

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MATTHEW LISTERUD	:	SMALL CLAIMS DETERMINATION DTA NO. 825429
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2006 and 2007.	:	

Petitioner, Matthew Listerud, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2006 and 2007.

A small claims hearing was held before Barbara J. Russo, Presiding Officer, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on December 18, 2013 at 1:15 P.M. Petitioner appeared by Harris Heitner, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Matthew Roberts). The final brief in this matter was due by February 21, 2014, which date began the three-month period for the issuance of this determination.

ISSUE

Whether petitioner has established that he effected a change of domicile from New York to Moscow, Russia, and thus was not taxable as a domiciliary and resident of New York for the years 2006 through 2007.

FINDINGS OF FACT

1. Petitioner, Matthew Listerud, did not file New York returns for the years 2006 and 2007. Prior to the years at issue, from 1996 through 1998 petitioner and his wife filed joint New York resident returns. There is no information in the record as to petitioner's filing of a return for 1999. For 2000 through 2002, petitioner filed a New York resident return under the filing status married filing separately. Petitioner did not file New York returns for tax years after 2002.

2. On August 15, 2012, the Division of Taxation (Division) issued to petitioner statements of proposed audit changes for tax years 2006 and 2007 informing petitioner that the Division received information from the Internal Revenue Service (IRS) indicating that petitioner filed a federal income tax return using a New York State address and that petitioner had sufficient income to require the filing of a New York State return. The Division used the federal information and computed petitioner's tax as a New York State resident for the years 2006 and 2007.

3. On October 3, 2012 the Division issued to petitioner two notices of deficiency asserting New York State and New York City personal income tax due for the years 2006 and 2007, in the amount of \$3,786.00 plus interest and penalty, and \$5,977.00 plus interest and penalty, respectively.

4. Petitioner filed federal income tax returns for the years 2006 and 2007, using a filing status of married filing separately, and reporting an address in New York, New York.

5. During the years at issue, petitioner maintained apartments in New York and in Moscow.

6. Petitioner resided in New York while attending Columbia University, from which he graduated in 1980. Following graduation, he went to Russia for a year and then returned to work

in New York for approximately a year. He then attended graduate school at John Hopkins University and participated in international study, spending one year in Bologna and one year in Washington. Petitioner is educated in Russian studies with a minor in chemistry and a master's degree in economics.

7. There is no information in the record as to where petitioner resided after graduating from John Hopkins, until 1990.

8. From 1990 to 1998 petitioner was a New York resident and worked as a Moscow representative for a New York based chemical company involved in Eastern European trade. His worked involved frequent travel between New York and Russia. From 1996 through 1998, petitioner filed income tax returns as a New York resident reporting his filing status as married filing jointly.

9. Petitioner was married in Russia in 1994. Petitioner's wife was a Russian citizen at the time of marriage. At some point between 1994 and 1996 she obtained her green card and resided with petitioner in New York. Petitioner's wife became a citizen of the United States in 2002 and currently holds dual citizenship with both Russia and the United States.

10. Sometime in 1998 petitioner left the New York based chemical company and began working for a chemical company in Holland involved in Eastern European trade. Petitioner worked for the Holland company for approximately three years. During that time, petitioner rented an apartment in Holland and also continued to maintain an apartment in New York. Petitioner's wife lived with petitioner in Holland temporarily, but returned to New York because she did not like it in Holland and could not get a job. During the time period while petitioner was working in Holland, for the years 2000, 2001 and 2002, he filed New York resident income tax returns using the filing status married filing separately.

11. Petitioner left his employment with the Holland company apparently some time at the end of 2002 and in January of 2003 entered into an employment contract with a Swiss company, Viterbo S.A. (Viterbo), as their Director of Representations based in Moscow. The employment contract provides that petitioner will be based in Moscow, Russian Federation and that, “[t]he Company reserves the right to appoint you in other positions (whether within the Company or an Associated Company) and to base you at other locations whether temporarily or permanently as the needs of the business require. This will be at the company’s expenses.” The employment contract specifies a start date of January 15, 2003 and does not state an end date.

12. Petitioner obtained a work visa for his employment in Russia, and was required to renew it annually. For the period at issue petitioner renewed his visa three times.

13. In 2003, when petitioner first started working for Viterbo in Moscow, he lived with his mother-in-law in her apartment. He began renting his own apartment in Moscow approximately a year later and continued renting that apartment during the years at issue to the present day. The apartment he rented was furnished, and he did not move any furnishings from his New York apartment.

14. During petitioner’s Moscow employment, throughout the years at issue and currently, petitioner has also continuously maintained an apartment in New York, where his wife resides. During the years at issue, petitioner’s wife resided in the New York apartment and was employed in New York. For the years at issue, the lease for the New York apartment was either in petitioner’s name or petitioner and his wife’s names, jointly. Currently, the lease for the New York apartment is in petitioner’s name. The rent for the New York apartment is paid from a joint bank account held by petitioner and his wife at Chase Manhattan bank.

15. Petitioner purchased a one-bedroom apartment in Moscow subsequent to the years at issue, sometime in 2010 or 2011. He purchased the apartment from an elderly friend of the family to assist her financially. The elderly friend continues to occupy the purchased apartment and petitioner continues to use the rented apartment in Moscow rather than the purchased apartment.

16. The parties stipulated to the following as days spent in New York: 58 days in 2006 and 32 days in 2007. The Division stipulates that petitioner was outside of New York for the remaining days in each of the years at issue.

17. Petitioner testified that he moved to Russia because, when he left the Holland company, he was placed into a position where the place of work was Moscow. When asked where he planned to be after retirement, petitioner was unsure. When he was asked if there was a process with which he could obtain Russian citizenship and if that was something he wanted to do, petitioner testified, "I'm not interested in that at all. This is a much better country. My wife thinks so too. That's why she lives here."

18. Petitioner does not have any blood relatives in Russia. His brothers and sisters live in Montana, United States. Petitioner does not have any children. Petitioner's wife has family in Russia. At some point in time, petitioner's mother-in-law passed away and his wife inherited her apartment in Russia. The dates are not in the record.

19. During the years at issue, petitioner maintained a bank account in New York at Chase Manhattan bank. Petitioner did not establish a Russian bank account when he first began working for Viterbo in Moscow. Petitioner did not think it was possible for foreigners to have a ruble account in Russia until some time after 2002. Petitioner opened a Russian bank account some time in 2010 or 2011.

20. Throughout the years at issue and presently, petitioner received mail at the New York address. Petitioner received private as well as professional mail, such as credit card bills and Keogh information, at the New York address. Bills for petitioner's Russian office are sent directly to his Moscow address. Petitioner testified that he uses the New York address so that he can receive his mail on time and completely, because, according to petitioner, the mail in Russia is terrible. Petitioner's wife opens the mail at the New York residence and pays the bills. If there is a personal letter or urgent item for petitioner, she forwards it to him in Moscow. Otherwise, the mail is stored in a large pile in the New York apartment until petitioner comes to New York.

21. Petitioner moved most of his clothes from Holland to Moscow when he started working for Viterbo. Petitioner left a few changes of clothes in the New York apartment.

22. Petitioner spent some holidays and vacations in New York during the years at issue. Petitioner's wife spent vacation time of 10 days to 2 weeks in Russia during the years at issue. Petitioner and his wife also vacationed in Peru and Spain during the years at issue.

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. These provisions are essentially identical, save for the use of the term state or city in each, as relevant, and provide as follows:

Resident individual. 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.

The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City source income, whereas residents are taxed on their income from all sources.

Since petitioner spent more than 30 days but less than 184 days in the state and city, the sole question here concerns the first, or domicile, basis upon which resident status is premised.

B. 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.

(3) Domicile is not dependent on citizenship; that is, an immigrant who has permanently established such immigrant's home in New York State is domiciled here regardless of whether such immigrant has become a United States citizen or has applied for citizenship. However, a United States citizen will not ordinarily be deemed to have changed such citizen's domicile by going to a foreign country unless it is clearly shown that such citizen intends to remain there permanently. *For example, a United States citizen domiciled in New York State who goes abroad because of an assignment by such citizen's employer or for study, research or recreation, does not lose such citizen's New York State domicile unless it is clearly shown that such citizen intends to remain abroad permanently and not to return*

(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 (emphasis added).

C. 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's Estate*, 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 238, 246 [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]).

D. The concept of intent was addressed by the Court of Appeals in *Matter of Newcomb's Estate*:

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 evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile [T]here 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

In *Matter of McKone v. State Tax Commission* (111 AD2d 1051 [1985], *affd* 68 NY2d 638 [1986]) the Court favorably quoted the following treatise on the intent necessary to establish domicile:

The intention necessary for acquisition of a domicile may not be an intention of living in the locality as a matter of temporary expediency. It must be an intention to live permanently or indefinitely in that place. But it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period. (25 Am Jur 2d *Domicile* § 25, at 19 [1966].)

E. 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. Matter of Gray v. Tax Appeals Tribunal*, 235 AD2d 641 [1997] *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989); (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*; *Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852 [1994]); (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 Trowbridge*; *Matter of Gray*; *Matter of Getz*).

F. 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 he gave up his New York domicile and acquired a new domicile as his fixed and permanent home in Moscow for the years at issue. The evidence shows that petitioner's presence in Moscow remained contingent upon his employer's desire to keep him there, as opposed to elsewhere, and was not based on petitioner's "range of sentiment, feeling and permanent association" with the particular place of habitation (*Matter of Bourne*). Specifically, petitioner's employment contract provides that petitioner will be based in Moscow, but petitioner's employer reserves the right to appoint petitioner to other positions and to base him at other locations either temporarily or permanently as the needs of business requires. Moreover, petitioner was required to apply for a new work visa every year, again demonstrating that his stay there was contingent upon his employment.

Perhaps most telling is petitioner's own testimony, wherein he stated that he moved to Russia because when he left his former company in Holland, he was placed into a position where the place of work was Moscow. When asked where he planned to be after retirement, petitioner was unsure. However, when he was asked if there was a process with which he could obtain Russian citizenship and if that was something he wanted to do, petitioner responded, "I'm not interested in that at all. This is a much better country. My wife thinks so too. That's why she lives here." Such statement belies any argument that petitioner intended to make Moscow his permanent home.

G. The facts in this matter are similar to those in *Matter of Taylor* (Tax Appeals Tribunal, December 8, 2011). The petitioner in that matter moved to London to follow a career path with

Deutsche Bank. The Tribunal found that petitioner's presence in London was initiated by the demands of her career and that she failed to prove "that she relinquished her long-time New York domicile and acquired a new domicile in London during the years at issue." (*Id.*)

Much like the petitioner in *Matter of Taylor*, petitioner's presence in any particular locale turned, at least for years prior to as well as during those in issue, upon the basis of whatever was the most advantageous location with respect to his employment. In this respect, petitioner was working for a New York based chemical company as its Moscow representative from 1990 until 1998, traveled frequently between Moscow and New York and maintained an apartment in New York. During those years petitioner resided in New York and he and his wife filed jointly as New York residents. Petitioner then accepted employment with a company in Holland for approximately three years. During petitioner's employment in Holland, he maintained apartments in both Holland and New York. Petitioner's wife lived with him for a period in Holland and then returned to New York. For the years 2000 through 2002, petitioner filed a New York resident return as married filing separately. Subsequently, in January of 2003, petitioner entered into an employment contract with a Swiss company, Viterbo S.A., as their Director of Representations based in Moscow. This choice to accept a position in Moscow appears to have resulted from the opportunity for career advancement offered there rather than from any strong sense that petitioner desired to live in Moscow or make his home there as opposed to any other location. During petitioner's Moscow employment, throughout the years at issue and to present day, petitioner has continuously maintained a permanent place of abode in New York, where his wife resides.

H. There is no such strong personal, as opposed to business and career-driven, sense conveyed or apparent prior to or through the years in question. As noted above, petitioner's Moscow location is at the will of his employer and is subject to change as the employer requires.

These circumstances are addressed directly by the Division's regulations at 20 NYCRR 105.20(d)(3), where a New York domiciliary who goes abroad because of a work assignment does not lose his New York domicile unless it is clearly shown that the intent is to remain abroad permanently and not to return. Under the facts of this case and the circumstances of petitioner's employment, the evidence does not compel a conclusion that petitioner was committed to staying in Moscow without any intent to return to New York, where petitioner continued to maintain two residences, including his historic place of domicile.

I. While petitioner maintained a permanent place of abode in Moscow during the years at issue, such factor alone is insufficient to establish a change of domicile. When petitioner first moved to Moscow, he stayed with his mother-in-law in her apartment. Subsequently, during the years at issue, petitioner rented his own apartment in Moscow. The apartment was furnished and there is no indication in the record that petitioner moved any furnishings from his New York apartment to Moscow. Other than petitioner's clothing, there was no evidence that any personal "near and dear" items such as artwork, heirlooms, photographs, etc., were moved from New York to Moscow (*see Matter of El-Tersli*, Tax Appeals Tribunal, January 23, 2003). Although petitioner purchased an apartment in Moscow sometime in 2010 or 2011, this time frame is subsequent to the years at issue. Additionally, the purchased apartment is occupied by an individual other than petitioner. These factors, along with petitioner's continued retention of his New York permanent place of abode weigh against petitioner's claimed change of domicile (*see Matter of Gray v. Tax Appeals Tribunal; Matter of Silverman*).

J. Addressing the remaining factors of domicile, while petitioner has established the location of business activity in Moscow based on his employment, he also continues to maintain ties to New York by receiving his mail at the New York apartment and maintaining a bank

account at Chase Manhattan (*see Matter of Erdman; Matter of Angelico*). The factor of location of family ties weighs against petitioner in that his wife remained in New York during the years at issue and remains there presently (*see Matter of Gray; Matter of Buzzard*). Moreover, petitioner has not presented any evidence regarding the location of social and community ties (*Matter of Getz*) or formal declarations of domicile (*Matter of Trowbridge; Matter of Gray; Matter of Getz*).

K. Based on the evidence in the record, petitioner has not established that as of the years in issue he had permanently abandoned his domicile in New York and established the same in Moscow. Accordingly, petitioner was properly held subject to tax as a resident of New York during the years in question.

L. The petition of Matthew Listerud is hereby denied and the notices of deficiency dated October 3, 2012 are sustained.

DATED: Albany, New York
April 24, 2014

/s/ Barbara J. Russo
PRESIDING OFFICER