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Income Tax Determinations
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BAH (16-65)

BUREAU OF LAW

Skifter, Hector + Naomi

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

Deputy Commissioner Cole

Nov. 27, 1934

<u>Residence of Laurence A. Steinhardt for purpose of taxation under Article 16</u>

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 <u>Mr. Steinhardt was appointed United States Minister to Sweden in 1933</u>, 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 gov't service - residence of L. A. Steinhardt, (app'td 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

MEK/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 within 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.

278 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. Fischenbach, Freeport, for petitioner.

[illegible] C. 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; Hector R. Skifter and Naomi J. Skifter, his wife
Personal Income Taxes, Articles 16 and 22, 1959 and 1960

The taxpayers are both deceased. Hector R. Skifter survived his wife and was her executor, and his estate appeared in this proceeding by Whitman, Ransom & Coulson, attorneys of New York, New York, by John D. Mayers of counsel. A witness, William E. Dobbins, an associate of the taxpayer, Hector R. Skifter, in his employment, testified; and a number of affidavits were submitted.

The additional assessments made for the years 1959 and 1960 against the taxpayers' income tax returns for those years were premised upon findings that the taxpayers were statutory residents of this State in those years for the entire year, and not nonresidents during the time when they actually were living in Washington, D. C., which was the period from March 31, 1959 until May 30, 1960.

The proposed determination holds that the taxpayers continued to be domiciled in the State of New York in 1959 and 1960 and that pursuant to the provisions of Tax Law section 350.7 and 605, since they had a permanent place of abode in the State in part of both years, in the earlier part of 1959 up to March 31, and in 1960 in the portion of the year after May 23, and also spent such portions of these years, which were more than 30 days, in New York, they were statutory residents for both entire years. Since their period of residence in Washington, D. C. is judged not to constitute a change in domicile, removal did not effect a change of statutory residence within the year pursuant to sections 367-a and 350.7 (and 605 and 654), and they were not statutory nonresidents for the period that they spent in Washington.

The files show that the State Tax Commission has consistently held that the exception to the definition of residence in section 350.7 of the Tax Law was never intended to apply to persons domiciled in this State who did not maintain a permanent place of abode outside the State throughout the entire taxable year, and that the provisions of sections

367-a and 350.7 would not apply to a person, who, it is judged, continues to be domiciled here after moving, who moved from New York through the course of the year so as to make him a statutory "nonresident" for the rest of the year unless he removed before he spent 30 days of the year here, and without having had a permanent place of abode in the time that he was here. Conversely he is ineligible in the year when he returns and thereafter has a place of abode in the state and spends more than 30 days here. Tax Law sections 350.7; 605(A)(1); Memorandum Lawrence A. Steinhardt, Nov. 27, 1954; Mitchell v. Bates (1951) 278 App. Div. 724.

The taxpayers took the position that they were domiciled in Washington, as well as resident there, during the time that they lived in Washington. On the question of domicile, the determination holds that the taxpayers continued to be domiciled in New York throughout 1959 and 1960.

The facts are these. The taxpayer, Hector R. Skifter, prior to February 18, 1959, was a vice-president and director of Cutler-Hammer, Inc., a Delaware corporation with its principal offices in Milwaukee, Wisconsin. He was employed as the chief executive officer of the Airborne Instruments Division of Cutler-Hammer, Inc., which was located at Deer Park, Long Island, New York. He had been president from 1945 to 1958 of Airborne Instruments Laboratories, Inc. of Mineola, New York, a corporation whose shares were purchased by Cutler-Hammer, Inc. in 1958 in exchange for shares of that corporation, and which was merged into Cutler-Hammer, Inc. as a division.

On February 11, 1957 the taxpayer, Hector R. Skifter, was appointed Assistant Secretary of Defense for Research and Development, a position in the Federal Department of Defense. In that capacity he had substantial but part-time duties at Washington, D. C. On February 18, 1959 he was appointed Director of Research and Engineering in the Department of Defense, and this was a full-time position. In accordance with company policy of Cutler-Hammer, Inc. the taxpayer arranged for and received a leave of absence, which was granted for a year and was to terminate on April 18, 1960. During his period of government service, Mr. Skifter received his full salary from his corporate employer working without salary from the government. Parenthetically the company policy referred to, of lending its executive and scientific personnel for government service, served to permit an executive to serve in government, without his having to give up any holdings of shares of stock in the corporation. In

April 1960 the taxpayer terminated his full-time employment with the Department of Defense, continuing briefly on a part-time basis, and in May 1960, giving up government employment, he resumed active employment with Cutler-Hammer, Inc. as vice-president in charge of the Airborne Instruments Division at Deer Park, New York, a capacity that was the same or not appreciably different from the one that he had occupied previous to his government service.

There was considerable testimony by affidavits that when taxpayer was with the government his future career was undetermined and that he might have made government his whole career, or, if he returned to Cutler-Hammer, Inc. that there was an equal possibility that he would be located in Milwaukee or elsewhere outside the State of New York. It was also indicated that his leave of absence could have been extended longer.

Prior to January 1959, the taxpayers lived in Manhattan, in an apartment at 50 Park Avenue, New York, New York. He then was employed at Deer Park, Long Island. When his government employment at Washington became a full-time one, on or about March 31, 1959, the taxpayers gave up their New York apartment and moved to an apartment on Connecticut Avenue in Washington, D. C. They took a three-year lease, it may be noted. The taxpayers lived at the address at Washington, D. C. until Mr. Skifter resumed his full-time active employment at Deer Park, New York in May 1960; and on about May 23, 1960, the taxpayer purchased a dwelling at Manhasset, New York where he and his wife resided continually after that date. The taxpayers did not own any real property in New York in 1959 or 1960 before they purchased the house at Manhasset.

As to domicile, the implication of Tax Law section 350.7 is that neither actual nor constructive present residence here is necessary to the section's concept of domicile; but a recent domicile here is considered to continue without residence if there is an intention to return to the State, or conversely if the earlier domicile is not given up, a conclusion which is to be gathered from the circumstances, including the person's own statements of his intention. If recent residence were not enough for domicile, the section could not state, as it does, that a person who "though domiciled in the state" "maintains no permanent place of abode here" etc. etc. (is not a statutory "resident").

The evidence pointing to continuing domicile and an intention to return here was the fact of the taxpayer's continuing status as an employee of Cutler-Hammer, Inc., and his special connection with the Airborne Instruments Division which was located in New York. He had further been the president of the independent corporation which became this division upon merger, and he resumed his connection with Airborne Instruments Division when he ended his government service, as we know by hindsight. Further the taxpayer's service in government, so long as he continued on full salary from Cutler-Hammer, Inc. was obviously somewhat provisional and tentative. Consequently, while it may be true that the taxpayer might have decided upon a career in government service, or might have located at another office of Cutler-Hammer, Inc. outside the State of New York, his actual situation, until his future was resolved, was tentative, so that his residence in Washington in this period, although it amounted to a permanent place of abode, need not be considered in the circumstances, to have imported, just yet, an abandonment of domicile here. Tax Law sections 305.7 and 605; Domicile, Regulations NYCRR 269.2; "Proposed Regulations" Article 22, Section 102.2(d).

The Tax Commission's position has been, not that a change of residence under section 367-a (or 654) is not to be determined by the full definition of residence under 350.7 (or 605) including the exception by amendment in 1934, (to the proposition that domicile gives statutory residence) in the case of a person living outside the State, but that section 350.7 is to be so read that the requirements for the exception refer to the whole year, and that a person after he spends 30 days here in a tax year cannot comply with "at least" that requirement. And if he had a permanent place of abode here prior to removal, he also could not comply with the requirement that he have no permanent place of abode here, it would appear. See memorandum of Gole to Palmer, re Laurence A. Steinhardt, Nov. 27, 1934; Mashall v. Bates, (1951) 278 App. Div. 724.

In both 1959 when the taxpayers moved to Washington and in 1960 when they returned here the taxpayers spent more than 30 days here and also had a permanent place of abode here. Therefore, they were residents for both entire years, since we hold that a change in domicile was not effected. (Tax Law Sections 350.7; 605(a)(1)) "In the year during which petitioner began, and in the year during which he ended his work in Washington, he does not bring himself within the last exception since he was both domiciled in New York and was here more than thirty days." Mackall v. Bates, memorandum decision. (supra)

The Mackall case insofar as it rules on the two terminal years gives tacit approval to and reflects the Tax Commission's reading of Tax Law section 305.7 and 367-a, it may be noted. Compare same Steinhardt, supra, Nov. 27, 1934.

The other reading of Tax Law section 350.7 with section 367-a (or section 605 with section 654) is this: Since section 367-a recognizes a right to change residence as that term ("resident") is defined in section 350.7, including the exception (to the statement that a domiciliary is a "resident") that provides that a domiciliary who maintains a place of abode outside the state is not a statutory resident, if he so lives outside of the state exclusively of having a place of abode here also, and does not spend more than 30 days here, then these strictures which are placed on the domiciliary living outside the state, naturally have to apply only to the portion of the year after removal, and it is during this time he may not also have a permanent place of abode here, or spend over "30 days of the taxable year" here (or a lesser number of days prorated as the number of months after removal are to twelve).

The settled view of the Tax Commission is that even when there is a removal during the course of a year the requirements of section 350.7 (or section 605(a)) as they read on their face apply without modification to the whole year. Cf: proposed regulations under Article 22, No. 102. 2(b) (Tax Law Section 605 (a)).

The proposed determination makes a finding that the taxpayers had a permanent place of abode in Washington for a portion of each of the years, and also that in this portion of each of the years they spent not more than ten days in New York in either year.

Some determination at least on the first point seems to be necessary to have complete finding under the exception in 350.7 and 605(a)(1).

The finding of ten days is also made because the contention in that respect seems to indicate that the taxpayers, who claim domicile, outside the state, if they cannot succeed on that point, will retreat to the position that the thirty-day provision (or an apportioned part) relates only to the portion of the year when they lived away from New York. Seemingly the taxpayers' attorneys are cognizant of such a possible reading.

The taxpayers spent fifteen months in Washington in a commodious apartment, and under a three year lease. This is clearly enough for a "permanent place of abode".

The taxpayer had a leave of absence for a year. However, his stay in Washington was not decisively coextensive with the leave of absence and further the leave of absence could have been extended, it was contended.

Consequently, the taxpayer, establishing residence in Washington for a term of a year or upwards and staying fifteen months in fact, clearly had residence and a "permanent place of abode" there. It is true that if a person goes to a place knowing that he will be there only briefly, as, say, a businessman who goes to a foreign country to carry out a mission or to perform a task, he would lack the subjective intention necessary to establish residence. But when he goes for a fixed time, as when he is stationed or assigned there for a term, he acquires residence except when the term of his assignment is too brief. A year and upwards seems more than adequate even if "maintains a permanent place of abode" which basically only means "resides" puts some degree of special emphasis on permanence.

I do not think that "permanent" means to add anything appreciable to the permanence inherent in the concept of residence but only to say explicitly what is also implicit in "maintains" and "abode", leaving nothing to the nuances of language. For the whole phrase one could read the word "resides" without losing anything that is intended. "Resides: 1. to make an abode for a considerable time; live; dwell." Funk and Wagnall's New College Standard Dictionary. See also 1940 OAG 246; In re Riley's Will, 145 Misc. 588.

The further definite durational requirements of Section 350.7 (and 605(a)(1)) are not to be found in the word "permanent" which refers only to the factor of some continuity inherent in the concept of residence but in the other explicitly stated requirements of the section, that is, in the case of the domiciliary living outside the state, that his residence there must be exclusive of any residence here also, and that he must stay out of the state except for the 30 days permitted. To try and read the further quantitative durational requirements also into the word "permanent" in section 350.7 (or section 605) in the three places where the phrase occurs, is to search for a mare's nest.

Accordingly, the applications and petitions are denied.

It is respectfully recommended that the Commission's determination be substantially in the form proposed and submitted herewith.

/s/ FRANCIS X. BOYLAN
Hearing Officer

FXB:pg

July 14, 1966

APPROVED:

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APPROVED:

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July 14, 1966

STATE OF NEW YORK

STATE TAX COMMISSION

- :

IN THE MATTER OF THE APPLICATION OF :

HECTOR & NAOMI SKIFTER :

for revision or refund of personal income taxes, under article 16 of tax law, for the year 1959, and under article 22, for the year 1960. :

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Hector R. Skifter and Naomi J. Skifter, his wife, having filed applications for revision or refund of personal income taxes for the years 1959 and 1960, and such applications having been denied, and a hearing having been held thereon at the offices of the State Tax Commission, 80 Centre Street, New York, New York on June 10, 1965 before Francis X. Boylan, Hearing Officer, and the taxpayers, both now deceased, having been represented by their attorneys, Whitman, Ransom & Coulson, of New York, New York, by John D. Smyers, Esq. of counsel, and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) By Notices of Additional Assessment, AB 037493, and AB 037494, both dated December 11, 1962, the Department of Taxation and Finance, State of New York, assessed additional income tax against the taxpayers for the respective years of 1959 and 1960 in the respective amounts of $3,618.31 and $1,784.75. These assessments were premised upon a finding that the taxpayers were residents of New York for the entire year in both years.

In their returns, taxpayers computed their tax on the premise that they were not residents of the State in the years 1959 after March 31, and in 1960 until May 30, 1960.

For these periods they filed nonresident returns.

As to the year 1959, the taxpayers computed their total tax for the period of residence in the amount of $661.59 and for the period of non-residence in the amount of $48.03 to a total computed tax of $709.62. There was witheld from wages and paid the amount of $1,890.93. The taxpayers in their returns, accordingly requested a refund in the amount of $1,181.31.

In their returns for the year 1960 as modified by an attached schedule recomputing the arithmetic of said return, the taxpayers computed a tax due for the period of residence in the amount of $631.42 and for the period of nonresidence in the amount of $159.96 to a total tax due in the amount of $1,111.30. The amount witheld was $2,530.13, an overpayment of $1,418.83. Taxpayers requested a refund of $1,318.83 with the balance of $100 to be credited on the estimated tax for the succeeding year, 1961.

By separate applications for revision or refund of taxes, both sworn to January 8, 1963, the taxpayer, Hector Skifter, for himself and as the executor of Naomi, then deceased, asked for revision of the additional taxes assessed for the year 1959, and for revision of the additional taxes assessed for 1960 and also for a refund, in the amount of $1,421.45 (sic), as to that year.

(2) Hector Skifter, himself deceased since July 25, 1964, prior to February 18, 1959, was a Vice-President and Director of Cutler-Hammer, Inc., a corporation with its principal offices in Milwaukee, Wisconsin, and he was employed as the chief executive officer of the Airborne Instruments Division of that corporation with offices at

active employment at the offices of his corporate employer at Deer Park, New York and on or about May 23, 1960 the taxpayer purchased a single family house at Manhasset, New York and the taxpayers resided there at 24 Bonnie Heights Road, Manhasset, New York, after that date. The taxpayers did not own any real property in the State of New York during the years under consideration, 1959 and 1960, prior to the purchase of the house at Manhasset.

(4) The taxpayers throughout 1959 and 1960 continued to have their domicile in the State of New York, as it is found; and during the portion of 1959 from the beginning of the year up to March 31, and during the portion of 1960 after May 23, the taxpayers maintained a permanent place of abode in the State of New York; and in both such years they spent more than 30 days in New York.

During the period from March 31, 1959 to May 23, 1960 the taxpayers did maintain a permanent place of abode at the stated address in Washington, D. C., outside the State of New York; and during such period they did not maintain any permanent place of abode within the State; and they did not spend more than 10 days within the State of New York during these portions of either 1959 or 1960.

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

DETERMINES

(A) Pursuant to the provisions of Tax Law sections 350.7 and 605 the taxpayers were statutory residents of the State of New York for the entire years of 1959 and 1960.

(B) The additional assessments for each of the said years, as above set forth in paragraph 1, which were premised upon a conclusion that the taxpayers were such statutory residents throughout 1959 and 1960 were not improper and were correct, and are affirmed; and the application and petition of the taxpayers accordingly are denied.

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