

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher M. Lust and	:	
Nicole M. Schmidt Lust,	:	
Petitioners	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	No. 645 F.R. 2011
Respondent	:	Argued: November 10, 2014

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: January 9, 2015

Christopher M. Lust (Lust) and Nicole M. Schmidt Lust (collectively, Taxpayers) petition this Court for review of the Board of Finance and Revenue's (BFR) August 23, 2011 order denying their petition for a personal income tax (PIT) refund. The sole issue before this Court is whether Taxpayers were Pennsylvania residents under The Tax Reform Code of 1971 (the Code)¹. After review, we affirm.²

On July 24, 2006, Taxpayers filed an initial tax return for 2005 (2005 Return) with the Pennsylvania Department of Revenue (Revenue) identifying themselves as part-year Pennsylvania residents for the period January 1, 2005 through October 5, 2005. On the 2005 Return, Taxpayers identified Avalon, New Jersey as their current place of residence. The 2005 Return reported a gross tax due of

¹ Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §§ 7101-10004.

² By per curiam order dated June 17, 2014, this Court granted Taxpayers' unopposed motion to seal the record and exhibits. This opinion does not disclose confidential information contained therein, such as social security numbers, addresses and income.

\$155,076.00 with credits totaling \$183,272.00,³ resulting in an overpayment of \$28,196.00. On October 31, 2006, after assessing an estimated tax penalty of \$1,464.36 and applying \$1,355.22 to an outstanding liability from 2004, Revenue issued Taxpayers a \$25,377.42 refund. By September 1, 2006 letter, Revenue notified Taxpayers that it required additional information including a copy of Taxpayers' Form W-2 in order to verify their income and New York wages for purposes of out-of-state credit, a letter from Taxpayers' employers verifying New York wages earned between January 1, 2005 and October 5, 2005, and proof of their New Jersey residency. On September 27, 2006, Taxpayers' certified public accountant Karl L. Fava (Fava) responded to Revenue's letter with various documentation and the following explanation: "In the Spring of 2005, [Taxpayers] wed. . . . Prior to the marriage, Mrs. Lust resided[] (domiciled)[] in New York and Mr. Lust resided[] (domiciled)[] in Pennsylvania. . . . Mr. and Mrs. Lust moved their respective residences[] (domicile)[] to New Jersey at the beginning of October, 2005." Original Record (O.R.) at 146.

Almost three years later, on October 14, 2009, Taxpayers filed an amended 2005 tax return stating that they were not Pennsylvania residents for any part of 2005, reporting \$0.00 of taxable income for the 2005 tax year and requesting a \$93,283.00 PIT refund, claiming:

Taxpayers are amending their tax return to exclude wages and investment income from gross income that were earned while the taxpayers were part[-]year residents of New York and New Jersey for the full tax year, and nonresidents of Pennsylvania. Therefore they are filing a refund claim for overpaid Pennsylvania income taxes.

³ Taxpayers attached a copy of their 2005 New York state nonresident tax return in support of a credit representing \$63,272.00 they paid in taxes to New York. The New York state nonresident return identifies Taxpayers as nonresidents.

O.R. at 79. Revenue determined that Taxpayers were not entitled to a refund. Taxpayers filed a Petition for Review with the BFR. By August 23, 2011 order, the BFR denied Taxpayers' Petition for Review. Taxpayers appealed to this Court.⁴

Taxpayers maintain that they were not residents of Pennsylvania in 2005. They further contend that they did not earn any income sourced from Pennsylvania in tax year 2005, and thus, are not subject to Pennsylvania PIT for the 2005 tax year.

The Code provides that every "resident individual" must pay personal income tax on all income received during the taxable year, and every "nonresident individual" must pay personal income tax on income received from sources within the Commonwealth during the taxable year. 72 P.S. § 7302.⁵ Section 301(p) of the Code defines a "[r]esident individual" as

an individual who is domiciled in this Commonwealth unless he maintains no permanent place of abode in this Commonwealth and does maintain a permanent place of abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in this Commonwealth; or who is not domiciled in this Commonwealth but maintains a permanent place of abode in this Commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in this Commonwealth.

72 P.S. § 7301(p).⁶ "Nonresident individual" is defined as "any individual who is not a resident of the Commonwealth." 72 P.S. § 7301(m).

Section 101.3 of the Revenue's Regulations states in pertinent part:

⁴ "In tax appeals from the [B]oard, this court functions as a trial court. As fact finder, this court may resolve factual disputes, but where there are no factual disputes, this court shall adopt the parties' stipulation of facts. Our scope of review in a tax appeal is limited to the construction, interpretation and application of a tax statute in relation to a given set of facts." *TCI Ne., Inc. v. Commonwealth*, 676 A.2d 1271, 1274 (Pa. Cmwlth. 1996)

⁵ Section 302 of the Code was added by Section 8 of the Act of August 4, 1991, P.L. 97, *as amended*.

⁶ Added by Section 4 of the Act of August 31, 1971, P.L. 362.

(a) In the case of an individual domiciled in this Commonwealth, the maintenance of a permanent place of abode in this Commonwealth is alone sufficient to make him a resident for tax purposes. Even though he remains outside this Commonwealth for the entire year, the 183-day rule applies only to taxpayers who are not domiciled in this Commonwealth. Reference should also be made to [Section] 101.5 [of the Revenue's Regulations] (relating to rules for days within and without the Commonwealth).

(b) A domicile, once established, continues until the individual in question moves to a new location with the bona fide intention of making his 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 his former home. The burden shall be upon the individual asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations shall be given due weight, but they may not be conclusive if they are contradicted by his conduct. The fact that an individual registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

....

(d) An individual may have only one domicile. If he has two or more homes, his domicile shall be the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location shall be important but not necessarily conclusive. An individual who maintains a permanent place of abode in this Commonwealth is taxable as a resident even though he may be domiciled elsewhere.

61 Pa. Code § 101.3. Further, Section 101.4 of the Revenue's Regulations provides in relevant part:

(a) An individual domiciled in this Commonwealth shall be a resident for purposes of this article for a specific taxable year, unless for that year he satisfies all three of the following requirements:

- (1) Maintains no permanent place of abode in this Commonwealth during the year.
- (2) Maintains a permanent place of abode elsewhere during the entire year.
- (3) Spends in the aggregate not more than 30 days of the taxable year in this Commonwealth.

....

(c) Where an individual claims to be a nonresident for any taxable year, the burden shall be upon him to show that during that year he satisfied all three of the requirements set forth in subsection (a).

61 Pa. Code § 101.4.

This Court has stated:

It is for the Board to determine whether taxes paid, including realty transfer taxes, are to be refunded. A review of determinations of the Board is governed by Pa.R.A.P. 1571. Although this Court hears such cases in its appellate jurisdiction, it functions essentially as a trial court. Therefore, this Court must consider a record made by the parties specifically for the Court rather than one certified to the Court from the proceedings below. Furthermore, **a party appealing from a denial of a tax refund by the Board has the burden of proof in a *de novo* proceeding before this Court.**

Armco, Inc. v. Commonwealth, 654 A.2d 1191, 1192-93 (Pa. Cmwlth. 1993) (citations omitted; emphasis added).

In determining whether Taxpayers were “[r]esident individual[s]” for the 2005 tax year, we examine the record. 72 P.S. § 7301(p). The evidence includes: (1) Lust’s **2004 Pennsylvania** personal income **tax return**, dated August 15, **2005**, which **listed Lust’s address as Pittsburgh, Pennsylvania**; (2) Lust’s **2004 New York State Nonresident** and Part-Year Resident Income **Tax Return**, also dated August 15, 2005, **listed Lust’s home address as Pittsburgh, Pennsylvania**; (3)

Taxpayers' **2005 personal income tax return**, dated July 24, 2006 which listed Taxpayers' address as Avalon, New Jersey, and **reflected a partial-year Pennsylvania residency** from January 1, 2005 to October 5, 2005; (4) Taxpayers' **2005 New York State Nonresident and Part-Year Resident Income Tax Return**, dated July 17, 2006, listed Taxpayers' home address as Avalon, New Jersey; (5) a September 1, 2006 letter from Revenue which requested additional information regarding Taxpayers' 2005 personal income tax return; (6) Fava's September 27, 2006 correspondence which responded to the September 1, 2006 letter, and stated in relevant part:

For your information [Taxpayers] are both employed by New York City[-]based employers and have offices located there. Both work out of their New York offices. In the Spring of 2005, [Taxpayers] wed. Prior to their 2005 tax filing[,] they filed under the single status. **Prior to the marriage[,] Mrs. Lust resided[] (domiciled)[] in New York and Mr. Lust resided[] (domiciled)[] in Pennsylvania.**

On August 2, 2005, Mr. Lust purchased a residence in New Jersey. **Mr. and Mrs. Lust moved** their respective residences[] (domicile)[] **to New Jersey at the beginning of October, 2005.** From that time forward, [Taxpayers] began to treat themselves as New Jersey tax residents and prepared their tax returns as such.

O.R. at 146 (emphasis added); (7) a **deed dated August 2, 2005**, which evidenced the purchase of Taxpayers' property in Avalon, New Jersey, that **identifies Taxpayers' address as Pittsburgh, Pennsylvania**; (8) a Recording and Endorsement Cover Page for the deed to Lust's New York apartment; (9) a tax calendar prepared by Lust noting his geographic location for each day of 2005; and, (10) Lust's deposition testimony.

Lust's deposition testimony is inconsistent with the documents that Taxpayers filed in 2005 and 2006. Lust testified that he began working for KBC Financial Products in New York City in December 2000. O.R. at 7. According to

Lust, he lived in different apartments in various locations in New York City and then in July 2004 purchased an apartment on West 74th Street (Apartment). O.R. at 8. Lust further testified that he was living at that Apartment during 2005. *Id.* He reported that his work involved structured finance asset-backed securities and required considerable travel. O.R. at 9. Lust stated that his wife also lived at the Apartment and worked for Eli Lilly in New York City. O.R. at 10. He explained that in 2005, he did not own or lease any Pennsylvania property, did not earn any income in Pennsylvania, and did not report to any office in Pennsylvania. O.R. at 13. He further testified that he had no connections with Pennsylvania in 2005 other than he was present in the Commonwealth on 32 days that year, and only 10 days between January 1, 2005 and October 5, 2005. O.R. at 15. He noted that during 2005, he earned no income in Pennsylvania, performed no work in Pennsylvania, had no clients in Pennsylvania, and was not sent to Pennsylvania on any business trips. O.R. at 18-19. Lust also recounted that during 2005, he did not support his family in Pennsylvania, did not purchase necessities in Pennsylvania, had no pets in Pennsylvania, did not attend a house of worship in Pennsylvania, did not participate in any clubs in Pennsylvania, did not own or lease Pennsylvania real estate, did not belong to a Pennsylvania union, did not receive unemployment compensation from Pennsylvania, and had no other connections to Pennsylvania. O.R. at 20-22.

Lust provided no explanation apart from poor tax advice, for filing the 2005 Return in a state for which he allegedly had no connection. On cross-examination, Lust was evasive, repeatedly declined to identify documents that he purportedly filed, refused to confirm information contained in those documents, testified that he could not remember critical facts, and provided only the most basic information. He did, however, admit that he held a Pennsylvania driver's license in 2005. O.R. at 45.

Taxpayers' documents, filed under penalties of perjury, contemporaneous to or shortly after the 2005 tax year, together with Fava's September 1, 2006 letter, demonstrate their consistent, repeated representations of Taxpayers' Pennsylvania residency and provide factual support therefor. Despite Lust's representation that he was domiciled in New York during 2005, he filed the 2005 Return stating he was a Pennsylvania resident until October 1, 2005 and filed a 2005 **nonresident** New York tax return representing the same.⁷ Lust listed a Pennsylvania residence on the deed for the New Jersey residence purchased on August 2, 2005. Finally, Lust held a Pennsylvania driver's license during that time.

In contrast, Taxpayers' amended 2005 personal income tax return, filed approximately 3 years later, Lust's self-serving tax calendar and selectively-evasive deposition testimony given approximately 9 years after the tax year at issue are of dubious value. As fact finder, we do not find Lust's testimony credible. It was Taxpayers' burden to demonstrate that they were not Pennsylvania residents during 2005. *Armco, Inc.* They have not met their burden.

For all of the above reasons, the BFR's order is affirmed.

ANNE E. COVEY, Judge

⁷ It is also noteworthy that Lust filed his 2004 Pennsylvania tax return on **August 15, 2005 using a Pennsylvania address.** O.R. at 83.

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ORDER

AND NOW, this 9th day of January, 2015, the Board of Finance and Revenue's August 23, 2011 order is affirmed. This judgment shall become final unless exceptions are filed within thirty (30) days pursuant to Pa.R.A.P. 1571(i).

ANNE E. COVEY, Judge