

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RANDY E. GREEN AND LAURA M. GREEN

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1982.

Petitioners, Randy E. Green and Laura M. Green, P.O. Box 314, Syracuse, Ohio 45779, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1982 (File No. 55979).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 23, 1986 at 1:15 P.M. Petitioners appeared by Edward R. Purser, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioners were domiciliaries of New York State who either maintained a permanent place of abode in New York, spent more than 30 days in New York or did not maintain a permanent place of abode outside the State, and were thus taxable as full-year resident individuals.

FINDINGS OF FACT

1. Petitioners, Randy E. Green and Laura M. Green, timely filed joint New York State resident and nonresident income tax returns for the year 1982. On each return, petitioners indicated that they were New York residents for 6 months of the year at issue. Petitioners reported \$12,521.00 in total nonresident income

and \$5,204.00 in total resident income. Petitioners also reported \$33,282.00 as their Federal adjusted gross income.

2. Based upon petitioners' returns, the Audit Division subsequently issued to petitioners a tax refund of \$1,179.00.

3. On March 1, 1984, following a review of petitioners' returns, the Audit Division issued a Statement of Audit Changes to petitioners asserting \$361.90 in additional tax due for 1982, plus interest. The Audit Division premised its assertion on its position that petitioners' departure from New York did not constitute a change of domicile, and therefore, since petitioners maintained a place of abode in New York for more than 30 days, they were subject to tax as full-year residents of New York.

4. Based upon the March 1, 1984 statement, the Audit Division issued a Notice of Deficiency to petitioners on April 27, 1984 asserting \$361.90 in additional tax due, plus interest.

5. The calculations of tax due in the April 27, 1984 Notice of Deficiency and the March 1, 1984 Statement of Audit Changes did not take into account the refund previously issued to petitioners (Finding of Fact "2").

6. On November 23, 1984, the Audit Division again issued to petitioners a Statement of Audit Changes for the year 1982. This notice stated that the refund on petitioners' 1982 returns had been erroneously issued, and that the April 27, 1984 Notice of Deficiency had been withdrawn. Like the March 1, 1984 statement, this statement advised petitioners that the Audit Division did not consider petitioners to have changed residence during the year at issue. Accordingly, since, in the Audit Division's view, petitioners were domiciled in New York and maintained a place of abode in New York for over 30 days, they were subject to tax as full-year residents of New York.

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7. Based upon this statement, the Audit Division issued a Notice of Deficiency to petitioners on February 26, 1985, asserting additional tax due for 1982 of \$1,125.64, plus interest.

8. Petitioners were born and raised in the area of Nunda, New York. They attended high school in the Nunda area and were married in November 1979. Mr. Green began working for Saikai Constrution Co., Inc., a subsidiary of Ontario Pipeline, Inc., in March 1978. He began as a laborer, but soon thereafter became a heavy equipment operator. He was employed on various projects for which his employer was under contract. At the completion of each project the employer gave its employees, including Mr. Green, the option of either being laid off, or accepting a job on another project, wherever that project might be.

9. On Mr. Green's first job with Ontario Pipeline, he worked as a laborer on a project in Linden, New York, until June 1978. He subsequently worked as a heavy equipment operator on a project in Honeoye, New York, until approximately June 1979. He then worked on a project in Racine, Ohio for approximately two months. While in Ohio, Mr. Green lived in a trailer provided by his employer. He subsequently worked on jobs in West Virginia for nearly two years until late spring of 1981.

10. Laura Green, along with their children (they had three children at the time) lived with Mr. Green in West Virginia at various times between September 1979 and June 1981.

11. Mr. Green subsequently worked on a project in Racine, Ohio for approximately four months, until early fall of 1981. During this period, Mrs. Green and the children returned to the Nunda, New York area to live. Mrs. Green was

pregnant at that time with the couple's fourth child and desired to return to New York to avail herself of the services of her doctor. The Green's oldest child went to school in New York in the fall of 1981.

12. Subsequent to his stay in Racine, Ohio in 1981, Mr. Green worked in Gauley, West Virginia until approximately January 1982, again living in a company trailer. Mr. Green visited his family in New York about three weekends a month.

13. Mr. Green subsequently worked in Penfield, New York from approximately late March through early May of 1982. He then returned to West Virginia, specifically, the Princeton, West Virginia area, to work on another project. He initially resided in company provided housing, but subsequently rented a house in Camp Creek, West Virginia in June 1982.

14. Mrs. Green and the children moved to Camp Creek, West Virginia at the end of June 1982.

15. The Greens, who had rented in New York, rented their home in Camp Creek. They did not hold a lease on the premises. The Green children attended school in West Virginia commencing in the fall of 1982.

16. The Greens opened a checking account in West Virginia and Mr. Green joined the local chapter of the Moose Lodge. Mrs. Green joined no social organizations in West Virginia.

17. The Greens did not register to vote in West Virginia. Mr. Green had not registered to vote in New York. Mrs. Green had registered to vote in New York.

18. The Greens registered their car in West Virginia. They did not obtain West Virginia driver's licenses.

19. In 1983, the Greens moved to Ohio, a location approximately 100 miles from their home in West Virginia, where they currently reside. Once in Ohio,

they subsequently obtained Ohio driver's licenses, registered to vote, purchased a cemetery plot, registered their vehicles, and joined local social organizations.

20. Petitioners filed West Virginia resident and nonresident returns for the year at issue. The Audit Division allowed a resident credit of \$416.00 for such taxes paid to West Virginia.

CONCLUSIONS OF LAW

A. That 20 NYCRR 102.2(d)(2) provides that:

"A domicile once established continues until the person in question moves to a new location with a 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 petitioners to show that the necessary intention to effect a change in domicile existed (Tax Law section 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'. The evidence to establish the required intention to effect a change in domicile must be clear and convincing" (Bodfish v. Gallman, 50 AD2d 457; citations omitted).

C. That "to 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 Natl. Bank v. Kramer, 142 App Div 444).

D. That petitioners have failed to sustain their burden of proof to show that they intended to abandon their New York State domicile and to acquire a new domicile in West Virginia. Upon review of the facts established herein, it is apparent petitioners' move to West Virginia was not intended to be permanent, but only to last as long as Mr. Green's employment kept him in that area. Accordingly, the Audit Division properly taxed petitioners as full-year residents of New York State pursuant to section 605(a)(1) of the Tax Law.


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E. That the petition of Randy E. Green and Laura X. Green is denied, and the Notice of Deficiency, dated February 26, 1985 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER