Income Tax Determinations
A-Z
Di Cocco, Constantine V.

I-9"(11-56)

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy and Macduff

FROM: E. H. Best, Counsel

SUBJECT: Formal Hearings. Question of Residence

Constantine V. Di Cocco--Article 16--year 1955
Hector & Naomi Skifter--Articles 16 and 22--years 1959 and 1960
Harold A. Taylor--Article 16--year 1959

Transmitted herewith are the files in the above three matters held before Mr. Francis Boylan, Hearing Officer, granting the application for cancellation of the assessment of Constantine V. Di Cocco, but denying the applications of Hector and Naomi Skifter and of Harold A. Taylor. The issue in each case is whether the taxpayer was a resident or nonresident of New York State during the periods in question.

The Hearing Officer is of the opinion, with which I agree, that all of the above persons were domiciled in the State of New York throughout the periods in issue.

The facts more specifically set forth in the proposed determinations are as follows:

Constantine V. Di Cocco - Prior to 1950, the taxpayer resided with his parents at their home in New York State. From 1950 until July of 1955 the taxpayer was engaged as a construction engineer for others and in his own business of uranium prospecting in states other than New York. In July of 1955 the taxpayer came to New York City and obtained a job as a construction engineer in Iceland. The taxpayer was in New York less than 30 days before departing overseas, and remained overseas in Iceland until March of 1956. During his stay in Iceland he was housed in company barracks. Thereafter the taxpayer returned to New York State. The Hearing Officer is of the opinion, with which I agree, that although the taxpayer remained a domiciliary of New York State, he did not maintain a permanent place of abode in New York State during 1955 and did maintain permanent places of abode in other states and Iceland during said year. Since the

taxpayer was in New York State less than thirty days of the taxable year, the Hearing Officer has prepared a proposed determination holding that the taxpayer was a nonresident of New York and proposing cancellation of the assessment for such year. I agree with the proposed determination.

Hector and Naomi Skifter - The taxpayers prior to 1959 and 1960, the years in issue, resided in a rented apartment in New York City. From 1945 to 1948 the taxpayer, Hector Skifter, was President of Airborne Instrument Laboratories, Inc. of Mineola, New York, which corporation was merged into Cutler Hammer, Inc. The taxpayer then became the Vice President of the Airborne Instruments division located in this State. On February 11, 1957 the taxpayer was appointed Assistant Secretary of Defense for Research and Development, which position required performance of duties at Washington, D. C. Thereafter and on February 18, 1959 he was appointed Director of Defense Research and Engineering, a full-time position. The taxpayer's firm accordingly granted the taxpayer one year leave of absence to terminate on April 10, 1960 in order that the taxpayer could go to Washington D. C. for the purpose of carrying on his duties as such Director. In May of 1960 the taxpayer returned to New York State and resumed his position as Vice President in the firm. During his stay in Washington, D. C. the taxpayer resided in the District of Columbia, having surrendered the lease to the New York City apartment. Upon his return to New York, the taxpayer purchased a home in this State.

Although the Hearing Officer is of the opinion that the taxpayers remained domiciliaries of the State of New York during the years involved, the Hearing Officer has prepared a proposed determination finding that the taxpayer who was granted leave of absence from April 1959 to April 1960 to perform duties as Assistant Secretary of Defense for Research and Development in Washington, D. C. maintained no permanent place of abode in New York State during that period but did maintain a permanent place of abode in Washington, D. C. for such period. The proposed determination, nevertheless, holds that the taxpayer was a resident pursuant to sections 350 and 605 of the Tax Law on the ground that the taxpayers, who were domiciled in New York State throughout the entire taxable year, did not maintain a permanent place of abode outside of the State of New York during the entire taxable year.

Although I am of the opinion that the taxpayer's stay in Washington was for the purpose of undertaking a temporary assignment and that, consequently, his place of abode in Washington was of a temporary nature and thus disagree with the Hearing Officer's findings of permanent place of abode, I have approved the proposed determination since it affirms the long-standing policy of the Tax Commission that a domiciliary who does not maintain a permanent place of abode outside thereof during the entire taxable year, is a resident of this State. (See copy of memorandum of Deputy Commissioner Cole in the Matter of Laurence A. Steinhardt, dated November 27, 1934 hereto attached and also the decision of Mackall v. Bates, 278 App. Div. 724) This policy has been expressly incorporated in the provisions of the proposed Article 22 personal income tax regulations approved by the Tax Commission for promulgation (see section 102.2(b) thereof).

Harold A. Taylor - The taxpayer prior to May 12, 1959 was employed by a New York firm and resided, together with his wife and two daughters, at a home located in New York State. On May 12, 1959 the taxpayer went to Spain to take employment of a different nature than his New York employment. He took with him his wife and his younger daughter, leaving his older daughter, then an adult and self-supporting, in his New York home, renting such home to that daughter. The taxpayer continued to live in Spain during the rest of the year and for several years thereafter. The Hearing Officer although holding that the taxpayer continued to remain a domiciliary of New York State, nevertheless held that the taxpayer maintained no permanent place of abode in this State by virtue of the leasing of his home to his daughter, and did maintain a permanent place of abode in Spain after that date. The Hearing Officer has, however, prepared a proposed determination holding that the taxpayer was a resident of New York during all of 1959 since he was a domiciliary of this State during such year and spent more than thirty days in this State.

Since the taxpayer did not maintain a permanent place of abode outside New York State for the whole of 1959, I am of the opinion that the Hearing Officer's proposed determination denying the application for revision be sustained for the reasons set forth above in the Matter of Hector & Naomi Skifter. In view of this it is not necessary to consider the question of whether or not Mr. Taylor's leasing of his home to a member of his household amounted to a relinquishing of a permanent place of abode, as held by the Hearing Officer.

E. H. Best
Counsel

MS:pad
Encs.
December 5, 1966

Personal Income Tax

Sec. 360(1)
Sec. 350(7)
Chapt. 462 Laws of 1934

Re: Inc. tax - State - domicile

Mr. Palmer

Nov. 27, 1934

Deputy Commissioner Cole

Residence of Laurence A. Steinhardt for purpose of taxation under Article 16

Your memorandum of November fifth together with the attached file presents specifically the question of whether Laurence A. Steinhardt was a "resident" of this State for the year 1933 so as to subject him to the tax imposed by Article 16 of the Tax Law.

It appears that Mr. Steinhardt was appointed United States Minister to Sweden in 1933, and embarked for that country on July 6, 1933. It is assumed that prior to his departure he was domiciled in this State. He filed a resident income tax return for the period begun January 1, 1933 and ended July 6, 1933, and a nonresident income tax return for the period begun July 6, 1933 and ended December 31, 1933.

It is Mr. Steinhardt's contention, as set forth in the letter from him under date of October 18, 1934, that, since he severed all business connections in New York and abandoned his "residence" here at the time he entered upon his duties, he is not a resident of this State for the purpose of taxation under Article 16 of the Tax Law.

Subdivision 7 of section 350 of the Tax Law, as last amended by Chapter 462 of the Laws of 1934, provides:

> "The word 'resident' applies only to natural persons and includes for the purpose of determining liability to the tax imposed by this article upon or with reference to the income of any taxable year, any person domiciled in the state of New York, and any other person who maintains a permanent place of abode within the state, and spends in the aggregate more than seven months of the taxable year within the state; except a person who, though domiciled in this state, maintains no permanent place of abode within the state, but does maintain a permanent place of abode without the state, and who spends in the aggregate not to exceed one month of the taxable year within the state."

It is a long established principle of law that ambassadors, consuls and other public officials residing abroad in governmental service retain their domicile when they accept posts in foreign

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countries, although under certain circumstances it may be possible for such persons to acquire new ones in the countries to which they are accredited. It is not contended that Mr. Steinhardt acquired a domicile in Sweden but that he no longer "resides" in New York because of a present disinclination to return to New York upon the termination of his duties abroad. On page 2 of the above mentioned letter it is stated:

> "I have not committed myself to ever again taking up a residence in New York. I own no property there and there is no reason . . . why I should return. My present inclination is to prefer Washington."

Aside from the above mentioned principle of law applicable to public officials abroad, it is clear that Mr. Steinhardt is domiciled in New York. Until a new domicile is acquired the old one is retained. It is clear that Mr. Steinhardt has not acquired a domicile in Sweden, for no intention so to do is present. It is equally clear that no domicile in Washington has been acquired by the mere expression of an inclination to establish one there in the future.

Being domiciled in this State, Mr. Steinhardt is within the above quoted definition of "resident", unless within the exception therein provided. It is essential in order to come within that exception that a person (a) be domiciled in this State, (b) maintain no permanent place of abode in this State, (c) maintain a permanent place of abode without this State, (d) spend not to exceed one month in the taxable year in the aggregate in this State. It is clear that the exception is not applicable for the year 1933, because Mr. Steinhardt did not comply at least with condition (d). On the basis of present information, it is not known whether Mr. Steinhardt is within the exception for the year 1934. It is understood that Mr. Steinhardt was within this State during the month of November, 1934.

On page 3 of the above mentioned letter, Mr. Steinhardt requests an opinion as to whether additional expenses and excess expenditures, which he incurs by virtue of his official position in maintaining the prestige of the United States abroad in his contact with foreign officials, are deductible in computing net income. Such expenses and expenditures have been held to be deductible under the Federal income tax law. Pollock v. Commissioner of Internal Revenue, 10 B. T. A. 1297.

It is not believed that such expenses and expenditures are deductible in computing net income under Article 16. Subdivision 1 of section 360 of the Tax Law permits as a deduction:

Re Inc. tax — State — (domicile —
ambassadors etc residing abroad in govt service — residence
of L. A. Steinhardt, appointed U.S. minister to Sweden in 1933.)

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, or in the production of income required to be included in gross income under this article,"

Such expenses and expenditures are not incurred in the production of income required to be included in gross income, since the compensation of the United States Minister to Sweden is not required to be included in gross income.

Your memorandum also presents the general inquiry of whether a person leaving this State during the taxable year without change of domicile, after being within this State more than one month of the taxable year prior to such departure, can avoid the personal income tax for the remaining portion of the year after such departure. Such a person, having retained his domicile within the State and having been within the State more than one month of the taxable year, is not within the exception, and is subject to the personal income tax for the entire year as a resident.

Deputy Commissioner and Counsel

11/27/34

MTK/HJS

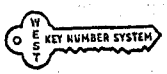
Before JOHNSTON, Acting P. J., and ADEL, SNEED, WENZEL and MacCRATE, JJ.

MEMORANDUM BY THE COURT.

This is a proceeding under article 78 of the Civil Practice Act to compel respondent Lindbloom (principal of the school district) to submit appellant's name to the district superintendent of schools and to the board of education, and for other relief. She appeals from an order dismissing her petition, the court holding that the selection by the principal of 39 probationary appointees from among 150 applicants interviewed involved a high degree of discretion, with the exercise of which the court would not interfere.

Order reversed on the law, with $50 costs and disbursements, and the application granted, without costs, to the extent of directing respondent Lindbloom to furnish to the district superindendent of schools a list of applicants, including appellant's name, for appointment as teachers, from which list the district superintendent of schools may exercise discretion in making recommendations to the board of education for appointment.

[1, 2] In our opinion, section 3013, subdivision 1, of the Education Law requires the principal to include the names of all applicants for appointment in the lists he is required to furnish to the district superintendent of schools. The principal is vested with no discretion to determine who shall be recommended for appointment. Such discretion is vested solely in the district superintendent of schools. Matter of Millicker v. Board of Education of Central School Dist. No. 1 of Towns of Carmel & Putnam Valley, 275 App.Div. 849, 88 N.Y.S.2d 759, affirmed 300 N.Y. 634, 90 N.E.2d 492.



278 App.Div. 724

PEOPLE ex rel. MACKALL v. BATES et al.

Supreme Court, Appellate Division, Third Department.

March 7, 1951.

The People of the State of New York on relation of Luther E. Mackall, instituted a proceeding under Civil Practice Act, § 1283 et seq., against Spencer E. Bates, and others, constituting the State Tax Commission, to review a determination of the State Tax Commission that relator was subject to New York State Income Tax. The Supreme Court, Appellate Division, held that the evidence sustained finding of Commission that relator maintained a permanent place of abode in New York while he worked in Washington and that the living arrangements of

relator in Washington did not constitute the maintenance of a permanent place of abode there.

Determination confirmed.

Taxation ⇐1013, 1088

In proceeding to review a determination of the State Tax Commission that petitioner was subject to the New York State income tax, evidence sustained finding of Commission that petitioner maintained a permanent place of abode in New York while he worked in Washington, and that the living arrangement of petitioner in Washington did not constitute the maintenance of a permanent place of abode there. Civil Practice Act, § 1283 et seq.; Tax Law, § 350, subd. 7.

Luther E. Mackall, pro se.

Nathaniel L. Goldstein, Atty. Gen. (Wendell P. Brown, Sol. Gen., Albany, John J. Crary, Jr., Asst. Atty. Gen., of counsel), for respondents.

Before FOSTER, P. J., and HEFFERNAN, BREWSTER, BERGAN and COON, JJ.

PER CURIAM.

Proceeding under Civil Practice Act, Article 78 to review a determination of the State Tax Commission.

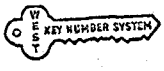
Prior to August of 1942 the petitioner lived with his wife in an apartment in New York City. In that month he was appointed to a position in the Federal service and petitioner went to Washington where he remained until July, 1945. In Washington he lived first in a hotel and later in a furnished room in a private home. His wife remained in the New York apartment and took over the rental of it, but the apartment remained accessible to petitioner and he made continuous contributions to his wife's general support. When his Federal appointment terminated in July, 1945, he returned to live in the New York apartment.

Petitioner maintains the view that during the period he was staying in Washington he was not subject to the New York State Income Tax. The Tax Commission takes a different view about this, and the question turns upon a construction of Tax Law, Section 350, subd. 7. The term "resident" is defined in language of general inclusion, as "any person domiciled in the state". There follows an exception as to some persons domiciled in the State. The exception affects a person who: (a) "maintains no permanent place of abode" in New York; (b) maintains "a permanent place of abode without the state"; and (c) spends not more than thirty days in the state during the taxable year.

In the year during which petitioner began, and in the year during which he ended his work in Washington, he does not bring himself with-

in the last exception since he was both domiciled in New York and was here more than 30 days. The factual decision of the Commission that petitioner "maintained" a permanent place "of abode" in New York while he worked in Washington is not unreasonable in view of the arrangement by which the New York apartment was occupied by his wife; nor is the conclusion unreasonable that the living arrangements of petitioner in Washington did not constitute the maintenance of a permanent place of abode there. This is the extent of our inquiry into the determination of the Commission.

Determination confirmed with $50 costs and disbursements.



273 App.Div. 703

GILROY v. BECKMANN.

Supreme Court, Appellate Division, Second Department.

March 12, 1951.

Proceeding in the matter of the application of Walter Gilroy, Jr., petitioner, for an order pursuant to Article 78 of Civil Practice Act against John M. Beckmann, as Commissioner of the Police Department of the County of Nassau, to review determination of Commissioner in dismissing petitioner from the police department of the County of Nassau and directing that petitioner be forthwith reinstated. The Supreme Court, Appellate Division, held that there was substantial evidence to support finding made by Commissioner as to the intoxication of petitioner.

Affirmed.

Municipal corporations ⇐185(10)

In proceeding for review of the determination of the police commissioner dismissing petitioner from the police department, evidence supported finding made by the commissioner as to the intoxication of petitioner. Civil Practice Act, § 1283 et seq.

George V. Beckmann, Freeport, for petitioner.

[illegible] Burchard Smith, Co. Atty., Mineola,

L 9 (6-65)

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin and Macduff

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: CONSTANTINE V. DI COCCO; Application for revision or refund of additional normal income taxes for the year 1955.

There are two questions in this case, first, whether the demand for a formal hearing was timely made, and then whether the taxpayer, on the premise that he was domiciled in New York in 1955, was not within the exception under Tax Law section 350.7, which provides in effect that a person, although domiciled in New York, is not a statutory "resident" if he did not maintain a permanent place of abode within the State, did maintain a permanent place of abode without the State, and spent in the aggregate not more than 30 days within the State. The proposed determination answers both questions in the affirmative, that is, in the petitioner's favor.

The taxpayer made no return for the year 1955. By notice of additional assessment AB 051372, dated October 7, 1963, the Department assessed normal income taxes in the amount of $129.49 on earnings received by the taxpayer which in fact were wages for work done in Iceland for the period from July 1955 to the end of the year. Since no return was filed, the assessment could lawfully be made "at any time" and was not untimely if the taxpayer had to file a return. Since all the income was earned outside of the State of New York, it would not be subject to tax, nor would Mr. Di Cocco have been required to file a return, if he was not a "resident" of this State during the year; and then, the question of the untimeliness of the assessment becomes unimportant because there is no substantive liability for the income taxes imposed by the assessment. The question therefore is whether he was a "resident" under Tax Law section 350.7 in 1955.

As to the timeliness of the demand for a hearing, the taxpayer made a timely application for revision or refund of the taxes so assessed and on September 27, 1964, ninety days after the denial of the application for revision, he mailed a demand for formal hearing on a form that had been sent to him by the Department. This paper was received and filed by the Department on the following day, the 91st day. However, on July 2, upon receipt of the Department's letter dated June 30, 1964 that denied his application for revision, the taxpayer had written to the Department. In his July 2 letter he acknowledged the notification in the Department's letter advising him that he had ninety days to demand a hearing, and without in terms stating that he would demand a hearing, the taxpayer indicated that he proposed to exhaust his legal remedies.

In a letter of reply, dated July 10, 1964 the Department in effect acknowledged informal notification that he "intend[ed] to apply for a hearing", and so sent the form to him.

Tax Law section 374 states "* * * If a demand for hearing, in a form prescribed by the tax commission, is filed with it by a taxpayer within ninety days after the date of such mailing, the tax commission shall grant a hearing thereon * * *." We have held this to mean that the demand for hearing must be received at the Department's offices by the ninetieth day. However, under parallel circumstances, when the demand on the prescribed form was mailed but not "filed" within the ninety day period, we have, in effect, ruled that an earlier informal demand for a hearing, not made on the form prescribed, was an adequate compliance with the statutory requirement, ruling in effect that while the ninety day period is mandatory, the use of "the form prescribed" within that time is only directory. Determination, etc; Memo Elizabeth M. Manning, March 8, 1964.

It may be noted, too, that currently under the statutory provision in Article 22, a mailing within the required time period, which now is prescribed by regulation, would be effectual to serve the required demand for a formal hearing. (Tax Law section 691) This is more in harmony with the usual requirements of the law as to the service of papers in civil practice, that they date from the time of mailing rather than from the date they are received by the addressee.

It should be pointed out that the formal hearing was held in two parts, the first on April 13, 1965 on the question of timeliness and the second on June 1, 1965, on the substantive issues. Under comparable circumstances, in an earlier case the Tax Commission indicated that it felt that the determination should be made on the whole record including the substantive issue, and not on the question of timeliness alone, and accordingly, hearings were held here on both questions, which were both reserved for decision. Elizabeth Manning, supra.

The substantive question logically would not be reached if the procedural question were to be decided against the taxpayer.

On the questions of domicile and residence, the facts are these. According to his testimony, the taxpayer spent only about ten days in 1955 within the State of New York, when he returned from a venture in uranium prospecting, in the states of Colorado, Utah and Wyoming in which he had been engaged, self-employed. He stayed at his parents' home in Schenectady for this period in June in connection

with his applying for employment to Metcalfe, Hamilton, Smith, Beck Companies of 80 Varick Street, New York, N. Y., for his later employment in Iceland as a construction engineer. He was employed in Iceland from July 1955 until February or March 1956 when he resigned. During this employment, he had quarters supplied by his employer in a dormitory in a quonset building at or near the site of employment. His visa status while in Iceland was that of a resident alien in Iceland, according to his statement in a letter to the Department.

As to domicile, the taxpayer's testimony indicated that a factor in his leaving Colorado and its environs had been the death of his then fiancee, some time earlier. In the circumstances, it may be concluded that when he came East in June, 1955, he did not have any intention of returning to Colorado, and did not regard it or its environs as his home. Neither, clearly, did he propose to make his home in Iceland.

Where a person's legal rights or obligations depend upon domicile, the law will fix one place or another as such domicile, and, in the circumstances here, on the choices presented, it would seem that the taxpayer was domiciled in the State of New York, upon his returning from Colorado.

However, in 1955 the taxpayer had less than 30 days of actual presence in New York and under the exception stated in Tax Law section 350, subdivision 7, if it is concluded that he was domiciled in New York in 1955, he was still not a "resident" if he did not "maintain a permanent place of abode" in New York and if his residence in Iceland did constitute so maintaining a permanent place of abode.

It seems to be clear that his stay at his parents' house in the circumstances did not constitute actual residence, or the maintaining of a permanent place of abode, within the State, since his stay from the outset was a visit and expected to be brief. A person may have domicile within the State without maintaining a place of abode here. (Tax Law section 350.7; Ryan v. Chapman, 1948, 273 App. Div. 99, see page 100.)

The further question is whether the residence of the taxpayer at his quarters in Iceland constituted maintaining a permanent place of abode outside the State, within the meaning intended. The determination holds that it did, since it constituted residence with the permanency implicit in that concept, and equivalently was a "permanent place of abode."

As to the question of the permanency needed to constitute a "permanent" place of abode, it is basically such permanency as is implicit in the common law concept of residency. "To maintain a place of abode" is a dictionary definition of "reside", with a connotation of some continuity. In a "permanent place of abode", the word "permanent" while used intensively, still does not mean anything qualitatively different from residence. (See Ryan v. Shannon, supra) It may be seen further that the phrase is used in a context where something less than domicile is meant, since the clause provides an exception to the basic statutory statement that a person domiciled here is a statutory "resident". In the section, the word "resident" is used to mean the statutory status, defined as a complex of domicile, residence and presence, of a person against whom jurisdiction is asserted in personam to assess taxes on a broad base, as distinct from a non-"resident", against whom jurisdiction is asserted only in rem on a narrower base on income from sources within the state. (Tax Law sections 350.7, 351) Consequently for the ordinary concept of residence, the quoted phrase is substituted.

Apart from constructive residence, a person resides at a place when he actually lives there with some degree of permanency and continuity, residence being something more lasting than a visit, or a stay at a hotel or resort, stays which are intended to be of only brief duration and which are not considered to amount to residence, so that questions of rights and duties dependent on residence will not be needlessly complicated. But a stay in a place that is dependent on and commensurate with an employment there, may still be residence so long as the employment is not too brief and known to be such. The petitioner's stay at Iceland was enough for residence, and that being so it was "permanent" within the meaning intended; and accordingly, he maintained a "permanent" place of abode as long as he stayed there, which in fact was for the remaining six months of the year and several months beyond that. In re Riley's Will, 266 N.Y.S. 209; 148 Misc 588; 1940 CAC 246; Ryan v. Shannon, 1946, 273 App. Div. 99.

Similarly, earlier in the year down to June, he resided outside of the State.

As to the necessity to "maintain" a place of abode, when a person actually resides at a place, he also may be said to "maintain residence" there, and equivalently to "maintain a . . . place of abode", at least if he is "sui juris", as a competent adult is. First Trust and Deposit Company v. Goodrich, 3 NY 416, p. 416; 2 AD 172. In the case of actual residence by such a person all that is needed to "maintain" a permanent place of abode in a place is to live there. (Idem)

Consequently, the authority of the cases seems to indicate that a person living in quarters assigned by his employer in an employment of indefinite duration that lasted beyond the end of the year and about eight months in fact, is to be regarded as maintaining a place of abode that is permanent within the meaning intended. It is true that a stay in a place that is dependent on and commensurate with a fixed brief or seasonal employment outside the State would not constitute residence since it is known to be brief and impermanent from the beginning. Other employments, however, even if it is hardly to be expected that they are to go on indefinitely or for many years, do not evidence in themselves that the physical presence of the person living at the place of the employment is too impermanent to constitute residence, or have the limited permanency needed for a "permanent" place of abode.

Consequently, it is concluded that the taxpayer did "maintain a permanent place of abode" outside the State of New York, after his visit here in June as well as earlier, and that he did not during the year 1955, maintain a permanent place of abode within the State. It follows, here, that he was not a statutory "resident"; and that his earnings in Iceland were not lawfully subject to the tax assessed against him by the notice of additional assessment. The assessment should be cancelled, therefore.

For the reasons stated, I recommend that the determination of the State Tax Commission in this matter be substantially in the form submitted herewith.

Jan. 6, 1966

/s/ FRANCIS X. BOYLAN
Hearing Officer

APPROVED:

APPROVED:

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF

CONSTANTINE V. DI COCCO

FOR REVISION OR REFUND OF ADDITIONAL NORMAL INCOME TAXES FOR THE YEAR 1955 UNDER ARTICLE 16 OF THE TAX LAW

Constantine V. Di Cocco, the taxpayer, having filed an application for revision or refund of personal income taxes assessed for the year 1955, under Article 16 of the Tax Law, and such application having been denied, and a timely demand for a hearing on such application having been made by the taxpayer as it is found, and a hearing having been held at Albany, New York before Francis X. Boylan, Hearing Officer, on April 13, 1965, and on June 1, 1965, and the taxpayer having been present in person, and the record having been duly examined and considered, the State Tax Commission hereby finds that:

(1) In 1955, the year under consideration, the taxpayer, at that time unmarried, in the early months of that year resided outside of the State of New York, and from February of 1955 until early June was self-employed in prospecting without any net earnings. He then returned to his parents' home in Schenectady, where he spent about ten days, during which time he contracted to take employment at Iceland. His employer was Metcalfe, Hamilton, Smith, Dock Companies, 80 Varick Street, New York, New York. From July 1955 until March of 1956 he was employed as a construction engineer in Iceland and lived in a dormitory in a quonset building, quarters provided by his employer, at an airfield base in Keflavik, Iceland. For a number of years prior to 1955, according to his testimony, he had had employment in various States other than the State of New York, and he was not in the State of

New York between 1949 and 1955 except for a visit in 1952.

(2) By notice of additional assessment AB 051378, dated October 7, 1963, the Department of Taxation and Finance assessed additional normal income taxes in the amount of $129.49 based on total income of $4,057.97, all of which income was from the taxpayer's earnings at Iceland in that year. The taxpayer had filed no State income tax return for 1955.

(3) It is found that the taxpayer, in coming East in mid-1955, did not intend to return to any situs in Colorado or any other State in that area, and did not have a home outside of the State of New York; in going to Iceland by reason of his employment there, he did not intend to make his home there, as it is found; and in 1955 the taxpayer, as it is found, was domiciled in the State of New York.

(4) In the said year the taxpayer did not maintain a permanent place of abode in the State of New York, and he did actually reside at his quarters in Iceland outside of the State of New York from July and until the end of the year and longer; and the taxpayer did not spend, in the aggregate, thirty days or more in the State of New York in the said year.

Upon the foregoing facts and all the evidence and findings, the State Tax Commission hereby

DETERMINES:

(A) That in 1955, the year under consideration, the taxpayer, although domiciled in the State of New York, was not a resident of this State under the definition of that term in Tax Law section 350.7, in that he did not maintain a permanent place of abode in the State of New York, and did, within the meaning intended, maintain a permanent place of abode outside of the State of New York, and the aggregate time

that he spent in the State of New York in the said year was not in excess of thirty days.

(B) That under Tax Law section 359.3, the taxpayer's income in 1955 earned in Iceland was not subject to personal income tax to the State of New York, since the taxpayer is held not to have been a resident of the State in that year.

(C) That accordingly, the assessment of taxes, in the amount of $129.49 as of the date of the said additional assessment, which was based on the said income from wages earned in Iceland, is cancelled in full; and the petitioner's application for revision or refund is granted.

And it is So Ordered.

DATED: Albany, New York this 27th day of December 1966.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ JAMES R. MACDUFF
COMMISSIONER

COMMISSIONER