

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

PETER STEMKOWSKI AND GAIL STEMKOWSKI

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1978.

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Petitioners, Peter Stemkowski and Gail Stemkowski, 70 Mohawk Avenue, Long Beach, New York 11561, 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 1978** (File No. 41739).

A hearing was commenced before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 6, 1986 at 10:45 A.M. and continued to conclusion before the same Hearing Officer at the same location on April 29, 1986 at 10:45 A.M., with additional documentation to be submitted by petitioners by May 29, 1986. Petitioners at all times appeared by Fred H. Geller & Co. (Raymond Giovanniello, C.P.A.) . The Audit Division at all times appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

**Whether**, for the year 1978, petitioners were domiciled in New York State and either maintained a permanent place of abode in New York, maintained **no** permanent place of abode elsewhere, or spent in the aggregate more than 30 days in New York, and were thus taxable as resident individuals under Tax Law § 605(a)(1).

FINDINGS OF FACT

1. On December 4, 1980, the Audit Division sent a letter to petitioners indicating that it had received information from the Internal Revenue Service which revealed that a Federal income **tax** return for 1978 had been filed by petitioners showing an address within New York State. The letter also indicated that the Audit Division had no record of having received petitioners' 1978 New York State income tax return. Petitioners were instructed to (i) send a copy of the return filed, if one was in fact filed (ii) if no return was filed, to complete and file a return or (iii) if no return was required to be filed for 1978, to explain why a return need not be filed. Petitioners did not respond to the inquiries set forth in the letter dated December 4, 1980.

2. On July 29, 1981, the Audit Division issued a Statement of Audit Changes to petitioners wherein their 1978 New York State personal income tax liability was computed based on information received from the Internal Revenue Service. Said statement computed additional tax due in the following manner:

Total income	\$54,429.00
Less: standard deductions	(2,400.00)
exemptions	(2,600.00)
Taxable income	<u>\$49,429.00</u>
Tax due	\$5,674.35

3. Based on the aforementioned Statement of Audit Changes, the Audit Division, on November 18, 1982, issued a Notice of Deficiency to petitioners for 1978 asserting additional tax due of \$5,674.35, plus interest of \$2,094.41, for a total allegedly due of \$7,768.76.

4. During the year at issue, and for some fourteen years prior thereto, Peter Stemkowski (hereinafter "petitioner") was employed as a professional hockey player. Mr. Stemkowski, a Canadian citizen, began his professional

Detroit Red Wings in 1968 and later traded to the New York Rangers in 1971.

Petitioner played for the New York Rangers until the summer of 1977.

5. In 1974 petitioner married Gail Stemkowski, a lifelong resident of New York. Soon thereafter the Stemkowski's purchased a house located at 43 Dutchess Boulevard, Atlantic Beach, New York.

6. In July 1977, petitioner was once again traded, this time to the Los Angeles Kings (hereinafter "Kings"). In September 1977, petitioner left New York State for California to report to the Kings' training camp. Once in California, petitioner rented a house for a nine month period from September 1, 1977 through May 31, 1978, a time frame roughly equivalent to the normal hockey season. At the start of the regular hockey season, approximately October 1, 1977, petitioner's wife and daughter joined him in California.

7. At the end of the hockey season, approximately May 31, 1978, petitioner and his family returned to New York State and their residence in Atlantic Beach, New York. Petitioner spent the summer months of 1978 in New York and in September 1978 he once again returned to California to report to the Kings' training camp. Mr. Stemkowski, as he had in the previous season, rented a house in California from September 1, 1978 through May 31, 1979 and his family joined him in California approximately October 1, 1978.

8. In the latter part of October 1978, the Kings transferred petitioner to its minor league affiliate in Springfield, Massachusetts. Petitioner spent the next six to seven weeks living in a motel in Massachusetts while his family remained in California. In early December of 1978 petitioner was appointed player/coach of the minor league affiliate. After being appointed player/coach, petitioner rented a house in Massachusetts so that his family could join him.

At the end of the minor league affiliate's season in May of 1979 petitioner and his family once again returned to their residence in Atlantic Beach, New York.

9. Petitioner alternatively argued that, if he is found to be taxable as a resident individual, he is entitled to claim itemized deductions in lieu **of** the standard deduction and is also entitled to a credit for income taxes paid to the states of California and Massachusetts. **No** documentary evidence was presented by petitioner to support his claim for itemized deductions or to show that he paid income taxes to the states **of** California and Massachusetts.

#### CONCLUSIONS OF LAW

A. That Commission regulation 20 NYCRR 102.2(d)(2) provides, in pertinent part, that:

"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".

B. That the burden of proof is upon petitioner to show that the necessary intention to effect a change in domicile existed (Tax Law § 689[e]).

"The test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home **of** a person, with the range of sentiment, feeling and permanent association with it' (citation omitted). The evidence to establish the required intention to effect a change in domicile must **be** clear and convincing" (Bodfish v. Gallman, 50 AD2d 457).

"[T]o effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another" (Aetna Nat'l. Bank v. Kramer, 142 App Div 444).

C. That petitioners have failed to sustain their burden **of** proof to show that they intended to abandon their New York domicile and to acquire

domicile in California or Massachusetts. Since petitioners were New York domiciliaries for all of 1978 and since they maintained a permanent place of abode within the State and also spent in excess of 30 days within New York, they were properly taxed as resident individuals pursuant to section 605(a)(1) of the Tax Law.

D. That petitioners have also failed to sustain their burden of proof to show that they are entitled to claim itemized deductions or are entitled to credit for income taxes paid to California or Massachusetts.

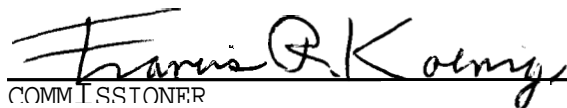
E. That the petition of Peter Stenkowski and Gail Stenkowski is denied and the Notice of Deficiency dated November 18, 1982 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER