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NEW YORK TAX INSIGHTS

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IN THIS ISSUE

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ALJ Holds That Executive Changed His Domicile to Paris and Was Not a New York Resident

By Irwin M. Slomka

A New York State Administrative Law Judge has held that an individual who retired as chief financial officer of Colgate-Palmolive headquartered in New York City in order to immediately move to Paris to be with his wife, a French domiciliary with whom he rekindled a relationship after more than 40 years apart, was no longer a New York City domiciliary. *Matter of Stephen C. Patrick, et al.*, DTA Nos. 826838 and 826839 (N.Y.S. Div. of Tax App., June 15, 2017).

Mr. Patrick was for many years a Connecticut domiciliary. Following his separation and eventual divorce from his first wife, he had briefly moved to and acquired an apartment in New York City, where he held a demanding executive position as CFO of Colgate-Palmolive. After he searched for and located his childhood girlfriend, who was now living in Paris, they decided to marry. Their initial plan was for Mr. Patrick to divide his time between New York and Paris, where his wife lived. However, it soon became apparent that they did not want to be apart for extended periods, and he decided to retire early from his executive position at Colgate-Palmolive at considerable financial cost. He flew to Paris the very next day after his retirement in 2011. He thereafter filed New York State nonresident returns, but the Department took the position that he remained a New York City domiciliary and assessed New York State and City income tax on that basis. A hearing followed, at which Mr. and Mrs. Patrick each testified in considerable detail.

The ALJ held that Mr. Patrick became a Paris domiciliary following his retirement and move to Paris to live with his wife. The ALJ based his decision largely on Mr. Patrick's "credible" and "unequivocal" testimony that following his retirement and move to Paris, Mr. Patrick thereafter considered Paris, where he purchased a home to live with his wife, to be his true home. Among other things, Mr. Patrick paid French taxes as a resident, and obtained the French equivalent of a Green Card. He retained no business ties to New

continued on page 2

York City, notwithstanding his service on the board of directors of a corporation that occasionally met in New York. None of his adult children lived in the New York metropolitan area.

Mr. Patrick did, however, retain a New York City apartment, and continued to spend considerable time in New York City, much of which was for treatment of a serious medical condition. The ALJ held that this did not negate his clear intent to make Paris his home. Therefore, the ALJ found that Mr. Patrick was no longer a New York City domiciliary and could not be taxed as a New York State and City resident.

The taxpayer was represented by Craig B. Fields, Irwin M. Slomka, and Kara M. Kraman of Morrison & Foerster LLP.

NYS Tribunal Finds a Florida Domiciliary Was a New York State Statutory Resident

By Hollis L. Hyans

The New York State Tax Appeals Tribunal has affirmed the decision of an Administrative Law Judge that a publishing executive who was domiciled in Florida was nonetheless a statutory resident of New York. *Matter of Carl Ruderman*, DTA No. 826242 (N.Y.S. Tax App Trib., June 15, 2017).

Facts and Issues. During the 2007 year in issue, Mr. Ruderman was an executive in the magazine publishing industry, and it was undisputed that he maintained a permanent place of abode in New York City. He filed a New York State and New York City nonresident and part-year resident return for 2007. The Department of Taxation and Finance conducted an audit, which included the review of records such as credit card statements, telephone bills, and air travel records. While agreeing that Mr. Ruderman was outside New York on 137 days, the Department concluded that he was present in New York City on 190 days, relying on credit card charges on days when Mr. Ruderman claimed to be elsewhere, and calls made from his New York City apartment on dates when he claimed to be outside New York. In addition, the Department could not determine Mr. Ruderman's whereabouts on 38 days and therefore treated those as New York State and City days, reaching a conclusion that Mr. Ruderman was present in New York State and City for a total of 228 days during 2007.

Under the law, a non-domiciliary of New York is treated as a "statutory resident" if he or she maintains a permanent place of abode in New York for substantially all of the year and spends more than 183 days in the State and/or City. Tax Law § 605(b)(1)(B), Administrative Code §§ 11-1705(b)(1)(A), (B). The Department issued a Notice of Deficiency asserting additional New York State and City personal income tax of nearly $1 million, plus interest and penalties.

At the hearing, Mr. Ruderman asserted that he was outside New York for an additional 78 days, which when combined with the 137 conceded by the Department totaled 215 days outside New York. He testified that he had been married twice, that his younger children from his current marriage live in Florida, and that he spent a significant amount of time in Florida in 2007, looking after his ailing mother who was in her nineties, and that, while he had business interests in New York, those were managed by others. He also testified that he allowed his older children, and his New York City housekeeper, to use his credit cards as needed, and that he believed many of the telephone calls from the New York City apartment were made by them. Mr. Ruderman provided a letter from his Florida dentist about dates of dental treatment in Florida, and seven supporting affidavits from his hairdresser, personal assistant, three concierges and a handyman at his Florida residence, and his current wife.

ALJ Determination. An ALJ had concluded that Mr. Ruderman did not meet his burden of proof to show by clear and convincing evidence that he was not present in New York on the disputed days, finding that the evidence and testimony submitted by Mr. Ruderman "did not provide the level of consistency and detail needed to meet his burden of proof." He noted that the affidavits presented very little detail, that their "repetitive tenor and generality" diminished their reliability, and that at least one affidavit was contradicted by other evidence. He also

continued on page 3

concluded that Mr. Ruderman's spouse's testimony that she had sole custody of one of his credit cards for a period of time was undermined by his own testimony that he allowed other family members to use his credit cards, and that Mr. Ruderman's testimony, while "forthright and honestly given," lacked specificity and detail. The ALJ also sustained a late filing penalty, since the 2007 return was filed late.

The Tribunal agreed with the ALJ that the testimony and statements provided by Mr. Ruderman and the affiants were too general [and] lacked specificity with regard to dates and events . . . .

Tribunal Decision. The Tribunal affirmed the ALJ's decision, agreeing that Mr. Ruderman did not meet his burden of proof. The Tribunal noted not only that the petitioner has the burden of demonstrating by clear and convincing evidence that he was not a statutory resident, but that the regulations also require any non-New York domiciliary who maintains a permanent place of abode in New York and files as a nonresident to keep adequate records to establish that he or she did not spend more than 183 days in New York. 20 NYCRR 105.20(c). The Tribunal agreed with the ALJ that the testimony and statements provided by Mr. Ruderman and the affiants were too general, lacked specificity with regard to dates and events, and, when the affidavits were evaluated in light of each other and the testimony given, were insufficient to establish Mr. Ruderman's whereabouts on each of the days in issue.

The Tribunal also upheld the late filing penalty, finding that the only argument offered by Mr. Ruderman—that he believed he was not present in New York for more than 183 days in 2007—did not establish reasonable cause for the late filing of his personal income tax return.

Additional Insights

Statutory residency cases are very fact-specific and proof of a non-domiciliary's actual location on every day in question often requires very detailed documentary evidence, but testimony at a hearing can also be critical. While cases involving carefully kept contemporaneous calendars, and those including a clearly established pattern of conduct from which a taxpayer's location could be determined on a day for which there was no documentary evidence, can result in success for taxpayers, *see, e.g., Matter of Jack and Helen Armel*, DTA No. 811255 (N.Y.S. Tax App. Trib., Aug. 17, 1995), the Tribunal has also held that the regulations do not require, as a matter of law, the production of records, and that credible testimony can be sufficient to meet the taxpayer's burden. *Matter of John G. Avildsen*, DTA No. 8097225 (N.Y.S. Tax App. Trib., May 19, 1994). Here the fault seemed not to be with the credibility of Mr. Ruderman—which the ALJ acknowledged—but the lack of specific detail, and the general nature of the supporting affidavits. It is always advisable for a non-domiciliary taxpayer claiming to be a nonresident to keep as detailed a set of records as possible, including a contemporaneous diary, very specific travel receipts, and credit card records that could show purchases directly by the taxpayer—as opposed to by other family members—involving physical presence outside New York.

One Page New York State Power of Attorney Form Released

By Irwin M. Slomka

For many years, the New York State Department of Taxation and Finance and New York City Department of Finance have used a joint Power of Attorney form. However, for some time New York State has been developing a more streamlined form, with the goal of reducing it from four pages to a single page. On June 27, 2017, a new one-page Power of Attorney form (POA-1 (6/17)) appeared on the New York State Tax Department's website.

The new form is undoubtedly more user-friendly. It no longer requires that the taxpayer's signature be notarized or acknowledged, and does not require that the taxpayer's representative also sign the form. Open questions include whether the new POA can be used before the New York State Tax Appeals Tribunal

continued on page 4

(a recent visit to the Tribunal's website indicates that the Tribunal continues to use the prior POA form). It is also unclear at this time whether taxpayers can continue to submit the prior POA form, although there is no indication that previously submitted prior POAs will need to be replaced with the new POA form.

There is one important caveat. Although the new POA form is intended to be a joint New York State-New York City form, the New York City Department of Finance has announced that the new form is not currently approved for use before the Department of Finance. *Finance Memorandum* 17-4, Joint State/City Power of Attorney Form (N.Y.C. Dep't of Fin., June 28, 2017). New York City is in the process of amending its regulations regarding appearances before the Department of Finance to allow it to accept the new POA form without the form being notarized or acknowledged. At present, the prior Form POA-1 (9/10) must be used for representation before the Department of Finance.

The new form . . . no longer requires that the taxpayer's signature be notarized or acknowledged, and does not require that the taxpayer's representative also sign the form.

Florida Resident Held to Retain New York Domicile

By Hollis L. Hyans

A New York State Administrative Law Judge has found that a former New York University professor had not changed his domicile from New York to Florida and that he was taxable as a New York domiciliary. *Matter of Jeremy Wiesen*, DTA No. 826284 (N.Y.S. Div. of Tax App., June 1, 2017).

Facts. Mr. Wiesen had rented a rent-stabilized apartment in New York City since August 1980, and lived in it as his primary residence. He acquired a residence in East Hampton, New York in 1999, that he continued to own, maintain, and use during the 2007 and 2008 years in issue. He had also purchased a condominium in West Palm Beach, Florida in 2002, and then acquired the apartment next door in 2004. Mr. Wiesen claimed that he changed his domicile to Florida when he vacated his New York City apartment in May 2007, and turned it over to his son, for whom he attempted to obtain a lease under the terms of New York's rent stabilization laws, communicating with the rent stabilization board from the New York City address.

Mr. Wiesen left New York in 2007 when he retired from New York University, pursuant to the terms of a Confidential Agreement between Mr. Wiesen and NYU which resolved a lawsuit for claimed damage to his reputation, emotional distress, and pain and suffering, and under which NYU agreed to make certain payments to Mr. Wiesen totaling over $2 million, less deductions for items such as payroll taxes and withholding. NYU issued a 2007 W-2 and 2007 and 2008 Forms 1099-Misc to Mr. Wiesen listing his New York City apartment as his address.

Mr. Wiesen filed a New York nonresident and part-year resident return for 2007, but only filed an extension of time to file with New York for 2008. The Department of Taxation and Finance audited the 2007 and 2008 years, requesting responses to a questionnaire, documentation concerning Mr. Wiesen's various residences, and various records to establish the number of days spent inside and outside New York. Mr. Wiesen answered the questionnaire and provided documentation including an application for a homestead exemption for his Florida condominium; a Florida driver's license, which was issued on March 30, 2007; a Florida vehicle tag number and a declaration of Florida domicile; evidence that he registered to vote in Florida in 2004; and credit card receipts, calendars, and other documents designed to address the Department's contentions that he spent more than 183 days in New York during 2007 and 2008. He also submitted several letters, all dated in 2008, that requested that his son succeed to his New York City apartment as a successor tenant under the rent stabilization laws, as well as a two-year renewal lease executed for that apartment in May 2008.

After the audit, the Department concluded that

continued on page 5

Mr. Wiesen remained a New York domiciliary in 2007 and 2008, or, in the alternative, that he was a statutory resident, since he continued to maintain a permanent place of abode and was present in New York for more than 183 days in 2007 and 2008.

ALJ Decision. The ALJ dealt only with the issue of whether Mr. Wiesen was domiciled in New York during 2007 and 2008, and readily concluded that he was. The ALJ noted that, under New York law, an historic domicile is deemed to continue unless the party claiming a change of domicile proves the change by clear and convincing evidence. The test also looks to intent, and whether the purported new domicile has "the range of sentiment, feeling and permanent association" to establish a true new domicile. After reviewing the record, which was made by written submission without any oral testimony, the ALJ determined that the facts did not demonstrate that Mr. Wiesen gave up his New York domicile in 2007 and acquired one in Florida. She noted, among other facts, that Mr. Wiesen continued to use and maintain his historic New York apartment for himself and his son during 2007 and 2008; that he executed a two-year lease renewal in May 2008; that he received mail concerning rent stabilization, ownership, property management, phone service, and credit cards at this New York address; and that he had not submitted any evidence of a claimed pattern of commuting from West Palm Beach to New York City. Also, after noting that family ties are a relevant factor, the ALJ found that Mr. Wiesen's son resided in the New York City apartment during 2007 and 2008.

After reviewing the record, which was made by written submission without any oral testimony, the ALJ determined that the facts did not demonstrate that Mr. Wiesen gave up his New York domicile in 2007 and acquired one in Florida.

The ALJ discounted the significance of such factors as the Florida voting registration and application for homestead exemption, dismissing them as "formal declarations [that] are less significant than informal acts demonstrating an individual's general habit of life." Finally, the ALJ found there was no evidence of a subjective intent to abandon the New York domicile, such as an affidavit from Mr. Wiesen or any persons familiar with him. Therefore, she found that he remained a New York domiciliary. The ALJ did not address whether he was present in New York for more than 183 days in 2007 or 2008 and thus taxable as a statutory resident. She also sustained the imposition of penalties, finding that no reasonable cause had been articulated.

Additional Insights

Just as in the residency case decided by the Tax Appeals Tribunal (see discussion of the *Ruderman* decision on page 2), this case also turned on whether sufficient facts had been developed and introduced to carry a petitioner's burden by clear and convincing evidence. In the case of a New York domiciliary such as Mr. Wiesen, the burden to establish a change is always high, and particularly difficult because demonstrating the subjective intent to change a domicile can be challenging, but it can be done, as is demonstrated by the *Patrick* decision discussed above on page 1.

Several factors have been developed by the Tribunal and the Department itself in its Audit Guidelines for cases involving multiple residences, such as the amount of time spent in each, the location of family, and the demonstration of where "near and dear" items were maintained. Mr. Wiesen, who appeared *pro se*, does not seem to have been able to demonstrate, by documentary evidence or by affidavit, that enough of those factors had shifted to Florida, which, when combined with the correspondence with the rent stabilization board and the signing of a renewed lease for his New York apartment, led the ALJ to conclude that he had failed to sustain his burden of proof on the issue of domicile.

continued on page 6

INSIGHTS IN BRIEF

Store Owner's Sales Tax Certificate of Authority Was Properly Revoked

A New York State ALJ held that the New York State Tax Department properly revoked a store owner's Sales Tax Certificate of Authority. *Matter of Clinton Delicatessen, Inc.*, DTA No. 827615 (N.Y.S. Div. of Tax App., May 25, 2017). The store owner had failed to respond to a Notice of Determination for sales tax, resulting in an unpaid final liability of approximately $779,000. The ALJ concluded that, consistent with the requirements of Tax Law § 1134(a)(4)(A), the Department had properly notified the taxpayer of the proposed revocation for willful failure to pay the tax and, since the taxpayer could no longer challenge the final sales tax liability, it was incumbent on the taxpayer to raise a defense to revocation, which the taxpayer failed to do.

ALJ Holds That Investment Tax Credits Cannot Be Taken for Property That Was Expensed Rather Than Depreciated

A New York State ALJ has upheld the denial by the Department of Taxation and Finance of Investment Tax Credits ("ITCs") for property that was expensed under Internal Revenue Code § 179(a). *Matter of Ronald N. and Karen A. LeBlanc, et al.*, DTA Nos. 826547-826549 (N.Y.S. Div. of Tax App., June 1, 2017). The ALJ found that ITC is allowed under Tax Law § 210.12(b) only for property that was depreciable pursuant to § 167 of the Internal Revenue Code, and that the statute creating an exemption must be strictly construed against the taxpayer. Since the cost incurred in the purchase of the property was, for federal purposes, completely recovered when it was expensed, leaving no basis upon which to compute the ITC, the ITC was held to be properly denied.

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