

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TATIANA VARZAR : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 824044
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 Years 2004 through 2006. :
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Petitioner, Tatiana Varzar, filed a petition 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 years 2004 through 2006.

A formal hearing was held before Donna M. Gardiner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 1384 Broadway, 19th Floor, New York, New York, on September 27, 2012 at 9:30 A.M., with all briefs to be submitted by May 9, 2013, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Marvis Warren, Esq., of counsel).

ISSUES

I. Whether petitioner has established that she effected a change of domicile from New York to Florida and, thus, was not taxable as a domiciliary of New York for the years 2004 through 2006.

II. Whether petitioner is liable as a statutory resident of New York for the years 2004 through 2006.

III. Whether the Division of Taxation properly denied a capital loss claimed by petitioner in 2004.

IV. Whether petitioner established reasonable cause and not wilful neglect such that penalties may be abated.

FINDINGS OF FACT

1. Petitioner, Tatiana Varzar, filed Form IT-203 (New York State Nonresident and Part-Year Resident Income Tax Return) for each of the years 2004, 2005 and 2006 as a nonresident of New York, with a filing status of head of household. The two dependents claimed on her tax returns are her daughters, Violetta and Karina Varzar, who resided in the Brooklyn, New York, house. There is no indication that intangible tax returns were filed in Florida for any year.

2. On August 13, 2009, following an audit, the Division of Taxation (Division) issued to petitioner a Notice of Deficiency asserting additional New York State and New York City personal income tax due for the years 2004, 2005 and 2006 in the aggregate amount of \$231,422.00, plus interest and penalties. This notice was premised upon the assertion that petitioner was a domiciliary of New York State and City for the years under audit. Furthermore, it was asserted that since petitioner maintained a New York residence in Brooklyn, her failure to establish that she was outside of New York for more than 183 days for each calendar year resulted in her being held as a statutory resident of New York State and City. Lastly, a capital loss claimed in 2004 was disallowed.

3. Petitioner was born in Russia and immigrated to the United States in 1978. In 1985, she and her husband, Michael Varzar, purchased a house in Brooklyn, New York (New York house), where they resided with their two daughters, Violetta and Karina. Petitioners still own and maintain this residence. There is no dispute that this house is a permanent place of abode.

4. In 1989, petitioner owned and operated a café named Tatiana's Grill on the boardwalk in the Brighton Beach section of Brooklyn. At some point, petitioner acquired more space near the location of this café and started a restaurant and nightclub business called Tatiana's Restaurant and Nightclub, which is operated on a year-round basis. She was the principal shareholder of both businesses. Petitioner received a salary and forms W-2.

5. In 1992, petitioner purchased a house in Pompano Beach, Florida, and such house was extensively remodeled in 2001. In late 2003 or early 2004, petitioner operated a casino boat business, VTM, in Tampa, Florida. She testified that she worked there on Thursdays, Fridays, Saturdays and Sundays. She explained that Tampa is roughly a four to four and a half hour drive from Pompano Beach and, depending on the traffic, could take even longer. For this reason, she testified that she had an apartment in Tampa. This business venture was short lived and was sold in 2004.

6. Petitioner was asked to explain why she changed her domicile from Brooklyn to Florida. She testified that she decided to abandon Brooklyn based upon two events. First, she stated that there was a fire at her restaurant and nightclub in September of 2003 and, secondly, she was robbed at gunpoint in February 2004.

7. On Thursday, June 9, 2005, the borough president of Brooklyn hosted a reception in honor of Russian Heritage Week. Petitioner, described as a Brighton Beach resident and restaurateur, was honored for:

representing the best of Brooklyn moxi [sic] and chutzpah, not only through her determination and resilience in rebuilding the restaurant, Tatiana's, less than one year after a devastating fire, but also for her tireless efforts on behalf of Brighton Beach through her service on Community Board 13, and as co-founder of the fabulous Blini Festival (Exhibit P, p. 2).

8. During the audit period, petitioner began a new business venture at the Trump International, catering parties on New Year's Eve and New Year's Day that amounted to a handful of catering opportunities. She also purchased a former Russian restaurant in Hallandale, Florida, which opened in early 2007.

9. Petitioner submitted seven months of bills for Comcast for the year 2005. The bills indicate that service was for the Florida house, yet all the bills were mailed to petitioner at the New York house. Petitioner submitted eight months of bills for DISH network service; however, these bills were in the name of Michael Varzar.

10. Petitioner submitted various other documents that were in the name of Michael Varzar. It is noted that most of this documentation was for periods outside of the audit period and, additionally, the Florida address indicated in these documents does not coincide with the Pompano Beach address of the Florida house. Additionally, Michael Varzar did not testify at this proceeding, and petitioner did not mention him in her testimony except regarding the aforementioned exhibits with his name on it.

11. Petitioner testified that she delegated all responsibilities regarding personal bills and payment thereof to one of her daughters. Petitioner explained that she did not have the time to

devote to ensuring her bills were paid and requested that all bills be sent to the address of the New York house. Neither of petitioner's daughters testified at this hearing.

12. In 2004, petitioner reported on her tax return a capital loss in the amount of \$975,000.00. Petitioner explained that she invested \$1 million in a proposed housing development project in the Ukraine with partners she had known her whole life. She testified that within months, the project failed due to a lack of government approval and she was offered \$25,000.00 for her worthless shares.

13. Most of the testimony given by petitioner was in response to leading questions by her attorney. Petitioner did not maintain any documentation as to her whereabouts on any particular day over the three-year audit period. Petitioner was unable to provide exact dates upon which certain events occurred, such as key business transactions or days spent within and without New York State and City. Her testimony regarding her various business ventures during the audit years was vague and so general in nature, it was difficult to discern which business ventures she was discussing during certain periods of time. For these reasons, her testimony was not credible.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1)(A) and (B) and New York City Administrative Code § 11-1705(b)(1)(A) and (B) set forth the definition of a New York State and New York City resident individual for income tax purposes.

A resident individual means an individual:

(A) who is domiciled in this state [city], unless (i) he maintains no permanent place of abode in this state [city], maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state [city] . . . , or

(B) who is not domiciled in this state [city] but maintains a permanent place of abode in this state [city] and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state [city], unless such individual is in active service in the armed forces of the United States.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York State or city, namely (A) the domicile basis or (B) the statutory residence basis, i.e., the maintenance of a permanent place of abode in the state or city and (2) physical presence in the state or city on more than 183 days during a given taxable year.

C. There is no dispute that the Brooklyn house was and remains a permanent place of abode. Furthermore, there is no dispute that petitioner spent more than 30 days within New York during each of the years at issue. Therefore, the first issue presented is whether petitioner has established that she gave up her domicile in Brooklyn and effected a change to Pompano Beach, Florida.

The Division's regulations define "domicile," at 20 NYCRR 105.20(d), 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 person 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 indicated 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.

D. 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 [1976]). 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*, 192 NY 238, 250 [1908]). 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 258 [1943], *affd* 267 App Div 876 [1944], *affd* 293 NY 785 [1944]); *see also Matter of Bodfish v. Gallman*). 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, *citing Matter of Trowbridge*, 266 NY 283, 289 [1935]).

E. The concept of intent was addressed by the Court of Appeals in *Matter of Newcomb*:

Residence means living in a particular locality, but domicile means living in that locality with the 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.

* * *

In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no

avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect. Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile but there must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration.

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: the retention of a permanent place of abode in New York, the location of business activity, the location of family ties, the location of social and community ties and formal declarations of domicile.

G. Upon review of the entire record and pursuant to the foregoing standards, it is concluded that petitioner has not proven, by clear and convincing evidence, that she gave up her long-time Brooklyn domicile and acquired a new domicile as her fixed and permanent home in Pompano Beach as of the years in issue.

The purported change of domicile took place in 2004. Petitioner states that the fire at Tatiana's coupled with the robbery drove her to abandon Brooklyn as her home. The facts of this case demonstrate petitioner never abandoned Brooklyn.

Obviously, a fire and robbery are both very traumatizing events. However, the honor bestowed upon her by the borough president for her moxie in not only rebuilding, but being a vital member of the Brooklyn community, flies in the face of any abandonment of her New York

domicile. Petitioner did not testify to any aspect of life in Florida that caused her to make it her new domicile.

As stated above, there are many factors to be considered in determining whether petitioner has effected a change in domicile. Petitioner already owned houses in both New York and Florida prior to 2004, petitioner's daughters lived in the New York house during the audit period, and all of petitioner's social and community ties were in Brooklyn. In fact, a glaring omission in the record is of any single tie to Florida. Although it is acknowledged that petitioner did start certain business ventures in Florida during the audit period, it is noted that the first venture was in Tampa, which is quite a distance from Pompano Beach, and then, the purchase and eventual operation of the restaurant in Hallandale was accomplished after the audit period. Therefore, the overriding sense is that petitioner continued to remain domiciled in Brooklyn throughout the audit period.

H. Although petitioner has been determined to be liable for New York State and City personal income taxes based upon being a domiciliary, it is concluded that she failed to establish that she was outside of the city for more than 183 days of any of the three years of the audit. Her general testimony was so vague and is found to be unreliable given the lack of documentation used to provide a frame of reference for her conclusory statements as to her whereabouts.

I. Similarly, her lack of documentation did not demonstrate that she sustained a loss in the amount of \$975,000.00 during the tax year 2004. As the Division correctly points out, in order to qualify for a capital loss, petitioner must show the existence of the capital asset, its cost basis, and its selling price. The paucity of documentation submitted regarding an investment of \$1 million fails to demonstrate entitlement to the capital loss treatment on her return.

J. The issue regarding the imposition of penalties was not addressed by petitioner and is considered abandoned.

K. The petition of Tatiana Varzar is denied and the Notice of Deficiency dated August 13, 2009 is sustained in full.

DATED: Albany, New York
October 31, 2013

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE