

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
	:	
DIARMUID M. GLYNN	:	DECISION
	:	DTA NO. 830170
for Redetermination of a Deficiency or for Refund of New	:	
York State and City Personal Income Taxes under Article	:	
22 of the Tax Law and the Administrative Code of the City	:	
of New York for the Year 2017.	:	

Petitioner, Diarmuid M. Glynn, filed an exception to the determination of the Administrative Law Judge issued on November 10, 2022. Petitioner appeared by Matthews Panariello PC (Christopher LaBarbiera, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel).

Petitioner did not file a brief in support. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for issuance of this decision began on January 4, 2023, the date that the letter brief in reply was received.

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

ISSUE

Whether the Division of Taxation has established that there are no material and triable issues of fact such that, as a matter of law, summary determination can be made holding petitioner Diarmuid M. Glynn liable for income tax as a statutory resident of New York State and City for the year 2017.

FINDINGS OF FACT

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

1. The Division of Taxation (Division) brought a motion on July 13, 2022, seeking summary determination in its favor. The subject of the Division's motion was whether petitioner, Diarmuid M. Glynn, was a resident of New York City under Tax Law § 605 (b) (1) (B) and the Administrative Code of the City of New York § 11-1705 (b) (1) (B) for the year 2017.

2. The Division conducted a residency audit of petitioner for the tax year 2017. The sole issue is whether petitioner, who admittedly spent more than 183 days within New York City, maintained a permanent place of abode that resulted in him qualifying as a resident of New York City under the relevant statutes. There is no dispute that petitioner was domiciled outside of New York. The auditor determined that petitioner was liable for additional personal income taxes as both a New York State and City resident for 2017.

3. On October 4, 2019, the Division issued a notice of deficiency to petitioner, bearing assessment number L-050667967 (notice), for the tax year 2017.

4. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services in protest of the notice. By conciliation order, CMS No. 315870, dated October 30, 2020, such request was denied and the notice of deficiency sustained.

5. In protest of the conciliation order, petitioner timely filed a petition with the Division of Tax Appeals on December 7, 2020.

6. In support of its motion, the Division provided, along with an affirmation of Colleen M. McMahon, Esq., dated July 12, 2022, the following with its motion papers: an affidavit, dated

July 6, 2022, of Marilyn Young, Tax Auditor 1, in the Buffalo regional office of the New York State Department of Taxation and Finance and a Report of Audit/Buffalo District Office that consists of audit workpapers prepared by the auditor.

7. During 2017, petitioner was domiciled outside of the country.

8. Petitioner is a researcher and the CEO of Basecare Inc. Basecare Inc. had two offices during the years 2015 through 2017; one in New York, located on East 11th Street, and one in Berlin, Germany.

9. Petitioner worked in New York City beginning on May 15, 2015, and for the tax year 2015, petitioner filed a part-year New York State personal income tax return, form IT-203. For the tax year 2016, petitioner filed a resident New York State and City personal income tax return, form IT-201. For the tax year 2017, petitioner filed a nonresident and part-year resident New York State and City personal income tax return, form IT-203.

10. Petitioner was present in New York City for 274 days in 2017.

11. Petitioner leased an apartment on Spring Street in New York City. A copy of the lease reflects a lease term of one year that began on June 28, 2016 to June 30, 2017. Petitioner renewed his lease for one year, beginning July 1, 2017 through June 30, 2018. Under the lease, he was the sole occupant of the apartment. The apartment has water, sewer and heat that is included in the amount of rent paid monthly. Petitioner was responsible for paying for electricity, used to operate all appliances within the apartment, as well as costs for phone and cable. Petitioner was responsible for maintaining the apartment throughout the lease period.

12. Petitioner stated that he was a nonresident for 2017 because he was in New York City solely for performance of a work assignment for a fixed and limited period of time.

Petitioner states that because of his temporary work assignment, his apartment does not qualify as permanent.

13. Petitioner's representative filed a two-page affirmation in opposition to the Division's motion. Petitioner did not submit any other documents in support of his argument.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first reviewed the standards for granting a motion for summary determination. She noted that the Division had moved for summary determination asserting that petitioner was properly deemed a city resident individual pursuant to Tax Law § 605 (b) (1) (B) and the Administrative Code of the City of New York § 11-1705 (b) (1) (B), based on the fact that petitioner maintained a permanent place of abode within the City and spent more than 183 days within the City in the year 2017.

The Administrative Law Judge observed that petitioner did not dispute that he had been present within the City for more than 183 days, but argued the Division had not sustained its burden of demonstrating that his apartment there was permanent. The Administrative Law Judge next reviewed petitioner's burden of proof to demonstrate by "clear and convincing evidence" that his stay at the apartment did not qualify as maintaining a permanent place of abode. The Administrative Law Judge also noted that there were no facts in dispute.

The Administrative Law Judge concluded that petitioner did maintain a permanent place of abode in the City in 2017 since, as petitioner conceded, the apartment was used by him in excess of 183 days during 2017 and petitioner had a legal right to occupy the apartment, having signed and renewed a one-year lease. The Administrative Law Judge found no legal support for petitioner's argument that his temporary work assignment necessitated a different conclusion. Indeed, she noted that, effective December 24, 2008, 20 NYCRR 105.20 (e) (1) had deleted a

reference to traveling to New York on a temporary basis to accomplish a particular purpose. The Administrative Law Judge thus granted the Division's motion for summary determination.

ARGUMENTS ON EXCEPTION

Petitioner contends that "it is not a fact that petitioner maintained a permanent place of abode" and denies making any argument relying on 20 NYCRR 105.20 (e) (1). In opposition to the exception, the Division contends that the determination of the Administrative Law Judge 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). While residents are taxed on their income from all sources, nonresidents are taxed only on their State and City source income (Tax Law §§ 611 [a], 631 [a]; Administrative Code of the City of New York §§ 11-1701 [a], 11-1902 [a]).

New York State and New York City employ an identical definition of a resident individual, with the exception of the use of the term "state" or "city" (Tax Law former § 1305 [a]; Administrative Code of the City of New York § 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 City statutory resident in 2017.

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 Pilaro and Gorrie*, Tax Appeals Tribunal, August 18, 2022; *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 Pilaro and Gorrie* quoting *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). The determination of a residential interest necessarily involves a subjective analysis of the taxpayer’s use of the dwelling, including the nature and duration of such use (*id.*). 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 Spring Street apartment meets the requirements for the maintenance of a permanent place of abode for statutory residency purposes. Specifically, the record shows that the Spring Street apartment was a dwelling suitable for use as a residence; petitioner was the occupant of the apartment; and the apartment was lawfully leased by

petitioner, who used the apartment while he was in New York City in 2017. Accordingly, petitioner maintained a permanent place of abode in New York City in 2017.

The requirement that 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]) is also met. 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]). We have previously noted that the Division’s guidelines are instructive on this point (*Matter of Pilaro and Gorrie; Matter of Mays*).

It is not in dispute that petitioner leased the apartment from June 28, 2016 to June 30, 2017 and renewed his lease for one year, beginning July 1, 2017 through June 30, 2018. Accordingly, he maintained a permanent place of abode for the entirety of 2017, meeting the “substantially all of the taxable year” requirement under both the regulation’s plain language and the Division’s guidelines.

Finally, there is no dispute that petitioner 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]), since he concedes that he was in New York City for 274 days in 2017.

Summary determination “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 851 [1985]). We conclude, as did the Administrative Law Judge, that there are no material issues of fact here. Indeed, petitioner does not point to a factual dispute and

instead argues that he did not maintain a *permanent* place of abode. We disagree with petitioner and conclude, based on the foregoing, that petitioner was a statutory resident of New York City for the 2017 tax year and that summary determination was properly granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Diarmuid M. Glynn is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Diarmuid M. Glynn is denied; and
4. The notice of deficiency, dated October 4, 2019, is sustained.

DATED: Albany, New York
June 29, 2023

/s/ Anthony Giardina
President

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

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner