

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOSEPH PILARO AND JOE GORRIE : DECISION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 829204
York State and City Personal Income Tax under Article 22 :
of the Tax Law and the Administrative Code of the City :
of New York for the Year 2014. :
:

Petitioners, Joseph Pilaro and Joe Gorrie¹, filed an exception to the determination of the Administrative Law Judge issued on August 26, 2021. Petitioner Joseph Pilaro appeared pro se on exception. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter reply brief. Oral argument was heard by teleconference on March 10, 2022, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether petitioner Joseph Pilaro is liable for income tax as a statutory resident of New

¹ Although the petition was filed under the names Joseph Pilaro and Joseph Gorrie, we are advised by petitioners that Mr. Gorrie's first name is Joe and not Joseph. As Mr. Gorrie's name appears as Joe Gorrie on petitioners' federal and New York returns for the year at issue, as well as on the subject statutory notice, we have made this change throughout this decision.

York State and City for the year 2014.

II. Whether, if petitioner Joseph Pilaro is such a statutory resident, petitioner Joe Gorrie is also liable for the deficiency at issue by reason of his joint filing status with Mr. Pilaro.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 1, 7 and 8 and have added findings of fact 22 and 23 to reflect the record more fully. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact appear below.

1. Petitioners, Joseph Pilaro and Joe Gorrie, jointly filed form IT-203 (New York State nonresident and part-year resident income tax return) for 2014 as nonresidents. On form IT-203, petitioners marked the "no" box when asked "Did you or your spouse maintain living quarters in NYS in 2014?" Petitioners also jointly filed their 2014 federal income tax return.

2. During 2014, petitioner Joseph Pilaro² was issued a form W-2 for wages of \$10,903.00 from his employment with the Los Angeles Community College District, where he taught English online through West Los Angeles College in Los Angeles, California. He was also issued a form W-2 for wages of \$76,294.00 from the Nassau County Comptroller's Office for work as an assistant professor at Nassau Community College in Garden City, New York.

3. For 2014, petitioners also reported capital gains of \$581,957.00 from the sale of their multi-family home located in Venice, California, on March 25, 2014.

4. In 2013 and for most of 2014, petitioner's position at Nassau Community College was temporary. This position became permanent at the end of 2014.

² Because his residency status is the main question presented, "petitioner" refers to Joseph Pilaro.

5. Petitioner testified at the hearing in this matter that from January 1, 2014, through November 1, 2014, when he was not in California with his husband, he rented an apartment located on East 7th Street in New York City (7th Street apartment) when working at the Nassau Community College. He testified that this apartment “was an office with a bed.” He described it as a place for him to do his schoolwork, such as grading papers, and sleep. He testified “[i]t had a small kitchenette and a really tiny bathroom.” He also stated “[i]t was a walk-up in the East Village.”

6. The Division sent petitioner a letter, dated September 28, 2018, requesting additional information regarding this apartment, including the lease agreement and rental payments made. However, a lease agreement was not provided.

7. On December 3, 2014, petitioners closed on the purchase of an apartment located at 465 West 23rd Street, Apartment 8H, New York City, New York (West 23rd Street apartment). Although the date of the contract to purchase the apartment is not in the record, the record does establish that petitioners made a deposit payment of \$55,500.00 on their purchase on or about October 27, 2014. Petitioners’ use of the West 23rd Street apartment as a residence began in January 2015, following the completion of construction work on the property.³

³ In petitioners’ brief submitted to the Administrative Law Judge, their former representative conceded that petitioners became domiciled in New York when they purchased the apartment on December 3, 2014. Based on that concession, the Administrative Law Judge found that petitioners acquired a New York domicile as of that date. At oral argument, however, Mr. Pilaro stated that his former representative had misrepresented his residency status and that he was not domiciled in New York at any time during 2014. Without petitioners’ concession, there is insufficient evidence in the record to find a change of domicile to New York as of December 3, 2014 (*see* 20 NYCRR 105.20 [d] [2] [burden is on party asserting a change in domicile to show such a change]). We have modified the Administrative Law Judge’s finding of fact 7 to reflect this change. Additionally, in his hearing testimony and in his response to the Division’s October 24, 2017 IDR, petitioner stated that he moved into the apartment in January 2015. Accordingly, we have further modified finding of fact 7 and have deleted the Administrative Law Judge’s finding that there was “no dispute that [the West 23rd Street] apartment was a permanent place of abode.”

8. The Division's September 28, 2018 letter to petitioner also requested information regarding where petitioner stayed after the lease of his 7th Street apartment ended until petitioner closed on the West 23rd Street apartment, but this information was not provided. At the hearing, petitioner testified that he stayed with friends but did not state where. He later testified that he had a friend in Harlem who had a three-bedroom apartment who allowed petitioner to stay with him and he would take accommodations depending on what was available to him. It is not clear when he stayed with this person.

9. On September 30, 2015, the Division sent petitioners a letter advising them that their New York State tax return for tax year 2014 was selected for audit. Included with this letter was the first of several information document requests (IDR) requesting, among other things, the completion and return of a nonresident questionnaire, petitioner's form 1040, U.S. individual tax return, and petitioner's relationship with three New York addresses, including petitioner's 7th Street apartment and his West 23rd Street apartment.

10. In a subsequent IDR, dated October 24, 2017, the Division asked petitioner for several more documents and more information, including a chronological history of his residence and employment, credit card and bank statements, employment contracts, calendars for days claimed to be spent outside of New York, cellphone number, carrier and monthly bills or statements, and petitioner's closing statement for the purchase of the property in December of 2014. Petitioner responded to this request on November 27, 2017.

11. Petitioner submitted airline and train documents for 2014, which indicate petitioner's travel as follows:

Date	From	To
January 15, 2014	Los Angeles, CA	New York, NY – JFK

January 25, 2014	New York, NY – Penn Station	Washington, DC
January 27, 2014	Washington, DC	New York, NY – Penn Station
February 15, 2014	New York, NY– JFK	Los Angeles, CA
February 24, 2014	Los Angeles, CA	Newark, NJ
February 28, 2014	New York, NY – JFK	Washington, DC
March 3, 2014	Washington, DC	New York, NY – Penn Station
March 7, 2014	New York, NY– JFK	Los Angeles, CA
March 10, 2014	Los Angeles, CA	New York, NY – JFK
March 28, 2014	New York, NY – JFK	Los Angeles, CA
April 1, 2014	San Francisco, CA	New York, NY – JFK
April 13, 2014	New York, NY – JFK	Los Angeles, CA
April 20, 2014	Los Angeles, CA	Washington, DC
April 21, 2014	Washington, DC	New York, NY – JFK
May 7, 2014	New York, NY – JFK	Los Angeles, CA
May 12, 2014	Los Angeles, CA	New York, NY – JFK
May 22, 2014	New York, NY – LaGuardia	Los Angeles, CA
August 29, 2014	Los Angeles, CA	New York, NY – JFK
October 2, 2014	New York, NY – JFK	Los Angeles, CA
October 6, 2014	Los Angeles, CA	New York, NY – JFK
October 31, 2014	New York, NY – JFK	Washington, DC
November 2, 2014	Washington, DC	New York, NY – JFK
November 7, 2014	New York, NY – JFK	Los Angeles, CA
November 11, 2014	Los Angeles, CA	New York, NY – JFK

November 26, 2014	New York, NY – JFK	Los Angeles, CA
December 1, 2014	Los Angeles, CA	Newark, NJ
December 12, 2014	New York, NY – Penn Station	Washington, DC
December 14, 2014	Washington, DC	New York, NY – Penn Station
December 19, 2014	Newark, NJ	Los Angeles, CA

12. On February 24, 2014, as shown above, petitioner flew into Newark, New Jersey, at approximately 9:10 p.m. Thereafter, there was a charge for a cab or limo in New York City at 9:42 p.m.

13. Additionally, on October 10, 2014, petitioner drove from New York to Virginia. He drove back to New York on October 14, 2014.

14. On December 1, 2014, after arriving in Newark, New Jersey, petitioner used an ATM in New York, New York, at approximately 10:20 p.m. that evening.

15. On December 19, 2014, before leaving for Los Angeles, petitioner used an ATM in New York, New York, at approximately 9:48 a.m.

16. The Division determined that petitioner spent 202 days in New York City in 2014. In reaching this determination, the Division relied on bank statements from Citibank, plane and train e-tickets, email of flight itineraries, Chase credit card statements, and T-Mobile cell phone statements.

17. On August 20, 2018, the Division sent petitioner's representative a letter advising that an audit of petitioner's New York state tax returns for the tax year 2014 has resulted in an increase of tax liability in the amount of \$35,275.00.

18. On November 23, 2018, the Division issued petitioners a notice of deficiency with assessment ID L-049187917, asserting additional New York State personal income tax due for

the year 2014 in the amount of \$22,352.00, plus interest and penalty. This notice was premised upon the assertion that petitioners were domiciled in New York State and City, were statutory residents of New York State and City, or the correct amount of income was not allocated to New York State and/or New York City.

19. The Division also found that petitioners were entitled to a New York State resident credit of \$36,720.00 for taxes paid to California.

20. Petitioners filed New York State resident income tax returns, forms IT-201, for tax years 2015 and 2016.

21. At the hearing, the Division submitted the affidavit of Glenda Knox, sworn to on September 21, 2020. Ms. Knox was the tax auditor 1 who performed an audit of petitioners' return. In her affidavit, Ms. Knox stated that "[u]pon audit, it was determined that Petitioners maintained a permanent place of abode located at [the 7th Street apartment] from 1/1/2014 thru 11/1/2014." She also stated "[u]pon audit, it was determined that Petitioners purchased a residence located at [West 23rd Street] on 12/3/2014."

22. Following its audit, the Division took the position that, for statutory residency purposes, the 7th Street and West 23rd Street apartments were permanent places of abode that petitioner maintained during 2014. This position, along with its audit finding that petitioner spent 202 days in New York, underlies the Division's contention that petitioner was a statutory resident of New York in 2014.

23. Petitioners' former representative executed a consent extending the period of limitations for assessment for tax year 2014 until on or before April 15, 2019. The consent is dated February 28, 2018.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that a New York resident for income tax purposes is an individual who is either: 1) domiciled in New York; or 2) not domiciled in New York but who maintains a permanent place of abode in New York and is physically present in New York for more than 183 days during the taxable year.

As the latter definition is at issue here, the Administrative Law Judge first considered whether petitioner's 7th Street apartment was a permanent place of abode under the Tax Law. The Administrative Law Judge determined that it was such an abode because the dwelling itself was suitable for year-round habitation and petitioner had the right to occupy it as a residence.

The Administrative Law Judge rejected petitioner's argument that his New York stay during the year at issue was temporary because his job was temporary. The Administrative Law Judge noted that the Division's regulations formerly had an exception to the definition of permanent place of abode if the dwelling was for "a temporary stay for the accomplishment of a particular purpose." The Administrative Law Judge found, however, that the regulation was amended and the relevant language deleted effective 2009.

Next, the Administrative Law Judge examined whether petitioner maintained a permanent place of abode for "substantially all of the taxable year" in accordance with the Division's regulations. The Administrative Law Judge noted that the regulations defines this phrase as "generally, the entire taxable year disregarding small portions of such year" (20 NYCRR 105.20 [a] [2]). The Administrative Law Judge further noted Division policy that defined this phrase more precisely as a period in excess as of 11 months.

The Administrative Law Judge found that petitioner maintained the 7th Street apartment from January 1, 2014 until November 1, 2014 and that he purchased the West 23rd Street

apartment on December 3, 2014 and maintained that apartment until December 31, 2014.

According to the Administrative Law Judge, these two periods total 11 months exactly. The Administrative Law Judge found no evidence in the record regarding petitioner's living arrangement in New York during the November 2 through December 2, 2014 period. The Administrative Law Judge concluded that petitioner failed to show that he did not maintain a permanent place of abode in New York during this period. The Administrative Law Judge thus determined that petitioner failed to show that he did not maintain a permanent place of abode for "substantially all" of 2014.

The Administrative Law Judge then examined whether petitioner proved that he was present in New York for fewer than 184 days in 2014. The Administrative Law Judge noted that, generally, any part of a day in New York counts as a New York day, with an exception for traveling through New York or entering New York solely to board a plane, train, bus or ship. The Administrative Law Judge found that petitioner's own travel documents and bank statements show that he was in New York State and City for 174 days in 2014. The Administrative Law Judge found an additional 28 days where New York City was the destination or origin of travel. Because petitioner was departing from or returning to his New York City permanent place of abode on such days, the Administrative Law Judge determined that these travel days count as New York days and do not fall within the narrow "traveling through" exception. The Administrative Law Judge thus concluded that petitioner spent 202 days in New York State and City in 2014.

The Administrative Law Judge rejected petitioners' argument that they were not afforded an opportunity to have their tax determined separately. The Administrative Law Judge observed that petitioners filed joint New York returns and that it was undisputed that they filed joint

federal returns. Under such circumstances, the Administrative Law Judge determined that petitioners are properly deemed to have elected to be treated as residents.

The Administrative Law Judge thus denied the petition and sustained the notice of deficiency.

ARGUMENTS ON EXCEPTION

Petitioner asserts that he did not maintain a permanent place of abode in New York in 2014 and that he spent 173 days in New York during that year. Petitioner contends that he stayed with a friend after leaving the 7th Street apartment on November 1, 2014, and that he left New York for the year in mid-December 2014. In reference to the 28 days where New York City was the destination or origin of travel, petitioner contends that such travel days, i.e., days on which he was present in two states, should not be considered New York days.

In an issue not raised below, petitioner asserts that the notice of deficiency was issued beyond the three-year period of limitations.

In another issue not raised below, petitioner contends that Mr. Gorrie was denied relief as an innocent spouse.

Petitioner complains of technical problems with the hearing, which was held by WebEx. Petitioner also complains that his representative at the hearing was unprepared.

Additionally, petitioner asserts that he and Mr. Gorrie were denied “the right of finality” under the New York City taxpayer bill of rights. By this assertion, petitioner contends that he was never advised by the Division of the “maximum time” it would take to complete the audit.

Petitioner also objects to the accrual of interest during the pendency of this proceeding given the “unprecedented circumstances . . . when the NY state government and courts were closed.”

In opposition to the exception, the Division contends that the determination is correct in all respects.

OPINION

New York State and New York City impose personal income taxes on resident and nonresident individuals (Tax Law § 601 [a] - [c], [e]; Administrative Code of the City of New York §§ 11-1701, 11-1902). Residents are taxed on their income from all sources (Tax Law § 611 [a]; Administrative Code of the City of New York § 11-1711 [a]). Nonresidents are taxed on their State and City source income (Tax Law § 631 [a]; Administrative Code of the City of New York § 11-1902 [a]).

New York City's definitions of a resident individual are identical to New York State's, except for the substitution of the term "city" for "state" (Tax Law former § 1305 [a]; Administrative Code of the City of New York former § 11-1705 [b] [1]). The Division's income tax regulations are applicable to the City's income tax (20 NYCRR 290.2).

A New York State resident individual includes a person "who is domiciled in this state" (Tax Law § 605 [b] [1] [A]). A resident individual also includes a so-called statutory resident. As defined during the period at issue, a statutory resident was a person who was not domiciled in New York State, but who 1) maintained a permanent place of abode in the state for substantially all of the taxable year; and who 2) spent at least 183 days in the state during the taxable year (Tax Law former § 605 [b] [1] [B]; 20 NYCRR 105.20 [a] [2]). As noted, the present matter concerns whether petitioner was a statutory resident in 2014.

For statutory residency purposes, a permanent place of abode is "a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer . . ." (20 NYCRR 105.20 [e] [1]). Such a dwelling must have the physical characteristics ordinarily found

in a dwelling suitable for year-round habitation (*id.*). Additionally, the taxpayer must have a “residential interest” in the property (*Matter of Gaied v New York State Tax Appeals Trib.*, 22 NY3d 592, 598 [2014]). This means that “[t]he taxpayer must have utilized the dwelling as his or her residence; maintaining a dwelling that could be a permanent place of abode is not enough to establish status as a statutory resident” (*Matter of Obus v New York State Tax Appeals Trib.*, _AD3d_, 2022 Slip Op 533310 [3d Dept 2022] citing *Matter of Gaied v New York State Tax Appeals Trib.*, 22 NY3d at 598; *see also* NY St Dept of Taxation & Fin Advisory Op No. TSB-A-18[3]I). Accordingly, a residential interest determination necessarily involves a subjective analysis of the taxpayer’s use of the dwelling, including the nature and duration of such use (*id.*). A residential interest may include an informal arrangement (*Matter of Evans v Tax Appeals Trib. of State of N.Y.*, 199 AD2d 840 [3d Dept 1993]). Maintaining a place of abode involves “doing whatever is necessary to continue one’s living arrangements in a particular place” (*Matter of Mays*, Tax Appeals Tribunal, December 21, 2017).

Petitioner’s rental of the 7th Street apartment was the maintenance of a permanent place of abode for statutory residency purposes. The record shows that this apartment was suitable for use as a residence; that petitioner had a right to use it as a residence; and that he did so (*see* finding of fact 5). Petitioner thus maintained a permanent place of abode in New York City during the period January 1 through November 1, 2014.

In contrast, the West 23rd Street apartment was not a permanent place of abode for petitioner in 2014. As noted, a taxpayer must use a dwelling as a residence for the dwelling to be considered a permanent place of abode for statutory residency purposes (*Matter of Obus v New York State Tax Appeals Trib.*). Petitioner did not reside in the West 23rd Street apartment until January 2015 (*see* finding of fact 7). We thus disagree with the Administrative Law Judge’s

conclusion that petitioner maintained a permanent place of abode in New York for the period December 3 through December 31, 2014.

We also disagree with the Administrative Law Judge's conclusion that, by his failure to detail his living arrangements in New York during the time between the end of his 7th Street rental and the closing on the East 23rd Street purchase, i.e., November 2 through December 2, 2014, petitioner failed to meet his burden to prove that he did not maintain a permanent place of abode in New York during that time. Although the record lacks specifics concerning petitioner's living arrangements during this period, the facts that are present weigh in petitioner's favor. First, it appears that petitioner stayed with a friend (*see* finding of fact 8). He thus did not have a legal right to occupy the dwelling. Under such circumstances, we consider a variety of factors to determine whether an individual has a residential interest in the dwelling, including the nature and duration of the use (*Matter of Obus v New York State Tax Appeals Trib.* citing *Matter of Evans v Tax Appeals Trib. of State of N.Y.*). Petitioner's living arrangement with his friend in late 2014 was brief and clearly temporary, considering that petitioner had begun the process of purchasing the East 23rd Street apartment prior to this period by paying a contract deposit (*see* finding of fact 7). Additionally, we find it significant that the Division did not take the position that petitioner maintained a permanent place of abode in New York during the November 2-December 2 period at any point during the audit or the proceeding below. We thus conclude that petitioner's living arrangement during this period did not constitute the maintenance of a permanent place of abode.

As noted, an individual must maintain a permanent place of abode for "substantially all of the taxable year" to be considered a statutory resident (20 NYCRR 105.20 [a] [2]). The regulations define this phrase as "generally, the entire taxable year disregarding small portions of

such year” (20 NYCRR 105.20 [a] [2]). In its nonresident audit guidelines, the Division has interpreted this phrase to mean more than 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]). The Division’s guidelines are instructive on this point (*Matter of Mays*). Residency periods at multiple abodes may be aggregated to ascertain whether the “substantially all of the taxable year” requirement has been met (*id.*).

We have determined that petitioner maintained a permanent place of abode in New York for the period January 1 through November 1, 2014. This period of 10 months and 1 day falls short of the “substantially all of the taxable year” requirement under both the regulation’s plain language and the Division’s guidelines. We conclude, therefore, that petitioner was not a statutory resident of New York for the 2014 tax year.

The foregoing conclusion renders petitioner’s remaining arguments moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph Pilaro and Joe Gorrie is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Joseph Pilaro and Joe Gorrie is granted; and
4. The notice of deficiency, dated November 23, 2018, is canceled.

DATED: Albany, New York
August 18, 2022

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner