

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

EDWARD S. ROACHE, JR.

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1980.

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Petitioner, Edward S. Roache, Jr., 4177 Rueda Drive, San Diego, California 92124, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1980 (File No. 40720).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 22, 1986 at 2:45 P.M. Petitioner appeared by Steven Golodny of the firm of Gasman & Gasman, C.P.A.'s. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

#### ISSUE

Whether petitioner was taxable as a resident individual of New York State for the entire year 1980.

#### FINDINGS OF FACT

1. Petitioner, Edward S. Roache, Jr., filed a New York State Income Tax Resident Return for 1980, showing an address in San Juan, Puerto Rico. The return indicated that petitioner was a New York State resident for three months of the year. All Federal adjusted gross income was reported as taxable for New York State purposes. A wage and tax statement attached to the return reported wage and salary income of \$21,624.96 from the Nestle Company, Inc. of White

Plains, New York. It showed petitioner's address as 334 Sprain Road, Scarsdale, New York 10583. The amount shown on the statement represented petitioner's earnings from January 1, 1980 through March 31, 1980. The tax computed on the New York return was \$4,016.99.

2. The aforementioned return was prepared by an accountant in Puerto Rico. A letter from the accountant which was attached to the return requested that petitioner be allowed a credit for taxes paid to the Commonwealth of Puerto Rico.

3. Petitioner's Puerto Rico return for 1980 shows \$60,018.00 in salary income earned in Puerto Rico during 1980 and \$11,577.44 in tax liability. Petitioner's Federal form 1040 for 1980 claimed a credit of \$7,874.43 for foreign taxes paid of \$11,577.44.<sup>1</sup>

4. On December 4, 1981 the Audit Division issued a Statement of Audit Changes to petitioner stating, in part, as follows:

"You are considered a full-year New York State resident and you are subject to New York State tax on all income reported on your Federal tax return. No credit for taxes paid to Puerto Rico are [sic] allowed.

We computed your tax liability as follows:

Maximum Tax per return	\$4,016.99
Tax withheld	<u>1,558.98</u>
PERSONAL INCOME TAX DUE	\$2,458.01"

5. On June 4, 1982 the Audit Division issued a Notice of Deficiency to petitioner for \$2,458.01 in additional tax, plus interest.

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<sup>1</sup> The credit applies to taxes paid to United States possessions as well as foreign countries.

6. Petitioner admits that he was domiciled in New York prior to April 1, 1980.

7. Petitioner was employed by the Nestle Company, Inc. at White Plains, New York prior to the beginning of the year at issue and until March 31, 1980. Effective April 3, 1980 petitioner was transferred to Nestle - Libby (Puerto Rico), Inc., in San Juan, Puerto Rico.

8. Petitioner moved from New York to Puerto Rico on April 1, 1980.

9. Petitioner sold his home in Scarsdale, New York to Merrill Lynch Relocation Management, Inc. The vacating date was April 1, 1980 and the contract date was May 1, 1980. Payment was made to petitioner on May 27, 1980.

10. On June 30, 1980 petitioner purchased a condominium apartment in San Juan, Puerto Rico.

11. Petitioner spent two days in New York between April 1, 1980 and December 31, 1980.

12. In a letter to the Audit Division dated September 9, 1981, petitioner stated in part:

"1. I moved to Puerto Rico because my Company, the Nestle Company, transferred me here. The assignment is considered temporarily [sic]. It **is** expected to be for three to five years, however, this can be shorten [sic] or lengthen [sic] at any time.

2. I intend to move back to the **U.S.** It could possibly be New York State, but that is very uncertain. This depends on my subsequent work assignment with Nestle. They could assign me to another country or they could send me to some other state in the **U.S.**"

13. On or about April 21, 1982 petitioner moved from Puerto Rico to San Diego, California, where he presently resides.

14. Petitioner concedes that he **is** not entitled to a credit against New York personal income tax for taxes paid to the Commonwealth **of** Puerto Rico.

CONCLUSIONS OF LAW

A. That petitioner remained a domiciliary of New York State and did not acquire a new domicile in Puerto Rico. The Regulations provide in pertinent part as follows:

"(d) Domicile. (1) Domicile, in general, **is** the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person 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 is upon any person asserting a change of domicile to show that the necessary intention existed." (20 NYCRR 102.2[d].)

Petitioner admits he was a New York domiciliary prior to April 1, 1980. Because he failed to prove a "bona fide intention **of** making his fixed and permanent home" in Puerto Rico, his New York domicile continued throughout the year in question. The only evidence of his intention was the purchase of a condominium apartment and the statements **in** his letter of September 9, 1981 (Finding of Fact "12"). According to petitioner's letter, his assignment in Puerto Rico was temporary, expected to be 3 to 5 years **in** duration. Insofar as petitioner did not intend to remain in Puerto Rico indefinitely, he did not establish a new domicile there.

B. That Tax Law § 605(a) provides, in pertinent part:

"(a) Resident individual. A resident individual means an individual:

(1) who **is** domiciled in this state, unless (A) 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 was domiciled in New York State for the entire year 1980 and did not meet the requirements for exception set forth in Tax Law § 605(a)(1)(A). Accordingly, petitioner was a resident individual of New York State for said entire year and is subject to New York State tax on that basis.

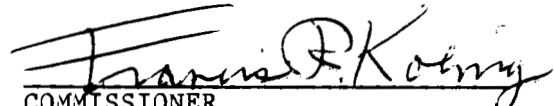
D. That the petition of Edward S. Roache, Jr. *is* denied and the Notice of Deficiency issued June 4, 1982 *is* sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER