Income Tax Determinations
A-Z

I-0 (11-65)

BUREAU OF LAW

Taylor, Harold A.

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)

Re: Inc. tax - State - domicile Chapt. 462 Laws of 1934

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

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

"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,"

of L. A. Steinhardt, as U.S. minister to Sweden in 1933.

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

MMK/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.

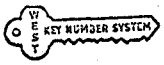
Prior to August of 1942 the petitioner lived with his wife in an apartment in New York City. In that month he was appointed to a position in the Federal service and petitioner went to Washington where he remained until July, 1945. In Washington he lived first in a hotel and later in a furnished room 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.



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. Blechenstein, Freeport, for petitioner.

Leonard G. Blanchard Smith, Co. Atty., Mineola,

L 8 (6-65)

BUREAU OF LAW

MEMORANDUM

TO: Commissioners Murphy, Palestin and Nesbeff

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: Harold A. Taylor
Personal Income Taxes
1959

A hearing was held on this matter before me as Hearing Officer on April 12, 1965. The taxpayer appeared by Kenneth Roberts, Esq. of Mount Vernon, New York; and the taxpayer was present himself and testified.

There are three points in the proposed determination, all of them having to do with the exception under Tax Law section 350 subdivision 7, which defines "resident". The subdivision first declared generally that a person domiciled here is a "resident" and the exception provides that a person, although domiciled in the State, is not a statutory "resident" if he maintains a permanent place of abode outside the State and does not maintain a permanent place of abode within the State or spend more than thirty days in the aggregate within the State.

The proposed determination holds that the taxpayer, who left on May 12, 1959 to work in Spain, and who continued to own a dwelling house in Bronxville, continued to be domiciled in New York and since he incontrovertibly spent well over thirty days here within the year before his departure and had a permanent place of abode here within the year at least before he went abroad, is liable as a "resident" under Tax Law section 350 subdivision 7.

The second point is that a person maintains a permanent place of abode outside the State for the balance of a year after May, when he lives abroad for that time and for a number of years thereafter.

The third point is that a person does not maintain a permanent place of abode within the State by owning a house here, if the house is leased out bona fide for the full period under consideration.

The taxpayer filed a separate New York State resident return for 1959, for the portion of the year down to May 12;

he filed no nonresident return for the rest of the year. He paid taxes on his earnings of $5,000 at New York down to May 12, and on an apportioned part of his annual army retirement pay and on annual Civil Service pension. He had about $9,500 dividends from stocks and $250 interest that he did not pay on and he also had wages and other earned income in Spain after May aggregating about $13,500. He claimed that the payments made on his account by payments of withholding and estimated tax to a total of $879.00 overpaid his proper tax by about $682.

By notice of additional assessment which considered him a "resident" for the full year, the Department assessed taxes on the New York salary earned down to May, on the entire annual army retirement pay of nearly $2,400, on the entire annual Civil Service pension of about $2,500, and on the whole year's dividends and interest. The earned income in Spain was not included in the base used in the additional assessment. The Department assessed taxes in the amount of $1,025.18, and asserted a balance due of $120.38 after payments of withholding and estimated taxes.

Taxpayer filed a timely application for revision or refund in February 1961.

According to an affidavit submitted by the taxpayer he had total gross rentals from the New York real property at Bronxville in the amount of $1,500 but he had no net income after taxes, insurance, repairs and depreciation to that amount claimed in his federal return.

Stock dividends distributed down to May 12 came to $3,669.67; these were reported by his wife, Katherine, in her separate New York return, the taxpayer further stated by affidavit.

Until May 1959 the taxpayer lived with his wife and two daughters at his home in Bronxville, New York. In the early part of 1959 he continued in the employment he had with Concrete Steel Company of New York, New York. On May 12, 1959 he went to Spain to take employment there. The taxpayer, a former United States army officer, was retained for some kind of political security work by an organization called Amcomlib, (now called Radio Liberty), identified as the American Committee for Liberation, Inc., also referred to as the American Committee for Liberation from Bolshevism, the latter probably being the earlier version of the committee's name. The taxpayer rented a seaside villa in Spain for the summer months, and then in October, in