thus, we start with the definition of a New York State and City resident under the Tax Law. In addition to taxpayers domiciled in New York State or City, the Tax Law defines a resident individual as an individual who is not domiciled in the state or city but maintains a permanent place of abode in the state or city and spends in the aggregate more than 183 days of the taxable year in the state or city (Tax Law § 605 [b] [1] [B]; Administrative Code of the City of New York § 11-1705 [b] [1] [B]).¹

Except in circumstances not applicable here, the taxpayer bears the burden of proof in demonstrating that a notice of deficiency is erroneous or incorrect (Tax Law § 689 [e]). Thus, petitioner here bears the burden of proof in showing by clear and convincing evidence that her stay at the apartment at the Marc did not qualify as maintaining a permanent place of abode within the meaning of the Tax Law § 605 (b) (1) (B) (*see Matter of Schibuk*, Tax Appeals Tribunal, May 6, 1999, *confirmed* 289 AD2d 718 [3d Dept 2001]).

A permanent place of abode is defined under the Division's regulations as "a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer . . ." (20 NYCRR 105.20 [e] [1]). The threshold question when examining whether a taxpayer maintained a permanent place of abode is whether the dwelling exhibits the physical

¹ The Division conceded the issue of domicile in the proceeding below. Thus, here we will only address the issue of statutory residency.

characteristics ordinarily found in a dwelling suitable for year-round habitation (*id.*). If answered in the negative, the dwelling is not a permanent place of abode. If answered in the affirmative, the question then becomes whether the taxpayer has a legal right to occupy that dwelling as a residence (*id.*; *see also Matter of Schibuk*). If this question is answered in the affirmative, and if the taxpayer exercised that right by enjoying his or her residential interest in that dwelling, it can be concluded that the taxpayer maintained a permanent place of abode within the meaning of Tax Law § 605 (b) (1) (B) (*cf. Matter of Gaied*, Tax Appeals Tribunal, July 8, 2010, *confirmed* 101 AD3d 1492 [3d Dept 2012], *revd* 22 NY3d 592 [2014] [even though the taxpayer owned a dwelling, he did not use it as such, and thus it did not qualify as his residence]). If the taxpayer has no legal right to occupy the dwelling, the analysis turns to factors indicating the taxpayer's relationship to the place (*Matter of Evans*, Tax Appeals Tribunal, June 18, 1992, *confirmed* 199 AD2d 840 [3d Dept 1993] ["In our view, the permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in the dwelling place. Permanence, in this context, must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place"]). Having established the permanency of the place of abode, the second part of the analysis examines whether the taxpayer can be said to have "maintained" the dwelling. If the taxpayer did what was necessary to continue his or her living arrangements in a permanent place of abode or otherwise had a residential interest therein, it may be concluded that the taxpayer maintained a permanent place of abode notwithstanding his or her lack of a legal right to occupy such a dwelling (*id.*, *see also Matter of Gaied* [a taxpayer must have a residential interest in a permanent place of abode to be deemed a statutory resident]).

The present case is similar to the situation in *Matter of Evans*, where the taxpayer did not have a legal right to reside at the dwelling that qualified as a permanent place of abode for purposes of statutory residency. In *Matter of Evans*, the taxpayer was invited to reside with a friend at a rectory of a church in Manhattan. The taxpayer stayed at the rectory and returned to his Dutchess County home on the weekends. The rectory was provided to the taxpayer's friend as part of his compensation by the parish that he served. The taxpayer and his friend shared common living expenses, such as food and housekeeping, and the taxpayer had a key and unfettered access to the dwelling. We held that the fact that the taxpayer did not have a legal right to reside in the rectory was not determinative of the question of the permanency of the place of abode (*id.*).

We reaffirm our holding in *Matter of Evans* that absent a legal right to occupy a dwelling, the determination of whether a taxpayer's dwelling qualifies as a permanent place of abode depends on a variety of factors, including, but not limited to, the physical aspects of a dwelling and the taxpayer's relationship to that dwelling. We agree with the Division that the Administrative Law Judge correctly determined that petitioner's apartment at the Marc qualified as a permanent place of abode. As observed by the Administrative Law Judge, the apartment at the Marc had all the characteristics of a dwelling that was permanent in nature, i.e., it contained a bedroom, bathroom, living room, and kitchen. The apartment's physical characteristics met the objective requirement that the dwelling must be suitable for habitation on a year-round basis (*id.*; *see also* 20 NYCRR 105.20 [e] [1]). Petitioner's relationship to the apartment at the Marc was as a residence, exhibiting all the physical characteristics of a dwelling that is permanent in nature. The record demonstrates that petitioner resided at and had unfettered access to the apartment at

the Marc during her stay, which she was ultimately able to extend until such time as she was able to move into her new apartment. Therefore, the apartment at the Marc constitutes a permanent place of abode, notwithstanding the fact that it was provided on a temporary basis as a benefit of petitioner's employment.²

We next turn to the question of whether petitioner maintained the apartment at the Marc within the meaning of the Tax Law (*see* Tax Law § 605 [b] [1] [B]). As discussed above, we held in *Matter of Evans* that maintaining a place of abode within the meaning of the Tax Law is achieved by doing whatever is necessary to continue one's living arrangements in a particular place. This interpretation accords with the Court of Appeals' decision in *Matter of Gaied*, which requires a taxpayer's relationship to a dwelling to consist of a residential interest in order to conclude that such a taxpayer maintained a particular place of abode within the meaning of the Tax Law.

We agree with the Division that the Administrative Law Judge correctly determined that petitioner maintained the apartment at the Marc within the meaning of Tax Law § 605 (b) (1) (B). We have held that a place of abode need not be owned or leased by a taxpayer nor must there be some legal right to reside in such a dwelling in order for it to be deemed a permanent place of abode (*Matter of Evans*; *see also* 20 NYCRR 105.20 [e] [1]). All that was required for petitioner to be deemed to maintain her apartment at the Marc was for her to do whatever was

² We are not convinced by petitioner's argument that the apartment at the Marc should not be considered a permanent place of abode due to its limited duration of availability to her. As argued by the Division, the exception to statutory residency for temporary stays in New York was deleted from the regulation in 2008 (*see* 20 NYCRR former 105.20 [e]; TSB-M-09[2]I). This repealed regulatory language provided an exception for dwellings that otherwise would be deemed permanent if they were only maintained by a taxpayer during a temporary stay for the accomplishment of a particular purpose. The change was effective for tax years beginning after December 31, 2008, and thus the temporary stay exception is unavailable to petitioner for tax year 2011.

needed in order to continue her living arrangements there (*Matter of Evans*; see also *Matter of El-Tersli*, Tax Appeals Tribunal, January 23, 2003, *affd* 14 AD3d 808 [3d Dept 2005]). Here, we find as particularly salient to the question of whether petitioner maintained the apartment at the Marc the facts that she maintained her employment with Avon, from which the right to reside at the Marc arose; that she had exclusive use of the apartment for the entire duration of her stay; and that she was able to extend that stay by request.

We next consider petitioner's argument that her stays at the Marc and in the 72nd Street apartments, in the aggregate, did not amount to substantially the entire year for purposes of statutory residency. The definition of a resident individual for purposes of Tax Law § 605 (b) (1) includes an individual who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year (generally, the entire taxable year disregarding small portions of such year) and is present for more than 183 days of the taxable year in New York State (20 NYCRR 105.20 [a] [2]). "Substantially all of the taxable year" is not a term that is defined numerically under the Tax Law or regulations, but the Division has, as a matter of policy, interpreted this to mean a period of time in excess of eleven months (*see 2014 Nonresident Audit Guidelines*, State of New York - Department of Taxation and Finance, Income Franchise Field Audit Bureau [https://www.tax.ny.gov/pdf/2014/misc/nonresident_audit_guidelines_2014.pdf]). Here, petitioner's residency periods at her two apartments in New York City amount to eleven months, three days in aggregate. We agree with the Division that the Administrative Law Judge correctly determined that this amounted to substantially all of the taxable year for purposes of establishing statutory residency (*cf. Matter of Tweed*, Tax Appeals Tribunal, May 23, 1996).

It is well established that determinations of a taxpayer's status as a resident or nonresident individual for purposes of the personal income tax have long been based on the principle that the result "frequently depends on a variety of circumstances which differ as widely as the peculiarities of individuals" (*Matter of Newcomb*, 192 NY 238 [1908] [recognizing that residency depends on a multitude of factors in discussion of domicile]). We recognize this principle at work in the present case. But for petitioner's new employment opportunity, she would not have been offered the choice of an apartment and ultimately would not have had the benefit of residing at the Marc until she secured other housing. The apartment at the Marc contained all the physical elements of a permanent place of abode, and petitioner did what was necessary to continue her living arrangements at that dwelling place, i.e. she continued to be employed by Avon. Because petitioner actually resided at the Marc in an apartment that met the physical requirements of permanency, we conclude that petitioner also enjoyed a residential interest in the apartment at the Marc for the course of her stay there.

Lastly, we address petitioner's argument that the negligence penalties assessed in this case should be abated due to her reliance on her accountant in preparing her tax returns. We agree with the Division that the Administrative Law Judge correctly determined that petitioner has a nondelegable duty to prepare and file timely tax returns with payment and her mere assertion that she relied on her accountant's expertise in preparing her tax return, without more, does not amount to reasonable cause for her failure to comply with her obligation under the Tax Law (*see* Tax Law § 685 [b]; *Matter of McGaughey*, Tax Appeals Tribunal, March 19, 1998, *confirmed sub nom Matter of McGaughey v Urbach*, 268 AD2d 802 [3d Dept 2000]). In *McGaughey*, we held that a careful weighing of facts and circumstances is necessary to

determine whether a taxpayer “acted with ordinary business care and prudence in attempting to ascertain his tax liability and that penalties should be abated” (*see also Matter of Koether*, Tax Appeals Tribunal, December 15, 1994). Although petitioner hired a New York accountant to assist in preparing her income tax return for the tax year here at issue, there is no evidence in the record indicating that petitioner acted with ordinary business care and prudence in trying to ascertain her correct tax liability. Thus, we do not find the requisite reasonable cause here to abate the penalties as imposed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leslie Mays is denied;
2. The determination of Administrative Law Judge is affirmed;
3. The petition of Leslie Mays is denied; and
4. The notice of deficiency as modified by the conciliation order is sustained.

DATED: Albany, New York
December 21, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner