

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LARRY R. GOTTFRIED AND SALLY S. GOTTFRIED

DECISION

for Redetermination of a Deficiency **or** for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1981.

Petitioners, Larry R. Gottfried and Sally **S.** Gottfried, 14 Locust Drive, Shelburne, Vermont 05482, 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 1981 (File No. 64852).

On February 12, 1987, petitioners waived their right to a hearing and requested the State Tax Commission to render a decision based on the entire record contained in the file with all briefs to be filed by March 10, 1987. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether, during the year 1981 petitioner Larry R. Gottfried was domiciled in New York 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 thirty days in New York and was thus a resident individual under section 605(a) (1) of the Tax Law.

FINDINGS OF FACT

1. In August 1982, petitioners, Larry R. Gottfried and Sally **S.** Gottfried, separately filed New York State resident income tax returns for 1981.

2. Attached to Mr. Gottfried's return was a Schedule for Change of Residence Status. It indicated that he had moved to Florida as of June 1,

1981. Accordingly, Mr. Gottfried excluded from New York income wages he earned in the latter seven months of 1981, while he was working and living in Florida.

3. Attached to Mr. and Mrs. Gottfried's returns were separate copies of an application for extension of time to file Federal returns for 1981, each stating that Mr. Gottfried was living and working in Florida, while Mrs. Gottfried continued to work and live in New York.

4. On July 1, 1985, the Audit Division issued to petitioners a Statement of Audit Changes for 1981, setting forth its position that Mr. Gottfried was considered to be a resident of New York State throughout 1981 because he continued to maintain a permanent place of abode in New York. Petitioners' 1981 income tax liability was recomputed on that basis. Accordingly, on August 1, 1985, the Audit Division issued to Sally Gottfried a Notice of Deficiency for 1981, asserting tax due of \$18.00 plus interest. On the same date, the Audit Division issued a Notice of Deficiency for 1981 to Larry Gottfried, asserting a tax due of \$2,551.70 plus interest.

5. Prior to June 1981, petitioners were residents and domiciliaries of New York State.

6. In June 1981, Mr. Gottfried accepted employment in Florida. He moved to Miami where he rented an apartment. Under the terms of the lease, he was required to pay two months rent after notifying the landlord of his intention to vacate the apartment. This arrangement was agreed upon because Mr. Gottfried planned to move his family to Florida eventually, and he did not wish to be obligated to a long-term lease.

7. Mrs. Gottfried was the sole owner of the family's home in Harrison, New York, and she remained there with petitioners' children. In the spring of 1981, she placed the house on the market with the intention of selling it and

moving to Florida. She received few offers on the house, and she rejected those she did receive because she considered them to be unacceptably low.

8. Mr. Gottfried lived and worked in Florida from June 1981 until July 1983. During that time, he obtained a Florida driver's license, leased a car in Miami, arranged loans from two Miami banks and registered a car in Miami.

9. As of July 1, 1983, Mr. Gottfried began working in a new position as a sales representative in his employer's New York City showroom.

10. Sometime prior to July 1, 1983, Mr. Gottfried returned to New York and resumed living in the Harrison family home. On July 5, 1983, Mrs. Gottfried sold the Harrison, New York property, and petitioners moved to Vermont.

CONCLUSIONS OF LAW

A. That section 605(a) of the Tax Law, defines a "resident individual", ~~inter alia~~, as one "who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state". The State Tax Commission has promulgated a regulation which states that "[d]omicile, in general, is the place which an individual intends to be his permanent home - the place to which he intends to return whenever he may be absent" (20 NYCRR 102.2[d][1]).

B. That domicile, whether of origin or selection, continues in existence until another is acquired, and the party alleging the change in domicile bears the burden of showing the change by clear and convincing evidence (Matter of Bodfish v. Gallman, 50 AD2d 457, 458-59). Acceptance of employment in, and relocation to, another state does not necessarily provide evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, revg 77 ADZd 725; Matter of Minsky v. Tully, 78 AD2d 955). The test of intent has been


stated as whether the new habitation is "the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne, 181 Misc 238, 246, ~~affd~~ 267 App Div 876, ~~affd~~ 293 NY 785). Applying this test, it is clear that petitioners have not shown that Mr. Gottfried changed his domicile from New York to Florida. Mr. Gottfried's wife and children continued to reside in the family home in Harrison, New York, and he returned to that home when he accepted a job transfer back to New York. Petitioners' own evidence establishes that Mr. Gottfried intended the living quarters he obtained in Florida to be temporary and that a permanent place of abode was to be acquired only when his wife and children were able to join him. The latter event never came to pass. Accordingly, a change of domicile may have been contemplated, but it was never accomplished.

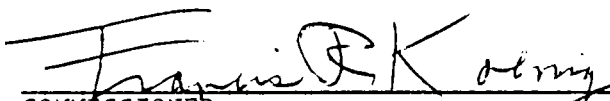
C. That the petition of Larry R. Gottfried and Sally S. Gottfried is denied, and the notices of deficiency issued on August 1, 1985 are sustained.

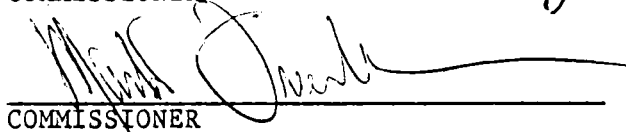
DATED: Albany, New York

STATE TAX COMMISSION

JUN 18 1987


PRESIDENT


COMMISSIONER


COMMISSIONER