

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Thea C. Petschek Iervolino :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1970. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 25th day of April, 1980, he served the within notice of Decision by certified mail upon Thea C. Petschek Iervolino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thea C. Petschek Iervolino
c/o Oppenheim, Appel, Dixon & Co.
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
25th day of April, 1980.

Joanne Krapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Personal Income Tax
under Article 22 of the Tax Law
for the Year 1970.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 25th day of April, 1980, he served the within notice of Decision by certified mail upon Jack Wong the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
25th day of April, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 25, 1980

Thea C. Petschek Iervolino
c/o Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004

Dear Mrs. Iervolino:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jack Wong
Oppenheim, Appel, Dixon & Co.
One New York Plaza
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

THEA C. PETSCHKEK IERVOLINO :

DECISION

for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Year :
1970. :

Petitioner, Thea C. Petschek Iervolino, c/o Oppenheim, Appel, Dixon & Co., One New York Plaza, New York, New York 10004, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1970 (File No. 13236).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1977 at 1:15 P.M., and was continued on October 21, 1977 at 9:15 A.M. Petitioner appeared at the first hearing by Jack Wong, CPA and at the second hearing by Milbank, Tweed, Hadley and McCloy, Esqs. (Alexander D. Forger and Jeanne E. Gorrisen, Esqs., of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner was properly considered a domiciliary and resident of New York State for all of 1970.

FINDINGS OF FACT

1. Petitioner, Thea C. Petschek Iervolino, timely filed a New York State Nonresident Income Tax Return (Form IT-203) for 1970.

2. On December 23, 1974, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency to petitioner, asserting personal income tax due for 1970 of \$49,799.63, plus interest of \$11,021.15, for a total due of \$60,820.78.

3. Petitioner, Thea C. Petschek Iervolino, maintained a leased apartment in her own name at 166 East 63rd Street, New York, New York from 1966 to the date of this hearing. On June 3, 1969, petitioner renewed the lease for two years.

4. Petitioner, Thea C. Petschek Iervolino, was married to Antonio Iervolino on April 18, 1968. Mr. Iervolino, a citizen of Argentina, was a French horn player and teacher in the United States on a visitor's visa. After the marriage, Antonio Iervolino took up residence in the apartment which his wife had under lease at 166 East 63rd Street, New York, New York. On August 2, 1969, petitioner and her alien husband took a trip to Newfoundland, Canada. There Antonio Iervolino filed an application for a visa to enter New York City for permanent residency as the spouse of a citizen of the United States.

5. On August 18, 1969, petitioner, Thea C. Petschek Iervolino, went, with her husband, to Puerto Rico. On July 15, 1969, Antonio Iervolino received an invitation from the Institute Casals, Inc., which was attached to the Conservatory of Music of Puerto Rico, to become professor of the French horn. The position also carried with it the position of first chair in the French horn section of the government symphony orchestra, plus additional salary.

6. On August 15, 1969, Antonio Iervolino signed a contract to teach at the Conservatory as professor of the French horn from August 19, 1969

through June 30, 1970. The contract was to be renewable annually, with permanent tenure to be acquired after three years. Mr. Iervolino did, in fact, acquire tenure in 1972.

7. On September 28, 1969, Antonio Iervolino signed a lease for an unfurnished apartment in San Juan, Puerto Rico at a monthly rental of \$850.00. The lease term coincided with the academic year which ended June 30, 1970 and the lease was renewed beginning July 1, 1970. In 1971 Antonio Iervolino purchased a condominium in San Juan, Puerto Rico. He sold it in 1976.

Petitioner, Thea C. Petschek Iervolino, who had been a part-time textile designer before her marriage, furnished the apartment.

8. Immediately on her arrival in Puerto Rico, petitioner, Thea C. Petschek Iervolino, joined the welcome wagon, began taking Spanish lessons (she already spoke some Spanish) and started part-time teaching. The couple purchased two small cars, acquired driver's licenses for Puerto Rico and opened checking and savings accounts there.

9. Antonio Iervolino filed income tax returns with the Commonwealth of Puerto Rico for 1969 and 1970. He filed as a nonresident for 1969 and as a resident for 1970. He averred that he was advised that one could not file as a resident of Puerto Rico until after the completion of one year's residence. Petitioner, Thea C. Petschek Iervolino, filed her Federal income tax return through her New York City accountants, from the accountants' address. She filed a New York State Nonresident Income Tax Return for 1970, showing no New York State taxable income. Her gross income for 1970 was \$424,033.00, largely from trust funds.

10. After her marriage to Antonio Iervolino in April, 1968, petitioner, Thea C. Petschek Iervolino, lived with him and was never separated from him except for occasional visits to relatives. She fully accepted his home as their home.

11. Antonio Iervolino was born in Buenos Aires, Argentina, in 1912. He spent his childhood there and became a French horn player. After three years as a musician with the government symphony orchestra in Montevideo, Uruguay, Mr. Iervolino returned to Buenos Aires, in December, 1934, where he was employed as a French horn player at the Municipal Opera House. He was so employed until January, 1958. After a period during which he worked as a musician successively in Montevideo, Uruguay and various places in Italy, Antonio Iervolino returned to Buenos Aires in November, 1965. His wife had been killed in an auto accident in Italy, in which Mr. Iervolino suffered injuries to the extent that he could no longer play the French horn. He believed the disability to be permanent. He turned from performing to teaching the French horn.

In 1966 one of Mr. Iervolino's students was invited to play as a soloist in a Young People's Symphony concert given December 2, 1966, in New York City. Mr. Iervolino decided to attend the concert. He also intended to learn about American methods of teaching French horn while on this initial visit to the United States and to stay only two or three months.

After a short stay in the United States however, Mr. Iervolino realized that his ability to gain full comprehension of American teaching methods was hampered by his scant knowledge of English. He extended his stay to improve his language ability. Mr. Iervolino had also made the acquaintance of petitioner, Thea C. Petschek, who photographed the soloist and his teacher at the Young People's Symphony concert December 2, 1966. He remained in New York City, living in inexpensive hotels and rooming houses. Mr. Iervolino sought work as a teacher of the French horn, but with little success. He had a small pension of \$150.00 a month from the Buenos Aires Municipal Opera. This income was supplemented by a few engagements

playing the French horn with amateur and student orchestras. His playing improved with practice and Mr. Iervolino went on three tours with the American Ballet Theater in the period October, 1967 through April, 1968. Each tour lasted about a month and a half.

In January, 1968, Mr. Iervolino applied for a position as a teacher of French horn at the Casals Institute in Puerto Rico. No position was open at the time; however, on July 15, 1969, a written offer of appointment was made to Mr. Iervolino by the Institute. He gave his written acceptance on July 18, 1969. On August 18, 1969, Mr. Iervolino and petitioner, Thea C. Petschek Iervolino, moved to Puerto Rico. Mr. Iervolino signed an employment contract for a one-year term from August 19, 1969 through June 30, 1970 at a salary of \$752.08 per month. On June 30, 1970, he signed another contract at the same salary for a one-year term from July 1, 1970 to June 30, 1971. At that time, every faculty member was obliged to enter into annual employment contracts.

12. During 1970, petitioner, Thea C. Petschek Iervolino, accompanied her husband on trips to Argentina and Europe. Each spent in excess of 30 days in New York State, but less than 150 days during 1970.

13. On July 10, 1969, before she knew of her husband's offer of a teaching job in Puerto Rico, petitioner, Thea C. Petschek Iervolino, purchased an automobile. When she left for Puerto Rico, petitioner stored the car. She sold it the next year, having already purchased another one in Puerto Rico.

14. In 1966, when Mr. Antonio Iervolino entered the United States, his domicile was Argentina, the country of his birth. He was raised and educated there, and had spent most of his adult and professional life there. In 1967, he purchased the apartment in Buenos Aires which he had

previously rented continuously from 1945. His family was there. He maintained savings and checking accounts and a safety deposit box in Buenos Aires' banks. He carried an Argentine passport, driver's license and union card and subscribed to Argentine periodicals. When he had worked and lived in Uruguay and Italy, Mr. Iervolino maintained his ties with Argentina and returned there from each of the foreign countries.

15. In the period from December, 1966 to August, 1969, Antonio Iervolino took no actions which would evince an intention to make New York his home. He did not obtain a driver's license nor did he lease an apartment.

16. On August 4, 1969, when Antonio Iervolino was asked whether he intended to remain permanently in the United States, he answered affirmatively on his Alien Registration Card. His explanation was that at the time he received the job offer to teach in Puerto Rico, he intended to stay in that Spanish-speaking society and that he understood Puerto Rico to be included in the term "United States of America". He named New York City as his address because that was his current address and he still had no address in Puerto Rico.

CONCLUSIONS OF LAW

A. That Antonio Iervolino did not establish domicile in New York State. By his actions, as well as by his expressed intent, he left New York in August, 1969, intending to make his permanent home in Puerto Rico. He had been uncomfortable in the non-Hispanic society, being unable to function as a musician in the English-speaking milieu. He intended to take with him his only tie to New York, his wife. She was apparently willing to go wherever Antonio Iervolino wanted, and to stay as long as he desired. She had lived in Germany, England and the United States. She was financially

independent because of inherited trust funds managed by her brothers.

B. That as a non-domiciliary who spent more than 30 days but less than 183 days in New York State, Antonio Iervolino was a nonresident taxpayer in 1970 under section 605(b) of the Tax Law and 20 NYCRR 102.3.

C. That petitioner, Thea C. Petschek Iervolino's domicile was that of her husband, Antonio Iervolino, in 1970. Although she maintained a permanent abode in New York, and spent more than 30 days and less than 183 days in the State, petitioner was a nonresident in 1970. (20 NYCRR 102.1(d)5, Matter of Daggett, 225 NY 243, 174 NE 641.)

D. That the petition of Thea C. Petschek Iervolino is granted and the Notice of Deficiency dated December 23, 1974 is cancelled.

DATED: Albany, New York

APR 25 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER