

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SILVIO VACCARO **AND** ANNETTE J. VACCARO

DECISION

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

Petitioners, Silvio Vaccaro and Annette J. Vaccaro, 333 Tuckahoe Road, Yonkers, New York 10710, 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. 53128).

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** October 24, 1986 at 10:20 A.M., with all briefs to be submitted by December 12, 1986. Petitioners appeared **pro se**. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, **Esq.**, of counsel).

ISSUE

Whether petitioners were resident individuals **of** New York State during the year 1980.

FINDINGS OF FACT

1. Petitioners, Silvio Vaccaro and Annette J. Vaccaro, failed to file a New York State personal income tax return for the year 1980.

2. **On** December 6, 1983, the Audit Division issued a Statement of Audit Changes to petitioners whereon their total 1980 income was held subject to New York State personal income tax based **on** the following explanation:

"Since you failed to reply to our previous letter(s), your 1980 personal income tax liability has been computed from information obtained from the Internal Revenue Service under authorization of Federal law (section 6103(d) of the Internal Revenue Code)."

3. Based on the aforesaid statement, a Notice of Deficiency was issued against petitioners on March 26, 1984, asserting personal income tax of \$2,496.94 plus penalties of \$1,011.26 and interest of \$884.47, for a total due of \$4,392.67. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file a 1980 return and failure to pay the tax due, respectively.

4. Petitioners contended that they were nonresidents of New York during 1980 and that they earned no income in New York during 1980. Accordingly, they argued that they have no New York State personal income tax liability for said year.

5. For many years prior to 1980, petitioners resided in an apartment located at 333 Tuckahoe Road, Yonkers, New York 10710. Said apartment is situated in a building owned by Silvac Construction Company, Inc. Petitioners were the sole stockholders of the corporation. The corporate headquarters was located in said building.

6. In April 1979, Mr. Vaccaro commenced employment as a maintenance engineer with Reynolds International, Inc. in Puerto Ordaz, Venezuela, South America. His employment in Venezuela, which was purportedly under contract, was to be for a period of approximately two years, terminating the end of June 1981. While in Venezuela he lived in a rented house trailer.

7. According to Mrs. Vaccaro's testimony, her husband was in Venezuela for the entire year 1980 except for a period of approximately two weeks in October and a short period around Christmas, during which time he was in New

of Mr. Vaccaro's contract except for the following periods, during which she was **in** Venezuela:

- a - July 12, 1980 to September 29, 1980 = 80 days
- b - January 1, 1981 to June **30**, 1981 = 181 days

8. According to a schedule submitted subsequent to the hearing, Mr. Vaccaro spent the following periods during 1980 **in** New York:

- a - March 29, 1980 to April 20, 1980 = 23 days
- b - September 27, 1980 to October 12, 1980 = 16 days
- c - December 14, 1980 to December 31, 1980 = 17 days
- Total days in New York in 1980 56 days

9. According to a schedule submitted subsequent to the hearing, Mrs. Vaccaro spent the period July 12, 1980 through September 27, 1980 in Venezuela, for a total of 78 days spent in Venezuela during 1980.

10. Petitioners did not deny that they continued to be domiciled in New York throughout the period **of** Mr. Vaccaro's employment in Venezuela; however, they argued that they were nonresidents **of** New York pursuant to section 605(a)(1) **of** the Tax Law.

11. According to the aforesaid schedules, Mr. Vaccaro spent 63 days in New York during the period of 548 consecutive days commencing December 12, 1979 and terminating June 12, 1981. The remaining 485 days in said period were purportedly spent in Venezuela.

12. According to the aforesaid schedules, Mrs. Vaccaro spent 110 days in New York during the period of **336** consecutive days commencing July 12, 1980 and terminating June 12, 1981. The remaining 226 days in said period were purportedly spent **in** Venezuela.

13. No documentation was submitted to establish the actual dates or number of days spent by each petitioner in either Venezuela or New York.

14. Petitioners resided in their Yonkers, New York apartment on all days spent in New York during the period of Mr. Vaccaro's employment in Venezuela.

15. Petitioners returned to New York at the conclusion of Mr. Vaccaro's employment commitment in Venezuela.

CONCLUSIONS OF LAW

A. That section 605 of the Tax Law provides:

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

(1) who is domiciled in this state, unless... (B)(i) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (ii) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (iii) during any period of less than twelve months, which would be treated as a separate taxable period pursuant to section six hundred fifty-four, and which period is contained within such period of five hundred forty-eight consecutive days, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such period of less than twelve months bears to five hundred forty-eight".

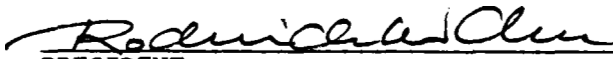
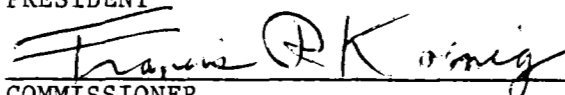
B. That petitioners have failed to meet the requirements provided in section 605(a)(1)(B) of the Tax Law. Accordingly, they were resident individuals of New York during 1980.

C. That the petition of Silvio Vaccaro and Annette J. Vaccaro is denied and the Notice of Deficiency issued March 26, 1984 is sustained, together with such penalties and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1987


PRESIDENT

COMMISSIONER