

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petitions  
of  
MARK D. GEORGE AND JOLANTA F.  
GEORGE  
for Redetermination of Deficiencies or for  
Refunds of Personal Income Tax under Article  
22 of the Tax Law for the Years 1981, 1982 and  
1983.

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DETERMINATION

Petitioners, Mark D. George and Jolanta F. George, P.O. Box 470, Syracuse, New York 13201-0470, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1981, 1982 and 1983 (File Nos. 802142 and 802488).

A hearing was held at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on January 27, 1987 at 1:15 P.M., with all briefs to be submitted by April 30, 1987. Petitioner Mark D. George appeared pro se and for Jolanta F. George. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioners were taxable as resident individuals of New York during the years at issue.

II. If so, whether the income of petitioner Mark D. George, an American Indian and a member of the Onondaga Indian Nation, was subject to New York State personal income tax.

FINDINGS OF FACT

1. Petitioners, Mark D. George and Jolanta F. George, filed New York State personal income tax returns as follows: (a) 1981 - A resident return was filed for six months of the year, on which petitioners reported total New York income of \$9,103.49. A nonresident return was filed, also for six months, reporting total New York income of \$7,758.59.

The address shown on each return was 5-11 Berliner Strasse, Apt. #38, Kaiserslautern, West Germany. The New York County of residence shown on the resident return was Onondaga County. A Schedule for Change of Resident Status attached to the returns claimed that petitioners were New York State residents from April 15, 1981 through September 15, 1981.

(b) 1982 - A nonresident return was filed for the entire year showing the Kaiserslautern address. Federal wage and salary income was shown as \$37,037.93. New York income was shown as \$28,674.38, which amount evidently consisted of Mr. George's earnings.

(c) 1983 - A nonresident return was filed showing an address of 111 West Utica Street, Oswego, New York. Petitioners reported Federal income of \$48,270.06 and subtracted Jolanta F. George's earnings of \$6,388.88 as "Overseas Military".

2. On January 10, 1984, the Audit Division issued a Statement of Audit Changes to petitioners claiming additional tax due of \$1,462.97 for the year 1981. The explanation was as follows:

"A service person who was a New York State resident upon entering military service retains this status even though assigned to duty outside New York State. All income reported on the Federal return is taxable to New York State unless all three of the following conditions are met:

1. Does not maintain a permanent place of abode in New York State during the entire taxable year.
2. Does maintain a permanent place of abode outside New York State during the entire taxable year.
3. Spends no more than 30 days in New York State during the entire taxable year.

Since your 1981 return was filed stating you lived in New York State from 4/15/81 to 9/15/81, all your income is taxable to New York State."

On April 5, 1985, a Notice of Deficiency for the year 1981 was issued to petitioners in the amount of \$1,462.97 in additional tax due.

3. On March 1, 1985, the Audit Division issued a Statement of Audit Changes to petitioners claiming additional tax due of \$728.37 for 1982 and \$424.72 for 1983. The explanation was as follows:

"A move within and without New York State for a brief and limited period of time does not constitute a change of resident status. Therefore, Mark is a New York State resident for the entire years of 1982 and 1983.

A wife's domicile follows that of the husband. Therefore, Jolanta is a full year resident also.

The itemized deductions listed in Schedule C of your 1982 New York State income tax return were totalled incorrectly and have been corrected accordingly.

You have been allowed the maximum tax benefit of Personal Service income on your 1982 and 1983 returns."

On August 8, 1985, the Audit Division issued a Notice of Deficiency against petitioners for 1982 and 1983 claiming \$1,153.09 in additional tax due.

4. Petitioner Mark D. George was born in Syracuse, New York. Petitioner Jolanta F. George was born in Poland and came to the United States in 1968 and settled in Syracuse.

5. Petitioners were married in 1974. Between 1974 and 1980, they lived in the Syracuse area except for time spent on trips made to other areas of the United States in search of employment.

6. In the summer of 1980, petitioners took a one-bedroom apartment in Atlantic City, New Jersey on a month-to-month basis. Petitioner Mark D. George worked as an electrician in an Atlantic City casino.

7. In October 1980, petitioner Jolanta F. George joined the Armed Forces of the United States and, after basic training, was assigned to serve in West Germany. She left for her assignment at the end of 1980.

8. Petitioner Mark D. George joined his wife in West Germany upon her assignment there, but was unable to find work and returned to New York in the spring of 1981.

9. During the years at issue, petitioner Mark D. George worked as an electrician at the Nine Mile Two nuclear power plant near Oswego, New York. The exact dates of his employment at the site do not appear in the record.

10. While working at the nuclear power plant, petitioner Mark D. George resided in a rooming house for a brief period, and then moved to a one-bedroom apartment at 111 West Utica Street, Oswego, New York.

11. While serving in the Armed Forces in West Germany, petitioner Jolanta F. George lived off base in a one-bedroom apartment at 5-11 Berliner Strasse, Kaiserslautern. All of the

income earned by Mrs. George during the years at issue was earned in West Germany.

12. Mrs. George's father was a citizen of Sweden and one reason she had asked for the European assignment was to be near him, as he was ill. He died while Mrs. George was stationed in West Germany.

13. Petitioners stopped living together as husband and wife after petitioner Mark D. George returned to New York State in December of 1981, but were not legally separated.

14. During the years at issue, petitioner Jolanta F. George returned to New York only to visit her mother, who resided in Syracuse. These visits were made while she was on military leave and she did not spend more than thirty days in the State of New York during any of the years at issue.

15. Petitioner Jolanta F. George was discharged from the Armed Forces in August of 1983. After her discharge, Mrs. George remained in Europe seeking civilian employment with the Department of Defense. She was unable to find such work in Europe and returned to the United States in 1984 or 1985, where she established residence in Maryland.

16. Petitioner Mark D. George is an American Indian and a member of the Onondaga Nation, Six Nations Iroquois Confederacy.

#### CONCLUSIONS OF LAW

A. That domicile, once established, continues until a new domicile is acquired and the burden of proof is on the party who alleges the change (Bodfish v. Gallman, 50 AD2d 457). Petitioners were domiciled in New York prior to the years at issue and did not show that they changed domicile during said years. Accordingly, under the Tax Law, they are deemed domiciliaries of this State.

B. That Tax Law § 605(a)(1) provides, in pertinent part, that a resident individual means an individual who is domiciled in New York State unless he "maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state".

C. That petitioner Jolanta F. George, although a domiciliary of New York State, was not a resident individual of New York State during the years at issue. She did not maintain a permanent place of abode in New York, she maintained a permanent place of abode in West Germany, and she did not spend more than thirty days of any of the years at issue in this State. It is noted that a de facto separation has existed between her and Mr. George since Mr. George left West Germany in the spring of 1981.

D. That petitioner Mark D. George, however, was a resident individual of New York State during the years at issue. He maintained a permanent place of abode in Oswego, New York during 1981, 1982 and 1983 and spent more than thirty days of each year in this State.

E. That Mr. George's claim, that as a member of the Onondaga Nation his income is exempt from taxation under Federal treaties (i.e., the Treaty of Six Nations, 1794; the Jay Treaty of 1794; and the Treaty of Ghent of 1814), is without merit. Income earned from employment on an Indian reservation, by an Indian who resides on such reservation, is not subject to New York State personal income tax (see \_\_\_ McClanahan v. Arizona State Tax Commission, 411 US 164; Bryan v. Itasca County, 426 US 373; 1978 Opns Atty Gen 79; 1977 Opns Atty Gen 76). Mr. George's income, however, was earned neither on an Indian reservation nor while said petitioner was residing on a reservation, and it thus is subject to New York State personal income tax.

F. That the Audit Division is directed to recompute the notices of deficiency to reflect the determination that petitioner Jolanta F. George was not a resident individual of New York State during the years at issue and that none of her income was from New York sources.

G. That except as granted in Conclusions of Law "C" and "F", the petitions of Mark D. George and Jolanta F. George are denied and the notices of deficiency, as modified, are otherwise sustained.

DATED: Albany, New York  
October 16, 1987

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ADMINISTRATIVE LAW JUDGE