STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GEORGE A. MALINASKY AND SHIYOE S. MALINASKY : DECISION

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1977.

Petitioners, George A. Malinasky and Shiyoe S. Malinasky, 139 Northwind Drive, Stamford, Connecticut 06904, 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 1977 (File No. 41544).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 25, 1985 at 9:15 A.M. with all briefs to be submitted by August 25, 1985. Petitioners appeared by Michael T. Hourihan, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether during the year 1977 petitioners were domiciled in the State of New York and either maintained a permanent place of abode in the State of New York, maintained no permanent place of abode elsewhere, or spent in the aggregate more than thirty days in the State of New York and were thus resident individuals under section 605(a)(1) of the Tax Law.

FINDINGS OF FACT

1. George A. Malinasky and Shiyoe S. Malinasky (hereinafter "petitioners"), filed a New York State Income Tax Resident Return for the year 1977 whereon

year was "10 days". Said return, which was marked "Final Return", showed no New York State tax liability for 1977.

2. On September 21, 1979, the Audit Division issued a Statement of Audit Changes to petitioners wherein their tax liability was recomputed on the basis that they were New York State residents during the entire year 1977. Accordingly, a notice of deficiency was issued against petitioners on May 8, 1980 asserting New York State personal income tax of $4,025.90, plus interest of $699.10, for a total due of $4,725.00.

3. Petitioners alleged that they changed their domicile and residence to the Philippines on January 11, 1977.

4. Petitioner George A. Malinasky was born March 3, 1943 in Boston, Massachusetts. He lived in Massachusetts until 1957, at which time he moved with his parents to California. In November, 1969, petitioner married Shiyoe Suzuki, a Japanese citizen. He and his wife continued to be domiciliaries and residents of California until the latter part of 1972.

5. In June, 1972, Mr. Malinasky accepted employment with Citibank N.A. ("Citibank") in New York. In the latter part of 1972 he and his wife moved to New York.

6. In 1973 petitioners bought a house located at 2880 Sunnybrook Drive East, Oceanside, New York. According to the deed dated September 17, 1973, their former address was 2727 Palisade Avenue, Riverdale, New York.

7. Petitioners continued to reside at the Oceanside, New York address until early 1977.

8. In late 1976, Mr. Malinasky was transferred to the Citibank International Staff. He was assigned to Citibank's office at Makati Commercial Center, Makati, Philippines on or about January 10, 1977. A[illegible]

submitted by an officer of Citibank executed August 12, 1985, said transfer and assignment were permanent in nature.

9. Petitioners sold their Oceanside, New York house to Citibank on or about January 4, 1977.

10. Petitioners removed themselves and their personal belongings from New York State on or about January 11, 1977.

11. On or about February 12, 1977, petitioners moved into a leased apartment at 2182 Paraiso Street, Dasmarinas Village, Makati, Metro Manila. The lease for said apartment was executed by Citibank as lessee. Said lease, which was for a period of two (2) years, contained an escape clause as follows:

> "Notwithstanding the immediately preceding paragraph, it is hereby agreed that in the event the person assigned by the LESSEE to occupy the leased premises is transferred to a branch of the LESSEE outside Metro Manila, or otherwise ceases to be connected with said LESSEE, the LESSEE may suspend or terminate this contract by giving to the LESSOR at least thirty (30) days advance notice in writing, and paying to the LESSOR one (1) month's rental as penalty for terminating this contract with the remaining advance rental amount returned to the LESSEE."

The aforestated lease was renewed for a period of one (1) year commencing February 12, 1979. The aforestated escape clause was contained in such renewal.

12. Petitioners entered the Philippines on a "Treaty Traders Visa" which allowed them employment in the Philippines for a prolonged period.

13. On January 18, 1977, petitioners received resident certificates from the Philippine government.

14. In March 1977, Mr. Malinasky received a social security number from the Philippine government.

15. Petitioners filed an Individual Income Tax Return with the Philippine Bureau of Internal Revenue for each of the years 1977, 1978 and 1979.

16. Mr. Malinasky joined the Dasmarinas Village Association, Inc. on March 11, 1977.

17. Petitioners maintained a bank account in the Philippines at the China Banking Corporation, Metro Manila.

18. Petitioners' daughter, who was born March 8, 1971, attended school in the Philippines.

19. Mr. Malinasky was issued a Philippine International Driving Permit in April, 1978. Said permit enabled him to drive an automobile in certain designated states, including those in the surrounding Asian - Pacific countries. His wife was issued a Philippine "Professional Driver's License" on February 25, 1977.

20. On October 9, 1979, petitioner submitted a response to the Audit Division's inquiry letter of May 2, 1979. Petitioner stated, inter alia, in said response that:

> "When we left New York State our intention was to not consider New York as our permanent home, but to remain within the Asia Pacific area. Our home in Oceanside, N.Y. was sold upon our departure in January, 1977. At that time, It was our intent not to return to New York State, and probably not to the U.S., which remains our intent.
>
> While we may return to the United States in the future to live, it was our intent when we moved from New York to the Philippines to remain outside the United States indefinitely. My assignment in Manila was not a temporary one with return to the United States upon its completion. In fact, we are moving to Australia for a multiple year stay in the immediate future. While a transfer back to the United States would be considered, it is not desired nor am I attempting to obtain one."

21. On the extension of time to file form annexed to their 1977 New York State return, petitioners indicated that they expected to return to the United States "after 1978".

22. Petitioners maintained no permanent place of abode in New York State subsequent to the sale of their Oceanside house in early January 1977.

23. Both petitioner and his wife spent less than 30 days in New York State during taxable year 1977.

24. Petitioners did not personally appear for the hearing.

CONCLUSIONS OF LAW

A. That a domicile once established continues until the person in question moves to a new location with the bonafi.de 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 (20 NYCRR 102.2(d)(2)). A United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly shown that he intends to remain there permanently. For example, a United States citizen domiciled in New York who goes abroad because of an assignment by his employer or for study, research or recreation, does not lose his New York domicile unless it is clearly shown that he intends to remain abroad permanently and not to return (20 NYCRR 102.2(d)(3)).

B. That petitioners were domiciled in the State of New York during the entire year 1977.

C. That any person domiciled in New York is **a** resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the following requirements: (1) he maintains no permanent place of abode in this State during such year; (2) he maintains a permanent place of abode elsewhere during such entire year; and (3) he spends in the aggregate not more than 30 days ***of*** the taxable year in this State. (20 NYCRR 102.2(b)).

D. That the record clearly shows that petitioners did not maintain a permanent place of abode outside the State of New York during the entire year

1977. Accordingly, they were resident individuals of New York State for the full year 1977 pursuant to 20 NYCRR 102.2(b).

E. That the petition of George A. Malinasky and Shiyoe S. Malinasky is denied and the Notice of Deficiency issued May 8, 1980 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JUN 30 1986

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

GEORGE A. MALINASKY & SHIYOE S. MALINASKY

I dissent. Two questions are presented by this petition. In the first instance, we are asked to determine whether petitioners were domiciliaries of New York during 1977. If petitioners were not domiciled in New York, their petition must be granted, and the second question need not be reached. If petitioners were domiciliaries, it must be determined whether or not they could have been considered non-residents, as they claim.

Petitioner George Malinasky was born in Massachusetts, resided there for 14 years, and subsequently moved, with his family, to California. He resided in California for another 15 years, during which time he married a Japanese citizen. He moved to New York in 1972, as a consequence of his employment with Citibank. He and his wife purchased a home in New York. After some 5 years in New York State, petitioner was assigned by Citibank to the Philippines. He resided in the Philippines for at least 3 years. At some point thereafter, he was assigned by his employer to Australia, where he remained for some years. At the time of his hearing before an officer appointed by this Commission (in 1985) petitioner resided in Connecticut. There is no indication that petitioners ever returned to New York State.

The issue presented here revolves around the first year of petitioner's assignment to the Philippines. Petitioner sold his home in New York on January 4, 1977, and left New York State on January 11, 1977. By February 12, 1977, petitioner was installed in his apartment in the Philippines. Precedent requires that I accede to the majority and agree, albeit somewhat reluctantly, that petitioner was a domiciliary of New York for the year 1977. Citizens of the United States who remove themselves to foreign countries do not shed their state domicile, except under highly unusual circumstances. Having retained the protection of his United States citizenship, petitioner signaled his intent of remaining a domiciliary of the United States. In fact, he eventually returned to the United States. Statements made by him in 1979 concerning his lack of intent to return, must be seen as self-serving, and made for the express purpose of influencing his New York tax liability. So long as he retained the intention of ultimately returning to the United States, he must have remained a domiciliary, as well, of one of the fifty states. As indicated previously, precedent dictates that, having failed to effect a formal change in his domicile, he remained domiciled in New York. I arrive at this conclusion reluctantly, because the total life history of petitioner indicates that his connection to New York was tenuous in nature. Presumably, having been born in Boston and having lived a majority of his life in California

(and having recently returned to Connecticut) he no more thought of himself as a "New Yorker" than as a domiciliary of any one of those several fair states. Thus, to petitioners, the persistence of New York's Department of Taxation and Finance must have seemed, an inequity. To them, it was merely a fortuity that New York happened to be the last state in which they resided prior to their move overseas. Nevertheless, it has been upheld repeatedly, in similar situations that the domicile of such persons remains unchanged.

The majority errs, though, on the issue of the non-residence of petitioners. It is here that they can be afforded relief, and the evidence, on balance, indicates that relief is deserved. Although they were domiciled in New York, our statute provides that they can be considered non-residents if they maintained no permanent place of abode in New York, maintained a permanent place of abode elsewhere, and spent less than 30 days in New York during the year in question. Petitioners' sale of their New York home on January 4th of the year in question makes it clear that they maintained no permanent place of abode in New York in 1977. To maintain otherwise, based upon their four-day long ownership of a home, would be ludicrous and inequitab The records indicate that petitioners spent less than 30 days in New York during 1977. The majority maintains that "the record clearly shows that petitioners did not maintain a permanent place o abode outside the State of New York during the entire year 1977". I strongly disagree with this conclusion.

Petitioners lived in a leased apartment in the Philippines for a period of at least 3 years. They entered into a two-year lease which was subsequently extended for another term. It is true that the lease was maintained in the name of their employer, Citibank. It is also true that the lease contained an escape clause, allowing termination of the lease in the event of re-assignment of petitioners. Nevertheless, such escape clause can be construed as a normal concomitant of leases entered into by employers on behalf of employees. Usually the clauses are formalities recommended by the legal staff of the employer. They bear no relationship to the expectation of the employee regarding the length of his assignment. Significantly, in this instance not only did the escape clause remain unused, but the lease was in fact extended following its initial expiration. By contrast, the employee's lifestyle was one of a permanent resident of the Philippines. Petitioners received resident certificates from the government, a Philippine social security number, a Philippine

driver's license, etc. Petitioners maintained a bank account in the Philippines and joined their local village association. There is no question but that petitioners produced evidence indicating that the nature of their stay in the Philippines was that of "permanent residents". Under the circumstances, it cannot be said that the record "clearly shows" petitioners to have been temporary residents.

The only remaining stumbling block for petitioners is the date of their installation in their Philippine residence. Petitioners took up permanent residence in the Philippines some 40 days after the beginning of 1977. Section 605(a)(1) of the Tax Law provides that a person is a non-resident when "he maintains a permanent place of abode elsewhere ...". By regulation, this Commission has interpreted the statute to mean "... he maintains a permanent place of abode elsewhere during such entire year ...". (Emphasis added). (20 NYCRR 102.2). The regulatory gloss is severe but legitimate, if it is applied with some reasonable forbearance. While the statute does not, on its face, require permanent residence for an entire year, it sets no standard whatsoever with regard to duration. Clearly it would be unreasonable to imply that the statute merely requires permanent residence elsewhere for several days in the year. Some standard must be set by those charged with applying the statute. While it may be arguably more reasonable to require permanent residence outside the state for a majority of the year (rather than for the entire year), it was within the legitimate discretion of the Tax Commission to enunciate a "full year" requirement. Nevertheless, such requirement cannot be too stringently applied, lest it become unreasonable and capricious. As an example, it would be unreasonable to require that the permanent residence outside the state be maintained for more than 11 months of the year, since the statute, by its terms, permits the non-resident to be in New York for a full 30 days. Declaring someone a non-resident, because his permanent residence elsewhere did not fill those 30 days permitted by statute, would, I think, be contrary to the spirit of the statute (even though literalists might argue that the "30 day" requirement and the "permanent residence" requirement are separate and distinct factors).

In this instance, the decision is made more difficult because petitioners did not maintain their "permanent residence elsewhere" for approximately 40 days during 1977. On balance, though, I believe that the 40-day period was "de minimus" in nature and

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should not be fatal to their application to be considered non-residents. Having met all the other tests provided by Section 605(a)(1) and having maintained a permanent place of abode in the Philippines for more than 300 days in 1977, petitioners come within the meaning of "non-residents" as that term is set forth in the statute. Any other result is, I think, arbitrary, and contrary to the intent of the Legislature.

For these reasons, I would sustain the petition.

JUN 30 1986

MARK FRIEDLANDER
Commissioner