

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Fred & Helene Oppenheimer :
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 1969. :

AFFIDAVIT OF MAILING

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 18th day of June, 1980, he served the within notice of Decision by certified mail upon Fred & Helene Oppenheimer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred & Helene Oppenheimer
4100 N. 41st St.
Hollywood, FL 33021
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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 18, 1980

Fred & Helene Oppenheimer
4100 N. 41st St.
Hollywood, FL 33021

Dear Mr. & Mrs. Oppenheimer:

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

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
FRED OPPENHEIMER and HELENE OPPENHEIMER
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Year
1969.

DECISION

Petitioners, Fred and Helene Oppenheimer, 4100 N. 41st Street, Hollywood, Florida 33021, 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 1969 (File No. 14256).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 12, 1978 at 2:00 P.M. Petitioners appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

- I. Whether the Notice of Deficiency was properly issued to petitioners prior to the expiration of the period of limitation.
- II. Whether petitioners changed their domicile during 1969.
- III. Whether New York itemized deductions and employee business expenses were properly deducted, if a change of domicile is determined.
- IV. Whether a capital gain derived from a payment of \$36,713.62, received from petitioner Fred Oppenheimer's former employer, is taxable to New York State, if a change of domicile is determined.

FINDINGS OF FACT

1. On February 3, 1971, the Income Tax Bureau received a New York State income tax resident return from petitioners, Fred and Helene Oppenheimer, for

the period January 1, 1969 to September 19, 1969. All items of income, deductions and exemptions were allocated in accordance with this period, which petitioners contended was their period of residency in New York State during 1969.

2. On September 17, 1971, the Income Tax Bureau issued a Statement of Audit Changes holding petitioners to be domiciliaries of New York State for all of 1969; therefore, all items of income and deductions were allowed in full. However, the Income Tax Bureau erroneously allowed five exemptions instead of the six exemptions which petitioners were entitled to.

3. On December 4, 1972, petitioners signed a consent extending the period of limitation to April 15, 1974. On January 7, 1974, petitioners signed another consent, further extending the period of limitation to April 15, 1975.

4. On June 24, 1974, the Income Tax Bureau issued a Notice of Deficiency to petitioners which was based on the Statement of Audit Changes dated September 17, 1971. The notice imposed additional personal income tax of \$3,967.26, plus interest of \$997.65, for a total of \$4,964.91.

5. On October 15, 1974, the Income Tax Bureau, which had accepted petitioners' contention that they were residents of New York State for the nine-month period during 1969, modified the aforementioned Notice of Deficiency. Accordingly, New York itemized deductions and employee business expenses were adjusted, and six exemptions were allocated on a nine-month basis (nine-twelfths). In addition, a net long-term capital gain of \$18,356.81 was held taxable to New York State. Petitioners protested, claiming that the capital gain of \$18,356.81 was not taxable to New York State, and that all itemized deductions and employee business expenses were incurred during their period of residency in New York State.

6. At the formal hearing, the Audit Division asserted a greater deficiency (pursuant to section 689(d)(1) of the Tax Law), by rescinding acceptance of petitioners' contention that they were residents of New York State for a nine-month period during 1969.

7. Petitioner Fred Oppenheimer was born in Germany and arrived in New York State in 1940. He subsequently became a United States citizen and a domiciliary of New York State.

8. Petitioner Fred Oppenheimer was associated with Waddell & Reed, Inc., or its wholly-owned subsidiary Waddell & Reed International, Ltd., for approximately fifteen years. On September 5, 1969, he resigned as executive vice-president of Waddell & Reed International, Ltd., and signed a five-year contract with Gramco (U.K.) Ltd. ("Gramco"), a foreign corporation with offices in London.

9. In August of 1969, Gramco executed a six-month lease effective September 20, 1969, for premises at 50 Wilton Crescent, London, England, for occupancy by Mr. Oppenheimer and his family. After selling their house in Roslyn Harbor, New York, petitioners departed for England with their children in September of 1969. Their furniture remained in the United States and was shipped to England in 1972 at a cost of over \$7,000.00.

10. In 1969 petitioners enrolled their four children, then ages eighteen, fifteen, twelve and nine, in schools in England. Petitioner Fred Oppenheimer purchased an automobile in England, closed out his New York bank and brokerage accounts, and made a new will in London.

11. While employed by Gramco, an international business, petitioner Fred Oppenheimer remained a United States citizen and did not acquire a British driver's license. He entered England on an alien permit which was renewed

every year; after four years it was made permanent and required no further renewal. He paid tax to the British Government solely on the income which he earned in Great Britain.

12. Petitioner Fred Oppenheimer contended that in 1974, he decided not to renew his contract with Gramco; however, he remained in England an additional year to ascertain whether a continued stay would be favorable to him in view of the bad economic conditions existing in that country.

13. On October 31, 1975, petitioners and their children returned to the United States and became residents of Florida.

14. While an employee of Waddell & Reed, Inc., petitioner Fred Oppenheimer was a member of the corporation's profit sharing plan, but did not receive any payment under the plan prior to his departure for England. He wrote to Waddell & Reed, Inc. from England and asked that the trustees of the profit sharing plan consider cashing in his interest. The trustees did so on October 10, 1969, and a check for \$36,713.62 was sent to Mr. Oppenheimer in England "as payment in full of all of your interest in and to the Waddell & Reed, Inc., Profit Sharing Plan." (Waddell & Reed International, Ltd. did not participate in the profit sharing plan of Waddell & Reed, Inc.).

15. Rodney O. McWhinney, senior vice-president of Waddell & Reed, Inc., wrote of the plan in a letter to Mr. Oppenheimer dated February 8, 1978:

I do have personal knowledge of the terms of the Profit Sharing Plan...

You had no options as to when or how distribution was made to you after your termination of employment.

You had no option to demand distribution or to retain your interest in the account. The options were solely those of the trustees, who in their discretion had the right to make immediate distribution in cash or in kind, make distribution in installments, or to purchase an annuity. The trustees at their sole option elected to make a lump sum cash distribution to you.

16. The New York itemized deductions and employee business expenses listed on petitioners' New York return were incurred during the period January 1, 1969 through September 19, 1969.

CONCLUSIONS OF LAW

A. That the Notice of Deficiency issued on June 24, 1974 and modified on October 15, 1974 was properly issued within the period of limitation, as extended by petitioners' written consent, in accordance with section 683(c)(2) of the Tax Law.

B. That a domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there [20 NYCRR 102.2(d)(2)]. The general presumption against a foreign domicile is stronger than the general presumption against a change of domicile (Matter of Newcomb, 192 N.Y. 238; Matter of Bodfish v. Gallman, 50 A.D.2d 457). Petitioners may have left New York State with no intention of returning; however, they failed to show that they went to England intending to remain there permanently or establish a domicile there. Accordingly, petitioners remained domiciled in New York State and were residents of New York State for 1969 within the meaning and intent of section 605(a)(1) of the Tax Law.

C. That Conclusion of Law "B" of this decision renders all issues dealing with itemized deductions, employee business expenses, and the capital gain (Issues III and IV) moot and inapplicable, since all items of income, gains, expenses, deductions, and exemptions are reportable by a resident individual, pursuant to Article 22 of the Tax Law.

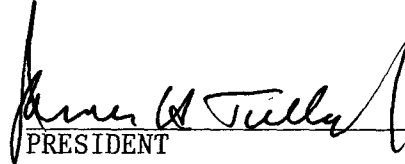
D. That the Audit Division is hereby directed to recompute the Notice of Deficiency as modified on October 15, 1974 (so as to reflect the greater deficiency asserted at the hearing) and as sustained by Conclusions of Law "B" and "C" of this decision, and that such amount is due together with such

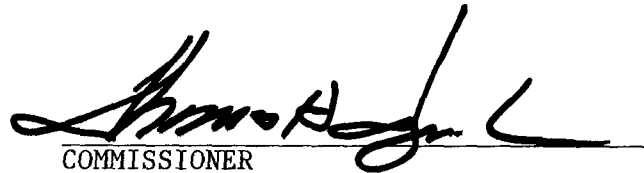
additional interest as may be lawfully owing. That the petition of Fred and Helene Oppenheimer is denied.

DATED: Albany, New York

JUN 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER