

APPENDIX

TABLE OF CONTENTS

Appendix A:	New York Court of Appeals order, March 26, 2019.....	1a
Appendix B:	New York Supreme Court, Appellate Division, Third Department opinion, November 1, 2018.....	2a
Appendix C:	Trial court opinion, March 3, 2017.....	5a

APPENDIX A

COURT OF APPEALS OF NEW YORK

RICHARD CHAMBERLAIN et al.,
Appellants,

v.

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE et al.,
Respondents.

2018-1236

Submitted December 31, 2018
Decided March 26, 2019

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Motion for leave to appeal denied with \$100 costs and necessary reproduction disbursements.

APPENDIX B

SUPREME COURT,
APPELLATE DIVISION,
THIRD DEPARTMENT, NEW YORK

RICHARD CHAMBERLAIN et al.,
Appellants,

v.

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE et al.,
Respondents.

525967

November 1, 2018

Lynch, J. Appeal (transferred to this Court by order of the Court of Appeals) from an order of the Supreme Court (McDonough, J.), entered March 13, 2017 in Albany County, which, among other things, granted defendants' motion for summary judgment dismissing the complaint.

From 2009 through 2011, plaintiffs maintained their domicile in Connecticut and a residence in New York City, where they both worked. Concededly, they were both physically present in New York for more than 183 days each year and thus qualified as statutory residents of New

York (*see* Tax Law § 605 [b] [1] [B]). Plaintiffs filed joint Connecticut resident income tax returns and paid taxes on their worldwide income, which, in large part, included income from the sale of their shareholder interest in a business entity. Plaintiffs also filed joint New York nonresident income tax returns, essentially on their wage income earned in New York. After an audit, defendant Department of Taxation and Finance concluded that, as statutory residents, all of plaintiffs' income was subject to New York's income tax. The Department assessed a tax liability against plaintiffs of \$2.7 million on their intangible income (i.e., income derived from interest, dividends and capital gains), without any credit for taxes paid to Connecticut. Plaintiffs paid the tax under protest and then commenced this declaratory judgment action, challenging the constitutionality of the tax as double taxation, violative of the dormant Commerce Clause, which "prohibit[s] certain state taxation even when Congress has failed to legislate on the subject" (*Oklahoma Tax Comm'n v Jefferson Lines, Inc.*, 514 US 175, 179 [1995]; *see* US Const, art I, § 8). After converting defendant's motion to dismiss to one for summary judgment, Supreme Court granted the motion and declared that New York's statutory residency provision was constitutional. Plaintiffs appealed directly to the Court of Appeals (*see* CPLR 5601 [b] [2]), which transferred the matter to this Court, finding that the constitutional question presented on appeal was not substantial.

Plaintiffs candidly acknowledge that in *Matter of Tamagni v Tax Appeals Trib. of State of N.Y.* (91 NY2d 530 [1998], *cert denied* 525 US 931 [1998]), the Court of Appeals rejected the same arguments raised in plaintiffs' complaint. That said, plaintiffs maintain that the *Tamagni* ruling was abrogated by a recent decision of the

Supreme Court of the United States, *Comptroller of Treasury of Maryland v Wynne* (575 US —, 135 S Ct 1787 [2015]). This same thesis was recently rejected by the First Department in *Edelman v New York State Dept. of Taxation & Fin.* (162 AD3d 574 [2018]). *Edelman* distinguished *Wynne* as pertaining to taxpayers who were residents of only one state and whose out-of-state business income was at issue—not intangible investment income—as in *Tamagni* and as here. The First Department further concluded that Commerce Clause scrutiny does not change the determination in *Tamagni* that the challenged statute does not affect interstate commerce. Notably, New York provides a credit for income taxes paid by its residents to other states if the income is “‘derived therefrom’—i.e., earned in the other [s]tate” (*Matter of Tamagni v Tax Appeals Trib. of State of N.Y.*, 91 NY2d at 536, quoting Tax Law § 620 [a]; see 20 NYCRR 120.4 [d]). We find the First Department’s analysis persuasive and conclude that Supreme Court properly granted summary judgment in defendants’ favor.

Egan Jr., J.P., Devine, Clark and Rumsey, JJ. concur.
Ordered that the order is affirmed, without costs.

APPENDIX C

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

RICHARD CHAMBERLAIN and MARTHA J. CRUM,
Plaintiffs,

v.

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE and JERRY BOONE, in his official ca-
pacity as Commissioner of New York State Department
of Taxation and Finance,
Defendants.

Index No.: 174-16

RJI No.: 01-16-120120

DECISION AND ORDER

Roger D. McDonough, J.:

Plaintiffs seek: (1) a judgment declaring that New York's statutory residency provisions violate the dormant Commerce Clause of the United States Constitution; (2) a judgment declaring that the statutory residency provisions administered by defendants violate the dormant

Commerce Clause of the United States Constitution and prohibiting defendants from retaining the taxes paid by plaintiffs on improper notices or assessments that fail to provide a credit for taxes plaintiffs paid to other states on investment and intangible income; and (3) attorneys' fees and other costs and disbursements pursuant to 42 U.S.C. § 1988.

Defendants moved to dismiss the complaint pursuant to CPLR § 3211(a)(7). Plaintiffs opposed the motion and brought a motion to convert defendants' motion to one for summary judgment. Defendants opposed the conversion motion. After oral argument, the Court gave the parties notice that it was converting defendants' motion to dismiss into one for summary judgment. Thereafter, the parties agreed to a joint briefing schedule and plaintiffs cross-moved for summary judgment. The Court, at the request of counsel, held a second oral argument session.

Background

Plaintiffs, a married couple, have a residence in the state of Connecticut. The plaintiffs also had "living quarters" in New York City between 2009 and 2011. Plaintiff Chamberlain ("Mr. Chamberlain") was the president of an entity known as Chamberlain Communications Group, Inc. ("CCG") from 1993 until 2007. In 2007, CCG was sold to an unrelated entity. Mr. Chamberlain continued to serve as President of CCG's successor from March 1, 2007 until December 31, 2009. In 2010, he served as an advisor to CCG's successor. Mr. Chamberlain worked in New York City during his employment with CCG and CCG's successor. Plaintiff Crum ("Ms. Crum") worked for the City University of New York ("CUNY") during 2010 and 2011 as an assistant professor at Hunter College. For

each year of 2009 through 2011, the plaintiffs filed joint Connecticut Resident Income Tax Returns. The plaintiffs also filed joint New York Nonresident Income Tax Returns (“New York returns”) for each year. Plaintiffs acknowledge being physically present in New York for more than 183 days in each of these years.

Plaintiffs’ New York returns were audited by respondent New York State Department of Taxation and Finance (“NYSDTF”). NYSDTF determined that plaintiffs were “statutory residents” of New York State and New York City during the relevant time periods. Accordingly, plaintiffs were deemed to be New York residents who should have filed New York Resident Income Tax Returns. The audit resulted in NYSDTF finding that a tax liability of \$2,731,953 was due. The tax liability was calculated without providing any credits for the taxes plaintiffs paid to the state of Connecticut during the relevant time periods. Plaintiffs paid the tax liability balance under protest. The instant litigation ensued.

Discussion

Plaintiffs rely on the United States Supreme Court decision in *Comptroller of the Treasury of Md. v Wynne*, 135 S Ct 1787 [2015] (“*Wynne*”). Specifically, plaintiffs argue that *Wynne* mandates a finding that New York’s “statutory residency scheme” violates the United States Commerce Clause. The residency “scheme” consists of New York’s Tax Law §§ 605(b)(1)(B), 612 and 620.

Defendants argue that the Dormant Commerce Clause is not implicated by this litigation. The defendants note that the Court of Appeals has already held that dual residency does not implicate interstate commerce for the

purpose of income taxation (*see, City of New York v State of New York*, 94 NY2d 577, 598 [2003]). Defendants further point out that the taxes at issue herein are based upon plaintiffs' status as residents of New York state. Finally, defendants assert that the intangible and investment income at issue was not earned in any particular State and cannot be traced to any jurisdiction outside of New York (*Id.*). Alternatively, defendants maintain that New York's resident statutory scheme passes the internal consistency test used by Courts to analyze Commerce Clause challenges.

Defendants assert that *Wynne* does not apply to this matter and that the Court of Appeals decision in *Tamagni v Tax Appeals Tribunal*, 91 NY2d 530 (1998) ("*Tamagni*") remains controlling authority. They note that, unlike *Wynne*, plaintiffs are not being taxed in New York for income specifically derived from business conducted outside of New York. Further, defendants contend that the precedents relied upon by the *Wynne* Court all involved statutes that had taxed residents for income clearly derived from business conducted outside of the particular state. The defendants also cite the *Wynne* Court's repeated references to income earned by residents outside the state. Again, defendants maintain that the income at issue here is intangible income that was not derived out of state. Defendants contrast this intangible income with the fact pattern in *Wynne*, where Maryland was taxing its residents on income derived in other states. Accordingly, defendants maintain that *Wynne* should have no impact on this litigation and that *Tamagni* remains controlling authority on this Court.

Defendants also point out that *Tamagni* involved taxpayers like the plaintiffs herein who were statutory residents of New York but claimed another state as their domicile or primary residence. The Court of Appeals in *Tamagni* held that New York's tax on a resident's intangible income did not implicate the Commerce Clause (*see, Tamagni v Tax Appeals Tribunal, supra* at 532). The *Tamagni* Court further held that commuting to work in New York and/or maintaining a permanent residence in New York did not produce the requisite effect on commerce to implicate the Commerce Clause (*see, Id.* at 534). Defendants also point to the *Tamagni* Court's repeated findings that the double taxation at issue bore no relation to interstate commercial activity and that New York's tax scheme was merely a tax on residents based on their status as residents. In sum, defendants point out that on seemingly identical facts to those present herein, the *Tamagni* Court found that no violation of the dormant Commerce Clause was apparent.

Plaintiffs take the polar opposite position on each of defendants' arguments. Relying on *Wynne*, plaintiffs maintain that New York cannot accurately claim that the statutory scheme at issue is insulated from Commerce Clause scrutiny. The plaintiffs maintain that defendants are attempting to avoid Commerce Clause scrutiny by labeling the tax scheme issue as a tax on residency.

Next, plaintiffs argue that the statutory residency scheme substantially affects interstate commerce. They point to three factors: (1) the impact of the 183 day count residency requirement on commuters who cross state lines; and (2) the impact of the permanent place of abode requirement on a person engaging the real estate market in more than one state as well as the purchase of utilities

and upkeep services in both the home state and New York. Further, plaintiffs contend that *Wynne* has abrogated the premise relied upon by the *Tamagini* Court as to the applicability of the dormant Commerce Clause to New York residents. Taking the next step, the plaintiffs also explain how New York's scheme flunks the internal consistency test. Further, plaintiffs point to New York's prior recognition of this precise problem and its failure to address it. Specifically, plaintiffs take issue with New York's failure to adopt the recommendations of the Northeastern States Tax Officials Association ("NESTOA"). NESTOA had proposed, for its twelve member states, the adoption of uniform credits for taxes paid to other states in dual-residency situations.

Returning to their analysis of *Wynne*, plaintiffs argue that the case repudiates the two arguments upon which the *Tamagni* decision was based. Plaintiffs maintain that *Wynne* guarantees that the Commerce Clause can protect state residents from their own state taxes. Additionally, plaintiffs argue that the *Tamagni* Court erred by failing to apply the internal consistency test.

Finally, plaintiffs argue that the fact that *Wynne* involved earned income from sources outside of the state, as opposed to intangible income, is irrelevant. Plaintiffs argue that the analysis must be whether interstate commerce is substantially affected by the scheme as opposed to whether interstate commerce itself is being directly taxed. The plaintiffs stress that New York is exposing "non-domiciliaries" engaged in sufficient interstate activity to be deemed a statutory resident to a heavier tax burden than that faced by domiciliaries who confine their ac-

tivities to their home state. Accordingly, they seek summary judgment and the aforementioned declaratory relief.

In further support of their summary judgment motion, defendants assert that plaintiffs: (1) have adopted an overly broad interpretation of *Wynne*; (2) are mistaken in their understanding of the status of dual residency; and (3) are mistaken in their application of the internal consistency test. Defendants argue that the dual residency situation before this Court was simply not a concern “addressed in *Wynne* directly, tangentially, or in analog.” Specifically, defendants reemphasize that *Wynne* only speaks to the taxability by one state of tangible income that is earned in another state by way of interstate commercial activity. Defendants contrast this with the plaintiffs’ situation, wherein New York is taxing intangible income that was not derived out of state. Further, defendants note that the *Wynne* Court clearly stated that double taxation would pass the internal consistency test if it did not unduly burden interstate commerce. The defendants also emphasize that plaintiffs are incorrectly comparing themselves to taxpayers who are solely residents of one state. Defendants contend that dual residency is not interstate commerce and that single residential real estate transactions (like the purchase of an apartment in New York City) are intrastate in nature. Finally, defendants stress that plaintiffs are misapplying the internal consistency test by focusing upon the impact on particular taxpayers as opposed the effect of the tax scheme on interstate commerce.

In further support of their cross-motion, plaintiffs stress that defendants have misapplied the internal con-

sistency test. Specifically, plaintiffs argue that the internal consistency test is not met because New York failed to adopt the NESTOA agreement regarding credits for taxes paid to other states on intangible income.

The Court finds that *Tamagni* remains controlling law on the issues raised in this litigation. A review of the *Wynne* decisions reveals that it is merely a reaffirmation of longstanding principles and caselaw pertaining to state tax schemes and interstate commerce. The *Wynne* Court itself stresses that the results of the case should have been apparent based on prior United States Supreme Court rulings in 1938, 1939 and 1948. Further, the *Wynne* ruling does not in any respect provide meaningful or new guidance as to how this Court should rule on the constitutionality of New York's statutory residency scheme. Regardless, *Tamagni* remains controlling authority and directly addresses the constitutionality of New York's statutory residency scheme on individuals who are deemed residents of two states. Finally, the Court notes that *Wynne* repeatedly stressed the crucial fact that Maryland residents were having income earned outside of Maryland taxed twice. New York, on the other hand, is merely taxing the untraceable intangible income of two of its residents.

Based on *Tamagni*, the Court concludes that New York's statutory residency scheme does not violate the dormant Commerce Clause. Specifically, the Court finds that the double taxation that occurred here "does not fall on any identifiable interstate market" and "does not favor intrastate commerce over interstate commerce in a manner violative of the dormant Commerce Clause" (*Tamagni v Tax Appeals Tribunal, supra* at 541-542). Clearly, the double taxation at issue herein does not bear

any relation to plaintiffs acts in commuting to or working in the New York City metropolitan area. Rather, the double taxation is attributable to plaintiffs status as New York statutory residents and the classification of the income as intangible income that cannot be tied to plaintiffs' activities in a State other than New York (*see, Id.*). Additionally, to the extent it is necessary for the Court to reach the issue, the Court finds that the statutory residency scheme at issue is internally consistent and satisfies the *Complete Auto* test set forth in *Complete Auto Tr., Inc. v Brady*, 430 U.S. 274, 279 [1977]). Accordingly, defendants' summary judgment motion must be granted, plaintiffs' cross-motion for summary judgment must be denied, and the declaratory relief sought by plaintiffs must be answered in the negative.

Based upon the foregoing, it is hereby

ORDERED that defendants' converted summary judgment motion is hereby granted in its entirety; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that plaintiffs' requests for attorneys' fees, costs and disbursements are hereby denied in their entirety; and it is further

ORDERED, ADJUDGED and DECLARED that New York's statutory residency provisions do not violate the dormant Commerce Clause of the United States Constitution; and it is further

ORDERED, ADJUDGED and DECLARED that the statutory residency provisions administered by defendants do not violate the dormant Commerce Clause of the United States Constitution and defendants are not prohibited from retaining the taxes paid by plaintiffs on notices or assessments that fail to provide a credit for taxes plaintiffs paid to other states on investment and intangible income.

This shall constitute the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to defendants' counsel who is directed to enter this Decision, Order and Judgment without notice and to serve plaintiffs' counsel with a copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment and the papers considered to the County Clerk. The signing of the Decision, Order and Judgment and delivery of a copy of the Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Defendants' counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER.

Dated: Albany, New York
March 3, 2017

/s/ Roger D. McDonough
Roger D. McDonough
Supreme Court Justice

Papers Considered¹:

1. Defendants' Notice of Motion, dated March 4, 2016;
2. Affirmation of Rachel Maman Kish, Esq., A.A.G., dated March 4, 2016, with annexed exhibits;
3. Plaintiffs' Notice of Motion to Convert, dated April 29, 2016;
4. Affirmation of Michelle L. Merola, Esq., dated April 29, 2016, with annexed exhibits, including affidavit of Professor Ruth Mason, Esq., sworn to on April 27, 2016, with annexed curriculum vitae;
5. Affirmation of Michelle L. Merola, Esq., dated April 29, 2016, with annexed exhibit;
6. Affirmation of Good Faith of Michelle L. Merola, Esq., dated April 29, 2016;
7. Plaintiffs' Notice of Cross-Motion, dated August 26, 2016;
8. Affirmation of Timothy P. Noonan, Esq., dated August 26, 2016, with annexed exhibits;
9. Affidavit of Richard Chamberlain, sworn to August 24, 2016, with annexed exhibits;

¹ Both parties submitted memoranda of law in support of their respective positions.

10. Transcript of Oral Argument held on November 17, 2016, received by the Court on December 13, 2016.