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## BUREAU OF LAW

## MEMORANDUM

*Income Tax Determinations*  
*A-Z*  
*Fuori, Michael and*  
*Ellen*

TO: **State Tax Commission**

FROM: **Alfred Rubinstein, Hearing Officer**

SUBJECT: **Petition of MICHAEL AND ELLEN FUORI  
Under Article 22 of the Tax Law for  
the Years 1961, 1962 and 1963**

A hearing on the above entitled matter was held before me at the office of the State Tax Commission, at 80 Centre Street, New York, New York, on February 23, 1968. Appearances and exhibits were as noted on the transcript.

The issues involved are (1) residence of Michael Fuori during all years, and (2) penalty imposed against the taxpayers jointly for claimed failure to file any return for 1961.

Taxpayers filed Federal joint returns for 1961, 1962 and 1963, reported Federal taxable income of \$34,049.16, as adjusted by the Treasury Department in the aggregate.

On June 23, 1966 the Income Tax Bureau issued a notice of deficiency (File No. 3-6361223) against the taxpayers based on their Federal joint returns for 1961, 1962 and 1963 in the total sum of \$2,124.03, for additional taxes, interest and penalty.

The record indicates that the petitioners, husband and wife, were separated in 1948. In that year Michael Fuori, a pilot, left New York and became employed by the New Orleans Division of Texaco in Louisiana. From 1948 to 1956 he leased an apartment in Houma, Louisiana. In 1956 he purchased a house in Houma, Louisiana, claiming a homestead exemption for tax purposes, which was granted, which dwelling he has occupied continuously since. Since 1948 he has paid income, property (real and personal) and other taxes to the State of Louisiana, voted there, and attended the Roman Catholic Church in Terrebonne parish. His automobile registration and driver's license are issued by the State of Louisiana and his Federal pilot's license and his W2 forms bear his Louisiana address. In 1959 he became engaged in the automobile rental business in Louisiana, which venture subsequently failed in 1961.

His wife, Ellen Fuori, remained in New York, residing in a two-family house, purchased by her husband in 1950, in the name of both, as husband and wife. She testified that the income from the rented portion was received by her and reported on her

New York State resident income tax returns. She furnished a copy of such return for 1961 which showed no tax liability, and testified that the original had been filed. She further testified that she had never been to Louisiana either to visit her husband or otherwise, and that her husband spends two weeks each year in New York, "To see his father, brothers and friends and me, I guess" (trans. p. 11). The house was purchased in both names, because, "My husband wanted it that way" (trans. p. 11) and joint Federal returns were filed for the same reason (trans. p. 12). On his visits to New York Michael Fuori sometimes stayed at the jointly owned house, but not with Ellen Fuori, occupying a separate room in another part of the house (trans. p. 14). The telephone listing remained in the name of Michael Fuori because, "I never bothered to change it" (trans. p. 14). Michael Fuori kept no personal property at the house in New York, bringing with him the necessary personal effects for his visits (trans. p. 14).

Section 603 of Article 22 of the Tax Law defines as a "resident" a domiciliary of the State, unless he maintains no permanent place of abode in the State, maintains a permanent place of abode elsewhere and spends not more than 30 days of the tax year in the State, and in the case of a non-domiciliary, one who maintains a permanent place of abode in the State and who spends more than 183 days of the tax year in the State.

The evidence is substantial that Michael Fuori, in 1948, intended to and did, in fact, abandon his New York domicile and acquire a new domicile in Louisiana. The only evidence adduced in contravention of such change of domicile are (1) that Federal joint returns were filed bearing the New York address, (2) that he owned, with his wife, real property in New York, and (3) the continued listing of the telephone in New York in his name. None of these is sufficient, taken individually, or in conjunction with the others, to raise any doubt that Michael Fuori was domiciled in the State of Louisiana in 1961, 1962 and 1963.

While normally the domicile of the wife follows that of the husband, we are concerned, here, solely with the question of the husband's domicile, and furthermore the separation of the parties is a fact which may negate any presumption created by the marriage relationship. Joint Federal tax returns may be filed by separated couples who are not so separated by a decree of divorce or separate maintenance (I.R.C. section 6013(d)) even if they have not lived together during the taxable year (I.R.C. Reg. section 1.6013-4(c)). The fact that one address is given instead of the other one cannot be deemed meaningful or conclusive.

Either address was valid for the purpose of filing the Federal returns (in fact, the Louisiana address did appear on the 1961 Federal return) and it cannot be seriously contended that had the Louisiana address been used for the convenience of the taxpayers that Ellen Fuori, could by virtue of such fact, been deemed a resident of the State of Louisiana.

The ownership of the real property in New York in both names, likewise is insufficient to create a conclusive presumption. The income was collected by Ellen Fuori and reported by her on her New York separate returns. Whatever his reasons (he may have wished to prevent the sale, mortgage or other disposition of the property in order to insure a home for his wife, or he may have wished to retain title to the real property if his wife predeceased him) his interest in the property does not, by itself, make him a resident. His occupancy of the house for two weeks of each year was for a temporary visit; he kept no personal effects or other property there and, inasmuch as his presence in the State was for such limited duration in each year and although such a finding may be redundant, the house occupied by his wife cannot be considered his permanent place of abode. When Michael Fuori departed in 1948 the telephone was not removed nor the number changed. That the listing was not changed from "Michael Fuori" to "Mrs. Michael Fuori" may be attributed to any of a number of reasons without raising any inference of continued domicile or residence on the part of Michael Fuori. The omission cannot be attributed to him. He was in Louisiana and the listing was subject to the direction and control of Ellen Fuori. If she chose to retain the listing in his name, for reasons of status or otherwise, the decision was hers, not his. This is the unusual case, contrary to the normal situation, in which a husband and wife are residents of different states.

Accordingly, I am of the opinion that for the years 1961, 1962 and 1963 Michael Fuori was neither a resident nor a domiciliary of New York; that he had no New York income; and that he was not required to file any personal income tax returns nor pay any personal income taxes to New York for such years. I am of the further opinion that Ellen Fuori, a resident of the State of New York, filed a personal income tax resident return for 1961 correctly reporting her income and tax liability for such year; that the notice of deficiency, in its entirety, is erroneous and that the petition should be granted.

The decision of the State Tax Commission should be substantially in the form submitted herewith.

/s/

ALFRED RUBINSTEIN

Hearing Officer

AR:kon

Enc.

November 12, 1968

**STATE OF NEW YORK**

**STATE TAX COMMISSION**

**In the Matter of the Petition**

**of**

**MICHAEL and ELLEN FUORI**

**For Redetermination of a Deficiency or  
For Refund of Personal Income Taxes  
Under Article 22 of the Tax Law For the  
Years 1961, 1962 and 1963**

Michael and Ellen Fuori having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1961, 1962 and 1963, and a hearing having been held on February 23, 1966 at the office of the State Tax Commission, 80 Centre Street, New York, New York before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, at which hearing taxpayer Ellen Fuori, having appeared in person and both taxpayers having appeared by Garman, Gallahan & Garman (Willie Garman, Sr., Esq., of counsel) and the matter having been duly considered,

**The State Tax Commission hereby finds:**

(1) That for the years 1961, 1962 and 1963 Michael and Ellen Fuori filed joint Federal income tax returns, reporting joint Federal taxable income of \$8,680.37 for 1961, \$11,733.63 for 1962 and \$13,619.16 for 1963, all as adjusted by the Treasury Department; that Ellen Fuori filed New York personal income tax resident returns for the same years reporting, separately, no New York taxable income; that Michael Fuori filed no New York income tax returns for such years.

(2) That on June 23, 1966 the Income Tax Bureau issued a Notice of Deficiency (File No. 3-6361223) determining that

Michael Fuori was a New York resident for 1961, 1962 and 1963, and further determining that no personal income tax return had been filed by either taxpayer for 1961, and that for 1962 and 1963, joint returns had, in effect been filed, resulting in the imposition of additional taxes, penalty and interest, as follows:

YEAR	DEFICIENCY	PENALTY	INTEREST	TOTAL
1961	\$441.86	\$110.32	\$110.83	\$662.97
1962	993.89		106.83	641.32
1963	<u>797.18</u>	<u>          </u>	<u>22.86</u>	<u>820.93</u>
TOTALS	\$1,703.73	\$110.32	\$239.98	\$2,154.03

(3) That Michael Fuori and Ellen Fuori are husband and wife; that until 1948 they resided together in Farmingdale, New York; that in 1948 Michael Fuori, a pilot, became employed by the New Orleans Division of Tammco, Inc. in Louisiana, and departed from New York, intending to reside permanently in Louisiana, his place of employment; that Ellen Fuori remained in New York and did not accompany her husband to Louisiana; that the parties became estranged and separated in 1948 and have not lived or cohabited together since 1948; that there has been no written separation agreement or decree of divorce or separate maintenance obtained by either.

(4) That in 1948 Michael Fuori leased an apartment in Houma, Louisiana, which he occupied as his dwelling until 1956; that in 1956 Michael Fuori purchased a house in Houma, Louisiana and has occupied such house as his dwelling since, and for which he applied and received a Louisiana homestead exemption; that since 1948 he has regularly attended church at Terrebonne Parish, Louisiana, voted in Louisiana, paid income, personal and real property taxes in Louisiana, registered his automobile and

obtained his driver's license in Louisiana; that he has returned to New York for temporary visits not exceeding two weeks in any taxable year since 1948.

(5) That in 1950 Michael Paori and Ellen Paori, jointly, as husband and wife, purchased a two-family dwelling house in Farmingdale, New York, part of which has since been continuously occupied as her dwelling by Ellen Paori, solely, and the remainder of which has been rented; that the income from such rents has been collected by Ellen Paori, reported by her on her New York State resident income tax returns for 1961, 1962 and 1963, and reported by the taxpayers on their joint Federal income tax returns for 1961, 1962 and 1963; that during the years 1961, 1962 and 1963 when Michael Paori visited the State of New York for two weeks of each year he used a separate room in the house in Farmingdale, New York as his temporary quarters and has not otherwise occupied the house, derived any income therefrom or kept any personal effects or other property there; that aside from his joint fee ownership in the real property Michael Paori has no interest in said real property.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby,

**HOLDERS:**

(A) That during the years 1961, 1962 and 1963 Michael Paori was domiciled in the State of Louisiana; that during such years he was not a resident of the State of New York within the meaning and intent of Subsection (b) of Section 605 of the Tax Law; that during such years he earned no New York taxable income within the meaning and intent of Section 632 of the Tax Law.

(b) That for the years 1961, 1962 and 1963 Ellen Fuori filed personal income tax resident returns reporting thereon correctly her income and her New York income tax liabilities for each year.

(c) That the Notice of Deficiency issued by the Income Tax Bureau on June 23, 1966 imposing personal income taxes, penalty and interest on the petitioners is incorrect and erroneous; that said Notice of Deficiency is hereby annulled; and that the petition of Michael Fuori and Ellen Fuori be and the same is hereby granted.

**DATED:** Albany, New York on this 22nd day of November , 1966.

**STATE TAX COMMISSION**

/s/ JOSEPH H. MURPHY  
**PRESIDENT**

/s/ A. BRUCE MENLEY  
**COMMISSIONER**

COMMISSIONER