

TAX APPEAL BOARD OF THE STATE OF DELAWARE

PAUL J. GEORGE,)	
)	
Petitioner,)	
)	
v.)	Docket No. 1613
)	
DIRECTOR OF REVENUE)	
)	
Respondent.)	

BEFORE: Todd C. Schiltz, Esq., Chairman, Steven R. Director, Esq., Vice-Chairman,
 Joan M. Winters, CPA, and Sindy Rodriquez and Robert Slavin, Members

Paul J. George, *pro se*

Jennifer R. Noel, Esq., Deputy Attorney General, for Respondent.

DECISION AND ORDER

Petitioner Paul J. George appeals the Notice of Determination issued by the Director of Revenue (“DOR”) upholding an assessment of tax, penalty and interest against Mr. George for failure to substantiate deductions he claimed on his 2011 and 2012 Delaware personal income tax returns. Mr. George contends that he was not a Delaware resident in 2011 and 2012 and that he earned no income in Delaware in those years and, as a result, he was not required to file returns in Delaware for those years. Alternatively, Mr. George argues that he has substantiated the deductions he claimed on his 2011 and 2012 Delaware income tax returns.

For the reasons set forth below, a majority of the Board concludes that Mr. George was a resident of Pennsylvania in 2011 and 2012 and that because none of the income he earned was sourced in Delaware, he had no obligation to file returns in Delaware in 2011 and 2012. Given this determination, the Board need not address the issue of deductions and the substantiation

thereof. Accordingly, the Board rules in favor of Mr. George and sets aside the DOR's assessment of tax, penalty and interest against him.

Statement of Facts

Mr. George moved to Delaware in 2006. In 2009, he moved to Pennsylvania and began living with his partner. One reason Mr. George and his partner live in Pennsylvania is Pennsylvania residency is a condition of his partner's probation.

Mr. George and his partner live in a home owned by Mr. George's partner's stepfather. Mr. George gives his partner cash to pay the rent on the home, and his partner pays the rent to his stepfather. All utilities at the Pennsylvania home are paid for by the stepfather. Mr. George owns some of the furniture located in the Pennsylvania home.

In 2011 and 2012, Mr. George worked at locations in Pennsylvania and other states, but none of the work occurred in Delaware and he had no Delaware-source income for these years. A majority of the mail Mr. George received in 2011 and 2012 was delivered to a post office box he rented in Pennsylvania that is close to his Pennsylvania place of employment.

Mr. George testified that he "eats, sleeps and works" in Pennsylvania and that he has done so since 2009. Despite some minor inconsistencies in portions of his testimony, a majority of the Board found this aspect of his testimony credible. The DOR offered no evidence that directly contradicts Mr. George's testimony on these issues. For example, no witness – a neighbor, a landlord, a mailman, etc. - testified that Mr. George lived in Delaware in 2011 or 2012.

Instead, the DOR relies on evidence of other contacts Mr. George has with Delaware to support its contention that Mr. George was a Delaware resident in 2011 and 2012. In particular, the DOR notes the following:

- Mr. George purchased a home in 2011 located at 7 North Mary Street, Wilmington, Delaware;¹
- Mr. George pays the utilities and taxes due on the Delaware property;
- Mr. George receives some mail at the Delaware address;
- Mr. George owns furniture located at the Delaware property;
- Mr. George has a Delaware driver's license and in 2011 he changed the address on his license to 7 North Mary Street, Wilmington, Delaware and in 2012 he renewed his license and used the same address;
- Since 2011, Mr. George has used the 7 North Mary Street address to register three cars and two trailers with the Delaware Department of Motor Vehicles; and
- Two weekly pay stubs, a W-2, a mortgage interest statement and certain medical bills Mr. George received in 2011 and 2012 list his address as 7 North Mary Street, Wilmington, Delaware.

The Board also notes that a W-2 issued to Mr. George in 2011 lists his Pennsylvania post office box as his home address, Mr. George has personal stationery that identifies his Pennsylvania post office box as his address and the DOR mailed letters and notices to Mr. George using his Pennsylvania post office box.

Mr. George's 2011 and 2012 Tax Returns and Amended Tax Returns

In 2011 and 2012, Mr. George prepared his tax returns using Turbo Tax®. He filed federal, Delaware and Pennsylvania tax returns in those years. His federal returns listed his Pennsylvania post office box as his address. Mr. George filed resident returns in Delaware in

¹ Mr. George testified that no one lives in the house located in Delaware, he does not rent it and that he only visits the house twice a month. The DOR presented no evidence rebutting this testimony.

2011 and 2012, and these returns listed his Pennsylvania post office box as his address. Mr. George filed non-resident returns in Pennsylvania in 2011 and 2012, and these returns listed his Pennsylvania post office box as his address.

Following the commencement of these proceedings, Mr. George filed amended non-resident returns in Delaware for the tax years 2011 and 2012. The DOR rejected these returns on the basis that Mr. George is a Delaware resident, not a non-resident.²

Analysis

Title 30, Section 1103 of the Delaware Code defines who is a resident of Delaware for purposes of personal income taxes. In pertinent part, it provides:

A resident individual of this State means an individual:

- (1) Who is domiciled in this State to the extent of the period of such domicileor
- (2) Who maintains a place of abode in this State and spends in the aggregate more than 183 days of the taxable year in this State.”

² Mr. George testified that he believes he should file resident returns in Pennsylvania. In his reply brief, Mr. George asserted that he has filed amended returns in Pennsylvania for 2011 and 2012 and that he claimed to be a Pennsylvania resident on these amended returns. These amended returns are not part of the record before the Board and were not considered by it; however, Mr. George’s filing of resident Delaware tax returns and non-resident Pennsylvania tax returns is not dispositive of his domicile. *See New York Trust Co. v. Riley*, 16 A.2d 772, 780-81, 785 (Del. 1940) (concluding husband and deceased wife were domiciled in New York, husband’s domicile, notwithstanding fact that wife’s tax returns, which were filed under the supervision and direction of husband, identified wife as a resident of Georgia); *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730-31 (7th Cir. 1991) (defendant domiciled in Illinois notwithstanding fact defendant filed tax returns listing Florida as his permanent address because Illinois remained the “center of gravity” of his life); *Core VCT PLC v. Hensley*, 89 F. Supp.3d 104, 110 (D. D.C. 2015) (declaration of citizenship on taxes is “weak evidence of domiciliary intent”); *Brignoli v. Balch, Hardy & Scheinman, Inc.*, 126 F.R.D. 462, 465 (S.D.N.Y. 1989) (fact plaintiff filed New York resident tax returns was not dispositive of his domicile and “no one factor, including the tax returns, proved his New York domicile”).

30 *Del. C.* § 1103. There is no evidence suggesting Mr. George spent more than 183 days in Delaware in 2011 or 2012. As a result, for Mr. George to be a Delaware resident in 2011 and 2012, he had to be domiciled in Delaware during that period.

Domicile is not defined in the Delaware Code; however, the Delaware Supreme Court has established a standard for determining an individual's domicile. In *New York Trust Co. v. Riley*, 16 A.2d 772 (Del. 1940), the Delaware Supreme Court had to determine whether an individual had changed his domicile from New York or Georgia. With regard to domicile, the Court stated: “[t]he essentials of domicile . . . are the fact of physical presence at a dwelling place and the intention to make that place home. There must be a concurrence of fact and intent. The absence of either precludes the change.” *Id.* at 783. The Court further stated that “[t]he fact of actual residence in a place is prima facie evidence of domicile there; and in the absence of explanatory evidence, the conclusion would be justified that the place of residence is the domicile of the person there resident.” *Id.* at 785.³

Similarly, in *Fritz v. Fritz*, 187 A.2d 348 (Del. 1962), the Delaware Supreme Court stated: “a domicile is defined as a dwelling place with the intention to make that place the resident's permanent home. It requires a concurrence of the fact of living at a particular place

³ In *New York Trust*, the Court also stated that the “absence from one's place of residence, even for a long time on business, pleasure, reasons of health, education of children, or other special purpose, will not effect a change of domicile if, all the while, the person intends to be absent only for the accomplishment of the temporary purpose and to return to his former place of residence upon the fulfillment of the purpose. The intention to return must, of course, be fixed, certain and constant. A loose, indefinite, or as it is called, a floating intention to return will not avail to prevent a change of domicile.” *New York Trust*, 16 A.2d at 784. The DOR contends that Mr. George's presence in Pennsylvania is temporary and that he has an intention to return to Delaware if he terminates his relationship with his partner or his partner completes his probation. The record on this issue is limited and we find that, at best, Mr. George has a floating intention to return to Delaware.

with the necessary intention of making that the permanent home. Absent this intent, no domicile exists” *Id.* at 349.

Delaware and Pennsylvania also have signed the Northeastern States Tax Officials Association Cooperative Agreement on Determination of Domicile as of 1996 (the “NESTOA Agreement”).⁴ Section 2 of the NESTOA Agreement states:

The problems associated with domicile and residency are difficult to address because of the subjective nature of this whole area. It is therefore critical that any parameters selected to determine the individual’s domicile be of a nature that would not be changeable at will or insignificant in nature. It is also important that the parameters be readily identifiable for ease of administration and increased voluntary compliance.

The revenue agencies agree that the adoption of uniform criteria which should be evaluated in determining an individual’s domicile would provide a fair evaluation of the facts and circumstances present in any individual case[] being reviewed. *This agreement establishes the factors which the member agencies shall evaluate in their determination of an individual’s domicile.* The member agencies are free to consider any individual secondary factors which they may believe provide additional insight as to the individual’s intent for the establishment of a domiciliary status. All member agencies adopting secondary factors agree to provide guidance to taxpayers and practitioners on such secondary factors.

The factors to be utilized are:

Home - Time - Items Near and Dear
Active Business Involvement - Family Connections

An agency’s staff shall review the following issues within these factors:

Home

⁴ On October 22, 1996, the Division of Revenue adopted Technical Information Memorandum 96-9 (Revised), which, in part, states “Eleven northeastern states and the District of Columbia have ratified a cooperative agreement concerning the determination of an individual’s domicile and/or residency and the multiple taxation of income that often results from conflicting determination by the various states The accord addresses the problem of multiple taxation of individuals who are deemed to be domiciliaries of more than one state NESTOA members . . . have joined together to formulate a solution which benefits both the individuals and the states The NESTOA agreement promotes uniformity among states in terms of tax policy relating to these individuals, and was predicated on these basic goals: That individuals should only be deemed to be domiciliary of one state for any given period; That criteria used by the states in determining an individual’s domicile should be as uniform as possible”

What are the residences owned or rented by the taxpayer? Where are they located? How are they used? What is the size and value of each residence? Responses to all such questions shall be considered.

Time

Where and how the individual spends time during the tax year shall be considered. Consideration shall also be given to whether the taxpayer is retired or actively involved in a business or profession. How much travel the individual does and the nature of the travel shall be considered. The overall living pattern or life style of the individual shall be examined.

Items “Near & Dear”

The location of the items or possessions that the individual considers “near and dear” to his or her heart, of significant sentimental value, family heirlooms, collections of valuables or possessions that enhance the quality of one’s lifestyle shall all be reviewed.

Active Business Involvement

How the taxpayer earns a living, whether the taxpayer is actively involved in any business ownerships or professions and to what degree the individual is involved as well as how that involvement compares to business outside of the state are areas that shall be examined.

Family Connections (to be reviewed when the first four factors are not conclusive)

Where the individual’s minor children attend school and, in certain circumstances and discrete situations, the residence of the individual’s immediate family.

NESTOA Agreement, Section 2 (emphasis added). The DOR has not argued that Delaware has adopted secondary factors (or provided guidance to taxpayers regarding such factors) which should be considered when determining an individuals’ domicile. The Board is likewise not aware of any secondary factors adopted by Delaware.

The opinions in *New York Trust* and *Fritz* focus on the taxpayer’s physical location and overall intent rather than the specific evidence emphasized here by the DOR. *New York Trust*, 16 A.2d at 783-84 (elements of domicile are “the fact of physical presence at a dwelling place

and the intention to make that place home,” and “[t]he fact of actual residence in a place is prima facie evidence of domicile”); *Fritz*, 187 A.2d at 349 (“a domicile is defined as a dwelling place with the intention to make that place the resident's permanent home. It requires a concurrence of the fact of living at a particular place with the necessary intention of making that the permanent home.”).⁵ Focusing on physical location and intent, a majority of the Board concludes that Mr. George was physically located in Pennsylvania in 2011 and 2012, and that it was his intent for Pennsylvania to be his permanent home at that time.

The NESTOA Agreement also is focused on “the individual’s intent for the establishment of a domiciliary status” and identifies several factors that Delaware “shall evaluate” in determining a taxpayer’s intent concerning domicile. Most of those factors – home, time, active business involvement and interpersonal connections - weigh in favor of finding Mr. George was domiciled in Pennsylvania, not Delaware, in 2011 and 2012. The remaining factor – items near and dear – has no application here.⁶

The majority of the Board recognizes that there is evidence suggesting Mr. George considered Delaware his residence/domicile in 2011 and 2012;⁷ however, some of that evidence

⁵ *New York Trust* and *Fritz* are consistent with established law in this area. See 1 *Fed. Proc. L. Ed.* § 1:86 (“Two elements are necessary to establish domicile: (1) physical presence in the claimed domicile; and (2) an intent to remain there indefinitely or the absence of an intent to go elsewhere.”).

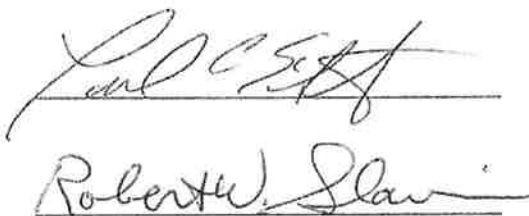
⁶ While the majority of the Board understands why the DOR emphasizes that Mr. George has a Delaware driver’s license, registered vehicles in Delaware using the 7 Mary Street, Wilmington Delaware address and received pay stubs and bills listing 7 Mary Street, Wilmington Delaware as his address, these are not factors identified in *New York Trust* or *Fritz*, they are not among the factors adopted in the NESTOA Agreement, they have never been identified as secondary factors Delaware will take into account and they are changeable at will and, therefore, less indicative of domicile.

⁷ See *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006) (considering driver’s license and vehicle registration in determining domicile). But see *Jankovic v. Int’l Crisis Group*, 2005 WL 3276227, at *4 (D. D.C. Aug. 23, 2005) (maintaining and renewing driver’s license is “unrevealing” as to plaintiff’s domicile) and *Nat’l Artists Mgmt. Co. v. Weaving*, 769

appears to arise from the fact that Mr. George is not a sophisticated tax preparer, none of that evidence concerns Mr. George's physical location in 2011 and 2012, and none of that evidence is dispositive as to his domiciliary intent. For example, the fact Mr. George owns a home in Delaware does not necessarily mean he intends for Delaware to be his domicile.⁸

Focusing on physical location and overall intent, as the Board believes it must per *New York Trust, Fritz* and the NESTOA Agreement, and considering the evidence as a whole, a majority of the Board concludes that Mr. George was a Pennsylvania resident in 2011 and 2012. He ate, slept and worked in Pennsylvania in those years. His intent was to be a Pennsylvania resident at that time.

As Mr. George was a Pennsylvania resident in 2011 and 2012 and as he had no Delaware-source income in these years, he had no obligation to file a Delaware tax return for 2011 or 2012. Accordingly, the Board overturns the DOR's Notice of Determination and concludes that Mr. George need not pay the tax, penalty and interest identified therein.



Robert W. Slaw

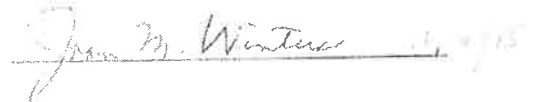
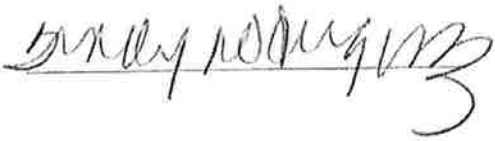


F. Supp. 1224, 1229 (S.D.N.Y. 1991) (substantial contacts with Connecticut, including driver's license and voter registration, not sufficient to establish domicile in Connecticut).

⁸ 1 *Fed. Proc. L. Ed.* § 1:87 ("the mere fact that one has a residence or an address in a state does not by itself make that person a domiciliary of that state . . ."). Indeed, many people whose lives are centered outside of Delaware own beach homes in Delaware, pay utilities and taxes related to their beach homes, own furniture that is physically located in their beach homes, receive some mail at their beach homes and register vehicles in Delaware using their beach home address.

DISSENT:

We respectfully dissent from the opinion by a majority of the Board. We believe Mr. George's testimony as to residency in Pennsylvania in 2011 and 2012 was inconsistent and lacked credibility and was not and could not be substantiated with other testimony or written evidence. Although his 2011 W-2 listed Pennsylvania as his address, his 2012 W-2 reported 7 North Mary Street, Wilmington, Delaware as his address. In addition, for the two years in question, he filed his Pennsylvania returns as a non-resident, meaning that he chose Delaware as his place of domicile. He did not provide proof of amending his Pennsylvania returns to reflect Pennsylvania residency. We further believe that he has not carried his burden of proof concerning substantiating the deductions he claimed on his 2011 and 2012 Delaware tax returns. Accordingly, we would affirm the Notice of Determination issued by the DOR.



Date: Nov. 17, 2015