

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

SIDNEY W. & JUDITH H. SWARTZ v. COMMISSIONER OF REVENUE

Docket No. C287671

Promulgated:
April 1, 2010

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the appellee, Commissioner of Revenue ("Commissioner"), to abate personal income tax for the calendar year 2004 ("tax year at issue").

On March 31, 2009, the Appellate Tax Board ("Board") issued a decision for the appellee. Based on the Statement of Agreed Facts submitted by the parties,¹ the Board issued a revised decision, granting an abatement of late payment penalties to the appellants, simultaneously with these Findings of Fact and Report.

Commissioner Scharaffa heard this appeal. Chairman Hammond and Commissioners Egan, Rose and Mulhern joined him in the revised decision for the appellants. These findings of fact and report are made pursuant to a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

¹ The Statement of Agreed Facts listed late payment penalties in the amount of \$64,176.42. The parties agreed in the Statement of Agreed Facts that the late payment penalties should be abated, regardless of the Board's decision in this appeal, based upon G.L. c. 62C, § 32(e), which provides that "no tax imposed by Chapters 62 . . . shall be required to be paid" while a taxpayer is contesting the tax.

Philip S. Olsen, Esq. and Natasha N. Varyani, Esq. for the appellants.

John J. Connors, Jr. Esq. and Christopher Glionna, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on the Statement of Agreed Facts and testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

The appellants timely filed, pursuant to a validly-executed extension, a 2004 Massachusetts Nonresident/Part-Year Resident Income Tax Return, Form 1-NR/PY. The Commissioner issued to the appellants a Notice of Intention to Assess dated April 2, 2006 and a Notice of Assessment dated May 19, 2006, notifying the appellants of an additional assessment in the amount of \$826,917, plus interest in the amount of \$63,186.54. On June 13, 2006, the appellants filed an abatement application, which the Commissioner denied by a Notice of Abatement Determination dated September 30, 2006. On November 13, 2006, the appellants seasonably filed their appeal with the Board. On the basis of the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The appellants recognized two capital gains during the tax year at issue on the sale of stock in Timberland Company ("Timberland"), one on October 28, 2004 and the other on November 1, 2004. The issue presented in this appeal is whether the appellants had changed their domicile from Massachusetts to Florida prior to October 28, 2004 or prior to November 1, 2004, the dates upon which they recognized the capital gains at issue in this appeal. It is not disputed that the capital gains which the appellants recognized on October 28, 2004 and November 1, 2004 were subject to Massachusetts income tax if the appellants were Massachusetts residents at the time that they recognized the capital gains.

Personal history of appellants

Sidney Swartz was born in Lynn and was raised in Dorchester, Swampscott and Newton. He attended Boston University for one year and subsequently joined the Army as part of the 101st field artillery unit of the Massachusetts National Guard. Judith Swartz was born in Boston and raised in Newton and West Newton. She graduated from Boston University and married Sidney Swartz in 1958. The couple lived in Cambridge, Brookline and Newton. Around the time of the birth of their youngest of three children, in 1968, the appellants moved to Andover, where they raised

their three children. Sidney testified that they chose Andover because it was a convenient commute for him when he was working in Southern New Hampshire. After their children had grown and left home, the appellants decided to sell their home in Andover and buy a home near the ocean.

On July 28, 1987, the appellants purchased a residence in Marblehead, at 33 Bradlee Road, which they continued to own during the tax year at issue. The residence had five bedrooms, five-and-one-half bathrooms, and was located on 1.5 acres of land with a view of the ocean.

The appellants purchased their first Florida residence in 1983, an apartment in Boca Raton, which they subsequently sold. By the tax year at issue, the appellants owned two residences in Florida, one in Delray Beach, which they had purchased in April, 1997, and the other, a condominium, in Boca West, which they had purchased in May, 2001. Judith testified that they purchased the home in Delray Beach -- with six bedrooms, five bathrooms, a three-car garage, and a pool - because it was spacious enough to accommodate the appellants' children and grandchildren when they visited Florida.² Sidney testified that the appellants purchased the condominium in Boca West for the included golf privileges at the Boca West

² The appellants also purchased two adjacent lots, which provided their residence with a total of 300 feet of ocean frontage.

Country Club. Judith testified that her twin sister, Joan, and her husband resided at the Boca West condominium during the winter months.

During the tax year at issue, two of the appellants' children were living in Massachusetts. Their son, Jeffrey Swartz, with his wife and children, lived in Newton, and their daughter, Julie, lived in Boston. The other child, David, also lived in the Northeast, in New York City. Three of Judith's siblings, Herman, Lawrence, and Audrey, lived in Massachusetts, while her twin sister, Joan lived in neighboring West Hartford, Connecticut. Sidney's brother, Herman, lived in Boston and also spent time in Boca Raton.

The appellants testified that, during the tax year at issue, on October 13, 2004, they purchased a condominium in Brookline to be closer to their children who lived in Boston and Newton. The deed for the purchase of this home, executed on October 13, 2004, described the appellants as being "of 33 Bradlee Road, Marblehead, Massachusetts." The appellants testified that they resided at the Brookline home when they were in Massachusetts. The appellants continued to own their Marblehead home during the tax year at issue. Sidney testified that the appellants had put the Marblehead home on the market sometime in 2005, but as of

the date of the hearing, June 24, 2008, they continued to own that property.

Judith testified that the appellants have spent time in Florida since the 1980s, vacationing there for several weeks at a time while Sidney was still working, and then spending longer periods of time there after his retirement in 1998. Both of the appellants' parents had lived in Florida since the late 1960s, and the appellants went to visit their parents on a regular basis. Judith testified that the appellants had been making friends in Florida since they purchased their home in Boca Raton in 2001. According to their Domicile Questionnaire and Judith's testimony, the appellants have, for the tax year at issue and for at least the prior five years, routinely stayed in Massachusetts from May to October and in Florida from October to May. Judith testified that their cars and jewelry traveled back and forth with them between Massachusetts and Florida and that they had art work in both Florida and Massachusetts.

The appellants filed Declarations of Domicile on October 13, 2004, declaring their Delray Beach home as their principle residence. The appellants signed these Declarations on October 1, 2004 before a Massachusetts notary. The appellants were issued Florida driver's

licenses on December 27, 2004. Sidney registered to vote in Florida on October 14, 2004, while Judith registered in Florida on December 8, 2004. Judith voted in the November, 2004 presidential election by means of an absentee ballot in Marblehead, Massachusetts. The address on file for their 2004 cellular telephone bills was the Delray Beach residence. However, the appellants' statement from the Boca West Golf club was addressed to their Marblehead home, as were Sidney's Visa and the couple's American Express credit card statements. Their Palm Beach County, Florida real estate tax bill for 2004 was also addressed to their Marblehead home. The appellants employed the services of a law firm to prepare estate planning documents which reflected a Florida domicile. However, these documents were executed in Florida on May 27, 2005, after the tax year at issue.

The appellants participated in religious, social and civic activities in both Massachusetts and Florida during the tax year at issue. The appellants were members of a synagogue in Newton as well as a synagogue in Boca Raton. The appellants testified that they have participated in various events and classes at the Florida synagogue since at least 2003. They also participated in a study class at the Florida synagogue for approximately six years. Sidney,

an avid golfer, was a member of the Boca West Country Club and the Banyon Country Club in Florida, with full privileges, as well as the Belmont Country Club in Massachusetts, with full privileges. The appellants had friends in both Massachusetts and Florida, and they had doctors in both Massachusetts and Florida. Judith testified that they had also enrolled in continuing education courses for retirees at Florida Atlantic University since around 2001 or 2002, and they had season tickets to the ballet, Kravitz (a variety of concerts and performances) and the Symphony in Florida. However, Judith also purchased a membership to the Museum of Fine Arts in Massachusetts in September, 2004.

Business and charitable activities

Sidney had spent his career with Timberland, the family business. Timberland is a Delaware corporation with its principle office in Stratham, New Hampshire. Sidney had been Chairman of the Board of Directors, President, Chief Executive Officer and a director of Timberland from June, 1986 to June, 1998. He retired in 1998 and his son, Jeffrey, assumed control of Timberland. Sidney remained a director and the Chairman of the Board of Directors. According to Sidney's testimony, the Board of Directors meetings were held in New Hampshire, Boston and sometimes

out of state. During the tax year at issue, Sidney was also the President and a Director of Timberland Retail, Inc. ("Timberland Retail"), a Delaware corporation with its principle office in Stratham, New Hampshire, in the same building as Timberland.

Additionally during the tax year at issue, Sidney was the Resident Agent of Bilsidial Partners, Limited Partnership ("Bilsidial"), a Massachusetts limited partnership with its principle office listed as the appellants' residence at 33 Bradlee Road, Marblehead. Sidney testified that Bilsidial was a small investment partnership that he started with a friend in order to enable his friend to invest some money with Goldman Sachs. He claimed that, although he was listed as the managing partner for Bilsidial, he did not actually perform any services on behalf of Bilsidial.

Judith's primary work outside of her home was her volunteer endeavors with Hadassah, a Jewish women's volunteer organization, which is involved in education and advocacy projects in the United States as well as charitable and volunteer projects in Israel. Judith has been involved in Hadassah since graduating from Boston University, where she became a study group member.

Throughout her membership, Judith rose through the ranks in Massachusetts and New England as the President of the Greater Lawrence Chapter of Hadassah, a member of the New England Regional Board, the fundraising coordinator of the New England Regional Board, the President of the New England Region, and the President of the Northern New England region. After serving as a Region President, Judith was re-elected to continue to serve on the National Board of Hadassah, and by 2004, she had earned tenure and a permanent spot on the National Board of Hadassah. Some time in 1998, Judith became the National Chair of the Society of Major Donors, and since about 2000, she has hosted an annual reunion event in Florida to benefit Hadassah.

Judith testified that she also volunteered in the local community in Florida, particularly in public kindergarten classrooms. She was unclear in her testimony as to the exact time when she volunteered, but she mentioned that, as she became more involved in Hadassah, she reduced her volunteer activities within the school system. Judith also testified that she was involved, through Hadassah, in supporting and educating legislators in Florida, particularly with respect to legislation relating to stem cell research. She testified that she was

not as politically involved in Massachusetts. However, as previously mentioned, Judith did not register to vote in Florida until December, 2004, and she voted in the 2004 Presidential Election by absentee ballot in Marblehead, Massachusetts.

Time spent in Massachusetts

As will be explained further in the following Opinion, a Massachusetts resident is defined as a person who is domiciled in the Commonwealth or who maintains a permanent residence and spends more than 183 days in the Commonwealth. G.L. c. 62, § 1(f). Citing their airline records and credit card statements, the appellants contended that they each spent fewer than 183 days in Massachusetts during the tax year at issue. The Commissioner did not challenge their evidence nor dispute their contention. The appeal, therefore, centers upon whether the appellants changed their domicile from Massachusetts to Florida during the tax year at issue.

The Board's Findings of Fact

On the basis of the above evidence of record, the Board found that the appellants' lifestyle did not change significantly prior to either dates of sale of Timberland stock at issue. As they had since Sidney's 1998 retirement, the appellants spent about half the tax year at

issue in Florida and were active in social, religious, cultural and volunteer activities there. The appellants had been gradually building ties to the area even before the tax year at issue, beginning in approximately 1998 with Sydney's retirement. The Board thus found that the appellants' social and civic ties to Florida were no stronger prior to the two dates of sale than in previous years when they filed Massachusetts Resident income tax returns.

If anything, the biggest changes occurring during the tax year at issue were (1) the appellants' recognition of significant capital gains from the sale of Timberland stock, and (2) the appellants' purchase of an additional Massachusetts property, the condominium in Brookline, which the appellants purchased to be closer to their two children and grandchildren who lived in the Boston area. The Board thus found that the appellants' family ties were stronger in Massachusetts than in Florida prior to the two dates of sale of Timberland stock.

The Board also found that, while the appellants made some modest ministerial changes in an attempt to reflect a change of domicile to Florida - including changing their voter registrations, drivers' licenses, and estate plan - these changes were not effective until after the dates of

sale of the Timberland stock.³ As of the dates of the stock sales, the appellants still owned their Marblehead home and they used that as the address of record on important documents and files, including, but not limited to, their credit card statements and even their Florida real estate tax bill. Further, the appellants purchased another Massachusetts residence, a condominium in Brookline, approximately two weeks prior to the first sale of the Timberland stock. The Board thus found, on the basis of all of the evidence of record, that Massachusetts continued to be the center of the appellants' personal, including their financial, lives prior to the two dates of sale of Timberland stock.

As will be explained more fully in the following Opinion, the Board thus found that the appellants did not abandon their Massachusetts domicile as of the dates of the sales of Timberland stock giving rise to the income at issue. Accordingly, the Board denied the abatement of the income tax at issue, but in accordance with the parties' Statement of Agreed Facts, the Board issued a

³ While Sidney changed his voter registration on October 14, 2004, Judith did not change hers until December 8; moreover, she voted in the 2004 Presidential election by absentee ballot in Marblehead. Both appellants received Florida drivers' licenses on December 27, 2004.

revised decision for the appellants in this appeal, abating the late payment penalties which had accrued since the filing of the abatement application.

OPINION

Under G.L. c. 62 § 2, Massachusetts residents are taxed, with certain limitations not relevant here, on all of their income from whatever sources derived. In contrast, Massachusetts taxes non-residents only on income from Massachusetts sources. See G.L. c. 62, § 5A. Accordingly, if the appellants were domiciled in Massachusetts prior to the dates when they recognized the disputed income, the disputed income is subject to tax in Massachusetts regardless of whether the income was from a Massachusetts source. A "resident" for Massachusetts tax purposes is defined as:

(1) any natural person domiciled in the Commonwealth, or (2) any natural person who is not domiciled in the commonwealth but who maintains a permanent place of abode in the commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in the commonwealth, including days spent partially in and partially out of the commonwealth.

G.L. c. 62, § 1(f). The Commissioner does not contest the appellants' assertion that they spent fewer than 183 days

in Massachusetts during the tax year at issue. The issue presented in this appeal, therefore, is whether the appellants were domiciled in Massachusetts at the time of the sales of stock and, therefore, were taxable as residents on the capital gains recognized from the two sales of Timberland stock.

Domicile has been defined as "the place of actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode." **McMahon v. McMahon**, 31 Mass. App. Ct. 504, 505 (1991). A person's domicile is primarily a question of fact, but the elements to be considered in locating a domicile present a question of law. **Reiersen v. Commissioner of Revenue**, 26 Mass. App. Ct. 124, 124-25 (1988). While domicile may be a difficult concept to define precisely, the hallmark of domicile is that it is "the place where a person dwells and which is the center of his domestic, social and civil life.'" **Id.** at 125 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12 (1969)). When a taxpayer has multiple residences, the Board must weigh the evidence and determine where it is that the taxpayer has his "home," that is, the center of the major facets of the taxpayer's life. See **id.** Having more than one residence can lead to factors on more than one side of

the "domicil[e] ledger." *Id.* at 127. Therefore, a determination of domicile depends upon a comprehensive facts-and-circumstances analysis. See, e.g., **Roarke v. Hanchett**, 240 Mass. 557, 561 (1922) (finding that proof of domicile "depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case.").

"A change of domicile occurs when a person with capacity to change his domicile is physically present in a place and intends to make that place his home for the time at least; the fact and intent must concur." *Id.* (citing **Hershkoff v. Board of Registered Voters of Worcester**, 366 Mass. 570, 577 (1974)). Moreover, "[i]t is a general rule that the burden of showing a change of domicil is upon the party asserting the change." **Mellon Nat'l Bank & Trust Co. v. Comm'r of Corporations and Taxation**, 327 Mass. 631, 638 (1951); **Horvitz v. Commissioner of Revenue**, 51 Mass. App. Ct. 386, 394 (2001). See also **Commonwealth v. Davis**, 284 Mass. 41, 49 (1933) ("The burden of proof that his domicil was changed rested on the defendant because he is the one who asserted that such change had taken place.").

In the instant appeal, the appellants had the means to establish residences for themselves in both Florida and Massachusetts. See **Horvitz v. Commissioner of Revenue**,

Mass. ATB Findings of Fact and Reports 2002-252, 256 ("Because of Horvitz's considerable financial resources, he was able to create two locations in each of which he carried on important parts of his life."). However, only one of those locations can be the appellants' domicile for purposes of taxation. Therefore, the Board must weigh the evidence and determine whether the appellants actually abandoned their Massachusetts domicile in favor of a new domicile in Florida before recognizing gain from the sales of Timberland stock in question.

Massachusetts follows the common law rule that a person with legal capacity is considered to have changed his or her domicile by satisfying two elements: the establishment of physical residence in a different state and the intent to remain at the new residence permanently or indefinitely. *McMahon*, 31 Mass. App. Ct. at 505. The determination of intent goes beyond merely accepting the taxpayer's expression of intent and instead requires an analysis of the facts closely connected to the taxpayer's major life interests, including family and social relations, business connections, and civic and religious activities in order to determine his true intent. See *Reiersen*, 26 Mass. App. Ct. at 125 (citing *Hershkoff v. Board of Registered Voters of Worcester*, 366 Mass. 570,

576-577 (1974)). Moreover, while the determination of intent is subjective in nature, if a person's driving motivation for establishing the new domicile is to reduce a possible tax liability, the claimed domicile will be more closely scrutinized. *Davis*, 284 Mass. at 50 ("A man cannot elect to make one place his home for the general purpose of life, and another place his home for the general purpose of taxation.").

In the instant appeal, the Board found substantial evidence of the appellants' familial ties to Massachusetts. Two of their children lived in Massachusetts, as did all of their grandchildren, as well as almost all of their siblings; their remaining child and sibling lived in neighboring states in the Northeast. In fact, the appellants purchased an additional residence in Massachusetts, the Brookline condominium, to be closer to their children and grandchildren. While each appellant had a sibling who spent considerable time in Florida, the Board found and ruled that, when weighing the evidence, the appellants' familial ties to Massachusetts were stronger than those to Florida during the time prior to the two dates of sale of Timberland stock.

The Board also found that the appellants' efforts to reflect a change of domicile to Florida - including

changing their voter registrations, drivers' licenses, and estate plan - were merely ministerial acts which were not even effective until after the sales of the Timberland stock; moreover, the appellants continued to use their Marblehead home as the address of record on important documents and files. The Board thus found and ruled that the appellants' business and personal financial ties were stronger to Massachusetts than to Florida during the time prior to and including the two dates of sale of Timberland stock.

The appellants filed Massachusetts resident income tax returns prior to the tax year at issue, and they were gradually building social and civic ties to Florida since 1998 when Sidney retired and they began to spend approximately half the year in Florida each year. However, the appellants failed to meet their burden of proving that their social, civic or other ties to Florida were stronger during the tax year at issue than in previous years. The Board thus found and ruled that there was no meaningful change in their activities between those prior tax years and the tax year at issue except for the appellants' recognition of the significant capital gains and the purchase of another Massachusetts residence.

On the basis of the facts in evidence, the Board thus found and ruled that the appellants' family, social and personal ties established that they did not have the requisite intent to abandon their Massachusetts domicile and change their domicile to Florida before either of the sales of Timberland stock.

"It is a general rule that the burden of showing a change of domicil is upon the party asserting the change." ***Mellon Nat'l Bank***, 327 Mass. at 638. In addition, the burden of proof is on the taxpayers to prove that they are entitled to an abatement. See, e.g., ***William Rodman & Sons, Inc. v. State Tax Commission***, 373 Mass. 606, 610 (1977); ***Stone v. State Tax Commission***, 363 Mass. 64, 65-66 (1973); ***Commissioner of Corp. & Tax. v. Filoon***, 310 Mass. 374, 376 (1941); ***Staples v. Commissioner of Corp. & Tax.***, 305 Mass. 20, 26 (1940). In the instant appeal, the Board found and ruled that the appellants failed to meet their burden of proving that they had abandoned their Massachusetts domicile in favor of a domicile in Florida prior to either sale of Timberland stock. Therefore, the Board found and ruled that the appellants were Massachusetts residents for tax purposes on the dates that they recognized the income at issue.

Accordingly, the Board did not grant an abatement of the income tax at issue, but in accordance with the parties' Statement of Agreed Facts, the Board issued a revised decision for the appellants in this appeal, abating only the late pay penalties which had accrued since the filing of the abatement application.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board