

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JAMES D. MILLER and MARY M. MILLER

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1979 and 1980.

Petitioners, James D. Miller and Mary M. Miller, 3017 Bayland Drive,
Ocean City, New Jersey 08226, filed a petition for redetermination of a
deficiency **or** for refund **of** personal income tax under Article 22 of the Tax
Law for the years 1979 and 1980 (File No. 51452).

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 **May** 12, 1986 at 2:45 P.M. Petitioners appeared by Stanley Weisz,
CPA. The Audit Division appeared **by** John P. Dugan, Esq. (Herbert Kamrass,
Esq., of counsel).

ISSUE

Whether during the years 1979 and 1980 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. Petitioners, James D. Miller and Mary M. Miller, timely filed New
York State income tax resident returns for each of the taxable years 1979 and

1980 whereon Mr. Miller reported only those wages derived from his occupation as a musician which were earned within the State of New York.

2. On December 22, 1981, petitioners filed an amended 1979 New York State income tax resident return in conjunction with schedules for change of resident status whereon they reported their 1979 period of New York residence as January 1 to June 30. Petitioner also submitted a copy of their 1979 State of New Jersey Gross Income Tax Resident Return whereon they reported a tax liability of \$336.95.

3. On January 13, 1983, petitioners filed an amended New York State Income Tax Nonresident Return for 1980 whereon Mr. Miller reported wages attributable to New York sources of \$3,922.00.

4. On petitioners' original 1979 and 1980 returns they reported their address as 46 Euston Road, Garden City, New York 11530. **Nine (9) wage and tax** statements were annexed to petitioners' original 1980 return. All such statements were issued to Mr. Miller at his New York address. On petitioners' amended 1979 return they reported their address as 119 East Yorkshire Avenue, Northfield, New Jersey 08225. On their amended 1980 return they reported their address as 3017 Bayland Place, Ocean City, New Jersey 08226.

5. On April 14, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for the years 1979 and 1980 wherein adjustments were made, which were explained thereon as follows:

"In order to effect a change of domicile, one must abandon the former domicile and establish a new domicile in another state. As you did not change your domicile and you did spend more than 30 days in New York State for both of the above years, you are considered a full-year New York State resident for tax purposes, and you are taxable on income from all sources. We will allow resident credit for taxes paid to other states, if copies of the tax returns filed with the other states are sent to us.

You are required to add 10% of the net long term capital gains

6. Based on the above, the Audit Division issued a Notice of Deficiency against each petitioner on April 14, 1983. The notice issued against Mr. Miller asserted additional personal income tax for 1979 and 1980 of \$2,794.89, plus interest of \$734.95, for a total due of \$3,529.84. The notice issued against Mrs. Miller asserted additional personal income tax for 1979 and 1980 of \$767.74, plus interest of \$234.69, for a total due of \$1,002.43.

7. On April 19, 1983, Carmen A. Barone, CPA, submitted a letter on petitioners' behalf. Said letter, which was accepted as a petition in this matter, stated, inter alia, that:

"The taxpayer erroneously filed a resident tax return for the State of New York rather than a non-resident return for the years 1979 - 1980. He resides with his wife in a leased apartment in Ocean City, N.J., but apparently has earned income in the state of New York and lives there for part of the year employed as a musician."

8. From 1970 to mid 1979 petitioners resided in a home which they owned at 46 Euston Road, Garden City, New York.

9. On May 25, 1979, Mr. Miller leased an apartment located at 5332 Asbury Avenue, Ocean City, New Jersey. No description was provided of said apartment. The lease on this apartment expired September 30, 1979.

10. Commencing September 30, 1979 to date, petitioners concurrently leased a one-story, two-bedroom, furnished cottage located at 3017 Bayland Drive, Ocean City, New Jersey.

11. To support their contention that they changed their residence from New York to New Jersey on **May** 24, 1979, petitioners submitted the following documents:

- a) A savings account statement from Coastal State Bank in Ocean City, New Jersey evidencing that Mr. Miller opened such account on May 24, 1979.

- b) A New Jersey drivers license issued to **Mr. Miller** on August 28, 1981.
- c) Several concurrent New Jersey vehicle registration certificates issued to Mr. Miller.
- d) A notice **of** approval of Mr. Miller's application for licensing as a hotel employee from the New Jersey Casino Control Commission.
- e) Several checks written to various New Jersey utility companies.**
- f) Automobile insurance policies issued to Mr. Miller at his Bayland Drive address.
- g) A Major Medical insurance policy issued to Mr. Miller in New Jersey effective October 1, 1979.

12. The aforestated notice of approval, which was sent October 24, 1979 and the Major Medical insurance policy, effective October 1, 1979, were sent to petitioner at 119 East Yorkshire Avenue, Northfield, New Jersey. As previously stated, said address was reported as petitioners' home address on their 1979 amended return, which was filed in December 1981.

13. No explanation or details have been provided by petitioners **with** respect to the Yorkshire Avenue address.

14. Mr. Miller alleged that from May 24, 1979 to December 31, 1979 he did not work in New York State. In 1980 he claimed to have worked about twenty two (22) days in New York State.

15. In their Perfected Petition, petitioners admitted that they owned two (2) pieces of property in New York State.

16. Petitioners have not sold their New York home located at 46 Euston Road, Garden City, New York. Mr. Miller testified that he kept the house solely as an investment. He claimed that although the utilities were not shut off, the house did, and still does remain vacant. The house furnishings, he

claimed, were either sold or given away. No attempt was made to rent the premises. Security of the premises was purportedly maintained by petitioners' daughter.

17. Mr. Miller alleged that he never visited his New York house during his claimed period of nonresidence.

18. No evidence was presented to establish the whereabouts of Mrs. Miller during the years at issue herein.

CONCLUSIONS OF LAW

A. That a domicile once established continues until the person in question moves to a new location, with the bonafide intention of making his fixed and permanent home there (20 NYCRR 102.2[d][2]).

B. That petitioners have failed to sustain their burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that they effected a change of domicile from New York to New Jersey during the years at issue. Accordingly, it must be held that petitioners remained domiciled in New York State during the entire taxable years 1979 and 1980.

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 no more than 30 days of the taxable year in this State (20 NYCRR 102.2[b]).

D. That petitioners have failed to sustain their burden of proof to show that they have met the aforesaid requirements. Accordingly, petitioners were residents of New York State during the entire taxable years 1979 and 1980.

E. That pursuant to section 620 of the Tax Law, petitioners are properly due a 1979 resident tax credit for the taxes paid to New Jersey of \$336.95. (see Finding of Fact "2", supra).

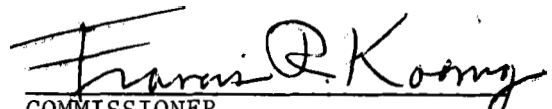
F. That except for the allowance of a resident tax credit, the petition of James D. Miller and Mary M. Miller is denied and the notices of deficiency issued April 14, 1983 are to be modified solely to reflect such allowance.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER