

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
DANIEL SHAPIRO AND OLGA : DETERMINATION  
W. SHAPIRO :  
for Redetermination of Deficiencies or for :  
Refund of New York State Personal Income Tax :  
under Article 22 of the Tax Law and New York :  
City Personal Income Tax under Chapter 46, :  
Title T of the Administrative Code of the City :  
of New York for the Years 1981 through 1983.

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Petitioners, Daniel Shapiro and Olga W. Shapiro, 48 Laurel Cove Road, Oyster Bay, New York 11771-1922, filed petitions for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1981 through 1983 (File Nos. 802925 and 802926).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 11, 1989 at 1:15 P.M., with all briefs to be submitted by November 10, 1989. Petitioners appeared by Nathaniel Marcus, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly asserted a deficiency of New York State and New York City personal income tax against Olga W. Shapiro.

II. Whether petitioners are subject to tax as residents of New York State and New York City during the years 1981 through 1983.

## FINDINGS OF FACT

Petitioners, Daniel Shapiro and Olga Werchola Shapiro, filed a New York State and City of New York Resident Income Tax Return for the year 1981 where they selected a filing status of "[m]arried filing separately on one return." They reported that their address was on Foster Hill Road in Milford, Pennsylvania. In conjunction with the foregoing return, petitioners filed a New York State Nonresident Income Tax Return wherein they reported that they were residents of New York for six months. Each petitioner also filed a City of New York Nonresident Earnings Tax Return wherein they reported that they were residents of the City of New York from January 1, 1981 through June 30, 1981. They also reported that they resided on Charles Street in New York City and that in 1981 they spent 182 days in the City. Lastly, to the extent at issue herein, each petitioner filed a New York State and City of New York Schedule for Change of Resident Status. Petitioner Daniel Shapiro allocated his income, itemized deductions and exemptions on this last form. Similarly, petitioner Olga Werchola Shapiro allocated her income and exemptions on the basis of the reported resident and nonresident period.

Petitioners' returns for the year 1981 contained a wage and tax statement addressed to Olga Werchola at 15 Charles Street in New York City from the New York City Health and Hospitals Corporation. It also contained a wage and tax statement from the firm of Gair, Gair & Conason addressed to Daniel Shapiro at the Charles Street address. Lastly, there was a wage and tax statement from the firm of Fuchsberg & Fuchsberg which was addressed to Daniel Shapiro in Milford, Pennsylvania.

Petitioners filed a New York State Nonresident Income Tax Return for the year 1982 wherein they selected the filing status of "[m]arried filing separately on one return". They also separately filed a City of New York Nonresident Earnings Tax Return. On each of the latter returns, petitioners reported that they did not maintain an apartment or other living quarters in the City of New York during 1982.

Petitioners' 1982 New York income tax return contained four wage and tax statements. Two of the wage and tax statements were from the firm of Fuchsberg & Fuchsberg and were

addressed to Daniel Shapiro in Milford, Pennsylvania. The remaining wage and tax statements were from, respectively, New York University and New York City Health and Hospitals Corporation. The latter wage and tax statements were addressed to Olga Werchola at the Charles Street address in New York City.

Petitioners filed separately, on one return, a New York State Nonresident Income Tax Return and each separately filed a City of New York Nonresident Earnings Tax Return for the year 1983. The preprinted label on the former return listed petitioners' address as being in Milford, Pennsylvania. On the latter returns, each petitioner checked the box stating that they did not maintain an apartment or other living quarters in the City of New York during any part of the year. Petitioners' returns contained a wage and tax statement addressed to Olga Werchola from New York University. This wage and tax statement was mailed to the Charles Street address in New York City.

On November 1, 1985, the Division issued two notices of deficiency to Daniel Shapiro which asserted a deficiency of New York State and New York City personal income tax. The first Notice of Deficiency explained that Daniel Shapiro had a deficiency of personal income tax for the years 1981 and 1982 in the amount of \$2,946.85, plus interest of \$1,032.86, for a total amount due of \$3,979.71. The second Notice of Deficiency explained that Daniel Shapiro had a deficiency of income tax for the year 1983 in the amount of \$39,419.24, plus interest of \$6,598.45, for a total amount due of \$46,017.69.

On November 1, 1985, the Division also issued two notices of deficiency to Daniel and Olga W. Shapiro which, in conjunction, asserted a deficiency of New York State and New York City personal income tax for the years 1981 through 1983. The first notice asserted a deficiency of tax in the amount of \$261.26, plus interest of \$107.57, for a total amount due of \$368.83. The second notice explained that tax was due in the amount of \$284.25, plus interest of \$47.59, for a total amount due of \$331.84.

The statements of personal income tax audit changes which correspond with the respective notices of deficiency disclose that each of the notices of deficiency was premised on

the Division's position that petitioners are subject to tax as residents of New York State and New York City. The Division also made adjustments to certain miscellaneous deductions claimed by petitioners. However, at the hearing, the only issue raised was whether petitioners are subject to tax as residents of New York State and New York City. The statements of audit changes reveal that the amounts sought in the notices of deficiency addressed to both Daniel and Olga W. Shapiro are based on the amounts reported in the separate filings of Olga W. Shapiro.

Petitioners filed joint Commonwealth of Pennsylvania individual income tax returns for the years 1981 through 1983.

A review of the New York State, New York City and Commonwealth of Pennsylvania income tax returns reveals that Olga W. Shapiro used the names "Olga W. Shapiro", "Olga Werchola", "Olga Werchola Shapiro" and "Dr. Olga Werchola". The perfected petition in this matter was filed under the names of "Daniel & Olga W. Shapiro".

In 1964, Daniel Shapiro's father built an apartment building at 15 Charles Street in New York City. In 1967, his father died and Daniel Shapiro acquired a 5% interest in the building. Thereafter, Daniel Shapiro moved into an apartment in this building. The apartment had a bedroom and kitchen facilities. At some juncture, this apartment became petitioners' residence.

On or about May 27, 1981, Daniel Shapiro and his wife purchased a home in Milford, Pennsylvania. Petitioners contend that when they purchased this house they intended to make it their domicile.

Daniel Shapiro has been licensed to practice medicine in the State of New York since 1960. In 1978, he was admitted to practice law in the States of New York and Pennsylvania. He was also admitted to the Fifth Circuit Court of Appeals.

In 1981, Daniel Shapiro maintained a medical practice in the Bronx, New York. He was also employed part time as an attorney for two separate law firms with offices in New York City, Gair, Gair & Conason and Fuchsberg & Fuchsberg. In 1982, Daniel Shapiro continued to work for Fuchsberg & Fuchsberg. In the latter part of 1982 he became a partner in the firm of

Katz, Katz & Brand. Since Daniel Shapiro was a physician and an attorney, his time was spent settling or trying medical malpractice cases. In order to perform these tasks, it was Daniel Shapiro's practice to take files from his office to his home in Pennsylvania, where he had an extensive medical library, and prepare for either a trial or a settlement conference. As a result, he did not report to his office on a daily basis.

As a trial attorney, Daniel Shapiro's efforts were not centered exclusively in New York City. He has participated in trials in Rockland, Suffolk and Nassau counties.

Daniel Shapiro never registered to vote in New York. However, he registered to vote in Pennsylvania upon purchasing a home in Milford. He also became a member of the Pennsylvania Bar Association and the Pike County Bar Association. Petitioners had a joint checking account in Pennsylvania.

Mr. Shapiro could commute by car from his home in Milford to Manhattan in about an hour and thirty minutes. If he used the commuter train, the trip lasted about an hour and forty-five minutes. Therefore, he was able to sleep at his home in Milford and attend a court appearance in New York by mid-morning the next day.

Mr. Shapiro has held only a New York driver's license. He felt that this was necessary because, in order to keep his M.D. license plate, his car had to be registered to his office address, which was the Charles Street apartment. Olga Shapiro never had a New York driver's license during the years in issue.

Daniel Shapiro never applied for a license to practice medicine in Pennsylvania.

Mr. Shapiro did not keep track of the number of days he spent in New York. However, he estimated that he slept at his home in Milford over 195 nights a year. He slept in his apartment at 15 Charles Street only if he had to be at court early in the morning the next day.

During the years in issue, petitioner Olga Werchola Shapiro was a dentist. In 1981 and 1982, she was employed by the New York City Health and Hospitals Corporation. Moreover, in 1982, she taught part time at New York University. In 1983, she purchased a dental practice in the Bronx.

Olga Shapiro grew up in Pennsylvania and, during the years in issue, she maintained a Pennsylvania driver's license. She also maintained a license to practice dentistry in Pennsylvania and was a member of the local dental societies.

Throughout the years in issue, petitioners continued to maintain bank accounts in New York City. During the same period, they had real estate investments in New York City. Daniel Shapiro visited these holdings a couple of times a week.

#### SUMMARY OF PETITIONERS' POSITION

It is petitioners' position that the apartment at 15 Charles Street was maintained because Daniel Shapiro was required to have separate addresses for his medical profession and his legal profession. Petitioners contend that Daniel Shapiro used the address on Charles Street to receive any mail related to his practice of medicine. Daniel Shapiro's mail pertaining to his practice of law was received at either the law firm he was with at the time or his home in Pennsylvania.

Apparently because his wife uses a different name, Daniel Shapiro also argued that there was no Olga Shapiro.

#### CONCLUSIONS OF LAW

A. Daniel Shapiro's argument that there was no Olga Shapiro may be summarily rejected in view of the fact that this name was used on tax returns during the years in issue. Since this name appears on the petition, it has been used for the purposes of this determination.

B. Tax Law § 605 (former [a]), in effect for the years at issue, provided, in pertinent part, as follows:<sup>1</sup>

"Resident individual. A resident individual means an individual:

(1) who is domiciled in this state, unless (A) he maintains no permanent

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<sup>1</sup>The personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

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, or...

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

C. In this case, it is unnecessary to resolve the question of petitioners' domicile because it is clear that, regardless of their domicile, they are subject to tax as residents of New York.

D. Permanent place of abode is defined in the regulations at 20 NYCRR 102.2(e)(1) as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

It is not necessary that the taxpayer actually live in the abode in order for it to constitute a "dwelling place permanently maintained by the taxpayer" within the meaning of 20 NYCRR 102.2(e)(1) (see, Matter of Robert Roth and Judith Roth, Tax Appeals Tribunal, March 2, 1989). It is concluded that the apartment on Charles Street, which was owned by

Daniel Shapiro, constitutes a permanent place of abode within the meaning of Tax Law § 605(a) and 20 NYCRR 102.2(e)(1). Since petitioners maintained a permanent place of abode in New York they cannot qualify for treatment as nonresidents under Tax Law § 605(a)(1).

E. Assuming, for purposes of argument, that petitioners were not domiciled in New York during the years in issue, they are still subject to tax as residents of New York. The regulations of the Commissioner of Taxation provide, in part, as follows:

"Any person domiciled outside New York State who maintains a permanent place of abode within New York State during any taxable year, and claims to be a nonresident, must keep and have available for examination by the Tax Commission adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State." (20 NYCRR 102.2[c].)

In this instance, Daniel Shapiro acknowledged that he did not keep records of the days he spent in New York during the years in issue. In addition, no evidence has been presented that Olga W. Shapiro kept such records. Since they failed to sustain their burden of proof on this issue, they are subject to tax as residents of New York even if it were found that they changed

their domicile to Pennsylvania.

F. Since the notices of deficiency described in Finding of Fact "7" are based on the separate returns of Olga W. Shapiro, the Division is directed to cancel those notices with respect to Daniel Shapiro.

G. That the petitions of Daniel Shapiro and Olga W. Shapiro are granted only to the extent of Conclusion of Law "F", and the Division of Taxation is directed to adjust the appropriate notices of deficiency accordingly; except as so granted, the petitions are, in all other respects, denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE